IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AEROGLOBAL CAPITAL MANAGEMENT, LLC,	)	
Plaintiff,	)	
v.	)	C. A. No. 01C-08-089 (CHT)
CIRRUS INDUSTRIES, INC., et. al.	)	NON-ARBITRATION
Defendant.	)	JURY TRIAL DEMANDED

AMENDED OPINION AND ORDER

On Defendants' Motion For Summary Judgment
Submitted: September 16, 2003
Decided: January 29, 2004
Amended: February 9, 2004 (Cover Sheet Only)

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TOLIVER, JUDGE

Before the Court is the motion of the Defendants seeking the entry of summary judgment in their favor. The matter having been briefed and oral argument completed, that which follows is the Court's resolution of the issues so presented.

NATURE AND STAGE OF THE PROCEEDINGS

On May 28, 2003, the Defendants filed the instant motion against the Plaintiff, Aeroglobal Capital Management, LLC ("Aeroglobal"). The motion arises out of a complaint filed by Aeroglobal against Cirrus Industries, Inc. ("Cirrus"), Cirrus Holding Company Limited ("CHCL"), Crescent Capital Investments, Inc. ("Crescent") and other various individuals on August 9, 2001. The complaint contains four causes of action: Count I - Breach of Contract by Cirrus; Count II - Breach of the Covenant of Good Faith and Fair Dealing by Cirrus; Count III - Tortious Interference With Contract and Prospective Business Relations of Aeroglobal; and Count IV - Civil Conspiracy Against All Defendants. This Court dismissed the individual Defendants for lack of personal jurisdiction, leaving the ultimate dispute between corporate/institutional Defendants on the one hand and Aeroglobal on the other.

STATEMENT OF FACTS

The underlying facts of this case are not complicated nor do they appear to be in substantial dispute. However, both parties differ on the interpretation of the applicable facts. Everyone agrees that there was a breach of contract and what the consequences were, but it is on the issue as to which entity caused the aforementioned problems where the views of the parties diverge.

Cirrus, a privately held Delaware corporation based in Duluth, Minnesota, manufactures and sells general aviation aircraft. Two brothers, Alan and Dale Klapmeier founded Cirrus. Alan Klapmeier is Cirrus' president, Chief Executive Officer and Chairman of the Board of Directors. Dale Klapmeier is Cirrus' Chief Operations Officer and a member of its board of directors. Crescent, a Delaware corporation, is the United States private equity advisor to First Islamic Investment Bank ("FIIB"), an investment bank based in Bahrain. CHCL is a Cayman Islands company formed to facilitate an investment by FIIB and others in Cirrus. Aeroglobal was created in April, 2001 for the purpose of purchasing common stock in Cirrus with the expectation of profiting from that venture.

In the early part of 2001, Cirrus was experiencing

financial difficulties and had already suffered losses of 9 million dollars. In its search for interested investors, Cirrus began negotiating with Crescent. On April 24, 2001, Cirrus and CHCL, on behalf of Crescent, signed a letter of intent ("CHCL LOI") in which CHCL was to invest 77.5 million dollars in Cirrus in exchange for 61% ownership of Cirrus stock.[1] The CHCL LOI was to be followed by a stock purchase agreement[2], which was to close no later than June 15, 2001.

Approximately three weeks later, Aeroglobal began to pursue an interest in Cirrus. Specifically, on May 16th of that year, Aeroglobal sent Cirrus a proposal indicating that it would invest up to 45 million dollars in exchange for 38% ownership in Cirrus.[3] There is no record of any response having been made at that time.

Notwithstanding Aeroglobal's proffer, on June 7, 2001, Cirrus and CHCL entered into a stock purchase agreement ("CHCL SPA") encompassing the terms of the CHCL LOI. This agreement allowed Cirrus ten days to pursue discussions with any interested party who made a "superior proposal" to the CHCL

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[1] CHCL LOI, Terms and Conditions, p. 1.

[2] The definitive stock purchase agreement was to contain "mutually agreeable representations, warranties, covenants, conditions and indemnities." CHCL LOI, p. 1.

[3] Aeroglobal Outline for Strategic Partnership with Cirrus ("Term Sheet"), Def.'s Ex. 4.

deal.[4] During those ten days, discussions between Aeroglobal and Cirrus continued. On June 16th, Aeroglobal made a presentation to the Cirrus Board, in which Craig Millard ("Millard"), a member of Aeroglobal's board of directors, assured them that he would be able to personally fund the entire 45 million dollar investment, if necessary. The next day, the Cirrus Board terminated the CHCL SPA and entered into a letter of intent with Aeroglobal ("Aeroglobal LOI"), consistent with its May 16th proposal.

The investment that was to be made pursuant to the Aeroglobal LOI was to occur in two stages. The first stage involved a bridge loan by Aeroglobal to Cirrus of 15 million dollars due immediately[5] upon signing the aforementioned LOI.[6] Stage Two called for an investment of an additional 30 million dollars within 45 days after the execution of the Aeroglobal LOI, which was to take place on August 2, 2001.[7] That LOI also contained an "Exclusive Negotiations" clause, which stated in pertinent part:

> As long as AGCM meets its obligations under the terms of this Letter of Intent, Cirrus . . . agrees not to enter into any agreements or hold

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[4] CHCL SPA at §7.3.1, §7.3.2 Acquisition Proposals, p. 45-6.

[5] The materials used during the June 16 presentation promised that Aeroglobal would fund the $15 million bridge loan on Monday, June 18, 2001. Aeroglobal Transaction Overview, Defs.' Ex. 7 at 7.

[6] Aeroglobal LOI, §1.a.

[7] *Id.* at §2.a. and §2.d.

> any discussions, directly or indirectly through any affiliate . . . concerning the sale or other disposition of its stock or any material investment.[8]

By June 22, 2001, Aeroglobal had funded only 12 million dollars of the 15 million dollar bridge loan, notwithstanding Millard's previous assertions that he could fund the entire investment by Aeroglobal. In addition, the 12 million dollars included 2 million dollars which Millard borrowed from his son's trust fund along with 3 million dollars loaned to him from Alice Hitchcock, a Cirrus Board member and supporter of Aeroglobal.

CHCL instituted litigation in the Court of Chancery on June 27, 2001 against Cirrus and Aeroglobal seeking, among other things, specific performance of the CHCL SPA and a preliminary injunction seeking to enjoin Cirrus and Aeroglobal from completing the contractual arrangement proposed by Aeroglobal. On July 19, 2001, the Court of Chancery denied CHCL's motion for a preliminary injunction.[9] Despite the denial, neither Millard or Aeroglobal paid the remaining 3 million dollars of the bridge loan.[10]

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[8] *Id.* at §4.d.

[9] Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191 (Del. Ch. 2001).

[10] Aeroglobal maintains that the Court of Chancery had concluded that they did not have to pay the remaining $3 million of the bridge loan. However, the basis for their claim was based on a footnote in the Court's order stating that "the $3 million shortfall is due entirely to the pendency of this motion and a resultant understanding between Cirrus and Aeroglobal that the completion of the funding should be delayed pending its outcome." *Id.* at

In early July 2001, Aeroglobal proposed an amendment of the Aeroglobal LOI to Cirrus, in which Aeroglobal's Stage Two investment of 30 million dollars would be deferred until after the Court of Chancery issued a decision in favor of Cirrus and expiration of the time to appeal any such decision. In addition, the proposal would allow Aeroglobal to place the remaining 3 million dollars of the bridge loan into an escrow account, pending a resolution of the lawsuit in the Court of Chancery or with the Court of Chancery pursuant to an interpleader action.[11] Cirrus rejected both proposals. However, on July 10, 2001, Cirrus agreed to and did amend the Aeroglobal LOI to include an extension of the closing deadline for the 30 million dollar investment from August 2nd to August 10th.[12] This amendment did not address or excuse Aeroglobal's obligation to pay the remainder of the bridge loan, which, despite Cirrus' frequent request for the balance, Aeroglobal never tendered.[13]

1203, fn 18.

[11] Draft Amdmt., Defs.' Ex. 13.

[12] Aeroglobal LOI Amdmt., Defs.' Ex. 14.

[13] Craig Millard Depo. at p. 406-7. Also noted is the discussion on July 23, 2001 via e-mail by Alice Hitchcock (Cirrus Board Member) to Chris Moe and Keith Fitzgerald (Investors in Aeroglobal) in which she expressed concern with CHCL's failure to pay the 3 million dollars. Moreover, certain members of the Cirrus board of directors, while attending a meeting at an air show on July 24, were informed by members of board of directors of Aeroglobal, that Aeroglobal could not meet the extended deadline for the provision of the second stage infusion of 30 million dollars to Cirrus.

At the same time it was having difficulties with the Aeroglobal loans, Cirrus began to consider other financing options. On July 13, 2001, CHCL offered to dismiss the Court of Chancery litigation against Cirrus in exchange for payment of 10 million dollars. Cirrus rejected the offer but did begin to discuss the possibility of reviving the initial CHCL/Cirrus stock purchase agreement. Shortly thereafter, on July 30, 2001, the Cirrus Board voted unanimously to withdraw approval of the Aeroglobal LOI and instead, approved a second stock purchase agreement with CHCL, which provided for an immediate infusion of 15 million dollars.[14] That action was formally passed by the Board on August 7, 2001.

One day before the Aeroglobal LOI was to expire, on August 9, 2001, Aeroglobal filed the lawsuit currently before this Court, alleging that Cirrus had violated and breached the explicit terms of the Aeroglobal LOI. During oral argument on this motion, counsel for Aeroglobal informed the Court that Aeroglobal had received advance information concerning adoption of the second CHCL stock purchase agreement prior to Cirrus' termination of the Aeroglobal LOI. Counsel also stated that this information was the impetus for the

[14] Defs.' Opening Br. In. Supp. Of Their Mot. For Summ. J. at 14. It should be noted that, in its pleadings, Aeroglobal does not appear to challenge the terms of the second stock purchase agreement between Cirrus and CHCL as alleged by Cirrus. Therefore, the Court will assume this fact to be true for present purposes.

institution of the instant litigation.[15] In any event, Cirrus did not in fact formally notify Aeroglobal that it, Cirrus, was terminating the Aeroglobal LOI until August 13, 2001. At that point, Cirrus repaid the 12 million dollars obtained from the bridge loan, along with interest on the principal and attorneys' fees, to Aeroglobal. In exchange, Aeroglobal released Cirrus from any further payment of the bridge loan as well as all claims to receive stock and all claims based on the indemnification clause of the aforementioned agreement.[16]

DISCUSSION

Summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[17] The moving party bears the initial burden of showing that there are no material facts in dispute.[18] Once that burden is satisfied, through affidavits or otherwise, the burden shifts to the non-moving

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[15] Ms. Hitchcock, a Cirrus Board member and Aeroglobal supporter, was identified by both parties as the person who was the likely source of the likely source of the information upon which that belief was based.

[16] Sept. 7, 2001 and Oct. 26, 2001 Payment and Release.

[17] Davis v. West Center City Neighborhood Planning Advisory Committee, Inc., 2003 WL 908885, at *1 (Del.Super.) citing Dale v. Town of Elsmere, 702 A.2d 1219, 1221 (Del. 1997).

[18] Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979).

party to establish the existence of disputed material issues of fact.[19] The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial.[20]

The Defendants have raised several arguments in support of their motion for summary judgment. First, they contend that Aeroglobal's breach of contract claims must fail in that it was Aeroglobal that failed to meet its obligations under the Aeroglobal LOI. Specifically, the Defendants maintain that the exclusive negotiations clause of the LOI did not apply because Aeroglobal failed to pay the balance of the 15 million dollar bridge loan and instituted litigation prior to the expiration of the LOI. Second, Aeroglobal's damages are speculative and based on future profits which cannot be proven with the requisite legal specificity in this case. Third, the implied covenants of good faith and fair dealing do not apply due to the adoption of superseding clauses in the LOI, specifically, the clauses referring to exclusive negotiations in §4.d., the terms of termination for the CHCL relationship in §3.c. and good faith negotiations provisions. Lastly, the

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[19] Albu Trading, Inc. v. Allen Family Foods, 2003 WL 21327486, at *1 (Del.Supr.) citing Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995).

[20] *Id.*

Defendants posit that the tortious interference and conspiracy claims raised by Aeroglobal are legally deficient in light of the record as it presently exists.

In response, Aeroglobal initially maintains that there are material disputes of fact as to each of the issues raised by the Defendants' motion which preclude the entry of summary judgment in their favor. Aeroglobal next insists that its tortious interference and conspiracy claims are sufficiently pled with substantial support in the record to withstand the instant challenge. In addition, Aeroglobal maintains that its claim for damages is not speculative in that what was being sought was the "benefit of the lost bargain" of the investment in Cirrus that was proposed. Aeroglobal's principal defense, however, lies in the contention that there was no breach of its obligation under §4.d. of the Aeroglobal LOI.

To be precise, Aeroglobal contends that Cirrus and Aeroglobal agreed to defer the payment of the final 3 million dollars of the bridge loan, and that as a result, the exclusive negotiations clause was binding on Cirrus. The modification was allegedly based on Cirrus' assent by conduct during the period in which the money was due. If there had been a breach of contract, Cirrus was obligated under §4.d. of the Aeroglobal LOI to provide fifteen days notice and the

opportunity to cure the problem.[21] Finally, Aeroglobal contends that it was Cirrus which in fact breached the agreement by failing to appoint Aeroglobal as Cirrus' exclusive financial advisor[22] and to issue to Aeroglobal, Cirrus stock warrants[23] as required under the terms of the Aeroglobal LOI.

Having reviewed the record in light of these contentions and notwithstanding the arguments of Aeroglobal to the contrary, and as is stated above, it is readily apparent that the material facts are not in dispute and the case is in fact one which is appropriate for resolution by means of summary judgment.

A. Breach of the Aeroglobal LOI

As indicated above, Aeroglobal's primary contention is that Cirrus breached the Aeroglobal LOI by negotiating with CHCL in the manner described while the "exclusive negotiations" provision set forth in §4.d. of that document was in effect. As a result, Aeroglobal asserts that it did not breach the agreement with Cirrus. There is no dispute that in order to trigger the language of §4.d., Aeroglobal was

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[21] Aeroglobal LOI, §4.d.; *See also* Pl.'s Br. In Opp'n To Defs.' Mot. For Summ. J. at 23-4.

[22] Aeroglobal LOI, §2.b.

[23] *Id.* at §1.b.

first required to fulfill its obligations to Cirrus spawned by that relationship. However, Aeroglobal asserts that Cirrus agreed to defer payment of the deficient 3 million dollar bridge loan and thereby assented to the condition precedent being excused.

Under Delaware case law, a condition precedent must be performed or happen before a duty of immediate performance arises on the promise which the condition qualifies, unless otherwise waived or excused.[24] A condition precedent may be waived by conduct which evidences such an intention.[25] In support of its position in this regard, Aeroglobal makes three arguments. First, Aeroglobal points to the deposition testimony of Alan Klapmeier, the CEO of Cirrus during this point in time, proclaiming his belief that the exclusivity provision was in effect notwithstanding Aeroglobal's deferral of the payment of the balance of the bridge loan.[26] It next posits that Cirrus never imposed a firm deadline for the 3 million dollar balance or in any way stated that Aeroglobal was in breach of the Aeroglobal LOI. Finally, Aeroglobal contends that Cirrus was on notice of, and therefore agreed

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[24] *See generally* SLMSoft.Com, Inc. v. Cross Country Bank, 2003 WL 1769770, at *12 (Del. Super. 2003) *citing* 13 WILLISTON ON CONTRACTS §§ 38:7.

[25] Nemeth v. Patterson Schwartz and Assoc., Inc., 1987 WL 12444, at *3 (Del. Super. 1987).

[26] Alan Klapmeier Depo. at p. 348-9.

to, Aeroglobal's deferral of payment of the balance of the bridge loan as of July 16, 2001, pending a resolution of the CHCL litigation in the Court of Chancery.[27]

The material facts set forth in the record lead to but one conclusion and that conclusion is that there was no such agreement to defer the balance of the bridge loan by Cirrus. While the language in question is far from a model of clarity, when viewed in light of the evidence, it represents an irrevocable commitment by Aeroglobal to immediately advance 15 million dollars to Cirrus. The only question is when.

As Cirrus points out, Millard testified that he believed "immediately" to mean "as soon as humanly possible" or "a matter of days," which inferred that there was no need for Cirrus to set any further deadline.[28] This testimony must be viewed in conjunction with the fact that the June 16th presentation by Aeroglobal included a representation that the 15 million dollar bridge loan would be paid by June 18, 2001[29] and that only 12 million dollars had been so paid by June 22nd. Also to be added to the mix is Millard's representation that although the funds were available through Aeroglobal, he could personally provide the money if necessary. Lastly, while

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[27] Pl.'s Br. In Opp'n To Defs.' Mot. For Summ. J. at 17-22.

[28] Craig Millard Depo. at p. 381, lines 9-24.

[29] *Supra* note 5.

Aeroglobal references the Klapmeier statements supportive of the applicability of the exclusivity provision,[30] more significant is the testimony by Klapmeier that the other board members disagreed and considered Aeroglobal already in breach by failing to transfer the balance due on the bridge loan.[31] It is therefore apparent that there was an expectation by both parties as to the time frame within which the loan proceeds were to be transferred as well as what the consequences would be for failing to comply with that schedule.

The strongest evidence against a finding that the terms of the Aeroglobal LOI had been modified is the rejection on July 10, 2001 of the two amendments to that document proposed by Aeroglobal. The amendments sought to extend the deadline for payment of the 30 million dollar investment until a final decision against Cirrus in the Chancery Court litigation had been rendered and provided that the balance of the bridge loan be placed in escrow in the interim. While an oral modification of a contract may occur by conduct of the parties as well as by express words, an oral modification altering the term of a written contract "must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal

[30] Alan Klapmeier Depo. at p. 348-9.

[31] *Id.*

document."[32] The express rejection by the Cirrus board of the proposals that Aeroglobal contends were adopted by assent, proves just the opposite, i.e., that there had been no change and/or modification of the parties' understanding as to the terms of payment of the bridge loan.

To the extent that Vice-Chancellor Lamb, in a footnote, made a statement indicating that the failure to tender the balance of the bridge loan was " . . . due entirely to the pendency of [the preliminary injunction] motion and a resultant understanding . . . that the completion of the funding should be delayed pending its outcome,"[33] that statement is at best dicta. There is no indication that Aeroglobal's failure to complete payment of the bridge loan was an issue in the litigation before that court or that it was decided. Moreover, even if one were to accept Vice-Chancellor Lamb's pronouncements literally, the 3 million dollars would still have been due upon issuance of the Court of Chancery's denial of the motion to enjoin the Aeroglobal-Cirrus deal by CHCL. Even at that point in time, Aeroglobal still failed to tender the balance of the loan and that failure continued up to the time Aeroglobal instituted this litigation.

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[32] Durig v. Woodbridge Board of Education, 1992 WL 423926 (Del. Super.) *citing* Reeder v. Sanford School, Inc., 397 A.2d 139, 141 (Del. Super. 1979).

[33] *Supra* note 9 at fn 18.

In sum, since Aeroglobal failed to fulfill its obligations under the Aeroglobal LOI, the Exclusive Negotiations provision set forth in §4.d. of that agreement was not binding on the parties. There was no modification, either by express agreement or by conduct. Aeroglobal was therefore in breach and Cirrus was free to negotiate for the needed financing with any available party or parties as it deemed appropriate.

B. Repudiation of the Aeroglobal LOI

Even if the Court were to find that Aeroglobal did not breach its agreement with Cirrus, the same result must obtain, albeit for different reasons. Simply put, Aeroglobal repudiated the deal prior to its consummation. This is opposed to the breach occasioned by the failure to tender the balance of the bridge loan, an obligation already due as discussed above. Given the facts of this case, no other conclusion is viable.

Anticipatory repudiation is an unequivocal statement by a promisor that he will not perform his promise and gives the injured party an immediate claim to damages for total breach,[34] in addition to discharging the remaining duties of performance. The non-repudiating party must establish that

[34] Manley v. Associates in Obstetrics and Gynecology, 2001 WL 946489, at *6 (Del. Super.) *citing* Carteret Bancorp., Inc. v. Home Group, Inc., 1988 WL 3010 (Del. Ch.)

there was an outright refusal to perform under the contract.[35] As stated in Elliott Associates L.P. v. Bio-Response, Inc., "an expression of doubt as to whether the ability to perform in accordance with the contract will exist when the time comes is not a repudiation."[36] In addition, if a repudiation is found, the non-repudiating party is entitled to treat the contract as having been rescinded.[37]

Again, the facts relevant to a resolution of this issue are relatively simple. The second stage funding of 30 million dollars was originally to be tendered on August 2, 2001. By agreement of the parties, that date was extended exactly eight days until August 10th. However, on or about July 24th, at an air show, certain members of the Aeroglobal board informed similarly situated representatives of Cirrus that the aforementioned financial assistance would not be forthcoming as agreed. In addition, Cirrus had been advised by Millard that no more money would be transferred until the Chancery Court litigation have been finally resolved.[38] Lastly, Aeroglobal instituted the instant litigation on August 9,

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[35] Sheehan v. Hepburn, 138 A.2d 810, 812 (Del. Ch. 1958) *citing* 12 AM.JUR. *Contracts* §442.

[36] Elliott Associates, L.P. v. Bio-Response, Inc., 1989 WL 55070, at *3 (Del. Ch.) *quoting* 4 CORBIN ON CONTRACTS § 974 (1951).

[37] *Supra* note 35.

[38] Craig Millard Depo. at p. 805.

2001, and did not in fact transfer any of the money due as of August 10th.

Based upon the above referenced facts, it is readily apparent that Aeroglobal did not intend to complete the agreement it entered into with Cirrus and affirmatively repudiated the same. That intention was formally confirmed by the initiation of this litigation the day before the Aeroglobal LOI was to be formally settled. The mere fact that Cirrus waited until August 13th to formally terminate and discharge its duties to Aeroglobal under the Aeroglobal LOI, is not relevant for present purposes. If Aeroglobal had the ability to pay the balance of the bridge loan and 30 million dollar second stage investment on or before August 10 and had done so, Cirrus would have been obligated to complete its end of the bargain. That did not take place and no other conclusion is possibly available under the circumstances.

C. Notice of the Breach and/or Repudiation of the Aeroglobal LOI

Aeroglobal argues that even if it breached and/or repudiated its agreement with Cirrus, Cirrus was required to give it notice of the problem and 15 days to cure the same via §4.d. Section 4.d. states, in pertinent part, that:

> . . . AGCM shall not be deemed to have failed to have met its obligations under this Letter of Intent until fifteen (15) days after Cirrus

> shall have given notice to AGCM of each alleged failure to meet such obligations. . . .[39]

Again, the Court is compelled to reach a different conclusion.

In terms of the breach of the Aeroglobal LOI occasioned by the failure to pay the balance of the bridge loan, Aeroglobal was on notice of what was required and the fact that it did not meet that obligation. That failure, as the evidence reveals, was the subject of discussion and a proposed amendment to the LOI. Moreover, Aeroglobal had at least from June 18th thru August 10th to cure that default. The provision of any further notice opportunity to cure, under these circumstances, would have been superfluous at best.

The same reasoning holds true for the failure to provide any of the second stage financing. Aeroglobal communicated its intentions in that regard prior to August 10th. If Aeroglobal repudiated the LOI as this Court has determined, §4.d. is a nullity and cannot be applied in any event. In addition, any other obligations arising under the Aeroglobal LOI must be deemed to be a nullity as a result.

D. Tortious Interference with Contractual and Prospective Business Relations, and Civil Conspiracy

The balance of the claims advanced by Aeroglobal against the instant Defendants are clearly recognized causes of action

[39] Aeroglobal LOI, §4.d.

in this state. Each requires the existence, for present purposes, of a contractual and/or business relationship which was terminated or interrupted by the wrongful conduct of one of the parties involved, or a third party, acting separately or in concert.

Specifically, a valid cause of action for tortious interference with existing contractual relations requires: (1) a contract; (2) of which the defendant was aware; (3) an intentional act by the defendant that is a significant factor in bringing about the breach of said contract; (4) without justification and (5) that act causes injury or results in injury.[40] To establish a claim for tortious interference with prospective business relations, the party alleged to have been injured must show: (1) the existence of a valid business relation or expectancy; (2) knowledge of the relationship or expectancy; (3)intentional interference that; (4) induces or causes a breach or termination of the relationship or expectancy; and that (5) causes resulting damages to the party whose relationship or expectancy is disrupted.[41] Lastly, in Delaware, to establish the existence of a civil conspiracy, one must prove that two or more persons joined together for an

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[40] Hursey Porter & Assocs. V. Bounds, 1994 WL 762670, at *13 (Del. Super.).

[41] CPM Industries, Inc. v. Fayda Chemicals & Minerals, Inc., 1997 WL 762650, at *7 (Del. Ch.).

unlawful purpose or for the accomplishment of a lawful purpose by unlawful means, which thereby results in damages.[42] Civil conspiracy is not an independent cause of action in Delaware, but requires an underlying wrong which would be actionable absent the conspiracy.[43]

Notwithstanding their recognition as causes of action, the alleged wrongs do not provide a basis for any relief in favor of Aeroglobal and against these Defendants. The basis for this decision is simple. The Court has concluded that it was Aeroglobal that breached and/or repudiated the Aeroglobal LOI, not Cirrus, CHCL or Crescent. The natural and logical consequences of that finding is that the Defendants did not act tortiously or in any other manner that might be deemed to have been wrongful in terms of any activities associated with Aeroglobal. As a consequence, there can be no valid claim for tortious interference and/or civil conspiracy against them.

E. Cirrus' Obligations Under the Aeroglobal LOI

In addition to its argument that it did not repudiate or breach the Aeroglobal LOI, Aeroglobal contends that Cirrus breached various provisions of the LOI, thereby relieving

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[42] Nutt v. A.C. & S. Co., Inc., 517 A.2d 690, 694 (Del. Super. 1986) citing Weinberger v. UOP, Inc., 426 A.2d 1333, 1348 (Del. Ch. 1981), *rev'd on other grounds*, 457 A.2d 701 (Del. 1983).

[43] *Id.*

Aeroglobal of any obligation to provide the funding as promised. Specifically, Aeroglobal contends that Cirrus failed to: (1) use its bests efforts to negotiate and prepare a stock purchase agreement (§2.a.); (2) use the proceeds of the bridge loans as required (§1.d.); (3) issue Cirrus stock warrants "immediately" upon signing the LOI (§1.b.); (4) appoint Aeroglobal as the exclusive advisor for additional investments (§2.b.) and (5) terminate its obligations to CHCL as required (§3.c.). These alleged transgressions, Aeroglobal contends, excused any nonfeasance and/or misfeasance by Aeroglobal.

Notwithstanding Aeroglobal's arguments in this regard, the Court must conclude that what Cirrus did or did not do under the terms of Aeroglobal LOI is not relevant in light of the failure by Aeroglobal to advance to Cirrus funds called for thereunder, a total of 45 million dollars. Under §4.d., Aeroglobal was required to provide the aforementioned financing ***first***. In return, Cirrus was bound to Aeroglobal and Aeroglobal only. That exclusivity was not tied to any other obligations set forth in the agreement between the two of them and Aeroglobal cannot now be heard to complain about any subsequent failures on the part of Cirrus.

The principal purpose of the Aeroglobal/Cirrus relationship was to provide Cirrus with immediate financial

assistance. Without that funding, the LOI served no purpose and Aeroglobal was deemed to have repudiated and/or breached the same. Cirrus was not required, as a result, to appoint Aeroglobal as its financial advisor, provide stock warrants, or enter a stock purchase agreement, among other things. Moreover, until Aeroglobal lived up to its obligations, §4.d. did not prohibit Cirrus from seeking other investors and none of the other obligations under the LOI were due until such terms were met.

F. Remaining Claims

Lastly, due to the execution of the Payment and Release Agreements between Cirrus and Aeroglobal, dated September 7, 2001 and October 26, 2001, the remainder of Aeroglobal's breach of contract claims have been resolved and must be deemed withdrawn. Aeroglobal admits in its sur-reply brief that it has abandoned all such claims relating to payment of legal fees, interest and commissions by Cirrus.[44] Moreover, Aeroglobal has admitted abandonment of its claim that Cirrus failed to maintain the confidentiality of information that

[44] Pl.'s Sur-Rep. Br. in Further Opp'n To Defs.' Mot. for Summ. J. at 1.

Cirrus received from Aeroglobal.[45] Those matters need not be addressed given those concessions.[46]

[45] *Id.*

[46] The Court also need not address the challenge raised by Cirrus regarding the "speculative" nature of Aeroglobal's damage claims since the Court has already concluded that Aeroglobal was the party which breached the LOI and was the cause of any injury that Aeroglobal suffered as a consequence.

CONCLUSION

For the aforementioned reasons, the Defendants' Motion for Summary Judgment must be, and hereby is, **granted**.

IT IS SO ORDERED.

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TOLIVER, JUDGE