IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

EARTH PRIDE ORGANICS, LLC and LTG, INC. f/k/a LANCASTER FINE FOODS, INC.,	)	
Plaintiffs,	)	C.A. No.: N23C-05-009-EMD CCLD
v.	)	
CORONA-ORANGE FOODS INTERMEDIATE HOLDINGS, LLC, and WIND POINT ADVISORS, LLC dba WIND POINT PARTNERS,	)	
Defendants.	)	

Submitted: March 14, 2024
Decided: April 17, 2024

Upon Defendants' Motion to Dismiss Plaintiffs' Amended Complaint
GRANTED in part DENIED in part

Jamie L. Brown, Esquire, Brendan Patrick McDonnell, Esquire, Heyman Enerio Gattuso & Hirzel, LLP, Wilmington, Delaware, Michael D. Adams, Esquire, Lucas K. Hori, Esquire, Rutan & Tucker, LLP, Irvine, California. *Attorneys for Plaintiffs Earth Pride Organics, LLC and LTG Inc. f/k/a Lancaster Fine Foods, Inc.*

Brian M. Rostocki, Esquire, Anne M. Steadman, Esquire, Reed Smith, LLP, Wilmington, Delaware, Michael Leib, Esquire, Reed Smith, LLP, New York, New York. *Attorneys for Defendants Corona-Orange Foods Intermediate Holdings, LLC and Wind Point Advisors, LLC dba Wind Point Partners.*

DAVIS, J.

I. INTRODUCTION

This civil action is a breach of contract and fraud claim assigned to the Complex Commercial Litigation Division of the Court. Plaintiffs Earth Pride Organics, LLC ("EPO"), and LTG, INC, f/k/a Lancaster Fine Foods ("LFF" and collectively with EPO, "Plaintiffs") claim Defendants Corona-Orange Foods Intermediate Holdings LLC ("Corona"), and Wind Point

Advisors LLC ("WPA" and collectively with Corona, "Defendants") breached their contractual obligation to contribute capital towards improvements for LFF's facilities.[1] Plaintiffs also claim WPA fraudulently induced Plaintiffs to enter into the Purchase Agreement (the "Agreement") with Corona.[2]

Plaintiffs filed their first complaint (the "Complaint") on May 5, 2023, asserting one count for breach of contract against Corona.[3] On July 6, 2023, Defendants moved to dismiss the Complaint.[4] On August 7, 2023, the Court entered a stipulation and order that stayed the proceedings pending mediation.[5] The parties were not able to resolve the matter during mediation.[6]

On October 25, 2023, Plaintiffs filed an amended complaint (the "Amended Complaint").[7] The Amended Complaint asserts two claims—breach of contract and fraud—and adds WPA as a defendant.[8] On November 21, 2023, Defendants then filed their Motion to Dismiss Amended Complaint and Defendants' Opening Brief in Support of Their Motion to Dismiss the Amended Complaint (collectively, the "Motion").[9] On January 25, 2024, Plaintiffs submitted their Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss the Amended Complaint ("Opposition.")[10] Defendants filed their Defendants' Reply Brief in Further Support of Their Motion to Dismiss the Amended Complaint on February 23, 2024.[11]

---

[1] Amended Complaint (hereinafter "Am. Compl.") p. 1 (D.I. No. 26).
[2] *Id.*
[3] Complaint (D.I. No. 1).
[4] Defendants' Motion to Dismiss (D.I. No. 13).
[5] D.I. No. 20.
[6] *See* D.I. No. 24.
[7] Am. Compl.
[8] *Id.*
[9] Defendants' Opening Brief in Support of Their Motion to Dismiss the Amended Complaint (hereinafter "MTD") (D.I. No. 32).
[10] Plaintiffs' Answering Brief in Opposition to Defendants' Motion to Dismiss the Amended Complaint (hereinafter "Opp.") (D.I. No. 38).
[11] Defendants' Reply Brief in Further Support of Their Motion to Dismiss the Amended Complaint (hereinafter "Reply") (D.I. No. 41).

On March 14, 2024, the Court held a hearing on the Motion, the Opposition and the Reply.[12] After hearing from the parties, the Court took the matter under advisement.

For the reasons set forth below, the Court will **GRANT** the Motion, in part, and **DENY** the Motion, in part.

II. RELEVANT FACTS

A. THE PARTIES

EPO and LFF, are organized under Pennsylvania law with their principal places of business in Lancaster County, Pennsylvania.[13] At one time, LFF owned 100% of EPO.[14] Before its sale to Corona, LFF "focused on producing contract formulation specialty foods such as sauces, dressings, and condiments."[15] By 2020, LFF, "a family-owned business established in 2008 by Michael Thompson, its President," was generating millions of dollars in annual revenue.[16] Because of LFF's success, numerous prospective purchasers contacted Mr. Thompson, and others at LFF, about buying the company.[17]

Corona and WPA are organized under Delaware law, with their principal places of business in Chicago, Illinois.[18] WPA, a private equity firm—with Joseph Lawler as its managing director— is Corona's majority equity holder.[19] WPA operates its specialty food contract manufacturing business under the name Stir Foods.[20] LFF became a part of Stir Foods after Corona acquired it.[21]

---

[12] D.I. No. 47.
[13] Am. Compl., ¶ 1.
[14] *Id.*
[15] *Id*. LTG's customers included Auntie Anne's, Casablanca Foods, Starbucks, Robert Rothchild Foods, Mike's Hot Honey, and Bonnie Jams. *Id*.
[16] *Id*. at ¶ 8.
[17] *Id*. at ¶ 9.
[18] *Id*. at ¶ 3-4.
[19] *Id*. at ¶ 4. *See also* MTD, at 2.
[20] Am. Compl. ¶ 5.
[21] *Id*.

B. CONTRACT NEGOTIATIONS

In August 2020, Mr. Lawler and Stir Foods' representatives contacted Mr. Thompson to express an interest in acquiring LFF.[22] Mr. Lawler and Stir Foods' representatives believed LFF was ideally located to expand Stir Foods' business to a national footprint because, at that time, Stir Foods' facilities were located in California and Canada.[23]

On September 28, 2020, Milton Lui, CEO of Stir Foods, sent Mr. Thompson an email with attachments (the "Email") expressing WPA's interest in growing LFF's facility in Lancaster, Pennsylvania.[24] Mr. Lui stated that, "[t]o support the foundation already in place, we will bring Cap Ex investment, operating experience, and customer relationships."[25] The Email provided that Stir Foods had the "[b]alance sheet / cash to support growth through continued investment," "broad manufacturing and packaging capabilities," a "diverse customer base," a "[s]easoned management team," and had "successfully brought operations, engineering, sourcing, logistics, and quality expertise to execute against new opportunities."[26]

On October 5, 2020, Mr. Lawler, sent an email with a Letter of Intent ("LOI") attached.[27] Mr. Lawler's email stated:

> Milt is looking forward to spending time in the near term with your team. In addition, we are prepared to commit all necessary R&D resources and align on the necessary capital for next year. To be clear we are prepared to spend the $1.5-$2M of capex for growth in 2021.[28]

[22] *Id.* at ¶ 9.
[23] *Id*.
[24] *Id.* at ¶ 11.
[25] *Id*.
[26] *Id*.
[27] *Id*. at ¶ 13.
[28] MTD, Ex. C, at p. 1.

The LOI included the following language: "we will commit to investing in the Lancaster facility and plan to invest $2 million in 2021 to support growth."[29] The LOI also expressed WPA's interest in LFF's management team; expressing:

> We have been impressed with Lancaster and look forward to working with the full management team. We regard our relationship with the entire management team to be a partnership and look forward to partnering together on the Company's next stage of growth.[30]

For Plaintiffs it was important that LFF continued to "flourish and that its leadership team remain intact."[31] Relying on the Email and the LOI, Plaintiffs agreed to sell their business to Stir Foods.[32]

C. THE PURCHASE AGREEMENT

On February 21, 2021, Plaintiffs received monetary consideration along with shares of Corona to transfer 100% of LFF to Corona through an entity called Stir Foods Lancaster, LLC (the "Company").[33] Mr. Lawler, as the assistant secretary for Corona, executed the Agreement for the purchaser, Corona.[34] The Agreement provides that required notices under the Agreement be sent to Mr. Lawler, and the Agreement listed Mr. Lawler's WPA email address.[35]

Additionally, the parties agreed to an earnout payment.[36] Agreement Section 3.8 (a) defines the earnout payment:

> In the event that the Earnout EBITDA is greater than the EBITDA Target [$1,800,000][37], the Purchaser shall pay to LFF an additional amount (the "Earnout Payment") equal to the product of (i) four (4) multiplied by (ii) the amount by which the Earnout EBITDA exceeds the EBITDA Target.[38]

---

[29] MTD, Ex. C, at p. 2 (hereinafter "LOI").
[30] *Id*.
[31] Am Compl. ¶ 10.
[32] *Id*. ¶ 15.
[33] *Id*. ¶ 16.
[34] *See* MTD, Ex. A (hereinafter "Agreement").
[35] *Id*. § 10.6.
[36] *Id*. § 3.8(a).
[37] *See* Agreement § 1.1.
[38] *Id*. § 3.8(a).

The Earnout Payment was based on the Company's income between July 1, 2021, through June 30, 2022 (the "Earnout Period").[39]

The parties included Agreement Section 7.8 which requires a $2 million investment in the Company between closing of the Agreement (February 21, 2021) and December 31, 2021 ("Capital Commitment").[40] Agreement Section 7.8 provides:

> Capital Commitment. *Purchaser and its Affiliates shall contribute not less than Two Million Dollars ($2,000,000) to the Company following Closing, but (except as expressly set forth in the following proviso) in no event later than December 31, 2021 such amount to be used to fund capital improvements for the facility* located at the Leased Real Property, provided, however, that the parties acknowledge that such contributions to capital of the Company may be delayed due to delays in ordering and delivery lead times for equipment.[41]

Plaintiffs allege that the parties added Agreement Section 7.8 to increase the Earnout Payment.[42]

Section 1.1 of the Agreement defines Affiliate as:

> (a) any Person[43] that directly or indirectly controls, is controlled by, or is under common control with such Person and (b) any Person who is a director, officer, manager, partner or principal of such Person or of any Person that directly or indirectly controls, is controlled by, or is under common control with such Person. For purposes of this definition, "control" of a Person shall mean the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether by ownership of voting equity, by contract or otherwise.[44]

The parties agreed to a survival term for any disputes that arise regarding the Capital Commitment provision. Agreement Section 9.1 states:

> Survival. *The representations and warranties set forth in* Article 5, Article 6 and *Article 7 shall survive the Closing for a period of eighteen (18) months from the Closing Date except as follows*: (i) the Fundamental Representations shall survive

[39] *Id.* § 1.1.
[40] Am. Compl. ¶ 18.
[41] Agreement § 7.8 (emphasis added).
[42] Am. Compl. ¶ 18.
[43] "Person" includes individuals and companies. *See* Agreement, § 1.1.
[44] Agreement § 1.1.

> the Closing Date until ninety (90) days following the termination of the applicable statute of limitations; (ii) the representations and warranties contained in Sections 6.14 (Taxes), 6.15 (Employee Benefit Plans) shall survive until thirty (30) days after the expiration of the applicable statute of limitations; (iii) the representations and warranties set forth in Section 6.17 (Environmental Compliance) shall survive closing for a period of three (3) years; (iv) *claims arising from willful misconduct or intentional misrepresentation shall survive for a period of six (6) years*; and (v) claims arising from fraud shall survive for a period of ten (10) years. Each of the covenants and agreements of the Parties set forth in this Agreement shall survive the Closing for a period of twelve (12) months following the Closing Date, except that the covenants that definitively expire by their specific terms shall expire in accordance with such terms. Any claims under this Agreement must be asserted by written notice delivered prior to 11:59 p.m. Eastern Time on the expiration date of the applicable survival period set forth in this Section 9.1, if any, and if such a Claim Notice is given prior to such time, the survival period with respect to the claim described in such Claim Notice shall continue until such claim is fully resolved.[45]

The Agreement did not incorporate, by reference or otherwise, the LOI. Agreement Section 7.2 defines Ancillary Agreements as "Rollover Contribution Agreement, the Escrow Agreement, the Subordination Agreements, and each other agreement, document, instrument or certificate, other than this Agreement, to be executed and delivered in connection with the consummation of the transactions contemplated by this Agreement."[46]

Agreement Section 7.3, outlines Corona's obligation as:

> Binding Obligation. The Purchaser has all requisite limited liability company authority and power to execute, deliver and perform this Agreement and the Ancillary Agreements and to consummate the transactions contemplated hereby and thereby. This Agreement the Ancillary Agreements and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary limited liability company action on the part of the Purchaser and no other limited liability company proceedings on the part of the Purchaser are necessary to authorize the execution, delivery and performance of this Agreement and the Ancillary Agreements and the consummation of the transactions contemplated hereby and thereby by the Purchaser. *This Agreement and the Ancillary Agreements have been duly executed and delivered by the Purchaser and, assuming that this Agreement and the Ancillary Agreements each constitute the legal, valid and binding obligations of the Purchaser, are enforceable against the Purchaser in accordance with its terms*.[47]

[45] Agreement § 9.1 (emphasis added).
[46] Agreement § 1.1.
[47] Agreement § 7.2 (emphasis added).

Corona did not meet its Capital Commitment obligation. Moreover, WPA did not contribute $2.0 million to the Company.

On September 22, 2022—after the Earnout Period—Defendants provided Plaintiffs with an earnout statement reflecting LFF earned $750,000 in earnout payments.[48]

III. PARTIES' CONTENTIONS

A. THE MOTION

Defendants argue WPA should not be a party to this civil action. Defendants highlight that WPA is not a party to the Agreement or a third-party beneficiary with respect to the Capital Commitment. As such, WPA cannot be held liable for a breach of contract.[49] Next, Defendants argue that the breach of contract claim fails against both WPA and Corona because: (1) the Capital Commitment under Agreement Section 7.8 was a "representation and warranty;"[50] (2) any valid claim expired under the deadline for asserting breaches under Agreement Section 7;[51] and (3) "claims for earnout-based damages must be dismissed as the representation and warranty allegedly breached has no connection to the contractual earnout mechanism."[52] Defendants also assert that Plaintiffs' allegations of damages based on the diminished value of their equity are "entirely conclusory, with no supporting facts pled."[53] Lastly, Defendants contend that Plaintiffs fraud claim (Claim II) is mere bootstrapping of a contract claim to a fraud claim by simply alleging that Defendants "must have never intended to perform."[54]

---

[48] Am. Compl. ¶ 25. LFF did not agree with the accounting calculations; so, under the Agreement, the discrepancies will be addressed by an independent accounting firm. *See* Agreement § 3.8 (b).
[49] MTD at 2.
[50] *Id.* at 3.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 4.
[54] *Id.*

B. THE OPPOSITION

Plaintiffs argue WPA is a proper party because: (1) the language under Agreement Section 7.8 bound Corona and its Affiliates to invest $2.0 million; (2) Mr. Lawler had actual or apparent authority to bind WPA; and (3) WPA received benefits under the Agreement, so it is estopped from arguing it was not bound to the Agreement.[55] Plaintiffs also contend that "[b]ecause Defendants willfully breached the Agreement, the survival period under Section 9.1 is six years and does not expire until February 2027."[56] Next, Plaintiffs maintain that establishing damages is not necessary at the pleadings stage; however, Plaintiffs sufficiently pled that the breach reduced their earnout payment.[57] Last, Plaintiffs assert that its fraud claim arises from the misrepresentations during contract negotiations, which was approximately five months before executing the Agreement.[58] Finally, Plaintiffs claim that Count II is pled in the alternative.[59]

IV. STANDARDS OF REVIEW

A. CIVIL RULE 12(B)(6) STANDARD

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[60] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[61]

---

[55] Opp. at 8-13.
[56] *Id*. at 17.
[57] *Id*. at 19-21.
[58] *Id*. at 26.
[59] *See* Opp. at 29. The Amended Complaint does not explicitly plead fraud in the alternative; however, it is pled in the alternative in Plaintiffs' Opposition and was argued that way at the hearing.
[60] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, 2010 WL 5825353, at *3 (Del. Super. Oct. 27, 2010).
[61] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).

Under Civil Rule 12(b)(6), the court generally may not consider matters outside the complaint.[62] However, documents that are integral to or incorporated by reference in the complaint may be considered.[63] "If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[64]

B. CIVIL RULE 9(B)(6) STANDARD

Under Civil Rule 9(b), a plaintiff must plead fraud with particularity to apprise the adversary of the acts or omissions by which it is alleged that a duty has been violated.[65] Particularity is satisfied if the complaint includes the time, place, contents of the alleged fraud, and the individual accused of committing the fraud.[66] "Malice, intent, knowledge and other condition of mind of a person may be averred generally."[67] "At the motion to dismiss stage, a plaintiff need only point to factual allegations making it reasonably conceivable that the defendants charged with fraud knew the statement was false."[68]

V. DISCUSSION

A. COUNT I- BREACH OF CONTRACT

"Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss."[69] In interpreting a contract, the Court "give[s] priority to

---

[62] Super. Ct. Civ. R. 12(b).
[63] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[64] Super. Ct. Civ. R. 12(b).
[65] *Mancino v. Webb*, 274 A.2d 711, 713 (Del. Super. 1971). *See also* Super. Ct. Civ. R. 9(b).
[66] *See TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *6 (Del. Super. Sept. 25, 2015) (quoting *Universal Capital Mgmt., Inc. v. Micco World, Inc,* 2012 WL 1313598, at *2 (Del. Super. Feb. 1, 2012).
[67] Super. Ct. Civ. R. 9(b).
[68] *Sofregen Med. Inc. v. Allergan Sales, LLC*, 2021 WL 1400071, at *2 (Del. Super. Apr. 1, 2021).
[69] *MicroStrategy Inc. v. Acacia Rsch. Corp*, 2010 WL 5550455, at *5 (Del. Ch. Dec. 30, 2010).

the intention of the parties," beginning with the "four corners of the contract."[70] To uphold the parties' intentions and give effect to the contract in its entirety,[71] a court must construe the contract "so that all of its provisions may be read together and harmonized."[72] The meaning inferred from a particular provision "cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."[73] Thus, to succeed on a motion to dismiss, the defendant must establish that their construction of the contract is the only reasonable interpretation.[74]

1. Wind Point is not bound by the Agreement.

Plaintiffs assert that Mr. Lawler, as the managing director of WPA, held himself out as having agency authority to bind WPA as an Affiliate by signing the Agreement.[75] Plaintiffs further assert that Mr. Lawler was involved with or controlled key aspects of the sale, including establishing and funding the escrow account and sending the LOI to Plaintiffs. Plaintiffs contend that this means WPA is bound by the Agreement—either under an agency theory or as Affiliate.[76]

Defendants argue that the reference to "Affiliate" in the Agreement does not create any obligations on WPA under Agreement Section 7.8.[77] Defendants maintain that the plausible reading of Agreement Section 7.8 is that Corona "would be credited towards the $2 million with any amounts contributed by its Affiliates," not that Affiliates would have any obligations to contribute.[78] Defendants also argue that Agreement Section 7 relates only to "Representations

[70] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).
[71] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[72] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 1999 WL 33236239, at *4 (Del. Ch. Nov. 4, 1999).
[73] *E.I. du Pont*, 498 A.2d at 1113.
[74] *MicroStrategy Inc.,* 2010 WL 5550455, at *5.
[75] Opp. at 9.
[76] *Id*.
[77] MTD at 16-17.
[78] *Id. See also* Reply at 2.

and Warranties of the Purchaser" so "any breach claim based on Section 7.8 can only brought against the party that made the representation and warranty—Corona."[79]

Additionally, Defendants note that WPA is not liable per Agreement Section 7.2, which provides:

> Binding Obligation. The Purchaser has all requisite limited liability company authority and power to execute, deliver and perform this Agreement and the Ancillary Agreements and to consummate the transactions contemplated hereby and thereby. This Agreement the Ancillary Agreements and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary limited liability company action on the part of the Purchaser and no other limited liability company proceedings on the part of the Purchaser are necessary to authorize the execution, delivery and performance of this Agreement and the Ancillary Agreements and the consummation of the transactions contemplated hereby and thereby by the Purchaser. *This Agreement and the Ancillary Agreements have been duly executed and delivered by the Purchaser and, assuming that this Agreement and the Ancillary Agreements each constitute the legal, valid and binding obligations of the Purchaser, are enforceable against the Purchaser in accordance with its terms*.[80]

The Agreement provides, "Ancillary Agreements means the Rollover Contribution Agreement, the Escrow Agreement, the Subordination Agreements, and each other agreement, document, instrument or certificate, other than this Agreement, to be executed and delivered in connection with the consummation of the transactions contemplated by this Agreement."[81]

The Court finds that the Agreement is unambiguous. "It is a general principle of contract law that only a party to a contract may be sued for breach of that contract."[82] "Agency law does not negate or otherwise alter that fundamental tenet of contract law."[83]

Agreement Section 7.8 states, *"***Purchaser and its Affiliates** shall contribute not less than Two Million Dollars ($2,000,000) to the Company following Closing, but (except as expressly

[79] Reply at 3.
[80] Agreement § 7.2 (emphasis added).
[81] Agreement § 1.1.
[82] *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999)
[83] *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 5994971, at *3 (Del. Ch. Nov. 13, 2018).

set forth in the following proviso) in no event later than December 31, 2021."[84] But nowhere in the Agreement is the LOI incorporated nor is WPA mentioned as an Affiliate.

Plaintiffs' argument logically flows from the LOI's terms to the Agreement. The LOI included the following language: "we will commit to investing in the Lancaster facility and plan to invest $2 million in 2021 to support growth."[85] Agreement Section 7.8 seemingly mirrors the LOI except that this section is a representation and warranty of Corona and not WPA or other Affiliates. As set out in the Agreement, Corona represents and warrants it will cause—either through itself or an Affiliate—the capital contribution. If no contribution is made, Corona has breached the representation and warranty contained in Agreement Section 7.8 but it does not mean others are obligated on that representation and warranty. Plaintiffs could have, but did not, negotiate the Agreement differently to: (i) include the LOI provision in the Agreement; (ii) expressly bind WPA; or (iii) incorporate, by reference, the LOI's terms.

The Court finds that a plain reading of the Agreement demonstrates the parties did not obligate WPA to the Agreement Section 7.8. The Agreement clearly indicates the purchaser is Corona and that Lawler executed the Agreement in the capacity of an assistant secretary for Corona.[86] Accordingly, only Corona is a party to the Agreement. So only Corona may be sued for a breach of the Agreement. WPA is not bound by the Agreement to make the Capital Commitment.

2. Count I, as against Corona, survives under Agreement Section 9.1

To survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate (1) the existence of a contract; (2) a breach of a contractual obligation; and (3)

[84] Agreement § 7.8 (emphasis added).
[85] MTD, Ex. C, at p. 2 (hereinafter "LOI").
[86] *Id*. at p 54.

damages resulting from the breach.[87] At this preliminary stage of the proceedings, Plaintiffs meet these requirements.

The Amended Complaint alleges that Corona is a party to the Agreement and that Corona breached its representation and warranty set out in Agreement Section 7.8. So, the primary issue is whether Plaintiffs' claim is time-barred under Agreement Section 9.1, which provides:

> Survival. *The representations and warranties set forth in* Article 5, Article 6 and *Article 7 shall survive the Closing for a period of eighteen (18) months from the Closing Date except as follows*: (i) the Fundamental Representations shall survive the Closing Date until ninety (90) days following the termination of the applicable statute of limitations; (ii) the representations and warranties contained in Sections 6.14 (Taxes), 6.15 (Employee Benefit Plans) shall survive until thirty (30) days after the expiration of the applicable statute of limitations; (iii) the representations and warranties set forth in Section 6.17 (Environmental Compliance) shall survive closing for a period of three (3) years; (iv) *claims arising from willful misconduct or intentional misrepresentation shall survive for a period of six (6) years*; and (v) claims arising from fraud shall survive for a period of ten (10) years. Each of the covenants and agreements of the Parties set forth in this Agreement shall survive the Closing for a period of twelve (12) months following the Closing Date, except that the covenants that definitively expire by their specific terms shall expire in accordance with such terms. Any claims under this Agreement must be asserted by written notice delivered prior to 11:59 p.m. Eastern Time on the expiration date of the applicable survival period set forth in this Section 9.1, if any, and if such a Claim Notice is given prior to such time, the survival period with respect to the claim described in such Claim Notice shall continue until such claim is fully resolved.[88]

The Agreement was executed on February 17, 2021, and per Agreement Section 9.1 the eighteen-month survival period ended on August 17, 2022.[89] Plaintiffs assert that Count I falls under one of the exceptions because the breach of contract claim arises from willful misconduct or intentional misrepresentation. As such, Plaintiffs content that the survival period is six years.[90]

---

[87] *VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 613 (Del. 2003).
[88] Agreement § 9.1 (emphasis added).
[89] *Id.*
[90] Opp. at 17.

On a motion to dismiss, the Court is required to make all reasonable inferences in favor of Plaintiffs. The Court finds that Plaintiffs have met their burden to show there are a reasonably conceivable set of circumstances that would extend the survival period to six years. Plaintiffs allege Defendants made multiple misrepresentations regarding their intention to induce Plaintiffs to act, which satisfies the exception under Agreement Section 9.1(iv). So, the Court cannot dismiss the claim as time-barred. Discovery is necessary to develop the record. Factually, Corona may be able to demonstrate that it did not mispresent its intentions. Alternatively, Plaintiffs may advance facts, obtained during discovery, that further support Plaintiffs' argument under Agreement Section 9.1(iv).

For these reasons, the Motion, with respect to Count I, is **GRANTED** in part and **DENIED** in part.

B. COUNT II- FRAUD

1. Count II does not plead a viable fraud claim.

In Count II of the Amended Complaint, Plaintiffs assert a claim for common law fraud against WPA. To plead a claim for fraud, Plaintiffs must satisfy the heightened pleading standard under Civil Rule 9(b).[91] Under Delaware law, common law fraud consists of:

> 1) a false representation, usually one of fact, made by the defendant;
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
> 3) an intent to induce the plaintiff to act or to refrain from acting;
> 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> 5) damage to the plaintiff as a result of such reliance.[92]

[91] *See generally Aveanna Healthcare, LLC v. Epic/Freedom, LLC*, 2021 WL 3235739, at *21 (Del. Super. July 29, 2021).
[92] *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983). *See also In re P3 Health Grp. Holdings, LLC*, 2022 WL 15035833 (Del. Ch. Oct. 26, 2022), *as corrected* (Oct. 28, 2022) (stating "Delaware law does not distinguish between a claim for fraudulent inducement and a claim for common law fraud.").

"Generally, there is no duty to disclose a material fact or opinion"[93] "However, where one actively conceals a material fact, such person is liable for damages caused by such conduct."[94] Sales projections are forecasts of future business and those "predictions about the future cannot give rise to actionable common law fraud."[95] "Opinions and statements as to probable future results are not generally fraudulent even though they relate to material matters. . ."[96]

Plaintiffs allege Defendants falsely represented "that [they] wished to work in partnership with the successful" LFF team.[97] And falsely represented Stir Foods' capabilities because "Stir Foods suffered leadership turnover, facilities were operating at a loss, and there were issues with major customers."[98]

The Amended Complaint further alleges:

> Prior to the execution of the Agreement, including on September 28 and October 5, 2020[99], Wind Point made false representations of fact. Wind Point touted Stir Foods' capabilities and management, and represented its commitment to optimizing the success of LFF, to investing for gains / revenue, and to including LFF's original leadership team in those efforts so that the facility would retain institutional knowledge and be profitable going-forward.[100]

Defendants argue the Plaintiffs have not pled with particularity because their allegations are conclusory statements.[101] Defendants also contend that the alleged misrepresentations were

---

[93] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).
[94] *Id.*
[95] *Great Lakes Chem. Corp. v. Pharmacia Corp.,* 788 A.2d 544, 554 (Del. Ch. 2001). *See also Clark v. Davenport*, 2019 WL 3230928, at *12 (Del. Ch. July 18, 2019) (finding that a person's optimistic statements about his skills, experience, and resources are generally considered puffery and cannot form the basis for a fraud claim).
[96] *Esso Standard Oil Co. v. Cunningham*, A.2d 380, 383, (Del. Ch. 1955), *aff'd,* 118 A.2d 611 (Del. 1955). *See also WyPie Invs., LLC v. Homschek*, 2018 WL 1581981 (Del. Super. Mar. 28, 2018) (stating that it is well settled in Delaware that predictions about the future and expressions of opinion cannot give rise to actionable common law fraud.).
[97] Am. Compl. ¶ 29.
[98] *Id*. ¶ 28.
[99] Referring to the Email and LOI, respectively.
[100] *Id*. ¶ 38.
[101] Reply at 20.

only "optimistic statements about Stir Foods, its business, and the parties' hopes for the combined business."[102]

From the record, the Court cannot infer that Defendants actively concealed material facts to induce Plaintiffs' action. The LOI indicated WPA was committed "to investing in the Lancaster facility and plan to invest $2 million in 2021 to support growth;" the LOI also stated that WPA was impressed with LFF and was looking forward to working with its management team.[103]

Again, Plaintiffs negotiated to include the Capital Commitment provision and similarly Plaintiffs could have negotiated an employment contract for its management team at LFF. But Plaintiffs did not. Mr. Thompson was employed by Corona after the sale until May 26, 2023, when Mr. Lawler sent Mr. Thompson a termination agreement.[104] As factually alleged, Defendants did work with Mr. Thompson and others from LFF's management. However, LFF's management team was not guaranteed employment indefinitely or for a certain time period. As such, the Court finds the record is devoid to support a finding that WPA misrepresented its intentions to work with LFF's management team.

The Email represented that Stir Foods had the "[b]alance sheet / cash to support growth through continued investment," "broad manufacturing and packaging capabilities," a "diverse customer base," a "[s]easoned management team," and had "successfully brought operations, engineering, sourcing, logistics, and quality expertise to execute against new opportunities."[105] Here, again, the statements cannot support a fraud claim. The representations included in the Email are pre-transaction "puffery" and cannot form the basis for a fraud claim. Defendants'

[102] MTD at 31.
[103] LOI at 2.
[104] Am. Compl. ¶ 29.
[105] *Id*. ¶ 11.

opinions on their capabilities and resources does not satisfy any element of fraud. The Court finds Plaintiffs have not met their burden to show WPA made false representations or concealed material facts.

2. Count II is a bootstrapped breach of contract claim.

"In Delaware, a plaintiff cannot 'bootstrap' a breach of contract claim into a fraud claim."[106] Delaware courts seek to prevent plaintiffs from "couching an alleged failure to comply with a contract as a failure to disclose an intention to take certain actions arguably inconsistent with that contract."[107] A fraud claim pled contemporaneously with a breach of contract claim may nonetheless survive "so long as the claim is based on conduct that is separate and distinct" from the alleged breach of contract.[108] "Allegations that are focused on *inducement* to contract are 'separate and distinct' conduct."[109]

Here, Plaintiffs plead fraud by offering the same facts as the breach of contract claim. Plaintiffs' breach of contract claim is focused on Defendants' failure to make the Capital Commitment. Similarly, the fraud claim alleges that WPA misrepresented—in emails and the LOI—its intentions to invest in the Company prior to executing the Agreement. In their fraud claim, Plaintiffs are simply alleging Defendants never intended to perform its contractual obligation. The Court finds the fraud claim is bootstrapped because is not factual distinct from the breach of contract claim.

Therefore, the Motion is **GRANTED** with respect to Count II of the Amended Complaint.

---

[106] *Cont'l Fin. Co., LLC v. ICS Corp.*, 2020 WL 836608, at *3 (Del. Super. Feb. 20, 2020).
[107] *JCM Innovation Corp. v. FL Acquisition Holdings, Inc.*,
[108] *ITW Glob. Invs. Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *6 (Del. Super. Jun 24, 2015).
[109] *Id.*

VI. CONCLUSION

For the reasons stated above, the Motion is **GRANTED** as to: (i) Count I—breach of contract—against WPA is **DISMISSED** with prejudice; and (ii) Count II—fraud— is **DISMISSED** with prejudice. The Motion is **DENIED** as to Count I—breach of contract—against Corona.

IT IS SO ORDERED.

Dated: April 17, 2024
Wilmington, Delaware

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

cc: File&ServeXpress