

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

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

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

*Upon Consideration of
Defendant Visagar Shyamsundar's Motion to Dismiss Counts I, II, III, V and VI of Amended
Cross-Claim of Defendant Ronald F. Cornelison
Defendant Edward Berkowitz's Motion to Dismiss the Cross-Claims of Defendant Ronald F.
Cornelison Pursuant to Rules 12(B)(1) and 12(B)(6)*

GRANTED in part and DENIED in part

Jeffrey S. Goddess, Esquire, Norman M. Monhait, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, and Matthew J. MacLean, Esquire, Ashley L.T. Joyner, Esquire, Pillsbury Winthrop Shaw Pittman LLP, Washington, D.C., *Attorneys for Defendant and Cross-Claim Defendant Visagar Shyamsundar*

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DAVIS, J.

INTRODUCTION

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

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

Mr. Cornelison first answered the Complaint and asserted counterclaims on November 19, 2014. On January 28, 2015, Mr. Cornelison filed his Answer, Amended Counterclaim and Amended Cross-claim of Defendant Ronald F. Cornelison (the “Answer”). Mr. Cornelison asserts six cross-claims in the Answer against Mr. Shyamsundar and Mr. Berkowitz: (i) Breach of Contract (against Mr. Shyamsundar); (ii) Fraud (against Mr. Shyamsundar); (iii) Breach of Covenant of Good Faith and Fair Dealing (against Mr. Shyamsundar); (iv) Aiding and Abetting Fraud (against Mr. Shyamsundar, and Mr. Berkowitz); (v) Civil Conspiracy (against Mr. Shyamsundar, and Mr. Berkowitz); and, (vi) Contribution and Indemnification (against Mr. Shyamsundar, and Mr. Berkowitz).

Mr. Shyamsundar filed the Defendant Visagar Shyamsundar's Motion to Dismiss Counts I, II, III, V and VI of the Amended Cross-Claim of Defendant Ronald F. Cornelison (the "Shyamsundar Motion") on February 11, 2015. On that same day, Mr. Berkowitz filed the Defendant Edward Berkowitz's Motion to Dismiss the Cross-Claims of Defendant Ronald F. Cornelison Pursuant to Rules 12(B)(1) and 12(B)(6) (the "Berkowitz Motion").

Mr. Cornelison opposes the relief sought in the Shyamsundar Motion and the Berkowitz Motion and, on March 13, 2015, Mr. Cornelison submitted Defendant Ronald F. Cornelison's Answering Brief in Opposition to Defendants Edward Berkowitz's and Visagar Shyamsundar's Motions to Dismiss the Amended Cross-Claims of Defendant Ronald F. Cornelison (the "Opposition").

Thereafter, Mr. Shyamsundar filed the Reply Brief in Support of Defendant Visagar Shyamsundar's Motion to Dismiss Counts I, II, III, V, and VI of Amended Cross-Claim of Defendant Ronald F. Cornelison (the "Shyamsundar Reply"), and Mr. Berkowitz submitted the Reply Brief in Support of Defendant Edward Berkowitz's Motion to Dismiss the Cross-Claims of Defendant Ronald F. Cornelison Pursuant to Rules 12(B)(1) and 12(B)(6) (the "Berkowitz Reply"). The Court held a hearing on the Shyamsundar Motion, the Berkowitz Motion, the Opposition, the Shyamsundar Reply and the Berkowitz Reply on May 4, 2015. After hearing arguments from the parties, the Court took the matter under advisement.

RELEVANT FACTS¹

On September 16, 2013, Jupiter, Mr. Shyamsundar, and Mr. Cornelison sold their majority interest in AmCad to Riverside. The transaction was governed by the EPA. Discussions for the sale of AmCad to Riverside began in September 2013.

Mr. Cornelison founded AmCad, a business which provided electronic court management systems to state courts. Jupiter, a Virginia limited liability company, held 73.06% member interest in AmCad, and Mr. Shyamsundar held the remaining 26.57% interest. Mr. Cornelison was a minority member of Jupiter. Mr. Berkowitz was and is the CFO of Jupiter. In January 2011, Mr. Cornelison ceased all day-to-day involvement with AmCad and from that point forward, Mr. Shyamsundar and Mr. Berkowitz were responsible for AmCad's Operations.

Mr. Cornelison contends that prior to the scheduled closing date of the purchase of AmCad by Riverside, Mr. Shyamsundar provided Mr. Cornelison with a draft of the proposed EPA. After reviewing the EPA, Mr. Cornelison told Mr. Shyamsundar that he would not agree to the proposed indemnification provision contained in Article 9 of the draft EPA. In an email to Mr. Shyamsundar, Mr. Cornelison stated that he could not agree to indemnification for anything occurring after January 1, 2011, the date when he ceased all day-to-day involvement with AmCad. In response, Mr. Shyamsundar advised that the indemnification by Mr. Cornelison was a must.

To resolve this issue, and induce Mr. Cornelison to sign the EPA with the proposed indemnification provision, Mr. Shyamsundar allegedly agreed to enter into a separate agreement entitled Agreement Between Parties ("ABP"). Mr. Cornelison alleges that on the evening of

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

September 13, 2013, Mr. Shyamsundar and Mr. Cornelison met at Mr. Shyamsundar's office. At this meeting Mr. Cornelison provided Mr. Shyamsundar with an executed copy of the ABP, which Mr. Shyamsundar stated he would sign in return for Mr. Cornelison executing the EPA.

Mr. Shyamsundar also allegedly advised Mr. Cornelison that Mr. Shyamsundar was only authorized to affix Mr. Cornelison's signature on the EPA if Mr. Shyamsundar signed the ABP. Based on Mr. Shyamsundar's representations Mr. Cornelison executed the signature pages for the EPA and authorized Mr. Shyamsundar to affix his signature pages to the EPA predicated on (1) Shyamsundar executing the ABP and (2) that there were no further changes to the EPA that adversely impacted Mr. Cornelison in any way. Mr. Berkowitz was allegedly aware that Mr. Cornelison had instructed Mr. Shyamsundar to affix Mr. Cornelison's signature page to the EPA only after Mr. Shyamsundar executed the ABP. Mr. Berkowitz was allegedly aware that Mr. Shyamsundar affixed Mr. Cornelison's signature page to the EPA despite the fact that Mr. Shyamsundar had not executed the ABP.

AmCad declared bankruptcy several months after the sale to Riverside. In June 2014, AmCad discontinued its court management systems division.

LEGAL STANDARD

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.² However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."³

² *Cent. Mortg. Co.*, 27 A.3d at 536; *Cedars Acad., LLC*, 2010 WL 5825343, at *3.

³ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

DISCUSSION

CROSS-CLAIM COUNT I

Cross-Claim Court I asserts a breach of contract claim against Mr. Shyamsundar. Specifically, Mr. Cornelison asserts that Mr. Shyamsundar breached a contract with Mr. Cornelison because Mr. Shyamsundar failed to execute the ABP before attaching Mr. Cornelison's signature page to the EPA.

To recover on a claim for a breach of contract under Delaware law, a party must prove (1) that an express or implied contract existed between the parties, (2) the defendant breached an obligation owed to plaintiff by way of the contract and (3) the breach led to damages.⁴ Whether a contract, express or implied, exists is to be determined from the "nature of the dealings of the parties."⁵

Mr. Cornelison asserts that his execution of the EPA was conditioned on Mr. Shyamsundar executing the ABP. The ABP states that Mr. Shyamsundar only has the following two obligations: (a) to notify Mr. Cornelison in the event "that the Series A Preferred Units have met the conditions of either 'Average Cash' or 'EBITDA' to provide for either the conversion or redemption of the Series A Preferred Units held by the Company for the benefit of Mr. Shyamsundar and Mr. Cornelison and (b) to take all actions necessary to ensure that 'there shall be no dilution to Mr. Shyamsundar's and Mr. Cornelison's interest in their respective pro-rata allocation of Series A Preferred Units.'"

The ABP does not state that Mr. Shyamsundar should execute the ABP before executing the EPA. Without proof of a breach of a specific contract provision, Mr. Cornelison cannot sustain a breach of contract claim under the ABP against Mr. Shyamsundar. Mr. Cornelison

⁴ *Kudroda v. SPJS Holdings L.L.C.*, 971 A.2d 872, 883 (Del. Ch. 2009).

⁵ *First Fed. Sav. Bank v. CPM Energy Sys. Corp.*, 1993 WL 138986, at *7 (Del. Super. Apr. 22, 1993).

does not allege that Riverside is subject to the ABP. Moreover, Mr. Cornelison does not assert that any express term of the ABP was breached. The Court also notes that even if Mr. Shyamsundar executed the ABP or is deemed to have executed the ABP, Mr. Cornelison fails to allege any breach of the ABP or how the ABP applies to Riverside or is a condition of the EPA.

Accordingly, the Shyamsundar Motion is **GRANTED** as to Cross-Claim Count I.

CROSS-CLAIM COUNT II

Cross Claim Count II is a fraud claim against Mr. Shyamsundar. Mr. Cornelison alleges that Mr. Shyamsundar fraudulently induced Mr. Cornelison to sign the EPA.

Under Superior Court Rule 9(b) “[i]n all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity.” To meet these pleading requirements, the allegations must include (1) the time, place, and contents of the false representation; (2) the identity of the person making the representations; and (3) what the person hoped to gain by making the representation.⁶ General and conclusory allegations of fraudulent conduct, including allegations based on information and belief, are not sustainable under Rule 9(b).⁷

The elements of common law fraud are (1) a false representation or omission of material fact; (2) made by a person with knowledge that the representation was false, or with reckless indifference to the truth; (3) an intention to induce the person to whom it is made to act or refrain from acting in reliance upon it; (4) causing that person, in justifiable reliance upon the false statement, to take or refrain from taking action; and (5) causing such person to suffer damage.⁸

⁶ *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990).

⁷ *Id.*

⁸ *DCV Holdings, Inc. v. ConAgra Holding Inc.*, 889 A.2d 954 (Del. 2005).

Under Delaware law, statements which are merely promissory in nature and expressions as to what will happen in the future are not actionable as fraud.⁹ “This Court looks with particular disfavor at allegations of fraud when the underlying utterances take the form of unfulfilled promises of future performance” because “unfulfilled promises generally prove grounds for breach of contract, rather than fraud claims.”¹⁰ Such a statement of future intent is not actionable as fraud unless a party can plead specific facts showing that it was false when made.¹¹ However, Delaware courts are “reluctant to dismiss a claim of fraud where the matter is peculiarly within the knowledge of the defendant or whether the plaintiff cannot be expected to have personal knowledge of the specific facts constituting the wrongdoing.”¹²

Mr. Cornelison alleges that Mr. Shyamsundar fraudulently induced Mr. Cornelison to sign the EPA by among other things, falsely and intentionally indicating that he would only affix Mr. Cornelison’s signature page on the EPA after Mr. Shyamsundar executed the ABP. Along with Mr. Shyamsundar’s alleged representations, Mr. Cornelison also provides the day of the alleged fraud, September 13, 2013, and the location, Mr. Shyamsundar’s office.

The Court finds that Mr. Cornelison has pleaded sufficient details to sustain a claim for fraud. As such, the Shyamsundar Motion is **DENIED** as to Cross-Claim Count II.

CROSS-CLAIM COUNT III

Cross-Claim Count III is a breach of covenant of good faith and fair dealing. Here, Mr. Cornelison contends that Mr. Shyamsundar breached the implied covenant of good faith and fair dealing under the Jupiter Operating Agreement (“Operating Agreement”). The Operating Agreement is governed by the law of the Commonwealth of Virginia.

⁹ *Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch. Dec. 8, 2009).

¹⁰ *Winner Acceptance Corp. Return on Capital Corp.*, 2008 WL 5352063, at *9 (Del. Ch. Dec. 23, 2008).

¹¹ *Grunstein*, 2009 WL 4698541, at *13.

¹² *Norman v. Paco Pharm. Serv.*, 1989 WL 110648, at *10 (Del. Ch.).

Under Virginia law the elements of a claim for breach of an implied covenant of good faith and fair dealing are (1) a contractual relationship between the parties, and (2) a breach of the implied covenant.”¹³ Generally such a covenant cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist.¹⁴ A plaintiff must not seek redress through an implied covenant claim for a defendant’s unfavorable exercise of its explicit contractual rights.¹⁵ A finding of bad faith requires conduct so wanton or oppressive as to essentially amount to fraud.¹⁶ Bad faith in the civil context “connotes the conscious doing of a wrong.”¹⁷

Mr. Cornelison asserts that Mr. Shyamsundar breached the covenant of good faith and fair dealing by mismanaging AmCad so badly that it led to the closing of AmCad’s bankruptcy practice. Mr. Shyamsundar contends that the assertion of mismanagement is not sufficient for a breach of the implied covenant claim.

The Court will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.¹⁸ At this time the record is not sufficient to determine whether a breach of an implied covenant of good faith and fair dealing has occurred with respect to the Operating Agreement. Mr. Cornelison has, for purposes of Civil Rule 12(b)(6), pled enough facts in the Answer to survive a motion to dismiss. The Shyamsundar Motion, therefore, is **DENIED** as to Cross-Claim Count III.

CROSS-CLAIM COUNT IV

¹³ *Enomoto v. Space Adv.*, 624 F.Supp.2d 443, 450 (E.D.Va. 2009).

¹⁴ *Ward’s Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 385 (Va. 1997).

¹⁵ *Sun Hotel, Inc. v. SummitBridge Credit Invest. III, LLC*, 86 Va. Cir. 189 (2013).

¹⁶ *Flanagan v. Harvey*, 160 Va. 214 (Va. 1993).

¹⁷ *Logan v. Com.*, 279 Va. 288, 293 (Va. 2010).

¹⁸ *Cent. Mortg. Co.*, 27 A.3d at 536; *Cedars Acad., LLC*, 2010 WL 5825343, at *3.

Cross-Claim Count IV is an aiding and abetting fraud claim against Mr. Berkowitz. Mr. Cornelison alleges that Mr. Berkowitz was aware of the ABP between Mr. Shyamsundar and Mr. Cornelison and that Mr. Berkowitz's signature should not be affixed to the EPA unless the ABP was signed by Mr. Shyamsundar. Mr. Cornelison further alleges that Mr. Berkowitz was also aware that Mr. Shyamsundar affixed Mr. Cornelison's signature to the EPA even though Mr. Shyamsundar did not sign the ABP.

A plaintiff alleging an aiding and abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance.¹⁹ Here, Mr. Cornelison merely alleges that Mr. Berkowitz was aware of Mr. Shyamsundar's fraudulent actions. Mere awareness is not sufficient to rise to the level of substantial assistance. Accordingly, the Court finds that Mr. Cornelison has not sufficiently pled an aiding and abetting fraud claim against Mr. Berkowitz.

The Berkowitz Motion is **GRANTED** as to Cross-Claim Count IV. Given this Court's ruling on Cross-Claim Count I, the Court is dismissing Cross-Claim Count IV with prejudice.

CROSS-CLAIM COUNT V

Cross-Claim Count V is a civil conspiracy claim against Mr. Shyamsundar and Mr. Berkowitz. Here, Mr. Cornelison alleges that Mr. Shyamsundar and Mr. Berkowitz committed civil conspiracy for the unlawful purpose of acquiring Mr. Cornelison's signature on the EPA.

Four elements must be asserted in support of a claim of civil conspiracy: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) knowing participation in that breach by the party not in direct fiduciary relationship and (4) damages resulting from the action of the conspiracy parties.²⁰

¹⁹ *Oster v. Kirschner*, 77 A.D.3d 51, 55 (N.Y. App. Div. 2010).

²⁰ *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984)

Mr. Cornelison cannot meet the third prong of this analysis. Even taking the facts in the light most favorable to Mr. Cornelison, Mr. Cornelison has only alleged that Mr. Berkowitz was aware that Mr. Shyamsundar affixed Mr. Cornelison's signature page to the EPA despite the fact that Mr. Shyamsundar had not executed the ABP. There is no allegation of knowing participation by Mr. Berkowitz in any of Mr. Shyamsundar's alleged actions.

The Shyamsundar Motion and the Berkowitz Motion are **GRANTED** as to Count V. Under the circumstances, the Court will allow Mr. Cornelison leave to amend Cross-Claim Count V. Mr. Cornelison has twenty (20) days to amend Cross-Claim Count V.

CROSS-CLAIM COUNT VI

Cross-Claim Count VI asserts claims of contribution and indemnification against Mr. Shyamsundar and Mr. Berkowitz. The Answer alleges that Mr. Cornelison seeks indemnification and contribution from Mr. Shyamsundar and Mr. Berkowitz in the event Mr. Cornelison is found liable in any way under Riverside's claim in the Complaint against Mr. Cornelison for indemnification under the EPA.

"Generally a right to indemnity arises by contract, although equitable grounds have been recognized."²¹ "Where a written contract exists which includes a specific indemnification provision setting forth the rights and duties of the parties, the specific provision should govern and the court should not enlarge the right to indemnification by implication."²²

The two contracts at issue here are the Jupiter Operating Agreement and the EPA. The Jupiter Operating Agreement provides Jupiter with an obligation to indemnify a "Manager." Only Mr. Shyamsundar is a Manager of Jupiter. Additionally, the EPA has the following definitions:

²¹ *Am. Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101, 1104 (Del. Super. 1982).

²² *Rock v. Delaware Elec. Co-op., Inc.*, 328 A.2d 449, 453 (Del. Super. 1974).

Preface

This Purchase Agreement (the “*Agreement*”) is entered into as of September 16, 2013, by and among ... (iii) Jupiter Technology Holdings, LLC, a Virginia limited liability company (the “*Member*”), (iv) the Member Beneficiaries (as defined on Exhibit A) ...

Exhibit A – Definitions

...

“Member(s)” has the meaning set forth in the preface.

“Member Beneficiary” means each of Visagar Shyamsundar and Ronald F. Cornelison.

Section 9.2 of the EPA provides for indemnification by the Member and Member Beneficiary of the Buyers and their Affiliates. Section 9.3 provides for indemnification by the Buyer of the Member. The EPA does not provide for the indemnification of one Member Beneficiary towards another Member Beneficiary.

Mr. Cornelius cites to *O’Neal v. Mercantile Press*²³ for the contention that in instances where a contract is silent with respect to indemnification and has no express indemnity provision, implied indemnification may be established by a party seeking indemnity.²⁴ There is a material difference between *O’Neal* and the instant case. *O’Neal* pertains to a worker’s compensation issue. *O’Neal* cites to *Davis v. R.C. Peoples, Inc.*,²⁵ where the Court held that under certain factual scenarios, a claim for implied indemnity may be viable, but only where the contract is silent on indemnification.²⁶ Indeed, the Court in *Davis* goes on to note that parties are free to negotiate the scope of the indemnity and the circumstances under which it will arise, and under certain circumstances, can go so far as to agree that one party to a contract will bear the risk of all losses regardless of which party may be at fault for the loss.²⁷

²³ *O’Neal v. Mercantile Press*, 2009 WL 3327228, at *1 (Del. Super. Oct. 8, 2009).

²⁴ *Id.*

²⁵ *Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013 (Del. Super. July 25, 2003).

²⁶ *Id.* at *1.

²⁷ *Id.* at *4.

Here the EPA is not silent as to indemnification. The EPA has certain specific indemnification clauses. Mr. Cornelius interprets the fact that indemnification of one Member Beneficiary towards another Member Beneficiary is not addressed, as the EPA being silent on indemnification, but such an interpretation is not sustained by the law.

A claim for contribution arises as a claim between joint tort-feasors.²⁸ Without a finding of common liability there is no right to contribution.²⁹ As to Mr. Berkowitz, Riverside's complaint does not list any cause of action that names both Mr. Cornelison and Mr. Berkowitz. As such, there can be no contribution by Mr. Berkowitz towards Mr. Cornelison. Additionally, Riverside has not alleged that Mr. Shyamsundar and Mr. Cornelison acted together to carry out any tort. As such, there can be no contribution among Mr. Shyamsundar and Mr. Cornelison.

The Shyamsundar Motion and the Berkowitz Motion are **GRANTED** as to Count VI. As the Jupiter Operating Agreement was not an integral part of the Complaint or the Answer, the Court will grant Mr. Cornelison leave to amend the Answer, within twenty (20) days, to assert any indemnification rights under the Jupiter Operating Agreement, or any other applicable agreement between Mr. Cornelison and a party that would provide for indemnification under the facts here.

IT IS SO ORDERED.

/s/ *Eric M. Davis*
Eric M. Davis, Judge

²⁸ *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1284 (Del. 2011).

²⁹ *ICI Am. Inc. v. Martin-Marietta Corp.*, 386 F. Supp. 1148, 1151 (D. Del. 1974).