OF THE STATE OF DELAWARE

DONALD F. PARSONS, JR. VICE CHANCELLOR

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Date Submitted: June 3, 2013 Date Decided: August 16, 2013

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RE: Anvil Holding Corporation, et al. v. Iron Acquisition Company, Inc., et al., Civil Action No. 7975-VCP

Dear Counsel:

On May 17, 2013, the Court issued a Memorandum Opinion (the "Opinion") rendering its decision on the Superior Court defendants' motion to dismiss the Superior Court Complaint (the "Motion to Dismiss"). In the Opinion, I granted the Motion to Dismiss with prejudice as to Count II to the extent that it purported to state a claim for bad faith breach of contract against the individual defendants in the Superior Court action

Anvil Hldg. Corp. v. Iron Acquisition Co., 2013 WL 2249655 (Del. Ch. May 17, 2013). By Order of the Chief Justice, pursuant to Del. Const. Art. IV, §13(2), I have been designated to sit on the Superior Court to hear and determine all issues in Iron Acquisition Co., Inc. et al. v. Anvil Hldg. Corp. et al., C.A. No. N12C-11-053 (the "Superior Court Action"). Thereafter, I granted a Stipulated Order of Coordination, which coordinated the Superior Court Action and the Court of Chancery action for all purposes. See Stipulated and (Proposed) Order of Coordination, C.A. No. 7975-VCP (Del. Ch.), Jan. 17, 2013 (the "Coordination Order"). In this Letter Opinion, the Court presumes familiarity with the procedural history and background facts recited in the Opinion and generally employs the same nomenclature as used therein.

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(here, the "Management Defendants").² Currently before the Court is a motion brought by the Superior Court plaintiffs, Iron Acquisition Company, Inc. and Indigo Holding Company, Inc. ("Plaintiffs"), to amend or alter the judgment, or alternatively, for reargument as to the Court's dismissal of the bad faith breach of contract claim in Count II. For the reasons that follow, I deny Plaintiffs' motion.

I. ANALYSIS

A. Standard

The standard applicable to a motion for reargument under Rule 59(f) is well settled. To obtain reargument, the moving party must demonstrate either that the Court overlooked a controlling decision or principle of law that would have a controlling effect, or the Court misapprehended the facts or the law so the outcome of the decision would be

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Count II is for "Breach of Contract and Bad Faith Breach of Contract Against Management and Anvil and Thompson Street in Their Capacities as Sellers' Representatives." The Buyers, the Superior Court plaintiffs, asserted the *bad faith* breach of contract claim against the Management Defendants only. *See* Superior Ct. Pls.' Answering Br. in Opp'n to Superior Ct. Defs.' Mot. to Dismiss the Superior Ct. Compl. ¶ 37. In addition to granting the motion to dismiss the bad faith breach of contract claim with prejudice, I granted the motion to dismiss the breach of contract claim in Count II of the Superior Court Complaint without prejudice to Plaintiffs' ability to amend its Complaint to name all Sellers as defendants within twenty days of the date of the Opinion. I later extended the time for Plaintiffs to amend the Superior Court Complaint to fourteen days following the Court's resolution of the motion currently before me. *See* Order Granting Stipulation and [Proposed] Order Extending the Time to Amend the Superior Court Complaint, C.A. No. 7975-VCP (Del. Ch.), June 5, 2013. In all other respects, I denied the Motion to Dismiss.

different.³ It is the moving party's burden to show that "the court's misunderstanding of a factual or legal principle is both material and would have changed the outcome of its earlier decision."⁴ Similarly, a motion to alter or amend a judgment under Rule 59(e) must be denied unless the movant demonstrates "(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice."⁵ The Court will not grant a motion for reargument or alteration if the plaintiff "merely restates arguments already made in slightly different form and rejected by the Court."⁶

B. Plaintiffs' Motion for Reargument or Alteration

In the Opinion, the Court held that "the [Superior Court] Complaint does not state a claim for 'bad faith breach of contract.'"⁷ That holding was premised on the fact that Plaintiffs also had asserted a fraud claim,⁸ which arguably provides a basis for avoiding

³ See, e.g., Medek v. Medek, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); Reserves Dev. LLC v. Severn Sav. Bank, FSB, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007).

Medek, 2009 WL 2225994, at *1 (internal quotation marks omitted); see also Serv. Corp. of Westover Hills v. Guzzetta, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008).

⁵ Chrin v. Ibrix, Inc., 2005 WL 3334270, at *1 (Del. Ch. Nov. 30, 2005).

Shell Oil Co. v. Shell Petroleum, Inc., 1992 WL 172675, at *1 (Del. Ch. July 20, 1992); see also Guzzetta, 2008 WL 5459249, at *1.

⁷ Anvil Hldg. Corp. v. Iron Acquisition Co., Inc., 2013 WL 2249655, at *9 (Del. Ch. May 17, 2013).

The Opinion held that the Complaint stated a claim for fraud against the Management Defendants based on the Company's representations in Section 3.25. *See Anvil Hldg. Corp.*, 2013 WL 2249655, at *6.

the limitations on remedies specified in Section 9.5 of the Purchase Agreement. Plaintiffs' bad faith breach of contract claim relied on the very same factual allegations as Plaintiffs' fraud claim. That is, Plaintiffs alleged one set of facts and labeled it as both fraud and bad faith without distinction. Furthermore, to the extent that the bad faith claim could be used to avoid the limitations in Section 9.5, the arguments would be the same as for the fraud claim. In Count I of the Superior Court Complaint, Plaintiffs allege facts that, taken as true, state a claim for common law fraud. In Count II, Plaintiffs allege similar facts that, taken as true, assert a breach of contract claim. In Count II, Plaintiffs mention "bad faith" only once, in the final paragraph:

The foregoing breach constitutes a *bad faith* breach of the representations and warranties in Section 3.25 of the Purchase Agreement. Accordingly as set forth in Section 9.6 of the Purchase Agreement, the damages incurred by Buyer are not subject to the liability limitations or the deductible set forth in Section 9.5. The knowing and intentional breach of contract warrants an award of punitive damages. ¹⁰

Not surprisingly, Count II incorporates the allegations made in the fraud claim, along with all allegations previously asserted in the Complaint, ¹¹ but Plaintiffs do not allege any

Superior Ct. Compl. ¶¶ 46–51.

Id. ¶ 59 (emphasis added). Similarly, Plaintiffs allege in Count I regarding their fraud claim that "[a]s set forth in Section 9.6 of the Purchase Agreement, the damages incurred by Buyer are not subject to the liability limitations or the deductible set forth in Section 9.5," and that "Management's knowing misrepresentations and material omissions also warrant an award of punitive damages." *Id.* ¶ 51.

See id. ¶ 52 ("Buyer incorporates the allegations of paragraphs 1 through 51 as if the same were fully set forth herein.").

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additional facts to support their assertion of bad faith. Rather, they rely entirely on the

factual allegations of wrongdoing contained in their fraud claim to support labeling Count

II as being for both breach of contract and "bad faith" breach of contract. For that reason,

the Court dismissed the bad faith breach of contract claim as duplicative of Plaintiffs'

fraud claim.

Plaintiffs now complain that they did not have fair notice of the argument that

their bad faith breach of contract claim is duplicative of their fraud claim. They contend

that Defendants did not make this argument in either their opening or reply briefs.

According to Plaintiffs, Defendants did not separately challenge the bad faith claim, but

rather, grouped it with the fraud claim and argued that both claims must be dismissed

because Plaintiffs (i) did not comply with the indemnity regime provided for in the

Purchase Agreement, and (ii) sought to hold the Management Defendants liable for the

representations in a specific provision of the Purchase Agreement that the Management

Defendants did not make. Defendants dispute Plaintiffs' "fair notice" argument,

asserting that the grounds on which the Court dismissed the bad faith claim were raised in

the parties' briefing and also were identified during the oral argument on the Motion to

Dismiss. Further, Defendants contend that they properly challenged the bad faith and

fraud claims together because the claims were based on the same factual allegations and

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constituted a single, indistinguishable effort to avoid the indemnity regime set forth in

Article IX of the Purchase Agreement. 12

In the motion currently before the Court, Plaintiffs contend that to prevent

"manifest injustice" under Rule 59(e), this Court must revise the Opinion to dismiss the

bad faith breach of contract claim without prejudice so that Plaintiffs may amend the

Superior Court Complaint to add allegations distinguishing the bad faith breach of

contract claim in Count II from the fraud claim in Count I. The time for such an

amendment has passed.

Court of Chancery Rule 15(aaa) provides, in relevant part:

[A] party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances. ¹³

See Defs.' Opp'n Br. 3.

The Coordination Order provides that the "Court of Chancery Rules shall apply to all future proceedings in the Coordinated Action; provided, however, that the parties reserve the right to file a motion seeking to modify the application of the Court of Chancery Rules to the Coordinated Action." Coordination Order ¶ 4. Plaintiffs did not move to modify the application of Rule 15(aaa) before filing their answering brief in response to Defendants' Motion to Dismiss. As such, Rule 15(aaa) applies to Plaintiffs' motion for amendment or reargument.

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"Rule 15(aaa) was written to . . . require[e] plaintiffs, when confronted with a motion to

dismiss . . . to elect to either: stand on the complaint and answer the motion; or, to amend

or seek leave to amend the complaint before the response to the motion was due."14

When Plaintiffs here were faced with the Motion to Dismiss, which treated the fraud

claim and bad faith claim as indistinguishable and sought dismissal of both on the same

grounds, they chose to stand on the Superior Court Complaint and file an answering brief

in response to Defendants' motion rather than amend their Complaint. By that time,

Plaintiffs had sufficient information to make that decision, and they do not argue that new

information recently has become available that provides separate grounds for their bad

faith claim.

Motions for reargument or alteration of judgment are not the appropriate method

for a party to raise new arguments that it failed to present in a timely way. 15 As

explained above, Plaintiffs' fraud and bad faith claims are based on the same factual

allegations and seek to achieve the same form of relief outside of the scope of Section

9.5. Thus, in the context of this case, Plaintiffs fraud and bad faith breach of contract

claims are duplicative.

¹⁴ *Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006).

Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, 2010 WL 975581 (Del. Ch.

Mar. 4, 2010), aff'd, 7 A.3d 485 (Del. 2010).

Plaintiffs argue that they seek to amend their Superior Court Complaint to allege

specific facts to support the different elements of proof required for a bad faith breach of

contract claim. Specifically, Plaintiffs assert that they would "make clear that the

allegations that Management acted in bad faith throughout the course of negotiating the

Purchase Agreement . . . gave rise to a separate claim for 'bad faith.'". To the extent

that this means Plaintiffs would make more explicit their reliance on the same facts

alleged in their fraud claim to support their bad faith breach of contract claim, it would

not address the duplication issue dealt with in the Opinion. If Plaintiffs intend to allege

new facts, they have failed to explain why they omitted any of the facts that would have

supported a separate "bad faith" claim from their initial Superior Court Complaint.

Indeed, if Plaintiffs intended to assert a bad faith claim in their Complaint that was

distinct from their claim for fraud, they were required to allege specific facts to support

that separate cause of action before now. A motion under Rule 59(e) or Rule 59(f) is not

intended to provide Plaintiffs with the opportunity to re-plead a claim that they failed to

plead adequately in the first instance and suffered a dismissal of as a result. As noted

above, Court of Chancery Rule 15(aaa) was drafted to address this exact situation.

Furthermore, I am unconvinced that Plaintiffs did not have notice that Defendants.

or this Court, considered Plaintiffs' bad faith claim duplicative of their fraud claim.

Defendants' opening brief challenged these counts together, mentioning "bad faith" on

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seventeen separate occasions. Plaintiffs, in their answering brief, grouped the defense of

their fraud and bad faith claims together, asserting that they were both untethered from

the indemnification regime provided for in the Purchase Agreement. For these reasons, I

adhere to my decision to dismiss the bad faith breach of contract claim in Count II with

prejudice and deny Plaintiffs' request for an opportunity to amend their Superior Court

Complaint to spell out a distinct claim of bad faith.

I also deny Plaintiffs' motion for reargument under Rule 59(f). Upon review of

the record available at the time of the Opinion, I am convinced that I did not

misapprehend the facts regarding Plaintiffs' position as to their fraud and bad faith

claims. As noted above, both Defendants and Plaintiffs combined their discussions of the

fraud and bad faith claims when addressing whether these claims fell outside of the

indemnification provisions of the Purchase Agreement. Plaintiffs did not single out their

bad faith breach of contract claim or attempt to differentiate it from their tort claim for

fraud. The Complaint contains allegations of fraud in Count I, and incorporates those

allegations in Count II. Plaintiffs, however, did not aver any additional facts in their bad

faith breach of contract claim. Paragraphs 53 to 56 set forth allegations that state a claim

for breach of contract. Paragraph 59 adds in conclusory fashion an assertion that "[t]he

foregoing breach constitutes a bad faith breach of the representations and warranties in

Section 3.25."

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Section 9.5 of the Purchase Agreement specifies the remedies available under the

Agreement's indemnification regime and the limitations on those remedies. Section 9.6

of the Agreement, however, contains a carve-out from the liability limitations in Section

9.5 for "any Claims based on fraud or the bad faith of any Party," and states that "each

Party hereto reserves all rights with respect to such Claims." The fact that Plaintiffs

might wish to describe the same conduct that they allege in their fraud claim as

amounting to "bad faith" does not give rise, without more, to additional or different

rights. Plaintiffs had a fair opportunity to allege a claim for bad faith breach of contract

that differed from their fraud claim. They failed to do so. Instead, Plaintiffs chose to

stand on their Complaint and answer the Motion to Dismiss. During the course of the

briefing and argument on the Motion to Dismiss, Plaintiffs had an adequate opportunity

to articulate how their bad faith breach of contract claim differed from their fraud claim,

if at all.

"Reargument under Court of Chancery Rule 59(f) is only available to re-examine

the existing record; therefore, new evidence generally will not be considered on a Rule

59(f) motion." As such, motions for reargument must be denied when, as here, a party

Purchase Agreement § 9.6.

Adams v. Calvarese Farms Maint. Corp., 2011 WL 383862, at *1 (Del. Ch. Jan. 13, 2011)

2011).

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merely restates its prior arguments or, alternatively, seeks an opportunity to plead new

facts.

II. CONCLUSION

For all of the above reasons, I deny Plaintiffs' motion to amend or alter the

judgment, or alternatively, for reargument of the Court's May 17, 2013 Opinion.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.

Vice Chancellor