IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DUPONT DE NEMOURS, INC. and DDP SPECIALTY ELECTRONIC MATERIALS US 9, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. N23C-10-261 PRW CCLD
HEMLOCK SEMICONDUCTOR OPERATIONS LLC,	)	
Defendant.	)	

Submitted: April 29, 2024
Decided: June 10, 2024
Issued: June 24, 2024*

MEMORANDUM OPINION AND ORDER

Upon Plaintiffs DuPont De Nemours, Inc. and DDP Specialty Electronic Materials US 9, LLC's Motion for Judgment on the Pleadings,
DENIED.

Upon Plaintiffs DuPont De Nemours, Inc. and DDP Specialty Electronic Materials US 9, LLC's Motion to Dismiss,
DENIED in part, GRANTED in part.

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WALLACE, J.

Plaintiffs entered into a multi-faceted transactional agreement to sell an aspect of their business to and settle a prior dispute with Defendant. As part of that transaction, Plaintiffs and Defendant agreed on calculations and procedures to protect both parties against a certain material's cost fluctuations year-over-year.

Plaintiffs and Defendant performed under the agreement for a couple years. But in 2022, Plaintiffs and Defendant disagreed about the adjustment calculation for the material's price. Soon thereafter, a dispute arose between the parties about the appropriate procedure needed to resolve that disagreement. Unable to reach a resolution, Defendant withheld their payments owed under the [redacted].

Plaintiffs then filed suit, alleging breach of both the [redacted] and the agreement governing [redacted] calculations and procedures. Defendant countered with its own claims, alleging that Plaintiffs committed a prior material breach, or in the alternative, that they breached the implied covenant and were unjustly enriched. Plaintiffs now move for judgment on their pleadings, and to partially dismiss Defendant's counterclaims.

On all but one claim for dismissal, Plaintiffs' motions fall short. Plaintiffs' breach-of-contract counts are either belied by contractual language or contain factual disputes, so pleadings-stage judgment on them is inappropriate. And Defendant's counterclaims, with the exception of a singular declaratory judgment request, are

adequately pled based on the factual circumstances present.

Accordingly, and for the reasons now more fully explained: Plaintiffs' motion for judgment on the pleadings is **DENIED**; Plaintiffs' partial motion to dismiss Defendant's declaratory judgment request No. 4 is **DENIED**; Plaintiffs' partial motion to dismiss Defendant's declaratory judgment request No. 5 is **GRANTED**; and, Plaintiffs' partial motion to dismiss Plaintiffs' alternative counterclaims of breach of the implied covenant of good faith and fair dealing and unjust enrichment is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. THE PARTIES

Plaintiff DuPont de Nemours, Inc. is a Delaware corporation.[2] Plaintiff DDP Specialty Electronic Materials US 9, LLC ("DDP" and collectively with DuPont, "Plaintiffs") is a Delaware limited liability company.[3] DDP is an assignee of [redacted]

* This public version of the Court's ruling is issued after consideration after consideration of the parties' requests for redaction of certain confidential information and with the Court's own necessary corrections and clarifications.

[1] This background is drawn from the pleadings, which include the amended complaint, Hemlock's answer, and the documents incorporated therein. *See D'Antonio v. Wesley Coll., Inc.*, 2023 WL 9021767, at *2 (Del. Super. Ct. Dec. 29, 2023) ("On a Civil Rule 12(c) motion, the Court considers all pleadings, including the complaints, answers, documents integral to the pleadings, such as those attached as exhibits or incorporated by reference, and facts subject to judicial notice." (internal quotations and citations omitted)).

[2] Complaint ("Compl.") ¶ 12 (D.I. 1).

[3] *Id.* ¶ 13.

Silicones Corporation, a non-party to this action.[4]

Defendant Hemlock Semiconductor Operations LLC is a Michigan limited liability company.[5]

B. THE AGREEMENTS

Prior to this action, DDP and Hemlock were parties to an agreement (the "Supply Agreement").[6] Under the Supply Agreement, DDP supplied Hemlock with [redacted], a raw material that Hemlock uses to manufacture a pure form of polysilicon that Hemlock then supplies to the semiconductor and solar panel industries.[7] Hemlock also contracted with [redacted] (the "Manufacturing Product Agreement").[8]

In 2020, a dispute arose under DDP and Hemlock's Supply Agreement.[9] Parallel to that dispute, DuPont and Hemlock entered into the three interrelated subject agreements: the Transaction Agreement, the [redacted], and the

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4 *Id.* ¶ 18.

5 *Id.* ¶ 14.

6 *Id.* ¶ 18.

7 *Id.* ¶ 19; Defendant and Counterclaim-Plaintiff Hemlock Semiconductor Operations LLC's Answer, Affirmative Defenses, and Counterclaims ("Def.'s Counterclaim") ¶ 9 n.2 (D.I. 10).

8 Def.'s Counterclaim ¶ 10. Neither the Supply Agreement nor the Manufacturing Product Agreement is included in the pleadings. Both are referenced in Def.'s Counterclaim, and both are integral to the terms of the Side Letter and the [redacted]. So, the Court can consider both agreements. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

9 Def.'s Counterclaim ¶ 10.

Side Letter (collectively, the "Agreements").[10]

1. The Transaction Agreement

Under the Transaction Agreement, Hemlock acquired certain assets and assumed certain liabilities from DuPont relating to the development, manufacture, purifying, testing, and packaging functions of the [redacted].[11] Section 1 defines certain relevant terms. "Acquisition Documents" is defined to include "[redacted]."[12] Section 1 also defines "DuPont Group" as "DuPont and its subsidiaries . . . and each Person that becomes a Subsidiary of DuPont after the date of this Agreement."[13] "Affiliate" is defined as "any specific Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person."[14] Both the "[redacted]" and "Side Letter" are defined in Section 2.2 with reference to the transfer documents due at the closing.[15] Hemlock's closing duties included delivery of:

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[10] Compl. ¶¶ 18-35; Def.'s Counterclaim ¶ 14; *see* Compl., Ex. 1 ("Transaction Agreement"); Compl., Ex. 2 ("[redacted]"); Compl., Ex. 3 ("Side Letter") (collectively, the "Agreements"). The [redacted] and the Side Letter are also exhibits to the Transaction Agreement itself. *See* Transaction Agreement, Ex. C; Transaction Agreement, Ex. D. They are attached as separate exhibits to the Complaint, and cited to as such, for the purposes of this action.

[11] Compl. ¶ 21; *see generally* Transaction Agreement.

[12] Transaction Agreement § 1.1 (Definitions).

[13] *Id.*

[14] *Id.*

[15] *Id.* § 2.2.

(ii) the [redacted] attached hereto as Exhibit C (the "[redacted]") for the benefit of DuPont with a [redacted], duly executed by Hemlock; [and]

(iii) the side letter attached hereto as Exhibit D (the "***Side Letter***"), duly executed by Hemlock[.][16]

And DuPont's closing duties included delivery to Hemlock of:

(i) the [redacted], duly executed by DuPont and/or other members of the DuPont Group, as applicable; . . . [and]

(iv) the Side Letter, duly executed by DuPont[.][17]

Transaction Agreement Section 3.2 is titled "Authority; Execution and Delivery; Enforceability."[18] Relevant here, it states that:

> DuPont has duly executed and delivered this Agreement and, at the Closing, DuPont and the applicable other members of the DuPont Group will have executed and delivered each other Acquisition Document to which it is a party, and assuming due authorization, execution and delivery by each other party thereto, this Agreement and each other Acquisition Document to which it is a party will constitute its legal, valid and binding obligations, enforceable against the applicable members of the DuPont Group in accordance with their respective terms, subject to General Enforceability Exceptions.[19]

2. The [redacted]

The [redacted]

[16] *Id.* § 2.2(b)(ii)-(iii) (bold and italics in original).

[17] *Id.* § 2.2(c)(i), (iv).

[18] *Id.* § 3.2.

[19] *Id.*

[redacted].[20] Pursuant to the [redacted], Hemlock agreed to pay DDP [redacted] [redacted].[21]

Section 1 of the [redacted] requires Hemlock to pay DDP a "[redacted]" on each payment date, of

[redacted].[22]

The [redacted] also defines certain "[redacted]," including if:

[redacted].[23]

In that circumstance, "the unpaid portion of the [redacted] and all accrued and unpaid [redacted] shall become immediately due and payable following receipt by HSO of such written notice from DuPont."[24]

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[20] Compl. ¶ 23; *see generally* [redacted].

[21] [redacted].

[22] *Id.*

[23] *Id.* § 5(a).

[24] *Id.* § 5.

3. The Side Letter

In conjunction with the Transaction Agreement, Hemlock and DuPont agreed to the Side Letter "through which DuPont agreed to protect Hemlock from spikes in the price of [redacted]" as part of the Manufacturing Product Agreement.[25] Through the Side Letter, DuPont agreed to pay Hemlock up to [redacted] should the cost of [redacted] exceed a specified baseline price.[26] The Side Letter was to remain in effect for five years.[27]

Side Letter Paragraph 1, titled "[redacted]," sets out a formula for Hemlock and DuPont to jointly calculate and monitor the costs of [redacted].[28] Paragraph 3(a) details [redacted] invoicing:

> As soon as reasonably practicable (and in any event within thirty (30) days) (i) following each quarter in a given Measurement Period, Hemlock will deliver to DuPont a good faith calculation of the [redacted] (for informational, and not payment, purposes) and (ii) following the end of each Measurement Period, Hemlock will deliver to DuPont a calculation of the [redacted] (each statement in this clause (ii), a "[redacted] Statement").[29]

Paragraph 3(b) governs [redacted] disputes. Under that subsection:

> If DuPont disagrees with any of the items included in such [redacted] Statement, DuPont can, during the sixty (60) days immediately following DuPont's receipt of each [redacted]

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[25] Def.'s Counterclaim ¶ 10; *see generally* Side Letter.

[26] Side Letter ¶ 1(a).

[27] *Id.*

[28] *Id.* ¶ 1.

[29] *Id.* ¶ 3(a) (underlining in original).

> Statement (the "Review Period"), deliver a written notice of the specific item(s) in dispute to Hemlock (a "Notice of Disagreement"). Each item for which there is a disagreement contained in a Notice of Disagreement must specify in reasonable detail the nature and amount of such disagreement, as well as a reasonable basis therefor and relevant supporting documentation (each a "Disputed Item").[30]

The paragraph further states that if DuPont "delivers a timely Notice of Disagreement, then during the twenty (20) day period following delivery of such Notice of Disagreement (the 'Resolution Period'), Hemlock and DuPont will seek in good faith to resolve the Disputed Item(s)."[31] The paragraph specifies that "[d]uring the Resolution Period, the parties will use reasonable efforts to settle the dispute in good faith, escalating to two (2) senior leaders from each part if necessary."[32]

Paragraph 3(c) then provides the procedure for unresolved Disputed Items. According to the subparagraph, "[i]f, at the end of the Resolution Period, Hemlock and DuPont have not resolved each Disputed Item, Hemlock and DuPont will submit each unresolved Disputed Item to a mutually agreed nationally-recognized accounting or consulting firm (the 'Independent Auditor') for review and resolution."[33] The subparagraph defines the role of the Independent Auditor:

> The Independent Auditor will, and Hemlock and DuPont will cause the

[30] *Id.* ¶ 3(b) (underlining in original).

[31] *Id.*

[32] *Id.*

[33] *Id.* ¶ 3(c) (underlining in original).

> Independent Auditor to, (i) act as an expert and not an arbitrator, (ii) make a final determination based solely on the applicable provisions of this Agreement (and not by independent review), (iii) base its decision on any presentation(s) submitted in writing by each of Hemlock and DuPont and on any written response(s) to each such presentation, and not on independent investigation, and (iv) with respect to each unresolved Disputed Item, render a determination that must be within the ranges of values claimed by each of Hemlock and DuPont (which will not be greater than or less than the values set forth in such [redacted] Statement or the Notice of Disagreement, as applicable).[34]

And the subparagraph continues:

> Each of DuPont and Hemlock will use commercially reasonable efforts to cause the Independent Auditor to render a final determination as to each Disputed Items within thirty (30) days following the end of the Resolution Period (the "Auditor Review Period"). The fees and expenses of the Independent Auditor will be borne in equal shares by DuPont and Hemlock. The final determination as to each Disputed Item, as determined by the Independent Auditor, will be final and binding on the parties, absent a showing of fraud or willful misconduct.[35]

Paragraph 3(d) describes what happens after the Independent Auditor's final determination. It states:

> At such time as a [redacted] Statement becomes final pursuant to the foregoing clauses (a) – (c), if (i) the [redacted] is a positive number, then, subject to paragraph 1(a), DuPont will pay to Hemlock the applicable [redacted] Payment within thirty (30) Business Days, and (ii) the [redacted] is a negative number, then, subject to paragraph 1(a), Hemlock will pay to DuPont the applicable [redacted] Return within thirty (30) Business

[34] *Id.*

[35] *Id.* (underlining in original).

Days.[36]

Paragraph 3(g) limits the parties' offset rights. It states, in pertinent part:

> Neither Hemlock nor its Affiliates shall have the right to offset any amount payable or alleged to be payable by DuPont pursuant to paragraph 1 against any amounts owed to DuPont or its Affiliates pursuant to the Transaction Agreement, the Acquisition Documents,[37] the DC HSC Interest Redemption Agreement and the Hemlock Semiconductor Interest Redemption.[38]

C. THE 2022 [redacted] AND DISPUTE

For the first couple years, the parties performed under the Agreements.[39] Hemlock made their contractually prescribed [redacted] to DDP in September 2021 and September 2022, and the [redacted] didn't exceed the baseline price during that time period.[40]

In 2022, Hemlock prepared a [redacted] Statement that reflected a [redacted] of $[redacted] in Hemlock's favor (the "2022 [redacted] Statement").[41] In February 2023, Hemlock notified DuPont of the 2022 [redacted] Statement.[42] Within the Side Letter's 60-day Review Period,

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[36] *Id*. ¶ 3(d) (underlining in original).

[37] "Acquisition Documents" is defined in the Transaction Agreement to mean, *inter alia*, "the [redacted]." Transaction Agreement § 1.1 (Definitions).

[38] Side Letter ¶ 3(g) (underlining in original).

[39] Compl. ¶ 36; Def.'s Counterclaim ¶ 16.

[40] *See* Compl. ¶ 37; Def.'s Counterclaim ¶ 16.

[41] Compl. ¶ 38; Def.'s Counterclaim ¶ 17.

[42] Def.'s Counterclaim, Ex. B (Oct. 30, 2023 Email from Hemlock to DuPont).

DuPont responded to Hemlock with its Notice of Disagreement.[43] That initiated the Side Letter's 20-day Resolution Period.[44] Despite being extended into August by the parties, the period ended without a resolution.[45]

Pursuant to the Side Letter, the unresolved dispute then entered the Auditor Review Period.[46] That period consisted of a series of emails back and forth between the parties. First, DuPont emailed to Hemlock, "we would like to speak with you about choosing a legal expert as the Independent Auditor, because we believe the operative question is whether the Agreement requires Hemlock to [redacted], [redacted]."[47] Hemlock responded: "As to your point about engaging a legal expert, we do not believe that is necessary because the Independent Auditor is fully capable of determining each Disputed Item without an [redacted]."[48] Dupont countered: "We continue to believe that an [redacted] is necessary in order to fairly evaluate the Disputed Items."[49]

On September 1, Hemlock emailed DuPont notice of what it alleges is

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43 Compl. ¶ 39.

44 *Id.* ¶ 40; Def.'s Counterclaim ¶ 20; *see* Side Letter ¶ 3(b).

45 Compl. ¶ 40; Def.'s Counterclaim ¶¶ 21-23.

46 *See* Def.'s Counterclaim ¶ 23; Side Letter ¶ 3(c).

47 Def.'s Counterclaim, Ex. D (Aug. 15, 2023 Email from DuPont to Hemlock).

48 *Id.* (Aug. 17, 2023 Email from Hemlock to DuPont).

49 *Id.* (Aug. 22, 2023 Email from DuPont to Hemlock).

DuPont's material breach of the Agreements.[50] That letter, in pertinent part, demands "assurances that DuPont will abide by the Independent Auditor process required under the Side Letter, without insisting that this matter be referred to a legal expert, and without insisting that an [redacted] is a necessary precondition to the Independent Auditor process running its course."[51]

On September 8, Hemlock emailed DuPont again, further demanding that DuPont not require an [redacted].[52] With its [redacted] due date looming, Hemlock also let DuPont know that it "will mitigate its estimated damages of $[redacted] by suspending Hemlock's payment of $[redacted] from the total payment that would otherwise be due to DuPont's affiliate on September 9 under the corollary agreement to the Side Letter, known as the [redacted]."[53]

On September 9, 2023, Hemlock paid DDP $[redacted] admitted due after fees and interest) and withheld the remaining $[redacted].[54] That amount remains withheld to date.[55]

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50 *Id.*, Ex. E (Hemlock's Sept. 1 Breach Notice).

51 *Id.* at 3.

52 Compl., Ex. 4 (Hemlock's Sept. 8 Demand Email).

53 *Id.*

54 *Id.* ¶ 51.

55 *Id.* ¶ 56.

D. PROCEDURAL BACKGROUND

DuPont initiated this action last November.[56] DuPont brings two counts against Hemlock: breach of contract under the Side Letter (Count I)[57] and breach of contract under the [redacted] (Count II).[58] Hemlock answered and asserted counterclaims for declaratory judgment, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.[59]

DuPont now simultaneously moves for judgment on its pleadings,[60] and to dismiss two of Hemlock's five requests for declaratory judgment as well as Hemlock's counterclaims for breach of the implied covenant and unjust enrichment.[61] Hemlock opposes both motions.[62] The Court heard the parties at argument and the motions are now ripe for decision.

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56 *See generally id.*

57 *Id.*¶¶ 58-64.

58 *Id.* ¶¶ 65-72.

59 Def.'s Counterclaim ¶¶ 33-61.

60 *See generally* Opening Brief in Support of Plaintiffs' Motion for Judgment on the Pleadings ("Pls.' Mot. for Judg.") (D.I. 18).

61 *See generally* Plaintiffs' Opening Brief in Support of Partial Motion to Dismiss Defendant's Counterclaims ("Pls.' Mot. to Dismiss") (D.I. 17).

62 *See generally* Defendant and Counterclaim Plaintiff Hemlock Semiconductor Operations LLC's Answering Brief in Opposition to Plaintiffs' Motion for Judgment on the Pleadings ("Def.'s Mot. for Judg. Opp.") (D.I. 25); Counterclaim Plaintiff's Answering Brief in Opposition to Counterclaim Defendants' Partial Motion to Dismiss ("Def.'s Mot. to Dismiss Opp.") (D.I. 24).

II. PARTIES' CONTENTIONS

Plaintiffs first move for judgment on the pleadings as to both their affirmative counts.[63] For Count I, Plaintiffs say that Hemlock's admitted withholding of the $[redacted] is in direct breach of Side Letter paragraph 3(g)'s unambiguous anti-offset language.[64] For Count II, Plaintiffs say that Hemlock's failure to pay the $[redacted] owed to DDP is an indisputable breach of its obligations under the [redacted].[65] In addition, Plaintiffs contend that DuPont's alleged prior material breach of the Side Letter does not excuse Hemlock from its obligations owed to DDP under the [redacted].[66]

Plaintiffs also move to partially dismiss Hemlock's counterclaims.[67] First, Plaintiffs move to dismiss certain of Hemlock's declaratory judgment requests, contending that they are duplicative of Plaintiffs' affirmative counts.[68] Second, Plaintiffs move to dismiss Hemlock's implied covenant of good faith and fair dealing counterclaim, arguing that the Side Letter's express anti-offset language controls.[69]

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63 *See generally* Pls.' Mot. for Judg.

64 *Id*. at 8-11.

65 *Id*.

66 Plaintiffs' Reply Brief in Support of Motion for Judgment on the Pleadings on Affirmative Claims ("Pls.' Re. Br.") at 2-5 (D.I. 29).

67 *See generally* Pls.' Mot. to Dismiss.

68 *Id*. at 9-12.

69 *Id*. at 12-15.

Third, Plaintiffs move to dismiss Hemlock's unjust enrichment counterclaim, positing that the Agreements fully govern the relationship between the parties.[70]

Hemlock opposes Plaintiffs' motion for judgment on the pleadings.[71] Hemlock contends that DuPont's prior material breach of the Side Letter relieved Hemlock's duty to perform under the [redacted].[72] In the alternative, Hemlock posits that material fact issues preclude judgment on the pleadings, including who is responsible for stalling the [redacted] resolution process, as well as whether DuPont breached the Side Letter at all.[73]

Hemlock also opposes Plaintiffs' motion to dismiss its counterclaims.[74] Hemlock contends that its declaratory judgment counterclaims are not duplicative of DuPont's affirmative counts.[75] And Hemlock posits that both its implied covenant and unjust enrichment counterclaims are adequately pled alternative claims.[76] Specifically, Hemlock argues that, because the exact manner in which the Agreements govern this dispute are in question, its alternative claims should

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70 *Id*. at 15-18.

71 *See generally* Def.'s Mot. for Judg. Opp.

72 *Id*. at 8-16.

73 *Id*. at 16-18.

74 *See generally* Def.'s Mot. to Dismiss Opp.

75 *Id*. at 10-14.

76 *Id*. at 14-26.

survive.[77]

III. STANDARD OF REVIEW

A. MOTION FOR JUDGMENT ON PLEADINGS

Any party may move for judgment on the pleadings pursuant to Civil Rule 12(c).[78] But the Court can't grant judgment on the pleadings unless, after drawing all reasonable inferences in favor of the non-moving party, "no material factual dispute exists and the movant is entitled to judgment as a matter of law."[79] In resolving a Rule 12(c) motion, the Court accepts the truth of all well-pleaded facts and draws all reasonable factual inferences in favor of the non-movant.[80]

"The standard for a motion for judgment on the pleadings is almost identical to the standard for a motion to dismiss."[81] The Court thus accords the party opposing a Rule 12(c) motion the same benefits as a party defending a Rule 12(b)(6) motion.[82] Given that resemblance, the Court engages certain 12(b)(6) procedures during a 12(c) review.[83]

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[77] *Id.*

[78] Del. Super. Ct. Civ. R. 12(c).

[79] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

[80] *See id.*

[81] *Silver Lake Off. Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Ct. Jan. 17, 2014) (internal quotations omitted).

[82] *E.g.*, *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *6 (Del. Super. Ct. Feb. 8, 2016), *aff'd sub nom.*, *Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209 (Del. 2016).

[83] *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 499-500 (Del. Ch. 2000).

B. MOTION TO DISMISS

"Under Superior Court Civil Rule 12(b)(6), '[t]he legal issue to be decided is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.'"[84] Under that Rule, the Court will

> (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [not dismiss the claims] unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[85]

"If any reasonable conception can be formulated to allow Plaintiffs' recovery, the motion must be denied."[86] And "these well-established rules applied to the suit-initiating plaintiff's claims are of the same utility when assessing an answering defendant's (*i.e.* counter-plaintiff's) counterclaims."[87] For both, "[d]ismissal is warranted [only] where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the

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[84] *Vinton v. Grayson*, 189 A.3d 695, 700 (Del. Super. Ct. 2018) (alteration in original) (quoting Del. Super. Ct. Civ. R. 12(b)(6)).

[85] *Id.* (alteration in original) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011)).

[86] *Id.* (citing *Cent. Mortg. Co.*, 27 A.3d at 535).

[87] *inVentiv Health Clinical, LLC v. Odonate Therapeutics, Inc.*, 2021 WL 252823, at *4 (Del. Super. Ct. Jan. 26, 2021).

complaint state a claim for which relief might be granted."[88]

IV. DISCUSSION

A. PLAINTIFFS ARE NOT ENTITLED TO JUDGMENT ON THEIR PLEADINGS.

1. A question of material fact remains as to whether Hemlock breached the Side Letter.

Plaintiffs first move for judgment on their pleading that Hemlock breached the Side Letter.[89] Delaware law governs the Side Letter, so its proper construction is a question of law.[90] "A court must accept and apply the plain meaning of an unambiguous term in . . . the contract language . . ., insofar as the parties would have agreed *ex ante*."[91] "Absent some ambiguity, Delaware courts will not destroy or twist [contract] language under the guise of construing it."[92] But a contract "is not ambiguous simply because the parties disagree on its meaning."[93] Ambiguity exists only if disputed contract language is "fairly or reasonably susceptible of more than

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[88] *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004).

[89] Pls.' Mot. for Judg. at 8-11.

[90] *E.g.*, *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266–67 (Del. 2017).

[91] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006).

[92] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992) (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. Super. Ct. 1982)).

[93] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997); *see also Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 n.68 (Del. 2019) (explaining that, because a contract's meaning is a question of law, a court, not the parties, must decide whether the contract is ambiguous or not).

one meaning."[94]

As a question of law, a contract's proper interpretation might be resolved on a pleadings-stage motion.[95] But, at the pleadings stage, the movant must show the terms supporting its motion are indeed unambiguous.[96] And the Court "cannot choose between two differing reasonable interpretations of ambiguous" contract language.[97] So, to succeed, the movant's interpretation must be "the *only* reasonable construction as a matter of law."[98] Otherwise, "for purposes of deciding" the motion, the language must be resolved in the non-movant's favor.[99]

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[94] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (citing *GMG Cap. Invest., LLC v. Athenian Venture Part. I, L.P.*, 36 A.3d 776, 780 (Del. 2012)).

[95] *See, e.g.*, *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language."); *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *12 (Del. Super. Ct. July 29, 2021) ("'[J]udgment on the pleadings is a proper framework for enforcing unambiguous contracts,' which only have one reasonable meaning and therefore do not create 'material disputes of fact.'" (alteration in original) (quoting *Lillis v. AT&T Corp.*, 904 A.2d 325, 329–30 (Del. Ch. 2006))).

[96] *See, e.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003); *GMG Cap. Invs., LLC*, 36 A.3d at 783 ("[W]here two reasonable minds can differ as to the contract's meaning, a factual dispute results. . . . In those cases, [judgment as a matter of law] is improper." (citations omitted)).

[97] *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *see also Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1292 (Del. 2007) ("Even if the Court considers the movant's interpretation more reasonable than the non-movant's, on a Rule 12(b)(6) motion it is error to select the 'more reasonable' interpretation as legally controlling." (cleaned up)).

[98] *VLIW Tech.*, 840 A.2d at 615 (emphasis in original).

[99] *Id.*; *see also CRE Niagara Holdings, LLC v. Resorts Grp., Inc.*, 2021 WL 1292792, at *10 (Del. Super. Ct. Apr. 7, 2021) ("Faced with a question of contract interpretation on a motion to dismiss, the Court must determine whether the contractual language is unambiguous. If so, the Court must give effect to its meaning. If, however, the contractual language is [ambiguous], the Court must resolve the ambiguity in favor of the non-moving party." (alterations and internal

The contract provisions interpreted here relate to the Side Letter's anti-offset clause. That clause provides that Hemlock shall not "have the right to offset any *amount payable or alleged to be payable* by DuPont pursuant to paragraph 1 against any amounts owed to DuPont or its Affiliates pursuant to the Transaction Agreement" and the "Acquisition Documents."[100] In paragraph 1, the Side Letter provides governing rules for calculating the [redacted].[101] And the term "Acquisition Documents" is defined in the Transaction Agreement to include the "[redacted]."[102] So, the anti-offset provision unambiguously prohibits Hemlock from offsetting a payable or alleged-to-be-payable [redacted] against any amounts owed to DuPont or its Affiliates under the [redacted].

Plaintiffs point to paragraph 3(g)'s unambiguous language and to Hemlock's withholding of $[redacted] to say that Hemlock is in breach of the Side Letter's anti-offset provision.[103] But Plaintiffs ignore that same paragraph's procedural provisions. Indeed, the Side Letter must be construed as a whole, giving effect to all its provisions, not just isolating individual

quotations omitted)).

[100] Side Letter ¶ 3(g) (emphasis added).

[101] *Id.* ¶ 1.

[102] Transaction Agreement § 1.1 (Definitions).

[103] Pls.' Mot. for Judg. at 8-11.

paragraphs.[104] As such, the Court "must read the specific provisions of the contract in light of the entire contract."[105]

Side Letter subparagraphs 3(b), (c), and (d) govern [redacted] dispute resolution. If a party disputes a [redacted] Statement, it sends a Notice of Disagreement to the other party.[106] That [redacted] Statement then becomes a Disputed Item.[107] If the parties cannot resolve the dispute, the Disputed Item gets sent to an Independent Auditor.[108] The Independent Auditor then will "render a final determination as to each Disputed Items[.]"[109] Paragraph 3(c) provides that "[t]he final determination as to each Disputed Item, as determined by the Independent Auditor, will be final and binding on the parties[.]"[110] And according to paragraph 3(d):

> *At such time as a* [redacted] *Statement becomes final pursuant to the foregoing clauses (a) – (c)*, if . . . the [redacted] is a negative number, then, subject to paragraph 1(a), *Hemlock will pay to DuPont* the applicable [redacted] Return within thirty (30)

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[104] *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014); *see also E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein.").

[105] *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 913–14 (Del. 2017).

[106] Side Letter ¶ 3(b).

[107] *Id.*

[108] *Id.* ¶ 3(c).

[109] *Id.*

[110] *Id.*

Business Days.[111]

Plaintiffs say that Hemlock is withholding an amount payable or alleged to be payable.[112] But the Side Letter is clear: a [redacted] is only *payable* at "*such time as a* [redacted] *Statement becomes final*" pursuant to its procedural provisions.[113] And here, there is no *final* [redacted] Statement. Instead, the parties got stuck in the mud while attempting to resolve the 2022 [redacted] Statement, a Disputed Item. That Disputed Item hasn't even been *submitted* to an Independent Auditor for a "final determination"[114]—therein lies the seed from which this lawsuit has grown. Without a final [redacted] Statement, the [redacted] cannot be paid. So, the Court can't grant judgment on Plaintiffs' pleading that Hemlock breached the Side Letter's anti-offset provision. There simply isn't an amount payable or alleged to be payable yet.

Accordingly, DuPont's motion for judgment on the pleadings in its favor as to Count I must be **DENIED**.

2. It's too early to analyze DuPont's alleged prior material breach or to discern the interrelated nature of the Agreements.

Plaintiffs also move for judgment on their Count II pleading that Hemlock is

[111] *Id*. ¶ 3(d) (emphasis added)

[112] *See* Pls.' Mot. for Judg. at 8-11.

[113] Side Letter ¶ 3(d) (emphasis added).

[114] *See id*. ¶ 3(c).

in breach of the [redacted].[115] The same Delaware rules of contract interpretation just mentioned apply here.[116] Too, "a motion for judgment on the pleadings cannot be granted when a material question of fact exists."[117] And the Court must afford the party opposing a Rule 12(c) motion the same benefits as a party opposing a Rule 12(b)(6) motion.[118] Pleadings-based dismissal is appropriate only if "it can be determined with reasonable certainty that the [non-moving party] could not prevail on any set of facts reasonably inferable" from the pleadings.[119]

Plaintiffs say that Hemlock's admitted failure to pay DDP $[redacted] is a breach of its obligations under the [redacted].[120] Hemlock counters that DuPont's prior material breach of the Side Letter supersedes its own breach, negating its obligation to perform under that [redacted].[121] At this early stage, the Court must accept both sides' well-pled allegations as true.[122] And given the present factual disputes, including any alleged breach's materiality,[123] sending

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[115] Pls.' Mot. for Judg. at 8-11.

[116] *See* Section IV(A)(1), *supra*.

[117] *Desert Equities, Inc.*, 624 A.2d at 1206.

[118] *See McMillan*, 768 A.2d at 500.

[119] *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

[120] Pls.' Mot. for Judg. at 8-11.

[121] Def.'s Mot. for Judg. Opp. at 8-16.

[122] *McMillan*, 768 A.2d at 500.

[123] Delaware courts routinely recognize that materiality is a question of fact that is ordinarily not suited for judgment as a matter of law. *See, e.g.*, *IP Network Sols., Inc. v. Nutanix, Inc.*, 2022 WL

this action to discovery is the most appropriate result.

In their reply brief, Plaintiffs for the first time argue that DuPont's alleged breach under the Side Letter—true or not—doesn't excuse Hemlock's performance under its [redacted] with DDP.[124] That's because, they say, DuPont signed the Side Letter and DDP signed the [redacted], so breach of one doesn't excuse performance under the other.[125] Unfortunately for DuPont, the Court would need to make too many pleadings-stage leaps to reach such a determination. A few of those leaps are outlined below.

First, the Court would need to determine that the Agreements should indeed be enforced separately, as DuPont suggests. If contracts overlap with other agreements in a single transaction, Delaware courts strive to "give a consistent reading" to the interrelated documents.[126] But the general rule still applies that "only the formal parties to a contract are bound by its terms."[127] DuPont, Hemlock, and DDP executed multiple related agreements simultaneously and as part of a singular

369951, at *11 (Del. Super. Ct. Feb. 8, 2022).

[124] Pls.' Re. Br. at 2-5.

[125] *Id.*

[126] *In re Nat'l Collegiate Student Loan Trusts Litig.*, 251 A.3d 116, 144 (Del. Ch. 2020); *see also Simon v. Navellier Series Fund*, 2000 WL 1597890, at *7 (Del. Ch. Oct. 19, 2000) (finding that multiple agreements "must be viewed together and in their entirety when determining the scope and nature of" the parties' obligations); RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").

[127] *Weygandt v. Weco, LLC*, 2009 WL 1351808, at *3 (Del. Ch. May 14, 2009) (quoting *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 760 (Del. Ch. 2009)).

transaction. At this early stage, that transactional web woven by these parties cannot be disentangled based on the pleadings alone.[128]

Second, assuming the [redacted] and Side Letter do create separate obligations for DDP and DuPont, the Court would still need to determine if those agreements were incorporated by reference into the underlying Agreements—and if so, to what extent. Documents or agreements can be incorporated by reference "[w]here a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it."[129] Here, there are some indicia that the parties intended to incorporate the Side Letter and the [redacted] into the underlying Agreements by making repeated reference to them as "Acquisition Documents."[130]

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[128] In addition, Transaction Agreement Section 3.2 states, in pertinent part:

> DuPont has duly executed and delivered this Agreement and, at the Closing, DuPont and the applicable other members of the DuPont Group will have executed and delivered each other Acquisition Document to which it is a party, and assuming due authorization, execution and delivery by each other party thereto, ***this Agreement and each other Acquisition Document to which it is a party will constitute its legal, valid and binding obligations, enforceable against the applicable members of the DuPont Group in accordance with their respective terms***, subject to General Enforceability Exceptions.

Transaction Agreement § 3.2 (Authority; Execution and Delivery; Enforceability) (emphasis added). As previously discussed, the definition of "Acquisition Documents" includes both the Side Letter and the [redacted]. *See id.* § 1.1 (Definitions). Contrary to DuPont's argument, Section 3.2's plain language thus suggests the parties' intent to jointly bind DuPont *and* members of the Dupont Group to the Agreement *and* the Acquisition Documents.

[129] *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 818 (Del. 2018) (quoting *State v. Black*, 83 A.2d 678, 681 (Del. Super. Ct. 1951)).

[130] The [redacted] and the Side Letter both reference the Acquisition Documents as well. *See, e.g.*, [redacted]

Third, the Court would need to resolve ambiguities in the Agreements about DuPont and DDP's business relationship. DuPont and DDP are defined inconsistently throughout the Agreements. In particular, DDP is a member of the "Dupont Group" in some parts of the Agreements[131] and a completely independent entity in other parts.[132] To muddle things even further, the parties chose the shorthand "DuPont" to refer to DDP throughout the same [redacted] that DuPont now purports to have no obligations under.[133] The nature of DuPont and

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[redacted]" (emphasis added)); Side Letter ¶ 3(g) ("Neither Hemlock nor its Affiliates shall have the right to offset any amount payable or alleged to be payable by DuPont pursuant to paragraph 1 against any amounts owed to DuPont or its Affiliates pursuant to the Transaction Agreement, ***the Acquisition Documents***, ..." (emphasis added)). And as just discussed, the underlying Transaction Agreement references the Acquisition Documents many times. So, these agreements may have been incorporated by reference into the Agreements governing the transaction between DuPont and Hemlock.

[131] The Transaction Agreement defines "DuPont Group" as "DuPont and its Subsidiaries . . . ." Transaction Agreement § 1.1 (Definitions). In Section 2.2, the Transaction Agreement defines the [redacted] as "duly executed by DuPont ***and/or other members of the DuPont Group*** . . . ." *Id.* § 2.2(c) (emphasis added). As DuPont itself points out, DDP and Hemlock were the [redacted]'s only signatories. [redacted] § Signature Page. So according to Transaction Agreement Section 2.2, DDP is defined as either "DuPont" or part of the "DuPont Group" under the Agreements.

[132] Transaction Agreement § 5.16 states, in relevant part, that:

> Hemlock and DuPont agree to negotiate agreements for the supply of AnHCl and EG TCS from Hemlock ***to DDP*** . . . . Solely with respect to EG TCS, Hemlock shall sell EG TCS to DuPont or a ***member of the DuPont Group*** on a spot purchase order basis at $[redacted] until the earlier of (a) such time as Hemlock ***and DDP*** enter into a supply agreement in accordance with this Section 5.16.

Transaction Agreement § 5.16 (Supply Agreements) (cleaned up and emphasis added). Section 5.16 thus doesn't consider DDP a part of the "DuPont Group," even though Section 2.2 does.

[133] *See* [redacted]:

> [redacted]

DDP's relationship in the Agreements thus creates a genuine factual question that the Court cannot resolve at the pleadings stage.[134]

Fourth, the Court would need to determine that DuPont is not a third-party beneficiary of the [redacted] between DDP and Hemlock. "A third-party beneficiary's rights are measured by the terms of the contract."[135] When the beneficiary accepts the benefits of a contract, "it also must accept the burdens expressed in that document."[136] A court "will not allow a third-party beneficiary to cherry-pick certain provisions of a contract which it finds advantageous in making its claim, while simultaneously discarding corresponding contractual obligations which it finds distasteful."[137] Here, Transaction Agreement Section 2.2 describes the [redacted] as "for the benefit of DuPont."[138] That language at least raises an inference that DuPont was a third-party beneficiary of the [redacted]

[redacted]

(emphasis added).

[134] *See, e.g.*, *ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *9 (Del. Ch. Sept. 23, 2019) ("When a contractual provision is ambiguous, judgment on the pleadings is not appropriate to resolve the ambiguity.").

[135] *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007).

[136] *Id.* (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001); RESTATEMENT (SECOND) OF CONTRACTS § 309 cmt. b (1981)).

[137] *Id.* (citing *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976)).

[138] Transaction Agreement § 2.2.

[redacted], even if it was not a formal signatory.[139]

All that said, there are far too many undetermined facts and unresolved questions to judge this claim in Plaintiffs' favor based on the pleadings alone. This was a complex multi-party transaction with various ancillary agreements, acquisition documents, affiliates, and subsidiaries. The interrelated nature of the Agreements may be cleared up through discovery, but it isn't clear now. DuPont's attempt to distance itself from the [redacted] and its underlying obligations falls short, and Plaintiffs' overarching attempt to avoid discovery fails.

Accordingly, Plaintiffs' motion for judgment on the pleadings in its favor as to Count II is **DENIED**.

B. PLAINTIFFS' MOTION TO DISMISS HEMLOCK'S COUNTERCLAIMS IS MAJORLY DENIED, BUT SINGULARLY GRANTED.

1. Hemlock's fourth declaratory judgment request is duplicative and dismissed.

Plaintiffs move to dismiss Hemlock's fourth and fifth declaratory judgment

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[139] The Transaction Agreement does contain a no third party beneficiary provision. *See id.* § 8.4 (No Third Party Beneficiaries). But that provision clarifies that:

> this Agreement ***together with the other Acquisition Documents and the Exhibits and Schedules hereto and thereto*** are for the sole benefits of the parties hereto and their permitted successors and assigns and nothing herein (express or implied) is intended to confer in or behalf of any Person not a party to this Agreement (and their successors and assigns) any rights, benefits, causes of action or remedies with respect to the subject matter or any provision hereof.

Id. (emphasis added). The Side Letter and the [redacted] are Acquisition Documents, and they are attached as exhibits to the Transaction Agreement. So, Section 8.4's plain language does not necessarily prohibit DuPont from being a third-party beneficiary in this instance.

requests, contending that they are wholly duplicative of DuPont's affirmative claims.[140] Delaware courts will dismiss counterclaims seeking "declaratory relief that relates wholly and completely to the claim asserted in the complaint."[141]

Hemlock's fourth declaratory judgment request asks the Court to declare that DuPont's breach of the Side Letter is a superseding breach of the Agreements, negating Hemlock's duty to perform under the [redacted].[142] Although some overlap exists, Hemlock's request is not "wholly and completely" duplicative of Plaintiffs' affirmative claims as is required for dismissal.[143] DuPont's affirmative claims say that Hemlock breached the Side Letter's offset provision and the [redacted]'s payment obligations, while Hemlock's fourth declaratory judgment request says that DuPont materially breached the Side Letter's [redacted] dispute resolution provisions prior to any of Hemlock's alleged breaches. Those respective claims involve different provisions of the agreements with different underlying facts. Thus, Hemlock's fourth declaratory judgment request isn't wholly duplicative and won't be dismissed.

Hemlock's fifth declaratory judgment request, on the other hand, entirely

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[140] Pls.' Mot. to Dismiss at 9-12.

[141] *IP Network Sols., Inc.*, 2022 WL 369951, at *7 (quoting *In re RJR Nabisco, Inc., S'holders Litig.*, 1990 WL 80466, at *1 (Del. Ch. June 12, 1990)).

[142] Def.'s Counterclaim ¶¶ 33-42 (citing Side Letter ¶¶ 3(c)-(d)); *see also* Def.'s Mot. for Judg. Opp. at 8-16.

[143] *See IP Network Sols., Inc.*, 2022 WL 369951, at *7.

overlaps with DuPont's affirmative counts. Hemlock asks the Court to declare that it has not breached the Side Letter's anti-offset provision.[144] That issue will necessarily be decided through resolving Plaintiffs' Count I, which alleges that Hemlock breached that exact provision. So, Hemlock's fifth declaratory judgment request warrants dismissal as wholly and completely duplicative of DuPont's affirmative Count I.

Accordingly, Plaintiffs' motion to dismiss Hemlock's fourth declaratory judgment request is **DENIED**, but Plaintiffs' motion to dismiss Hemlock's fifth declaratory judgment request is **GRANTED**.

2. Hemlock's unjust enrichment and implied covenant counterclaims are well-pled and survive.

Last, Plaintiffs move to dismiss Hemlock's implied covenant and unjust enrichment counterclaims.[145] To state a claim for a breach of the implied covenant of good faith and fair dealing, Hemlock must allege: "(1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damages."[146] And for an unjust enrichment claim, Hemlock must plead "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the

[144] Def.'s Counterclaim ¶ 42.

[145] Pls.' Mot. to Dismiss at 12-18.

[146] *E.g.*, *KT4 Partners, LLC v. Palantir Techs. Inc.*, 2021 WL 2823567, at *26 (Del. Super. Ct. June 24, 2021).

absence of justification, and (5) the absence of a remedy provided by law."[147]

Hemlock brings both its implied covenant and its unjust enrichment counterclaims in the alternative, and both are adequately pled.[148] In this factual circumstance, Hemlock's alternative counterclaims survive Plaintiffs' pleadings-stage motion. As discussed earlier, there are many outstanding factual questions regarding the nature of the Agreements, including whether they govern Hemlock's counterclaims at all, and to what extent if so. These are open questions that will need to be answered through discovery. And those answers may necessitate Hemlock's alternative claims if DuPont's alleged breach isn't wholly governed by the Agreements.[149] As such, Hemlock's alternative counterclaims are reasonably conceivable and won't be dismissed.

Accordingly, Plaintiffs' motion to dismiss Hemlock's counterclaims II and III is **DENIED**.

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[147] *E.g.*, *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 875 (Del. 2020).

[148] *See* Def.'s Counterclaim ¶¶ 43-61.

[149] The implied covenant exists to "fill unanticipated gaps in a contract's express terms" and is an "occasional necessity . . . to ensure the parties' reasonable expectations are fulfilled." *Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at *11 (Del. Super. Ct. Aug. 16, 2021) (internal quotations omitted). And unjust enrichment is available only in "the absence of a formal contract." *ID Biomed. Corp. v. TM Techs., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995). Here, the outstanding questions about the Agreements and the remedies therein necessitate Hemlock's counterclaims.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for judgment on the pleadings is **DENIED**; Plaintiffs' partial motion to dismiss Defendant's declaratory judgment request No. 4 is **DENIED**; Plaintiffs' partial motion to dismiss Defendant's declaratory judgment request No. 5 is **GRANTED**; and, Plaintiffs' partial motion to dismiss Plaintiffs' alternative counterclaims of breach of the implied covenant of good faith and fair dealing and unjust enrichment is **DENIED**.

IT IS SO ORDERED.

/s/ *Paul R. Wallace*

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Paul R. Wallace, Judge

Original to Prothonotary

cc: All Counsel via File and Serve