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Case No. 5508-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GREAT-WEST INVESTORS LP,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 5508-VCN**
THOMAS H. LEE PARTNERS, L.P., THOMAS H. LEE ADVISORS, LLC, and THOMAS H. LEE MANAGEMENT COMPANY, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: November 29, 2011
Date Decided: January 4, 2012

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NOBLE, Vice Chancellor

I. INTRODUCTION

Defendant Thomas H. Lee Advisors, LLC ("TH Lee" or the "General Partner") is the general partner of defendant Thomas H. Lee Partners, L.P. (the "Partnership"). Defendant Thomas H. Lee Management Company, LLC (the "Manager," and collectively, with TH Lee and the Partnership, the "Defendants") manages the Partnership. Plaintiff Great-West Investors LP ("Great-West" or "Great-West Investors") is the Partnership's "Special Limited Partner." Great-West has asserted claims against the Defendants in an eight count complaint (the "Complaint" or "Compl."). The Defendants moved to dismiss the Complaint. The Court granted that motion in part, but permitted Counts I(a), II, IV, V, VI, and VII to proceed. Now, Great-West has moved for partial summary judgment and the Defendants have moved for summary judgment. This is the Court's decision on those motions.

II. CONTENTIONS[1]

The remaining counts of the Complaint revolve around Section 12.2(c) of the LP Agreement, which provides:

> After July 6, 2008, the General Partner and the Special Limited Partner shall negotiate in good faith toward an agreement upon the allocation of Fee Income and expenses payable pursuant to Section 12.2 to assure that, effective as of July 6, 2009, the Special Limited Partner receives thereafter, directly and/or indirectly, (including through the benefit of a Sub Class Interest), 25% of the Fee Income (determined for this purpose by including all Management Fees) attributable to each Class in which it holds a Partnership Interest, reduced by 25% of all expenses attributable to such Class, and the applicable Sections of this Agreement shall be amended by the General Partner with the written consent of the Special Limited Partner to give effect to such agreement. In connection with such good faith negotiations, the Special Limited Partner shall receive financial statements of the Manager and other information reasonably requested by the Special Limited Partner to enable it to determine the expenses attributable to each Class, including the total cash compensation of each investment professional attributable to each Class. In the event that the General Partner and the Special Limited Partner are unable to agree on such allocation, the Expense Assumption then in effect will increase on January 1 of each year, commencing on January 1, 2010, by

[1] The background facts are generally laid out in *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *1-4 (Del. Ch. Jan. 14, 2011) (the "January 14 Opinion" or "Jan. 14 Op."). The Court presumes familiarity with those facts. But for clarity, a few basic facts will assist the reader. The Partnership was formed as a Delaware limited partnership in 1999. Putnam Investments, LLC ("Putnam") was originally the Partnership's Special Limited Partner. On August 3, 2007, Great-West acquired Putnam's interest in the Partnership and became the Partnership's Special Limited Partner. In order to become the Special Limited Partner, Great-West was required to become a signatory to the Partnership's limited partnership agreement (the "LP Agreement").

> an amount equal to the product of 1.05 <u>multiplied by</u> the Expense Assumption in effect during the preceding year.[2]

Great-West has moved for summary judgment on Counts I(a), II, and VII. The Defendants oppose that motion. Count I alleges that "Great-West Investors is entitled to a declaration by this Court that [S]ection 12.2(c) of the [LP Agreement] provides that: (a) the Expense Assumption may increase from the amount in effect for 2009 only after TH Lee has negotiated in good faith with Great-West Investors concerning the allocation of Fee Income and related expenses premised on Great-West Investors receiving 25% of Fee Income. . . ."[3] Great-West argues that, as a matter of law, it is entitled to a declaration that the Default Escalator may not be imposed unless and until TH Lee negotiates in good faith and provides Great-West with the documents listed in 12.2(c). The Defendants respond that "under the plain language of Section 12.2(c), the only precondition to applying the . . . [D]efault [E]scalator is that, by July 6, 2009, the parties are 'unable to agree.' Because the parties indisputably did not reach agreement, the [D]efault [E]scalator was triggered."[4]

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[2] The LP Agreement may be found at Compl., Ex. A. The Court will refer to the 105% increase in the Expense Assumption addressed in the last sentence of Section 12.2(c) as the "Default Escalator."
[3] Compl. ¶ 56.
[4] Defs.' Memo. in Opp. to Pl.'s Mot. for Partial Summary Judgment ("Defs.' Opp. Memo.") at 50.

In Count II, Great-West seeks:

> a decree of specific performance ordering (a) Defendants to provide Great-West Investors (i) detailed financial statements of the Manager from 1999 to the present, (ii) information for that same period detailing employee and partner compensation at the Manager level, (iii) information detailing the total cash compensation of each investment professional, including actual compensation paid and comparisons to industry standards, (iv) information explaining how the [E]xpense [A]ssumption was originally constructed, and (v) any and all other information reasonably requested by Great-West Investors to enable it to determine the Partnership's historical, current, and forecasted expenses; (b) TH Lee to negotiate in good faith with Great-West Investors toward an agreement upon the allocation of Fee Income and related expenses premised on Great-West Investors receiving 25% of Fee Income; and (c) that any increase in the Expense Assumption amount from that in effect for 2009 be barred unless and until such good faith negotiations have occurred and then only as the parties may agree in such negotiations . . . . In addition, Great-West Investors is entitled to an order requiring Defendants to provide, to the extent not otherwise provided pursuant to clause (a)(i) of this paragraph, detailed information concerning all amounts collected from limited partners of the Partnership, and all amounts given to the Manager, in connection with the Expense Assumption since 1999, and the disposition thereof, including, without limitation, all expenses paid with such amounts and all distributions or other payments made to owners of the Manager (and identifying such owners) based on the excess of the Expense Assumption amount in any period over actual expenses paid.[5]

Great-West contends that Section 12.2(c) requires that (a) the Defendants provide Great-West with certain financial statements, (b) TH Lee negotiate in good faith regarding an allocation of Fee Income and expenses premised

[5] Compl. ¶ 63.

upon Great-West receiving 25% of Fee Income, and (c) TH Lee abstain from imposing the Default Escalator until it negotiates in good faith with Great-West. Great-West argues that there is no genuine issue of material fact that the Defendants did not meet those requirements. Therefore, Great-West concludes that it is entitled to summary judgment on Count II. The Defendants disagree. They argue that there is a genuine issue of material fact as to whether they complied with the requirements of Section 12.2(c).

The claims alleged in Count VII appear to be the basis for the decree of specific performance sought in Count II. Thus, the issues raised in Count II are very similar to those raised in Count VII. Counts II and VII, however, were alleged as separate and distinct requests for relief. Therefore, each will be addressed individually.

Count VII contains three claims. First, TH Lee breached the LP Agreement "by failing to negotiate in good faith with Great-West Investors toward an agreement upon the allocation of Fee Income and expenses."[6] Second, TH Lee and the Manager breached the LP Agreement "by failing to provide Great-West Investors the information requested by Great-West Investors to enable it to determine the actual, necessary, and reasonable

[6] *Id.* at ¶ 103.

expenses of the Partnership."[7] Third, TH Lee and the Partnership have breached the LP Agreement "by increasing the Expense Assumption for 2010 to $97,791,853, using the $97,791,853 figure as the basis for calculating the amount owed by Great-West Investors for the Expense Assumption, and wrongfully offsetting against amounts that were due to Great-West Investors as a distribution in respect of its Special Limited Partner interests."[8]

With regard to its first breach of contract claim, Great-West presents two challenges to the negotiations that occurred between Great-West and TH Lee. The first challenge is that under Section 12.2(c) of the LP Agreement, TH Lee is supposed to negotiate with Great-West, and TH Lee has yet to do that. According to Great-West, the people purporting to negotiate with Great-West on TH Lee's behalf did not represent the interests of TH Lee, rather they represented the interests of the Manager. Thus, Great-West concludes, as a matter of law, that TH Lee never actually negotiated with Great-West. Great-West's second challenge is that even if the Court determines that negotiations did occur, TH Lee did not undertake them in good faith.

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[7] *Id.* at ¶ 104.
[8] *Id.* at ¶ 105.

The Defendants respond that TH Lee did negotiate with Great-West in good faith. The Defendants suggest that the reason they proposed terms benefiting the Manager is because it is in the Partnership's interest to attract and retain the professionals required to build the business and make it profitable.

With regard to its second breach of contract claim, Great-West argues that it requested certain specific financial statements, as well as certain specific information about the compensation of each investment professional, but that the Defendants failed to produce what Great-West requested. Great-West further argues that Section 12.2(c) clearly required the Defendants to produce the financial statements and information that Great-West requested and, thus, the Court should determine that the Defendants breached Section 12.2(c) as a matter of law. The Defendants respond that they provided Great-West with sufficient financial information to determine the Partnership's expenses, as well as the compensation of each investment professional. The Defendants also argue that Great-West seemed satisfied with the Defendants' production, and that "Great-West has waived any complaint about the financial information [the Defendants] provided because [Great-West] accepted [the Defendants'] performance."[9]

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[9] Defs.' Opp. Memo. at 37.

With regard to its third breach of contract claim, Great-West argues that the Default Escalator may not be imposed unless and until the Defendants negotiate in good faith and provide Great-West with the documents listed in Section 12.2(c). Great-West contends that it is undisputed that the Defendants have yet to do either of those things. Therefore, Great-West argues that, as a matter of law, the Default Escalator should never have been imposed. The Defendants respond that "under the plain language of Section 12.2(c), the only precondition to applying the . . . [D]efault [E]scalator is that, by July 6, 2009, the parties are 'unable to agree.' Because the parties indisputably did not reach agreement, the [D]efault [E]scalator was triggered."[10] The Defendants also argue that "even if good-faith negotiations were required to trigger the . . . [D]efault [E]scalator, the parties engaged in good-faith negotiations . . . . Therefore, [the Defendants were] permitted to apply the . . . [D]efault [E]scalator."[11]

The Defendants have moved for summary judgment on Counts IV, V, and VI, and for partial summary judgment on Counts II and VII, to the extent the claims in those counts are based upon fraud or mistake. Great-West opposes that motion. Count IV seeks reformation of the LP

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[10] *Id.* at 50.
[11] *Id.*

Agreement based on mutual mistake. Count V seeks reformation of the LP Agreement based on unilateral mistake. In Count IV, Great-West alleges:

> Great-West Investors, TH Lee, and the Manager understood and believed at all relevant times mentioned herein that, pursuant to [S]ection 12.2(c), the Expense Assumption amount then in effect would increase 5% annually on January 1 of each calendar year, beginning January 1, 2010, if the General Partner and Special Limited Partner did not reach agreement on the allocation of Fee Income and expenses after good faith negotiations.[12]

In Count V, Great-West alleges:

> Great-West Investors believed at all relevant times mentioned herein that, pursuant to [S]ection 12.2(c), the Expense Assumption amount then in effect would increase 5% annually on January 1 of each calendar year, beginning January 1, 2010, if the General Partner and Special Limited Partner did not reach agreement on the allocation of Fee Income and expenses after good faith negotiations. This was a basic and material assumption under which Great-West Investors agreed to be the Special Limited Partner in the Partnership and to enter into the . . . [LP] Agreement.[13]

The Defendants contend that before Great-West acquired Putnam and agreed to be bound by the LP Agreement, Mark Corbett, a Great-West employee, reported to the Chief Executive Officer of Great-West: the Defendants have "not agreed to fix the [E]xpense [A]ssumption clause in the

[12] Compl. ¶ 76.
[13] *Id.* at ¶ 84.

documents."[14] Corbett went on to state: "The language was apparently drafted incorrectly (Skadden and Weil) and provides for an increase in the annual expense by an amount equal to 105% of the Expense Assumption in the prior year (instead of to)."[15] In light of Corbett's statements, the Defendants argue that Great-West knew the Default Escalator provided for a 105% increase before it agreed to be bound by the LP Agreement. Because Great-West understood the Default Escalator provided for a 105% increase at that time, the Defendants contend that Great-West does not have any mistake claim as a matter of law.

Great-West responds that its mistake claims arose in 1999 when the first iteration of the LP Agreement was executed by the Defendants and Putnam. Great-West argues that the mistake made by those parties in 1999 is applicable to the Court's interpretation of both the current LP Agreement as well as the LP Agreement that was operative when Great-West acquired Putnam. According to Great-West, when it acquired Putnam it also acquired all of Putnam's rights under the LP Agreement, and one of those rights consists of the ability to assert a mistake claim on the basis that Section 12.2(c) was incorrectly drafted in 1999. Moreover, Great-West

[14] Memo. in Supp. of Defs.' Mot. for Summary Judgment ("Defs.' Supp. Memo.") at 25 (citing Transmittal Aff. of David E. Ross, Esq. ("Ross Aff."), Ex. 46 ("E-mail dated July 27, 2007 from Mark Corbett to Ray McFeetors") at GW00939347).

[15] *Id.* (citing E-mail dated July 27, 2007 from Mark Corbett to Ray McFeetors at GW00939347).

argues that even if it did not acquire all of Putnam's rights under the LP Agreement, the quoted language from Corbett merely "laid out the possible interpretation of the 105 as an issue,"[16] and does not suggest that he or Great-West thought that the Default Escalator actually provided for a 105% increase.

Count VI seeks reformation of the LP Agreement on the basis of fraud. The Defendants contend that after the January 14 Opinion, Great-West has one surviving fraud claim. That claim, according to the Defendants, is that the Defendants' outside counsel, David P. Kreisler, in his communications with Putnam's outside counsel, Russell G. D'Oench, could have given Great-West the impression that the Defendants agreed with Great-West that Section 12.2(c) was intended to create a 5% annual increase in the Expense Assumption and that the Defendants would negotiate to implement that intent after Great-West became the Special Limited Partner. The Defendants argue that, after discovery, there is no evidence that (1) Kreisler stated, implied, or left the impression that the Defendants would change Section 12.2(c), (2) Kreisler acted with scienter, or (3) Great-West relied on Kreisler's statement or any "impression" he created. Therefore, the

[16] Pl.'s Br. in Opp. to Defs.' Mot. for Partial Summary Judgment ("Pl.'s Opp. Br.") at 36.

Defendants contend that they should be granted summary judgment on Count VI.

Great-West responds that it has two surviving fraud claims. The first claim is that, before Great-West agreed to be bound by the LP Agreement, the Defendants pretended to agree with Great-West that the Default Escalator created a 5% annual increase in the Expense Assumption, but once Great-West agreed to be bound, the Defendants changed their story and claimed that the Default Escalator created a 105% annual increase. The second claim is that the Defendants suggested that they would interpret the Default Escalator to provide for a 5% annual increase before Great-West agreed to be bound by the LP Agreement, but after Great-West agreed to be bound, the Defendants interpreted the Default Escalator to provide for a 105% annual increase. Great-West argues that the Defendants are not entitled to summary judgment on either of those claims because the Defendants have failed to demonstrate: (1) that their representations were not false or misleading; (2) that they did not act with scienter; or (3) that Great-West could not reasonably have relied on their fraudulent misrepresentations.

III. ANALYSIS

"Summary judgment may be granted pursuant to Court of Chancery Rule 56 if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[17] The moving party initially has the burden of showing that no material fact issues exist, but once the moving party makes that showing, "the nonmoving party has the burden of demonstrating that there are genuine issues of material fact that require resolution at trial."[18]

A. *Great-West's Motion for Summary Judgment*

Great-West has moved for summary judgment on Counts I(a), II, and VII.

1. Count I(a)

Count I(a) seeks a declaration as to what Section 12.2(c) of the LP Agreement means. That is a pure question of law; an issue ripe for summary judgment. Section 12.2(c) consists of three sentences. The first sentence requires that TH Lee and Great-West negotiate in good faith toward an agreement in which TH Lee receives 25% of the Fee Income for each Class in which it holds an interest less 25% of the expenses attributable to each of those Classes. The second sentence explains that, in connection with those

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[17] *Grunstein v. Silva*, 2011 WL 378782, at *7 (Del. Ch. Jan 31, 2011).
[18] *Id.* (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

good faith negotiations, Great-West shall receive certain documents from the Manager. The third sentence explains what happens if TH Lee and Great-West are "unable to agree" through their good faith negotiations, namely: "the Expense Assumption then in effect will increase on January 1 of each year, commencing on January 1, 2010, by an amount equal to the product of 1.05 <u>multiplied by</u> the Expense Assumption in effect during the preceding year."[19]

Great-West seeks a declaration that "the Expense Assumption may increase from the amount in effect for 2009 only after TH Lee has negotiated in good faith with Great-West Investors concerning the allocation of Fee Income and related expenses premised on Great-West Investors receiving 25% of Fee Income. . . ."[20] Great-West is entitled to that declaration. Section 12.2(c) contemplates that Great-West and TH Lee will undertake good faith negotiations, and if those negotiations fail, then 12.2(c) provides for the Default Escalator. If TH Lee did not engage in good faith negotiations with Great-West before it implemented the Default Escalator, then TH Lee breached Section 12.2(c).

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[19] LP Agreement § 12.2(c).

[20] Compl. ¶ 56.

Great-West, however, fails to note that Section 12.2(c) provides for a specific time frame. Section 12.2(c) states:

> After July 6, 2008, the General Partner and the Special Limited Partner shall negotiate in good faith to assure that, effective as of July 6, 2009 [the parties have a new agreement in which Great-West receives 25% of the Fee Income less 25% of the Expense Assumption]. . . . In the event that the General Partner and the Special Limited Partner are unable to agree . . . the Expense Assumption then in effect will increase on January 1 of each year, commencing on January 1, 2010. . . .

Thus, if TH Lee negotiated in good faith with Great-West between July 6, 2008 and July 6, 2009 "to assure that, effective as of July 6, 2009 [the parties have a new agreement]" but the parties were nevertheless unable to agree, then the Default Escalator would have been automatically triggered. It is not true, as Great-West suggests, that the "Defendants could not have determined the parties were 'unable to agree' . . . [if] they were still engaged in negotiations."[21] Rather, Section 12.2(c) provides that if the parties are unable to agree by a specific time, the Default Escalator is automatically imposed.

2. Count VII

Count VII contains three breach of contract claims. First, "TH Lee has breached [S]ection 12.2(c) . . . by failing to negotiate in good faith with

[21] Pl.'s Reply Br. in Supp. of Its Mot. for Partial Summary Judgment ("Pl.'s Reply Br.") at 42.

Great-West Investors toward an agreement upon the allocation of Fee Income and expenses."[22] Although Great-West argues that it has yet to negotiate with TH Lee, Great-West did negotiate with the people who have the power to speak for TH Lee,[23] and the Defendants have proffered facts which suggest that, in the negotiations, those people were representing TH Lee's interests.[24] Moreover, the Defendants have proffered facts which suggest that TH Lee undertook the negotiations in good faith.[25] Thus, Great-West is not entitled to summary judgment on the first claim asserted in Count VII.

Second, "[e]ach of TH Lee and [the Manager] has breached [S]ection 12.2(c) . . . by failing to provide Great-West Investors the information requested by Great-West Investors to enable it to determine the actual, necessary, and reasonable expenses of the Partnership."[26] The record, at this preliminary stage, suggests that the Defendants did provide

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[22] Compl. ¶ 103.
[23] *See* Pl.'s Opening Br. in Supp. of its Mot. for Partial Summary Judgment at 37-38.
[24] *See* Def.'s Opp. Memo. at 45 ("It is in the Partnership's interest to attract and retain the professionals required to build the business and make it profitable for all partners including by generating maximum carried interest. TH [Lee] proposed an [Expense Assumption] of $125 million in order to ensure Great-West would absorb its 25% share of $79 million of market-based compensation to TH [Lee]'s 10 most senior partners and future senior partners coming up the ranks. TH [Lee] has submitted expert testimony showing market compensation for TH [Lee]'s professionals which would justify an [Expense Assumption] of much higher than $125 million.") (internal citations omitted).
[25] *Id.* at 16-28.
[26] Compl. ¶ 104.

Great-West with some financial documents,[27] as well as some compensation information.[28] Great-West contends that the documents provided were not sufficient, arguing that Section 12.2(c) required the Defendants to provide Great-West with certain specific documents. Section 12.2(c), however, does not list any specific documents; rather, it states that "the Special Limited Partner shall receive financial statements of the Manager and other information reasonably requested by the Special Limited Partner . . . ." In the LP Agreement, "financial statements" is not a defined term. Audited financial statements prepared for a governmental body would fit within the term "financial statement," but so would other documents. Moreover, when the drafters of the LP Agreement wanted a party to receive certain specific financial documents, they listed those documents.[29] Thus, Section 12.2(c) cannot be read to require that the Defendants provide certain specific documents to Great-West. Moreover, the Court cannot say, as a matter of law, that the documents the Defendants provided to Great-West were

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[27] Pl.'s Reply Br. at 7 ("Defendants now assert that the limited information they deigned to provide to Great-West should have been 'sufficient' . . . .").

[28] *Id.* at 16 ("Although Defendants now respond that the April Spreadsheets contained some aggregate compensation information, they admit that those Spreadsheets did not contain the detailed compensation information that Great-West had twice requested. . . .").

[29] *See* LP Agreement § 5.3(b) ("[T]he General Partner shall deliver to each Limited Partner a balance sheet, statement of operations, statement of changes in partners equity and statement of cash flows of the Partnership, in accordance with GAAP . . . .").

insufficient under Section 12.2(c). Therefore, Great-West is not entitled to summary judgment on the second claim asserted in Count VII.

Third,

> TH Lee and the Partnership have breached [S]ection 3.2(b), [S]ection 12.1(b), and [S]ection 12.2(c) . . . by increasing the Expense Assumption for 2010 to $97,791,853, using the $97,791,853 figure as the basis for calculating the amount owed by Great-West Investors for the Expense Assumption, and wrongfully offsetting against amounts that were due to Great-West Investors as a distribution in respect of its Special Limited Partner interests.[30]

As discussed above in Subsection A.1, Section 12.2(c) of LP Agreement provides that Great-West and TH Lee are to negotiate in good faith during a specific time period. If, during that time period, the parties are unable to reach an agreement, then the Default Escalator is automatically imposed. If TH Lee is found to have negotiated in good faith, then it is possible that neither TH Lee nor the Partnership breached the LP Agreement when the Default Escalator was imposed. Whether TH Lee negotiated in good faith is still an open question and, thus, Great-West is not entitled to summary judgment on the third and final claim asserted in Count VII.

3. <u>Count II</u>

Count II seeks a decree of specific performance ordering three things. First, that the Defendants provide Great-West certain specific financial

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[30] Compl. ¶ 105.

documents.[31] Second, that TH Lee negotiate in good faith with Great-West. Third, that any increase in the Expense Assumption amount be barred unless and until good faith negotiations have occurred. With regard to the first and second requested orders, it is not yet clear that Great-West is entitled to any additional financial documents, or that TH Lee has not already negotiated in good faith. Thus, Great-West is not, as a matter of law, entitled to a decree ordering either: (1) the Defendants to provide Great-West with certain financial statements; or (2) TH Lee to negotiate in good faith. With regard to the third requested order, the Court has determined that Section 12.2(c) requires TH Lee to negotiate in good faith. But the Court may not conclude, as a matter of law, that Great-West will be entitled to a certain remedy if it is determined that TH Lee failed to negotiate in good faith. Thus, Great-West is not entitled to summary judgment on Count II.

B. *The Defendants' Motion for Summary Judgment*

The Defendants have moved for summary judgment on Counts IV, V, and VI, and for partial summary judgment on Counts II and VII, to the extent that the claims in those counts are based upon fraud or mistake.

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[31] Great-West seeks a decree of specific performance ordering the Defendants to provide Great-West certain financial documents in subpart (a) of Count II, as well as, in the final sentence of Count II, which begins: "In addition."

1. Counts IV and V

Counts IV and V seek reformation of the LP Agreement on the basis of both mutual mistake and unilateral mistake. "[R]egardless of whether mutual mistake or unilateral mistake is cited as the ground for reformation, 'the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.'"[32] Thus, to prevail on their motion for summary judgment, the Defendants must show, as a matter of law, that the parties did not have a prior understanding that differed materially from the LP Agreement.

Great-West argues that the mistakes at issue arose in 1999 when the first iteration of the LP Agreement was signed by the Defendants and Putnam. Great-West further argues that it succeeded to Putnam's right to assert those mistake claims. The problem with that argument is that Great-West did not simply buy Putnam, it took Putnam's place as the Special Limited Partner and expressly agreed to be bound by the terms of the LP

[32] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *9 (Del. Ch. May 16, 2007) (quoting *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151-52 (Del. 2002)).

Agreement.[33] Thus, there was a novation to the LP Agreement when Great-West became the Special Limited Partner.[34]

Because there was a novation, Great-West, in order to prevail on either of its mistake claims, must show that it and the Defendants came to an understanding that differed materially from what was written in the LP Agreement that Great-West signed. Great-West contends that the materially different understanding was a Default Escalator that provided for a 5% annual increase in the Expense Assumption. Days before Great-West agreed to become a party to the LP Agreement, however, Corbett reported to the Chief Executive Officer of Great-West: the Defendants have "not agreed to fix the [E]xpense [A]ssumption clause in the documents."[35] Corbett went on to state: "The language was apparently drafted incorrectly (Skadden and Weil) and provides for an increase in the annual expense by an amount equal to 105% of the Expense Assumption in the prior year (instead of to)."[36] Great-West admits that Corbett's statements to Great-West's CEO "laid out

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[33] *See* Compl. ¶ 26 ("Great-West Investors acquired Putnam's interests in the Partnership, and became the Special Limited Partner in the Partnership . . . , and thereupon became a party to the [LP Agreement] . . . .").

[34] *See Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1186 (Del. Ch. 2009) ("A novation extinguishes a prior contract and replaces it with a new agreement. It requires four elements: '(1) a valid pre-existing obligation; (2) a valid new contract; (3) extinction of the old contract; and (4) the consent of all parties to the novation transaction.'") (quoting *Schwartz v. Centennial Ins. Co.*, 1980 WL 77940, at *3 (Del. Ch. Jan. 16, 1980)).

[35] Defs.' Supp. Memo. at 25 (citing E-mail dated July 27, 2007 from Mark Corbett to Ray McFeetors at GW00939347).

[36] *Id.* (citing E-mail dated July 27, 2007 from Mark Corbett to Ray McFeetors at GW00939347).

the possible interpretation of the 105 as an issue."[37] Moreover, at oral argument, Counsel for Great-West explained: "if you look at Mr. Corbett's email, what he's saying is it's ambiguous, and, again, in layman's terms, it's ambiguous."[38] Thus, before Great-West agreed to be bound by the LP Agreement it admits that it recognized that the Default Escalator was an ambiguous provision.

A party cannot show by clear and convincing evidence that it reached a definitive agreement as to the meaning of a sentence when it admits that it knew the sentence was ambiguous. As a matter of law, Great-West cannot show that the parties had a prior understanding that differed materially from the LP Agreement. Therefore, the Defendants are entitled to summary judgment on Counts IV and V.

2. Count VI

Count VI seeks reformation of the LP Agreement based on fraud. To prevail on its fraud claim at trial, Great-West would need to prove:

> 1) a false representation, usually one of fact made by the defendant; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction

[37] Pl.'s Opp. Br. at 36.
[38] Oral Arg. Tr. at 140.

> taken in justifiable reliance upon the representation; and 5) damage to the plaintiff as a result of such reliance.[39]

Thus, to prevail on their motion for summary judgment, the Defendants must show, as a matter of law, that Great-West cannot prove all of the elements of a fraud claim.

Great-West argues that it has two remaining fraud claims. The January 14 Opinion could be interpreted to have allowed two fraud claims to survive the Defendants' motion to dismiss. Thus, the Court will address each of the two fraud claims that Great-West maintains it has.

The first claim is that before Great-West agreed to be bound by the LP Agreement, the Defendants pretended to agree with Great-West that the Default Escalator created a 5% annual increase, but once Great-West agreed to be bound, the Defendants changed their story and claimed that the Default Escalator created a 105% annual increase. The second claim is that the Defendants suggested that they would interpret the Default Escalator to provide for a 5% annual increase before Great-West agreed to be bound by the LP Agreement, but after Great-West agreed to be bound, the Defendants interpreted the Default Escalator to provide for a 105% annual increase.

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[39] *Tristate Courier and Carriage, Inc. v. Berryman*, 2004 WL 835886, at *11 (Del. Ch. April 15, 2004) (quoting *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992)).

As stated above, the third element of any fraud claim is "an intent to induce the plaintiff to act or to refrain from acting."[40] With regard to this element, Great-West argues:

> there is substantial evidence that [the Defendants] had a powerful motive to make these false representations, as getting Great-West to sign the Fourth Amended [LP Agreement] with the Default Escalator unchanged potentially represented either a multibillion dollar windfall for [the Defendants] or, at a minimum, the much-desired "leverage" necessary to accomplish [the Defendants'] admitted goal of either forcing the [Special Limited Partner] out altogether or significantly reducing its share of the partnership.[41]

The Defendants, however, did not have the motive that Great-West describes. As the Defendants explain, "Putnam was already a partner, already subject to the . . . [Default Escalator]."[42] Therefore, Great-West has not provided the Court with any basis to infer that the Defendants had an intent to induce Great-West to act.[43] Because Great-West has failed to

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[40] *Tristate Courier*, 2004 WL 835886, at *11 (Del. Ch. April 15, 2004) (quoting *Gaffin*, 611 A.2d at 472).

[41] Pl.'s Opp. Br. at 65.

[42] Defs.' Reply Memo in Supp. of Defs.' Mot. for Summary Judgment at 9.

[43] In theory, at least, two factors might have motivated TH Lee to deceive Great-West. Although TH Lee did not need a new special limited partner, Great-West brought two distinct characteristics. First, backed by its parent, Great-West may have been in a position to provide more capital for TH Lee's various projects. Second, in light of the argument sponsored by TH Lee here, a novation of the LP Agreement, accomplished as part of substituting Great-West for Putnam, could have been seen as reducing any risk that the benefits accruing to TH Lee under the LP Agreement following the initial ten-year period might be challenged on account of mistake. The Court need not address either of these arguments for the simple reason that, as far as it can tell, neither has been made by Great-West.

proffer any evidence on an element of its fraud claims, the Defendants are entitled to summary judgment on these claims.

3. Counts II and VII

In addition to moving for summary judgment on Counts IV, V, and VI, the Defendants have moved for partial summary judgment on Counts II and VII, to the extent the claims in those counts are based upon fraud or mistake. The Defendants do not make any arguments in favor of their motion for partial summary judgment on Counts II and VII, nor do the Defendants suggest what claims in those counts are based on fraud or mistake. Thus, the Defendants are not entitled to partial summary judgment on Counts II and VII.[44]

IV. CONCLUSION

For the foregoing reasons, Great-West's motion for partial summary judgment is denied, except as to Count I, which is granted. Great-West is entitled to a declaration that the Expense Assumption may not increase until TH Lee has negotiated in good faith. The Defendants' motion for summary judgment is denied as to Counts II and VII, and granted as to Counts IV, V, and VI. Great-West's claims for mistake and fraud fail as a matter of law.

[44] By denying the Defendants' motion for partial summary judgment on Counts II and VII, the Court is in no way suggesting that there are fraud or mistake claims in those counts.

Counsel are requested to confer and to submit an implementing form of order.