IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ENVO, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4156-VCP
	)	
KIM WALTERS, JOSEPH AYLOR, E.S.G., Inc. and ENVIRONMENTAL SOLUTIONS GROUP, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: September 30, 2009
Decided: December 30, 2009

Henry A. Heiman, Esquire, COOCH AND TAYLOR, P.A., Wilmington, Delaware; *Attorneys for Plaintiff*

David L. Finger, Esquire, FINGER, SLANINA & LIEBESMAN, LLC, Wilmington, Delaware; *Attorneys for Defendants Kim Walters and Environmental Solutions Group, Inc.*

PARSONS, Vice Chancellor.

Based on the Complaint, this action resembles a corporate version of a shell game. Plaintiff, Envo, Inc. ("Envo"), filed this suit against Defendants, E S G, Inc. ("E S G"), Environmental Solutions Group, Inc. ("New Environmental"), Kim Walters, and Joseph Aylor (collectively, the "named Defendants"), alleging six causes of action against various combinations of these parties. Envo's allegations stem from an Asset Purchase Agreement (the "APA") entered into in 2005 between Envo's predecessor, Environmental Solutions Group, Inc. ("Old Environmental"), and ESG, Inc. ("ESG"), a nonparty and, in fact, nonentity, purportedly owned by Walters and Aylor. The APA called for Old Environmental, and, accordingly, Envo as its successor, to receive $300,000. Although the parties closed on the APA in 2005, Envo has yet to receive any payments for the assets it sold. Envo filed this suit to recover damages from the named Defendants and for reformation of the APA and the imposition of a constructive trust on the assets sold through the APA and the profits generated from the use of those assets.

This case is before the Court on a motion to dismiss by Defendants Walters and New Environmental. This motion seeks to dismiss: (1) the reformation claim in Count V of Envo's Complaint for failure to state a claim; (2) five of the six counts in the Complaint as being barred by laches; and (3) the entire Complaint for lack of subject matter jurisdiction. For the reasons stated in this Memorandum Opinion, I find that Envo has not stated a claim for reformation in Count V and, accordingly, dismiss this claim. I also find, however, that Envo has demonstrated a sufficient justification for a remedy that only equity can afford as to at least two of its remaining claims and that on the basis of that and the clean-up doctrine, this Court has subject matter jurisdiction over Envo's

Complaint. Finally, Defendants have failed to show that they are entitled to dismissal of any of the remaining counts of the Complaint based on laches or a statute of limitations.

I. BACKGROUND[1]

A. The Parties

Plaintiff Envo is a Delaware corporation formerly known as Environmental Solutions Group, Inc. The name change occurred on August 15, 2005 following the sale of assets at issue in this action.

Defendants Kim Walters and Joseph Aylor are both Delaware residents. Defendant E S G is a Delaware corporation that originally was incorporated as Autta Week, Inc. in 1986. E S G took on its present name in 1991. The only claim asserted against E S G is Count II for breach of an express contract. Because E S G is not named as a party to any contract referenced in the Complaint, however, I infer from Count II that Envo contends E S G, rather than ESG, should have been named as a party to the APA and the promissory notes. Defendant New Environmental is a Delaware corporation that Walters created on August 15, 2005.

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[1] Unless stated otherwise, the facts recited herein come from the Amended Complaint and are assumed to be true for purposes of the pending motion to dismiss.

B. Facts

1. Defendants buy Envo's assets

On July 21, 2005, Old Environmental and ESG closed on the APA.[2] In negotiations over the APA, Walters and Aylor represented that they owned ESG. Pursuant to the APA, Old Environmental sold the assets of an environmental consulting firm to ESG for $300,000. The parties structured the deal so that ESG would pay Old Environmental $10,000 in cash at closing and execute two promissory notes in favor of Old Environmental, one for $71,632 payable in full on September 15, 2005 (the "September Promissory Note"), and the other for $218,368 payable in sixty installments, with the first installment due on October 15, 2005 (the "October Promissory Note").

At closing, Old Environmental tendered the purchased assets to ESG, and Walters and Aylor tendered the promissory notes, but Thomas C. Marconi, the lawyer representing Walters and Aylor in this transaction, did not release to Old Environmental the $10,000 that was due at closing.[3] Walters and Aylor began occupying the business premises acquired from Old Environmental the day after the APA closed.

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[2] There is an ESG, Inc. different from the E S G, Inc. that is a Defendant in this action. ESG, Inc. is a Delaware corporation that has not been in good standing since 1984; it has not been named as a party to this action.

[3] This $10,000 is the subject of an interpleader action filed by Marconi in the Court of Common Pleas in and for New Castle County, Delaware on April 27, 2009. *See* Am. Compl. Ex. E.

On August 15, 2005, Old Environmental filed a Certificate of Amendment with the Delaware Secretary of State changing its name to Envo, Inc.[4] Later that same day, Walters incorporated New Environmental.[5]

As of the filing of the Amended Complaint, Defendants had not paid a single dollar toward the $300,000 purchase price specified in the APA.

2. The Amended Complaint

Envo's Amended Complaint alleges six causes of action. Count I sounds in fraud and alleges that Walters and Aylor falsely represented that they owned ESG and that ESG would pay Envo the $300,000 purchase price called for in the APA knowing that they did not own ESG and lacked the authority to bind ESG to purchase Envo's assets. Envo further alleges that Walters and Aylor intended for Envo's representatives to rely on their representations and that Envo's representatives reasonably did so rely. Envo seeks damages on its fraud claim in the amount of the purchase price under the APA, plus interest and lost profits, as well as punitive damages.

Count II states a claim for breach of express contract against E S G based on Envo not receiving any of the APA purchase price and seeks damages of $300,000 plus interest. Count III is a claim for breach of contract implied in fact against Walters and Aylor. Here, Envo alleges that because Walters and Aylor signed the promissory notes providing the consideration for the purchase of Envo's assets on behalf of a corporation

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4 Am. Compl. Ex. F.

5 Am. Compl. Ex. G.

that was not in good standing and took possession of these assets, a contract for the purchase price should be implied between Walters and Aylor on one side and Envo on the other. Envo then alleges that Walters and Aylor breached this implied contract, causing it $300,000 in damages, plus interest.

Count IV of the Amended Complaint accuses Walters, Aylor, and New Environmental of equitable fraud or negligent misrepresentation. This claim alleges that Walters and Aylor falsely represented that they owned ESG or had the authority to bind ESG to purchase the assets and that ESG would pay $300,000 for Envo's assets. Envo also alleges that Walters and Aylor should have known these statements were false or made them negligently or in willful and wanton disregard for whether they were true. Envo further alleges that Walters and Aylor intended for Envo's representatives to rely on their representations and that Envo's representatives reasonably did rely on them. As a remedy, Envo seeks the imposition of a constructive trust on the assets sold through the APA and the past profits those assets generated for Walters, Aylor, and New Environmental.

Envo seeks reformation of the relevant contracts based on mutual mistake in Count V, alleging that Walters, Aylor, and Envo's representatives mistakenly believed that Walters and Aylor owned ESG and that Marconi made a scrivener's error by incorrectly drafting the APA and the promissory notes to name ESG as the purchasing party. On that basis, Envo requests that the APA and promissory notes be reformed to substitute Walters and Aylor for ESG. Envo then seeks damages against Walters and Aylor personally for breach of the reformed APA and promissory notes.

Count VI requests relief from Walters, Aylor, and New Environmental based on theories of quasi-contract, unjust enrichment, contract implied in law, and promissory estoppel. In this count, Envo alleges that: (1) Walters and Aylor took possession of and currently operate an environmental consulting business formerly run by Envo; (2) some or all of Envo's former assets have been transferred or sold to New Environmental and third parties not named in this action; and (3) Walters and Aylor have not paid anything for the environmental consulting business. Envo seeks a constructive trust on the assets sold through the APA and the profits generated by these assets as a remedy for this claim.

C. Procedural History

Envo filed its Complaint in this action on November 11, 2008. I granted Walters' initial motion to dismiss for lack of subject matter jurisdiction on June 26, 2009, but gave Envo leave to amend its Complaint to assert a basis for equitable jurisdiction. Envo filed its Amended Complaint on July 15, 2009.[6] Walters then filed the pending motion to dismiss for failure to state a claim and lack of subject matter jurisdiction.[7] This Memorandum Opinion represents my ruling on that motion.

D. Parties' Contentions

On their motion to dismiss for failure to state a claim, Defendants argue as follows. First, they contend that five of the six causes of action alleged in Envo's

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[6] In the interest of brevity, the Amended Complaint will be referred to hereinafter as the "Complaint."

[7] On September 22, 2009, New Environmental joined Walters' motion to dismiss. Aylor and E S G have not joined Walters' motion. For convenience, I refer to the moving Defendants, Walters and New Environmental, simply as "Defendants."

Complaint (all but Count II for breach of express contract) are barred by laches as having been filed after the expiration of the corresponding statute of limitations at law. In response, Envo contends that several of its claims arise from a promissory note and, thus, are subject to, and were filed within, a longer statute of limitations period. Envo also contends that the statute of limitations should be tolled as to its fraud and negligent misrepresentation claims because these claims were not knowable when they arose. Second, Defendants seek dismissal of the reformation claim alleged in Count V for failure to state a claim on the merits.

Defendants further urge this Court to dismiss Envo's Complaint for lack of subject matter jurisdiction because Envo has a full and fair remedy at law and, thus, there is no basis for equitable relief. Envo responds by pointing to three counts in its Complaint that allegedly require an equitable remedy, Count V for reformation and Counts IV and VI, both of which seek the equitable remedy of a constructive trust.

II. ANALYSIS

A. Applicable Standards

The Court of Chancery will dismiss an action under Rule 12(b)(1) "if it appears from the record that the Court does not have subject matter jurisdiction over the claim."[8]

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[8] *Pitts v. City of Wilm.*, 2009 WL 1204492, at *5 (Del. Ch. Apr. 27, 2009) (quoting *AFSCME Locals 1102 & 320 v. City of Wilm.*, 858 A.2d 962, 965 (Del. Ch. 2004)).

The burden of establishing this court's jurisdiction is on the plaintiff, and the court may consider evidence outside the pleadings in making its determination.[9]

The Court of Chancery is a court of limited jurisdiction.[10] The court can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right;[11] (2) a request for an equitable remedy when there is no adequate remedy at law;[12] or (3) a statutory delegation of subject matter jurisdiction.[13] The court "will not exercise subject matter jurisdiction where a complete remedy otherwise exists but where plaintiff

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9 *Id.* (citing *Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993)).

10 The issue of subject matter jurisdiction is so crucial that it may be raised at any time before final judgment and by the court *sua sponte*. *See Appoquinimink Educ. Ass'n v. Appoquinimink Sch. Dist.*, 2003 WL 1794963, at *3 n.24 (Del. Ch. Mar. 31, 2003).

11 *See* 10 *Del. C.* § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."); *Christiana Town Ctr. LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) ("Equitable rights are rights that have traditionally not been recognized at common law. The most common example of equitable rights in this court are fiduciary rights and duties that arise in the context of trusts, corporations, other forms of business organizations, guardianships, and the administration of estates."); *Azurix Corp. v. Synagro Techs., Inc.*, 2000 WL 193117, at *2 (Del. Ch. Feb. 3, 2000).

12 10 *Del. C.* § 342 ("The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State."); *Christiana Town Ctr.*, 2003 WL 21314499, at *3 ("Equitable remedies . . . may be applied even where the right sued on is essentially legal in nature, but with respect to which the available remedy at law is not fully sufficient to protect or redress the resulting injury under the circumstances.").

13 *See Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004). No statutory basis for subject matter jurisdiction is asserted in this case.

has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery."[14] If a legal remedy capable of affording the plaintiff full, fair, and complete relief is available, this court will not accept jurisdiction.[15]

In determining whether equitable jurisdiction exists, the court must look beyond the remedies nominally being sought and focus on the complaint's allegations in light of what the plaintiff truly aims to gain by bringing the claim.[16] In other words, the court must address the nature of the wrong alleged and the available remedy to determine whether a legal remedy, as opposed to an equitable one, is available and adequate.[17]

Defendants also have moved, under Court of Chancery Rule 12(b)(6), to dismiss Counts I and III through VI of Envo's Complaint for failure to state a claim. The grounds for that motion are that all the counts are barred by the applicable statute of limitations or laches and that Count V fails to state a claim for reformation. A court should only grant a motion to dismiss pursuant to Rule 12(b)(6) if "it can be determined with reasonable certainty that the [nonmoving party] could not prevail on any set of facts reasonably

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[14] *Christiana Town Ctr.*, 2003 WL 21314499, at *3 (quoting *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991)).

[15] *Metro Ambulance, Inc. v. E. Med. Billing, Inc.*, 1995 WL 409015, at *2 (Del. Ch. July 5, 1995).

[16] *Pitts*, 2009 WL 1204492, at *5 (citing *Candlewood Timber*, 859 A.2d at 997).

[17] *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

inferable" from the pleadings.[18] The court must assume the truthfulness of the Complaint's well-pleaded allegations and allow the nonmoving party the benefit of all reasonable inferences. Mere conclusory allegations, however, will not be accepted as true without specific supporting allegations of fact.[19]

B. Has Envo Stated a Claim for Reformation?

Generally, I would begin my analysis of a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim with the issue of subject matter jurisdiction.[20] Here, because Defendants' contention that the Court lacks subject matter jurisdiction over Envo's Complaint depends, in part, on whether Envo has stated a claim for reformation, I address the sufficiency of the reformation claim first.

Envo's reformation claim arises from an allegation of mutual mistake. Therefore, Envo bears an additional pleading burden under Court of Chancery Rule 9(b), which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Under *Joyce v. RCN Corp.*, a complaint for reformation on grounds of mutual mistake will survive a motion to dismiss only if "it alleges: (i) the terms of an oral agreement between the parties; (ii) the execution of a written agreement that was intended, but failed, to incorporate those terms; (iii) the

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18 *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1108 (Del. Ch. 2008) (quoting *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).

19 *Id.*

20 *See Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del. Ch. Dec. 23, 2008).

parties' mutual -- but mistaken -- belief that the writing reflected their true agreement; and (iv) the precise mistake."[21]

The parties dispute whether Envo's Complaint alleges the four required elements with the possible exception of the precise mistake, namely, that Marconi made a scrivener's error in drafting the APA and promissory notes when he named ESG as the buyer.[22] In particular, Count V of the Complaint contains only: (1) an allegation that Envo, Walters, and Aylor all believed that Walters and Aylor owned ESG; (2) a statement of the law governing reformation of a written contract based on mutual mistake; (3) an allegation that Marconi made a scrivener's error; (4) a request that the Court reform the APA and promissory notes to substitute Walters and Aylor for ESG; and (5) a statement that Envo will seek to hold Walters and Aylor liable for breach of contract after the APA and promissory notes are reformed. The Complaint does not allege that the parties reached an oral agreement that Envo would be contracting with Walters and Aylor, as opposed to a corporation or other business entity, or that they would be liable personally under the relevant contracts or that the APA was intended, but failed, to incorporate the terms of any such oral agreement. Thus, Envo has failed to meet at least the first two of the four elements articulated in *Joyce*, and, accordingly, has not met Rule 9(b)'s requirement of stating the circumstances constituting the alleged mistake with particularity.

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21 2003 WL 21517864, at *4 (Del. Ch. July 1, 2003).

22 Am. Compl. ¶ 34.

Additionally, it is doubtful that Envo has met the third and fourth elements for a claim of reformation either. To the extent Envo contends the mistake was in making ESG the buyer under the APA, rather than Walters and Aylor, it has not satisfied those elements. The suggestion in Count V that the APA named a corporation as a party when the parties intended to name two individuals strains credulity. If that were true, this case would not involve a "scrivener's error" in the sense of a minor typographical mistake, such as an incorrect address, which the parties easily could miss while reviewing a complex agreement.[23] Instead, the alleged scrivener's error of naming a corporate entity as the buyer, when the parties intended to bind two individuals under the APA, fundamentally would alter the personal liability of the parties involved, given the limited liability afforded to corporations. This is not the type of error one would expect business parties to miss. Indeed, to credit Envo's claim, the Court would have to draw unreasonable inferences from the facts alleged, which is not permitted on a motion to dismiss. I therefore find that Envo's claim to reform the APA and related promissory notes to make Defendants Walters and Aylor personally liable under those agreements fails to meet Delaware's pleading requirements for alleging mistake and is generally incredible.

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[23] *See Amstel Assocs., L.L.C. v. Brinsfield-Cavall Assocs.*, 2002 WL 1009457, at *4 (Del. Ch. May 9, 2002).

For all of these reasons, I grant Defendants' motion to dismiss Count V of the Complaint under Rules 12(b)(6) and 9(b).[24]

C. Does the Court of Chancery have Subject Matter Jurisdiction over this Action?

Counts IV, V, and VI of Envo's Complaint all seek an equitable remedy. Count IV for equitable fraud or negligent misrepresentation and Count VI for quasi-contract, unjust enrichment, contract implied in law, or promissory estoppel[25] both seek the imposition of a constructive trust on the assets Envo sold through the APA and the profits generated by those assets in the hands of Defendants. Count V seeks reformation of the APA and promissory notes, but it provides no basis for subject matter jurisdiction

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[24] Count II of the Complaint, which is not the subject of the pending motion to dismiss, presents a far more plausible claim for the equitable remedy of reformation. Count II is for "Breach of Express Contract" and is the only claim asserted against Defendant E S G. The claim simply asserts that "E S G, Inc. promised to pay Envo, Inc. $300,000 plus interest to purchase certain assets" and breached the APA "because the $10,000 has not been tendered and it has defaulted on the promissory notes." Am. Compl. ¶¶ 18-19. On that basis, Envo seeks damages from E S G of $300,000 plus interest. *Id*. ¶ 20. One reasonable inference from the facts alleged in the Complaint is that a scrivener's error occurred in connection with the APA and the other relevant agreements when ESG was used instead of "E S G, Inc." Count II, for example, implicitly seeks such a finding when it claims that E S G breached express obligations it had under the APA. My decision to dismiss the claim in Count V to reform the relevant contracts to make Walters and Aylor personally liable does not apply to this implicit claim for reformation in Count II. Because that aspect of Count II is only implicit and Count II is not subject to the pending motion to dismiss, however, I have not relied on Count II as a potential basis for subject matter jurisdiction over any of Envo's other claims. Furthermore, I find it unnecessary to address that issue based on my resolution of Defendants' motion to dismiss under Rule 12(b)(1).

[25] For the sake of brevity, I sometimes refer to Counts IV and VI, respectively, as the "negligent misrepresentation claim" and the "unjust enrichment claim."

because I have concluded Count V must be dismissed for failure to state a claim. I focus, therefore, on the counts for negligent misrepresentation and unjust enrichment, and their claims for imposition of a constructive trust, to determine whether Envo has invoked an equitable right or requested an equitable remedy when there is no adequate remedy at law and thereby stated a basis for subject matter jurisdiction in this Court.

A claim for equitable fraud or negligent misrepresentation differs from one for common law fraud in that the claimant need not show that the respondent acted knowingly or recklessly -- innocent or negligent misrepresentations or omissions suffice.[26] "The primary policy trade-off for the reduction in the state of mind required to recover [for negligent misrepresentation] is that the law pares down the class of potentially liable defendants."[27] An equitable fraud or negligent misrepresentation claim lies only if there is either: (i) a special relationship between the parties over which equity takes jurisdiction (like a fiduciary relationship) or (ii) justification for a remedy that only equity can afford.[28] Envo does not allege any special or fiduciary relationship between itself and Defendants. Accordingly, for Count IV to stand, Envo must show that an action at law for damages would not provide an adequate remedy and that only equity will afford it full, fair, and complete relief.

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[26] *Addy v. Piedmonte*, 2009 WL 707641, at *18 (Del. Ch. Mar. 18, 2009).

[27] *Corporate Prop. Assocs. 14 Inc. v. CHR Hldg. Corp.*, 2008 WL 963048, at *8 (Del. Ch. Apr. 10, 2008).

[28] *Wal-Mart Stores, Inc. v. AIG Ins. Co.*, 2006 WL 3742596, at *2 (Del. Ch. Dec. 12, 2006).

Envo seeks the imposition of a constructive trust over the assets sold through the APA and the profits generated through Defendants' sale or use of those assets. According to Envo, this Court will not be divested of jurisdiction unless "a concurrent remedy at law will provide full, complete, and fair relief."[29]

Defendants dispute the need for a constructive trust in this situation, claiming money damages can provide Envo with a full, fair, and complete remedy. According to Defendants, Envo seeks only to be paid the APA's $300,000 purchase price, plus interest. Noting that Envo has not alleged Defendants are judgment proof or seek to defraud Envo by hiding or transferring assets, Defendants argue that Envo has no basis for claiming that money damages are insufficient.

In assessing whether subject matter jurisdiction exists over Count IV or VI, I must identify the remedies Envo truly seeks in those counts and decide if any of those remedies are equitable in nature. "A constructive trust is one imposed by a court of equity as a remedy to correct the unlawful vesting, or assertion of, legal title."[30] A constructive trust may be imposed "upon specific property [or] identifiable proceeds of specific property, and even money so long as it resides in an identifiable fund to which

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29 Pl.'s Opp'n Br. 7 (quoting *Medek v. Medek*, 2008 WL 4261017, at *5 (Del. Ch. Sept. 10, 2008)).

30 *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009) (quoting *E. Lake Methodist Episcopal Church, Inc. v. Trs. of Peninsula-Del. Annual Conf. of the United Methodist Church, Inc.*, 731 A.2d 798, 809 n.4 (Del. 1999)).

the plaintiff can trace equitable ownership."[31] Moreover, a request for the imposition of a constructive trust will confer equity jurisdiction on the Court of Chancery only if the plaintiff can show that full and fair relief requires the restoration of title to specific property or identifiable proceeds of specific property.[32]

Envo seeks restoration of title to the specific property sold to Defendants through the APA, some of which allegedly remains in the possession of Defendant New Environmental, as well as the identifiable proceeds of the sale of any such property and the profits generated from its use by Defendants.[33] Envo seeks this relief in the form of the imposition of a constructive trust.

As this court previously observed: "Neither the artful use nor the wholesale invocation of familiar chancery terms in a complaint will itself excuse the court . . . from a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate."[34] The nature of the wrong alleged here is difficult to pin down. There is no question Envo conveyed assets to Defendants under the APA and expected to be paid for those assets in accordance with the terms of the APA and related promissory notes. It also is undisputed

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31 *B.A.S.S. Gp., LLC v. Coastal Supply Co.*, 2009 WL 1743730, at *7 (Del. Ch. June 19, 2009) (quoting Wolfe and Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12-7[b], at 12-75, 76 (2008)).

32 *Metro Ambulance, Inc. v. E. Med. Billing, Inc.*, 1995 WL 409015, at *4 (Del. Ch. July 5, 1995).

33 Pl.'s Opp'n Br. 9; Am. Compl. ¶¶ 32, 40.

34 *McMahon v. New Castle Assocs.*, 532 A.2d 601, 603 (Del. Ch. 1987).

that no payments were ever made. The reason why is unclear, but the Complaint suggests it may be because the wrong corporate entity was named as the buyer in the operative agreements. Additionally, at this preliminary stage, it is not clear whether the apparent misnaming of the buyer resulted from intentional fraud, negligence, or even an innocent mistake.

Against this factual backdrop, I conclude that there is "justification for a remedy that only equity can afford and the exercise of subject matter jurisdiction over at least Envo's negligent misrepresentation claim."[35] If the nonpayment stems from common law fraud by Defendants Walters and Aylor, for example, Envo's damages would appear to include at least the $300,000 price it contracted for plus interest. As indicated in the Restatement (Second) of Torts, the measure of damages for fraud differs from that for negligent misrepresentation. Pursuant to a fraud claim:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including: (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation. (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.[36]

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35 *See Wal-Mart Stores, Inc. v. AIG Ins. Co.*, 2006 WL 3742596, at *2 (Del. Ch. Dec. 12, 2006).

36 RESTATEMENT (SECOND) OF TORTS § 549 (1977).

Hence, Envo conceivably could recover the contract price of $300,000 based on its claim for fraud. But, that remedy probably would not be available under Count IV for negligent misrepresentation. According to the Restatement:

> (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including: (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation. (2) *The damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant*.[37]

Thus, if Envo succeeds on its alternative theory of negligent misrepresentation, but not on its fraud claim, the focus in terms of relief will be much more on the assets Defendants obtained under the APA.

Under Count I for fraud, Envo also seeks "lost profits" and punitive damages. The Court of Chancery does not award punitive damages.[38] Envo has not described the

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[37] RESTATEMENT (SECOND) OF TORTS § 552(B) (1977) (emphasis added). Delaware courts have cited the RESTATEMENT (SECOND) OF TORTS §§ 549 and 552(B) with approval. *See Coleman v. PricewaterhouseCoopers LLC*, 2005 WL 405450, at *1 n.3 (Del. Super. Feb. 8, 2005); *Stanley v. Scaran*, 1989 WL 147329, at *1 (Del. Super. Dec. 1, 1989).

[38] *See Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978) (the Court of Chancery has no authority to decide petitions for punitive damages, even under the clean-up doctrine). There may be an exception to this rule, when the Delaware legislature vests the Court of Chancery with the authority to award punitive or exemplary damages by statute, but such an exception would not apply in this case. *See* WOLFE & PITTENGER § 2-5, at 2-82 & nn. 7-8 (citing as an example 6 *Del. C.* § 2003(b)).

precise contours of the "lost profits" it seeks or provided legal support for that relief. Rather, they seem to argue that Defendants would be liable for Envo's actual damages and the illicit gains they achieved through the fraud. Here, that would include the profits Walters, Aylor, and New Environmental realized from the sale or use of the assets in question. Conceivably, all such profits could still be in the possession of New Environmental, which was not a party to any of the agreements at issue in this action and may not have participated in any wrongdoing or negligence. Nevertheless, through the remedy of a constructive trust, Envo could reach those profits of New Environmental and any remaining assets in this Court under at least the claims for negligent misrepresentation and unjust enrichment. It is not likely, however, that such full, complete, and fair relief would be available at law, especially against a potentially less culpable Defendant like New Environmental. Thus, I conclude that Envo has demonstrated a basis for subject matter jurisdiction in this Court under Counts IV and VI of its Complaint, both of which seek imposition of a constructive trust.

In addition, because this Court has jurisdiction over Counts IV and VI and all the claims in the Complaint arise from a common nucleus of operative fact, the Court also has jurisdiction over all the remaining counts in this action under the clean-up doctrine.[39] Therefore, I deny Defendants' motion to dismiss for lack of subject matter jurisdiction.

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[39] *See Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009) (The clean-up doctrine allows the Court of Chancery, once it determines that equitable relief is warranted, to retain the power, at its discretion, to decide the legal features of the claim); *Pitts v. City of Wilm.*, 2009

D. Are Envo's Claims Barred by Laches?

Laches is an equitable defense that stems from the maxim "equity aids the vigilant, not those who slumber on their rights."[40] Although there is no firm rule as to a specific period of time that will constitute laches, it is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant.[41] Therefore, laches generally requires the establishment of three elements: "first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, resulting prejudice to the defendant."[42]

Statutes of limitations operate as a time bar to actions at law, but they are not controlling in equity. Rather, under the equitable doctrine of laches, a court of equity accords great weight to the analogous statute of limitations.[43] In the absence of unusual

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WL 1204492, at *5 (Del. Ch. Apr. 27, 2009); *Quereguan v. New Castle Cty.*, 2006 WL 2522214, at *7 (Del. Ch. Aug. 18, 2006).

40 *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citing 2 Pomeroy's Equity Jurisprudence §§ 418-19 (5th ed. 1941); *accord Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

41 *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *13 (Del. Ch. Sept. 30, 2009) (citing *Reid*, 970 A.2d at 182).

42 *Whittington v. Dragon Gp., L.L.C.*, 2009 WL 4894305, at *6 (Del. Dec. 18, 2009) (internal quotation marks and citations omitted).

43 *Id.*

or extraordinary circumstances, the analogous statute of limitations creates a presumptive time period during which the claim must be filed or else be barred as stale or untimely.[44]

Defendants allege that the analogous statute of limitations for the four remaining claims it seeks to dismiss (Counts I, III, IV, and VI) is three years. Defendants assert that Count III for breach of contract implied in fact and Count VI for unjust enrichment are both analogous to contract claims, for which a three-year statute of limitations applies.[45] The general rule for determining the analogous statute of limitations that should apply to a suit in equity is that "the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law."[46] Defendants contend that a three-year limitations period also applies to Count I for fraud and Count IV for negligent misrepresentation.

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[44] *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2490845, at *5 (Del. Ch. Aug. 14, 2009) (citing *Reid*, 970 A.2d at 183).

[45] *See* 10 *Del. C.* § 8106. Section 8106(a) states, in pertinent part: "[N]o action . . . to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise . . . and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title."

[46] *Whittington*, 2009 WL 4894305, at *6 (internal quotation marks and citations omitted).

Envo disputes the applicability of Section 8106 to its implied-in-fact contract and unjust enrichment claims, arguing that 10 *Del. C.* § 8109 should apply to these claims instead. Section 8109 states: "When a cause of action arises from a promissory note, . . . the action may be commenced at any time within 6 years from the accruing of such cause of action." If Envo can show that its implied-in-fact contract and unjust enrichment causes of action arise from a promissory note and, therefore, are subject to a six-year limitations period by analogy, that would weigh heavily against a finding of laches. It is important to note, however, that the "doctrine of laches also permits the [Court of Chancery] to hold a plaintiff to a shorter period if, in terms of equity, the plaintiff should have acted with greater alacrity, and when the plaintiff's failure to seek equitable relief with alacrity threatens prejudice to the other party."[47]

Envo's claims accrued in September and October 2005 when payment under the two promissory notes first became due. Because Envo filed its initial Complaint on November 11, 2008, three years and one month after the first payment was due on the October Promissory Note, Defendants argue that Envo's claims are barred by laches, because the analogous three-year statute of limitations had run.[48]

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47 *Id.* (internal quotation marks and citations omitted).

48 Defendants do not challenge the timeliness of Count II of Envo's Complaint for breach of express contract against E S G, but this claim presumably is subject to an extended statute of limitations because the APA was signed under seal. *See Whittington*, 2009 WL 4894305, at *7.

I agree with Envo that Count III is analogous to a cause of action arising from a promissory note. This count seeks to hold Defendants Walters and Aylor liable for breaching a contract implied in fact by not paying on the promissory notes they signed on behalf of a nonexistent entity when they took possession of Envo's environmental consulting firm. Because Envo's basis for implying a contract in Count III is Walters and Aylor's signing of the promissory notes, this cause of action arises from a promissory note and would be subject at law to the six-year statute of limitations prescribed by Section 8109. Because the events that gave rise to Count III occurred far less than six years ago, that claim is not barred by laches unless Defendants can show such prejudice or other exceptional circumstances as would warrant application of a shorter time period. Defendants, however, have made no such showing.

Whether Count VI arises from a promissory note requires a closer analysis. In this count, Envo alleges that, despite never having paid for the environmental consulting firm they agreed to buy in the APA, Walters and Aylor operated this business, presumably at a profit, and sold some of its assets. While on its face, Count VI does not refer to the promissory notes, the core of the claim is that Defendants have been unjustly enriched because they accepted the benefits of the APA without paying anything pursuant to the concomitant promise to pay Envo $300,000. Because the promissory notes were the means by which Walters and Aylor were to pay under the APA, Count VI effectively seeks to hold Walters and Aylor liable for unjust enrichment because they did not pay on those notes. Thus, I find that Count VI of the Complaint also arises from a promissory note and would be subject, by analogy, to Section 8109's six-year statute of limitations.

Because the Complaint was filed years before the expiration of that time period, Count VI is not barred by laches for the same reasons as Count III.

As to Defendants' contention that its fraud and negligent misrepresentation claims are barred by laches under the three-year limitations period of Section 8106, Envo admits that unless it can toll the statute of limitations, it filed these claims too late.[49] Envo argues, however, that the statute should be tolled under the doctrine of fraudulent concealment.

A statute of limitations will be tolled under the doctrine of fraudulent concealment, "if there was an affirmative act of concealment or some misrepresentation that was intended to put a plaintiff off the trail of inquiry until such time as the plaintiff is put on inquiry notice."[50] Here, Envo was put off the trail of inquiry as to whether ESG actually existed by the signatures of Defendants Walters and Aylor, as the purported President and Vice President of ESG, on the APA and the promissory notes and by the notarial statement and seal appended to the promissory notes by Marconi, who also served as the attorney for Defendants in connection with the APA. Marconi's stamp indicates that he is an attorney at law, and he states in his capacity as a notary public that Walters and Aylor were known to him personally to be the President and Vice President, respectively, of ESG and that Walters and Aylor "acknowledged this Promissory Note to

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[49] Relevant case law supports this assessment. *See, e.g.*, *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *13 (Del. Ch. Dec. 23, 2008); *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. June 2, 2006).

[50] *Winner*, 2008 WL 5352063, at *15.

be the act and deed of the said ESG, Inc., intending to be legally bound."[51] These statements by Walters, Aylor, and Marconi apparently were false. Walters and Aylor cannot have been officers of ESG because ESG allegedly did not and does not exist. It also is reasonable to infer that Walters and Aylor may not have intended for ESG to be legally bound by the APA, when they signed it. At this preliminary stage in the litigation, it is unclear how these false representations came to be made and then corroborated by Marconi. One reasonable inference that can be drawn from Marconi's notarial statement and his interpleader Complaint filed years later is that the misrepresentations resulted from Walters and Aylor providing Marconi incorrect information about ESG and their intentions regarding the APA, knowing that Envo would rely on these misrepresentations. Accepting that inference as true for the limited purpose of the pending motion to dismiss, it constitutes the requisite intentional misrepresentation needed to toll the statute of limitations. Moreover, I find Envo reasonably could have relied on these misrepresentations. Accordingly, Envo has presented sufficient evidence to demonstrate that it could succeed in proving that the statute of limitations on its fraud and negligent misrepresentation claims was tolled until Envo was put on inquiry notice of its claims.

Defendants contend that Envo was put on inquiry notice when it did not receive the $10,000 due at closing in July 2005 or any payment on the promissory notes that first became due in September and October of 2005. That argument is not persuasive. It is

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[51] Am. Compl. Ex. D.

unreasonable to infer that Envo was put on inquiry notice of Walters and Aylor's alleged misrepresentations concerning the existence of ESG as soon as it failed to receive the initial payments due under the APA. The only thing Envo would have had notice of at that time was that ESG had breached the APA by not paying the money owed when it was due. This failure would not have alerted Envo to the possibility that ESG did not exist or that Walters and Aylor fraudulently may have induced it to enter into the APA. More likely, it would have taken Envo some time to realize what had happened and that it had potential fraud claims in addition to more straightforward breach of contract claims related to nonpayment on the promissory notes. Although the Complaint and the documents associated with it do not show when exactly Envo was on inquiry notice of its fraud and negligent misrepresentation claims, it is reasonable to infer from the allegations in the Complaint that Envo would not have been on such notice until more than two months after Defendants missed the first payment on the promissory notes.[52] Because Envo filed its initial Complaint three years and one month after the first payment was due on the October Promissory Note, only a month or so of tolling from the date this payment was due would be necessary to bring Envo's fraud and negligent misrepresentation claims within the analogous three-year statute of limitations.

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[52] I further note that Marconi did not file his interpleader action over the $10,000 deposit that was put in escrow to be paid at closing in July 2005 until April 27, 2009, some five months after Envo filed its initial Complaint in this action, and approximately three and a half years after the alleged misrepresentation claims arose.

Because I find the statute of limitations was tolled for at least two months, Counts I and IV of Envo's Complaint would not have been time-barred at law because they ran afoul of the analogous statute of limitations. Defendants also have not shown any exceptional circumstances here warranting a requirement that Envo have acted with greater alacrity. Thus, I hold Counts I and IV are not subject to dismissal on grounds of laches.

In addition to failing to demonstrate that Envo's remaining claims necessarily would be barred by laches and the analogous statutes of limitations, Defendants have not shown that they suffered any prejudice from whatever delay fairly may be attributed to Envo. Defendants are fully aware that they have not made good on their promise to pay Envo $300,000 for the environmental consulting business. They have used the assets they purchased in the APA and, if the assertions in Envo's Complaint prove to be true, have profited from their use of these assets. Because Defendants have benefited from the bargain they made by signing the APA, it cannot prejudice them now to come before this Court and answer claims that they did not meet their end of the bargain. Accordingly, Defendants have not been prejudiced by Envo's allegedly tardy filing of this action, tardiness that, in any event, does not amount to unreasonable delay. As such, Defendants have failed to show that Counts I, III, IV, and VI of Envo's Complaint should be barred by laches, and I deny their motion to dismiss these claims on this ground.

For the foregoing reasons, I grant Defendants' motion to dismiss Count V of Envo's Complaint under Rule 12(b)(6) and Rule 9(b) for failure to state a claim. In all other respects, Defendants' motion to dismiss Envo's Complaint under Rules 12(b)(1)

and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim, respectively, is denied.

IT IS SO ORDERED.