IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES RUFFALO, PAUL POOLE and OPPORTUNITY PARTNERS L.P.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5039-VCP
TRANSTECH SERVICE PARTNERS INC., SURESH RAJPAL, and LM SINGH,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: May 20, 2010
Decided: August 23, 2010

Carmella P. Keener, Esquire, ROSENTHAL, MONHAIT & GODDESS, P.A., Wilmington, Delaware; Gregory E. Keller, Esquire, Carol Shahmoon, Esquire, CHITWOOD HARLEY HARNES LLP, Great Neck, New York; *Attorneys for Plaintiffs*

Edmond D. Johnson, Esquire, James G. McMillan, III, Esquire, PEPPER HAMILTON LLP, Wilmington, Delaware; *Attorneys for Defendants*

PARSONS, Vice Chancellor.

The issue in this case is what rights public shareholders of a "blank check company" have when that company fails to use the proceeds of its initial public offering ("IPO") to make an acquisition, thus requiring its dissolution and the distribution of its assets back to its public shareholders. Plaintiffs purchased stock of Defendant TransTech Services Partners Inc. ("TransTech" or the "Company") in TransTech's 2007 IPO. TransTech is a blank check company, which the United States Securities and Exchange Commission ("SEC") defines as a "development stage company that has no specific business plan or purpose or has indicated its business plan is to engage in a merger or acquisition with an unidentified company or companies, other entity, or person."[1] While TransTech spent two years attempting to find a company to acquire, it ultimately failed to achieve this goal, and its shareholders voted for its dissolution on or about July 16, 2009.

Plaintiffs allege that Defendants violated TransTech's corporate charter and a related trust agreement by making payments in connection with TransTech's dissolution beyond what was authorized in those and other relevant corporate documents.

---

[1] 17 C.F.R. § 230.419(a)(2)(i). Blank check companies are "essentially empty shells that generally give themselves [eighteen] months to two years to acquire an operating company with the proceeds from an [IPO]." Lynn Cowan, '*Blank Checks' Generate New Interest - Deals Gain Momentum as Investors Seek Alternative to Private Equity*, WALL ST. J., Dec. 24, 2007, *available at* http://mstblog.ohsu.edu/?p=174. The majority of recently created blank check companies differ from traditional blank check companies in that they do not issue penny stock, are not subject to the Securities Offering Reform requirements, and are typically started by former CEOs or founders of successful companies. Harold S. Bloomenthal & Samuel Wolff, SECURITIES AND FEDERAL CORPORATE LAW § 6:55 (2d. ed. 2010).

Specifically, Plaintiffs contend that in the process of dissolving and liquidating TransTech, Defendants improperly spent interest monies earned by the trust fund on proceeds of the IPO in excess of an $800,000 limit on working capital expenses provided for in the trust agreement. That is, Plaintiffs allege that, because TransTech already had spent $800,000 from the trust fund interest for working capital expenses, it could not use such interest to make additional payments to creditors in excess of the $800,000 cap in order to complete TransTech's dissolution. Plaintiffs also challenge Defendants' stated plan to distribute certain expected tax refunds to creditors without regard to the $800,000 limit. Defendants deny that the working capital limit has any application in the context of a dissolution and liquidation.

Plaintiffs' Complaint seeks, among other things, an accounting of all amounts paid from the trust fund and a return of excess distributions on a pro rata basis to public shareholders, as well as an accounting and return of any tax refunds paid to TransTech and a pro rata distribution of those refunds to the public stockholders. The Complaint contains four counts, which accuse Defendants of (I) Breach of Corporate Charter, (II) Breach of Constructive Trust, (III) Fraud, and (IV) Conversion. This action is currently before the Court on Defendants' motion to dismiss the Complaint under Court of Chancery Rules 23.1, 9(b), and 12(b)(6) or, alternatively, as precluded by a prior settlement between Defendants and Plaintiff Opportunity Partners L.P. ("Opportunity Partners").

After careful consideration of Defendants' motion, I deny the motion to dismiss under Rule 23.1, grant in part and deny in part the motion to dismiss Counts I, II, and IV

under Rule 12(b)(6), grant the motion to dismiss Count III under Rule 9(b), and deny the motion to the extent it seeks to preclude the claims of Opportunity Partners based on an alleged satisfaction of those claims.

I. FACTUAL BACKGROUND[2]

A. The Parties

Plaintiff James Ruffalo is a shareholder of Defendant TransTech who held approximately 5.1% of the publicly available shares of TransTech at the time of the liquidation of a trust established in connection with TransTech's IPO (the "Trust Fund" or the "Trust Account"). Plaintiffs Paul Poole and Opportunity Partners, a limited partnership, have been shareholders of TransTech at all material times.

Defendant TransTech is a Delaware corporation. TransTech is a "blank check company" formed for the purpose of acquiring, through a merger, capital stock exchange, asset acquisition, stock purchase, or other similar business combination, an unidentified operating business.[3] Defendant Suresh Rajpal is the Chairman of the Board, President, and Chief Executive Officer of TransTech, as well as one of its founding shareholders and sponsors. Defendant LM Singh is a director, founding shareholder, and sponsor of

---

[2] Unless otherwise noted, the following summary incorporates facts from the Complaint and related documents with inferences drawn in the "plaintiff-friendly manner" required in the procedural context of a motion to dismiss. *See*, *e.g.*, *Sample v. Morgan*, 935 A.2d 1046, 1048 (Del. Ch. 2007) (citing *Outokumpu Eng'g Enters., Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 727 (Del. Super. 1996)).

[3] Compl. ¶ 8.

TransTech and serves as its Chief Financial Officer, Executive Vice President, Secretary, and Treasurer.

B. Facts

1. TransTech's IPO

TransTech filed its original certificate of incorporation on August 16, 2006 and its third amended and restated certificate (the "Charter") on May 4, 2007. On May 16, 2007, TransTech filed a Form S-1 registration statement (the "Registration Statement") with the SEC in anticipation of its IPO, the proceeds of which would be used to acquire an existing business.[4] Contemporaneously with the filing of the Registration Statement, TransTech entered into a trust agreement (the "Trust Agreement") with the Continental Stock Transfer & Trust Company, pursuant to which the Trust Fund was created for the purpose of holding the net IPO proceeds.[5]

On May 30, 2007, TransTech completed its IPO, which generated net proceeds of $40,754,500, or $7.88 per share. Defendants Rajpal and Singh were existing shareholders, directors, and officers of the Company at the time of the IPO.[6] TransTech placed the proceeds of the IPO into the Trust Fund. The monies in the Trust Fund were to be available for distribution only upon consummation of a business combination or, if

---

4 Defs.' Opening Br. ("DOB") Ex. B at II-7.

5 DOB Ex. D.

6 Purchasers of TransTech IPO stock are referred to in this Memorandum Opinion as "IPO Shareholders," while those who held TransTech stock before the IPO are referred to as "Sponsors."

a business combination did not occur within eighteen months of the IPO (twenty-four months if TransTech signed a letter of intent ("LOI") within the original eighteen-month period), liquidation of the Trust Fund.[7] The Charter also provides that TransTech's right to withdraw the interest monies accrued by the Trust Fund is governed by the Registration Statement and that the IPO Shareholders' rights to the funds in the Trust Fund are governed by the terms of the Trust Agreement.

Collectively, the Charter, Registration Statement, and Trust Agreement specify the procedures that TransTech was to follow between the time of the IPO and the time it either consummated a business combination or was dissolved and liquidated. Although Plaintiffs urge the Court to focus on the language in § 2(b) of the Trust Agreement, which imposes a limit of $800,000 on distributions from the Trust Fund interest for working capital expenses, it is important to consider the Trust Agreement in conjunction with the Charter and the Registration Statement to understand fully the application of the $800,000 limit. The primary issue in dispute is whether this dollar limit represents a hard cap applicable to all expenditures incurred on behalf of TransTech at any time. In addition, the Complaint raises two ancillary issues. The first pertains to whether any of the disputed payments made or reserves created by TransTech relate to expenditures incurred before, as opposed to after, TransTech decided to pursue a plan of dissolution. The second relates to whether payments were made to TransTech's Sponsors or their affiliates, on one hand, or to unrelated third parties, on the other. The provisions of the

---

[7] DOB Ex. A at 4-5.

three relevant documents quoted at length below at least arguably relate to one or more of those issues.

a. The Charter

Article 5 of the Charter generally provides the terms under which TransTech is to operate, covering the use of the IPO proceeds, the requirements for consummating a business combination, and the dissolution and liquidation of the Company if no business combination is consummated. Article 5 ¶ A of the Charter states that:

> Immediately after the IPO, a certain amount of the net offering proceeds received by the Corporation in the IPO . . . shall be deposited and thereafter held in the Trust Fund . . . . Neither the Corporation nor any officer, director or employee of the Corporation shall disburse any of the proceeds held in the Trust Fund until the earlier of (i) a Business Combination or (ii) the liquidation of the Corporation as discussed in Paragraph (D) below, in each case in accordance with the terms of the investment management trust agreement governing the Trust Fund; *provided*, *however*, the Corporation shall be entitled to withdraw interest income from the Trust Fund as specified in the Registration Statement.[8]

The Charter provides in Article 5 ¶ D that:

> In the event the Corporation does not consummate a Business Combination by the later of (i) 18 months after the consummation of the IPO or (ii) 24 months after the consummation of the IPO, in the event that either a letter of intent, an agreement in principle or a definitive agreement to complete a Business Combination was executed but was not consummated within such 18-month period (such later date being referred to as the "Termination Date"), the directors and officers of the Corporation shall take all such action

---

[8] *Id*. at 4.

> necessary to dissolve the Corporation and liquidate the Trust Fund to holders of IPO Shares as soon as reasonably practicable . . . . In the event that the stockholders vote in favor of such dissolution and the Corporation is so dissolved, the Corporation shall promptly adopt and implement a plan of distribution which provides that only the holders of IPO Shares shall be entitled to share ratably in the Trust Fund, plus any other net assets of the Corporation not used for or reserved to pay obligations and claims, or such other corporate expenses relating to, or arising during, the Corporation's remaining existence, including costs of dissolving and liquidating the Corporation. The Corporation shall pay no liquidating distributions with respect to any shares of capital stock of the Corporation other than IPO Shares.[9]

Article 5 ¶ E of the Charter states that:

> A holder of IPO Shares shall be entitled to receive distributions from the Trust Fund only in the event of a liquidation of the Trust Fund pursuant to the terms of the investment management trust agreement governing the Trust Fund or the dissolution of the Corporation or in the event such holder demands conversion of its shares in accordance with paragraph (C) above. Except as may be required under applicable law, in no other circumstances shall a holder of IPO Shares have any right or interest of any kind in or to the Trust Fund or any amount or other property held therein. A holder of shares issued and outstanding prior to the IPO or issued in a private placement concurrently with or prior to the consummation of the IPO shall not have any right or interest of any kind in or to the Trust Fund.[10]

Finally, Article 5 ¶ F of the Charter provides that:

> Except as specified in the Registration Statement, neither the Corporation nor any officer, director or employee of the Corporation shall disburse any of the proceeds held in the

---

9 *Id*.

10 *Id*. at 5-6.

> Trust Fund until the earlier of (i) a Business Combination or (ii) the dissolution and liquidation of the Corporation pursuant to paragraph (D) above, in each case, in accordance with the terms of the investment management trust agreement governing the Trust Fund; *provided*, *however*, the Corporation shall be entitled to withdraw interest income from the Trust Fund as specified in the Registration Statement.[11]

b. The Trust Agreement

Section 2 of the Trust Agreement is entitled "Limited Distributions of Income on Property." Subsections 2(a) through 2(d) are relevant to this dispute, and they read, in pertinent part, as follows:

> (a) If there is any income tax obligation relating to the income from the Property in the Trust Account, then, at the written instruction of the Company, the Trustee shall disburse to the Company by wire transfer, out of the Property in the Trust Account, the amount indicated by the Company as required to pay income taxes.
>
> (b) Upon one or more written requests from the Company, which may be given not more than once in any calendar month period, the Trustee shall distribute to the Company interest or dividends earned on the Property in the Trust Account, net of taxes payable, up to a maximum of $600,000 ($800,000, if the Underwriters' over-allotment option is exercised in full).[12] The distributions requested by the Company may be for any amount, provided that (i) in the aggregate, all distributions under this Section 2(b) may not exceed [$800,000] . . . , and (ii) such distributions may only be made if and to the extent that income has been earned and

---

11 *Id*. at 6.

12 All parties to this action appear to agree that the Underwriters for the TransTech IPO exercised their over-allotment option in full. Thus, the maximum allowable limit for distributions under § 2(b) was $800,000, and all references hereinafter to the distribution limit will be to $800,000.

> collected on the amount initially deposited into the Trust Account.
>
> (c) Upon receipt by the Trustee of a written instruction from the Company for distributions from the Trust Account in connection with a plan of dissolution and distribution, accompanied by an Officers' Certificate signed by the Chief Executive Officer and Chief Financial Officer of the Company certifying as true, accurate and complete (i) a statement of the amount of actual expenses incurred or, where known with reasonable certainty, imminently to be incurred by the Company in connection with its dissolution and distribution, including any fees and expenses incurred or imminently to be incurred by the Company in connection with seeking stockholder approval of the Company's plan of dissolution and distribution, (ii) any amounts due to pay creditors or required to reserve for payment to creditors, and (iii) the sum of (i) and (ii), the Trustee shall distribute to the Company an amount, as directed by the Company in the instruction letter, up to the sum of (i) and (ii) as indicated in the instruction letter.
>
> (d) Except as provided in Sections 1(i) [authorizing distribution of the contents of the Trust Account upon receipt of a Termination letter signed by the Company's CEO and CFO], 1(j) [authorizing a distribution from the Trust Account upon shareholder approval of a plan a dissolution and liquidation], 2(a), 2(b), and 2(c) above, no other distributions from the Trust Account shall be permitted.[13]

c. The Registration Statement

The section entitled "Offering and private placement proceeds to be held in the trust account" contained within the prospectus summary of the Registration Statement provides that:

> $35,530,000 ($40,754,500, if the underwriters' over-allotment option is exercised in full) of the proceeds of this

[13] DOB Ex. D at 3-4.

> offering and the private placement, or approximately $7.90 per share ($7.88 per share, if the underwriters' overallotment option is exercised in full)[14] will be placed in a trust account . . . pursuant to an agreement to be signed on the date of this prospectus. . . .
>
> Subject to federal bankruptcy and similar laws, these proceeds will not be released until the earlier of (i) the completion of a business combination on the terms described in this prospectus, or (ii) implementation of [TransTech's] plan of dissolution and liquidation. Therefore, unless and until a business combination is completed, the proceeds held in the trust account will not be available for [TransTech's] use for any purpose, . . . except that there can be released to [TransTech] from the trust account amounts necessary to pay taxes on the interest earned on the trust account and interest earned, net of taxes on such interest, and up to [$800,000] . . . to fund [TransTech's] working capital requirements, including expenses associated with pursuing a business combination. With these exceptions, expenses incurred by [TransTech] while seeking a business combination may be paid prior to a business combination only from the net proceeds of this offering not held in the trust account (initially, $100,000 after the payment of the expenses related to this offering).[15]

The section of the Registration Statement's prospectus summary entitled "Dissolution and liquidation if no business combination" states:

> As required under Delaware law, [TransTech] will seek stockholder approval for any voluntary plan of dissolution and liquidation. Upon [TransTech's] receipt of the required approval by [its] stockholders of [its] plan of dissolution and liquidation, [TransTech] will liquidate [its] assets, including the trust account, and after (i) paying or making reasonable

---

[14] All parties to this action agree that the Trust Fund was required to hold a minimum of $40,754,500 or $7.88 per share. All references hereinafter to the minimum amount held in the Trust Fund will be to $40,754,500 or $7.88 per share.

[15] DOB Ex. B at 6.

provision to pay all claims and obligations known to [TransTech]; (ii) making such provision as will be reasonably likely to be sufficient to provide compensation for any claim against [TransTech] which is the subject of a pending action, suit or proceeding to which we are a party; and (iii) making such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to [TransTech] or that have not arisen but that, based on facts known to [TransTech], are likely to arise or to become known to us within ten years after the date of dissolution, distribute [TransTech's] remaining assets solely to [TransTech's] public stockholders.

[TransTech's] existing stockholders will not have the right to participate in any liquidating distributions occurring upon our failure to complete a business combination with respect to their founding shares . . . .

[TransTech] estimate[s] that, in the event [TransTech] liquidate[s] the trust account, a public stockholder will receive approximately [$7.88] per share . . . , without taking into account interest earned, net of taxes on the trust account, out of the funds in the trust account which means that [TransTech's] stockholders may lose money on their initial investment. We expect that all costs associated with implementing [TransTech's] plan of dissolution and liquidation, as well as payments to any creditors, will be funded by the proceeds of this offering not held in the trust account and interest released to [TransTech] of up to [$800,000] . . . for working capital, *but if [TransTech does] not have sufficient funds outside of the trust account for those purposes or to cover [its] liabilities and obligations, the amount distributed to [TransTech's] public stockholders would be less than [$7.88] per share* . . . . [TransTech] estimate[s] that [its] total costs and expenses for implementing and completing [its] stockholder-approved plan of dissolution and liquidation will be in the range of $50,000 to $75,000. This amount includes all costs and expenses relating to filing of [TransTech's] dissolution in the State of Delaware, the winding up of [TransTech's business] and the costs of a proxy statement and meeting relating to the approval by [TransTech's] stockholders of our plan of dissolution and liquidation. [TransTech] believe[s] that there

> should be sufficient funds available from the proceeds not held in the trust account and interest released to [TransTech] of up to [$800,000] . . . for working capital, to fund the $50,000 to $75,000 of expenses, although [TransTech] cannot give you assurances that there will be sufficient funds for such purposes. [TransTech's] sponsors have agreed to indemnify [TransTech] for these expenses to the extent there are insufficient funds available from the proceeds not held in the trust account and interest released to [TransTech].[16]

The "Risk Factors" section of the Registration Statement warns investors that "[TransTech's] placing of funds in trust may not protect those funds from third party claims against [TransTech]"[17] and that:

> Of the net proceeds of this offering and the private placement, only $100,000 is estimated to be available to [TransTech] initially outside the trust account to fund [TransTech's] working capital requirements. [TransTech] will be dependent upon sufficient interest being earned on the proceeds held in the trust account to provide [TransTech] with the additional working capital [TransTech] will need to search for a target company and complete a business combination. While [TransTech is] entitled to up to a maximum of [$800,000] . . . to be released to [TransTech] for working capital purposes, if interest rates were to decline substantially, [TransTech] may not have sufficient funds available to provide [itself] with the working capital necessary to complete a business combination. In such event, [TransTech] would need to borrow funds from our existing stockholders or others or be forced to liquidate. None of [TransTech's] officers, directors or stockholders is required to provide any financing to [TransTech] in connection with or after a business combination.[18]

---

16 DOB Ex. B at 8-9 (emphasis added).

17 *Id*. at 16.

18 *Id*. at 20.

Furthermore,

> *[TransTech's] officers, directors and special advisors will not receive reimbursement for any out-of-pocket expenses incurred by them to the extent that such expenses exceed the amount of available proceeds not deposited in the trust fund and the amount of interest income from the trust account, net of taxes on such interest, of up to a maximum of [$800,000]* . . . which may be released to [TransTech], unless the business combination is completed. These amounts are based on management's estimates of the funds needed to fund our operations for the next 24 months and complete a business combination. Those estimates may prove to be inaccurate, especially if a portion of the available proceeds is used to make a down payment in connection with the business combination or pay exclusivity or similar fees or if [TransTech] expend[s] a significant portion in pursuit of an acquisition that is not completed.[19]

The "Proposed Business" section of the Registration Statement discusses TransTech's hope that it will be able to obtain waivers of liability from potential creditors, such as vendors and prospective target businesses, but also provides that:

> [I]n order to protect the amounts held in trust each of [TransTech's] sponsors has agreed to indemnify [TransTech] for all claims of creditors, to the extent that [TransTech] fail[s] to obtain valid and enforceable waivers from them. Based on information [TransTech has] obtained from such individuals, [TransTech] currently believe[s] that such persons are of substantial means and capable of funding a shortfall in [TransTech's] trust account even though [TransTech has] not asked them to reserve for such an eventuality. [TransTech] cannot assure you, however, that they would be able to satisfy those obligations. *Accordingly, [TransTech] cannot assure you that the actual per-share liquidation value receivable by [TransTech's] public*

---

[19] *Id*. at 21 (emphasis added).

> *stockholders will not be less than [$7.88] per share . . . , plus interest (net of taxes payable), due to claims of creditors*.[20]

2. TransTech's failed business combination attempts

On November 13, 2008, TransTech signed an LOI to consummate a merger with Active Response Group, Inc. ("ARG").[21] The Company ultimately failed, however, to enter into a definitive merger agreement with ARG by May 30, 2009, the deadline under the Charter for it to close a merger, and never presented the deal to the IPO Shareholders.

On March 26, 2009, twenty-two months after the IPO, TransTech signed a separate LOI to merge with Global Hi-Tech Industries, Inc. ("Global"), a company not associated with ARG. TransTech announced the merger agreement with Global on April 3, 2009 and filed a preliminary proxy statement to solicit IPO Shareholder approval of the merger on April 6, 2009. But, TransTech ultimately abandoned the merger with Global after concluding that it could not be completed by the May 30, 2009 deadline.

3. Settlement with Opportunity Partners

On February 6, 2009, Opportunity Partners filed a petition in this Court to compel TransTech to hold an annual meeting to elect directors pursuant to 8 *Del. C.* § 211(c) on the grounds that TransTech had not held such a meeting in more than thirteen months. As a result, the Court ordered TransTech to hold a meeting by June 8, 2009. On June 5,

---

[20] *Id*. at 51 (emphasis added).

[21] The signing of this LOI gave TransTech an additional six months (twenty-four months from the completion of the IPO) to consummate a business combination. Although the parties dispute whether this extension applies to a business combination with any entity or only with the original co-signor of the LOI, I need not address that issue for purposes of the pending motion.

2009, however, TransTech and Opportunity Partners entered into a settlement agreement (the "Settlement") whereby Opportunity Partners withdrew its competing proxy and TransTech agreed, subject to the Court's approval, to hold a meeting to elect directors on June 30, 2009. The Settlement also required TransTech to reimburse Opportunity Partners $50,000 for the cost of the litigation. Additionally, the Settlement provided that Opportunity Partners would release TransTech from liability for any losses Opportunity Partners suffered in connection with the stockholders' meeting or the proxy statement and that TransTech would not need to indemnify Opportunity Partners if the monies in the Trust Fund fell below $7.90 per share of TransTech stock.[22]

4. Liquidation of TransTech

On June 19, 2009, TransTech filed a definitive proxy statement ("Definitive Proxy") for its upcoming shareholders meeting. At this meeting, the IPO Shareholders were asked to vote on whether to extend TransTech's corporate existence (by cancelling all of the IPO shares) or dissolve the Company. In the Definitive Proxy, TransTech set July 8, 2009 as the date for the shareholders meeting and indicated that the Trust Fund held $7.89 per IPO share as of May 26, 2009.[23] As of the date of the Definitive Proxy, TransTech had net liabilities and obligations that exceeded available cash outside the Trust Account by approximately $305,900, of which $125,576 could be deducted from

---

22 DOB Ex. C at 27.

23 *Id*. at 26. This estimate was less than the estimate in the preliminary proxy filing of $7.94 per share as of March 31, 2009. Compl. ¶ 17. The preliminary proxy filing was not released to TransTech's shareholders.

the income of the Trust Account pursuant to the terms of the Trust Agreement.[24] The Definitive Proxy also stated that TransTech intended to pursue any applicable federal or state tax refunds for past overpayments and that any such funds received would be used first to satisfy the claims of its vendors, second to reimburse its Sponsors for expenses of the Company they paid pursuant to their indemnification obligations, and then, finally, to pay the IPO Shareholders. On or about July 16, 2009, the IPO Shareholders voted to dissolve TransTech, and they later received a distribution of $7.88 per share from TransTech.[25]

C. Procedural History

On November 2, 2009, Plaintiffs filed their Complaint in this action, asserting four counts against Defendants for: (I) Breach of Corporate Charter; (II) Breach of Constructive Trust; (III) Fraud; and (IV) Conversion. On December 7, 2009, Defendants moved to dismiss the Complaint on several grounds. First, Defendants characterize Plaintiffs' claims as derivative and seek to dismiss the entire Complaint under Rule 23.1 because Plaintiffs failed to make a demand on TransTech's Board of Directors or show

---

[24] DOB Ex. C at 18.

[25] Plaintiffs complain that TransTech has not accounted for the difference of six cents per share between the $7.94 per share noted in the preliminary proxy and the $7.88 per share ultimately distributed to the IPO Shareholders ($310,000 total). *See* Compl. ¶ 20. Defendants point to the Definitive Proxy's statement that, at the time of its filing, TransTech owed approximately $330,000 to creditors and estimated its liquidation expenses to be $249,500. Defendants also contend that TransTech was still allowed to deduct $125,576 from the Trust Fund according to the terms of the Trust Agreement. *See* DOB Ex. C at 37-38.

why demand should be excused. Second, Defendants contend that Counts I, II, and IV are, at most, claims for breaches of the duty of care, which are exculpated by the exculpation clause in TransTech's Charter and, thus, must be dismissed under Rule 12(b)(6) for failure to state a claim. Third, Defendants argue that Count III fails to plead a claim for fraud with the particularity required under Rule 9(b). Finally, Defendants seek dismissal of all claims made by Opportunity Partners as having been satisfied by the Settlement. On May 20, 2010, I heard argument on Defendants' motion to dismiss.

II. ANALYSIS

A. Defendants' Motion to Dismiss for Failure to Make Demand

A shareholder asserting a derivative claim must comply with the pleading requirements of Court of Chancery Rule 23.1. This Rule requires a shareholder to, among other things, "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."[26] Defendants assert that because Plaintiffs seek an accounting of TransTech and a distribution of funds to the IPO Shareholders, Plaintiffs' claims do not allege any direct injury to Plaintiffs and are, therefore, derivative in nature.[27] Defendants further contend that because Plaintiffs made no effort to comply with the pleading requirements of Rule

---

[26] Ct. Ch. R. 23.1.

[27] DOB 10.

23.1 by detailing their efforts to make demand on the TransTech Board or alleging demand futility, all of their derivative claims against Defendants should be dismissed.

In response, Plaintiffs state that their claims are direct, rather than derivative, because only the IPO Shareholders, and not the Sponsors, who were also TransTech shareholders, suffered the alleged harm. Plaintiffs further assert that TransTech did not suffer any damages and that the founding shares held by the Sponsors are not entitled to liquidating distributions. Thus, according to Plaintiffs, they seek only to vindicate their rights as individual shareholders, as outlined in the Charter and the Registration Statement, and to obtain a remedy for the alleged breach of those rights.[28]

Whether a claim is direct or derivative depends upon "the nature of the wrong and to whom the relief should go."[29] Where a shareholder is directly injured, the shareholder may bring an individual action for injuries affecting his or her legal rights, separate and distinct from an injury to the corporation.[30] Claims based upon contractual rights of the shareholder which exist separately from any right of the corporation are direct claims.[31] In this case, the Charter distinguishes between the rights of the IPO Shareholders and the

---

28 PAB 4, 10; DOB Ex. B at 9, 35.

29 *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004).

30 *Id*. at 1039.

31 *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988) (citing *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985)).

rights of TransTech regarding interest income from the Trust Fund.[32] Furthermore, the Charter stipulates that only the IPO Shareholders, and not all TransTech shareholders, are entitled to funds in the Trust Fund.[33] Thus, the IPO Shareholders claim rights to the funds in the Trust Fund that are separate and distinct from the rights of TransTech. Plaintiffs' claims, therefore, are direct contract claims for which no demand is required.

Because the claims asserted by Plaintiffs are direct, rather than derivative, and pertain to alleged breaches of certain contracts by TransTech, these claims may be asserted only against TransTech and not against Defendants Rajpal and Singh as directors of TransTech. In light of this, a question arises as to whether Defendants Singh and Rajpal may be dismissed from this action. Rule 20 permits all persons to be "joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."[34] These provisions for permissive joinder under Rule 20 "are very broad[,] and the court is given discretion to decide the scope of the civil action and to make such orders as will prevent delay or prejudice."[35] In

---

32 DOB Ex. A at 4, 6.

33 *Id*. at 5-6.

34 Ch. Ct. R. 20.

35 *Quereguan v. New Castle Cty.*, 2006 WL 2925411, at *2 (Del. Ch. Sept. 20, 2006) (citing *Arrington v. City of Fairfield*, 414 F.2d 687, 693 (5th Cir. 1969) (applying the similar Fed. R. Civ. P. 20(a)).

this case, it is reasonably conceivable from the allegations in the Complaint that Defendants Singh and Rajpal improperly received payments derived from the interest accrued on the Trust Fund and that Plaintiffs might succeed on their claim to recover the amounts of those payments, regardless of whether Singh or Rajpal engaged in any wrongful conduct.[36] For this reason, Singh and Rajpal are parties who have sufficient interest in these proceedings to be included as co-defendants, and I decline to dismiss them from this action even though Plaintiffs apparently have not asserted any claims against them directly.

B. Defendants' Motion to Dismiss for Failure to State a Claim

A court will grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when "it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings."[37] While all facts alleged in the pleadings and inferences that reasonably can be drawn from them are accepted as true, the court need not accept inferences or factual conclusions unsupported by specific allegations of facts. That is, only reasonable inferences need be drawn in the

---

[36] *See Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999), *aff'g*, 1997 WL 770706 (Del. Ch. Dec. 3, 1997) (noting that, in appropriate circumstances, assets in the possession of a party who is not accused of any wrongdoing may be subject to a claim for relief).

[37] *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005); *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007).

nonmovant's favor.[38] Consequently, "a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks. But, if a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted."[39]

Defendants argue that Counts I (breach of the Charter), II (breach of constructive trust), and IV (conversion) fail to state claims upon which relief may be granted. Defendants contend that all three of these claims rest on the same, incorrect, interpretation of the Charter, the Trust Agreement, and the Registration Statement.[40] Specifically, Plaintiffs base their claims on the argument that the maximum amount TransTech could withdraw from the interest earned by the Trust Fund was $800,000, plus any amounts needed to pay taxes. Defendants counter that, in the context of a

---

38 *See Hendry v. Hendry*, 2006 WL 1565254, at *10 (Del. Ch. May 26, 2006) ("[A] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences.").

39 *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007).

40 Because these documents were adopted at approximately the same time and the Charter references both the Registration Statement and the Trust Agreement, I will interpret them as a whole and read their terms to be consistent with one another as much as possible. *See Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 231 A.2d 450, 456 (Del. Ch. 1967) (citing *State ex rel. Hirst v. Black*, 83 A.2d 678, 679 (Del. 1951)).

Defendants initially argued that Counts I, II, and IV were all claims for breach of the duty of care and, as such, were precluded by the exculpation clause in TransTech's Charter. DOB 12-13. This argument is now moot, however, because Plaintiffs have clarified that they have brought these claims directly against TransTech, rather than any individual directors. *See* Defs.' Reply Br. 15-16.

dissolution, there is no such limit on TransTech's use of the Trust Fund interest.[41] Accordingly, the success of Defendants' motion to dismiss under Rule 12(b)(6) depends on the proper interpretation of the relevant provisions of the Charter, the Trust Agreement, and the Registration Statement relating to what TransTech could withdraw from the Trust Fund.

1. Contract interpretation standard

When interpreting a contract, the court's ultimate goal is to determine the shared intent of the parties.[42] "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."[43] Delaware adheres to the objective theory of contracts.[44] Accordingly, "the court looks to the most objective indicia of that intent: the words found in the written instrument."[45] "As part of this initial review, the court

---

41 Counts I and IV of the Complaint both allege that TransTech withdrew amounts from the Trust Fund in excess of the alleged $800,000 cap. Count II avers that TransTech's proposed distribution of potential tax refunds to creditors is improper because the amounts used to overpay the taxes came from the Trust Fund and, thus, any tax refunds received should be considered interest earned on the Trust Fund and subject to the alleged cap. As such, Counts I, II, and IV all are based on the same theory that TransTech could withdraw no more than $800,000 from the Trust Fund for any purpose other than paying taxes.

42 *Sassano v. CIBC World Mkts. Corp*., 948 A.2d 453, 462 (Del. Ch. 2008).

43 *HIFN, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936)).

44 *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 835 (citing *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007)).

45 *Sassano*, 948 A.2d at 462. In determining the intent of the parties, the court looks first at the relevant document, read as a whole. *PharmAthene, Inc. v. SIGA Techs.*,

ascribes to the words their common or ordinary meaning and interprets them as would an objectively reasonable third-party observer."[46]

A disagreement between the parties as to a contract's construction does not suffice to render it ambiguous. Instead, a contract will be deemed ambiguous only if its language is susceptible to two or more reasonable interpretations.[47] While extrinsic evidence cannot be used to manufacture an ambiguity where one does not exist on the contract's face,[48] "an understanding of the context and business circumstances under which the language was negotiated" is to be considered,[49] as "seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiating and contracting occurred."[50] When a motion to dismiss requires interpretation of a contract, the finding of an ambiguity will scuttle the defendant's

---

Inc., 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008) (quoting *Matulich v. Aegis Commc'ns Gp., Inc.*, 2007 WL 1662667, at *12 (Del. Ch. May 31, 2007)).

46 *Sassano*, 948 A.2d at 462.

47 *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

48 *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

49 *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *10 n.10 (Del. Ch. June 6, 1996).

50 *Id*.

chances of dismissing the plaintiff's claim, insofar as the defendant's motion relies on a specific interpretation of the contract.[51]

2. The parties' interpretations of the relevant documents

Plaintiffs argue that TransTech could receive disbursements from the Trust Fund "for only two purposes: to pay taxes and to meet working capital needs," and that the disbursements for working capital expenses were subject to a strict $800,000 cap that TransTech could not "withdraw one penny beyond."[52] In making this claim, Plaintiffs point to § 2(b) of the Trust Agreement, which provides that: "Upon one or more written requests from the Company, . . . the Trustee shall distribute to the Company interest or dividends earned on the Property in the Trust Account, net of taxes payable, up to a maximum of [$800,000]."[53] Plaintiffs also rely on the following provision in the Registration Statement:

> Unless and until a business combination is completed, the proceeds held in the trust account will not be available for [the Company's] use for any purpose, including the payment of any expenses related to this offering or expenses which [TransTech] may incur related to the investigation and selection of a target business or the negotiation of an agreement to effect the business combination, except that there can be released to [the Company] from the trust account amounts necessary to pay taxes on the interest earned on the

---

51 *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("On a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents.").

52 PAB 4-5.

53 DOB Ex. D at 3.

> trust account and interest earned, net of taxes on such interest, and up to [$800,000] to fund our working capital requirements, including expenses associated with pursuing a business combination.[54]

Plaintiffs further contend that any amounts expended by TransTech in connection with its dissolution and liquidation must be considered working capital expenses. In effect, Plaintiffs argue that all amounts TransTech paid to creditors or reserved for payment to creditors in relation to its successful dissolution also would be subject to the $800,000 cap. To support the reasonableness of this position, Plaintiffs cite TransTech's estimation in the Registration Statement that liquidation expenses would be in the range of $50,000 to $70,000 and an indemnification pledge made by TransTech's Sponsors to keep the Trust Fund at a minimum of $7.88 per share.[55]

Defendants dismiss Plaintiffs' view as based on a selective reading of the relevant documents. They further contend that other provisions in those documents show that distributions could be made from the Trust Fund to TransTech for expenses actually incurred or imminently to be incurred in connection with its dissolution and distribution or to pay or reserve for payment to creditors, even if they exceeded the $800,000 limit on working capital expenses. Defendants read § 2 of the Trust Agreement as authorizing

---

[54] DOB Ex. B at 6.

[55] The offering price in the IPO for a share of TransTech was $8.00. DOB Ex. B at Prospectus Cover Page. The indemnity obligation only applies when the amount distributed to the IPO Shareholders from the Trust Fund falls below $7.88 per share. Because the IPO Shareholders received a distribution of $7.88 per share at the time of TransTech's dissolution and liquidation, the indemnity provision is not applicable here.

disbursement from the Trust Fund to TransTech in three different circumstances. Section 2(a) allows TransTech to receive distributions from the Trust Fund to pay income taxes on interest or other income earned by the Fund. Section 2(b) allows TransTech to withdraw from income earned and collected by the Trust Fund up to $800,000 to fund working capital expenses. Section 2(c) permits a distribution to be made to TransTech from the Trust Account in an amount necessary to cover expenses associated with its dissolution and liquidation and the satisfaction of its creditors' claims.[56] As Defendants read § 2, these three provisions essentially operate independently of each other. Thus, the $800,000 limit in § 2(b) does not apply to either distributions made to pay taxes or distributions associated with dissolution and liquidation.

As additional support for their position, Defendants point to a number of statements in the Registration Statement warning investors that their rights to the amounts in the Trust Fund may be jeopardized by creditor claims against TransTech. One such statement provides that:

> We expect that all costs associated with implementing a plan of dissolution and liquidation as well as payments to any creditors will be funded by the proceeds of [the IPO] not held in the trust account and the interest on amounts held in the trust account (net of taxes) released to us as described elsewhere in the prospectus, although we cannot assure you that those funds will be sufficient funds for such purposes.[57]

---

[56] DOB Ex. D at 3.

[57] DOB Ex. B at 51.

Another states:

> If we are forced to dissolve and liquidate prior to a business combination, our public shareholders are entitled to share ratably in the trust fund, inclusive of any interest not previously released to us to fund working capital requirements and net of any income taxes due on such interest, which income taxes, if any, shall be paid from the trust fund and after payment of claims and obligations of the company.[58]

A third provides that:

> There is no guarantee that vendors, prospective target businesses, or other entities will execute [waivers of liability], or even if they execute such agreements that they would be prevented from bringing claims against the trust account . . . . Pursuant to agreements with [TransTech], in order to protect the amounts held in trust each of our sponsors has agreed to indemnify [TransTech] for all claims of creditors, to the extent that we fail to obtain valid and enforceable waivers from them. Based on information we have obtained from such individuals, we currently believe that such persons are of substantial means and capable of funding a shortfall in our trust account even though we have not asked them to reserve for such an eventuality. We cannot assure you, however, that they would be able to satisfy those obligations. Accordingly, we cannot assure you that the actual per-share liquidation value receivable by our public stockholders will not be less than [$7.88] per share, plus interest (net of taxes payable), due to claims of creditors.[59]

Defendants ultimately contend that the relevant documents, taken in their entirety, show that the $800,000 working capital limit upon which Plaintiffs base their claim does not

---

[58] *Id.* at 67.

[59] *Id.* at 51.

apply to expenditures made or reserves created for payment of creditors in connection with a plan of dissolution and liquidation of TransTech.

3. Proper construction of the relevant documents

I find that Defendants' interpretation of the relevant documents is reasonable, while Plaintiffs' is not. The Charter provides that TransTech "shall be entitled to withdraw interest income from the Trust Fund as specified in the Registration Statement."[60] The Registration Statement then provides that the proceeds of the IPO will be placed in a trust account "pursuant to an agreement to be signed on the date of this prospectus," *i.e.*, the Trust Agreement, and generally recites provisions from the Trust Agreement whenever it references any withdrawals from the Trust Fund.[61] Accordingly, I consider the Trust Agreement to be the principal document for determining TransTech's rights to receive distributions from the Trust Fund and begin my analysis with that document.

The only reasonable reading of § 2 of the Trust Agreement is that §§ 2(b) and 2(c) are independent of each other; thus, the $800,000 limit in § 2(b) does not apply to distributions made in connection with the dissolution and distribution of the Trust Fund provided for in § 2(c). According to Plaintiffs, § 2 provides only two ways TransTech

---

60 DOB Ex. A at 4.

61 DOB Ex. B at 6. The Charter also mentions the Trust Agreement in Article 5 ¶ E ("A holder of IPO Shares shall be entitled to receive distributions from the Trust Fund only in the event of a liquidation of the Trust Fund pursuant to the terms of the investment management trust agreement governing the Trust Fund."). DOB Ex. A at 5.

can receive distributions from the Trust Fund: for the payment of income taxes and for working capital expenses, with the latter distributions subject to an $800,000 limit. For this reading to be correct, the dissolution and liquidation expenses referred to in § 2(c) would have to be subject to the $800,000 cap provided in § 2(b). At first glance, this reading might seem plausible, as § 2(b) appears to place a hard cap on distributions from the income of the Trust Fund ("interest or dividends earned on the property in the Trust Account, net of taxes payable") at a maximum of $800,000. But, there are important differences between §§ 2(b) and 2(c).

Considering § 2 of the Trust Agreement as a whole, I find that the only logical reading of this section is that subsections 2(a), 2(b), and 2(c) are all independent of each other. Section 2(a) clearly allows TransTech to receive distributions from any property in the Trust Fund for the purpose of paying "any income tax obligation relating to the income from the Property in the Trust Account."[62] Section 2(b) was intended to allow TransTech to obtain money from the Trust Fund while it pursued a business combination to fund its working capital requirements, but only "if and to the extent that income has been earned and collected on the amount initially deposited into the Trust Account."[63] The distributions provided for in § 2(b) were further limited in that they only could come

---

62 DOB Ex. D at 3. The heading of § 2, "Limited Distributions of Income of Property," suggests that distributions from the Trust Fund are limited to income earned on the property in the Fund, but the plain language in §§ 2(a) and 2(c) indicates that those subsections are not so limited. *Id.*

63 *Id.*

from "interest or dividends earned on the Property in the Trust Account, net of taxes payable," and could not exceed $800,000.[64]

No such limitations apply to the distributions authorized to be made pursuant to § 2(c) in connection with a plan of dissolution and distribution. Section 2(c) refers only to the specific situation of a dissolution. It authorizes distributions from the Trust Account, but only if TransTech provided a written instruction to the trustee signed by both TransTech's CEO and CFO that stated "the amount of actual expenses incurred or . . . imminently to be incurred by the Company in connection with its dissolution . . . [and] any amounts due to pay creditors or required to reserve for payment to creditors."[65] The maximum distribution from the Trust Fund authorized by § 2(c) is the total amount certified by the CEO and CFO as necessary to pay the costs of dissolution and satisfy the claims of creditors. Importantly, § 2(c) does not contain any limit on the amount TransTech can receive in distributions for this purpose, any reference to § 2(b), or any requirement that these distributions come from the income earned by the Trust Fund. Moreover, the mechanism established by § 2(c) to provide for the claims of creditors and potential creditors upon dissolution of TransTech is consistent with, and arguably required by, the General Corporation Law ("GCL").[66] TransTech's need to comply with

---

64 *Id.*

65 *Id.*

66 *See* 8 *Del. C.* § 281(b) ("A dissolved corporation . . . shall . . . adopt a plan of distribution pursuant to which the dissolved corporation or successor entity (i) shall pay or make reasonable provision to pay all claims and obligations, including

the mandates of the GCL suggests that no cap could apply to payments TransTech was required to make to satisfy the claims of creditors while it was in the process of dissolving. Thus, from the plain language of § 2, I conclude that §§ 2(b) and 2(c) are intended to deal with two different scenarios. Section 2(b) applies when TransTech is operating and pursuing a business combination, while § 2(c) applies when TransTech needs to make distributions in connection with a plan for its dissolution and liquidation.

This reading finds support in numerous locations in the Registration Statement. In particular, on page 51, TransTech notes its hope that it will be able to pay all expenses associated with dissolution and liquidation, including payments to creditors, from the IPO proceeds that were not put into the Trust Account and the $800,000 it could withdraw as working capital expenses. TransTech warns, however, that it "cannot assure you that those funds will be sufficient funds for such purposes."[67] Elsewhere in the Registration Statement, TransTech observes that if it is forced to dissolve, the IPO Shareholders will

---

> all contingent, conditional or unmatured contractual claims known to the corporation or such successor entity, (ii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the corporation which is the subject of a pending action, suit or proceeding to which the corporation is a party and (iii) shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the corporation or that have not arisen but that, based on facts known to the corporation or successor entity, are likely to arise or to become known to the corporation or successor entity within 10 years after the date of dissolution. The plan of distribution shall provide that such claims shall be paid in full and any such provision for payment made shall be made in full if there are sufficient assets."). *See also* DOB Ex. B at 8-9.

[67] DOB Ex. B at 51.

receive the contents of the Trust Fund, less any interest previously released to fund working capital requirements and any income taxes due on the interest generated by the Trust Fund "*after payment of claims and obligations of the company*."[68] This, again, indicates that the payment of monies in the Trust Fund to TransTech's creditors in connection with its dissolution and liquidation was potentially in addition to, rather than included in, the $800,000 that could be distributed to fund TransTech's working capital requirements. Finally, the Registration Statement's remark that the claims of creditors could cause the IPO Shareholders to receive less than $7.88 per share if the Sponsors do not make good on their indemnification promises is consistent with the recognition that claims made during dissolution could cause expenditures from the Trust Fund to exceed the $800,000 cap.[69]

For these reasons, I conclude that the relevant documents are not ambiguous as to whether the $800,000 cap applies in the context of a dissolution and distribution and that Defendants' interpretation in that regard is correct. The only reasonable reading of the Trust Agreement is that its provisions allowing for distributions from the Trust Fund are to be read independently of each other. This means that the $800,000 limit on distributions for working capital expenses in § 2(b) is not applicable to the allowance for dissolution and liquidation expenditures in § 2(c). This reading of the Trust Agreement is supported by the Registration Statement, which repeatedly refers to the payment of

---

68 *Id.* at 67 (emphasis added).

69 *Id.* at 51.

expenses in connection with a plan of dissolution and distribution as an obligation separate and apart from the $800,000 allowance for working capital expenses. As such, Defendants' proposed interpretation of the documents as allowing TransTech to withdraw all monies from the Trust Fund necessary to pay its creditors and other dissolution expenses is reasonable, while Plaintiffs' proposed interpretation whereby TransTech can receive distributions from the Trust Fund only up to an $800,000 limit, regardless of the purpose for which they are used, is unreasonable.

4. Application of the properly construed documents to Plaintiffs' claims

Plaintiffs allege in Count I of the Complaint that TransTech "withdrew from the trust account monies to which they were not entitled because they had already withdrawn the $800,000 maximum allowed for working capital."[70] Count II contains an allegation that TransTech's proposed use of tax refunds to satisfy the claims of creditors runs afoul of the $800,000 cap on withdrawals from the Trust Fund. Count IV alleges that TransTech converted Trust Fund assets by withdrawing more than $800,000 from the Trust Fund.

In determining whether Plaintiffs have stated a claim in Counts I, II, and IV, a distinction needs to be drawn between payments made by TransTech to third-party creditors and payments[71] made to its Sponsors and their affiliates. Payments made to

---

70 Compl. ¶ 23.

71 For brevity and convenience, I use the term "payments" broadly to cover both actual payments and the creation of a reserve for the payment of creditors.

third-party creditors were permissible under the relevant documents because the $800,000 cap on withdrawals of income generated by the Trust Fund does not apply to payments made by TransTech in connection with its dissolution. Payments made by TransTech to third-party creditors during dissolution expressly are permitted by § 2(c) of the Trust Agreement, which allows "any amounts due to pay creditors or required to reserve for payment to creditors" to be distributed from the Trust Fund and does not subject these distributions to any cap on their amount.[72] Plaintiffs also cannot state a claim that any payments made to third-party creditors for expenses incurred before TransTech began the dissolution process were improper because those payments were not proscribed by § 2(c) and, as previously discussed, were not subject to § 2(b) once TransTech began to operate under a plan of dissolution. Thus, even if TransTech incurred expenses to third-party creditors before, and unrelated to, its plan of dissolution, once it began its dissolution, payment of those expenses was permissible under the relevant documents. Accordingly, I grant Defendants' motion to dismiss Counts I, II, and IV of the Complaint insofar as these claims relate to payments made to third-party creditors.

As for payments made by TransTech to its Sponsors and their affiliates, however, I find that Plaintiffs have pled sufficient facts that, if true, plausibly could support a claim for the relief they seek. Drawing all inferences in Plaintiffs' favor, as I am required to do in the procedural context of a 12(b)(6) motion to dismiss, I find that the allegations in the

---

[72] DOB Ex. D at 3.

Complaint are broad enough to encompass claims that payments to the Sponsors and their affiliates were improper. For instance, Count I alleges that TransTech breached the Charter by withdrawing more than $800,000 from the Trust Fund, but does not state what was done with these monies or to whom they were paid. Accordingly, it is reasonable to infer that at least some of the challenged payments were made to the Sponsors and their affiliates, as opposed to third-party creditors.

I also consider it reasonably conceivable that Plaintiffs will be able to prove that payments made to TransTech's Sponsors and their affiliates from distributions to TransTech in excess of the $800,000 cap were improper. The Registration Statement appears to place a significant limitation on payments to TransTech's Sponsors and their affiliates.[73] Moreover, I find the proposition that TransTech could incur expenses to its Sponsors and their affiliates before its dissolution and then wait until it was dissolving to pay those expenses far different from the situation regarding the payments to third-party creditors. In particular, I cannot say on the current state of the record and the parties' briefing that TransTech unambiguously had the right to make such payments to the

---

[73] The Registration Statement provides that "there will be no fees or other cash payments paid to our existing stockholders or our officers, directors or special advisors prior to or in connection with a business combination, other than": (1) the repayment of a $125,000 loan made to TransTech by the Sponsors at a 4% annual interest rate; (2) payments of $7,500 per month to Lotus Capital LLC (an affiliate of one of TransTech's Sponsors) from the IPO date to the date of TransTech's dissolution and liquidation; and (3) reimbursement of out-of-pocket expenses incurred in connection with the pursuit of a business combination. DOB Ex. B at 7. The Registration Statement further provides that no more than $800,000 could be withdrawn from the interest on the Trust Fund for the purpose of reimbursing the Sponsors for their out-of-pocket expenses. *Id*. at 21.

Sponsors and their affiliates without regard to the $800,000 limit.[74] Thus, Plaintiffs conceivably could prove that payments of that type were improper. Therefore, I deny the motion to dismiss Counts I, II, and IV of the Complaint insofar as these claims are based on payments TransTech made to its Sponsors and their affiliates.

C. Defendants' Motion to Dismiss for Failure to Allege Fraud with Particularity

When a claim of fraud is alleged, Rule 9(b) requires that the circumstances constituting the fraud be alleged with particularity.[75] At common law, fraud consists of:

> 1) a false representation, usually one of fact, made by the defendant;
>
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
>
> 3) an intent to induce the plaintiff to act or to refrain from acting;
>
> 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
>
> 5) damage to the plaintiff as a result of such reliance.[76]

---

74 For example, the Registration Statement indicates that TransTech expected there to be "sufficient funds available from the proceeds not held in the trust account and interest released to [TransTech] of up to [$800,000] for working capital" to fund the dissolution expenses, although TransTech could not assure its investors that there would be sufficient funds for such purposes. DOB Ex. B at 9. The Registration Statement further stated that TransTech's "sponsors have agreed to indemnify [TransTech] for these expenses to the extent there are insufficient funds available from the proceeds not held in the trust account and interest released from to [TransTech]." *Id.*

75 Ct. Ch. R. 9(b).

To meet the requirements of Rule 9(b), a complaint for fraud must include "the time, place, contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby."[77]

Defendants contend that Count III of the Complaint fails to plead these requisite facts with particularity.[78] I agree. Count III merely consists of generalities and conclusory statements. Plaintiffs allege that TransTech's act of instructing the trustee of the Trust Fund to withdraw amounts in excess of $800,000 constitutes fraud against the trustee and the IPO Shareholders.[79] The Complaint lacks any detailed allegations, however, pertaining to the time, place, and contents of the allegedly false representations made by Defendants in relation to the withdrawal of funds from the Trust Fund. Thus, the Complaint fails to satisfy the pleading requirements of Rule 9(b) as to this portion of Count III.

Plaintiffs also allege in Count III that TransTech's decision to distribute potential tax refunds to creditors and its Sponsors, instead of the IPO Shareholders, constitutes fraud against the IPO Shareholders.[80] Again, however, the Complaint contains no

---

76 *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *see also DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005).

77 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *7 (Del. Ch. Aug. 26, 2005) (citing *York Linings v. Roach*, 1999 WL 608850, at *2 (Del. Ch. July 28, 1999)) (internal quotations and citations omitted).

78 DOB 14.

79 Compl. ¶ 29.

80 Compl. ¶ 30.

information regarding the time, place, and contents of Defendants' allegedly false representations regarding the anticipated tax refunds and the proposed distribution of those refunds, or even whether any such refunds have been received. Therefore, this aspect of Plaintiffs' fraud claim also fails to satisfy the requirements of Rule 9(b). Furthermore, neither fraud claim pleads facts sufficient to support a reasonable inference that Defendants knowingly or recklessly made false representations. I therefore grant Defendants' motion to dismiss Count III for failure to allege fraud with the requisite particularity.

D. Defendants' Motion to Dismiss for Satisfaction of Claims by Opportunity Partners

Defendants contend that the terms of the Settlement between Opportunity Partners and TransTech in the litigation regarding the TransTech shareholders meeting bar Opportunity Partners from asserting any claims against Defendants.[81] Because the Settlement released TransTech from all losses it may have incurred relating to the shareholders meeting and the proxy statement, as well as its obligation to indemnify the IPO Shareholders for any reduction in the monies in the Trust Fund below $7.90 per share, Defendants assert that Opportunity Partners lacks standing to assert any claims based on an improper reduction of monies in the Trust Fund.

Opportunity Partners responds that its claims stem from allegedly improper disbursements of the income earned by the Trust Fund and Defendants' plan to allocate

---

[81] DOB 16-17.

tax refunds in an allegedly improper manner. According to Opportunity Partners, therefore, its claims are unaffected by the indemnity provision in the Settlement.

Based on the facts pled in the Complaint, it is reasonably conceivable that Opportunity Partners' claims are outside the scope of the Settlement. I read those claims to suggest a violation of the Charter independent of the Settlement's indemnity provision and the claims released by the settlement of the prior lawsuit. Because this is a motion to dismiss and the facts pled by Opportunity Partners, if proven, could support a judgment in its favor, I deny Defendants' motion to dismiss Opportunity Partners' claims as having been satisfied by the Settlement.

III. CONCLUSION

For the foregoing reasons, I grant in part and deny in part Defendants' motion to dismiss as follows: (1) I deny Defendants' motion to dismiss the Complaint under Rule 23.1; (2) I grant the motion to dismiss Count III pursuant to Rule 9(b); (3) I grant the motion to dismiss Counts I, II, and IV as they pertain to amounts paid to third-party creditors, but deny that motion insofar as Counts I, II, and IV pertain to payments made to TransTech's Sponsors, officers, directors, and special advisors or their affiliates; and (4) I deny the motion to dismiss the claims brought by Opportunity Partners.

IT IS SO ORDERED.