IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TOUCH OF ITALY SALUMERIA & PASTICCERIA, LLC, a Delaware Limited Liability Company, ROBERT CIPRIETTI and JOSEPH CURZI, III,	)	
Plaintiffs,	)	
v.	)	*Civil Action No. 8602-VCG*
LOUIS BASCIO and FRANK BASCIO, Trading as FRANK AND LOUIE'S ITALIAN STORE,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: November 18, 2013
Date Decided: January 13, 2014

Larry W. Fifer, of LAW OFFICE OF LARRY W. FIFER, Lewes, Delaware, Attorney for Plaintiffs.

David C. Hutt, Dennis L. Schrader, and Thomas E. Hanson, Jr., of MORRIS JAMES WILSON HALBROOK & BAYARD LLP, Georgetown, Delaware, Attorneys for Defendants.

GLASSCOCK, Vice Chancellor

A lie can be an insidious thing. It can destroy friendships and business relationships. It can also be the basis for a successful lawsuit, where it is in aid of fraud or conceals actionable wrongdoing. But sometimes a lie, no matter how morally problematic, is just a lie. This case, as pled, involves such a lie.

In 2009, several individuals formed an LLC, Touch of Italy Salumeria & Pasticceria,[1] LLC ("Touch of Italy") which operates a specialty Italian grocery in Rehoboth Beach. One member, Robert Ciprietti, provided cash in exchange for his membership; at least one other member, Louis Bascio,[2] a defendant here, provided business goodwill and sweat equity. The business was successful, and an additional member entered, while others left. Eventually, Louis decided to leave the business. He gave notice, as specified in the LLC agreement, and withdrew as a member on December 15, 2012.

The lie alleged is this: Louis told the other members that he was moving to Pennsylvania, perhaps to open a business there. Although he told them he would not compete with Touch of Italy after his withdrawal, ten weeks later Louis and his brother, Frank Bascio, also a defendant here, formed their own LLC, Bascio Bros.

[1] According to the website "wiktionary," a salumeria is an Italian delicatessen; literally, a shop specializing in salami. *Salumeria*, WIKTIONARY, http://en.wiktionary.org/wiki/salumeria. A pasticceria is an Italian cake shop. *Pasticceria*, WIKTIONARY, http://en.wiktionary.org/wiki/pasticceria.

[2] I refer to Louis Bascio in this Memorandum Opinion as "Louis," and Frank Bascio as "Frank," to differentiate them from other individuals and an entity also named Bascio; no disrespect is intended.

Italy, LLC ("Bascio Bros."),[3] which then opened a competing Italian grocery, doing business as Frank and Louie's Italian Store ("Frank and Louie's"). Frank and Louie's is located on the same block in Rehoboth Beach as Touch of Italy. Louis' former partners, understandably, feel betrayed. Those partners, however, chose to associate themselves with Louis under an LLC agreement. Delaware's law with respect to LLCs, as this Court has repeatedly noted, is explicitly contractarian; it allows those associating under this business format to structure their relationship in the way they believe best suits them and their business. This particular LLC agreement was written to allow members to readily withdraw, without triggering any obligation to forgo competition thereafter. Thus, Louis faced no legal impediment to withdrawing and opening Frank and Louie's as a competing grocery. Given this fact, had his fellow members known his true intentions—that is, had the lie as alleged never occurred—they would have been contractually powerless to change the course of events. The Plaintiffs can point to no acts or omissions of their own, taken in reliance on the lie. They allege that Louis breached fiduciary duties, but fail to allege a single act undertaken before his withdrawal, other than the lie, in furtherance of his competing business or in derogation of any duty to Touch of Italy. In reality, this complaint is an attempt to achieve a result—restraint on post-withdrawal competition—that the members

[3] Bascio Bros. was initially a defendant in this action, but the action against this LLC has been dismissed.

could have but chose not to forestall by contract. The Defendants have moved to dismiss the Plaintiffs' Verified Complaint for Permanent Mandatory Injunction (the "Complaint").[4] For the reasons below, the Complaint fails to state a claim, and must be dismissed.

I. BACKGROUND

The following facts are taken from the Complaint. In February 2009, Robert Ciprietti, Diane Bascio, Frank Bascio, and Louis Bascio entered into an LLC agreement "to establish and operate a retail food business specializing in Italian foods and food products at 33A Baltimore Avenue, Rehoboth Beach," thereby establishing Touch of Italy.[5] In support of this venture, Ciprietti provided $100,000 in initial capital, while Louis provided labor and goodwill.[6]

In March 2011, Ciprietti, Louis, and Joseph Curzi III entered into an Amended and Restated Limited Liability Company Agreement of Touch of Italy Salumeria & Pasticceria, LLC (the "Amended LLC Agreement").[7] In exchange for an initial contribution of $17,000 "and other consideration," Curzi received a one-third interest in Touch of Italy.[8] After entering into the Amended LLC Agreement, both Ciprietti and Louis held a one-third interest in the LLC.[9] To facilitate this

[4] The Complaint seeks damages, as well as injunctive relief.
[5] Compl. ¶ 9.
[6] *Id.* at ¶¶ 10-11.
[7] *Id.* at ¶ 12.
[8] *Id.*
[9] *Id.*

arrangement, Frank and Diane Bascio "sold and conveyed all of their interest in Touch of Italy to the remaining three members."[10]

As of October 2012, the business had been "successful and profitable."[11] Nevertheless, that month, Louis provided his fellow members with notice of his withdrawal from the LLC, to occur "on or about January 1, 2013."[12] Pursuant to Section 19(b) of the Amended LLC Agreement:

> Any member may give written notice to the other members of that members election [sic] to cease as a member and quit the company and the remaining members shall have sixty (60) days from the receipt of said notice during which to elect to purchase the quitting member's interest in the company. The purchase price under such circumstances shall be fair market value of that member's interest as determined hereafter.[13]

The Plaintiffs allege that, after receiving notice of Louis' impending resignation, "there were various discussions between the three members of the limited liability company and their accountant concerning what should be done in order to honor the original agreement between the parties whereby Robert Ciprietti was to receive payment of $100,000.00 for his initial capital contribution as set forth in the original agreement."[14] Section 9(b) of the Amended LLC Agreement, which governs the relationship among the parties before me, provides that:

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[10] *Id.*
[11] *Id.* at ¶ 13.
[12] *Id.*
[13] LLC Agmt. § 19(b). Section 19 of the Amended LLC Agreement governs the "Election of Member to Leave the Company."
[14] Compl. ¶ 13.

> Upon the expiration of five years after October 3, 2009, after thirty days advance written notice, Robert Ciprietti may request reimbursement of the $100,000.00 at which time the company shall make such distribution to Ciprietti, provided however, that said distribution shall be made in [sic] over a period of ten months in monthly payments of $10,000.00. Said payments shall be made with no interest charged or accruing.[15]

The Plaintiffs further contend that "[a]lthough Louis Bascio was requested to obtain a valuation for the business he failed to do so, but he did assure his [fellow members] and others that he would not take any action that would be adverse to the Touch of Italy business. Specifically, he stated that he would not open any competing business in Rehoboth Beach, Delaware."[16]

On December 15, 2012, Louis communicated his resignation to Plaintiffs Ciprietti and Curzi in a note that stated: "I'm leaving today."[17] Prior to his resignation, Louis had purportedly mentioned several times his intentions to move to Pennsylvania, and even to establish a new business there.[18] As such, the Plaintiffs emphasize their surprise at learning that he "planned all along to open a business of the same type as Touch of Italy in Rehoboth Beach, Delaware, and he in fact did so."[19] Specifically, in February 2013, Louis and Frank formed Bascio Bros., which opened Frank and Louie's, an Italian grocery that the Defendants

[15] LLC Agmt. § 9(b).
[16] Compl. ¶ 13.
[17] *Id.* at ¶ 14.
[18] *Id.* at ¶ 15.
[19] *Id.* at ¶ 15(a).

continue to operate.[20] Frank and Louie's is located on the same block of Baltimore Avenue in Rehoboth Beach as Touch of Italy.[21] Notably absent from the Amended LLC Agreement, at least as it concerns this matter, is any sort of non-compete covenant or provision restricting the behavior of a former member.

The Plaintiffs allege that Louis and Frank engaged in a conspiracy to establish this competing business, contending that the Defendants conspired to recruit Touch of Italy employees and dissuade individuals from working at Touch of Italy, while also establishing a relationship with Touch of Italy vendors—in other words, the Defendants have competed with Touch of Italy.[22] Additionally, the Plaintiffs allege generally that Louis "took steps at his former work place at Touch of Italy, prior to his departure, which denigrated the operation of that business and his partners and fellow members, Robert Ciprietti and Louis Curzi, III, and he evidenced a disinterest in the operation of that business and disavowed any intention to open a similar business in the same general area or in Rehoboth Beach, Delaware."[23]

On May 30, 2013, the Plaintiffs—Touch of Italy, Ciprietti, and Curzi—filed their Complaint, seeking injunctive and monetary relief. The Plaintiffs allege the following nine counts: conversion (Count I); fraudulent misrepresentation (Count

[20] *Id.* at ¶¶ 15(b), (c).
[21] *Id.* at ¶¶ 2, 15(b).
[22] *Id.* at ¶¶ 15(b)-(d).
[23] *Id.* at ¶ 15(e).

II); breach of contract (Count III); negligent misrepresentation (Count IV); fraudulent concealment (Count V); breach of the implied covenant of good faith and fair dealing (Count VI); breach of fiduciary duty (Count VII); prayer for punitive damages (Count VIII); and injunctive relief (Count IX).[24] On June 27, 2013, the Defendants moved to dismiss all nine counts of the Plaintiffs' Complaint, emphasizing the lack of a covenant not to compete in the Amended LLC Agreement, as well as other purported defects in the Complaint. The parties briefed the matter, and on November 18, 2013, I heard oral argument. At oral argument, the Plaintiffs' counsel conceded that, because the competing LLC was not formed until after the breaches alleged in the Complaint took place, the action as to Bascio Bros. should be dismissed. I entered an Order to that effect on December 9, 2013. For the reasons that follow, I dismiss Count I of the Plaintiffs' Complaint without prejudice, and Counts II through IX with prejudice.

II. STANDARD OF REVIEW

A motion to dismiss is decided under a reasonable conceivability standard.[25] When reviewing a motion to dismiss under Court of Chancery Rule 12(b)(6), this Court must

[24] The Plaintiffs' Complaint includes two Count IIIs; thus, the numbering in this Memorandum Opinion differs from the Complaint.

[25] *Pfeiffer v. Leedle*, 2013 WL 5988416, at *9 (Del. Ch. Nov. 8, 2013) ("This 'reasonable conceivability' standard asks whether there is a 'possibility' of recovery. If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.") (footnote omitted).

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[26]

Nonetheless, this Court "need not accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[27]

In considering the motion before me, I consider the facts pled in the Plaintiffs' Complaint, as well as the provisions of the Amended LLC Agreement, which is incorporated by reference therein. However, I decline to consider the two additional exhibits appended to the Defendants' Motion to Dismiss; specifically, two letters, both unsigned, from Bascio to Ciprietti and Curzi regarding his expected resignation from Touch of Italy, as these exhibits are beyond the scope of this Motion to Dismiss.

III. ANALYSIS

The gravamen of the Plaintiffs' allegations is that Louis lied about his intention to open a competing Italian grocery in order to deceive the Plaintiffs and to induce their reliance on his misrepresentations, a lie in which Louis' brother, Frank, participated; and that under cover of this lie, they brought that competing

[26] *Id.* (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)).
[27] *Id.* (internal quotation marks omitted).

entity into existence. The Plaintiffs' allegations are best characterized as, in effect, an attempt to replicate the non-compete agreement that the parties failed to include in their LLC agreement; a deficiency that the Plaintiffs, because of changed circumstances, now regret. For the following reasons, the Plaintiffs' allegations do not withstand the Defendants' Motion to Dismiss.

A. *Breach of Contract*

The Plaintiffs allege in their Complaint that the Amended LLC Agreement required Louis "to represent the [P]laintiffs' interests, to avoid conflicts of interest, and to uphold his fiduciary responsibilities to [the P]laintiffs . . . ."[28] The Plaintiffs emphasize that Louis did not disclose to them "his true intentions" about opening a competing Italian grocery; Frank is alleged to have assisted this breach.[29] The Plaintiffs maintain that, if they had known of Louis' intentions to compete, they would have objected to his departure from Touch of Italy.[30] The Plaintiffs contend that they were damaged in the amount of at least $100,000, which is the amount of Ciprietti's initial contribution to Touch of Italy, while also suffering the loss of employees and vendors, and incurring legal and accounting costs.[31]

[28] Compl. ¶ 27.
[29] *Id.* at ¶¶ 29-30.
[30] *Id.* at ¶ 30.
[31] *Id.* at ¶ 31.

This Court recognizes that "a company's LLC agreement defines when members of the LLC can be liable for breach of provisions of that agreement."[32] Thus, I must look to the language of the Agreement among the parties before me in order to determine whether a claim for breach of contract exists.[33] Pursuant to this Court's well-established principles of contract interpretation, and recognizing that LLCs are creatures of contract, I must enforce LLC agreements as written.[34]

The Amended LLC Agreement provided each member with a right of withdrawal, and lacked any sort of non-compete provision, or any provision limiting the conduct of a former member. There is therefore no ground on the facts alleged, even with all reasonable inferences drawn in the Plaintiffs' favor, to find a breach of contract. The Plaintiffs have not sufficiently alleged that Louis breached this Agreement, to which he is no longer a party, by opening a competing business after he resigned from the LLC. Additionally, the Plaintiffs have not pointed to any conduct by Louis while he was a member of Touch of Italy, and party to the Amended LLC Agreement, that breached this contract. In fact, the Plaintiffs do not specifically refer to a single provision of the Amended LLC Agreement in their Complaint to demonstrate the purported contract breach.

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[32] *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 880-81 (Del. Ch. 2009).
[33] *Id.* at 881.
[34] *See, e.g., id.* at 880 ("Limited liability companies are creatures of contract, and the parties have broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members."); *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 588 (Del. Ch. 2006) ("[C]ourts will not bend contract language to read meaning into the words that the parties obviously did not intend.").

Importantly, while detailing the procedure for withdrawal from the LLC, the Amended LLC Agreement lacks any provision requiring that a member receive the permission or consent of other members before withdrawal. Instead, Section 19(b) of this Agreement provides that "[a]ny member may give written notice to the other members of that members election [sic] to cease as a member and quit the company and the remaining members shall have sixty (60) days from the receipt of said notice during which to elect to purchase the quitting member's interest in the company. . . ."[35] If no such election is taken, the "quitting member" may elect to have the company dissolved and distributed.[36] Consequently, the Plaintiffs lacked the means to object, in any legally effective way, to Louis' resignation from the LLC.

The Plaintiffs further appear to contend that Louis' exit triggered Ciprietti's entitlement to his $100,000 initial contribution in Touch of Italy. However, the clear and unambiguous language in Section 9(b) of the Amended LLC Agreement commands otherwise, providing that

[35] LLC Agmt. § 19(b).

[36] *Id.* § 19(c) ("In the event that the remaining members upon receipt of the quitting member's notice of election to quit . . . do not elect in writing within the time prescribed for so electing, to purchase the quitting members' interest [sic], then the quitting member (or his representatives) shall then, within 30 days, have the option of electing in writing either to continue as a member or that the company be terminated and in the latter instance the business shall then be liquidated in accordance with the provisions of this agreement."). In this instance, Louis has waived his right to dissolution and distribution, and has simply relinquished his interest in favor of the remaining members of Touch of Italy.

> [u]pon the expiration of five years after October 3, 2009, after thirty days advance written notice, Robert Ciprietti may request reimbursement of the $100,000.00 at which time the company shall make such distribution to Ciprietti, provided however, that said distribution shall be made in [sic] over a period of ten months in monthly payments of $10,000.00. Said payments shall be made with no interest charged or accruing.[37]

Pursuant to this Agreement, therefore, Ciprietti is not entitled to repayment of his $100,000 initial contribution until October 2014, and only then if additional conditions are met. Such a right of recovery, moreover, runs against Touch of Italy, which continues in business, and not against its current or former members.

Accordingly, I dismiss Count III for failure to state a claim.

B. *Fraud and Misrepresentation*

The Plaintiffs allege counts of fraudulent concealment, fraudulent misrepresentation, and negligent misrepresentation in their Complaint. These counts are premised on allegations that Louis either conveyed to the Plaintiffs the misleading or false information that he was not going to compete with Touch of Italy, or failed to disclose his plans to open a competing business, with the "intention of misleading the [P]laintiffs and to induce [the P]laintiffs to refrain

[37] *Id.* § 9(b).

from taking further action to discover his deceit."[38] Louis' misrepresentations were purportedly aided in unspecified ways by his brother, Frank.[39]

Fraud and negligent misrepresentation share an essential element; the party asserting these claims must have relied to his detriment upon the supposedly actionable statement or silence.[40] Although the Complaint makes a pro-forma allegation of reliance, under the terms of the Agreement no act in reliance can have taken place here, and the Complaint is completely silent as to what meaningful actions the Plaintiffs could have taken, or refrained from taking, absent the misrepresentation alleged. In effect, these Counts allege that Louis misrepresented his intention to take an action—withdrawal from the LLC to start a competing business—*which the Amended LLC Agreement gave him the right to take.* Further,

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[38] Compl. ¶ 39.

[39] *See, e.g.*, *id.* at ¶ 23; *see also id.* at ¶ 15(f) ("The conduct of the defendant, Louis Bascio, as well as [Frank Bascio], has constituted and continues to constitute fraud, deceit and misrepresentation against all of the [P]laintiffs who have incurred damages as a result thereof.").

[40] *See, e.g.*, *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 (Del. Ch. 2003) ("Justifiable reliance is an element of common law fraud, equitable fraud, and negligent misrepresentation under Delaware law.") (footnotes omitted); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) (noting that, to establish a prima facie case of fraudulent concealment, the plaintiff must show, inter alia, "[a]n intent to induce plaintiff's reliance upon the concealment," as well as "[d]amages resulting from the concealment"); *Oglesby v. Conover*, 2011 WL 3568276, at *3 (Del. Super. May 16, 2011) (noting that the elements of fraudulent misrepresentation include demonstration that "the defendant's false representation was intended to induce the plaintiff to act or refrain from acting" and that "the plaintiff's action or inaction was taken in justifiable reliance upon the representation"); *Those Certain Underwriters at Lloyd's v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 2813774, at *6 (Del. Ch. Feb. 8, 2007) (noting that reasonable reliance is "one of the key elements necessary for stating a prima facie case of negligent misrepresentation"). *See also Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, 2012 WL 6632681, at *18 (Del. Ch. Dec. 20, 2012) ("Negligent misrepresentation differs from fraud only in the level of scienter involved; fraud requires knowledge or reckless indifference rather than negligence.") (internal quotation marks omitted).

this Agreement lacks any provision requiring that a member receive the permission or consent of other members before resigning from the LLC, and does not restrict the resigning member's right to compete thereafter. The Plaintiffs' allegation that, armed with this knowledge, they would have "objected," is therefore legally meaningless. In fact, at oral argument, the Plaintiffs' counsel disclosed that, absent any misrepresentation, the Plaintiffs would have done precisely what they ultimately did here; bring suit to vindicate what they believe to be their rights under the Amended LLC Agreement. As such, the Plaintiffs are not able to plead reliance or resulting damages. In reality, these allegations, like the allegations of breach of fiduciary duty described below, are an attempt to bootstrap a tort (or equitable) claim out of the contract claim that I have already found to be illusory, in this instance by alleging wrongful concealment of an intent to breach the Amended LLC Agreement.[41] Because the Plaintiffs have failed to state claims for fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment, Counts II, IV, and V are dismissed.

[41] *See Data Mgmt. Internationalé, Inc. v. Saraga*, 2007 WL 2142848, at *3 (Del. Super. July 25, 2007) ("Under Delaware law, a plaintiff bringing a claim based entirely upon a breach of the terms of a contract generally must sue in contract, and not in tort. In preventing gratuitous 'bootstrapping' of contract claims into tort claims, courts recognize that a breach of contract will not generally constitute a tort. Even an intentional, knowing, wanton, or malicious action by the defendant will not support a tort claim if the plaintiff cannot assert wrongful conduct beyond the breach of contract itself.") (footnotes omitted).

C. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

The Plaintiffs also allege that Louis breached the implied covenant of good faith and fair dealing. This covenant applies to prevent a party from denying his contractual partners the benefit of their bargain based upon a circumstance unanticipated by the parties.[42] No such circumstance was unanticipated here. The desire of a member to resign was anticipated and specifically provided for, in detail, in the Amended LLC Agreement.[43] Louis' post-resignation conduct—specifically, opening a competing business near Touch of Italy—is not unforeseeable.[44] In fact, the method of providing for, and avoiding the consequences of, such competition is a staple of employee contracts: the covenant not to compete.[45] The members here decided to forgo such a contractual provision, an omission the Plaintiffs obviously now regret. The Plaintiffs cannot utilize, post

[42] *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) ("Delaware's implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract."); *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) ("Stated in its most general terms, the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.") (internal quotation marks omitted); *Klig v. Deloitte LLP*, 36 A.3d 785, 797 (Del. Ch. 2011) ("A court will employ the covenant to analyze unanticipated developments or to fill gaps in the contract's provisions.") (internal quotation marks omitted).

[43] *See* LLC Agmt. § 19 (governing the "Election of Member to Leave the Company").

[44] *See generally Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955 (Del. Ch. 2004) (discussing the ubiquity of covenants not to compete).

[45] *See generally Am. Homepatient, Inc. v. Collier*, 2006 WL 1134170 (Del. Ch. Apr. 19, 2006) (finding that the non-compete agreement at issue was enforceable, but had not been breached); *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784 (Del. Ch. Aug. 9, 2004), *aff'd*, 880 A.2d 1047 (Del. 2005) (enforcing a covenant not to compete against a former employee).

hoc, the implied covenant of good faith and fair dealing in order to generate a non-compete provision which is conspicuously absent from their Agreement. If I found otherwise, I would effectively be inserting a covenant not to compete in every such contract. Such an imposition would be in direct contravention of the policy behind the law pertaining to LLCs, which supports the right to contract freely. Count VI of the Complaint is thus dismissed.

D. *Breach of Fiduciary Duties*

The Plaintiffs allege in Count VII of their Complaint that Louis "breached his fiduciary duties . . . by engaging in the willful, wrongful and bad faith conduct recited in [their Complaint]," including "in making arrangements for opening a competing business while he was still employed in and by Touch of Italy."[46] The Complaint does not identify the source of the fiduciary obligations it implies that Louis owes or owed to Touch of Italy. In their Answering Brief, the Plaintiffs point to the provision in Section 11 of the Amended LLC Agreement, providing that "[a]ll the members/managers shall be faithful to the company in all transactions relating to the company."[47] That provision goes on to limit members' unilateral rights to enter certain transactions on behalf of Touch of Italy, and is not pertinent here. I assume, for purposes of this Motion, that Louis owed fiduciary

[46] Compl. ¶¶ 38, 47.
[47] LLC Agmt. § 11.

duties to Touch of Italy and its members during his membership;[48] nonetheless, the Plaintiffs have failed to state a claim for the reasons that follow.

Although the Plaintiffs allege that Louis was "planning" to open a competing business while he was a member of Touch of Italy, the Complaint is devoid of any factual allegations of acts in support of that intention. Bascio Bros. was not formed until February 2013, more than ten weeks after Louis left Touch of Italy. In fact, the Complaint indicates that Louis' efforts on behalf of Touch of Italy were satisfactory, and the business successful, up to the point when he announced his withdrawal from the LLC. "[A] complaint alleging breach of fiduciary duty must plead facts supporting an inference of breach, not simply a conclusion to that effect."[49] Further, to the extent that the Plaintiffs allege that Louis' conduct following his departure from Touch of Italy breached fiduciary duties owed to his *former* partners, this claim also fails, as, generally, no such

[48] The Delaware LLC Act, Chapter 18 of Title 6 of the Delaware Code (the "LLC Act"), provides, "[t]o the extent that, at law or in equity, a member . . . has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's . . . duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement . . . ." 6 *Del. C.* § 18-1101(c). The LLC Agreement among the parties here does not limit the fiduciary duties owed to fellow members or to the LLC. Moreover, this Agreement provides that, ". . . to the extent that this agreement is silent as to any matter to which the Delaware [LLC] Act speaks, then the provisions of the Delaware [LLC] Act shall govern this company." LLC Agmt. § 30. Pursuant to that Act, "[i]n any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties . . . shall govern." 6 *Del. C.* § 18-1104.

[49] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).

duties exist once the fiduciary relationship has ended.[50] As the Plaintiffs have not alleged any actionable conduct by Louis during his time of membership and employment at Touch of Italy, the Plaintiffs have not alleged facts upon which it is conceivable they could be entitled to relief. Count VII must therefore be dismissed.

E. *Conversion*

In their Complaint, the Plaintiffs contend that "[e]ither Touch of Italy or Robert Ciprietti was the sole legal owner of all assets held in or on behalf of the business known as Touch of Italy," and that "[e]ither Robert Ciprietti or Touch of Italy is, *and/or was*, entitled to legal possession of all assets of the business known as Touch of Italy, including but not limited to, bank account deposits, business income, equipment and inventory, customer and vendor list[s], goodwill in its community, etc."[51] Further, the Plaintiffs contend that the "Defendants have exercised dominion and control over *certain of* the above stated assets to the

[50] Under Delaware law, fiduciary duties arise out of the existence of a fiduciary relationship. In general, "[a] fiduciary relationship is a situation where one person reposes special trust in another or where a special duty exists on the part of one person to protect the interests of another." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006) (internal quotation marks omitted). As a former member of Touch of Italy, Louis was no longer in a position of "special trust" with the Plaintiffs, and lacked any "special duty . . . to protect [their] interests." *See id.*; *see also Gilbert v. El Paso Co.*, 490 A.2d 1050, 1056 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990) ("State law claims of . . . breach of fiduciary relationship must subsist on the actuality of a specific legal relationship . . . .").

[51] Compl. ¶¶ 17-18 (emphasis added).

exclusion of [the Plaintiffs]," who have thus been damaged "[a]s a direct and proximate result of the aforesaid conversion, control and misrepresentations."[52]

"For a plaintiff to recover under a theory of conversion, he must prove, *inter alia*, precisely what property the defendant converted and that his interest in the property was viable at the time of the conversion."[53] This requisite precision is entirely lacking from the Plaintiffs' allegations of conversion. Not only have the Plaintiffs not definitely identified who owns the purportedly converted property, they have not alleged any specific property the Defendants have converted, instead identifying broad categories of property in their Complaint and noting that the Defendants have exerted control over "certain" items within these broad categories.

Where property was initially lawfully possessed by a defendant, conversion requires a demand for return of the property converted prior to filing an action.[54] The Complaint is silent as to whether this demand was made here. Regardless of whether recitation of demand is necessary to plead conversion in this case, the demand requirement is noteworthy for policy reasons: knowledge of what property

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[52] *Id.* at ¶¶ 19-20 (emphasis added).

[53] *CIT Commc'ns Fin. Corp. v. Level 3 Commc'ns, LLC*, 2008 WL 2586694, at *2 (Del. Super. June 6, 2008).

[54] Under Delaware law, "if a party was once in lawful possession of the plaintiff's property, the plaintiff must first make a demand upon that party for return of the property before bringing an action at law for conversion." *Id.* However, this demand requirement is not absolute, and "is excused . . . when the alleged wrongful act is of such a nature as to amount, in itself, to a denial of the rights of the real owner." *Id.* (internal quotation marks omitted).

has allegedly been converted is with the plaintiff, who has a right to possession and thus is presumptively aware of what has been taken from him.[55] The defendant is therefore entitled to notice of what property is subject to the claim. Even in light of the low standard required to withstand a motion to dismiss, reasonable conceivability, notice pleading requires more than what is pled here, where the Plaintiffs merely allege that one or the other of them has (or *had*) a right to possess all of several broad categories of property, some undefined part or piece of which is held by the Defendants. Consequently, even viewing these allegations in a light most favorable to the Plaintiffs, they have failed to adequately state a claim for conversion. Nevertheless, because the Plaintiffs' allegations—viewed most favorably—demonstrate that Louis had access to the categories of property noted in the Complaint, and may have had the opportunity, as well as the motivation, to convert some items within the categories of property identified, I dismiss Count I of the Plaintiffs' Complaint without prejudice. If the Defendants are holding property belonging to the Plaintiffs, the Plaintiffs may file an appropriate action at law and seek recovery there.

[55] *See, e.g.*, *Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 384 (Del. 1951) (noting that "the purpose of the 'demand and refusal' rule, in those cases where it applies, is simply to settle whether there has been a conversion or not"); *see also Drug, Inc. v. Hunt*, 168 A. 87, 94 (Del. 1933) ("A demand and a refusal to deliver are usually evidence of a conversion and when the original possession of the defendant is lawful must in most cases be shown at the trial to establish that charge.").

F. *Punitive Damages and Injunctive Relief*

Lastly, because Counts VIII and IX do not state independent claims, but instead are requests for relief predicated on the allegations pled in Counts I through VII, which are dismissed, Counts VIII and IX do not survive. In any event, Count VIII, seeking punitive damages, was inappropriately pled because this Court has only that jurisdiction enjoyed by the English Court of Chancery in 1776, as supplemented by the General Assembly, and neither source permits the Court to award exemplary or punitive damages. As to why, the explanation provided thirty-five years ago by then-Vice Chancellor Hartnett in *Beals v. Washington International, Inc.* can hardly be improved upon, in regards to legal scholarship or writing style; I will indulge myself only with this brief quote: "Traditionally and historically the Court of Chancery as the Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance and therefore will not enforce penalties or forfeitures."[56]

IV. CONCLUSION

There are undoubtedly sound business reasons to include—as there are to eschew—covenants not to compete in or in connection with LLC agreements. Nonetheless, the parties failed to incorporate such a covenant in the Amended LLC Agreement at issue here. For the reasons above, the Plaintiffs' attempt to replicate

[56] *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978).

the effect of such a provision post hoc by alleging breaches of contract, the implied covenant of good faith and fair dealing, and fiduciary duties, must fail here. Moreover, the fraud and misrepresentation claims based on alleged false statements which had no legal effect must fail for lack of reliance and resulting damages. The Plaintiffs' Complaint is therefore dismissed without prejudice as to Count I, and with prejudice as to the remaining Counts. The parties should provide a form of order consistent with this Memorandum Opinion.