ORIGINAL

#73

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEBAK.EY CORPORATION, a Nevada Corporation, INTERACTIVE TELEMEDICAL SYSTEMS, a Florida corporation, and ITS-RAYTHEON-DEBAKEY TELEMEDICINE SYSTEMS, a Delaware Partnership,

Plaintiffs,

V.

RAYTHEON SERVICE COMPANY, a Delaware corporation, and RAYTHEON CORPORATION, a Delaware corporation,

Defendants.

C.A. No. 14947

RAYTHEON SERVICE COMPANY, a Delaware corporation,

Counterclaim Plaintiff,

V.

INTERACTIVE TELEMEDICAL SYSTEMS, a Florida corporation, and DEBAKEY CORF'ORATION, a Nevada Corporation,

Counterclaim Defendants.

MEMORANDUM OPINION

Date Submitted: December 14, 1999
Date Issued: August 25.2000

Stuart M. Grant and Megan D. McIntyre, Esquires, of GRANT & EISENHOFER, Wilmington, Delaware; and Charles M. Hartz and Daniel D. Dolan, Esquires, of GEORGE, HARTZ, LUNDEEN, FLAGG & FULMER, Coral Gables, Florida; Attorneys for Plaintiffs

Jesse A. Finkelstein, C. Malcolm Cochran, IV, Robert J. Stearn, Jr., Lisa A. Schmidt, J. Travis Laster and Chad M. Shandler, Esquires, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Attorneys for Defendants and Counterclaim Plaintiffs Raytheon Service Company and Raytheon Company

JACOBS, 'VICE CHANCELLOR

The event that generated this action for money damages was the failure of a joint venture partnership (the "Partnership") formed by three entities in September, 1993. Those entities, which were the joint venture partners, were Raytheon Service Company ("'RSC"), a subsidiary of the Raytheon Company ("Raytheon"); the DeBakey Corporation ("DeBakey"); and Interactive Telemedical Systems ("ITS"). The Partnership was named "MedTel," and its purpose was to sell telemedicine systems worldwide. The Joint Venture Agreement that formalized the parties' relationship (the "JV Agreement") obligated RSC to provide initial financing to the Partnership, but also entitled RSC to terminate the joint venture "in its sole discretion" if RSC's required financing exceeded $2 million dollars. One year later, when RSC's financial contribution had reached or exceeded $2 million, RSC gave notice on September 2, 1994 that it was terminating the Partnership, which occurred shortly thereafter.

Nearly two years thereafter, the plaintiffs--DeBakey, ITS, and the Partnership-- filed this lawsuit, naming RSC and Raytheon as defendants. The plaintiffs claim that RSC's performance and termination of the JV Agreement, and its withdrawal from MedTel, constituted breaches of contract and of fiduciary and

---

[1]RSC and Raytheon are sometimes referred to collectively as "RSC/Raytheon." In other contexts where it is important to distinguish between those two entities, they are referred to separately as "RSC" or "Raytheon."

other duties that RSC owed the plaintiffs. The plaintiffs separately charge Raytheon (RSC's parent company) with tortious interference with the contract between plaintiffs and RSC, and with aiding and abetting RSC's breach of fiduciary duties. Lastly, the plaintiffs claim that Raytheon, through fraudulent or negligent misrepresentations, induced them to enter into the JV Agreement. As a consequence of these claimed wrongs, the plaintiffs seek damages in excess of $5 1.5 million.

The defendants deny that they committed any wrongdoing, and have counterclaimed against the plaintiffs for breaching the JV Agreement and inducing RSC to invest in the joint venture through fraudulent or negligent misrepresentations. The defendants seek to recover the $2 million they invested in MedTel, plus consequential damages (including attorneys' fees) on their counterclaims.

The merits of these claims and counterclaims were tried between July 7 through July 2 1, 1999. This is the Opinion of the Court after post-trial briefing. For the reasons next discussed,, I conclude that (1) the plaintiffs have failed to prove their claims against RSC and Raytheon, and (2) RSC and Raytheon have failed to prove their counterclaims against the plaintiffs. Accordingly, judgment will be entered in favor of the defendants on the plaintiffs' claims, and in favor of

the plaintiffs on the defendants' counterclaims.'

I. THE PERTINENT FACTS

What follows are the pertinent facts that convey the essential "story line" of this case. Additional facts are set forth, where appropriate, in those sections of this Opinion that are devoted to analyzing the parties' claims and counterclaims. Certain fundamental facts are undisputed, but where there are disputes--and there are many--the facts are as found herein.

A. The Parties

As earlier noted, on September 14, 1993, RSC, DeBakey, and ITS entered into the JV Agreement, which established MedTel, a joint venture partnership organized under the Delaware Uniform Partnership Act, "to obtain and perform contracts to provide telemedicine capabilities, world wide."[3] RSC was the managing partner of the Partnership, whose operations were conducted in Burlington, Massachusetts where Raytheon's headquarters were located.

Telemedicine is the practice of long-distance medical consultation, diagnosis and evaluation through the use of computer telecommunications

---

[2]This outcome makes it unnecessary for the Court to consider the various motions in limine that were reserved for posttrial decision.

[3]JV Agreement, PX 55, at §3.1

technology. A telemedicine system combines off-the-shelf telecommunications equipment with medical diagnostic devices to create a video network that allows -patients in remote locations to be examined in "real time" by specialists at major medical centers via two-way television. That technology affords patients throughout the world access to both a broad group of medical specialists (in&ding the world-renowned heart surgeon, Dr. Michael E. DeBakey) and access to advanced medical technology and diagnostic services.[4]

RSC, MedTel's rnanaging partner, is a wholly-owned subsidiary of Raytheon, a Delaware corporation that for many years was one of the country's leading defense contractors. The other two venture partners, ITS and DeBakey, were corporations with which two prominent physicians, Dr. Jay Sanders and Dr. Michael E. DeBakey, were affiliated, respectively, as either principals or agents. ITS is a Florida corporation whose principal office was located in Coral Gables, Florida. DeBakey is a Nevada corporation whose principal office was located in Las Vegas, Nevada. Dr. Sanders is a Professor of Telemedicine at the Medical

[4]The core of a telemedicine system is a set of video conferencing machines. One set (the "hub unit") is installed at the site of the physician(s) who will be using it. The other machines are set up at the remote site where the patient is located. The remote units are connected to the diagnostic tools or modalities that are needed for the types of examination and diagnosis involved (e.g., stethoscopes, x-ray machines, electrocardiogram machines). Once these devices are connected, diagnostic information is transferred electronically to the physicians at the hub unit for evaluation.

College of Georgia ("MCG"), and Dr. DeBakey, as previously noted, is a world renowned heart surgeon who was based at the Texas Medical Center ("TMC") in Houston, Texas.

B. Events Leading To The Joint Venture Agreement

The parties' initial contacts started in April, 1992. How those contacts began and who initiated them is a subject of considerable dispute. Plaintiffs claim that RSC became interested in entering the telemedicine business, and after consulting with experts, began exploring the telemedicine market. According to plaintiffs, RSC contacted Dr. DeBakey, who had designed and built hospitals that would be equipped with updated equipment and technology in various countries. RSC viewed Dr. DeBakey's projects as "ideal opportunities to bring telemedicine to the global market," and his involvement as "lend[ing] medical credibility to the project," and "open[ing] the market for Raytheon's construction division to provide in-frastructure as part of the telemedicine venture." Accordingly (plaintiffs say) Raytheon went "all-out in its efforts to convince Dr. DeBakey and his company, DeBakey Corporation to enter into a telemedicine joint venture."[5]

---

[5]Pl. Op. Posttrial Br. at 7.

The defendants tell the story quite differently. They insist that RSC initially contacted Dr. Sanders to explore whether telemedicine might offer business opportunities for RSC, and that Dr. Sanders responded by visiting Raytheon and meeting with RSC's Fred Beissner and William Stevens ("Stevens") in May, 1992. Dr. Sanders overviewed the potential telemedicine market, and made a slide presentation demonstrating what he contended was "his" telemedicine system at the Medical College of Georgia (MCG). The defendants contend that Dr. Sanders represented to them that (i) the telemedicine market was large, (ii) telemedicine technology was mature, (iii) he (Dr. Sanders) had an established reputation in this field and had an existing telemedicine system in place, and (iv) Dr. Sanders was looking for a corporate partner that could provide worldwide capabilities and financial backing. Defendants urge that in reliance on those representations, Mr. Stevens wrote to Dr. Sanders and expressed RSC's interest in pursuing a business relationship. They further contend that during RSC's initial discussions with DeBakey Group[6] representatives, it was DeBakey who proposed entering into a joint venture relationship.

[6]The various enterprises with which Dr. DeBakey was affiliated are sometimes referred to as the "DeBakey Group."

At this juncture this dispute need not be resolved. Whatever the sequence of events may have been, no one questions that over the next 19 months Dr. Sanders and RSC engaged in joint venture discussions that by December, 1992 'had been expanded to include the DeBakey Group. Participating in those 'discussions were representatives of RSC (Mr. Stevens and RSC's President, Pat Roddy), ITS (Dr. Sanders), and the DeBakey Group (Raymond Hofker and Herman Fr:ietsch). The post-trial briefs argue at length about what each party did (and did not) represent to the others in the course of the negotiations. Suffice it to say that each party claims to have come away with a different understanding of what it and the others were obligated to contribute to the joint venture.

The plaintiffs claim that Raytheon, which held itself out as a systems integrator, would be responsible for the technical aspects of setting up and integrating the telemedicine system and its components. Specifically, Raytheon would contribute system design integration and overall system configuration to the venture, and would not rely upon the other partners for technical expertise. Dr.. Sanders would instruct the integrator (RSC) as to the kinds of equipment that would be needed and how the system should be configured, and DeBakey would then market and sell the system through a telemedicine hub at TMC, which would serve as the demonstration unit. Finally, Raytheon would provide the initial

funding for the joint venture, the magnitude of which is a critical issue in this litigation.

The defendants claim a quite different understanding. They contend that Dr. Sanders' company, ITS, would provide the "ITS System," which was represented as a fully functional and integrated state-of-the-art telemedicine system currently in operation at MCG. DeBakey and ITS would also provide immediate and near-term sales, with DeBakey's sales to flow from certain "exclusive contracts" it then had to build hospitals in foreign countries. RSC would provide initial financing for the joint venture, as well as management support, system installation and integration, and system maintenance services. RSC would not design, develop or engineer the baseline ITS System, however, and no Partnership funds would be used for that purpose. Rather, RSC would assemble the "ITS System" using technical information provided by ITS, and would later improve the ITS System with funds derived from future sales. Lastly, the defendants claim, there was no understanding that a "demonstration" telemedicine unit would be installed immediately at the "DeBakey hub" (TMC) at Partnership expense, as the plaintiffs contend.

RSC contends that in reliance on this understanding, it sought funding for the new venture from Raytheon, based upon a business plan for MedTel which

rested. on two basic premises, namely, that: (1) the Partnership would market and sell the existing interactive telemedicine system developed by ITS, and (2) over the next four and one half years the Partnership would achieve sales totaling approximately $433 million. Neither of those premises turned out to be correct.

C. The Negotiation and Execution off the Joint Venture Agreement

Between April and September, 1993, highly sophisticated and experienced representatives of ITS, the DeBakey Group, and RSC negotiated the JV Agreement. The negotiations were vigorous and protracted, and involved an ongoing exchange of a series of term sheets, drafts, letters, and riders.

The first draft of the JV Agreement was circulated on July 14, 1993. It provided that the Agreement would automatically terminate if the required financing by RSC exceeded $1.5 million, and it also envisioned a decreasing share of profits for DeBakey. The plaintiffs' objections to that draft led to written comments,, further negotiations, and ultimately to a second draft that was circulated on August 4, 1993.

The second draft triggered further meetings and negotiations, which led to a third draft agreement that the parties' representatives met to finalize on September 14, 1993. Even at the September 14 meeting the parties continued to negotiate,

and the signed version of the Agreement contained initialed changes and interlineations.

A significant issue during that meeting was Section 4.2(c) of the JV Agreement, which entitled RSC to terminate the Joint Venture in its "sole discretion" if RSC's required financing exceed $2 million. At meetings that took place both before and at the time the JV Agreement was signed, the DeBakey Group and ITS opposed this provision. They urged that more funding was needed and had to be provided, because (i) over $1 million of the $2 million was already committed, and (ii) the remaining $1 million would not be nearly enough to cover the expenditures required to launch worldwide sales of telemedicine products in a newly emerging market.

How Raytheon and RSC responded to the plaintiffs' funding position is hotly disputed. The defendants contend that RSC's Mr. Brond and Mr. Stevens responded clearly and unequivocally that the total limit of Raytheon's liability was $2 million,, and at that point in time only $2 million was authorized. Mr. Stevens did tell ITS and the DeBakey Group, however, that once MedTel achieved some level of' success, he would go back and ask Raytheon to authorize more funding, but at the time the JV Agreement was executed there was no commitment beyond

the $2 million.[7]

The plaintiffs' quite different version of these events is that Mr. Stevens told them that the $2 million reflected only the initial funding, and that Raytheon followed an appropriations process whereby a project's funding would be continually supplemented over time. Plaintiffs claim that Mr. Stevens assured them that Raytheon would provide additional funding as the project progressed, and that they accepted Mr. Stevens' assurances as those of Raytheon. Finally, plaintiffs claim that at no time were they ever told that the additional funding was dependent -upon their achieving sales quotas of any kind.

Despite these divergent positions (and the conflicting witness testimony supporting both sides of the dispute), the defendants signed the JV Agreement that contained Section 4.2(c), which (to repeat) permitted RSC to terminate the Agreement in its "sole discretion" once its required financing exceeded $2 million. ITS signed the Agreement fully aware of the risk that RSC could rely on Section 4.2(c) as a ground to terminate the Agreement. For the reasons more fully elaborated elsewhere in this Opinion, I find as fact that RSC's (and Raytheon's) legally Mnding commitment to finance the joint venture was limited to a $2

'Stevens Dep., Vol. I at 188; Id., Vol. II, at 269-271.

million ceiling, as the Agreement unambiguously provided.

D. The Joint Venture Agreement Terms

The JV Agreement, as executed, established a joint venture partnership among ITS, DeBakey, and RSC, with RSC being the managing partner. Any profits realized by the joint venture would be divided 40% to RSC, 40% to ITS, and 20% to DeBakey. The Partnership's business would be managed by a Management Committee consisting of two members from RSC and one each from ITS and DeBakey. Any binding action by the Management Committee would require the approval of at least three of the four committee members. The Management Committee had the power to approve RSC's appointment of a General Manager for the Partnership and to approve all proposals, contracts, and financial and business plans. ITS's representative on the Management Committee was Dr. Gamal Badreg ("Badreg"); DeBakey's representative was Raymond Hofker ("Hofker"), and RSC's two representatives were Messrs. Stevens and Morton L. Brond ("Brond"). Mr. Stevens was designated as both the senior RSC representative and as RSC's appointee to serve as the Partnership's General Manager to run its day-to-day business.

Plaintiffs contend that tbe defendants breached several distinct provisions of the JV Agreement while it was in force. With two exceptions, those provisions

(and the facts that pertain to them) are set forth and discussed in those sections of this Opinion that analyze these contract claims. The exceptions are Sections 5.1 and 4.2(c), the two provisions that relate to RSC's obligation to fund the joint venture. Section 5.1 pertinently provides:

> RSC shall provide initial financing to the Joint Venture Partnership, according to a schedule established by the. . .Partners, in a total amount not to exceed One Million Dollars ($1 ,000,000), in order to establish working capital resources. Subject to paragraph 4.2(c), . . .RSC shall provide additional financing as the. . . Management Committee shall determine necessary to meet the obligations of the. . .Partnership. . . .
> (emphasis added)

And Section 4.2(c) states:

> This Agreement may be determined at the sole discretion of RSC if the required financing by RSC (see Section 5.1 below) exceed $2,000,000; provided however, that RSC shall give the parties notice of such intention to terminate and give the parties, or either of them, sixty (60) days to provide alternate financing that is non-recourse to RSC.

E. Post-Agreement Events Leading To The Termination of the Joint Venture

The JV Agreement was executed on September 14, 1993. On September 2, 1994, almost one year later, RSC formally terminated the joint venture after having invested $2 million in the Partnership. During that period MedTel sold no telemedicine units. These core facts are not disputed. Almost everything else that happened before and during that one year period is.

Resolving those disputes has proved to be problematic, not only because of their multitude, but also because the extensive post-trial briefs submitted by both sides (devote minimal space to legal and factual analysis, and maximum effort to embellishing the facts with large dollops of "spin." To say it bluntly, this overlitigated, overpapered and overbriefed lawsuit appears more an occasion for the parties to vent their spleen on each other than to establish the validity and justice of their legal claims in a detached, reasoned manner. The principal casualty of this self-indulgent exercise has been analytical clarity.

There is no quick or easy way to wade through the resulting morass. What follows is the Court's best effort. The approach I have adopted is to proceed chronologically through the significant events that occurred during MedTel's single year of life under the JV Agreement, highlighting in each case the fact

dispute and each party's perspective, and resolving the dispute where necessary.

Starting with the parties' "big picture" perspective, the plaintiffs' portrayal, simply put, is that no sooner did RSC sign the JV Agreement than Raytheon decided to scuttle the telemedicine project, and over the next year RSC and Raytheon surreptitiously sabotaged the project by various means. The defendants' quite contrary view is that RSC/Raytheon worked diligently on behalf of the Partnership with no support from ITS, which failed to deliver the ITS telemedicine system or any of the specifications therefor. In July 1994, after months of no sales and after disagreements had erupted between DeBakey and ITS, Raytheon commissioned a study of the telemedicine market and discovered that the telemeclici-ne market was far smaller than Raytheon had initially been led to believe, and that in this market MedTel's product was not competitive. Mindful that it would soon reach the $2 million funding limit, Raytheon decided that its most prudent course would be to exit the telemedicine business altogether.

This dispute over this larger perspective spills over into many of the lower level disputes about key specific events, which are next discussed.

(1) The Saudi Arabian Contract

The plaintiffs contend that before the JV Agreement was executed, Raytheon was told that ITS had received an urgent request from the Saudi Arabian

Kingdom for a proposal 'to install 39 telemedicine units. Shortly after signing the JV Agreement, RSC prepared a $50 million proposal, which (plaintiffs claim) included not only the cost of the telemedicine units but also "an unrelated proposal for Raytheon to complete tens of millions of dollars worth of peripheral services to rewire and upgrade Saudi Arabia's internal telecommunications system.. ."[8] According to plaintiffs, RSC's refusal to "unbundle" these two components led to Saudi Arabia's rejection of the proposal--including the telemedicine contract--in its entirety.

RSC prepared the Saudi Arabian proposal, but it denies that the proposal included inflated and unnecessary costs to rewire and upgrade Saudi Arabia's telecommunications system. Some communication components were included in the cost estimate, defendants say, because Saudi Arabia's existing analog network would not support the proposal being requested. Nor, defendants argue, did RSC refuse to change the Saudi Arabian estimate to offer less expensive alternatives or to remove the telecommunications component from the proposal. Rather, RSC included the components that it believed were essential, and scaled the cost proposal downwards in response to Dr. Badreg's demands for a smaller and

[8]Pl. Op. Posttrial Br. at 21.

cheaper system. Accordingly (defendants urge), although the proposal was not accepted, the blame cannot be laid at RSC's door.

I find the defendants' position and evidence on this issue to be the more persuasive. No reason or motive was shown for RSC to act against its economic self interest by sabotaging the Saudi Arabian proposal, nor have the plaintiffs proved that RSC, in fact, attempted any such sabotage.

(2) Raytheon's December 1993 Internal Review of MedTel

On December 3, 1993 an internal Raytheon meeting took place in which Raytheon's Chairman and CEO, Dennis Picard ("Picard"), questioned the RSC team about the ITS System. Mr. Picard quickly realized that RSC did not have a "specification;" that is, RSC did not know what the system's functional requirernents were. Because that knowledge gap would make it difficult for MedTel to "cost" the system, Mr. Picard instructed RSC to create an "A-Specification" for the ITS System as soon as possible. Mr. Paul Tanzi was instructed to prepare the A-Specification, which would enable RSC to determine whether MedTel had a viable product that could be built on schedule and that could be costed out. Mr. Paul Tanzi was instructed to prepare the A-Specification. That much is undisputed.

What is disputed is whether the plaintiffs were told that RSC was conducting this internal review, and whether Mr. Picard instructed his subordinates, including Mr. Stevens, to put a "hold" on MedTel and to put off making any commitments on behalf of MedTel until further notice. The plaintiffs contend that a "hold" was placed on MedTel activity, and that they were never told about that or about Raytheon's ongoing internal review of the ITS System. The defendants deny that any '"hold" was placed on MedTel or that they concealed that internal review from their partners.

Again, I am unpersuaded by the plaintiffs' position and evidence. The defendants' witnesses testified that Mr. Stevens informed the partners that Raytheon was reviewing the ITS System. No reason has been shown why their testimony should not merit credit. Moreover the record shows significant efforts by MedTel and RSC to promote business during the one month period that the "hold" was supposedly in effect--efforts that are inconsistent with, and undercut, the plaintiffs' position. I find as fact that the activity at MedTel after the alleged "hold" continued at the same level as it did before.

The defendants argue that they lacked a specification because Dr. Sanders never furnished RSC the technical data on the ITS System that was needed for RSC to prepare accurate planning and budgetary estimates, to provide firm

proposals when requested, and ultimately to install the ITS System for customers. After the December 3,1993 meeting, Mr. Stevens and Mr. Tanzi approached Dr. Sanders and asked him for a technical data package. Although Stevens and Tanzi were -unable to get the technical information from Dr. Sanders directly, they did obtain a partial list of generic system components from Mr. Ken Lucas at CAE-Link," to whom Dr. Sanders had referred them.

Ultirnately, Raytheon's engineers were able to complete the A-specification by January 20, 1994. Four days later, the team presented the results of their technical review at a meeting vvith Mr. Picard. Mr. Tanzi reported that Raytheon had enough knowledge to understand the cost structure of the basic system, and he also discussed software improvements that could be made to the system. Mr. Picard agreed that if MedTel achieved some sales of the basic system, RSC/Raytheon would consider investing additional funds for system upgrades beyond the $2 million funding limit.

(3) The Delay in Constructing The Texas Medical Center "Hub" Unit

The plaintiffs urge that all the partners knew that it was essential that a telemedicine unit be installed at the TMC as soon as possible, to enable MedTel to

[9]CAE-Link was the firm that had designed and installed the so-called ITS telemedicine unit at MCG.

demonstrate its product and promote sales to customers. The plaintiffs further contend that when he made his A-Specification report, Mr. Tanzi told Mr. Picard that the ITS System could be built and installed as proposed with no significant value added by Raytheon. Nonetheless, plaintiffs complain, the construction of the TMC Unit was inexcusably delayed until April, 1994.

The 'defendants dispute that. They argue that all parties agreed that the MCG (not the TMC) unit would be the demonstration unit, and that the TMC unit would not be built until after the first sale of a MedTel telemedicine system to a customer had been completed. Indeed, defendants emphasize, completing the "A-Spec" did not mean that Raytheon could then immediately build a telemedicine system because (as Mr. Tanzi explained):

> The A-spec....doesn't tell you how to build the system. It doesn't tell you what the architecture is like, or give any of the design details. It simply describes [the system] from a functional and performance objective.
>
> * * *
>
> . ..[W]hat is missing is how are the connectors or the input or output ports, on the medical electronics, on the video conferencing equipment, on other pieces of equipment--how would they be tied together? What is missing is the experience that comes from putting a first system together, and having debugged and tested it

thoroughly. [10]

(4) The February 15, 1994 Raytheon Meeting

The next significant (but hotly disputed) event was a meeting among the RSC team and Raytheon senior management on February 15, 1994, to review costing for the ITS System. The plaintiffs contend that at that meeting Mr. Stevens was forced by his superiors to present misleadingly low profit percentage figures for MedTel, and that as a result Raytheon management lost interest in the venture, The defendants categorically deny that this ever happened.

Central to an understanding of this dispute is how Raytheon accounted for the profitability of its investments in joint ventures. Raytheon used two methods, depending upon whether it held a majority or a minority interest in the venture. For joint ventures in which Raytheon owned a minority interest (e.g., MedTel), Raytheon typically used the unconsolidated method, whereby its profit from the venture would be calculated upon 40% of the venture's sales. For ventures in which Raytheon owned a greater-than-50% interest, it used the consolidated method of accounting, whereby Raytheon's profit would be calculated upon 100% of MedTel's sales. The consolidated method would result in a higher sales figure,

[10]Tr. 2149-2150.

but a lower profitability figure, than the unconsolidated method. In the case of MedTel, it appears undisputed that (i) the appropriate accounting method was the unconsolidated method under which Raytheon's projected profit percentage from the MedTel venture would be 28.7%; and (ii) under the consolidated method Raytheon's profitability percentage would be only 11.5%.

The plaintiffs contend that at the February 15, 1994 meeting, Mr. Stevens' superior, Mr. Roddy, ordered Mr. Stevens to present MedTel's profitability using the consolidated method that would show the lower profit percentage, and that Roddy overruled Mr. Stevens' objection that such a presentation would be inappropriate. Plaintiffs contend that after the presentation was made, Mr. Picard chastised Mr. Stevens and RSC for not ensuring that the venture would turn a profit of at least 20%, and directed RSC to work on increasing the profit percentage for MedTel. According to plaintiffs, Mr. Picard also instructed Mr. Stevens to add 25% to the costs of procurement Raytheon would be providing to the venture --. an instruction that would have violated RSC's contractual obligation to provide procurement at cost, Plaintiffs further contend that Mr. Stevens left the meeting in emotional turmoil because he had been unjustly criticized by Mr. Picard for profitability percentage figures that he had been forced to present and that were also inappropriate and misleading. Mr. Stevens also left the meeting

convinced that Raytheon would terminate its support for MedTel.

Two days later, Mr. Stevens met with Mr. Roddy and handed him a memorandum in which he requested Mr. Roddy to relieve him of his MedTel responsibilities, and "transfer immediately all telemedicine activities to someone who will have the support and help of Senior Management...." Mr. Roddy agreed to search for a replacement, but he told Mr. Stevens to go back and keep doing exactly what he had been doing until a replacement could be found. Mr. Stevens agreed.

It is claimed that as a result of these events, Mr. Stevens developed post-traumatic stress syndrome that exacerbated his heart condition. Whatever may be the cause, it is undisputed that eight months later Mr. Stevens took a medical leave of absence from Raytheon beg-inning in October of that year.

The 'defendants dispute this portrayal of the February 15th meeting events. They contend that because RSC had only a 40% interest in the joint venture, the chart for the February 15 meeting presentation properly showed Raytheon's return on sales under the unconsolidated method. But, because Messrs. Brond and Roddy knew from past presentations that Mr. Picard also wanted to know a

[11]DX 231.

project's return on sales under the consolidated method, they asked Mr. Stevens to prepare a backup chart showing RSC's return on sales on that basis. At the meeting (the defendants' witnesses testified) only the "unconsolidated" sales chart was presented, but Mr. Picard, nonetheless, mentally calculated the (lower) consolidated profit figure.[12] Mr. Picard then questioned Mr. Roddy, then Mr. Brond, and finally Mr. Stevens, but was not critical of anyone in particular. Moreover, defendants say, although Mr. Picard did instruct the RSC team to go back and review all available options to increase MedTel's profitability, he did not order anyone at RSC to add any fees for the services RSC would provide to the joint venture.

Having considered the evidence on both sides, it is evident that Mr. Stevens became upset as a result of what occurred at the February 15, 1994 meeting, but I am not persuaded that Mr. Stevens was forced to present to Mr. Picard a misleading picture of RSC's projected profit percentage from MedTel. Plaintiffs' evidence on that point is Mr. Stevens' first deposition, which was taken in 1996.

---

[12]The defendants contend that Mr. Stevens' Request for Transfer contained inaccurate statements, perhaps because in Mr. Brond's view, Stevens had taken Mr. Picard's comments "more personally than he should have." Tr. 1835. In particular, defendants take issue with the statement in that memorandum that at the February 15 presentation, the RSC team "couldn't discuss [the use of unconsolidated accounting for MedTel] because of the gag order on the 40% issue." There was no "gag order," defendants insist, and the profitability figures were properly presented using the unconsolidated method.

However, in later depositions of Mr. Stevens taken shortly before trial, Mr. Stevens recanted several of his earlier held views. Moreover, the totality of evidence about what occurred at the February 15 meeting is irreconcilably in conflict. That evidentiary conflict, and the absence of any credible motive Mr. Stevens' superiors might have had to order him to downplay the profit potential of the MedTel venture, leads me to conclude that the plaintiffs have not carried their burden of proof on this issue.

This is not to suggest that Mr. Picard may not have developed a negative impression of MedTel's profit potential at the February 15th meeting. Perhaps he did., but only Mr. Picard will ever know that for certain. What is important, however, is that any negative impressions Mr. Picard may have developed were not the result of any improper conduct by Mr. Stevens' superiors at RSC.

(5) Internal Transfer of Authority
Over The MedTel Project

After Mr. Stevens requested relief from his MedTel responsibilities, Mr. Roddy attempted to find a replacement. Mr. Roddy's attempt was part of a more comprehensive effort within Raytheon to transfer operating responsibility for MedTel from RSC to another Raytheon division. Ultimately, Mr. Picard decided that Raytheon's Equipment Division ("ED") should have that responsibility, but

that was not to occur until early July, five months later. During the search for a replacement, Mr. Stevens continued on as Med Tel's General Manager until he took his extended leave of absence in October, 1994.

Meanwhile, on March 7, 1994, Mr. Roddy informed DeBakey and ITS in writing that Raytheon was "considering replacing Bill Stevens as the MedTel General Manager," and (as an internal matter), was envisioning transferring supervision over RSC's involvement to a "division-level organizational entity."[13] These matters were discussed in detail with the representatives of DeBakey and ITS at the March 10, 1994 MedTel Management Committee meeting.

On July 1, 1994, Raytheon announced a transfer of the "reporting line of responsibility for MedTel. Originally, Mr. Stevens had reported directly to Mr. Roddy, then to Mr. Roddy's superior, and finally to Mr. Picard. After July I, Mr. Stevens reported through ED, first to Mr. Tanzi, then to Mr. Dale Reis (the head of ED), and then to Mr. Picard. This new arrangement provided Mr. Picard with input about MedTel from ED, and it also gave RSC access to ED support. There was no change in RSC's legal responsibility or day-to-day support for MedTel, and at the June 9, 1994 Management Committee meeting, ITS and DeBakey did

[13]DX 242.

not oppose this internal transfer of reporting responsibility to ED. Mr. Stevens did tell ITS and DeBakey representatives that he had scaled back his efforts to pursue certain '"teaming agreements" (i.e., strategic alliances) pending the completion of the transfer, but in all other respects Mr. Stevens day-to-day responsibilities would remain unchanged.

The plaintiffs contend that these internal rearrangements were concealed from them, that Mr. Stevens was left solely as a figurehead with no real management authority, that Messrs. Stevens and Tanzi "dragged their feet" in seeking business for MedTel, and that Raytheon "[cast] MEDTEL adrift to be operated without an acting General Manager."[14] The record does not support these assertions. As noted, the plaintiffs were kept informed of the organizational changes within Raytheon, and (except for the teaming agreements) Mr. Stevens' day-to-day authority and responsibilities remained unchanged. Messrs. Stevens, Tanzi, and their associates continued working diligently on behalf of MedTel. They "...continued to support with budgetary estimates...[and]...to support the building of a demonstration system at [Texas Medical Center] . . . [and]. . .to pursue potential customers in support of Dr. Badreg and Dr. DeBakey."[15] As Dr.

[14]Pl. Op. Posttrial Br. at 26.

[15]Tr. 1748; see also Tr. 1477, 1659-60.

DeBakey himself observed in a letter dated May 17, 1994:

> Bill [Stevens] pledged that he would continue his own personal high level of activity in the Partnership until such time as the changes were made, and, true to his word, his dedication toward the realization of the potential of MED-TEL has not wavered since the announcement on March 9.[16]

(6) The Funding Reaches $2 Million And RSC Terminates The JV Agreement

At the March 10, 1994 MedTel Management Committee meeting, RSC's Mr. B:rond reported that the initial funding of $2 million would be exhausted as early as June 1994. At the June 9, 1994 Management Committee meeting, the partners discussed the fact that MedTel was running out of money. Mr. Brond's notes of that meeting indicate that a "strategic issue" was how to get a "decision from Raytheon as to whether we are committed to provide added support."[17] With the benefit of hindsight that became the $64,000 question.

---

[16]DX 269. The considerable efforts that Raytheon personnel devoted to MedTel from and after February 1994 are summarized (together with supporting trial exhibit citations) in a chart appended as Exhibit C to the Defendants' Opening Posttrial Brief. These efforts are inconsistent with the plaintiffs' attempted portrayal of the Raytheon defendants post-February 1994 strategy as essentially one of "paying lip service," "treading water" and "marking time" by doing as little as possible until they could seek to extricate themselves from the JV Agreement when their $2 million funding limit had been reached.

[17]DX 272.

As the MedTel funding neared the $2 million limit, Raytheon was evaluating its options. 'To assist Raytheon in that endeavor, in July 1994 Fletcher Spaght, an independent consulting firm with expertise in teleradiology and telemedicine, was retained to analyze the telemedicine market. Fletcher Spaght performed a market analysis based upon interviews of persons at twenty-one companies and organizations, and then briefed Raytheon personnel on its conclusions. Those conclusions were summarized in a July 12, 1994 internal Raytheon memorandum from Sam Tischler to David Dwelley, which reported that Fletcher Spaght had estimated the 1993 total market size at $30-40 million, and anticipated no significant changes in market size over the near term. Fletcher Spaght also estimated the "'total U.S. available market" at $245 million, or $50 million of sales per year over five years[18]--about half of the market size ITS was allegedly touting during the pre-Agreement negotiations.

Mr. Tischler went on to report that for RSC/Raytheon to be competitive, it needed to have a "well-designed, user friendly product, priced competitively," and a "marketing and sales force which is equipped and experienced in selling to the medical/hospital industry."[19] Pointing out that Raytheon had neither of those

---

[18]DX 281 at R044971-72.

[19]Id., at R044973.

assets, the author went on to conclude:

> I do not believe our current joint venture, with I.T.S. and DeBakey is useful. We are relying upon I.T.S. for a product, and that which they supply is deemed to be inappropriate for today's market. We are relying upon I.T.S./DeBakey for marketing assistance. They provide us with leads. but we do not have the marketing/sales force in place to turn those leads into sales.

***

RECOMMENDATION

***

1. At the moment, I believe MedTel does not possess either a competitive product, or an appropriate marketing/sales force.

2. A typical telemedical system consists of standard off the shelf hardware, which is tied together through unique, but not particularly complex software. I believe Raytheon will find it difficult to compete with smaller firms in this arena. We do not bring anything unique to bear on the problem. Teleradiology is a different issue. These systems call for sophisticated imaging software and hardware, an area where our expertise could be brought to bear....

3. At the moment MedTel has no outstanding proposals. I believe that a successful effort on our part to win any business will require a re-start; i.e., a different product, and a different marketing technology.

> 4. Although Fletcher and Spaght did not estimate the international market size, it has been my experience that international customers typically base their purchase decisions largely upon the success of U.S. based installations. MedTel's lack of any international orders tends to confirm this. Whether the total available U.S. market size estimate of $245 million is correct is less of a concern than the fact that systems will not be sold in quantity in this country until questions of real need, funding, and reimbursability are answered.
>
> I believe we have a non-competitive position in an uncertain market....1 recommend we terminate our activities in telemedicine.[20]

O-n July 15, 1994, Mr. Picard held a meeting to evaluate Raytheon's involvement in MedTel. Mr. Tanzi presented an extensive analysis at that meeting, and suggested that Raytheon should either discontinue MedTel or restart the business. Mr. Reis recommended that Raytheon discontinue MedTel. Accepting Mr. Reis's view, Mr. Picard decided that without a clear path to profitability, Raytheon should get out of the business.

On August 10, 1994, RSC noticed a MedTel Management Committee meeting be: held on August 14, 1994. In his formal notice letter, Mr. Stevens stated that "RSC has determined that the financing required for the

[20]DX 281, at RO44973-74.

operations will, in the aggregate, exceed $2 million by mid-September,"and that "Raytheon feels compelled in light of the status of MedTel sales to date, to review its commitment and future investment plans."[21] At the August 14 meeting, Mr. Brond summarized the joint venture's financial status and Mr. Tanzi explained Raytheon's position. ITS and DeBakey accused Raytheon of misleading them and not performing its end of the bargain. Mr. Brond's notes of that meeting, however, reflect that DeBakey's Mr. Hofker acknowledged that from the outset Mr. Stevens had told him that he could not get more than $2 million without some sales.[22]

On September 2, 1994, Raytheon gave formal notice that, based on Section 4.2(c), it was terminating the JV Agreement, effective in 60 days. Nonetheless, RSC 'offered to assist DeBakey and ITS in continuing the joint venture by supporting the Partnership's efforts through the end of 1994, subcontracting with the joint venture for integration services, and helping ITS and DeBakey to locate a replacement partner. ITS and DeBakey declined RSC's offer.[23]

---

[21]DX 291.

[22]Tr. 1765-66; DX 292.

[23]The plaintiffs contend that at the time Raytheon notified them of its intent to withdraw from the Partnership, Greece and Saudi Arabia had already committed to purchase telemedicine units, and that RSC failed to provide support or assistance in consummating those sales, or in following up on a sale to NASA, which had allocated $1 million for the purchase of a

The plaintiffs commenced this action on April 16, 1996. The record does not disclose why plaintiffs delayed filing this lawsuit almost two years after Raytheon gave notice of its termination of the JV Agreement.[24]

II. THE PARTIES' CONTENTIONS

The plaintiffs assert six separate claims against RSC and Raytheon. Their first claim is that RSC rnaterially breached the JV Agreement; their second is that RSC and Raytheon breached their fiduciary duties to plaintiffs; the third is that Raytheon aided and abetted RSC's breach of fiduciary duty; the fourth is that Raytheon tortiously interfered with the contract between RSC and plaintiffs; and the fifth and sixth are that RSC and Raytheon induced plaintiffs to enter into the JV Agreement either through fraudulent or negligent misrepresentations. Although these claims are hotly contested, the disputes are largely factual and rest

---

telemedicine unit. The record does not support those contentions. Moreover, although RSC did decline to bid on a telemedicine installation for the University of Cincinnati, it did that because of technical problems with, and onerous conditions imposed by, the request for quotations ("RFQ"), and because Dr. Sanders (who was working with the University as a consultant) had improperly caused RSC to receive the RFQ before its official release date.

[24]Although the plaintiffs' unexplained delay is hardly dispositive, it cannot help but be a factor in the Court's assessment of the credibility of the plaintiffs' highly fact-intensive claims. Why, if the plaintiffs truly had a valid legal grievance, did they wait so long to seek redress? The absence of any explanation suggests that the plaintiffs did not believe they had a legal grievance and would not have filed this lawsuit if MedTel had succeeded without RSC. When that did not happen, however, the plaintiffs changed their minds and decided to hold RSC and Raytheon responsible for the business failure, and to seek $51 million in damages for a venture that lasted only one year and never saw a dime in sales revenue. As discussed in Part VI, infra, similar opportunistic behavior concerns infect the credibility of the defendants' counterclaims as well.

on issues of credibility. The applicable legal principles are not controverted.

At the heart of plaintiffs' case is their claim that the defendants breached the JV Agreement in various respects. Specifically, plaintiffs claim that RSC: (i) breached its funding obligation under Sections 5.1 and 4.2(c) of the JV Agreement; (ii) breached Sections 8.1 and 8.9 of that Agreement by usurping the roles and powers of MedTel's Management Committee and General Manager, (iii) breached Sections 7.2 and 7.3 of the JV Agreement by secretly adding a fee to the procurement costs charged to the venture; (iv) breached Section 15.1 of the Agreement by transferring its interest in MedTel; and (v) violated its implied covenant of good faith and fair dealing by secretly deciding to "pull the plug" on MedTel for the sole benefit of Raytheon, by sabotaging the venture's success, and by failing to inform plaintiffs of its intention to withdraw from the venture.

The plaintiffs' second claim, for breach of fiduciary duty, rests upon a litany of separate acts, most of which also underlie the breach of contract claims. One category of alleged fiduciary misconduct includes holding meetings of upper level Raytheon executives in late 1993 and early 1994 unbeknownst to the MedTel partners; and taking actions, also not disclosed to plaintiffs, that adversely affected the success and viability of MedTel. Another category consists of RSC allegedly taking (or failing to take) "actions...which caused MEDTEL to be unable to

consummate sales," and then by using the lack of sales as justification for refusing to provide needed funding for, and ultimately withdrawing from, the Partnership.[25]

The plaintiffs also assert, as their third and fourth claims, that Raytheon's conduct constituted tortious interference with the plaintiffs' contract with RSC, as well as aiding and abetting RSC in breaching its fiduciary duties to plaintiffs.

Lastly, the plaintiffs assert, as their fifth and sixth claims, that Raytheon and RSC wrongfully induced the plaintiffs to enter into the JV Agreement by outright fraud or negligent misrepresentation. The fraud is said to consist of deliberately false representations that RSC would continue to fund the venture beyond $2 million, and would also provide technological and project management expertise to the project. These representations included assurances that RSC would install a hub unit at the TMC promptly after signing the JV Agreement. The plaintiffs contend that they reasonably and detrimentally relied on these representations, and that but for those assurances would not have signed the JV Agreement.

---

[25]Pl. Op. Posttrial Br. at 51-52. The conduct falling into this latter category includes: (i) proposing the bid to Saudi Arabia that RSC knew would be unacceptable because it included tens of millions of dollars in unnecessary peripheral communications, (ii) failing to install the TMC telemedicine unit (the "DeBakey Hub") promptly upon execution of the JV Agreement, and sending inexperienced personnel who were unable to get the unit to work properly, (iii) failing to follow up with potential customers and spurning potential strategic alliances that would have been valuable to MedTel, all without informing the partners, and (iv) refusing to provide MedTel with funding for marketing materials and software.

Alternatively, the plaintiffs claim that if those misrepresentations were not fraudulent, then they were, at the very least, actionably negligent.

'The defendants assiduously dispute all these claims, and have asserted counterclaims against ITS and DeBakey. The defendants (as counterclaimants) first contend that ITS and DeBakey respectively breached the JV Agreement by failing, to deliver the ITS System and to generate sales. Second, the defendants claim that ITS fraudulently induced Raytheon and RSC to enter into the JV Agreement and to approve direct payments of $500,000 to ITS and $108,000 to Dr. Sanders, and to invest more than $2 million in the joint venture. The defendants seek to rescind the JV Agreement and to recover those payments.

* * *

To avoid burdening further this already lengthy Opinion, the specific contentions supporting and opposing the claims and counterclaims, are identified in the Sections of the Opinion devoted to the analysis and evaluation of those claims. To aid the reader, the Court's analysis of the claims and counterclaims is structured as follows: Part III of this Opinion addresses the plaintiffs' breach of contract claims, Part IV treats their breach of fiduciary duty claims, Part V evaluates the plaintiffs' remaining claims, and Part VI addresses the defendants' counterclaims. Because I conclude that neither side has proved any entitlement to

relief under any of their claims or their counterclaims, the Court does not reach or address the issues of damages and other requested remedies.

III. THE PLAINTIFFS' CONTRACT CLAIMS

A. The Claim That RSC Breached Its Contract Funding Obligation

The -plaintiffs first claim that RSC breached its contractual obligation to fund the venture under Sections 5.1 and 4.2(c) of the JV Agreement. As earlier noted, Section 5.1 relevantly states that:

> RSC shall provide initial financing to the... Partnership...in a total amount not to exceed One Million Dollars....Subject to paragraph 4.2(c) above, RSC shall provide additional financing as the...[Management Committee] shall determine necessary to meet the obligations of the...Partnership.

Section 5.1 thus established RSC's obligation to provide (i) up to $1 million dollars of '"initial financing" to the joint venture, plus (ii) such additional financing as the Management Committee determine was necessary, "subject to paragraph 4.2(c)." Paragraph 4.2(c) relevantly provides that the "[JV] Agreement may be terminated at the sole discretion of RSC if the required financing by RSC (see section 5.1 below) exceed $2,000,000...." RSC complied with both provisions. It provided $ 1 million in initial financing, which took the form of

direct payments to ITS, DeBakey and Dr. Sanders; and it provided additional financing up to the $2 million total. Nothing further was required.

Plaintiffs respond by serving up an array of arguments, many of which Sections 5.11 and 4.2 do not even address. The plaintiffs also advance a new contention that was never before raised until the plaintiffs' post-trial reply brief. The newly-minted argument is that the limit of RSC's funding obligation under these two Sections was $3 million, not $2 million, based on the premise that the language "[s]ubject to paragraph 4.2(c)" in Section 5.1 limits only the "additional" financing RSC was to provide, not the $1 million of "initial" financing. This argument fails on procedural grounds, and also because it tortures the language of Section 4.2(c), which permits RSC to terminate the JV Agreement if "the required -financing by RSC (see Section 5.1 below) exceed $2 million." The references in Section 4.2(c) to "Section 5.1" and to "the required financing" can only be read to mean that the $2 million limit applies to all of RSC's "required financing" under Section 5.1.

The plaintiffs next contend that RSC violated Section 5.1's requirement that the amount of additional financing shall be as determined by the Management Committee. The argument is that RSC and Raytheon management made the decisions about how to spend MedTel's money, and rejected outright the

Management Committee's decisions regarding the use of MedTel funds, including specifically, rejecting the Management Committee's requests for funds to purchase software, software upgrades, and marketing materials for the telemedicine system.

The argument is factually and legally unsound. It is unfounded factually, because over the course of the joint venture RSC spent more than $300,000 on marketing materials. As for software upgrades, the intent was for MedTel to sell the ITS System, and then purchase software upgrades from RSC after the Partnership became profitable. At various points in the joint venture the partners considered upgrades. On December 9, 1993, the Management Committee authorized $300,000 to install a "state of the art" system at TMC, but Mr. Tanzi later reported that the upgrades would cost just under $1 million over a three year period. That amount exceeded both the budget for the DeBakey hub and the balance of the monies available for financing under Section 4.2(c). Later, during the installation of the DeBakey hub, Mr. Brond signed an internal work request for $65,000 in initial software upgrades, but ED informed Mr. Stevens that $100,000 would be needed just to start the project. As the joint venture's financial situation

worsened, Mr Stevens decided to withdraw the internal work request.[26]

The argument is also legally incorrect, because the JV Agreement authorized RSC as Managing Partner to make decisions regarding marketing materials.[27] Section 5.1 does not address these types of day-to-day decisions, and, hence:, cannot support a claim for breach of contract.

B. The Claim That RSC Usurped The Management Committee's Authority

The plaintiffs next claim that RSC usurped the roles of MedTel's Mamagement Committee and General Manager. That claim rests upon Sections 8.1 and 8.9 of the JV Agreement, which provided that "the business of

---

[26] Mr. Stevens testified:

> ...I had limited financial resources. And if I took from [MedTel's] funding a significant amount to make changes, that might shorten our ability to get to the market in other ways in order to make proposals...to take trips for marketing....So I had to prioritize the money that was available until such time as the venture to make [a] profit; then that would be a different procedure.

Stevens Dep., Vol. II at 170; see also Id., at 173; Stevens Dep., Vol I at 108.

[27] Section 3.3(b) of the JV Agreement states that "With prior approval of the managing fortner, the...Partnership shall bear...costpufrpo'seschures, pamphlets, etc. of marketing." (emphasis added). Thus, even if RSC had rejected a Management Committee request, it had the authority to do so. Plaintiffs rejoin by arguing that RSC was obligated to exercise its authority in good faith and could not withhold its approval of marketing expenses unreasonably. The rejoinder is a "non-starter," however, because there is no persuasive evidence that RSC ever rejected a Management Committee request at all, let alone in bad faith or unreasonably.

the...Partnership shall be managed by the...Management Committee."[28] The Management Committee, in turn, had the power to approve to approve RSC's appointment of a General Manager and to supervise the General Manager's activities. Subject to the supervisory powers of the Management Committee, the General Manager had ". . .full and complete authority and responsibility for the planning, execution, and control of all aspects of the...Partnership."[29]

Plaintiffs argue that RSC breached those general corporate governance provisions in several different ways. They contend first that RSC failed to allow the Management Committee to allocate the $2 million as it saw fit. That claim is factually unfounded because the Management Committee allocated funds on only one occasion--$300,000 for the DeBakey hub--and RSC carried out the Committee's directive.[30]

Second, plaintiffs claim that RSC improperly spent part of MedTel's funding on internal reviews and presentations for senior Raytheon management. That argument is also unfounded. The plaintiffs' record citations relate only to

---

[28]PX 55 at §8.1.

[29]Id. at §8.9(a).

[30]The plaintiffs repeat under this heading their claim about RSC's refusal to authorize payment for marketing materials. The infirmity of that claim is discussed in Part III A above.

payments made to develop the "A-Spec," without which Raytheon could not build a telemedicine system. MedTel did not have the technical capability to prepare the A-Spec and would in any event have had to pay someone to develop it. Accordingly, that expense was necessarily and properly charged to the joint venture.

Third, plaintiffs claim that RSC usurped the Management Committee's authority by placing a "hold" on MedTel while Raytheon's internal reviews were pending, and by directing Mr. Stevens to curb his activities (including entering into binding agreements) on MedTel's behalf. As the Court has previously found, there was no such "hold" or other significant restriction on Mr. Stevens' day-to-day activities. Mr. Stevens was free to market MedTel and pursue strategic alliances to any degree he wished. Moreover, during this entire period there was significant activity on the Partnership's behalf, including preparing budgetary estimates for institutions in several states and foreign countries. That Mr. Stevens was directed to obtain his supervisor's approval before entering into binding agreements and was required to report to Raytheon on financial matters, were purely internal arrangements designed to enable Raytheon to decide what position RSC--as MedTel's managing partner--should take. Such unremarkable arrangements hardly evidence a scheme to usurp the Management Committee's

authority. Finally, and in any event, there is no persuasive evidence that the level of Mr. Stevens' activity caused any harm to MedTel.[31]

Fourth, the plaintiffs contend that RSC violated the JV Agreement by ordering Stevens to present the (projected) profits of the joint venture calculated under the consolidated accounting method. As earlier found, there was no such corder. The joint venture's profitability was presented using the unconsolidated method, as part of an internal Raytheon review meeting to enable Raytheon to decide what position RSC would take as a partner in the joint venture. Legally, how Raytheon deliberated internally was none of the plaintiffs' concern. Nothing in the JV Agreement authorized the Management Committee to dictate to Raytheon (or, for that matter, any partner) how to conduct its internal procedures.

Fifth, and finally, the plaintiffs claim that RSC caused Messrs. Stevens and Tanzi (i) to refrain from pursuing sales opportunities available to MedTel, and (ii) to rebuff or fail to follow up inquiries from strategic partners, thereby foreclosing

[31]In one of their sillier claims, the plaintiffs charge RSC with unilaterally changing MedTel's principal place of business without notice to its partners. RSC did relocate its MedTel personnel on two occasions, but each time it notified ITS and DeBakey by facsimile, and the plaintiffs never objected to these moves. Of a similar piece is plaintiffs' claim that RSC failed promptly to inform them of Stevens' resignation. But Mr. Stevens did not resign from Raytheon or MedTel; rather, he requested a transfer of responsibility. Mr. Roddy informed ITS and DeBakey by letter dated March 7, 1994, that Raytheon was considering replacing Mr. Stevens and realigning RSC's internal reporting responsibility on MedTel matters. Those issues were discussed at Management Committee meetings held on March 10 and June 9, 1994, and neither ITS nor DeBakey ever objected to these proposed changes.

the MedTel partners frorn obtaining a replacement for RSC after termination. The plaintiffs have not identified any JV Agreement provision that addresses this alleged misconduct. Moreover, neither of these claims is factually supported. The record shows that RSC pursued all sales leads for MedTel diligently, that the RSC team (including Stevens) continued to work at the same level on MedTel's behalf, and that there was no slowdown. There is no persuasive evidence that Raytheon -restricted either Mr. Stevens or Mr. Tanzi from following up on inquiries from strategic partners, and nothing prevented ITS and DeBakey from finding a substitute partner for RSC after RSC withdrew. Indeed, the plaintiffs rejected RSC's offer to help them find a replacement partner.

C. The Claim That RSC Improperly Overcharged The Joint Venture

Section 7.3 of the JV Agreement requires RSC to provide procurement and other infrastructure-type services and bill them to the joint venture at cost. The plaintiffs claim that RSC breached Section 7.3 by surreptitiously adding a fee to procurement costs charged to the venture. The credible evidence shows the contrary. Throughout the course of the joint venture RSC provided all of its services to MedTel at cost. The only evidence plaintiffs cite--two Raytheon draft budgetary estimates dated June 29 and July 15, 1994--appear to be draft proposals

intended for third parties. The JV Agreement required RSC to provide procurement and related services at cost to the joint venture; proposals to third parties,"' however, were not subject to that requirement.

I% The Claim that RSC Improperly Transferred Its Partnership Interest To Raytheon's Equipment Division

The plaintiffs next claim that the internal transfer in 1994 of RSC's responsibilities for MedTel to Raytheon's ED in 1994 violated Section 15.1 of the JV Agreement, which provided that "[n]o...Partner at any time shall sell, assign, pledge, or otherwise transfer or attempt to sell, assign, pledge or otherwise transfer its interest in the...Partnership at any time to a third party without the consent of the other...partners."

This claim is also fatally flawed. No transfer of RSC's interest in the Partnership ever took place. At all times RSC remained a partner until it tenminated the joint venture. There was only a change of reporting responsibility within Raytheon. Even if those arrangements constituted a "transfer," it was not to a third party, i.e., a stranger to the relationship. ED was part of the Raytheon family, and the same RSC personnel continued to handle MedTel's day-to-day

[32]There is no evidence that these documents were ever sent out to a customer.

activities for the Partnership. Finally, what was done was not "without the consent of the other...partners." The plaintiffs were notified of this change, discussed it at Management (Committee meetings, and supported it.

E. The Claim That The Defendants Breached Their Implied Covenant Of Good Faith And Fair Dealing

Lastly, the plaintiffs claim that RSC violated its implied covenant of good faith and fair dealing (i) "by secretly deciding to pull the plug on MedTel for the sole benefi t of Raytheon, and then sabotaging the venture's success," by withholding financial and other support, and (ii) by failing to inform Plaintiffs of its intention to withdraw from the venture, thereby damaging Plaintiffs' reputations[33] This claim, bereft of factual support, has no merit either.

RSC did not "secretly decide" to pull the plug on MedTel. RSC deliberated, internally and privately, on what course of action to take, which it was entitled to do. And once RSC decided to exercise its termination right, it promptly informed its -partners. To say that RSC did that "for the sole benefit of Raytheon" is to say nothing of significance, since RSC, although a separate entity, was a wholly-owned Raytheon subsidiary that had no interest distinct from that of its parent.

---

[33]Pl. Op. Posttrial Br. at 46-47.

In that sense RSC was Raytheon, so to argue that RSC acted for Raytheon's "sole benefit" is only to say that RSC and Raytheon acted for their own identical benefit. In this context that argument leads nowhere, because that is precisely what Section 4.2(c) of the JV Agreement allowed RSC to do: when deciding whether or not to terminate the venture once its investment exceeded $2 million dollars, RSC was free to act "in its sole discretion."

For these reasons, the plaintiffs' breach of contract claims are rejected.

IV. THE CLAIM THAT DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES OWED TO PLAINTIFFS

The plaintiffs' second set of claims, for breach of fiduciary duty, retreads much of the same ground as their breach of contract claims, as both sets of claims arise out of the same conduct. Although in analyzing these claims I will strive to avoid repetition, given the nature of those claims, some repetition is unavoidable.

It cannot be doubted that RSC, as a partner in and as managing partner of the joint venture, owed fiduciary duties to its remaining partners, the plaintiffs. As RSC's sole shareholder, Raytheon owed fiduciary duties to RSC's partners as well. Those fiduciary duties were to act with "the utmost good faith, fairness and

honesty in dealing with [the partners] with respect to the enterprise."[34] The plaintiffs contend that RSC and Raytheon breached those duties in numerous respects.

The fiduciary duty claims may be grouped into three categories: (i) Partnership business decisions, (ii) internal Raytheon business decisions, and (iii) claims that the defendants intentionally harmed the Partnership. These repackaged breach of contract claims do not improve when dressed up in fiduciary duty clothing.

1. Partnership Business Decisions

The claims in the first category are that RSC breached its fiduciary duties by: (i) rejecting MedTel's request for funds to develop marketing materials and software upgrades, (ii) unilaterally relocating the Partnership's offices, (iii) adding a mark-up to procurement costs, (iv) failing immediately to replace Mr. Stevens as General Manager, (v) preparing an inflated Saudi Arabian estimate, (vi) delaying the installation of the DeBakey Hub, and (vii) failing to follow up with potential customers and strategic alliances.

[34] J. Leo Johnston, Inc. v. Carmer, Del. Sur., 156 A.2d. 499, 502 (1959).

For the reasons previously discussed in this Court's analysis of the contract claims (see Part III, supra), most of these claims fail for want of factual support" The underlying fact scenario on which these claims rest either never occurred or did not occur in the way plaintiffs contend. The remaining fiduciary duty claims fail because they attack internal Raytheon decisions that were legally protected matters of business judgment. Mr. Stevens' decision not to allocate MedTel's limited funds to software upgrades, but instead to "prioritize" MedTel's resources in a different way, was clearly a judgment of that character, as were the decisions to retain Mr. Stevens as MedTel's General Manager and to defer pursuing strategic alliances.

2. Internal Ravtheon Business Decisions

The second category of fiduciary claims includes: (i) transferring MedTel to ED, (ii) holding secret meetings of Raytheon executives, (iii) conducting comprehensive internal reviews of MedTel and tampering with the results to distort unfavorably MedTel's level of profitability, and (iv) directing Stevens to consult with Raytheon management before committing to MedTel business. Plaintiffs con tend that these actions "benefited Defendants at Plaintiffs' expense by enabling Defendants to direct their internal resources away from MEDTEL (an.d presumably toward other projects) while MEDTEL was left to languish in

'neutral' until RSC formally withdrew."[35]

These claims also fail. Factually, the Court has already rejected the contention that the Defendants "tampered" with the results of the internal reviews so as to distort unfavorably MedTel's level of profitability. The alleged "unilateral" transfer of MedTel to ED was discussed at Management Committee meetings and acceded to by the plaintiffs. Stevens was directed to consult with his employer, RSC, before committing MedTel to binding agreements because RSC was both a partner and the managing partner of MedTel. RSC was entitled to be consulted with in advance so that it could decide, in both capacities, how best to proceed.

But more fundamentally, these decisions were all internal to RSC and did not involve the external exercise of RSC's authority as managing partner. Therefore, the plaintiffs have no standing to challenge those decisions. Even if they did, plaiatiffs have failed to overcome the business judgment rule presumption that those decisions were made independently, with due care, in good faith, and in the decisionmaker's honest belief that they were in the best interests of the enterprise.[36] Plaintiffs' assertion that these were self-interested actions that

---

[35]Pl. Posttrial Reply Br. at 35-36.

[36]See Williams v. Geier, Del. Supr., 671 A.2d 1368, 1376 (1996).

benefited Raytheon at defendant's expense, fails for lack of proof. While these decisions may have "benefited" the defendants in some internal administrative sense, there is no persuasive evidence that this "benefit" came at the plaintiffs' expense.

3. Claims of Intentional Harm to MedTel

The plaintiffs' third and final set of fiduciary duty claims is that Raytheon intentionally took steps to inflict harm upon MedTel by (i) placing a secret "hold" on MedTel, (ii) failing promptly to disclose Stevens' resignation and to replace Stevens immediately as General Manager, (iii) directing Stevens and Tanzi to "'drag their feet," and by (iv) prematurely "pulling the plug" on the venture. As previously found, only one of these charges is even factually supported. It is conceded that Stevens was retained as General Manager, but the plaintiffs have not established that that decision violated any duty or caused any harm. Indeed, the plaintiffs are unable to advance a plausible explanation for why Raytheon and RSC would have had any reason to harm the Partnership. As the owner of a 40% Partnership interest and as the only partner that invested money in the joint venture, RSC/Raytheon had the most to lose if the venture failed.

For these reasons, the breach of fiduciary duty claims are rejected.

V. THE PLAINTIFFS' REMAINING CLAIMS

Lastly, the plaintiffs assert other claims, specifically, that: (a) Raytheon tortiously interfered with the JV Agreement, (b) Raytheon aided and abetted RSC's breaches of fiduciary duty, and (c) RSC and Raytheon induced the plaintiffs to enter into the JV Agreement either fraudulently or through negligent misrepresentations. Those claims must also be rejected.

A. The Tortious Interference And Aiding And Abetting Claims

The first two of the plaintiffs' remaining claims are easily disposed of. To begin with, there can be no claim of tortious interference with the JV Agreement, because a showing of tortious interference with contract requires (among other things) that there be a breach of the contract.[37] Here, no breach of contract has been (established, the Court having rejected the plaintiffs' contract claims on the merits. Second, there can be no claim that Raytheon aided and abetted a breach of RSC's fiduciary duty, because to establish aiding and abetting the plaintiffs must show (among other things), a breach of fiduciary duty.[38] In this case the Court has also determined that RSC breached no fiduciary duty that it owed to plaintiffs.

---

[37] Cantor Fitzgerald, L.P. v. Cantor, Del. Ch., 724 A.2d 571, 584 (1998).

[38] In Re Santa Fe Pac. Shareholders Litig., Del. Supr., 669 A.2d 59, 72 (1995).

B. The Wrongful Inducement Claim

That leaves for disposition the claim that RSC and Raytheon induced the plaintiffs to enter into the JV Agreement either fraudulently or by negligent misrepresentation. That claim is the flip side of the defendants' counterclaims, which hurl similar causes of action against ITS and DeBakey. Specifically, the plaintiffs claim that RSC falsely represented to them that it would continue to capitalize the venture beyond $2 million and that it would provide technological and management expertise. The plaintiffs contend that they justifiably relied on these representations to their detriment, and that as a result they lost the opportunity to partner with other reputable companies and gain substantial profits through sales of telemedicine systems to third parties. These claims are fatally infirm for at least two reasons.

First, plaintiffs have failed to establish that the representations that form the basis of these claims were false. The plaintiffs do not--indeed they cannot--deny that the JV Agreement on its face limited RSC's funding commitment to $2 million. They argue, however, that although they were unhappy with this provision, they nonetheless signed the Agreement, because they relied upon representations that (they contend) RSC made to them. Those representations were that Section 4.2(c) of the JV Agreement was merely a reflection of

Raytheon's internal appropriations process, and that Raytheon in fact intended to provide more than $2 million in funding, but Raytheon's internal appropriations procedures prohibited a formal commitment above $2 million at that time.

The testimony upon which the plaintiffs rely is self-serving (coming from the plaintiffs themselves), is uncorroborated by any document of record, and is ultimately unpersuasive. The strongest evidence in plaintiffs' favor is Mr. Stevens' testimony that "there was an assurance that additional monies [above the $2 million:] could be and would be obtained rather easily."[39] But, Mr. Stevens also testified that neither he nor Mr. Brond had any authority to commit orally to a contribution of more than $2 million.[40] Thus, plaintiffs' evidence is weak, and is sharply controverted by evidence that is at least equally, if not more, persuasive. At trial RSC's Mr. Brond testified that he "clearly and unequivocally" told plaintiffs that the total limit of Raytheon's funding liability was $2 million, and that Mr. Stevens supported and confirmed his (Mr. Brond's) statements.[41] I find that at best the evidence on both sides is in equipoise, and that when taken as a whole, the evidence fails to persuade me of plaintiffs' factual argument.

---

[39]Stevens Dep., Vol. I at 188. See also, id. at 31-36.

[40]Stevens Dep., Vol. I at 188.

[41]Tr. at 1708, 1710.

Accordingly, the plaintiffs have not carried their burden of proving an actionable misrepresentation by RSC with respect to the $2 million funding limit.

Nor (I find) did RSC misrepresent that it would provide technological and project management expertise. RSC did make--and it did honor-- that representation. Throughout the joint venture RSC provided management expertise: it responded to inquiries, prepared proposals, arranged trips and demonstrations, tracked finances, and kept the partners informed of ongoing developments. RSC also provided technological expertise: after Raytheon learned that ITS did not deliver the ITS System, ED developed a specification for the system from the generic CAE-Link components list within weeks at a cost of $80,000. ED also later built and installed the demonstration telemedicine system at the TMC. There has been no showing of any false representations by RSC.

Second, a claim for fraud requires a showing that the plaintiffs acted in justifiable reliance on the purported misrepresentations.[42] Here, it is difficult for plaintiffs credibly to claim that they justifiably relied on RSC's alleged oral promi se to provide more than $2 million in funding. The JV Agreement expressly and unambiguously permitted RSC to terminate the Agreement "in its sole

[42]Stephenson v. Capano Dev.,Inc., Del. Supr., 462 A.2d 1069, 1074 (1983).

discretion" once the $2 million limit was reached. Plaintiffs had to know that in any contested proceeding the JV Agreement would control. Indeed, after the JV Agreement was signed but before ITS's stockholders ratified it, Mr. Hartz advised his client, ITS, that the Agreement would enable RSC to take the position that it could terminate the Agreement. when the $2 million funding limit was reached.

Thus, the record establishes that at the very least, the plaintiffs knew that they were subject to the very real risk that RSC would rely upon the plain language of the written Agreement to terminate the joint venture once the $2 million funding limit was reached. Therefore, even if (contrary to my finding) RSC did make the oral representation that the plaintiffs claim, and even if the plaintiffs did rely upon it, their reliance was not justified. If it was important for the plaintiffs to obtain a binding commitment by RSC to provide more than $2 million in funding, the plaintiffs should have negotiated for the specific inclusion of that obligation in the JV Agreement. Failing that, they should have refused to sign the Agreement. The plaintiffs did neither.

The claim that RSC and Raytheon wrongfully induced the plaintiffs to enter into the JV Agreement, accordingly, must fail.

* * *

For the above reasons, the plaintiffs have failed to establish by competent evidence their contract, fiduciary, and tort claims against RSC and Raytheon. That leaves for determination the defendant's counterclaims against the plaintiffs, to which I next turn.

VI. THE DEFENDANTS' COUNTERCLAIMS

The defendants assert two counterclaims. The first is that ITS fraudulently induced RSC to enter into the JV Agreement; the second is that ITS and DBC breached the JV Agreement -- ITS, by failing to deliver the ITS System, and DBC, by failing to deliver sales. RSC and Raytheon contend that as a consequence of these wrongdoings, defendants they are entitled to have the JVAgreement rescinded and to recover restitution equal to their $2 million lost investment, plus consequential damages including attorneys' fees. These claims are now considered.[43]

[43] The defendants argue that because Mr. Hartz and ITS filed this action with full knowledge of the defendants' clear and established right to terminate the joint venture, and are guilty of extensive and egregious frauds, the defendants are entitled to recover their attorneys fees in this action. The defendants further contend that in awarding judgment to them, the Court should disregard ITS' separate corporate existence. That latter argument, if validated, would result in judgment being entered against ITS's principals, Dr. Sanders and Mr. Hartz who, inexplicably, were never joined as parties. Because the Court finds that the defendants are not entitled to relief on their counterclaims, it does not reach the attorneys' fee and the corporate-veil-piercing issues.

A. The Fraudulent Inducement Claim

1. The Contentions

The fraudulent inducement claim, briefly summarized, is that Dr. Sanders, from his first contact with RSC, repeatedly and intentionally made representations to RSC that: (i) ITS developed, possessed and could deliver to the joint venture a state-of-the-art, fully functional and ready-for-market telemedicine system, (ii) a substantial market existed for the ITS System, (iii) ITS could deliver prompt, near-term sales of that system to identifiable customers, and (iv) ITS was a viable corporation with valuable alternatives to entering into a joint venture with Raytheon.

The defendants claim that in fact none of these representations was true. Their argument runs as follows: Dr. Sanders told Mr. Stevens that he had designed and developed the ITS System, had provided it to MCG, and hence could also provide it to Raytheon. In fact, however, there was no "ITS System" in the sense of a -tangible, operating configuration of telemedicine hardware and software components. As Dr. Sanders admitted in his deposition, there was no "touchable system" or "literal unit," but at most only what he described as "ITS know-how."[44]

[44]Sanders Dep. at 542-544, 418-22.

Moreover, the system that had been installed at the MCG was one in which both MCG and CAE-Link had claimed proprietary rights. Indeed, defendants point out, MCG had previously warned Dr. Sanders that he could not claim that the MCG system was an ITS System, nor could Dr. Sanders develop it commercially without MCG's permission. MCG also had refused to give Dr. Sanders a letter crediting him with the design of the MCG System, which (defendants claim) was actually designed by CAE-Link. Defendants contend that during the contract negotiations Dr. Sanders knew all these facts, but never disclosed them to RSC.

The defendants contend that Sanders/ITS also misrepresented the size of the telemedicine market and ITS's ability to deliver near-term sales to identifiable customers. RSC's initial telemedicine market projections and the data that appeared in the MedTel business plan were based on information provided by Drs. Sanders and Badreg. Yet, Dr. Sanders never told RSC that (i) for two years ITS had tried without success to sell the "ITS System" to virtually the same customers, and that (ii) two years earlier, Dr. Sanders had included virtually identical sales projections in ITS's own Business Plan and Company Overview, and that ITS had failed to meet those projections.

Lastly, defendants claim that Dr. Sanders (i) misrepresented ITS' status as a viable corporate entity, omitting to disclose that in fact ITS was insolvent, and (ii)

told Raytheon that entities such as DEC, GTE, IBM and NASA were interested in entering into joint ventures with ITS, whereas in fact the party those entities really wanted to establish a telemedicine relationship with was MCG.

Raytheon and RSC contend that those misrepresentations were intentional and that the defendants relied upon them in entering into the JV Agreement. Defendants point specifically to their own executives' testimony that they would not: have approved RSC's involvement with the joint venture had they known that there was no "existing" ITS System, or that there was no substantial telemedicine market, or that ITS had a negative net worth.

In response, the plaintiffs argue that Raytheon and RSC have failed to prove that any false statements were made, or that ITS acted with intent to deceive, or that the defendants justifiably relied on those false statements if any in fact were made. More specifically, the plaintiffs insist that ITS never claimed to own a telemedicine system, or to have sold such a system to MCG, or to have integrated the MCG system. Nor did ITS ever claim to have the ability to "deliver" the MCG system to MedTel for demonstrations or any other purpose. Rather, plaintiffs urge, all that ITS did was claim was that it designed and developed the MCG system. Plaintiffs further contend that ITS fully disclosed CAE-Link's role as the integrator of that system, and all that ITS told RSC and Raytheon was that it

was capable of providing the same type of functional assistance in developing the MedTel system as it provided when developing the MCG system.

As :for the size of the telemedicine market, plaintiffs concede that ITS "may have"' told Raytheon that it believed there was a promising market for telemedicine and that ITS had identified customers to whom it believed it could sell its systems in the near term. Those representations, however, were "mere expressions of opinion as to probable future events," and as such cannot be deemed misrepresentations.[45] Moreover, argue plaintiffs, the defendants have failed to prove that those representations were materially false. The reason, they say, is that even if ITS had tried and failed to meet those projections, that would be irrelevant to MedTel's chances of success, because ITS lacked the financial, project management, and technological support that Raytheon would be providing to MedTel. It was therefore entirely reasonable for ITS to believe, and to represent to Raytheon, that MedTel had the potential for great success in marketing telemedicine systems.

The plaintiffs further contend that RSC and Raytheon were not misled about ITS's financial circumstances. They point to Mr. Hofker's testimony that before

---

[45]Pl. Posttrial Reply Br. at 52 (quoting Biasotto v. Spreen, Del. Super., No. 996C-04-030-WTQ, 1997 WL 527956, at 8*, Quillen, J. (July 30, 1997)).

the JV Agreement was signed, he forwarded to Mr. Stevens a Dun & Bradstreet report on ITS. That report showed that ITS was a small company with only four principals, of which the two active principals were medical doctors; and that ITS had zero sales, considerable debt, and low or negative net worth. Thus, RSC and Raytheon (through Stevens) were fully aware of ITS' size and weak financial condition at the time they entered into the JV Agreement.

Finally, the plaintiffs urge that even if ITS did make false representations, the defendants have adduced no direct evidence that ITS did so with intent to deceive, or that RSC and Raytheon justifiably relied on those representations. Regarding market projections, RSC and Raytheon knew that ITS was a small company whose principals never claimed to have conducted any telemedicine market studies. Raytheon, on the other hand, was a multinational corporation with immense resources, that was fully capable of conducting a market assessment, and that did conduct a market study informally through Mr. Stevens.[46] For that reason. RSC/Raytheon could not have relied on representations by ITS about the telemedicine market, but even if RSC/Raytheon did rely, their reliance was not justified.

---

[46]Stevens Dep., Vol. II at 71-75, 86.

The same conclusion is compelled, the plaintiffs argue, with respect to their representations about ITS's corporate viability and its ability to deliver a telemedicine system to MedTel. Because Mr. Stevens was aware of and reviewed the Dun & Bradstreet report which disclosed ITS's size and financial condition, that precludes any claim of justifiable reliance. Moreover, plaintiffs argue, the fact that ITS did not integrate the MCG system, and that the system would not be available for use by MedTel should have been no secret to Raytheon, because Dr. Sanders accompanied Raytheon representatives on an inspection of the MCG system and placed Mr. Stevens in contact with CAE-Link, which had performed the system integration.

2. Analysis

Having considered the multitude of arguments pressed by both sides, I conclude that the defendants have not established their fraudulent inducement claim, for two separate reasons.

First, there were no actionable misrepresentations regarding the size and viability of ITS, nor could there have been, because Mr. Stevens (and, hence, RSC and R.aytheon) were aware of the material facts. During the negotiations leading to the JV Agreement, DeBakey's Mr. Frietsch obtained a Dun & Bradstreet report on ITS. Frietsch forwarded the report to DeBakey's Mr. Hofker, who then sent it

to Mr. Stevens and discussed it with him. As Mr. Hofker testified:

> Frankly, we were surprised at the smallness or the size of ITS. We thought it was a more structured organization.. ..There were -- two of the prime movers were medical doctors, and while I have a great respect for medical doctors in the entrepreneurial business sense you would expect to find a businessperson with them, and my recollection is that their sales were zero dollars and that their indebtedness was considerable. They were either a low net worth, no net worth or negative net worth company and this concerned us a little bit because...that's not what we were expecting.
>
> Q. Was that information transmitted to Mr. Stevens?
>
> A. It was transmitted and discussed by me with him.[47]

An essential element of a claim for fraud is that the alleged victim be ignorant of the true facts that are misrepresented.[48] Here, RSC and Raytheon (through Stevens) were aware of ITS's size and tenuous financial condition. That knowledge precludes any claim that they were defrauded with respect to those subjects.

The defendants' other fraud counterclaims -- based upon ITS's alleged misrepresentations concerning the size of the telemedicine market and ITS's

---

[47]Tr. at 651-652.

[48]Merrill v. Crothall-American, Inc., Del. Supr., 606 A.2d 96, 100 (1992).

ability to deliver a telemedicine system to MedTel -- fare no better, although for a different reason. Another essential element of a fraud claim is that there be reasonable or justifiable reliance by the defrauded party, with the burden of proof resting upon the proponent of the claim (here the defendants).[49] In this case I assume (without deciding) that ITS falsely represented the size of the telemedicine market and ITS's ability to deliver a telemedicine system to MedTel. Even so, the defendants have not persuaded me that they relied justifiably upon ITS's representations concerning its ability to deliver a telemedicine system, or that they relied at all (let alone justifiably) on ITS's representations about the size of the telemedicine market.

Addressing these claims in reverse order, it is manifest that Raytheon, a multinational corporation, had ample resources to conduct a study of the size of the telemedicine market. And before entering into what for Raytheon would be an entirely new 'business, it is reasonable to suppose that a firm of that size and sophistication would perform such a market study, to determine whether the potential rewards of entering that new business outweighed the financial risk. Indeed, RSC/Raytheon did perform a study of sorts, albeit informally through Mr.

[49]Simons v. Cogan, Del. Supr., 549 A. 2d 300, 304 (1988).

Stevens, who collected market information from ITS, from an Arthur D. Little study,, from media articles, and from DeBakey, Massachusetts General Hospital, MCG, and local Massachusetts and Rhode Island medical centers." Thus, the market-related information supplied by ITS was only one component of a larger mix of information upon which defendants relied. That fact makes it difficult for defendants to carry their burden of proving that they relied upon--and were misled by--only one single informational component--the supplied by ITS.

But even if RSC/Raytheon did rely upon ITS's market information, their reliance was not justified. The indisputable fact, and this claim's fundamental flaw, is that the due diligence that RSC/Raytheon performed in 1993 was inadequate, as evidenced by the Fletcher Spaght market study that Raytheon cornmissioned one year later. That market study revealed that the size of the telemedicine market was far smaller than RSC/Raytheon had initially concluded. By asserting their fraud counterclaim, the defendants are seeking, in effect, to shift the cost of their inadequate due diligence to the plaintiffs. The defendants attempt to achieve that result by arguing that they were entitled to rely exclusively upon what ITS told them. That argument conveniently ignores the fact that the

---

[50]Stevens Dep., Vol. I at 76, 72-75.

defendants did not rely solely on ITS's representations, but, instead had performed due diligence (however perfunctory) on their own. Besides attempting (counterfactually) to narrow the universe of their "reliance" information to that provided by ITS, the defendants also insist that their reliance was justified, 'because "RSC limited its risk by limiting its commitment to $2 million....Given the level of financial commitment, it made little economic sense to do more than rely on the representations of the seemingly trustworthy partners.""

That argument turns logic and common sense on its head, because the consequence of RSC having "limited its risk" is the precise opposite of what RSC contends. RSC could have performed an adequate market study before executing the JV Agreernent, but it did not. Instead, RX/Raytheon made a cost-benefit analysis, and apparently decided that a less-than-careful job of due diligence would suffice, because their financial risk was limited to $2 million. RSC/Raytheon were free to make that economic choice, but it must live with its consequences, RSC/Raytheon cannot shift those consequences to a nonconsenting third party. To say it differently, RSC/Raytheon cannot enjoy the benefit of limiting its risk of loss to $2 million, yet be permitted to avoid the

[51]Raytheon's Posttrial Reply Br., at 24-25.

accompanying burden, by shifting that entire risk to the plaintiffs on a theory that RSC/Raytheon "justifiably relied" on what ITS told them. To the extent it can truthfully be argued that the defendants relied at all upon ITS's representations concerning market size, their reliance was not justified.

The fraud claim that is based on ITS's representation about its ability to deliver -the "ITS System" installed at MCG, must be rejected for the same reason. Raytheon's Mr. Brond testified that RSC normally performs due diligence on third parties before entering into agreements with them. In this connection Mr. Stevens did perform some due diligence by (inter alia) visiting MCG on several occasions.[52] Because two critical premises of the joint venture arrangement were that (i) an ""ITS System" actually existed, and (2) ITS owned the system and could lawfully transfer it to MedTel, reasonable due diligence would have included, at a minimum, an effort to obtain and inspect the evidence (including pertinent documents) that would validate those premises. There is no claim or showing that Mr. Stevens or anyone else at RSC/Raytheon sought access to that evidence.

Alternatively, absent careful due diligence, RSC/Raytheon should have formalized RSC's representations by insisting that they be expressed and included

[52]Tr. at 1779-80.

in the JV Agreement as contractual representations and warranties. That omission was especially significant here, because RSC/Raytheon's knowledge of ITS's shaky financial condition, of the small size of ITS's organization and its lack of in-house technical capability, should have alerted RSC/Raytheon to the need for reliable assurance on that score. Because RSC/Raytheon did not do that or conduct adequate due diligence on these subjects, it has not established that its reliance on ITS's representations was justified.

In reaching these conclusions, I considered two other factors. I have already alluded to the first--the absence of any express provision in the JV Agreement that would have protected RSC/Raytheon against misrepresentations. If it was truly important that RSC/Raytheon be assured that ITS had, in fact, a functioning telemedicine system that ITS owned and could lawfully transfer to MedTel, it would have been reasonable--indeed, customary--for RSC/Raytheon to insist that that assurance be expressed as representations and warranties in the JV Agreement. The absence of such contract protections suggests that RSC/Raytheon did not believe that it needed them, presumably because they had performed their own clue diligence and were willing to accept the risk that their due diligence might later turn out to be inadequate.

The second factor is RSC/Raytheon's own conduct, which is inconsistent with their claim--amplified by the decibel level of the rhetoric in their briefs--that they were victims of a heinous fraud. If that were truly the case, then one would expect RSC/Raytheon, as plaintiffs, to have sued on their fraud claim promptly after learning what they contend were the true facts. They did not. Instead, they asserted fraud as a counterclaim long afterwards, in response to the plaintiffs' own delayed filing of this action. Again, the logical inference is that but for the plaintiffs' bringing this lawsuit, no counterclaim would have been filed. That inference becomes stronger when one considers the two possible scenarios that would shed light on RSC/Raytheon's delay. The first would require us to suppose that RSC/Raytheon knew they had been grievously defrauded, yet would have been content to sit by indefinitely, in stoic silence as wounded fraud victims, but for the plaintiffs' happenstance filing of this lawsuit, which stirred the defendants to act. Such passive reluctance to right so egregious a wrong seems incongruous for a corporate colossus that has achieved such success in an economic environment as competitive as ours. The second, more plausible, scenario is that RSC/Raytheon was unable to conclude that the plaintiffs had defrauded them, but nonetheless asserted the fraud counterclaim as a litigation tactic when it became clear that they would be put to the cost and risk of defending this lawsuit.

Whatever may be the explanation, the defendants have failed to prove the element of justifiable reliance. For these reasons the defendants' counterclaim for fraud is rejected.

B. The Breach of Contract Claim

RSC also claims that both ITS and DeBakey are liable for breach of the JV Agreement--ITS by failing to deliver the ITS System, and DeBakey, for failing to deliver sales. Neither claim, in my view, has merit.

1. The Claim Against ITS

The claim against ITS is grounded upon what defendants contend was ITS's contract obligation to deliver to the joint venture "the configuration of telemedicine systems developed and/or used by ITS as of July 3 1, 1993..."[53] The difficulty with this argument is that the quoted contract language does not require ITS to "deliver" these telemedicine systems. All it requires is that "[d]uring the term of [the JV] Agreement, the partners...will endeavor to obtain contracts for the [Partnership] to provide telemedicine canabilities, using the configuration of telemedicine systems developed and/or used by ITS as of July 3 1, 1 993...."[54] The defendants do not point to any other contract provision as a source of the

---

[53]JV Agreement, PX 55, at §3.3 (a).

[54]Id. (Emphasis added).

obligation that they claim was breached, nor do they rely upon an oral agreement as that source.

While the defendants may indeed have come away from the contract negotiations with the view that ITS had that obligation, they did not see fit to create it in the JV Agreement. The only obligation imposed by that portion of the Agreement upon which defendants rely is that "the partners individually and collectively" would "endeavor to obtain contracts" to sell MedTel's telemedicine system, based on the configuration previously developed or used by ITS for the MCG. There is no evidence that ITS did not "endeavor" to do that. Accordingly, the contract claim against ITS fails.

2. The Claim Against DeBakey

Of the 285 pages of posttrial briefs, the argument supporting the defendants' contract claim against DeBakey occupies one short paragraph:

> Separate and independent of ITS, [DeBakey] breached the JV Agreement by failing to deliver any sales to the Partnership. Like ITS, [DeBakey] represented in the JV Agreement that it possessed "unique knowledge and sources of knowledge concerning medical facilities and other potential users...which can contribute to and benefit substantially from the business of telemedicine." DX177 at 1. [DeBakey] -made clear during the parties' extensive discussions and negotiations that

> it possessed exclusive contracts that could deliver immediate sales to the Partnership [citation omitted]. . . ..Again. no sales were obtained.[citation omitted]"

A cursory reading of the JV Agreement shows why the defendants have so little to say in support of this claim: nowhere does the JV Agreement expressly obligate DeBakey--or any other partner-- to achieve (i) any sales (ii) in any specific dollar amount. Indeed, the language upon which defendants rely is excerpted from one of the Agreement's six "Whereas" recitals. That language does not appear in any of the substantive, obligation-creating provisions, nor is it designated as a contract representation or warranty.

If the defendants thought it essential to obligate DeBakey and/or ITS to deliver sales, the way to accomplish that would have been to insert into the JV Agreement an express requirement that DeBakey achieve a specified level of sales on or before a date certain. No such requirement appears in the Agreement. The only arguably relevant provision that does appear is the above-quoted language that "the partners individually and collectively...will endeavor to obtain contracts for the [Partnership]."[56] Thus, although DeBakey may have represented during the

---

[55]Def. Posttrial Reply Br. at 112.

[56] JV Agreement, PX 55, at §3.3 (a).

negotiations that it had agreements with third parties that might translate into immediate sales, the parties chose not to convert that representation into an enforceable promise. Instead, all they did was require all partners to "endeavor" to make sales of the described telemedicine units.

Because it is based upon a contract obligation that did not exist, the contract counterclaim against DeBakey fails.

VII. CONCLUSION

For the reasons previously discussed, the Court concludes that none of the parties' claims and counterclaims have merit. Accordingly, judgment will be entered against the plaintiffs, and in favor of the defendants, on the plaintiffs' claims; and judgment will be entered against the defendants, and in favor of the plaintiffs, on the defendants' counterclaims. An order implimenting these determinations is enclosed herewith.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEBAKEY CORPORATION, a Nevada Corporation, INTERACTIVE TELEMEDICAL SYSTEMS, a Florida corporation, and ITS-RAYTHEON-DEBAKEY TELEMEDICINE SYSTEMS, a Delaware Partnership,

Plaintiffs,

v.

RAYTHEON SERVICE COMPANY, a Delaware corporation, and RAYTHEON CORPORATION, a Delaware corporation,

Defendants.

C.A. No. 14947

RAYTHEON SERVICE COMPANY, a Delaware corporation,

Counterclaim Plaintiff,

v.

INTERACTIVE TELEMEDICAL SYSTEMS, a Florida corporation, and DEBAKEY CORPORATION, a Nevada Corporation,

Counterclaim Defendants.

ORDER

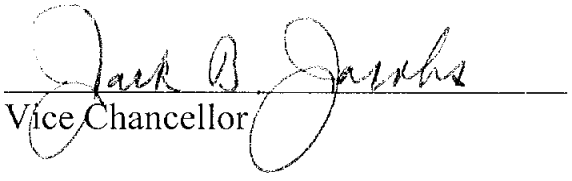
For the reasons set forth in this Court's Opinion of even date, it is hereby ORDERED, DECREED, and ADJUDGED this 25th day of August, 2000 as

follows:

1. Judgment is entered in favor of the defendants, and against the plaintiffs, on each and all of the plaintiffs' claims.

2. Judgment is entered in favor of the plaintiffs, and against the defendants, on each and all of the defendants' counterclaims.

3. Each party shall bear its own costs.



Vice Chancellor