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

TRUEBLUE, INC., TRUEBLUE SERVICES, INC. (F/K/A SEATON ACQUISITION CORP.), SEATON HRX HOLDINGS PTY LTD, and HRX HOLDINGS PTY LIMITED,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-12-112 WCC CCLD
LEEDS EQUITY PARTNERS IV, LP,	)	
Defendant.	)	

Submitted: May 12, 2015
Decided: September 25, 2015

Defendant's Motion to Dismiss – GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

Before this Court is Defendant's Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim. For the following reasons, the Court finds that Defendant's Motion to Dismiss as it relates to the contract claims is hereby GRANTED, but will be DENIED as to the fraud claim.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the June 2014 sale of Staffing Solutions Holdings, Inc. ("Staffing Solutions") by Leeds Equity Partners IV, LP ("Defendant" or "Leeds") to TrueBlue Inc. ("Plaintiffs" or "TrueBlue"). Prior to the sale, Seaton HRX, a subsidiary of Staffing Solutions, bought an Australian human resources and recruitment business, HRX Holdings Pty Ltd. ("HRX"). As part of the purchase, Seaton HRX agreed to delay payment of a portion of the purchase price pursuant to an earn-out provision (the "HRX Earn-Out"). The HRX Earn-Out provision required a specified accounting be completed at the conclusion of HRX's fiscal year, at which time the precise amount of the payment would be determined. Under the agreement, the HRX Earn-Out payment was due on December 15, 2014.

Between the time that Seaton HRX agreed to the HRX Earn-Out and the time that the HRX Earn-Out payment was due, Plaintiffs bought Staffing Solutions, and in turn Seaton HRX, from Leeds in a stock transaction. During negotiations between TrueBlue and Leeds, the subject of the HRX Earn-Out arose. The Plaintiffs assert that during at least two discussions in or about April 2014,

Leeds represented to TrueBlue that the HRX Earn-Out was Leeds's obligation and that Leeds would take care of it. However, when the HRX Earn-Out was due on December 15, 2014, Leeds refused to fund the payment, forcing Plaintiffs to make the payment or risk suit by the HRX sellers.

Plaintiffs filed the instant action against Leeds on December 11, 2014 seeking declaratory judgment as to who was responsible for the HRX Earn-Out payment. After funding the payment on the due date, Plaintiffs amended their complaint to assert claims for breach of contract, breach of the implied covenant of good faith, fraud, promissory estoppel, and unjust enrichment. On February 20, 2015, Defendant filed a Motion to Dismiss. After briefing, the Court heard oral argument on the Motion and this decision follows.

STANDARD OF REVIEW

When analyzing a motion to dismiss under Superior Court Civil Rule 12(b)(6), the Court generally must proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the complaint.[1] A complaint is "well-pleaded" if it puts the opposing party on notice of the claim brought against it.[2] Additionally, where certain documents are "integral to a plaintiff's claims,

[1] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996).

[2] *See Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995) (citing *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 59 (Del. 1970) and Super. Ct. Civ. R. 8(e)(1), (f)).

[they] may be incorporated by reference without converting the motion to a summary judgment."[3]

At this preliminary stage, the Court will dismiss a complaint under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.[4] Although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[5]

DISCUSSION

The Amended Complaint asserts seven counts against Defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, and fraud. The Court will address the contract claims and the fraud claims separately below.

[3] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 (Del. Super. 2014).
[4] *See Solomon*, 672 A.2d at 38 (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)); *see also In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (citing *Rabkin*, 498 A.2d at 1104) ("Only if the [C]ourt can say with reasonable certainty that plaintiff could prevail on no state of facts inferable from the pleadings may the court dismiss a complaint at this preliminary stage.").
[5] *See In re USACafes, L.P. Litig.*, 600 A.2d at 47.

I. Breach of Contract Claims

In Counts I-III of the Amended Complaint, Plaintiffs allege that the stock purchase agreement ("SPA") and Leeds's oral representations required Defendant to fund the HRX Earn-Out and that by failing to do so, they breached the contract. Plaintiffs further allege, in Counts IV and VI, that Leeds breached the implied covenant of good faith and fair dealing by falsely representing that Leeds would fund the HRX Earn-Out, and that Plaintiffs are entitled to promissory estoppel because they reasonably relied on those oral promises. Plaintiffs also contend in Count VII that Defendant has been unjustly enriched as a consequence of Plaintiffs' payment of the HRX Earn-Out because the purchase price for Staffing Solutions assumed Defendant would pay the HRX Earn-Out. In response to Plaintiffs' allegations, Defendant contends the SPA constitutes a fully integrated contract that required Plaintiffs to fund the HRX Earn-Out payment. Based on this reasoning, Defendant asserts it was not justifiable for Plaintiffs to rely on the alleged oral promises made prior to execution of the SPA.

Because "the proper interpretation of language in a contract is a question of law,"[6] "a motion to dismiss is a proper framework for determining the meaning of contract language."[7] Delaware courts apply the "'objective' theory of contracts,

[6] *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006).
[7] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

i.e. a contract's construction should be that which would be understood by an objective, reasonable third party."[8] This means that a court will "give priority to the parties' intentions as reflected in the four corners of the agreement,"[9] such that "plain and unambiguous" terms have a "binding effect" according to "their ordinary and usual meaning."[10]

The contract at issue in this case is a stock purchase agreement. "[I]t is a general principle of corporate law that all assets and liabilities are transferred in the sale of a company effected by a sale of stock."[11] As a corollary, the obligations of the company whose stock is sold, in this case Staffing Solutions, would become obligations of the purchasing company absent an express agreement to the contrary.[12] Consistent with this, the SPA specifically stated that TrueBlue agreed to purchase all of "[t]he authorized capital stock of [Staffing Solutions]."[13] Thus, TrueBlue agreed to purchase and acquire all of the assets and liabilities of Staffing Solutions when it executed the SPA. As a sophisticated purchaser assisted by

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[8] *Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxon Comm'cns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. April 29, 2005)).

[9] *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012) (quoting *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012)).

[10] *Allied Capital Corp.*, 910 A.2d at 1030 (citing *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)); *see also Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) ("When interpreting a contract, the role of a court is to effectuate the parties' intent. In doing so, we are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended.").

[11] *See In re KB Toys Inc.*, 340 B.R. 726, 728 (D. Del. 2006) (discussing Bankruptcy Court's reasoning and affirming its decision).

[12] *See, e.g., In re BankAtlantic Bancorp, Inc. Litig.*, 39 A.3d 824, 835 (Del. Ch. 2012) (describing in the context of a stock purchase agreement the buyer's payment of certain consideration "through the exclusion from the sale of [explicitly defined 'retained'] assets").

[13] SPA § 3.2.

expert advisors, TrueBlue would have understood that it was required to set forth in the SPA any liabilities for which Leeds would retain responsibility. TrueBlue's understanding of this principle is evidenced by Section 1.9(a) of the SPA, which sets forth Leeds's retention of responsibility for a 2005 Earn-Out, specifically disavowing TrueBlue's responsibility for this liability.

In an effort to ensure they were aware of all the assets and liabilities it was acquiring, TrueBlue asked Staffing Solutions for a complete list of its "material liabilities" and "material contracts" beyond that evidenced in the financial records of the business. Both of these lists, set forth in Schedules 3.4(c) and 3.7(a)(i) of the SPA, include the HRX Earn-Out payment and the 2005 Earn-Out payment dealt with in Section 1.9(a) of the SPA. TrueBlue contends that Section 1.9(a), when read in conjunction with Schedules 3.4(c) and 3.7(a)(i), creates an ambiguity in the contract as to who is responsible for each liability listed in the schedules. The Court disagrees and in fact believes the opposite is true. That the 2005 Earn-Out was specifically dealt with in the SPA as a retained liability by Leeds, while the HRX Earn-Out was not, is instructive to the Court in interpreting the SPA. The inclusion of Section 1.9(a) in the contract shows that TrueBlue knew how to allocate Staffing Solutions' liabilities when it was their intent to do so. Thus, the fact that TrueBlue and their army of advisors failed to allocate liability to Leeds for the HRX Earn-Out in the SPA demonstrates either they did not intend to do so or a

complete lack of diligence by those individuals relied upon by the company.[14] In either event, the inference this suggests does not favor TrueBlue's position.

TrueBlue attempts to salvage its contract claim by alleging extrinsic evidence of the parties' negotiations illustrates that they had various agreements relating to the liabilities in Schedule 3.4(c) which were not included in the SPA because they were rushed for time between the due diligence period and execution of the agreement. The Court would characterize this argument as one that suggests the Court should excuse such conduct and in some manner overlook the parties' negligence. This argument is simply unpersuasive given that TrueBlue was a sophisticated purchaser with expert advisors who knew precisely how to allocate liabilities it did not wish to assume.

TrueBlue attempted to support this contention during oral argument by pointing out that Defendant has paid many of the other liabilities listed in Schedule 3.4(c). The parties agree that this schedule is an itemization of those liabilities which were not reflected on the balance sheet as of the last date it was audited. These liabilities had not matured and were contingent upon factors that had not yet occurred. Schedule 3.4(c) is referenced in Section 3.4(c) of the SPA which states:

[14] *See Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) (citing *Priest v. State*, 879 A.2d 575, 584 (Del. 2005)) (applying the canon of *expressio unius est exclusion* in holding that the parties' agreement to treat one item in a certain way necessarily "excluded the other" item from the same treatment).

> (c) Except as set forth on Schedule 3.4(c), neither the Company nor any of its Subsidiaries has any material liabilities that would be required to be reflected or reserved against on a consolidated balance sheet of the Company prepared in accordance with GAAP. . . .

This provision and the related schedule reflect a clear acknowledgment of the "material liabilities" of the entities that Plaintiffs were purchasing and are integrated into the SPA. To the Court, even if it is true that Defendant has agreed to pay some of the listed liabilities, it does not overcome the clear disclosure of the potential liabilities of the company Plaintiffs were purchasing. This is not a disputed or unclear provision nor does it represent something misunderstood by the parties.

The HRX Earn-Out was a multi-million dollar payment, which Plaintiffs now argue affected the purchase price paid for Staffing Solutions. To suggest that a six million dollar payoff obligation was mistakenly left out of the contract or not included based on two oral representations is simply not convincing. As we start football season, the Court would describe TrueBlue's arguments as a Hail Mary to save a desperate situation. Unfortunately for TrueBlue, their pass has been knocked down. If it was Plaintiffs' intent for Leeds to retain responsibility for this substantial obligation, that should have been provided for specifically in the SPA as was the 2005 Earn-Out. TrueBlue has no one to blame other than their advisors for failing to do so.

Even if the Court were inclined to accept Plaintiffs' argument that the HRX Earn-Out was not dealt with because the parties were rushed for time, the parole evidence rule precludes the Court from considering the alleged oral promises made before execution of the SPA. The parole evidence rule "bars admission of extrinsic evidence to an unambiguous, integrated written contract for the purpose of varying or contradicting the terms of that contract."[15] Plaintiffs allege that the SPA is an ambiguous, partially integrated contract and thus, extrinsic evidence of the parties' course of dealings and prior agreements is admissible to supplement the terms of the agreement. However, as stated above, there is no ambiguity in the SPA. It may not set forth everything in hindsight that TrueBlue intended to include, but that does not create an ambiguity.

In addition to the Court's belief that the SPA is unambiguous, Section 9.5 of the SPA contains an integration clause,[16] which creates a presumption of integration.[17] In determining whether the presumption of integration is rebutted, "the court focuses on whether [the contract] is carefully and formally drafted, whether it addresses the questions that would naturally arise out of the subject

[15] *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 WL 4930693, at *3 (Del. Oct. 1, 2014) (citation omitted); *see also Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Dec. 17, 2002) (describing the parole evidence rule as "a principle of substantive law that prevents the use of extrinsic evidence of an oral agreement to vary a fully integrated agreement that the parties have reduced to writing").

[16] SPA § 9.5 ("This Agreement (including the Disclosure Schedules, annexes and exhibits hereto and the other agreements and instruments referred to herein) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the Parties with respect to the subject matter hereof and thereof.").

[17] *See, e.g., Addy v. Piedmonte*, 2009 WL 707641, at *9 (Del. Ch. Mar. 18, 2009).

matter, and whether it expresses the final intentions of the parties."[18] Plaintiffs cite to two cases to support their assertion that the presumption of integration should be overcome here. The first case, *Addy v. Piedmont*, involved several written contracts, each of which purported to fully integrate the parties' agreement with terms of notes that were described in informal documents and never formally issued.[19] In *Addy*, the court found that the integration clause was not controlling because of "discrepancies and internal inconsistencies" and "the absence of . . . formal documents," all of which "contradict[ed] the notion that the [] Agreements were carefully drafted," as well as the reference to other, never-drafted, agreements which showed that the documents before the court did not reflect the final agreement of the parties.[20] The second case to which Plaintiffs cite, *Bowers v. Wilmington Delivery*, involved two written truck leases between a driver and a shipping company. In *Bowers*, the court refused to find a fully integrated agreement where the documents at issue lacked essential terms, such as those specifying payment and travel routes.[21] The court in *Bowers* also emphasized that "both parties admitt[ed] that the form leases omitted certain terms and did not comprise the entire agreement between them."[22]

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[18] *See id*. (citing *Hyanski v. Vietri*, 2003 WL 21976031, at *3 (Del. Ch. Aug. 7, 2003)).
[19] *See id*. at *1-4.
[20] *See id*. at *9-10.
[21] *See Bowers v. Wilmington Delivery Serv., Inc.*, 1986 WL 7514, at *3 (D. Del. June 23, 1986).
[22] *See id*.

Here, however, there is nothing to overcome the presumption of integration. The SPA was clearly drafted without internal inconsistencies, it fully and carefully addresses all of the points one would expect to be included in a stock purchase agreement, and there is no mention of further documentation in the agreement. Moreover, the SPA was not a form document such as the lease in *Bowers*, nor does it lack the essential terms of a stock purchase agreement. This was a carefully drafted 59-page stock purchase agreement relating to a significant financial transaction by sophisticated parties that was executed with professional advisors. As such, there is no conceivable set of circumstances pled in the Amended Complaint under which Plaintiffs can support Counts I-IV of their Complaint and those counts will be dismissed.

II. Quasi-Contractual Claims

Plaintiffs' quasi-contractual claims for promissory estoppel and unjust enrichment also fail. The doctrine of promissory estoppel is a quasi-contractual remedy "designed to enforce a contract in the interest of justice where some contract formation problem would otherwise prevent enforcement."[23] To prevail under promissory estoppel, a plaintiff must show by clear and convincing evidence that: "(i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee

[23] *See Feinberg v. Saunders, Karp & Megrue, L.P.*, 1998 WL 863284, at *17 (D. Del. Nov. 13, 1998).

reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise."[24] However, "[p]romissory estoppel does not apply . . . where a fully integrated, enforceable contract governs the promise at issue."[25] That is the case here. The Court also finds no injustice in requiring the parties to abide by their contractual agreement. Plaintiffs have received the benefit of the bargain, acquired the company they desired, were aware of the payout issue, and had the means to protect themselves from that liability. To believe they chose not to preserve their position as to a six million dollar liability on the basis of two oral representations is simply not credible. As such, Count VI of the Amended Complaint alleging promissory estoppel is also dismissed.

Furthermore, Delaware courts have held that a claim for unjust enrichment cannot stand if the parties' relationship and the claims asserted "are the subject of an express contract" because "the terms of that contract control and there is no occasion to pursue the theory of quantum meruit or contract implied in law."[26] That is also true here. The terms of TrueBlue and Leeds's agreement in which TrueBlue

[24] *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003) (quoting *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000)).

[25] *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 348 (Del. 2013) (citing *Chrysler Corp.*, 822 A.2d at 1033-34 (noting that "existing written contracts between the parties governed the relationship, and therefore promissory estoppel [was] inapplicable" that "the promises made ... were in addition to the existing relationship")).

[26] *See Maglione v. BCBSD, Inc.*, 2003 WL 22853421, at *5 (Del. Super. July 29, 2003); *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 (Del. Super. 1980); *see CIT Commc'ns Fin. Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *4 (Del. Super. June 6, 2008) (observing that a party is "precluded from prosecuting an unjust enrichment claim if binding and enforceable contracts . . . govern the parties' relationship").

would acquire Staffing Solutions' assets and liabilities with the exception of those expressly allocated to Leeds are clearly set forth in the SPA. The HRX Earn-Out was not one of the liabilities expressly allocated to Leeds in the SPA. If the purchase price was based on Leeds retaining liability for the HRX Earn-Out, the financial impact of that decision alone would have mandated inclusion in the agreement. Equally important is that the exact cost of the HRX Earn-Out was not known when the deal was consummated, so it is difficult to accept that it was a critical factor in the purchase price offered by TrueBlue. The Plaintiffs cannot now back out of the deal simply because in hindsight they believe they paid too much. As such, Counts VI –VII of the Amended Complaint will also be dismissed.

III. Fraud Claim

In Count V of the Amended Complaint, Plaintiffs allege certain Leeds representatives falsely represented to TrueBlue that Leeds would fund the HRX-Earn-Out, knowing the statements were false or with reckless disregard of their truth and intending to induce TrueBlue to rely on the representations. Plaintiffs further allege Leeds did not intend to perform on the promises at the time they were made and that TrueBlue's reliance was justifiable given the parties' course of dealing, the specificity of Leeds's representations, and the absence of contemporaneous evidence contradicting the veracity of the representations.

Defendant counters Plaintiffs' fraud claim should be dismissed because (1) Plaintiffs fail to plead fraud with the required particularity; (2) Plaintiffs fail to plead a misrepresentation of a material *fact*; and (3) Plaintiffs fail to plead justifiable reliance.

In order to survive a motion to dismiss a fraud claim, Plaintiffs must allege:

> 1) a false representation, usually one of fact, made by the defendant; 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; 3) an intent to induce the plaintiff to act or to refrain from acting; 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> 5) damage to the plaintiff as a result of such reliance.[27]

Fraud need not take the form of an overt misrepresentation;[28] it may occur through concealment of material facts or by silence when there is a duty to speak.[29] Additionally, Superior Court Rule 9(b) requires that "[i]n all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity."[30] However, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."[31]

A. Rule 9(b) Particularity

[27] *See Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del.1992).
[28] *See Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del.1983).
[29] *See id.* ("Thus, one is equally culpable of fraud who by omission fails to reveal that which it is his duty to disclose in order to prevent statements actually made from being misleading.").

[30] Del. Super. Ct. Civ. R. 9(b).
[31] *Id.*

Defendant contends that Plaintiffs failed to meet the heightened pleading requirement under Rule 9(b) because the Amended Complaint does not allege to whom the misrepresentations underlying their fraud claim were made. However, Delaware courts have held that to satisfy particularity under Rule 9(b) all that is required is that the complaint set forth the "time, place, and contents of the alleged fraud, as well as the individual accused of committing the fraud."[32]

Here, the Amended Complaint alleges that in or about April 2014, in Chicago, Christopher Mairs (a Leeds representative) stated that the HRX Earn-Out was Leeds' obligation and promised to pay it; and, that in or about April 2014, in Florida, Cartner Harned (Leeds's lead negotiator) stated that "of course Leeds would pay [the HRX Earn-Out]." These allegations are sufficient to satisfy the Rule 9(b) particularity requirement because the time, place, content, and speaker of the statements underlying Plaintiffs' fraud claim are clearly specified.

B. Misrepresentation of Material Fact

Defendant next contends Plaintiffs' fraud claim fails because the Amended Complaint alleges prior oral promises or statements of future intent, rather than false representations of *fact*.[33] While Delaware courts generally "disfavor

[32] *See Universal Capital Mgmt., Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *2 (Del. Super. Feb. 1, 2012) (internal quotation omitted); *see also Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *2 (Del. Super. Apr. 1, 2010) (fraud particularity requires "a statement of the time, place and contents of the false representations, as well as the identity of the person making those representations").

[33] Op. Br. 25.

allegations of fraud when the underlying utterances take the form of unfulfilled promises of future performance," a complaint that alleges facts with sufficient particularity may "support a reasonable inference that Defendants made promises they had no intention of keeping when they made them."[34] In addition, "the particularity requirement must be applied in light of the facts of the case, and less particularity is required when the facts lie more in the knowledge of the opposing party than of the pleading party."[35]

Here, Plaintiffs allege two discrete representations made by Leeds representatives in April 2014 in which Leeds promised to fund the HRX Earn-Out, and that the amount TrueBlue agreed to pay for Staffing Solutions was calculated based on these representations.[36] One can reasonably infer from the Amended Complaint that Leeds made those representations just to influence TrueBlue's decision, while never intending to live up to its promises. The Court will simply not condone such conduct or dismiss a case on motion at this early stage of the litigation. Discovery may cast these representations in a different light, but this Court will give Plaintiffs the opportunity to support this claim.

[34] *See Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *9-10 (Del. Ch. Dec. 23, 2008)(denying motion to dismiss for failure to state promissory fraud claim based on guarantor's promises to assume mail carrier's contract); *see also Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch. Dec. 8, 2009)("Courts, however, will convert an unfulfilled promise of future performance into a fraud claim if particularized facts are alleged that collectively allow the inference that, at the time the promise was made, the speaker had no intention of performing.").

[35] *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 146 (Del. Ch. 2003).

[36] Compl. ¶¶ 50-54. *See Grunstein*, 2009 WL 4698541, at *14 (emphasizing that plaintiffs asserted "discrete representations by Silva at specifically delineated times during the acquisition negotiations, as well as what Silva stood to gain from making such representations" in finding fraudulent misrepresentations adequately alleged).

Additionally, Plaintiffs have adequately alleged facts creating an inference that most of the evidence regarding Leeds's intent would be in Leeds's possession.[37] Therefore, viewing the Amended Complaint in the light most favorable to Plaintiffs, sufficient facts are alleged to support their claim that Leeds fraudulently induced TrueBlue to enter into the SPA by repeatedly assuring TrueBlue that Leeds would fund the HRX Earn-Out, when it had no intention of doing so.

[37] *See H-M Wexford LLC*, 832 A.2d at 146 ("[T]he particularity requirement must be applied in light of the facts of the case, and less particularity is required when the facts lie more in the knowledge of the opposing party than of the pleading party."). For example, Plaintiffs allege that, after signing binding letter of intent on May 19, 2014, the parties began a "rushed" due diligence period, during which Leeds "made late disclosures of various significant liabilities" and limited the scope of due diligence to "valuation" issues only. *See* Answering Br. 6. Additionally, The Amended Complaint also alleges that the amount of the HRX earn-out was to be based on a specified accounting of HRX's financial performance as of the June 30, 2014 fiscal year end. *See* Compl. ¶ 3.

C. Justifiable Reliance

Defendant also contends Plaintiffs have failed to properly plead justifiable reliance in support of their fraud claim. "The question of whether one's reliance was reasonable generally is a question of fact…. The reasonableness of one's reliance on false information depends on all of the circumstances."[38] As such, whether a party's reliance was reasonable is not generally suitable for resolution on a motion to dismiss.[39] Nevertheless, Delaware courts have addressed the reasonableness of a party's reliance when the dispute involved a fully integrated contract.

Defendant asserts the SPA was a fully integrated contract between two sophisticated parties; therefore, Plaintiffs' reliance on prior representations was unreasonable.[40] Specifically, Defendant cites the SPA's integration and no-representation clauses as precluding Plaintiffs from justifiably relying on misrepresentations made prior to the SPA's execution.[41] However, Delaware courts have held such clauses "will not be given effect to bar allegations of fraudulent inducement based on extra-contractual statements made before the effectuation of the contract unless such clauses contain an explicit anti-reliance

[38] *Vague v. Bank One Corp.*, 2004 WL 1202043, at *1 (Del. May 20, 2004).
[39] *See Iacono v. Barici*, 2006 WL 3844208, at *3 (Del. Super. Dec. 29, 2006) (denying motion to dismiss fraud claim on grounds that reliance was unjustified because this is generally a question of fact).
[40] Op. Br. 28.
[41] Op. Br. 30-31.

representation."[42] Thus, for the Court to dismiss Plaintiffs' fraud claim for lack of justifiable reliance, the terms of the SPA "when read together, [must] constitut[e] a clear statement by the plaintiff that it was not relying on the very factual statements … the plaintiff contend[s] to be fraudulent."[43]

Neither SPA provision cited by Defendant includes an express representation by TrueBlue that it was not relying on Leeds's extra-contractual representations. The first provision, Section 9.5, supplies a standard integration clause:

> This Agreement (including the Disclosure Schedules, annexes and exhibits hereto and the other agreements and instruments referred to herein) constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, among the Parties with respect to the subject matter hereof and thereof.[44]

The second provision, Section 5.8, states in pertinent part:

> The Purchaser acknowledges that neither the Company, nor any of its Subsidiaries nor any seller nor any other Person . . . makes, or has made, any representation or warranty with respect to . . . information or documents made available to the Purchaser or its counsel, accountants or advisors with respect to the Company, its Subsidiaries or any of their respective businesses, assets, liabilities or operations. …The Purchaser acknowledges and agrees that the representations and warranties set forth in this Agreement (as qualified by the Schedules) supersede, replace and nullify in every respect the data set forth in any other document, material or statement, whether written or oral, made available to the Purchaser.[45]

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[42] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *13 (Del. Ch. Dec. 30, 2010); *see also Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1058-59 (Del. Ch. 2006).

[43] *See Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004) ("Because Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract.").

[44] SPA § 9.5 ("Entire Agreement").

[45] SPA § 5.8 ("No Other Representations").

While Delaware courts will generally honor contractual provisions "in which sophisticated parties disclaim reliance on extra-contractual representations," the provisions "must 'clearly state that the parties *disclaim reliance* upon extra-contractual statements.'"[46] Sections 9.5 and 5.8 do not "reflect a clear promise" by TrueBlue that it was not relying on statements made to it outside of the SPA when deciding to enter into the SPA.[47] As stated by then Vice Chancellor Strine in *Abry Partners*:

> The integration clause must contain "language that ... 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." This approach achieves a sensible balance between fairness and equity—parties can protect themselves against unfounded fraud claims through explicit anti-reliance language. If parties

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[46] *See TEK Stainless Piping Products, Inc. v. Smith*, 2013 WL 5755468, at *4 (Del. Super. Oct. 14, 2013)(citing *Anvil Holding Corp. v. Iron Acquisition Co.*, 2013 WL 2249655, at *8 (Del. Ch. May 17, 2013))(emphasis in original). In *TEK*, the Court allowed the plaintiff's fraud claim to survive a motion to dismiss where the contractual language at issue stated:

> This Agreement supersedes all prior agreements among the parties with respect to its subject matter. This Agreement is intended (with documents referred to herein) to be a complete and exclusive statement of the terms of the agreement among the parties with respect thereto and cannot be changed or terminated except by a written instrument executed by Seller, Buyer and Owner. *Except as explicitly set forth herein, no representations, warranties or promises of any kind have been made by Buyer or any third party to induce Seller or Owner to execute this [A]greement.*

Id. at *3 (emphasis in original). The Court found this language was "not a clear and unambiguous agreement that the parties are not relying upon any representation or statement of fact not contained within the [agreement]" and as such, it "lack[ed] the specific anti-reliance language required as evidence that the parties intended for the clause to bar fraud claims." *See id.* at *4.

[47] *See Anvil Holding Corp.*, 2013 WL 2249655, at *8 (interpreting provisions similar to those at issue here and finding no anti-reliance provision existed). The language of the contract in *Anvil* stated "neither the Company nor any Seller 'makes any other express or implied representation or warranty with respect to the Company ... or any Seller or the transactions contemplated by this Agreement" and "[t]his Agreement ... constitutes the entire Agreement among the Parties (and the Sellers' Representatives) with respect to the subject matter of this Agreement and supersede[s] all other prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter of this Agreement." *Id.* In holding the clauses insufficient to "disclaim reliance," the Chancery Court found the clauses instead merely "indicate[d] that the Company represented that neither it nor any Seller was 'making any other express or implied representation or warranty with respect to the Company' and that the Purchase Agreement constitutes the entire agreement of the parties. The Buyer's fraud claim is not precluded by this promise." *Id.*

> fail to include unambiguous anti-reliance language, they will not be able to escape responsibility for their own fraudulent representations made outside of the agreement's four corners.[48]

The Court finds that the clauses in the SPA are routine integration and representation clauses and are simply insufficient to create the kind of explicit and unambiguous anti-reliance provision that would preclude justifiable reliance on extra-contractual representations.

Defendant further asserts that, even if the SPA lacks an enforceable anti-reliance clause,[49] such language is not required to preclude justifiable reliance on prior representations where sophisticated parties later execute a written agreement containing integration and no-representation clauses under *Black Horse Capital, LP v. Xstelos Holdings, Inc.*[50] In *Black Horse Capital*, plaintiffs alleged the parties entered into an oral contract whereby plaintiffs would make a $10 million "Bridge Loan" in exchange for the defendants transfer of a 60.5% interest in an asset referred to as "Serenity."[51] The Chancery Court found that, even in the absence of an anti-reliance provision, it was "not reasonably conceivable that Plaintiffs justifiably could have relied on [the] promise as being enforceable"

because the parties later executed "multiple written agreements" expressly

[48] *Abry Partners*, 891 A.2d at 1059.
[49] Reply Br. 18.
[50] 2014 WL 5025926 (Del. Ch. Sept. 30, 2014).
[51] *See Id* at *22.

disclaiming "any and all prior…agreements…with respect to the Bridge Loan and the post-merger operation and control of FCB Holdings, the contemplated owner of the 'Serenity' assets."[52] Given "how directly and completely the terms of the alleged Serenity Agreement conflict[ed] with the plain language of the Acquisition Agreements," the *Black Horse* Court found plaintiffs' reliance on the alleged oral representations unjustifiable and dismissed the plaintiffs' fraud claim.[53]

This case is distinguishable from *Black Horse*, however, because here, there is no *direct contradiction* between the alleged misrepresentations and the plain language of the SPA.[54] Given the circumstances surrounding execution of the SPA and the allegations in Plaintiffs' Amended Complaint, TrueBlue justifiably could have interpreted Leeds's representations as implying Leeds intended to fund the HRX Earn-Out payment.[55] Unlike in *Black Horse*, where the terms of several subsequent written agreements essentially rendered the alleged Serenity Agreement impossible, this Court is not convinced the alleged statements by Leeds representatives so "directly and completely" contradict the language of the SPA as to justify dismissal of Plaintiffs' fraud claim in the absence of an explicit anti-

[52] *Id.* at 22, 24 ("Like the integration clause in *Kronenberg*, the language agreed to by the parties in the Acquisition Agreements does not contain sufficient anti-reliance language to bar a claim based on '*material misstatements of fact.*' The teaching of this court, however, 'is that a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent inducement claim.'").
[53] *See id.* at 26.
[54] *See id.* at 22 (emphasis added).
[55] *See MicroStrategy Inc.*, 2010 WL 5550455, at *14 ("MSI justifiably could have interpreted Vella's statements as implying that ARC had no present reason to believe it might enforce another patent against MSI in the future. In that case, Vella's statements would not contradict § 5.2(ii) of the Agreement.").

reliance provision.[56] The Court finds the facts of this case more in line with the reasoning in *Anvil Holding Corp.* than *Black Horse*.[57]

Perhaps even more fundamental to the survival of this claim is that in the SPA the parties specifically preserved the right to pursue a legal remedy for fraud.[58] Section 8.8 states in part:

> Notwithstanding anything to the contrary herein, the existence of this ARTICLE VIII or Section 6.4 and of the rights and restrictions set forth therein and elsewhere in this Agreement do not limit any legal remedy against any Party hereto to the extent such Party has committed actual fraud against the Party seeking such legal remedy.[59]

So not only does the SPA's integration and representation/warranty language fail to satisfy anti-reliance standards, the agreement expressly indicates that the parties contemplated fraud claims would survive. If Defendant wants to maintain that the SPA is a fully integrated contractual agreement, a finding that has been adopted by the Court, it too will be held to the clear intention of the parties as set forth in the SPA. Plaintiffs' fraud claim has been preserved, so on this occasion Defendant's forward pass has also been knocked down.

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[56] *See Black Horse Capital, LP*, 2014 WL 5025926, at *19-22 (noting "fundamental inconsistencies" regarding the alleged oral agreement throughout plaintiffs' complaint and emphasizing that the alleged terms of the agreement directly conflict with a number of formally executed documents).

[57] *See supra* note 47 (discussing contractual provisions at issue in *Anvil Holding Corp.*).

[58] *See Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 141 (Del. 2009) ("When drafters specifically preserve the right to assert fraud claims, they must say so if they intend to limit that right to claims based on written representations in the contract. I will not imply that limitation."); *see also Anvil Holding Corp.*, 2013 WL 2249655, at *7 n.29 (finding integration and representations and warranties clauses insufficient to bar fraud claim where contract specifically preserved parties' right to bring actions for fraud).

[59] SPA § 8.8

Given the conservative standard for deciding a motion to dismiss, the lack of clear and unambiguous anti-reliance language, and the express preservation of fraud claims in the agreement, this Court concludes the SPA does not bar allegations of fraud and justifiable reliance on statements made before the contract was signed. Therefore, Plaintiffs are not precluded at this stage of the litigation from bringing their fraud claim and the Motion to Dismiss as to this claim is denied.

CONCLUSION

The Court can appreciate why the Plaintiffs are upset by the fallout of the contract they executed. And they may even feel they have been duped by the Defendant and the representations that were made during negotiations. But the Court is not the forum to rewrite the contract or to add provisions that, in hindsight, a party wishes it had included. The Plaintiffs will have the opportunity to prove they were defrauded by the Defendant's conduct, but the SPA must

remain the controlling document as to their relationship. For all of these reasons, Defendant's Motion to Dismiss as to Counts I-IV and Counts VI and VII is **GRANTED** and as to Count V is **DENIED.**

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.