IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARK FURNARI, Plaintiff v. WALLPANG, INC. f/k/a SHAPEWRITER, INC., WALDEMAR HARRY GREINER, and NUANCE COMMUNICATIONS, INC., Defendants.	)	C.A. No. 13C-04-287 JRJ CCLD

Submitted: April 2, 2014
Decided: April 16, 2014

OPINION

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JURDEN, J.

In May 2010, Defendants Shapewriter, Inc. ("Shapewriter") and Nuance Communications, Inc. ("Nuance") executed an asset sale agreement. Plaintiff Mark Furnari ("Furnari" or "Plaintiff"), a Shapewriter employee, claims he facilitated the deal and is owed commission. Plaintiff filed the instant suit against Shapewriter for, *inter alia*, breach of contract, and has named Nuance as a successor-in-interest. Defendants Shapewriter and Nuance have separately moved to dismiss pursuant to Superior Court Civil Rule 12(b)(6), or alternatively for summary judgment. For the following reasons, Defendants' motions are **DENIED, in part,** and **GRANTED, in part.**

I. FACTS

Defendant Wallpang, Inc. ("Wallpang") formerly known as Shapewriter, a Delaware corporation based in Ontario, Canada, developed and licensed software applications for use in the wireless communication industry.[1] Plaintiff and Shapewriter's relationship began in March 2009, when Shapewriter scouted Plaintiff to take over its Business Development and Marketing Group and lead the company's external strategy and licensing for prospective customers.[2] In April 2009, Plaintiff and Shapewriter executed an employment contract naming Plaintiff vice president of Business and Strategic Partner Development.[3] The employment contract detailed Plaintiff's compensation to include "a percentage of the company,

[1] Compl., Trans. ID 51998286, ¶ 9.
[2] *Id*. ¶ 10.
[3] *Id*. ¶ 11-12.

deferred salary of $200,000, [and] 5% commission on any business activity he was party to," in addition to reimbursement of all business related expenses.[4]

In late July 2009, Defendant Waldemar Harry Greiner ("Greiner"), Shapewriter's President, told Plaintiff that the owners wanted to sell Shapewriter.[5] Greiner and Plaintiff discussed strategies to sell Shapewriter to Dell or Nuance.[6] Greiner verbally agreed to pay Plaintiff 15% commission on any sale proceeds.[7]

Between March and November 2009, Plaintiff alleges Greiner and other Shapewriter executives made several "affirmative misrepresentations […] to induce Plaintiff into agreeing to market Shapewriter."[8] Those alleged misrepresentations included: (1) that Plaintiff would receive a written contract detailing his commission upon Shapewriter's sale; (2) that Plaintiff would receive a commission upon Shapewriter's sale; (3) that Plaintiff would be reimbursed for all expenses incurred as part of Shapewriter's marketing and discussions with potential buyers; and (4) that Plaintiff would be involved in the discussions with any potential buyer.[9] Plaintiff alleges he reasonably relied on all of Defendants' misrepresentations.[10]

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[4] *Id*. ¶ 12.
[5] *Id*. ¶ 15.
[6] *Id*. ¶ 15.
[7] *Id*. ¶ 16.
[8] *Id*. ¶ 33.
[9] *Id*. ¶ 34.
[10] *Id*. ¶ 36.

In August and September 2009, Plaintiff discussed merger and acquisition possibilities with Nuance.[11] Nuance was interested and ultimately signed a commitment letter.[12] Plaintiff alleges that "[d]uring the Shapewriter/Nuance negotiations, Shapewriter, through Greiner, committed to continuing negotiations with the understanding that [Plaintiff] would not be included [….]"[13] While Shapewriter was in lockdown negotiations with Nuance, Greiner told Plaintiff that Shapewriter was no longer on the market.[14] Subsequently, however, Shapewriter encouraged Plaintiff to seek alternative buyers.[15]

In December 2009, after several discussions, Greiner and Plaintiff drafted a "revised agreement" confirming Plaintiff's commission on a sale ("the Letter Agreement").[16] Greiner sent the Letter Agreement to Plaintiff, Plaintiff signed and returned the agreement with a hand-written note, "[p]lease countersign, return fully executed Agreement."[17] The Letter Agreement detailed that Plaintiff would "help in any and every way on" a deal with Dell and, if Shapewriter sold to Dell, Furnari would receive a 15% commission.[18] If "and only if" Shapewriter chose to use Dell as leverage to pressure Nuance into buying Shapewriter, then Furnari would

[11] *Id*. ¶ 17.
[12] *Id*. ¶ 18.
[13] *Id*. ¶ 19.
[14] *Id*. ¶ 20.
[15] *Id*. ¶ 21.
[16] *Id*. ¶ 22.
[17] Aff. of Waldemar Harry Greiner ("Greiner Aff."), Trans. ID 53044286, Ex. B.
[18] *Id*. ¶ 1.

receive a 10% commission.[19] The Letter Agreement also stated that Furnari would be reimbursed for outstanding expenses[20] and "abandon [his] salary, stock ownership and other commissions previously discussed."[21] Shapewriter then continued its discussions with Nuance without Plaintiff's involvement.[22]

Plaintiff alleges that between January and March 2010, Greiner informed him that Nuance negotiations had stalled. Around February 2010, Greiner asked Plaintiff to obtain a letter of interest from Dell ("the Dell Letter"), which Shapewriter would use as leverage in the Nuance negotiations.[23] In late February 2010, Greiner informed Plaintiff that Nuance was no longer interested in Shapewriter.[24] But, in early March, and after receiving the Dell Letter, Nuance called a meeting and "within 24 hours thereafter proffered the deal that was ultimately accepted."[25] Shapewriter and Nuance entered an Asset Sale Agreement ("ASA") for $7 million, executed on May 18, 2010.[26] The deal closed and Plaintiff has not been paid commission.

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[19] *Id*. ¶ 2. In whole, the clause states:

> IF (and only if) Shapewriter chooses to use Dell as leverage with Nuance (in any form or fashion), [Furnari] will receive 10% of a Nuance [Shapewriter Merger & Acquisition] value. [Furnari] will provide assistance on Nuance if requested by Shapewriter.

[20] *Id*. ¶ 4.
[21] *Id*. ¶ 5.
[22] *Id*. ¶ 23.
[23] *Id*. ¶¶ 25-28.
[24] *Id*. ¶ 29.
[25] *Id*. ¶ 29.
[26] *Id*. ¶ 30.

Important to note is that the ASA specifically categorizes certain "Purchased Assets" and "Excluded Assets."[27] The "Excluded Assets" category lists "all rights existing under any Contract that is not a Shapewriter Purchased Contract, including the Contracts set forth on Section 1.3(b)(iv) of the Disclosure Schedule."[28] Contained in the Disclosure Schedule's section 1.3(b)(iv) is the "[L]etter [A]greement, dated December 22, 2009, by and between Shapewriter, Inc. and Mark Furnari."[29]

Additionally, the ASA directs that $1 million worth of Nuance shares were to be placed in escrow as "partial security for [] indemnity obligations."[30] The ASA further directs Nuance to retain the escrowed funds "in the event Nuance becomes aware of third party claims which Nuance reasonably believes may result in a demand for indemnification."[31]

On September 1, 2010, Plaintiff filed suit against Greiner and Shapewriter in Florida state court.[32] Greiner and Shapewriter removed the case to federal district court, and the action was dismissed in January 2011 for lack of jurisdiction.[33] In turn, Plaintiff filed against Nuance on May 26, 2011, alleging tortious interference,

[27] Greiner Aff., Ex. A at 7, 9 (the "ASA").
[28] *Id*.
[29] *Id*.; Defts.' Shapewriter and Greiner Op. Br. in Support of Mtn. to Dismiss or in the alternative, for Summary Judgment ("Shapewriter Op. Br."), Trans. ID 53044286, at 2.
[30] Compl. ¶ 39; *see* ASA § 7.3(a).
[31] *Id*. ¶ 40.
[32] Shapewriter Op. Br. 4.
[33] *Id.*

unjust enrichment, and violation of the Florida Deceptive Trade Practices Act.[34] That case was also dismissed for failure to state a claim.[35]

As a result of the initial Florida state court action, in November 2010, Nuance filed a notice to an escrow agent ordering said agent to not distribute funds held in escrow, in accordance with the ASA.[36] On December 21, 2012, Greiner, as representative to several companies,[37] sued Nuance in the Delaware Court of Chancery.[38] Greiner alleges in that suit that Nuance is wrongfully withholding the escrowed funds, and that "the liabilities purportedly at issue in the [Florida suit] were excluded from those assumed by Nuance in the agreement, so Nuance could not have been held liable for them."[39]

On April 26, 2013, Plaintiff filed the instant case alleging six claims: fraud in the inducement stemming from the alleged misrepresentations made between March and November 2009 (Count I); breach of the commission contract based on Shapewriter's failure to pay (Count II); unpaid wages also based on Plaintiff's unpaid commission (Count III); quasi contract/quantum meruit and unjust

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[34] Deft. Nuance Op. Br. in Support of Mtn. to Dismiss or in the alternative, for Summary Judgment ("Nuance Op. Br."), Trans. ID 53536700, at 7.
[35] *Id*.; Transmittal Aff. of Garret B. Moritz, Ex. B, Order Granting Dismissal.
[36] Pltf.'s Ans. Br. in Opp. To Shapewriter Op. Br. ("Ans. to Shapewriter"), Ex. A, at 5, ¶ 28 (the "Chancery Compl.").
[37] *See Waldemar Harry Greiner, as Representative for Leading Profits Limited, Concord Star Holdings, Limited, Wallpang, Inc., f/k/a Shapewriter, Inc., and Shen Xing Hu Lian (Beijing) Technology Co., Ltd. v. Nuance Communications, Inc.*, No. 8146-VCN, Trans. ID 48564239.
[38] *See id.*; Compl. ¶ 38. Vice Chancellor Noble stayed the Chancery action pending resolution of Defendants' motions to dismiss at issue. Trans. ID 54840773.
[39] Ans. to Shapewriter, Chancery Compl. ¶ 28.

enrichment relief based on Plaintiff's efforts to execute a sale (Counts IV and V); a declaratory judgment that Nuance may hold the escrowed funds in abeyance until this litigation is concluded (Count VI). Despite his claims, Plaintiff did not include the Letter Agreement with his initial complaint.

II. DEFENDANTS' ARGUMENTS

Defendants move to dismiss all claims pursuant to Superior Court Civil Rule 12(b)(6), or in the alternative, for summary judgment under Superior Court Civil Rule 56.[40] Shapewriter presents several arguments: (1) Plaintiff's claims are barred by the Statute of Limitations;[41] (2) Plaintiff's fraud claim is duplicative of his breach of contract claim; (3) Plaintiff failed to plead fraud with specified particularity; (4) Plaintiff's quasi-contract claims are duplicative because a valid contract exists; (5) Plaintiff does not have standing to seek declaratory judgment as to the escrowed funds; (6) this Court lacks personal jurisdiction over Greiner; and (7) Nuance is not a successor-in-interest. Nuance adopted Shapewriter's arguments, but submitted its own motion to dismiss in which it elaborated on the

[40] Defendants' Motion to Dismiss includes the Letter Agreement as an exhibit. As a significant document, the Court must review its contents to determine whether Plaintiff has a claim. As such, Defendants move in the alternative for summary judgment based upon the Letter Agreement not being part of the initial complaint. *See* Mot. at 1, n. 1.

[41] Shapewriter Op. Br. 5-14. Plaintiff concedes his unpaid wages claim is not viable. *See* Ans. to Shapewriter 28, n. 7.

successor-in-interest argument.[42] The Court will address Defendants' arguments *seriatim*.

III. STANDARD

A motion to dismiss may only be granted where "it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[43] In reviewing a motion to dismiss, the record must be viewed in a light most favorable to the non-moving party and all reasonable inference considered most strongly in Plaintiff's favor.[44] All well-pled allegations are taken as true.[45]

As a general rule, if "matters outside the pleadings are presented to and not excluded by the Court, the motion [to dismiss] shall be treated as one for summary judgment."[46] Two exceptions to the general rule arise where: (1) an extrinsic document is integral to a plaintiff's claim and is incorporated into the complaint by reference, and (2) the document is not being relied upon to prove the truth of its contents.[47] Where an agreement plays a significant role in the litigation and is

[42] Nuance Op. Br. 14-16.
[43] *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).
[44] *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984).
[45] *Spence v. Funk*, 396 A.2d 967 (Del. 1978).
[46] Super. Ct. Civ. R. 12(b)(6).
[47] *Furman v. Delaware Dept. of Trans.*, 30 A.3d 771, 774 (Del. 2011).

integral to a plaintiff's claims, it may be incorporated by reference without converting the motion to a summary judgment.[48]

IV. DISCUSSION

A. Statute of Limitations

Defendants' Statute of Limitations argument is two-fold. First, Defendants argue that Delaware's Borrowing Statute applies and, therefore, Delaware's shorter limitations period applies, thereby barring Plaintiff's claims. Defendants also assert that if the Court determines the Borrowing Statute does not apply, the Court must conduct a choice-of-law analysis, under which Plaintiff still loses. As for Plaintiff's breach of contract claim, Defendants argue that the Court must determine when and where the contract became binding and conduct a choice-of-law analysis, regardless.[49]

1. Delaware's Borrowing Statute

It is undisputed that none of Plaintiff's claims arose in Delaware: Plaintiff is a Florida resident, Greiner is an Ontario resident, Shapewriter is a Delaware Corporation based in Ontario, and Nuance is a Delaware Corporation based in

[48] *See Deuley v. DynCorp Intern., Inc.*, 2010 WL 704895, at * 3 (Del. Super. Feb. 26, 2010) (Silverman, J.), *aff'd*, 8 A.3d 1156 (Del. 2010), *cert. denied*, 131 S. Ct. 2119 (2011). Because Plaintiff's case relies on the Letter Agreement executed in December 2009, while not attached to the complaint, the Court will consider it incorporated by reference. Therefore, the Court does not need to review Defendants' motions under a summary judgment standard.

[49] Op. Br. 9. Defendants contend that "the place of contracting is the place where the last act occurred that was necessary to give the contract binding effect." *Id.* (quoting *Liggett Group, Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 138 (Del. Super. 2001)).

Massachusetts. Because the events complained of did not occur in Delaware, Defendants contend that Plaintiff's claims are barred pursuant to Delaware's applicable statute of limitations and/or Delaware's Borrowing Statute.[50]

Plaintiff counters that his prior suits were not the result of "forum shopping," and his action here is timely under Florida law.[51] As to the Borrowing Statute, Plaintiff claims it does not apply because he filed in Delaware only to obtain jurisdiction over Defendants.[52] Plaintiff asserts the lack of "forum shopping" is evidenced by Florida's longer statute of limitations on all his counts.[53] Even if the Court were to apply the Borrowing Statute, Plaintiff asserts that his claims are still timely under Delaware's statute of limitations.[54]

The general rule is that the forum state's statute of limitations applies.[55] Delaware's Borrowing Statute, 10 *Del. C.* § 8121, modifies the general rule:

> Where a cause of action arises outside of this state, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or

[50] Delaware's limitations period for a breach of contract claim is three years; Florida's is five and Ontario's is two. *See* Shapewriter Op. Br. 8-14. Delaware's limitations period for fraud in the inducement is also three years; Florida's is four and Ontario's is two. *Id.*; Ans. to Shapewriter 21, n. 5.
[51] Ans. to Shapewriter 19.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *See e.g., Delargy v. Hartford Accident & Indem. Co.*, 1986 WL 11562, at *2 (Del. Super. Oct. 8, 1986) (Lee, J.), *appeal denied*, 521 A.2d 247 (Del. 1987) (TABLE).

> country where the cause of action arose for bringing an action upon such cause of action.[56]

The Borrowing Statute is designed to prevent a non-resident plaintiff from forum shopping.[57] Specifically, the statute precludes a non-resident from bringing a foreign cause of action, which is barred by that jurisdiction's statute of limitations, in Delaware where the limitations period is longer.[58] Succinctly, Delaware's Borrowing Statute is "designed to address a specific kind of forum shopping scenario – cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware."[59]

The Court is not satisfied that the Borrowing Statute applies here, even considering Plaintiff's two previous filings in Florida, both of which were dismissed for lack of jurisdiction. Importantly, Florida has longer limitations periods than Delaware, making the facts of this case the opposite of what the Borrowing Statute seeks to prevent; Plaintiff is not attempting to circumvent the

[56] 10 *Del. C.* § 8121.
[57] *See Saudi Basic Indus. Corp. v. Mobil Yanbu Oetrochemical Co., Inc.*, 866 A.2d 1, 16-17 (Del. 2005); *Huffington v. T.C. Group, LLC.*, 2012 WL 1415930, at *8-9 (Del. Super. Apr. 18, 2012) (Jurden, J.).
[58] *Delargy*, 1986 WL 11562, at *2.
[59] *Saudi Basic*, 866 A.2d at 16.

expiration of his claims by filing in Delaware, he only seeks jurisdiction over the parties.[60] A finding otherwise would "subvert that statute's underlying purpose."[61]

2. Choice of Law Analysis

Because the laws of Delaware, Florida, and Ontario, Canada are implicated under the facts of this case, the Court must determine which jurisdiction's substantive law applies. In determining which jurisdiction's substantive law applies, the Court considers several factors, including the place of contracting. Defendants argue that because Plaintiff signed the Letter Agreement, sent it to Greiner in Ontario, who in turn counter-signed and returned it to Plaintiff, the Letter Agreement was executed in Ontario. Further, Defendants contend that the remaining Restatement Second of Contracts § 188 factors weigh in favor of Ontario, Canada.

Plaintiff argues the breach of contract claim is timely because it accrued when Shapewriter was sold, entitling Plaintiff to his commission in May 2010. On the same basis, Plaintiff argues his quasi-contract and unjust enrichment claims are timely as those claims cannot accrue any earlier than when the ASA closed and

[60] The Court notes that Delaware is not Plaintiff's only jurisdictional option as Greiner and Shapewriter are based in Ontario, which has shorter limitations periods than either Delaware or Florida. Plaintiff asserts that he filed in Delaware after Greiner filed a December 2012 complaint in Delaware's Court of Chancery, believing he would have jurisdiction here. Ans. to Shapewriter 19. Even if Plaintiff filed in Ontario, that does not mean he would have jurisdiction over Nuance. Viewing the facts in the light most favorable to Plaintiff, the Court finds he was not forum shopping and the Borrowing Statute does not apply here.

[61] *Saudi Basic*, 866 A.2d at 16.

his commission was due. Plaintiff also argues that the Court should not conduct a choice of law analysis at this early stage, but if the Court so chooses, then under Delaware's choice of law analysis, Florida law applies.[62]

In determining which jurisdiction's law applies, Delaware utilizes the "most significant relationship" test as set forth in the Restatement (Second) Conflicts of Laws, Section 188, in addition to several principals for consideration.[63] Section 188 provides, in pertinent part:

> In the absence of an effective choice of law by the parties, the contacts to be taken into account […] include (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Section 6 provides seven principles to consider: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied.[64]

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[62] Ans. to Shapewriter 19.
[63] *See Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. 2001); Restatement (Second) of Conflicts of Laws §§ 6, 188.
[64] Restatement (Second) of Conflicts of Laws § 6.

i. Place of Contracting

The parties heavily dispute the Letter Agreement's place of contracting: Plaintiff asserts the Letter Agreement became binding when he signed it and faxed it to Greiner; Defendants assert the Letter Agreement was executed in Ontario after Greiner countersigned, per Plaintiff's request. In contesting Plaintiff's argument that the Letter Agreement was a simple "offer and acceptance," Defendants summarize that the document reflected: "(1) an agreement reached by the parties mutually, after extensive negotiations, (2) [that] both parties were to signify their agreement by their signature, and (3) th[at the] agreement was not considered to be 'fully executed' until it was 'countersigned' by Shapewriter."[65]

Both parties cite to *Century Industries, Inc. v. Benoit*[66] for the proposition that "[i]n a case where an offer is made and an acceptance by the offeree is expected, the acceptance will create a valid and binding contract."[67] In *Century Industries*, the Court of Chancery stated that, "[a]cceptance is an expression of assent to the terms of the offer," and "is made when it is transmitted to the offeror regardless of whether it reaches him or where it happens to do so."[68] The parties do not offer case law regarding the formation of a contract in regard to a counter-

[65] Shapewriter Reply 11.
[66] 1979 WL 174445, at *1 (Del. Ch. Sept. 5, 1979) (Hartnett, V.C.).
[67] *Id*. at *2.
[68] *Id.*

signature, but Defendants assert that Greiner's signature was the "last act" required to make an enforceable contract.

The Court finds that the Letter Agreement became enforceable upon Plaintiff's signature in Florida. The Letter Agreement was in essence an employment contract negotiated between the parties, executed "[a]fter numerous discussions." Greiner faxed Shapewriter's employment offer, drafted on Shapewriter letterhead, to Furanri with the expectation that Furnari's signature would constitute acceptance. Plaintiff received the offer, signed it, and in turn requested a countersigned copy.[69] The Letter Agreement makes no indication that the its enforceability is contingent upon Greiner's countersignature, rather it states, "effective as of the signing date of our agreement, December 22nd."

Because Plaintiff accepted the offer by his signature, the Court finds the contract formation took place in Florida. This does not, however, end the Court's choice of law analysis, because this is only one of several factors to be considered.

ii. Remaining Restatement (Second) Conflicts of Laws Analysis

The parties agree that the place of negotiations is a "wash" because Greiner negotiated the Letter Agreement from Ontario and Plaintiff negotiated from "Florida and elsewhere."[70] As to the place of performance, Defendants assert it is of little importance because it was "unspecified and uncertain […] or it is Ontario

[69] Furnari's mere request for a countersigned copy is not enough to invalidate his acceptance. *See* 2 Williston on Contracts §6:13 (2013).
[70] Shapewriter Op. Br. 11; Ans. to Shapewriter 17.

because that is where Shapewriter is based and from where the payment to Furnari would be made."[71] Plaintiff argues that Florida is the place of performance because the "vast majority of [] discussions with Dell took place via telephone while Furnari was in Florida," and Shapewriter sent Furnari's payments to Florida.[72] The Court finds the majority of performance took place in Florida.

As for the Letter Agreement's subject matter, Defendants argue that it bears little weight and "Furnari's assistance in negotiations [… do not have] any definitive location."[73] Plaintiff counters that it was his "expertise and negotiations" that Defendants contracted to pay a commission for, thus Florida is the significant contact. The Court agrees with Plaintiff on this point.

Considering all the above Restatement factors, the Court finds that Florida has the "most significant relationship" to Plaintiff's claims and his claims are therefore timely. It is evident that Greiner and Shapewriter knew they were contracting with a Florida citizen (with the expectation that Plaintiff's work would be conducted in Florida), and Shapewriter sent payments to Furnari in Florida. The Court's finding is reinforced by the Restatement (Second) Conflict of Laws § 6 principles, specifically that Florida's law will be readily determinable and applied.

[71] Shapewriter Op. Br. 11.
[72] Ans. to Shapewriter 17.
[73] Shapewriter's Op. Br. 12.

B. Fraud Claim is Duplicative and Not Plead with Particularity

Defendants argue that the "misrepresentations" alleged by Plaintiff as a basis for Plaintiff's breach of contract claim cannot be recast to support a separate claim for fraud in the inducement.[74] Defendants contend that "it is well-established that a plaintiff 'cannot bootstrap a claim of breach of contract into a claim for fraud merely by alleging that a contracting party never intended to perform its obligations.'"[75] Defendants similarly contend that Plaintiff's fraud claim only makes vague allegations and fails to identify "the who, what, where, and when" of his claim.[76]

Plaintiff counters that the complaint, when read in its entirety, alleges fraud sufficient to satisfy Superior Court Civil Rule 9(b).[77] Plainitff also contends that based on Florida or Delaware's law, the claims are not barred by the economic loss rule because the breach of contract and alleged misrepresentations involve different facts.[78]

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[74] *Id*. at 15 (citing *Bean v. Fursa Captial Partners, LP*, 2013 WL 755795, at *4 (Del. Ch. Feb. 28, 2013) (Parsons, V.C.)).
[75] *Id*.
[76] Shapewriter Op. Br. 17.
[77] Ans. to Shapewriter 24 (quoting *Garcia v. Signetics Corp.*, 2010 WL 3101918 (Del. Super. Aug. 5, 2010) (Jurden, J.) ("Rule 9(b) operates to '(1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims.'").
[78] Ans. to Shapewriter 26-27.

Superior Court Civil Rule 9(b) requires claims of fraud "be stated with particularity."[79] The core of a fraud claim requires "details regarding time, place and content."[80] A plaintiff "cannot 'bootstrap' a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations."[81] Where a plaintiff claims breach of contract and fraud based upon the same contract, "the alleged misrepresentation(s) must involve either a past or contemporaneous fact or a future event that falsely implies an existing fact."[82] Essentially, a fraud claim alleged contemporaneously with a breach of contract claim may survive, "so long as the claim is based on conduct that is separate and distinct from the conduct constituting breach."[83]

Here, Plaintiff fails to allege separate facts in support of his fraud claim. The "misrepresentations" that Plaintiff alleges occurred between March and November 2009 are affirmatively set forth in the Letter Agreement.[84] Plaintiff asserts that the

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[79] Super. Ct. Civ. R. 9(b).
[80] *Universal Capital Mgmt. v. Micco World, Inc.*, 2012 WL 1413598, *4 (Del. Super. Feb. 1, 2012) (Cooch, R.J.).
[81] *Narrowstep Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010) (Parsons, V.C.).
[82] *Brevet Capital Special Opportunities Fund, LP v. Fourth Third, LLC*, 2011 WL 3452821, at *6 (Del. Super. Aug. 5, 2011) (Slights, J.).
[83] *Taylor v. Maness*, 941 So.2d 559, 564 (Fl. Dist. Ct. App. 2006).
[84] As mentioned, Plaintiff alleged the following misrepresentations: (1) that Plaintiff would receive a written contract detailing his commission upon a sale of Shapewriter; (2) that Plaintiff would receive a commission upon Shapewriter's sale; (3) that Plaintiff would be reimbursed for all expenses incurred as part of Shapewriter's marketing and discussions with potential buyers; and (4) that Plaintiff would be involved in the discussions with any potential buyer. The Letter Agreement sets forth those claims. While not expressly stating Furnari would be involved in negotiations, the Letter Agreement states that Furnari would "help in any and every way on Dell"

essence of the fraud claim is based on the theory that Defendants only needed Plaintiff for his working relationship with Nuance. That theory is contradicted, however, by Plaintiff's own complaint that alleges between January and March 2010, the Nuance negotiations stalled, requiring Plaintiff to obtain the Dell Letter as leverage. Therefore, the complaint only sets forth allegations for breach of contract and fails to otherwise allege, with the requisite particularity, any fraud that occurred prior to the Letter Agreement's execution that "induced" Plaintiff into signing. Notably, at oral argument, Plaintiff's counsel conceded that the fraud and breach of contract claims are essentially an either/or situation.[85]

C. Quasi-contract Claims are Duplicative

Defendants argue that Plaintiff's quasi-contract claims must fail because each claim is clearly based on an existing contract.[86] While recognizing the right to plead in the alternative, Defendants contend that Plaintiff fails to allege an independent basis for the quasi-contract and unjust enrichment claims.

Plaintiff contends that the unjust enrichment and quasi-contract claims are pled as an alternative, a permissible approach "when doubt as to enforceability or meaning of terms in the contract" exist. While Plaintiff does not contest the Letter Agreement's existence, he claims that "Defendants have yet to affirmatively state

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and "provide assistance on Nuance negotiations if requested by [Shapewriter]." Greiner Aff, Ex. B.

[85] *See* Oct. 15, 2013 Hr'g Trans. 69:2-21; 74:13-75:16.

[86] Shapewriter Op. Br. 17-18.

that the contract is enforceable."[87] Plaintiff argues it is premature to dismiss the claims without discovery.

Quasi-contract claims may survive dismissal when pleaded as an alternative to breach of contract, but such claims must be based upon independent factual bases.[88] The court may dismiss quasi-contract and unjust enrichment claims where a plaintiff has failed to allege a right to recovery that is not otherwise controlled by a contract.[89]

Despite Plaintiff's claim, Defendants do not contest the existence of the Letter Agreement or its enforceability. Because the parties concede a valid contract exists, and based upon Plaintiff's concession that the claims were made in an abundance of caution, the Court finds the equitable claims are duplicative and not grounded upon independent factual bases, and therefore they are dismissed.

D. Plaintiff Lacks Standing for Declaratory Judgment

Defendants argue that Plaintiff is improperly seeking a declaratory judgment of another party's rights.[90] Defendants allege that Plaintiff was not a party to the

[87] Ans. to Shapewriter 25.
[88] *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed martin Corp.*, 2009 WL 264088, at *8 (Del. Ch. Feb. 3, 2009) (Noble, V.C.).
[89] *See Palese v. Del. State Lottery Office*, 2006 WL 1875915, at *5 (Del. Ch. June 29, 2006) (Noble, V.C.) ("A party cannot seek recovery under an unjust enrichment theory if a contract is the measure of the plaintiff's right."); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005) (Lamb, V.C.) ("Courts generally dismiss claims for *quantum meruit* on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls.").
[90] Shapewriter Op. Br. 19.

ASA and does not otherwise claim an interest in the escrowed funds.[91] Accordingly, Defendants claim that there is no actual controversy between Plaintiff and the parties to the escrowed funds that requires a judicial determination.[92] Moreover, Defendants allege that several other entities are party to the escrowed funds and Plaintiff failed to join them in this litigation.[93]

Under the *McWane* doctrine, Defendants request that the Court dismiss Plaintiff's request for declaratory judgment because a contemporaneous case in the Court of Chancery involves the escrowed funds.[94] If the Court permits the claim to move forward, Defendants argue that Plaintiff is not entitled to declaratory relief under the unclean hands doctrine.[95] Defendants contend that the cases currently pending are the result of Plaintiff's own action – i.e., suing Nuance in Florida.[96]

Plaintiff argues that his demand for declaratory judgment is proper because Nuance is not releasing the escrowed funds based upon his claims, thereby making Plaintiff the contemplated beneficiary and creating an "actual controversy"

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[91] *Id*.
[92] *Id*. at 19-20.
[93] *Id*. at 20.
[94] *Id*. at 21.
[95] *Id*. at 22.
[96] *Id*. The equitable doctrine of unclean hands is "a rule of public policy to protect the public and the Court against misuse by persons who, because of their conduct, have forfeited the right to have their claims considered." *Gallagher v. Holcomb and Salter*, 1991 WL 158969, at *4 (Del. Ch. Aug. 16, 1991) (Allen, C.); *see also*, *Milford Power Co., LLC v. PDC Milford Power, LLC*, 866 A.2d 738, 748 (Del. Ch. 2004) (Strine, V.C.). While Plaintiff's Florida litigation resulted in the Court of Chancery action here, Plaintiff's act of filing suit against Defendants is not enough to warrant the severe application of the unclean hands doctrine.

between the parties.[97] Plaintiff further asserts that the other parties are not necessary to this matter because Greiner is a representative and has, therefore, placed the parties on notice. As the representative, Plaintiff argues that the "extraneous parties are certainly not necessary to the present action," and "complete relief can certainly be accorded those already parties given that Mr. Greiner, as representative of all parties, and Shapewriter are parties to the action."[98] Lastly, Plaintiff asks for leave to amend if the Court determines that the other entities are necessary parties.[99]

A claim for a declaratory judgment requires an "actual controversy" between the parties.[100] An "actual controversy" is present where four prerequisites exist: (1) a controversy involving the rights or other legal relations of the party seeking relief; (2) the claim of right or other legal interest is asserted against one which has an interest in contesting a claim; (3) the controversy must be between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.[101] Moreover, because a declaratory

[97] Ans. to Shapewriter 33.
[98] *Id*. at 32.
[99] *Id*. at 33.
[100] *Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).
[101] *Id*.

judgment determines a party's rights, all persons with any interest that would be affected by a declaration must be made a party.[102]

Under the *McWane* doctrine, the Court has great discretion to dismiss or stay a case "when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."[103] The *McWane* doctrine permits a court "to *dismiss or stay* an action in favor of a first-filed action pending in another jurisdiction."[104] Dismissal or stay of the subsequent filing is permissible "where a first-filed suit is pending in a court capable of administering prompt and complete justice, and involves substantially similar parties and issues."[105]

Initially, the Court notes that an "actual controversy" does not exist between the parties because Plaintiff does not have a legal rights under the ASA. Plaintiff was not a party to the ASA and this Court cannot make a determination on a contract in which he was not involved or contemplated. Moreover, the right to the escrowed funds is the subject of the Court of Chancery case and this Court will not

[102] *See* 10 *Del. C.* § 6511.
[103] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
[104] *Chadwick v. Metro Corp.*, 856 A.2d 1066, 2004 WL 1874652, at * 2 (Del. Aug. 12, 2004) (TABLE) (emphasis in original).
[105] *Id*.

usurp the Court of Chancery's jurisdiction.[106] Consequently, Plaintiff's claim for a declaratory judgment as to Nuance's rights to the escrowed funds is dismissed.

E. Personal Jurisdiction Over Greiner

Defendants claim that Greiner was not personally served, rather he received process of service through Shapewriter's registered agent. Defendants argue that while 10 *Del. C.* § 3114 implies an officer of a Delaware corporation consents to service via the corporation's registered agent, such service only applies when the corporate officer is sued in his corporate capacity.

Plaintiff relies on 10 *Del. C.* § 3114, authorizing service on a corporate director, because Greiner's actions occurred in his capacity as a Shapewriter director, resulting in an action against Shapewriter.[107] In the alternative, Plaintiff asserts that Greiner impliedly consented to jurisdiction once Greiner filed the Court of Chancery action against Nuance.[108]

Title 10, section 3114 of the Delaware Code authorizes service on a director of a corporation. Specifically, the statute authorizes "*in personam* jurisdiction in Delaware in actions relating to the defendant's capacity as a director."[109] Title 10, section 3114(b) extends the same jurisdiction over a company's officers. Additionally, "[t]he defense of lack of personal jurisdiction is a personal right" that

[106] *See McWane*, 263 A.2d at 283; Ct. Ch. R. 57.

[107] Ans. to Shapewriter 33.
[108] *Id.* at 34.
[109] *Armstrong v. Pomerance*, 423 A.2d 174, 175 (Del. 1980).

may be waived by consent.[110] A party may waive personal jurisdiction "on the ground that the party consented to jurisdiction by submitting itself to a court's jurisdiction by instituting another, related suit."[111]

The Court notes that Plaintiff's only remaining viable claim is breach of contract stemming from the Letter Agreement. Greiner signed the Letter Agreement in his corporate capacity as Shapewriter's president. Based on that, jurisdiction is viable under 10 *Del. C.* § 3114(b). Even if jurisdiction were not viable under the Code, Greiner filed suit on a related matter in the Delaware Court of Chancery, thereby effectively waiving the lack of personal jurisdiction defense.

F. Nuance is not a Successor-in-Interest

In each claim asserted against Nuance, the complaint specifically states that "the liability asserted against Nuance is as a successor in interest to Shapewriter, as Nuance assumed the liabilities of Shapewriter pursuant to the ASA."[112] Defendants assert that the ASA "flatly contradicts" Plaintiff's "conclusory allegation and shows that Nuance is not the successor in interest to [Shapewriter]."[113] Moreover, Defendants allege that the ASA's disclosure schedule specifically excludes Plaintiff's letter agreement from the sale.[114]

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[110] *Foster Wheeler Energy Corp. v. Metallgesellschaft AG*, 1993 WL 669447, at *1 (D. Del. Jan. 4, 1993) (Robinson, D.J.).
[111] *Id*.
[112] Compl. ¶¶ 56, 62, 70, 76, 84, 90.
[113] Shapewriter Op. Br. 24.
[114] *Id.* at 25.

Plaintiff asserts that there are "two big picture themes" underlying his claims against Nuance: (1) Nuance is liable as successor in interest to Shapewriter; and (2) "while the ASA generally describes the escrow's purpose as covering Shapewriter's indemnity obligations to Nuance, the parties' conduct shows that they established the escrow deal with Furnari's claims, regardless of whether the parties excluded the December 2012 Agreement as an acquired asset or liability."[115] Plaintiff concedes, however, that the ASA expressly excludes the Letter Agreement as an acquired asset or assumed liability, but makes two alternative damages claims.[116] First, relying on the ASA and "Nuance's judicial admissions," Plaintiff asserts that liability is alleged against Nuance as a successor-in-interest under one of four possible theories: (1) Nuance assumed the liability; (2) the sale was a *de facto* merger or consolidation; (3) Nuance is a mere continuation of Shapewriter; and (4) fraud.[117] In the event the Court finds that the complaint fails to allege any viable successor-in-interest liability theories, Plaintiff asserts that Nuance knew the exceptions applied because it addressed them in its opening brief.[118] Because Nuance proactively argued against a successor-in-interest theory, Plaintiff asserts that his complaint effectively placed Defendants on

[115] Pltf.'s Reply to Nuance's Op. Br., Trans. ID 54269811, at 1.
[116] Ans. to Shapewriter 27.
[117] *Id.* 28-30.
[118] *Id*. 30.

notice as required by the notice pleading standard.[119] Plaintiff requests discovery in order to pursue the possible successor-in-interest theories.[120] Next, Plaintiff argues that fraud in the inducement damages are explicitly covered by the ASA.[121]

When a company transfers all its assets to another company, the asset purchaser is generally not liable for seller's liabilities.[122] There are exceptions to the rule, such as where avoidance of liability would be unjust, the buying company contractually assumed the liability, or a *de facto* merger occurred.[123] A plaintiff bears the burden to "adequately plead in its complaint the element of the alleged exceptions to the general rule" that asset purchasers do not bear "successor corporate liability."[124]

In conclusory fashion, Plaintiff alleges that "the liability asserted against Nuance is as a successor in interest to Shapewriter, as Nuance assumed the liabilities of Shapewriter pursuant to the ASA," but is unable to point to any language in the complaint that supports his theories of *de facto* merger or mere

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[119] *Id.*; *See* Super. Ct. Civ. R. 9(b); *Garcia v. Signetics Corp.*, 2010 WL 3101918 (Del. Super. Aug. 5, 2010) (Jurden, J.) ("Rule 9(b) operates to '(1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims.'").

[120] *Id*.

[121] *Id*. 27. Because the Court has declared that Plaintiff failed to allege a fraud in the inducement claim, the Court will not consider the related argument regarding the viability of fraud damages under the ASA.

[122] *Ross v. Desa Holdings Corp.*, 2008 WL 4899226, at *4 (Del. Super. Sept. 20, 2008) (Johnston, J).

[123] *See Id*.

[124] *Magnolia's At Bethany, LLC v. Artesian Consulting Eng'rs, Inc.*, 2011 WL 4826106, at *1 (Del. Super. Sept. 19, 2011) (Bradley, J.).

continuation. While Plaintiff requests discovery in order to develop his theories, he has an obligation to plead "the exception[] to the general rule" that Nuance did not retain liability. Plaintiff has failed to do so. The fact that Defendants asserted a defense against possible successor-in-interest theories does not alleviate a plaintiff's duty to properly allege a claim.[125] Based on that, and because the parties agree that the ASA explicitly states Nuance did not acquire or assume liability stemming from the Letter Agreement, Nuance is dismissed.

V. CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, is **DENIED, in part,** and **GRANTED, in part**. Plaintiff is not given leave to amend.[126] Counts I, IV, V, and VI are dismissed. Plaintiff's breach of contract claim survives.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

[125] That is especially true in instances such as here, where a Plaintiff is suing a new corporation that otherwise had no part in the contract at issue.

[126] A request for leave to amend is determined by the discretion of the Court, where justice so requires. *See* Super. Ct. Civ. R. 15(a). In the absence of substantial prejudice or legal insufficiency, the Court must exercise its discretion in granting an amendment. *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb. 29, 2008) (Vaughn, P.J.). Based on the Court's reasoning *supra*, the request to amend is denied. That decision is reinforced by the fact that this is Plaintiff's third complaint filed against Defendants.