IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WINNER ACCEPTANCE CORPORATION, a Delaware corporation, WINNER GROUP LEASING, INC., a Delaware corporation, Plaintiffs, v. RETURN ON CAPITAL CORPORATION, a Delaware corporation, RETURN ON EQUITY GROUP, INC., a Delaware corporation, POSTAL EXPRESS OF AMERICA, INC., a Delaware corporation, and EDWARD MICHAEL DASPIN, JEFFERY H. HITT, RONALD STELLA, Defendants.	)	Civil Action No. 3088-VCP

MEMORANDUM OPINION

Submitted: July 11, 2008
Decided: December 23, 2008

Michael P. Kelly, Esquire, A. Richard Winchester, Esquire, Noriss E. Cosgrove, Esquire, MCCARTER & ENGLISH, LLP, Wilmington, Delaware; *Attorneys for Plaintiffs*

William J. Cattie, III, Esquire, George T. Lees, III, Esquire, RAWLE & HENDERSON, LLP, Wilmington, Delaware; Michael Shapanka, Esquire, Somerville, New Jersey; *Attorneys for Defendants*

PARSONS, Vice Chancellor.

This is an action by two leasing companies that allege several individuals and entities engaged in fraud, fraudulent transfers, conversion, and unjust enrichment in connection with a leased fleet of postal trucks and trailers. The leasing companies also requested the enforcement of a judgment that was obtained in Virginia against one of the defendant entities based on a corporate guarantee. The matter is currently before me on Defendants' motion to dismiss for, among other things, failure to comply with Court of Chancery Rule 3(aa), failure to state a claim upon which relief can be granted, and the running of the applicable statutes of limitations. During oral argument on the motion to dismiss, the Court raised *sua sponte* the issue of subject matter jurisdiction. The parties filed supplemental letter briefs on that question.

For the reasons stated in this memorandum opinion, I hold that this Court does have subject matter jurisdiction over this action, deny Defendants' motion to dismiss for failure to comply with Rule 3(aa), and deny the motion to dismiss for failure to state a claim, except as it relates to certain aspects of Plaintiffs' claim for fraud in Count I of the First Amended Complaint. Those aspects of the fraud claim are dismissed with prejudice.

I. BACKGROUND

A. Facts

1. The parties

There are two Plaintiffs in this action: Winner Acceptance Corporation and Winner Group Leasing, Inc. (collectively, "Winner" or "Plaintiffs"). Plaintiffs are Delaware corporations that together leased thirty-seven trucks and ten trailers (the

"Fleet") to Jubb's Mail Service, Inc. ("Jubb's"), which operated a rural mail route in Virginia.[1] Subsequently, as part of a Chapter 11 restructuring of Jubb's,[2] Mid-Atlantic Postal Express, Inc. ("Mid-Atlantic") assumed the lease obligations of Jubb's.[3]

There are six Defendants. Defendant Postal Express of America, Inc. ("Postal Express"), guaranteed the leasing obligations undertaken by Mid-Atlantic. According to the Complaint, Postal Express is a wholly-owned subsidiary of Return on Capital ("ROC") or Return on Equity Group, Inc. ("ROEG"), both of which are Defendants and hold themselves out as merchant or investment banks incorporated in Delaware. The Complaint describes Defendant Edward Michael Daspin as a director, chief executive officer, and "alter ego" of Postal Express, ROC, and ROEG, and Defendants Jeffery H. Hitt and Ronald Stella as both directors and executive officers of the same three entities.

2. The Fleet lease

At some point, Jubb's, a Virginia corporation, secured a contract with the United States Postal Service ("USPS") to operate a rural mail route in Virginia. To conduct that business, Jubb's leased the Fleet from Winner. By December 13, 2002, however, Jubb's filed for Chapter 11 bankruptcy protection.

On or about January 21, 2003, Hugh Jarman, Winner's corporate representative, met with counsel for Jubb's to discuss the bankruptcy and the available options regarding

---

1 Unless otherwise noted, all facts recited herein are drawn from Plaintiffs' First Amended Complaint (the "Complaint").

2 *See generally* 11 U.S.C. §§ 1101-1174.

3 Neither Jubb's nor Mid-Atlantic is a party to this action.

the original Fleet lease. Defendants Daspin, Hitt, and Stella (the "Individual Defendants") were present. At this meeting, the Individual Defendants expressed an interest in assuming the USPS mail route contract. To acquire the Jubb's route, Defendants needed the approval of Plaintiffs, the bankruptcy court, and the U.S. Trustee overseeing the bankruptcy. To begin operations, Defendants also needed access to the Fleet.

In October 2003, Winner's representatives met with Daspin, and Daspin reiterated the same plan. At a meeting with Winner representatives on November 10, 2003 in Roanoke, Virginia, Daspin allegedly represented to Winner that he would personally oversee the rural mail venture. Daspin further promised that he would "expand the mail business that Jubb[']s had started."[4] Daspin told Plaintiffs' representatives that Jubb's postal business was just "a postage stamp of which [sic: what] I can orchestrate this mail business to be."[5]

On November 15, 2003, Jarman and Jay Tarlov of Winner met with Daspin and Hitt in Daspin's Morristown, NJ office. At that meeting, Daspin allegedly assured Winner that he was installing "Hitt, a war hero" to oversee the management of the Fleet, and that "Hitt was the man you wanted in your foxhole when things went bad."[6]

---

4 Compl. ¶ 25.

5 *Id.*

6 *Id.* ¶ 26.

Apparently at that same meeting, Plaintiffs told Daspin, Hitt, and Stella that they required additional security for the Fleet before they could commit to supporting Daspin's plan.

Again apparently at the same meeting, Daspin offered to make Postal Express a guarantor of Mid-Atlantic's obligations to Winner under the Fleet lease. Daspin allegedly represented that Postal Express was a "well funded and long-established 'Delaware transportation and logistics based holding company' under the total control of Daspin, ROC and ROEG" and that Daspin would personally oversee "the new business to be formed as part of the plan and Postal Express."[7] Plaintiffs also were provided with certain unnamed "documents" and unspecified "information" concerning Postal Express's "viability and operations," upon which Winner claims to have justifiably relied.

At some point after the November 15, 2003 meeting, Daspin, Hitt, and Stella allegedly formed Mid-Atlantic to operate the rural Virginia mail route, and hired Joe Capitimino to act as chief operations officer. Capitimino contributed $153,000.00 of his own capital to Mid-Atlantic. Also, at some point, Daspin, Hitt, and Stella convinced William Jubb, founder of Jubb's, to contribute $100,000.00 of his own capital to Mid-Atlantic.[8]

Winner ultimately agreed to accept Postal Express's guarantee.

---

[7] *Id.* ¶ 28, citing Ex. C. Exhibit C does not mention the words "well funded" or "long-established."

[8] *Id.* ¶ 29. The combined equity investments of Capitimino and William Jubb totaled $253,000.00 (the "Equity Investment").

On November 24, 2003, while back in Roanoke for a bankruptcy court hearing, Daspin allegedly passed out his ROC business cards and reiterated that he personally would oversee the business and that the new company would "successfully assume" the USPS contracts and begin making payments to creditors.[9] He added that the Fleet was "in good hands," and that his "top people" would manage the new company.[10] On this occasion, Daspin, Hitt, and Stella told Plaintiffs that they would "use the new company, Mid-Atlantic," which was funded by new equity capital, to secure and run the USPS rural mail route, so that Mid-Atlantic could pay off the Fleet lease payment owed to Plaintiffs.[11]

In summary, the Complaint alleges that "[b]y November 24, 2003 Daspin, Hitt and Stella had thus promised" that:

> (1) Daspin would commit $250,000 in personal capital to Mid-Atlantic which was to assume all obligations under the lease for the Fleet and that Defendants would capitalize Mid-Atlantic with the Equity Investment; (2) Defendants and Postal Express would guarantee the Fleet lease, assume all obligations thereunder and make all required payments to Plaintiffs; and (3) Daspin, Hitt and Stella would use their expertise to grow the business.[12]

The Complaint, without mentioning a date, alleges that "Daspin . . . also represented to the Bankruptcy Court that he would assume $250,000.00 of the liability for the Fleet (as

---

9 *Id.* ¶ 31.

10 *Id.* ¶¶ 31-32.

11 *Id.* ¶ 32.

12 *Id.* ¶ 33.

incorporated into the Bankruptcy Plan), and that Mid-Atlantic would assume the balance of the Fleet leases and other Jubb's liabilities."[13]

Plaintiffs allege they relied on these representations in agreeing to lease the Fleet to Mid-Atlantic with the first payment due in December 2003. Among other things, this new agreement with Mid-Atlantic required: "(a) that the fleet be maintained in good working order; (b) that the Defendants maintain physical control over each vehicle; and (c) that Defendants make timely payments under the leases."[14]

Within a year, Mid-Atlantic was no longer meeting its financial obligations related to the Fleet lease. Despite the fact that the USPS recently had made a second payment to Mid-Atlantic, Plaintiffs aver that by mid-2004 Defendants stopped communicating with Plaintiffs and ceased making payments on the lease. Mid-Atlantic made its last lease payment of $33,206.13 on May 18, 2004. The Complaint further alleges that, shortly after mid-2004, the USPS payments, the Equity Investment, the Fleet, and Defendants all disappeared.[15] At some point in time, Winner also discovered that, far from being a long established and successful company, Postal Express actually had been formed in November 2003.

---

13 *Id.* ¶ 34. Although the Complaint capitalizes the words "Bankruptcy Plan," this term is never defined.

14 *Id.* ¶ 3.

15 *Id.* ¶¶ 36-37.

In response to those developments, Plaintiffs sued Mid-Atlantic for breach of the lease contract in the United States District Court for the Western District of Virginia and obtained a judgment on November 30, 2004. By mid-2005, Daspin communicated to Winner that he had transferred the Fleet to other of Daspin's operations to generate revenue.[16] Thereafter, Daspin met with Winner's representatives, rejected their demands to return the Fleet, and asserted that he himself owned the Fleet. At some point, Plaintiffs began searching for the Fleet, and eventually recovered most of the vehicles. According to the Complaint, vehicles from the Fleet were scattered across the eastern seaboard having been abandoned in various states, such as Virginia, Indiana, Georgia, Maryland, New Jersey, and New York.[17]

Plaintiffs later filed suit against Postal Express as the guarantor of the Fleet lease in a state court in Virginia. On September 15, 2006, Plaintiffs received a judgment against Postal Express from the Roanoke City Virginia Circuit Court for $1,506,703.56 plus interest.[18]

B. Procedural History

Plaintiffs commenced this action on July 11, 2007, and filed their First Amended Complaint on July 24, 2007. Defendants moved to dismiss on September 20, 2007,

---

16 Compl. ¶ 40. Although Plaintiffs cite to Complaint Exhibit E as support, which apparently was to contain a letter written by Daspin in 2005, no such letter appears in the version of Exhibit E that was e-filed.

17 *Id.* ¶ 42. The Complaint does not specify when Plaintiffs recovered any of the Fleet vehicles.

18 *See id.* Ex. F.

pursuant to Court of Chancery Rules 12(b)(6) and (7), as well as 9(b). The parties briefed that motion[19] and the Court heard argument on it. At the argument, I granted a default judgment against Postal Express and requested supplemental briefing on the issue of subject matter jurisdiction. This is the Court's opinion on the motion to dismiss.

C. Parties' Contentions

The Complaint contains five counts. Count I asserts claims for both fraudulent representations and promissory fraud against all Defendants. Count II alleges Defendants engaged in fraudulent transfers of the Fleet, the USPS payment, and the Equity Investment for their personal benefit to avoid paying creditors. Count III seeks enforcement of the guarantee against Postal Express. Count IV alleges conversion of the Fleet by Defendants. And lastly, Count V alleges unjust enrichment. The Complaint also seeks recovery from the Individual Defendants, ROC, and ROEG based on an alter-ego or veil-piercing theory.

Defendants first seek dismissal for failure to comply with Rule 3(aa). Defendants also have moved to dismiss Counts I, II, and V for failure to state a claim, and to dismiss Counts I, IV, and V based on the applicable statute of limitations. Finally, Defendants seek dismissal pursuant to Rule 12(b)(7) for failure to join indispensable parties, for claim splitting, and under principles of comity.

---

[19] In this opinion, the parties' submissions regarding Defendants' motion to dismiss are cited as follows: "DOB" refers to Defendants' opening brief; "PAB" refers to Plaintiffs' answering brief; and "DRB" stands for Defendants' reply brief.

As to the issue of subject matter jurisdiction, the parties dispute whether the Complaint pleads a claim under an alter ego or piercing the corporate veil theory. To the extent it does, there is little dispute that this Court would have jurisdiction over this litigation.

II. ANALYSIS

A. Should this Action be Dismissed for Failure to Comply with Rule 3(aa)?

Rule 3(aa) requires that all complaints be verified by a qualified individual: "Every pleading by a corporation which must be verified shall be verified under oath or affirmation by the chairperson, or vice-chairperson of the board of directors, by the president, by a vice-president, by a secretary, by an assistant secretary, by the treasurer, or by an authorized agent . . . ." Defendants argue that the initial complaint was verified by Defendants' counsel, who is not a qualified person under Rule 3(aa), and, therefore, should be dismissed. I disagree.

A lawyer may qualify as a plaintiff's "authorized agent" and may satisfy Rule 3(aa) in certain circumstances. In this case, it appears reasonable to infer that Plaintiffs' lawyer did act as their agent in signing the initial complaint. Regardless, there is no need to resolve this issue, because the technical objection was mooted by the filing of the First Amended Complaint accompanied by a verification signed by Plaintiffs' controller less than two weeks after the filing of the initial complaint. Therefore, I reject Defendants' motion to dismiss the Complaint based on an alleged failure to comply with Rule 3(aa).

B. Does this Court have Subject Matter Jurisdiction?

Before addressing the adequacy of Winner's claims, I first must determine whether this Court has subject matter jurisdiction over this action. Plaintiffs argue the answer is yes, because "this case is a demand for veil piercing under an alter ego theory, and therefore asserts an equitable right per 10 *Del. C.* § 341."[20] Defendants, however, contend that this Court lacks subject matter jurisdiction, because "[t]he matters pleaded in this case are all determinable at law in the Delaware Superior Court."[21] Defendants also note that not a single count of the Complaint seeks to pierce the corporate veil as a right or as a form of relief.[22]

Section 341 of Title 10 of the Delaware Code provides: "The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity." A cause in equity arises when the plaintiff "asserts an equitable right or seeks an equitable remedy."[23] Under Delaware law, "piercing the corporate veil may be done only in the

---

[20] July 11, 2008 Letter, Pls.' Mem. of Law in Supp. of Equitable Jurisdiction ("Pls.' Supp. Mem."), at 1.

[21] July 11, 2008 Letter, Defs.' Mem. of Law in Opp'n to Equitable Jurisdiction ("Defs.' Supp. Mem."), at 1.

[22] *Id.* at 3.

[23] *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 (Del. Ch. Mar. 4, 2004).

Court of Chancery, when the purpose of the action is to obtain a judgment against individual stockholders or officers."[24]

Equitable jurisdiction is determined from the face of the complaint as of the time of filing, viewing all well-pleaded factual allegations as true.[25] Jurisdiction in the Court of Chancery does not depend on the invocation of "magic words" but rather depends on the substance of what the asserted claims seek. Thus, a claim to enforce an equitable right or obtain an equitable remedy will support jurisdiction in Chancery, even if it is not artfully pleaded.[26]

This Court will disregard the corporate form only in the "exceptional case."[27] Determining whether to do so requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned

---

[24] *Eden v. Oblates of St. Francis de Sales*, 2006 WL 3512482, at *8 (Del. Super. Dec. 4, 2006).

[25] *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) (citing *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586 (Del. 1970)).

[26] *Medi-Tec of Egypt Corp.*, 2004 WL 415251, at *3 ("The allegations of the Complaint, taken together with the rights to be protected and the remedies sought, ordinarily determine this Court's subject matter jurisdiction.") (citing *Heston v. Miller*, 1979 WL 174446, at *1 (Del. Ch. Oct. 11, 1979); *Hughes Tool Co. v. Fawcett Publ'ns, Inc.*, 297 A.2d 428, 431 (Del. Ch. 1972), *rev'd on other grounds*, 315 A.2d 577 (Del. 1974)).

[27] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *11 (Del. Ch. July 14, 2008) (internal citations omitted).

company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder.[28] Delaware courts also must find an element of fraud to pierce the corporate veil.[29]

Defendants argue that Winner's Complaint fails to list a separate count for veil-piercing, and, thus, provides no basis for subject matter jurisdiction in this Court.[30] Because the Court determines subject matter jurisdiction by looking to the allegations in the entire complaint, as opposed to searching for talismanic words or a particular form of organization, the key inquiry is whether the Complaint fairly put Defendants on notice that Winner seeks to pierce the corporate veil.[31] In that regard, I find that the Complaint contains sufficient allegations to sustain subject matter jurisdiction on an alter ego or "corporate veil piercing" theory.[32]

Paragraphs 10-12 of the Complaint allege that Daspin is the alter ego of Postal Express, ROC, and ROEG. Paragraph 17 avers that Postal Express, ROC, and ROEG are Delaware entities created, operated, dominated, and controlled by Daspin. Paragraph 28

---

28 *Id.*

29 *Mason v. Network of Wilm., Inc.*, 2005 WL 1653954, at *3 (Del. Ch. July 1, 2005).

30 Defs.' Supp. Mem. at 3.

31 *See, e.g.*, *Medi-Tec of Egypt Corp.*, 2004 WL 415251, at *3; *Heston*, 1979 WL 174446, at *2.

32 The terms "alter ego theory" and "piercing the corporate veil" are used interchangeably in Delaware law. Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* ("Wolfe & Pittenger") § 2.03[b][1][iii] (2008).

states Daspin represented to Plaintiffs that Postal Express was a well-funded, established company under the total control of Daspin, ROC, and ROEG. In offering Postal Express as a guarantor under the Fleet lease, Daspin allegedly provided Plaintiffs with documents containing representations, on which Plaintiffs claim they reasonably relied, concerning Postal Express's viability and its operations.[33]

Regarding the requisite element of fraud for piercing the corporate veil, Plaintiffs allege that after relying in late 2003 on the documents Daspin provided, they later discovered, for example, that Postal Express was not established until November 2003. Additionally, the Complaint avers that Defendants did not intend to continue the mail service or the lease payments when they gave assurances to Winner to the contrary.[34] Instead, Daspin and the other Defendants "intended to abscond with the equity invested by Jubbs and Capitimino, abscond with the substantial payments from the United States Postal Service and to use the Fleet assets for their own gain and purposes."[35]

The Complaint further alleges that Daspin used the Fleet for his own purposes after Mid-Atlantic ceased making payments. Plaintiffs claim they "had received correspondence from Daspin, stating that he had transferred the Fleet to other of Daspin's operations in order to 'generate revenue.'"[36] Daspin also claimed he himself owned the

---

33 Compl. ¶ 28.

34 *Id.* ¶ 1.

35 *Id.* ¶ 44.

36 *Id.* ¶ 40.

Fleet, despite the fact that Mid-Atlantic was allegedly a mere lessee. Moreover, Plaintiffs allege that "Defendants' direct acts, and their clandestine, fraudulent and wrongful activities, intentionally left Mid-Atlantic without any assets or ability to pay Plaintiffs any judgment, Mid-Atlantic's assets having been transferred to or otherwise coming under the exclusive control of Defendants."[37] Additionally, Plaintiffs seek damages directly from Daspin, as well as from the other Defendants.

These allegations provide a sufficient basis to support a claim for piercing the corporate veil, which falls within this Court's equitable jurisdiction.[38] Winner relies on that claim to seek damages against Daspin and various other Defendants. Thus, this Court has subject matter jurisdiction over Plaintiffs' veil piercing claims. In addition, because the Court has jurisdiction over those claims, it also has jurisdiction over the remaining claims asserted in the Complaint under the "clean-up doctrine."[39]

---

37 *Id.* ¶ 48.

38 10 *Del. C.* § 341; *Eden v. Oblates of St. Francis de Sales*, 2006 WL 3512482, at *8 (Del. Super. Dec. 4, 2006).

39 *Medi-Tec of Egypt Corp.*, 2004 WL 415251, at *3 (citing *Getty Ref. Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1979)); *see also Those Certain Underwriters at Lloyd's London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 1207106, at *3 (Del. Ch. Feb. 8, 2007) ("[I]t is settled law that when equity obtains jurisdiction over some portion of the controversy it will decide the whole controversy and give complete and final relief . . . ." (quoting *Wilmont Homes Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964))), *aff'd*, 2008 WL 4918222, at *1 (Del. Nov. 18, 2008) (TABLE).

C. Does the Complaint State a Claim upon which Relief Can Be Granted?

Defendants seek dismissal of all counts under Rule 12(b)(6). A court should not grant a motion to dismiss pursuant to Rule 12(b)(6), "unless it can be determined with reasonable certainty that the [nonmoving party] could not prevail on any set of facts reasonably inferable" from the pleadings.[40] The court must assume the truthfulness of the well-pleaded allegations and must afford the nonmoving party "the benefit of all reasonable inferences."[41] Mere conclusory allegations, however, will not be accepted as true without specific, supporting allegations of fact.[42]

1. Fraud (Count I)

Winner alleges that Defendants engaged in a scheme to defraud. To state a claim for fraud, Plaintiffs must allege:

> (1) a false representation, usually one of fact . . . ; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.[43]

---

40 *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).

41 *Id.*

42 *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

43 *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

Fraud need not take the form of an overt misrepresentation;[44] it also may occur through concealment of material facts, or by silence when there is a duty to speak.[45]

Additionally, per Court of Chancery Rule 9(b), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." That is, "[t]o satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations."[46] State of mind, however, may be averred generally.[47]

To support a claim for fraud, the putative misrepresentation must concern either a past or contemporaneous fact or a future event that falsely implies an existing fact.[48] An unfulfilled promise of future performance will not convert a potential contract claim into a claim sounding in fraud, unless at the time the promise was made the speaker had no intention of performing.[49] Conversely, if a speaker intended when she made a promise to perform it, but sometime later reneges, no action for fraud arises.

---

44 *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

45 *Id.* ("Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading.").

46 *Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

47 *Id.*

48 *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at *8 (Del. Ch. Dec. 15, 1997) (applying Florida law but noting that Delaware law is the same).

49 *Id.*

Unfortunately, Winner's Complaint is far from a model of clarity. Winner made little attempt to identify the requisite details of the supposedly false statements that form the basis for their claim of fraud. Instead, they cobble together a mélange of facts and statements, which they purport to summarize in paragraph 50 of Count I as examples of the false statements and misrepresentations that make up their claim. Those statements are:

> (a) [Defendants'] companies were solvent and stable business operations capable of guaranteeing the loans;
>
> (b) [Defendants] were experts who routinely handled these types of transactions and successfully repaid loans of this type;
>
> (c) The Fleet would be utilized to repay the Lease and monies owed to Plaintiffs;
>
> (d) That it was [Defendants'] purpose to use Mid-Atlantic to pay for the Fleet lease obligations and to repay Plaintiff in full the Jubbs' [sic] debt;
>
> (e) That [Defendants] would insure that Mid-Atlantic would remain solvent and take advantage of the existing route contracts;
>
> (f) That Defendants' experience and expertise had identified Jubbs [sic] as a valuable and promising company, and that Plaintiffs were an integral part of the business plan of Mid-Atlantic, such that payment to them would be assured;
>
> (g) That Postal Express, an iron clad company owned and operated by Daspin and well funded by Daspin, ROC, and ROEG, would guarantee the promises, performances, duties and obligations of Mid-Atlantic under the Fleet lease; and

> (h) That Defendants had successfully completed hundreds of such transactions *all* leading to the successful repayment of capital and *all* resulting in a going concern.[50]

Whether these alleged misrepresentations are pleaded with the particularity required by Rule 9(b) is not readily apparent. Consequently, one must scour the Complaint for facts supporting these allegations to determine if they satisfy the Rule.

First, nothing in the allegations supporting Count I provides the time, place, or other detail as to alleged misrepresentation (h) that "Defendants had successfully completed hundreds of such transactions *all* leading to the successful repayment of capital and *all* resulting in a going concern." The same is true for statement (b). Therefore, the allegations as to statement (b) and (h) fail to satisfy the pleading requirements of Rule 9(b).

Second, alleged misrepresentations (c), (d), (e), and (f) all refer to promises made regarding Defendants' future involvement in Mid-Atlantic, which a prudent person might have thought to get in writing. The underlying allegations in the Complaint refer to a number of statements made by Daspin that might relate to these misrepresentations, but they would not qualify as fraudulent, because they lack a direct or implied statement of past or existing fact.[51] For example, Daspin promised that with his expertise and management he would expand the mail business. Similarly, Daspin's statement that the

---

[50] Compl. ¶ 50.

[51] *See Consol. Fisheries Co. v. Consol. Solubles Co.*, 112 A.2d 30, 37 (Del. 1955) ("It is the general rule that mere expressions of opinion as to probable future events, when clearly made as such, cannot be deemed fraud . . . .").

existing Jubb's postal business and the Fleet were just a "postage stamp of [what] I can orchestrate this mail business to be" is mere pun and puffery.[52]

Likewise, Plaintiffs allege that "by November 24, 2003," Daspin, Hitt, and Stella promised that Daspin would commit $250,000.00 in personal capital to Mid-Atlantic, which was to assume all obligations under the lease for the Fleet. At some unspecified time, Daspin also allegedly represented to the bankruptcy court that he would assume $250,000 of the liability for the Fleet, and this agreement was incorporated into the "Bankruptcy Plan." Defendants contend the allegation that outside of the bankruptcy proceeding Daspin, Hitt, and Stella promised that Daspin would commit $250,000 in personal capital to Mid-Atlantic fails the pleading with particularity requirement, because the Complaint does not specify when the statement was made. Based on a careful review of the Complaint, I find that argument unpersuasive. Although the negotiations that led up to Winner's backing Mid-Atlantic's plan spanned ten months, it is reasonable to infer from the Complaint that Daspin made the statement about committing $250,000 of his own capital in late October or November 2003. In the circumstances of this case, that is sufficient to meet the applicable pleading requirements.

As for the representation to the bankruptcy court, the Complaint provides neither the time nor the place of the representation. Moreover, Defendants deny Daspin ever

---

[52] *See Solow v. Aspect Res., LLC*, 2004 WL 2694916, at *3 (Del. Ch. Oct. 19, 2004) ("[S]tatements such as, 'Aspect has the skills, experience, and resources to successfully and quickly capitalize on the 3D opportunity' are mere puffery and cannot form the basis for a fraud claim.").

made the alleged representations to the bankruptcy court. To prove it, they attached selected portions of a hearing transcript to their opening papers. In their answering brief, Plaintiffs did not point to any part of that transcript or any other documentary evidence to bolster their averments about what Daspin represented to the bankruptcy court. Instead, Plaintiffs noted that certain pages of the transcript were omitted from Defendants' submission. With their reply brief, Defendants then submitted what they assert is the complete transcript of Daspin's testimony in the bankruptcy court proceeding to show he never made the alleged representation about the $250,000 investment.

A threshold question is whether and to what extent I can consider the additional documents on a motion to dismiss. Defendants argue, over Winner's objection, that this Court may consider the numerous documents attached to their moving papers in evaluating their 12(b)(6) motion. Court of Chancery Rule 12(b) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Delaware Supreme Court has observed that matters outside of the pleadings *usually* should not be considered in ruling on a Rule 12(b)(6) motion to dismiss.[53] The two exceptions are (1) when the document is integral to a plaintiff's claim and incorporated into the complaint, or (2) when the document is not being relied upon to prove the truth

---

[53] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

of its contents.[54] Consistent with these principles and unless otherwise indicated, I generally have considered the documents Defendants have offered.

For the representation Daspin allegedly made to the bankruptcy court, however, I decline Defendants' invitation to review well over one hundred pages of transcripts from the bankruptcy court proceedings to confirm that Daspin did not state to the bankruptcy court that he would assume $250,000 of the liability for the Fleet, as Winner alleges he did. Within the parameters articulated by the Supreme Court in *Santa Fe*, a trial court has discretion in determining whether to consider documents outside of the pleadings at the motion to dismiss stage. For example, where a plaintiff alleges that a defendant corporation did not disclose a particular fact in a publicly filed prospectus or similar document, the Court of Chancery routinely considers such a document on a motion to dismiss. In contrast, in a case like this one, where the Complaint alleges a defendant made a particular statement in the course of litigation, disproving that allegation at the pleading stage is much more difficult. As to Daspin's alleged statement, for example, I do not know whether he made it on the record or not, whether there were multiple hearings or arguments, and so on. Thus, it is difficult to assess the importance of a single

---

[54] *Id.* at 70; *see also Vanderbilt Income & Growth Assoc., LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *4 (Del. Ch. June 13, 2008) ("While the court may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim, the court may consider documents that are integral to a plaintiff's claim and incorporated into the complaint as well as facts subject to judicial notice.").

transcript without additional facts. For those reasons, I have not considered the proffered transcript and assume the truth of the allegations in Winner's complaint.

The complaint also alleges a number of facts with particularity that would support a reasonable inference that Defendants made promises they had no intention of keeping when they made them. For purposes of this motion and on these specific facts, these allegations of what is best termed "promissory fraud" satisfy Rule 9(b). This Court looks with particular disfavor at allegations of fraud when the underlying utterances take the form of unfulfilled promises of future performance. First, unfulfilled promises generally provide grounds for breach of contract, rather than fraud claims.[55] Second, the ultimate question turns on whether the speaker intended not to perform when she made the promise, which is generally difficult to prove or disprove because there may be no readily observable, objective, external fact with which to divine the speaker's intent.[56]

Where a claim is based on allegations of promissory fraud, an internal tension exists between the different provisions of Rule 9(b). On the one hand, the Rule requires that fraud be pleaded with particularity; on the other hand, it expressly provides that, "[m]alice intent, knowledge and other condition of mind of a person may be averred

---

[55] *See EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *8 (Del. Ch. Sept. 2, 2008).

[56] A claim of negligent misrepresentation or equitable fraud, which does not require a knowing or intentional state of mind, cannot lie where the underlying representations take the form of promises, because promissory fraud requires an intentional or knowing act. *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at *8 (Del. Ch. Dec. 15, 1997) (holding that promissory fraud requires an intention not to perform at the time the promise was made).

generally."[57] In a claim for promissory fraud, however, the speaker's state of mind is the factual predicate for the fraudulent statement.[58] Thus, the ability to plead intent generally raises the spectre of parties using a claim for promissory fraud to pursue what in reality is a breach of contract cause of action, but for one reason or another cannot be pleaded that way, to bring additional parties into an action, and thereby survive a motion to dismiss. With that in mind, I hold that to state a claim for promissory fraud, a plaintiff must plead something more than a promise, mere nonperformance, justifiable reliance, damages, and a general averment of a culpable state of mind.[59] To assert a claim for promissory fraud, the plaintiff also must plead specific facts that lead to a reasonable inference that the promissor had no intention of performing at the time the promise was made.

Viewing the Complaint as a whole and in the light most favorable to Plaintiffs, Winner has alleged with sufficient particularity to satisfy Rule 9(b) a series of fraudulent

---

[57] The Supreme Court has held that "any attempt to require specificity in pleading a condition of mind would be unworkable and undesirable." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993) (citation omitted).

[58] *See College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 360 A.2d 200, 206 (Pa. 1976) ("Statements of intention, however, which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent. . . . This knowing misrepresentation of one's intention or state of mind is a misrepresentation of an existing fact.") *cited with approval in Berdel*, 1997 WL 793088, at *8.

[59] *See Berdel*, 1997 WL 793088, at *8-9 (holding that "a party's failure to keep a promise does not prove the promise was false when made" and that the plaintiff did not adduce evidence showing that the defendant intended to renege at the time it made the promise) (citations omitted).

promises made by Defendants, including facts which support a reasonable inference that they had no intention to fulfill the alleged promises at the time they were made. On November 10, 2003, Daspin purportedly represented to Plaintiffs that he personally would oversee the rural mail venture. On November 24, 2003 in Virginia, Daspin allegedly passed out his ROC business cards and reiterated that he personally would oversee the business and that the new company would "successfully assume" the USPS contracts and begin making payments to creditors.[60] He added that the Fleet was "in good hands,"[61] and that his "top people" would manage the new company.[62] At this meeting, Daspin, Hitt, and Stella told Winner that they would "use the new company, Mid-Atlantic," which they said was funded by new equity capital.[63] Daspin, Hitt, and Stella said the goal of Mid-Atlantic was securing and running the USPS rural mail route, so that Mid-Atlantic could pay off the Fleet lease payment owed to the Winner Group.[64]

Here, Plaintiffs also have pleaded a number of facts, which if true, would lead to a reasonable inference that Daspin, Hitt, and Stella never intended to perform on the promises they made. First, the allegations that the Equity Investment, the USPS contract payment, and some or all of the Defendants disappeared shortly after Mid-Atlantic's last

---

60 Compl. ¶ 31.

61 *Id.*

62 *Id.* ¶ 32.

63 *Id.*

64 *Id.*

lease payment in May 2004 supports Winner's position. Second, the same is true for Daspin's inexplicable claim that he owned and would not return some of the leased vehicles. Third, the alleged failure of both Mid-Atlantic and Postal Express to make good on virtually any of their obligations, even after judgments were entered against them by sister courts, leads to an inference that a cascading series of undercapitalized entities was formed to evade personal liability for those who profited through the protections afforded by Delaware law.[65] Further, the allegations that after Mid-Atlantic received certain payments from the USPS, Mid-Atlantic stopped paying for the vehicles, Defendants used them for other purposes, and the vehicles eventually were recovered littered across several states far away from rural Virginia call into question Defendants' *bona fides* from the outset. Accordingly, Defendants' motion to dismiss the promissory fraud claims against Daspin, Hitt, Stella, and ROC for failure to state a claim is not well founded.

Finally, misrepresentations (a) and (g) listed in ¶ 50 of the Complaint relate to Postal Express as the guarantor of Mid-Atlantic. Plaintiffs have alleged with the requisite

---

[65] Delaware takes the potentially fraudulent use of the protections it affords to entities created under this State's laws very seriously. A manifestation of this concern can be seen in the ways in which Delaware takes personal jurisdiction over those who form Delaware subsidiaries. In *Cairns v. Gelmon*, for example, this court concluded the incorporation of a Delaware subsidiary constituted a single act sufficient to satisfy the requirements of 10 *Del. C.* § 3104(c)(1) when that incorporation was central to plaintiffs' claims of wrongdoing. 1998 WL 276226, at *1-3 (Del. Ch. May 21, 1998). *See also AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 439 (Del. 2005) (citing *Papendick v. Bosch*, 410 A.2d 148 (Del. 1979)).

particularity statements that could lead to a reasonable inference that Daspin intended to defraud Winner. On November 15, 2003, Daspin offered Postal Express as a guarantor of the Fleet lease payments undertaken by Mid-Atlantic. Daspin allegedly falsely represented that Postal Express was a well-funded and long-established Delaware transportation and logistics based holding company.[66] This alleged misrepresentation could form the basis for a claim for fraud against Daspin.

Defendants argue that Winner never pleaded how well funded Postal Express would be, and, therefore, did not satisfy the applicable pleading requirements.[67] This contention strikes me as hair-splitting. Fairly read, the Complaint sufficiently alleges that Daspin at least implicitly represented that Postal Express had adequate resources to be able to satisfy the guarantee, if Mid-Atlantic defaulted on the agreement. That representation allegedly was false.

On a motion to dismiss, the Court must draw all reasonable inferences in favor of the nonmoving party. Applying that standard, I conclude Plaintiffs adequately have pleaded fraud and promissory fraud as to the representation that Postal Express was funded well enough to honor its guarantee in November 2003, the representation to Winner and to the bankruptcy court that Daspin would commit capital, and the representation that Defendants intended to perform on promises related to using the Fleet to pay back Winner. To that extent, therefore, I deny Defendants' motion to dismiss the

---

66 Compl. ¶ 28.

67 DRB at 20.

fraud claims of Count I of the Complaint under Rule 12(b)(6). In all other respects, however, I grant the motion and dismiss those aspects of Count I with prejudice.

2. Fraudulent transfer (Count II)

Defendants also seek dismissal of Plaintiffs' fraudulent transfer claim for failure to state a claim. In Count II of the Complaint, Winner purports to assert a claim for fraudulent transfers. Winner avers that Defendants caused the conveyance of the property of Mid-Atlantic, including the Fleet and the revenue and proceeds from it, to Postal Express and then through ROC and ROEG to Daspin, Hitt, and Stella without Mid-Atlantic's receiving reasonably equivalent consideration, without a valid business purpose, and with the intent to deceive Plaintiffs and destroy the value of their collateral and guarantees.[68]

The Delaware Uniform Fraudulent Transfer Act (the "Act")[69] specifies the requirements for such a claim. Section 1304 of the Act provides:

---

[68] Compl. ¶¶ 55-59.

[69] 6 *Del. C.* §§ 1301-1311. Defendants made no mention of any choice-of-law argument in their opening brief, but cursorily raise that issue in their reply brief. DRB at 24. Nevertheless, Defendants appear to argue that Virginia law controls and that Virginia has not adopted the Uniform Fraudulent Transfer Act, so the fraudulent transfer claim should be dismissed. *See id.* Because Defendants failed to raise this issue in their opening brief and did not develop it in any meaningful way in their reply brief, I conclude they have waived the issue for purposes of the pending motion. Additionally, I note that Virginia apparently does recognize a cause of action for fraudulent conveyance under Va. Code Ann. § 55-80. Defendants did not address this statute or any differences between it and the Delaware Uniform Fraudulent Transfer Act in their briefs.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (6) The debtor absconded;
>
> (7) The debtor removed or concealed assets;

> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Defendants contend that Winner has not identified any specific funds that were transferred to Defendants, but rather, has made generalized allegations about the disappearance of money received by Mid-Atlantic under the USPS contract. As explained *supra* Part II.C.1, Rule 9(b) requires that a plaintiff plead fraud with particularity. Once again, however, Defendants read the Complaint too narrowly. Plaintiffs allege Defendants diverted the funds Mid-Atlantic received from the USPS contract, as well as other assets, to Defendants' own uses, *i.e.*, to the individual Defendants themselves or to business entities with which they were involved. In addition, the Complaint adequately alleges facts that, if proven, could satisfy the other elements of a claim for a fraudulent conveyance. For example, Winner avers that Defendants made the challenged transfers to insiders with the intent to defraud Plaintiffs and at a time when there were inadequate assets in relation to the business in which Defendants, through Mid-Atlantic, were engaged. The Complaint further states that Defendants concealed the transfers and effectively caused the debtors, Mid-Atlantic and

its guarantors, to abscond. Therefore, I deny Defendants' motion to dismiss the fraudulent conveyance claim.

3. Unjust enrichment (Count V)

Defendants argue Plaintiffs' Count V for unjust enrichment also fails to state a claim. Plaintiffs allege Defendants were unjustly enriched, because they wrongfully pilfered cash and other assets from Mid-Atlantic, and transferred them to Postal Express and then through ROC and ROEG to themselves for their own benefit. Plaintiffs also allege they were not compensated when Defendants appropriated the use of the Fleet from Mid-Atlantic to other businesses Defendants controlled.

The elements of a claim for unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided at law.[70] Defendants contend the allegations in the Complaint regarding unjust enrichment are contradicted by Winner's Controller's October 18, 2004 affidavit to a federal court in

---

[70] *Oliver v. Boston Univ.*, 2000 WL 1091480, at *9 (Del. Ch. July 18, 2000) (citations omitted). In the circumstances of this case, where subject matter jurisdiction exists over the unjust enrichment claim under at least the clean-up doctrine, the existence or absence of the fifth element, an adequate remedy at law, is immaterial. Depending on the circumstances, unjust enrichment can be thought of as either a legal or an equitable claim. In *Crosse v. BCBSD, Inc.*, the Delaware Supreme Court held that the Superior Court could award relief for an unjust enrichment claim, when unjust enrichment served as an alternate theory of recovery for a contract claim. 836 A.2d 492, 496-97 (Del. 2003); *see also Testa v. Nixon Uniform Serv., Inc.*, 2008 WL 4958861, at *3 n.23 (Del. Ch. Nov. 21, 2008) (embracing the proposition that a claim for unjust enrichment by itself does not invoke this court's subject matter jurisdiction).

Virginia, which states that Winner recovered 42 of the 47 Fleet vehicles.[71] The Complaint states that Plaintiffs "sold the few vehicles they were able to recover."[72] While there might be a legitimate dispute about what "few" means in this context and the degree of impoverishment or enrichment that occurred, that begs the question.

When read in the light most favorable to Plaintiffs, the Complaint adequately pleads that Defendants used the vehicles in the Fleet for Defendants' own purposes and to Plaintiffs' detriment. Moreover, the argument that "a few" means something less than 89% ignores what happened to the five remaining vehicles. Likewise, taking Plaintiffs' allegations as true, the fact remains that the vehicles recovered were scattered all over the eastern seaboard. From that, one reasonably could infer that those who had control over the vehicles were using them for some purpose other than servicing a rural Virginia mail route and paying for the use of the Fleet. Also, the recovered vehicles were allegedly in disrepair. Thus, the vehicles' value presumably was diminished and Plaintiffs, who held the residual interest in the vehicles, were thereby impoverished.

Defendants will have an opportunity to disprove these allegations or develop their position more fully as to the absence of damage suffered at a later time. In the context of Defendants' motion to dismiss, however, I conclude that Plaintiffs conceivably could prove their claim of unjust enrichment based on the allegations in the Complaint. Thus, I deny Defendants' motion to dismiss the unjust enrichment claim under Rule 12(b)(6).

---

71 DOB at 39.

72 Compl. ¶ 6.

D. Are Plaintiffs' Claims for Fraud, Conversion, and Unjust Enrichment Barred by the Statute of Limitations?

Defendants seek dismissal of Winner's claims for fraud, conversion, and unjust enrichment as time-barred by Delaware's three-year statute of limitations.[73] Preliminarily, I note that in a court of equity, the applicable defense for untimely commencement of an action for an equitable claim is laches, rather than a statute of limitations.[74] When exercising ancillary jurisdiction over legal claims, however, this Court will apply the applicable statute of limitations found at law.[75] Similarly, because equity follows the law, this Court looks to analogous statutes of limitations and gives those statutes appropriate weight when evaluating causes of action that invoke the Court's concurrent jurisdiction or involve an equitable claim bearing a close resemblance

---

73 *See* 10 *Del. C.* § 8106.

74 *See Whittington v. Dragon Group LLC*, 2008 WL 4419075, at *3 (Del. Ch. June 6, 2008) ("Laches operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position to their detriment. This doctrine is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights.") (internal quotations omitted).

75 *See Halpern v. Barran*, 313 A.2d 139, 141 (Del. Ch. 1973) (citing *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970)).

to a legal claim.[76] Thus, a three year statute of limitations applies either directly or analogously to the fraud, conversion, and unjust enrichment claims here.[77]

The statute of limitations is an affirmative defense that normally is raised in an answer.[78] A party seeking judgment on a statute of limitations defense generally does so by way of a summary judgment motion or a motion for judgment on the pleadings.[79] Nevertheless, motions to dismiss have been granted on the ground that a plaintiff's claims are barred by operation of the statute of limitations.[80]

In general, the defendant bears the burden of proving that a limitations period has lapsed and that a claim is time-barred. When a complaint asserts a cause of action that on its face accrued outside the statute of limitations, however, the plaintiff has the burden of pleading facts leading to a reasonable inference that one of the tolling doctrines adopted by Delaware courts applies.[81] Thus, at the motion to dismiss stage this Court conducts a

---

76 *See U.S. Cellular v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996). For example, fraud can be both equitable and legal in nature. Wolfe & Pittenger, § 2.03[b][1][ii], at 2-30.

77 *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005) (evaluating statute of limitations directly or by analogy).

78 *See Lee v. Linmere Homes, Inc.*, 2008 WL 4444552, at *3 (Del. Super. Oct. 1, 2008) (citations omitted).

79 *Id.* (citations omitted).

80 *See In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998).

81 *Yaw v. Talley*, 1994 WL 89019, at *6 (Del. Ch. Mar. 2, 1994) ("To invoke these tolling exceptions to the statute, the party asserting the claim must observe certain pleading requirements. Specifically, where the complaint asserts a claim that on

three part analysis to determine whether a claim is time-barred. From the pleadings, the Court determines (1) the date of accrual of the cause of action based on the allegations, (2) if the plaintiff has pleaded facts sufficient to create a reasonable inference that the statute of limitations has been tolled, and (3) assuming a tolling exception has been pleaded adequately, when the plaintiff was on inquiry notice of a claim based on the allegations.[82]

On Defendants' motion to dismiss, I thus begin by determining when Winner's claims for fraud, unjust enrichment, and conversion accrued, and then proceed to the second and third steps, if necessary. Section 8106 specifies a three year statute of limitations period for these types of actions, and a cause of action of that type accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.[83] Winner's fraud claim sounds in tort. A cause of action in tort accrues at the time of injury.[84] Here, Daspin allegedly misrepresented in November of 2003 that Postal Express was well-funded and long-established. Plaintiffs filed this action on July 11, 2007. The first question is, thus, when did the injury occur and thereby the claim accrue. The injury

---

its face would otherwise be time-barred, the plaintiff bears the burden of pleading facts that would operate to toll the statute.").

82 *In re Dean Witter*, 1998 WL 442456, at *19.

83 10 *Del. C.* § 8106; *see Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *13 (Del. Ch. June 29, 2005).

84 *Krahmer v. Christie's Inc.*, 903 A.2d 773, 778 (Del. Ch. 2006). For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach. *Whittington v. Dragon Group LLC*, 2008 WL 4419075, at *5 (Del. Ch. June 6, 2008).

occurred either at the time of the misrepresentation, the date Mid-Atlantic stopped making payments, or the date Postal Express failed to make good on its guarantee.

In this case, the alleged fraud relates to a statement concerning whether or not Postal Express had the assets on hand in November 2003 to make good on the guarantee it was offering on behalf of Mid-Atlantic. I find the injury occurred when the misrepresentations were made. If Postal Express was not sufficiently well funded to pay the guarantee when the representation was made, Winner would have suffered the injury at that time, because Winner agreed to enter into the transaction with Mid-Atlantic in reliance on Daspin's statement to the contrary. Moreover, Plaintiffs could have pressed the claim as of November 2003 and sought relief either in the form of damages or rescission of the transaction with Mid-Atlantic, precisely because the claim had accrued as of that date. Thus, on the face of the Complaint, the fraud claim based on the representation that Postal Express was well-funded accrued in November 2003 and falls outside the statute of limitations. The same analysis applies to the alleged misrepresentation to the bankruptcy court and the allegedly fraudulent promises made in 2003. Absent tolling, all of Plaintiffs' fraud claims fall outside the statute of limitations. Consequently, I now turn to the second part of the analysis: whether tolling applies.

The Delaware courts recognize three doctrines that may toll the statute of limitations: (1) inherently unknowable injuries, (2) fraudulent concealment, and (3) equitable tolling. Under the doctrine of inherently unknowable injury, the statute of limitations will be tolled until the point when an injury becomes empirically discoverable. At that time, the plaintiff would be on inquiry notice of a claim and the

statute would begin to run.[85] Under the doctrine of fraudulent concealment, the statute of limitations will be tolled 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.[86] The third tolling doctrine, equitable tolling, applies when a plaintiff "reasonably relies on the competence and good faith of a fiduciary."[87]

As to the misrepresentation about Postal Express being "well funded" and "long established," none of these tolling principles applies. Defendants assert Plaintiffs knew of their breach of contract claim against Mid-Atlantic by May 18, 2004, when Mid-Atlantic allegedly made its last lease payment. Plaintiffs counter that even assuming Defendants' statute of limitations argument has superficial appeal, "the concealment and fooling issues preclude a grant of Defendants' Motion."[88]

According to Plaintiffs, the acts of concealment include (1) Defendants having "wrongfully transfer[ed] capital and principal assets (i.e. the Fleet) in increments from Mid-Atlantic to other entities or persons under their control," and (2) the fact that "almost one year had passed [from the date of Mid-Atlantic's last payment] before Plaintiffs were

---

85 *In re Dean Witter*, 1998 WL 442456, at *5 (citation omitted).

86 *Id.*

87 *Id.* Because there is no allegation of any fiduciary relationship between Winner and any of the Defendants, the equitable tolling doctrine is inapposite here.

88 PAB at 32.

able to learn of Defendants' lies and misappropriation of assets."[89] First, the representation concerning Postal Express's funding was not concealed by the transfer of assets from Mid-Atlantic. Second, Plaintiffs appear to be arguing for two different dates of inquiry notice. At one point, they aver, "Plaintiffs' claims . . . did not accrue until July 2006 when Postal Express failed to honor the guaranty and Defendants' efforts to defraud Plaintiffs finally came to light."[90] In the same brief, however, Plaintiffs aver that Defendants' "wrongful conduct–as a direct result of Defendant's fraudulent concealment of information–did not become apparent to Plaintiffs until the middle of 2005 during discovery related to [the suit against Mid-Atlantic]."[91]

The burden to plead tolling rests on Plaintiffs. Plaintiffs have not pleaded what they learned in 2005 or 2006 during either of the litigation matters about Defendants' conduct during the relevant time period that they could not have learned before the litigations. Instead, they offer conclusory allegations that they were unable to uncover Defendants' lies until then or that it was only during the litigations that Defendants' fraudulent conduct came to light. I find these conclusory allegations simply unconvincing and conclude, instead, that Plaintiffs could have discovered the underfunding of Postal Express much sooner with a modicum of diligence. Thus, I find

---

89 *Id.* at 31.

90 *Id.* at 29.

91 *Id.* at 31.

no basis for tolling either the three year statute of limitations or the analogous period for laches in this case.

Unlike the misrepresentation regarding the extent of Postal Express's funding, the allegedly fraudulent promises, including Daspin's promises to put $250,000 into Mid-Atlantic, reasonably could be tolled as inherently unknowable. One reasonably could infer from the fact that Mid-Atlantic made its last lease payment on May 18, 2004, that Winner was not put on inquiry notice until July 2004 or later that no further payments would be forthcoming, that the Fleet would not be returned voluntarily, and that when Daspin, Hitt, and Stella made the promises in issue they had no intention of performing them. Thus, the statute of limitations could be tolled as to this aspect of Winner's fraud claim until July 2004 or later, which would defeat Defendants' argument that it should be dismissed as time-barred.

A similar conclusion results for the conversion[92] and unjust enrichment claims. The Complaint alleges facts sufficient to support a reasonable, although not conclusive, inference that Winner was not on inquiry notice that the Fleet had been converted by Defendants until July 2004 or later. Likewise, Plaintiffs conceivably could prove on the facts alleged that they were not on inquiry notice before July 2004 that Defendants were

---

92 Conversion is defined as the "act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." *McGowen v. Ferro*, 2004 WL 2423570, at * 19 (Del. Ch. Oct. 8, 2004) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996)). Winner ultimately must prove: that they had a property interest in the Fleet; that Winner had a right to possession of the Fleet; and that Winner sustained damages. *Facciolo Constr. Co. v. Bank of Del.*, 514 A.2d 413 (Del. 1986).

unjustly enriching themselves at the expense of Plaintiffs. Because I must draw all inferences in Winner's favor, I conclude that the statute of limitations provides no basis to dismiss the conversion and unjust enrichment claims. Defendants still can pursue that affirmative defense in discovery and further proceedings in this action.

E. Should the Complaint be Dismissed for Failure to Join Indispensable Parties, Improper Claim Splitting, or Under Principles of Comity?

Defendants further contend this action should be dismissed for Plaintiffs' failure to join indispensable parties, for improper claim splitting, and under principles of comity. First, Defendants assert that the Jubbs are indispensable parties. Defendants claim they would "certainly wish to assert third party claims against each of the Jubbs" family members who were direct obligors to the Plaintiffs.[93] Moreover, Defendants contend that William and Richard Jubb were responsible for the collapse of Mid-Atlantic.

Court of Chancery Rule 12(b)(7) recognizes the defense of failure to join an indispensable party under Rule 19. Rule 19(a) provides the test for determining those persons who are necessary parties:

> (a) . . . A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave

---

93 DOB at 44-45.

> any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Rule 19(b) addresses the related question of when a party will be deemed indispensable:

> (b) . . . If a person as described in paragraph (a)(1) and (2) hereof cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Rule 19(a) relates to a "person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action." If such a person fits the description of 19(a)(1) or (2), then that person is a necessary party and "shall be joined as a party in the action."

Unlike Rule 19(a), Rule 19(b) addresses the situation where a person who should be joined under the criteria of Rule 19(a) "cannot be made a party." If such a person cannot be joined, the Court proceeds to consider the following four enumerated factors to determine whether that person would be regarded as "indispensable" and the action should be dismissed:

> [1] to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
>
> [2] the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
>
> [3] whether a judgment rendered in the person's absence will be adequate; [and]

> [4] whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[94]

Here, Defendants argue that complete relief among the parties is unattainable absent the Jubbs. Because Defendants seek dismissal of this action and none of the parties has suggested the Jubbs would be subject to personal jurisdiction in Delaware, I assume they would not be. Nevertheless, I find untenable Defendants' argument that members of the Jubb family are indispensable parties.

Plaintiffs argue that joint and several liability attaches to the claims presented in the Complaint, and Defendants do not argue otherwise. Thus, Plaintiffs theoretically could recover from any party, and potentially could obtain an adequate judgment or recovery from the existing Defendants, even without the Jubbs. Nevertheless, Defendants argue that the Jubbs are indispensable, because "[a]bsent jurisdiction against the Jubbs in this Court the [Defendants] would not have the opportunity [sic: to] press contribution and indemnification claims."[95] Yet, Defendants' desire to seek contribution or indemnification from the Jubbs does not justify classifying the Jubbs as indispensable. As this court previously has held, "[a]lthough the joinder of [a third party] would alleviate the need for a second suit for contribution by [the defendants], if judgment goes

---

94 Ct. Ch. R. 19(b).

95 DOB at 45.

against them, this does not make [the third party] indispensable."[96] The same reasoning applies in this case, and leads me to conclude the Jubbs are not indispensable parties.

Similarly, Defendants have not articulated a sufficient basis for granting a motion to dismiss based on impermissible "claim splitting." Claim splitting is one facet of the doctrine of res judicata or claim preclusion. The doctrine of res judicata or claim preclusion stands for the proposition that "a final judgment on the merits rendered by a court of competent jurisdiction may, in the absence of fraud or collusion, be raised as an absolute bar to the maintenance of a second suit in a different court upon the same matter by the same party, or his privies."[97] In *Maldonado v. Flynn*, the court adopted the modern, "transactional view" of res judicata, which serves to bar not only the claims asserted in an initial action but also any claims arising out of the same transaction that might have been asserted in the first action.[98] Defendants argue that Winner could have pursued the claims asserted in this case against the Defendants in either of the prior suits against Mid-Atlantic or against Postal Express, and, accordingly, this suit should be dismissed. I disagree.

---

96 *See Russell v. Morris*, 1990 WL 15618, at *7 (Del. Ch. Feb. 14, 1990). The only case Defendants cited for their position is distinguishable on its facts and was effectively vacated when the court subsequently granted reargument and reversed its decision. *See Graham v. State Farm Mut. Ins. Co.*, 2006 WL 1600949 (Del. Super. June 12, 2006), *modified on reh'g*, 2006 WL 2382781 (Del. Super. July 10, 2006). Thus, the cited statement in *Graham* is, at most, dicta and does not warrant deviating from the reasoning of the *Russell* case.

97 *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980).

98 *Id.*

Allowing this action to proceed does not implicate directly the main policy concern addressed in *Maldonado*. Claim splitting "reflects the policy that it is preferable to require a plaintiff to present all of his theories of recovery (and supporting evidence) in a single action, than to allow him to prosecute overlapping or repetitive actions in different courts or at different times."[99] Claim splitting is meant to prevent burdening the same defendant with duplicative proceedings in different courts brought by the same plaintiff based on different causes of action arising out of a common underlying nucleus of facts. In *Maldonado*, for example, the plaintiff first pursued an action in federal court on federal law claims against several defendants.[100] After the federal court granted a motion to dismiss, the plaintiff continued to pursue those same defendants in state court on state law claims based on the same transaction that gave rise to the federal claims.[101] Because the plaintiff could have brought both the federal and state claims in the federal court action under pendant jurisdiction but chose not to, the court found the plaintiff guilty of claim splitting that was burdensome to the defendants and dismissed the state court action.

Here, the situation is different. As far as the record shows, Winner has not pursued any of these Defendants in any other forum. Defendants complain that they would be burdened by having to fight two separate battles on two separate fronts, but

---

99 *Balin v. Amerimar Realty Co.*, 1995 WL 170421, at *4 (Del. Ch. Apr. 10, 1995).

100 417 A.2d at 380.

101 *Id*.

they have not demonstrated that the two lawsuits would substantially overlap or that they would suffer undue prejudice as a result. Thus, Defendants have not shown that Plaintiffs' claims in this Court should be dismissed based on claim splitting or any other doctrine that touches on comity.

III. CONCLUSION

For the reasons stated, I grant Defendants' motion to dismiss as to Plaintiffs' fraud claims in Count I to the extent those claims are based on the statements identified in subparagraphs (a), (b), (g), and (h) of paragraph 50 of the Complaint as discussed herein, and deny the motion in all other respects.

IT IS SO ORDERED.