IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BREVET CAPITAL SPECIAL OPPORTUNITIES FUND, LP,	)	
Plaintiff,	)	
V.	)	C.A. No. N10C-12-071 JRS (CCLD)
FOURTH THIRD, LLC and TURBINE ENERGY SOLUTIONS, LLC,	)	
Defendants.	)	

Date Submitted: May 31, 2011
Date Decided: August 5, 2011

MEMORANDUM OPINION

Upon Consideration of Defendant's
Motion to Dismiss Count III of Plaintiff's Complaint
GRANTED.

Kevin G. Abrams, Esquire and John M. Seaman, Esquire, ABRAMS & BAYLISS LLP, Wilmington, Delaware. Dean A. Dickie, Esquire and Robert C. Levels, Esquire, MILLER, CANFIELD, PADDOCK AND STONE, P.L.C., Chicago, Illinois. Attorneys for Plaintiff.

Bruce E. Jameson, Esquire and Laina M. Herbert, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware. Steven P. Blonder, Esquire, MUCH SHELIST DENENBERG AMENT & RUBENSTEIN, P.C., Chicago, Illinois. Attorneys for Defendants.

SLIGHTS, J.

I.

Defendant, Fourth Third, LLC ("Fourth Third"), has moved to dismiss one of several counts of a complaint brought against it by Plaintiff, Brevet Capital Special Opportunities Master Fund, LP ("Brevet"). The dispute arises from a contract between Brevet and Fourth Third, whereby Brevet purchased from Fourth Third a one-third interest in a loan facility to Turbine Energy Solutions, LLC ("TES"). Brevet alleges that Fourth Third breached the contract and engaged in fraud both prior to and after the parties reached and later amended their agreement. In its motion, Fourth Third contends that Brevet's fraud claim, set forth in Count III of the complaint, cannot be maintained together with Brevet's breach of contract claim, as set forth in Count II of the complaint, because both claims rest on the same facts and both claims seek the same relief. Fourth Third also alleges that the complaint fails to plead fraud with the requisite particularity.[1] After careful consideration, the Court has determined that Brevet has not pled fraud with the requisite particularity and, therefore, Fourth Third's Motion to Dismiss Count III must be **GRANTED**.

II.

Brevet's claims are the product of a complex web of relationships and transactions. Ron Natole formed TES, a Delaware limited liability company, for the

[1]Def.'s Mot. to Dismiss ("Def.'s Mot.") at 1.

purpose of reselling gas-turbine parts, contributing 25% of the initial capital himself, and receiving the remaining 75% from Turbine Energy Solutions Holdings Corporation ("TES Holdings").[2] Pursuant to the TES operating agreement, Natole became the managing member of TES and TES Holdings became the majority member.[3] Although designated as TES' managing member, Natole had limited actual authority.[4] The operating agreement permitted TES Holdings to appoint a majority representative to exercise its rights under the LLC Agreement, and it appointed Andrew Fentress (TES Holding's President) to fulfill that role.[5] Per the operating agreement, virtually every action that Natole could take as the managing member required the approval of Fentress.[6] Fentress controlled TES' day-to-day operations, budget and cash flow - - essentially exercising complete control over the company.[7]

On May 4, 2007, TES entered into a loan agreement (the "original loan agreement") with Fourth Third whereby Fourth Third extended a $75 million line of

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[2]Compl. ¶5.

[3]*Id.* at ¶6.

[4]*Id.* at ¶7.

[5]*Id.* at ¶¶7, 11.

[6]*Id.* at ¶7.

[7]*Id.* at ¶¶8-9.

credit to TES.[8] A percentage of Fourth Third's loan to TES was funded by Medley Opportunity Fund, LP ("Medley LP") - - the whole owner of TES Holdings.[9] Medley LP, in turn, is controlled and managed by Medley Capital LLC ("Medley Capital").[10] The managing members of Medley Capital are Brook B. Taube, Seth Taube, and Fentress.[11] Medley Capital also owns and controls Fourth Third. Thus, Brook Taube, Seth Taube and Fentress control Medley LP, Medley Capital, TES Holdings, TES and Fourth Third.[12]

On August 29, 2008, Brevet entered into a Participation Agreement with Fourth Third, whereby Brevet acquired a one-third interest in the $75 million loan facility that Fourth Third had extended to TES.[13] Between September 24, 2008 and November 19, 2008, Brevet and Fourth Third agreed to extend the Participation Agreement so that they could negotiate terms for amending the loan agreement between Fourth Third and TES to include Brevet as a lender.[14]

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[8] *Id.* at ¶10.

[9] *Id.* at ¶12.

[10] *Id.* at ¶13.

[11] *Id.* at ¶14.

[12] *Id*. at ¶¶15-16.

[13] *Id.* at ¶17.

[14] *Id.* at ¶18.

On November 20, 2008, Brevet and Fourth Third executed the Amended and Restated Senior Loan Agreement (the "Loan Agreement").[15] Under the Loan Agreement, TES was required, *inter alia,* to notify Brevet and Fourth Third of any material changes in its business, including notice of any defaults and potential or actual litigation.[16] TES was prohibited from making material changes to its business, granting any liens on its property or selling inventory for less than approved prices.[17] If TES defaulted on or violated any term of the Loan Agreement, Brevet and Fourth Third had the right to accelerate the loan and/or charge a higher rate of interest on any past-due payments.[18]

The Loan Agreement designated Fourth Third as the Collateral Agent and the Loan Servicing Agent, making Fourth Third responsible for receiving and managing the collateral that secured the loans to TES and for ensuring that the proceeds generated through TES' sales of turbine equipment were properly applied according to the terms of the Loan Agreement.[19] Fourth Third was also responsible for enforcing the lenders' rights under the Loan Agreement. In the event of a default,

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[15] *Id.* at ¶19.

[16] *Id*. at ¶20.

[17] *Id.*

[18] *Id.* at ¶21.

[19] *Id.* at ¶¶22-23.

Fourth Third was either to accelerate the loan and collect payments, or ensure that TES paid a higher interest rate on past due payments.[20] Brevet and Fourth Third were to share each payment of principal and/or interest *pro rata* according to their percentage of contribution to the loan and Fourth Third was required to distribute the loan payments to Brevet at the same time it took its own share.[21]

Brevet's execution of the Loan Agreement was conditioned upon TES' execution of a Security Agreement (in which TES guaranteed the lenders a secured interest in, among other things, all of its inventory), a Guarantee Agreement and a Pledge Agreement whereby Natole and TES Holdings, as security for their guarantees, pledged their equitable interests in TES to Brevet and Fourth Third.[22] Additionally, in a document entitled "November 2008 Letter Agreement," Fourth Third promised Brevet that, among other things, it would act "[c]onsistent[ly] with its duty of good faith and fair dealing . . . using best efforts to accord equitable regard for the interests of each Lender. . . ." In addition to this broad commitment to honor its contractual obligations and to act in good faith, Fourth Third also committed to provide Brevet with information regarding TES on Brevet's request and to provide

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[20] *Id.* at ¶24.

[21] *Id.* at ¶25; *See* Loan Agreement §2.7(a).

[22] Compl. ¶27.

Brevet with all material information that Fourth Third received from TES immediately upon receiving such information.[23]

In January 2009, TES learned that one of its customers, Navasota Odessa Energy Partners, L.P. ("Navasota"), might bring breach of warranty claims against TES arising from TES' sale of $1.27 million worth of parts to Navasota in August 2008.[24] In response, TES set aside $400,000 from its Operating Account as a reserve for potential warranty liability, thereby significantly reducing TES' operating funds and necessitating the use of funds from its Investment Account to fund TES operations.[25] Neither TES nor Fourth Third informed Brevet of the warranty claims or the creation of the warranty reserve.[26]

On September 9, 2009, the parties entered into Amendment No. 1 to the Amended and Restated Senior Secured Loan Agreement (the "September Amendment").[27] One of the purposes of the September Amendment was clearly to establish how the proceeds from TES' sales of turbine equipment would be applied

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[23] *Id.* at ¶¶30, 32.

[24] *Id.* at ¶33.

[25] *Id.* at ¶34.

[26] *Id.* Brevet did not learn of the reserve and potential warranty liability until December 2009.

[27] *Id.* at ¶37.

to pay off the loan.[28] Accordingly, the September Amendment added a new mandatory repayment section, which provides in relevant part:

> **Mandatory Prepayments Relating to Excess Cash Flow:** Upon the sale of any Turbine Equipment, all proceeds from the sale will be paid by the purchasers of the Turbine Equipment directly into the Revenue Account (as defined in the LLC Agreement, as amended), as set forth in the LLC Agreement. On the applicable Interest Payment Date, the Borrower shall apply the proceeds from all sales in the following order:
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> (i) first, an amount equal to the pro rata portion for which proceeds have been received of the Cost of Goods Sold shall be applied to the Prepayment of the Loan;
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> (ii) second, an amount equal to the interest due for the applicable period shall be applied thereto and an amount equal to Quarterly Operating Expense for the ensuing quarter shall be deposited into the Operating Account (as such term is defined in the LLC Agreement);
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> (iii) third, to payment of capital expenditures, including refurbishment and acquisition of Turbine Equipment which are not included in the budgeted Quarterly Operating Expense, subject to the prior written consent of the Majority Lenders; and
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> (iv) fourth, to Prepayment of the Loan.

In connection with its execution of the September Amendment, TES warranted that no event of default or condition that would constitute default had occurred.[29] TES also promised that it had "duly performed and observed the covenants and undertakings set forth in the Loan [Agreement], and [that it] covenants and

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[28] *Id.*

[29] *Id.* at ¶41.

undertakes to continue to duly perform and observe each such covenants [sic] and undertakings [sic], as amended [by the September Amendment] so long as the Loan Agreement as amended hereby shall remain in effect."[30]

On February 5, 2010, TES sold $5.1 million of turbine equipment to Mitsubishi Power Systems Americas ("Mitsubishi").[31] Brevet alleges that TES did not apply the proceeds from this sale in the manner required by the September Amendment and further failed to respond to Brevet's requests for an accounting of the sale proceeds.[32] In March 2010, TES sold $925,000 of turbine equipment to PPL Generation. Brevet alleges that TES also failed to apply these proceeds in accordance with the September Amendment.[33]

On April 9, 2010, Fourth Third sent TES a notification of missed payments.[34] Brevet responded on April 15, 2010, by sending a letter notifying Fourth Third that TES still had not paid interest on the loan, nor had it made prepayments, as required by the Loan Agreement.[35] By letter dated April 22, 2010, Fourth Third admitted that

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[30] *Id.*

[31] *Id.* at ¶43.

[32] *Id.* at ¶¶43-44.

[33] *Id.* at ¶45.

[34] *Id.* at ¶46.

[35] *Id.* at ¶47.

it permitted TES to retain the proceeds from the sales to Mitsubishi and PPL Generation in order to meet TES' short-term liquidity needs.[36] Fourth Third suggested that TES should be given a working-capital facility in order to stay in business and that it had done everything it could do to maintain TES, thereby preserving the equity for its affiliates.[37] Fourth Third also declined to accelerate the Loan, as requested by Brevet, explaining:

> As you [Brevet] are aware, Section 6.1 of the Credit Facility clearly states that the Majority Lenders may instruct the collateral agent to accelerate the Loan. As you [Brevet] do not currently hold a large enough percentage of the Loan to permit you to act as Majority Lender, we [Fourth Third] respectfully decline to honor what we understood to be your request to accelerate . . . .[38]

Brevet again demanded that Fourth Third honor its obligations under the Loan Agreement in April 2010.[39] On May 6, 2010, Fourth Third responded by transferring to Brevet $708,333.00 which Fourth Third represented to be "a [partial] repayment of the Loan in connection with the available proceeds" from TES' sales to Mitsubishi and PPL Generation.[40] Fourth Third stated that, as Collateral Agent, it had

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[36] *Id.* at ¶51.

[37] *Id.*

[38] *Id.* at ¶52.

[39] *Id.* at ¶53.

[40] *Id.* at ¶54.

determined the "best way to maximize the repayment to the Lenders of TES' obligations under the Loan [was] through an orderly liquidation of the Collateral with the cooperation of [TES]."[41] In the meantime, TES failed to pay the outstanding principal and interest to Brevet when it became due on May 4, 2010.[42]

Fourth Third intended to sell the majority of the Collateral during 2010. As of June 18, 2010, however, TES had no significant pending order for the Collateral.[43] As a result, Fourth Third began marketing and selling the Collateral at a significant discount in order to satisfy its liquidation plan.[44] All the while, Fourth Third continued to advance monies to TES to fund its operating expenses.[45] Fourth Third also informed Brevet that it expected Brevet to reimburse it for a portion of the monies it advanced to TES, with interest, claiming that Fourth Third, in its role as Collateral Agent, must be reimbursed for expenses incurred in connection with the enforcement of the Lenders' rights under the Loan Agreement before it would distribute the proceeds of any sale of collateral to the Lenders.[46]

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[41] *Id.*

[42] *Id.* at ¶55.

[43] *Id.* at ¶56.

[44] *Id.*

[45] *Id.* at ¶57.

[46] *Id.* at ¶62.

On December 8, 2010, Brevet filed its Complaint against Fourth Third and TES for breach of the November 2008 Letter Agreement, breach of the Loan Agreement as amended by the September Amendment and, as to Fourth Third, for fraud. In lieu of an answer, Fourth Third filed a Motion to Dismiss Brevet's fraud claim. The motion has been briefed and argued and is now ripe for decision.

III.

In support of its Motion, Fourth Third argues that Brevet's fraud claim, alleging that Fourth Third fraudulently induced Brevet to enter into the September Amendment, is inconsistent with Brevet's breach of contract claim in which it seeks to enforce that same agreement.[47] According to Fourth Third, Brevet cannot seek to enforce the terms of the September Amendment and simultaneously argue that "the September Amendment never should have come into being."[48]

Fourth Third next argues that Brevet may not restyle its breach claim to state a claim for fraud because the alleged conduct that forms the basis of Brevet's breach claim is the same conduct upon which Brevet relies to support its fraud claim.[49] Fourth Third contends that courts will not countenance a fraud claim where the

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[47]Def.'s Mot. at ¶2.

[48]*Id.* at ¶4.

[49]*Id.* at ¶5.

relationship between the parties is addressed by the underlying contract.[50] Because the parties rights and obligations arise solely by contract, and because Brevet has alleged nothing more than that Fourth Third never intended to honor its obligations under the Loan Agreement; i.e., a "run-of-the-mill breach of contract claim," Fourth Third contends that Brevet "has not and cannot plead a viable fraud claim."[51]

Finally, Fourth Third contends that Brevet failed to plead its fraud claim with particularity. In this regard, Fourth Third contends that Brevet failed to plead with particularity: (a) how Brevet relied on the alleged omissions;[52] (b) what advantage Fourth Third obtained through its alleged fraud;[53] (c) how Fourth Third's alleged omissions caused Brevet any injury;[54] and (d) how specifically Brevet was damaged by entering into the September Amendment.[55]

In response, Brevet argues that a party may plead a breach of contract claim and a fraud claim together where the complaint "alleges a misrepresentation or concealment of 'a past or contemporaneous fact or future event that falsely implied

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[50] *Id.* at ¶6.

[51] *Id.* at ¶7.

[52] *Id.* at ¶8.

[53] *Id.* at ¶¶8-9.

[54] *Id.* at ¶10.

[55] *Id.* at ¶¶11-12.

an existing fact.'"[56] Brevet contends that Fourth Third's failure to disclose the warranty reserve and potential liability at the time of the September Amendment constitutes a "past or contemporaneous fact or a future event" that falsely implied an existing fact.[57] Thus, Brevet argues, it is not that Fourth Third merely promised to disclose warranty issues and failed to do so, but rather that, at the time of the September Amendment, Fourth Third had both failed to disclose the warranty issues ***and*** submitted incomplete financial statements that deliberately omitted the warranty issues.[58] Had it known of the warranty issues, Brevet argues that it would not have entered into the September Amendment as written, but rather would have addressed the warranty reserve issues within that document.[59]

Brevet additionally argues that it has adequately pled reliance to support its fraud claim by alleging that it acted based upon the incorrect assumption that no material adverse events had occurred that would impair TES' ability to pay its debt to Brevet.[60] The September Amendment, Brevet observes, included a definition of

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[56]Pl.'s Resp. to Def.'s Mot. ("Pl.'s Resp.") at 12 (quoting *Grunstein v. Silva*, 2009 WL 4698541, *5 (Del. Ch. Dec. 8, 2009)).

[57]*Id.* at 13.

[58]*Id.*

[59]*Id.* at 14.

[60]*Id.*

"quarterly operating expenses" that did not directly address the warranty issues.[61] Brevet further argues that it adequately pled that Fourth Third obtained a benefit from the alleged fraud by pleading that Fourth Third induced Brevet to agree to a priority of prepayments from proceeds of the primary collateral for the TES loan that failed to account for the warranty issues. According to Brevet, Fourth Third's alleged fraudulent misrepresentations allowed Fourth Third to place a preference on its equity interest to the detriment of Brevet's interest.[62]

Finally, Brevet contends that it has adequately pled that Fourth Third's concealment of the warranty issues caused Brevet injury and damages.[63] The warranty issues, Brevet argues, constituted a material fact that it knew nothing about and, as a result, Brevet agreed to further exposure on its loan to TES that did not explicitly address the risk posed by the warranty issues.[64] Fourth Third was thus able to allow TES to create the warranty reserve without protecting Brevet's rights as a creditor, improperly diverting funds that should have been paid to Brevet.[65] Brevet argues that, at a minimum, Fourth Third's concealment deprived Brevet of its ability

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[61] *Id.*

[62] *Id.* at 15.

[63] *Id.*

[64] *Id.* at 16.

[65] *Id.*

to protect against such losses at the time the September Amendment was executed or to seek legal remedies at that time.[66]

IV.

When considering a Motion to Dismiss under Superior Court Rule 12(b)(6), the Court must assume that all well pled facts in the complaint are true.[67] A complaint will not be dismissed unless the plaintiff would not be entitled to recover under any reasonable set of circumstances susceptible of proof.[68] Stated differently, a complaint may not be dismissed unless it is clearly not viable, which may be determined as a matter of law or fact.[69] "Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to dismiss."[70]

V.

The parties raise the following issues: (A) whether Brevet's fraud claim is fatally inconsistent with its breach of contract claim; (B) whether Brevet has impermissibly cast its breach of contract claim as a fraud claim; and (C) whether Brevet has pled fraud with the requisite particularity. The Court will address the

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[66] *Id.*

[67] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

[68] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

[69] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[70] *Criden v. Steinberg*, 2000 WL 354390, at *2 (Del. Ch. Mar. 23, 2000) (citation omitted).

issues in turn.

A. Brevet's Fraud Claim Is Not Fatally Inconsistent With Its Breach Of Contract Claim

Fourth Third argues that Brevet's breach of contract claim cannot be reconciled with its fraud claim because Brevet seeks to enforce the September Amendment while simultaneously arguing that it never would have agreed to the September Amendment but for Fourth Third's fraud. In support of its argument, Fourth Third cites to only one case, which applied Pennsylvania and Texas law.[71] *Brown*, in turn, cites to Professor Williston's seminal treatise on contract law in which the author states:

> One who has been induced by fraud to enter into a contract may either rescind the contract and recover what he has parted with or affirm the contract and sue for damages caused by the fraud. He cannot do both, because the two remedies are inconsistent and mutually exclusive. However, we think the rule denying damages in case of rescission must be limited to denial of damages that in effect permit one to rescind a bargain and at the same time claim the damages of the bargain. Damages incidental to the contract and caused directly by the fraud may be allowed upon rescission.[72]

The Court has no reason to doubt that the proposition advanced in the Williston treatise and endorsed in *Brown* comports with Delaware law, although neither the

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[71] *See* Def.'s Mot. at ¶4 (citing *Brown v. SAP America, Inc.*, 1999 WL 803888, *9 (D. Del. Sept. 13, 1999) ("[P]laintiff cannot spare his breach of contract and warranty claims from the Agreement's limited liability provisions by asserting fraudulent inducement of the agreement itself.")).

[72] 27 WILLISTON ON CONTRACTS §69:61 (4th ed. May, 2011) (citations omitted).

parties nor the Court have located Delaware authority (applying Delaware law) that addresses the issue. The real question is whether the proposition even applies here. Brevet does not overtly seek rescission of the Loan Agreement or the September Amendment by virtue either of Fourth Third's alleged fraud or breach of the agreements. Instead, it appears that Brevet seeks to "affirm the contract(s) and sue for damages caused [both] by the fraud"[73] ***and*** the breach of contract(s). This, of course, assumes that the fraud and breach damages are somehow distinct from one another (an assumption that will be tested later in this opinion).

Pursuant to Super. Ct. Civ. R. 8(a), "[r]elief in the alternative or of several different types may be demanded." Delaware courts have, on occasion, heard claims for both breach of contract and fraud arising from and relating to the same contract.[74] The fact that the two claims are pled simultaneously is not, as Fourth Third alleges, *ipso jure* fatal to Brevet's fraud claim. Whether *vel non* Brevet has adequately distinguished its claims of damages with respect to its fraud and breach claims, such that it can satisfy its enhanced pleading obligations for fraud under Rule 9,[75] remains

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[73] *Id.*

[74] *See e.g. Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405 (Del. Ch. Dec. 22, 2010) (allowing plaintiff to proceed on a breach claim and a fraud claim arising from the same contract); *Grunstein v. Silva*, 2009 WL 4698541 (Del. Ch. Dec. 8, 2009) (same).

[75] Del. Super. Ct. Civ. R. 9(b).

an open question to be addressed below.

B. Brevet Has Not Impermissibly Recast Its Breach of Contract Claim As A Fraud Claim

Fourth Third next argues that Brevet has impermissibly restyled its contract claim as a claim for fraud.[76] "One cannot 'bootstrap' a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations."[77] Stated differently, "[r]epresentations as to what will be performed or will take place in the future are regarded as predictions and hence are not fraudulent. . . ."[78] To plead simultaneously a breach of contract and fraud claim arising from the same transaction or series of transactions, the alleged misrepresentation(s) "must involve either a 'past or contemporaneous fact or a future event that falsely implies an existing fact.'"[79]

Delaware courts have held that the identification of persistent misrepresentations can meet the burden of alleging "past or contemporaneous facts

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[76]Def.'s Mot. at ¶5.

[77]*Brown*, 1999 WL 803888 at *8 (quoting *Diamond Elec., Inc. v. Delaware Solid Waste Auth.*, 1999 WL 160161, *7 (Del. Ch. Mar. 15, 1999)).

[78]*Grunstein*, 2009 WL 4698541 at *13.

[79]*Id.* at *13 (citation omitted).

that falsely imply an existing fact."[80] Brevet has pled that Fourth Third misrepresented and concealed the warranty issues by intentionally omitting the potential warranty claims and warranty reserve from TES' audited financial statements for 2008, and quarterly financial statements in March and June 2009.[81] These allegations constitute misrepresentations of past or contemporaneous facts that falsely implied an existing fact (i.e. that TES had no claims or potential claims against it that would impair its ability to repay the loan). As such, these allegations adequately separate and distinguish the factual predicates for TES' fraud and breach of contract claims.

C. Brevet Has Failed To Plead Fraud With The Requisite Particularity

Fourth Third's final argument is that the Complaint fails to state a viable claim of fraud by failing to plead the elements with the requisite particularity. Specifically, Fourth Third contends that Brevet has failed to plead: (1) how Brevet relied on the alleged omissions; (2) what benefit Fourth Third obtained through its alleged fraud; and (3) how Fourth Third's alleged omissions caused Brevet injury.

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[80] *Id.* (holding that a series of alleged misrepresentations that came shortly after the formation of a "purported partnership and occurred concurrently with persistent representations [by defendant] that such a partnership existed" were sufficient to show that defendant intended to induce performance by the plaintiffs without any intention of complying with their agreement).

[81] Compl. ¶85.

To state a claim for fraud, a complaint must allege:

> (1) that a defendant made a false representation, usually one of fact; (2) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the plaintiff to act or refrain from acting; (4) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of her reliance on the representation.[82]

Fraud must be pled with particularity.[83] In order to meet the particularity requirement, 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 representation."[84]

Upon reviewing the Complaint in a light most favorable to Brevet, the Court is satisfied that Brevet has adequately pled that Fourth Third knowingly made a false representation. Brevet alleges that Fourth Third knowingly represented and withheld information concerning the financial health of TES, specifically the existence of the potential warranty claims and the creation of the warranty reserve.[85] In this regard, Brevet alleges that the misrepresentation and/or failure to disclose occurred not only

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[82] *Grunstein*, 2009 WL 4698541 at *12; *Narrowstep*, 2010 WL 5422405 at *12.

[83] Super. Ct. Civ. R. 9(b).

[84] *Grunstein*, 2009 WL 4698541 at *14; *Narrowstep,* 2010 WL 5422405 at *12.

[85] Compl. ¶35.

during the negotiations leading up to the September Amendment, but also in TES' quarterly financial statements for March and June, 2009 and audited statements for 2008.[86] According to Brevet's complaint, given the contractual relationship between TES and Fourth Third, TES could not create the warranty reserve without Fourth Third's knowledge and approval (which Brevet alleges Fourth Third readily provided).[87]

The Complaint also adequately pleads how Fourth Third intended to benefit or gain from the false representations and how Brevet relied upon the alleged omissions. In this regard, Brevet alleges that Fourth Third intended for Brevet to rely upon Fourth Third's allegedly false representations so that Brevet would continue to participate as a lender to TES.[88] Brevet additionally alleges that Fourth Third induced Brevet to agree to a priority of prepayments without accounting for the warranty issues, thereby allowing Fourth Third to prioritize its interests ahead of Brevet's.[89] Brevet contends that if Fourth Third had disclosed the warranty issues, Brevet would not have agreed to the September Amendment.[90] Brevet also claims that it entered

[86]Compl. ¶¶35-36, 42.

[87]*Id.* at ¶36.

[88]*Id.* at ¶¶87-88.

[89]*Id.* at ¶¶40-42.

[90]*Id.* at ¶88.

into the September Amendment based upon the incorrect assumption that no materially adverse events had occurred that would impair TES' ability to pay its debt to Brevet.[91] These facts adequately plead reliance.

Of concern to the Court, however, is Brevet's failure to plead with particularity how it was harmed by Fourth Third's alleged fraud over and above the damages caused by the alleged breach of contact. "Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages as a result of a defendant's actions," and those damages must be based on identifiable facts.[92] Brevet contends that had it known of the warranty issues, it would not have entered into the September Amendment. Because it entered into the September Amendment without such knowledge, Brevet contends that it "suffered damages."[93] Beyond this general allegation of damages, the Complaint fails in any meaningful way to identify what impact the September Amendment actually had on Brevet's interest.

As alleged in the Complaint, the September Amendment came about at Brevet's request in order to more "clearly establish how the proceeds . . . would be

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[91]Compl. ¶¶84-85.

[92]*Dalton v. Ford Motor Co.*, 2002 WL 338081, *6 (Del. Super. Feb. 28, 2002)

[93]*Id.* at ¶89.

applied to pay off the loan."[94] Brevet has alleged that both defendants breached the September Amendment and that this breach has caused identifiable damages. Beyond these damages, the Complaint fails to allege what Brevet would have bargained for or, more importantly, *could* have bargained for, to better protect its interests under the Loan Agreement.[95] Nor does the Complaint otherwise attempt to delineate any damages specifically attributable to the fraud.

When the plaintiff "fail[s] to allege legally cognizable damages suffered as a result of reliance on any false representation," the claim must be dismissed.[96] Simply put, Brevet has failed to identify any "cognizable injury"[97] within the Complaint (with requisite particularity or otherwise) that can be attributed to the alleged fraud.[98]

VI.

Based on the foregoing, Fourth Third's Motion to Dismiss Count III of Brevet's Complaint must be **GRANTED.**

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[94]Compl. ¶38.

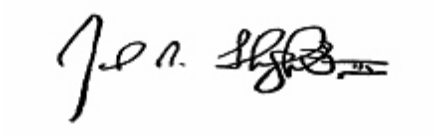
[95]Compl. ¶37.

[96]*Manzo v. Rite Aid Corp.*, 2002 WL 31926606, *5 (Del. Ch. Dec. 19, 2002).

[97]*Id.*

[98]*Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 970 (Del. Ch. 2004) ("[I]njury to the plaintiff as a result of such reliance, so-called loss causation . . . must be plead with particularity, not generality.").

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary