IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GRT, INC., a Delaware corporation Plaintiff, v. MARATHON GTF TECHNOLOGY, LTD., a Delaware corporation, and MARATHON OIL COMPANY, an Ohio corporation, Defendants.	)	Civil Action No. 5571-CS

OPINION

Date Submitted: April 19, 2011
Date Decided: July 11, 2011

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STRINE, Chancellor.

I. Introduction

The plaintiff and the defendant are both corporations in the nascent business of developing and commercializing methods to convert comparatively "abundan[t]" natural gas into liquid transportation fuels such as gasoline.[1] The plaintiff, as an investor, and the defendant, as a facilities operator, formed a joint venture in which the operator, in exchange for favorably priced access to some of the investor's intellectual property, agreed to build a highly experimental testing facility to enable the investor to conduct research on some of its new technologies that would be useful to the parties' shared business goals.

In the joint venture contract, the operator made a series of representations that the facility was reasonably designed to achieve certain objectives (the "Design Representations") because the facility was experimental and not expected to be complete until several months after the contract's closing date. And, because the testing facility involved the operator's proprietary information, the investor was not permitted access to the facility or other pre-closing due diligence regarding the facility's design. Instead, the investor was allowed, after closing, to inspect the facility to make sure that the facility was designed as the operator had represented in the Design Representations. And, in order to give teeth to the investor's post-closing inspection, the operator agreed to a

[1] "There is an abundance of natural gas in North America, but it is a non-renewable resource, the formation of which takes thousands and possibly millions of years." *How Much Natural Gas is There?*, NATURALGAS.ORG, http://www.naturalgas.org/overview/resources.asp (last visited July 10, 2011). NaturalGas.org is a website funded and maintained by The Natural Gas Supply Association, a trade organization representing producers and marketers of domestic natural gas.

"Survival Clause" which provided that the Design Representations would survive for a period of one year after the closing (the "Survival Period"). When the Survival Period expired, however, the contract made plain that the operator's Design Representations, *as well as the contractually provided remedies for their breach*, would terminate.

In the event that the investor proved that the operator breached its representations about the facility's design, i.e., the Design Representations, the contract provided that the operator would have to modify the facility's design in order to make the Design Representations true in all material respects. The contract further provided that in the event that the operator failed to remedy the breach in that manner, the investor could sue the operator for a second breach of contract, and seek specific performance.

The contract's closing date was July 18, 2008, at which point the investor was granted access to the facility. The investor filed this suit on June 16, 2010 claiming in Count I of its complaint that the operator breached its contractual obligation to remedy alleged breaches of its Design Representations that the operator knew about because the investor "raised multiple issues" about the facility's design with the operator within months after closing.[2] In response, the operator has moved to dismiss the investor's breach of contract claim on the ground that it is time-barred by the contract's Survival Clause that limits the survival of its Design Representations, as well as the remedy for their breach, to the one-year Survival Period. Thus, the operator's motion to dismiss raises a straightforward question of contract interpretation: what does it mean when a contract expressly provides that representations will survive for one year after closing but

[2] Compl. ¶ 20.

thereafter will terminate, together with the sole contractually provided remedy for their breach?

According to the operator, because its Design Representations, as well as the contractual remedy for any breach thereof — the sole remedy — expired at the end of the Survival Period in July 2009, the contract plainly shortened the three-year statute of limitations applicable to breach of contract claims to one year. The investor responds in two ways. First, on the basis of case law from outside of Delaware, the investor says that the Survival Clause should not be read as shortening the time period in which a claim for breach must be brought, but instead only as shortening the period of time in which a breach may occur subject to the ordinarily applicable three-year statute of limitations. Second, the investor insists that it is not suing for a breach of the operator's Design Representations, representations it admits expired before it filed this suit, but is instead suing for a breach of the operator's remedial obligations that were triggered when, during the one-year Survival Period, the investor "informed" the operator that the testing facility's design was not as represented.[3]

In this opinion, I reject the investor's argument. The contract unambiguously sets forth a three-step liability scheme, the first of which requires that the investor sue and prove a breach of the operator's Design Representations. That first step is essential and cannot be skipped. The operator's contractual obligation to remedy the identified breach of its Design Representations is only triggered by a determination of breach. This makes practical sense because by proving that the operator breached its Design Representations,

[3] Compl. ¶ 21.

the investor establishes the "gap" between the operator's Design Representations and the facility's actual design. That gap is critical because it shapes the remedial plan the operator must implement at the court's direction, which is a plan that requires the operator to modify the facility's design to close the gap between what was represented, and the reality of the facility's actual design. If, after the investor has proven that the operator has breached its Design Representations (step one), the operator's contractual remedial obligation to close the design gap is triggered (step two), but the operator then fails to comply with a court's remedial order, step three of the contract's liability scheme is traversed, at which point the investor can sue the operator for a second breach of contract and seek an order of specific performance.

Although the investor admits that basic three-step scheme, its arguments against dismissal require accepting that the Survival Clause limits not the time in which an action for breach of the Design Representations must be filed (step one), but instead only limits the time in which a breach may occur. But that is not a reasonable reading of the contract's Survival Clause.

By its plain terms, the Survival Clause expressly says that the sole remedy for a breach of the Design Representations terminates along with the Design Representations themselves. Not only that, in contrast to the Design Representations that survive only for the one-year Survival Period, the contract provides that certain other representations and warranties survive indefinitely, and that still others survive until the applicable statutes of limitations expire. This makes clear that any claim for breach of the Design Representations had to be brought before the Survival Period expired.

The investor attempts to undercut this reading, and to broaden the lens through which the court looks at the Survival Clause, by pointing to case law outside of Delaware that requires "clear and explicit" language for a court to conclude that a contract shortened the statute of limitations.[4] This line of argument is unconvincing for several reasons. For starters, even if the law of other states requiring "clear and explicit" language to contractually shorten the statute of limitations for breach of contract claims was applicable,[5] which it is not, the Survival Clause likely would meet that standard because, among other reasons, the Survival Clause expressly says that any remedy for a breach of the operator's Design Representations terminates along with the Design Representations themselves.

As important, unlike the law in some other jurisdictions, Delaware law does not have any bias against contractual clauses that shorten statutes of limitations because they do not violate the legislatively established statute of limitations, there are sound business reasons for such clauses, and our case law has long upheld such clauses as a proper exercise of the freedom of contract.[6] Consistent with that, prior case law in Delaware has read survival clauses like the one in this case as acting to shorten the statute of limitations and require that suit be brought before the relevant survival period expires.[7] That case law is also consistent with the treatise that most thoroughly addresses mergers and

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[4] Pl. Rep. Br. at 4 (citing *Western Filter Corp. v. Argan*, 540 F.3d 947, 949 (9th Cir. 2008)).
[5] *E.g.*, *Western Filter*, 540 F.3d at 949.
[6] *E.g.*, *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del. Super. 1978) (citing *Keller v. President, Directors and Co. of Farmers Bank of State of Delaware*, 41 Del. 471 (Del. Super. 1942) (quoting *Boston v. Bradley's Executor*, 4 Harr. 524, 526 (Del. Super. 1847))).
[7] *E.g.*, *Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *1 (Del. Super. Mar. 28, 2008).

acquisitions agreements, generally, and the use of survival clauses in transactional contracts more particularly. That treatise concludes that "[t]he survival period is, in effect, a contractual statute of limitations."[8]

Likewise, reading the Survival Clause as the investor wishes would result in the investor having up to four years after the contract closed to bring a suit, a result which clashes with the contractual text addressing other categories of representations and warranties, and does not seem plausible given the subject matter addressed by the Design Representations — the construction of a state of the art research facility, the very purpose for which could be thwarted by protracted proceedings for specific performance resulting from a lawsuit that, in the investor's view, could be filed up to four years after closing.

In sum, I conclude that the Survival Clause unambiguously establishes a one-year limitations period for filing claims alleging a breach of the Design Representations. Because the investor did not file its complaint until after that period expired, the investor's breach of contract claim in Count I based on the operator's alleged breach of its Design Representations is time-barred and dismissed.

II. Factual Background

The standard of review applicable to a motion to dismiss brought under Court of Chancery Rule 12(b)(6) is well known, and applies when the motion is grounded, as is the case here, on an argument that the plaintiff's suit is untimely.[9] Under that standard, I am required to accept as true all well-pled factual allegations in the complaint as well as

[8] LOU R. KLING & EILEEN T. NUGENT, 2 NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 15.02[2] n.45 (2011).
[9] *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 524-25 (Del. Ch. 2005).

to draw all reasonable factual inferences in the plaintiff's favor.[10] In accordance with that standard, the following facts are drawn from the verified amended complaint and its attachments.

A. The Parties Enter Into A Contract Containing Design Representations That Would Survive For One Year From The Date Of The Contract's Closing

The plaintiff investor is GRT, Inc., a closely held Delaware corporation that develops and markets transformational gas to liquid fuels technology for eventual use in the production of transportation fuels such as automobile gasoline.[11] The defendant operator is Marathon GTF Technology, LTD, also a Delaware corporation engaged in the experimental field of developing gas to liquid fuels technology.[12]

On July 18, 2008, after months of negotiation, GRT and Marathon entered into a series of contracts in order to form a joint venture, the purpose of which was to "cooperate on the advancement of technology for the conversion of natural gas into transportation fuels."[13] In broad strokes, those agreements provide that in exchange for licenses to use some of GRT's intellectual property, Marathon would grant GRT access to Marathon's "Pilot Unit," a small scale research unit, and more important for present purposes, to Marathon's "Demonstration Facility," a larger-scale testing facility that at the time of the agreements' execution and closing, was designed but still under

[10] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).
[11] Compl. ¶ 3.
[12] There is a second defendant, Marathon Oil Company, the Ohio parent corporation of Marathon GTF Technology, LTD. Marathon Oil's liability rises and falls entirely with Marathon GTF's. For the sake of simplicity, I will limit my discussion to Marathon GTF and refer to it as "Marathon."
[13] Compl. ¶ 1.

construction. Because the construction and design of both facilities involved Marathon's proprietary information, GRT was not granted access to either facility during the time the contracts were negotiated and their terms finalized. In other words, GRT was unable to conduct pre-closing due diligence on the Demonstration Facility.[14]

Instead, in a contract known as the Securities Purchase Agreement (the "Purchase Agreement"),[15] Marathon made a series of representations about the Demonstration Facility's pre-existing design (i.e., the Design Representations) that expressly survived that agreement's closing — July 18, 2008 — solely for a period of one year (i.e., the Survival Period). To give GRT a chance to determine for itself if the Demonstration Facility was in fact designed in accordance with Marathon's Design Representations, the Purchase Agreement granted GRT access to the Demonstration Facility after the Purchase Agreement's closing, at which point GRT could inspect the Demonstration Facility's design.[16] If GRT proved that Marathon breached any of its Design Representations, the Purchase Agreement required Marathon to remedy those breaches by undertaking, at its sole expense, the necessary modifications to the Demonstration Facility's design in order to make the Design Representations true in all material respects.[17] But, the lifespan of that remedy expressly terminated along with the Design Representations at the end of the Survival Period.[18]

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[14] Compl. ¶ 14.
[15] Compl. Ex. C ("Securities Purchase Agreement" (July 18, 2008)) ("Purchase Agreement").
[16] Purchase Agreement § 5.12 ("Within ten (10) days following the Closing Date, [Marathon] shall permit [GRT] to inspect the Pilot Unit and Demonstration Facility . . . .").
[17] *Id.* § 7.4(b)(ii).
[18] *Id.* § 7.1.

B. GRT "Informed" Marathon That The Demonstration Facility Did Not Meet The Design Representations During The Survival Period But Did Not Sue For Breach Of The Design Representations During The Survival Period

Beginning on October 8, 2008, and continuing through April 9, 2009, GRT allegedly notified Marathon that the Demonstration Facility's design failed to meet the Design Representations.

Specifically, GRT alleges that it "raised multiple issues"[19] with Marathon regarding the Design Representations and "informed" Marathon that it believed there were deficiencies in the Demonstration Facility's design.[20] Although GRT's complaint describes the Design Representations as hard and fast promises about the Demonstration Facility's ultimate physical specifications and technical capabilities such that anything short of measurable success constituted a breach, the Design Representations are couched in terms of the Facility's *design* and hoped-for outcomes on the basis of that design.[21]

[19] Compl. ¶ 20.
[20] Compl. ¶¶ 21-26.
[21] *See, e.g.*, §§ 4.6(b)(i)(A) ("To [Marathon's] knowledge, [the Demonstration Facility] has been designed using standard scientific and chemical engineering, pilot plant and analytical practices applicable to demonstration units."); 4.6(b)(i)(B) ("[The Demonstration Facility] [h]as been designed (x) to convert methane to higher molecular weight products, including liquid hydrocarbons, using bromine as a methane activating agent, and (y) for continuous, steady-state, integrated operation, including the regeneration of molecular bromine. Notwithstanding the foregoing, [GRT] acknowledges and agrees that the Demonstration Facility may be operated on an other than continuous basis."); 4.6(b)(i)(D) ("[The Demonstration Facility] [h]as been designed to have a capacity of at least five (5) barrels of liquid hydrocarbon products (if condensed) per day."); 4.6(b)(i)(E) ("[The Demonstration Facility] [h]as been designed to include (x) instrumentation and facilities for monitoring and sampling reaction products and intermediates which may contain bromine, and (y) complete and operational control instrumentation."); 4.6(b)(i)(F) ("[The Demonstration Facility] [h]as reactors that have been designed to operate within a range of reasonable reaction temperature and a reasonable range of pressure consistent with the purpose of the Demonstration Facility."); 4.6(b)(i)(G) ("[The Demonstration Facility] [i]s being constructed with the intent of accomplishing the design criteria described in Sections 4.6(b)(i)(A) through (F) . . . .").

For instance, GRT alleges in its complaint that "[o]n April 9, 2009, GRT informed Marathon [] that the Demonstration Facility was unable to demonstrate a commercial scaleup process, as represented and warranted by Marathon [] under Section 4.6(b)(i)(C)."[22] But § 4.6(b)(i)(C) provides only that "[The Demonstration Facility] *[h]as been designed to* be of adequate size to provide data which is useful in the scaleup of a fixed bed vapor phase process to commercial scale applications . . . ."[23]

In any event, GRT alleges that despite repeatedly "informing" Marathon about these purported "design" shortfalls during the Survival Period, Marathon failed to make any modifications to the design or construction of the Demonstration Facility, as GRT claims Marathon was obligated to do under the Purchase Agreement upon the breach of the Design Representations.[24] GRT further alleges that it even offered several proposed design modifications it believed would remedy the perceived flaws, and that Marathon agreed to test some of these proposed modifications in the smaller-scale Pilot Unit, but ultimately refused to do anything similar at the Demonstration Facility.[25]

But, despite its alleged serial communications to Marathon in which GRT expressed its opinion that the Demonstration Facility was not built in accordance with the Design Representations, GRT did not file suit against Marathon for breach of the Design Representations during the Survival Period, and further does not plead that Marathon, during the Survival Period, conceded that it breached any of the Design Representations.

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[22] Compl. ¶ 24.
[23] Purchase Agreement § 4.6(b)(i)(C) (emphasis added).
[24] Compl. ¶ 27.
[25] Compl. ¶ 28.

Instead of filing suit against Marathon for breach of the Design Representations, GRT filed this action on June 16, 2010, nearly one year after the expiration of the Survival Period. Count I of the complaint's two counts is the only one subject to Marathon's motion to dismiss.

III. Analysis

The primary issue raised by Marathon's motion to dismiss is whether GRT had to bring its claim in Count I within the one-year Survival Period, as Marathon contends, or whether GRT could, as it asserts, sue and prove a breach of the Design Representations at any time up to three years after the end of the Survival Period. In other words, the key question that I must answer is whether the Survival Clause acted to shorten the statute of limitations during which GRT could sue for a breach of the Design Representations. This is a question that may be resolved on a motion to dismiss if the relevant terms of the Purchase Agreement are unambiguous, and together with "the facts pled in the complaint, . . . demonstrate that the claim[] [is] untimely."[26]

In Delaware, the default statute of limitations applicable to claims based on contract, including breach of contract, is three years.[27] The three-year period typically begins to run when the contract is breached, whether or not the plaintiff was aware of

[26] *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 5757762, at *6 (Del. Ch. Jan. 24, 2005) (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993)).
[27] 10 *Del. C.* § 8106; *see also CertainTeed*, 2005 WL 5757762, at *4 (citing 10 *Del. C.* § 8106; *Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999)).

such breach.[28] Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made, a breach occurs on the date of the contract's closing and hence the cause of action accrues on that date.[29]

Under Delaware law, however, parties to a contract are entitled to shorten the period of time in which a claim for breach may be brought, i.e., the statute of limitations, so long as the agreed upon time period is a reasonable one.[30] Shortening statutes of limitations, as opposed to lengthening them, does not conflict with the legislatively determined limitations period and, in fact, has been seen as being harmonious with the public policy purposes served by statutes of limitations in general.[31] As a venerable Delaware decision observed over a century and a half ago,

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[28] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004); *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del. 1982); *see also Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 923 (D. Del. 1975) (applying Delaware law); 31 WILLISTON ON CONTRACTS § 79:14 (4th ed. 2011).

[29] *CertainTeed*, 2005 WL 5757762, at *7 (noting that a claim for breach of a contractual representation accrued on the date the contract closed because "[o]n that date, CertainTeed's contractual rights were breached and it was injured by receiving Facilities the value and nature of which were not as represented."). *Cf.* 31 WILLISTON ON CONTRACTS § 79:14 (4th ed. 2011) (observing the analogous situation for contracts governed by the UCC and noting that a breach of warranty in a sale of goods contract accrues on the date the goods are tendered to the buyer).

[30] *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010); *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del. Super. 1978) (citing *Murray v. Lititz Mutual Ins. Co.*, 61 A.2d 409 (Del. Super. 1948)); *Rumsey Elec. Co. v. Univ. of Del.*, 334 A.2d 226, 229-30 (Del. Super. 1975), *aff'd*, 358 A.2d 712, 714 (Del. 1976); *see also* CORBIN ON CONTRACTS § 83.8 at 287 (2003) ("Courts have held that parties can, by agreement in advance, limit the bringing of suit upon a contract to a shorter period than that fixed by the otherwise applicable statute of limitations . . . .").

[31] *Wesselman v. Travelers Indem. Co.*, 345 A.2d 423, 424 (Del. 1975) ("[I]n the absence of an express statutory provision to the contrary, a statute of limitations does not proscribe the imposition of a shorter limitations period by contract."); *Shaw*, 395 A.2d at 386. *See also* CORBIN ON CONTRACTS § 83.8 at 287 ("To [shorten the statute of limitations] is not contrary to

> [S]tatutes of limitation are founded in wisdom and sound policy. They have been termed statutes of repose, and are regarded as highly beneficial. They proceed on the principle, that it is to the interest of the public to discourage the litigation of old or stale demands; and are designed . . . to afford a security against the prosecution of the claims where, from lapse of time, the circumstances showing the true nature or state of the transaction, may have been forgotten; or may be incapable of explanation by reason of the uncertainty of human testimony, the death or removal of witnesses, or the loss of receipts, vouchers, or other papers.[32]

But, of course, the reality that parties to a contract may shorten the statute of limitations does not mean that they did, or did so unambiguously. To address that question, I also apply settled principles of Delaware law. These require that unambiguous contractual language be given "its ordinary and usual meaning."[33] And, because questions of contract interpretation are to be determined objectively, "the true test," it has been stated, is "what a reasonable person in the position of the parties would have thought it meant."[34]

To apply these principles in addressing the merits of Marathon's motion to dismiss, I first identify the key provisions of the Purchase Agreement that bear on the timeliness of GRT's claims in Count I and then summarize the parties' contending positions on what effect those provisions have on the timeliness of Count I.

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public policy but rather assists the public policy behind statutes of limitations: preventing stale claims.").

[32] *Boston v. Bradley's Executor*, 4 Harr. 524, 526 (Del. Super. 1847); *see also Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944) ("Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.").

[33] *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (quoting *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).

[34] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

A. GRT's Breach Of Contract Claim In Count I Is Time-Barred

1. The Relevant Provisions Of The Purchase Agreement

Section 4.6(b)(i) of the Purchase Agreement sets forth the Design Representations made by Marathon. As noted above,[35] the Design Representations are couched in terms of what the Demonstration Facility has been designed to be and do, not in terms of mandatory physical specifications.[36]

Section 7.4(b)(ii) provides GRT with a remedy, the "sole and exclusive remed[y],"[37] should it turn out that after the Purchase Agreement's closing, GRT discovered that Marathon had breached its Design Representations made in § 4.6(b)(i):

> *In the event of a breach of any of [Marathon's] [Design] [R]epresentations in Section 4.6(b)(i), [Marathon] will, at its sole cost and expense and as promptly as reasonably practicable, make modifications to the design of the Demonstration Facility in order to make the [Design] [R]epresentations in Section 4.6[(b)(i)] true and correct in all material respects*. If the design is modified pursuant hereto, then [Marathon] shall complete construction of or make modification (if any) to the Demonstration Facility in order to cause the Demonstration Facility to be constructed in accordance with the design as modified. Promptly following *the occurrence of any such breach*, [Marathon] shall deliver to [GRT] a work plan and proposed schedule for *remedying such breach*, and thereafter shall keep [GRT] informed at reasonable periodic intervals regarding progress toward *remedying such breach*.[38]

And, Marathon further promised in § 7.5 that in the event that it breached the Design Representations,[39] and thereafter failed to undertake its remedial obligations in § 7.4,

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[35] *See supra* note 21 and accompanying text.
[36] Purchase Agreement § 4.6(b)(i).
[37] *Id.* § 7.6(c).
[38] *Id.* § 7.4(b)(ii) (emphasis added).
[39] Marathon Oil, a signatory to the Purchase Agreement and a defendant in Count I, agreed to "perform the actions set forth in Section 7.4(a) and 7.4(b), if required thereunder . . . ." Purchase

GRT could sue to enforce those obligations and Marathon would not plead in defense that GRT had an adequate remedy at law.[40] In other words, GRT could, upon a breach of § 7.4(b)(ii), seek specific performance.

But, the parties also contractually limited the survival of the Design Representations and Marathon's related promise in § 7.4 to remedy any breach thereof by undertaking the necessary design modifications. Specifically, the parties agreed in § 7.1 of the Purchase Agreement, the Survival Clause, that Marathon's Design Representations, and the associated remedy for their breach provided for in § 7.4, would only survive for a period of one year after the closing of the Purchase Agreement (i.e., the Survival Period):

> The representations and warranties of the Parties contained in Sections 3.1, 3.3, 3.6, 4.1 and 4.2 shall survive the Closing indefinitely, together with any associated right of indemnification pursuant to Section 7.2 or 7.3. The representations and warranties of [GRT] contained in Section 3.16 shall survive until the expiration of the applicable statutes of limitations . . . , and will thereafter terminate, together with any associated right of indemnification pursuant to Section 7.3. *All other representations and warranties in Sections 3 and 4 will survive for twelve (12) months after the*

Agreement § 8.16(b). That is, Marathon Oil agreed that it, along with Marathon, would undertake the same contractual remedies as Marathon, in the event the Design Representations contained in § 4.6(b)(i) were breached. It is in that sense that the liability of Marathon Oil rises and falls with that of Marathon, and further the reason that Marathon moves to dismiss Count I with respect to both Marathon and Marathon Oil.

[40] Section 7.5 of the Purchase Agreement provides:

> Equitable Relief. [Marathon] acknowledges that irreparable injury will result from a breach of [Marathon's] obligations under Section[] . . . 7.4(b)(ii), and the Parties have agreed that an action for monetary damages is an inadequate remedy in the event of such a breach. In order to prevent such irreparable injury, in the event of any breach of Section[] . . . 7.4(b)(ii) by [Marathon] . . . , [GRT] will be entitled . . . to injunctive and other equitable relief from any court of competent jurisdiction, and [Marathon] will not plead in defense thereto that there would be an adequate remedy at law.

> *Closing Date, and will thereafter terminate, together with any associated right of indemnification pursuant to Section 7.2 or 7.3 or the remedies provided pursuant to Section 7.4.*[41]

2. The Parties' Conflicting Arguments Regarding The Timeliness Of GRT's Breach Of Contract Claim In Count I

In support of its motion to dismiss, Marathon argues on the basis of the Purchase Agreement's clear language, that it has no remedial obligations under § 7.4 to modify the design of the Demonstration Facility unless and until it has first been proven that Marathon in fact breached the Design Representations. And, even though GRT contends that Count I asserts a claim not for a breach of the Design Representations, but instead for a breach of Marathon's remedial obligations under § 7.4 such that any shortened statute of limitations does not apply to that claim, Marathon responds by arguing that GRT is skipping an essential step by bypassing the liability determination that is a necessary predicate to any right to a remedy under § 7.4. Moreover, to the extent that GRT seeks to prove a breach of the Design Representations in this action, it is too late because the Survival Period, which under Marathon's reading is a contractual statute of limitations, expired before GRT filed its complaint.[42]

In that regard, Marathon contends that the Survival Clause shortened the statute of limitations for breach of contract claims grounded on the Design Representations to one year. By stating that the Design Representations and the "sole and exclusive" remedy for their breach survive the closing for the one-year Survival Period and thereafter terminate,

[41] *Id.* § 7.1(a) (emphasis added).
[42] Marathon admits that had GRT filed suit before the expiration of the Survival Period, Count I would have been timely. Tr. at 7 (Counsel for Marathon).

the Survival Clause, says Marathon, unambiguously imposed an obligation on GRT to bring suit during the Survival Period and not after. Marathon says that its reading is the only reasonable one in view of the structure of the entire Survival Clause, which, in contrast to the Design Representations that were to survive for one year, provides that some representations would live indefinitely and some would survive for the applicable statute of limitations period. Furthermore, says Marathon, prior Delaware cases interpreting similar contractual provisions support this as the only fair reading.[43]

GRT responds to Marathon's argument by offering several of its own. First and foremost, GRT argues by citation to cases outside of Delaware, that although parties may contractually shorten the otherwise applicable statute of limitations for breach of contract actions, in order for parties to do so successfully, they must use language that clearly and unequivocally evidences an intent to do so.[44] Because in GRT's view, the Survival Clause does not say anything, at least expressly, about when a claim or action for breach of the Design Representations must be brought, GRT argues that its claim in Count I is subject to the ordinarily applicable three-year statute of limitations for breach of contract claims.

Similarly, GRT argues that if a breach of the Design Representations occurs during the Survival Period, as opposed to after, GRT is entitled to sue Marathon for

[43] Def. Op. Br. at 10-11 (citing *Rumsey Elec. Co. v. Univ. of Delaware*, 358 A.2d 712, 714 (Del. 1976); *Wesselman v. Travelers Indem. Co.*, 345 A.2d 423, 424 (Del. 1975); *Sterling Network Exch., LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *5 (Del. Super. Mar. 28, 2008); *Strange v. Keiper Recaro Seating, Inc.*, 117 F. Supp.2d 408, 411 (D. Del. 2000)).
[44] Pl. Ans. Br. at 9-10 (citing *Hurlbut v. Christiano*, 405 N.Y.S.2d 871, 871 (N.Y. App. Div. 1978); *Arcade Co. Ltd. v. Arcade, LLC*, 105 F. Appx. 808, 811 (6th Cir. 2004)).

breach of contract just as any plaintiff could do, subject to the ordinarily applicable three-year statute of limitations. In other words, GRT argues that the Survival Clause limits only the time in which a breach of the Design Representations can occur, not when a suit can be brought to remedy a breach.

In that vein, GRT posits that once GRT notifies Marathon of a "breach" of the Design Representations during the Survival Period, Marathon's obligation under § 7.4 to remedy that breach is "trigger[ed]."[45] "Only after [Marathon] [is] given an opportunity to modify the [Demonstration] Facility to bring it into conformance, and [Marathon] then fail[s] to do so . . . can GRT sue to enforce the contract."[46] Under Marathon's proposed interpretation of the Survival Clause, argues GRT, GRT could notify Marathon of a breach within the Survival Period, Marathon could then promise to undertake the necessary design modifications as it is then, at least in GRT's view, contractually obligated to do under § 7.4, but then on the first day of the thirteenth month after the Purchase Agreement's closing, Marathon could walk away from the job, leaving GRT with a defective Demonstration Facility. "Indeed," argues GRT, "the whole purpose of Section 7.4 is to allow [Marathon] to fix [its] mistakes before the parties head to court, a purpose that would be thwarted by [Marathon's] interpretation."[47]

Alternatively, argues GRT, even if the Design Representations expired after the Survival Period, and as a result, the right to sue for their breach, Marathon's motion to dismiss mischaracterizes its complaint. That is, GRT emphasizes the fact that it is not

[45] *Id.* at 13.
[46] *Id.*
[47] *Id.* at 14.

directly suing Marathon in Count I for a breach of the Design Representations. Rather, GRT alleges in Count I that Marathon breached § 7.4 when Marathon, despite having been "informed" of alleged breaches of the Design Representations, failed to remedy those breaches in accordance with its remedial obligations under § 7.4.

Finally, GRT argues that even if GRT's interpretation of the Purchase Agreement is not the only reasonable one, a finding of ambiguity requires the denial of Marathon's motion to dismiss.

3. The Purchase Agreement Unambiguously Requires GRT To Sue And Prove A Breach Of The Design Representations Before Marathon Has A Contractual Obligation To Modify The Demonstration Facility's Design

As an initial matter, I reject GRT's argument that the Survival Clause, which limits the survival of the Design Representations, has no effect on the timeliness of its breach of contract claim in Count I because that claim is, at least on its face, only a claim that Marathon breached § 7.4 of the Purchase Agreement.

Together, § 4.6(b)(i) (the Design Representations), § 7.1 (the Survival Clause), and § 7.5 create what can be best described as a three-step liability scheme for GRT to follow in order to hold Marathon to task on its Design Representations post-closing. Step one requires GRT to sue Marathon for breach of the Design Representations. To succeed, GRT must show that the Demonstration Facility's design does not meet the Design Representations. GRT's successful prosecution of such a claim is necessary to both trigger, and shape, the contractual remedy in § 7.4 (step two), which requires Marathon, upon a "breach" of the Design Representations, to close the gap (by making modifications to the design) between what it represented to GRT as the Demonstration

Facility's design, and the actual design of the Demonstration Facility discovered by GRT when it was granted post-closing access to the Facility. Finally, if GRT sues Marathon for breach of its Design Representations successfully (step one), and thus obtains a remedial order obligating Marathon to modify the Demonstration Facility's design to the extent GRT has proven it falls short of the Design Representations (step two), but Marathon fails to modify the Facility's design in a way that makes the Design Representations true "in all material respects,"[48] then GRT can sue Marathon for a second breach of contract (based on Marathon's breach of its remedial obligations in § 7.4) and seek an order of specific performance under § 7.5 (step three).

Importantly, a court cannot order a remedy under § 7.4 (step two) before GRT proves that Marathon breached the Design Representations by showing a material gap between the Design Representations and the Demonstration Facility's actual design (step one). Thus, this lawsuit represents an attempt by GRT to skip essential steps in the three-step liability scheme codified in the Purchase Agreement. That is, GRT seeks to sue Marathon for a breach of its remedial obligations under § 7.4 (step three) before GRT has proven that Marathon has breached the Design Representations (step one) and was therefore obligated, under § 7.4, to undertake remedial measures with respect to the Demonstration Facility's design (step two).

Counsel for GRT admitted at oral argument that in order to trigger Marathon's contractual obligation under § 7.4 to modify the Demonstration Facility's design, it must

[48] *Id.* § 7.4(b)(ii).

also prove that Marathon breached its Design Representations.[49] Because the Design Representations survive for a period of one year from the date of closing, and thereafter terminate, along with the remedy for their breach spelled out in § 7.4, the only remaining question I must answer is when an action for breach of the Design Representations must be brought. Unless GRT has brought suit within the time permitted to sue for a breach of the Design Representations, its claim in Count I must be dismissed as time-barred.

4. The Purchase Agreement Shortened The Statute Of Limitations Applicable To GRT's Breach Of Contract Claim In Count I

Having determined that Count I must be dismissed unless it asserts a timely claim for breach of the Design Representations, I now explain why any claim for a breach of the Design Representations had to have been filed while the Design Representations were alive and could not be brought after they and the remedy for their breach expired.

The conclusion that the only reasonable interpretation of the Purchase Agreement is the one advanced by Marathon is supported by: (i) a close reading of the relevant words of the Survival Clause in full contractual context; (ii) a consideration of how similar text has been interpreted by Delaware courts and learned commentary and treatises on the subject; and (iii) the commercial realities and business context facing the parties at the time the Purchase Agreement was negotiated and consummated.

[49] Tr. at 21 (Counsel for GRT) ("I have to prove two things [in order to maintain Count I]. I have to prove a breach of the [Design Representations], and I have to prove a breach of [§] 7.4, that [Marathon] did not adequately cure those breaches of the [Design Representations]. I have to prove both.").

a. The Text Of The Survival Clause Unambiguously Shortened The Statute Of Limitations Applicable To Claims For Breach Of The Design Representations To One Year After Closing

After considering the text of the Purchase Agreement, and in particular, the Survival Clause in light of the relevant principles of contract interpretation, I find that the parties to the Purchase Agreement unambiguously shortened the statute of limitations applicable to claims for breach of the Design Representations to one year.

On its face, the Survival Clause is drafted in a liability-limiting fashion. It plainly states that the Design Representations in § 4.6(b)(i) will "terminate" one year after the Purchase Agreement's closing.[50] That the parties intended to shorten the time period during which GRT could sue Marathon for a breach of the Design Representations is also made clear by their decision to expressly "terminate" § 7.4's remedy for a breach of the Design Representations — the "sole and exclusive"[51] remedy — simultaneously with the expiration of the Design Representations. This makes plain that the expiration of the Design Representations was intended to foreclose claims filed after the Survival Period.

Moreover, when, as required, I read the Survival Clause in full contractual context,[52] it further clarifies that in contrast to GRT's representations and warranties contained in §§ 3.1, 3.3, 3.6. 4.1 and 4.2 of the Purchase Agreement which "will survive the Closing indefinitely," and GRT's representations and warranties in § 3.16 of the

[50] *Id.*
[51] *Id.* § 7.6(c).
[52] *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) ("We will read a contract as a whole . . . ."); *Eugene A. Delle Donne and Son, L.P. v. Applied Card Sys., Inc.*, 821 A.2d 885, 887 (Del. 2003) ("In construing a contract, the document must be considered as a whole . . . ."); RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) ("A writing is interpreted as a whole . . . .").

Purchase Agreement, which "shall survive until the expiration of the applicable statutes of limitations . . . ,"[53] the parties intended to shorten the statute of limitations for claims brought for an alleged breach of Marathon's Design Representations which, "together with . . . the remedies provided pursuant to § 7.4," "will terminate" after the conclusion of the Survival Period.[54] That the parties to the Purchase Agreement designated three specific buckets of representations and warranties, each of which provides for a different survival period and one of which couches the survival period in terms of the "applicable statutes of limitations," confirms that the only reasonable way to read the Survival Clause is that it cabined the period of time in which GRT could timely file a claim for breach of the Design Representations to the one-year Survival Period.

b. Reading The Survival Clause As Establishing A One-Year Period To Sue Is Supported By Delaware Precedent

GRT's contrary reading of the text — that the Survival Clause limits only the time period in which a breach of the Design Representations can occur, not when an action for breach must be filed — does little to address the glaring fact that the Survival Clause expressly terminates the Design Representations *and the sole remedy for their breach* at the end of the Survival Period while having other representations and warranties survive indefinitely or until the traditional statutes of limitations expire. Instead, GRT relies heavily on an interpretive maxim utilized by courts in other jurisdictions. In California and New York, GRT says, courts refuse to read a survival clause that merely limits the survival of a contractual representation as also shortening the statute of limitations absent

[53] Purchase Agreement § 7.1.
[54] *Id.*

"clear and explicit" language to that effect.[55] That heightened requirement is an outgrowth of the public policy of California and New York that "does not favor contractual stipulations to limit a statute of limitation."[56] But even if the law of California or New York was applicable, and it is not, I am inclined to believe that the Survival Clause would meet that standard because unlike the survival clauses considered in the California and New York cases cited by GRT,[57] the Survival Clause in this case terminates not only the Design Representations, but also the sole remedy for their breach. That move underscores, to my mind, the parties' intention to make indisputably clear, perhaps in response to the very case law cited by GRT, that the Survival Clause was intended to establish the statute of limitations for claims alleging a breach of the Design Representations.

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[55] *Western Filter Corp. v. Argan, Inc.*, 540 F.3d 947, 953 (9th Cir. 2008) (citing *Lewis v. Hopper*, 295 P.2d 93 (Cal. Ct. App. 2008)) ("[A] [contractual] stipulation [to shorten the statute of limitations] must be clear and explicit, and is to be strictly construed against the party invoking the provision."); *see also Herring v. Teradyne, Inc.*, 242 F. Appx. 469, 471 (9th Cir. 2007) (applying California law) ("Here, we find no clear and unequivocal language in the survival clauses that permits the conclusion that the parties have unambiguously expressed a desire to reduce the statute of limitations."); *Hurlbut v. Christiano*, 63 A.D.2d 1116, 1117-18 (N.Y. App. Div. 1978) (holding that a survival clause that limited the survival of contractual representations and warranties did not shorten the statute of limitations because the language was "clear and unambiguous and suggests nothing from which a shortened period of limitations can be inferred").

[56] *Western Filter*, 540 F.3d at 953; *see also Herring*, 256 F. Supp.2d at 1126 (quoting *Hopper*, 295 P.2d at 95) ("In California, '[c]ontractual stipulations which limit the right to sue to a period shorter than granted by statute are not looked upon with favor because they are in derogation of the statutory limitation.'"); *Case Financial, Inc. v. Alden*, 2009 WL 2581873, at *13 (Del. Ch. Aug. 21, 2009) (applying California law) (citing *Western Filter*, 540 F.3d at 952) ("California courts disfavor contractual limitations on statutes of limitations."); *Hurlbut*, 63 A.D.2d at 1117 (quoting *Hauer Constr. Co. v. City of New York*, 85 N.Y.S.2d 42, 44 (N.Y.App. Term 1948)) (same).

[57] The survival clause at issue in *Western Filter* that did not pass "explicit" muster provided only that "[t]he representations and warranties [of the parties] in this Agreement shall survive the Closing for a period of one year, except the representations and warranties contained in [§ Y] shall survive indefinitely." *Western Filter*, 540 F.3d at 949.

The more fundamental problem for GRT is, of course, that the Purchase Agreement is governed by Delaware law,[58] not by some other state's, and GRT points to no Delaware decisions sharing the public policy concerns embraced by the courts of California and New York.[59] Under Delaware law, which is more contractarian than that of many other states,[60] parties' contractual choices are respected and there is no special rule requiring that in order to contractually shorten the statute of limitations, parties utilize "clear and explicit" language.

In fact, the relevant Delaware precedent cuts against GRT. To wit, Delaware courts have interpreted contractual provisions that limit the survival of representations and warranties as evidencing an intent to shorten the period of time in which a claim for breach of those representations and warranties may be brought, i.e., the statute of

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[58] Purchase Agreement § 8.8.

[59] To the contrary, the shortening of statutes of limitations by contract is viewed by Delaware courts as an acceptable and easily understood contractual choice because it does not contradict any statutory requirement, and is consistent with the premise of statutory limitations periods, namely, to encourage parties to bring claims with promptness, and to guard against the injustices that can result when parties change position before an adversary brings suit or where causes of action become stale, evidence is lost, or memories are dimmed by the passage of time. *See supra* notes 30-32 and accompanying text.

[60] *See, e.g.*, *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) ("[W]e must . . . not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. *Parties have a right to enter into good and bad contracts, the law enforces both.*") (emphasis added); *Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006)) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations."); *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999) ("Equity respects the freedom to contract . . . .").

limitations.[61] For instance, in *Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC*,[62] the Superior Court held, on the basis of a survival clause that "limit[ed] the survival of representations and warranties to six months after closing," that the contract placed "[t]ime limitations on claims," and therefore dismissed as time-barred an action filed more than six months after the closing alleging breaches of the expired representations and warranties.[63]

c. Learned Commentary And Treatises Support Reading The Survival Clause As Creating A Contractual Statute Of Limitations

As most corporate lawyers know, there are a number of valuable treatises and casebooks on mergers and acquisitions that address the corporate and securities laws that influence such transactions. But, much harder to find is any learned consideration of the important contract issues that are often even more central to the parties to such transactions.[64] In law school, the basic contracts class does not often delve into the

[61] *See, e.g., Sterling Network Exchange, LLC v. Digital Phoenix Van Buren, LLC*, 2008 WL 2582920, at *1 (Del. Super. Mar. 28, 2008); *Campanella v. General Motors Corp.*, 1996 WL 769769, at *1 (Del. Super. Nov. 6, 1996) (holding that a contractual provision that provided that "the duration of the express warranty coverage is three years or 50,000 miles, whichever occurs first" effectively shortened the applicable statute of limitations to three years for a breach of warranty claim for a car that had not yet been driven 50,000 miles); *Strange v. Keiper Recaro Seating, Inc.*, 117 F. Supp.2d 408, 410-11 (D. Del. 2000) (applying Delaware law) (holding on the basis of a contract governed by the UCC that provided that the "seller warrants for a period of twelve months from date of purchase that its products are manufactured and shipped free from substantial defects in materials and workmanship," that the statute of limitations applicable to the plaintiff's breach of contract claim was twelve months and thus his claim, being filed after that twelve-month period, was time-barred).

[62] 2008 WL 2582920 (Del. Super. Mar. 28, 2008).

[63] *Id.* at *1, *2, *5.

[64] Examples of useful works that are helpful to M&A practitioners but that spend comparatively little time on contractual issues include: ARTHUR FLEISCHER, JR. AND ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE: MERGERS AND ACQUISITIONS § 14.07 (Aspen Publishers 2010) (including a section on "Certain Merger Agreement Issues," but confining the analysis to topics like material

admittedly obscure differences between covenants, representations, warranties, and conditions, and how they work together in an acquisition agreement.[65] The mysteries of bring-down clauses and indemnification are difficult to shoehorn into a first-year course, and do not seem to tickle the fancy of many scholars.

In part for that reason, and also because of its sensible and clear consideration of some of these issues, most young transactional lawyers are told that they would be well-served by reading the now nearly forty-year-old, *Anatomy of a Merger: Strategies and*

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adverse change provisions, disclosure regulations, and the circumstances under which a court might order specific performance); STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 72-73 (2d ed. 2009) (considering only the general nature and purpose of representations and warranties in a typical merger agreement); MARTIN LIPTON AND ERICA H STEINBERGER, 1 TAKEOVERS & FREEZEOUTS § 1.09[5] (Law Journal Press 2009) (including subsections on "Contractual Provisions" and "Conditions" but not reaching the issue of representations, warranties, and their survival); WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS 635 (Foundation Press 2000) (including materials, in a section on "The Due Diligence Process," suggesting that "[t]he extent of . . . investigations prior to closing is dependent, in part, upon the nature of the representations and warranties, whether they survive the closing, and the strength of any indemnification," but otherwise not dealing with the issue of survival); and DALE A. OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS 326-333 (Thomson West 2005) (considering the basic structure and content of a typical M&A contract, including an indemnification provision "to provide that the remedies *survive* the closing," but otherwise not dealing with the time-barring effect of survival clauses that contain discrete survival periods) (emphasis in original).

[65] *See, e.g.*, EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 724 (6th ed. 2003) (including a subsection on "Representations and Warranties of Quality," largely based on the Uniform Commercial Code, which preliminarily acknowledges that "[m]odern corporate contracts (involving, inter alia, mergers and acquisitions or sales of assets) are carefully structured around the representations and warranties of each side," but otherwise not dealing with topics like survival, bring-down clauses, and the intricacies surfaced by the interplay between representations, warranties, and conditions). Perhaps unsurprisingly, popular hornbooks on basic principles in contract law also choose not to confuse first-year minds with these subjects. *E.g.*, MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 80 (5th ed. 2006) (devoting a single page to representations and the concept of a misrepresentation as a defense raised to avoid a contract); CLAUDE D. ROHWER AND ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL 290-93 (Thomson West 2006) (considering only the concept of misrepresentation as a defense affecting contractual assent).

Techniques for Negotiating Corporate Acquisitions, by James C. Freund.[66] Along with that text, young lawyers are now often pointed to the sections of *Negotiated Acquisitions of Companies, Subsidiaries and Divisions*, by Lou R. Kling and Eileen T. Nugent, which address in even more depth than Freund, just how complex acquisition agreements work.[67]

A consideration of these leading works helps to explain why I conclude that the Survival Clause can only be plausibly read as establishing a discrete, one-year period within which claims for breach of the Design Representations must be brought. In addressing these works, I acknowledge that there are strands of other commentary that do not necessarily accord in whole with these works. But a consideration of them reveals that, unlike Freund, Kling and Nugent, who attempt to explain what transactional lawyers have traditionally meant when using survival clauses, these other commentaries are trying to goad practitioners into using a new lexicon that their authors view, perhaps rightly, as preferable. Unlike a commentary designed to advocate for a change in commercial contracting techniques, however, a judicial decision interpreting a contract must respect the contractual lexicon the parties themselves chose to employ and accord the words their commonly accepted meaning within that tradition. When that approach is taken, the Survival Clause here emerges as establishing an unambiguous one-year limitations period.

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[66] JAMES C. FREUND, ANATOMY OF A MERGER: STRATEGIES AND TECHNIQUES FOR NEGOTIATING CORPORATE ACQUISITIONS (Law Journal Press 1975) ("FREUND").

[67] LOU R. KLING & EILEEN T. NUGENT, 2 NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS (2011) ("KLING & NUGENT").

To explain why the most incisive learned commentary supports this conclusion, I begin by observing that there are at least four distinct possible ways to draft a contract addressing the life span of the contract's representations and warranties, with each possibility having the potential to affect the extent and nature of the representing and warranting party's post-closing liability for alleged misrepresentations.

The first possibility — i.e., where the contract expressly provides that the representations and warranties terminate upon closing — is the clearest of all. In that case, all the major commentaries agree that by expressly terminating representations and warranties at closing, the parties have made clear their intent that they can provide no basis for a post-closing suit seeking a remedy for an alleged misrepresentation. That is, when the representations and warranties terminate, so does any right to sue on them. For instance, Freund says that "[g]enerally speaking, there is no indemnification section in acquisition agreements between two public companies, *inasmuch as the agreement usually states that the respective representations and warranties terminate upon the closing.*"[68] It is therefore common in cases where the representations and warranties

[68] FREUND at 231-32 (emphasis added); *see also* KLING & NUGENT § 15.02[2] n.31 (noting that "[u]nless fraud is present, a court will generally enforce the *clear expression* of the parties' intent" with respect to whether or not the representations and warranties will survive the closing, which is necessary if they are to form the basis for a post-closing lawsuit alleging breach of contract); Samuel C. Thompson, Jr., Practising Law Institute, *Mergers, Acquisitions and Tender Offers* § 2:14 (observing that the effect of a typical "Non-survival" clause in acquisition agreements between public companies which provides that "[n]one of the representations [and] warranties . . . in this Agreement . . . shall survive the Effective Time . . . ." is to preclude a post-closing suit for breach of the representations and warranties); MARTIN D. GINSBURG AND JACK S. LEVIN, 4 MERGERS, ACQUISITIONS, AND BUYOUTS ¶ 1702.13.1.4 (Aspen Publishers 2011) ("[S]ellers will generally want the representations and warranties to terminate at the closing (i.e., *not to survive the closing, so that they merely function as closing conditions*) . . . .") (emphasis added); ABA Model Agreement And Plan Of Merger (Jan. 20, 2010) § 2 cmt. at 13 ("Unlike in

expire at closing for the parties to conduct robust due diligence *pre-closing*, with it being understood that the contractual representations and warranties will be true as of the closing date and can provide a basis to avoid closing to the extent that their truth is made a condition to closing, but will not provide a basis for a post-closing lawsuit.[69]

The second possibility — i.e., where the contract is silent as to whether the representations and warranties survive or expire upon closing — is perhaps the least

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the typical acquisition of private companies, however, the target's representations and warranties in a public company acquisition agreement generally do not form the basis for any post-closing indemnification or other post-closing remedy. *Indeed, in public company acquisitions, it is customary to provide explicitly that the representations and warranties do not survive the consummation of the acquisition.*") (emphasis added); ABA Model Asset Purchase Agreement (2001) § 11.1 cmt. at 214 ("In acquisitions of assets of public companies without controlling shareholders, the seller's representations *typically terminate at closing* and, thus, serve principally as information-gathering mechanisms, closing conditions and a basis for liability if the closing does not occur.") (emphasis added); ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) § 11.1 cmt. at 198 (same).

[69] *See, e.g.*, FREUND at 160 ("But in acquiring a public company [where the representations and warranties expressly terminate at closing], your investigative prowess must be exhibited *prior* to the closing, so that you are in a position to use the reiteration of the representations as the basis for an out; if you do not catch the misrepresentation before you close, you may well lack recourse.") (emphasis in original); *see also* GINSBURG ET AL. ¶¶ 1702.13.1.3, 1702.13.1.7 (noting that where representations and warranties "terminate at closing," they "merely function as closing conditions . . . ," and that in an acquisition of a publicly held company where the sellers' "representations and warranties generally do not survive the closing of the acquisition, [the purchaser] is generally not entitled to recover any of the purchase price from the sellers"); ABA Model Asset Purchase Agreement (2001) § 11.1 cmt. at 214 ("[T]he seller's representations typically terminate at the closing and, thus, serve principally as information-gathering mechanisms, closing conditions and a basis for liability if the closing does not occur."); ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) § 11.1 cmt. at 198 (same); ABA Model Agreement And Plan Of Merger (Jan. 20, 2010) § 2 cmt. at 13 ("In a public company acquisition [where the representations and warranties expressly terminate at closing], the target's representations and warranties . . . are a device for obtaining disclosures about the target before the signing of a definitive agreement and thus play a significant role in the buyer's diligence process."); Samuel C. Thompson, Jr., Practising Law Institute, *Mergers, Acquisitions and Tender Offers* § 2:14 ("The truthfulness of the representations and warranties as of the date of execution and, when appropriate, the date of the closing is generally a condition to the closing."); 58 FLETCHER CYC. OF THE LAW OF CORPORATIONS § 5615 at 336 (2009) (same).

clear. The lack of clarity is most likely because it is a rare instance that parties to an M&A contract fail to address the issue of survival given the important implications survival or non-survival has for the representing and warranting party's potential post-closing liability, and for the non-representing and warranting party's post-closing remedy in the event it discovers that certain representations and warranties were not true when made. Thus, some commentaries and treatises take a cautionary approach, advising parties to make explicit their intentions with respect to survival. Indeed, Kling and Nugent opine that "*unless the contract specifically provides otherwise, it is not clear* that the representations and warranties contained in the acquisition agreement survive the closing (and form the basis for a cause of action)."[70] Kling and Nugent go on to suggest, in order to avoid that uncertainty,[71] that "if it is the intention of the parties that the Buyer

[70] KLING & NUGENT § 15.02[2]; *see also* ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) § 11.1 cmt. at 198 ("In order to confirm that the sellers' representations are intended to provide a basis for post-closing liability, the acquisition agreement includes an express survival clause to avoid the possibility that a court might import the real property principle that obligations merge with the delivery of a warranty deed to hold that the representations merge with the sale of the shares and thus cannot form the basis of a remedy after the closing."); GINSBURG ET AL. ¶ 1702.13.1.1 ("[The purchaser] will desire sellers' representations and warranties to survive the closing of the acquisition for a long time, if not indefinitely, so [the purchaser] can recover for breaches . . . ."); ABA Model Asset Purchase Agreement (2001) § 11.1 cmt. at 214 ("If the seller's representations are intended to provide a basis for post-closing liability, it is common for the acquisition agreement to include an express survival clause . . . to avoid the possibility that a court might import the real property law principle that obligations merge in the delivery of a deed and hold that the representations merge with the sale of the assets and, thus, cannot form the basis of a remedy after closing. . . . *Although no such case is known, the custom of explicitly providing for survival of representations in business acquisitions is sufficiently well established that it is unlikely to be abandoned.*") (emphasis added).

[71] Kling and Nugent do offer their best guess, that "[a]bsent express intention, [i.e., where the contract is silent with respect to survival,] normal principles of contract interpretation will be applied by a court. Thus, survival may be most likely for representations and warranties which refer to a post-closing event or circumstance, like projections of post-closing Company results or the ability to maintain customers. However, most typical representations do not address post-

may recover from the Seller post-closing for a misrepresentation, they should specifically provide that the Seller's representations and warranties survive the closing."[72] Adding to the lack of clarity in this category of contracts, there are some commentators, however, who suggest a hard and fast rule that "[u]nless the parties agree to a survival clause extending the representations and warranties in the agreement past the closing date, the breaching party *cannot be sued* for damages post-closing for their later discovered breach."[73] What can be concluded from the foregoing discussion is that contracting parties who decide to remain silent on the question of whether their representations and warranties survive closing do so at some risk, and the better and more certain practice is to have the contract expressly state whether or not the representations and warranties survive the closing, and therefore will provide a basis for a post-closing lawsuit.

The third situation — i.e., where the contract contains a discrete survival period during which the representations and warranties will continue to be binding on the party who made them — is the one encountered here. The commentators and scholars who have chosen to tailor their analysis to contracts employing the traditional lexicon and the

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closing matters but the pre-closing condition of the Company's business and, further, are often given with respect to matters that the Buyer could have reasonably discovered in its due diligence investigation." KLING & NUGENT § 15.02 (citations omitted). Kling and Nugent's sentiment, at least with respect to representations and warranties the truth or falsity of which cannot be determined until after closing, is echoed by the ABA in the commentary to its draft Revised Stock Purchase Agreement: "Secondary authorities and their discussions by the courts might suggest that a survival clause is necessary for the representations to be enforced beyond the closing. That should not be the case. One would not expect that a manufacturer's warranty expired when delivery of the automobile was taken." ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) § 11.1 cmt. at 198.

[72] KLING & NUGENT § 15.02.

[73] 58 FLETCHER CYC. OF THE LAW OF CORPORATIONS § 5615 at 336 (2009) (citing *Western Filter*, 540 F.3d 947 (9th Cir. 2008)) (emphasis added).

decisional law interpreting it have made plain their view that the effect of a survival clause with a discrete survival period is to limit the time period during which a claim for breach of a representation or warranty may be filed. For example, consistent with the idea that when the representations and warranties expressly terminate at closing there can be no post-closing lawsuit for their breach, by parity of reasoning, Kling and Nugent conclude that when the survival period ends, so does the period to sue: "*[t]he survival period is, in effect, a contractual statute of limitations*. . . . Perhaps *in California*, language should be included expressly stating that the parties intend the language to operate as a contractual statute of limitations, *but this really should not be necessary*."[74] Likewise, Professor Samuel C. Thompson, Jr. views "*it [as] clear* that a provision of an acquisition agreement that states, for example, that a representation and warranty survives for a year, means that any claim that such representation was false must be made prior to the end of the one-year period. *In other words, the survival period acts as a private statute of limitations on the claim*."[75] Finally, although more oblique in his discussion, Freund seems to share the understanding that a survival period serves as a contractual statute of limitations for claims seeking post-closing remedies for breach of a representation or warranty. In his consideration of the issues that surround typical indemnification provisions in acquisition agreements between two privately held companies, Freund notes that a common defense raised by the seller to a purchaser's claim for indemnification is "the length of time that the representations survive [the

[74] KLING & NUGENT § 15.02 n.45 (emphasis added).
[75] Samuel C. Thompson, Jr., Practising Law Institute, *Mergers, Acquisitions and Tender Offers* § 2:14 (2011) (emphasis added).

closing]."[76] "It is not unreasonable," continues Freund, "that there should be a cut-off date beyond which the purchaser cannot assert claims. *The rationale is the same as underlies statutes of limitations . . . .*"[77] This is consistent with Freund's view that no post-closing suit can be brought on representations and warranties that expressly do not survive the closing.[78]

Admittedly, there is some commentary that does not view a contractual survival clause as unambiguously establishing a contractual limitations period. But the purpose of that commentary is to urge practitioners to adopt a new approach to drafting the provisions of merger and acquisition agreements involving representations and warranties, their lifespan, and the ability to sue for their breach. This commentary is therefore designed more to advocate how M&A agreements should be drafted if the traditional lexicon is abandoned than to explain what the traditional lexicon means. But the task before me is the interpretation of a contract using the traditional lexicon. Moreover, the commentary of this kind seems to hew more closely to the policy concerns embraced by the courts in California and New York that require "clear and explicit" language in order to conclude that a survival clause will act to set the limitations period.[79]

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[76] FREUND at 372.
[77] *Id.* (emphasis added).
[78] FREUND at 231-32.
[79] A pertinent example of this type of commentary is Kenneth A. Adams' thought-provoking *A Manual of Style for Contract Drafting*. From the outset, Adams makes clear that his manual's purpose is not to comment on the traditional lexicon of contract drafting as it has evolved and been interpreted by the courts, but is instead to advocate for a method of contract drafting that prefers "standard English" over "tested" contract language, or what Adams pejoratively dubs "legalese." KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING xxvi-xxvii (2d ed. 2008). Indeed, his manual's opening section makes plain that "[t]he usages [the manual] recommend[s] are those that are *clearest and most efficient* for accomplishing a given drafting

goal. That's the case *even if what [the manual] recommend[s] does battle with the conventional wisdom . . . .*" *Id.* at xxii (emphasis added).

With respect to survival clauses, consistent with his manual's thematic underpinning — one that openly rejects the "popular rationale for retaining legalese in contracts . . . [solely because] traditional contract language has been litigated, or 'tested,' and so has a clearly established, or 'settled' meaning — Adams, *without citation*, advocates to putting an end to the standard practice of using survival clauses to serve as a contractual limitations period:

> *It's commonplace* for most representations in a given contract survive [sic] for a limited time (perhaps a year), whereas others survive until the applicable statutes of limitations expire and still others survive indefinitely. *Although it's entirely standard to refer in this manner to survival of representations*, it's unhelpful to do so. For one thing, you should resort to such legal jargon in a contract *only if no clearer alternative presents itself*. And furthermore, referring to survival of representations addresses only one of the potential bases of a claim for indemnification — for instance, it doesn't serve to put time limits on when you can bring a claim for indemnification for breach by the indemnifying party of any of its obligations. That's why *it's preferable* instead to address this topic, head-on and more broadly, in a section entitled "Time Limitations." ADAMS at xxvii, 300 (emphasis added).

In other words, Adams suggests doing away with the use of the traditional approach to addressing the limitations period applicable to claims seeking remedies for breaches of representations and warranties, which has been tied to the lifespan of the representations and warranties themselves (such as their death at closing) and being more specific by setting forth an express limitations period. His view on progress has adherents. *See generally* LENNÉ EIDSON ESPENSCHIED, CONTRACT DRAFTING: POWERFUL PROSE IN TRANSACTIONAL PRACTICE 109-112 (ABA 2010) (considering and rejecting arguments against using "plain, conversational English" in contract drafting, including one that promotes adherence to the traditional lexicon because courts have "'blessed'" the "archaic jargon and customs" in prior cases, because "language that has been litigated by definition is subject to two or more interpretations."); *see also* ABA Model Asset Purchase Agreement (2001) at 228-229 (advocating for the inclusion of a section that is separate and distinct from a general survival clause, entitled "Time Limitations," that expressly provides when claims for indemnification based on breaches of surviving representations and warranties must be noticed); ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) at 198 (same). Adams' policy proposal may well have utility, but its admirably candid nature as an advocacy piece underscores the difference between the roles served by courts and judges, on the one hand, and commentators like Adams, on the other. In contrast to a commentator, like Adams, who is free, as he does, to "disregard[] ["entrenched assumptions held by many who draft and review contracts"]" and espouse his own beliefs about the lexicon contracting parties ought to use, ADAMS at xxvi, a judge's role in a contractual interpretation case is to read and understand a contract in the manner that the parties who drafted it intended. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) ("When interpreting a contract, the role of the court is to effectuate the parties' intent."). Although reading a contract inherently involves a degree of interpretation, a judge's

The fourth situation — i.e., where the contract provides that the representations and warranties will survive indefinitely or otherwise does not bound their survival — is perhaps the most interesting. As a matter of strict or literal construction, one might imagine that a clause which provides that the representations and warranties shall survive indefinitely would mean that the representing and warranting party would face indefinite post-closing liability for its representations and warranties. But, in light of the public policy underlying statutes of limitations in general, and the widespread refusal of courts to permit parties to extend the limitations period beyond the legislatively determined statute of limitations and thereby violate the legislature's mandate,[80] the general rule is that in such a situation, courts will treat the indefinite survival of representations and

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interpretative prowess must be constrained by settled principles of law that are themselves outgrowths of the traditional contractual lexicon as it has been developed by practitioners, and read and interpreted by the courts. One can even share and in fact applaud Adams' encouragement of clearer forms of contract drafting but find it not useful in interpreting a contract written in the form Adams wishes to abandon. The judge must honor the parties' bargain by being faithful to his role and not superimposing on them his own views of appropriate drafting.

[80] Traditionally, this refusal has been justified and understood in terms of the public policy rationale underlying statutes of limitations in general. *E.g.*, *Shaw*, 395 A.2d at 386-87 ("Conversely, a contractual period of limitations which attempts to lengthen or extend the period otherwise contained in a statute violates the aforesaid public policy interests [underlying statutes of limitations in general] . . . ."); 15 CORBIN ON CONTRACTS § 83.8 at 289-90 ("Because the purpose of a statute of limitations is 'to prevent the bringing and enforcement of stale claims . . . ,' courts do not enforce parties' agreements to lengthen the limitations period.") (citing *Shaw*, 395 A.2d at 386) (internal citations omitted); 54 C.J.S. *Limitations of Actions* § 65 (2011) ("The public policy of some states prevents one from contractually extending a statute of limitations period . . . ."). In explaining this case law, some of the general authorities, in my view, overemphasize the normative role that public policy as discerned by a court ought to play within the context of a court's application of a statute like 10 *Del. C.* § 8106, which provides that "*[n]o action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of action . . . .*") (emphasis added). A freely made contractual decision among private parties to shorten, rather than lengthen, the permitted time to file a lawsuit does not violate the unambiguous negative command of 10 *Del. C.* § 8106, but a decision to lengthen it does and allows access to the state's courts for suits the legislature has declared moribund.

warranties as establishing that the ordinarily applicable statute of limitations governs the time period in which actions for breach can be brought.[81] In other words, a survival clause that states generally that the representations and warranties will survive closing, or one that provides that the representations and warranties will survive indefinitely, is treated as if it expressly provided that the representations and warranties would survive for the applicable statute of limitations.[82]

Considering these scenarios and what they suggest about the case at hand, two general points about survival clauses and the third situation emerge that support my conclusion that the Survival Clause established a one-year limitations period. The first is that the presence (or absence) of a survival clause that expressly states that the covered representations and warranties will survive beyond the closing of the contract, although it may act to *shorten* the otherwise applicable statute of limitations, never acts to lengthen the statute of limitations, at least in jurisdictions, like Delaware, whose statutes have been read to forbid such extensions. This strengthens the argument of those commentators who equate the termination date for representations and warranties with the last date to sue on those representations and warranties.[83]

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[81] *See* KLING & NUGENT § 15.02 ("[I]f the representations and warranties are said to survive the closing but no time limit is placed upon such survival, the Buyer may well have the ability to sue the Seller for misrepresentation until the expiration of the applicable statute of limitations.").

[82] Careful readers will remember that the Survival Clause contains language to this effect: "The representations and warranties of the Parties contained in Sections 3.1, 3.3, 3.6, 4.1 and 4.2 *will survive the Closing indefinitely*, together with any associated right of indemnification pursuant to Section 7.2 or 7.3." Purchase Agreement § 7.1 (emphasis added). But, because those representations and warranties are separate and distinct from the Design Representations which survive for a discrete period of time (the Survival Period), I need not grapple with the potential issue raised by that language.

[83] *E.g.*, FREUND at 231-32, 372; KLING & NUGENT § 15.02 n.45; Thompson § 2:14.

Second, and consistent with the prior point, the most persuasive authorities conclude that survival clause with a discrete survival period has the effect of granting the non-representing and warranting party a limited period of time in which to file a post-closing lawsuit. A survival clause is like a provision expressly terminating representations and warranties at closing in the sense that it is a tool utilized by contracting parties to avoid the uncertainty that learned commentary suggests exists where the contract is silent on the issue of survival. Where a given contract expressly terminates the representations and warranties at closing, it is understood that there can be no post-closing lawsuit for their breach.[84] Thus, a party to a contract with an express termination clause ordinarily has no post-closing recourse against the representing and warranting party because the grounds for such a remedy were expressly terminated in the contract. [85] By parity of reasoning, then, a survival clause, like the one found in the Purchase Agreement, that expressly states that the covered representations and warranties will survive for a discrete period of time, but will thereafter "terminate," makes plain the contracting parties' intent that the non-representing and warranting party will have a period of time, i.e., the survival period, to file a claim for a breach of the surviving

[84] *E.g.*, KLING & NUGENT § 15.02 n.45; Thompson § 2:14; FREUND at 231-32.
[85] *See, e.g.,* ABA Revised Model Stock Purchase Agreement With Commentary, Working Draft (Dec. 14, 2009) § 11.1 cmt. at 198 ("[W]hat is meant by saying the representations 'survive' *is that a remedy is preserved even after closing.*") (emphasis added); *see also* FREUND at 231-32 (stating that in the absence of a survival clause, there can be no post-closing remedy for a breach of a contractual representation or warranty).

representations and warranties, but will thereafter, when the surviving representations and warranties terminate, be precluded from filing such a claim.[86]

The Survival Clause at issue in this case goes a step further. That is, the Survival Clause not only expressly terminates the Design Representations upon the expiration of the Survival Period, it also terminates the "remedies provided pursuant to Section 7.4."[87] The parties' decision to terminate the Design Representations *and the sole remedy for their breach*, from an objective point of view, is further evidence of an intent to give GRT the one-year Survival Period to either file a claim for breach of the Design Representations, or accept the Demonstration Facility as designed, and move on.

d. The Business Context In Which The Purchase Agreement Was Negotiated Supports Reading The Survival Clause As Establishing A One-Year Limitations Period

In addition to GRT's reading of the Survival Clause being unsupported by the Clause's plain language, Delaware case law interpreting similar language, and learned commentary and treatises on the subject, I find that the business context in which the Purchase Agreement was negotiated and executed further supports the reading of the Survival Clause that limits GRT's time to sue for breach of the Design Representations.[88]

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[86] KLING & NUGENT § 15.02 n.45; Thompson § 2:14; FREUND at 372.
[87] Purchase Agreement § 7.1(a).
[88] *See, e.g.*, *Pharm. Product Dev., Inc. v. TVM Life Science Ventures IV, L.P.*, 2011 WL 549163, at *4 n.24 (Feb. 16, 2011) (citing *USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 766 A.2d 462, 474 (Del. 2000); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 740 (Del. 2006)) ("[T]he general business context in which a given contract was negotiated" is appropriate to consider because "the reality [is] that the same word can have more than one general meaning and that the commercial context can influence which meaning the parties intended.") (citing various sources); *see also* 11 WILLISTON ON CONTRACTS § 32:7 (4th ed. 2011) ("[T]he circumstances surrounding the execution of a contract may always be shown and are always relevant to a determination of what the parties intended by the words they chose. . . . Some courts . . . have held that the former rule runs afoul of . . . the parol evidence rule. . . . These

As an initial matter, GRT's reading of the Survival Clause would require this court to accept the idea that by including the liability-limiting Survival Clause, the parties actually intended to lengthen the time that Marathon was exposed to liability for breach of the Design Representations. That is, under GRT's reading of the Survival Clause, GRT could discover (or claim or conclude or decide) on the last day of the Survival Period that Marathon breached the Design Representations, keep quiet for three years from that date, and then, on the last day of the traditional three-year statute of limitations for breach of contract claims, file suit against Marathon and obtain the contractual remedy in § 7.4.[89] That proposed reading of the Survival Clause, in addition to being at odds with our law addressing when a cause of action for a breach of a contractual representation accrues,[90] would give GRT up to four years from the Purchase Agreement's closing to bring suit against Marathon on the basis of the Design Representations — representations about the Demonstration Facility's existing design made at a time when the Demonstration Facility was still under construction.

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decisions in truth, reflect a misunderstanding . . . of the parol evidence rule . . . . [T]he term ["surrounding circumstances"] refers to the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties.").

[89] *See, e.g.*, Pl. Ans. Br. at 9 (citing *Hurlbut v. Christiano*, 63 A.D.2d 1116, 1117-18 (N.Y. App. Div. 1978)) ("The plain language of [the Survival Clause] states that the [Design Representations] 'survive,' or remain in existence, for twelve months after closing. This means that if a breach of the [Design Representations] occurs while they are in effect, GRT is entitled to seek appropriate remedies. However, if the breach occurs *after* the twelve-month period, there is no remedy because the [Design Representations] no longer exist. In this way, the [S]urvival [C]lause limits the time when a breach may occur, not the time when suit based on that breach must be brought.") (emphasis in original).

[90] *CertainTeed*, 2005 WL 5757762, at *7 ("CertainTeed's misrepresentations are also subject to a three-year statute of limitations . . . [and] the accrual date as to all of these claims was the date of Closing. On that date, CertainTeed's contractual rights were breached and it was injured by receiving Facilities the value and nature of which were not as represented.").

In a highly experimental industry like the one in which both GRT and Marathon participate, where, like most industries that involve the novel commercialization of new scientific discoveries, time is of the essence, it does not seem plausible that the parties intended that the Survival Clause give GRT up to three or four years after the contract's closing to bring claims alleging that the cutting-edge Demonstration Facility's design, as represented on the closing date, did not meet the Design Representations and therefore obligate Marathon to redo its design after the Facility's construction was complete and its operations had commenced.[91] If the parties had wanted to do that, the Design Representations would have been in the category of the representations and warranties in the Survival Clause that were to live for the applicable statutes of limitations or in the category of representations and warranties that were to survive indefinitely. The fact that the parties explicitly chose to have the Design Representations live for only one year may only be plausibly read as a way to balance the commercial exigency of addressing design deficiencies promptly against GRT's lack of pre-closing due diligence by giving GRT a limited one-year period to conduct diligence and sue.

e. Count I, Which Was Filed After The Survival Period, Is Time-Barred And Dismissed

Having determined that any cause of action, like GRT's claim in Count I, premised on an alleged breach of the Design Representations accrued on the date the

[91] Although when the Purchase Agreement closed on July 18, 2008 the Demonstration Facility was still under construction, one of the Design Representations in § 4.6(b)(i) provided that Marathon hoped the "process of commissioning and start-up" "may commence by June 30, 2008." Purchase Agreement § 4.6(b)(i)(G). But, it also notes that "[GRT] acknowledges that the process of commissioning and start-up may take several months to complete." *Id.* Thus, it is reasonable to infer that the parties contemplated that the Demonstration Facility would be fully constructed and operational within a few months after the Purchase Agreement's closing.

Purchase Agreement closed and further that the Survival Clause established a one-year statute of limitations for claims alleging a breach of the Design Representations, I note that GRT does not make any credible argument that the statute of limitations was, or should have been, tolled.[92] Although GRT does allege in Count I, without factual support, that "Marathon [] led GRT to believe [during the Survival Period] that it would repair and modify the Demonstration Facility so that it would meet" the Design Representations GRT claims it had breached, GRT does not argue, in the alternative, that if the Survival Clause shortened the statute of limitations for its claim, the doctrine of equitable tolling should be applied to revive Count I. Furthermore, to the extent that GRT's arguments in opposition to the motion to dismiss could be construed as an appeal to the law in other jurisdictions, like California, that, through a liberal application of the so-called "discovery rule," treats some breach of contract causes of action as accruing (and thus starting the running of the statute of limitations) on the date the plaintiff discovers the breach,[93] GRT's reliance is misplaced. Although Delaware courts do apply Delaware's own, narrower version of the discovery rule, they do so only in "narrowly confined" circumstances in which the plaintiff can show both*:* (i) that her injury was

[92] *CertainTeed*, 2005 WL 5757762, at *6-*7 (citing *Wal-Mart Stores*, 860 A.2d 312) ("In addressing the timeliness of [the plaintiff's claims], I am required to . . . [(i)] ascertain the date of accrual of the cause of action . . . ; [(ii)] determine whether the statute of limitations has been tolled . . . ; [and] [(iii)] [a]ssuming a tolling exception applies, . . . consider when the plaintiff received inquiry notice, because when that occurs, the statute of limitations begins running."); *id.* at *7 ("Generally, the statute of limitations runs from the date of accrual, except when the plaintiff shows that a tolling exception applies.").

[93] *E.g.*, *April Enters., Inc. v. KTTV*, 147 Cal.App.3d 805, 832 (Cal. Ct. App. 1983) ("[In breach of contract actions,] [t]he discovery rule . . . presumes that a plaintiff has knowledge of injury on the date of injury. In order to rebut the presumption, a plaintiff must plead facts sufficient to convince the trial judge that delayed discovery was justified.").

"inherently unknowable;" and (ii) was "sustained by a 'blamelessly ignorant' plaintiff."[94] GRT has not argued, nor has it pled facts from which the court could reasonably infer, that the alleged breaches of the Design Representations were "inherently unknowable" or that its failure to discover the breaches post-closing was a result of "blameless[] ignora[nce]." Instead, the complaint pleads facts that suggest that as early as October 8, 2008 — less than four months after the Purchase Agreement's closing and well within the Survival Period — GRT "informed" Marathon of purported breaches of the Design Representations.[95] Thus, ordinary principles of claim accrual apply,[96] and in the absence of any basis for the contractual limitations period to be tolled, GRT's claim for breach of § 7.4,[97] the success of which requires that GRT first prove the existence of a predicate breach of the Design Representations, fails as untimely, and is dismissed in its entirety.

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[94] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992) (quoting *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 133 (Del. 1974)) (citations omitted). "In such a case, the statute will begin to run only 'upon the discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts.'" *Wal-Mart Stores*, 860 A.2d at 319 (emphasis in original).

[95] Compl. ¶ 21.

[96] *Wal-Mart Stores*, 860 A.2d at 319.

[97] GRT also claims in Count I that Marathon breached § 5.10 when Marathon failed "to construct the Demonstration Facility as required by Section 5.10." Compl. ¶ 51. Section 5.10 of the Purchase Agreement requires that "[Marathon] shall complete construction of the Demonstration Facility in accordance with the design criteria described in [the Design Representations]." Purchase Agreement § 5.10. That claim, like the claim for breach of § 7.4, clearly requires that GRT prove that Marathon breached the Design Representations, a claim that I have already determined is time-barred by the Survival Clause. Moreover, GRT does not allege that the Demonstration Facility was not built. Rather, it alleges that the Demonstration Facility was not built in conformity with the Design Representations. But if GRT is unable, because of the expiration of the statute of limitations, to prove that Marathon breached the Design Representations, it is likewise precluded from proving that Marathon breached its obligation to construct the Demonstration Facility in accordance with the Design Representations, and that portion of Count I is also dismissed.

IV. Conclusion

For the foregoing reasons, Marathon's motion to dismiss is GRANTED.[98] IT IS SO ORDERED.

[98] In addition, because I have already noted that Marathon Oil's liability rises and falls with that of its subsidiary, Marathon, I also dismiss Count I with respect to Marathon Oil. Because Count I is the only count in which Marathon Oil is a named defendant, I further grant Marathon's motion to dismiss the entire action with respect to Marathon Oil only. *See supra* notes 12, 39.