

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FIRMENICH INCORPORATED,)
)
Plaintiff,)
) C.A. No. N19C-01-320 MMJ [CCLD]
v.)
)
NATURAL FLAVORS, INC., HARRIS)
STEIN, HEBERT STEIN, JASON)
STEIN, JOCELYN MANSHIP, and)
JULIE WEISMAN,)
)
Defendants.)

Submitted: September 19, 2019
Decided: October 29, 2019

On Defendants’ Motion to Dismiss
GRANTED IN PART, DENIED IN PART

OPINION

Brittany M. Giusini, Esq., (Argued), Elizabeth A. Sloan, Esq., Ballard Spahr LLP, Wilmington, Delaware, Alizia R. Karetnick, Esq., (Argued), Matthew A. White, Esq., Matthew Vahey, Esq., Ballard Spahr LLP, Philadelphia, Pennsylvania, *Attorneys for Plaintiff*

Lisa Zwally Brown, Esq., (Argued), Jason Kislin, Esq., Steven T. Margolin, Esq., Samuel Moultrie, Esq., Greenberg Traurig, LLP, Wilmington, Delaware, *Attorneys for Defendants Natural Flavors, Inc., Harris Stein, Herbert Stein and Jason Stein*

Paul Cottrell, Esq., (Argued) Melissa L. Rhoads, Esq., Tighe & Cottrell, P.A., Wilmington, Delaware, *Attorneys for Defendants Jocelyn Manship and Julie Weisman*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiff Firmenich, Inc., (“Firmenich”) develops and manufactures fragrances and flavors.¹ Firmenich entered into an Asset Purchase Agreement (“APA”) to purchase Defendant Natural Flavors, Inc. (“Natural Flavors”). The remaining Defendants are shareholders of Natural Flavors: Harris Stein, Herbert Stein, Jason Stein, Jocelyn Manship, and Julie Weisman.² The following facts are presumed in favor of Firmenich for purposes of this motion.

Natural Flavors manufactures natural and organic flavors.³ Beginning in 2017, Firmenich sought to expand its natural and organic product manufacturing.⁴ Natural flavors must meet specific industry standards to qualify as natural.⁵ The United States Department of Agriculture’s National Organic Program determines whether flavors are certifiably organic in accordance with specific regulations.⁶ Firmenich considered compliance with industry standards and organic certifications a critical factor for any potential acquisition target, and sought a company with a substantial portfolio of qualifying flavors.⁷

¹ Compl. ¶ 3.

² *Id.* ¶¶ 4–5.

³ *Id.* ¶¶ 25–26.

⁴ *Id.* ¶ 13.

⁵ *Id.* ¶ 17–18.

⁶ *Id.* ¶ 15–16.

⁷ *Id.* ¶ 19.

In August 2017, Firmenich received a “teaser” about the potential acquisition of Natural Flavors.⁸ Firmenich asserts that it was “led to believe that around 65% of Natural Flavors’ product line was organic certified.”⁹

Upon completion of its first phase of due diligence, Firmenich made an offer of \$115 million to acquire Natural Flavors.¹⁰ After this offer, Firmenich met with Jason Stein, Natural Flavors’ Vice President of Quality.¹¹ On October 26, 2017, Stein assured Firmenich’s representatives that Natural Flavors’ organic products were compliant with certifications.¹² Firmenich also conducted a site visit, and accessed a data room that housed organic certificates attesting that a significant percentage of Natural Flavors’ portfolio was certified organic in compliance with government regulations.¹³

On December 22, 2017, Firmenich and Defendants executed the APA, whereby Firmenich agreed to purchase Natural Flavors.¹⁴ The parties also executed a Manufacturing Agreement and a Temporary Staffing Services Agreement. Under Section 3.3 of the APA, Defendants confirmed that all products

⁸ *Id.* ¶ 22.

⁹ *Id.* ¶ 25.

¹⁰ *Id.* ¶¶ 29, 36–37, 50.

¹¹ *Id.* ¶ 37, 40–43.

¹² *Id.* ¶ 42.

¹³ *Id.* ¶¶ 44, 47, 48.

¹⁴ *Id.* ¶ 51.

sold by Natural Flavors complied with government regulations.¹⁵ The sale closed on February 1, 2018.¹⁶

“Shortly after closing, former Natural Flavors[sic] employee, Livia Engel, told [Firmenich] that the ingredients used to produce flavors were different from the ingredients listed on the formula sheets submitted for organic certification.”¹⁷ Ms. Engel also informed Firmenich that “Natural Flavors maintained two sets of books: one set reflected the flavors as they were produced, and the second purported to show the flavors as they should have been produced according to the certified formulas.”¹⁸

Stein confirmed that Natural Flavors did not produce flavors compliant with federal regulations or industry standards,¹⁹ and that Natural Flavors recorded two sets of batch sheets.²⁰ The first set reflected formulas consistent with certified formulas to provide auditors and regulators.²¹ The second set logged the batches Natural Flavors actually produced.²²

Natural Flavors shared a physical plant with Elan Chemical Company (“Elan”). Defendants placed suspect raw materials in Elan’s section of the plant to

¹⁵ APA § 3.3.

¹⁶ Compl. ¶ 51.

¹⁷ Pl.’s Opp. Br. at 8 (Jun. 19, 2019) (citing *Id.* ¶ 70).

¹⁸ *Id.* (citing Compl. ¶ 71).

¹⁹ Compl. ¶ 78.

²⁰ *Id.* ¶¶ 79-81.

²¹ *Id.*

²² *Id.*

prevent discovery by auditors.²³ Defendants Manship and Weisman, both of whom were Natural Flavors shareholders and signatories to the APA, own and control operations of Elan.²⁴ Weisman also served as Natural Flavors' Safety and Compliance Officer.²⁵

Firmenich filed its Complaint on January 31, 2019. On June 18, 2019 Defendants filed this Motion to Dismiss Counts I, III, II, IV & V, as well as claims as against individual Defendants. The Court heard oral argument on September 16, 2019.

STANDARD OF REVIEW

Failure to State a Claim Upon Which Relief Can be Granted

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”²⁶ The Court must accept as true all well-pleaded allegations.²⁷ Every reasonable factual inference will be drawn in the non-moving

²³ *Id.* ¶ 83.

²⁴ *Id.* ¶¶ 9–11.

²⁵ *Id.*

²⁶ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

²⁷ *Id.*

party's favor.²⁸ If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.²⁹

Improper Venue

Rule 12(b)(3) governs a motion to dismiss or stay on the basis of improper venue. The Court should “give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation.”³⁰ “The Court can ‘grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position.’”³¹ However, the Court usually must allow the plaintiff to take discovery where the plaintiff “advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges.”³² “In reviewing a motion to dismiss, the court must assume as true all the facts pled in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff.”³³

²⁸ *Wilmington Sav. Fund Soc’y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

²⁹ *Spence*, 396 A.2d at 968.

³⁰ *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super.).

³¹ *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super.) (citing *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *3 (Del. Ch.)).

³² *Id.*

³³ *Loveman*, 2009 WL 847655, at *2 (citing *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int’l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003)).

ANALYSIS

Count I – Fraud

Firmenich contends that Defendants knowingly made false representations regarding Natural Flavors’ compliance with applicable laws, industry standards, and contractual requirements. Firmenich asserts that it justifiably relied on Defendants’ false representations, which were intended to, and did, induce Firmenich to execute the APA.³⁴

Defendants argue that Firmenich failed to state a claim for fraud.³⁵ Defendants make three arguments in support of their Motion to Dismiss Firmenich’s fraud claim: (1) Firmenich’s fraud claim constitutes impermissible bootstrapping; (2) Section 3.5 of the APA provides a limitation on warranties that prevents Firmenich from demonstrating justifiable reliance; and (3) Firmenich’s fraud claim pleads duplicative damages.

Impermissible Bootstrapping.

Defendants argue that Firmenich’s fraud claim arises from warranties and representations provided in the APA, thus Firmenich must raise a breach of contract claim, and cannot claim fraud. In *EZLinks Golf, LLC v. PCMS Datafit, Inc.*,³⁶ this Court recognized that “a fraud claim only survives if it is based on some

³⁴ Compl. ¶¶ 144–153.

³⁵ Defs.’ Reply Br. at 3 (Jul. 15, 2019).

³⁶ 2017 WL 1312209 (Del. Super.).

conduct distinct from that constituting a breach of contract.”³⁷ Thus, “[f]or both a breach-of-contract claim and a tort claim to coexist in a single action, the plaintiff must allege that the defendant breached a duty that is independent of the duties imposed by the contract.”³⁸ 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.”³⁹

In *EZLinks*, the plaintiff’s claims arose from a reseller agreement whereby defendant agreed to provide a Point-of-Sale system to plaintiff.⁴⁰ The agreement required the system to be capable of handling plaintiff’s customer demands within seven months, and on a budget of \$1.4 million.⁴¹ As the basis for its breach of contract and fraudulent inducement claims, plaintiff alleged that defendant exceeded the time and budget constraints.⁴² The defendant moved to dismiss plaintiff’s fraud claim as impermissible bootstrapping.⁴³

³⁷ *Id.* at *3 (citing *Hiller & Arban, LLC v. Reserves Mgmt., LLC*, 2016 WL 3678544, at *4 (Del. Super.)).

³⁸ *Id.* (citing *Brasby v. Morris*, 2007 WL 949485, at *7 (Del. Super.) (quoting *McKenna v. Terminix Int’l Co.*, 2006 WL 1229674, at *2 (Del. Super.)) (internal quotations omitted).

³⁹ *Id.* at *5 (quoting *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch.) (quoting *Iotex Comms., Inc.*, 1998 WL 914265, at *5 (“[A breach-of-contract claim] cannot be ‘bootstrapped’ into a fraud claim merely by adding the words ‘fraudulently induced’ or alleging that the contracting parties never intended to perform.”))) (internal quotations omitted).

⁴⁰ *Id.* at *1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at *2

“In its best light,” the *EZLinks* plaintiff’s fraud claim alleged that defendant made misrepresentations regarding a preexisting product, and intentionally concealed defects.⁴⁴ This Court found that such pre-contractual conduct rendered plaintiff’s claims sufficiently distinct to survive defendant’s motion to dismiss.⁴⁵ Timing was essential to the analysis, because pre-contractual representations may violate duties predating contractual duties.⁴⁶

In the present case, Firmenich insists that the warranties and representations in the APA—not pre-contractual conduct—“are the bedrock of Firmenich’s fraud claim.”⁴⁷ Such a pleading cannot survive the bootstrapping bar. “[C]asting an alleged failure to comply with a contract as a failure to disclose an intention to take certain actions arguably inconsistent with that contract is exactly the type of bootstrapping [Delaware c]ourt[s] will not entertain.”⁴⁸ Instead, Firmenich must rely on Defendants’ pre-APA statements regarding product compliance with regulations and certification, and pre-APA measures taken to conceal such misrepresentations.⁴⁹

⁴⁴ *Id.* at *5.

⁴⁵ *Id.*

⁴⁶ *Id.* (quoting *Brasby*, 2007 WL 949485, at *7 (Del. Super.) (“the question of whether or not a fraudulent-inducement claim stands is whether the alleged conduct go[es] directly to the inducement of the contract, rather than its performance.”) (internal quotations omitted)).

⁴⁷ Pl.’s Opp. Br. at 12 (Jun. 19, 2019).

⁴⁸ *EZLinks*, 2017 WL 1312209, at *5 (quoting *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at 8* (Del. Ch.) (internal citations omitted)).

⁴⁹ Pl.’s Opp. Br. at 13 (Jun. 19, 2019) (citing Compl. ¶¶ 25, 37, 40, 47).

Firmenich’s fraud claim appears to withstand the bootstrapping bar based on Defendants’ alleged pre-APA misrepresentations and conduct. The Court finds that Firmenich has pled facts sufficient to overcome the bootstrapping bar to the fraud claim at the motion to dismiss stage.

Limitation on Warranties Pursuant to APA Section 3.5

Defendants assert that, pursuant to Section 3.5 of the APA, Firmenich explicitly disclaims reliance on pre-APA representations, thus Firmenich’s claim for fraud based on pre-contractual representations fails.⁵⁰

Section 3.5, “Limitation on Warranties” provides:

The representations and warranties in Sections 3.3 and 3.4 constitute the sole and exclusive representations and warranties to Buyer in connection with the transactions contemplated hereby. Except as expressly set forth in Sections 3.3⁵¹ and 3.4,⁵² neither any Shareholder, Sellers’ Representative, the Company, their respective Affiliates nor any of their respective directors, managers, partners, shareholders, members, officers, employees, accounting firms, legal counsel or other agents, consultants or representatives make any express or implied representation or warranty of any kind whatsoever . . . and Shareholders, Sellers’ Representative and the Company . . . disclaim all liability and responsibility for, and Buyer acknowledges and agrees that it has not relied on, any representation, warranty, covenant, agreement, or statement made or information communicated (orally or in writing) to Buyer ANY AND ALL PRIOR REPRESENTATIONS AND WARRANTIES MADE BY ANY PARTY OR ITS REPRESENTATIVES, WHETHER VERBALLY OR IN WRITING, ARE DEEMED TO HAVE BEEN MERGED INTO THIS AGREEMENT, IT BEING INTENDED THAT NO SUCH PRIOR

⁵⁰ Defs.’ Br. at 8 (Jun. 18, 2019) (quoting Compl. Ex. 1 § 3.5).

⁵¹ Compl. Ex. 1 § 3.3 (setting forth representations and warranties).

⁵² *Id.* § 3.4 (setting forth representations of individual shareholders).

REPRESENTATIONS OR WARRANTIES SHALL SURVIVE THE EXECUTION AND DELIVERY OF THIS AGREEMENT.⁵³

This Court addressed a similar provision in *Affy Tapple, LLC v. ShopVisible, LLC*.⁵⁴ The plaintiff raised a fraud in the inducement claim based on defendant's pre-contractual representations.⁵⁵ The defendant asserted that plaintiff could not bring claims arising from pre-contractual representations because the contract limited defendant's warranties and representations in an anti-reliance provision. This Court found that the anti-reliance provision in *Affy Tapple* sufficiently disclaimed reliance on pre-contractual representations because "[the provision] explicitly states that [plaintiff] agrees that the warranties provided in the [contract] are the *exclusive* warranties."⁵⁶ Thus, the contract prevented plaintiff from pursuing its fraud claim.

In the present case, Section 3.5 of the APA also explicitly states that the representations included in the APA constitute the "sole and exclusive representations and warranties" available to Firmenich. Firmenich argues that, despite the language in Section 3.5, Section 8.7 specifically carves out common law fraud.⁵⁷ Section 8.7 provides: "*Except in the case of common law fraud* by any

⁵³ *Id.*

⁵⁴ 2019 WL 1324500, at *2–3 (Del. Super.).

⁵⁵ *Id.* at *3.

⁵⁶ *Id.* at *3 (emphasis added).

⁵⁷ Pl.'s Opp. Br. at 11 (Jun. 19, 2019) ("Defendants ignore the fraud exception, which plainly prevents them from using the contractual indemnification to escape or limit their responsibility.").

of the *Seller Parties*...indemnification...shall be the sole and exclusive remedy....”⁵⁸ Thus, Firmenich contends that Section 8.7 permits extra-contractual remedies.

Defendants counter that Section 8.7 actually limits the parties’ rights to sue each other for torts “with respect to any matter that is subject of this Article VIII [Indemnification]....”⁵⁹ Defendants contend that Firmenich is contractually barred from suing Defendants for fraud, not *despite*, but *pursuant* to Section 8.7.⁶⁰

The Court finds that the Section 8.7 carve-out permits Firmenich to pursue a claim for fraud based on pre-contractual representations. Section 8.7 reflects the parties’ agreement to treat common law fraud claims differently from other indemnifiable causes of action.

Duplicative Damages.

Defendants argue that Firmenich must, but did not, plead fraud damages distinct from its breach of contract damages. “Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must

⁵⁸ *Id.* (quoting Compl. Ex. 1 § 8.7) (emphasis added).

⁵⁹ Defs.’ Br. at 11 (Jun. 18, 2019) quoting APA § 8.7:

Notwithstanding anything expressed or implied herein to the contrary, the provisions of Sections 3.2(i), 3.5 and 10.6 shall, at all times, be given full force and effect, and *shall not be abrogated or otherwise affected in the case of fraud* (or any Claim based thereon) or any other Claim by an Buyer indemnitee with respect to any matters arising under or relating to this Agreement...and/or the transactions contemplated hereby (whether or not indemnification pursuant to the provisions of this Article VIII is the sole and exclusive remedy of the parties with respect thereto).
Id.

have sustained damages as a result of a defendant's action."⁶¹ "And those fraud damages allegations can't simply 'rehash' the damages that were allegedly caused by the claimed breach of contract."⁶²

On the basis of its claims for breach of contract, fraud, and unjust enrichment, Firmenich requests the following relief:

- (1) general damages and losses;
- (2) special damages in an amount to be determined at the time of trial;
- (3) an award of compensatory, consequential, statutory, exemplary, and punitive damages;
- (4) indemnification of all damages, expenses, costs, fees, or other charges incurred by Firmenich resulting or arising from Defendants' conduct;
- (5) a declaration that Defendants committed fraud and/or engaged in willful misconduct, thus vitiating any cap or limitation on contractual damages;
- (6) reasonable attorneys' fees, pre and post-judgment interest, and costs of suit; and

⁶¹ *EZLinks*, 2017 WL 1312209, at *7 (quoting *Cornell Glasgow, LLC v. La Grange Props. LLC*, 2012 WL 2106945, at *8 (Del. Super.) (quoting *Dalton v. Ford Motor Co.*, 2002 WL 338081, at *6 (Del. Super.))).

⁶² *Id.* (citing *Cornell Glasgow, LLC*, 2012 WL 2106945, at *8 (citing *Albert v. Alex Brown Mgt. Serv., Inc.*, 2005 WL 2130607, at *7 (Del. Ch.))).

(7) such other and further relief as the Court may deem just and proper.

These prayers for relief are not specifically allocated among Firmenich's causes of action. Firmenich demands this relief for all its claims. It appears to the Court that "[t]he only claims for relief unique to the fraud claims are for punitive damages."⁶³ Firmenich also seeks a declaration that Defendants committed fraud, presumably to permit punitive damages.

In *EZLinks*, the defendant also argued that plaintiff's fraudulent inducement damages were identical to its breach of contract damages.⁶⁴ The *EZLinks* plaintiff asserted that punitive damages, which cannot be granted for breach of contract claims, sufficiently distinguished its damages for fraud.⁶⁵ This Court disagreed, and dismissed plaintiff's fraud claim despite finding it sufficiently distinct from plaintiff's breach of contract claim.⁶⁶

This Court consistently has held that the "mere addition of punitive damages to [plaintiff's] fraudulent inducement charge is not enough to distinguish it from

⁶³ *AFH Holding Advisory, LLC v. Emmaus Life Scis., Inc.*, 2013 WL 2149993, at *12 (Del. Super.).

⁶⁴ *EZLinks*, 2017 WL 1312209, at *6.

⁶⁵ *See id.*

⁶⁶ *Id.*

the contract damages.”⁶⁷ “Failure to plead separate damages is an independent ground for dismissal.”⁶⁸

Firmenich attempts to distinguish its fraud damages from its breach of contract damages. The Court is not persuaded that there is a difference. Therefore, *EZLinks* controls, and Defendants’ Motion to Dismiss Count I – Fraud, is hereby **GRANTED**.

***Count III – Breach of Contract
(Breach of the Asset Purchase Agreement)***

Firmenich claims that Defendants breached the warranties and representations in the APA,⁶⁹ entitling Firmenich to damages pursuant to APA Section 8.2.⁷⁰ Defendants argue that Firmenich’s breach of contract claim must be dismissed because Firmenich failed to abide by the exclusive remedy provision in APA Section 8.3. Section 8.3 requires that Firmenich: (1) provide written notice of a claim of breach; and (2) pursue damages according to procedures prescribed by the APA before bringing a cause of action for breach of contract.

⁶⁷ *Id.* (citing *Hiller & Arban*, 2016 WL 3678544, at *4–5; and *AFH Holding Advisory*, 2013 WL 2149993, at *12–13).

⁶⁸ *Id.* (citing *Cornell Glasgow*, 2012 WL 2106945, at *9 (“[Plaintiff] has failed to plead fraud damages separate and apart from its breach damages. The fraud claim, therefore, must be dismissed for this reason as well.”); and *ITW Global Invs. Inc. v. Am. Indus. Partners Cap. Fund IV, L.P.*, 2015 WL 3970908, at *5 (Del. Super.)).

⁶⁹ Compl. ¶¶ 162–165.

⁷⁰ *Id.* Ex. 1 § 8.2 (“[T]he [Defendants] shall indemnify [Firmenich] against and from all Damages [...] actually sustained or incurred by [Firmenich], as a result of, or arising out of, or by virtue of: (a) [...] breach of any representation and warranty....”).

Defendants argue that Section 8.3(a) of the APA required Firmenich to assert a claim, in writing, “specifying the details of the alleged breach with reasonable particularity, the sections of this Agreement alleged to have been breached, a *good faith estimate of Damages* claimed, and all relevant facts with respect thereto, delivered to Seller’s Representative....”⁷¹ Defendants assert that Firmenich failed to provide any notice beyond filing its Complaint. Defendants further argue that, even if the Complaint otherwise satisfies the Section 8.3(a) notice requirement, Firmenich nevertheless fails because it omits an estimation of damages.

Defendants also assert that Firmenich was required, and failed to follow the procedures in APA Section 8.3(c) for pursuing damages in the event of a breach.⁷² Defendants contend that, pursuant to Section 8.3(c), Firmenich must first collect from the Escrow Account up to \$575,000. Next, Firmenich must collect from the Environmental Insurance Policy, if applicable. If Firmenich’s claims remain unsatisfied, it must then collect from the R&W Insurance Policy. Only if Firmenich is not made whole by this process may it pursue claims against Defendants.⁷³ Defendants assert that Firmenich failed to exhaust the remedies

⁷¹ Compl. Ex. 1 § 8.3(a) (emphasis added).

⁷² Defs.’ Br. at 24 (Jun. 18, 2019).

⁷³ *Id.* (citing Compl. Ex. 1 § 8.3(c)).

according to the procedures in the APA. Thus, Firmenich's breach of contract claim must be dismissed.⁷⁴

Firmenich argues that the Court cannot dispose of Firmenich's claim for breach of contract at the motion to dismiss stage.⁷⁵ Firmenich disagrees with the Defendants' reading of the APA, but considers it irrelevant at this time. Firmenich contends that Defendants' argument necessarily relies on facts outside the Complaint. Thus, regardless of whether the Court agrees with Defendants' interpretation of the APA, dismissal based on facts outside the Complaint is inappropriate.⁷⁶

Defendants disagree, asserting that Firmenich's compliance with notice and exclusive remedy provisions is a legal issue ripe for disposition.⁷⁷ Defendants argue that contract interpretation is a legal question, and "[u]nder Delaware law, the interpretation of a contract is a question of law, and a motion to dismiss is a proper vehicle to determine the meaning of contract language."⁷⁸ Defendants contend that the contract is unambiguous. Thus, this Court "should give binding effect to its evident meaning."⁷⁹

⁷⁴ *Id.*

⁷⁵ Pl.'s Opp. Br. at 21 (Jun. 19, 2019).

⁷⁶ *Id.* at 21–22.

⁷⁷ Defs.' Reply Br. at 13 (Jul. 15, 2019).

⁷⁸ *Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *6 (Del. Ch.)

⁷⁹ *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorist Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

Defendants assert that the Court may apply the clear meaning of the APA to the *undisputed* fact that Firmenich failed to comply with Section 8.3,⁸⁰ but Firmenich disputes that it has not complied.⁸¹ Firmenich alleges that it satisfied the notice requirement and followed the proper remedial channels prescribed in 8.3. Further, on the day of oral argument, Firmenich’s counsel stated for the first time that Firmenich is presently pursuing claims under the R&W Insurance Policy.

Viewing the facts in the light most favorable to the nonmoving party, the Court finds that there remain questions of fact as to whether Firmenich complied with the requirements in APA Section 8.3. Therefore, Defendants’ Motion to Dismiss Count III – Breach of Contract, is hereby **DENIED**.

Count II – Unjust Enrichment

Firmenich claims Defendants wrongfully induced Firmenich to execute the APA, which enriched Defendant, and impoverished Firmenich. Firmenich contends that it is entitled to recovery for unjust enrichment. Defendants argue that Firmenich’s Count II must be dismissed because Firmenich cannot raise a

⁸⁰ Defs.’ Reply Br. at 14 (Jul. 15, 2019) (“[Firmenich] failed to comply with [Section 8.3], and that undisputed fact is fatal to Count III.”).

⁸¹ Transcript of Oral Argument at 29–30 (Sep. 16, 2019).

claim for unjust enrichment where a contract already comprehensively governs the parties' relationship.⁸²

Firmenich submits that unjust enrichment may exist at the pleadings stage alongside claims for breach of contract and fraud,⁸³ as an alternative theory of recovery,⁸⁴ or to inform an appropriate remedy.⁸⁵ This Court in *Affy Tapple* allowed a claim for unjust enrichment to survive a Motion to Dismiss, but permitted it to remain only as a potential measure of damages.⁸⁶

The Court will not deviate from its approach in *Affy Tapple*.⁸⁷ Unjust enrichment is not a standalone claim. The Court considers unjust enrichment more properly a potential measure of damages. Firmenich may maintain its unjust enrichment allegations, provided Firmenich proves its breach of contract claim, as well as the elements of unjust enrichment. Firmenich may pursue unjust

⁸² Defs.' Br. at 25–26 (Jun. 18, 2019) (citing *Yu v. GSM Nation, LLC*, 2018 WL 2272708, at *21 (Del. Super.); *BAE Sys. Info. and Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *7 (Del. Ch.)).

⁸³ Pl.'s Opp. Br. at 22 (Jun. 19, 2019) (quoting *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2018 WL 1559936, at *16 (Del. Ch.) (quoting *McPadden v. Sidhu*, 964 A.2d 1262, 1276 (Del. Ch. 2008) (“[W]hen a plaintiff alleges that it is the [contract], itself, that is the unjust enrichment, the existence of the contract does not bar the unjust enrichment claim.”) (internal quotations omitted)).

⁸⁴ *Id.* at 24 (quoting *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980, at *27 (Del. Ch.)).

⁸⁵ *Id.* at 25 (citing *Narrowstep*, 2010 WL 5422405, at *17).

⁸⁶ *Affy Tapple*, 2019 WL 1324500 at *6.

⁸⁷ Defendants respond that this alternative theory for recovery fails because the APA provides Firmenich's exclusive remedy is provided in Section 8.3. Just as in *Affy Tapple*, the Court will not resolve the issue of punitive damages at this stage of the proceedings. *Id.* Whether or not Firmenich may seek punitive damages as a matter of law is a question that may be decided at either the summary judgment stage or at the conclusion of evidence at trial. *Id.*

enrichment as a potential measure of damages, but cannot duplicate its contract damages with alleged tort claims. Therefore, Defendants' Motion to Dismiss Count II – Unjust Enrichment, is hereby **DENIED IN PART**.

Individual Defendants

Firmenich raises its breach of contract, fraud, and unjust enrichment claims against all Defendants: Natural Flavors, Harris Stein, Herbert Stein, Jason Stein, Jocelyn Manship, and Julie Weisman.⁸⁸ Natural Flavors is a corporation, but Harris Stein, Herbert Stein, Jason Stein, Jocelyn Manship, and Julie Weisman are individual, natural persons. Defendants argue that Firmenich failed to allege any basis to find liability on the part of the individual defendants, thus requiring dismissal of those persons from Firmenich's causes of action.

Defendants cite case law holding that “a corporate officer can only be held liable for *his own* wrongful acts.”⁸⁹ Defendants maintain that mere knowledge is insufficient, and Firmenich must allege “that the officer directed, ordered, ratified, approved, or consented to the tortious act.”⁹⁰ Defendants argues that Firmenich has not alleged any acts individual Defendants personally committed.

⁸⁸ *Id.* ¶¶ 4–5.

⁸⁹ *Heronemus v. Ulrick*, 1997 WL 524127, at *2 (Del. Super.).

⁹⁰ *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *10 (Del. Super.) (quoting *T.V. Spano Bldg. Corp. v. Dep't of Nat. Res. And Env'tl. Control*, 628 A.2d 53, 61 (Del. 1993)).

Firmenich asserts that determining an individual’s culpability is inappropriate at the motion to dismiss stage. Firmenich argues that personal liability is a question of fact, and the Court need only find “some conceivable set of facts that could be proven to support the claims asserted such that the claimant would be entitled to relief.”⁹¹ In its Complaint, Firmenich alleges various actions attributed to specific individual Defendants:

- (1) Jason Stein made various misrepresentations regarding the compliance of Natural Flavors’ products;⁹²
- (2) Jason Stein, Jocelyn Manship, and Julie Weisman controlled the operations of Elan, where Defendants hid the noncompliant ingredients;⁹³
- (3) Herbert Stein was the President of Natural Flavors, which he ran with his son, Jason Stein;⁹⁴ and
- (4) Each of the individual Defendants signed the APA with the obligation to “severally, and not jointly”⁹⁵ indemnify Firmenich for any damages arising from a breach of the APA.⁹⁶

⁹¹ *Yavar Rzayev, LLC v. Roffman*, 2015 WL 5167930, at *4 (Del. Super.); *see also Brasby*, 2007 WL 949485, at *6.

⁹² Compl. ¶ 42.

⁹³ *Id.* ¶ 83.

⁹⁴ *Id.* ¶ 6.

⁹⁵ Compl. Ex. 1 § 8.2.

⁹⁶ *Id.* at 80–82.

Viewing the facts in the light most favorable to Firmenich, the Court finds that Firmenich has established a *prima facie* case against the individual Defendants, sufficient to survive Defendants’ Motion to Dismiss. Questions of facts have been raised as to whether the individual Defendants directed, ordered, ratified, approved, or assented to breaches of the APA. Therefore, Defendants’ Motion to Dismiss Firmenich’s claims as to the individual Defendants named herein, is hereby **DENIED**.

Count IV – Breach of the Manufacturing Agreement; & Count V – Breach of the Temporary Staffing Services Agreement

Firmenich raises two breach of contract claims arising from: (1) the Manufacturing Agreement; and (2) the Temporary Staffing Services Agreement. Firmenich and Defendants executed these contracts in addition to the APA. Defendants moved to dismiss Counts IV and V pursuant to Rule 12(b)(3). The Manufacturing Agreement and the Temporary Staffing Services Agreement include mandatory forum selection clauses that grant jurisdiction to New Jersey. Defendants contend that this Court does not have jurisdiction over Counts IV and V.

Defendants argue that Firmenich and Defendants, two “sophisticated parties,” entered into three separate contracts. The parties agreed that causes of action arising out of the APA would be resolved in Delaware, while any claims

arising from the additional agreements would be resolved in New Jersey. Both additional agreements provide:

The Parties each agree to the exclusive jurisdiction of the state of and federal courts sitting in the state of New Jersey, with respect to any claim arising under or relating to this Agreement and/or the transactions contemplated hereunder...the Parties each waive any objection based on forum non conveniens and waive any objection to venue of any action instituted hereunder.⁹⁷

Defendant posits that “[t]he courts of Delaware defer to forum selection clauses’ and grant Rule 12(b)(3) motions to dismiss where the parties use express language clearly indicating that the forum selection clause excludes all other courts before which those parties could otherwise properly bring an action.”⁹⁸ “Forum selection clauses are presumptively valid, unless the resisting party clearly shows that enforcement would be unreasonable or unjust, or that the clause is invalid for such reasons as fraud and overreaching.”⁹⁹

Firmenich contends that the Court need not enforce the forum selection clauses in the Agreements because doing so would violate strong public policy of judicial efficiency. Firmenich asserts that judicial efficiency would be promoted by having this Court hear Firmenich’s claims arising out of all agreements because

⁹⁷ Compl. Ex. 2 at Ar. 21.2; Compl. Ex. 3 at § 11(a).

⁹⁸ *Scanbuy, Inc. v. NeoMedia Techs., Inc.*, 2014 WL 5500245, at *2 (Del. Ch.) (quoting *Ashall Homes Ltd. v. ROK Entm’t Grp. Inc.*, 992 A.2d 1239, 1245 (Del. Ch. 2010) (internal quotations omitted)).

⁹⁹ *Nat’l Union Fire Ins. Co. v. Trustwave Holdings, Inc.*, 2016 WL 2354621, at *4 (Del. Super.) (citing *Ingres Corp. v. CA, Inc.*, 8 A.2d 1143, 1146 (Del. 2010)).

the same operative facts required to adjudicate claims arising from the APA are required to address Counts IV and V. “That same efficiency avoids multiple suits and redundant costs, and provides for relief in one action.”¹⁰⁰

The Court finds Firmenich’s public policy argument unpersuasive. “Mere inconvenience or additional expense is not the test of unreasonableness.”¹⁰¹ There is no case pending in New Jersey at this time. Therefore, there is no need for the Court to engage in a *McWane*¹⁰² analysis. The Court declines to presume that New Jersey would yield to Delaware any interest it has in litigation concerning the additional agreements.

The additional agreements include mandatory forum selection clauses providing exclusive jurisdiction to the State of New Jersey. There is no legal basis for this Court to invalidate the parties’ agreed forum on the grounds of judicial economy. Therefore, Defendants’ Motion to Dismiss Count IV – Breach of the Manufacturing Agreement, and Count V – Breach of the Temporary Staffing Services Agreement, is hereby **GRANTED**.

¹⁰⁰ *Mell v. New Castle County*, 2003 WL 1919331, at *9 (Del. Ch.).

¹⁰¹ *Nat’l Union Fire*, 2016 WL 2354621, at *4. (citing *Loveman*, 2009 WL 847655, at *3 (Del. Super.)).

¹⁰² *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co.*, 263 A.2d 281, 282–83 (Del. 1970) (standard of review for *forum non conveniens*).

CONCLUSION

The Court finds that Firmenich's fraud claim withstands the bootstrapping bar, and is not prohibited by APA Section 8.7. However, Firmenich's attempts to distinguish its fraud damages from its breach of contract damages are unavailing. The Court is not persuaded that there is a difference. **THEREFORE**, Defendants' Motion to Dismiss Count I – Fraud, is hereby **GRANTED**.

Viewing the facts in the light most favorable to the nonmoving party, the Court finds that there remain questions of fact as to whether Firmenich complied with the requirements in APA Section 8.3. **THEREFORE**, Defendants' Motion to Dismiss Count III – Breach of Contract, is hereby **DENIED**.

The Court considers unjust enrichment more properly a potential measure of damages, as opposed to a stand-alone claim. **THEREFORE**, Defendants' Motion to Dismiss Count II – Unjust Enrichment, is hereby **DENIED IN PART**.

Viewing the facts in the light most favorable to Firmenich, the Court finds that Firmenich has established a *prima facie* case against the individual Defendants sufficient to survive Defendants' Motion to Dismiss. Questions of facts have been raised as to whether the individual Defendants directed, ordered, ratified, approved, or assented to breaches of the APA. **THEREFORE**, Defendants' Motion to Dismiss Firmenich's claims as to the individual Defendants named herein, is hereby **DENIED**.

