IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Paul Van Lake,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 12C-04-036 JRJ CCLD
	)	
Sorin CRM USA, Inc., F/K/A ELA Medical, Inc.,	)	
	)	
	)	
Defendant.	)	

Date Submitted: December 12, 2012
Date Decided: February 15, 2013

MEMORANDUM OPINION

Upon Defendant's Motion to Dismiss: **DENIED**

David S. Eagle, Esquire, (argued), Sean M. Brennecke, Esquire, Klehr, Harrison, Harvey & Branzburg, LLP, 919 Market Street, Suite 1000, Wilmington, Delaware, 19801-3062. Attorneys for Plaintiff.

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Jurden, J.

I. INTRODUCTION

Before the Court is Defendant's Motion to Dismiss. In support of its Motion, Defendant avers that: (1) all of Plaintiff's claims are barred by the three-year statute of limitations for fraud; (2) this Court lacks jurisdiction to decide Plaintiff's negligent misrepresentation claim; (3) Plaintiff has failed to allege past or present representations of material fact and the existence of a fiduciary relationship between the parties; and (4) the Complaint lacks the requisite specificity under Superior Court Civil Rule 9(b). For the reasons that follow, the Motion is **DENIED**.

II. BACKGROUND

The following well-pleaded factual allegations drawn from the Complaint are accepted as true for the purposes of this Rule 12(b)(6) motion.[1] The Plaintiff, Paul Van Lake ("Van Lake"), is an experienced, well-trained and highly respected medical sales representative[2] who left his top tier position with St. Jude Medical, Inc. ("St. Jude") in 2008 in order to join Sorin CRM USA, Inc. ("Sorin"), a global medical device company and self-described leader in the treatment of cardiovascular disease.[3] While employed by St. Jude, Van Lake developed an extensive network of contacts which allowed him to become the number one

[1] *See Snyder v. Butcher & Co*., 1992 WL 240344, at *1 (Del. Super.) ("The facts on which this Motion [to dismiss] must be decided are those well-pleaded facts alleged in the Complaint.").
[2] Van Lake specializes in the sale of implantable medical devices such as implantable cardioverter defibrillators and other devices for regulating heart rhythms. Complaint [Trans. ID 43487784] at ¶ 1.
[3] *Id.* at ¶¶ 2, 3. Sorin and St. Jude are competitors in the field of cardiac rhythm management ("CRM"). Sorin is a Delaware corporation with its principal place of business in Colorado. *Id*.

revenue generating producer in the state of Arizona, and one of St. Jude's top producers for the western United States.[4] Van Lake's annual sales were approximately $8 million in 2006 and $10 million in 2007.[5]

In March 2007, as Van Lake's contract with St. Jude was coming up for renewal, Sorin initiated efforts to recruit Van Lake.[6] Sorin made its first recruitment effort through one of its sales representatives, Anthony Caforio ("Caforio"). Caforio engaged Van Lake in a discussion regarding their respective contracts.[7] During this conversation, Caforio told Van Lake that Sorin was interested in hiring him and urged Van Lake not to renew his contract with St. Jude until Van Lake spoke with Sorin.[8]

In May 2007, Tom Carpenter ("Carpenter"), a Sorin sales manager, approached Van Lake at an industry event after learning from Caforio that Van Lake's contract with St. Jude was up for renewal and Van Lake was in the process of negotiating a new contract.[9] Carpenter urged Van Lake not to sign with St. Jude until Van Lake spoke with Sorin's new Vice-President of Sales, Richard Ames ("Ames").[10] Carpenter advised Van Lake that Sorin was interested in making him

[4] *Id*. at ¶ 6.
[5] *Id.*
[6] *Id*. at ¶ 7.
[7] *Id*.
[8] *Id.*
[9] *Id*. at ¶ 8.
[10] Ames had recently left St. Jude to join Sorin in the spring of 2007. As a result, he was familiar with St. Jude's CRM products and also with Van Lake's record and capabilities. One of Ames' responsibilities at Sorin was to recruit high level representatives to build Sorin's image and reputation among physicians. Complaint at ¶ 10.

an offer.[11] At that same event, Caforio met with Van Lake as well, and told Van Lake that there was more than enough work for Caforio and Van Lake in the state of Arizona, that Van Lake would retain the relationships that he had successfully developed at St. Jude, and that Caforio and Van Lake would "partner together" at Sorin to become a huge force in Arizona.[12]

In the Spring of 2007, Ames traveled to Phoenix to meet with Van Lake for the purpose of recruiting him to join Sorin.[13] During the meeting with Ames, Van Lake expressed some reservations about Sorin's capabilities in the CRM space, believing that Sorin's products and technologies had fallen behind the competition.[14] Specifically, Van Lake expressed concern about Sorin's product line missing an implantable cardioverter defibrillators ("ICD") that utilized cardiac resyncronization therapy ("CRT") (which was the device of choice in approximately 50% of the ICD implants in the United States).[15] Van Lake told Ames that without a CRT ICD, Sorin was missing as much as 50% of the U.S. market.[16] Van Lake also told Ames he was concerned that some of Sorin's products were considered inferior compared to other companies' products.[17]

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[11] *Id*.
[12] *Id*. at ¶ 9.
[13] *Id*. at ¶ 10.
[14] *Id*. at ¶ 11.
[15] *Id.*
[16] *Id*.
[17] *Id*.

In order to allay Van Lake's concerns, Ames invited Van Lake to travel to France at Sorin's expense to see the Sorin manufacturing plant.[18] Van Lake agreed.[19] While in France, Van Lake met with design engineers, project managers and vice presidents who showed him that the products that he had expressed concern about were being developed and would be released by Sorin over the next 18-24 months.[20] During that same trip to France, Van Lake had a videoconference with Sorin's Chief Executive Officer, Andre Michel Ballester ("Ballester"), who expressed a strong desire to recruit Van Lake because Sorin needed a sales representative of his caliber in fertile markets such as Arizona.[21] Ballester also expressed Sorin's commitment to the U.S. market and to growing the company through the acquisition of high-quality sales representatives such as Van Lake.[22]

As a result of these various conversations and his trip to France, Van Lake obtained a comfort level with Sorin's products and its commitment to his long-term career and, thus, negotiations turned to Van Lake's compensation and sales territory.[23] Van Lake provided Sorin with details about his compensation and territory with St. Jude.[24] Sorin's Vice President of Marketing, Kurt Goos ("Goos"), offered Van Lake a two year non-repayment commission guarantee of

[18] *Id*. at ¶ 12.
[19] *Id.*
[20] *Id*.
[21] *Id*. at ¶ 13.
[22] *Id*.
[23] *Id*. at ¶ 14.
[24] *Id*.

$750,000 per year and a 45% commission rate on products sold.[25] Because he had spent years with St. Jude developing relationships with certain physicians, Van Lake insisted (and Sorin agreed) that after his one year non-compete period with St. Jude expired, Van Lake's territory with Sorin would include the high-producing physician accounts he had previously serviced (the "Accounts").[26] The foregoing terms were material to Van Lake's decision to leave St. Jude and enter into an independent sales contract with Sorin.[27]

Toward the end of 2007, discussions ensued among Van Lake, Ames and Sorin's then Sales Manager, Irene Parko ("Parko") regarding the Accounts and Van Lake's potential territory under Sorin.[28] Ames and Parko specifically represented to Van Lake that he would have exclusive rights to the Accounts upon the expiration of his one year non-compete agreement with St. Jude.[29]

In the fourth quarter of 2007, Sorin drafted an Independent Sales Representative Agreement (the "ISR Agreement") which included the financial terms agreed to by Sorin and Van Lake, as well as other standard contractual provisions.[30] There was no reference to the Accounts in the draft ISR or its schedules.[31] Sorin's draft ISR included a combination of low-producing accounts

[25] *Id*. at ¶ 15.
[26] *Id.*
[27] *Id*.
[28] *Id*. at ¶ 16.
[29] *Id*.
[30] *Id*. at ¶ 17.
[31] *Id*.

and accounts that did not use implantable devices.[32] Concerned, Van Lake raised this issue with Sorin's in-house counsel, Ted Bitterman ("Bitterman"), who assured Van Lake that Sorin would deliver the Accounts to Van Lake after the expiration of his non-compete agreement with St. Jude.[33] Bitterman also told Van Lake that "such an express provision or schedule could not be included in the ISR Agreement or its schedules because, given Van Lake's prior success at St. Jude, it could trigger a litigious response from his former employer."[34] Van Lake reasonably relied upon Bitterman's assurances and advice.[35]

At the end of 2007 and into January of 2008, during the continued negotiations of Van Lake's contract, Van Lake and Ames discussed Sorin's promise of the Accounts as a necessary condition of Van Lake's departure from St. Jude and employment with Sorin.[36] Ames "specifically and repeatedly told Van Lake that he had nothing to worry about: that the Company would deliver the Accounts as soon as Van Lake 'rode out' his non-compete with St. Jude."[37] According to Van Lake, however, those assurances were false.[38] "Either the company had no intentions of providing the Accounts to Van Lake – but simply desired to tie up the competition for CRM business in Arizona for several years –

[32] *Id.*
[33] *Id*. Van Lake's one-year non-compete agreement with St. Jude would expire on February 1, 2009, one year after he signed the ISR Agreement with Sorin. *See id.* at ¶¶ 15, 20, 22.
[34] *Id*. at ¶ 17.
[35] *Id*.
[36] *Id*. at ¶ 16.
[37] *Id*. at ¶ 18.
[38] *Id*. at ¶ 19.

or it knew that it could not effectively promise Van Lake any territory in Arizona because it did not have the ability to deliver the Accounts."[39] Further, according to Van Lake, those acting on behalf of Sorin – Ames, Parko, Bitterman, Caforio and others at Sorin – were aware of the falsity of their promises to Van Lake when they made them, or they made them with reckless indifference to the accuracy of such statements.[40] In so doing, these individuals acting on behalf of Sorin "sought to induce Van Lake into entering into a multi-year ISR Agreement with Sorin."[41]

Based on Sorin's assurances, promises and inducements, as described above, Van Lake signed a final version of the ISR Agreement, with an effective date of February 1, 2008.[42] The ISR Agreement provided that Van Lake was to be the exclusive sales representative for Sorin products for certain accounts.[43] In exchange for his services, Van Lake was to receive 45% of his sales as a commission with a per year commission guarantee of $750,000 for the first two years.[44] In reliance on Sorin's assurances, Van Lake began selling to the accounts listed in the ISR Agreement and working to enhance Sorin's image and reputation in the CRM marketplace.[45]

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[39] *Id*.
[40] *Id.*
[41] *Id*.
[42] *Id*. at ¶ 20.
[43] *Id*. at ¶ 21.
[44] *Id*.
[45] *Id*. at ¶ 22.

During the winter and spring of 2008, Van Lake met with Caforio and Goos to discuss Van Lake's future with Sorin and to memorialize Sorin's promises with respect to the Accounts.[46] Goos assured Van Lake that when his non-compete period with St. Jude expired, Sorin would sign over the Accounts to him.[47] Caforio echoed those representations and specifically assured Van Lake that although he maintained current responsibility for the Accounts, that arrangement was necessary to "keep them safe," and that Sorin would re-assign them once Van Lake's non-compete period had expired.[48] Van Lake reasonably relied on these and other representations because they were repeatedly made by Sorin and corroborated by Caforio.[49]

After several months with Sorin, Van Lake began to witness rapid turnover and instability at the management level.[50] In April of 2008, Van Lake's first manager, Parko, was terminated.[51] Then his next manager, Doug Helm ("Helm"), served in that capacity for only a few months before leaving Sorin and being replaced by Skip Dunavent ("Dunavent").[52] Eventually, in the second or third quarter of 2009, Sorin demoted Ames from his position as Vice President of

[46] *Id*. at ¶ 23.
[47] *Id.*
[48] *Id*.
[49] *Id*.
[50] *Id*. at ¶ 24.
[51] *Id.*
[52] *Id.*

Sales.[53] Ames was replaced first by Dan Hackman ("Hackman") and then by Tim Dougherty ("Dougherty").[54]

In addition to these events, Sorin's reputation in Arizona was declining as a result of Caforio's poor customer care and questionable practices.[55] Certain doctors refused to do business with Sorin because of Caforio.[56] As a result of these developments during his first year with Sorin, Van Lake fully expected that Sorin would seek to improve its image in Arizona and fulfill its promises to assign the Accounts to Van Lake once his non-compete period expired.[57]

Toward the end of Van Lake's first year and continuing into the second year of his ISR Agreement, Sorin intensified its assurances to him.[58] In approximately December 2008, with the end of his non-compete period approaching, Ames and Caforio met with Van Lake to discuss transitioning the Accounts.[59] Both Ames and Caforio told Van Lake that the Company was preparing an amendment to the ISR Agreement (as well as a corresponding amendment to Caforio's contract) that

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[53] *Id.*
[54] *Id*.
[55] *Id*. at ¶ 25.
[56] *Id*. For example, while Van Lake was working with his client Dr. Raniolo and Tom Sapienza, a Sorin technical support employee, during a procedure to replace a pacemaker, Dr. Raniolo stated that he would not use any Sorin products while Caforio was still working there. Another such example occurred in November of 2008 when one of Van Lake's former clients, Dr. Mattioni, called him to address a serious recurring issue arising from Caforio's failure to show up for scheduled patient appointments. Van Lake reported these incidents to Sorin management, but contends that Sorin did not investigate Caforio's conduct or take any disciplinary action against him. *Id*. at ¶¶ 25-27.
[57] *Id*. at ¶ 28.
[58] *Id.*
[59] *Id*. at ¶ 29.

would memorialize the transition and division of Accounts.[60] That amendment was provided to Van Lake at a national sales meeting in February or March of 2009.[61] Ames presented Van Lake with a short list consisting of some, but not all, of the Accounts, while at the same time assuring Van Lake that the entire list of Accounts would be forthcoming shortly from Sorin and Caforio.[62] To Van Lake, Sorin's continued promises appeared to be supported by its actions.[63]

In April of 2009, Ames and Caforio gave Van Lake their consent to begin selling new Sorin products to certain of the Accounts that Caforio confirmed he did not want, despite the fact that the necessary documentation had not been finalized.[64] In this manner, Van Lake was able to retain several clients who were otherwise planning to abandon Sorin.[65]

On April 4, 2009, Ames sent an email to Van Lake, Caforio, and Taylor Pollock, Esq. ("Pollock") and Jamie Leitner, Esq. ("Leitner") of Sorin's legal department, in response to Van Lake's observation that one of his physician Accounts – Dr. Himal Shah – had been incorrectly listed as Dr. "Shishir" Shah on the above-referenced amendment to the ISR Agreement.[66] Ames and Sorin's in-house counsel all agreed on behalf of Sorin to correct the error and clarify that this

[60] *Id*.
[61] *Id*. at ¶ 30.
[62] *Id*.
[63] *Id*. at ¶ 31.
[64] *Id.*
[65] *Id*.
[66] *Id*. at ¶ 32.

Account belonged to Van Lake.[67] In his email, Ames "expressly acknowledged the Company's long-standing promises to Van Lake: 'Way back in around November 2007 when we originally specified the territory that was to become PVL's in February of 2009, one of the physicians we listed was Shishir Shah, M.D. Unfortunately, this Dr. Shah is a family practitioner. The correct Dr. Shah is actually Himal Shah, M.D., an electrophysiologist at Arizona Heart.'"[68]

In September of 2009, Van Lake met with Sorin representatives Pollock, Dunavent and Caforio in Scottsdale, Arizona, for the purpose of finalizing the re-assignment of the Accounts from Caforio to Van Lake.[69] After a 4-5 hour meeting, the parties came to an agreement to be documented by Sorin's in-house legal counsel and signed by both Caforio and Van Lake.[70] On September 25, 2009, Pollock sent Van Lake an email, which was copied to Dunavent, attaching a list of Accounts which Pollock "unequivocally committed" to deliver to Van Lake on behalf of Sorin.[71] The email provided as follows:

> I've attached for your final review a new territory list based on the discussion last week in Phoenix. This list will be incorporated into an amendment to your current agreement …. Of course, Anthony's [Caforio's] agreement will be revised to reflect that all physicians are being removed from his territory and given to you.[72]

[67] *Id*.
[68] *Id*.
[69] *Id*. at ¶ 33.
[70] *Id*.
[71] *Id*.
[72] *Id.*

When Van Lake did not receive the new amendment incorporating the list of Accounts, he approached Dunavent who told him to "go ahead and sell to those accounts [sic] anyway, you will get paid."[73]

On December 30, 2009, Sorin sent Van Lake a letter entitled, "Notice of Non-Renewal of Independent Representative Agreement."[74] The letter stated, *inter alia*, that "[Sorin] would like to continue the relationship; however it is necessary that we do so under the terms of a new agreement.[75]" The letter further stated, "We look forward to continuing negotiations regarding a new independent representative agreement to become effective on February 2, 2010."[76]

In furtherance of the objectives set forth in its December 30, 2009 letter, Sorin commenced negotiations with Van Lake in early 2010 with respect to a replacement ISR Agreement, and the parties exchanged drafts.[77] Dougherty and Dunavent once again agreed to deliver the Accounts to Van Lake, and both assured Van Lake that prior to the execution of a new written contract, he would be paid commissions for any Sorin products he sold to the Accounts.[78] Despite these continued representations, Sorin failed to provide Van Lake with a new ISR Agreement and, ultimately, failed to provide him with any rights to the Accounts.[79]

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[73] *Id*. at ¶ 34.
[74] *Id*. at ¶ 35.
[75] *Id.*
[76] *Id*.
[77] *Id*. at ¶ 36.
[78] *Id*.
[79] *Id*. at ¶¶ 37, 38.

Meanwhile, the CRM physician market in Arizona somehow became aware of Sorin's desire not to renew Van Lake's initial ISR Agreement, resulting in a dramatic drop off in his sales.[80] In July of 2010, notwithstanding all of Sorin's representations to the contrary, Caforio sent Van Lake a "cease and desist letter" demanding that he refrain from calling on any of the Accounts.[81] In February 2011, after Sorin "continually misrepresented its intentions and/or ability to deliver the Accounts, thereby decimating Van Lake's earning potential at Sorin,"[82] Van Lake returned his supplies and computer to Sorin.[83] By letter dated February 11, 2011, Sorin acknowledged the termination of its relationship with Van Lake.[84]

On April 4, 2012, Van Lake filed the instant suit against Sorin, alleging fraudulent inducement, fraudulent misrepresentation and negligent misrepresentation. Sorin has moved to dismiss all counts.

III. LEGAL STANDARD

Under Superior Court Civil Rule 12(b)(6), a complaint may be dismissed if it "fail[s] to state a claim upon which relief can be granted." When reviewing a motion to dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[85]

[80] *Id*. at ¶ 37.
[81] *Id*. at ¶ 38.
[82] *Id*. at ¶ 39.
[83] *Id.*
[84] *Id*.
[85] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

The Court must accept as true all non-conclusory, well-pleaded allegations.[86] Every reasonable factual inference will be drawn in favor of the non-moving party.[87] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[88]

IV. DISCUSSION

A. Choice of Law Provision

The parties dispute whether Van Lake's claims are governed by Arizona law or Delaware law. Sorin argues that the parties expressly agreed to a broad choice of law provision, whereby Delaware law would govern all aspects of the case.[89] Conversely, Van Lake contends that application of the "most significant relationship test," as set forth in the Restatement (Second) of Conflicts of Laws, dictates that Arizona law govern Van Lake's claims.[90]

The ISR Agreement, executed by the parties, includes a choice-of-law provision:

> *The laws of the State of Delaware shall govern this Agreement in all respects. Any dispute, controversy, or claim arising out of or relating to this Agreement*, including but not limited to, the breach, termination or invalidity

[86] *Id.*
[87] *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[88] *Spence*, 396 A.2d at 968.
[89] *See* Defendant's Reply Brief in Further Support of its Motion to Dismiss Plaintiff's Complaint ("Def's. Reply Br.") at 2-3 (Trans. ID 45502039).
[90] *See* Plaintiff's Answering Brief in Opposition to Defendant's Motion to Dismiss ("Pltf's. Ans. Br.") at 9 (Trans. ID 45205984).

> thereof, shall be venued exclusively in the state or federal courts in the City of Wilmington, Delaware, and the parties hereby expressly consent to the exercise of personal jurisdiction over them by such courts.[91]

The Court finds that this broad choice-of-law language governs all aspects of this case, including those tort actions that arise out of the parties' contractual agreements.[92] The plain language of the ISR Agreement states that Delaware law governs the ISR Agreement "in all respects," and further governs all disputes or claims "arising out of or relating to" the ISR Agreement.[93] It is undisputed that Van Lake's claims "arise out of or relate to" the formation and/or performance or non-performance of the ISR Agreement.[94] Therefore, under the express terms of the ISR Agreement, Delaware law applies to Van Lake's claims.[95]

B. Statute of Limitations

Sorin contends that Van Lake's claims are barred by the statute of limitations.[96] According to Sorin, all of Van Lake's claims accrued more than three years before the Complaint was filed and, therefore, are time-barred under 10

[91] ISR Agreement, Section 14.06. (Attached as Ex. A to the Motion to Dismiss) (Trans. ID 44629451) (emphasis added).
[92] *See Gloucester Holding Corp. v. U.S. Tape and Sticky Prods., LLC*, 832 A.2d 116, 124 (Del. Ch. 2003) (citing *VGS, Inc. v. Castiel*, 2003 WL 723285, at *7 (Del. Ch.)); *Huffington v. T.C. Group, LLC*, 2012 WL 1415930, at *11 (Del. Super.); *Eby v. Thompson,* 2005 WL 1653988, at *3 (Del. Super.).
[93] *Id*.
[94] *See* Complaint at ¶¶ 1, 9, 14-23, 28-31, 33-39.
[95] *See Total Holdings USA, Inc. v. Curran Composites, Inc*., 999 A.2d 873, 882-83 (Del. Ch. 2009) ("When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* ***disputes arising out of the transaction or relationship***.") (emphasis added).
[96] *See* Defendant's Opening Brief in Support of its Motion to Dismiss Plaintiff's Complaint ("Def's. Op. Br.") at 5 (Trans. ID 44629451).

Del. C. § 8106.[97] Sorin further argues that the facts of the case do not warrant application of a tolling doctrine to any of Van Lake's claims.[98]

In response, Van Lake contends that his claims are not time-barred.[99] In the alternative, Van Lake argues that even assuming, *arguendo,* that his Complaint was filed more than three years after his claims accrued, the statute of limitations should be tolled.[100] Specifically, Van Lake asserts three theories to support tolling the statute of limitations: (1) the discovery rule; (2) fraudulent concealment; and (3) equitable tolling.[101]

1. Applicable Statute of Limitations

Pursuant to 10 *Del. C.* § 8106, claims "arising from a promise," including fraud, must be brought within three years after the claim has accrued. Delaware courts have held that "[t]he statute of limitations begins to run when a plaintiff's claim accrues, which occurs at the moment of the wrongful act and not when the effects of the act are felt."[102] In cases of fraud, the cause of action accrues when the fraud is successfully perpetrated.[103]

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[97] *Id.* at 5-6.
[98] *Id*. at 8.
[99] Pltf's. Ans. Br. at 19.
[100] *Id.* at 24.
[101] *Id.* at 25-30.
[102] *Airport Bus. Ctr. V LLLP v. Sun Nat'l Bank*, 2012 WL 1413690, at *7 (Del. Super.) (citing *Sunrise Ventures LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *6 (Del. Ch.)).
[103] *Playtex, Inc. v. Columbia Cas*., 1993 WL 390469, at *3 (Del. Super.) (citing *Tobacco & Allied Stocks v. Transamerica Corp*., 143 F.Supp. 323, 328 (D. Del. 1956)).

In deciding a motion to dismiss based on the statute of limitations defense, the Court must conduct a three-part analysis to determine whether a claim is time-barred.[104] From the pleadings, the Court must determine: (1) the date of accrual of the cause of action based on the allegations; (2) whether the plaintiff has pleaded facts sufficient to create a reasonable inference that the statute of limitations has been tolled; and (3) assuming a tolling exception has been pleaded adequately, when the plaintiff was on inquiry notice of a claim based on the allegations.[105]

In determining the timeliness of Van Lake's Complaint, filed April 4, 2012, the Court must first ascertain the date of accrual of Van Lake's claims.[106] Van Lake has raised three claims – fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation – each of which stems from Sorin's alleged misrepresentations concerning Van Lake's future exclusive rights to the Accounts. Van Lake contends that despite Sorin's knowledge that these representations were false, or with reckless indifference as to their accuracy, Sorin made these misrepresentations to induce Van Lake to leave St. Jude's and commence employment with Sorin.

As to Van Lake's claim of fraudulent inducement, the Court finds that this claim accrued on February 1, 2008 – the date on which the parties executed the

[104] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *14 (Del. Ch.).
[105] *Id.*
[106] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6-7 (Del. Ch.) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)).

ISR Agreement.[107] It was on this date that Sorin's alleged fraudulent and/or negligent misrepresentations were successfully perpetrated, thereby inducing Van Lake to execute the ISR Agreement. With respect to Van Lake's fraudulent misrepresentation and negligent misrepresentation claims, the Court finds that these claims accrued in May 2007 when Sorin first made the misrepresentations concerning Van Lake's future exclusive rights to the Accounts.[108]

Van Lake's Complaint was filed on April 4, 2012, more than three years after the claims accrued. Plainly, Van Lake's claims are time-barred under 10 *Del. C.* § 8106, unless a tolling doctrine applies.

2. Inquiry Notice and Tolling Doctrines

Under Delaware law, it is plaintiff's burden to plead facts to demonstrate that the statute of limitations was, in fact, tolled.[109] The statute of limitations can only be tolled until the plaintiff "discovers the facts constituting a basis for the cause of action, or knows facts sufficient 'to put a person of ordinary intelligence ... on inquiry, which, if pursued, would lead to the discovery of such facts.'"[110]

[107] *See also Puig v. Seminole Night Club, LLC,* 2011 WL 3275948, at *4 (Del. Ch.) (finding that a fraudulent inducement claim accrues at the time the plaintiff entered into the agreement).
[108] *See Winner Acceptance Corp.*, 2008 WL 5352063, at *14 (finding that injury occurred, and thereby the claim accrued, when the misrepresentations were made); *Krahmer v. Christie's Inc*., 903 A.2d 773, 778 (Del. Ch. 2006) (holding that a claim of negligent misrepresentation accrues at the time the misrepresentations were made to plaintiffs).
[109] *Burrell v. Astrazeneca LP*, 2010 WL 3706584, at *4 (Del. Super.).
[110] *Russum v. Russum*, 2011 WL 4731120, at *2 (Del. Super.) (citing *Wal-Mart Stores*, 860 A.2d at 319).

"Inquiry notice does not require a plaintiff to have actual knowledge of a wrong, but simply an objective awareness of the facts giving rise to the wrong."[111] The Court must analyze the evidence to determine whether there were "'red flag[s]' that clearly and unmistakably would have led a prudent person of ordinary intelligence to inquire" and if pursued, would have led to discovery of the elements of the claim being asserted.[112] "Thus, the critical inquiry for purposes of this motion to dismiss is: w[as] [P]laintiff[] entitled to rely on [D]efendant['s] representations for as long as [he] did … ?"[113]

Van Lake has raised three theories to support tolling of the statute of limitations in this case: (1) the discovery rule; (2) fraudulent concealment; and (3) equitable tolling. Relying on the "discovery rule," Van Lake contends that there were no observable factors to put him on inquiry notice of an injury.[114] According to Van Lake, "He was specifically advised by more than one member of his employer's legal staff that Sorin would deliver on its representations."[115] Van Lake contends that it was not until he received the "cease and desist" letter in July 2010 that he was on notice of his potential claims.[116]

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[111] *E.I. duPont de Nemours and Co. v. Medtronic Vascular, Inc*., 2013 WL 261415, at *11 (Del. Super.) (citing *Sunrise Ventures,* 2010 WL 363845, at *7).
[112] *Coleman v. PriceWaterhouseCoopers LLC*, 854 A.2d 838, 842 (Del. 2004).
[113] *In re Dean Witter P'ship Litig*., 1998 WL 442456, at *7 (Del. Ch.).
[114] Pltf's. Ans. Br. at 25-26.
[115] *Id.* at 26.
[116] *Id.*

Van Lake next argues that Sorin engaged in fraudulent concealment of the facts necessary to place him on notice of the truth.[117] In support of this contention, Van Lake points to numerous "affirmative acts" that prevented him "from gaining the knowledge that Sorin had either no intention or no ability to deliver the high-producing Accounts he had been assured, or that led Van Lake away from the truth."[118]

Finally, Van Lake argues that by virtue of the fiduciary relationship between the parties, application of equitable tolling is warranted.[119] According to Van Lake, "Sorin will certainly owe fiduciary duties to its sales rep[resentatives] like Van Lake to provide accurate assurances that do not lead him off the trail of inquiry."[120]

The Court will address the substance and application of each of the tolling doctrines *in seriatim*.

The Discovery Rule

Under the "discovery rule," the statute of limitations is tolled "where there is evidence of concealment or fraud, or where the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury

[117] *Id.* at 26-29.
[118] *Id.* at 28.
[119] *Id.* at 29.
[120] *Id.* at 29-30.

complained of.'"[121] The statute of limitations begins to run "upon the discovery of facts 'constituting the basis of the cause of action or the existence of facts sufficient to put a person on inquiry which, if pursued, would lead to the discovery of such facts.'"[122] "These facts must usually be observable or objective factors that would alert laymen to the problem."[123] Therefore, the application of the "discovery rule" is necessarily fact-specific.

The question here is whether Van Lake has pled sufficient facts to support application of the "discovery rule." The Court finds he has. Accepting the well-pleaded allegations as true, the Court finds that no observable or objective factors, or "red flags," existed to place Van Lake on notice of Sorin's wrongful conduct until July 2010.

The record establishes that prior to and after the execution of the ISR Agreement, Sorin made repeated and ongoing assurances that Van Lake would have exclusive rights to the Accounts at the expiration of the non-compete. When the non-compete expired in February 2009, Van Lake was advised that an amendment to the ISR Agreement was forthcoming and would reflect the transfer of the Accounts.[124] In February or March 2009, Sorin presented the amendment to

[121] *Island Farm, Inc. v. Master Sidlow & Assocs*., *P.A*., 2007 WL 2758775, at *2 (Del. Super.) (quoting *Wal-Mart Stores,* 860 A.2d at 319).
[122] *Coleman*, 854 A.2d at 842 (quoting *Becker v. Hamada, Inc*., 455 A.2d 353, 356 (Del. 1982)).
[123] *Island Farm,* 2007 WL 2758775, at *2 (quoting *Wal-Mart Stores,* 860 A.2d at 319); *see also Yencer Builders, Inc. v. Fabi*, 2010 WL 8250829, at *2 (Del. Super.).
[124] Complaint at ¶ 29.

Van Lake, which contained a list of *certain* of the Accounts.[125] Van Lake was assured, however, that the remaining Accounts would be transferred in time.[126]

In April 2009, Sorin's assurances were finally supported by its actions.[127] It was at this time that Van Lake was given consent to begin selling Sorin products to certain of the Accounts.[128] From April 2009 through early 2010, Sorin continued to reassure Van Lake that an amendment to the ISR Agreement was forthcoming and would show that Sorin was "unequivocally committed to deliver[ing] the Accounts" to Van Lake.[129]

Van Lake argues that no "red flags" appeared until July 2010 when he received a "cease and desist" letter from Caforio.[130] According to Van Lake, the letter demanded that Van Lake refrain from calling on any of the Accounts.[131] Van Lake alleges that up until July 2010, he "had no reason to conduct a further investigation and, even if he had, he would not have uncovered facts sufficient to enable him to discover the basis of his claims."[132]

Giving Van Lake the "benefit of all reasonable inferences," the Court finds that Sorin's repeated assurances, from late 2007 through early 2010, could have instilled in Van Lake a reasonable belief that Sorin would make good on its

[125] *Id.* at ¶ 30.
[126] *Id.*
[127] *Id.* at ¶ 31.
[128] *Id.*
[129] *See id.* at ¶¶ 32, 33, 36.
[130] *Id.* at ¶ 38.
[131] *Id.*
[132] Pltf's. Ans. Br at 26.

promise.[133] Coupled with Sorin's transfer of certain Accounts and its subsequent consent to Van Lake to begin selling to those Accounts, a reasonably prudent person could have inferred that Sorin intended to transfer all of the Accounts to Van Lake.[134]

From early 2010 until receipt of the "cease and desist" letter in July 2010, however, Van Lake offers little information as to the relationship and communications between himself and representatives of Sorin. It is unclear whether Sorin continued to make assurances to Van Lake concerning his rights to the Accounts (such that Van Lake was not on inquiry notice until receipt of the "cease and desist" letter), or whether the relationship had sufficiently deteriorated to such a point that Van Lake should have been on notice of Sorin's alleged fraudulent conduct.[135] Notwithstanding, at this stage of the proceedings, the Court finds that Van Lake has pled sufficient facts to toll the statute of limitations until July 2010.[136]

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[133] *See Vichi v. Koninklijke Philips Elecs. N.V.,* 2009 WL 4345724, at *18 (Del. Ch.).

[134] *See id.* ("Giving Vichi 'the benefit of all reasonable inferences,' I find that these assurances could have instilled in Vichi a reasonable belief that Philips was, in fact, backing LPD such that LPD could repay the Notes. Vichi's alleged injuries, therefore, may have been inherently unknowable as long as he reasonably believed that LPD would satisfy its obligations on the Notes.").

[135] *In re Dean Witter P'Ship Litig*., 1998 WL 442456, at *8 n. 64 ("Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of that fraud will be imputed to him.") (citing *In re Prudential Sec. Inc. L.P. Litig*., 930 F.Supp. 68, 76 (S.D.N.Y. 1996)).

[136] Even if discovery demonstrates that Van Lake was on inquiry notice in early 2010, his Complaint was still filed well within the statute of limitations.

Fraudulent Concealment

Van Lake also seeks to toll the statute of limitations by invoking the doctrine of fraudulent concealment. Under this exception, "the statute of limitations will be tolled if there was an affirmative act of concealment or some misrepresentation that was intended to 'put a plaintiff off the trail of inquiry' until such time as the plaintiff is put on inquiry notice."[137] The purpose of the fraudulent concealment tolling doctrine was propounded by the Delaware Supreme Court over a century ago:

> It is said that the statute [of limitations] must be expounded reasonably, so as to suppress, and not to extend, the mischiefs it was intended to cure; that it was intended to suppress fraud, by preventing unjust claims from starting up after a great lapse of time, when evidence by which they might be repelled was forgotten or had ceased to exist; that it should not, therefore, be so construed as to encourage fraud, by enabling those who, through falsehood and deceit, have managed to keep one in ignorance of the fact that he had a cause of actions, to take advantage of their own wrongdoing under a plea of the statute.[138]

The fraudulent concealment doctrine, over a hundred years old, is alive and well. The Delaware Supreme Court reaffirmed the doctrine in the seminal case of *Layton v. Allen*[139]:

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[137] *Winner Acceptance Corp.,* 2008 WL 5352063, at *15 (citing *In re Dean Witter P'ship Litig*., 1998 WL 442456, at *5).
[138] *Snyder v. Butcher & Co*., 1992 WL 240344, at *5 n.7 (Del. Super.) (quoting *Lieberman v. First Nat'l Bank*, 45 A 901, 903 (Del. 1900)).
[139] 246 A.2d 794 (Del. 1968).

> It is the well recognized function of the courts to construe statutes of limitations so as to establish just and reasonable guidelines for different classes of cases in light of the general policy repose. Our holding here is no more an exception and encroachment upon the legislative function than the judge-made rule, long established and unquestionably accepted, that fraudulent concealment tolls the running of the statute of limitations until such time as the cause of action is discovered or could have been discovered by the exercise of due diligence.[140]

Where a plaintiff alleges some affirmative act by the defendant that "either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth,"[141] the plaintiff carries his burden of pleading facts sufficient to demonstrate the applicability of this tolling doctrine.[142]

Turning to Van Lake's Complaint, and accepting the well-pleaded factual allegations as true, the Court finds that Van Lake has sufficiently pled fraudulent concealment for tolling purposes. Van Lake has proffered numerous affirmative acts of concealment, which put Van Lake "off the trail of inquiry." For instance, Van Lake avers that he was specifically and repeatedly told that he would retain the relationships he had successfully developed at St. Jude, that his territory at Sorin would include the high-producing physician Accounts, and that he would have

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[140] *Id*. at 798.

[141] *See Smith v. Mattia*, 2010 WL 412030, at *5 (Del. Ch.) (quoting *In re Tyson Foods, Inc., Consol. S'holders Litig*., 919 A.2d 563, 585 (Del. Ch. 2007)).

[142] *Smith v. Mattia*, 2010 WL 412030, at *5 (citing *Certainteed Corp. v. Celotex Corp*., 2005 WL 217032, at *6 (Del. Ch.)). *See also Snyder*, 1992 WL 240344, at *10 ("[A]s Plaintiffs have successfully pled fraudulent concealment, the affirmative statute of limitations defense turns on a question of fact, and relief on a motion to dismiss is not appropriate. Defendants may contest at trial the factual issues as to whether they committed the affirmative act of concealment alleged; and whether Plaintiffs, by exercise of due diligence, should have discovered the concealment alleged at such time as to be barred from recovery by operation of the statute of limitations.") (citations omitted)

exclusive rights to those Accounts upon the expiration of his one-year non-compete agreement with St. Jude.[143] When the draft ISR Agreement did not include the promised Accounts, Van Lake questioned Sorin's in-house counsel about the omission. Van Lake was again assured that those Accounts would be transferred to him upon expiration of the non-compete agreement, but that such an express provision could not be included in the ISR Agreement for fear of litigation by St. Jude.[144]

Van Lake reasonably relied upon Sorin's assurances and advice.[145] The Complaint states facts sufficient to allege that every time Van Lake questioned Sorin about the promised Accounts, Sorin engaged in affirmative acts and made false representations, promises, and assurances to keep him from leaving (thereby avoiding competition from Van Lake in the CRM business in Arizona for several years),[146] knowing its representations were false, and that it could not deliver the promised Accounts. The Court finds sufficient factual allegations to support Van Lake's claim that he was prevented from learning material facts about Sorin's intent and ability to provide the Accounts, and that Sorin's conduct led him away from the truth.[147]

[143] *See* Complaint at ¶¶ 15, 16, 18, 20, 23, 29.
[144] *See id*. at ¶ 17.
[145] *See id*. at ¶¶ 17, 22, 23.
[146] *See id.* at ¶ 19.
[147] *Id.* at ¶ 38.

The question then becomes at what point could Van Lake have discovered, through the exercise of due diligence, Sorin's fraudulent conduct. Van Lake alleges he did not discover the fraud until he received Caforio's "cease and desist" letter in July 2010.[148] Although he fails to specifically allege in his Complaint that he could not have discovered the fraud through the exercise of due diligence before receiving that "cease and desist" letter, he does allege facts sufficient to support such a claim for purposes of a motion to dismiss.[149]

Equitable Tolling

Finally, Van Lake contends that the facts of the case warrant tolling under the doctrine of equitable tolling. Equitable tolling "applies when a plaintiff reasonably relies on the competence and good faith of a fiduciary."[150] If plaintiff meets this burden, the statute of limitations is tolled until plaintiff was "objectively aware of the facts giving rise to the wrong, *i.e.,* on inquiry notice."[151]

Plaintiff's complaint fails to allege a fiduciary relationship between Sorin and Van Lake. To the contrary, the allegations demonstrate that Sorin and Van Lake, both sophisticated and experienced, entered into an arms-length transaction

[148] *Id*.
[149] *See Reid v. Thompson Homes at Centreville, Inc*., 2007 WL 4248478, at *8 (Del. Super.) (declining to grant Defendant's motion to dismiss after concluding that, although the Complaint did "not provide any specificity as to Plaintiffs' knowledge extent, or time of knowledge, or legitimacy if the absence of knowledge," the claim had been raised and the factual record should be developed).
[150] *Sunrise Ventures*, 2010 WL 363845, at *6 (quoting *Stevanov v O'Connor*, 2009 WL 1059640, at *9 (Del. Ch.)).
[151] *In re American Intern. Group, Inc*., 965 A.2d 763, 812 (Del. Ch. 2009) (quoting *In re Dean Witter P'ship Litig*., 1998 WL 442456, at *6).

after extensive negotiations spanning almost a year.[152] While the Court recognizes that some relationships may "become fiduciary by circumstances,"[153] the Complaint fails to plead circumstances sufficient to establish such a relationship existed or developed here. However, given the Court's finding that Van Lake has sufficiently pleaded fraudulent concealment and the discovery rule, the inapplicability of the equitable tolling doctrine does not change the outcome of this motion.

C. Negligent Misrepresentation

Sorin argues that this Court lacks subject matter jurisdiction over Count III of Van Lake's Complaint – negligent misrepresentation.[154] According to Sorin, the Court of Chancery has exclusive jurisdiction to hear claims of negligent misrepresentation.[155] Sorin, therefore, urges the Court to dismiss this count for lack of jurisdiction.

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[152] *See, e.g.,* Complaint at ¶ 2 ("Van Lake…is an experienced, well-trained and highly respected medical sales representative" who had a "top tier position with St. Jude…."); ¶ 3 ("Sorin is a global medical device company…."); ¶ 6 ("Van Lake…[was] the number one generating producer in Arizona, and one of the top producers for St. Jude in the western United States.").

[153] *See, e.g., Manno v. BAC Home Loans Servicing, LP*, 2011 WL 3844900, at *6 (W.D. Tex.) ("[B]ecause not every relationship involving a high degree of trust and confidence rises to the stature of a formal fiduciary relationship, the law also recognizes the existence of an informal or confidential fiduciary relationship. An informal fiduciary relationship may arise from a moral, social, domestic, or purely personal relationship of trust and confidence.") (citations omitted); *St. John's Univ., N.Y. v. Bolton*, 757 F.Supp.2d 144, 166 (E.D.N.Y. 2010) ("[A] fiduciary relationship embraces not only those the law has long adopted—such as trustee and beneficiary—but also more informal relationships where it can be readily seen that one party reasonably trusted another."); *Whittle v. Ellis*, 122 So.2d 237 (Fla. Dist. Ct. App. 1960) ("[T]he term 'fiduciary or confidential relation' is recognized as being very broad … It embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies upon another.").

[154] Def's. Op. Br. at 4-5.

[155] *Id.*

In response, Van Lake contends that this Court has jurisdiction over Count III because it is based upon negligence.[156] According to Van Lake, Count III is premised on "the existence of a duty of care on the part of Sorin to provide accurate and truthful information about the scope of Van Lake's sales territory."[157] Van Lake further argues that Sorin breached this duty by "negligently ma[king] … material misrepresentations to Van Lake."[158] Such averments, Van Lake contends, adequately state a claim for negligence under Delaware law.

It is well-settled Delaware law that the Court of Chancery has exclusive jurisdiction over claims of negligence misrepresentation.[159] "The one exception to the exclusive jurisdiction of the Court of Chancery would be cases where the negligent misrepresentation claim is raised in the context of the Consumer Fraud Act."[160]

Plainly, Count III is not premised on any alleged violation of the Consumer Fraud Act. Therefore, at first blush, it would appear that this Court lacks subject matter jurisdiction over Count III of the Complaint. However, the Court's analysis does not end here. As noted by this Court in *Radius Services, LLC v. Jack Corrozi*

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[156] Pltf's. Ans. Br. at 10.
[157] *Id.* at 17.
[158] *Id.* at 17-18.
[159] *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc*., 2011 WL 5593163, at *4 (Del. Super.); *see also Mark Fox Group, Inc. v. E.I. duPont de Nemours & Co.,* 2003 WL 21524886, at *6 (Del. Ch.) ("In addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action.").
[160] *Iacono v. Barici*, 2006 WL 3844208, at *5 (Del. Super.) (citing *Atwll v. RHIS, Inc*., 2006 WL 2686532, at *2 (Del. Super.))

Construction, Inc.,[161] in examining a negligent misrepresentation claim, the Court must go one step farther. In this regard, the Court must look beyond the "labeling" of the claim and examine its substance to determine the true nature of the claim.[162] Therefore, the question before the Court is whether Count III sounds in negligence or negligent misrepresentation.[163]

The Court finds that Van Lake has pled simple negligence. "[P]leading a cause of action in negligence requires that 'a defendant [] be put on notice of what duty was breached, who breached it, the breaching act, and the party upon whom the act was performed.'"[164] In his Complaint, Van Lake avers the following: Sorin had a duty to provide accurate information to Van Lake; Sorin breached its duty by negligently making misrepresentations to Van Lake; Van Lake justifiably relied on Sorin's representations; and as the proximate result of Sorin's misrepresentations, Van Lake was damaged.[165] Such allegations adequately state a negligence claim. Therefore, this Court has subject matter jurisdiction over Count III.

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[161] 2009 WL 3273509 (Del. Super.).
[162] *Id.* at *3 n.10; *see also Mark Fox Group*, 2003 WL 21524886, at *5 ("Merely labeling a count in a complaint as 'Innocent or Negligent Misrepresentation,' without more, however, fails to properly invoke th[e] [Court of Chancery's] jurisdiction.").
[163] *State Dep't of Transp*, 2011 WL 5593163, at *4.
[164] *Atwell*, 2006 WL 2686532, at *1 (quoting *Anderson v. Airco, Inc.*, 2004 WL 1551484, at *2 (Del. Super.)).
[165] Complaint at ¶¶ 58, 59, 61.

D. Representations of Past or Present Material Fact

Sorin maintains that all three counts must be dismissed because Van Lake failed to allege that Sorin made representations of past or present material fact. According to Sorin, all of Van Lake's claims relate to unfulfilled future promises and, thus, cannot support a fraud claim.[166] Specifically, Sorin contends that all of the alleged misrepresentations relate to the *future* transfer of the Accounts to Van Lake upon the expiration of his non-compete agreement with St. Jude.[167] Van Lake counters by arguing that Sorin's misrepresentations involve a future event that falsely implies an existing fact.[168]

To plead a claim for fraud under Delaware law, a plaintiff must allege: (1) a false representation, usually one of fact, made by the defendant; (2) with knowledge or belief of its falsity or with reckless indifference to the truth; (3) with intent to induce action or inaction; (4) plaintiff's response was taken in justifiable reliance on the representation; and (5) an injury resulting from such reliance.[169] Here, Van Lake alleges that the misrepresentations and numerous, repeated assurances made by Sorin representatives falsely implied the existing fact that Sorin intended to deliver, and was capable of delivering, the Accounts to Van

[166] Def's. Op. Br. at 11.
[167] *Id*. at 12.
[168] Pltf's. Ans. Br. at 31.
[169] *Anderson v. Airco, Inc*., 2004 WL 1551484, at *7 (Del. Super.) (citations omitted).

Lake.[170] The allegations of the Complaint, accepted as true, aver that Sorin made the representations with knowledge or belief of their falsity or with reckless indifference to the truth.[171] Van Lake's fraud allegations are sufficient to withstand a 12(b)(6) motion to dismiss.[172]

V. CONCLUSION

For the reasons stated above, the Defendant's Motion to Dismiss Plaintiff's Complaint is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden Judge

[170] *See* Complaint at ¶¶ 9, 15, 16, 17, 18, 23, 30, 31, 33, 34.

[171] *See id*. at ¶ 1 (Sorin "had either no intention of honoring its promises or knew it did not have the ability to do so."); ¶ 2 (Sorin's "assurances…were false. Either the Company had no intention of providing the Accounts to Van Lake…or it knew that it could not effectively promise Van Lake any territory in Arizona because it did not have the ability to deliver the Accounts."); ¶ 39 (Sorin "continually misrepresented its intentions and/or ability to deliver the Accounts…."); ¶ 42 (Sorin "made these representations and inducements…with knowledge or belief as to their falsity, with reckless indifference to their accuracy.…The Company either had no intention of providing the Accounts…or…[it] knew it did not have the ability…[to do so]."); ¶ 50 ("Sorin made these representations with the knowledge or belief as to their falsity, or with reckless indifference to their accuracy, in that the Company either had no intention of providing the Accounts to Van Lake, or the Company knew it did not have the ability to provide the Accounts to Van Lake."). *See also* Pltf's. Ans. Br. in Opp. to Deft's. Mot. to Dism. [Trans. ID 45205984] at 32 (Van Lake's allegations are not mere unfulfilled promises, but constitute representations of present fact that were material to Van Lake's decision to enter into the ISR Agreement and to stay on with Sorin….Sorin and its officials knew they did not have the ability or authority to secure the Accounts for Van Lake each time they made representations to that effect.).

[172] *See Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch.) (citations omitted). ("A false assertion presupposes that…a duty has been performed…or that an authority exists,…which may have induced the contract or prevented its being consummated.").