IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PHAGE DIAGNOSTICS, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N19C-07-200 MMJ [CCLD]
v.	)	
	)	
CORVIUM, INC.,	)	
	)	
Defendant.	)	

POST-TRIAL OPINION

Submitted: March 13, 2023
Decided: May 2, 2023
Unsealed: May 16, 2023

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JOHNSTON, J.

Plaintiff Phage Diagnostics, Inc., ("Phage") brought this fraud action against Defendants Corvium, Inc. ("Corvium"), Michael Koeris ("Koeris"), Red Maple Capital, LLC ("RMC"), and Vik Narasimhan ("Narasimhan") (collectively "Defendants"). Phage purchased Corvium's pathogen detection business and its related technology ("DETECT") from Corvium (the "Transaction"). The Transaction closed on October 10, 2017.

Parties

Phage is a Delaware corporation and wholly-owned subsidiary of Institute for Environmental Health, Inc. ("IEH"). IEH partners with food companies to implement proactive approaches to manage food safety risks. IEH created Phage for the purpose of purchasing Corvium's DETECT business. IEH is not a party to these proceedings.

Corvium is a Delaware corporation. Corvium formerly was known as Sample6, Inc., and was in the business of designing systems for the testing of food products and food processing environments. While operating as Sample6, Corvium developed and provided testing systems for different pathogens, such as Listeria and Salmonella, under the DETECT and CONTROL brands. Koeris founded Corvium, and was a Director at the time of the Transaction. Narasimhan was Corvium's broker for the Transaction. Narasimhan was RMC's Managing Partner.

Plaintiff Files this Action

On July 25, 2019, Phage filed an initial two-count complaint seeking relief for fraud and breach of contract. Phage alleged that Corvium and Koeris committed fraud, and were aided and abetted by RMC and Narasimhan. Corvium filed a Motion to Dismiss on September 6, 2019. Phage subsequently dropped its breach of contract claim.

Phage filed its Amended Complaint on October 4, 2019. In its Amended Complaint, Phage raised one count of fraud in the inducement against Corvium.

Corvium filed a second Motion to Dismiss. By Opinion dated March 9, 2020, the Court made the following rulings.

> Viewing the facts under the light most favorable to Plaintiff, the Court finds that there exists, at minimum, a question of fact as to whether Defendant's statements were affirmative statements or mere puffery. The Court finds that Plaintiff has complied with Rule 9(b) requirements, as interpreted by case precedent, and stated fraud claims with sufficient particularity as to the allegations of misrepresentations to survive Defendant's motion to dismiss.
>
> Plaintiff has alleged that Defendant made numerous misrepresentations in connection with the sale of its DETECT business, that Defendant knew such representations were false, and that Defendant made those statements to induce Plaintiff to

> purchase the DETECT business. Therefore, the Court finds that Plaintiff has sufficiently pled knowledge and intent to survive Defendant's Motion to Dismiss for failure to plead with particularity regarding knowledge and intent.
>
> The extent of Plaintiff's due diligence; the knowledge available to Plaintiff at the time of its alleged reliance; and the degree to which Plaintiff relied on any representations, are potentially discoverable, and heavily fact-involved. Thus, the Court finds that the issue of reliance in this case is a fact-intensive inquiry that is not appropriate for resolution on motion to dismiss. Therefore, Plaintiff's fraud complaint survives Defendant's Motion to Dismiss for failure to plead with particularity regarding justifiable reliance.
>
> Plaintiff alleged that it suffered damages in connection with its purchase of the DETECT business, which it alleges was based on its reliance on false information provided by Defendant. The Court finds that Plaintiff has adequately tied its allegations of fraud to its alleged damages. Therefore, the Court finds that Plaintiff has stated damages with sufficient particularity to withstand Defendant's Motion to Dismiss.
>
> **THEREFORE**, Defendant's Motion to Dismiss the Amended Complaint for failure to state a claim pursuant to Rules 12(b)(6) and 9(b) is hereby **DENIED.**

A five-day bench trial was held beginning September 26, 2022. The parties submitted post-trial briefs.

FINDINGS OF FACT

The parties stipulated to the following facts prior to trial.

1. Prior to October 10, 2017 (the date of the Transaction), Corvium[1] developed and provided solutions for food safety under the DETECT and CONTROL brands. The DETECT products included, among other things, two types of detection systems used to identify pathogens such as Listeria and Salmonella: a single tube detection system ("ST System") that ran one test at a time and a high-throughput detection system ("HT System") that could run up to ninety-six tests at a time.

2. Dr. Samadpour, who at the time was a principal of IEH (Phage's parent corporation), met Dr. Koeris at the International Association for Food Protection ("IAFP") meeting in Tampa, Florida, held July 9-12, 2017, and discussed the possible sale of the DETECT business.

3. On August 25, 2017, Dr. Narasimhan, on Corvium's behalf, provided Dr. Samadpour with the "Sample6 DETECT Executive Summary."

4. On August 28, 2017, Dr. Koeris, Thomas Phair (Corvium's former contract Chief Financial Officer), other Corvium employees, and Dr. Narasimhan met with Dr. Samadpour in Massachusetts.

[1] Corvium was known as "Sample6" at the time of the Transaction.

5. On September 2, 2017, Dr. Samadpour made a written offer of $10 million to purchase the DETECT business.

6. Between September 18 and September 21, 2017, Dr. Koeris, Matt Miller (a Corvium Field Application Specialist), and Sophie Daudenarde (Corvium's Senior Director of Product) met with Dr. Samadpour and other IEH representatives in Washington to demonstrate the HT System and to discuss the DETECT business. Following the meeting, Corvium left an HT System with IEH.

7. On or about September 24, 2017, Eurofins also expressed interest in purchasing the DETECT business for $14 million.

8. On October 4, 2017, Corvium held a Board meeting, also attended by Dr. Narasimhan.

9. On or around October 4 or 5, 2017, Dr. Samadpour conveyed an offer of $12 million for the DETECT business.

10. On October 10, 2017, Phage and Corvium executed and entered the Asset Purchase Agreement ("APA"). By wire transfer, Corvium received the $12 million purchase price, less any adjustments set forth in the APA. In or pursuant to the APA, Phage acquired from Corvium, among other things, the Purchased Assets, as defined in the APA.

11. Sample6 subsequently changed its name to Corvium.

Executive Summary

Corvium sent Samadpour the Sample6 DETECT Executive Summary, attached to an email dated August 25, 2017. The covering email stated that Samadpour previously had received information during discussions that took place between Samadpour and Koeris at the IAFP meeting in July 2017. Corvium confirmed that this information included representations that Corvium "recently launched a high-throughput micro-plate based Listeria test[] that targets larger plants and central testing labs" and Corvium "is on track to launch a high-throughput environmental test for Salmonella at the end of 2017...."

The Executive Summary represented that: "Salmonella spp. Assay for environmental (surfaces) samples poised to received validation and launch in...Q4 2017;" and a "similar DETECT test for Salmonella is ready for launch for surface testing, with finished goods testing scheduled for launch in Quarter 1 2018."

It is undisputed that "validation" refers to AOAC certification.

The Executive Summary also stated that data generated by third parties demonstrated that Corvium's Salmonella Test Kit could detect Salmonella in diverse food types (beef, smoked salmon, milk and spinach) in between six and ten hours. Further, the HT Salmonella Test Kit "accurately and sensitively detects all relevant bacterial strains in the design scope." And, the "DETECT family of tests employ

cocktails of these bacteriophages that specifically target bacterial pathogens of interest." Corvium did not define "all relevant" or "design scope."

Further representations stated: "High-throughput, micro-plate based system ready for launch for larger plants and labs;...With launch of a new DETECT Salmonella test in the high-throughput microplate-based format slated for Q4 2017, the company will offer two of the highest volume tests for monitoring of food processing surfaces;...this expanded product offering allows the company to address the critical needs of these high volume test users."

Management Presentation and DETECT Demonstration

On August 28, 2017, Samadpour met with Koeris and Narasimhan at Corvium's headquarters in Woburn, Massachusetts. Corvium gave Samadpour: (1) a PowerPoint "Management Presentation" detailing the HT System and Salmonella Test Kit's status and capabilities; (2) a live demonstration; and (3) a tour of Corvium's lab.

The Management Presentation represented that the Salmonella Environmental Test had an "[e]xpected launch in Q4 2017" after "Validation/Certification;" and that the Salmonella Food Test had an "[e]xpected launch in Q1 2018 after "Validation/Certification." Financial projections were for HT System growth. The live demonstrations were successful.

A second meeting took place in Corvium's headquarters September 19-20, 2017. Blind sample tests on the ST and HT System accurately detected the targeted bacteria and excluded the non-target bacteria. A training session for Phage's team included another PowerPoint Management Presentation, including the same timelines.

The Management Presentation included the specific disclaimer that "there can be no assurance that any projected results or other forward-looking statements are attainable or will be realized...actual results may vary significantly from the forward-looking statements...and no representations or warranties are made...that the projected results or other forward-looking statements will be achieved."

Phage requested a copy of the Corvium grant application to the NIH relating to DETECT. Corcium declined to provide a copy, on the basis that it contained "many aspects of proprietary knowhow."

Koeris testified that Corvium had spent months doing "exhaustive diligence work" with Phage. This included the scientific and technical diligence pursued by Phage. IEH did not perform any testing from the time IEH had possession of the HT instrument (before training) through closing.

Status of HT System Environmental Salmonella Test at Closing

Closing occurred on October 10, 2017. As of January 2017, Corvium was still testing combinations of assay parameters to identify the correct combination or set of parameters for inclusitivity (accurate detection of Salmonella) and exclusivity (accurate exclusion of non-Salmonella). At that time, the assay obtained false negatives and detected non-Salmonella as Salmonella. Corvium data showed that the assay consisted of a single bacteriophage, not a "cocktail."

The AOAC certification process began in January 2017. As a result of inclusivity and exclusivity problems with the Salmonella Environmental Test, Corvium focused its certification efforts on the HT Listeria environmental test. The "pause" on the HT Salmonella Environmental Test AOAC certification began in March 2017 and ended June 2017. False positives continued to be a problem, which required resolution before the Test could move out of pre-development to the development stage**.** The Salmonella Test could not be submitted for AOAC certification before two risks - related to retesting inclusivity and to solving exclusivity - could be satisfactorily completed. A draft AOAC validation outline set out five uncompleted studies required for certification. On August 22, 2017, Corvium received a validation outline from the AOAC.

As of September 27, 2017, 146 Salmonella strains from Corvium's 562 strain panel were missed by the Salmonella assay. Corvium was still experimenting to find a combination of assay parameters that would result in "zero-off-target hits." 133 strains were proposed for AOAC certification purposes. Corvium's assay was detecting 98 strains at sufficiently high levels - 2 strains less that the necessary 100-strain verification panel. On the day before the October 10, 2017 closing, a revised panel of 104 Salmonella strains was sent to Corvium's AOAC consultant for "urgent" review. The consultant responded that the "updated list looks really good to me. I do not forsee any issues." Corvium's expert witness testified that Corvium would have been able to obtain AOAC certification in less than three months.

Corvium never received AOAC approval of an inclusivity panel, which is prerequisite to doing testing for certification. Phage's expert testified that the AOAC certification process normally takes 10 months after an assay is "locked" and a validation outline finalized.

Phage does not dispute that a Salmonella test theoretically can be marketed for commercial sale without AOAC certification. However, Phage presented evidence that it was "common knowledge" at Corvium that customers required AOAC certification, and certification was necessary for product launch. The minimal AOAC certification standard is detection of 100 strains, and exclusion of

30 strains. Corvium does not dispute that as of the time of closing, the Salmonella Environmental Test could not be launched.

Status of HT Salmonella Food Test at Closing

In January 2017, an internal Corvium business plan described the HT Salmonella Food Test as in "planning phase." The Corvium Salmonella Strategy circulated on August 18, 2017 still listed the Test as in "planning phase." There is no evidence that any other work was performed on the Salmonella Food Test in 2017. The results of a Q Labs study showed the Test at the stage of "proof of concept."

However, in August, 2017 Corvium developed the "Salmonella Strategy" memo. The Salmonella Strategy stated that "two major areas of concern...have been mitigated." The Strategy asserted that the enrichment medium formulation solved exclusivity; and process improvements demonstrated 3 consecutive passing runs. Re-testing occurred within 2-3 weeks thereafter.

Ten months before closing, Corvium received Small Business Innovation Research Program grant funding through the National Institutes of Health ("NIH") to expand (not develop) the Salmonella Food Test. Corvium's grant application stated: "Sample6 has already established feasibility of the DETECT/S assay for environmental surface detection and finished product testing."

On October 29, 2019, two years after closing, Phage certified to the NIH that the Salmonella Test and the HT System worked. The Salmonella Test had "exceptional" coverage and "no exclusivity issues."

Status of the HT System at Closing

Design of the HT System began in January 2017, and was based on an existing product. The design was completed by August 24, 2017. A test was run in August, but the high-throughput function was not yet available for evaluation.

By September, a two-day test included the high-throughput feature. There were no technical or significant issues with the equipment during high-volume testing. Nevertheless, Corvium's expert acknowledged during trial testimony that more tests were needed to confirm the HT System's capabilities.

Four days before closing, Corvium and the System designer entered into an Amended Consulting Agreement. The Agreement indicated that more work was needed on the System.

Two weeks after the transaction closed, the AOAC certified the HT Listeria test. The certification stated that the HT Listeria test performed to the manufacturer's specification and was "a robust and rapid assay for the accurate identification of Listeria."

Six months after closing, a Phage customer terminated its contract. Phage identified the problem as poor conditions and lack of general upkeep by the customer, as opposed to "an inherent design flaw with the hardware." Samadpour defended the efficacy of the HT System and confirmed that the problem was fixed.

In July 2018, Phage advertised the HT System as being able to run "Up to 1000 Samples Per Shift." Phage has continued to market the HT System.

Status of the Bacteriophage Cocktail at Closing

At the time of closing, the Salmonella assay used a single bacteriophage, not a "cocktail."[2] Phage alleges that this means that 25% of Corvium's 562 Salmonella strain panel was not detected or resulted in low light production.

The NIH grant was transferred to Phage after closing. Phage used the grant to develop a cocktail consisting of three bacteriophages. This expanded coverage to 99% of Corvium's 562 strain panel. This work was confirmed as completed on October 29, 2019, with the submission of a grant report.

[2] However, Listeria used "cocktails."

ANALYSIS

Elements of Fraud

To state a claim for fraud, a plaintiff must allege: (1) a false representation made by the defendant; (2) the defendant knew or believed the representation was false or was recklessly indifferent to its truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or refrained from acting in justifiable reliance on the representation; and (5) damage resulted from such reliance.[3]

Alleged Misrepresentations

As of the time of trial, Phage asserted that Corvium knowingly made four false representations:

- The Salmonella Test Kit employed a bacteriophage cocktail which could accurately and sensitively detect all relevant Salmonella strains.
- The Salmonella Environmental Test would be both AOAC validated and launched by Q4 2017.
- The Salmonella Food Test would be both AOAC validated and launched by Q1 2018.

[3] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 49 (Del. Ch. 2015).

- The HT System, on which the Salmonella Test Kit runs, was suitable for high volume commercial use.

Salmonella Test Kit Detection of "All Relevant" Salmonella Strains Using a Bacteriophage "Cocktail"

At the time of closing, in October 2017, the Salmonella Test Kit did not utilize a bacteriophage "cocktail" to detect Salmonella. The assay used a single bacteriophage. There was no trial evidence that the Salmonella cocktail was in place before October 2019.

Samadpour had asked in September to see the NIH grant application. Corvium refused. Narasimhan testified that the reason was that Corvium did not want to disclose the "strains." The application would have placed Phage on notice that Corvium planned to increase coverage from 100 to 560 strains. This evidences that bacteriophage cocktail had not yet been finalized.

The term "all relevant strains" is not defined. Nevertheless, at the time of closing, 25% of Corvium's 562 Salmonella strain panel was not detected or resulted in low light production.

The Executive Summary represented that Corvium's Salmonella Test Kit could detect Salmonella in diverse food types (beef, smoked salmon, milk and spinach) in between six and ten hours. Further, the HT Salmonella Test Kit "accurately and sensitively detects all relevant bacterial strains in the design scope."

The Executive Summary represented that the "DETECT family of tests employ cocktails of these bacteriophages that specifically target bacterial pathogens of interest."

Although "design scope" and "relevant bacterial strains" were not defined, in the context of the Executive Summary, the reasonable interpretation is that the employment of cocktails applied to the Salmonella Test. It is undisputed that as of the time of closing, this representation was not accurate.

The Court finds that Phage has proved by a preponderance of the evidence that Corvium knew that this representation was false; the misrepresentation was made with the intention to induce Phage to enter into the APA; Phage acted in justifiable reliance on the misrepresentation; and damages resulted.

Salmonella Environmental Test - Q4 2017 Launch

The August 2017 Executive Summary represented that: "Salmonella spp. Assay for environmental (surfaces) samples poised to received validation and launch in...Q4 2017." It is undisputed that "validation" refers to AOAC certification. "Launch" means to place the product in the commercial market. The August 28, 2017, Management Presentation represented that the Salmonella Environmental Test had an "[e]xpected launch in Q4 2017" after "Validation/Certification." A training

session for Phage's team included another PowerPoint Management Presentation, including the same timelines.

The Management Presentation included the specific disclaimer that "there can be no assurance that any projected results or other forward-looking statements are attainable or will be realized...actual results may vary significantly from the forward-looking statements...and no representations or warranties are made...that the projected results or other forward-looking statements will be achieved.

The AOAC certification process began in January 2017. Corvium focused its certification efforts on the HT Listeria environmental test. The HT Salmonella Environmental Test AOAC certification process was paused between March 2017 and June 2017. The Salmonella Test could not be submitted for AOAC certification before certain risks were addressed. Five uncompleted studies were required for certification. As late as September 27, 2017, 146 Salmonella strains from Corvium's 562 strain panel were missed by the Salmonella assay.

Prior to closing, Corvium never received AOAC approval of an inclusivity panel or a final validation outline, both prerequisite to testing necessary for certification. Phage's expert testified that the AOAC certification process normally takes 10 months after an assay is "locked" and a validation outline finalized.

Corvium does not dispute that as of the time of closing, the Salmonella Environmental Test could not be launched.

The Court finds the testimony of Phage's expert persuasive. Phage has proved by a preponderance of the evidence that the Salmonella Environmental Test could not have been AOAC validated and launched by Q4 2017. Therefore, the representation in the Executive Summary, for which there was no waiver in the Executive Summary itself[4] was not accurate. Phage also has proved that Corvium knew that this representation was made with the intention to induce Phage to enter into the APA,

However, Phage has failed to prove the remaining elements required for fraud. The same representation contained in the Management Presentation was limited by a specific disclaimer that any "projected results or other forward-looking statements are attainable or will be realized" and that "actual results may vary significantly from the forward-looking statements...and no representations or warranties are made...that the projected results or other forward-looking statements will be achieved."

Therefore, the Court finds that Phage has failed to prove that Phage acted in justifiable reliance on the Executive Summary misrepresentation. The Court need

[4] The email forwarding the Executive Summary contained a general disclaimer regarding representations as to the "accuracy, completeness or fair presentation of any information nor any conclusion contained herein."

not address whether Corvium knew the statement was false at the time it was made and whether damages resulted from this specific misrepresentation.

These representations were not included in the APA.

Salmonella Food Test - Validation and Q1 2018 Launch

The August 2017 Executive Summary represented that: a "similar DETECT test for Salmonella is ready for launch for surface testing, with finished goods testing scheduled for launch in Quarter 1 2018." The Management Presentation represented that the Salmonella Food Test had an "[e]xpected launch in Q1 2018 after "Validation/Certification."

In January 2017, the HT Salmonella Food Test was in the "planning phase." As of August 18, 2017, the Test still was in the "planning phase." There is no evidence that any other work was performed on the Salmonella Food Test in 2017. The results of a Q Labs study showed the Test at the stage of "proof of concept."

Ten months before closing, Corvium's grant application stated: "Sample6 has already established feasibility of the DETECT/S assay for environmental surface detection and finished product testing." Corvium witness Keener testified that he had no doubt that the finished food test could be completed within Q1 2018.

Nevertheless, it was not until October 29, 2019 that the Salmonella Food Test was acknowledged by Phage as working. At that point, the Salmonella Test had "exceptional" coverage and "no exclusivity issues."

The Court finds that Phage has proved by a preponderance of the evidence that the Salmonella Food Test could not have been "ready for launch for surface testing, with finished goods testing scheduled for launch in Quarter 1 2018." Therefore, the representation in the Executive Summary, for which there was no applicable disclaimer, was not accurate. Additionally, the Court finds that Corvium knew that the representation was false. Phage also has proved that Corvium knew that this the misrepresentation was made with the intention to induce Phage to enter into the APA.

However, as with the Salmonella Environmental Test misrepresentation, Phage has failed to prove the remaining elements required for fraud. The Management Presentation representation was virtually identical to the Executive Summary. But the Management Presentation disclaimer prevents a finding of justifiable reliance. The Court need not address whether damages resulted from this specific misrepresentation.

These representations were not included in the APA.

HT System Suitability for High-Volume Commercial Use

The Court finds that Phage has failed to prove by a preponderance of the evidence that the HT System it purchased was not suitable for high-volume commercial use. Although additional work and testing was needed at the time of closing, within two week, the AOAC certified the HT Listeria test. The certification confirmed that the HT System performed to the manufacturer's specification and was a rapid assay for the accurate identification of food bacteria.

The circumstances surrounding termination by Phage's customer do not demonstrate that the HT System was defective or not functioning as a high-volume commercial machine for accurate identification of bacteria.

Existence of a Competing Bidder and Aiding and Abetting

Narasimhan testified that he posited potential negotiating strategies during an October 3, 2017 Corvium Board meeting. These included a push back on rent and inventory, with a signal that Corvium might walk away if the offer were not increased to $11 million; "a bluff about another bidder"; and an offer of exclusivity and a "quick close" at $11 million. The Board was informed that another prospective buyer was no longer part of the bidding.

A few days before closing, Samadpour reminded Corvium that he did not want the APA negotiations to be used as leverage with other potential buyers. During a

phone call on October 4, 2017, Narasimhan informed Samadpour that Corvium was negotiating with another interested party. Samadpour expressed disappointment, but told Narasimhan that Phage was willing to increase its current $10 million offer to beat any other offer by $500,000 to $1 million.

Samadpour testified that on October 5th, Narasimhan told Samadpour that another buyer had made a written offer of $12 million. Samadpour agreed to match the supposedly competing offer at $12 million - the final purchase price in the APA. Corvium also included a provision for a two-week exclusivity period. Because the transaction was set to close within 5 days, Samadpour testified that this exclusivity provision made no sense.

Corvium presented evidence that during the October 5th phone call, Samadpour asked Narasimhan to "tell me your highest offer and I will pay you half a million more." Narasimhan told Samadpour that he could not disclose other offers, but if IEH raised its offer to $12 million, Narasimhan would recommend that Corvium grant two-weeks exclusivity.

Bluffing or mere puffery have been recognized as usual negotiating tactics. More is needed to support a claim of fraud.[5]

[5] *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch.) (mere puffery cannot form the basis for a fraud claim).

The Court finds that the parties' competing testimony is not essentially different or contradictory. Narasimhan told Samadpour that there were other offers, and that an increased offer from Samadpour from $10 million to $12 million would seal the deal. It is undisputed that there was no competing offer as of October 3rd. In context, Narasimhan's statement to Samadpour was a factual representation that there were other offers, at least one in excess of $10 million, that Narasimhan could not disclose. Narasimhan knew that this statement was false. The statement was made to induce Samadpour to increase the offer from $10 million to $12 million. Narasimhan named $12 million as the topping number necessary for the deal to close. Samadpour did not initiate the suggestion of another $2 million. Samadpour justifiably relied on the misrepresentation. The resulting damages are $2 million.

The Court finds unpersuasive Corvium's argument that Samadpour agreed to the $2 million increase in exchange for what the parties knew was only a few days' exclusivity. The closing date was set. In any event, such a permium for a short exclusivity period only would have been reasonable if there were other concrete offers on the table, or at least other active and serious bidders, as Narasimhan falsely led Samadpour to believe.

Liability for aiding and abetting requires proof of three elements: (1) underlying tortious conduct; (2) knowledge; and (3) substantial assistance.[6] Because Narasimhan was the knowing and direct source of the fraudulent information, Narasimhan is liable for aiding and abetting tortious conduct. Narasimhan was the undisputed authorized representative and agent of RMC. Therefore, RMC also is liable for aiding and abetting.

Standing

Corvium argues that Phage lacks standing. Corvium asserts that non-party Samadpour, not Phage, paid the $12 million purchase price. Thus, Phage has suffered no damages.[7] Corvium contends that the loan is a sham.

Samadpour testified that, consistent with his prior acquisitions, he loaned the purchase price to Phage and expected to be repaid. His standing practice was to wire funds for an acquisition directly to the seller from his personal account. Loan documents subsequently were prepared.[8] This testimony is uncontradicted and unrebutted.

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[6] *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super.)

[7] *See Anschutz Corp. v. Brown Robin Cap., LLC*, 2020 WL 3096744, at *7 (Del. Ch.) (acquiror, not inventor, suffered direct injury).

[8] *Spacht v. Cahall*, 2016 WL 6298836, at *3 (Del. Super.)(after-the-fact loan documentation permitted).

The Court finds Samadpour credible. Such a practice is not inconsistent with closely-held businesses, operated by high net worth individuals, engaged in regular acquisitions. There is no evidence that the loan was either illusory or not legitimate. Phage, as the buyer, is the party alleged to have suffered direct injury.

The Court further notes that Corvium's standing argument should have been raised as an affirmative defense pursuant to Rule 8(c). The fact that the funds were wired from the personal account of Samadpour and his wife was known at the time of transfer.

Therefore, the Court finds that Phage has standing to bring this action.

Damages

The parties' damages arguments and expert testimony are diametrically opposed. The Court is presented with all or nothing positions. There is scant guidance for an award of damages on the basis of factual and legal findings of liability for fewer than all of Phage's claims.

Phage seeks fraud damages measured by the benefit of the bargain. Phage's expert testified that the value of DETECT in its as-was condition on October 10, 2017 was $0. The expert reasoned that the value of expected future earnings was not greater than $0. The expert opined that the ST System costs and expenses were

greater than the earnings, based on actual financials and future projections. The expert relied on Phage's conclusion that the HT System and the Salmonella Test Kit, DETECT would never be able to generate a stream of positive cash flows. Therefore, the full $12 million purchase price is the difference between DETECT's represented value and its actual value.

Corvium asserts that Phage's expert failed to value any assets received in the transaction. Such assets include:

- The ST System and its approximately thirty to forty customers generating approximately $750,000 to $1,000,000 in revenue annually;
- $1,350,053 in grant funding;
- $273,638 (as Phage reported in 2017 IRS filings) in inventory;
- $43,146 (as Phage reported in 2017 IRS filings) in other assets;
- $94,243 of value for use of Corvium's laboratory from October 10, 2017 through March 31, 2018;
- A five-year non-compete;
- Patents (which Phage characterized as "substantial," trademarks, and trade dress;
- Know-how, including four Corvium employees transferred to Phage and a percentage of Koeris' time through December 31, 2018; and
- Two weeks of exclusivity.

The Court finds that Phage did not get everything it expected. The Salmonella testing simply was not as far along, ready for market, or immediately commercially viable as Phage had anticipated. However, Phage did not buy worthless assets. Additionally, the Court already has found that certain of Phage's expectations were not reasonably justified.

The Court holds that Phage is entitled to the following damages:

(1) $2,000,000 for the fraudulent misrepresentation that induced Phage to increase the acquisition price from $10,000,000 to $12,000,000;

(2) $2,500,000 for the fraudulent misrepresentation that the "DETECT family of tests employ cocktails of these bacteriophages that specifically target bacterial pathogens of interest." The representation explicitly relating to Salmonella was that the Salmonella Test could detect "all relevant bacterial strains in the design scope."

Pre-Judgment Interest

Pre-judgment interest is awarded in Delaware as matter of right.[9] Pre-judgment interest shall run from the closing date of the Transaction – October 10, 2017, at the legal rate.

[9] *Brandywine Smyrna, Inc. v. Millennium Builders, LLC,* 34 A.3d 482, 486 (Del. 2011); *Citadel Hldg. Corp. v. Roven,* 603 A.2d 818, 826 (Del. 1992); *Moskowitzv Mayor and Counsel of Wilmington, 391* A.2d 209, 210 (Del. 1978).

Attorneys' Fees and Expenses

The Court holds that there are no grounds for granting attorneys' fees and expenses under the bad faith exception to the American Rule.

CONCLUSION

The Executive Summary represented that the "DETECT family of tests employ cocktails of these bacteriophages that specifically target bacterial pathogens of interest." The representation explicitly relating to Salmonella was that the Salmonella Test could detect "all relevant bacterial strains in the design scope." The Court finds that Phage has proved by a preponderance of the evidence that Corvium knew that this representation was false, the misrepresentation was made with the intention to induce Phage to enter into the APA, Phage acted in justifiable reliance on the misrepresentation; and damages resulted. **THEREFORE, Corvium is liable for fraud on the basis of the misrepresentation that the Salmonella Test Kit detects "all relevant" Salmonella strains using a bacteriophage "cocktail."**

The Court finds that Phage has proved by a preponderance of the evidence that the Salmonella Environmental Test could not have been AOAC validated and launched by Q4 2017. Therefore, the representation in the Executive Summary, for which there was no waiver, was not accurate. Phage also has proved that Corvium knew that this the misrepresentation was made with the intention to induce Phage to

enter into the APA. However, Phage has failed to prove that Phage acted in justifiable reliance on the misrepresentation. The Court need not address whether Corvium knew the statement was false at the time it was made and whether damages resulted from this specific misrepresentation. **THEREFORE, Phage has failed to prove fraud on the basis of the representation that the Salmonella Environmental Test could have been AOAC validated and launched by Q4 2017.**

The Court finds that Phage has proved by a preponderance of the evidence that Corvium knew that the representation of the Salmonella foot test as a "similar DETECT test for Salmonella [] ready for launch for surface testing, with finished goods testing scheduled for launch in Quarter 1 2018" was false. Phage also has proved that Corvium knew that this representation was false, and was made with the intention to induce Phage to enter into the APA. However, Phage has failed to prove justifiable reliance. The Court need not address whether damages resulted from this specific misrepresentation. **THEREFORE, Phage has failed to prove fraud on the basis of the representation that the Salmonella Food Test was "ready for launch for surface testing, with finished goods testing scheduled for launch in Quarter 1 2018."**

The Court finds that Phage has failed to prove by a preponderance of the evidence that the HT System it purchased was not suitable for high-volume commercial use. Although additional work and testing was needed at the time of closing, within two weeks, the AOAC certified the HT Listeria test. The certification confirmed that the HT System performed to the manufacturer's specification and was a rapid assay for the accurate identification of food bacteria. **THEREFORE, Phage has failed to prove fraud on the basis of the representation that the HT System was suitable for high-volume commercial use.**

The Court finds that Narasimhan told Samadpour that there were other offers, and that an increased offer from Samadpour from $10 million to $12 million would seal the deal. It is undisputed that there was no competing offer as of October 3rd. Narasimhan's statement to Samadpour was a factual representation that there were other offers that Narasimhan could not disclose. Narasimhan knew that this statement was false. The statement was made to induce Samadpour to increase the offer from $10 million to $12 million. Samadpour justifiably relied on the misrepresentation. The resulting damages are $2 million. **THEREFORE, Corvium is liable for fraud on the basis of the representation concerning competing offers exceeding $10 million.**

Narasimhan was the knowing and direct source of the fraudulent information. **THEREFORE, Narasimhan is liable for aiding and abetting tortious conduct.** Narasimhan was the undisputed authorized representative and agent of Red Maple Capital "RMC." **THEREFORE, RMC also is liable for aiding and abetting.**

The Court finds that Phage has standing to bring this action.

The Court holds that Phage is entitled to the following damages:

(1) $2,000,000 for the fraudulent misrepresentation that induced Phage to increase the acquisition price from $10,000,000 to $12,000,000;

(2) $2,500,000 for the fraudulent misrepresentation regarding Salmonells testing that the "DETECT family of tests employ cocktails of these bacteriophages that specifically target bacterial pathogens of interest."

Pre-judgment interest shall run from the closing date of the Transaction – October 10, 2017, at the legal rate.

The Court further holds that there are no grounds for granting attorneys' fees and expenses under the bad faith exception to the American Rule.

JUDGMENT SHALL BE ENTERED IN FAVOR OF PLAINTIFF IN THE AMOUNT OF $4,500,000.00.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston