IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN RE BRACKET HOLDING CORP. LITIGATION	) CONSOLIDATED) C.A. No. N15C-02-233 WCC CCLD

Submitted: January 31, 2017
Decided: July 31, 2017

Express Scripts, Inc. and United BioSource LLC's Motion to Dismiss Bracket Holding Corp.'s Amended Complaint – DENIED

Jim Stewart's Motion to Dismiss Bracket Holding Corp.'s Amended Complaint – GRANTED

Bracket Holding Corp. and PCP Managers LLC's Motion to Dismiss Counts I, II, IV and V of United BioSource LLC's Amended Complaint – GRANTED in Part and DENIED in Part

MEMORANDUM OPINION

David E. Ross, Esquire, Nicholas D. Mozal, Esquire, Ross Aronstam & Moritz LLP, 100 S. West Street, Suite 400, Wilmington, Delaware 19801. Of Counsel: Reed S. Oslan, P.C., Scott A. McMillin, P.C., Leslie S. Garthwaite, Esquire, Brett A. Nerad, Esquire, Kirkland & Ellis LLP, 300 North LaSalle Chicago, Illinois 60654. Attorneys for Bracket Holding Corp. and PCP Managers LLC.

Edward B. Micheletti, Esquire, Cliff C. Gardner, Esquire, Matthew P. Majarian, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, One Rodney Square, 920 North King Street, Wilmington, Delaware 19801. Attorneys for Express Scripts, Inc. and United BioSource LLC.

Stephen E. Jenkins, Esquire, Catherine A. Gaul, Esquire, Marie M. Degnan, Esquire, Ashby & Geddes, P.A., 500 Delaware Avenue, 8th Floor, P.O. Box 1150, Wilmington, Delaware 19899. Attorneys for Jim Stewart.

CARPENTER, J.

Three motions to dismiss have been filed in this consolidated matter: (1) Express Scripts, Inc. and United BioSource LLC's Motion to Dismiss Bracket Holding Corp.'s Amended Complaint; (2) Jim Stewart's Motion to Dismiss Bracket Holding Corp.'s Amended Complaint; and (3) Bracket Holding Corp. and PCP Managers LLC's Motion to Dismiss Counts I, II, IV, and V of United BioSource LLC's Amended Complaint. For the foregoing reasons, the Motion of Express Scripts, Inc. and United BioSource LLC is **DENIED**, Jim Stewart's Motion is **GRANTED**, and Bracket Holding Corp. and PCP Managers LLC's Motion is **GRANTED in Part** and **DENIED in Part**.

I. BACKGROUND

A. The Parties

Express Scripts, Inc. ("ESI"), a Delaware corporation engaged in pharmaceutical support services and benefits management, purchased United BioSource LLC ("UBC") in April of 2012.[1] Among other subsidiary entities, UBC owned Bracket Global Holdings LLC, Bracket Global K.K., and Bracket Global Limited (collectively, "the Company").[2] In June of 2013, Parthenon Capital

[1] Bracket Holding Corp.'s Am. Compl. ("BAC") ¶¶ 7-8. UBC is apparently wholly-owned by non-party United BioSource Holdings, which is a wholly-owned subsidiary of ESI. United Biosource LLC's Am. Compl. for Breach of Contract and Tortious Interference ("UAC") ¶ 13.
[2] BAC ¶ 1.

Partners ("Parthenon"), a private equity fund, formed Bracket Holding Corp. ("Bracket") for purposes of purchasing the Company from UBC ("Transaction").[3]

Jim Stewart ("Stewart") was the Company's Vice President of Finance and Controller for its Scientific Services division at all relevant times prior to closing.[4] On August 15, 2013, after the Transaction closed, Stewart was appointed as Bracket's Vice President of Finance and Secretary.[5]

B. Marketing & Sale of the Company

ESI and UBC began marketing the Company for sale in the fall of 2012.[6] ESI, through its agents and employees, apparently "exercised significant control over the process of selling the Company."[7] ESI hired Credit Suisse Securities (USA) LLC ("Credit Suisse") as a financial advisor and KPMG LLC ("KPMG") to perform seller-side due diligence.[8] Credit Suisse prepared a Confidential Information Memorandum ("CIM"),[9] and KPMG conducted a Quality of Earnings ("QoE") investigation and issued its findings in a February 2013 QoE Report.[10]

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[3] Bracket is a Delaware corporation. *Id.* ¶ 6.
[4] *Id.* ¶ 142.
[5] *Id.* ¶ 143.
[6] *Id.* ¶ 16.
[7] *Id.* ¶ 20. ESI's "employees and agents were personally involved in the marketing of the Company and the sale transaction, including Benjamin Bier, David Norton, Jennifer Seeser, Dean Milcos, Michael Kennedy, Chris McGinnis, Joseph Satorius, and Jamie G. Kates." *Id.*
[8] *Id.* ¶ 17.
[9] BAC Ex. A [hereinafter CIM].
[10] BAC Ex. B [hereinafter QoE].

Both the CIM and QoE Report would be provided to potential purchasers in connection with the sale of the Company.[11] The materials reflected, among other things, the Company's historical earnings before interest, tax, depreciation, and amortization ("EBITDA"), along with current and projected estimates of working capital.[12] The CIM touted the Company as a leading pharmaceutical services provider with a 16.4% increase in revenue from 2009 to 2012.[13] These financial figures were apparently based on historical "unaudited internal management financial statements" and projections supplied by Company management.[14] The QoE Report cited the CIM, information provided by management, and "Q&A sessions" with Stewart and others as the "key sources" KPMG relied upon in arriving at its QoE findings.[15]

ESI and UBC collected and prepared the financial information KPMG and Credit Suisse used to complete the CIM and QoE Report.[16] In this regard, ESI and UBC worked closely with Stewart, as the Company's then-Vice President of Finance and Controller of the Scientific Services division.[17] Throughout the sales process, Stewart was "substantially involved and worked closely with ESI and

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[11] BAC ¶ 17.
[12] *Id.* ¶ 18.
[13] *Id.* ¶ 21.
[14] CIM at 60.
[15] QoE at 7.
[16] BAC ¶ 17.
[17] *Id.* ¶ 19.

UBC in responding to due diligence requests with respect to the Company's revenue recognition policies and financial statements."[18]

At ESI's direction, UBC sent a copy of the CIM to Parthenon in October of 2012. Based on the representations contained in the CIM and conversations with Credit Suisse personnel, Parthenon viewed the Company as a potential acquisition target. On January 3, 2013, Parthenon sent Credit Suisse an indication of interest.[19]

Several meetings among Parthenon, Company management, and representatives of both ESI and UBC took place in January and February of 2013.[20] On February 22, 2013, Parthenon sent a letter of intent to purchase the Company.[21] Thereafter, Parthenon continued to perform due diligence, which included review and consideration of the QoE Report, the Company's financials, and customer agreements. Parthenon also engaged auditors from Ernst & Young to further assist with the diligence process.

On April 13, 2013, Parthenon submitted a revised letter of intent based collectively on the CIM, QoE Report, and the represented historical financial information of the Company through March 31, 2013. These financials reflected that the Company continued to generate over $30 million in EBITDA over the

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[18] *Id.* ¶ 50.
[19] *Id.* ¶¶ 23-25.
[20] *Id.* ("Included among these early meetings was a January 23, 2013 road show presentation which was attended in person by Catherine Spear (President), Jim Stewart (VP Finance) and others from the Company, and telephonically by Benjamin Bier of ESI and Annette Vaughan of UBC, among others.").
[21] *Id.* ¶ 26.

prior twelve-month period. Parthenon's intent to purchase the Company would nevertheless remain contingent upon the Company's financial performance through May 2013.

UBC and Credit Suisse provided the May 31, 2013 financial statements to Parthenon in early June 2013. The updated financials were based on and incorporated the March 31, 2013 statements, and reflected similar trailing twelve months ("TTM") revenue and EBITDA.[22] UBC and ESI allegedly represented that the financial information was true and accurate.[23]

Satisfied with the information it received about the Company, Parthenon formed Bracket to complete the Transaction.[24] Bracket agreed to purchase the Company from UBC for over $180 million. This final purchase price was apparently based in large part "on ESI's and UBC's represented TTM EBITDA generated by the Company as of May 31, 2013...."[25]

C. The Securities Purchase Agreement

UBC and Bracket entered a Securities Purchase Agreement ("SPA") on July 12, 2013.[26] The SPA included express representations and warranties by UBC as to the accuracy of certain financial information. Specifically, in § 3.4, UBC

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[22] *Id.* ¶ 29.
[23] *Id.*
[24] *Id.* ¶¶ 31-32.
[25] *Id.* ¶ 34. Apparently, "Bracket initially offered a purchase price of $200 million in reliance on the financials presented in the CIM and the materials Credit Suisse provided to Bracket." *Id.*
[26] BAC Ex. C [hereinafter SPA].

represented and warranted that the "Financial Statements" were derived from and consistent with the Company's books and records, had been "prepared in accordance with" U.S. Generally Accepted Accounting Principles ("GAAP"), and "present[ed] fairly in all material respects the financial position and results of operation" of the Company.[27] As defined, "Financial Statements" included the Company's unaudited combined balance sheets as of (1) March 31, 2013 and "related statements of income for the three-month period then ended;" (2) December 31, 2012 and "related statements of income for the twelve-month period then ended;" and (3) December 31, 2011 and "related statements of income for the twelve-month period then ended."[28]

For purposes of the SPA, "Working Capital" was defined as "the sum of the current assets of [the Company]...less the sum of the current liabilities of [the Company], all as determined in accordance with GAAP applied on a basis

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[27] BAC ¶ 39; SPA § 3.4(a). UBC also represented and warranted that "[n]one of the Companies or any of the Company Subsidiaries has any material obligations or material liabilities (whether accrued, absolute, contingent or unliquidated whether or not known, whether due or to become due and regardless of when asserted)," with the exception of:

> (i) obligations under Material Contracts set forth on the Disclosure Schedules or under other Contracts entered into in the Ordinary Course, including without limitation obligations under or with respect to Straddle Contracts, (ii) liabilities reflected on the face of the liabilities side of the Balance Sheet, (iii) liabilities which have arisen after the date of the Balance Sheet in the Ordinary Course, (iv) liabilities incurred in connection with, or as a result of entering into, or the consummation of, the transactions pursuant to, this Agreement, (v) liabilities disclosed on Disclosure Schedule 3.4(b).

SPA § 3.4(b).

[28] SPA § 1.71.

consistent with the preparation of the Benchmark Statement."[29] The SPA incorporated the Company's statement of Working Capital as of May 31, 2013, which the agreement refers to as the "Benchmark Statement."[30] Section 2.4(a) provides that the Benchmark Statement had been "calculated in accordance with GAAP" and identifies a "Benchmark Working Capital" of nearly $11.9 million. [31] Prior to Closing, UBC would provide a statement setting forth its "good faith" estimation of Working Capital. This "Estimated Working Capital" figure was "final and binding for purposes of calculating the Closing Payment," which would be adjusted according to a comparison between the Estimated and Benchmark Working Capital figures.[32] Finally, "Closing Working Capital" would be reflected in a Closing Statement, "prepared consistently with the Benchmark Statement" within 120-days of Closing.[33]

Section 2.5 of the SPA governed post-Closing adjustments to Closing Working Capital. If UBC and Bracket could not promptly resolve disputes concerning the Closing Working Capital,[34] § 2.5 required that they "jointly refer the dispute to KPMG LLP," as "Arbiter," "to finally resolve…all points of disagreement set forth in the Notice of Dispute that remain unresolved with respect

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[29] *Id.* § 1.167.
[30] *Id.* § 2.4(a) (indicating May 31, 2013 statement appeared in Disclosure Schedule 2.4(a)).
[31] *Id.*
[32] *Id.* § 2.4(b).
[33] *Id.* § 2.4(c).
[34] *Id.* § 2.5(b) (allowing parties 30 calendar days to resolve dispute from date UBC received Bracket's Notice of Dispute).

to the Closing Working Capital reflected on the Closing Statement."[35] The SPA provides that the Arbiter's determinations would be "final, conclusive and binding with respect to…Closing Working Capital…in the absence of manifest error."

Closing took place on August 14, 2013. In accordance with SPA Disclosure Schedule 2.3, Bracket wired the funds to close the deal to ESI's account.[36] UBC, at ESI's direction, executed a closing certificate affirming to Bracket that UBC's representations and warranties remained true and correct as of the Closing Date and that all covenants and agreements had been performed.[37] Individuals comprising the "Knowledge Group," including Stewart, likewise signed certificates at closing attesting to the truth and accuracy of representations and warranties contained in the SPA.[38]

D. The Transaction Services Agreement

On August 15, 2013, UBC and Bracket entered a Transition Services Agreement ("TSA").[39] The terms of the TSA pertained to "the provision of certain transitional services in connection with the divestiture and sale of the Compan[y]

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[35] *Id.* (requiring that such resolution be achieved at arbitration "as soon as practicable, and in any event within 45 calendar days after such reference").
[36] *Id.*, Disclosure Schedule 2.3.
[37] BAC ¶ 38, Ex. E.
[38] BAC ¶ 43, Ex. F. Per § 10.13 of the SPA, "knowledge," as used in the agreement with respect to UBC, means anything within the "actual knowledge" of certain key individuals, including Stewart. *See* SPA § 10.13.
[39] UAC Ex. B [hereinafter TSA].

from UBC to [Bracket]."[40] UBC agreed to provide support and human resources services to Bracket for six months post-closing ("Transition Period") and Bracket agreed to promptly compensate UBC for its services.[41] The terms of the TSA required Bracket to pay UBC within 30 days of receiving each invoice. Under § 2(d), Bracket was prohibited from withholding payment to UBC "on account of any obligation owed by [UBC] to [Bracket] that has not been finally adjudicated, settled, or otherwise agreed upon by the parties in writing."[42] Beginning in October 2013, UBC sent Bracket monthly invoices for its services. To date, none of the invoices have been paid.[43]

E. Bracket's Discovery of the Alleged Fraud

The day after the Transaction Closed, August 15, 2013, Stewart was named Bracket's Vice President of Finance and Secretary. However, by December 2013, Stewart's financial reporting and accounting practices were called into question. Bracket's new Chief Financial Officer and consultants apparently "discovered that many of the unbilled receivables" Stewart recorded "were invalid and could never be billed." Further investigation allegedly revealed that Stewart had tracked revenue in a "secret second set of books" and recognized revenue for contracts

[40] TSA at 1.
[41] UAC ¶¶ 108-10, 112-13.
[42] *Id.* ¶ 114.
[43] *Id.* ¶¶ 116, 123.

prior to work being performed, from non-existent and/or terminated contracts, and/or in amounts above contracted totals for active contracts.

As a result of these improper accounting practices, it is alleged that UBC overstated revenue in connection with the sale of the Company by approximately: $8 million in the financial statements provided for the twelve months ended December 31, 2011; $8 million in the financial statements for the twelve months ended December 31, 2012; and $2.8 million in the financial statements for the three months ended March 31, 2013. Additionally, the Closing Working Capital figure was allegedly inflated by $30 million "on a net basis…as a result of the overstatement of revenue's impact on the Company's unbilled receivables and deferred revenue accounts."[44] Overall, Bracket claims it overpaid to acquire the Company by $50 million dollars as a result of the purportedly fraudulent financials Defendants supplied in connection with the Transaction.

F. The Working Capital Arbitration

Bracket filed this litigation on February 27, 2015, alleging, among other things, that UBC, ESI, and Stewart fraudulently induced Bracket to purchase the Company with falsely inflated financial information. On March 26, 2015, UBC filed an action in the Delaware Court of Chancery seeking to compel Bracket to commence arbitration in compliance with the § 2.5(b) of the SPA. The Chancery

[44] BAC ¶ 45.

Court granted UBC's request on November 12, 2015 and ordered the parties to promptly commence the working capital arbitration process in accordance with the SPA (the "Chancery Order").[45] The Chancery Order further provided that "the arbiter will not decide defendant Bracket Holding Corp.'s fraud claims pending in Delaware Superior Court...."[46]

Per § 2.5(b) of the SPA, each party submitted its proposed calculation of Closed Working Capital and related briefing to the Arbiter ("Working Capital Arbitration").[47] Consistent with the Chancery Order, the Arbiter did not consider "[t]he impact of Stewart's fraudulent activities on the estimated Closing Working Capital...."[48] On March 9, 2016, the Arbiter issued its report, ruling in favor of UBC and determining a "Final Working Capital" of $9,687,383 thus entitling Bracket to a price adjustment of $504,591.

G. The Instant Litigation

The proceedings in this Court were stayed pending the outcome of Arbitration and the Chancery Court action. After certain of UBC's claims against

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[45] *Id.* ¶ 70 n. 1 (citing *UBC v. Bracket & PCP Managers LLC*, C.A. No. 10840-CB (Del. Ch.) Nov. 12, 2015 Order).
[46] *See id.*
[47] SPA § 2.5(b) ("For purposes of such arbitration each of Parent and Buyer shall submit a proposed calculation of Closing Working Capital. The Arbiter shall apply the terms of Section 2.4 of this Agreement (including the Agreed Accounting Principles), and...conduct the arbitration under such procedures as the Parties may agree.... Parent and Buyer shall each furnish...such work papers and other documents and information relating to the disputed issues as the Arbiter shall request....").
[48] BAC ¶ 70 n. 1.

Bracket were transferred to this Court from the Court of Chancery, this Court entered an order consolidating UBC's case with the litigation Bracket filed in February of 2015. Both Bracket and UBC filed Amended Complaints on April 13, 2016. Bracket's Amended Complaint asserts a number of claims, including fraud, aiding and abetting, conspiracy, and breach of fiduciary duty against ESI, UBC, and Stewart. UBC's Amended Complaint asserts three counts of breach of contract against Bracket (two based on the SPA and one based on the TSA) and two counts of tortious interference against Parthenon.[49]

UBC and ESI have moved to dismiss Bracket's Amended Complaint pursuant to Delaware Superior Court Civil Rule 12(b)(6) and 9(b) for failure to state a claim upon which relief can be granted and for failure to plead fraud with particularity. Stewart's motion requests dismissal of Bracket's claims against him pursuant to Superior Court Civil Rules 12(b)(1),12(b)(2), 12(b)(6), and 9(b). Finally, Bracket and Parthenon move to dismiss Counts I, II, IV, and V of UBC's Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim.

After two hearings on the motions were held before this Court, the Court reserved decision with respect to UBC and ESI's Motion to Dismiss Bracket's Amended Complaint and Stewart's Motion to Dismiss Bracket's Amended

[49] UBC wrote a letter to this Court in November of 2016, after the hearings on the instant Motions had occurred, indicating that UBC has since filed an additional claim against Bracket for breach of the SPA in the Court of Chancery.

Complaint. The Court denied Bracket's Motion to Dismiss UBC's Complaint as to Count II and reserved decision with regard to Counts I, IV, and V. This Opinion disposes of all outstanding motions.

II. STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted."[50] On a motion to dismiss, the Court accepts as true the well-pleaded allegations of the complaint and gives the plaintiff "the benefit of every reasonable inference to be drawn from those allegations."[51] "In evaluating the complaint, the [C]ourt may also consider the unambiguous terms of those documents incorporated by reference in the complaint, especially when evaluating a claim that those documents make material misstatements of fact."[52] Only if the Court finds with reasonable certainty that a plaintiff "could prevail on no state of facts inferable from the pleadings" will the Court dismiss the Amended Complaint at this preliminary stage.[53]

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[50] *See* Super. Ct. Civ. R. 12(b)(6).
[51] *See Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 548 (Del. Ch. 2001) (citing *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991)). *See also Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996) (citing *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).
[52] *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 188 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007). *See also Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 (Del. Super. 2014) (noting that such documents may be incorporated by reference without converting a motion to dismiss to a summary judgment).
[53] *Solomon*, 672 A.2d at 38 (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

III. ESI AND UBC'S MOTION TO DISMISS BRACKET'S AMENDED COMPLAINT

Bracket's Amended Complaint asserts two counts of fraud each against UBC (Counts I and III) and ESI (Counts II and IV). Counts I and II allege fraud based on the overstated EBITDA. Counts III and IV claim UBC and ESI fraudulently manipulated the Company's working capital. In addition, Bracket asserts claims for aiding and abetting fraud against ESI (Count VII) and conspiracy to commit fraud against ESI, UBC, and Stewart (Count IX). ESI and UBC move to dismiss Bracket's claims against them pursuant to Rule 12(b)(6), on the grounds that: (1) collateral estoppel prevents Bracket from challenging facts decided in the binding Working Capital Arbitration; (2) the fraud claims are merely bootstrapped breach of contract claims; (3) Bracket fails to state a claim for fraud with the requisite particularity; and (4) Bracket fails to state claims for aiding and abetting and/or conspiracy.

A. Collateral Estoppel

ESI and UBC primarily contend that Bracket must be collaterally estopped from challenging facts decided in the Working Capital Arbitration. In response, Bracket argues that application of collateral estoppel would be inappropriate because the Arbitration adjudicated a much *narrower* dispute than that presented in the instant litigation.

The doctrine of collateral estoppel "precludes a redetermination of facts actually litigated and determined in a prior proceeding."[54] Arbitration is included among the "prior actions" to which the doctrine applies.[55] Importantly, it is the burden of the party raising collateral estoppel to show "that the issue whose relitigation [it] seeks to foreclose was *actually decided* in the first proceeding."[56] Ultimately, in order for collateral estoppel to bar Bracket's claims, UBC and ESI must demonstrate that: "(1) a question of fact essential to the judgment (2) [was] litigated and (3) determined (4) by a valid and final judgment."[57] In assessing whether these elements are satisfied, the Court must necessarily "consider the prior adjudication in order to determine whether issue preclusion bars [the] plaintiff's claims."[58]

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[54] *Belfint, Lyons, & Shuman v. Potts Welding & Boiler Repair, Co.*, 2006 WL 2788188, at *3 (Del. Super. Ct. Aug. 28, 2006) (citing *James v. Tandy Corp.*, 1984 WL 8256, at *4 (Del. Ch. Nov. 1, 1984)). *See also Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 89-90 (Del. Ch. 2013) ("[A] judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action." (quoting *E.B.R. Corp. v. PSL Air Lease Corp.*, 313 A.2d 893, 894-95 (Del.1973))).

[55] *See LG Elecs., Inc. v. InterDigital Commc'ns, Inc.*, 98 A.3d 135, 138 (Del. Ch. 2014) (citing *Meso Scale Diagnostics, LLC,* 62 A.3d at 89-90 and *Brown v. T–Ink, LLC*, 2007 WL 4302594, at *14 n. 63 (Del.Ch. Dec. 4, 2007)), *aff'd*, 114 A.3d 1246 (Del. 2015).

[56] *See CompuCom Sys., Inc. v. Getronics Fin. Hldgs. B.V.*, 2012 WL 4963314, at *2 (D. Del. Oct. 16, 2012) (emphasis added) (quoting *Proctor v. Delaware,* 931 A.2d 437, 2007 WL 2229013 (Del. Aug.2, 2007)).

[57] *See HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *9 (Del. Super. Ct. Jan. 16, 2007) (quoting *Taylor v. State,* 402 A.2d 373 (Del.1979)).

[58] *See Laborers' Dist. Council Constr. Indus. Pension Fund v. Bensoussan*, 2016 WL 3407708, at *6 (Del. Ch. June 14, 2016) (quoting *In re Wal–Mart Stores, Inc. Del. Deriv. Litig.*, 2016 WL 2908344, at *8 (Del. Ch. May 13, 2016)) (noting that "strict application" of the standard of review for Rule 12(b)(6) motions "would deprive defendants of the ability to argue for

Bracket's Amended Complaint alleges that the Company's unbilled receivables and deferred revenue were fraudulently inflated, resulting in an overstatement of net working capital by approximately $30 million.[59] While, in hindsight, it would perhaps have been more productive for all issues relating to working capital to have been presented to the Arbiter, that simply did not occur here. While the Court will not comment on the truncated presentation to the Arbiter, what was provided, and why the Working Capital Arbitration proceeded in the manner it did, it is clear to the Court that Bracket's fraud allegations were not factored into the Arbiter's working capital determination and thus, were not "actually litigated" at that time. The directions from the Chancellor did not require such determination and, in fact, the Chancery Order removed it from the arbitration decision unless pursued by Bracket. Bracket's arbitration submissions clearly reflect its intention to remove the fraud issues from the scope of the Working Capital Arbitration. Bracket's January 29, 2016 submission reads:

> In accordance with the terms of the SPA and the Chancery Court's Order, for purposes of this arbitration, Bracket has removed all adjustments from its Working Capital calculation that pertain to and overlap with its fraud claims and the underlying fraudulent accounting issues. Accordingly, Bracket has dropped *all* issues relating to fraud from the arbitration.

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preclusion if, for example, a plaintiff does not plead facts regarding the potentially preclusive litigation or incorporate documents from that litigation into the complaint").

[59] BAC ¶¶ 69-75.

> As Bracket has explained in its Complaint filed in the Superior Court Suit, the Benchmark Statement was prepared using fraudulent financial records. However, solely for the purposes of this arbitration, Bracket will arbitrate the dispute over working Capital, as described under the SPA, without regard to the fraud embedded in the Benchmark Statement and other financial records. For the arbitration only, Bracket removed adjustments to account balances that are based upon or overlap with Bracket's Superior Court fraud claims.

Bracket cites *CompuCom Sys., Inc. v. Getronics Fin. Holdings B.V.*[60] as setting forth the proper scope of arbitration determinations like the one at issue here. In *CompuCom*, the U.S. District Court for the District of Delaware refused to dismiss a plaintiff's fraud claim based on the doctrine of collateral estoppel despite prior arbitration concerning post-closing adjustments to purchase price.[61] The Court recognized that such proceedings generally "encompass[] *narrow* paradigms"[62] and exist "*not* to determine whether the …purchase price agreed to…was 'the fair sale price for the company[,]"'since "the process *assumes the accuracy of the baseline purchase price*[,]" but rather "to account for post-agreement changes in the value of the acquired company over the brief period between the signing and closing…."[63] The Court also emphasized that there, as here, the contract "differentiate[d] between the purchase price adjustment

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[60] 2012 WL 4963314 (D. Del. Oct. 16, 2012).
[61] *See id.* at *4-5.
[62] *See id.* at *3 (emphasis added) ("[P]arties customarily agree—as did the parties here—to resolve post-closing purchase price adjustment disputes in a 'streamlined ADR proceeding.'" (citing *Westmoreland Coal Co. v. Entech, Inc.*, 794 N.E.2d 667, 671 (N.Y. 2003))).
[63] *See id.* (internal citation omitted) (quoting *In re Melun Indus., Inc.*, 898 F. Supp. 990, 994 (S.D.N.Y.1990)).

mechanism and the entirely separate representations and warranties made by the Sellers," and therefore "clearly anticipate[d]" that the plaintiff could pursue an action for fraud to enforce the representations and warranties.[64]

UBC and ESI argue that *CompuCom* is distinguishable from the instant matter because, there, the Arbiter's determination expressly "differentiated between [the Arbiter's] limited role under the purchase price adjustment mechanism and whether the allegations of fraud have any merit."[65] Similarly, in *Mehiel v. Solo Cup Co.*,[66] the Court permitted the plaintiff's claim that the defendant "failed to prepare its working capital statement in good faith in its treatment of the Earthshell Reserve" to proceed, even though the plaintiff made this argument in its earlier arbitration submissions because the Arbiter's report stated that it did "not address" the proposed adjustments related to plaintiff's Earthshell Reserve claim.[67]

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[64] *See id.* at *4-5 (citations omitted) (finding that "[t]he issue presented in the KPMG arbitration—whether a four-year or a six-year useful life estimate should have been used 'in calculating the Proposed Net Working Capital as at August 20, 2008'" was "not the same as that presented in CompuCom's fraud claim—whether defendants 'substantially overstated'…earnings…'by tripling the useful life of [USACo's] spare parts from two years to six years in connection with a fraudulent scheme to manage earnings").

[65] The *CompuCom* Court acknowledged that KPMG, which also coincidentally served as the arbiter in the matter at issue in that case, "was careful to note that 'any determination as to the allegation of…fraud is a matter of law [which] should be decided by a court of competent jurisdiction and is…beyond the scope of this arbitration.'" *Id.* at *4.

[66] 2007 WL 901637 (Del. Super. Ct. Mar. 26, 2007).

[67] *See Mehiel*, 2007 WL 901637, at *4 ("Thus, while this argument was made, the arbitrator did not entertain it, and it was not part of the final arbitration decision.").

Unlike the arbitration reports discussed in *CompuCom* and *Mehiel*, the arbitration determination involved here does not expressly exclude certain claims or issues from the scope of its determination.[68] In fact, this Arbitration Report relays largely numerical findings without further explanation or detail. The Report does, however, clearly state that the scope of the Arbiter's review and determination was limited by § 2.5(b) of the SPA and "subject to the terms of the Chancery Order."[69] Given the narrow scope of § 2.5 and the Chancery Order's instruction that the Arbiter "not decide" Bracket's "fraud claims pending in the Delaware Superior Court,"[70] the lack of an express indication by the Arbiter that it excluded from its consideration the fraud claims appears meaningless. The Court cannot find, at this juncture, that the facts and issues essential to Bracket's claims were "actually decided" in the Working Capital Arbitration.[71] UBC and ESI's

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[68] *See CompuCom Sys., Inc.*, 2012 WL 4963314, at *3-4 (illustrating that KPMG addressed and weighed the parties' arguments and discussed and applied various authority).

[69] Majarian Aff., Ex. 6 [hereinafter Arbitration Report] at 2.

[70] *UBC v. Bracket & PCP Managers LLC*, C.A. No. 10840-CB (Del. Ch.) Nov. 12, 2015 Order. The Order also granted the parties an opportunity "to clarify the issues they seek to have decided in the arbitration...." *Id.* As discussed above, Bracket qualified its arbitration submissions, stating that it was accepting the balances set forth in UBC's Estimated Closing Statement solely purposes of the arbitration without waiving "any of its rights to challenge the Benchmark Statement or balances of any accounts in proceedings outside the working capital adjustment arbitration." Majarian Aff., Ex. 10; Bracket's Briefing Binder, Tab 2 at 7 ("To avoid any doubt," Bracket also reiterated in its arbitration submission that it was "not waiving or releasing any of its rights to challenge the Benchmark Statement or any other financial records used in this arbitration" and "reserves all rights to challenge the historical balances of those accounts and other accounts and its fraud claims pending in the Superior Court").

[71] On January 23, 2017, ESI and UBC wrote to the Court raising the Delaware Supreme Court's January 20, 2017 ruling in *Aleynikov v. Goldman Sachs Group, Inc.*, No. 366, 2016, Order. That case is factually distinguishable from the instant matter, however, and does nothing to convince

Motion to Dismiss Bracket's Amended Complaint based on the doctrine of collateral estoppel is therefore denied. As a final note on this issue, the parties will be bound, absent fraud, by the Arbiter's decision as to working capital. In other words, if Bracket fails to prove its fraud claims with respect to working capital here, the decision of the Arbiter will remain final and binding.

B. Bootstrapping Doctrine

Next, ESI and UBC contend Bracket is essentially claiming breach of § 3.4(a) of the SPA, in which UBC represented and warranted that the financial statements were GAAP-compliant and presented fairly the Company's financial position and results of operation.[72]

Under Delaware law, a plaintiff may claim fraud "based on representations found in a contract," but "where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."[73] The bootstrapping doctrine thus prevents a plaintiff from stating a claim for fraud "simply by adding the term 'fraudulently induced' to a complaint that states a

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the Court that, at this stage and on this record, dismissal based on the doctrine of collateral estoppel would be appropriate here.

[72] UBC and ESI speculate that Bracket framed the action as one for fraud in order to evade contractual limitations set forth in §§ 9.5 and 9.6. Per § 9.5(a), the representations and warranties contained in § 3.4 expired upon closing. SPA § 9.5(a). Section 9.6(d) provides that the "sole and exclusive" remedy for breach of representations and warranties under the SPA is the "R&W insurance policy," except in cases of "deliberant fraud[]." *Id.* § 9.6(d).

[73] *See ITW Glob. Invs. Inc. v. Am. Indus. P'rs Capital Fund IV, L.P.*, 2015 WL 3970908, at *6 (Del. Super. Ct. June 24, 2015) (citations omitted).

claim for breach of contract, or by alleging that the defendant never intended to abide by the agreement at issue...."[74] However, the doctrine does not foreclose fraud claims "based on conduct that is *separate and distinct* from...conduct constituting breach" of contract.[75]

Bracket maintains the Amended Complaint alleges fraudulent conduct that occurred *before* the parties entered the SPA and "that is separate and distinct from" any breach of the SPA.[76] Generally, allegations focused on *inducement* to contract qualify as "separate and distinct" conduct for purposes of avoiding the bootstrapping doctrine.[77] Indeed, Delaware courts have refused to apply the doctrine where the defendant's alleged fraud takes place *prior* to contracting and thus with the goal of inducing the plaintiff's signature and willingness to close on the transaction.[78]

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[74]*See Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *16 (Del. Ch. Nov. 19, 2013) (citing *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010)).

[75] *See Furnari*, 2014 WL 1678419, at *8 (internal quotation marks omitted).

[76] Bracket's Answ. Br. in Opp'n to ESI and UBC's Mot. to Dismiss at 10 (emphasis added).

[77] *See Osram Sylvania, Inc.*, 2013 WL 6199554, at *16-17; *Aviation W. Charters, LLC v. Freer*, 2015 WL 5138285, at *6 (Del. Super. July 2, 2015).

[78]*See ITW Glob. Invs. Inc.*, 2015 WL 3970908, at *7 ("Importantly, ITW alleges the sham sales occurred before entering into the SPSA and were designed to induce ITW to enter into the SPSA. AIP warranted in Section 2.8(c) of the SPSA that all of the Financial Statements conformed to GAAP and were presented fairly, in all material respects, and that AIP had sufficient controls to ensure that the statements were accurate....Therefore, the Court will not dismiss Count II to the extent it alleges that AIP manipulated the November 2011 financial statements before ITW entered into the SPSA and is based on misrepresentations in the SPSA."); *Aviation W. Charters, LLC*, 2015 WL 5138285, at *6 ("Plaintiff's fraud claims are not bootstrapped to its contract claims. Plaintiff alleges that the JTF Defendants fraudulently induced Plaintiff to enter into the APA. Critically, any alleged fraud occurred before the parties entered into the APA."); *Osram*

At this juncture of the litigation, the Amended Complaint sufficiently alleges fraudulent conduct *prior* to the SPA's execution and Closing which was intended to induce Bracket to purchase the Company.[79] Simply put, throughout negotiations and in the lead up to Closing, UBC and ESI allegedly produced and assured the accuracy of certain financial information, knowing that information was false and misleading, with the intent of *inducing* Bracket to purchase the Company at an inflated price.[80] These allegations suffice to avoid dismissal.

C. Fraud

To survive a motion to dismiss, a plaintiff claiming fraud must allege that:

> (1) defendant falsely represented a material fact or omitted facts that the defendant had a duty to disclose; (2) defendant knew that the representation

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Sylvania, Inc., 2013 WL 6199554, at *16 ("OSI has pointed to specific misrepresentations by Sellers, including misrepresentations about the sales results and financial condition of the Company made *before* the Execution of the SPA. For this reason, I find that OSI's fraud claim is not a mere bootstrap of its breach of contract claim.").

[79] Bracket alleges that, "[p]rior to executing the SPA in July 2013, UBC provided Bracket with updated May 31, 2013 financial statements" and that "ESI and UBC represented to Bracket that these financials were true and accurate." The May 2013 financials were apparently based upon and incorporated the earlier supplied financial statements, certain of which were represented and warranted in the SPA as prepared consistent with GAAP and fairly reflecting the position of the Company. BAC ¶¶ 29, 87; SPA §§ 1.71, 3.4(a). At ESI's direction, UBC affirmed its representations and warranties were true and correct in the certificates provided to Bracket at Closing.

[80] *See ABRY P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1051 (Del. Ch. 2006) (refusing to dismiss a fraudulent inducement claim and finding that the "financial statements were represented and warranted in the Agreement and were therefore intended to induce the Buyer to sign the Agreement and close the sale to purchase the Company"). The Court recognizes that, in a footnote in its answering brief, Bracket claims it "has not asserted it was fraudulently induced to enter the SPA, but only raises independent torts" in response to UBC and ESI's contention that the claim should be barred under § 4.9 of the SPA, discussed *infra*. Bracket's Answ. Br. in Opp'n to ESI and UBC's Mot. to Dismiss at 8 n.6. The remainder of its brief, the explicit allegations of the Amended Complaint, and the statements of Bracket's counsel at the August 2016 hearing on the Motions suggests otherwise.

> was false or made with a reckless indifference to the truth; (3) defendant intended to induce plaintiff to act or refrain from action; (4) plaintiff acted in justifiable reliance on the representation; and (5) plaintiff was injured by its reliance on defendant's representation.[81]

Per Superior Court Civil Rule 9(b), "[i]n all averments of fraud, …the circumstances constituting fraud… shall be stated with particularity."[82] Accordingly, a plaintiff must "plead 'the time, place and contents of the false representations,'"[83] in addition to "the identity of the person making those representations."[84] Rule 9(b)'s particularity requirement is satisfied where the plaintiff "allege[s] circumstances sufficient to fairly apprise the defendant of the basis for the claim."[85]

First, any rational reading of Bracket's Amended Complaint would lead to a reasonable conclusion that if the allegations are established, elements 3, 4 and 5 above would clearly be met. There would be no other reason for the material misrepresentations other than to induce Bracket to purchase the Company, and the alleged false representations could be shown to have been reasonably relied upon in a context such as this. In addition, since Bracket asserts that the fraud caused an overpayment for the Company in excess of $50 million, it seems almost silly to

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[81] *ITW Glob. Investments Inc.*, 2015 WL 3970908, at *5 (citation omitted).
[82] Del. Super. Ct. Civ. R. 9(b).
[83] *See ITW Glob. Invests. Inc.*, 2015 WL 3970908, at *5 (quoting *Browne v. Robb*, 583 A.2d 949, 955 (Del.1990)); Del. Super. Ct. Civ. R. 9(b), (f).
[84] *See Peterson v. 21st Century Centennial Ins. Co.*, 2015 WL 4154070, at *5 (Del. Super. Ct. July 9, 2015).
[85] *See Ameristar Casinos, Inc. v. Resorts Int'l Hldgs., LLC*, 2010 WL 1875631, at *10 (Del. Ch. May 11, 2010) (quoting *Abry P'rs V, L.P.*, 891 A.2d at 1050)).

dispute the damages element on a motion to dismiss. Rather, the real issue here is whether Bracket has alleged its fraud claims against UBC and ESI with sufficient particularity to avoid dismissal.

UBC and ESI argue Bracket failed to identify with particularity any misstatement made to Bracket on either ESI or UBC's behalf. Rather, they characterize the allegations as pertaining only to fraudulent conduct of *Stewart* that "in no way implicate[s] either ESI or UBC"[86] and of which neither ESI nor UBC could conceivably have been aware. Because of the contractual relationship of the parties, to establish the fraud claims (as opposed to breach of contract claims), material misstatements or omissions made outside of the written contract must be pled and established by Bracket. "In addition to overt representations, fraud may…occur through deliberate concealment of material facts, or by silence in the face of a duty to speak."[87] At the motion to dismiss stage, a plaintiff "need only point to factual allegations making it reasonably conceivable that the defendants charged with fraud knew the statement was false."[88]

The Court finds the Amended Complaint specifically identifies the financial information that allegedly reflected the overstatements as well as the specific

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[86] ESI and UBC's Reply Br. at 18 (emphasis omitted).
[87] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 144 (Del. Ch. 2003) (citing *Stephenson*, 462 A.2d at 1074).
[88] *See Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 61 (Del. Ch. 2015)

accounts and contracts implicated in the alleged fraud.[89] Bracket also provides the names of the specific ESI and UBC employees and agents, in addition to Stewart, allegedly involved throughout the marketing and sale of the Company.[90] These allegations clearly relate to and surround the marketing and sale of the Company and are sufficient to apprise ESI and UBC of the basis of Bracket's fraud claims for Rule 9(b) purposes.[91]

The Court also finds it reasonable that Bracket may prove UBC and ESI were in a position to know of the allegedly false financial information, or were at least reckless in not knowing, at the time representations concerning the accuracy of the financials were made.[92] The Amended Complaint alleges UBC knew its representations and warranties were false when made "through the direct knowledge of [its] agents, including, but not limited to Stewart, who was a member of the Knowledge Group in the SPA and whose knowledge is attributable to

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[89] BAC ¶¶ 25, 63-68.

[90] *Id.* ¶¶ 20, 25, 30, 52, 53, 74, 90, 100, 110, 118.

[91] *See Osram Sylvania Inc.*, 2013 WL 6199554, at *13 (finding Rule 9 satisfied where complaint pled that "Sellers intentionally inflated the sales figures, and…manipulated the financial statements…to make it appear as though the Company had met its forecasts and was more successful than it actually was" and set forth "several of the techniques used to achieve this financial manipulation"); *Aviation W. Charters, LLC*, 2015 WL 5138285, at *7 ("Unlike *Trenwick*, Plaintiff identifies specific improper accounting practices in the 2013 Financial Statements."); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 209 (Del. Ch. 2006) (finding failure to satisfy particularity requirement where complaint lacked allegations of specific aspects of financial statements tainted by fraud), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007).

[92] *See Prairie Capital III, L.P.*, 132 A.3d at 61 ("A plaintiff…must plead that the defendants charged with fraud knew the statement was false or acted with reckless indifference to its truth.… [A] plaintiff need only point to factual allegations making it reasonably conceivable that the defendants charged with fraud knew the statement was false.").

UBC."[93] ESI is likewise alleged to have known of the misrepresentations "through the contact between its agents and the Knowledge Group in the SPA, including Stewart," as well as by virtue of "its position as parent of UBC and the Company, and through its control and direction of the sale process."[94] General allegations of knowledge are sufficient at the motion to dismiss stage, and the Court is obliged to consider those allegations in the light most favorable to Bracket.[95] As a result, the Court will not, at this stage, dismiss Bracket's fraud claims for failure to plead the element of knowing misrepresentation.[96]

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[93] BAC ¶¶ 90, 110.

[94] *Id.* ¶¶ 100, 118.

[95] *See Prairie Capital III, L.P.*, 132 A.3d at 61. In support of their Motion to Dismiss, UBC and ESI emphasize the Amended Complaint's allegations of secrecy surrounding Stewart's conduct. *See* BAC ¶¶ 55-57. Indeed, Stewart's secretive practices are allegedly what "initially hampered" Bracket's own investigation of the financial records, forcing Bracket to hire external consultants "to review all of the underlying contracts and build the Company's revenue model from the ground up." *Id.* ¶ 59. However, given Stewart's relationship to the entities and the allegation that all three Defendants collaborated and conspired to commit the fraud, the Court is unwilling to find on a motion to dismiss that UBC and ESI could not have known of Stewart's conduct and the resulting impact on the Company's financials when the representations were made to Bracket. Clearly factual issues remain making dismissal inappropriate at this stage.

[96] ESI and UBC point out that the Amended Complaint also alleges that, from April to July of 2013, "additional representations" were made "to Bracket" by ESI about "the strength of the Company's financials to induce Bracket to purchase the Company during …meetings and telephonic conversations…." BAC ¶ 30. It is unclear to what extent, if any, Bracket attempts to rely on these "additional" exchanges as a basis for its fraud claims. Given that the motions and argument focus largely on the inflated financials and misrepresentations made in connection with the SPA's execution and closing. Regardless, Bracket has not specified how the "additional representations" amounted to false statements of material facts. Rather, Bracket vaguely contends ESI and UBC representatives made statements about the "strength" of the Company's financials. Bracket has not stated the content of the alleged misrepresentations with particularity, and what it has alleged in this respect seems more analogous to puffery than fraud. *See Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *7-8 (Del. Ch. July 20, 2010) (dismissing fraud claim based on "classically vague statements that a commercial party routinely makes during deal-making courtship" because such statements are "puffery" and not false representations of material fact).

Finally, the Court recognizes that the Amended Complaint cites a number of exchanges between ESI and UBC personnel and Parthenon before Bracket's formation in June 2013. Citing *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, in which the Court of Chancery disallowed a litigation trust plaintiff from claiming reliance on statements made before the trust existed, UBC and ESI argue representations *made to Parthenon* cannot serve as the basis for *Bracket's* fraud claims.[97] Bracket responds that any representations made to Parthenon may, in fact, be imputed to Bracket, because Parthenon served as Bracket's "promoter" [98] by "actively assist[ing] in…creating, protecting, and organizing" Bracket.[99] This relationship, Bracket maintains, distinguishes this case from *Trenwick*, which involved a trust created solely for litigation purposes with no connection to the earlier entity. The Court agrees with Bracket. There is no dispute Parthenon created the Bracket entity simply for purposes of completing the Transaction just prior to the SPA's execution. Any misstatements and omissions directed at Parthenon with the intent to influence the decision to purchase the Company can be

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[97] ESI and UBC's Mot. to Dismiss at 23-24; *Trenwick Am. Litig. Trust*, 906 A.2d at 211 ("To the extent that the Litigation Trust is referring to itself, it could not have relied on the statements at issue as it did not exist when those statements were made.").
[98] Bracket's Answ. Br. in Opp'n to ESI and UBC's Mot. to Dismiss at 15.
[99] *Id.* (quoting *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 350 n.67 (Del. Ch. 2003)).

considered transferred to Bracket at this stage. UBC and ESI's Motion to Dismiss Bracket's fraud claims is therefore DENIED.

D. Aiding and Abetting / Conspiracy

Finally, UBC and ESI argue for dismissal of Counts VII and VIII. Count VII asserts a claim for aiding and abetting against ESI, alleging ESI, through its and its agents' participation and direction of UBC during the sales process, knowingly and substantially participated in UBC and Stewart's fraud. [100] In Count VIII, Bracket claims UBC and ESI knowingly participated in a conspiracy to defraud Bracket with the shared objective of "sell[ing] the Company for the largest amount possible."[101] The entities allegedly acted in furtherance of the conspiracy by engaging and directing their financial advisors, consultants, agents, and employees, including Stewart, throughout the marketing and sales process to present and supply the artificially inflated financial information to Bracket. [102]

The torts of civil conspiracy and aiding and abetting, while similar, address different claims.[103] Conspiracy involves "concerted action by agreement," whereas aiding and abetting concerns "concerted action by substantial assistance."[104] Both

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[100] BAC ¶¶ 149-54 ("ESI provided substantial assistance for the fraud such that the sale would not have been possible without its assistance or…the involvement of its agents and employees.").
[101] *Id.* ¶ 157.
[102] *Id.* ¶ 159.
[103] *See Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980, at *22 (Del. Ch. Nov. 26, 2014), *judgment entered*, (Del. Ch. Dec. 8, 2014).
[104] *See id.* (quoting *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *2 (Del. Super. Ct. Nov. 30, 2004)).

causes of action require predicate tortious conduct.[105] To state an aiding and abetting claim, a plaintiff must show: (1) underlying tortious conduct, (2) knowledge, and (3) substantial assistance.[106] For civil conspiracy, a plaintiff must allege: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds…relating to the object or…course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof."[107]

ESI and UBC argue Counts VII and VIII should be dismissed because the Amended Complaint fails to plead the required elements of a valid predicate and knowing participation. Because the Court has allowed Bracket's fraud claims to move forward, it will not dismiss Counts VII and VIII for lack of predicate tortious conduct at this time. Further, the Courts finds the Amended Complaint satisfies the less stringent standards for pleading knowledge on a motion to dismiss. Bracket sufficiently alleges facts from which one may infer UBC and ESI knowingly participated in the underlying fraud or that ESI knowingly assisted the fraudulent acts of UBC and/or Stewart.[108] While the Court believes there are

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[105] *See Anderson*, 2004 WL 2827887, at *4-5.
[106] *See id.*
[107] *See Metro. Life Ins. Co. v. Tremont Grp. Hldgs., Inc.*, 2012 WL 6632681, at *19 (Del. Ch. Dec. 20, 2012) (quoting *Matthew v. Laudamiel,* 2012 WL 605589, at *8 (Del.Ch. Feb.21, 2012)).
[108] *See Great Hill Equity P'rs IV, LP*, 2014 WL 6703980, at *21-23 ("As to knowledge on the part of SIG Fund and SIG Management, it is reasonable to infer at the pleading stage that Goldman and Klahr, two principals of SIG, had knowledge that was imputed to these entities under Delaware law."); *Tremont Grp. Hldgs., Inc.*, 2012 WL 6632681, at *19 ("Under Delaware law, 'the knowledge of an agent acquired while acting within the scope of his or her authority is

significant questions as to the merit of Bracket's vicarious liability claims, it will allow the claims to survive for now. The Court does suggest that Bracket review whether these counts are necessary or merit pursuing further. Candidly they appear to be mere "add on" counts that may actually undermine the fraud claims. However, that is a decision for Bracket to make, not the Court.

IV. JIM STEWART'S MOTION TO DISMISS BRACKET'S AMENDED COMPLAINT

Defendant Jim Stewart has also moved to dismiss Bracket's claims against him. The Amended Complaint asserts three Counts against Stewart. Bracket claims Stewart: (1) breached his fiduciary duty (Count VI); (2) committed fraud by artificially inflating Bracket's value (Count V); and (3) conspired with ESI and UBC to defraud Bracket by inducing them to purchase the Company at an inflated price (Count IX).

In moving to dismiss, Stewart contends: (1) this Court lacks subject matter jurisdiction over Bracket's breach of fiduciary duty claim; (2) the Court lacks personal jurisdiction over him as a non-resident; and (3) even if this Court has jurisdiction, Bracket's claims fail as a matter of law pursuant to Superior Court Civil Rules 9(b) and 12(b)(6). Because this Court finds it lacks personal

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imputed to the principal") (quoting *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del.Ch. Aug.26, 2005)).

jurisdiction over Stewart, it need not address Stewart's remaining grounds for dismissal.

In response to the contention that this Court lacks personal jurisdiction over Stewart, Bracket asserts three distinct theories in an attempt to show jurisdiction exists.[109] Bracket relies on: (1) Delaware's long-arm statute, 10 *Del. C.* § 3104(c); (2) Delaware's director consent statute, 10 *Del. C.* § 3114; and (3) the SPA's forum selection clause. The Court will address each theory in turn.

Delaware's Long-Arm Statute

Delaware courts apply a two-pronged analysis to determine whether a plaintiff has met its burden of establishing personal jurisdiction over a nonresident under the long-arm statute.[110] The Court must first consider whether the long-arm statute is satisfied and then determine "whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment."[111]

Delaware's long-arm statute, 10 *Del. C.* § 3104(c), confers personal jurisdiction over any nonresident who, *inter alia,* causes tortious injury in the State by an act or omission in this State.[112] Bracket contends that Stewart is subject to jurisdiction in Delaware because he was a key participant in the conspiracy to

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[109] BAC ¶ 12.
[110] *See AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437–38 (Del. 2005).
[111] *See id.* at 438.
[112] 10 *Del. C.* § 3104(c)(3).

defraud Bracket. This "conspiracy theory" of personal jurisdiction does not, however, "constitute an independent basis for subjecting an out-of-state resident to personal jurisdiction."[113] Instead, the theory rests on "the notion that, in appropriate circumstances, a defendant's conduct that either occurred or had a substantial effect in Delaware," thus subjecting him to personal jurisdiction in Delaware, "may be attributed to another defendant who would not otherwise be amenable to jurisdiction in this State, if that defendant is a coconspirator."[114]

In *Istituto Bancario Italiano SpA v. Hunter Engineering Co.*,[115] the Delaware Supreme Court set forth a five-part test for establishing conspiracy jurisdiction. According to the *Istituto* test, Bracket must make a factual showing that:

> (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in [Delaware]; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[116]

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[113] *Aviation West Charters, LLC*, 2015 WL 5138285, at *2 (quoting *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *9–10 (Del. Ch. Jun. 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012)).
[114] *Id.*
[115] 449 A.2d 210 (Del.1982).
[116] *Istituto Bancario Italiano SpA*, 449 A.2d at 225.

Delaware courts have consistently construed this test narrowly, requiring "a plaintiff to assert specific facts, not conclusory allegations."[117] However, a defendant who has voluntarily participated in a conspiracy "with knowledge of its . . . effects in the forum state can be said to have purposefully availed himself of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws."[118]

Bracket argues that Stewart's out-of-state activities directly harmed Bracket, a Delaware corporation, causing Bracket to pay substantially more than it otherwise would have paid. However, Bracket has not alleged that any of Stewart's actions occurred in Delaware. Rather, Bracket merely argues that because a Delaware corporation suffered harm, Delaware's public policy favors broadly construing 10 *Del. C.* § 3104.[119] In essence, Bracket asserts that simply by virtue of its incorporation in Delaware and Stewart's alleged fraudulent acts affecting it, *Istituto* is satisfied. However, in *Iotex Communications v. Defries*,[120] the Court of Chancery made clear that "in the case of Delaware corporations having no substantial physical presence in this State, an allegation that a civil conspiracy caused injury to the corporation by actions wholly outside this State

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[117] *See Aviation West Charters, LLC*, 2015 WL 5138285, at *2 (quoting *Hartsel*, 2011 WL 2421003, at *10).
[118] *See Istituto Bancario Italiano SpA,* 449 A.2d at 225.
[119] Bracket's Answ. Br. in Opp'n to Jim Stewart's Mot. to Dismiss at 8 (quoting *Sample v. Morgan*, 935 A.2d 1046, 1058 n.44 (Del. Ch. 2007)).
[120] 1998 WL 914265 (Del. Ch. Dec. 21, 1998).

will not satisfy the requirement found in the Supreme Court's opinion in *Istituto Bancario* of a 'substantial effect . . . in the forum state.'"[121]

None of the corporations involved in this case have presences in Delaware, and none of Stewart's conduct is alleged to have occurred in Delaware.[122] Additionally, unlike the entities involved in Bracket's cited cases, Bracket is neither headquartered in Delaware, nor is Delaware its principal place of business. Its sole connection to Delaware is its incorporation status. That, by itself, will not support *Istituto.*[123] The Court finds the long-arm statute will not support a finding of personal jurisdiction over Stewart.

Director Consent Statute

Bracket also contends Delaware has jurisdiction over Stewart under Delaware's Director Consent statute, 10 *Del. C.* § 3114.[124] Section 3114(b) allows for personal jurisdiction over non-resident officers "in all civil actions…, by or on behalf of, or against such corporation,…in any action or proceeding against such officer for *violation of a duty in such capacity.*"[125] An "officer" is defined as a person who:

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[121] *Iotex Commc'ns, Inc.*, 1998 WL 914265, at *8.
[122] *See, e.g., Republic Business Credit, LLC v. Metro Design USA, LLC*, 2016 WL 3640349, at *8 (Del. Super. Jun. 29, 2016) (holding that tortious injury in Delaware must be caused by an act or omission in Delaware).
[123] *See, e.g., Aviation West Charters, LLC*, 2015 WL 5138285, at *3.
[124] 10 *Del. C.* § 3114.
[125] *Id.* § 3114(b) (emphasis added).

> (1) Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
> (2) Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission (SEC) because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
> (3) Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.[126]

Bracket contends that, post-closing, Stewart was appointed by the Board as its "Vice President, Finance and Secretary."[127] Even assuming this designation satisfies the statute's definition of "officer," appointment as an officer of a Delaware corporation is not alone enough to confer jurisdiction over Stewart. Section 3114 requires a "close nexus between the claims against the corporation and those against the officer..., and that the claims against the officer...involve conduct taken in his official corporate capacity."[128] As such, the implied consent mechanism of § 3114 only applies against an officer or director involved conduct taken in his official corporate capacity.[129] The core of the offending conduct alleged here occurred *prior* to closing, and thus prior to Stewart's designation as an officer. Stewart did not owe any official duty to Bracket prior to his appointment as an officer, and therefore, he cannot be said to have violated any duty in his

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[126] *Id.*
[127] BAC ¶ 143.
[128] *See Hazout v. Tsang Mun Ting*, 134 A.3d 274, 279 (Del. 2016).
[129] *See id.*

capacity as an officer with regard to his conduct in anticipation of the Transaction. Once the Transaction had been completed, the sting had occurred and any assertion of continued fraudulent conduct would be in the context of a contract action. In addition, to the extent Stewart assumed a corporate position, it appears to have been held only for a very short period of time after closing and before he left the Company. Based on these facts, the Court finds the § 3114 does not confer personal jurisdiction over Stewart.

SPA's forum selection clause

Finally, Bracket contends Stewart is subject to jurisdiction in Delaware because the SPA contains a forum selection clause naming Delaware as the proper forum.[130] Bracket concedes Stewart did not sign the SPA, but argues he was "closely related" to the SPA. Bracket contends Stewart should be bound by the forum selection clause because he fraudulently induced Bracket to sign the SPA, and personally benefitted from the Transaction.

Delaware Courts use a three-part test to determine whether a non-signatory may be bound by a forum selection clause. First, is the forum selection clause valid? Second, is Stewart a third-party beneficiary or closely related to the

[130] BAC ¶¶ 12–13.

contract? Third, does the claim arise from his standing relating to the agreement?[131] If the answer to all three questions is "yes," then the forum selection clause may bind Stewart, despite his not having signed the SPA.[132]

The only prong at issue here is whether Stewart is "closely related" to the SPA. Delaware Courts have recognized two instances where a non-signatory may be "closely related" to a contract: "1) the party receives a direct benefit from the agreement or 2) it was foreseeable that the party would be bound by the agreement."[133]

Here, the parties do not focus on foreseeability, but on the purported "direct benefit" to Stewart under the SPA. According to Bracket, Stewart committed fraud to ensure he received lucrative compensation from the SPA.[134] Under § 5.2 of the SPA, Bracket agreed to take "such actions as are necessary to ensure that all of the individuals listed on Disclosure Schedule 1.53 are employed by the Company or the Company subsidiaries, effective as of the Closing."[135] Stewart appears as one of the individuals listed on Disclosure Schedule 1.53.

The Court finds that Bracket has not sufficiently pled that Stewart directly benefited from the SPA. Bracket states that Stewart began the fraud in 2011, prior

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[131] *See Baker v. Impact Hldg., Inc.*, 2010 WL 1931032, at *3 (Del. Ch. May 13, 2010) (quoting *Capital Grp. Cos. v. Armour*, 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004) (revised Nov. 3, 2004)).
[132] *Id.*
[133] *Id.* at *4.
[134] BAC ¶ 58.
[135] SPA § 5.2.

the parties' negotiations, to keep his job post-sale. There is nothing at the moment to support this allegation and it appears that Stewart was placed in the same situation as all employees of the Company purchased by Bracket. All were promised that they would continue to be employed at the same salary for a six-month transition period. This is not the type of "direct benefit" that would justify finding Stewart was closely related to the SPA. There is nothing to suggest that Stewart personally benefitted from the Agreement or embraced it in a manner that would bind him to the forum clause selected by other individuals.[136]

In sum, the Court finds no basis to exercise personal jurisdiction over Stewart. As such, the arguments concerning subject matter jurisdiction of Bracket's fiduciary duty claims and the adequacy of its fraud claims against Stewart are moot. Stewart's Motion to Dismiss is hereby **GRANTED.**

V. BRACKET AND PARTHENON'S MOTION TO DISMISS UBC'S AMENDED COMPLAINT

UBC filed an Amended Complaint on April 13, 2016 alleging three counts of breach of contract against Bracket, two pertaining to the SPA (Counts I and II) and one concerning the TSA (Count III). UBC's Amended Complaint also asserts two counts of tortious interference against Parthenon with regard to the SPA and

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[136] *See Capital Grp. Cos.*, 2004 WL 2521295, at *7 (holding that a non-signatory directly benefited from an agreement by being able to access stock previously held on non-signatory's behalf by a trust). *See also Baker*, 2010 WL 1931032, at *4 (holding that a non-signatory's placement on the Board of Directors as part of an sale constituted a direct benefit).

TSA (Counts IV and V). Bracket and Parthenon moved to dismiss all claims, with the exception of Count III.

Following the September 2016 hearing, this Court denied Bracket and Parthenon's Motion to Dismiss as it concerns Count II of UBC's Amended Complaint, in which UBC claims Bracket breached § 6.3 of the SPA by destroying the Company's trial balance as it existed at Closing, along with other books and records.[137] That leaves the Court to decide Bracket and Parthenon's remaining contentions, namely: (1) whether Count I for breach of the SPA's Working Capital Arbitration clause should be dismissed as moot or, alternatively, for failure to state a claim; and (2) whether Counts IV and V for tortious interference must be dismissed under the "affiliate exception" or for otherwise failing to plead the required elements.

A. Breach of § 2.5 of the SPA

To state a breach of contract claim, UBC must demonstrate: (1) the existence of a contract, whether express or implied; (2) a breach of an obligation

[137] UAC ¶ 138. Section 6.3 prohibited Bracket from destroying, altering, disposing, or allowing the destruction, alteration, or destruction of "Records without first offering to surrender…such records" to UBC. *See* SPA § 6.3. Bracket and Parthenon argued dismissal was justified because the Amended Complaint failed to include "specific facts supporting its conclusion that the Company's trial balance had been destroyed or permanently altered." Bracket and Parthenon's Mot. to Dismiss at 19. In refusing to dismiss the claim after hearing from the parties, the Court explained that Bracket and Parthenon were simply denying allegations that were, in fact, set forth in UBC's pleading and asking that it instead adopt their characterization of the factual events regarding how the relevant books and records were handled.

imposed by that contract; and (3) damages.[138] In Count I, UBC alleges that "Bracket willfully and intentionally breached the SPA, including [§] 2.5, by refusing to submit to the mandated Working Capital arbitration process."[139] UBC requests indemnification or money damages in an amount no less than the costs UBC incurred in pursuing the Chancery Action and in enforcing §2.5 of the SPA.[140] UBC demands this damages calculation also include interest paid to Bracket on the Working Capital Adjustment, which accrued while arbitration was "impermissibly delayed."[141]

Bracket and Parthenon contend Count I must be dismissed as moot because the Working Capital Arbitration did, in fact, occur and has since concluded.[142] The Court agrees. Delaware Courts function to decide actual, live controversies.[143] Although a justiciable controversy may exist when litigation begins, the action will be dismissed if that controversy ceases to exist.[144] While the Court agrees that the Chancery Court did order the Arbitration to proceed, that decision does not reflect that there was no good faith basis for Bracket to initially refuse to participate. As counsel is well aware, Bracket had filed this action seeking significant damages

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[138] *See Kuroda v. SPJS Hldgs., LLC*, 971 A.2d 872, 883 (Del. Ch. 2009).
[139] UAC ¶ 133.
[140] *Id.* ¶¶ 134-35.
[141] *Id.* ¶ 135.
[142] Alternatively, Bracket and Parthenon claim dismissal is warranted for failure to plead damages. Because the Court finds Count I is moot, it need not address this alterative theory.
[143] *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).
[144] *Id.*

based on the allegedly improper and fraudulent conduct of ESI and UBC, which directly related to the issue of working capital. Under the circumstances, there was a great deal of uncertainty as to what would be decided by the Arbiter and the consequences of that decision.

While the Court agrees with the Chancellor's decision to move forward with the Arbitration, if the fraud claims are established, the merit of that exercise remains questionable. The Court does not perceive Bracket's actions to have been motivated by some bad faith purpose, nor were its concerns particularly unreasonable given their interest in protecting their pending litigation. All litigants here expended funds to resolve this issue, but those costs would appear minimal in comparison to the overall expense of this litigation. If UBC wants to pursue this claim in the Court of Chancery, it is free to do so, but this Court finds it not only moot, but without merit. As a result, Bracket and Parthenon's Motion is GRANTED and Count I will be dismissed.

B. Tortious Interference

Next, Parthenon and Bracket contend Delaware's "affiliate exception" bars UBC's claims against Parthenon for tortious interference with the SPA and TSA. UBC responds that Pennsylvania law governs Counts IV and V, such that the affiliate exception does not apply.

1. Choice of law

"'Delaware conflict of law rules direct that the Court determine where a plaintiff's claims arose by application of the 'most significant relationship' test, as set forth in the Restatement (Second) of Conflicts of Laws.'"[145] The Restatement's "most significant relationship" test lists a number of broad policy considerations relevant to the Court's choice of law analysis. In tort actions, the Court must apply these considerations "with four specific contacts in mind": "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered."[146]

i. Place of injury

The first relevant contact is the place where the injury occurred. UBC contends that the injury occurred in Pennsylvania. Bracket argues that UBC's tortious interference claim stems from Bracket's alleged refusal to arbitrate,

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[145] *TrustCo Bank v. Mathews*, 2015 WL 295373, at *9 (Del. Ch. Jan. 22, 2015) (citation omitted). *See also* Restatement (Second) of Conflicts of Laws § 145 (enumerating factors to consider in deciding choice of law in tort actions).

[146] *Eureka Res., LLC v. RangeRes.-Appalachia, LLC*, 62 A.3d 1233, 1237 (Del. Super. Ct. 2012) (applying Pennsylvania substantive law to a tortious interference with a contract claim after balancing Section 145's "most significant relationship" factors).

causing UBC to file claims in Delaware.[147] Therefore, Bracket argues Delaware law should apply.

UBC sued in Delaware because the SPA and TSA's forum selection clauses identified Delaware as the appropriate forum to resolve disputes. It also was the one place where there was a commonality of jurisdiction in which all parties were subject to suit. However, as noted by UBC, its principal place of business is in Blue Bell, Pennsylvania[148] and Bracket is headquartered in Wayne, Pennsylvania.[149] "'[T]he effect of [a] loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business.'"[150] Because both companies are headquartered in Pennsylvania, the first contact "favors the application of Pennsylvania law."[151]

ii. Place of the injury–causing conduct

The second relevant contact under the Restatement test is the place where the conduct causing the injuries occurred. According to UBC's Amended Complaint, Parthenon "interfered" by using its control over Bracket to cause Bracket to: (1) destroy the Company's financial records in breach of the SPA; (2) initially refuse to submit to Working Capital Arbitration in breach of the SPA; and (3) to refuse to pay UBC for its transition services in breach of the TSA.

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[147] Bracket and Parthenon's Reply Br. at 11.
[148] UAC ¶ 13.
[149] *Id.* ¶ 14.
[150] *See Eureka Res., LLC*, 62 A.3d at 1238.
[151] *Id.*

Parthenon operates in California and Massachusetts, not Pennsylvania.[152] While none of Parthenon's conduct is alleged to have occurred in Delaware, the Court cannot ignore that the parties, including UBC, selected Delaware as the forum to resolve disputes under the agreements. In addition, the focus of the alleged conduct that Parthenon allegedly interfered with was the contractual obligation of Bracket and the litigation in Delaware was to enforce the arbitration provision. While this factor may have favored California law, of the jurisdictions argued by the parties here, Delaware clearly has the more significant relationship with the alleged improper conduct.

iii. Domicile, residence, nationality, place of incorporation and place of business of the parties

The third relevant contact is the domicile, residence, nationality, place of incorporation and place of business of the parties. The focus of UBC's tortious interference claim is Parthenon, which, as indicated previously, has its principal place of business in California and Massachusetts. UBC operates out of Pennsylvania. However, weighing the factors regarding this issue favors Delaware law. All the parties here are incorporated in Delaware and Parthenon specifically formed Bracket as a Delaware corporation for the limited purpose of entering into the transaction and to execute the SPA and TSA, both of which are governed by

[152] Bracket and Parthenon's Reply Br. at 11. *See also Eureka Res.*, 62 A.3d at 1238 (explaining that where the locus of conduct is not clear, the Court may assume conduct occurred at corporate headquarters during pleading stage).

Delaware law. Of all the jurisdictions relevant here, this factor favors application of Delaware law.

iv. Place where the relationship between the parties is centered

The tortious interference claim here is based upon conduct allegedly intended to prevent Parthenon's affiliate from performing under the contractual agreements relevant to this litigation. The SPA and TSA are contractual agreements between Delaware corporations in which the parties have chosen Delaware as the appropriate forum to govern any dispute. The Court finds these agreements are at the center of this dispute and the alleged interference. It does not appear the contracts were executed in Pennsylvania, nor did closing occur in that state. As such, this factor favors the application of Delaware law.

v. Restatement (Second) of Conflict of Laws § 6 policy considerations

After completing the § 145 analysis, the Court must consider the aforementioned factors in relation to the Restatement (Second) of Conflict of Laws § 6.[153]. When considering "relevant policies," both Delaware and Pennsylvania

[153] Restatement (Second) of Conflict of Laws § 6(2) states:

> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,

have an interest in deterring tortious interference with contract and punishing those who may interfere. And, both Delaware and Pennsylvania allow parent corporations some leeway in "interfering" legitimately with subsidiaries' contracts. But the Court finds Pennsylvania's interest in this litigation to be minimal, such that the outcome here will not interfere with any particular state interest. This is largely a dispute between Delaware corporations relating to a transaction the parties agreed would be governed by Delaware law. While this does not require that forum selection apply to actions in tort, there is no reason under the Restatement to apply the laws of another jurisdiction under the circumstances presented here.[154]

Accordingly, after analyzing the parties' dispute pursuant to Restatement (Second) of Conflicts of Laws §§ 6 and 145, the Court finds Delaware has the most significant relationship to the tortious interference claims presented in Counts IV and V of UBC's Amended Complaint. As such, the Court will apply Delaware law.

2. *Tortious inference*

To state a claim for tortious interference, UBC must show that "(1) there was a contract, (2) about which the particular defendant knew, (3) an intentional

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(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

[154] *See UbiquiTel Inc. v. Sprint Corp.*, 2005 WL 3533697 (Del. Ch. Dec. 19, 2005). *See also Eureka Res., LLC*, 62 A.3d 1233.

act that was a significant factor in causing the breach of contract, (4) the act was without justification, and (5) it caused injury."[155]

The first element is easily satisfied, as no one disputes that the SPA and TSA constitute valid and binding agreements between Bracket and UBC. The second element is also met. As alleged by UBC, Parthenon was the only entity with which UBC would have dealt prior to Parthenon's formation of Bracket for purposes of the transaction and Parthenon was actively involved in negotiating the contracts governing Bracket's purchase of the Company. At this stage, the third element is also satisfied as UBC alleges that Parthenon "directed Bracket" to: "sabotage the Working Capital arbitration process[,]"[156] and "destroy[] vital financial records of the Companies[,]" among other things.[157] UBC also maintains it was injured as a result of Parthenon's actions in that it would not have had to pursue the Chancery suit if Bracket (and Parthenon) had properly complied with § 2.5 of the SPA, thus ostensibly satisfying the fifth element at the pleading stage.

The issue, then, is whether UBC has sufficiently alleged that Parthenon's acts were "without justification." In the parent-subsidiary context, Delaware Courts consider the significant economic interest a parent entity necessarily has in its subsidiary, "including the parent's interest in consulting with its subsidiary," in

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[155] *See WaveDivision Hldgs., LLC v. Highland Capital Mgmt.*, L.P., 49 A.3d 1168, 1174 (Del. 2012) (citing Restatement (Second) of Torts § 766 (1979)).
[156] UAC ¶ 107.
[157] *Id.* ¶ 96.

balance with the "subsidiary's status as a separate entity and the interest of third parties in their contractual relationships with the subsidiary."[158] "The result is a qualified privilege which protects a parent corporation that 'pursues lawful action in the good faith pursuit of [the subsidiary's] profit making activities.'"[159] UBC may only overcome the privilege by alleging Parthenon's interference was "motivated by some malicious or other bad faith purpose" rather than in pursuit of Bracket's legitimate profit seeking activities.[160] "Such allegation[s] must meet a 'stringent bad faith standard.'"[161]

Having reviewed UBC's Amended Complaint, the Court finds Parthenon's conduct protected by the affiliate privilege. Parthenon is Bracket's parent company, and, in that role, it was clearly no stranger to either the contracts or the business relationships "giving rise to and underpinning" those contracts at issue in this litigation. [162] Parthenon negotiated the terms of the SPA and TSA, conducted due diligence into the Company, and formed Bracket as a portfolio company for

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[158] *See NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *26 (Del. Ch. Nov. 17, 2014) (quoting *Shearin v. E.F. Hutton Grp., Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994)).
[159] *Id.*
[160] *See AM Gen. Hldgs. LLC v. Renco Grp., Inc.*, 2013 WL 5863010, at *12 (Del. Ch. Oct. 31, 2013).
[161] *See id.* at *12, *13 n.89 ("[A] plaintiff must allege behavior beyond a failure to comply with the terms of a contract to seek remedies beyond those contemplated by the contractual terms governing its breach. An escalated showing of bad faith is particularly necessary when the entities are so closely intertwined, as they are here, where despite the somewhat complicated organizational structure, the real dispute is between Rennert and M & F and its controller.").
[162] *See id.* at *12 (explaining that, to avoid the affiliate exception, a tortious interference claim must allege the defendant was "a stranger to both the contract and the business relationship giving rise to and underpinning the contract").

the purpose of acquiring the Company.[163] Under these facts, Parthenon cannot be held liable for tortious interference and UBC has not alleged facts demonstrating the level of bad faith required so as to overcome the affiliate exception. Counts IV and V are therefore dismissed.

VI. CONCLUSION

The decisions above resolve all outstanding motions. The pretrial conference in this matter will be held on January 11, 2018 at 9:00 a.m. with trial commencing on February 12, 2018.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[163] *See id.* at *13 ("Renco can hardly be described as an outsider to the business relationship when it was one of the two parties responsible for the transaction and resulting organizational structure. On these facts, both Renco and Rennert are entitled to the limited affiliate privilege…because they were both parties to the 2004 transaction responsible for the agreements giving rise to the allegations in the present dispute and thus are not strangers to the transaction.").