

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

RIVERSIDE FUND V, L.P., and	)	
RIVERSIDE AMCAD BLOCKER	)	
CORP.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No.: N14C-10-038 EMD CCLD
	)	
VISAGAR SHYAMSUNDAR,	)	
JUPITER TECHNOLOGY	)	
HOLDINGS, LLC, RONALD F.	)	
CORNELISON, and EDWARD	)	
BERKOWITZ,	)	
	)	
Defendants.	)	

Submitted: May 4, 2015  
Decided: August 17, 2015

*Upon Consideration of  
Defendants Visagar Shyamsundar and Jupiter Technology Holdings, LLC's Rule 12(b)(6)  
Motion to Dismiss Plaintiffs' Complaint  
Joinder of Edward Berkowitz to Motion to Dismiss of Visagar Shyamsundar and Jupiter  
Technology Holdings, LLC and Memorandum in Support of Defendant Edward Berkowitz's  
Motion to Dismiss Plaintiffs' Complaint Pursuant to Rule 12(b)(6) or, in the Alternative, for  
Summary Judgment*

***DENIED***

Philip Trainer, Jr., Esquire, Marie M. Degnan, Esquire, Ashby & Geddes, P.A., Wilmington, Delaware, and Mark D. Cahill, Esquire, Jean-Paul Jaillet, Esquire, Choate Hall & Stewart LLP, Boston, Massachusetts, *Attorneys for the Plaintiffs Riverside Fund V, L.P. and Riverside AmCad Blocker Corp.*

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**DAVIS, J.**

## **INTRODUCTION**

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. The action concerns the purchase of a majority interest in American Cadastre LLC (“AmCad”) by Plaintiffs Riverside Fund V, L.P. and Riverside AmCad Blocker Corp. (collectively, “Riverside”). On September 16, 2013, Defendants Jupiter Technology Holdings, LLC (“Jupiter”), Visagar Shyamsundar, and Ronald Cornelison sold their majority interest in AmCad to Riverside. The transaction was governed by an Equity Purchase Agreement (“EPA”), which was signed by several parties. At the time of the transaction, Mr. Shyamsundar was AmCad’s Chief Executive Officer and Mr. Berkowitz was AmCad’s Chief Financial Officer.

On October 3, 2014, Riverside filed this lawsuit. In the Complaint, Riverside alleges the following claims: (i) Fraud (against Jupiter and Mr. Shyamsundar); (ii) Aiding and Abetting Fraud (against Mr. Berkowitz); (iii) Civil Conspiracy (against Jupiter, Mr. Shyamsundar, and Mr. Berkowitz); and (iv) Breach of Contract – Indemnification (against Jupiter, Mr. Shyamsundar, and Mr. Cornelison).

On November 19, 2014, Mr. Shyamsundar and Jupiter jointly filed Defendants Visagar Shyamsundar and Jupiter Technology Holdings, LLC’s Rule 12(b)(6) Motion to Dismiss Plaintiffs’ Complaint (the “Motion”). On the same day, Mr. Berkowitz filed Joinder of Edward Berkowitz to Motion to Dismiss of Visagar Shyamsundar and Jupiter Technology Holdings, LLC and Memorandum in Support of Defendant Edward Berkowitz’s Motion to Dismiss Plaintiffs’ Complaint Pursuant to Rule 12(b)(6) or, in the Alternative, for Summary Judgment (the “Joinder”). The Joinder seeks relief under Civil Rule 12(b)(6) and, in the alternative, Civil Rule 56. On January 14, 2015, Riverside filed its Answering Brief in Opposition to Defendants’

Motion to Dismiss. On January 28, 2015, Defendants filed their Reply Brief in Support of their Motion to Dismiss.

### **RELEVANT FACTS<sup>1</sup>**

In 2013, Jupiter and Mr. Shyamsundar began discussions with Riverside regarding Riverside's potential purchase of AmCad. During its due diligence, Riverside inquired about certain AmCad customers. Riverside entered into the EPA based on representations made by Jupiter, Mr. Shyamsundar, and Mr. Berkowitz (collectively, "Defendants").

After closing the EPA, Riverside discovered numerous undisclosed communications demonstrating that the representations were false when made. The Complaint details six customer contracts including quotations of specific correspondences from AmCad customers to Defendants complaining that AmCad was not in compliance with its contractual obligations.<sup>2</sup>

Riverside also discovered that the Financial Statements overstated assets and understated liabilities. Mr. Shyamsundar and Mr. Berkowitz approved the Financial Statements. The Complaint alleges that the Financial Statements were based, in part, on "percentage of completion" accounting. The EPA calculates the percentage of completion by "the percentage completed based on the percentage of costs incurred to date in relation to total estimated costs expected upon completion of the contract."<sup>3</sup> Specifically, the Complaint alleges Defendants

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<sup>1</sup> Unless otherwise indicated, the following are the Relevant Facts of this action as the facts were alleged in the Complaint. For purposes of the Motion and the Joinder, the Court must view the Complaint's alleged facts in a light most favorable to Riverside. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at \*3 (Del. Super. Oct. 27, 2010).

<sup>2</sup> For example, AmCad customer, the Metropolitan Government of Nashville and Davidson County ("Nashville"), sent three separate notices to AmCad detailing that AmCad was "six years into what should have been a 12 to 18 month project" and that if significant progress was not made, Nashville would take steps to terminate its contract with AmCad. Compl. ¶¶ 73–83, *Riverside Fund V., L.P. v. Shyamsundar*, C.A. No. N14C-10-038 (Del. Super. Oct. 3, 2014) (No. 56130061).

<sup>3</sup> Compl., Ex. 1 at 89 (providing the Independent Auditor's Report of AmCad's Financial Statements).

falsely represented that AmCad projects were closer to completion than they actually were, which resulted in the Financial Statements overstating the percentage of completion.<sup>4</sup>

In June 2014, AmCad discontinued its court management systems division. Riverside alleges it lost its entire \$32 million investment in AmCad due to Defendants' misrepresentations. Pursuant to the EPA, on August 7, 2014, Riverside served written notice of indemnification for \$32 million on Jupiter, Mr. Shyamsundar, and Mr. Cornelison for breaches of the Customer Representations, the Financial Statement Representations, and the Assets and Liabilities Representations. Jupiter, Mr. Shyamsundar, and Mr. Cornelison have not indemnified Riverside.

### **LEGAL STANDARD**

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.<sup>5</sup> However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."<sup>6</sup>

In considering a motion to dismiss under Civil Rule 12(b)(6), the court generally may not consider matters outside the complaint.<sup>7</sup> However, documents that are integral to or incorporated by reference in the complaint may be considered.<sup>8</sup> "If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for

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<sup>4</sup> The Complaint alleges the percentage of completion accounting was overstated for five of the government customer contracts. Compl. ¶¶ 103–109.

<sup>5</sup> *Cent. Mortg. Co.*, 27 A.3d at 536; *Cedars Acad., LLC*, 2010 WL 5825343, at \*3.

<sup>6</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

<sup>7</sup> Super. Ct. Civ. R. 12(b).

<sup>8</sup> *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”<sup>9</sup>

As a preliminary matter, Defendants rely on a PowerPoint presented to Riverside during their due diligence. Defendants purport in their Motion that the PowerPoint relieves them from liability because Riverside knew of the correspondences from AmCad customers cited to in the Complaint. However, the PowerPoint is not integral to or incorporated by reference in the Complaint. Therefore, the Court will not consider it in deciding this Motion.

## **DISCUSSION**

### ***BREACH OF CONTRACT CLAIM***

Defendants contend that Riverside fails to state a claim for breach of contract/indemnification. Defendants argue that this claim should be dismissed because Riverside has failed to allege: (1) any material breach of a customer contract; (2) any material breach of the “good commercial working relationship” warranty; and (3) any material inaccuracy in AmCad’s Financial Statements.

To state a claim for breach of contract, a plaintiff must allege: (1) the existence of a contract; (2) a breach by defendant of an obligation pursuant to the contract; and (3) damage to the plaintiff as a result of the defendant’s breach.<sup>10</sup> A complaint for breach of contract is sufficient if it contains “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>11</sup>

Under the EPA, as pled in the Complaint, Defendants caused AmCad to represent and warrant that (1) AmCad was in compliance in all material respects with its government customer contracts and that no government customer had served any notice that AmCad had materially

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<sup>9</sup> Super. Ct. Civ. R. 12(b).

<sup>10</sup> *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

<sup>11</sup> Super. Ct. Civ. R. 8(a)(1).

breached or defaulted on any contractual obligation;<sup>12</sup> (2) AmCad had good commercial working relationships with its key customers;<sup>13</sup> and (3) AmCad's Financial Statements fairly presented the financial conditions of the company including valid and enforceable accounts receivable that would be collected and not written off.<sup>14</sup>

Riverside has sufficiently alleged material breaches of the customer contracts warranty. For example, under Section 3.7(f)(ii), of the EPA, AmCad warranted it had not been notified in writing that it had materially breached or violated any representation, clause, provision, or requirement of any Contract with a Government Entity. Under Section 3.24(b), AmCad warranted that since March 16, 2012, no customer had threatened to terminate its relationship with AmCad or had threatened to materially change its business relationship with AmCad.<sup>15</sup> The Complaint details that Nashville threatened to terminate its contract on November 13, 2012 based, in part, on AmCad's failure to deliver in a timely manner.<sup>16</sup>

Defendants claim that AmCad did not materially breach any of the six customer contracts in the Complaint because the customer complaints only show that AmCad was falling behind schedule on the contracts. Defendants go on to assert that such a complaint does not amount to a material breach absent a "time is of the essence" clause—which was not included in any of the six contracts—under *Cornell Glasgow LLC v. LaGrange Properties*.<sup>17</sup> In *Cornell Glasgow*, this Court found that, despite an unambiguous "time is of the essence" clause in the agreement, the defendants failure to meet projections did not amount to a breach of the agreement because

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<sup>12</sup> Compl., Ex. 1, Equity Purchase Agreement § 3.7(d).

<sup>13</sup> *Id.* § 3.24(b).

<sup>14</sup> *Id.* § 3.8.

<sup>15</sup> Section 3.24 states in pertinent part: "During the previous 18 months, no customer . . . to [AmCad's] Knowledge threatened to terminate, its relationship with [AmCad] . . . ." The EPA was entered into on September 16, 2013.

<sup>16</sup> Compl. ¶¶ 73–83.

<sup>17</sup> 2012 WL 6840625 (Del. Super. Dec. 7, 2012).

plaintiffs attempted to link the time is of the essence clause to aspirational projections rather than firm deadlines.<sup>18</sup>

However, Riverside alleges AmCad did more than fall behind schedule. For example, Nashville threatened termination and reported quality and implementation problems with AmCad's software.<sup>19</sup> On January 11, 2013, Bexar County sent a two-page memorandum detailing its frustration with AmCad's service including: lack of a project plan, lack of system design document, inadequate levels of staffing, failure to deliver reports as required, deliverables are not completed, lack of leadership, and lack of project management.<sup>20</sup> The memorandum concludes that "[a]ll of these items are significant."<sup>21</sup> Further, on May 3, 2013, Bexar County emailed Mr. Berkowitz explaining that "the reason [AmCad] ha[s] not been paid is because the work has not been completed according to the contract terms."<sup>22</sup> The entirety of the Complaint pleads similar specific correspondences from six AmCad customers to AmCad representatives.

Riverside has sufficiently alleged material breaches of the "good commercial working relationship" warranty. Under Section 3.24(b), AmCad warranted that it had a "good commercial working relationship" with certain customers. Section 3.24(b) provides in pertinent part: "no customer listed on Section 3.24(a) of the Disclosure Schedule . . . has threatened to, stop, or materially decrease the rate of, buying products or services from the Company..." Defendants argue the word "good" is a mere statement of opinion, not of fact, and thus, cannot be the basis of a breach of contract claim.<sup>23</sup> As stated in *Tam v. Spitzer*,<sup>24</sup> "[e]ven an opinion

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<sup>18</sup> *Id.* at \*11–12.

<sup>19</sup> Compl. ¶¶ 73–83.

<sup>20</sup> *Id.* ¶¶ 37–51, Ex. 3 at 3.

<sup>21</sup> *Id.*

<sup>22</sup> Compl. ¶ 42.

<sup>23</sup> In support of their argument, Defendants cite to *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006). In *Trenwick*, the Court of Chancery found that the assertion that an "acquisition would general good results" was an "expectation of opinion about the future of the company and the hoped for results of business strategies." *Id.* at 209. Here, the EPA contains a representation of a "good commercial working

may rise to the level of a misstatement of fact when made by one with special or superior knowledge.”<sup>25</sup> The Court holds, for purposes of Civil Rule 12(b)(6), that it is reasonably conceivable that customers threatening termination and refusing to pay under a contract cannot be described as “good” for a profit-seeking business.

Riverside has sufficiently alleged material breaches of the Financial Statement warranty. Under Section 3.8, AmCad warranted that its Financial Statements fairly presented the financial condition of the company. The dispute focuses on AmCad’s “percentage of completion” accounting. Defendants contend that a breach of contract action based on AmCad’s percentage of completion accounting fails as a matter of law because under *Frick v. American President Lines, Ltd.*<sup>26</sup> and the EPA, estimates based on future projections are not actionable. But, the percentage of completion is not based merely on future projections.<sup>27</sup> Instead, it takes into account the costs incurred to date—*i.e.*, historical costs—and compares it to the expected cost ceiling for a particular contract. The Complaint details the percentages of completion that were represented by Defendants.<sup>28</sup> The Complaint then details that the actual computation when Riverside took over was lower than Defendants represented.<sup>29</sup>

The Complaint further avers that certain accounts receivable were improperly recorded as income before it was earned. Defendants argue that these allegations are conclusory and irrelevant. However, such allegations go to the falsity of the Financial Statements and the facts

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relationship” based on then-current and past relationships—not future, hoped-for projections of AmCad’s customer relationships.

<sup>24</sup> 1995 WL 510043 (Del. Ch. Aug. 17, 1995).

<sup>25</sup> *Id.* at \*8.

<sup>26</sup> 1975 WL 1257 (Del. Ch. June 18, 1975). In *Frick*, the Court of Chancery stated that, in the context of interpreting a statement of cash flow projecting future income in an appraisal action, “mere projections of future earnings have been looked upon with disfavor in Delaware as speculative.” *Id.* at \*5.

<sup>27</sup> The percentage of completion is calculated by “the percentage completed based on the percentage of costs incurred to date in relation to total estimated costs expected upon completion of the contract.” Compl., Ex. 1 at 89.

<sup>28</sup> Compl. ¶¶ 105–108.

<sup>29</sup> *Id.*

alleged are sufficient to meet the pleading standards at this stage of the litigation. As such, it is reasonably conceivable that the Financial Statements were inaccurate based on the factual allegations in the Complaint.

The Court finds that Riverside has pled reasonably conceivable facts to put Defendants on notice that: Defendants had an indemnification obligation under the EPA; Defendants breached their indemnification obligation by failing to indemnify Riverside for AmCad's material breaches of customer representations; AmCad materially breached the "good commercial working relationship" representation; AmCad materially breached the Financial Statements representation; and Riverside suffered damages as a result of Defendants' breach.

#### ***FRAUD CLAIM***

Defendants also move to dismiss Riverside's claim for fraud. Defendants contend that the fraud claim should be dismissed because Riverside does not specifically plead the time, place, and context of any alleged false representations.

To state a claim for fraud, a plaintiff must allege that: (1) defendant falsely represented a material fact or omitted facts that the defendant had a duty to disclose; (2) defendant knew that the representation was false or made with a reckless indifference to the truth; (3) defendant intended to induce plaintiff to act or refrain from action; (4) plaintiff acted in justifiable reliance on the representation; and (5) plaintiff was injured by its reliance on defendant's representation.<sup>30</sup> Delaware requires a strict pleading requirement to state a claim for fraud. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."<sup>31</sup> The particularity required by Rule 9(b) requires

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<sup>30</sup> *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

<sup>31</sup> Super. Ct. Civ. R. 9(b).

“the time, place and contents of the false representations.”<sup>32</sup> However, “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.”<sup>33</sup>

The Complaint details with enough specificity the time, place, and contents of the alleged false representations. The Complaint identifies each warranty in the EPA that Defendants allegedly misrepresented. The Complaint then describes why each of these representations was false when made by citing specific correspondences. For example, Riverside cites to a text message from Mr. Shyamsundar to Mr. Berkowitz that states, “This vi letter is a problem. Do we need to disclose?”<sup>34</sup> Riverside also cites to an email from Mr. Shyamsundar that states, “We have broken pretty much all the promises we made to [R]iverside.”<sup>35</sup> Such averments are sufficient to show it is reasonably conceivable that Defendants intentionally took steps to conceal information from Riverside prior to closing.

The Complaint details Defendants had direct knowledge of the falsity of the representations because Mr. Shyamsundar was the direct recipient of several of the customer correspondences. The Complaint also alleges that Riverside relied on the representations in determining whether to purchase AmCad.<sup>36</sup> Lastly, the Complaint sets out that Riverside suffered damages in the amount of \$32 million. Accordingly, the Court finds that Riverside has pled a claim for fraud with the requisite specificity under Rule 9(b).

#### *CIVIL CONSPIRACY CLAIM*

Defendants seek dismissal of Riverside’s claim for civil conspiracy. Here, Defendants contend that the Court should dismiss the civil conspiracy claim because Riverside fails to state a claim for fraud in the Complaint. Mr. Berkowitz does not make any separate arguments for

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<sup>32</sup> *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) (internal quotations omitted).

<sup>33</sup> Super. Ct. Civ. R. 9(b).

<sup>34</sup> Compl. ¶ 86.

<sup>35</sup> *Id.* ¶ 123.

<sup>36</sup> *Id.* ¶¶ 21, 32, 96, 99, 130, 151.

dismissal of the aiding and abetting fraud claim against him. Because the fraud claim has not been dismissed, the Court will not dismiss Riverside's claims for civil conspiracy<sup>37</sup> and aiding and abetting fraud<sup>38</sup> at this stage of the litigation.

### CONCLUSION

The Court finds that Riverside has adequately pled claims for breach of contract/indemnification against Jupiter, Mr. Shyamsundar, and Mr. Cornelison; fraud against Jupiter and Mr. Shyamsundar; aiding and abetting fraud against Mr. Berkowitz; and civil conspiracy against Defendants. Therefore, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

**IT IS SO ORDERED** that the Motion and the Joinder are **DENIED**.

/s/ Eric M. Davis

Eric M. Davis, Judge

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<sup>37</sup> "Civil conspiracy is not an independent cause of action; it must be predicated on an underlying wrong. Thus, if plaintiff fails to adequately allege the elements of the underlying claim, the conspiracy claim must be dismissed." *Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at \*3 (Del. Super. Aug. 1, 2012) (quoting *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009)). A claim for civil conspiracy cannot be attached to a claim for breach of contract. *Kuroda*, 971 A.2d at 892. Instead, the underlying claim must be an independent tort action such as fraud. *Id.*

<sup>38</sup> "To prove a claim of aiding and abetting, a plaintiff must demonstrate that (1) a wrongful act was committed; (2) the defendant had knowledge of the act; and (3) the defendant knowingly and substantially participated in or provided substantial assistance for the wrongful act." *Brug v. Enstar Group, Inc.*, 755 F. Supp. 1247, 1256 (D. Del. 1991). Mr. Berkowitz's sole argument is that Riverside has not adequately pled the first element because Riverside has not adequately pled a claim for fraud against Jupiter and Mr. Shyamsundar.