IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SOFREGEN MEDICAL INC., a Delaware Corporation; and SOFREGEN MEDICAL IRELAND LIMITED, an Irish Private Limited Company, Plaintiffs, v. ALLERGAN SALES, LLC, a Delaware Limited Liability Company; and ALLERGAN PHARMACEUTICALS HOLDINGS (IRELAND), an Irish Incorporated Private Unlimited Liability Company, Defendants.	)	C.A. No.: N20C-03-319 EMD CCLD

Submitted: March 1, 2021[1]
Decided: April 1, 2021

Upon Defendants' Motion to Dismiss as to Count III of the Second Amended Complaint
DENIED

Thomas A. Uebler, Esquire, Joseph L. Christensen, Esquire, Hayley M. Lenahan, Esquire, McCollom D'Emilio Smith Uebler LLC, Wilmington, Delaware. *Attorneys for Plaintiffs Sofregen Medical Inc. and Sofregen Medical Ireland Limited.*

Brian M. Rostocki, Esquire, Benjamin P. Chapple, Esquire, Alexandria P. Murphy, Esquire, Reed Smith LLP, Wilmington, Delaware. *Attorneys for Defendants Allergan Sales, LLC and Allergan Pharmaceuticals Holdings (Ireland).*

DAVIS, J

Upon consideration of Defendants' Motion to Dismiss Second Amended Complaint (the "Motion") filed by Defendants Allergan Sales, LLC and Allegran Pharmaceuticals Holding (Ireland) (collectively, "Allergan"); Plaintiffs' Answering Brief in Opposition to Defendants'

[1] D.I. No. 37. The Court held a hearing on this matter on December 21, 2020.

Motion to Dismiss Second Amended Complaint (the "Response") filed by Plaintiffs' Sofregen Medical Inc. and Sofregen Medical Ireland Limited (collectively, "Sofregen"); Defendants' Reply Brief in Further Support of Their Motion to Dismiss the Second Amended Complaint filed by Allergan (the "Reply"); the Second Amended Complaint; the arguments made in support of the Motion, the Opposition and the Reply at the December 21, 2020 hearing (the "Hearing")[2] held by the Court; and the entire record of this civil action, the Court will **DENY** the Motion.

I. INTRODUCTION[3]

Sofregen filed its first complaint against Allergan on March 31, 2020.[4] Sofregen then filed a First Amended Complaint on April 17, 2020.[5] Allergan moved to dismiss the Amended Complaint on June 8, 2020.[6] On July 23, 2020, Sofregen filed the Second Amended Complaint for: (i) breach of warranties and representations (Count I); (ii) breach of contract (Count II); and (iii) fraudulent inducement.[7] All of Sofregen's claims arise out of an Asset Purchase Agreement (the "APA") between Allergan and Sofregen. Allergan filed the Motion on September 3, 2020.[8] Allergan sought dismissal on all of Sofregen's claims.

[2] D.I. No. 34.
[3] The Court issued this Opinion under seal on April 1, 2021. D.I. No. 38. The Court sent a notice to unseal (the "Notice") on April 1, 2021. D.I. No. 39. In the Notice, the Court stated that, under Civil Rule 5(g)(4), it would unseal the opinion unless, within seven days, a party sets forth grounds for continued restriction and requests a judicial determination on whether good cause exists to keep matters under seal. Plaintiffs' counsel submitted a letter request, D.I. No. 41, which the Court has reviewed and determined states good cause to keep portions of the Opinion under seal. This is the redacted Opinion. ***Redacted portions are noted with "[Under Seal]" designation.***
[4] D.I. 1.
[5] D.I. 5.
[6] D.I. 10.
[7] Second Am. Compl. ¶¶ 56-73.
[8] D.I 23.

At the Hearing, the Court denied the Motion as to Count I and Count II. The Court took the Motion under advisement as to Count III.[9] The Court entered an Order reflecting these rulings on January 4, 2021.[10]

II. PARTIES CONTENTIONS

Allergan contends Count III fails to state a claim for fraudulent inducement. Allergan argues that Sofregen's Fraudulent Inducement claim should be dismissed because (1) it is pled with insufficient particularity, (2) the APA precludes Sofregen's claim, (3) the Fraudulent Inducement claim is a bootstrapped Breach of Contract claim and (4) Sofregen has not alleged any damages distinct from its Breach of Contract claim.[11]

Sofregen contends that Count III states a claim for fraudulent inducement. The claim is based upon two representations from pre-APA meetings in February 2016.[12] The first is that "Allergan specifically presented that SERI had minimal adverse reactions."[13] The second is that "Allergan presented unduly optimistic revenue forecast predictions.[14] Sofregen contends that Allergan fraudulently induced Sofregen to enter the APA by making these representations while intentionally and knowingly hiding information showing serious adverse reactions.[15] Sofregen's pleads Count III in the alternative.[16]

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[9] D.I. No. 34.
[10] D.I. No. 36.
[11] *See* Mot. at 22-35.
[12] *See* Second Am. Compl. ¶¶ 67-68.
[13] *Id.* ¶ 67
[14] *Id.* ¶ 68
[15] *See* Opp. at 26; Second Am. Compl. ¶ 34 (alleging that Allergan disclosed 450 documents related to the SERI studies after closing).
[16] Opp. at 30. Although the Second Amended Complaint does not explicitly plead Count III in the alternative, Sofregen concedes that it is pled in the alternative in the Opposition. *See Ashland LLC v. Samuel J. Heyman 1981 Continuing Trust for Heyman*, 2018 WL 3084975, at *14 (Del. Super. Jun. 21, 2018).

III. LEGAL STANDARD

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[17] However, the Court must "ignore conclusory allegations that lack specific supporting factual allegations."[18]

In considering a motion to dismiss under Civil Rule 12(b)(6), the Court generally may not consider matters outside the complaint.[19] However, documents that are integral to or incorporated by reference in the complaint may be considered.[20] If the Court considers matters outside the pleading, the motion to dismiss shall be treated as one for summary judgment and disposed of as provided in Civil Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[21]

A plaintiff must plead fraud and negligence with particularity under Civil Rule 9(b).[22] The plaintiff must include the "time, place, contents of the alleged fraud or negligence, as well as the individual accused of committing the fraud" or negligence.[23] "Malice, intent, knowledge and other condition of mind of a person may be averred generally."[24] "At the motion to dismiss stage, a plaintiff 'need only point to factual allegations making it reasonably conceivable that the

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[17] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825353, at *3 (Del. Super. Oct. 27, 2010).
[18] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[19] *Windsor I, LLC v. CWCapitalAsset Mgmt., LLC*, 238 A.3d 863, 873-75 (Del. 2020).
[20] *Id*. at 873; *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[21] *Windsor I, LLC*, 238 A.3d at 874; Del. Super. Civ. R. 12(b).
[22] Del. Super. Civ. R. 9(b).
[23] *See TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *6 (Del. Super. Sept. 25, 2015) (quoting *Universal Capital Mgmt., Inc. v. Micco World, Inc*, 2012 WL 1313598, at *2 (Del. Super. Feb. 1, 2012).
[24] DEL. SUPER. CT. R. 9(B).

defendants charged with fraud knew the statement was false.'"[25] Essentially, the plaintiff must allege fraud "with detail sufficient to apprise the defendant of the basis for the claim."[26]

IV. DISCUSSION

To state a claim for fraudulent inducement, Sofregen "must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance."[27] The Court holds that, pled in the alternative, Sofregen sufficiently pled a fraudulent inducement claim.

A. SOFREGEN SUFFICIENTLY PLED THE FIRST THREE ELEMENTS OF A FRAUDULENT INDUCEMENT CLAIM IN COUNT III.

First, Sofregen alleges that Allergan falsely represented facts and failed to disclose facts that it had a duty to disclose. "Generally, there is no duty to disclose a material fact or opinion."[28] "However, where one actively conceals a material fact, such person is liable for damages caused by such conduct."[29] The Second Amended Complaint alleges that, at February 2016 meetings,

> Allergan specifically presented that SERI had minimal adverse reactions" and "showed forecast revenue for SERI extending to $93 million in 2020, even though . . . Allergan had ceased practically promoting SERI as a commercial product and intended to discontinue SERI if the sale was unsuccessful.[30]

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[25] *In re Bracket Holding Corp. Litigation*, 2017 WL 3283169, at *10 (Del. Super. Jul. 31, 2017) (citing *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 61 (Del. Ch. 2015).
[26] *Abry Partners V., L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1050 (Del. Ch. 2006)., 891 A.2d at 1050 (Del. Ch. 2006).
[27] *Id*.
[28] *Nicolet, Inc. v. Nutt,* 525 A.2d 146, 149 (Del. 1987).
[29] *Id*.
[30] Second Am. Compl. ¶¶ 67, 68.

The Second Amended Complaint alleges that Allergan did not reveal negative SERI studies until after closing.[31] From these facts, the Court can infer that Allergan actively concealed the negative **[Under Seal]** studies.

Furthermore, the Second Amended Complaint identifies Matthew Moore, Vice-President of Corporate Business Development and Schedule 1.1 individuals as those who would have had knowledge about the adverse **[Under Seal]** studies and a duty to disclose them.[32] These allegations are sufficient for Rule 9(b) purposes because they "clearly relate to and surround the marketing and sale" of SERI under the APA.[33]

Second, Sofregen alleges facts supporting an inference that Allergan knew or believed that its representations were false. Knowledge may be pled generally but the plaintiff must allege facts supporting an inference that the subject of misrepresentation "was knowable and the defendants were in a position to know it."[34] Sofregen alleges that Schedule 1.1 individuals and Allergan consultants knew about the adverse SERI studies before closing and communicated about how to respond to inquiries about the negative studies.[35] Sofregen also contends that Allergan wanted to "bury the data" from the adverse SERI studies.[36] These facts support an inference that Allergan knew or believed that it falsely represented that SERI had minimal adverse reactions.

Third, Sofregen alleges facts supporting an inference that Allergan misrepresented the SERI studies to induce Sofregen into the APA. The alleged misrepresentations were made at

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[31] *Id*. ¶ 34.
[32] *Id*. ¶¶ 34-35, 67.
[33] *In re Bracket Holding Corp. Litigation*, 2017 WL 3283169, at *11 (Del. Super. July 31, 2017) (Holding that a complaint alleged fraudulent inducement with sufficient particularity when it specifically identified financial information overstatements and employees involved "throughout the marketing and sale" of a company).
[34] *Abry Partners V., L.P.*, 891 A.2d at 1050 (Del. Ch. 2006).
[35] *See* Second Am. Compl. ¶ 34.
[36] *Id*. ¶ 35.

pre-APA diligence meetings while the SERI studies were not released until after closing.[37] Sofregen claims that "[t]here would be no other reason for the material misrepresentations other than to induce" Sofregen into entering the APA.[38] Thus, Sofregen alleges facts that support an inference that Allergen misrepresented the SERI studies to induce Sofregen into the APA.

B. SOFREGEN PROPERLY PLED JUSTIFIABLE RELIANCE ON THE ALLEGE MISREPRESENTATIONS.

Next, Sofregen must demonstrate "justifiable reliance on false representations" made by Allergan.[39] Allergan's misrepresentations must be material and cannot be "puffery, expressions of mere opinion, or representations that are obviously false."[40]

"Forward-looking statements of opinion are actionable as fraudulent only if they were known to be false when made or were made with a lack of good faith."[41] Furthermore, sophisticated parties may not rely upon representations made outside the contract when the parties "contractually disclaim reliance upon representations not included within the four corners of the written agreement."[42] Neither can a party state a fraud claim by arguing that facts were actively concealed "when it was clearly on notice of the possible existence of those facts but nonetheless unreasonably chose not to exercise its contractual rights."[43] Essentially, the plaintiff must not be on inquiry notice.[44]

Allergan argues that Sofregen could not justifiably rely upon Allergan's revenue forecast projection. Generally, revenue projections are not actionable because those representations are

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[37] SAC ¶ 34, 67.
[38] *In re Bracket Holding Corp. Litigation*, 2017 WL 3283169, at *10 (Del. Super. July 31, 2017).
[39] *Vichi v. Kononklijke Philips Elec. N.V.*, 85 A.3d 725, 775 (Del. Ch. 2014).
[40] *Id.*
[41] *Mooney v. E.I. du Pont de Nemours and Co.*, 2017 WL 5713308, at *6 (Del. Super. Nov. 28, 2017)
[42] *St. James Recreation, LLC v. Rieger Oppt'y Partners, LLC*, 2003 WL 22659875, at *3 (Del. Ch. Nov. 5, 2003).
[43] *Metro Commc'n Corp. BVI v. Adv. Mobilecomm Tech. Inc.*, 854 A.2d, 121, 152 (Del. Ch. 2004).
[44] *See Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *12 (Del. Ch. Jun. 6, 2018) ("To establish justifiable reliance, [a plaintiff] must demonstrate he did not have either the awareness or opportunity to discover the accurate information") (Internal citations omitted).

not "false representations *of fact*."[45] Allegations that a party made predictions that it "did not genuinely believe to be true," however, will support a fraudulent inducement claim.[46] Sofregen alleges that "Allergan had ceased practically promoting SERI as a commercial product and intended to discontinue SERI if the sale was unsuccessful," even as Allergan presented optimistic revenue projections.[47] This allegation supports an inference that Allergan genuinely did not believe that its revenue projections were true. Therefore, Sofregen has pled justifiable reliance on Allergan's revenue forecast predictions.

Allergan also argues that its characterization of adverse reactions as minimal is an expression "of opinion and . . . non-actionable under Delaware law."[48] Allergan contends that Sofregen could not justifiably rely on its characterization of adverse reactions as minimal because Sofregen is a sophisticated party that could make its own investigation.[49] Allergan supports its contention by submitting evidence that it disclosed an adverse-event report detailing more than 1,900 complaints.[50]

Sofregen's claim is based not only on the characterization but also on fraudulent concealment. Sofregen alleges that 450 documents were produced after closing.[51] According to Sofregen, the fraud is not merely the predictions or the minimal adverse reaction characterizations. Instead, the Second Amended Complaint provides that Allergan committed the fraud by making the representations ". . . *while intentionally and knowingly hiding information* showing serious adverse reactions."[52]

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[45] *Id.*
[46] *Hewlett v. Hewlett-Packard Co.*, 2002 WL 549137, at *11 (Del. Ch. Apr. 8, 2002).
[47] SAC ¶ 68.
[48] Mot. at 28 (citing *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch. Jul. 20, 2010)).
[49] Mot. at 26.
[50] *Id.*; Mot., Ex. 2.
[51] *See* Second Am. Compl. ¶ 34.
[52] Opp. at 25-26.

Under Civil Rule 12(b)(6), the Court may only "consider documents incorporated by reference or integral to the Complaint."[53] "Generally, a document is integral to the claim if it is the source for the . . . facts as pled in the complaint."[54] In this case, Allergan submitted documents that are not integral to the Second Amended Complaint. As such, the Court may not consider the documents under Civil Rule 12(b)(6).[55] The Second Amended Complaint pleads that Allergan did not disclose documents that would have allowed Sofregen to come to its own conclusions about the minimal adverse reactions or the revenue forecast projections. Sofregen justifiably relied on Allergan's representations unless the parties disclaimed reliance on extracontractual representations in the APA.

C. THE APA DOES NOT PRECLUDE COUNT III.

"Delaware law enforces clauses that identify the specific information on which a party has relied and which foreclose reliance on other information."[56] There is, however, a "strong and venerable" public policy against fraud.[57] Delaware courts, therefore, will "not bar a contracting party from asserting claims for fraud based on representations outside the four corners of the agreement unless *that contracting party* unambiguously disclaims reliance on such statements."[58] That is, "the disclaimer must come from the point of view of the aggrieved party . . . to ensure the preclusion of fraud claims for extra-contractual statements."[59] The Court determines whether a disclaimer is effective by reading a contract as a whole.[60] Read as a whole, "the contract must

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[53] *Abbot v. North Shores Board of Governors, Inc.*, 2020 WL 1490880, at *2 (Del. Ch. Mar. 27, 2020); see also *Windsor I, LLC*, 238 A.3d at 873-74.
[54] *Fortis Advisors LLC v. Allergan W.C. Holding Inc.*, 2019 WL 5588876, at *3 (Del. Ch. Oct. 30, 2019) (Internal citations omitted).
[55] *Windsor I, LLC*, 238 A.3d at 873-74.
[56] *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 50 (Del. Ch. 2015).
[57] *Abry Partners V, L.P.*, 891 A.2d at 1035.
[58] *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 860 (Del. Ch. 2016).
[59] *Id.*
[60] *See ChryonHego Corp. v. Wight*, 2018 WL 3642132, at *4 (Del. Ch. Jul. 31, 2018) ("As with any contractual analysis, the contract must be read as a whole").

contain language, that when read together, can be said to add up to a clear anti-reliance clause."[61] Furthermore, disclaiming reliance on representations and warranties outside the stock purchase agreement does not bar a claim "for fraudulent *concealment* of material information."[62] A plaintiff seeking to recover on a claim must plead "an affirmative act of concealment."[63]

Allergan argues that APA Sections 4.5(b) and 6.7 preclude Sofregen from relying on any representations outside Article III of the APA. APA Section 4.5(b) provides:

> (b) Buyer acknowledges that except as expressly set forth in Article III of this Agreement, **neither Seller nor any of its affiliates nor their respective Representatives has made any representation or warranty, express or implied, as to the accuracy or completeness of any information** concerning the Business, SeriScaffold, SeriPliable, the Acquired Assets of the Assumed Liabilities made available in connection with Buyer's investigation of the foregoing. Buyer acknowledges that it has not relied and is not relying on any statement, representation or warranty, oral or written, express or implied (including any representation or warranty as to merchantability or fitness for a particular purpose), made by Seller or any of its Affiliates or their respective Representatives, except for the express representations of Seller set forth in Article III. Without limiting the foregoing, Buyer acknowledges that neither Seller nor any of its Affiliates nor their respective Representatives is making, directly or indirectly, any representation or warranty with respect to any estimates, projections or forecasts relating to SeriScaffold, SeriPliable, the Business or the Acquired Assets.[64]

APA Section 6.7 provides:

> Entire Agreement. This Agreement (including the Schedules hereto), the Ancillary Agreements and the Confidentiality Agreement (the extent, pursuant to Section 5.2(a), expressly surviving the Effective Date) constitute the entire agreement, and supersede all prior written agreements, arrangements, communications and understandings and all prior and contemporaneous oral agreements, arrangements, communications and understandings, between the parties with respect to the subject matter hereof and thereof, including without limitation the non-binding proposal of Buyer dated February 29, 2016, as supplemented by the Allergan draft dated May 9, 2016. Neither this Agreement nor any Ancillary Agreement shall be deemed to contain or imply any restriction, covenant, representation, warranty, agreement or undertaking of any party with respect to the transactions contemplated hereby or

[61] *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).
[62] *Wind Point Partners VII-A, L.P. v. Insight Equity A.P. X Co., LLC*, 2020 WL 5054791, at *16 (Del. Super. Aug. 17, 2020)
[63] *Id.* at *17.
[64] APA § 4.5(b) (emphasis added).

> thereby other than those expressly set forth herein or therein or in any document required to be delivered hereunder or thereunder, and none shall be deemed to exist or inferred with respect to the subject matter hereof. Notwithstanding any oral agreement or course of conduct of the parties or their Representatives to the contrary, no party to this Agreement shall be under any legal obligation to enter into or complete the transactions contemplated hereby unless and until this Agreement shall have been executed and delivered by each of the parties.[65]

APA Sections 4.5(b) and 6.7, read together, are anti-reliance clauses providing that Sofregen cannot rely upon any representations outside of the APA. Sofregen argues that Allergan made representations about minimal adverse reactions to SERI and profit forecasts while fraudulently concealing information that would have led to Sofregen to come to its own conclusions.[66] APA Sections 4.5(b) and 6.7 do not disclaim fraud by concealment, and therefore, do not preclude Sofregen's fraudulent inducement claim.

D. FOR NOW, THE COURT FINDS THAT COUNT III IS NOT A BOOTSTRAPPED BREACH OF CONTRACT CLAIM.

"In Delaware, a plaintiff cannot 'bootstrap' a breach of contract claim into a fraud claim."[67] Delaware courts seek to prevent plaintiffs from "couching an alleged failure to comply with a contract as a failure to disclose an intention to take certain actions arguably inconsistent with that contract."[68] A fraud claim pled contemporaneously with a breach of contract claim may nonetheless survive "so long as the claim is based on conduct that is separate and distinct" from the alleged breach of contract.[69] "Allegations that are focused on *inducement* to contract are 'separate and distinct' conduct."[70]

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[65] APA § 6.7.
[66] *See* Second Am. Compl. ¶ 34.
[67] *Cont'l Fin. Co., LLC v. ICS Corp.*, 2020 WL 836608, at *3 (Del. Super. Feb. 20, 2020).
[68] *JCM Innovation Corp. v. FL Acquisition Holdings, Inc.*,
[69] *ITW Glob. Invs. Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *6 (Del. Super. Jun 24, 2015).
[70] *Id.*

Sofregen's allegations are focused on the inducement to contract. Sofregen's allegations related to fraudulent inducement are that Allergan made misleading pre-APA representations in February 2016 while concealing negative SERI studies until after closing. By contrast, Sofregen bases its breach of representations and warranties claim that: (i) Allergan's failure to report those SERI studies to the relevant legal authorities; and (ii) on failing to disclose the *Knecht* action. Sofregen alleges factually separate and distinct conduct to support its claims and is not "merely . . . alleging that [Allergan] never intended to *perform* its obligations."[71]

The Court is skeptical that Count III is really nothing more than a contract claim with the words "fraud" inserted before each sentence. The Court realizes that the Second Amended Complaint allegations in Count III are substantially like those made in Counts I and II. Even if Count III is a bootstrapped contract claim, however, the Court will allow it to survive at this stage because it is pled in the alternative.[72] Moreover, discovery on Count III should mirror the discovery for Counts I and II given the Second Amended Complaint's allegations.

A fraud claim must still "plead separate damages" even if it is otherwise distinct from a breach of contract claim.[73] "Failure to plead separate damages is an independent ground for dismissal."[74] "[A] claim for recission or recessionary damages separates a fraudulent inducement claim from breach of contract damages," even if the damages are otherwise similar.[75] The duplicative damages bar exists "to prevent a rehash of the same damages."[76] The

[71] *Id.* (Quoting *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *8 (Del. Super. Apr. 16, 2014)).
[72] *See Flowshare, LLC v. GeoResults, Inc.*, 2018 WL 3599810, at *6 (Del. Super. Jul. 25, 2018).
[73] *EZLinksGolf, LLC v. PCMS Datafit, Inc.*, 2017 WL 1312209, at *6 (Del. Super. Mar. 13, 2017).
[74] *Id.*
[75] *Novipax Holdings LLC v. Sealed Air Corp.*, 2017 WL 5713307, at *14
[76] *Firmenich Inc. v. Natural Flavors, Inc.*, 2020 WL 1816191.

Court will not dismiss a fraudulent inducement claim pled in the alternative because "the claims would never co-exist at final judgment and are, therefore, not duplicative."[77]

Sofregen asserts that Count III asserts similar damages to its breach of contract claims, not a rehash of damages from Counts I and II.[78] Sofregen bases its argument on APA Section 2.4(c), which provides that there is no limit on indemnification from Losses caused by fraud.[79] As stated above, the Court is not entirely convinced. Analyzing whether the damages are distinct is unnecessary, however, because the fraud claim is pled in the alternative.[80] The claims would not co-exist at final judgment and are therefore not duplicative.

V. CONCLUSION

For the reasons set forth above, the Motion is **DENIED** with respect to Count III.

IT IS SO ORDERED.

April 1, 2021
Wilmington, Delaware

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

[77] *Ashland LLC*, 2018 WL 3084975, at *15 (Del. Super. Jun. 21, 2018).
[78] *See* Opp. at 30.
[79] *Id.* at 31.
[80] *Id.* at 30.