IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KT4 PARTNERS LLC, and SANDRA MARTIN CLARK, as trustee for MARC ABRAMOWITZ IRREVOCABLE TRUST NUMBER 7,	)	
Plaintiffs,	)	C.A. No. N17C-12-212 EMD CCLD
v.	)	
PALANTIR TECHNOLOGIES INC., and DISRUPTIVE TECHNOLOGY ADVISERS LLC,	)	
Defendants.	)	

Submitted: April 12, 2021[1]
Decided: June 24, 2021

Upon Defendant Palantir Technologies Inc.'s Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART

Upon Defendant Disruptive Technology Advisers LLC's Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART

Bartholomew J. Dalton, Esquire, Michael C. Dalton, Esquire, Dalton & Associates, P.A., Wilmington, Delaware, Barry S. Simon, Esquire (*argued*), Jonathan B. Pitt, Esquire, Stephen Wohlgemuth, Esquire, Williams & Connolly LLP, Washington, D.C., *Attorneys for Plaintiffs KT4 Partners LLC and Sandra Marsha Clark, as Trustee for Marc Abramowitz Irrevocable Trust Number 7.*

Blake Rohrbacher, Esquire, Kelly E. Farnan, Esquire, Kevin M. Gallagher, Esquire, Katharine L. Mowrey, Esquire, Ryan D. Konstanzer, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware, John C. Hueston, Esquire, Moez M. Kaba Esquire (*argued*), Hueston Hennigan LLP, Los Angeles, California, Kevin J. Orsini, Esquire, Rory A. Leraris, Esquire, Cravath Swaine & Moore LLP, New York, New York, *Attorneys for Defendant Palantir Technologies Inc*.

Elena C. Norman, Esquire, Paul J. Loughman, Esquire, Lakshmi A. Muthu, Esquire, Caleb G. Johnson, Esquire, Young Conaway Stargatt & Taylor LLP, Wilmington, Delaware, John Douglas Bethay, III, Esquire (*argued*), Maynard Cooper & Gale LLP, Birmingham, Alabama, *Attorneys for Defendant Disruptive Technology Advisers LLC*.

[1] D.I. No. 476.

DAVIS, J.

I. INTRODUCTION

This civil action is assigned to the Complex Commercial Litigation Division of this Court. Plaintiffs KT4 Partners LLC ("KT4") and Sandra Marsha Clark, as trustee for the Marc Abramowitz Irrevocable Trust Number 7 (the "Trust" and, collectively with KT4, the "Plaintiffs") are stockholders of Defendant Palantir Technologies Inc. ("Palantir" or the "Company"). Plaintiffs allege Palantir and Defendant Disruptive Technology Advisers LLC ("DTA" and, collectively with Palantir, the "Defendants") tortiously interfered with a prospective business relationship Plaintiffs had with CDH Investments ("CDH") to sell Plaintiffs' stock through a secondary securities transaction. Plaintiffs also allege that Defendants' conspired to steer CDH away from Plaintiffs so that Defendants could appropriate the stock transaction for themselves.

On December 14, 2017, Plaintiffs filed a complaint (the "Complaint")[2] seeking compensatory and punitive damages from Defendants for (1) tortious interference with prospective contractual relations; and (2) civil conspiracy to commit tortious interference with prospective contractual relations. On February 16, 2018, Defendants moved to dismiss the Complaint for failure to state a claim upon which relief can be granted.[3] On August 22, 2018, the Court issued a decision (the "MTD Decision") that denied the motions.[4]

[2] D.I. No. 1, Compl.
[3] D.I. Nos. 38, 42.
[4] D.I. No. 84; *see generally KT4 Partners LLC v. Palantir Techs., Inc.*, 2018 WL 4033767 (Del. Super. Aug. 22, 2018).

On December 11, 2020, Defendants moved for summary judgment (the "Motions").[5] Plaintiffs opposed the Motions on January 11, 2021.[6] On March 23, 2021, the Court held a hearing on the Motions.[7] After the hearing, the Court took the Motions under advisement.

For the reasons set forth below, the Court will **GRANT** the Motions **IN PART** and **DENY** the Motions **IN PART**.

II. BACKGROUND[8]

A. THE PARTIES AND RELEVANT NON-PARTIES

1. Parties

KT4 is a Delaware limited liability company headquartered in North Carolina.[9] The Trust is a Delaware trust headquartered in North Carolina.[10] Palantir is a Delaware corporation headquartered in California.[11] DTA is a Delaware limited liability company headquartered in California.[12] DTA often assisted with primary investments in Palantir on the Company's behalf.[13]

---

[5] D.I. Nos. 689, 693.
[6] D.I. Nos. 703, 706.
[7] D.I. No. 742. At the hearing, the Court also heard argument on two *Daubert* motions filed by Plaintiffs. The Court will resolve the *Daubert* motions by separate decision.
[8] The Court recites the facts, many of which are in genuine dispute, from the Complaint and the exhibits attached to the Motions and the Plaintiffs' opposition. Citations to Plaintiffs' exhibits are titled "PX [#]". Citations to Defendants' exhibits are titled "DX [#]". Where appropriate, pincites to the exhibits reference the exhibits' Bates numbers. The Court has drawn inferences from the record in the light most favorable to Plaintiffs.
[9] PX 1 at 19-21; PX 54 at 71. The stated location of KT4's principal place of business is based on Mr. Abramowitz's undisputed testimony that all KT4's business records and accounts are with the Trust in North Carolina. Based on the same testimony, it is not clear whether Mr. Abramowitz himself is a California resident. In any event, Mr. Abramowitz is not a party to this lawsuit, making his personal residence immaterial. For that reason, and because Defendants cite no authority for the proposition that an LLC's residence is indistinguishable from that LLC's managing member's residence, the Court finds that KT4 is headquartered in North Carolina.
[10] *Id.*
[11] Compl. ¶¶ 4-5.
[12] *Id.*
[13] *E.g.*, *id.* ¶ 16.

2. Relevant non-parties

CDH is a Chinese private equity firm that engaged Plaintiffs in sale discussions to acquire Plaintiffs' Palantir stock.[14] Brooklands Capital Strategies ("Brooklands") was the acquisition vehicle CDH employed to potentially purchase Plaintiffs and other stockholders' Palantir stock.[15] Amy Gussin served as the lead negotiator on behalf of CDH in her role at Brooklands.[16] Where appropriate, the Court will refer to CDH and Brooklands as the "Buy-Side."

Marc Abramowitz is KT4's managing member and the Trust's grantor.[17] Mr. Abramowitz hired Stephen Brown as Plaintiffs' lead broker during Plaintiffs' sale discussions with the Buy-Side.[18] BTIG, LLC is a brokerage firm that represented other Palantir stockholders in sale discussions with the Buy-Side.[19] Where appropriate, the Court will refer to Mr. Brown and Plaintiffs as the "Selling Group," which is the name Mr. Brown used to delineate his clients from BTIG and its clients.[20]

Kevin Kawasaki is the Company's Global Head of Business Development.[21] Alexander Davis and Alexander Fishman are DTA principals.[22] Mr. Davis and Mr. Fishman also are affiliated with SF Sentry Securities, Inc ("SF Sentry").[23] SF Sentry served as Palantir's lead

[14] *E.g.*, *id.* ¶ 1.
[15] *E.g.*, *id.* ¶ 23.
[16] *E.g.*, *id.*
[17] *Id.* ¶¶ 6-7.
[18] *E.g.*, *id.* ¶ 24.
[19] *E.g.*, PX 4. BTIG maintained a separate case against Defendants that was set to be consolidated with this case. *See* C.A. No. N19C-08-314 EMD CCLD. BTIG voluntarily dismissed its case with prejudice. *See id.* D.I. 188.
[20] *E.g.*, PX 4.
[21] *See e.g.*, Compl. ¶ 27.
[22] *E.g.*, *id.* ¶ 16.
[23] *E.g.*, *id.*

broker-dealer in connection with Palantir's Series K primary equity offering that relates to this dispute.[24]

B. THE PREFERRED STOCK PURCHASE AGREEMENTS

At various times between June 15, 2006 and November 17, 2009, KT4 became a Palantir preferred stockholder by participating in the Company's Series B, C, and D primary equity offerings.[25] On July 5, 2011, the Trust became a Palantir preferred stockholder by participating in the Company's Series E primary equity offering.[26] Plaintiffs collectively acquired several hundred thousand preferred shares in the Company.[27] Palantir and Plaintiffs memorialized these investments in Preferred Stock Purchase Agreements (the "PSPAs").[28] Palantir and Plaintiffs are parties to the PSPAs.[29] The PSPAs declare that the PSPAs are "governed by," and must be "construed under[,] the laws of California."[30]

The PSPAs had the purpose of imposing restrictions on Plaintiffs' right to sell the Company's stock to third parties.[31] Sale restrictions were necessary because, at the time the PSPAs were executed, Palantir was a privately-held corporation that, under federal securities law, was limited to selling its equity in statutorily-exempt private placements.[32] Sale restrictions

---

[24] *E.g.*, *id.* ¶ 29.
[25] *See, e.g.*, DX 67 (Series B); *id.* at PALANTIR_BR00005197 (schedule of investors listing KT4); Compl. ¶ 11.
[26] PX 19; *id.* at KT4_Trust00003061 (schedule of investors listing the Trust).
[27] *See, e.g.*, DX 67 at PALANTIR_BR00005197; PX 19 at KT4_Trust00003061.
[28] *See generally* DX 67. As all the PSPAs use identical language, the Court refers to the Series B PSPA when citing to the PSPAs.
[29] *See, e.g.*, DX 67 at PALANTIR_BR00005180 (signature of Alexander Karp, Palantir's Chief Executive Officer); *id.* at PALANTIR_BR00005184 (signature of KT4); PX 19 at KT4_Trust00003039 (signature of Karp); *id.* at KT4_Trust00003054 (signature of the Trust).
[30] PSPAs § 6.3.
[31] *E.g.*, *id.* §§ 3.5, 3.6, 3.7.
[32] *See, e.g.*, *id.* § 3.5 (declaring that the investors are exempt "Accredited Investors" as that term is defined by "SEC Rule 501 of Regulation D"); *id.* § 3.6 (explaining that the Plaintiffs' shares are "restricted securities" under federal securities law); *id.* § 3.8 ("These securities have not been registered under the Securities Act of 1933, as amended. They may not be sold, offered for sale, pledged or hypothecated . . . [unless Palantir determines] that [the securities'] registration is not required or unless sold pursuant to Section 144 of the [Securities] Act." (internal quotation marks omitted)); *see also id.* § 6.11 (explaining that sales may not be executed unless the sales are exempt under state "blue sky" securities law equivalents); DX 65 (claiming exemption from securities registration in Palantir Series K filing).

also were necessary because an unchecked secondary sale of the Company's preferred stock could expose the Company to liability under the Securities Act of 1933 for failing to comply with a number of registration obligations enforced by the United States Securities & Exchange Commission (the "SEC") against publicly-traded firms.[33] To avoid these and analogous penalties, the Company required Plaintiffs' consent to a contractual term titled "Further Limitations on Disposition."[34] In relevant part, that term provides the following.

> Investors further agree not to make any disposition of all or any portion of the Securities unless and until: . . .
>
> > (i) Such Investor shall have notified [Palantir] of the proposed disposition and shall have furnished [Palantir] with a detailed statement surrounding the circumstances of the disposition[;] and
> >
> > (ii) if reasonably requested by [Palantir], such Investor shall have furnished [Palantir] with an opinion of counsel, reasonably satisfactory to [Palantir] that such disposition will not require registration of such shares under the [Securities] Act.[35]

The PSPAs are silent on Palantir's duties or additional rights with respect to the information the Company receives from preferred stockholders about any proposed outside transactions.

C. PLAINTIFFS' POTENTIAL TRANSACTION

1. The Buy-Side engages with Plaintiffs and BTIG.

Plaintiffs decided to sell their Palantir stock through a secondary securities transaction in the third quarter of 2015.[36] As part of this process, Mr. Abramowitz was introduced to Ms. Gussin, who represented the Buy-Side.[37] Brooklands wanted to negotiate an acquisition of the Company's stock from "an early investor" for CDH, *i.e.*, to secure a secondary purchase of

[33] *See, e.g.*, PSPAs § 3.8; *see generally* Compl. ¶¶ 4-5 (describing this securities exemption issue further).
[34] PSPAs § 3.7.
[35] *Id.* §§ 3.7(b)(i)-(ii) (formatting added).
[36] *E.g.*, PX 1 at 32, 278.
[37] *E.g.*, *id.*

preferred stock from a stockholder who participated in the Company's older preferred equity rounds.[38] After making contact, Mr. Abramowitz retained Mr. Brown to negotiate with the Buy-Side on the Selling Group's behalf.[39] Mr. Brown learned, early in the negotiation process, that other Palantir stockholders were interested in selling their stock through a secondary transaction.[40] BTIG represented those stockholders.[41] The Selling Group and BTIG collaborated to secure CDH's acceptance.[42]

2. CDH sets an aspirational transaction price and outlines a transactional structure.

During the fall of 2015, the Buy-Side communicated with the Selling Group and BTIG about the potential sale "daily."[43] The Buy-Side used "Project Christmas" to indicate the Buy-Side's desire to close the transaction by the end of Q4 2015.[44] Brooklands regularly sought progress updates, informing the Selling Group and BTIG that CDH had at least $100 million "ready to go."[45] Brooklands also informed BTIG that, at the conclusion of a three-hour meeting with CDH, CDH decided it would purchase up to $300 million of the Company's stock.[46] Both sides ultimately agreed that $300 million would be the "notional amount" on which the transactional structure would be based.[47] CDH likely would "tranche" any finalized investment into preferential segments, making the $300 million notional amount more of a ceiling.[48] That

[38] PX 6 at 130, PX 11 at Brooklands-000047; *see* PX 3 at 90-91 (emphasizing CDH's interest in "founder" shares). At the time of the disputed events, Palantir was offering a Series K preferred stock primary round. DX 36-37. As a result, it is reasonable to infer that the Plaintiffs' Series B, C, D, and E preferred stock was facially more valuable to CDH.
[39] *E.g.*, PX 2, PX 8.
[40] *E.g.*, PX 3 at 38, 140.
[41] *Id.*
[42] *Id.*
[43] PX 6 at 161.
[44] *E.g.*, PX 6 at 156, 161.
[45] PX 4.
[46] PX 6 at 134-35, 150-52; PX 7 at Brooklands-000201; PX 13.
[47] PX 12 at 84-85; *see* DX 5 at Brooklands-000866 (CDH states it is "serious about the project" and affirms that $300 million is the number it had been committed to).
[48] PX 7 at Brooklands-000201; PX 10 at 77; PX 14 at Brooklands-000798.

structure, had it been executed, would have allowed the Plaintiffs' stock to be acquired by CDH ahead of, or possibly instead of, BTIG's clients' stock.[49]

3. CDH selects price ranges but does not commit to a per-share price.

CDH priced Palantir common stock at $8.80 to $9.20.[50] CDH priced Palantir preferred stock at $10.00 to $10.70.[51] CDH was not willing to deviate from those numbers. CDH rejected contrary proposals. For example, on December 2, 2015, BTIG met with Brooklands about BTIG's pricing. BTIG insisted on $10.70 for BTIG's clients' common stock and $11.38 for their preferred stock.[52] The Buy-Side rejected BTIG's proposal.[53] In rejecting that proposal, Brooklands noted that the Selling Group was willing to stay within the parameters the Buy-Side outlined, suggesting the Selling Group's pricing was more attractive and viable.[54] BTIG agreed. According to BTIG, Plaintiffs "had the best pricing" in comparison to BTIG's clients. [55] BTIG also noted that CDH appeared "the most interested" in Plaintiffs' stock.[56] Recognizing this, BTIG resolved to take more reasonable positions so as to facilitate the larger sale.[57] BTIG stated its clients had "flexibility" on price per-share.[58] For Brooklands, BTIG's concessions made "the opportunity" with CDH more "formal" or realistic.[59]

The Buy-Side, however, did not conclusively determine the price CDH was willing to pay per share. Brooklands provided that CDH wanted to "cherry pick what [it] [thought was] the

[49] PX 7 at Brooklands-000201; PX 10 at 77.
[50] PX 15 at BROWN000003.
[51] *Id.*
[52] PX 14 at Brooklands-000798.
[53] *Id.*
[54] *Id.*; *see* PX 13 at Brooklands-000899 (identifying the Selling Group's preferred stock pricing as the most competitive).
[55] PX 12 at 107.
[56] *Id.*
[57] *Id.* at 99.
[58] *Id.* at 99-100, 121, 265.
[59] *Id.* at 100.

best value," rather than accepting a "blended price in order to move the entire block of $300 [] [million]."[60] It appears that the Buy-Side was closer to Plaintiffs than any other seller.[61] But, on the present record, the Court is not aware of an actual agreement by CDH on a per-share price. That is so even after crediting BTIG's testimony that CDH's distance from the sellers on a per-share price was not "material."[62] The Court notes that immaterial disagreement seems to imply that there was no actual agreement by CDH on a per-share price. By consequence, that also means there was no actual agreement by CDH on a per-share price for Plaintiffs' stock either.[63]

4. CDH demands due diligence, which the Selling Group and BITG do not complete.

In early December 2015, and shortly after BTIG's per-share price adjustments, the Buy-Side demanded due diligence on the Company.[64] CDH's diligence demands were extensive. CDH demanded due diligence on the Company's (i) past and present financial performance; (ii) future financial outlook; (iii) internal controls; (iv) prospects of going public; (v) overall valuation and goodwill (including the Company's assumptions and models); (vi) tangible and intangible assets; (vii) investments in research and development; (viii) marketing strategies; and (ix) employee dynamics.[65] Some members of the Selling Group reacted to CDH's demands

---

[60] PX 14 at Brooklands-000798.
[61] *Id.*
[62] *E.g.*, PX 12 at 251 (BTIG's testimony).
[63] To support an actual agreement on a per-share price for Plaintiffs' stock, Plaintiffs rely on Mr. Brown's testimony. *E.g.*, PX 3 at 98-99, 314-15. But Mr. Brown's testimony on this point is hearsay. Mr. Brown testifies to off-the-record conversations he had with Ms. Gussin during which Mr. Brown says Ms. Gussin confirmed CDH's agreement on a per-share price for Plaintiffs' stock. Plainly, Plaintiffs offer Mr. Brown's testimony for its truth. Plaintiffs have not made any arguments regarding the admissibility of Mr. Brown's testimony. And the Court cannot consider "inadmissible hearsay" on a motion for summary judgment. *Williams v. United Parcel Serv. of Am., Inc.*, 2017 WL 10620619, at *2 (Del. Super. Nov. 9, 2017) (citing *Cont'l Cas. Co. v. Ocean Accident & Guar. Corp.*, 209 A.2d 743, 747 (Del. Super. 1965)); *see, e.g.*, *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 367 (Del. Ch. 2008) (declining to consider hearsay statements on summary judgment where plaintiff "made no effort whatsoever to find an exception permitting their admissibility"); *see generally* Del. R. Evid. 801. The Court notes that Plaintiffs' may seek admission of Mr. Brown's statements at trial either under a hearsay exception or for a non-hearsay purpose. Here, however, in the absence of argument to the contrary, the Court agrees with Defendants that Mr. Brown's hearsay statements cannot create a genuine fact issue on whether CDH committed to a per-share price for Plaintiffs' stock.
[64] PX 16.
[65] *Id.* §§ 1.1.2, 1.1.3, 1.3.1, 1.3.2, 1.4.1, 1.5, 1.6, 2.

negatively.[66] Given the breadth of the demands and that Palantir was a privately-held company, some members of the Selling Group doubted that CDH's diligence demands could be met.[67] Indeed, Mr. Abramowitz opined that Brooklands must "control" CDH's expectations.[68] Ultimately, no diligence was conducted by Plaintiffs.

The record, however, reflects countervailing interpretations of CDH's demands. Brooklands testified that CDH knew it was unlikely to obtain most of the diligence it sought.[69] CDH itself acknowledged the same.[70] Instead, Brooklands testified that CDH likely would be comfortable investing in Palantir if CDH merely were given high-level financial reports and a meeting with the Company's executives.[71] In addition, CDH invested $40 million of its own capital in the Company through a different acquisition vehicle without receiving any of the due diligence it had demanded.[72] CDH's $40 million investment was made contemporaneously with the sale discussions between the Buy-Side and Plaintiffs.[73] The impact of CDH's December 2015 diligence demands, on the proposed transaction's closing, is unclear on this record.

5. Palantir indicates a willingness to assist Plaintiffs with due diligence and the sale.

CDH's due diligence demands would necessitate Palantir's cooperation. The Selling Group and BTIG therefore contacted Palantir. On December 7, 2015, Palantir's former Chief Financial Officer, Colin Anderson, responded.[74] Mr. Anderson stated that Palantir would be "delighted to help" and wanted more information about the potential transaction in order to "get

[66] *E.g.*, DX 21 (Brown), DX 33 (Abramowitz); *see also* DX 6 at 176-77 (representative of Brooklands).
[67] *Id.*
[68] DX 33.
[69] PX 6 at 171-72.
[70] PX 7 at Brooklands-000201.
[71] PX 6 at 232-33.
[72] PX 9 at 26-27, 40, 85-97, 94-95, 111-12.
[73] *Id.* at 111-12, 117.
[74] PX 21 at Palantir_KT4_00043705.

the ball rolling."[75] Mr. Anderson obtained CDH's due diligence requests and reassured that, despite the requests' size, Palantir would answer as many of CDH's questions as Palantir could.[76] Moreover, Palantir's current Chief Financial Officer, David Glazer, testified that the Company's involvement was doubly essential. Not only did Palantir need more information as a practical matter, but also Mr. Glazer testified that Palantir mandated notice of any proposed secondary sale of the Company's stock.[77]

The Selling Group, BTIG and Brooklands met on December 10, 2015.[78] These parties met to coordinate and streamline the proposed transaction's current details so as to give the Company a full overview of the proposed transaction.[79] At the conclusion of that meeting, these parties designated Rosco Hill, a member of the Selling Group, to debrief the Company on the proposed transaction.[80] Mr. Hill updated the Company on the proposed transaction.[81] The Company, after receiving sufficient information from Mr. Hill, agreed to host a diligence meeting with the Buy-Side at Palantir's headquarters.[82] The parties scheduled the diligence meeting for December 15, 2015.[83]

[75] *Id.*
[76] PX 12 at 70, 219; PX 17.
[77] PX 18 at 41-42; *see id.* at 40-41 (describing Palantir as a "transfer agent" for secondary securities sales); *see also* PSPAs § 3.7 (requiring notice of secondary securities transactions).
[78] *See* PX 12 at 135; PX 13 at 135-138.
[79] PX 3 at 173.
[80] *Id.* at 163, 194-95, 236; PX 6 at 246, 249.
[81] *See* PX 20 at 48-49, 90-91.
[82] PX 21 at Palantir_KT4_00002304.
[83] *Id.*

D. DEFENDANTS' ALLEGED INTERFERENCE AND RELATED MISCONDUCT

1. Palantir cancels the diligence meeting and cuts off contact with Plaintiffs.

Palantir cancelled the diligence meeting.[84] Palantir provided no explanation for the cancellation.[85] Palantir also did not answer a request to reschedule the diligence meeting.[86] Mr. Kawasaki then told the Company's staff to "shut down all interaction" with Brooklands, the Selling Group, and BTIG.[87] Mr. Kawasaki seems to have failed to preserve subsequent, electronically-stored messages related to that directive.[88]

2. The Company and DTA.

Next, on December 18, 2015, Mr. Kawasaki contacted Mr. Fishman.[89] Mr. Kawasaki informed Mr. Fishman that Palantir "refused to meet" with Brooklands.[90] Mr. Kawasaki then instructed Mr. Fishman to contact CDH directly and to tell CDH that DTA is the Company's exclusive broker of secondary securities transactions.[91] DTA agreed.[92] After exchanging these messages, Mr. Kawasaki and Mr. Fishman spoke on the phone.[93] Mr. Fishman took some notes on that phone call.[94] Mr. Fishman wrote that CDH was in the market for $300 million worth of the Company's stock.[95] Mr. Fishman noted that CDH had employed Brooklands to "collect shares" worth that much from investors "like Marc Abramowitz."[96] Mr. Fishman reiterated that the Company wanted CDH to know that DTA was "the only broker allowed to do secondary."[97]

---

[84] PX 24 at BTIG_KT4-Email 0001629.
[85] *Id.*
[86] *Id.*
[87] PX 25 at Palantir_KT4_00002303.
[88] *See generally* D.I. No. 397, Order Grant's Pls.' Mot. to Compel.
[89] PX 30.
[90] *Id.* at AFDEL0000407.
[91] *Id.* at AFDEL0000408.
[92] *Id.* at AFDEL0000413.
[93] PX 23.
[94] PX 32.
[95] *Id.*
[96] *Id.*
[97] *Id.*

Mr. Fishman noted that the Company "would not approve anything" connected to Brooklands, the Selling Group and BTIG.[98] More specifically, Mr. Fishman set out that "Palantir really wants to crush" the Selling Group and BTIG.[99] Finally, Mr. Fishman noted that the Company would "match the price[s]" the Buy-Side had been circulating in its discussions with the Selling Group and BTIG.[100]

Mr. Fishman relayed these notes and others to Mr. Davis "carefully."[101] Mr. Fishman set out that DTA should "guarantee" CDH would get the "shares" and "price" from the Company that CDH had been considering in CDH's discussions with the Selling Group and BTIG.[102] Mr. Fishman stated that the Company wants DTA "to make sure [the Selling Group and BTIG's] deal gets shut down[.]"[103] Mr. Fishman specified that DTA should warn CDH that "[i]f [CDH] continue[s] to pursue the other deal[,] [CDH] will not get the shares."[104] Mr. Fishman detailed that DTA should warn CDH that, if CDH closed the other deal, "the [C]ompany will buy [the stock] back" or exercise "a right of first refusal" and thus CDH "will never be able to have a relationship with the [C]ompany."[105] Finally, Mr. Fishman provided that DTA should tell CDH that "[i]f [CDH] work[s] with [DTA], as [the Company] has requested, [CDH] can have a meeting with the [C]ompany's [executives] and be a friend of the [C]ompany."[106]

[98] *Id.*
[99] PX 33.
[100] PX 32.
[101] PX 23.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* (parenthetical and abbreviations omitted).
[106] *Id.*

3. DTA initiates sale discussions with CDH on the Company's behalf.

On December 21, 2015, DTA contacted CDH directly.[107] Mr. Davis introduced himself as a DTA agent.[108] DTA represented that DTA worked for the Company on an "exclusive basis" as Palantir's "placement agent[.]"[109] DTA offered CDH the opportunity to "invest[] directly" in the Company through the Company's then-ongoing Series K primary equity offering.[110] DTA explained that the Company would accept "$300 million" from CDH for preferred shares with 1:1 liquidation preferences.[111] DTA represented that $300 million would achieve the fundraising target the Company set for the Company's Series K round.[112] DTA also told CDH that CDH was "approved" by the Company's board of directors as a qualified and serious buyer.[113] Further, DTA told CDH that (i) DTA would provide all the diligence documents CDH would request; (ii) CDH would have access to the Company's "data room," which contained all Palantir's proprietary information; and (iii) CDH would have personal access to the Company's senior management, which would answer all CDH's questions.[114] Finally, in a January 3, 2016 e-mail, DTA added that if CDH pursued an "alternative" path to investment in the Company, *e.g.*, a "secondary market" transaction, CDH would "jeopardize" its relationship with the Company.[115] DTA then arranged to meet CDH at CDH's Beijing headquarters on January 7, 2016 to set out a primary Palantir investment in greater detail.[116]

[107] PX 34 at DTA-001590.
[108] *Id.*
[109] *Id.* at DTA-001591.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] PX 39 at DTA-003347.
[116] *Id.* at DTA-003346.

4. CDH terminates negotiations with the Selling Group and BTIG.

Mr. Brown and Ms. Gussin continued to discuss the prospective transaction between the Buy-Side, the Selling Group and BTIG. On December 22, 2015, Ms. Gussin noted that she had not heard from CDH in some time.[117] In response, Mr. Brown asked if Ms. Gussin "thought [CDH was] walking?"[118] Ms. Gussin replied, "I don't think so. They are coming in Jan. Probably trying yo [*sic*] buy time till then."[119] At a deposition, Ms. Gussin testified that, as of that time, she did not think CDH wished to terminate negotiations with the Selling Group and BTIG.[120]

On December 30, 2015, Ms. Gussin communicated to Mr. Brown that Defendants had contacted CDH.[121] Ms. Gussin told Mr. Brown that the Company used the information Mr. Hill provided about the proposed transaction to determine CDH's identity.[122] Ms. Gussin also expressed that the Company used Hill's information to offer CDH better terms at the same prices CDH, the Selling Group and BTIG had been discussing.[123] Though Ms. Gussin expressed considerable frustration with the news,[124] Ms. Gussin also claimed that she was "confident" CDH still would close the proposed transaction with the Selling Group and BTIG.[125] Ms. Gussin sent that message on January 2, 2016.[126] On January 3, 2016, however, CDH unilaterally ended

[117] PX 15 at BROWN000015.
[118] *Id.*
[119] *Id.*
[120] PX 6 at 194-95, 266-67.
[121] PX 15 at BROWN000016.
[122] *Id.* at BROWN000016, -18, -20.
[123] *Id.*
[124] *E.g.*, *id.* at BROWN000019.
[125] *Id.* at BROWN000024.
[126] *Id.*

sale discussions with the Selling Group.[127] CDH stated in a message to Defendants that "[s]ince [it] got in touch with DTA, [CDH has] not continued with any secondary brokers anymore."[128]

5. The Company seeks to "clarify" Plaintiffs' "misunderstandings."

On January 5, 2015, Mr. Brown contacted Palantir.[129] In his letter, Mr. Brown wrote to the Company about DTA's outreach.[130] According to Mr. Brown, DTA's outreach "caused confusion on all sides" because the Selling Group was under the impression that the Company supported the Selling Group's potential transaction with CDH.[131] Mr. Brown also noted that Palantir's offer seemed to "circumvent" the Selling Group's offer.[132] According to Mr. Brown, Palantir intended to push the Selling Group's secondary sale through with any primary investment by CDH in the Company.[133]

Before responding to this letter, Mr. Kawasaki instructed DTA to cancel its meeting with CDH in China.[134] On January 7, 2016, after Mr. Davis and Mr. Fishman already were in Beijing, Mr. Davis cancelled DTA's meeting with CDH.[135] Mr. Davis said the Company was concerned that CDH's "alternative" investment route with "common shareholders" would be problematic for CDH's negotiations with the Company.[136] CDH was seemed surprised by the meeting's cancellation and wrote to Defendants the following.

> [W]e're excited and hundred-percent committed to participate in Palantir's **PRIMARY** investments, and **we definitely are not progressing with any sellers or brokers for secondary shares. To those brokers who got in touch with us,**

[127] PX 39 at DTA-003346.
[128] *Id.*
[129] PX 40 at Palantir_KT4_00002999.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] PX 41.
[135] PX 42 at DTA-003458.
[136] *Id.*

> **we have turned down their offers and made clear to them that CDH is ONLY interested in primary investment.**[137]

On January 11, 2016, the Company, through Mr. Kawasaki, responded to the Selling Group.[138] In his reply, Mr. Kawasaki sought to "clarify" and "prevent any further misunderstandings" regarding Defendants' relationship with CDH.[139] To that end, Mr. Kawasaki stated the following.

> DTA is not currently representing Palantir in relation to any transaction with CDH. We believe that this has been communicated to CDH by DTA. Separately, CDH has reached out directly to Palantir seeking an opportunity to make a primary investment. We do not intend to pursue this offer. If CDH decides to proceed with the proposed transaction with [t]he Selling Group, we would, of course, be willing to assist. . . . In the circumstances, the extent of our participation will necessarily be limited.[140]

6. Defendants resume negotiations with CDH.

Despite the representations made by Mr. Kawasaki, the Company continued to "pursue" CDH over the next several months. As of late February, and early March 2016, DTA was actively negotiating with CDH on the Company's behalf. During those negotiations, DTA reminded CDH that DTA "control[led] primary fundraising and secondary liquidity for Palantir," preventing CDH from obtaining "alternative pricing and opportunities" from other "brokers and sellers."[141] DTA also cautioned CDH that, if CDH declined to invest in the Company exclusively through DTA, the Company would nullify CDH's outside investments with a "right of first refusal."[142] DTA blamed CDH's previous willingness to engage secondary sellers (*e.g.*, Plaintiffs) for the Company's insistence on aggressive, exclusivity conditions.[143]

---

[137] PX 44 at Palantir_KT4_00005518 (capitalization and emphasis in original).
[138] PX 4 at Palantir_KT4_00002265.
[139] *Id.*
[140] *Id.* (spacing omitted).
[141] PX 46 at DTA-003728.
[142] *Id.*
[143] *Id.*

7. CDH does not purchase any Palantir stock.

On March 1, 2016, CDH rejected Defendants' offer.[144] CDH cited exclusivity as the deal-breaker.[145] Undeterred, DTA next offered CDH, from DTA's own portfolio, $100 million worth of the Company's common stock.[146] DTA added that, as DTA was "not a broker" in this capacity, Defendants did "not need exclusivity."[147]

CDH entertained DTA's offer.[148] Calling CDH by the codename "Charleston," DTA requested a diligence meeting from the Company between Defendants and CDH at the Company's headquarters.[149] The parties met at some point in late April 2016.[150] On May 16, 2016, CDH rejected DTA's offer.[151] CDH based its rejection on (i) the Company's lack of a clear IPO plan; (ii) CDH's fear that a misfiring IPO could dilute the Company's secondary market value; (iii) a recent reversal suffered by the secondary market in which companies like Palantir trade; and (iv) the Company's lack of transparency, which worried CDH's risk management officers.[152]

E. THIS LITIGATION

1. Plaintiffs' allegations and Defendants' Motion to Dismiss the Complaint.

Plaintiffs filed the Complaint on December 14, 2017.[153] Through the Complaint, Plaintiffs seek to recover compensatory and punitive damages from Defendants for (i) tortious interference with prospective contractual relations; and (ii) civil conspiracy to commit tortious

[144] *Id.*
[145] *Id.*
[146] PX 48.
[147] *Id.*
[148] *Id.*
[149] PX 50 at Palantir_KT4_00009898.
[150] *See generally id.*
[151] PX 51.
[152] *Id.*
[153] D.I. No. 1.

interference with prospective contractual relations.[154] Plaintiffs allege that Defendants worked together to frustrate Plaintiffs' proposed transaction with CDH. Plaintiffs contend that the relevant time for determining when Defendants' tortious interference occurred is December 2015. Plaintiffs claim that, in December 2015, the proposed transaction with CDH was "preparing to close."[155] Plaintiffs also allege that certain conduct Defendants engaged in was independently wrongful apart from the alleged tortious interference itself. Specifically, Plaintiffs assert: (i) a breach of fiduciary duty by the Company (aided and abetted by DTA); (ii) abuse of Plaintiffs' confidential information by both Defendants; (iii) a bad faith motive; (iv) false, misleading and deceptive representations by the Company to Plaintiffs; (v) intentional harm inflicted on stockholders by the Company (aided and abetted by DTA); and (vi) breach of an implied covenant of good faith and fair dealing in the PSPAs by the Company.[156]

Defendants moved to dismiss the Complaint on February 16, 2018.[157] Defendants argued that the Complaint failed to state a claim upon which relief can be granted. Defendants challenged as deficient the elements of Plaintiffs' two claims and the "independent wrongfulness" requirement built into the tortious interference with prospective contractual relations claim.

2. The MTD Decision.

The Court denied the motions.[158] The Court found the Complaint supported a reasonable inference that Defendants committed tortious interference with prospective contractual relations.[159] The Court also found the Complaint set out a claim that Defendants entered into a

[154] Compl. ¶¶ 36-46 & Prayer for Relief.
[155] *Id.* ¶ 27.
[156] *Id.* ¶ 39.
[157] D.I. Nos. 38, 42.
[158] D.I. No. 84; *KT4 Partners*, 2018 WL 4033767.
[159] *KT4 Partners*, 2018 WL 4033767, at *7-8.

civil conspiracy to commit tortious interference with prospective contractual relations.[160] In making these findings, the Court also considered the parties' conflict of law arguments and Plaintiffs' independent wrongfulness theories. As to conflict of law, the Court declined to resolve the purported conflict between California law and Delaware law because the Court found the Complaint survived dismissal under both state's laws.[161] As to independent wrongfulness, the Court identified at least four theories that could be sufficient to establish independent wrongfulness. The Court stated:

> *For example*, Plaintiffs allege a civil conspiracy to commit fraud (DTA and Palantir working together to provide false, misleading, and deceptive representations to Plaintiffs); breach of duty by Palantir (aided and abetted by DTA) not to use confidential information provided by Plaintiffs to disrupt [the] Plaintiffs' transaction with Brooklands; and a breach of good faith and fair dealing implied in the [PSPAs]. . . . In addition, . . . [the allegation] that DTA is an unregistered broker that made an offer of securities in violation of federal securities laws [is sufficient].[162]

As to the unregistered broker allegation, the Court noted that the unregistered broker theory was not specifically pleaded in the Complaint.[163]

3. The Present Motion Practice.

Since the MTD Decision, the parties have engaged in significant discovery. Using the parties' discovery, Defendants moved for summary judgment on December 11, 2020.[164] Plaintiffs opposed the Motions one month later.[165] At the same time, Plaintiffs moved *in limine* to exclude certain expert testimony the Company seeks to admit at trial.[166] The Court has taken

[160] *Id.* at *8.
[161] *Id.* at *5-8.
[162] *Id.* at *7 & n.55 (emphasis added) (internal quotation marks omitted).
[163] *Id.* at *7 n.55.
[164] D.I. Nos. 689, 693.
[165] D.I. Nos. 703, 706.
[166] D.I. Nos. 735, 757.

Plaintiffs' evidentiary motions under advisement. The Court will rule on Plaintiffs' evidentiary motions by separate decision.

III. PARTIES' CONTENTIONS

A. DEFENDANTS

1. Arguments supporting application of California law.

Defendants begin with conflict-of-law arguments. Defendants argue that California has the most significant relationship to this case for several reasons. First, Defendants argue that California is the place of injury because Mr. Abramowitz manages Plaintiffs and Mr. Abramowitz lived in California when Plaintiffs invested in the Company. Second, Defendants contend that any alleged interference was directed from Defendants' headquarters in California. Third, Defendants claim that their principal places of business—California—support California law. Last, Defendants argue that California is the center of the parties' relationships because the PSPAs are governed by California law.

2. Joint arguments against Plaintiff's claims.

No matter the law applied, Defendants argue they are entitled to judgment as a matter of law on both of Plaintiffs' claims. As to the tortious interference claim, Defendants argue Plaintiffs' proposed transaction with CDH did not have a reasonable probability of closing because it is undisputed that there was no (i) no preliminary agreement on the number or class of shares that CDH would acquire; (ii) no preliminary agreement on per-share price; (iii) no preliminary or final due diligence; (iv) no indication that CDH's internal committees approved the proposed transaction; and (v) no signed term sheet. According to Defendants, all these steps were necessary to securing CDH's acceptance and that without them, the proposed transaction was too speculative to support a tortious interference cause of action.

Defendants similarly argue that they were not the proximate cause of the proposed transaction's failure. Defendants stress that (i) CDH was more attracted to Palantir's Series K primary equity offering than a secondary securities transaction with Plaintiffs; and (ii) CDH ultimately decided not to invest in the Company directly even after receiving diligence materials from DTA.

Finally, Defendants contend that each of Plaintiffs' theories of independent wrongfulness fail as a matter of law. Specifically, Defendants claim that (i) the transactional information provided on the proposed sale was not confidential; (ii) there was no fiduciary relationship between the Company and Plaintiffs; (iii) a breach of an implied covenant does not count as an independent wrongful act under California law; (iv) Plaintiffs failed to adequately plead any of their theories sounding in fraud; and (v) Defendants' conduct is protected by California law and Delaware law's "competition privilege."

Defendants then contend that because the tortious interference claim fails, the civil conspiracy claim, which is derivative of an underlying tort, necessarily fails.

3. DTA's separate arguments against Plaintiffs' claims.

Separately, DTA argues against Plaintiffs' allegation that DTA operated as an unregistered securities broker. Specifically, DTA argues that it is an exempt investment adviser under federal law, not a broker. DTA also argues that, to the extent Mr. Davis and Mr. Fishman were operating as brokers, they were doing so in their roles at SF Sentry, which is a properly registered broker-dealer.

B. PLAINTIFFS

1. Arguments supporting application of Delaware law.

Plaintiffs contend that a choice-of-law analysis is unnecessary because this dispute, as one between a corporation and its stockholders, must be decided under Delaware law through the "internal affairs doctrine." Alternatively, Plaintiffs argue that Delaware has the most significant relationship to this case for several reasons. First, Plaintiffs claim that the parties' relationships are centered in Delaware because every party is a Delaware organization. Second, Plaintiffs contend that the place of injury and principal places of business contacts are not important because Plaintiffs are headquartered in North Carolina. Third, Plaintiffs argue that the Defendants' misconduct occurred in China, weakening California's interest. Finally, Plaintiffs state that broader policy considerations support Delaware because every party is a Delaware organization, and Plaintiffs are stockholders alleged to have been injured by the Delaware corporation in which they invested.

2. Arguments against the Motions.

Plaintiffs argue that Defendants are not entitled to summary judgment under either California or Delaware law. Plaintiffs contend that Defendants' merits-based arguments are not supported by undisputed facts. Plaintiffs note that their relationship with CDH needed only be reasonable probable, not formalized in a manner resembling a true contract. Plaintiffs emphasize that (i) CDH lost interest after Defendants' alleged interference began; (ii) CDH set out a transactional structure that would have allowed CDH to buy Plaintiffs' stock before, or instead of, other sellers' stock; (iii) CDH agreed to purchase Plaintiffs' shares for a specific price; and (iv) CDH's investment history indicates that CDH did not require all the diligence it asked for. Plaintiffs therefore argue that there were no impediments to the proposed transaction's closing.

Plaintiffs also contend that Defendants were the proximate cause of the deal's failure. Plaintiffs assert that Defendants actively diverted CDH away from Plaintiffs. Plaintiffs highlight that Defendants' causation arguments about CDH's decision not to invest in the Company focus on events that occurred after Defendants interfered. Plaintiffs also point out that Defendants' alternative-causation arguments, *e.g.* those about CDH's interest in a primary investment, overlook that CDH's interest in a primary investment was a product of Defendants' interference.

Finally, Plaintiffs contend that none of their independent wrongfulness theories fails as a matter of law. Plaintiffs offer numerous independent wrongfulness theories. Plaintiffs argue that Palantir breached fiduciary duties it owed to Plaintiffs by misusing the "confidential information" Plaintiffs provided in connection with the proposed transaction. Plaintiffs also insist that the Company cannot "pick and choose" among stockholders when deciding to facilitate a transaction and wrongfully did so when the Company gave DTA disclosures and diligence and not Plaintiffs. Plaintiffs contend misuse of confidential information is wrongful regardless of a fiduciary relationship.

Similarly, Plaintiffs argue that misuse of their secondary transaction information violated an implied covenant in the PSPAs. Plaintiffs claim that the Company violated its own Articles of Incorporation by misrepresenting to CDH that it could sell more stock than the Company's Articles of Incorporation authorized. Plaintiffs maintain that misrepresentations alone amount to independent wrongs and that Defendants' concerted effort to make misrepresentations to Plaintiffs and CDH amounted to a civil conspiracy to defraud Plaintiffs.

Finally, as to DTA, Plaintiffs claim that DTA aided and abetted the Company's misuse of Plaintiffs' transactional information. Plaintiffs also assert that DTA acted as a broker by offering

to sell the Company's stock exclusively on the Company's behalf. Plaintiffs contend that Mr. Fishman and Mr. Davis made clear to CDH that they were working for DTA, not for SF Sentry.

IV. STANDARD OF REVIEW

The Court will grant summary judgment if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law.[167] In ruling on a summary judgment motion, the Court (i) construes the record in the light most favorable to the non-moving party;[168] (ii) detects, but does not decide, genuine issues of material fact;[169] and (iii) denies the motion if a material fact is in dispute.[170] The movant bears the initial burden of demonstrating its motion is supported by undisputed material facts.[171] If that burden is met, the non-movant must show there are material issues of fact to be resolved by a fact-finder.[172]

Although Summary judgment is "encouraged when possible;"[173] however, there is no "right" to summary judgment.[174] The Court may deny summary judgment if the Court is not reasonably certain that there is no triable fact issue.[175] The Court may deny summary judgment if the Court concludes a more thorough inquiry into, or development of, the facts, would clarify the law or its application.[176]

---

[167] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99-100 (Del. 1992); *see* Del. Super. Civ. R. 56.
[168] *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1977).
[169] *Merrill*, 606 A.2d at 99.
[170] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).
[171] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[172] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[173] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 443 (Del. 2005); *see Unbound Partners Ltd. P'ship v. Invoy Holdings Inc.*, 2021 WL 1016442, at *4 (Del. Super. Mar. 17, 2021) ("[A] matter should be disposed of by summary judgment whenever . . . a trial is unnecessary." (internal quotation marks omitted) (quoting *Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 677 (Del. Super. Ct. 1999))).
[174] *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002) (internal quotation marks and citation omitted).
[175] *Cross v. Hair*, 258 A.2d 277, 278 (Del. 1969).
[176] *Alexander Indus., Inc. v. Hill*, 211 A.2d 917, 918-19 (Del. 1965); *see Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) ("The trial court may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." (cleaned up)).

V. DISCUSSION

A. DELAWARE LAW APPLIES

As a threshold matter, the Court must decide which state's laws govern this dispute: California or Delaware. The Court will use Delaware's conflict-of-law framework.[177] A conflict of tort law analysis involves two steps. The Court first must determine whether an actual conflict between California law and Delaware law on the relevant legal standards exists.[178] If there is an actual conflict, the Court then must determine whether California or Delaware has the "most significant relationship" to this case.[179]

For the reasons discussed below, Delaware law applies because there is no actual conflict between Delaware and California law on the legal standards governing this case. Alternatively, the Court finds that Delaware has the most significant relationship to this case.[180]

1. California law and Delaware law are not in conflict.

Under Delaware's choice-of-law analysis, the Court begins by determining whether an actual conflict between the two states' laws exists. If the purported conflict is "false," then there is no choice-of-law analysis to undertake.[181] Delaware law recognizes two situations in which a conflict of law is false.

First, if one of the two states have not addressed the legal question presented, there can be no conflict between the two states. In that situation, the Court must apply the "settled law" on

[177] *E.g.*, *Shook & Fletcher Asbestos Settlement Tr. v. Safety Nat'l Cas. Corp.*, 2005 WL 2436193, at *2 (Del. Super. Sept. 29, 2005), *aff'd*, 909 A.2d 125 (Del. 2006).
[178] *E.g.*, *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015).
[179] *Id.*
[180] Because Delaware law applies under a traditional conflict-of-law analysis, the Court need not address Plaintiffs' alternative argument that Delaware law applies under the "internal affairs doctrine."
[181] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010); *accord Germaninvestments AG v. Allomet Corp.*, 225 A.3d 316, 332 n.69, 335 (Del. 2020).

the matter.[182] Here, California and Delaware have addressed the elements of, and defenses to, tortious interference with prospective contractual relations claims. Both states thus have settled law on this tort. Accordingly, the conflict is not false on a settled-law basis.

Second, the Court can "avoid a choice-of-law analysis altogether" if "the result would be the same" under either state's laws.[183] In that situation, Delaware law applies because there can be no conflict between laws that are identical.[184] Here, though their arguments are not structured this way, the parties suggest there might be a different outcome depending on which state's laws apply.[185] Accordingly, the Court must determine whether California law and Delaware law truly conflict on the legal principles governing this case.

a. California law.

Under California law, the elements of a tortious interference with prospective economic advantage claim are:

> (i) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;
>
> (ii) the defendant's knowledge of the relationship;
>
> (iii) intentional acts on the part of the defendant designed to disrupt the relationship;
>
> (iv) actual disruption of the relationship; and

---

[182] *E.g.*, *Arch Ins. Co. v. Murdock*, 2018 WL 1129110, at *8 (Del. Super. Mar. 1, 2018) (citing *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *4 (Del. Super. Nov. 5, 2010)), *aff'd sub nom.*, *RSUI Indem. Co. v. Murdock*, 243 A.3d 887 (Del.).

[183] *Deuley*, 8 A.3d at 1161.

[184] *Id.*

[185] The Court notes that the parties' lack of engagement with the actual-conflict step may be attributable, in part, to undue emphasis on the Court's observation in the MTD Decision that the two states' laws appeared to conflict. *See KT4 Partners*, 2018 WL 4033767, at *6. The Court, however, made clear that it was not deciding the conflict-of-law issue, encouraged the parties to develop the issue with additional briefing, and analyzed the Complaint under both states' laws. *Id.* at *6-8. As a result, and contrary to suggestions otherwise, the Court's conflict-of-law analysis in its motion to dismiss ruling did not establish any law of the case. *See, e.g.*, *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017) ("'The law of the case' is established when *a specific legal principle is applied* to an issue presented by facts which remain constant throughout the course of the same litigation." (emphasis added) (quoting *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990))).

(v) economic harm to the plaintiff proximately caused by the acts of the defendant.[186]

In addition, California law requires the plaintiff to demonstrate the defendant's conduct was wrongful apart from the interference itself.[187] To be independently wrongful, the defendant's conduct must be "unlawful, [*i.e.*,] proscribed by some constitutional, statutory, regulatory, common law or other determinable legal standard."[188] California requires the defendant's conduct to be independently wrongful because the line separating unlawful "interference" and legitimate competition in a free market is thin.[189] California views this tort as a potentially undesirable restraint on business opportunities.[190] As a result, California affords defendants a "competition privilege." The privilege precludes recovery if a plaintiff fails to demonstrate that the defendant's conduct was independently wrongful.[191]

b. Delaware law.

Under Delaware law, the elements of a claim for tortious interference with prospective contractual relations are:

(i) the reasonable probability of a business opportunity;

(ii) the intentional interference by the defendant with the opportunity;

(iii) proximate causation; and

(iv) damages.[192]

---

[186] *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 388 P.3d 800, 803 (Cal. 2017) (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 950 (Cal. 2003)).
[187] *Roy Allan*, 388 P.3d at 803.
[188] *Edwards v. Arthur Anderson LLP*, 189 P.3d 285, 290 (Cal. 2008) (cleaned up).
[189] *E.g.*, *Roy Allan*, 388 P.3d at 810.
[190] *Id.*
[191] *E.g.*, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 749-51 (Cal. 1995)
[192] *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1285 (Del. Super. 2001) (internal quotation marks omitted); *see also DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980) (same), *aff'd*, 428 A.3d 1151 (Del. 1981).

Delaware law requires courts to consider these elements "in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner."[193] That privilege derives from Delaware's concern that this tort could restrict free competition.[194] As a result, a plaintiff must prove that a defendant's conduct was independently wrongful to prevent the competition privilege from barring recovery.[195] To be independently wrongful, the defendant's conduct must implicate an unspecified number of factors in *Restatement (Second) of Torts* § 767's wrongfulness test.[196] Those factors are:

> (i) the nature of the actor's conduct;
>
> (ii) the actor's motive;
>
> (iii) the interests of the other with which the actor's conduct interferes;
>
> (iv) the interests sought to be advanced by the actor;
>
> (v) the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
>
> (vi) the proximity or remoteness of the actor's conduct to the interference; and
>
> (vii) the relations between the parties.[197]

Delaware courts have held "the nature of the actor's conduct" to be the "chief factor."[198] Delaware courts have stated that this factor may be dispositive of whether conduct is

---

[193] *Kable Prods. Servs., Inc. v. TNG GP*, 2017 WL 2558270, at *10 (Del. Super. June 13, 2017) (internal quotation marks omitted).
[194] *E.g.*, *Preston Hollow Cap. LLC v. Nuveen LLC*, 2020 WL 1814756, at *12 (Del. Ch. Apr. 9, 2020); *see also Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 608 (Del. Ch. 2010) (same), *aff'd sub nom., ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010)).
[195] *E.g.*, *Preston Hollow*, 2020 WL 1814756, at *17-19 (analyzing a tortious interference with prospective economic advantage claim against the background of the competition privilege).
[196] *Id.* (citing *Restatement (Second) of Torts* § 767 (1979)) (hereinafter, "*Restatement of Torts*"). The Court notes that the competition privilege technically has *Restatement of Torts* elements of its own. *See generally Restatement of Torts* § 768. As a practical matter, however, only the "wrongful means" element in § 768(b) is relevant, as it ties directly into the independently wrongful act requirement. *See Preston Hollow*, 2020 WL 1814756, at *17 (focusing solely on the "wrongful means" element); *Kable*, 2017 WL 2558270, at *11 (same).
[197] *Restatement of Torts* § 767.
[198] *E.g.*, *Preston Hollow*, 2020 WL 1814756, at *17 ("The chief factor in this analysis is the nature of the actor's conduct because it cuts to the heart of whether" a defendant's conduct is independently wrongful.); *Restatement of*

independently wrongful.[199] In accord, a comment to the *Restatement of Torts* explains that "unlawful conduct," such as conduct that violates statutory or common law, satisfies the independent wrongfulness requirement.[200]

c. The result is the same under either Delaware or California law.

The Court holds that the two states' laws are the same in all material respects. Specifically, both states require the plaintiff to show an existence of some kind of commercial relationship or reasonable expectation of a commercial relationship between the plaintiff and an identified third party.[201] Relatedly, neither state protects contractual relationships that are too speculative.[202] Moreover, both states require proof of the defendant's knowledge about the plaintiff's prospective deal.[203] Each state requires proof that the defendant's conduct was the proximate cause of the prospective deal's failure.[204] Moreover, Delaware and California have

---

Torts § 767 cmt. c. ("The nature of the actor's conduct is the chief factor in determining whether the conduct is improper or not.").

[199] *E.g.*, *Preston Hollow*, 2020 WL 1814756, at *17.

[200] *Restatement of Torts* § 767 cmt. c. ("Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make interference in improper. This may be true, for example, of conduct that is . . . in violation of statutes, regulations, or judicial . . . holdings. . . ."). An earlier comment cautions that nothing in the comments, including its examples, should be construed as exhaustive in interpreting whether conduct is independently wrongful. *See id.* cmt. b.

[201] *Compare Roy Allan*, 388 P.3d at 803 (observing that an economic relationship must exist between "the plaintiff and some third party" (citing *Korea Supply*, 63 P.3d at 950)) *with Soterion Corp. v. Soteria Mezzanine Corp.*, 2012 WL 5378251, at *13 (Del. Ch. Oct. 31, 2012) ("[A] plaintiff must identify a specific party who was prepared to enter a business relationship but was dissuaded from doing so by the defendant. . . ." (internal quotation marks omitted)), *aff'd sub nom.*, *Soterion Corp. v. Soteria Inv. Holdings, Inc.*, 74 A.3d 655 (Del. 2013). Though, under Delaware law, the claim's elements do not use the term "relationship," recent authority has noted that Delaware law does in fact require a "relationship" (or "expectancy," which is used interchangeably) to prove this claim. *See DG BF, LLC v. Ray*, 2021 WL 776742, at *18 n.145 (Del. Ch. Mar. 1, 2021) (collecting authority).

[202] *Compare, e.g.*, *Korea Supply*, 63 P.3d at 958 (observing that the tort does not protect the "speculative expectation that a potentially beneficial relationship will arise" (internal quotation marks omitted)) *with DG BF*, 2021 WL 776742, at *19 (observing that the prospective relationship must be a "*bona fide* expectancy," not be based on one-sided optimism) *and Kable*, 2017 WL 2558270, at *10 ("A perception that there will be a prospective business opportunity will not be enough." (internal quotation marks omitted)).

[203] *Compare, e.g.*, *Roy Allan*, 388 P.3d at 803 *with Lipson*, 790 A.2d at 1285. Again, though Delaware seemed not to require the defendant's "knowledge" of the relationship, recent Delaware caselaw has pointed out that the knowledge requirement is collapsed into the intentional act requirement. *See DG BF*, 2021 WL 776742, at *18 n.146 (first citing *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001); then citing *Am. Homepatient, Inc. v. Collier*, 2006 WL 1134170, at *5 (Del. Ch. Apr. 19, 2006)).

[204] *Compare, e.g.*, *Roy Allan*, 388 P.3d at 803 and *State Dep't of State Hosps. v. Super. Ct.*, 349 P.3d 1013, 1021-22 (Cal. 2015) (explaining that proximate cause encompasses "but-for" cause and "policy considerations," such as

each identified the same policy considerations counseling against using this tort to curtail entrepreneurship or to destabilize efficient markets.[205] In line with that reasoning, both states give defendants a complete "competition privilege" defense unless the plaintiff shows independent wrongfulness.[206] To be independently wrongful, each state asks whether the defendant's conduct constitutes a violation of positive law, judicial rulings, or expressly or by implication, a "determinable legal standard."[207] Accordingly, the Court finds that the result would be the same here. Delaware law applies because the conflict is false.

d. The Implied Covenant "Conflict."

Defendants do not seemingly dispute this conclusion. In briefing, Defendants cite both to California and Delaware precedent interchangeably and contend they should be successful no matter the law applied. Defendants still insist that one of Plaintiffs' theories of independent wrongfulness, *i.e.*, breach of an implied covenant, creates an actual conflict. The Court will discuss each of Plaintiffs' independent wrongfulness theories individually later in this opinion. The Court will consider the implied covenant theory for the sole purpose of rejecting Defendants' arguments.

According to Defendants, a breach of an implied covenant does not count as an independent wrong under California law because it gives rise to contract, not tort, liability. In support of this argument, Defendants rely on non-tortious interference and non-implied covenant cases from California. Defendants' cases, however, involve different facts and different legal doctrines. In addition, the Court does not agree with Defendants' analyses of their cited cases.

---

when an intervening severs off liability) *with Lipson*, 790 A.2d at 1285 *and Preston Hollow*, 2020 WL 1814756, at *15.

[205] *Compare, e.g.*, *Della Penna*, 902 P.2d at 749-51 *with Beard Rsch.*, 8 A.3d at 608.

[206] *Compare, e.g.*, *Della Penna*, 902 P.2d at 749-51 *with DeBonaventura*, 419 A.2d at 947.

[207] *Compare, e.g.*, *Edwards*, 189 P.3d at 290 *with Preston Hollow*, 2020 WL 1814756, at *17-19; *see Restatement of Torts* § 767 cmt. c.

In *JRS Products, Inc. v. Matsushita Electric Corporation of America*,[208] a non-implied covenant case, the California Court of Appeal considered whether "damages can be recovered for interference with prospective economic advantage by one contracting party against another based on conduct that would otherwise constitute a breach of the parties' contract."[209] Put concisely, the court considered whether a party who breaches its own contract also can be liable in tort for interfering with that contract. The California court said no.[210] Delaware courts have reached the same conclusion.[211]

Deerpoint Group, Inc. v. Agrigenix, LLC,[212] another non-implied covenant case, is also distinguishable. In *Deerpoint*, the plaintiff sought to recover damages for tortious interference with prospective economic advantage solely because the defendant violated the parties' separation agreement. Given the facts alleged, a federal court in California treated the tortious interference claim as a breach of contract claim.[213] The court then held that the defendant could not be liable both for breaching his contract and for tortiously interfering with his own contractual obligations.[214] In doing so, the court observed in passing that implied covenant

[208] 8 Cal. Rptr. 3d 840 (Cal. Ct. App. 2004).
[209] *Id.* at 849.
[210] *Id.* at 851 ("A contracting party's unjustified failure or refusal to perform is a breach of contract, and cannot be transmuted into tort liability by claiming that the breach detrimentally affected the promisee's business." (internal quotation marks omitted)).
[211] *See, e.g.*, *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994) (Allen, C.) ("It is rudimentary that a party to a contract cannot be liable both for breach of that contract and for inducing its breach.").
[212] 345 F. Supp. 3d 1207 (E.D. Cal. 2018).
[213] *Id.* at 1234 & n.14 (noting that the tortious interference claim did not contain allegations independent from the breach of contract claims, which included a duplicative implied covenant claim).
[214] *Id.* at 1234-35 ("From these allegations, [the plaintiff] identifies essentially two types of wrongful acts: breaches of contract and trade secret misappropriation. . . . Under California law, a breach of contract does not form the basis of a valid tortious interference with prospective economic advantage claim." (citations omitted)).

claims are types of breach of contract claims.[215] Again, a Delaware court would rule the same way.[216]

These cases hold that breaching one's own contract does not amount to tortiously interfering with one's own contractual performance under that same contract, *i.e.*, a plaintiff cannot recharacterize a breach of contract case between two contracting parties as a tort claim. These cases do not support Defendants' position that a breach of an implied covenant never can serve as an independent wrongful act. Indeed, as discussed *infra*, Plaintiffs base their implied covenant claim on an agreement unrelated to the arrangement Plaintiffs claim was interfered with by Defendants. The Court finds that difference separates this case from *JRS* and *Deerpoint*—Plaintiffs seek damages for tortious interference with their unconsummated *CDH deal* that allegedly was achieved, in part, by an independently wrongful breach of an implied covenant in *the PSPAs*.

As such, the Court holds that Defendants fail to articulate an actual conflict between California and Delaware on the independent wrongfulness requirement. Delaware law applies.

2. Delaware has the most significant relationship to this civil action.

When an actual conflict between two states' laws exists, Delaware courts use the most significant relationship test from the *Restatement (Second) of Conflict of Laws* to determine which state's laws apply.[217] For tort cases, *Second Restatement* § 145 provides a list of contacts

[215] *Id.* at 1235. The Court briefly notes that the Defendants' third case, *Digerati Holdings, LLC v. Young Money Ent., LLC*, 123 Cal. Rptr. 3d 736 (Cal. Ct. App. 2011), a non-tortious interference case, similarly observed that, where a contract's express terms govern a particular matter, an implied covenant claim addressing that matter is "necessarily" duplicative. *Id.* at 744-45. The *Digerati* decision sheds no light on the interplay between contract and tort liability.

[216] *Shearin*, 652 A.2d at 590.

[217] *E.g.*, *Arteaga*, 113 A.3d at 1050 (citing *Restatement (Second) of Conflict of Laws* § 145(2) (1971)) (hereinafter, the "*Second Restatement*") (adopting the *Second Restatement* for tort cases); *see Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017) (adopting the *Second Restatement* for contract cases).

designed to connect the most interested state with the parties to, and subject of, the litigation.[218] Those contacts are:

> (a) the place where the injury occurred;
>
> (b) the place where the conduct causing the injury occurred;
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
>
> (d) the place where the relationship, if any, between the parties is centered.[219]

The most significant relationship analysis "is not mathematical…."[220] The state with the most significant relationship will not necessarily be the one that has the most contacts.[221] Instead, the Court assesses and assigns differing weight to the contacts as appropriate for the facts and issues involved in the particular case before it.[222] The Court will select the state that, under the case-specific circumstances, reflects the *Second Restatement*'s core focus on promoting legal consistency and discharging the parties' reasonable expectations.[223] Delaware courts also consider the factors set out in the *Second Restatement* § 6 in addition to the contacts listed in § 145.[224] The *Second Restatement* § 6 guiding factors are:

> (a) the needs of the interstate and international systems;
>
> (b) the relevant policies of the forum;
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

---

[218] *See Second Restatement* § 145 cmt. c. ("The purpose sought to be achieved by the relevant tort rules of the interested states, and the relation of these states to the occurrence and the parties, are important factors to be considered in determining the state of most significant relationship.").
[219] *Id.* § 145(2).
[220] *Arteaga*, 113 A.3d at 1050 (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47-48 & n.6 (Del. 1991)).
[221] *Id.* at 1051.
[222] *Id.*; *Second Restatement* § 145 ("These contacts are to be evaluated according to their relative importance with respect to the particular issue.").
[223] *E.g.*, *Second Restatement* § 145 cmt. b.
[224] *E.g.*, *Arteaga*, 113 A.3d at 1051; *Eureka Res., LLC v. Range Res.-Appalachia, LLC*, 62 A.3d 1233, 1239-41 (Del. Super. Ct. 2012); *see Second Restatement* § 145(1) (directing courts to consider § 6).

(d) the protection of justified expectations;

(e) the basic policies underlying the particular area of law;

(f) certainty, predictability and uniformity of result; and

(g) ease in the determination and application of the law to be applied.[225]

The Court will consider *Second Restatement* § 145's contacts and § 6's guiding factors in turn.

a. The place where the injury occurred.

The place of injury depends on the tort.[226] For tortious interference cases, the place of injury generally is the plaintiff's headquarters.[227] Plaintiffs are headquartered in North Carolina. This contact, therefore, supports neither California nor Delaware. As a result, the Court assigns this contact no weight. This assessment is consistent with the *Second Restatement*. A comment to the *Second Restatement* explains that the place of injury is of minimal importance for torts causing pecuniary loss.[228]

b. The place of misconduct.

A comment to the *Second Restatement* explains that the place of misconduct matters most when the injury and the misconduct originate "in a single, clearly ascertainable state."[229] It is unclear from the record, however, where exactly Plaintiffs felt the alleged injury. Based on Plaintiffs' domiciles, and the financial nature of the tort, it is conceivable that Plaintiffs were "injured" by the failed transaction both at headquarters (*i.e.*, North Carolina) and in their state of incorporation (*i.e.*, Delaware). To remove doubt, the *Second Restatement* planned for this fact pattern. The *Second Restatement* declares that, when the alleged injury might be dispersed

[225] *Second Restatement* § 6.
[226] *Id.* § 145 cmts. e. & f.
[227] *See Eureka*, 62 A.3d at 1238.
[228] *Second Restatement* § 145 cmt. f.
[229] *Id.* cmt. e.

across multiple states, the state where the misconduct occurred overrides the state(s) where the injury is sustained.[230] For tortious interference cases, the place of misconduct generally is the alleged tortfeasor's headquarters.[231] Defendants are headquartered in California. Accordingly, the Court finds this contact supports California. The Court, however, is not placing the most weight on this factor.

c. The place of business and the state of incorporation.

Plaintiffs are headquartered in North Carolina and organized in Delaware. Defendants are headquartered in California and organized in Delaware. Where, as here, financial injury couples with multiple domiciles, the *Second Restatement* recommends that courts assign more weight to headquarters than to the state of incorporation.[232] Doing so here, however, would not make much sense. Rigidly implemented, the *Second Restatement*'s advice leads the Court to North Carolina—which no one has argued for—and California—where only Defendants are headquartered. Perhaps that it is why, in circumstances like these, the *Second Restatement* candidly acknowledges that strict adherence to its guidelines will offer only "some clue," not "precise answers."[233]

Complex cases involving sophisticated entities who conduct securities transactions in several states at the same time implicate the *Second Restatement*'s "qualitative aspect[s]."[234] The *Second Restatement* is flexible. It allows courts to concentrate on factors unaccounted for when assessing a state's contacts.[235] Indeed, the *Second Restatement*'s comments to this contact seem

---

[230] *Id.*; *accord Eureka*, 62 A.3d at 1238; *UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697, at *4 (Del. Ch. Dec. 14, 2005).
[231] *E.g.*, *Eureka*, 62 A.3d at 1238.
[232] *Second Restatement* § 145 cmt. e; *see Eureka*, 62 A.3d at 1238.
[233] *Second Restatement* § 6 cmt. c.
[234] *Arteaga*, 113 A.3d at 1051 n.20 (internal quotation marks and citations omitted).
[235] *Id.*at 1051; *Second Restatement* § 145 (disapproving a one-size-fits-all approach to the most significant relationship analysis); *see Second Restatement* § 145 cmt. e. ("The importance of [headquarters *vis-à-vis* the state of incorporation] will frequently depend upon the particular issue involved." (cross-reference omitted)).

to presuppose that the representative plaintiff will be an individual, not a business organization.[236] The Court, therefore, will have to adopt a more commonsense approach. The thread unifying these parties is their shared state of incorporation: Delaware. Delaware courts have held that where there are two or more different principal places of business, a mutual nexus to Delaware controls.[237] The Court finds that even more logical given that Plaintiffs are stockholders of a Delaware corporation. Accordingly, the Court finds that California's interests are diluted by North Carolina interests, making Delaware—where all the parties chartered—the clearest choice out of the three.

d. The center of the parties' relationship.

The *Second Restatement* provides that "when the injury is caused by an act done in the course of the [parties'] relationship," the state where the relationship is centered has a considerably strong connection to the case.[238] The parties would not have a relationship unless Plaintiffs invested in Palantir, a Delaware corporation. In addition, the stock CDH might have purchased but for Defendants' alleged interference is in Delaware. Indeed, this lawsuit would not exist without Palantir's Delaware stock and Plaintiffs' decision to buy it. The Court notes that it is reasonable to conclude that Defendants' alleged interference arose from the parties'

[236] *See Second Restatement* § 145 cmt. e. ("[T]he place of the plaintiff's domicil[e], or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law . . . [when the tort] causes him financial injury. . . ." (cross-references omitted)).
[237] *E.g.*, *Wavedivision Holdings, LLC v. Highland Cap. Mgmt. L.P.*, 2011 WL 5314507, at *9 (Del. Super. Nov. 2, 2011), *aff'd*, 49 A.3d 1168; *Soterion*, 2012 WL 5378251, at *12, *aff'd*, 74 A.3d 655; *cf. Eureka*, 62 A.3d at 1238 (deeming this contact "a wash" because the parties were headquartered in two different states and one of the parties was not incorporated in Delaware); *UbiquiTel*, 2005 WL 3533697, at *4 n.35 (inferring that where, as here, at least one of the parties does "little or no business" at its headquarters, the *Second Restatement*'s emphasis on headquarters should be diminished); *see* PX 1 at 19-21 & PX 54 at 71 (Mr. Abramowitz's testimony that KT4 merely keeps its books and related financial documents in North Carolina).
[238] *Second Restatement* § 145 cmt. e.

Delaware-based relationship. As such, the Court finds this contact supports Delaware, and notes that it may be "the most important contact of all with respect to most issues" in this case.[239]

Defendants urge that California is the center of the parties' relationship because anything involving the PSPAs is governed by California law. The Court does not agree. The PSPAs' California law provision only governs the "construction" of the PSPAs.[240] It does not govern every dispute "involving" or "arising out of" the PSPAs, let alone tort disputes challenging Defendants' misuse of the PSPAs in a third-party transaction.[241] Both Delaware and California courts take a plain meaning approach to contract interpretation.[242] Palantir, the PSPAs' drafter, deliberately chose the word "construed." The Court cannot broaden terms the Company narrowed.

In addition, the *Second Restatement* reminds courts that they may apply more than one state's laws in one case.[243] The PSPAs' choice of law provision, if triggered, simply would mandate that the Court apply California law to the contract issues. The provision would not weaken Delaware's greater relationship to the tort issues, nor change the fact that Delaware has the most significant relationship to DTA, who did not sign the PSPAs. In any event, Defendants have not requested that the Court engage in a law-splitting exercise. Instead, Defendants have asserted that only California law applies.[244]

---

[239] *Id.*
[240] DX 67 § 6.7.
[241] *See Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2018 WL 6266195, at *4 (Del. Super. Nov. 30, 2018) ("'Arising out of' is a term that 'lends itself to uncomplicated, common understanding. . . .' [I]t means 'incident to, or having a connection with.'" (citations omitted) (first quoting *Eon Labs Mfg. v. Reliance Ins. Co.*, 756 A.2d 889, 893 (Del. 2000); then quoting *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256 n.42 (Del. 2008))).
[242] *See, e.g.*, *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012); *Hotels Nevada, LLC v. Bridge Banc, LLC*, 30 Cal. Rptr. 3d 903, 906 (Cal. Ct. App. 2005).
[243] *Second Restatement* § 145 cmt. d. ("The courts have long recognized that they are not bound to decide all issues under the law of a single state.").
[244] The Court notes that Defendants' failure to make this argument is inconsequential on these facts. California and Delaware law use the same standards when considering an implied covenant claim. *Compare, e.g.*, *McClain v. Octagon Plaza LLC*, 71 Cal. Rptr. 3d 885, 902-03 (Cal. Ct. App. 2008) *with* discussion, *infra*, Section V.B.3.b.

e. Policy considerations.

The Court's finding that Delaware has the most significant relationship to this litigation is reinforced by *Second Restatement* § 6's pertinent guiding principles.[245]

i. The relevant policies of California and Delaware.

The *Second Restatement*, in a comment, cautions courts not to ignore competing laws of sister states when deciding which state has the most significant relationship to a case.[246] Here, both California and Delaware recognize the same tort. Accordingly, this factor is either neutral or further supports the Court's finding that application of Delaware tort law would not contravene California's interest in remedying the same injury.

ii. The policies underlying tortious interference claims.

Though the parties have not argued one state's interests are superior to the other's, the *Second Restatement* still instructs the forum court to consider "not only its own relevant policies but also the relevant policies of all other interested states."[247] As explained above, both states have limited this tort to avoid frustrating legitimate capitalist ambitions. Both states afford defendants a competition privilege. Moreover, each state permits plaintiffs to seek damages. This factor, therefore, is either neutral or further supports the Court's determination that California's interests would not be undercut by applying Delaware law to this case.

iii. The parties' justified expectations.

This factor's purpose is to reduce exposure to unanticipated obligations.[248] Because each party is a Delaware business organization, "it would [not] be unfair and improper" to apply

[245] The Court uses the word "pertinent" because some of § 6's guiding principles are not relevant to this dispute. For example, "the needs of the international system" are not implicated because this case does not involve a conflict between state laws in the United States and the laws of foreign countries. *Cf., e.g.*, *Arteaga*, 113 A.3d at 1057.
[246] *Second Restatement* § 6 cmt. e.
[247] *Id.* cmt. f. (internal cross-reference omitted).
[248] *See id.* cmt. g.

Delaware law.[249] Having been formed in Delaware under Delaware law, the Court finds it reasonable to assume that each party has endeavored to "mold[] [its] conduct to conform to the requirements of" Delaware law.[250] Accordingly, this guiding principle further supports Delaware's interests in this case.

iv. Predictability and uniformity of outcome.

This factor strikes a balance between preserving commercial consistency and eliminating forum shopping.[251] As explained *supra*, the tort is basically the same in both jurisdictions. In either jurisdiction, Plaintiffs would have the same burden of proof. In either jurisdiction, Defendants would be entitled to the same defenses. As a result, consistency exists while forum shopping does not. Accordingly, this guiding principle further supports Delaware.

v. Ease of application.

Finally, the *Second Restatement* declares that it "should not be overemphasized" that the law selected should be "simple and easy to apply."[252] Here, both jurisdictions have ample precedent explaining and resolving this tort. Accordingly, this factor is neutral or further supports the application of Delaware law.

For the reasons stated, the Court will apply Delaware law. First, Delaware law is not in actual conflict with California law. Second, assuming there is an actual conflict, Delaware has the most significant relationship to this litigation.

B. GENUINE ISSUES AS TO MATERIAL FACTS PRECLUDE SUMMARY JUDGMENT

Under Delaware law, the elements of a tortious interference with prospective contractual relations claim are: "(a) the reasonable probability of a business opportunity, (b) the intentional

[249] *Id.*
[250] *Id.*
[251] *Id.* cmt. i.
[252] *Id.* cmt. j.

interference with that opportunity by the defendant, (c) proximate causation, and (d) damages."[253] The Court must consider these elements "in light of a defendant's privilege to compete or protect his business interests in a fair and lawful manner."[254] To defeat the defendant's competition privilege, the plaintiff must prove that the defendant's conduct was wrongful independent of the interference.[255] Violations of statutory and common law, as well as legal standards of behavior more broadly, satisfy the independent wrongfulness requirement.[256]

Through their Motions, Defendants challenge the reasonable probability element, the proximate causation element, and the independent wrongfulness requirement. The Court finds that Defendants have not met their burdens to show that undisputed facts support their Motions.

1. The Plaintiffs' deal with CDH may have been reasonably probable.

The reasonable probability element is "the most crucial element."[257] To determine whether a business opportunity is reasonably probable, the Court must assess the opportunity's probability "at the time of the alleged interference."[258] An opportunity's reasonable probability generally is a fact-intensive inquiry.[259]

To satisfy the reasonable probability element, the plaintiff must allege a "*bona fide* expectancy."[260] No matter what the potential deal is called, *e.g.*, an "expectancy," a "relationship" or an "opportunity,"[261] the plaintiff's potential deal with an identified third party

---

[253] *Malpiede*, 780 A.2d at 1099 (internal quotation marks omitted).
[254] *DeBonaventura*, 428 A.2d at 1153.
[255] *E.g.*, *Preston Hollow*, 2020 WL 1814756, at *17; *Restatement of Torts* § 767; *see Restatement of Torts* § 768(b) (requiring that the defendant employ "wrongful means" to defeat the competition privilege).
[256] *E.g.*, *Restatement of Torts* § 767 cmt. c.
[257] *Kable*, 2017 WL 2558270, at *10.
[258] *Id.* (internal quotation marks omitted).
[259] *See Chapter 7 Tr. Constantino Flores v. Strauss Water Ltd.*, 2016 WL 5243950, at *12 (Del. Ch. Sept. 22, 2016); *cf. Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *18-19 (Del. Ch. May 18, 2009) (finding plaintiff had no reasonable probability of a business opportunity after conducting a full trial on the issue), *aff'd*, 2010 WL 376924 (Del. Jan. 14, 2010).
[260] *Lipson*, 790 A.2d at 1285 (internal quotation marks omitted)
[261] *DG BF*, 2021 WL 776742, at *18 n.145 (observing that Delaware courts use these three terms interchangeably and collecting authority); *e.g.*, *Malpiede*, 780 A.2d at 1099 (using relationship and opportunity interchangeably);

cannot be too speculative.[262] Instead, to be reasonably probable, "a business opportunity must be something more than a mere hope, the innate optimism of a salesman, or a mere perception of a prospective business relationship."[263] The reasonably probable opportunity never need be reduced to a "formal, binding contract."[264] Invariably, however, the reasonably probable opportunity "must be of pecuniary value to the plaintiff."[265] Accordingly, the Court cannot grant summary judgment to Defendants unless undisputed facts show, at the time of Defendants' alleged interference, Plaintiffs had nothing more than a speculative deal with CDH that was based on a subjective, one-sided belief of success, but that objectively had no reasonable probability of materializing.

Plaintiffs allege that Defendants began interfering with the proposed transaction in December 2015. At that time, (i) CDH set a notional transactional price of $300 million; (ii) CDH seemed willing to prioritize or "tranche" the Plaintiffs' stock above other sellers' stock; (iii) Brooklands regularly was communicating with the Selling Group to close "Project Christmas"; (iv) Brooklands had no reason to think CDH lost interest; (v) CDH made diligence demands that Palantir ostensibly was prepared to oblige; (vi) Plaintiffs complied with their

---

Collier, 2006 WL 1134170, at *5 (using relationship and expectancy interchangeably); *Preston Hollow*, 2020 WL 1814756, at *13 (using opportunity and expectancy interchangeably); *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *5 (Del. Super. Nov. 28, 2011) (using relationship and expectation interchangeably), *rev'd on other grounds*, 67 A.3d 444 (Del. 2013).

[262] *See Carney v. B & B Serv. Co.*, 2019 WL 5579490, at *2 (Del. Super. Oct. 29, 2019) ("[A] plaintiff must identify a specific party who was prepared to enter into a business relationship but was dissuaded from doing so by the defendant and [the plaintiff] cannot rely on generalized allegations of harm." (internal quotation marks omitted)); *see also Neurvana Med., LLC v. Balt USA, LLC*, 2020 WL 949917, at *26 (Del. Ch. Feb. 27, 2020) (dismissing tortious interference claim where plaintiff did not allege "any party, let alone a specific party" was prepared to deal with the plaintiff (internal quotation marks omitted)).

[263] *DG BF*, 2021 WL 776742, at *19 (cleaned up); *Kable*, 2017 WL 2558270, at *10 (same); *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at *7 (Del. Ch. Jan. 20, 2009) (same); *see Lipson*, 790 A.2d at 1285; *see also O'Gara v. Coleman*, 2020 WL 752070, at *8 (Del. Ch. Feb. 14, 2020) (dismissing tortious interference claim where business opportunity was premised on fact that current stockholder, just by being current stockholder, would make future investment in plaintiff).

[264] *Kable*, 2017 WL 2558270, at *10 (internal quotation marks omitted); *see also Preston Hollow*, 2020 WL 1814756, at *12 (same); *Restatement of Torts* § 766(B) cmt. c.); *accord Preston Hollow*, 2020 WL 1814756, at *12.

[265] *DG BF*, 2021 WL 776742, at *19 (internal quotation marks omitted); *see also Restatement of Torts* § 766(B) cmt. c.

contractual duty to put Palantir on notice of the proposed transaction; and (vii) CDH had just invested $40 million in the Company through a different acquisition vehicle without receiving any of the diligence CDH requested.

The Court understands that these facts, and aspects of them, are disputed by other record evidence presented by Defendants. But these facts, if proven, could demonstrate a true expectancy or relationship with which Defendants began interfering when the opportunity had been progressing nearer to a closing. Given the close proximity of the alleged interference to what would have been the natural next steps in finalizing a proposed transaction, the Court, on this record, cannot find, as a matter of law and fact, that the Plaintiffs' proposed transaction purely was speculative. Accordingly, summary judgment must be denied so that a factfinder can determine whether Plaintiffs had a reasonably probable opportunity with CDH.

Defendants argue that the proposed transaction was too speculative. In doing so, the Defendants highlight the protracted length of negotiations, coordination difficulties experienced by the sellers, incomplete diligence, no agreement on a per-share price, no agreement on a share quantity, no internal CDH approval, and an unsigned term sheet. But the Defendants mistake the relevant analytical starting point. The relevant analytical starting point for determining reasonable probability is "the time of the interference," not before or after the interference. Otherwise, every tortious interference with prospective contractual relations claim would fail for not obtaining the very thing that damages on the claim try to approximate: a contract. Proof of an actual contract is not required to establish the reasonable probability of a prospective contract.

With this timeframe in place, the Court disagrees that Defendants' facts, most of which are disputed by Plaintiffs, render the proposed transaction speculative at this stage of the proceedings. At the time of the alleged interference, *i.e.*, December 2015, it is not clear whether

CDH viewed any of these issues as dispositive. For example, there are genuine disputes of material fact on the importance of diligence to CDH or whether CDH would get all the diligence it wanted. Record evidence indicates that CDH invested its own capital in Palantir without any diligence using a different acquisition vehicle at the same time CDH was negotiating with Plaintiffs. The evidence also indicates that CDH knew that due diligence can be problematic with a privately held company like Palantir.

In addition, the Court finds there are genuine disputes of material fact on whether Defendants deliberately impaired Plaintiffs' ability to move more quickly, to coordinate properly, or to complete the steps Defendants now fault the Plaintiffs for not fulfilling. In other words, the duty to disclose imposed by the PSPAs complicates the Motions. Because of the PSPAs' duty to disclose, the time of the alleged interference apparently coincides with the moment Plaintiffs attempted to take the steps Defendants argue were necessary for making the proposed transaction reasonably probable. After disclosure, which was made not only for notice purposes, but also to make CDH's potential acceptance more probable, the Company "shut down all interaction" with Plaintiffs. After disclosure, DTA also told CDH that DTA was the Company's exclusive broker of secondary transactions. Despite the unique duty to disclose at issue here, Defendants ask the Court to hold that the proposed transaction was not reasonably probable because Plaintiffs could not get it done. After drawing inferences in Plaintiffs' favor, however, a closing may have been reasonably probable until Defendants seemingly took acts to stall the deal. The Court finds this raises a genuine issue as to a material fact. As such, the Court cannot decide this issue on summary judgment.

The Court observes that Defendants seem to be arguing that because the proposed transaction was not *certain* to close, Plaintiffs cannot establish a reasonable *probability* of a

closing. Plaintiffs, however, need not prove certainty. Instead, Plaintiffs must prove reasonable probability. The Court cannot grant Defendants summary judgment on these arguments, which are supported by disputed facts.

2. Defendants may have been the proximate cause of the deal's failure.

To establish the causation element, the defendant's interference must have been the proximate cause of the business opportunity's failure.[266] "Delaware courts follow the 'but-for' definition of proximate causation."[267] "In Delaware, proximate cause is that direct cause without which the incident would not have happened."[268] "Put another way, 'a proximate cause is one which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred.'"[269] An intervening event severs proximate causation only if it is a superseding cause.[270] A superseding cause is "an act or event, itself a proximate cause of the injury, that could not have been anticipated or reasonably foreseen by the original tortfeasor."[271] An intervening cause is not truly a superseding cause if it is instigated by the tortfeasor.[272] If the tortfeasor produces the supposed intervening cause, the tortfeasor remains the proximate cause of the injury. Delaware accepts that "there may be more than one proximate cause of an injury."[273] To assess proximate causation, the Court must look to the time of the alleged interference. The defendant's interference is the proximate cause of the

[266] *E.g.*, *Malpiede*, 780 A.2d at 1099.
[267] *Spicer v. Osunkoya*, 32 A.3d 347, 351 (Del. 2011).
[268] *Preston Hollow*, 2020 WL 1814756, at *15 (internal quotation marks omitted).
[269] *Soterion*, 2012 WL 5378251, at *17 (emphasis in original) (quoting *Duphily v. Del. Elec. Coop., Inc.*, 588 A.2d 821, 828 (Del. 1995)).
[270] *E.g.*, *Spicer*, 32 A.3d at 351.
[271] *Soterion*, 2012 WL 5378251, at *17 (internal quotation marks omitted).
[272] *See Soterion*, 2012 WL 5378251, at *17 (A superseding cause "could not have been anticipated or reasonably foreseen by the original tortfeasor." (internal quotation marks omitted)); *see also Spicer*, 32 A.3d at 351 ("When the court finds that full responsibility . . . has passed to a third person, his failure to act is then a superseding cause, which relieves the original actor of liability." (cleaned up)).
[273] *Wolf v. Toyota Motor Corp.*, 2013 WL 6596833, at *6 (Del. Super. Dec. 9, 2013).

opportunity's failure if the interference had "'cause[d] . . . [the] termination of the relationship or expectancy.'"[274]

Defendants argue they are not the proximate cause of the proposed transaction's failure largely for the same reasons they contend Plaintiffs' proposed deal with CDH was speculative. As discussed, the Court finds those arguments involve genuinely disputed facts. Defendants also contend that they are not the proximate cause of the proposed transaction's failure because CDH's attraction to Palantir's Series K primary equity offering was a superseding cause of CDH's lost interest in a secondary securities transaction with the Plaintiffs.

It appears undisputed that Palantir's Series K primary equity offering was open during December 2015, as the Company's SEC filings demonstrate. The Court notes that CDH became more interested in a Palantir Series K primary investment than a secondary one for different stock *after* DTA's outreach. Moreover, the Company offered CDH the same price (*e.g.*, $300 million) except on better terms than CDH could have executed with Plaintiffs. But it is unclear if CDH knew about Palantir's Series K primary equity offering *before* DTA's outreach.

Prior to hearing from DTA, CDH seemed interested in entering a secondary securities transaction with the Selling Group and BTIG for preferred stock from an earlier Series. The Company's representatives could not recall whether the Company considered CDH a serious potential Series K investor before Plaintiffs put Palantir on notice of CDH's identity.[275] Mr. Fishman, who purported to control the Company's securities sales through DTA and/or SF Sentry, did not know who CDH was until Mr. Kawasaki directed DTA to solicit CDH.[276]

---

[274] *Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc.*, 5 Supp. 2d 238, 243 (D. Del. 1998) (quoting *Dionisi v. DeCampli*, 1995 WL 398536, at *12 (Del. Ch. June 28, 1995)); *see Enzo Life Scis., Inc. v. Digene Corp.*, 295 F. Supp. 2d 424, 429 (D. Del. 2003) (applying Delaware law and articulating same standard).
[275] PX 37 at 138-39.
[276] PX 30 (Fishman stating that the name CDH "doesn't ring a bell").

Defendants then conditioned the Company's more favorable Series K offer on CDH's departure from the Selling Group and BTIG. CDH promptly departed. Considering all this together, Defendants seemingly created CDH's interest in Palantir's Series K primary equity offering to undermine Plaintiffs' proposed transaction. That instigation would not make the Series K primary equity offering a superseding cause.[277] Accordingly, absent a clearer understanding of the facts surrounding CDH's knowledge of the Company's Series K primary equity offering, the Court cannot determine whether that offering broke the original causal chain.

Finally, Defendants point to the fact that CDH ultimately declined to invest in the Company even after receiving diligence from Defendants. Defendants seemingly ignore the relevant timeline. What may have happened from February through May of 2016, *i.e.*, long after the alleged interference occurred, cannot accurately measure CDH's interest level in December, *i.e.*, when Defendants allegedly were interfering. The causation question is whether the alleged interference "cause[d] a breach or termination of the relationship or expectancy."[278] The expectancy, if any, was solidified in mid-December 2015 and abruptly terminated in early January 2016. The Court cannot speculate as to whether CDH would have declined on buying in mid-December 2015 for the same reasons CDH declined to buy four to five months later. That is especially so since some of the reasons CDH cited in rejecting Defendants' proposals were not available to CDH in mid-December. For example, CDH cited Defendants' insistence on exclusivity, an economic downturn in the secondary market within which companies like Palantir traded, and the Company's lack of transparency. These deal-breakers emerged in 2016. Accordingly, the cause of CDH's lost interest is inappropriate for resolution at this stage.

[277] *See Preston Hollow*, 2020 WL 1814756, at *15 (rejecting superseding cause argument because defendant "motivated" third party to lose interest in dealing with plaintiff).
[278] *Dionisi*, 1995 WL 398536, at *12.

3. Some of Defendants' conduct may have been independently wrongful.

Last, the Court must determine whether there is sufficient evidence in the record to permit each of Plaintiffs' proffered theories of independent wrongfulness to come before a jury. Plaintiffs advance several independent wrongs. Many of these independent wrongs are undifferentiated. Many of these independent wrongs also were not presented to the Court earlier in this case. Defendants claim that Plaintiffs' disorganization—*i.e.*, Plaintiffs' theories were not specifically pleaded in the Complaint—means that they are waived.

In the MTD Decision, the Court identified some independent wrongs that, if proven, would satisfy the independent wrongfulness requirement. But, in considering the Defendants' motions to dismiss, the Court applied a different legal standard and analyzed the Complaint under that standard. The Court determined whether the Complaint supported a reasonable inference of actionable wrongdoing. The factual record has developed in discovery. Indeed, Plaintiffs could have sought to amend the Complaint.[279] As a result, the MTD Decision is not necessarily law of the case that bars "new" factually developed theories. The Court may, depending on the circumstances, address new independent wrongfulness theories if based on a record developed beyond the Complaint in discovery.

This in mind, the Court must have subject matter jurisdiction over the claim. A tortious interference with prospective contractual relations claim is unusual in that a plaintiff ordinarily must prove at least one other violation in addition to the tortious interference claim itself. As the parties have argued, this two-in-one structure inevitably will require the Court to instruct a jury on the elements of the tortious interference claim and a separate legal theory constituting an independent wrong. As an initial matter, then, this Court must be the proper tribunal for

[279] *See* Del. Super. Civ. R. 15(a).

adjudicating the independent wrong alongside the tortious interference claim. The Court cannot submit a claim to a jury of this Court that this Court itself is not permitted to hear. This Court is a court of law, not of equity. The Court must narrow Plaintiffs' independent wrongfulness theories that do not belong in a court of law. It is in that regard that the Court grants the Motions in part. The Court does find, however, that Plaintiffs' independent wrongfulness theories that do belong in a court of law survive summary judgment.

a. This Court lacks subject matter jurisdiction over Plaintiffs' breach of fiduciary duty and non-contractual common law misappropriation theories.

Plaintiffs intend to bring independent wrongfulness "claims" sounding in breach of fiduciary duty and common law misappropriation. Plaintiffs' approach to bringing independent wrongfulness theories has alerted the Court to a subject matter jurisdiction problem. Defendants have not raised subject matter jurisdiction arguments through their Motions. But the Court may question its own subject matter jurisdiction "*sua sponte* . . . at any time."[280] The Court "is independently obligated to ensure that it has jurisdiction over the parties' claims *if any doubt exists*."[281] And "[w]henever it appears by suggestion of the parties *or otherwise"* that the Court lacks subject matter jurisdiction, the Court must dismiss the claim.[282]

This Court lacks subject matter jurisdiction over breach of fiduciary duty claims.[283] That is because a breach of fiduciary duty claim "is an equitable cause of action and the [Delaware]

[280] *B/E Aerospace, Inc. v. J.A. Reinhardt Holdings, LLC*, 2020 WL 4195762, at *2 (Del. Super. July 21, 2020) (first citing *Stearn v. Koch*, 628 A.2d 44, 47 (Del. 1993); then citing *Stroud v. Miliken Enters., Inc.*, 552 A.2d 476, 477 (Del. 1989)).
[281] *Webster v. Brosman*, 2019 WL 5579489, at *1 (Del. Super. Ct. Oct. 29, 2019) (emphasis added) (citing *Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1284 (Del. 2007)).
[282] Del. Super. Civ. R. 12(h)(3) (emphasis added); *see Perlman v. Vox Media, Inc.*, 2019 WL 2647520, at *4-5 (Del. Ch. June 27, 2019) (dismissing for lack of subject matter jurisdiction on summary judgment despite denying a motion to dismiss earlier in the case).
[283] *E.g.*, *Reybold Venture Grp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *2 (Del. Super. Jan. 20, 2009) (citing *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987)).

Court of Chancery has exclusive jurisdiction" over such claims.[284] Despite that, Plaintiffs ask the Court to find that the Company's actions breached its fiduciary duties to treat the Company's stockholders fairly, equally and with loyalty. The Court declines this invitation.[285]

Similarly, Plaintiffs assert that the Company violated its Articles of Incorporation when it offered CDH the opportunity to purchase more stock than allegedly allowed by the Company's Articles of Incorporation. Though Plaintiffs couch this alleged misconduct as a mere misrepresentation, the Court's analysis would not be that one-dimensional. To gauge the validity of the Company's actions, the Court would be required to interpret Palantir's Articles of Incorporation and to rule on the rights of Delaware corporations to issue additional stock, to amend their governance documents, and to sell primary securities to outside buyers. That type of analysis, however, would advance the Court, and a jury, into the Court of Chancery's exclusive jurisdiction.[286] This Court cannot do that here.[287]

Plaintiffs' standalone common law misappropriation theory poses a subtler subject matter jurisdiction issue. In Delaware, common law misappropriation claims involving misuse of confidential information that does not meet the definition of a "trade secret" are preempted by Delaware's Uniform Trade Secret Act ("DUTSA").[288] Plaintiffs do not contend that the general

[284] *Reybold*, 2009 WL 143107, at *3 (citing *McMahon*, 532 A.2d at 604); *see, e.g.*, *Tally Bros., Inc v. Ford Motor Co.*, 1992 WL 240341, at *3 (Del. Super. Ct. Sept. 16, 1992) (granting summary judgment based on a lack of subject matter jurisdiction over a breach of fiduciary duty claim).
[285] *E.g.*, *Harman v. Masonelian Int'l, Inc.*, 442 A.2d 487, 492 (Del. 1982).
[286] *See* 8 *Del. C.* § 111.
[287] *See, e.g.*, *JCM Innovation Corp. v. FL Acquisition Holdings, LLC*, 2016 WL 5793192, at *5 (Del. Super. Sept. 30, 2016) (citing 8 *Del. C.* § 111); *see also Sun Life Assurance Co. of Canada – U.S. Operations Holdings, Inc. v. Grp. One Thousand One, LLC*, 206 A.3d 261, 269-70 (Del. Super. 2019) (similar).
[288] *See* 6 *Del. C.* § 2007; *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 898 (Del. 2002); *see also Atl. Med. Specialists, LLC v. Gastroenterology Assocs., P.A.*, 2017 WL 1842899, at *12-15 (Del. Super. Apr. 20, 2017) (explaining DUTSA preemption and its effect on common law misappropriation claims).

transactional information they provided the Company under the PSPAs is trade secretive. The Court agrees that such information is not a trade secret.[289]

Delaware decisions interpreting DUTSA provide that a standalone misappropriation claim involving general business information can withstand DUTSA preemption only if the claim requires proof of an element beyond that required to establish misappropriation.[290] Based on Supreme Court precedent,[291] the same decisions found the "proof beyond" constraint overcome only where the misappropriation claim combines with a breach of fiduciary duty claim.[292] The Court, however, lacks subject matter jurisdiction to resolve the breach of fiduciary duty allegations underlying Plaintiffs' common law misappropriation theory.

Nonetheless, the Court also finds that Plaintiffs' common law misappropriation theory is based in part on the contract rights inherent to their preferred stockholder statuses. Preferred stockholders differ from common stockholders in that Delaware corporations are in both fiduciary and contractual relationships with preferred stockholders.[293] And under DUTSA, a general misappropriation claim avoids preemption if that misappropriation claim actually is a breach of contract claim.[294] Using that DUTSA provision, this Court has found a tortious interference with contract case involving a breach of a confidentiality agreement to avoid

---

[289] *See Alarm.com Holdings, Inc. v. ABR Cap. Partners Inc.*, 2018 WL 3006118, at *10 (Del. Ch. June 15, 2018) (explaining that general business information is not a trade secret under DUTSA).
[290] *Id.* at *10-11; *Atl. Med.*, 2017 WL 1842899, at *14-15.
[291] The cases cited *infra* n.288 discussed *Beard Research*, 8 A.3d 573 (Del. Ch. 2010), a case from the Court of Chancery that was affirmed by the Supreme Court. This Court recognized that the Supreme Court did not pass explicitly on the DUTSA issue raised below. *See Atl. Med.*, 2017 WL 1842899, at *14. Presumably, however, the Supreme Court would not have affirmed *Beard Research*, a post-trial decision, in its entirety if the DUTSA preemption analysis were incorrect. *See id.* at *15 (reaching this conclusion).
[292] *Alarm.com*, 2018 WL 3006118, at *10; *Atl. Med.*, 2017 WL 1842899, at *14-15. The Court of Chancery has persuasively distinguished the only case that allowed a misappropriation claim coupled with a non-fiduciary duty claim to survive DUTSA preemption, making that case unreliable authority. *See Alarm.com*, 2018 WL 3006118, at *10-11 (questioning *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209 (Del. Ch. June 17, 2011)).
[293] *See, e.g., HB Korenvaes Invs., L.P. v. Marriott Corp.*, 1993 WL 205040, at *5 (Del. Ch. June 9, 1993) (Allen, C.).
[294] *See* 6 *Del. C.* § 2007(b) (preserving "contractual remedies, whether or not based on misappropriation of a trade secret").

preemption.[295] The Court still must reject Plaintiffs' misappropriation theory to the extent it is based on a breach of fiduciary duty. But neither this conclusion nor DUTSA precludes the Court from considering the same misappropriation claim where Plaintiffs' have folded it into a contract theory stemming from a breach of an implied covenant in the PSPAs.

b. The implied covenant theory survives.

Having resolved jurisdictional issues, the Court now assesses Plaintiffs' other theories. The Court begins with Plaintiffs' implied covenant theory. As noted above, the PSPAs require preferred stockholders to put the Company on notice of any proposed secondary securities transaction for the sale of the Company's stock. Plaintiffs contend that implied in that provision is a parallel prohibition on the Company not to use Plaintiffs' transactional information for the Company's or its associates' bad faith personal gain. Plaintiffs contend that the Company breached this obligation when it usurped their opportunity with CDH. Plaintiffs also contend that DTA aided and abetted Palantir's breach of this implied obligation.[296]

To state a claim for breach of the implied covenant, "a claimant must allege: (1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damage."[297] The implied covenant of good faith and fair dealing inheres in all contracts.[298] The

[295] *Atl. Med.*, 2017 WL 1842899, at *15-16.
[296] The Court rejects this theory as to DTA because "Delaware law generally does not recognize a claim for aiding and abetting a contractual breach." *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 193 (Del. Ch. 2014), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015); *see, e.g.*, *ASB Allegiance Real Est. Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 442–45 (Del. Ch. 2012) (explaining why the implied covenant is a breach of contract theory), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013). A narrow exception exists for contracts that have "fiduciary" aspects. *MKE Holdings Ltd. v. Schwartz*, 2020 WL 467937, at *16 (Del. Ch. Jan. 29, 2020) (internal quotation marks omitted). This Court, though, cannot pass on fiduciary aspects of contracts. As a result, the proper rubric for evaluating a third party's participation in a contractual breach in this Court would be through a tortious interference with contract claim. *See Bhole*, 67 A.3d at 453 (enumerating elements). Plaintiffs, however, have not made this argument. DTA, therefore, has not had an opportunity to respond to it. Accordingly, the Court will not discuss it. *See Matthew v. Laudamiel*, 2014 WL 5904716, at *2 & n.12 (Del. Ch. Nov. 12, 2014) (rejecting aiding and abetting breach of contract claim where plaintiff should have argued tortious interference with contract but did not do so), *aff'd*, 2016 WL 3563268 (Del. June 22, 2016).
[297] *Buck v. Viking Holding Mgmt. Co. LLC*, 2021 WL 673459, at *5 (Del. Super. Feb. 22, 2021).
[298] *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017).

implied covenant exists to deter "arbitrary or unreasonable" conduct that would undermine "the fruits of the bargain that the asserting party reasonably expected."[299] "The reasonable expectations of the contracting parties are assessed at the time of contracting."[300] Before implying a covenant, the Court must "look[] to the past"[301] to determine "what the parties likely would have done if they had considered the issues involved."[302] Put differently, a covenant only should be implied where it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter."[303]

"The retrospective focus applies equally to a party's discretionary rights."[304] By consequence, "parties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms."[305] "When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith."[306] Given

[299] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).
[300] *Dieckman*, 155 A.3d at 367.
[301] *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013), *overruled in part on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013).
[302] *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) (internal quotation marks omitted).
[303] *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).
[304] *Gerber*, 67 A.3d at 419 (internal quotation marks omitted).
[305] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation marks omitted); *see Gerber*, 67 A.3d at 419 ("[W]hat is arbitrary or unreasonable—or conversely reasonable—depends on the parties' original contractual expectations, not a free-floating duty applied at the time of the wrong." (internal quotation marks omitted)).
[306] *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146–47 (Del. Ch. 2009); *see Gerber*, 67 A.3d at 419 ("[G]ood faith does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose and terms of the parties' contract." (emphasis and internal quotation marks omitted)).

that paradigm, the Court recognizes that the implied covenant is most appropriate when deployed to combat conduct involving aspects of fraud.[307]

The Court must be cautious when addressing the purported existence of an implied covenant.[308] Implying the covenant is "a rare and fact-intensive exercise[] governed solely by issues of compelling fairness."[309] The implied covenant "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, [] later adversely affect[] one party to a contract."[310] Indeed, "[p]arties have a right to enter into good and bad contracts, the law enforces both."[311] As a result, the Court will not "re-write" the agreement under the guise of implying a covenant.[312] The implied covenant "does not apply when the contract addresses the conduct at issue, but only when the contract is truly silent concerning the matter at hand."[313] Even where there is a "gap," a court "should be most chary about implying a contractual protection when the contract easily could have been drafted to expressly provide for it."[314] Accordingly, the Court will imply the covenant only if, given the PSPAs' plain language and overarching purpose, there is a gap in which the parties would have included a provision that prevents the Company from exercising its discretion to misappropriate Plaintiffs' transactional information and effectively defraud Plaintiffs with the PSPAs' sale restraints and notice provisions.

---

[307] *See ASB Allegiance*, 50 A.3d at 443 ("It would be a rare party who, in the original bargaining position, would agree that a counterparty could defraud him. . . . Proof of fraud therefore violates the implied covenant, not because breach of the implied covenant requires fraud, but because 'no fraud' is an implied contractual term." (citation omitted)).
[308] *Nemec*, 991 A.2d at 1125.
[309] *Dunlap*, 878 A.2d at 442 (internal quotation marks and citations omitted).
[310] *Oxbow Carbon & Min. Holdings, Inc. v. Crestview–Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019).
[311] *Nemec*, 991 A.2d at 1126.
[312] *Oxbow*, 202 A.3d at 507 (internal quotation marks omitted).
[313] *Id.* (internal quotation marks and citations omitted).
[314] *Id.* (internal quotation marks omitted); *see Allen*, 113 A.3d at 183 ("If a contractual gap exists, then the court must determine whether the implied covenant should be used to supply a term to fill the gap. Not all gaps should be filled.").

The Court finds that the PSPAs' sale restraints and notice provisions are plain and unambiguous. The PSPAs' sale restraints and notice provisions plainly and unambiguously express an intent to keep matters involving secondary securities transactions private until the Company determines, in its discretion, whether the proposed secondary transaction complies with exemptions afforded Palantir by securities law.[315] As support for this conclusion, the same terms further state that an "opinion of counsel" may be required for the Company to properly evaluate whether a proposed secondary sale will violate federal securities law.[316] The parties, therefore, at the time of contracting intended some degree of confidentiality in order to prevent enforcement penalties from the SEC.

In addition, the sale restraints and notice provisions plainly and unambiguously vest the Company with discretion to approve secondary securities transactions. The PSPAs, however, do not specify the limits of that discretion. They only state that the Company gets to determine whether disclosed transactional information and accompanying compliance analyses are "reasonably satisfactory."[317] That language is tied to the Company's discretionary approval rights. It does not speak to what the Company may not do with the transactional information as the approval process is ongoing. In other words, the sale restraints and notice provisions contain a gap concerning prohibitions on the Company's permitted uses of private transactional information. But together with their emphasis on non-disclosure, the parties clearly intended that the Company would not use transactional information for any other purpose than for internal review and approval. Otherwise, the notice provision—which should only activate the

[315] PSPAs §§ 3.7(b), 3.8.
[316] *Id.* § 3.7(b)(ii).
[317] *Id.*

Company's role as a transfer agent for preferred stockholders' sales—effectively would permit a kind of fraud.[318]

An overarching purpose of the PSPAs is to allow preferred stockholders to sell their stock after the sale has been internally reviewed and approved. That purpose would be frustrated if the Company could use its discretion to arrogate otherwise private securities information and share it with other sellers or third-party associates (*e.g.*, DTA). Outsiders could inadvertently trigger registration by disseminating or otherwise using the information intended for Palantir alone. A factfinder could find, therefore, that it would be arbitrary or unreasonable for the Company—which controls the approval process—to convert a notice provision designed to shield Palantir from registering on an exchange into a tool for obtaining a bad faith, fraud-like advantage over its stockholders.[319] Accordingly, the Court finds that there is sufficient evidence in the record to support the existence of an implied covenant in the PSPAs prohibiting the Company from exercising its discretion to reject a proposed sale just so it could use the securities transaction information it receives to subvert those transactions. This covenant would not create a "free-floating duty unattached to" the PSPAs.[320] Instead, this covenant would require the Company to respect the PSPAs' sale restrictions and notice provisions as written and originally intended. Whether the Company's duty was triggered and whether the Company breached this duty are questions for a jury. The Court cannot grant the Motions on this point.

[318] PX 18 at 40–41 (The Company's CFO describing the Company merely as a "transfer agent" for secondary securities sales the Company learns of through the PSPAs).
[319] *See Airborne*, 984 A.2d at 146 (observing that the implied covenant requires discretion be exercised reasonably and in good faith); *Dunlap*, 878 A.2d at 842 (observing that "parties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms"); *see also ASB Allegiance*, 50 A.3d at 443 (explaining that "no fraud" is an implied term in all agreements).
[320] *See Dunlap*, 878 A.2d at 441.

That said, the Court remains mindful of the fiduciary duty of loyalty claims Plaintiffs have tried to assert. If, at trial, it turns out that Plaintiffs merely "seek[] to re-introduce fiduciary review through the backdoor of the implied covenant,"[321] the Court could essentially direct a verdict by dismissing the claim, *sua sponte* or otherwise, on jurisdictional grounds.

c. The misrepresentation and related fraud theories survive.

Plaintiffs contend Defendants conspired to defraud Plaintiffs by misrepresenting the true nature of Defendants' involvement with CDH. Plaintiffs also argue that Defendants' statements to CDH about DTA's exclusive role as Palantir's secondary securities broker, the Company's board approval, and Palantir's "rights of first refusal" were misrepresentations.

The *Restatement of Torts* specifically isolates "misrepresentations" as independently wrongful conduct.[322] A comment to the *Restatement of Torts* explains that a misrepresentation is wrongful when made to a third party by the defendant in regard to the plaintiff or her commercial rights.[323] The same comment to the *Restatement of Torts* explains that, as opposed to other independent wrongs, these misrepresentations need not result in actual legal violations to be independently wrongful.[324]

Still, Plaintiffs must demonstrate that Defendants' statements were in fact misrepresentations. The legal standard for a misrepresentation is a false statement of material fact made "knowingly, intentionally, or with reckless indifference to the truth."[325] If the

[321] *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1019 (Del. Ch. 2010); *see Gerber*, 67 A.3d at 419 (explaining that the implied covenant is not about a duty of loyalty); *Katz*, 508 A.2d at 879 n.7 (explaining that the implied covenant is not a substitute for fiduciary duty review).
[322] *Restatement of Torts* § 767 cmt. c; *accord Preston Hollow*, 2020 WL 1814756, at *17.
[323] *Restatement of Torts* § 767 cmt. c.
[324] *Id.* ("One may be subject to liability for intentional interference even when his fraudulent representation is not of such a character as to subject him to liability for the other torts."); *accord Preston Hollow*, 2020 WL 1814756, at *17 (finding misrepresentations to third parties independently wrongful without engaging in a fraud analysis).
[325] *Preston Hollow*, 2020 WL 1814756, at *17 (internal quotation marks omitted); *see also In re Wayport, Inc. Litig.*, 76 A.3d 296, 326 (Del. Ch. 2013)(same).

intentional statements Defendants made to CDH about the Company's contract rights and approvals and DTA's status as the Company's exclusive secondary broker are proven to be misrepresentations, then Defendants will have committed an independent wrong.

As to fraud by overt misrepresentations, Plaintiffs must prove:

> (i) a false representation, usually one of fact, made by the defendant;
>
> (ii) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
>
> (iii) an intent to induce the plaintiff to act or to refrain from acting;
>
> (iv) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
>
> (v) damage to the plaintiff because of such reliance.[326]

To impose liability on DTA as a co-conspirator in fraud, Plaintiffs must prove: "(i) underlying tortious conduct, (ii) knowledge, and (iii) substantial assistance."[327] Plaintiffs principally rely on Mr. Kawasaki's e-mail to the Selling Group to satisfy these elements. Defendants argue against the claim that Mr. Kawasaki's e-mail was calculated to be false or misleading.

The Selling Group contacted Palantir after learning that Defendants contacted CDH. The Company replied, stating that (i) DTA did not represent the Company in any negotiations with CDH; (ii) CDH contacted Defendants first; (iii) in any event, the Company did not intend to pursue CDH; and (iv) the Company was willing to assist the Selling Group by stewarding the proposed transaction with CDH.[328] The disputed facts in the record, if proven, suggest that the Company's message may not have been true. DTA—after contacting CDH first—had been

---

[326] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs., Inc.*, 854 A.2d 121, 144 (Del. Ch. 2004) (quoting *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).
[327] *Agspring Holdco, LLC v. NGP US X Holdings, L.P.*, 2020 WL 4355555, at *20 (Del. Ch. July 30, 2020) (internal quotation marks omitted).
[328] PX 4 at Palantir_KT4_00002265.

actively recruiting CDH for a Palantir investment until the Selling Group discovered DTA's outreach. Only then did the Company—but before replying to the Selling Group—order DTA to cancel its meeting with CDH in China. In addition, the disputed facts in the record, if proven, indicate that the underlying premise of the Company's reply was incorrect. CDH did not appear to know about Palantir's Series K primary equity offering until DTA's outreach. Disputed facts in the record, if proven, also suggest that the Company did intend to pursue CDH. Conversely, disputed facts in the record, if proven, suggest the Company did not intend to assist the Plaintiffs in their efforts to induce CDH's acceptance. Based on disputed, and yet-unproven, facts, Plaintiffs may have been unable to further engage with CDH due to the Company's statements. Accordingly, the Court cannot grant the Motions on this point. A jury must resolve these issues.

d. The unregistered securities broker theory survives.

Finally, Plaintiffs contend that DTA engaged in independently wrongful conduct by brokering securities on the Company's behalf without registering as a broker under federal securities law. If DTA did not register as a broker, but acted as one, Plaintiffs argue that DTA engaged in wrongful conduct under certain securities and criminal statutes and federal rules.

Under federal law, it is illegal for a person "to induce or attempt to induce the purchase or sale of any security" unless the person has registered with the SEC as a "broker."[329] Under the Securities Exchange Act of 1934, a "broker" is "any person engaged in the business of effecting transactions in securities for the account of others."[330] "For a person to be deemed a broker . . ., [t]he evidence must . . . show involvement at key points in the chain of distribution, such as participating in the negotiation, analyzing the issuer's financial needs, discussing the details of

[329] Securities Exchange Act of 1934, 15 U.S.C. § 78o(a)(1).
[330] *Id.* § 78c(a)(4)(A).

the transaction, and recommending an investment."[331] "Merely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough to warrant broker registration" under the Exchange Act.[332] Instead, the facts must demonstrate that the putative broker's involvement in the sale was substantial and that the putative broker's activity does not fall into one of the Exchange Act's exceptions.[333]

DTA is an exempt investment adviser under federal law. SF Sentry is a registered broker-dealer under federal law. Mr. Davis and Mr. Fishman work for both DTA and SF Sentry. DTA's main argument against this theory is that Mr. Davis and Mr. Fishman were acting as representatives of SF Sentry, not DTA, when they reached out to CDH.

The problem for DTA is that the record does not seem to support this argument. Mr. Davis and Mr. Fishman were listed as placement agents of SF Sentry in connection with the Company's Series K round. SF Sentry also was the lead primary broker for the Company's Series K round. Mr. Davis, however, introduced himself to CDH as DTA's representative, not SF Sentry's representative. Moreover, CDH noted contact from DTA and not SF when CDH reassured the Company that it had terminated negotiations with Plaintiffs. Adding another layer of complexity, the record contains fact disputes on whether SF Sentry knew about, or supervised, Mr. Davis and Mr. Fishman's "side" involvement with the Company. The parties have given less attention to the Exchange Act's technical broker registration requirements and exceptions. Without meaningful legal argument, or undisputed facts, the Court is not confident that it can grant DTA's Motion on this point. The Court may deny summary judgment where the record does not clarify the correct application of the governing law. This is an appropriate case for

[331] *Endowment Rsch. Grp., LLC v. Wildcat Venture Partners, LLC*, 2021 WL 841049, at *12 (Del. Ch. Mar. 5, 2021) (alteration in original) (internal quotation marks omitted) (citing federal authority).
[332] *Id.* at *11 (internal quotation marks omitted) (citing federal authority).
[333] *Id.* at *12.

deferring the issue until the jury has a more complete evidentiary record to decide the issue. If, at trial, the evidence supports DTA's position on this issue, the Court could direct a verdict in DTC's favor.

DTA contends that Plaintiffs waived this claim for not specifically pleading it in the Complaint. The Court observed in the MTD Decision that the unregistered broker theory was not specifically pleaded in the Complaint. But the Complaint referenced DTA's alleged broker activity several times.[334] DTA is not registered as a securities broker; however, the disputed record indicates DTA may have acted like one. As a result, Plaintiffs' references to brokerage put DTA on notice that a claim like this one existed. A plaintiff only has an obligation to put an opposing party on fair notice of its theories.[335]

4. Defendants may have conspired to commit tortious interference with prospective contractual relations.

"To successfully [prove] a claim for civil conspiracy under Delaware law, a plaintiff must [show] (1) [a] confederation or combination of two or more persons; (2) [a]n unlawful act done in furtherance of the conspiracy; and (3) [a]ctual damage."[336] "Each conspirator is jointly and severally liable for the acts of co-conspirators committed in furtherance of the conspiracy."[337] A civil conspiracy claim fails if the plaintiff does not demonstrate "an underlying wrongful act, such as a tort or a statutory violation."[338] A civil conspiracy claim also fails if the underlying wrongful act alleged is a breach of contract, or tortious interference with an existing contract.[339]

[334] *E.g.*, Compl. ¶¶ 2, 16, 20, 29.
[335] *E.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (explaining notice pleading).
[336] *NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) (first and second alteration added) (internal quotation marks omitted).
[337] *Id.* at 35 (internal quotation marks omitted).
[338] *Id.* (citing *Empire Fin. Servs. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 (Del. 2006)).
[339] *E.g.*, *NACCO*, 997 A.2d at 35 (collecting authority).

Defendants argument against the civil conspiracy claim is that because Plaintiffs' tortious interference with prospective contractual relations claim fails as a matter of fact and law, the civil conspiracy claim necessarily fails for lack of an underlying wrongful act. As explained, however, the tortious interference claim rests on disputed facts. In addition, because the alleged civil conspiracy attaches to a tort involving a prospective contract—not an existing one—there is no legal basis for rejecting the civil conspiracy claim. Accordingly, the civil conspiracy claim survives summary judgment.

VI. CONCLUSION

For the foregoing reasons, the Court will **GRANT** the Motions **IN PART** (*i.e.*, to the extent the Plaintiffs seek to bring claims over which this Court lacks subject matter jurisdiction) and will **DENY** the Motions **IN PART** (*i.e.*, in all other respects).

Dated: June 24, 2021
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress