IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT O'LEARY and DAVID GUALCO	)	
	)	CIVIL ACTION NUMBER
Plaintiffs	)	10C-03-108-JOH
v.	)	
TELECOM RESOURCES SERVICE, LLC, NAL WORLDWIDE, LLC, LAKE CAPITAL MANAGEMENT, LLC, PAUL SAN MIGUEL and JOHN O'BRIEN	)	
Defendants	)	

Submitted: December 2, 2010
Decided: January 14, 2011

MEMORANDUM OPINION

Upon Motion of Plaintiffs for Judgment on the Pleadings - ***DENIED***

Upon Motion of Defendants O'Brien and San Miguel to Dismiss the Intentional Infliction of Emotional Distress Claim - ***GRANTED***

Upon Motion of Defendant Lake Capital Management to Dismiss Breach of Contract Claim - ***GRANTED***

Upon Motion of Defendants O'Brien and San Miguel to Dismiss Tortious Interference Claim - ***DENIED***

Appearances:

Douglas B. Catts, Esquire, and Kathryn J. Garrison, Esquire, of Schmittinger & Rodriguez, Dover, Delaware, Attorneys for Plaintiffs

Philip A. Rovner, Esquire, and Jonathan A. Choa, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, and Terrence J. Dee, Esquire, and Jordan M. Heinz, Esquire, of Kirkland & Ellis, Chicago, Illinois, Attorneys for the Defendants

HERLIHY, Judge

To understand the myriad motions pending before the Court, it is best to outline the various causes of action the plaintiffs, Robert O'Leary and David Gualco, have bought against the various defendants. To further put their claims in context, this matter and the motions, a truncated factual statement is helpful.

Plaintiffs owned a business which was involved in the purchase and resale of the telecommunications equipment. Their business also provided test, repair and engineering services of telecommunications equipment.[1] They sold their business in a contract entitled an Asset Purchase Agreement ("APA"). Each plaintiff entered into a Senior Management Agreement ("SMA") with an entity known then as TRS Acquisition, LLC.

Plaintiffs' complaint contains eleven separate causes of action against all or various defendants as follows:

1. Breach of the SMA's against Telecom Resource Service, LLC, ("TRS"), NAL Worldwide, LLC, ("NAL")[2], and Lake Capital Management, LLC, ("Lake");

2. Fraudulent inducement against TRS and NAL;

3. Breach of the APAs against TRS and NAL;

4. Bad Faith and Breach of Contract against TRS, NAL, and Lake;

5. Defamation against TRS, NAL, defendants John O'Brien and Paul San Migel;

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[1] Plaintiffs' Complaint ¶ 10.

[2] NAL is now known as Syncreon Technology USA, LLC, but will for ease of reference remain NAL in this opinion.

6. Outrageous Conduct Causing Severe Emotional Distress against TRS, NAL, O'Brien and San Miguel;

7. Tortious Interference with the APA and SMA's against O'Brien and San Miguel;

8. Declaratory Judgment regarding (sic) Covenant Not to Compete.

9. Wrongful Failure to Pay Lost Wages/Expenses by Gualco against TRS and NAL;

10. Conversion against TRS and NAL;

11. Conversion of Accounts Receivable against TRS and Gualco.

Of the specifically pled damages, plaintiffs' claims exceed $15,000,000.00.

Plaintiffs have moved for judgment on the pleadings on Count 8, their declaratory judgment action seeking to have the non-compete clause declared unenforceable. Defendant Lake moves to dismiss the claims against it for breach of the plaintiffs' SMAs (Count 1) and Count 6 which is really a claim for intentional infliction of emotional distress ("IIED"). Defendants San Miguel and O'Brien move to dismiss Count 6 and Count 7, tortious inference.*

Factual Background & Allegations

Plaintiffs O'Leary and Gualco sold their business, Telecom Resource Service, LLC to TRS Acquisition LLC ("TRS"), a solely-owned subsidiary of NAL which was created to purchase their business. The introductory paragraph of the APA states:

* All parties have indicated they do not oppose the Court converting the motions to dismiss to ones for summary judgment since items were added in the briefing beyond the complaint.

> ASSET PURCHASE AGREEMENT (this "**Agreement**"), dated as of August 31, 2007, by and among Telecom Resource Service, LLC, a California limited liability company ("**Seller**"), Robert O'Leary, Lisa O'Leary, David Gualco and Kathryn Gualco (together, the "**Equity Owners**" and each an "**Equity Owner**"), TRS Acquisition LLC, a Delaware limited liability company ("**Buyer**") and NAL Worldwide LLC, a Delaware limited liability company ("**NAL Worldwide**"). Certain terms used herein are defined in Section 7.10 hereof.

Lake is the parent company of NAL. Plaintiffs allege that Lake was "heavily involved in negotiating the sale,"[3] and that Lake "ratified and approved all acts of both companies."[4]

Plaintiffs sold their business with various terms, particularly these financial terms:

> 14. The contract for the sale of TRS is entitled the Asset Purchase Agreement ("APA"), and it was entered into between Plaintiffs, their wives, TRS Acquisition, LLC and NAL. Pursuant to the terms of the APA, Plaintiffs sold TRS' assets to TRS Acquisition LLC in exchange for a sale price of $1,000,000.00, which was to be adjusted based on the difference in working capital of TRS with the $1,000,000 estimate, as assessed at the time of closing within 150 days of closing. In addition, Plaintiffs would continue to accrue "earnouts" for calendar years 2008 to 2010 depending on the EBITDA (Earnings Before Interest, Taxes, Depreciation and Amoritization) of TRS. The total of the potential earnout payments was$1,000,000.00. If EBITDA for any calendar year through 2010 exceeded $2,000,000.00 Plaintiffs would also have been granted 0.50% equity options in NAL. In Article VIII of the APA, NAL guaranteed full and timely payment of the earnouts to Plaintiffs.
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> 15. Pursuant to section 2.2 of the APA $200,000.00 of the $1,000,000.00 purchase price was to be deposited in an escrow account with the Bank of New York and to be administered and payable in accordance with an

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[3] Compl. ¶13.

[4] Compl. ¶¶5 and 6.

> escrow agreement (the "escrow agreement"), attached as Exhibit A to the APA and also executed on August 31, 2007. The funds were to be held in escrow to allow for indemnification of NAL or TRS in the event they filed a claim for or became entitled to indemnification under the terms of the APA during the first two years after closing. One half of the funds in escrow, less any amount subject to pending clams, was to be paid to Plaintiffs on the first anniversary of the closing date. The second half, less any amount subject to pending claims, was to be paid to Plaintiffs on the second anniversary of the closing date. $100,00 was duly released to Plaintiffs on their one-year anniversary date as required in the escrow agreement. The escrow agreement was entered into between TRS, TRS Acquisition LLC and The Bank of New York Trust Company (the "escrow agent").[5]

Each plaintiff entered into employment agreements with TRS Acquisitions, LLC,[6] which were memoralized in SMAs providing in part as follows:

> 16. Each Plaintiff was employed by TRS under a written contract of employment with TRS Acquisition LLC that was for a period of three years. The employment contacts are entitled Senior Management Agreements ("SMAs"). Plaintiffs were to receive an annual base salary of $125,000.00, which would increase to $150,000 once TRS achieved an "Annual EBITDA Run Rate" of no less than $300,000.00 for three consecutive months. The Board of Managers of TRS would also perform an annual review after 2008 and had the option to increase Plainitffs' salaries.
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> 17. In addition to their salaries, Plaintiffs were also eligible for discretionary bonuses following the end of each full fiscal year they had been employed by TRS. Each Plaintiff was to receive 50% of a discretionary bonus pool set up by TRS, which would contain 10% of

[5] Compl. ¶¶14 and 15.

[6] TRS Acquisitions shortly after it acquired plaintiffs' company changed its name to what is now Telecom Resources, LLC - (TRS).

TRS' "Incremental Company EBITDA."[7]

Each SMA and the APA contained covenants which essentially outlined that the plaintiffs may not directly or indirectly "own, operate, manage, control, engage in, invest in, be employed by or participate in any manner in, act as consultant or advisor to, render services for…any entity competitive with the Business of TRS anywhere in the United States for a period of four (4) years from the closing date of August 31, 2007."[8]

On November 11, 2008 Plaintiffs were terminated, allegedly, for cause from their positions as vice presidents of TRS. TRS claimed that Plaintiffs were operating several business ventures in violation of their SMAs, particularly with regard to resale of certain telecommunications equipment which was supposed to be recycled. Plaintiffs claim that the resale of this equipment was not prohibited by either the SMA or the APA, and therefore they were wrongfully discharged in breach of their employment contracts.

Further details on the factual background to the case will be provided as appropriate for consideration of each motion.

I. Judgment on the Pleadings - Covenant Not to Compete

A. Parties' Contentions

Plaintiffs move for judgment on the pleadings challenging the validity of the

[7] Compl. ¶¶16 and 17.

[8] Plaintiff's Motion at 1; Complaint at ¶19.

covenant not to compete provisions in the SMAs and APA.[9] They first argue that the covenant not to compete is not related to a legitimate business interest because TRS has "no significant business activity."[10] They contend that the covenant not to compete with the business they sold to defendants TRS/NAL is not reasonably limited in both geography and duration, and therefore facially void. In addition, Plaintiffs assert that they should be excused from performance under the covenant not to compete because TRS/NAL breached the SMAs and the APA.[11]

TRS and NAL oppose Plaintiffs' motion, arguing that Plaintiffs have not met their burden of proof under the "stringent" standard required for a motion on the pleadings. They assert that, although NAL no long sells or repairs telecommunications equipment, it is still "actively engaged in testing, repair, and engineering services for telecommunications equipment."[12] These defendants claim that NAL still has protectable rights under the non-compete agreements, and can enforce them against the Plaintiffs.[13]

B. Applicable Standard

The standard for granting a motion for judgment on the pleadings under Superior Court Civil Rule 12(c) is that such a motion is permissible when no material issues of fact

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[9] Compl., Count 8.

[10] Compl. ¶157.

[11] Compl. ¶158.

[12] Resp. at 2.

[13] Resp. at 2.

remain, and the movant is entitled to judgment as a matter of law. The nonmoving party is entitled to the benefit of any inferences that may fairly be drawn from the pleading.[14] The standard for granting a motion for judgment on the pleadings is stringent.[15]

C. Discussion

The covenants at issue bar the Plaintiffs from directly or indirectly, "in any capacity, own operate, manage, control, engage in, invest in, be employed by or participate in any manner in, act as consultant or advisor to, render services for…any entity competitive with the Business of TRS anywhere in the United States for a period of four (4) years from the closing date of August 31, 2007."[16]

Intent of the parties to a covenant not to engage in a competitive business must be determined in light of the surrounding facts and circumstances. Non-compete covenants are not mechanically enforced.[17] The Court must take "into account both standard concerns of contract formation such as consideration, agreement, or excuse of performance," and a two-prong test limiting non-compete covenants.[18] First, a covenant must be reasonably limited in geography and time. Second, the covenant must advance a legitimate interest of

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[14] *Gonzalez v. Apartment Communities Corp.,* 2006 WL 2905724 (Del. Super. 2006).

[15] *Artisans' Bank v. Seaford IR, LLC*, 2010 WL 2501471 at *2 (Del. Super. 2010).

[16] Compl. At ¶19.

[17] *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 3 (Del. Ch. 1987).

[18] *EDIX Media Group, Inc. v. Mahani*, 2006 WL 3742595 at *7 (Del. Ch. 2006).

the employer or purchaser of a business.[19] A non-compete covenant in a contract is considered to be *for the protection of the purchaser*, for his or its enjoyment of the business, and to build good will.[20]

NAL's Enforceable Right Related to a Legitimate Business Interest

A non-compete provision would be for the benefit of the purchaser, in this case TRS/NAL. Both corporations have a right to enjoy that benefit, even if one is no longer in operation. The law extends NAL's benefits even further. TRS/NAL has a right to assign the covenant to any assignee competing in the same business as the assignor as part of a sale of business assets.[21]

While Plaintiffs have claimed, and defendants have admitted, that TRS itself is not in operation, Plaintiffs have neither claimed nor offered evidence that NAL has ceased its operations. To the contrary, Plaintiffs contend that after their termination when they sought unemployment benefits, NAL opposed them.[22] Additionally, Plaintiffs have never claimed, and even admit in their complaint, that NAL is a signatory to the APA[23] and have

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[19] *EDIX*, 2006 WL 3742595 at *7.

[20] *Tull v. Turek,* 147 A.2d 658, 662 (Del. Ch. 1958)(emphasis added).

[21] *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219 at *12 (Del. Super. 2010); see also, *Caldwell Flexible Staffing, Inc. v. Mays*, 1976 WL 1716 at *2-3 (Del. Ch. 1976).

[22] Compl. ¶76.

[23] Compl. ¶14.

offered no evidence TRS was not the only signatory to the covenant for the sale of their business.

NAL claims that it is still "actively engaged in testing, repair, and engineering services for telecommunications equipment."[24] Plaintiffs submitted reqeusts for admission to NAL among which was this:

> REQUEST FOR ADMISSION NO. 41:
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> Admit that Defendant is no longer in the business of providing, testing, repair and engineering services for telecommunications equipment.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 41:
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> Subject to and without waiving the General Objections and Objections to Definitions set forth above, NAL denies Request for Admission No. 41.[25]

Plaintiffs have not shown that there are no issues of material fact remaining as to whether NAL has a legitimate business interest under the non-compete clause in the APA, and their motion for judgment on the pleadings must therefore fail as to their claim that NAL has no enforceable interest in the non-compete agreement.

Covenant Not Overbroad

Defendants TRS and NAL are correct in their assertion that Plaintiffs ignore cases

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[24] TRS/Syncreon M. at 2.

[25] TRS & NAL's M. Ex. C.

where Delaware courts have upheld non-compete agreements restricting competitive employment for up to five years.[26] Delaware courts have upheld as reasonable non-compete provisions for the sale of a business as long as ten years.[27] The non-compete clause restricted Plaintiffs from competing with TRS for four years from the date the contract was signed on August 31, 2007, not four years from the date of employment termination. This four year period is particularly reasonable considering that it was part of the sale of a business, and they would be employed with TRS at a good salary with chances for bonuses. The Plaintiffs received substantial consideration for the sale of their business and compensation as employees with the prospect of much more for both.

The non-compete clause is also valid as to its national geographical scope. A non-compete covenant will be enforced only over a geographical area reasonable under the circumstances.[28] In Delaware, "the reasonableness of a covenant's scope is not determined by reference to physical distances, but by reference to the area in which a covenantee has an interest the covenants are designed to protect."[29] The overarching intent of a non-compete covenant is to protect the geographical area where the business owner conducts business, and to protect its economic interests against those who may have gained an unfair

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[26] *See, Hough Assocs., Inc. v. Hill,* 2007 WL 148751 at *6 (Del.Ch. 2007).

[27] *Tull,* 147 A.2d at 661.

[28] *Research & Trading Co. v. Pfuhl*, 1992 WL 345465 at *12 (Del. Ch. 1922).

[29] *Weichert Co. of Pennsylvania v. Young*, 2007 WL 4372823 at *3 (Del. Ch. 2007).

competitive advantage against them as a former employee.[30] A national scope can be particularly necessary in today's world where so many businesses operate on a national or even global scale. Delaware courts and other jurisdictions have permitted a nationwide non-compete covenant in certain circumstances[31] and are not adverse to broad geographical scopes when they are necessary to protect the legitimate business interests of the party trying to enforce the covenant.[32]

The APA and SMAs contain this introductory language:

> "The Company (TRS Acquisition, LLC) is in the business of providing test, repair and engineering services for network operators principally to customers in the telecommunications industry in the United States…"[33]

The APA contains a similar clause. Further, one of NAL's biggest clients was a national, if not international firm, Ericsson.[34] The Plaintiffs business location was in Ventura, California. TRS opened a facility in Texas in 2008.[35]

Plaintiffs' business operated nationwide before the sale to TRS. The record before the Court shows that nationwide business continued after the sale. When signing the

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[30] *Del. Exp. Shuttle, Inc. v. Older*, 2002 WL 314582243 at *12.

[31] *Gas Oil Prods., Inc. of Del. v. Kabino*, 1987 WL 18432 at *2 (Del. Ch.).

[32] *Research & Trading Corp. v. Pfuhl*, 1992 WL at *2 (Del. Ch.); *Wolf v. Colonial Life & Acc. Inc. Co.*, 420 S.E.2d 217, 222 (S.C. App. 1992).

[33] SMA Preamble, A.

[34] Compl. ¶94.

[35] M. for J. on Pleadings, 4.

SMAs and APA, Plaintiffs acknowledged TRS' business was national in scope. Work with a national company like Ericsson demonstrates that.

Covenant Reasonable Under General Principles of Contract Law

When evaluating this non-compete covenant under general contractual principles, it is also pertinent to note that the Plaintiffs received substantial consideration in exchange for their covenant not to compete, including an employment contract, which, in Delaware, is deemed adequate consideration to support a covenant not to compete.[36] The restrictions were reasonable considering the benefits Plaintiffs were to receive under the APA and the SMAs. They received a $1,000,000.000 purchase price, executive positions, and six-figure salaries in exchange for their agreement not to compete with TRS for four years.[37] The SMA also explicitly stated that the non-compete clause would stand in its entirety if Plaintiffs were terminated for cause.[38] Plaintiffs do not allege any failure by TRS/NAL to uphold the benefits due them under the SMA or APA *before* they were discharged. Aside from their discharge as alleged in the complaint, there are no other allegations that TRS/NAL breached Plaintiffs' employment contract. Delaware courts are strongly in favor of enforcement of contracts freely entered into by parties, and the Court will only set aside the agreement "upon a strong showing that dishonoring the contract is required to vindicate

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[36] *See, e.g., Research and Trading Corp. v. Powell*, 468 A.2d 1301, 1305 (Del. Ch.1983).

[37] Compl. ¶¶14-18.

[38] Compl. ¶19.

a public policy interest even stronger than the freedom of contract."[39]

Plaintiffs have not met the standard for a judgment on the pleadings regarding the non-compete provision. First, there is an issue of material fact as to whether actually TRS/NAL violated the SMAs when they fired Plaintiffs for alleged cause. Second, there is an issue of material fact as to whether NAL is still in operation and therefore has a legitimate business interest and an enforceable right under the non-compete clause as a signatory to the contract. Third, Plaintiffs have not shown as a matter of Delaware law that the non-compete clause is overbroad and thus facially invalid. They have failed to show that the non-compete clause is invalid as a matter of law, and therefore have failed to meet the heavy burden entitling them to a judgment on the pleadings. Their motion for judgment on the pleadings regarding Count 8 is DENIED.

II. Intentional Infliction of Emotional Distress (Count 6)

Lake Motion to Dismiss

O'Brien and San Miguel Motion to Dismiss

A. Applicable Standard

In a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), all well-pled allegations are taken as true.[40] A motion to dismiss will not be granted if the plaintiff may

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[39] *See, Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005).

[40] *Lord v. Souder,* 748 A.2d 383, 398 (Del. 2000).

recover under any conceivable set of circumstances susceptible of proof under the complaint.[41] Liability for IIED, however, is only found when the alleged conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community…"[42] In a breach of contract action, damages for emotional distress are not available without accompanying physical injury or actual intentional infliction of emotional distress.[43]

B. Discussion

Plaintiffs claim of IIED against Lake is without merit, and is dismissed. They have yet to show, even under the standard for a motion to dismiss, whether or not Lake is a party to the APA and the SBA contracts. However, even if Lake is found to be a party to the contract in its role as NAL's parent company, a mere breach of an employment contract, without accompanying "extreme and outrageous behavior," is never sufficient cause to recover damages for emotional distress.[44] Plaintiffs have alleged no other actions to support their IIED claim against Lake but for breach of employment contract. Therefore, defendant Lake's motion to dismiss Plaintiff's claim of IIED is GRANTED.

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[41] *Lord,* 748 A.2d at 398.

[42] *Mattern v. Hudson*, 532 A.2d 85, 86 (Del. Super. Ct. 1987).

[43] *E.I. DuPont de Nemours & Co. v. Pressman,* 679 A.2d 436, 444-445 (Del. 1996).

[44] *Pressman,* 679 A.2d at 444-445.

Plaintiffs claim of IIED against Defendants O'Brien, and San Miguel is also without merit and is dismissed. They allege that O'Brien and San Miguel told unidentified third parties in the telecommunications industry that Plaintiffs were terminated for engaging in "dishonest and disloyal business activities, criminal and fraudulent buying and selling of stolen property, and other similar acts."[45] Plaintiffs claim these acts were extreme and outrageous, going beyond the bounds of common decency, and that they suffered emotional distress.[46]

In Delaware, the Supreme Court has firmly established that a claim for IIED "does not lie where the gravamen of the complaint sounds in defamation."[47] "Liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.... There must still be freedom to express an unflattering opinion."[48]

Plaintiffs here have not made any claims of extreme and outrageous behavior by San Miguel and O'Brien. At most, if Plaintiffs prove their case at trial, these two defendants may be liable for defamation, which the law clearly states cannot be a basis for IIED liability. Additionally, Plaintiffs' alleged injuries do not rise to the level of "severe emotional distress." They have not even claimed any physical or psychological damages

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[45] Compl. ¶137.

[46] Compl. ¶143.

[47] *Barker v. Huang*, 610 A.2d 1341, 1351 (Del. 1992).

[48] *Mattern v. Hudson*, 532 A.2d at 86.

requiring treatment as a result of their discharge from TRS, only that their reputations "have been compromised, they cannot work in their chosen fields, have reduced wages…humiliation, embarrassment, anger, chagrin, disappointment, worry frustration, and a deep sense of injustice."[49] There are no conceivable set of circumstances in which Plaintiffs could recover for IIED under these facts. The allegations are insufficient to support an IIED claim, and therefore San Miguel and O'Brien's motion to dismiss Plaintiffs' claim of IIED (Count 6) is GRANTED.

III. Breach of SMAs (Count I)

Lake Motion to Dismiss

A. Parties' Contentions

Defendant Lake argues that it was not a named party to the contract, and despite its status as NAL's parent company, it cannot be held liable for the breach of contract by its subsidiary, and moves to dismiss the breach of SMA claim in Count 1 of the complaint. Plaintiffs counter Lake's motion to dismiss, arguing that despite, the fact that Lake was not a party to the contract, it "ratified and approved all decisions made by NAL." According to Plaintiffs, a parent company can be held liable for the actions of its subsidiary under agency theory.

[49] Compl. ¶146.

B. Applicable Standard

In a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), all well-pled allegations are taken as true.[50] A motion to dismiss will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint. In a motion to dismiss, all reasonable inferences shall be in favor of the non-moving party.

C. Discussion

Lake is Not Liable for Breach of SMA

It is basic contract law that only parties to a contract may be liable under that contract.[51] Under Delaware law, a parent corporation can only be held liable for the performance of a contract by a wholly-owned subsidiary under extremely limited circumstances.[52] "A huge amount of wealth generation results from the use of distinct entities by corporate parents to conduct business. This allows parents to engage in risky endeavors precisely because the parents can cabin the amount of risk they are undertaking by using distinct entities to carry out certain activities. Delaware law respects corporate formalities, absent a basis for veil-piercing, recognizing that the wealth-generating

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[50] *Lord,* 748 A.2d at 398.

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

[52] *Wallace*, at 1180.

potential of corporate and other limited liability entities would be stymied if it did otherwise."[53] Fraud is one circumstance under which a parent company can be held liable for a subsidiary's action.[54] Another circumstance is when the subsidiary is merely an instrumentality or alter ego of the parent corporation.[55] The degree of control that would be required to "pierce the veil" and hold the parent corporation liable would be a degree of control by the parent corporation that the subsidiary no longer has legal or independent significance of its own.[56] The key to this degree of control is an absence of corporate formalities separating the parent and the subsidiary, "such as where the assets of the two entities are commingled, and their operations intertwined."[57] Although Plaintiffs correctly claim that a principal may be liable for a subsidiary under pure agency theory, they ignore the fact that for liability to attach under customary agency, "an arrangement exists between the two corporations so that one acts on behalf of the other and within usual agency principles, [and] the arrangement must be relevant to the plaintiff's claim of wrongdoing."[58]

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[53] *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 769 (Del. Ch. 2009) *aff'd,* 976 A.2d 170 (Del. 2009).

[54] *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

[55] *Geyer* at 793.

[56] *Wallace* at 1184.

[57] *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260, 266 (D. Del. 1989).

[58] *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988).

Under these limited circumstances, Lake cannot be held liable for a breach of contract by TRS/NAL. Plaintiffs have not alleged or offered any evidence of such control over TRS/NAL by Lake to succeed under the "alter ego" theory of liability. The SMAs were clearly an employment contract between Plaintiffs and TRS/NAL.[59] TRS Acquisition LLC was a wholly owned subsidiary created by NAL, not Lake.[60] Without more or any substantive proof, the repetitive and vague averments by Plaintiffs that "Lake ratified and approved the acts constituting a breach of the SMA…and is therefore vicariously liable for those acts" are conclusory as to whether Lake is actually liable for control over TRS/NAL, and the Court may disregard them.[61]

As to whether an agency relationship existed, Plaintiffs have not alleged that an agency agreement existed between TRS/NAL and Lake, to the extent that TRS/NAL acted on behalf of Lake, instead claiming only that Lake "ratified and approved" TRS/NAL's actions. Delaware law favors protecting parent corporations from the actions of its subsidiaries, and the Court will not make an exception under these facts.

Lake's motion to dismiss is GRANTED, as it was not a party to the SMA employment contracts allegedly breached, and did not have an agency or any other kind of relationship with NAL that would incur liability for NAL's actions.

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[59] Compl.¶80.

[60] Compl. ¶12.

[61] *Wallace* at 1180.

IV. Tortious Interference with Plaintiff's Contractual Rights (Count 7)

O'Brien and San Miguel Motion to Dismiss

A. Parties' Contentions

Defendants O'Brien and San Miguel argue that Plaintiffs' complaint fails to state a claim for tortious interference with Plaintiffs' contractual rights under the APA and SMA, and move to dismiss. They argue the complaint fails to allege any intentional act either on both of them did in causing the alleged breach, or any act that was a significant factor in causing the alleged breach. Also, these two defendants assert that Plaintiffs have alleged they were aware of the APA or that their acts were done without justification.

Plaintiffs' response is that these defendants knew they had an employment agreement with TRS and interfered with the rights Plaintiffs had with TRS.

B. Applicable Standard

As previously stated, a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), all well-pled allegations are taken as true.[62] A motion to dismiss will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible of proof under the complaint. In a motion to dismiss, all reasonable inferences shall be in favor of the non-moving party.[63]

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[62] *Lord,* at 398.

[63] *Savor, Inc. v. FMR Corp.,* 812 A.2d 894, 896 (Del. 2002).

C. Discussion

"To state a claim for tortious interference with contract, a plaintiff must plead facts that demonstrate the existence of: (1) a valid contract (2) about which defendant has knowledge, (3) an intentional act by defendant that is a significant factor in causing the breach of the contract, (4) done without justification, and (5) which causes injury.[64] In their complaint, Plaintiffs allege:

> 149. O'Brien and San Miguel were employees of TRS both before and after TRS was purchased by NAL.
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> 150. O'Brien and San Miguel knew Plaintiffs had employment contracts with TRS/NAL.
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> 151. Plaintiffs are informed and believe, and on such information and belief allege that Defendants O'Brien and San Miguel interfered with the Plaintiffs' right to the benefits under the APA and SMA by inducing TRS/NAL to terminate Plaintiffs.
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> 152. TRS/NAL did terminate Plaintiffs, resulting in a breach or disruption of the contractual relationship.[65]

First, these and other allegations in the complaint are sufficient on a motion to dismiss to make this claim. Second, issues of material fact remain, and if proven at trial, could arise to a "conceivable set of circumstances" under which Plaintiffs could recover

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[64] *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511 at *5 (Del. Super. 2003).

[65] Compl. ¶¶149-152.

for tortious interference with a contract. O'Brien and San Miguel were likely aware of Plaintiffs employment contracts, as Plaintiffs were vice presidents of TRS and probably held high profile positions within the company. Additionally, O'Brien and San Miguel do not necessarily deny making statements to TRS/NAL about Plaintiffs actions at work. The determination of O'Brien and San Miguel's liability will turn on whether the alleged statements made by them were made "with justification" as required by law. This is a factual issue, which must be determined by the trier of fact. Viewing the facts in favor of the non-moving party, here the Plaintiffs, San Miguel and O'Brien's motion to dismiss Count 7 is DENIED.

Conclusion

For the reasons stated herein:

Plaintiffs' motion for a judgment on the pleadings regarding Count 8 is DENIED.

Defendants Lake, O'Brien, and San Miguel's motions to dismiss the claim of intentional infliction of emotional distress against them are GRANTED.

Defendant Lake's motion to dismiss for breach of contract (Count 1) is GRANTED.

Defendants O'Brien and San Miguel's motion to dismiss for tortious interference is DENIED.

IT IS SO ORDERED.

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J.