IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRANSDIGM INC., McKECHNIE AEROSPACE (EUROPE) LTD., AND McKECHNIE AEROSPACE INVESTMENTS, INC.,	)	
Plaintiffs/Counterclaim-Defendants,	)	
	)	C.A. No. 7135-VCP
v.	)	
ALCOA GLOBAL FASTENERS, INC.,	)	
Defendant/Counterclaim-Plaintiff.	)	

MEMORANDUM OPINION

Submitted: February 1, 2013
Decided: May 29, 2013

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PARSONS, Vice Chancellor.

This dispute between parties to a stock purchase agreement relates to the regrettably familiar situation where a buyer claims that the seller engaged in fraud related to the transaction or misrepresented facts in the stock purchase agreement. Involved are, on one side, a Delaware corporation which purchased all issued and outstanding shares of two companies and, on the other side, the prior owner of those companies, including a Delaware corporation and its Delaware and UK subsidiaries, which owned the companies that were sold. This Memorandum Opinion addresses only one piece of the parties' dispute. Here, the sellers—the Delaware corporation and its subsidiaries—seek dismissal of the buyer's claim for damages based on the sellers' alleged fraudulent and active concealment of material information (Count II), fraudulent or negligent misrepresentation in the stock purchase agreement (Counts III and IV), and civil conspiracy (Count V).

The buyer's main contentions of fraud relate to the facts that: (1) one of the purchased company's key customers had expressed to the sellers that it intended to buy 50% less from the purchased company; and (2) the sellers had offered, and the key customer agreed to, a 5% price discount effective after the closing date. According to the buyer, the sellers' failure to disclose these known facts was fraudulent concealment and the stock purchase agreement's broad anti-reliance language does not bar a claim for such concealment. The buyer also contends that, although these facts may not directly contradict representations in the stock purchase agreement, the representations, as drafted, gave the buyer a false impression of the true state of affairs. Thus, according to the buyer, the representations constitute actionable partial disclosures or "half-truths"

under Delaware law. The sellers maintain that the terms of the stock purchase agreement preclude each of the buyer's claims.

For the reasons that follow, I conclude that the buyer disclaimed reliance on any representations and warranties outside of the stock purchase agreement but that these anti-reliance provisions do not bar the buyer's claim for fraudulent concealment of material information. Because of this, I deny the motion to dismiss Counts II and V of the buyer's counterclaim. I further conclude, however, that the buyer has failed to state a claim for fraudulent or negligent misrepresentation based on the provisions in the purchase agreement. Therefore, I grant the motion to dismiss Counts III and IV.

I. BACKGROUND

A. The Parties

Plaintiff/Counterclaim Defendant TransDigm Inc. is a Delaware corporation. TransDigm Inc. is the parent company of Plaintiffs/Counterclaim Defendants McKechnie Aerospace Investments, Inc. ("McKechnie USA"), a Delaware corporation, and McKechnie Aerospace (Europe) Ltd. ("McKechnie UK"), a company organized under the laws of England and Wales (collectively, the "Sellers" or "TransDigm").

Before the execution of the stock purchase agreement that is the subject of this dispute, McKechnie USA was the sole shareholder of Valley-Todeco, Inc., and McKechnie UK was the sole shareholder of Linread Ltd. ("Linread," and together with Valley-Todeco, Inc., the "Fastener Subsidiaries"). The Fastener Subsidiaries engaged in the design, development, manufacture and distribution of fasteners, fastening systems, and bearings.

Defendant/Counterclaim Plaintiff, Alcoa Global Fasteners, Inc., is a Delaware corporation (the "Buyer" or "Alcoa").

B. Facts[1]

Alcoa purchased all issued and outstanding shares of the Fastener Subsidiaries pursuant to a stock purchase agreement executed on January 28, 2011 (the "Purchase Agreement" or "SPA"). The dispute addressed in this Memorandum Opinion relates to Alcoa's purchase of Linread. One of Linread's most important customers, if not *the* most important customer, was Airbus. Under a contract covering the period January 1, 2005 to December 31, 2008, Airbus had agreed to purchase lockbolts from Linread (the "Airbus Contract"). In 2008, Linread and Airbus extended the term of the Airbus Contract until December 31, 2012.

During its due diligence into Linread's business in connection with the SPA, it immediately became clear to Alcoa that Linread's future success depended on its business relationship with Airbus. Alcoa therefore asked questions to understand the scope of Linread's business with Airbus and the strength and potential for future success of the Linread–Airbus business relationship. At a January 6, 2011 meeting between Alcoa and TransDigm representatives, for example, Alcoa inquired as to whether there were any disputes between Linread and any of its customers, including Airbus, with

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[1] The facts recited herein are drawn from the well-pled allegations of Alcoa's First Amended Verified Counterclaim (the "Counterclaim"), together with the attached exhibits, and are presumed true for purposes of TransDigm's motion to dismiss.

respect to any matter, including pricing.[2] Representatives of TransDigm, which tightly controlled information regarding Airbus during Alcoa's due diligence, responded that there were not.[3] Alcoa also specifically inquired about payment terms governing TransDigm's relationships with its customers, including Airbus, and about whether any agreements with those customers included cost savings, rebate requirements, or price negotiations.[4] Although TransDigm had information at that time that would have been responsive to Alcoa's questions, TransDigm intentionally did not reveal some of that information in its responses.

After the Purchase Agreement was executed and the deal closed on March 8, 2011, Alcoa learned of two important interactions with Airbus. First, on October 26, 2009, Airbus officials expressed dissatisfaction to McKechnie UK and Linread representatives about the prices it was paying for certain lockbolts under the Airbus Contract. In response, McKechnie UK's CEO verbally offered to give Airbus a 5% discount on all lockbolts purchased under the Airbus Contract starting on January 1, 2012. On December 18, 2009, Linread's General Manager memorialized this offer in an email to Airbus. Around September 15, 2010, Airbus accepted this discount. Although McKechnie UK then authorized Linread's general manager to sign the proposed

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2 Countercl. ¶ 86.

3 *Id.* ¶¶ 85–86.

4 *Id.* ¶ 87.

amendment to the Airbus Contract, it was not signed at that time.[5] Second, during an October 6, 2010 meeting, Airbus indicated to McKechnie and Linread that Airbus seriously was considering moving 50%–55% of its lockbolt business to a European competitor.

Alcoa alleges that TransDigm devised a scheme to conceal and suppress this information from Alcoa during its due diligence. For example, Alcoa alleges that McKechnie UK's President emailed Linread's General Manager on January 1, 2011 stating, "I am not sure what Alcoa knows about our Airbus business and their direction on lockbolts with them. I would keep the story consistent and speak to the expiration date only."[6]

C. Procedural History

TransDigm filed a two-count complaint against Alcoa on December 21, 2011 (the "Complaint"). Count I seeks reformation based on an alleged mutual mistake as to how the Purchase Agreement requires the final purchase price for Linread to be calculated. Count II is for breach of contract based on Alcoa's failure to tender payment of a tax refund that Alcoa received, but to which TransDigm claims it is entitled under the Purchase Agreement. In addition to reformation and damages in an amount at least equal to the tax refund, TransDigm seeks its attorneys' fees under Section 12.14 of the Purchase Agreement.

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5 *Id.* ¶ 90.

6 *Id.* ¶ 91.

Alcoa filed its answer and verified counterclaim on March 6, 2012. TransDigm replied to the counterclaim and simultaneously moved to dismiss the second count of it on April 5, 2012. Alcoa then filed its first amended verified counterclaim on July 2, 2012 (the "Counterclaim"). In Count I of the Counterclaim, Alcoa alleges breach of contract for TransDigm's failure to pay a deficit amount Alcoa alleges is due based on the final calculation of the purchase price for Linread. Count II is for fraudulent and active concealment of material information. Counts III and IV assert claims for fraudulent or negligent misrepresentation based on Purchase Agreement Sections 4.19 and 4.8, respectively. Count V is for civil conspiracy based on the fraudulent acts alleged to support Counts II through IV. By way of relief, Alcoa seeks damages, pre- and post-judgment interest, and attorneys' fees under Section 12.14 of the Purchase Agreement.

On August 24, 2012, TransDigm filed its opening brief in support of a renewed and expanded motion to dismiss, which challenged Counts II through V of the Counterclaim. On September 25, 2012, Alcoa moved for partial judgment on the pleadings related to Count I of its Counterclaim for breach of contract and Counts I and II of the Complaint for reformation and breach of contract. After hearing argument on these motions on February 1, 2013, I denied Alcoa's motion for partial judgment on the pleadings and took TransDigm's motion to dismiss under advisement.[7] This Memorandum Opinion constitutes my decision on the motion to dismiss Counterclaim Counts II, III, IV, and V.

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[7] Oral Arg. Tr. (Feb. 1, 2013) ("Tr.").

D. Parties' Contentions

Transdigm avers that Alcoa has not stated a claim for fraudulent and active concealment of material information because Alcoa's express disclaimer in the Purchase Agreement of reliance on any representations outside of that Agreement preclude it from alleging that it reasonably relied on such extra-contractual representations. TransDigm further argues that the allegedly concealed information is not inconsistent with the Sellers' representations and warranties in the Purchase Agreement. As to Counts III and IV for fraudulent or negligent misrepresentation, TransDigm contends that, even accepting the Counterclaim's allegations as true, Alcoa has not demonstrated that the representations in Sections 4.19 and 4.8 were false or misleading. Lastly, TransDigm asserts that Alcoa's count for civil conspiracy must be dismissed because it lacks a necessary predicate. That is, the Counterclaim fails to state a claim for either of the torts underlying its conspiracy claim.

Alcoa counters, first, that the Court should deny the motion to dismiss outright because there is an open question as to which state's law governs its fraud claims. Alcoa argues that this question requires a fact intensive inquiry that this Court is not equipped to undertake on the preliminary record before it. In addition, Alcoa contends that the motion should be denied even if the Court applies the Purchase Agreement's choice of Delaware law. Alcoa also argues that TransDigm misconstrues its claim under Count II of the Counterclaim as being based on extra-contractual *representations*. According to Alcoa, Count II stems from TransDigm's *concealment* of material information, not from any representation that TransDigm made outside the Purchase Agreement. Alcoa

therefore denies that its claims are barred by its contractual promise that it did not rely on any extra-contractual representations. In support of Counts III and IV, Alcoa maintains that it has stated a claim for fraudulent or negligent misrepresentation because the Sellers' representations in Sections 4.19 and 4.8 are actionable half-truths, if not outright misrepresentations. Based on its contentions as to the sufficiency of its underlying tort claims, Alcoa also urges denial of TransDigm's motion to dismiss Count V for civil conspiracy.

II. ANALYSIS

This is a motion to dismiss under Court of Chancery Rule 12(b)(6). Therefore, I assume the truthfulness of the well-pled allegations in the Counterclaim and afford Alcoa "the benefit of all reasonable inferences."[8] If the well-pled allegations in the Counterclaim would entitle Alcoa to relief under any "reasonably conceivable" set of circumstances, the Court must deny the motion to dismiss.[9] But, the court need not accept inferences or factual conclusions unsupported by specific allegations of fact.[10] Furthermore, "a complaint may, despite allegations to the contrary, be dismissed where

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8 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

9 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

10 *Norton v. K-Sea Transp. P'rs L.P.*, No. 238, 2012, slip op. at 10–11 (Del. May 28, 2013).

the unambiguous language of documents upon which the claims are based contradict the complaint's allegations."[11]

A. Governing Law

As a threshold matter, Alcoa argues that a fact-intensive inquiry exists as to which state's law governs this dispute, which cannot be resolved without further development of the record. On this basis alone, Alcoa asserts that the motion to dismiss should be denied.

Delaware courts will recognize the chosen law of contracting parties if that law has a material relationship to the transaction.[12] The parties to the Purchase Agreement agreed that their contract "shall be governed by the laws of the State of Delaware, its rules of conflict of laws notwithstanding."[13] This choice of law provision alone is sufficient to demonstrate that Delaware has a material relationship with the agreement.[14]

Nevertheless, Alcoa maintains that the Purchase Agreement's choice of law provision applies to contract-based claims only. According to Alcoa, the provision is not broad enough to govern all claims arising from or related to the Purchase Agreement, such as its claims for fraud, fraudulent misrepresentation, and civil conspiracy. In

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11 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

12 *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1046 (Del. Ch. 2006) (citing *J.S. Alberici Const. Co. v. Mid–West Conveyor Co.*, 750 A.2d 518, 520 (Del. 2000)).

13 Countercl. Ex. 1, Purchase Agreement, § 12.11(a).

14 *Abry*, 891 A.2d at 1046 (citing 6 *Del. C.* § 2708).

support of this contention, Alcoa relies on this Court's 2003 decision in *Gloucester Holding Corp. v. U.S. Tape & Sticky Products, LLC*.[15] On that basis, Alcoa suggests that California law might govern the counterclaims at issue here under the "most significant relationship test" set forth in Section 145(1) of the Restatement (Second) of Conflicts of Law.[16]

TransDigm counters that the Purchase Agreement's choice of law provision reflects the parties' intent that Delaware law apply to claims related to the Agreement. TransDigm argues that this Court's 2006 decision in *Abry Partners V, L.P. v. F & W Acquisition LLC*[17] is more pertinent to this dispute than *Gloucester*. In *Abry*, the Court

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15 832 A.2d 116 (Del. Ch. 2003).

16 *See* Restatement (Second) of Conflicts of Law § 145(1) (the "Restatement (Second)") ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."). Section 6 identifies the following factors as relevant:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id. § 6(2). Notably, in *Gloucester*, the alleged misrepresentations and omissions that formed the basis of the buyer's fraud claims were made in connection with the lease of real property and sale of assets located in Massachusetts. *See Gloucester*, 832 A.2d at 124 n.17. By contrast, the Purchase Agreement here involved the sale of a global fastener business.

17 891 A.2d 1032 (Del. Ch. 2006).

found that Section 201 of the Restatement (Second) is directly on point and that this Section stands "for the proposition that the law governing the agreements also governs fraud and negligent misrepresentation claims seeking relief for the wrongful inducement of the contract."[18]

Alcoa attempts to distinguish *Abry* based on the fact that the plaintiff in *Abry* sought the contract-based remedy of rescission. The *Abry* Court did not focus on this point, however. Instead, the Court noted that "Section 201's reasoning is important" and that "[t]o hold that [the parties'] choice is only effective as to the determination of contract claims, but not as to tort claims seeking to rescind the contract on grounds of misrepresentation, would create uncertainty of precisely the kind that the parties' choice of law provision sought to avoid."[19] In addition, comment e to Restatement (Second) Section 187[20] states:

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18 *Id.* at 1047 n.24.

19 *Id.* at 1047–48.

20 Restatement (Second) Section 201 provides that: "The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187–188." Section 187, in turn, states in relevant part:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be

> Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby.

As Chancellor Strine observed in *Abry*, "[t]o layer the tort law of one state on the contract law of another state compounds that complexity and makes the outcome of disputes less predictable, the type of eventuality that a sound commercial law should not seek to promote."[21]

In the dispute before this Court, Alcoa does not seek rescission, but it does seek, effectively, a reduction in the price it paid under the Purchase Agreement in the form of damages. In addition, Alcoa seeks attorneys' fees under Section 12.14 of the

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> contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) § 187.

[21] *Abry*, 891 A.2d at 1048; *see also* Restatement (Second) § 6 (stating that the factors relevant to the choice of applicable law include the protection of justified expectations and certainty, predictability, and uniformity of result).

Agreement.[22] Thus, this is a dispute over "rights created [by the Purchase Agreement]" and the parties' choice of law should govern.[23]

Lastly, I note that in *Gloucester* the Court based its decision not to follow the contract's choice of law provision in part on the fact that the choice of law provision did not state that it applied to any controversy "arising out of or relating to" the agreement.[24] Rather, the provision at issue in *Gloucester* stated: "[This Asset Purchase Agreement] shall be construed, interpreted and the rights of the parties determined in accordance with the laws of the State of Delaware (without regard to any conflict of law provisions thereof)."[25] The Court in *Abry*, however, gave short shrift to a similar distinction.[26] The provision in *Abry* contained language almost identical to that in *Gloucester*: "This

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22 Section 12.14 of the Purchase Agreement provides, in relevant part, that "in the event of any dispute between the parties arising under this Agreement, the party prevailing in that dispute shall be entitled to receive from the other party reimbursement for its attorneys' fees, court costs, expert witness fees and other similar costs."

23 *See* Restatement (Second) § 187 cmt. e.

24 *Gloucester Hldg. Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 124 (Del. Ch. 2003) ("The choice of law clause here, however, does not claim to cover litigation that *arises out of or relates to* the Asset Purchase Agreement. Rather, the clause merely provides that Delaware law applies to the 'rights of the parties' derived from the contract.").

25 *Id.* at 123.

26 *Abry*, 891 A.2d at 1047 ("The Buyer asserts the proposition that the contracting parties only meant for Delaware law to govern contract claims that might arise among the parties, but not claims in tort seeking rescission of the Stock Purchase Agreement on grounds that false contractual representations were made. That division is not sensible.").

Agreement shall be governed by, and construed in accordance with, the Laws of the State of Delaware, regardless of the Laws that might otherwise govern under applicable principles of conflicts of law."[27] Nevertheless, the Court in *Abry* concluded that the Restatement (Second) Section 201 provides the appropriate framework for determining the law applicable to claims for fraud in the inducement and fraudulent misrepresentation. Under this framework, the Court found that it should apply the law the parties chose to govern contractual rights and duties "unless the chosen state lacks a substantial relationship to the parties or transaction or applying the law of the chosen state will offend a fundamental policy of a state with a material greater interest."[28] I

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[27] *Id.* at 1046.

[28] *Id.* at 1047 (referring to Restatement (Second) § 187); *see also id.* at 1048 & n.26. For this reason, I also reject Alcoa's argument that the choice of law provision should be construed narrowly because it was narrowly drafted. The provision states: "*This Agreement shall be governed by* the laws of the State of Delaware, its rules of conflict of laws notwithstanding. . . . Each of the parties hereto irrevocably and unconditionally waives any objection to the laying of venue of *any action, suit or proceeding arising out of this Agreement* or the transactions contemplated hereby in the Court of Chancery of the State of Delaware . . . ." Purchase Agreement 12.11(a) (emphasis added). Alcoa argues that the parties knew how to use broad language when it was their intent to refer to "any action, suit or proceeding arising out of" the Agreement. Alcoa's counterclaims for fraudulent concealment and fraudulent misrepresentation under the Purchase Agreement, however, are based, at least in part, on the terms of the Agreement and require interpretation of the Agreement. Furthermore, these claims, and the additional counts for breach of contract, have their origin in a contract-based relationship. *See Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1154 (Cal. 1992) ("We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle

agree. Therefore, I conclude that Delaware law governs the issues raised by Counts II–V of Alcoa's Counterclaim.[29]

B. Count II – Fraudulent and Active Concealment of Material Information

Turning to the merits of the motion to dismiss, I consider first TransDigm's request that I dismiss Count II for fraudulent and active concealment of material information. To state a claim for fraud, a plaintiff must allege that: "(1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance."[30] Common law fraud can occur in three ways: (1) overt misrepresentation; (2) silence in the face of a duty to

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concerning only the threshold question of what law was to be applied to which asserted claims or issues.").

[29] The Delaware Supreme Court recently indicated that fraud claims based on a contractual relationship should be governed by the parties' choice of law in that contract. *See RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 112 (Del. 2012) (assuming, without deciding, that New York law applied where the parties' nondisclosure agreement contained a New York choice of law provision but Delaware arguably was the state with the most significant relationship to the fraud claims).

[30] *Abry*, 891 A.2d at 1050 (quoting *Crescent/Mach I P'rs, L.P. v. Turner*, 2000 WL 1481002, at *18 (Del. Ch. Sept. 29, 2000)).

speak; or (3) deliberate concealment of material facts.[31] Here, Alcoa alleges that the fraud stems from the third category.

When a fraud claim is based on active concealment, the plaintiff

> must show that a defendant took some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.[32]

A claim of fraud based on active concealment does not require a showing that the defendant had a pre-existing duty to speak.[33]

Furthermore, when a complaint alleges fraud, Court of Chancery Rule 9(b) requires that "the circumstances constituting fraud . . . shall be stated with

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[31] *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Corporate Prop. Assocs. 14 Inc. v. CHR Hldg. Corp.*, 2008 WL 963048, at *6 (Del. Ch. Apr. 10, 2008).

[32] *Metro Commc'ns Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 150 (Del. Ch. 2004) (internal quotation marks omitted) (citing *Lock v. Schreppler*, 426 A.2d 856, 860 (Del. 1981)); *see also* Restatement (Second) of Torts § 550 ("One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.").

[33] *See Nicolet, Inc. v. Nubb*, 525 A.2d 146, 149 (Del. 1987) ("Generally, there is no duty to disclose a material fact or opinion, unless the defendant had a duty to speak. However, where one actively conceals a material fact, such person is liable for damages caused by such conduct."); *see also Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *12 (Del. Ch. Apr. 20, 2009) (finding that the plaintiff did not state a claim for fraudulent concealment when it reasonably could not be inferred from the complaint that the defendants made an effort to hide the relevant information through subterfuge or other artifice).

particularity."[34] Intent and knowledge, however, "may be averred generally."[35] A well-pled fraud allegation must include the time, place, and contents of the fraudulent act or omission and what was obtained thereby.[36]

1. The allegations in the Counterclaim state a prima facie claim for fraudulent and active concealment

Alcoa alleges that, in late 2009, Tariq Jesarai, a McKechnie UK executive officer, and Paul Brown, Linread's General Manager, offered, and Airbus later accepted, a 5% discount to begin on January 1, 2012.[37] Alcoa further avers that James Riley, a TransDigm representative, instructed Brown during a phone call on or around December 14, 2010 not to discuss the potential loss of 50%–55% of Airbus's lockbolt business with anyone and not to discuss anything, including Airbus matters, with anyone at Alcoa.[38] In addition, Alcoa alleges that during a January 6, 2011 meeting, TransDigm representatives were asked about payment terms relating to Airbus, but that

> [d]espite Alcoa's inquiries and the parties' discussions, at no time during the meeting (or at any time prior to the close of the deal) did Counterclaim-Defendants [*i.e.*, TransDigm]

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34 Ct. Ch. R. 9(b).

35 *Id.*

36 *Steinman v. Levine*, 2002 WL 31761252, at *14 (Del. Ch. Nov. 27, 2002); *see also Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, at *25 (Del. Super. Aug. 31, 2006) ("[T]he party averring fraud must provide the time, place and contents of the fraudulent act or omission, as well as the person who gave the false representation.").

37 *See* Countercl. ¶ 109.

38 *Id.* ¶ 114.

> reveal that Airbus was seriously considering moving 50–55% of its lockbolt business from Linread to another European competitor or that Linread had promised (and Airbus had indicated its acceptance of) a 5% across-the-board discount on all lockbolt parts starting on January 1, 2012.[39]

These allegations state a claim for fraud based on active concealment.

A well-pled fraud claim must include the identity of the persons who engaged in the conduct giving rise to the claim of fraud.[40] Here, Alcoa does not allege that Brown, Jesarai, or Riley attended the January 6, 2011 meeting at which the alleged omissions took place. Rather, the Counterclaim alleges generally that the meeting was "attended by representatives of Counterclaim-Defendants and Alcoa."[41] The Counterclaim does identify, however, specific TransDigm, McKechnie UK, and Linread (but not McKechnie USA), executives who knew about the alleged 5% discount and Airbus's alleged intent to move 50%–55% of its business to a competitor. Importantly, the Counterclaim specifically alleges that these executives made an effort to hide this information from Alcoa.[42] For example, Alcoa alleges that a McKechnie UK representative, James Costello, emailed Brown on January 1, 2011 to say: "I am not sure what Alcoa knows

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39 *Id.* ¶ 112.

40 *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 142 (Del. Ch. 2009).

41 Countercl. ¶ 111.

42 *See Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *12 (Del. Ch. Apr. 20, 2009) (requiring the plaintiff to demonstrate that the defendant made an effort to hide the relevant information through subterfuge or other artifice).

about our Airbus business and their direction on lockbolts with them. I would keep the story consistent and speak to the expiration date only."[43]

Based on these allegations, it appears reasonably conceivable at this preliminary stage of the litigation that Alcoa could prove that the TransDigm representatives who attended the January 6, 2011 meeting were apprised of the information allegedly known to Costello and Brown, among others, and that they intentionally omitted or concealed information from Alcoa. Alternatively, it is also reasonable to infer that, if the TransDigm representatives who attended the January 6, 2011 meeting did *not* know of the discount and potential loss of Airbus business, their ignorance—and resultant inability to inform Alcoa—was due to the active concealment of the information by Brown and others.[44] Thus, the Counterclaim adequately alleges fraudulent and active concealment of material information.[45]

2. The language in the Purchase Agreement does not preclude Alcoa's claim of fraudulent and active concealment

TransDigm further argues that even if Count II appears to state a prima facie claim for fraud, it is barred by the Purchase Agreement. Specifically, TransDigm asserts that Alcoa's express representation in Section 5.8 of the Purchase Agreement that it was provided with all material information necessary to make an informed decision before it

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43 Countercl. ¶ 115.

44 *See id.* ¶ 114.

45 TransDigm did not move to dismiss Count II of the Counterclaim under Court of Chancery Rule 9(b) for failure to plead fraud with particularity. Even if it had, however, Alcoa's allegations appear to meet the requirements of Rule 9(b).

purchased the Fastener Subsidiaries precludes Alcoa from bringing its counterclaim.[46] TransDigm also contends that Alcoa cannot prove reasonable reliance on the alleged fraudulent misrepresentation because Alcoa represented in Section 5.8 that it agreed to purchase the shares "without reliance" on any express or implied representation or warranty not expressly set forth in the Purchase Agreement. Section 5.8 states in relevant part:

> Buyer has undertaken such investigation and has been provided with and has evaluated such documents and information as it has deemed necessary to enable it to make an informed decision with respect to the execution, delivery and performance of this Agreement and the transactions contemplated hereby. Buyer agrees to accept the Shares *without reliance upon any express or implied representations or warranties of any nature, whether in writing, orally or otherwise*, made by or on behalf of or imputed to TransDigm or any of its Affiliates, except as expressly set forth in this Agreement.[47]

Alcoa counters that Count II is consistent with this representation and warranty. In Section 5.8, Alcoa admittedly disclaimed reliance on any extra-contractual representations. But, Alcoa argues, Count II is not based on any extra-contractual *representation* by TransDigm; rather, it arises from the intentional and affirmative *concealment* of material facts. According to Alcoa, its representation and warranty in Section 5.8 does not preclude such a claim.

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[46] Pls./Countercl. Defs.' Br. in Supp. of Their Mot. to Dismiss Counts II, III, IV and V of Alcoa's First Am. Countercls. 11–12 (citing Section 5.8 of the Purchase Agreement).

[47] Purchase Agreement § 5.8 (emphasis added).

Alcoa alleges that it relied on both pre-closing representations and omissions of TransDigm. The Counterclaim states: "Alcoa reasonably and justifiably relied upon the pre-closing representations and material omissions of Counterclaim-Defendants [TransDigm] as to Linread's business relationship with Airbus in determining whether to purchase Linread shares, in determining how much it was willing to offer and ultimately pay for the Linread shares, and in negotiating, and ultimately agreeing upon, the terms of the SPA."[48]

Based on Alcoa's representation in Section 5.8, I hold that it could not reasonably and justifiably have relied on extra-contractual pre-closing representations of TransDigm. For the reasons that follow, however, I conclude that Count II of the Counterclaim states a claim for fraudulent and active concealment based on TransDigm's alleged omissions.

TransDigm relies almost exclusively on the Delaware Supreme Court's recent decision in *RAA Management, LLC v. Savage Sport Holdings, Inc.*[49] to argue that the Purchase Agreement's language bars Alcoa's claims. That case involved the following provision in a nondisclosure agreement:

> You [the potential acquirer] understand and acknowledge that neither the Company nor any Company Representative is making any representation or warranty, express or implied, as to *the accuracy or completeness* of the Evaluation Material or of any other information concerning the Company provided or prepared by or for the Company, and none of the Company nor the Company Representatives, will have any liability to

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48 Countercl. ¶¶ 94, 117.

49 45 A.3d 107 (Del. 2012).

> you or any other person resulting from your use of the Evaluation Material or any such other information. *Only those representations or warranties that are made to a purchaser in the Sale Agreement* when, as and if it is executed, and subject to such limitations and restrictions as may be specified [in] such a Sale Agreement, *shall have any legal effect*.[50]

There, the potential acquirer, RAA, expressly not only agreed that the selling company was making no representation or warranty as to the accuracy or completeness of any information being provided to RAA, but it also agreed that only representations the company might make in a later sale agreement would have any legal effect. Here, the accuracy and completeness of the information TransDigm provided Alcoa is key to Alcoa's claim for active concealment of material information. There is no argument, however, that Alcoa agreed in the Purchase Agreement that TransDigm was making no representation as to the "accuracy and completeness" of the information TransDigm provided to Alcoa. Nor did Alcoa disclaim reliance on extra-contractual *omissions*.

TransDigm makes light of this distinction. It argues that it effectively did secure this disclaimer with language stating that "Buyer has . . . been provided with and has evaluated such documents and information as it has deemed necessary to enable it to make an informed decision with respect to the execution . . . of this Agreement."[51] In this

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50 *Id.* at 110 (emphasis added).

51 Purchase Agreement § 5.8. At argument, TransDigm's counsel argued: "[Alcoa is] really trying to rewrite every nonreliance provision out. Because what do you say? You say there's nothing you've omitted? Well, we got them to say that. We got them to say 'You can't make a representation to us that you didn't have

broad representation by Alcoa, Alcoa agrees that TransDigm provided it with information Alcoa deemed sufficient in making its decision to enter into the Purchase Agreement. Consistent with this representation, and absent contrary language elsewhere in the Agreement, however, Alcoa reasonably could have relied on the assumption that TransDigm was not actively concealing information that was responsive to Alcoa's inquiries and that TransDigm was not engaged in a scheme to hide information material to Alcoa's purchase of Linread. In other words, the language in Section 5.8 does not clearly disclaim reliance on the type of concealment and omission that Alcoa alleges here.

TransDigm cites no case holding that a party to an agreement with language similar to that in the Purchase Agreement would be precluded from recovering for fraudulent and active concealment of material information. This contrasts with two cases the Supreme Court discussed in detail in reaching its decision in *RAA Management*. The agreements at issue in those two cases, unlike the agreement at issue here, contained language expressly disclaiming reliance on both the *omission* of information and extra-contractual *representations*.[52] For example, in *In re IBP, Inc. Shareholders Litigation*, an

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everything you needed because you told us you did. You told us you had everything. . . .'" Tr. 37.

[52] The two cases are *Great Lakes Chemical Corp. v. Pharmacia Corp.*, 788 A.2d 544 (Del. Ch. 2001) and *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001). In *Great Lakes*, the buyer represented that "[n]one of [the sellers] make any express or implied representation or warranty as to the accuracy or completeness of the information contained herein or made available in connection with any further investigation of the Company," and that "[e]ach of [the sellers]

acquiring corporation sought to rescind a contract on the grounds of fraudulent inducement based on misrepresentations and omissions made during the due diligence process.[53] The Court of Chancery rejected the fraud claim based on the following language in the confidentiality agreement that the parties had entered into at the beginning of the due diligence process:

> We [the acquirer] understand and agree that none of the Company, its advisors or any of their . . . representatives (i) have made or make any representation or warranty, express or implied, as to *the accuracy or completeness* of the Evaluation Material or (ii) shall have any liability whatsoever to us or our Representatives relating to or resulting from the use of the Evaluation Material or any errors therein *or omissions therefrom*, except in the case of (i) and (ii), to the extent provided in any definitive agreement relating to a Transaction.[54]

The difference in language between the nondisclosure agreement in *RAA Management* and the agreements in the cases that Opinion discussed renders *RAA Management* distinguishable from this case. Thus, based on the terms of the Purchase Agreement here,

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expressly disclaims any and all liability that may be based on such information or errors therein or omissions therefrom." *Great Lakes Chem. Corp.*, 788 A.2d at 552.

53 *RAA Mgmt., LLC*, 45 A.3d at 114.

54 *Id.* The Court of Chancery explained: "[A] contextually-specific factor—the Confidentiality Agreement—contributes to the caution with which Tyson [the acquirer] should have taken any oral assurances or representations from IBP during the Merger negotiation process. Tyson had agreed that it could not use any oral or written due diligence information (*or omissions therefrom*) as a basis for a lawsuit unless that issue was covered by a specific provision of a subsequent, written contract." *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 73 (Del. Ch. June 18, 2001).

I conclude that Alcoa conceivably could prevail on its claim for fraudulent and active concealment of material information. I therefore deny TransDigm's motion to dismiss Count II and turn next to its challenge to Counts III and IV.

C. Counts III and IV – Fraudulent/Negligent Misrepresentation

Counterclaim Counts III and IV are based on allegedly misleading, or half true, language in the "Representations and Warranties of the Sellers" in Sections 4.19 and 4.8 of the Purchase Agreement, respectively. Section 4.19(b) states, in part: "Since December 31, 2010, none of the customers listed on Section 4.19(a) of the Disclosure Letter has . . . (iii) changed or indicated an intention in writing to Parent, TransDigm, Company, US Seller and UK Seller to materially change the economic terms on which it is prepared to purchase from a Fastener Subsidiary."[55] Section 4.8 states, in part: "Since December 6, 2010, there has not occurred, nor has there been any change or event which has had, or would reasonably be expected to have, a Material Adverse Effect."[56] The

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[55] Parent is defined as "TransDigm Group Incorporated, a Delaware Corporation"; TransDigm is "TransDigm, Inc."; Company is McKechnie Aerospace Holdings, Inc.; US Seller and UK Seller are the Plaintiffs referred to in this Memorandum Opinion as McKechnie USA and McKechnie UK, respectively. *See* Purchase Agreement § 1.1.

[56] Material Adverse Effect means "any . . . change that . . . would reasonably be expected to have, individually or in the aggregate, a material adverse effect on or change in the financial condition, liabilities, business or results of operations of the Fastener Subsidiaries taken as a whole." *See* Purchase Agreement § 1.1. Drawing all reasonable inferences in Alcoa's favor, Alcoa conceivably could prove that either a 5% price decrease for lockbolts beginning January 1, 2012 or the potential loss of 50% of Airbus's business or both reasonably could be expected to have a Material Adverse Effect.

Counterclaim, however, contains no allegations relating to actions or events that occurred *after* December 6 or 31, 2010 that would come within the scope of Sections 4.19 and 4.8. The allegations that form the basis of Alcoa's counterclaims refer to emails and meetings that took place between October 2009 and October 2010.

1. Half-truth doctrine

Alcoa argues that Counts III and IV nevertheless state a claim because the representations and warranties in Sections 4.19 and 4.8 are only "half-truths" that can constitute an actionable misrepresentation of fact under Delaware law. For this argument, Alcoa relies on the Delaware Supreme Court's decision in *Norton v. Poplos.*[57] In *Norton,* the Supreme Court held that "although a statement or assertion may be facially true, it may constitute an actionable misrepresentation if it causes a false impression as to the true state of affairs, and the actor fails to provide qualifying information to cure the mistaken belief."[58] According to Alcoa, this is precisely what happened here.

Alcoa asserts that, by representing that certain events had not occurred "since December 6 [or 31], 2010," TransDigm implicitly represented that "during the course of due diligence, TransDigm Parties had fully disclosed all material information encompassed by the representations in SPA Sections 4.19(b) and 4.8."[59] In addition to recognizing the half-truth doctrine, the Supreme Court also held in *Norton* that "a merger

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57 443 A.2d 1 (Del. 1982).

58 *Id.* at 5.

59 Answering Br. of Def./Countercl. Pl. in Opp'n to Pls./Countercl. Defs.' Mot. to Dismiss Counts II, III, IV and V of the First Am. Countercl. ("Answering Br.") 27.

clause[, which states that the parties do not rely on any written or oral representations not expressly written in the contract,] does not preclude a claim based upon fraudulent misrepresentation."[60] Based on these conclusions, the Court held that the plaintiff, a buyer of property, conceivably could be entitled to rescission of a land sale contract based on the seller's innocent misrepresentation of a material fact.[61]

TransDigm asserts that *Norton* is distinguishable because it involved unsophisticated parties to a simple real estate contract and a dispute over boilerplate language in that contract. Indeed, both the Supreme Court and this Court have distinguished *Norton* on those grounds.[62] But, the cases that have distinguished *Norton* have done so with regard to its holding that "Delaware law prohibited the use of contract disclaimers to release claims of fraud."[63] In limiting *Norton* to its facts, Delaware courts

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60 *Norton*, 443 A.2d at 6.

61 *Id.* The Court remanded the case to the Court of Chancery to determine if the seller's innocent misrepresentation was material, whether it induced the buyer to execute the contract, and whether the buyer's reliance on the misrepresentation was justified. *Id.*

62 *See RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107, 118–19 (Del. 2012); *Great Lakes*, 788 A.2d at 555; *Progressive Int'l Corp. v. E.I. duPont de Nemours & Co., Inc.*, 2002 WL 1558382, at *7 & n.36 (Del. Ch. July 9, 2002).

63 *Progressive Int'l Corp.*, 2002 WL 1558382, at *7 & n.36; *see also RAA Mgmt., LLC*, 45 A.3d at 118; *Great Lakes*, 788 A.2d at 555–56. The boilerplate nature of the merger clause at issue in *Norton* was one factor the Supreme Court mentioned in concluding that the contract disclaimer did not release the buyer's misrepresentation claim. *See Norton*, 443 A.2d at 7 ("We see no reason why a court of equity should enforce a standard 'boiler plate' provision that would permit one who makes a material misrepresentation to retain the benefit resulting from that misrepresentation at the expense of an innocent party.").

have held since then that "such disclaimer provisions *are* enforceable when the parties to the agreement are sophisticated entities that carefully negotiated its provision."[64]

It seems unlikely, however, that these later cases intended to disturb *Norton*'s recognition that a half-truth may constitute an actionable misrepresentation under Delaware law.[65] The Supreme Court in *Norton* did not refer to the boilerplate nature of the parties' real estate contract when it stated that a half-true statement "may constitute an actionable misrepresentation if it causes a false impression as to the true state of affairs."[66] Thus, this aspect of *Norton*'s holding applies more broadly. Indeed, this Court recently observed that "[a] partial disclosure may be technically true yet actionably misleading" if the partial disclosure tended to create a false impression.[67] Hence, Alcoa

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64 *Progressive Int'l Corp.*, 2002 WL 1558382, at *7 & n.36 (emphasis added).

65 *See, e.g.*, *RAA Mgmt., LLC*, 45 A.3d at 118–19 ("*Norton v. Poplos* is distinguishable for the reasons that were stated in *Great Lakes*. *Abry Partners* accurately states Delaware law and explains Delaware's public policy in favor of *enforcing contractually binding written disclaimers of reliance* on representations outside of a final agreement of sale or merger." (citations omitted) (emphasis added)); *Great Lakes*, 788 A.2d at 555 ("This case involves materially different facts [from *Norton*]. Here, two highly sophisticated parties, assisted by industry consultants and experienced legal counsel, entered into *carefully negotiated disclaimer language* after months of extensive due diligence. The parties explicitly allocated their risks and obligations in the Purchase Agreement. In these quite different circumstances, a party to such a contract who later claims fraud is not in the same position—and does not have the same need for protection—as unsophisticated parties who enter into residential real estate contracts having *boilerplate disclaimers* that were not negotiated." (emphasis added)).

66 *Norton*, 443 A.2d at 5.

67 *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *9 (Del. Ch. July 20, 2010) (citing *Norton*, 443 A.2d at 5); *see also Shore Builders, Inc. v.*

potentially could succeed on its misrepresentation claims if TransDigm's representations and warranties in Sections 4.19 and 4.8 were half-truths that caused a false impression as to the true state of affairs.

2. Were the representations and warranties in Sections 4.19 and 4.8 half-truths?

The second issue I must address, therefore, is whether Alcoa could demonstrate, under any reasonably conceivable set of circumstances susceptible of proof, that the representations in Sections 4.19(b) and 4.8 caused a false impression as to the true state of affairs. For the reasons that follow, I conclude that it cannot.

Quoting the Restatement (Second) of Contracts, the Supreme Court stated in *Norton* that "a statement may be true with respect to the facts stated, but may fail to include qualifying matters necessary to prevent the implication of an assertion that is

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Dogwood, Inc., 616 F. Supp. 1004 (D. Del. 1985) (relying on *Norton* and the Restatement (Second) of Contracts § 159 for the proposition that "[o]ften times a statement of fact, unaccompanied by any qualification, is misleading, although the statement of fact may be technically true"); *Wolf v. Magness Constr. Co.*, 1995 WL 571896, at *2 (Del. Ch. Sept. 11, 1995) (quoting *Norton*). In addition, the Court in *Squid Soap* recognized that a half-truth could be relevant to a claim for fraud based on active concealment. In evaluating a seller's (Squid Soap's) claim that the buyer (Airborne) fraudulently concealed that the buyer was engaged in a lawsuit and was the subject of a regulatory investigation, the Court stated: "If [the seller] Squid Soap had asked about litigation and was not told about the California Action or the regulatory proceedings, then Airborne would have a problem. If Squid Soap sent over a due diligence checklist and the litigation information was withheld, there would be a claim. *If Airborne had made a misleading partial disclosure or offered a half-truth designed to put Squid Soap off the scent, then the motion to dismiss would be denied.* Under any of those circumstances, a court could infer active concealment at the pleadings stage." *Id.* (emphasis added).

false with respect to other facts."[68] As previously discussed, the Counterclaim does not allege facts that undermine the literal truth of the statements in Sections 4.19(b) and 4.8.[69] Taking the statements as true, therefore, the question remains whether Alcoa conceivably could prove that there are qualifying matters that should have been included with these representations to prevent the implication of a false assertion with respect to other facts.

The implication that Alcoa asserts was created by Sections 4.19 and 4.8 is that TransDigm already had provided to Alcoa all material information encompassed by these Sections pertaining to the period of time before the dates listed. In the absence of such an understanding between the parties, Alcoa argues, the contractual representations would be rendered meaningless. TransDigm counters that because the sophisticated parties to this transaction negotiated the language in the Purchase Agreement and included specific time period limitations, they thereby allocated the risks as they deemed appropriate. To

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68 *Norton*, 443 A.2d at 5.

69 I have considered whether Alcoa conceivably could prove that the representations and warranties in Sections 4.19 and 4.8 were false when made, *e.g.*, that Airbus indicated its intention in writing *after* December 2010 to materially change the economic terms of its purchases from Linread. Alcoa seems to suggest that these representations may be literally false. *See* Tr. 22. The Counterclaim, however, contains no allegations that the relevant acts took place *within* the time period covered by the Purchase Agreement's representations. Instead, Alcoa has pled and argued based on the "half-truth" theory. In these circumstances, the Court will not infer that the representations may have been false when such an inference is unsupported by any specific factual allegations. *See Ruffalo v. Transtech Servs. P'rs Inc.*, 2010 WL 3307487, at *10 (Del. Ch. Aug. 23, 2010) ("[T]he court need not accept inferences or factual conclusions unsupported by specific allegations of facts.").

disregard the plain language of the Purchase Agreement, according to TransDigm, would be to ignore the unambiguous terms of the parties' Agreement.

Mindful of the plaintiff-friendly motion to dismiss standard, I have considered carefully Alcoa's argument that "[b]y including these temporal limitations, TransDigm Parties intended to mislead (and did in fact mislead) Alcoa into believing that during the course of due diligence, TransDigm parties had fully disclosed all material information encompassed by the representations in SPA Sections 4.19(b) and 4.8."[70] The Counterclaim alleges that TransDigm *knew* at the time it was negotiating the limiting language "[s]ince December 6, 2010" and "[s]ince December 31, 2010" that two months earlier, in October 2010, Airbus had indicated its intention to move approximately 50% of its business to a competitor and, in September 2010, had accepted Linread's offer of a 5% discount on lockbolts by sending an amendment to the Airbus Contract reflecting that price reduction beginning in January 2012. If true, these allegations would render the representations in Sections 4.19(b) and 4.8 false but for the date limitations. Alcoa maintains that by selecting date limitations that TransDigm knew only just avoided making the representations actually false, TransDigm "cause[d] a false impression as to the true state of affairs."[71] According to the Counterclaim, TransDigm strategically set the time limitations in Sections 4.19(b) and 4.8 so that even if it technically was not

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70 Answering Br. 27.

71 *See Norton*, 443 A.2d at 5.

making a false representation, it knew that it was giving a false impression to Alcoa that no such pricing agreements were in place.[72]

I consider Alcoa's argument to be flawed. Sections 4.19(b) and 4.8 do not create a false impression as Alcoa asserts. On the topic of concealment and nondisclosure, Section 551 of the Restatement (Second) of Torts states:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, . . . (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading . . . .[73]

The comment to Section 551(2)(b) states: "A statement that is partial or incomplete may be a misrepresentation because it is misleading, when it purports to tell the whole truth and does not." The language "[s]ince December [6 or] 31, 2010," however, is not ambiguous. It is not an incomplete or partial statement of fact. TransDigm did not need to disclose any additional facts to prevent the words of the representations in Sections 4.19(b) and 4.8 from being misleading.[74] The representations state a concrete idea that leaves no room for doubt as to what they mean. In this sense, the language at issue in this

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72 *See* Answering Br. 10–12.

73 Restatement (Second) of Torts § 551.

74 *See id.* cmt. on cl. (b) ("So also may a statement [be] made so ambiguously that it may have two interpretations, one of which is false. (*See* §§ 527, 528). When such a statement has been made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient.").

case is distinguishable from the language at issue in *Norton*, which required some definition to understand.

In *Norton*, the buyer was seeking, and ultimately purchased, property that was zoned M-1. The zoning was so important to the buyer that his attorney added to the contract the language "contract contingent on property being zoned M-1."[75] Although the property was, in fact, zoned M-1, there were undisclosed restrictions on the property for many uses normally associated with M-1 zoning. Thus, the disclosure of additional information about the property was necessary to explain its character. Moreover, this information was inconsistent with the factually correct statement that the property was zoned M-1. In that sense, the additional information was necessary to prevent an ambiguous statement of fact from being misleading.

The representation at issue here does not have the same characteristics. The most I reasonably could infer based on Alcoa's allegations is that TransDigm engaged in misleading negotiation tactics. That is, during the parties' negotiations, TransDigm gave the impression that it had disclosed fully during the course of due diligence the information encompassed by Purchase Agreement Sections 4.19(b) and 4.8 related to all relevant time periods both before and after December 2010, and that TransDigm nevertheless persuaded Alcoa to agree that TransDigm's contractual representations would relate only to periods beginning on specific dates in December 2010. By setting temporal limits on its representations and warranties, TransDigm presumably caused

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[75] *See Norton*, 443 A.2d at 3.

Alcoa to consider the reasonableness of those limitations. In other words, rather than creating a false impression, the parties probably realized that there were risks to the Buyer and the Sellers depending on when the time periods in question began. In this regard, the time periods specified in the Sellers' representations and warranties simply reflect the agreed upon allocation of risk between sophisticated parties.[76]

In these circumstances, it is not the Court's function to rewrite the parties' contract to eliminate an unambiguous term to which Alcoa now regrets that it agreed.[77] Notably, however, to the extent TransDigm's negotiation tactics may have included an active

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[76] *See RAA Mgmt. LLC v. Savage Hldgs., Inc.*, 45 A.3d 107, 118 (Del. 2012) ("[W]here parties, particularly sophisticated ones, have undertaken certain obligations—and at the same time expressly limited those obligations—the courts should not normally interfere with those choices." (quoting a Second Circuit decision by now-Supreme Court Justice Sonia Sotomayor in *Warner Theatre Assocs. Ltd. P'ship v. Metro. Life Ins. Co.*, 1997 WL 685334, at *5 (S.D.N.Y. Nov. 4, 1997), *aff'd*, 149 F.3d 134 (2d Cir. 1998)).

[77] Conceptually, there is no difference between limiting the contractual representations one makes and excluding from a contract representations that a party is unwilling to make. In the latter circumstance, Delaware courts will honor the parties' agreement, and disallow a claim for fraud based on representations not in a contract, when in that contract, as here, the aggrieved party disclaimed reliance on any representation outside the four corners of the contract. *See id.* at 117 (contrasting fraud claims "based on representations made *outside* of a merger agreement—which *can* be disclaimed through non-reliance language—with fraud claims based on false representations of fact made *within* the contract itself—which cannot be disclaimed" (citing *Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006))). By agreeing to a date limitation, Alcoa agreed that all time periods before that date were outside the four corners of the agreement. It could not reasonably have relied, therefore, on a belief that the representations in Sections 4.19(b) and 4.8 also were true as to time periods outside the express date limitation.

concealment of material information that was responsive to Alcoa's requests for information, Alcoa still may pursue its fraudulent concealment claim under Count II.

D. Count V – Civil Conspiracy

The only ground TransDigm advanced for dismissing Count V is that this Count cannot proceed if the Court dismisses the underlying tort claims. But, Alcoa has stated a claim for fraudulent and active concealment of material information. Thus, TransDigm's argument for dismissal of Count V fails, but only to the extent it is based on the fraudulent and active concealment alleged in Count II.

III. CONCLUSION

For the foregoing reasons, I grant Plaintiffs/Counterclaim Defendants' motion to dismiss Counts III and IV of the Counterclaim and hold that the wrongful conduct specifically alleged in those Counts cannot supply the underlying tort for Alcoa's civil conspiracy claim. In all other respects, the motion is denied.

IT IS SO ORDERED.