IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

RIVER VALLEY INGREDIENTS, LLC, TYSON POULTRY, INC., and TYSON FARMS, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. N19C-12-160 MMJ CCLD
AMERICAN PROTEINS, INC. n/k/a CROSSROADS PROPERTIES A, INC., AMPRO PRODUCTS, INC. n/k/a CROSSROADS PROPERTIES B, INC., GEORGIA FEED PRODUCTS COMPANY, LLC n/k/a CROSSROADS PROPERTIES, C, LLC, THOMAS N. ("TOMMY") BAGWELL, DON MABE, MARK HAM, and MIKE HULL,	)	
Defendants.	)	

Submitted: October 27, 2020
Decided: February 4, 2021

On Defendant Don Mabe's Motion to Dismiss
GRANTED IN PART and DENIED IN PART

Defendant Mike Hull's Motion to Dismiss
GRANTED IN PART and DENIED IN PART

Defendant Thomas Bagwell's Motion to Dismiss
GRANTED IN PART and DENIED IN PART

Defendant Mark Ham's Motion to Dismiss
GRANTED IN PART and DENIED IN PART

Defendant American Proteins, Inc. n/k/a Crossroads Properties A, Inc.'s Motion to Dismiss
DENIED

Defendant AMPRO Products, Inc. n/k/a Crossroads Properties B, Inc.'s Motion to Dismiss
DENIED

Defendant Georgia Feed Products Company, L.L.C. n/k/a Crossroads Properties C, LLC's Motion to Dismiss
DENIED

MEMORANDUM OPINION

Edward S. Sledge IV, Esq. (Argued), Whitt Steinker, Esq., Zachary A. Madonia, Esq., Hillary C. Campbell, Esq., K. Laney Gifford, Esq., Bradley Arant Boult Cummings LLP, Birmingham, Alabama, Stephen B. Brauerman, Esq. (Argued), Sarah T Andrade, Esq., Bayard, P.A., Wilmington, Delaware, *Attorneys for Plaintiffs.*

J. Allen Maines, Esq. (Argued), Caroline Johnson Tanner, Esq., A. Andre Hendrick, Esq., Patrick Reagin, Esq., Jacquelyn Thomas Watts, Esq., Matthew D. Friedlander, Esq., Holland & Knight LLP, Atlanta, Georgia, Philip A. Rovner, Esq., Jonathan A. Choa, Esq., Potter Anderson & Corroon LLP, Wilmington, Delaware, *Attorneys for Defendants.*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Parties

Plaintiffs purchased certain business operations and assets from Defendants. Plaintiff River Valley Ingredients, LLC ("RVI") is a Delaware limited liability company with its principal place of business in Springdale, Arkansas.[1] RVI is a wholly-owned subsidiary of Tyson Poultry, Inc.[2] Plaintiff Tyson Poultry, Inc. ("Tyson Poultry") is a Delaware corporation with its principal place of business in Springdale, Arkansas.[3] Tyson Poultry is a wholly-owned subsidiary of Tyson Foods, Inc.[4] Plaintiff Tyson Farms, Inc. ("Tyson Farms") is a North Carolina corporation with its principal place of business in Springdale, Arkansas.[5] Tyson Farms is also a wholly-owned subsidiary of Tyson Foods, Inc.[6] Plaintiffs collectively will be referred to as "Tyson."

Defendant American Proteins, Inc. n/k/a Crossroads Properties A, Inc. ("American Proteins") is a Georgia corporation with its principal place of business in Cumming, Georgia.[7] Defendant AMPRO Products, Inc. n/k/a Crossroads Properties B, Inc. ("AMPRO"), a subsidiary of American Proteins, is a Georgia

[1] Compl. at ¶ 9.
[2] *Id.*
[3] *Id.* ¶ 10.
[4] *Id.* Tyson Foods, Inc., a Delaware corporation, is not a party to this suit.
[5] *Id.* ¶ 11.
[6] *Id.*
[7] *Id.* ¶12.

corporation with its principal place of business in Cumming, Georgia.[8] Defendant Georgia Feed Products Company, L.L.C. n/k/a Crossroads Properties C, LLC ("Georgia Feed") is a Georgia limited liability company with its principal place of business in Cumming, Georgia.[9] Defendants American Proteins, AMPRO, and Georgia Feed collectively will be referred to as "API."

Defendants Thomas "Tommy" Bagwell ("Bagwell"), Don Mabe ("Mabe"), Mark Ham ("Ham"), and Mike Hull ("Hull") reside in Georgia.[10] Defendants Bagwell, Mabe, Ham, and Hull collectively will be referred to as the "API Executives."

Tyson Enters into an Asset Purchase Agreement with API

Tyson purchased various "rendering and blending assets" from API.[11] The parties began seriously discussing the purchase in May 2017.[12] The Asset Purchase Agreement ("APA") was executed on May 14, 2018.[13]

Tyson alleges that prior to the sale, API had purchased and sold "secondary poultry nutrients" ("SPN") in violation of "statutes, regulations, industry standards, and consumer contracts."[14] Tyson further alleges that once the pre-sale diligence

[8] *Id.* ¶ 13.
[9] *Id.* ¶ 14.
[10] *Id.* ¶¶ 15-18.
[11] Opening Brief in Support of Defendant Don Mabe's Motion to Dismiss, at 1.
[12] Compl. ¶ 4.
[13] *Id.* ¶ 5.
[14] *Id.* ¶ 3.

process began, API "embarked on a . . . scheme to eradicate SPN from the production process for poultry by-product meal and to actively conceal from Tyson their decades of wrongdoing, showing instead year after year of API's profitability."[15] The purpose of this "scheme" was to inflate API's financial performance and, in turn, raise the purchase price. After the $825 million purchase was completed, Tyson claims that it discovered various other lies, fraudulent misrepresentations, and information concealed by the defendants.[16]

During the period of time when the APA was prepared and executed, Bagwell was: (1) chairman of the board of American Proteins; (2) the owner of over 99% of the outstanding shares of American Proteins' stock; (3) chairman of the board and a partial owner of AMPRO; (4) the direct holder of 1% of the outstanding shares of AMPRO stock; and (5) the indirect holder of 79% of the outstanding shares of AMPRO stock.[17] Mabe is the former CEO of American Proteins.[18] At the time of acquisition, Mabe served on American Protein's board of directors and owned .13% of the company's outstanding stock;[19] Ham was the CEO and President of American Proteins, and served on its board of

[15] *Id*. ¶ 4.
[16] *Id*. ¶¶ 6, 7.
[17] *Id*. ¶ 15.
[18] *Id*. ¶ 16.
[19] *Id*.

directors;[20] and Hull was the CFO of American Proteins.[21]

Procedural History

Tyson filed suit in this Court against API and the API Executives on December 20, 2019. Tyson asserts claims for fraud in the inducement and civil conspiracy against all defendants, unjust enrichment against the API Executives, and breach of contract against API. On December 27, 2019, Mabe invoked diversity jurisdiction and removed the case to the United States District Court for the District of Delaware.

District Court Opinion

While this case was before the District Court, Tyson moved to remand the case back to this Court. Tyson argued that the forum selection clause contained in the APA required the case to be heard in a Delaware state court. Mabe argued in response that the case could be heard in the District Court because he was not bound by the forum selection clause.

The District Court followed a three-prong analysis to determine whether Mabe, as a non-signatory party, could be bound by the forum selection clause.[22] Judge Andrews found that: (1) the forum selection clause was valid;[23] (2) Mabe

[20] *Id*. ¶ 17.
[21] *Id*. ¶ 18.
[22] *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2020 WL 2220148, at *3 (D. Del.).
[23] *Id*. at *3.

was closely related to the agreement;[24] and (3) the claims at issue arose from Mabe's status related to the APA.[25] The District Court held that the forum selection clause was binding on Mabe and the other defendants.[26] The case was remanded to this Court.[27]

Status of Motions Upon Remand

The following documents were submitted to the District Court: (1) American Protein's Motion to Dismiss and supporting Opening Brief and Reply Brief; (2) AMPRO's Motion to Dismiss and supporting Opening Brief and Reply Brief; (3) Georgia Feed's Motion to Dismiss and supporting Opening Brief and Reply Brief; (4) Tyson's Answering Brief in Opposition to API's Motions to Dismiss; (5) Mabe's Motion to Dismiss, Opening Brief, Reply Brief, and Declaration; (6) Tyson's Answering Brief in Opposition to Mabe's Motion to Dismiss; (7) Ham's Motion to Dismiss, Opening Brief, Reply Brief, and Declaration; (8) Tyson's Answering Brief in Opposition to Ham's Motion to Dismiss; (9) Hull's Motion to Dismiss, Opening Brief, Reply Brief, and Declaration; and (10) Tyson's Answering Brief in Opposition to Hull's Motion to Dismiss.

[24] *Id*. at *5.
[25] *Id*.
[26] *Id*. at *6.
[27] *Id*.

The status of these motions was not immediately clear upon remand to this Court. While the parties provided this Court with a set of courtesy copies of the aforementioned documents, they failed to properly docket them in the Superior Court. The parties additionally failed to provide a cover letter, or other communication to the Court, that clarified which motions were still pending and whether any issues had been resolved. Finally, the parties failed to revise the briefs and focus on the legal standards applicable in this Court. All arguments contained in the briefs are based on federal standards.

STANDARD OF REVIEW

Failure to State a Claim Upon Which Relief Can be Granted

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[28] The Court must accept as true all well-pleaded allegations.[29] Every reasonable factual inference will be drawn in the non-moving party's favor.[30] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.[31]

[28] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[29] *Id.*
[30] *Wilmington Sav. Fund. Soc., F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[31] *Spence*, 396 A.2d at 968.

ANALYSIS

Defendants' Contentions

Mabe argues that this case must be dismissed because the pleadings are inadequate. Mabe first contends that the Complaint fails to plead facts sufficient to confer jurisdiction or make venue proper.[32] Second, Tyson employs impermissible group pleading. Third, Tyson fails to plead loss causation. Fourth, Tyson's fraud in the inducement claim is precluded by the APA's anti-reliance clause.

In addition to the errors in pleading, Mabe argues that Tyson's civil conspiracy claim fails as a matter of law because Tyson has not plead a viable underlying tort or provided particularized allegations. Finally, Mabe asserts that Tyson's unjust enrichment claim fails because: (1) Tyson has not alleged that it lacks a remedy at law; (2) Mabe did not receive anything of value from any of the three Plaintiffs; and (3) the matters at issue are governed by a contract.[33]

In their respective briefs, the API defendants advance similar arguments attacking Tyson's pleadings. The API defendants additionally argue that Tyson's breach of contract claim must be dismissed because Tyson failed to plead that it incurred any recoverable losses. Finally, the API defendants argue that Tyson's

[32] This issue has been resolved by the District Court. As all defendants are bound by the forum selection clause found in the APA, this Court has jurisdiction and venue is proper.
[33] Defendants Bagwell, Hull, and Ham advance substantially similar arguments tailored to their individual facts.

fraud claim fails because the fraud damages sought by Tyson are duplicative of the alleged breach of contract damages.

Plaintiffs' Contentions

In response, Tyson contends that it has pled each element of its fraudulent inducement claim with the requisite particularity. Tyson asserts that the Complaint identifies the "who, what, when, where, and how" of the alleged fraud. The Complaint additionally alleges causation and justifiable reliance. Tyson argues that, in this case, group pleading is permissible because the Complaint specifically identifies the alleged wrongful actions of each defendant. Tyson further argues that it has sufficiently pled the elements of civil conspiracy and unjust enrichment.

As to API's arguments, Tyson maintains that the damages listed in the Complaint are recoverable under the APA. Finally, Tyson asserts that the alleged fraud damages are distinct from the breach of contract damages.

Count I- Fraud in the Inducement

Pursuant to Superior Court Rule 9(b): "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "The factual circumstances to be stated with particularity refer to the time, place, and contents of the false representations; the facts misrepresented; the identity of the person(s) making the misrepresentation; and what that person(s) gained from

making the misrepresentation."[34] While the pleading requirements for fraud are heightened, allegations still may be "'well-pleaded' if they provide the defendant notice of the claim."[35] There is nothing in Rule 9 that *per se* prohibits group pleading.[36] A plain reading of the rule suggests that group pleading may be permitted so long as individual defendants are on notice of the claim against them.

Under federal law, a motion to dismiss to will be granted if the complaint fails to state a *plausible* claim for relief.[37] However, under Delaware law, a motion to dismiss will be granted only if the plaintiff "could not recover under any *reasonably conceivable* set of circumstances susceptible of proof under the complaint."[38]

Tyson Identified the Alleged False Representations of Material Fact

In the Complaint, Tyson alleges that API and the API Executives made various false representations of material facts and committed other wrongful acts. API and the API Executives argue that the Complaint does not meet the particularity requirements under Rule (9)(b).

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[34] *GreenStar IH Rep, LLC v. Tutor Pernini Corp.*, 2017 WL 5035567, at *10 (Del. Ch.) (internal citation and quotation omitted).
[35] *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011).
[36] *See* Super. Ct. Civ. R. 9.
[37] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[38] *Spence*, 396 A.2d at 368 (emphasis added).

The Court of Chancery has held:

> When a party sues based on a written representation in a contract . . . it is relatively easy to plead a particularized claim of fraud. The plaintiff can readily identify who made what representations where and when, because the specific representations appear in the contract. The plaintiff likewise can readily identify what the defendant gained, which was to induce the plaintiff to enter into the contract. Having pointed to the representations, the plaintiff need only allege facts sufficient to support a reasonable inference that the representations were knowingly false.[39]

Tyson's fraud claim is based on certain representations made in the APA. Because the representations are contained in a written contract, it is clear that API made the statements when and where the contract was signed. The "gain" here is Tyson entering into the APA. As for knowledge, the Complaint alleges that Mabe, Bagwell, Hull, and Ham were contacted by various employees about API's use of SPN in its products;[40] failed to stop the practice of using SPN;[41] paid employees bonuses in return for signing nondisclosure agreements;[42] assented to the APA, knowing that it contained fraudulent misrepresentations;[43] specifically excluded Bagwell's, Ham's, and Hull's emails from the assets included in the purchase agreement;[44] and took all of these actions to induce Tyson to pay a higher price for the assets.[45] Additionally, Mabe told an employee that the employee would lose his

[39] *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 62 (Del. Ch. 2015).
[40] Compl. ¶¶ 51-54.
[41] *Id*. ¶ 55.
[42] *Id*. ¶ 103.
[43] *Id*. ¶¶ 117-131.
[44] *Id*. ¶ 113.
[45] *Id*. ¶ 132.

job if he did not lie about the use of SPN.[46] The knowledge of the API Executives supports a reasonable inference that API knew the representations were false. The Court finds that Tyson's fraud claim meets the pleading requirements as against API.

The API Executives are included in the fraud claim even though they are not signatory parties to the APA. At the time the APA was signed, Mabe was serving on American Protein's Board of Directors, Ham was the CEO and President of American Proteins, Hull was the CFO of American Proteins, and Bagwell was the chairman for American Proteins and AMPRO's Board of Directors. The Court finds that it is reasonably conceivable that Tyson *could* show that the API Executives are connected to, and liable for, the representations made in the APA. The Court finds that the representations, and specific allegations of each API Executives' alleged wrongful actions, are sufficiently particularized to put the API Executives on notice of Tyson's claims against them.

Tyson Pled Causation

Defendants allege that Tyson failed to plead loss causation. "To be actionable, a fraudulent misrepresentation or omission must cause the plaintiff to

[46] *Id*. ¶ 54.

suffer damages."[47] The misrepresentation must be both a "but for" and legal cause of the plaintiff's harm.[48]

Tyson alleges that the defendants, individually and collectively, participated in a scheme to hide certain aspects of API's manufacturing process.[49] This "scheme" was intended to elevate the purchase price under the APA and cause Tyson to overpay for API assets.[50] Whether or not Tyson ultimately will be able to succeed on its fraudulent inducement claim, the Court finds that it is reasonably conceivable that but for API's misrepresentations, Tyson would have paid a lower price for the assets. The Court further finds it reasonably conceivable that API's misrepresentations are the legal cause Tyson's overpayment.

Tyson Pled Justifiable Reliance

To succeed in a fraudulent misrepresentation claim, a plaintiff must show that it relied on the fraudulent misrepresentations made by the defendant.[51] Such reliance must be justifiable.[52] In the Complaint, Tyson states that it "justifiably relied on Defendants' false representations and material omissions."[53]

[47] *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 815 (Del. Ch. 2014).
[48] *Id*. at 815-16.
[49] Compl. ¶ 139.
[50] *Id*. ¶ 140.
[51] *Lechliter v. Del. Dept. of Nat. Res. & Envtl. Control*, 2015 WL 9591587, at *18 (Del. Ch.).
[52] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).
[53] Compl. ¶ 141.

The API Executives allege that Tyson could not have relied on any statements they made because the APA includes Anti-Reliance and Integration clauses. Section 5.7 of the APA states that "[Tyson] is not relying and has not relied on any other representations or warranties whatsoever . . . except for the representations and warranties contained in the agreement[.]"[54] Section 11.7 states that the APA "constitutes the entire agreement between the Parties . . . and supersedes all prior agreements."[55]

These provisions do not bar Tyson's claim because the fraudulent misrepresentations alleged in the Complaint are contained in the APA. For the purpose of this motion to dismiss, Tyson's allegation that it relied on the misrepresentations is sufficient. Therefore, Tyson's fraud in the inducement claim survives the motions to dismiss.

Count II- Civil Conspiracy to Commit Fraud

Tyson alleges in its Complaint that all seven defendants committed civil conspiracy. To succeed on this claim, Tyson will need to show that two or more persons agreed to commit a crime, a criminal act was done in furtherance of the conspiracy, and the act caused actual damage.[56] To support its claim, Tyson states that the defendants "conspired with one another and aided and abetted each other

[54] APA § 5.7.
[55] *Id.* § 11.7.
[56] *In re American Intern. Group, Inc.*, 965 A.2d 763, 805 (Del. Ch. 2009).

in planning and perpetrating the massive fraud alleged in the Complaint."[57] The defendants argue that Tyson's claim fails because: (1) the underlying fraud claim fails; (2) the conspiracy claim is not sufficiently particularized; and (3) the claim is barred by the intra-corporate conspiracy doctrine.

First, as discussed above, Tyson's fraud in the inducement claim is viable. Second, while Count II of the Complaint does not include specific allegations of conduct, it incorporates by reference the rest of the Complaint. "Although mere inferences from the complaint are inadequate to establish the necessary factual basis, a court may look to any 'factual allegations of particular acts' within the complaint as a whole incorporated by the conspiracy claim to provide this basis."[58] Tyson's Complaint, read as a whole, is sufficiently particularized to put the defendants on notice of the claims against them. It is reasonably conceivable that Tyson could show that the defendants conspired to hide API's wrongdoing and inflate the purchase price; included representations and warranties in the APA that furthered this conspiracy; and caused Tyson harm.

As to the defendants' third argument, the Court finds that the intra-corporate conspiracy doctrine does not bar this claim. Generally, "a corporation cannot be

[57] Compl. ¶ 144.
[58] *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (internal citations omitted).

deemed to have conspired with its officers and agents."[59] The reasoning behind this doctrine is that acts of an agent or officer of a corporation are deemed to be the actions of the corporation. Thus, in essence, any agreement would be between only one "person."

Tyson's Complaint does not allege that one seller company conspired with its own officers. Instead, it alleges that three separate companies and four executives from the different companies all conspired together. Therefore, the intra-corporate conspiracy doctrine is inapplicable to the facts of this case. Tyson's civil conspiracy claim survives the motions to dismiss.

Count III- Unjust Enrichment

Count III of the Complaint alleges that the API defendants were unjustly enriched by the purchase. To succeed on a claim for unjust enrichment, a plaintiff must show that there is: "(1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law."[60] In the Complaint, Tyson alleges that: (1) the API Executives received "substantial moneys and property" from API;[61] (2) Tyson "was defrauded into overpaying" API for the purchase;[62] (3) the

[59] *Amaysing Technologies Corp. v. Cyberair Communications, Inc.*, 2005 WL 578972, at *7 (Del. Ch.).
[60] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).
[61] Compl. ¶ 149.
[62] *Id*.

API Executives' enrichments included the money that Tyson overpaid API;[63] and (4) the API Executives have no lawful justification for retaining the money.[64]

As for the fifth element, Tyson does not allege in the Complaint that it has no other remedy at law available.[65] To the contrary, it appears that Tyson has, and is currently pursuing, other possible remedies. Tyson's unjust enrichment claim relies on its alleged overpayment for the purchase of API facilities. However, this purchase is governed by the APA.

Under Delaware law, "[w]here a plaintiff's actions are governed by contract, the plaintiff cannot attempt to circumvent that contract by bringing an unjust enrichment claim against a third-party."[66] As Tyson entered in to the APA with API, it must first seek to recover any amounts that it overpaid from API, not from the API Executives. Regarding its fraud in the inducement claim, Tyson essentially argued that the API Executives were so involved with the APA that they could be held liable for the representations contained in it. Tyson cannot also argue that API and the API Executives are so separate that it can pursue relief against both sets of defendants.

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[63] *Id*.
[64] *Id*. ¶ 151.
[65] *See id*. ¶ 152.
[66] *Stryker Demolition & Envtl. Servs, LLC v. Arcadis, U.S., Inc.*, 2020 WL 6588493, at *2 (Del. Super.) (citing *Metcap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch.)).

At this point, there is nothing to suggest that API would be unable to pay any judgments that may be obtained in Tyson's favor. Because Tyson's alleged overpayment is subject to a governing contract, and there is no reason to believe that pursuing breach of contract against API would fail to provide an adequate remedy, Count III of the Complaint is dismissed without prejudice.

Count IV- Breach of Contract

Tyson Pled the Elements of Breach of Contract Under Delaware Law

Tyson alleges that American Proteins, AMPRO, and Georgia Feed are all liable for breach of contract. API argues that this claim must be dismissed because Tyson failed to meet the pleading requirements. "Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages."[67]

In section four of the APA, API made a number of representations and warranties.[68] Tyson alleges that API breached several of the subsections under section four by "providing false representations and warranties."[69] As a result of these breaches, Tyson claims that it "has suffered and will continue to suffer 'Losses,' as that term is defined in the [APA], including, but not limited to,

[67] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. 2005).
[68] APA § 4.
[69] Compl. ¶¶ 155-162.

damages, expenses, attorneys' and other fees, and out-of-pocket costs."[70] The Court finds that Tyson has pled the elements for breach of contract under Delaware law.

Tyson is Not Required to Plead Damages in Excess of $4.125 Million

API additionally argues that the breach of contract claim must be dismissed because Tyson failed to plead losses recoverable under the APA. The terms of the APA state that API will reimburse Tyson for losses resulting from, among other things, inaccuracies and breach of warranties.[71] However, the APA also states that Tyson will not have recourse against API unless its losses total more than $4.125 million.[72] Once Tyson reaches this threshold, it would be entitled only to those losses which were incurred beyond that amount.[73]

The parties in this case are highly sophisticated and the APA likely was heavily negotiated. The indemnification clause, including the monetary threshold for losses, was agreed upon by both parties and must be given due deference. It is unclear at this point in the litigation whether the total losses incurred by Tyson (if any) will be greater or less than $4.125 million. However, it would be premature to dismiss the breach of contract claim on this basis. For the purpose of the

[70] *Id.* ¶ 163.
[71] APA § 10.1.
[72] *Id.* § 10.3.
[73] *Id.*

motions to dismiss, the damages pled in the Complaint, as quoted above, are sufficient.[74]

The Court finds that API's argument fails because Tyson is not required, at this juncture, to show that it incurred losses in excess of $4.125 million. However, API potentially could raise this argument again if, after the discovery process is completed and the parties have a more concrete estimate of damages, Tyson cannot prove it suffered losses beyond the designated amount.

Tyson's Breach of Contract Damages are Not Impermissibly Duplicative

As a final matter, the Court turns to API's argument that Tyson's alleged breach of contract and fraud damages are duplicative. Under Delaware law, "[b]reach of contract claims cannot be bootstrapped into fraud claims[.]"[75] A plaintiff is not permitted to recover identical damages for fraud and breach of contract.[76] However, this is not to say that a plaintiff can *never* bring claims for both fraud and breach of contract; these claims can co-exist so long as the damages are sufficiently distinct.

The Court was faced with a similar issue in *Firmenich Incorporated v. Natural Flavors, Inc*.[77] In that case, Firmenich entered into an agreement to

[74] *See* Compl. ¶ 163.
[75] *Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412, at *3 (Del. Super.).
[76] *See EZLinks Golf, LLC v. PCMS Datafit, Inc*., 2017 WL 1312209, at *6 (Del. Super.) ("Failure to plead separate damages is an independent ground for dismissal.")
[77] 2020 WL 1816191, at *1 (Del. Super.).

purchase Natural Flavors, Inc., a company that manufactured organic flavorings.[78] Compliance with industry standards and organic certifications was critical to Firmenich's decision to purchase the company. Firmenich was "led to believe that around 65% of Natural Flavors' product line was certified organic."[79] In the Asset Purchase Agreement, Natural Flavors "confirmed that all products sold by Natural Flavors complied with government regulations."[80] However, shortly after closing, Firmenich discovered "that Natural Flavors did not produce flavors compliant with federal regulations or industry standards."[81] Firmenich sued Natural Flavors, and various executives, for: (1) fraud in the inducement; (2) unjust enrichment; and (3) breach of contract.[82]

To resolve the parties' arguments, the Court analyzed existing case law on the duplicative damages bar. While "unable to construct a seamless trail of legal analysis on this narrow issue," the Court summarized the relevant case law as follows:

[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*. at *2.
[82] *Id*.

- *Abry Partners V, L.P. v. F & W Acquisition LLC*[83] "supports the conclusion that a contractual limitation on damages opens the door to parallel breach of contract and fraud claims";[84]
- In *JCM Innovation Corporation v. FL Acquisition Holdings, Inc.*,[85] "the Court declined to dismiss the fraud claim on the basis of duplicative damages";[86] and
- "[*ITW Global Investments Inc. v. American Industrial Partners Capital Fund IV, LLP*][87] and [*Novipax Holdings LLC v. Sealed Air Corporation*][88] support the proposition that rescissory damages based on a fraud claim are distinguishable from breach of contract damages."[89]

Ultimately, the Court held that the breach of contract and fraudulent inducement claims could "proceed in a parallel manner."[90] The damages pled in the Complaint were sufficiently distinguished from one another because Firmenich sought rescissory damages for its fraud claim.[91]

[83] 891 A.2d 1032, 1035 (Del. Ch. 2006).
[84] *Firmenich*, 2020 WL 1816191, at *10.
[85] 2016 WL 5793192, at *9 (Del. Super.).
[86] *Firmenich*, 2020 WL 1816191, at *10.
[87] 2015 WL 3970908, at *7 n. 103 (Del. Super.).
[88] 2017 WL 5713307, at *14 (Del. Super.).
[89] *Firmenich*, 2020 WL 1816191, at *10.
[90] *Id*.
[91] *Id*.

Here, Tyson is seeking "rescissory-like" damages for its fraud claim. In the Complaint, Tyson asserts that it has suffered "damages, including, but not limited to, the amount by which the purchase price exceeded the value of the business and the costs of this action."[92] While Tyson seeks generalized damages for its breach of contract claim, it seeks the amount by which it overpaid on the purchase price for its fraud claim. The Court finds that these damages are sufficiently distinct and, therefore, not subject to the duplicative damages bar. Tyson's fraud and breach of contract claims may proceed in a parallel manner.

CONCLUSION

For the reasons stated above, the Court finds that Tyson's Complaint meets the particularized pleading requirements for Counts I (Fraud in the Inducement) and II (Civil Conspiracy to Commit Fraud). Count III (Unjust Enrichment) fails as against the individual non-signatory defendants because Tyson's actions are governed by the APA. Tyson cannot bring an unjust enrichment claim against the API Executives at this time because it has other adequate remedies available. Tyson has sufficiently pled Count IV (Breach of Contract). Because the damages sought under the fraud and breach of contract claims are distinct, both claims may proceed.

[92] Compl. ¶ 142.

THEREFORE, Count III of the Complaint is hereby **DISMISSED WITHOUT PREJUDICE**. The motions to dismiss Counts I, II, and IV are hereby **DENIED**. The API Executives' Motions are hereby **GRANTED IN PART and DENIED IN PART**. API's Motions are hereby **DENIED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston