IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AVIATION WEST CHARTERS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-09-271 WCC CCLD
	)	
JEREMY FREER, JTF AVIATION HOLDINGS, INC. (f/k/a AVIATION WEST CHARTERS, INC.) and RICHARD LARSON,	)	
	)	
Defendants.	)	

Submitted: January 21, 2015
Decided: July 2, 2015

Defendants' Motion to Dismiss – GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

David E. Wilks, Esquire, Laina M. Herbert, Esquire, Wilks, Lukoff & Bracegirdle, LLC, 1300 N. Grant Avenue, Suite 100, Wilmington, DE 19806. Attorneys for Plaintiff.

William C. O'Neil, Esquire, Thomas G. Weber, Esquire, Winston & Strawn LLP, 35 West Wacker Drive, Chicago, IL 60601. Attorneys for Plaintiff.

Kevin Shannon, Esquire, Christopher N. Kelly, Esquire, Potter Anderson & Corroon LLP, 1313 North Market Street, Hercules Plaza, 6th Floor, Wilmington, DE 19899. Attorneys for Defendants.

William J. Maledon, Osborn Maledon, 2929 North Central Avenue, 21st Floor, Phoenix, AZ 85012. Attorneys for Defendants.

CARPENTER, J.

Before this Court is Defendants' Jeremy Freer, JTF Aviation Holdings, Inc., and Richard Larson (collectively the "Defendants"), Motion to Dismiss the current action brought by Plaintiff Aviation West Charters, LLC. For the following reasons, the Court finds that Defendants' Motion to Dismiss is hereby GRANTED in part and DENIED in part.

FACTUAL & PROCEDURAL BACKGROUND

This case centers on Plaintiff's acquisition of an air ambulance and related services business conducted under the name Angel MedFlight (the "Company" or "AMF"). Before the acquisition, AMF was operated by Defendant Aviation West Charters, Inc., now known as JTF Aviation Holdings ("JTF"). Defendant Freer ("Freer") was the founder, owner and President of AMF and Defendant Larson ("Larson") was the CFO.

The Company's business model was to charge a significant premium for its flights, but only collect a portion of the amount billed. AMF would charge an initial $14,000 retainer and seek the remaining fees, on average $380,000 per flight, from the patient's insurer. Recovery from insurers varied significantly, ultimately depending on numerous factors including the identity of the primary and secondary insurer and the terms of the patient's coverage. Thus, it was

difficult to predict the revenue that the Company would ultimately receive with regard to a specific patient flight.

Before 2013, the Company's financial statements were reviewed, not audited, by Aspire Financial LLC and prepared on a modified cash-basis. The Company's 2012 financial statements expressly stated that the Company "elected to recognize certain revenues and the related assets when received rather than when earned." In connection with the sale of the Company, AMF retained a new independent accountant, CliftonLarsonAllen LLP ("CLA"), to conduct the audit and prepare financial statements for 2013 on an accrual basis to comply with Generally Accepted Accounting Principles ("GAAP"). After conducting its audit, CLA sent a letter to the Company proposing certain "adjustments to the consolidated financial statements that resulted in an increase in net income of $29,978,387."[1] CLA explained that a significant portion of that amount "related to the valuation of the net accounts receivable."[2] The Company accepted CLA's adjustment and CLA issued the Company's 2013 financial statements with a clean audit opinion. The 2013 Financial Statements reported that AMF's "earnings before interest, taxes, depreciation and amortization" ("EBITDA") in 2013 was

[1] Compl. ¶ 66.
[2] *Id*. ¶ 67.

$40.8 million and its net accounts receivables as of December 31, 2013 were $38.4 million.

In July 2013, AMF retained Green Manning & Bunch, LTD ("GMB") as a financial advisor to assist in marketing the Company to potential buyers. GMB created a data room and facilitated the due diligence process on behalf of the Company. Plaintiff, a potential purchaser, made its first due diligence requests on December 30, 2013. Plaintiff was given access to the data room and supplemental material provided by the Company, including the 2013 Financial Statements. On February 7, 2014, Plaintiff's private equity parent company, The Vistria Group, LP, submitted a Letter of Intent ("LOI") to purchase substantially all of the assets of the Company, which they valued at $100 million on a "long-term debt free basis" and an anticipated closing date of April 30, 2014.[3] Following further due diligence, Plaintiff lowered its offer to $80 million. The parties entered into the Asset Purchase Agreement ("APA") on June 24, 2014, and the transaction closed that same day.

Plaintiff subsequently filed the instant action asserting that the Company intentionally overstated its Accounts Receivable ("A/R") and revenue by

[3] Opening Br. at 2.

approximately $30 million. Defendant filed this Motion to Dismiss and the Court heard oral argument.

STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[4] When analyzing a motion to dismiss under Rule 12(b)(6), the Court generally must proceed without the benefit of a factual record and assume as true the well-pleaded allegations in the complaint.[5] A complaint is "well-plead" if it puts the opposing party on notice of the claim being brought against it.[6] Therefore, the Court may dismiss a complaint under Rule 12(b)(6) only where the Court determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the plaintiff could prevail.[7] However, documents that are integral to or incorporated by reference in the complaint may be considered.[8] "Where an agreement plays a significant role in the litigation and is integral to a plaintiff's

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[4] Super. Ct. Civ. R. 12(b)(6).

[5] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996) (citing *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).

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

[7] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d at 38 (citing *Robkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

[8] *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

claims, it may be incorporated by reference without converting the motion to a summary judgment."[9]

Additionally, although the Court need not blindly accept as true all allegations nor draw all inferences in the plaintiff's favor, "it is appropriate . . . to give the pleader the benefit of all reasonable inferences that can be drawn from its pleading."[10] "Only if the [C]ourt can say with reasonable certainty that plaintiff could prevail on no state of facts inferable from the pleadings may the court dismiss a complaint at this preliminary stage."[11]

DISCUSSION

Defendants move to dismiss the Complaint against Larson for lack of personal jurisdiction, and to dismiss the Complaint against all Defendants for failure to state a claim. The Court will deal with each issue separately below.

I. Jurisdiction over Richard Larson

A. Conspiracy Theory

Plaintiff contends that Larson, as CFO of the Company is subject to jurisdiction in Delaware because he was a key participant in the conspiracy with Freer to defraud Plaintiff. "The 'conspiracy theory' of personal jurisdiction does

[9] *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *4 (Del. Super. 2014).
[10] *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).
[11] *Id.* (citing *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

not constitute an independent basis for subjecting an out-of-state resident to personal jurisdiction."[12] Instead, the theory rests on "the notion that, in appropriate circumstances, a defendant's conduct that either occurred or had a substantial effect in Delaware," thus subjecting him to personal jurisdiction in Delaware, "may be attributed to another defendant who would not otherwise be amenable to jurisdiction in this State, if that defendant is a coconspirator."[13] In *Istituto Bancario Italiano v. Hunter Engineering Co.*, the Delaware Supreme Court set forth a five-part test for establishing conspiracy jurisdiction.[14] According to the *Istituto* test, Plaintiff must make a factual showing that:

> (1) a conspiracy to defraud existed; (2) the defendant [in this case, Larson] was a member of that conspiracy; (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in [Delaware]; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.[15]

Delaware courts have consistently construed this test narrowly, requiring "a plaintiff to assert specific facts, not conclusory allegations,"[16] because this theory

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[12] *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *9-10 (Del. Ch. June 15, 2011) *aff'd*, 38 A.3d 1254 (Del. 2012).
[13] *Id.*
[14] *See Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982).
[15] *Id.*
[16] *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *10.

of personal jurisdiction would otherwise afford "an easy technique to evade the thrust of *International Shoe*."[17] However, a defendant who has voluntarily participated in a conspiracy "with knowledge of its…effects in the forum state can be said to have purposefully availed himself of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws."[18]

Here, Plaintiff alleges that the out-of-state activities by non-resident defendants, Freer and Larson, directly affected Plaintiff, a Delaware corporation, causing Plaintiff to pay substantially more for the assets of the Company than they otherwise would have paid. However, the Court finds that the Plaintiff has failed to meet the requirements set forth by the Delaware Supreme Court in *Istituto Bancario* to establish conspiracy jurisdiction as it relates to Larson.

Plaintiff does not allege that any of the actions by Freer and Larson occurred in Delaware nor that the negotiations or execution of the Agreement occurred here. Instead they rely on the wording "substantial effect" in the *Istituto Bancario* test to plead conspiracy jurisdiction. In essence, Plaintiff asserts that simply by virtue of their incorporation in Delaware and Larson's alleged fraudulent acts as CFO of AMF, they have established a "substantial effect" to satisfy the third prong of the *Istituto* test. The Court disagrees. As the Court of

[17] *Carlton Invs. vs. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at *12 (Del. Ch. Nov. 21, 1995).
[18] *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d at 225.

Chancery held in *Iotex Communications v. Defries*, "in the case of Delaware corporations having no substantial physical presence in this State, an allegation that a civil conspiracy caused injury to the corporation by actions wholly outside this State will not satisfy the requirement found in the Supreme Court's opinion in *Istituto Bancario* of a 'substantial effect ... in the forum state.'"[19] Unlike the cases it cites, Plaintiff is not headquartered in Delaware nor is Delaware its principal place of business. Certainly if the actions in *Iotex*, where the use of a Delaware Corporation was alleged to be the vehicle of fraud, were found not to be sufficient, the mere fact that a company incorporated in Delaware was injured by a third party cannot be a justifiable basis for jurisdiction. Here, Plaintiff's connection to Delaware is simply their incorporation status, and the Court finds that alone will not support the "substantial effect" requirement of the *Istituto* test. Therefore, the Court finds jurisdiction over Larson under conspiracy theory is unsupportable.

B. Closely Related to APA

Plaintiff also contends that Larson is subject to jurisdiction in Delaware because he was "closely related" to the APA, which contains a forum selection clause indicating Delaware is the proper forum.[20] Plaintiff concedes that

[19] *Iotex Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *8 (Del. Ch. Dec. 21, 1998).

[20] *See* 6 *Del. C.* § 2708 (6 *Del. C.* § 2708 governs choice of law provisions in contracts and provides that parties to a contract may agree in writing that the contract shall be governed under the laws of Delaware, or that the laws of this State shall govern the contract in whole or in part.)

Defendant Larson was a non-signatory to the APA; but, argues that even as a non-signatory he is bound by the forum selection clause because he held a pivotal role in the creation, communication and execution of the fraud. Delaware Courts use a three-part test to determine whether non-signatories are bound by a forum selection clause: "'First, is the forum selection clause valid? Second, are the [non-signatories] third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the ... agreement?' If all three questions are answered in the affirmative, the forum selection clause will bind the non-signatory."[21] Defendants have not challenged the validity of the forum selection clause nor that the Complaint relates to the APA. Therefore, the issue before the Court is whether Larson meets the "closely related" requirement.

Delaware Courts have consistently held that a non-signatory may be found to be closely related to a contract in two ways: "1) the party receives a direct benefit from the agreement or 2) it was foreseeable that the party would be bound by the agreement."[22] Here, Plaintiff has not sufficiently pled with specific facts that Larson received a direct benefit from the agreement. In fact, during oral argument Plaintiff admitted they have no facts to allege any direct benefit to

[21] *Baker v. Impact Holding, Inc.*, No. 2010 WL 1931032, at *3 (Del. Ch. May 13, 2010) (quoting *Capital Grp. Cos. v. Armour,* 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004) (revised Nov. 3, 2004)).
[22] *Id.* at *4.

Larson under the APA. Plaintiff simply states that Mr. Larson went along with the scheme "based on Freer's promises of payment and future employment post-transaction, which Freer reneged on, leaving Larson without a job."[23] This conclusory allegation is not enough to support the assertion that Larson received a direct benefit from the APA, and moreover, it does not allege that these "promises of payment and future employment" were even related to the APA or the illegal conduct. There is nothing to suggest that Larson personally benefitted from the Agreement or embraced it in a manner that would bind him to the forum clause selected by other individuals. Thus, the question for the Court is whether it was foreseeable that Larson would be bound by the Agreement.

Delaware courts have held that a forum selection clause applies to non-signatory officers and directors who are "closely related to one of the signatories such that *the non-party's enforcement of the clause is foreseeable* by virtue of the relationship between the signatory and the party sought to be bound."[24] In the Delaware cases cited by Plaintiff, the Court has held that non-signatory officers and directors of a signatory corporation could enforce the forum selection clause

[23] Compl. ¶ 6.

[24] *ASDC Holdings, LLC, et al. v. The Richard Malouf 2008 All Smiles Grantor Retained Annuity Trust, et al.*, 2011 WL 4552508 at *7 (Del. Ch. Sept. 14, 2011) (emphasis added).

of an agreement against other signatories.[25] In *Ashall Homes*, the Delaware Supreme Court held that non-signatories can enforce a forum selection clause against a signatory where it is foreseeable that the non-signatories could enforce the clause because they (1) "solicited" plaintiffs to participate in the transaction, (2) "managed" the acquisition, and (3) "are being sued by the [plaintiffs] as a result of acts that the [plaintiffs] themselves contend directly implicate the negotiation of and performance under the [agreement]."[26]

Plaintiff contends that the same test may be used when a signatory is attempting to enforce a forum selection clause against a non-signatory. However, the Court does not agree. It makes sense that a signatory to an agreement, who has endorsed and consented to be bound by such agreement, should generally be bound by a forum selection clause in that agreement. As such a non-signatory who is being sued by a signatory may reasonably assert the forum selection clause should be enforced to require the signatory to only bring suit in the forum selected. However, the opposite is true here. Here, Plaintiff, a signatory to the Agreement, is attempting to use the forum selection clause of the Agreement to bind a non-signatory, Larson. Not only does the Court find such action generally

[25] *See e.g. ASDC Holdings*, 2011 WL 4552508 at *7; *Baker v. Impact Holding, Inc.*, 2010 WL 1931032, at *1 (Del. Ch. May 12, 2010); *Ashall Homes Ltd. v. ROK Entertainment Grp., Inc.*, 992 A.2d 1239, 1241, 1248-49 (Del. Ch. Apr. 23, 2010).
[26] *Ashall Homes*, 992 A.2d at 1241, 1249.

inappropriate, Plaintiff here does not allege sufficient facts to show that Larson solicited their involvement in the acquisition, nor that he managed the negotiation, drafting or execution of the transaction.[27] There is no question that as CFO Larson had some involvement in this transaction, but there is no basis to find that it was foreseeable that Larson would be bound by the forum selection clause or the APA itself. Thus, the Court finds there is no personal jurisdiction over Larson and the Motion to Dismiss him from the litigation is granted.

II. Rule 12(b)(6) Failure to State a Claim

Defendants also allege that Counts I-V of the Complaint should be dismissed for failure to state a claim. The Court will address each Count separately below.

A. Count I: Fraudulent Inducement

Because Larson has been dismissed based on this Court's lack of personal jurisdiction over him, the Court will only analyze the fraudulent inducement claim as asserted against Freer and JTF (collectively, the "JTF Defendants"). The JTF Defendants contend that Plaintiff's fraudulent inducement claim should be dismissed because: (1) Plaintiff fails to plead fraud with the required particularity;

[27] *See e.g.* Compl. ¶¶ 27, 58-59, 61-64, 66, 68, 70-71, 91-93, 95-96, 103-104, 115-116.

(2) Plaintiff fails to plead a misrepresentation of a material *fact*; (3) Plaintiff fails to plead knowledge; and (4) Plaintiff fails to plead justifiable reliance.

Superior Court Civil Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[28] The particularity pleading standard requires a plaintiff to plead "the time, place and contents of the false representations."[29] However, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally."[30]

In order to survive a motion to dismiss a fraud claim, a plaintiff must allege that: (1) defendant falsely represented a material fact or omitted facts that the defendant had a duty to disclose; (2) defendant knew that the representation was false or made with a reckless indifference to the truth; (3) defendant intended to induce plaintiff to act or refrain from action; (4) plaintiff acted in justifiable reliance on the representation; and (5) plaintiff was injured by its reliance on defendant's representation.[31]

[28] Super. Ct. Civ. R. 9(b).

[29] *Browne v. Robb*, 583 A.2d 949, 955 (Del. 1990) (internal quotations omitted).

[30] Super. Ct. Civ. R. 9(b).

[31] *See ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006).

1. *Rule 9(b) Particularity*

Rule 9(b) requires the "circumstances" of fraud be pled with particularity and include: "(1) the time, place, and the false representation; (2) the identity of the person making the representation; and (3) the misrepresenter's intended gain."[32] "Under Delaware law, a fraud claim can be based on representations found in a contract or on material statements or omissions outside of the contract."[33]

a. Fraud Based on the APA

Freer contends that he did not personally make any contractual representations under the APA and, therefore, only JTF can be held liable for allegedly false Financial Statements. It is well-settled law that officers and directors may be liable for tortious misconduct even though they were acting on behalf of the business.[34] In *Anvil Holding Corp. v. Iron Acquisition Co.*, the Delaware Court of Chancery was confronted with a similar argument to the one Freer asserts here.[35] There, the individual defendants argued that they could not be liable for fraud based on misrepresentations under the agreement because the

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[32] *L&R Saunders Assoc. v. Banks of America*, 2012 WL 4479232, at *4 (Del. Super. Sept. 12, 2012).

[33] *Ameristar Casinos, Inc. v. Resorts Int'l Holdings, LLC*, 2010 WL 1875631, at *11 (Del. Ch. May 11, 2010).

[34] *See e.g. Anvil Holding Corp. v. Iron Acquisition Co.*, 2013 WL 2249655, at *6 (Del. Ch. May 17, 2013); *T.V. Spano Bldg. Corp. v. Wilson*, 584 A.2d 523, 530 (Del. Super. 1990) ("[C]orporate officers are liable for their tortious conduct even though they were acting officially for the corporation in committing the tort.").

[35] *See Anvil Holding Corp.*, 2013 WL 2249655, at *6.

representations were made by the company, not the individual defendants.[36] However, the Court of Chancery found that the complaint adequately stated a claim for fraud against the individual defendants because, in addition to meeting the five factors to state a claim for fraud, the individual defendants were senior management at the company and they attended meetings with the plaintiff–buyer regarding the agreement.[37]

Here, Freer, the founder, President and CEO of AMF, not only made numerous oral and written representations to Plaintiff about AMF, Plaintiff also alleges that Freer "concocted" the fraudulent scheme.[38] Plaintiff asserts that Freer, to artificially show growth and increase EBIDTA, inflated the A/R by increasing the number of flights conducted by AMF in 2013 or by mischaracterizing them even though he knew AMF would not collect the full amount charged.[39] Plaintiff avers that Freer knew this practice overstated the EBITDA of AMF, in violation of GAAP, by approximately $30 million and was designed to induce Plaintiff to enter into the APA.[40] Plaintiff alleges that it relied on Freer's statements and representations, and as a result, suffered damages in excess of $25 million.[41] Freer

[36] *See id.*
[37] *See id.* at *7.
[38] *See* Compl. ¶¶ 4, 21, 91.
[39] *See* Compl. ¶¶ 26-32, 90.
[40] *See id.* ¶¶ 33-55, 58-72, 78-87, 91.
[41] *See id.* ¶¶ 94-96.

was directly involved in seeking potential buyers for AMF and hired the financial advisor responsible for identifying and attracting potential buyers.[42] Because of Freer's role as a President and CEO, and his involvement in the negotiation and sale of AMF to Plaintiff, Plaintiff has sufficiently alleged a claim against him for fraudulent inducement.

b. Bootstrapping

The JTF Defendants next argue that Plaintiff's fraud claims are "impermissibly bootstrapped" to its breach of contract claims. A fraud claim can be based on representations found in a contract; however, "where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort."[43] Under Delaware law, a plaintiff "cannot 'bootstrap' a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to *perform* its obligations."[44] In other words, "a plaintiff cannot state a claim for fraud simply by adding the term 'fraudulently induced' to a complaint."[45] "Essentially, a fraud claim alleged contemporaneously

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[42] *See id.* ¶¶ 18-20.

[43] *Ameristar Casinos*, 2010 WL 1875631, at *11; *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co.*, 2005 WL 445710, at *3 (Del. Super. 2005).

[44] *Furnari*, 2014 WL 1678419, at *8 (quoting *Narrowstep Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch. 2010)) (emphasis added).

[45] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *17 (Del. Ch. 2010).

with a breach of contract claim may survive, so long as the claim is based on conduct that is separate and distinct from the conduct constituting breach."[46] Allegations that are focused on *inducement* to contract are not barred by the bootstrapping doctrine.[47]

Here, Plaintiff's fraud claims are not bootstrapped to its contract claims. Plaintiff alleges that the JTF Defendants fraudulently *induced* Plaintiff to enter into the APA.[48] Critically, any alleged fraud occurred *before* the parties entered into the APA. Therefore, Plaintiff's claim for fraudulent inducement against the JTF Defendants is not barred by the bootstrapping doctrine.

2. *Misrepresentation of a Material* Fact

The JTF Defendants next contend that the fraud claim relates solely to the calculation of a GAAP-compliant estimate of AMF's A/R and not an actual misstatement of fact. To state a claim for fraud, the alleged misrepresentations must be based on a misstatement of fact.[49] Representations regarding future conduct and predictions are insufficient.[50] Similarly, mere expressions of opinion do not give rise to actionable fraud.[51] However, "even an opinion may rise to the

[46] *Furnari*, 2014 WL 1678419, at *8 (internal quotations omitted).
[47] *See Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *16-17 (Del. Ch. 2013); *Brasby v. Morris*, 2007 WL 949485, at *6-7 (Del. Super. 2007).
[48] *See* Compl. ¶¶ 92-93.
[49] *See L&R Saunders*, 2012 WL 4479232, at *4.
[50] *See id.*
[51] *See Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 554 (Del. Ch. 2001).

level of a misstatement of fact when made by one with special or superior knowledge."[52] In *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, the Court of Chancery dismissed fraud claims against the defendants because "[n]otably absent from the complaint [were] particularized allegations identifying what aspects of [the company's] financial statements were tainted by improper accounting practices . . . ."[53]

Here, Plaintiff has adequately alleged that the JTF Defendants falsely represented a material fact. Plaintiff alleges that the JTF Defendants improperly inflated the A/R in 2013, which in turn, improperly inflated the 2013 EBITDA.[54] Such inflation of A/R is a statement of past fact—not one of opinion or future conduct. Plaintiff alleges this conduct occurred before the parties entered into the APA in an effort to induce them into entering the APA.[55] Plaintiff further details Freer's involvement in preparing the 2013 Financial Statements.[56] Additionally, compared to Plaintiff, Freer was in a position of superior knowledge to know whether the AMF's 2013 EBITDA was accurate. Unlike *Trenwick*, Plaintiff identifies specific improper accounting practices in the 2013 Financial

[52] *Tam v. Spitzer*, 1995 WL 510043, at *8 (Del. Ch. Aug. 17, 1995).
[53] *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 208 (Del. Ch. 2006) *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007).
[54] *See* Compl. ¶ 90.
[55] *See id.* ¶¶ 33-39.
[56] *See id.* ¶¶ 33-57.

Statements.[57] Therefore, Plaintiff has adequately alleged a misrepresentation of a material fact.

3. *Knowledge of Falsity*

The JTF Defendants further argue that the alleged 2013 EBITDA and A/R inflation resulted from a $30 million CLA Audit Adjustment proposed by the independent accountants; and, therefore, Freer did not know CLA's estimates were materially false. While Superior Court Civil Rule 9(b) provides that "knowledge…may be averred generally," Delaware courts have held "where pleading a claim of fraud…that has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this 'something' was knowable and that the defendant was in a position to know it."[58]

Here, the "something" that the JTF Defendants allegedly knew was that the A/R was falsely inflated. The Complaint alleges that Freer "concocted" the scheme to overstate A/R and that he personally participated in the manipulation of the Financial Statements. The Complaint specifically alleges that Freer "knowingly concealed" AMF's true financial condition,[59] "knew all along" that

[57] *See id.*
[58] *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs., Inc.*, 854 A.2d 121, 147 (Del. Ch. 2004) (quoting *IOTEX*, 1998 WL 914265, at *4).
[59] *See* Compl. ¶ 2.

Medicare Flights were unprofitable, "knew" that the 28 percent collections rate was an overstatement, "knew" that the EBITDA representation "was false," and the 2013 Financial Statements were "knowingly, intentionally, and purposefully false."[60] Accordingly, Plaintiff has sufficiently pled that the "something" here was knowable and that the JTF Defendants had knowledge of it.

4. *Justifiable Reliance*

The JTF Defendants make two arguments here to support their Motion: (1) that the Plaintiff could not rely on the 2013 EBITDA calculation, as a matter of law, because the APA disclaimed reliance; and (2) that the Plaintiff could not factually rely on the 2013 EBITDA calculation.

First, Freer contends that Section 12.2 of the APA precludes Plaintiff from relying on any representations made prior to entering into the APA. Section 12.2 states in pertinent part:

> The Disclosure Schedule, the Schedules and the Exhibits referenced in this Agreement are incorporated into this Agreement and collectively with the Confidentiality Agreement and this Agreement contain the entire agreement between the parties hereto with respect to the transactions contemplated hereunder, and *supersede all* negotiations, *representations*, *warranties*, commitments, offers, contracts and writings prior to the date hereof, including the letter of intent dated, February 7, 2014, between the Vistria Group, LP and Seller.[61]

[60] *See id.* ¶ 29, 36, 58, 70, 91-92.

[61] (emphasis added).

Delaware courts have "held that integration clauses will not be given effect to bar allegations of fraudulent inducement based on extra-contractual statements made before the effectuation of the contract unless such clauses contain an explicit anti-reliance representation."[62] In *MicroStrategy Inc. v. Acacia Research Corp.*, the defendant argued that the integration clause of the contract disclaimed reliance.[63] The integration clause at issue in *MicroStrategy* stated that the contract "constitutes and contains the entire agreement among the [parties] and supersedes any and all prior negotiations, conversations, correspondence, understandings, and letters respecting the subject matter hereof."[64] The Court there held that the integration clause did not contain an explicit anti-reliance expression; therefore, the plaintiff was not precluded from alleging justifiable reliance in support of its fraud claim.[65]

Just as in *MicroStrategy*, the integration clause here, Section 12.2 of the APA, does not contain an explicit disclaimer of reliance. Section 12.2 is nearly identical to the provision at issue in *MicroStrategy*, wherein the Court found that the plaintiff could appropriately bring a claim for fraud based on reliance on the contract's representations. Because Section 12.2 is not an anti-reliance disclaimer,

[62] *MicroStrategy*, 2010 WL 5550455, at *13.
[63] *See id.*
[64] *Id.*
[65] *See id.*

Plaintiff may plead justifiable reliance if the Complaint satisfies the factual pleading requirements of Rule 9(b).

Second, the JTF Defendants argue that Plaintiff could not rely on the $40.8 million in A/R in the 2013 Financial Statement because an exhibit to the APA stated that the A/R was only $16 million. Delaware courts have held that the "reasonableness of one's reliance on false information depends on all of the circumstances," and is necessarily a question of fact.[66]

The Court finds at this stage of the litigation, Plaintiff reasonably and justifiably relied on the Financial Statements representation. Section 4.13(a) of the APA warranted that "[t]he Financial Statements were prepared in accordance with GAAP consistently applied and present fairly the financial position and results of operations of [AMF] at the dates and for the periods indicated."[67] If the Court were to hold that Plaintiff could not justifiably rely on the $40 million A/R contained in the 2013 EBITDA, then Section 4.13(a) would be held meaningless. Additionally, at oral argument, it was discussed that the $16 million A/R figure in the APA was created solely for the fair distribution of taxes and was not the true fair market value given to A/R by the Plaintiff. Thus, Plaintiff has pleaded

[66] *Vague v. Bank One Corp.*, 2004 WL 1202043, at *1 (Del. May 20, 2004).
[67] Compl. ¶ 74.

sufficient facts to show justifiable reliance on the $40.8 million figure in the 2013 Financial Statements.

Based on the allegations in the Complaint, it is reasonably conceivable that Plaintiff could prove that the AMF's Financial Statements were false and that the JTF Defendants not only knew that AMF was making false representations and warranties, but actively concealed accounting methodologies from Plaintiff with the intent to induce Plaintiff to enter into the APA. Plaintiff has alleged sufficient facts to show that it justifiably relied on the JTF Defendants' representations and that if Plaintiff knew the truth of the Financial Statements, it would not have entered into the APA or would have paid less than it did. For all of these reasons, the JTF Defendants' Motion to Dismiss Count I of the Complaint is denied.

B. Counts II & III: Breach of Contract and Breach of Warranty

The JTF Defendants next argue that Counts II and III should be dismissed because: (1) Plaintiff fails to plead the requisite damages for a breach of contract claim; and (2) only AMF—not Freer—made representations and warranties in the APA.

1. *Damages*

To state a claim for breach of contract, a plaintiff must allege: (1) the existence of a contract; (2) a breach by defendant of an obligation pursuant to the

contract; and (3) damage to the plaintiff as a result of the defendant's breach.[68] A complaint for breach of contract is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief."[69] "Such a statement must only give the defendant fair notice of a claim and is to be liberally construed."[70]

The Complaint alleges that as a result of the JTF Defendants' breach, Plaintiff would not have entered into the APA, or would have paid less for AMF's assets.[71] Specifically, the Complaint alleges that the JTF Defendants represented that AMF's EBITDA was $40.8 million even though in reality it was only $11 million.[72] Plaintiff alleges that if it knew the true EBITDA, it would not have agreed to the $80 million purchase price.[73] Such allegations are sufficient under Superior Court Civil Rule 8(a)(1) to put the JTF Defendants on notice of its claim.

2. *Representations and Warranties of "Seller"*

Freer next contends that he cannot be liable for breach of the representations and warranties in the APA because the representations and warranties at issue

[68] *See VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).
[69] Super. Ct. Civ. R. 8(a)(1); *See also VLIW Tech.*, 840 A.2d at 611.
[70] *VLIW Tech.*, 840 A.2d at 611.
[71] *See* Compl. ¶ 104.
[72] *See id.* ¶¶ 2, 58-63, 104, 108.
[73] *See id.* ¶ 104.

were only made by the "Seller," which is defined in the APA as Aviation West Charters, Inc.

"It is a general principle of contract law that only a party to a contract may be sued for breach of that contract. Indeed, Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually."[74]

Here, pursuant to the clear language of the APA, Freer did not make any contractual representations or warranties under Sections 4.13 or 4.14. According to the APA, "Seller" is defined as Aviation West Charters, Inc, "Shareholder" is defined as Jeremy Freer, and "Seller Parties" is defined as both Aviation West Charters, Inc. and Jeremy Freer. Article IV of the APA contains the representations and warranties given by "Seller." The plain language of Sections 4.13 and 4.14 of the APA do not contain any representation or warranty given by the "Shareholder" or "Seller Parties."

Plaintiff contends that Freer's involvement in preparing the Financial Statements binds him to the contract. While this may support a fraud claim against Freer, as the Court has found above, it will not support a breach of contract claim against him where he did not make any contractual representations or

[74] *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999).

warranties that Plaintiff alleges he breached. Therefore, Defendant's Motion to Dismiss Counts II and III against Freer is granted; and against JTF is denied.

C. Count IV: Breach of Implied Covenant Good Faith and Fair Dealing

The JTF Defendants next argue that Count IV of the Complaint should be dismissed because it "rehashes" the other claims asserted in the Complaint.

"Every contract in Delaware has an obligation of good faith and fair dealing, which is implied into the agreement by law. This implied covenant was created to promote the spirit of the agreement and to protect against one side using underhanded tactics to deny the other side the fruits of the parties' bargain."[75] "The covenant is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions."[76] However, existing contract terms control such that the implied covenant does not create a "free-floating duty . . . unattached to the underlying legal document."[77]

To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify a specific implied contractual obligation, a breach

[75] *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at *10 (Del. Super. Jan. 17, 2002).
[76] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).
[77] *Dunlap*, 878 A.2d at 441.

of that obligation, and damages resulting from the breach.[78] The court's focus is whether, at the time of contract formation, the parties would have prohibited the conduct had they contemplated it or thought to negotiate about it.[79] A plaintiff must allege the breaching party's actions were motivated by an improper purpose reflecting bad faith.[80] Applying the implied covenant in Delaware has been described as a "cautious enterprise."[81]

This Court confronted a similar situation to the instant case, and concluded that there was an implied obligation not to distort the financial condition of a company pursuant to a merger agreement.[82] In *Kelly v. McKesson HBOC, Inc.*, specific provisions in the parties' merger agreement set forth obligations to accurately and timely disclose the financial position, practices, and results.[83] The plaintiffs alleged that the defendant "violated the implied covenant of good faith and fair dealing when it misrepresented, omitted, and failed to disclose material facts concerning the defendant's financial condition and artificially inflated their stock price during the [ ] valuation period."[84] The Court found that the Complaint

[78] *See Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).
[79] *See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).
[80] *See Dunlap*, 878 A.2d at 442.
[81] *Cincinnati SMSA*, 708 A.2d at 992.
[82] *See Kelly*, 2002 WL 88939, at *10.
[83] *See id.*
[84] *Id.*

stated an implied covenant claim because "[i]mplied in the contractual terms is the understanding that the [d]efendant would refrain from distorting its financial condition so as to not adversely affect the value of its stock which was to be used as the linchpin to the [p]laintiffs' bargain."[85]

The Court finds that the Complaint here sufficiently states a claim for the implied covenant of good faith and fair dealing. Plaintiff alleges selective disclosure of due diligence information, creation of accounting manipulations, and abuse of the negotiating process, all of which constitute bad faith actions inconsistent with the implied covenant. Plaintiff's implied covenant arises out of Sections 4.13(a)–(b) and 4.14(a), which state that "[t]he Financial Statements were prepared in accordance with GAAP consistently applied and present fairly the financial position and results of operations of [AMF] at the dates and for the periods indicated." The implied covenant found in these provisions is that JTF would not artificially inflate any of the A/R in the Financial Statements that would induce Plaintiff to pay a higher price than it otherwise would if it knew the truth of the financial condition of AMF.

[85] *Id*.

However, as discussed above, Freer did not make any representations or warranties under Sections 4.13 or 4.14 of the APA. Therefore, Defendants' Motion to Dismiss Count IV as to Freer is granted but is denied as to JTF.

D. Count V: Civil Conspiracy

Finally, the JTF Defendants argue that Plaintiff's civil conspiracy claim fails for three reasons: (1) Plaintiff has failed to state a predicate tort to support this claim; (2) a corporation cannot conspire with its officers or agents; and (3) Plaintiff has failed to identify any conduct in furtherance of the alleged conspiracy.

To state a claim for civil conspiracy, Plaintiff must allege "(i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties."[86] A claim for civil conspiracy is not a separate cause of action; instead, the underlying claim must be an independent tort action such as fraudulent inducement.[87] Civil conspiracy cannot be attached to claims for fraudulent transfer, breach of contract, or breach of the implied covenant of good faith and fair dealing."[88]

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[86] *Strong v. Wells Fargo Bank*, 2012 WL 3549730, at *3 (Del. Super. July 20, 2012).
[87] *See Cornell Glasgow, LLC v. LaGrange Properties, LLC*, 2012 WL 3157124, at *5 (Del. Super. Aug. 1, 2012).
[88] *See id.*

As discussed above, Plaintiff has stated a claim for fraudulent inducement against Freer and JTF. This fraudulent inducement claim serves as the independent tort action upon which the civil conspiracy claim attaches. Thus, Plaintiff has adequately stated a claim to attach its assertion of civil conspiracy. That, however, does not end the inquiry.

A claim for civil conspiracy cannot survive a motion to dismiss if there are not sufficient facts to establish the conspiratorial relationship and an overt act in furtherance of the conspiracy occurred or had a substantial effect in Delaware.[89] The Complaint here fails in this respect.

In addition to the fact that the Court has dismissed Larson from this litigation, even if the Complaint sufficiently stated an agreement between Freer and Larson to inflate the A/R, Plaintiff does not allege that any conduct in furtherance of the conspiracy occurred in Delaware. Merely asserting that the Plaintiff was a victim of the conspiracy and there was a substantial effect because of its status as a Delaware corporation is not sufficient.[90] Here the alleged overt acts are the misrepresentations and misstatements regarding AMF 2013 EBITDA. There is no dispute that none of this conduct occurred in Delaware. Therefore, the

[89] *See Hartsel*, 2011 WL 2421003, at *10.
[90] *See Iotex*, 1998 WL 914265, at *7.

civil conspiracy claim under Count V between Freer and Larson must be dismissed.[91]

CONCLUSION

For the aforementioned reasons, Defendants' Motion to Dismiss as to Defendant Larson is **GRANTED**, and Defendants' Motion to Dismiss Counts I-V is **GRANTED in part** and **DENIED in part.**

IT IS SO ORDERED.

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

[91] While the Defendant has also argued that the conspiracy count should be dismissed, since a corporation cannot conspire with its officers, Count V of the Complaint does not allege that such conduct occurred. As such, this argument will not be addressed.