IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AMERICAN CAPITAL ACQUISITION PARTNERS, LLC; LEE ARGUSH; NICHOLAS MARINIELLO; and ALAN F. GAVORNIK,	)	
Plaintiffs,	)	
v.	)	*Civil Action No. 8490-VCG*
LPL HOLDINGS, INC.; LPL FINANCIAL LLC; FORTIGENT, LLC; and ANDREW PUTTERMAN,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 3, 2013
Date Decided: February 3, 2014

Richard J. Thomas, of Young Conaway Stargatt & Taylor, LLP; OF COUNSEL: Anthony R. Caruso, Charles A. Yuen, and Eleanor Grinshteyn, of Scarinci & Hollenbeck, LLC, Attorneys for the Plaintiffs.

A. Thompson Bayliss and Steven C. Hough, of Abrams & Bayliss LLP; OF COUNSEL: Robert S. Fischler and Helen Gugel, of Ropes & Gray LLP, Attorneys for the Defendants.

GLASSCOCK, Vice Chancellor

The Plaintiffs here are the former owner of an acquired company and that company's former directors and officers; they argue that the Defendant acquirer has denied them some of the contractual benefits to which they are entitled under the stock purchase agreement governing the sale of the acquired entity. In addition to the sale price already received, the Plaintiffs would be due certain contingent payments if the acquired entity had met performance guidelines that, in fact, it failed to meet. The Plaintiffs' various theories fall into two groups: claims based on alleged misrepresentations that the acquirer had, or would obtain, the technological ability to allow the acquired entity to prosper, which in fact the acquirer did not have and failed to pursue; and claims that clients, personnel and opportunities were diverted from the acquired entity to another subsidiary of the acquirer, denying the acquired entity any opportunity to meet its performance guidelines, and thus rendering the potential for contingent payments illusory. For the reasons that follow, I find generally that claims in the first group cannot withstand the Defendant's Motion to Dismiss, but that those in the latter group survive.

I. FACTS

A. The Stock Purchase Agreement

American Capital Acquisition Partners, LLC ("American Capital"), the corporate Plaintiff in this action, is a New Jersey LLC and former parent of

Concord Capital Partners, Inc. ("Concord"), "an industry leader in providing technology and open architecture investment management solutions for trust departments of financial institutions."[1] LPL Holdings, Inc. ("LPL") is a Massachusetts corporation that provides "an integrated platform of proprietary technology, brokerage and investment advisory services to over 12,000 independent financial advisors and financial advisors at financial institutions;"[2] LPL Financial LLC ("LPL Financial") is a wholly-owned subsidiary of LPL. On April 20, 2011, the corporate Plaintiff and LPL entered into a Stock Purchase Agreement ("SPA") whereby LPL acquired 100% of the outstanding equity interests in Concord, which became Concord-LPL. The individual Plaintiffs also entered into supplemental employment agreements with LPL Financial.[3] At that time, LPL issued a press release explaining the strategy behind the acquisition:

> As a result of [the Concord] acquisition, LPL Financial will have the ability to support both the brokerage and trust business lines of current and prospective financial institution partners. The unique combination of offerings will create an integrated wealth management solution for financial institutions that the company believes will redefine the market.[4]

The press release went on to note that LPL Financial was "excited about the potential for this transaction, which will significantly expand the services and

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[1] Am. Compl. ¶ 17. The facts recited herein are taken from the Amended Complaint unless otherwise noted.
[2] *Id.* at ¶ 14 (citations omitted).
[3] *Id.* at ¶ 10.
[4] *Id.* at ¶ 19.

support we can offer the trust departments of our existing financial institution customers and create multiple new expansion opportunities for us in the space."[5] The transaction closed on June 22, 2011.[6]

In addition to a specified purchase price, the SPA includes a contingent purchase price provision. That provision is contained in Section 2.06(a) of the SPA, which states:

> In addition to the Closing Purchase Price payable at Closing, and subject to the terms and conditions set forth in this Section 2.06, [the Plaintiffs] shall be entitled to an additional purchase price payment from [LPL] in an aggregate amount, if any (such aggregate purchase price payment is referred to herein as the "Contingent Purchase Price Payment") of (i) for every $250,000 in 2013 Gross Margin in excess of $5,500,000 but less than or equal to $7,250,000, $215,000 up to a maximum payment of $1,500,000 and (ii) for every $250,000 in 2013 Gross Margin in excess of $7,250,000, $675,000 up to a maximum payment of $13,500,000; provided, however, the maximum Contingent Purchase Price Payment shall not exceed $15,000,000.

In addition, Plaintiffs Argush, Marniello, and Gavornik—who were directors and senior executives of Concord—executed new employment agreements with Concord-LPL. Those agreements, dated April 14, 2011, stated that the Plaintiffs' offers for employment were contingent on the transaction closing, and were signed by the individual Plaintiffs on June 21, 2011, the day before the transaction closed.[7] The employment agreements provide that the Plaintiffs will

[5] *Id.* at ¶ 20.
[6] *Id.* at ¶ 13.
[7] Defs.' Op. Br. Ex. B-D.

receive additional compensation based on Concord-LPL's reaching revenue targets of $975,000 in 2011, $3,750,000 in 2012, and $7,700,000 in 2013.[8]

B. Pre-Agreement Representations

At the heart of this dispute is the Plaintiffs' expectation that LPL's acquisition of Concord would enable Concord to develop a "custody services business" for its trust accounts. The Plaintiffs describe that business as "providing technology and open architecture investment management solutions for trust departments of financial institutions."[9] Those "management solutions" include "intake, recording, and processing of account assets and related transactions," as well as "settling trades, investing cash balances, collecting income, processing corporate actions, pricing securities positions and providing recordkeeping and reporting services" for trust clients.[10]

The Plaintiffs aver that they participated in several meetings with executives at LPL and LPL Financial, the purpose of which was to "formulate[] a plan to maximize synergy via the combination of LPL Financial and Concord," whereby "after the closing LPL Financial would provide custodial services for Concord-LPL based trust accounts. On the one hand, LPL Financial would obtain directly enhanced revenue for performing custody services for the additional Concord-

[8] Am. Compl. ¶¶ 37-38.
[9] *Id.* at ¶ 17.
[10] Pls.' Opp'n Br. at 2.

LPL-based trust accounts. On the other hand, Concord-LPL would perform its work and generate enhanced revenue from having access to the Concord-LPL trust assets as custodied by LPL Financial."[11] Thus, the Plaintiffs contend that the parties anticipated that LPL Financial and Concord-LPL would work together to create synergies and to generate custody-based revenue in anticipated amounts of $1 million in 2011, $4.3 million in 2012, $9.3 million in 2013, $14.8 million in 2014, and $20.4 million in 2015.[12] According to the Plaintiffs, because an acquisition by a company that performed custody services would generate significant synergies, the Plaintiffs "rejected a competing bid from a bidder which did not perform custody services, even though the rejected bid set forth an option for a greater initial cash payment and a potentially greater overall sale price."[13]

The Amended Complaint avers that prior to closing, Plaintiffs Argush, Mariniello and Gavornik met with various LPL and LPL Financial executives, including Arnold, LPL's CFO; Feeney, Managing Director of LPL's technology group; and Hardin, LPL Financial's Executive Vice President.[14]

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[11] Am. Compl. ¶¶ 52, 54.
[12] *Id.* at ¶ 58.
[13] *Id.* at ¶ 59.
[14] *Id.* at ¶¶ 41-44. The Plaintiffs also allege that they attended meetings with Dan Schuck, LPL Financial's Executive Vice President for its Business Technology Services division; Andrew Maudsley, LPL Financial's Senior Vice President for Corporate Software; Crystal Clifford, LPL Financial's Senior Vice President for Operations Services Technology; Mark Greenberg, LPL Financial's Senior Vice President for Technology Application Development and Chief Technology Architect; Joy Goble, LPL Financial's Senior Vice President for Cash Management Services; and Steve Morrison, LPL Financial's Associate Legal Counsel. *Id.* at ¶ 44.

According to the Plaintiffs, at those meetings, "LPL Financial advised plaintiffs that it was amply addressing any potential issues of potential concern regarding any technical limitations in LPL Financial's computer systems, including specifically as to [sic] they pertained to possible problems in regard to LPL Financial's custody of relevant trust assets."[15] According to the Plaintiffs, "[i]t was anticipated that the computer-based system used by LPL Financial to provide custodial services would require minimal and routine technical adaptation of LPL Financial's software and data management systems,"[16] and "some of the due diligence performed by [the Plaintiffs] prior to the closing included acquiring knowledge of and assurances as to LPL's data servicing capabilities."[17] The parties, however, did not include in the SPA a provision requiring LPL to make, or to use its best efforts to make, any technical adaptations necessary to allow Concord-LPL to develop its custody business. Still, the Plaintiffs aver generally that "LPL failed to disclose, and concealed, the true nature of LPL Financial's technical limitations to the plaintiffs but yet knew that plaintiffs would rely upon

[15] *Id.* at ¶ 46.
[16] *Id.* at ¶ 61.
[17] *Id.* at ¶ 63. The Plaintiffs point to a statement on LPL's website, which claims "[a]s the largest independent broker/dealer in the nation, LPL Financial has invaluable expertise in the clearing, technology, compliance, and customer service functions and enables other broker/dealers to outsource these critical activities so you can reduce complexity and focus on your business's core activity—helping clients." *Id.* at ¶ 65. They also quote language from LPL's SEC Form 424B4 prospectus, which states that LPL provided "an integrated platform of proprietary technology, brokerage and investment advisory services to over 12,000 independent financial advisors and financial advisors at financial institutions . . . ." *Id.* at ¶ 14.

its public statements," and in fact, LPL Financial was unable or unwilling to facilitate Concord's entry into the custody business;[18] "LPL failed to disclose that LPL Financial's computer systems could not easily be adapted so that LPL Financial could provide such similar services [for Concord's use], and that LPL Financial would likely therefore resist making the changes;"[19] and "LPL Financial confirmed directly to Concord that LPL Financial could, and would, make any necessary ministerial technical changes to its computer system by the fourth quarter of 2011."[20] According to the Plaintiffs, while LPL and LPL Financial represented that they had, in the past, serviced large financial services companies, they did not inform the Plaintiffs that they had done so by creating a costly exception logic sequence, and not by truly integrating the serviced company into LPL's own compliance and processing oversight management systems.[21]

C. Technical Difficulties after Closing

Despite LPL's and LPL Financial's alleged indications that they were in a position to, and would, make technological adaptations in order to enable LPL Financial to provide custody services to Concord-LPL, the Plaintiffs aver that after the acquisition, the Defendants were unable or unwilling to do so. According to the Amended Complaint, LPL refused to customize its system in order to facilitate

[18] *Id.* at ¶ 71.
[19] *Id.* at ¶ 78.
[20] *Id.* at ¶ 86.
[21] *Id.* at ¶ 83.

LPL Financial's providing custody services to Concord-LPL. The Plaintiffs explain that after the acquisition, they discovered that "LPL Financial's computer systems could not be easily adapted for Concord-related custodial accounts in a way which would be compatible with Concord-LPL's business model. LPL Financial systems could not, for example, easily segregate Concord-related custodial accounts from irrelevant compliance, oversight, accounting, and other processing applications."[22] Consequently, Concord-LPL was unable to service old clients, acquire new clients, or otherwise generate revenue it could have generated prior to the acquisition, or if the technological adaptations had been made.[23] The Plaintiffs argue that the Defendants' refusal to make those adaptations "is arbitrary and in bad faith, motivated, for example, by avoiding making contingent payments to plaintiffs yet retaining the profit and further profiting from the retention of Concord-LPL's technology and from the other provisions in the Agreement and Employment Agreements."[24]

The Amended Complaint avers that after the Plaintiffs realized LPL was resistant to making the needed technological adaptations, Plaintiff Argush met with LPL President Robert Moore to discuss his "30/30 plan," under which the adaptations would be made in thirty days for $30,000. According to the Plaintiffs,

[22] *Id.* at ¶ 89.
[23] *Id.* at ¶¶ 96-97.
[24] *Id.* at ¶ 100.

LPL Financial refused to implement this plan because it was "motivated in significant part by a desire to profit from the time restrictions on the additional Contingent Purchase Price Payment set forth in the Agreement and in the Targets in the Employment Agreements."[25] The Plaintiffs also allege that, in accordance with that motivation, LPL Financial and Fortigent,[26] another wholly-owned subsidiary of LPL, agreed to "pivot" sales from Concord-LPL to Fortigent;[27] "Concord-LPL was told to 'stand down' in regard to its relationships with existing clients;"[28] and Fortigent's CEO, Andrew Putterman, directed Concord-LPL staff not to recommend its services to prospective clients.[29] In addition, the Plaintiffs allege that LPL Financial has reassigned Concord-LPL employees to LPL Financial, caused Concord-LPL to stop servicing its existing clients, and waived fees owed to Concord-LPL by its existing clients.[30]

D. Counts

The Plaintiffs allege eight counts in their Amended Complaint, including claims for breach of the implied covenants of good faith and fair dealing against LPL and LPL Financial; claims for breach of contract against LPL; claims for fraudulent inducement against LPL and LPL Financial; claims for equitable fraud

[25] *Id.* at ¶ 106.
[26] Fortigent was a named Defendant in the Plaintiffs' Amended Complaint, but Plaintiffs have since stipulated to dismiss all claims against Fortigent and its CEO, Andrew Putterman.
[27] Am. Compl. ¶ 117.
[28] *Id.* at ¶ 124.
[29] *Id.* at ¶ 122.
[30] *Id.* at ¶¶ 130, 132, 137.

against LPL and LPL Financial; and claims for civil conspiracy against LPL and LPL Financial. The Amended Complaint also asserts claims for tortious interference with contract and tortious interference with prospective advantage against Fortigent and its CEO, Andrew Putterman; these claims were voluntarily dismissed on August 9, 2013. I address the remaining counts in turn.

II. ANALYSIS

This action is before me on Defendants LPL and LPL Financial's Motion to Dismiss. At this stage, if under any reasonably conceivable set of circumstances the Plaintiffs are entitled to recover, I must deny the Motion.[31] While I must afford the Plaintiffs the benefit of all reasonable inferences, I need not accept unsupported, conclusory allegations.[32]

1. Implied Covenant of Good Faith and Fair Dealing

The Plaintiffs assert two arguments that LPL and LPL Financial have breached an implied covenant of good faith and fair dealing. First, the Plaintiffs argue that based on the contingent purchase price provision in the SPA, and the compensation targets in the employment agreements, the implied covenant of good faith and fair dealing imposed upon the Defendants an affirmative obligation to make the technological adaptations necessary for LPL Financial to provide custody

[31] *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings. LLC*, 27 A.3d 531, 536 (Del. 2011).
[32] *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *5 (Del. Ch. Nov. 19, 2013).

services to Concord in order to help make Concord profitable. Second, the Plaintiffs argue that LPL and LPL Financial breached the implied covenant of good faith and fair dealing by intentionally impeding Concord-LPL's ability to generate revenue by shifting employees and customers from Concord to Fortigent in order to avoid both earn-out payments under the continent purchase price provision of the SPA and additional payments based on the compensation targets in the employment agreements.

A. Technological Adaptations

The Plaintiffs argue that the implied covenant of good faith and fair dealing imposes on LPL an obligation to make the technological adaptations necessary to enable LPL Financial to provide custody services to Concord-LPL.[33] The Plaintiffs argue that the existence of the contingent purchase price provision in the SPA and compensation targets in the employment agreements require LPL and LPL Financial to make these adaptations because the parties to the agreements recognized that, absent those adaptations, Concord-LPL would be unable to generate revenue sufficient to hit its contingent purchase price and employee bonus targets. The Plaintiffs argue that "[i]n order for Concord-LPL to generate revenue so that the plaintiffs might earn the Contingent Purchase Price and the revenue-

[33] The Plaintiffs additionally argue that "no fraud" is an implied contractual term, and that Defendants have breached that implied covenant. Pls.' Opp'n Br. at 21. As explained below, however, the Plaintiffs have failed to state a claim for fraud.

based bonuses under the Employment Agreements, it was reasonable and necessary—and *anticipated* and assumed—that LPL Financial would modify its system for providing custodial services to permit generation of net revenues by Concord-LPL,"[34] and that failure to make the technological adaptations "has frustrated the purpose and violated the spirit of the Agreement and the Employment Agreements."[35]

The Defendants respond that this theory is legally insufficient, as the implied covenant of good faith and fair dealing serves a gap-filling function, and the Plaintiffs have alleged in their pleadings that the parties contemplated the need to make technological adaptations prior to signing the SPA and employment agreements.[36] Because the parties anticipated that technological adaptations would be necessary, and the Plaintiffs failed to negotiate for a best efforts provision or another provision requiring LPL to make those adaptations, the Defendants contend that the Plaintiffs cannot now write into their agreements an additional term for which they failed to bargain. I agree.

The covenant of good faith and fair dealing is implied in every contract,[37] and "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the

[34] Am. Compl. ¶ 146 (emphasis added).
[35] *Id.* at ¶ 150.
[36] Defs.' Op. Br. at 10.
[37] *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636 (Del. Ch. 2011).

contract from receiving the fruits of the bargain."[38] However, the implied covenant of good faith and fair dealing, as the Plaintiffs recognize,[39] serves a gap-filling function by creating obligations only where the parties to the contract did not anticipate some contingency, and had they thought of it, the parties would have agreed at the time of contracting to create that obligation.[40] Thus, "the implied covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal. Rather, a party may only invoke the protections of the covenant when it is clear from the underlying contract that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter."[41]

Here, the Defendants correctly point out that, in connection with their fraud claims, the Plaintiffs make multiple assertions that the parties anticipated and discussed, prior to signing the SPA and employment agreements, that it would be helpful to make technological adaptations in order to integrate Concord's and LPL Financial's services.[42] At that time, the Plaintiffs chose not to bargain for specific

[38] *Id.* (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)).
[39] *See* Pls.' Opp'n Br. at 20 ("The implied covenant acts as a way to import terms into the agreement to fill gaps in the contract's provisions.").
[40] *Winshall*, 55 A.3d at 637.
[41] *Id.* (citations omitted).
[42] *See, e.g.*, Am. Compl. ¶ 46 ("From the beginning of serious discussions, LPL Financial advised plaintiffs that it was amply addressing any potential issues of potential concern regarding any technical limitations in LPL Financial's computer systems, including specifically as to [sic]

language requiring LPL to make those adaptations,[43] and they cannot now claim that the parties did not anticipate such language would be necessary.

The Plaintiffs respond that, though the parties anticipated technological adaptations would be necessary, they chose not to include language in the SPA requiring LPL to make those adaptations because LPL's promises to make the adaptations "diverted their attention away from the issue,"[44] and because making the adaptations was in LPL's interests, and therefore was not a negotiating point. These arguments are belied by the facts that (1) the Plaintiffs now argue that LPL in fact has an incentive *not* to make the technological adaptations, and (2) the SPA contains an integration clause, which states that "[t]his Agreement . . . constitutes the entire agreement among the parties hereto with respect to the subject matter hereof . . . There are no restrictions, promises, warranties, representations, covenants, or undertakings, other than those expressly provided for herein . . . ."[45] The SPA is not merely a collection of negotiated deal points: it is the *entire agreement*. Thus, it is clear that the parties anticipated that technological

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they pertained to possible problems in regard to LPL Financial's custody of relevant trust assets."); *id.* ¶ 61 ("It was anticipated that the computer-based system used by LPL Financial to provide custodial services would require minimal and routine technical adaptation of LPL Financial's software and data management systems.").

[43] *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 147 (Del. Ch. 2009) (explaining that the plaintiff's argument that the covenant of good faith and fair dealing required the defendant to affirmatively expend resources was "undercut by the ease with which [the plaintiff] could have insisted on specific contractual commitments from [the defendant] regarding the expenditure of resources, or some form of 'efforts' obligation for [the defendant]").

[44] Pls.' Opp'n Br. at 24.

[45] SPA § 12.05.

adaptations might be advantageous to Concord-LPL, but chose not to contractually obligate LPL to make them.

The Plaintiffs also look to the definition of Net Revenue in the SPA, which defines that term as "all revenues attributed to [Concord-LPL's] existing Business activities from current and future customers and existing and future LPL clients who utilize services provided by the Acquired Companies as well as revenues from cash accounts, custody fees, and trading and execution revenues. . . ."[46] Because Section 2.06(c) of the SPA requires that LPL "operate [Concord-LPL] in such a manner so as to permit the appropriate identification and calculation of Net Revenues and Production Expenses," the Plaintiffs argue that the covenant to calculate fees necessarily obligates LPL to *generate* fees, including custody fees, which necessarily requires Concord-LPL to use LPL-supplied technology to provide custody services in order to earn custody fees. This argument is premised on an unreasonable interpretation of the provisions, however. The plain language of Section 2.06(c) requires LPL to calculate revenue, *if such revenue exists*, in such a way that the parties can determine what is owed to the Plaintiffs under the contingent purchase price provision. It does *not* create an affirmative obligation to generate revenue.

[46] *Id.* § 1.01 ("Definitions").

The Plaintiffs anticipated, but failed to bargain for, a requirement that the Defendants adapt their software and data-handling capabilities for Concord-LPL's benefit. Because the implied covenant of good faith and fair dealing serves only a gap-filling function, and the Plaintiffs do not allege that the parties failed to anticipate the need for technological adaptations, this portion of the implied covenant count must be dismissed.

B. Shifting Resources from Concord to Fortigent

The Plaintiffs raise the additional argument that LPL has breached the implied covenant of good faith and fair dealing by taking affirmative steps to impede Concord-LPL's ability to generate revenue. Specifically, the Plaintiffs allege that LPL "pivoted" sales from Concord-LPL to Fortigent in an effort to evade payments under the contingent purchase price provision of the SPA and under the employment agreements;[47] that Concord-LPL staff was told to "discourage prospective clients and current clients from using Concord's services" and to "stand down" with existing clients;[48] and that some Concord-LPL employees were transferred to Fortigent.[49]

The Defendants make two arguments in connection with this claim. First, they argue that the allegations upon which this claim is based are conclusory, and

[47] Am. Compl. ¶ 117.
[48] *Id*. at ¶¶ 123-24.
[49] *Id.* at ¶ 127.

therefore legally insufficient to state a claim. Second, they argue that the Plaintiffs have failed to adequately plead that they were damaged by these alleged acts, since the Plaintiffs have not demonstrated that, had the Defendants not acted to avoid the earn-out payments, Concord-LPL would have hit the targets that trigger additional payment under the contingent purchase price provision and under the employment agreements.[50]

I find that the Plaintiffs' allegations here are sufficiently specific to support an inference that the Defendants have breached the implied covenant of good faith and fair dealing. Taken together, the contingent purchase price provision in the SPA, the compensation targets in the employment agreements, and Section 2.06(c), which provides for the calculation of revenue in order to determine the payments to which the Plaintiffs are entitled under the two former agreements, demonstrate that, had the parties contemplated that the Defendants might affirmatively act to gut Concord-LPL to minimize payments under the SPA and employment agreements, the parties would have contracted to prevent LPL from shifting revenue from Concord-LPL to Fortigent.

Additionally, I find that the Plaintiffs have sufficiently pled damages as a result of the Defendants' breach. The Plaintiffs plead that, by agreeing to the contingent purchase price provision in the SPA, they forewent offers from other

[50] Defs.' Op. Br. at 16.

potential buyers for larger upfront payments.[51] Further, the Plaintiffs plead that both parties anticipated that the transaction would generate large synergies, and it is at least a reasonably conceivable inference based on that assertion that, had the Defendants not interfered with Concord's ability to generate revenue, it would have reached its revenue targets sufficient to trigger payment under the contingent purchase price provision of the SPA and employment agreements. The Defendants' Motion with respect to this portion of the implied covenant claim is therefore denied.

2. Breach of Contract

The Plaintiffs bring a count against LPL for breach of SPA Section 2.06(c). As noted above, that provision requires that LPL operate Concord "in such a manner so as to permit the appropriate identification and calculation of Net Revenues and Production Expenses." Throughout briefing and oral argument, the Plaintiffs have asserted two arguments in support of this count.

First, the Plaintiffs argue that "LPL's system was incapable of properly identifying and calculating Net Revenues to be generated by the Concord's [sic] custodial services, as required by the Agreement because LPL Financial's infrastructure was incapable of servicing the types of clients that Concord mainly

[51] Am. Compl. ¶ 59.

serviced;"[52] in other words, "LPL's computer system was incapable of servicing Concord-LPL's trust accounts let alone operating in a manner to allow plaintiffs to calculate net revenue and production expenses."[53] This argument is unavailing, since there are no allegations in the Amended Complaint that Concord-LPL has generated revenues that LPL has not properly identified and calculated, and, as explained above, the plain language of this provision does not require LPL to *cause* Concord-LPL to generate revenue.

Second, at oral argument, the Plaintiffs argued that the parties' intent in drafting Section 2.06(c), which requires that LPL operate Concord-LPL in such a way that the parties can measure its revenue, was to protect the Plaintiffs' right to payments under the contingent purchase price provisions in the SPA as well as payments based on targets under the employment agreements. The Plaintiffs suggest that by shifting clients and employees from Concord-LPL to Fortigent, LPL is not operating in such a way that it can track revenue generated by what was formerly Concord's business. Reading the SPA as a whole, I agree that the unambiguous purpose of Section 2.06(c) is to provide a mechanism with which the parties can calculate revenue in order to determine whether the Plaintiffs are entitled to additional compensation under the contingent purchase price provision. LPL's alleged attempt to shift business from Concord-LPL to Fortigent thwarts

[52] Pls.' Opp'n Br. at 30.
[53] *Id.* at 31.

LPL's ability to calculate revenue properly ascribed to Concord-LPL, and so, under this theory, the Plaintiffs have stated a claim for breach of Section 2.06(c).

3. Fraudulent Inducement

The Plaintiffs also bring a count of fraudulent inducement against LPL and LPL Financial. They allege that, prior to signing the SPA and the employment agreements, the Plaintiffs had several conversations with members of management at LPL and LPL Financial in which representatives communicated to the Plaintiffs that LPL and LPL Financial had experience integrating technology and planned to do so for Concord-LPL. In support of those assertions, the Plaintiffs identify email communications by Melanie Hardin, LPL Financial's Executive Vice President, who stated that "internal discussions have been revolving around custody of assets;"[54] "[a]s you probably know we are keen to be sure that we can indeed custody all the trust assets;"[55] and "hearing [the Plaintiffs] talk to a client about custody opportunities . . . would be a big help in validat[ing] a large assumption in our business model."[56]

The Plaintiffs also claim that they relied on public statements by LPL, including the following statement on LPL's website:

> As the largest independent broker/dealer in the nation, LPL Financial has invaluable expertise in the clearing, technology, compliance, and

[54] Am. Compl. ¶ 47.
[55] *Id.* at ¶ 48.
[56] *Id.* at ¶¶ 50-51.

> customer service functions and enables other broker/dealers to outsource these critical activities so you can reduce complexity and focus on your business's core activity—helping clients.[57]

The Plaintiffs allege that "LPL knew the public statement [on its website] was false, and/or knew the statement was material and misleading in light of its knowledge of plaintiffs' expectations in regard to the transactions contemplated;"[58] "LPL failed to disclose, and concealed, the true nature of LPL Financial's technical limitations to the plaintiffs but yet knew that plaintiffs would rely upon its public statements;"[59] "LPL failed to disclose that LPL Financial's computer systems could not easily be adapted so that LPL Financial could provide such similar services, and that LPL Financial would likely therefore resist making the changes;"[60] and "LPL Financial confirmed directly to Concord that LPL Financial could, and would, make any necessary ministerial technical changes to its computer system by the fourth quarter of 2011."[61]

These allegations do not amount to "bootstrapping" claims, in which a plaintiff claims that a party made a promise in a contract with the intent not to perform. Instead, the Plaintiffs claim that the Defendants made extra-contractual statements that amount to fraud. A fraud claim requires establishing (1) a false

[57] *Id.* at ¶ 65.
[58] *Id.* at ¶ 70.
[59] *Id.* at ¶ 71.
[60] *Id.* at ¶ 78.
[61] *Id.* at ¶ 86.

representation or omission (2) made by a person with knowledge of the statement's falsity (3) and the intention to induce action by making the representation, (4) the plaintiff's reasonable reliance, and (5) damages.[62] Additionally, "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity;"[63] to satisfy this standard, "a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations."[64]

Often, parties choose to preempt fraud claims arising out of extra-contractual representations by including in their contracts both integration clauses and anti-reliance clauses. Our courts have explained that:

> [F]or a contract to bar a fraud in the inducement claim, the contract must contain language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract. The presence of a standard integration clause alone, which does not contain explicit anti-reliance representations and which is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims.[65]

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[62] *In re Wayport, Inc. Litig.*, 76 A.3d 296, 323 (Del. Ch. 2013).
[63] Ct. Ch. R. 9(b).
[64] *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *13 (Del. Ch. Nov. 19, 2013).
[65] *Kronenberg v. Katz*, 2004 WL 5366649, at *19 (Del. Ch. May 19, 2004).

The present situation is unusual in that the Plaintiffs here claim that they reasonably relied on certain extra-contractual representations which induced them to enter into two separate contracts: the SPA, which includes a clear anti-reliance clause, and the employment agreements, which include integration clauses but not anti-reliance clauses. In other words, the Plaintiffs have contractually agreed that they did not rely on any extra-contractual statements, including statements about LPL's and LPL Financial's technological capabilities, in entering into the SPA. The Plaintiffs have not, however, agreed that they did not rely on those same alleged representations in entering into the employment agreements; thus, those fraud claims arising out of the employment agreements must fall, if at all, for reasons other than the anti-reliance provision contained in the SPA.

A. Fraudulent Inducement into the Employment Agreements

The Plaintiffs' claims that they were fraudulently induced to enter into the employment agreements fail to state a claim upon which relief could be granted, because they fail to specifically allege any affirmative statements or material omissions by LPL or LPL Financial upon which the Plaintiffs could reasonably have relied. The Plaintiffs do not allege any independent bases for asserting a fraudulent inducement claim arising out of the employment agreements, but instead point to the same representations alleged in connection with their SPA

fraud claims.[66] In support of both claims, the Plaintiffs put forth several conclusory allegations that fail to meet the particularity requirements of Rule 9(b). The Plaintiffs allege, for instance, that LPL Financial assured the Plaintiffs that "it was amply addressing any potential issues of potential concern regarding any technical limitations,"[67] that LPL "proceeded to issue statements 'aligned' with Concord . . . confirming that LPL and LPL Financial expected a simple integration,"[68] and that "LPL Financial confirmed directly to Concord that LPL Financial could, and would, make any necessary ministerial technical changes to its computer system . . . ."[69] These allegations fail to identify circumstances in which specific individuals made specific representations at specific times, and therefore do not satisfy the particularly requirement of Rule 9(b).

Further, the representations that *are* alleged with particularity by the Plaintiffs do not amount to false or misleading statements upon which the Plaintiffs could reasonably have relied. The Plaintiffs specifically point to disclosures

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[66] *See, e.g.*, Am. Compl. ¶ 73 ("Plaintiffs relied upon LPL's public statements, and upon LPL's failures to disclose their misleading nature, in entering into the transactions set forth in the Agreement and the Employment Agreements."); *id.* at ¶ 166 ("LPL and LPL Financial knew that plaintiffs, in considering and entering into the Agreement and Employment Agreements, would rely upon LPL's and LPL Financial's representations . . . ."); *id.* at ¶ 168 ("LPL and LPL Financial did not speak, but intended that plaintiffs would rely upon those misleading representations and failures to disclose in entering into the Agreement and the Employment Agreements."); *id.* at ¶ 172 ("LPL and LPL Financial made the representations, and failed to disclose information, in order to induce the plaintiffs into entering to [sic] the Agreement and the Employment Agreements.").

[67] *Id.* at ¶ 46.

[68] *Id.* at ¶ 84.

[69] *Id.* at ¶ 86.

describing LPL's business of providing technology solutions[70] and press releases describing anticipated synergies that could be generated both by the "unique combination" of LPL Financial and Concord, and by LPL's entry into the trust business.[71] These statements make no assertions regarding LPL's ability or intent to make technological adaptations for Concord's benefit. Neither do statements by LPL Financial executive Melanie Hardin, who noted that "internal communications have been revolving around custody of assets,"[72] "we are keen to be sure that we can indeed custody all the trust assets,"[73] and "I would be most interested in hearing you talk to a client about custody opportunities."[74] The Plaintiffs could not have reasonably relied on public statements describing LPL's business in non-specific terms and on statements by an LPL executive who was "keen to be sure" of, but made no specific promises about, LPL Financial's ability to provide custody services to Concord.

Finally, the Plaintiffs also allege that LPL and LPL Financial failed to disclose their technical limitations, and that their computer systems could not easily be adapted to provide services to Concord.[75] However, the Plaintiffs have not adequately alleged that the Defendants owed a special duty to the Plaintiffs

[70] *Id.* at ¶¶ 14, 15.
[71] *Id.* at ¶¶ 19, 21.
[72] *Id.* at ¶ 47.
[73] *Id.* at ¶ 48.
[74] *Id.* at ¶ 50
[75] *Id.* at ¶¶ 71, 78.

requiring them to make such disclosures,[76] or that prior statements by the Defendants rendered such omissions misleading.[77] The Plaintiffs' claims that they were fraudulently induced into entering into the employment agreements must therefore be dismissed.

B. Fraudulent Inducement into the SPA

As noted above, the Plaintiffs' claims that they were fraudulently induced to enter into the SPA must fall for the additional reason that, in addition to the integration clause discussed above, the SPA contains a provision disclaiming reliance on extra-contractual representations:

> Non-Reliance. Except for the representations and warranties by the Company in this Agreement, Buyer and Seller each acknowledge and agree that no Person is making, and Buyer nor *Seller is not relying on, any representation or warranty* of any kind or nature, express or implied, at law or in equity, or otherwise, *in respect of* the Company, *the Business*, the Sellers or *the Buyer*, including in respect of the Company's Liabilities, operations, assets, results of operations or condition.[78]

The plain language of this provision states that the Seller, the Plaintiffs, did not rely on extra-contractual representations about the Buyer, LPL. The Plaintiffs

[76] *See BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004) ("[A] duty to speak arises when necessary to make a previous statement not misleading or when, because of a 'fiduciary or other similar relation of trust and confidence,' such information should be disclosed.") (citations omitted).

[77] The Plaintiffs state that "LPL knew the public statement was false, and/or knew the statement was material and misleading in light of its knowledge of plaintiffs' expectations in regard to the transactions contemplated." Am. Compl. ¶ 70. However, as explained above, the statements cited by the Plaintiffs in their Amended Complaint are not sufficiently specific to render any omissions misleading.

[78] SPA § 11.01 (emphasis added).

point out the clause's reference to the "Buyer," and argue that because LPL Financial is not included in the definition of Buyer under the SPA, this provision does not bar reliance on statements about LPL Financial. However, the clause bars reliance not only in respect of the Buyer, but also in respect of the Business, defined as Concord's business. Thus, any allegations that the Plaintiffs relied on statements about Concord's technological compatibility with LPL and LPL Financial pre- or post-closing are barred by the anti-reliance clause. More importantly, it is clear that the language of the anti-reliance clause, which prevents reliance on "any representation or warranty of any kind or nature, express or implied, at law or in equity, or otherwise, in respect of the Company, the Business, the Sellers or the Buyer," is drawn as broadly as possible.[79] No reasonable person would agree to such a clause in the belief that an action based on representations could survive. Thus, I do not find persuasive the argument that the parties intended with this language to bar reliance on statements by LPL but not LPL Financial. Accordingly, this provision necessarily prevents the Plaintiffs from pleading reasonable reliance, and their fraud claims relating to the SPA must be dismissed.[80]

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[79] I note that the Plaintiffs do not argue that the anti-reliance provision should be read narrowly, but that it must be clear. Pls.' Opp'n Br. at 40. I recognize that such is the standard for evaluating a contractual provision on a Motion to Dismiss, and I find that the anti-reliance provision at issue is in fact clear and unambiguous.

[80] The Plaintiffs additionally assert fraud claims based on omissions. Without reaching the question of whether the Defendants had a duty to make disclosures, those claims must fall as

4. Equitable Fraud

The Plaintiffs also bring a count against LPL and LPL Financial for equitable fraud. Equitable fraud requires proof of the same elements as common law fraud, except that, rather than demonstrating that the defendant made a representation with knowledge that such representation was false, the plaintiff must instead show that a special relationship existed between the plaintiff and the defendant.[81] Where plaintiffs fail on their common law fraud claims for reasons other than failure to prove scienter, their equitable fraud claims must also fail.[82] As explained above, the Plaintiffs cannot demonstrate reasonable reliance on the allegedly false extra-contractual representations. Accordingly, the Plaintiffs' equitable fraud count fails to state a claim upon which relief could be granted.

5. Civil Conspiracy

Finally, the Plaintiffs bring a count against the Defendants for civil conspiracy. To recover for civil conspiracy, a plaintiff must demonstrate (1) an

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well, since fraud claims based on omissions also require proof of reasonable reliance. *See Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 158 (Del. Ch. 2003) (explaining that a fraud claim requires demonstration of "(1) a false representation of fact (or material omission) by the defendant; (2) with the knowledge or belief that the representation is false or with reckless indifference to its truth or falsity; (3) intent to induce the plaintiff's reliance; (4) actual and justifiable reliance; which results in (5) harm to the plaintiff").

[81] *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013).

[82] *See id.* ("The plaintiffs failed on their common law fraud claims against [the defendants] for reasons other than scienter, and hence their equitable fraud claims would fail as well."). The Defendants here also argue that the Plaintiff cannot demonstrate the existence of a "special relationship" between the Plaintiffs and the Defendants. Because I have found that the Plaintiffs have failed to allege reasonable reliance, I need not reach the question of whether there existed a special relationship between the parties sufficient for a finding of equitable fraud.

agreement between two or more persons, (2) a wrongful act, other than breach of contract,[83] committed in furtherance of the conspiracy, and (3) harm to the plaintiff caused by such wrongful acts.[84] The Plaintiffs assert two wrongful acts in furtherance of a conspiracy between LPL, LPL Financial, Fortigent, and Fortigent's CEO Putterman.[85] First, the Plaintiffs claim that their fraudulent inducement and equitable fraud claims form the predicate of their civil conspiracy claim. But, as explained above, the Plaintiffs fail to state a claim for fraud or equitable fraud, and so those claims cannot form the basis of a conspiracy count.[86] Second, the Plaintiffs suggest that the counts for tortious interference with contract and tortious interference with prospective advantage against Fortigent and Putterman—counts that have been dismissed to those Defendants, and were not brought against the Defendants remaining—constitute wrongful acts. To the extent the Plaintiffs seek to hold the Defendants liable under a civil conspiracy theory for a third party's tortious inference with contract in order to circumvent our law that

[83] *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("A breach of contract is not an underlying wrong that can give rise to a civil conspiracy claim.").
[84] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006).
[85] The Defendants raise an additional argument that a corporation cannot conspire with its wholly-owned subsidiaries. I need not reach this argument since the Plaintiffs' civil conspiracy count must fail for the reasons stated below.
[86] *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009) ("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.").

breach of contract does not constitute a tort, that attempt must fail. This Court previously rejected a similar argument, explaining:

> Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties. Delaware also recognizes the concept of efficient breach. Delaware law generally elevates contract law over tort to allow parties to order their affairs and bargain for specific results, to the point where Delaware law enforces contractual provisions that eliminate the possibility of any tort liability short of actual fraud based on explicit written contractual representations. A claim of conspiracy to commit tortious interference against a party to the contract would undercut these principles and replace the predictability of the parties' agreement with a far less certain, after-the-fact, judicially-fashioned tort remedy. Recognizing such a round-about claim would circumvent the limitations on tort liability that are a fundamental aspect of Delaware law.[87]

Accordingly, the Plaintiffs' tortious interference with contract claim cannot form the basis for their civil conspiracy claim.

Finally, the Plaintiffs' civil conspiracy claims, including their claim based on intentional interference with prospective advantage, must fail for the additional reason that the Plaintiffs fail to allege two or more actors engaged in the conspiracy:

> A civil conspiracy requires a plaintiff to establish that two or more persons combined or agreed with the intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Yet, a corporation generally cannot be deemed to have conspired with its wholly owned

[87] *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("[The plaintiff] fares no better to the extent it means to suggest that [a third party] has engaged in tortious interference with contract, and that [a party to the contract] can be held liable under a theory of civil conspiracy for that tort.").

> subsidiary, or its officers and agents. This general rule does not apply, however, when the officer or agent of the corporation steps out of her corporate role and acts pursuant to personal motives.[88]

Here, the Plaintiffs name as conspirators only LPL, two of its wholly-owned subsidiaries, and an officer of its wholly-owned subsidiary. While the Plaintiffs aver that "[t]he defendants' injurious actions were performed for reasons outside the normal course of their businesses,"[89] they do not support this general assertion with any particularized allegations; thus, the general rule that a corporation cannot conspire with its wholly-owned subsidiaries and officers must apply. The Plaintiffs' civil conspiracy claims therefore fail to state a claim upon which relief could be granted.

III. CONCLUSION

For the reasons explained above, the Defendants' Motion to Dismiss is granted in part and denied in part. The parties should submit an appropriate Order.

[88] *In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *6 (Del. Ch. Feb. 28, 2006).
[89] Am. Compl. ¶ 209.