IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

METROPOLITAN LIFE INSURANCE COMPANY, GENERAL AMERICAN LIFE INSURANCE COMPANY, NEW ENGLAND LIFE INSURANCE COMPANY, on Behalf of Themselves, and in the Alternative, Derivatively on Behalf of the Nominal Defendants,	)	
Plaintiffs,	)	C.A. No. 7092-VCP
v.	)	
TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., TREMONT OPPORTUNITY FUND III, L.P., ROBERT I. SCHULMAN, RUPTER A. ALLAN, CYNTHIA J. NICOLL, MARK SANTERO, ILEANA M. LÓPEZ -BALBOA, JOHN T. MATWEY, SANDRA MANZKE, LYNN O. KEESHAN and BARRY H. COLVIN,	)	
Defendants,	)	
- and -	)	
In the Alternative, TREMONT OPPORTUNITY FUND III, L.P. and RYE SELECT BROAD MARKET PRIME FUND, L.P.,	)	
Alternative Nominal Defendants.	)	

MEMORANDUM OPINION

Submitted: September 13, 2012
Decided: December 20, 2012

Michael P. Kelly, Esq., Daniel M. Silver, Esq., McCARTER & ENGLISH, LLP, Wilmington, Delaware; Gregory J. Hindy, Esq., Daniel P. D'Alessandro, Esq., McCARTER & ENGLISH, LLP, Newark, New Jersey; *Attorneys for Plaintiffs.*

Robert S. Saunders, Esq., Brian D. King, Esq., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; Seth M. Schwartz, Esq., Jason C. Vigna, Esq., SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, New York, New York; *Attorneys for Defendants Tremont Group Holdings, Inc., Tremont Partners, Inc., Robert I. Schulman, Rupert A. Allen, Cynthia J. Nicoll, Mark Santero, Ileana M. López-Balboa, John T. Matwey, Lynn O. Keeshan, and Barry H. Colvin.*

Jon E. Abramczyk, Esq., D. McKinley Measley, Esq., MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; Ralph A. Siciliano, Esq., David J. Kanfer, Esq., TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP, New York, New York; *Attorneys for Defendants Tremont Opportunity Fund III, L.P. and Rye Select Broad Market Prime Fund, L.P.*

Andre G. Bouchard, Esq., BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; Jonathan D. Cogan, Esq., Carrie A. Tendler, Esq., John Han, Esq., KOBRE & KIM LLP, New York, New York; Maggie E. Sklar, Esq., KOBRE & KIM LLP, Washington, D.C.; *Attorneys for Defendant Sandra Manzke.*

PARSONS, Vice Chancellor.

This action is before me on a motion to dismiss a lawsuit seeking to recover losses connected with investments in Bernard L. Madoff's Ponzi scheme.

Plaintiffs are insurance carriers who were limited partners of a Delaware limited partnership. That partnership invested in another fund, which invested substantially all of its investment capital in Madoff's investment firm. After Madoff confessed to his now infamous Ponzi scheme, numerous lawsuits were filed in the Southern District of New York seeking to recover related losses. Those lawsuits pertaining to the Delaware partnership involved here eventually were consolidated and ultimately settled. The plaintiffs now before me, however, opted out, and filed an action in this Court against the limited partnership, two related entities, and various officers, directors, managers, and principal decision makers of those entities.

The defendants have moved to dismiss on multiple grounds. As a preliminary matter, the individual defendants contend that the Court lacks personal jurisdiction over them. The defendants also argue that the plaintiffs' claims are barred by an exculpation provision contained in the limited partnership agreement. The defendants further assert that a number of the plaintiffs' claims are derivative, and that those derivative claims are barred by the settlement in the Southern District of New York. Finally, the defendants seek dismissal of several other counts for failure to state a claim.

Having considered the parties' arguments and the record before me at this stage, I find that this Court lacks personal jurisdiction over the individual defendants. I also conclude that certain of the counts are solely derivative in nature, and dismiss those derivative claims on the grounds of res judicata and release. In addition, I grant the

motion to dismiss the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing because the complaint fails to plead a specific, implied contractual obligation. Similarly, I dismiss the plaintiffs' negligent misrepresentation claim because it is either barred by the exculpation provision of the limited partnership agreement or duplicative of the fraud and intentional misrepresentation claims. Finally, I grant in part and deny in part the motion to dismiss plaintiffs' claims for aiding and abetting and civil conspiracy.

I. BACKGROUND

A. The Parties

The plaintiffs in this case, Metropolitan Life Insurance Co., General American Life Insurance Co., and New England Life Insurance Co. (collectively, "Plaintiffs" or the "Carriers"), are insurance carriers offering variable life insurance policies (the "Policies") to high net worth clients (the "Policyholders"). The Policyholders select from a number of investment options that the Carriers offer in order to maximize the value of the Policies.

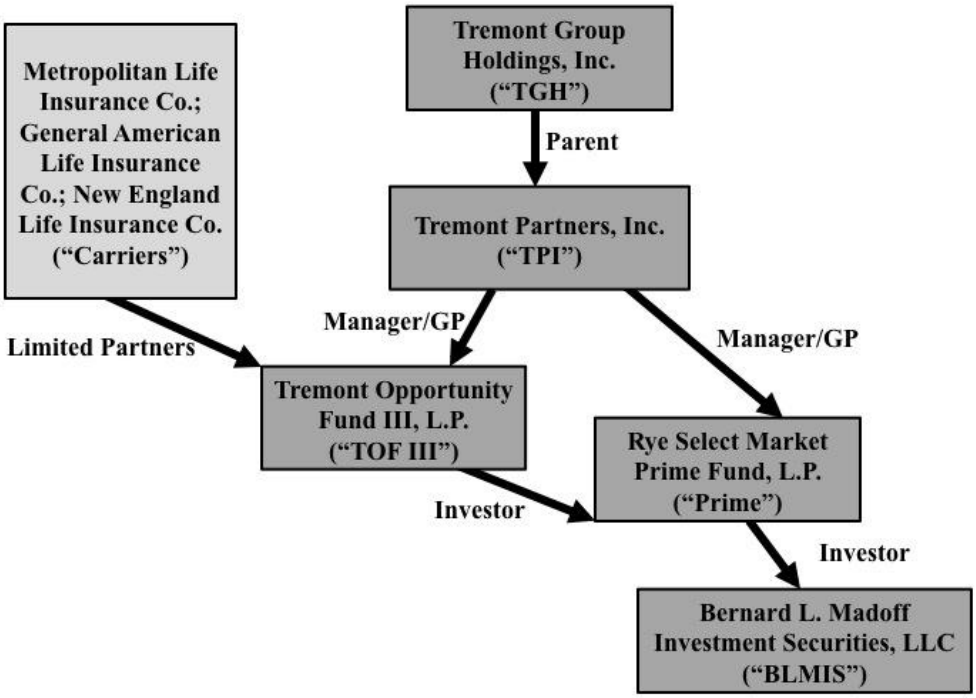
The defendants are: Tremont Group Holdings, Inc. ("TGH"), Tremont Partners, Inc. ("TPI"), Tremont Opportunity Fund III, L.P. ("TOF III" or the "Fund," and, together with TGH and TPI, "Tremont"), Robert I. Schulman, Rupert A. Allan, Cynthia J. Nicoll, Mark Santero, Ileana M. López-Balboa, John T. Matwey, Sandra Manzke, Lynn O. Keeshan, and Barry H. Colvin (collectively, "Defendants"). Defendants Shulman, Allan, Nicoll, Santero, López-Balboa, Matwey, Manzke, Keeshan, and Colvin (collectively, the

"Individual Defendants") are or were officers, directors, managers, and principal decision makers of TPI or TGH.

TOF III is a hedge "fund of funds" that invests in a portfolio of other hedge funds, including Rye Select Broad Market Prime Fund, L.P. ("Prime"). Prime invested nearly all of its assets with Bernard L. Madoff Investment Securities LLC ("BLMIS"), a broker-dealer owned and operated by Bernard L. Madoff.

TPI, a Connecticut corporation headquartered in Rye, New York, is the general partner of TOF III and Prime (the "Funds"), which are both limited partnerships organized under the laws of Delaware and with their principal place of business in Rye, New York. TGH, a Delaware corporation based in Rye, New York, is the parent of TPI.

The following organizational chart depicts the various relationships among the parties other than the Individual Defendants:



B. Facts[1]

1. The Private Placement Memorandum

Before becoming limited partners in TOF III, the Carriers received a private placement memorandum (the "PPM") disclosing the strategy, objectives, material risks, and material terms of investing in TOF III.[2] Specifically, the PPM stated that "[t]he Partnership is highly dependent upon the expertise and abilities of the underlying Managers, which will have investment discretion over the Partnership's assets."[3] The PPM also disclosed that:

---

1 Unless otherwise noted, the facts recited herein are drawn from the well-pled allegations of Plaintiffs' Verified Complaint (the "Complaint"), together with its attached exhibits, and are presumed true for the purposes of Defendants' motions to dismiss. Although the Court may consider evidence outside the pleadings for purposes of jurisdictional motions, *see Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007), this facts section omits reference to such evidence in an effort to avoid confusion regarding the materials considered on each set of motions. To the extent the Court has considered evidence beyond the pleadings in deciding the jurisdictional motion, such additional evidence with appropriate citations is discussed in context throughout the analysis in Section II, *infra*.

2 Tremont asserts that this Court may consider exhibits attached to their motion to dismiss. According to the Delaware Supreme Court, matters outside of the pleadings usually should not be considered in ruling on a Rule 12(b)(6) motion to dismiss unless: (1) the document is integral to a plaintiff's claim and incorporated into the complaint, or (2) the document is not being relied upon to prove the truth of its contents. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995). Here, the private placement memorandum and limited partnership agreement are integral to, and cited in, the Carriers' Complaint. Consequently, those additional documents will be considered for purposes of the pending motions to dismiss.

3 Transmittal Aff. of Brian D. King in Supp. of the Tremont Defs.' Mot. to Dismiss the Compl. ("King Aff.") Ex. B, PPM, 23. TOF III previously was named the American Masters Opportunity Insurance Fund, L.P.

> The Partnership will receive periodic reports from Managers . . . . The General Partner [TPI] will request detailed information on a continuing basis from each Manager regarding the Manager's historical performance and investment strategies. However, the General Partner may not always be provided with detailed information regarding all the investments made by the Managers because certain of this information may be considered proprietary information by the Managers. This lack of access to information may make it more difficult for the General Partner to select, allocate among and evaluate the Managers.[4]

The PPM also disclosed a number of purported safeguards and services provided by TOF III. For example, the PPM states that: "In selecting Managers, the General Partner [TPI] collects, analyzes and evaluates information regarding the personnel, history and background, and the investment styles, strategies and performance of professional investment management firms."[5] In addition, the PPM contained a non-reliance clause, which stated that prospective limited partners should not rely on any information not contained in the PPM.[6]

---

4 *Id.*

5 *Id.* at 3.

6 PPM overleaf ("NO PERSON HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS OR PROVIDE ANY INFORMATION WITH RESPECT TO THE INTERESTS EXCEPT SUCH INFORMATION AS IS CONTAINED IN THIS MEMORANDUM. PROSPECTIVE LIMITED PARTNERS SHOULD NOT RELY ON ANY INFORMATION NOT CONTAINED IN THIS MEMORANDUM. NEITHER THE DELIVERY OF THIS MEMORANDUM NOR ANY SALE MADE UNDER IT SHALL UNDER ANY CIRCUMSTANCES IMPLY THAT INFORMATION CONTAINED IN THIS MEMORANDUM IS CORRECT AS OF ANY TIME SUBSEQUENT TO THE DATE HEREOF.").

2. The Tremont Group's website

According to the Complaint, TGH's website represented that Tremont engaged in a "rigid due diligence and selection process."[7] Specifically, the website allegedly stated that Tremont only selected managers that "passed through our exhaustive multi-stage due diligence process" and that it employed "a comprehensive, proprietary database enabling us to capture both qualitative and performance-based quantitative information on hedge fund managers and to compare managers to their peer groups."[8]

3. The Limited Partnership Agreement

In alleged reliance on these representations, the Carriers entered into a Limited Partnership Agreement (the "LPA") and became limited partners in TOF III. The LPA contained an exculpation clause (the "Exculpation Provision"), which provides:

> Except as otherwise stated herein, neither the General Partner nor any of its Affiliates shall be liable to any Partner or the Partnership for any losses or expenses suffered by any Partner or the Partnership, except for losses or expenses resulting from gross negligence, willful misfeasance, bad faith or reckless disregard of duties hereunder.[9]

The LPA also warranted that the PPM "does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading."[10]

---

7 Compl. ¶ 42.

8 *Id.*

9 King Aff. Ex. C, LPA, § 3.05(a).

10 *Id.* § 3.08(a).

4. Madoff-related litigation against Tremont

At some point, TOF III became a limited partner in and investor of Prime.[11] Prime invested substantially all of its investment capital with BLMIS.[12]

On December 11, 2008, the Securities and Exchange Commission (the "SEC") filed a complaint against Madoff and BLMIS for securities fraud. On March 12, 2009, Madoff pled guilty to all eleven counts filed against him.

After Madoff's arrest, numerous individual, class, and derivative actions were filed against Tremont and others to recover losses as a result of Madoff's Ponzi scheme. Those actions were consolidated in the United States District Court for the Southern District of New York as *In re Tremont Group Holdings, Inc., Securities Litigation* (the "Southern District Action").[13]

In that case, the defendants sought and received approval of a Stipulation of Partial Settlement (the "Settlement") that settled, among other things, all Madoff-related derivative and direct claims.[14] The Settlement also gave the limited partners in the

---

11 Compl. ¶¶ 7, 74

12 *Id.* ¶¶ 7, 41.

13 C.A. No. 1:09-md-02052 (S.D.N.Y).

14 King Aff. Ex. D ("Final Judgment") ¶ 15 ("'Released Claims' shall mean: any and all direct, indirect and/or derivative claims, demands, rights, liabilities, causes of action, or lawsuits whatsoever . . . that have been . . . or . . . that could have been asserted in any forum by Plaintiffs, any Settlement Class Member, any Settling Fund, or any Individual Settling Insurance Plaintiff.").

"Settling Funds" (including TOF III) an opt-out right, which the Plaintiff Carriers exercised.[15]

C. Procedural History

After opting out of the Settlement, the Carriers commenced this lawsuit by filing their Complaint on December 7, 2011. On March 2, 2012, Tremont and the other Defendants moved to dismiss the Complaint. I heard argument on that motion on September 13, 2012. This Memorandum Opinion constitutes my ruling on Defendants' motions to dismiss.

D. Parties' Contentions

Defendants seek to dismiss the Carriers' claims on four separate grounds.[16] First, the Individual Defendants seek to dismiss the claims against them for lack of personal jurisdiction. Second, Defendants allege that the Exculpation Provision in the LPA bars seven of the thirteen counts asserted in the Complaint. Third, Tremont seeks to dismiss the derivative claims because: (1) the claims are barred by principles of res judicata and release; and (2) the Carriers have not satisfied the demand requirements applicable to their derivative claims. Finally, Tremont seeks dismissal of the remaining claims for failure to state a claim.

---

[15] *Id.* ¶ 3(d) ("Also excluded from the Settlement Class and subclasses are those Persons who timely and validly requested exclusion from the Settlement Class in accordance with the requirements set forth in the Notice, listed on Exhibit 1 attached hereto.").

[16] Defendant Sandra Manzke also moved to dismiss the Complaint against her for insufficiency of process and insufficiency of service of process. Because Manzke later withdrew those defenses, I do not address them.

The Carriers dispute all of Defendants' contentions and argue that the Court should deny the motions to dismiss in their entirety. Specifically, the Carriers argue that the Court has personal jurisdiction over the Individual Defendants pursuant to Delaware's long-arm statute. The Carriers also assert that the Exculpation Provision does not bar their claims because they adequately plead gross negligence and willful and reckless conduct. The Carriers further contend that they should be allowed to pursue their claims because: (1) the claims are direct; (2) the circumstances warrant disregarding the direct versus derivative distinction; and (3) the demand requirement should be excused because demand would be futile. Finally, the Carriers maintain that the challenged counts of the Complaint sufficiently plead causes of action to withstand Defendants' motions under Rule 12(b)(6).

II. ANALYSIS

A. Personal Jurisdiction

On a motion to dismiss under Court of Chancery Rule 12(b)(2), the plaintiff bears the burden to show the basis for the court's exercise of personal jurisdiction over the defendant.[17] To do so, the plaintiff must demonstrate: "(1) a statutory basis for service of process; and (2) the requisite 'minimum contacts' with the forum to satisfy constitutional due process."[18] When considering such motions, "the Court is not limited to the

---

[17] *See Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).

[18] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *6 (Del. Ch. May 7, 2008), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE); *see also Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) ("Delaware courts apply a two-step analysis

pleadings";[19] rather, it "may consider the pleadings, affidavits, and any discovery of record. If, as here, no evidentiary hearing has been held, plaintiffs need only make a prima facie showing of personal jurisdiction and 'the record is construed in the light most favorable to the plaintiff.'"[20]

---

to determine whether the exercise of personal jurisdiction over a nonresident is appropriate. First, the court must determine whether Delaware statutory law offers a means of exercising personal jurisdiction over the nonresident defendant. Second, after establishing a statutory basis for jurisdiction, the court must determine whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment." (internal quotation marks and citations omitted)).

19 *Matthew v. Laudamiel*, 2012 WL 605589, at *6 (Del. Ch. Feb. 21, 2012).

20 *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007) (citation omitted) (quoting *Cornerstone Techs., LLC v. Conrad*, 2003 WL 1787959, at *3 (Del. Ch. Mar. 31, 2003)). In their answering brief, the Carriers requested leave to take jurisdictional discovery. Pls.' Answering Br. in Opp'n to Defs.' Mot. to Dismiss the Compl. ("Pls.' Answering Br.") 13 n.6. Here, "the parties do not seriously dispute the nature of Individual Defendants' contacts with Delaware." *Hartsel v. Vanguard Gp., Inc.*, 2011 WL 2421003, at *15 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012) (TABLE). As in the *Hartsel* case, I am not persuaded that additional factual discovery would benefit the parties' jurisdictional dispute or that the attendant delay would be justified. Therefore, I deny Plaintiffs' request for leave to take jurisdictional discovery. *Id.* In addition, I note that nothing precluded Plaintiffs from taking such discovery before they responded to the pending motions to dismiss.

1. Consent to jurisdiction

As a preliminary matter, I address the question of whether this Court may exercise personal jurisdiction over the Individual Defendants because the LPA contains a forum selection clause whereby the parties expressly consented to the exclusive jurisdiction and venue of this Court.

"A party may expressly consent to jurisdiction by contract."[21] "If a party properly consents to personal jurisdiction by contract, a minimum contacts analysis is not required."[22] The only parties to the LPA, however, are the Fund's general partner, TPI, and its limited partners, including the Carriers. The Individual Defendants are present and former officers and employees of TPI and TGH, but they were not parties to the LPA. "Directors of a corporation . . . are not parties to a contract simply because the corporation is a party to a contract."[23] Therefore, TPI's consent in the LPA to jurisdiction in Delaware, in itself, does not subject the Individual Defendants to personal jurisdiction in this case.

---

21 *Ruggiero*, 948 A.2d at 1132 (citing *Capital Gp. Cos. v. Armour*, 2004 WL 2521295, at *2 (Del. Ch. Oct. 29, 2004)).

22 *Id.*

23 *Ruggiero*, 948 A.2d at 1132 (citing *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999) ("It is a general principle of contract law that only a party to a contract may be sued for breach of that contract.")).

2. Statutory basis for jurisdiction

In support of the "statutory basis" prong of personal jurisdiction, Plaintiffs rely on two provisions of the Delaware long-arm statute.[24] I note that the "burden [is] upon the plaintiff to make a specific showing that the Delaware court has jurisdiction under the long-arm statute."[25] The provisions of the Delaware long-arm statute, 10 *Del. C.* § 3104(c), that the Carriers rely on state:

> [A] court may exercise personal jurisdiction over any nonresident . . . who in person or through an agent . . . (1) [t]ransacts any business . . . in the State . . . [or] (4) [c]auses tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from service, or things consumed in the State.[26]

The long-arm statute has been divided into two main categories: "specific jurisdiction" and "general jurisdiction."[27] Section 3104(c)(1) constitutes a specific jurisdiction provision, while Section 3104(c)(4) represents a general jurisdiction provision.[28] Here, Plaintiffs allege that the Individual Defendants have satisfied the requirements of subsections (c)(1) and (c)(4) of the Delaware long-arm statute by: (a)

---

[24] 10 *Del. C.* § 3104.

[25] *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984) (citing three cases including *McNutt v. General Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178 (1936)).

[26] 10 *Del. C.* §§ 3104(c)(1), (4).

[27] *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1155 (Del. Super. 1997), *aff'd*, 707 A.2d 765 (Del. 1998).

[28] *Id.*

"knowingly and voluntarily" accepting management positions in TOF III, a Delaware limited partnership; (b) participating in negotiations and meetings concerning Plaintiffs becoming limited partners; (c) "likely" participating in the formation of TOF III and appointment of TPI as its general partner; and (d) reaping substantial financial benefits in connection with managing the Funds.[29] With those allegations in mind, I now address whether the Individual Defendants are subject to jurisdiction under either Section 3104(c)(4) or Section 3104(c)(1).

The Carriers have not presented sufficient facts to meet the requirements of Section 3104(c)(4). That subsection addresses a situation in which a defendant is generally affiliated with the forum jurisdiction.[30] "That is, subsection (c)(4) will apply when a defendant has had contacts with this state that are so extensive and continuing that it is fair and consistent with state policy to require that the defendant appear here and defend a claim even when that claim arose outside of this state and causes injury outside of this state."[31] The Carriers have not alleged that any of the Individual Defendants have had extensive and continuing contacts with Delaware. To the contrary, the actions the Carriers have alleged as supporting jurisdiction here are limited and isolated. Although the Individual Defendants may have reaped substantial benefits, they reaped those

---

29 Pls.' Answering Br. 11.

30 *Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Productions, Inc.*, 1991 WL 129174, at *3 (Del. Ch. July 10, 1991).

31 *Id.*

benefits in connection with managing the Funds and *not* in connection with "services, or things used or consumed in" Delaware.[32] Therefore, the Carriers have failed to show that this Court has jurisdiction over any of the Individual Defendants under 10 *Del. C.* § 3104(c)(4).

I now examine whether the Carriers have demonstrated that the Individual Defendants are subject to personal jurisdiction under the "transacts any business" section of the Delaware long-arm statute. This provision, Section 3104(c)(1), requires that the defendant's transaction of business in Delaware be related to the wrongs alleged in the complaint.[33] The conduct that the Carriers rely on as being "sufficient" under Section 3104 as the transaction of business by the Individual Defendants, however, either did not take place in Delaware *or* is unrelated to the alleged wrongs. For example, there are no allegations that the acceptance of management positions in TOF III, the formation of TOF III, or the appointment of TPI as a general partner are related to the alleged wrongs. Likewise, the Carriers do not allege that any of the Individual Defendants participated in negotiations or meetings with the Carriers in Delaware. Because the Carriers have failed to allege facts indicating the transaction of business in Delaware that was related to the wrongs alleged, I dismiss the Complaint as to all Individual Defendants for want of personal jurisdiction.

---

[32] *Id.* (quoting 10 *Del. C.* § 3104(c)(4)).

[33] *See Red Sail Easter Ltd. P'rs, L.P.*, 1991 WL 129174, at *2 ("Section 3104 expressly requires that . . . the wrong alleged must arise from the 'acts enumerated.'").

"In addition to demonstrating a statutory basis for personal jurisdiction as to each Individual Defendant, Plaintiffs also must show that the Court's exercise of jurisdiction over them meets the so-called minimum contacts analysis."[34] This analysis "seeks to determine the fairness of subjecting a nonresident defendant to suit in a distant forum by considering all of the connections among the defendant, the forum and the litigation . . . . [and] ensures that 'the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'"[35]

The Carriers' argument for personal jurisdiction over the Individual Defendants also fails the due process prong of personal jurisdiction because of a lack of contacts with Delaware. Due Process is satisfied if a court finds the existence of "minimum contacts" between the nonresident defendant and the forum state, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,"[36] or "if the defendant has purposefully directed his activities at residents of the forum and the litigation results from injuries that arise out of or relate to those activities."[37]

---

34 *Hartsel v. Vanguard Gp., Inc.*, 2011 WL 2421003, at *14 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012) (TABLE).

35 *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 330 (Del. Ch. 2003) (internal quotation marks omitted).

36 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

37 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks and citations omitted).

As previously discussed, the Carriers have not alleged contacts that would meet the minimum contacts standard, such as residing, conducting business, or owning real property or other assets in Delaware. Moreover, applying the same analysis contained in this section, the Carriers also have failed to allege facts that the Individual Defendants purposefully directed their activities at the forum and the litigation resulted from injuries that arose out of or related to those activities.

For these reasons, therefore, I grant the motion to dismiss the Complaint against the Individual Defendants for want of personal jurisdiction.

B. The Exculpation Provision

Defendants next contend that the Exculpation Provision of the LPA bars the Carriers' claims against Tremont for breach of contract (Count I), breach of fiduciary duty (Counts III and VIII), negligent misrepresentation (Counts VI and XI), and unjust enrichment (Counts VII and XII). Plaintiffs dispute those arguments.

The Delaware Revised Uniform Limited Partnership Act ("DRULPA")[38] provides that:

> A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission

---

[38] 6 *Del. C.* §§ 17-101 to 17-1111.

> that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.[39]

Consistent with that provision of DRULPA, the LPA contains an Exculpation Provision that exculpates the General Partner for any losses or expenses except those resulting from gross negligence, willful misfeasance, bad faith, or reckless disregard of duties arising under the LPA.[40]

As a preliminary matter, the Carriers argue that asserting an exculpatory provision of a limited partnership agreement as a bar to claims is an affirmative defense, and, therefore, is not appropriate for disposition on a motion to dismiss. According to the Carriers, "[u]ntil a factual record is developed, a determination of the applicability of the exculpatory provision to the claims would be premature."[41] Generally, factual questions regarding whether or not a standard of care has been met are resolved later in the proceedings, not at the motion to dismiss stage. Nevertheless, the Court may grant a motion to dismiss a claim where the plaintiffs have not adequately pled that the defendants' conduct constitutes a non-exculpated claim against a person subject to, for example, a limited partnership agreement containing an exculpation clause.[42]

---

39 *Id.* § 17-1101.

40 LPA § 3.05(a).

41 Pls.' Answering Br. 16 (quoting *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 157 (Del. Ch. 2003)).

42 *See, e.g., Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242, at *2 n.11 (Del. Ch. May 25, 2012) ("The Court, however, may consider an exculpatory provision on a motion to dismiss."); *see also Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) ("Where directors are contractually or otherwise exculpated from

Thus, to survive this motion to dismiss, the Carriers must assert that Tremont's conduct constituted at least gross negligence. While the Complaint never uses the words "gross negligence," the Carriers contend that they have adequately pled facts that would support a finding of gross negligence.[43]

In the civil context, the Delaware Supreme Court has defined "gross negligence" as "a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[44] Gross negligence refers to a decision "so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion."[45] Under the law of entities, gross negligence "involves a devil-may-care attitude or indifference to duty amounting to recklessness."[46] In order to prevail on a claim of gross negligence, a

---

liability for certain conduct, 'then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts.'"); *Malpiede v. Townson*, 780 A.2d 1075, 1079 (Del. 2001) ("Because the plaintiffs do not contest the existence, terms, validity or authenticity of the Frederick's exculpatory charter provision, we hold that the charter provision was properly before the Court of Chancery.").

43 Tr. 54.

44 *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990), *cert denied*, 499 U.S. 952 (1991) (quoting W. Prosser, *Handbook of the Law of Torts* 150 (2d ed. 1955)).

45 *See Solash v. Telex Corp.*, 1988 WL 3587, at *9 (Del. Ch. Jan. 19, 1988) (internal quotations and citations omitted).

46 *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *4 (Del. Ch. Aug. 26, 2005) (citing William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1300 (2001)); *Gelfman v. Weeden Investors, L.P.*, 859 A.2d 89, 114 (Del. Ch. 2004) (same).

plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason."[47]

The Carriers claim that their Complaint contains six allegations of gross negligence and willful and reckless conduct.[48] Specifically, they state that: (1) TPI, contrary to representations in the LPA, failed to supervise, monitor, and manage the investments in Prime, and instead "blindly and recklessly handed over its responsibility to Madoff," without performing any due diligence;[49] (2) TPI "intentionally chose to remain willfully ignorant of the fraud" despite warnings and opportunities to uncover the fraud;[50] (3) TPI acted with gross recklessness by blindly resting upon Madoff's self-proclaimed success and the long-standing relationship with Madoff;[51] (4) Tremont deliberately decided to ignore the indicia of Madoff's fraud, which demonstrates its conscious misbehavior and gross recklessness;[52] (5) Tremont knew, at the time of the representations, that they were false or disregarded their falsity with extreme

---

47 *Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *4 (citing *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *14 (Del. Ch. Sept. 3, 1996), *aff'd*, 692 A.2d 411 (Del. 1997) (TABLE)).

48 Pls.' Answering Br. 14.

49 Compl. ¶ 46.

50 *Id.* ¶ 57.

51 *Id.* ¶ 62.

52 *Id.* ¶ 69.

recklessness;[53] and (6) Tremont knew that the investment assets were not invested as described, but rather, simply were handed over to and invested with Madoff.[54]

Tremont alleges that the Carriers' allegations regarding a failure to heed "warning signs" do not satisfy the requirement of gross negligence, and, at most, support a claim of simple negligence.[55] None of the cases relied upon or cases cited to by Tremont in support of this argument, however, are from Delaware or involve facts similar or analogous to the facts of this case. Rather, Tremont's cases refer to situations where the defendant failed to heed or take notice of red flags, rather than willfully and consciously ignored red flags, as alleged here.

While no Delaware case has addressed whether a failure to heed "warning signs" can constitute gross negligence in the partnership context, the analysis set forth by this Court in *Forsythe v. ESC Fund Management Co. (U.S.)*[56] is instructive. In *Forsythe*, the general partner delegated the fund's management to affiliates of its bank.[57] The general partner's sole duty was to oversee the managers of the fund. Moreover, the general

---

53 *Id.* ¶ 106.

54 *Id.* ¶ 113.

55 Reply Br. of the Tremont Defs. in Further Supp. of their Mot. to Dismiss the Compl. ("Tremont Reply Br.") 8 (citing *In re J. Ezra Merkin & BDO Seidman Sec. Litig.*, 817 F. Supp. 2d 346, 358 (S.D.N.Y. 2011) and *Mfrs. Life Ins. Co. v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 2000 WL 709006, at *4 (S.D.N.Y. June 1, 2000)).

56 2007 WL 2982247 (Del. Ch. Oct. 9, 2007); *see also Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *4 (Del. Ch. Aug. 26, 2005).

57 *Forsythe*, 2007 WL 2982247, at *3.

partner was only liable for acts committed in bad faith, willful misconduct, gross negligence, or a material breach of the partnership agreement. The court denied the defendants' motion to dismiss a complaint that accused the general partner of failing to oversee the manager. In doing so, the court held that the plaintiff adequately stated his claim based on allegations that the general partner had failed "to inquire into the investment decisions," "ask[] for any of the underlying material," or "question[] either the Special Limited Partner, the Investment Advisor, or any other person or entity regarding the investments being made."[58]

Here, Plaintiffs allege conduct that arguably is more egregious than that at issue in *Forsythe*. According to the Complaint, Tremont not only failed to oversee its investments with Madoff—Tremont *willfully* and *consciously* ignored warning signs about those investments.

Accordingly, the Carriers' Complaint adequately pleads facts in support of its claim against Tremont that conceivably could satisfy one or more of the grossly negligent, willful, or reckless requirements set forth in the Exculpation Provision. Therefore, I deny Tremont's motion to dismiss Counts I, III, VI, VII, VIII, XI, and XII based on the Exculpation Provision.

C. The Derivative Claims

Tremont asserts that the doctrines of res judicata and release by operation of the Final Judgment in the Southern District Action bar the Carriers' derivative claims—*i.e.*,

---

[58] *Id.* at *8.

Count VIII (breach of fiduciary duty), Count IX (fraud), Count X (intentional misrepresentation), Count XI (unjust enrichment), and Count XII (negligent misrepresentation). In addition, Tremont argues that, although the Complaint labels Count III (breach of fiduciary duty) and Count VII (unjust enrichment) as direct claims, they also should be barred, because in fact, they are derivative in nature. Finally, Tremont seeks dismissal of the derivative claims because the Carriers have failed to satisfy the demand requirements applicable to those claims.

1. Are the Carriers' claims for breach of fiduciary duty and unjust enrichment derivative or direct?

Before I can decide whether the Carriers' claims are barred by the doctrine of res judicata, release by operation of the Final Judgment, or a failure to make a demand, I first must consider whether Counts III and VII are derivative or direct claims.

The "determination of whether a claim is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases."[59] The test for determining whether a claim is derivative or direct in corporate cases was set forth by the Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[60] The test requires answering two questions: (1) who suffered the alleged harm; and (2) who would

---

[59] *Albert*, 2005 WL 2130607, at *11 (citing *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992)).

[60] 845 A.2d 1031, 1033 (Del. 2004).

receive the benefit of any recovery or other remedy.[61] "The manner in which a plaintiff labels its claim and the form of words used in the complaint are not dispositive; rather, the court must look to the nature of the wrong alleged, taking into account all of the facts alleged in the complaint, and determine for itself whether a direct claim exists."[62] As to the first prong of the test set forth in *Tooley*, the "stockholder's claimed direct injury must be independent of any alleged injury to the corporation . . . . The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."[63] If the nature of the injury is such that it falls directly on the business entity as a whole and only secondarily on individual investors "as a function of and in proportion to [their] pro rata investment in the [entity]," then the claim is derivative and must be prosecuted on behalf of the entity.[64] Regarding the second prong of the *Tooley* test, "in order to maintain a direct claim, stockholders must show that they will receive the benefit of any remedy."[65]

---

61 *Id.* at 1035; *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 817 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006).

62 *Hartsel v. Vanguard Gp., Inc.*, 2011 WL 2421003, at *16 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012) (citing *In re J.P. Morgan Chase*, 906 A.2d at 817; *In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 860 (Del. Ch. 1998)).

63 *Tooley*, 845 A.2d at 1039; *In re J.P. Morgan Chase*, 906 A.2d at 817.

64 *Kelly v. Blum*, 2010 WL 629850, at *9 n.63 (Del. Ch. Feb. 24, 2010).

65 *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *13 (Del. Ch. Aug. 26, 2005); *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1179 (Del. Ch. 2006) (noting that a direct claim is one in which "no relief flows to the corporation").

Although the Carriers labeled Counts III and VII as "direct" claims, Tremont argues that they are derivative. Tremont points out that the claims for breach of fiduciary duty and unjust enrichment stem from a diminution in the value of the Funds resulting from Madoff's theft of Fund assets and from the Funds' payment of allegedly unwarranted fees to Tremont. Because these injuries were suffered by the Funds, and only indirectly by the Carriers, Tremont classifies the claims as derivative, and not direct.

The Carriers disagree, arguing that the Settlement renders their claims direct rather than derivative.[66] Specifically, they assert that the first prong of the *Tooley* test—*i.e.*, who suffered the alleged harm—is satisfied because the Carriers *alone* received no benefit from the Settlement and will be left without remedy or recourse for damages. Under the same rationale, the Carriers also argue that the second prong of the *Tooley* test—*i.e.*, who would receive the benefit of any recovery or other remedy—is satisfied here because the claimed damages would benefit the Carriers *alone*.

The Carriers effectively are asking this Court to convert their derivative claims to direct claims based on their decision to opt out of the settlement class (the "Settlement Class"). Preliminarily, I note that, under both Delaware and federal law, shareholders do

---

[66] Pls.' Answering Br. 18. The Carriers also argue that the first prong of *Tooley* is satisfied because general partners of a limited partnership owe duties to the partnership *and* the limited partners themselves. Defendants contend, however, that the Carriers have failed to show that the *injury* is independent of any alleged injury to the limited partnership. *See Tooley*, 845 A.2d at 1039; *In re J.P. Morgan Chase*, 906 A.2d at 817.

not have a right to opt out of a derivative suit.[67] With that principle of law in mind, I conclude that if the claims in issue here were derivative in nature at the time of the Settlement, the Carriers could not have opted out of those claims in the first place.

Applying the *Tooley* test, at the time of the Settlement, Counts III and VII were derivative. As noted by Tremont, the injuries allegedly suffered as a result of the wrong asserted in those claims were suffered directly by the Funds and not by the Carriers themselves. In their Complaint, the Carriers allege that the claimed injury resulted from the losses incurred by the Funds and the Funds' payment of unwarranted fees to Tremont.[68] The injury for which Plaintiffs seek redress, therefore, was suffered by the Funds. That is, the Carriers complain that the alleged misconduct made TOF III less valuable. Because Tremont's misconduct damaged the Carriers only to the extent of their

---

[67] *Compare* Fed. R. Civ. P. 23, *and* Ct. Ch. R. 23 (both allowing an opt-out or exclusion from a class), *with* Fed. R. Civ. P. 23.1, *and* Ct. Ch. R. 23.1 (not allowing opt-out or exclusion in derivative actions by shareholders); *see also Tabas v. Crosby*, 1982 WL 116989 (Del. Ch. July 23, 1982) (revising opinion to deny objectors permission to opt-out of the class in a derivative suit); 7C C. Wright & A. Miller, *Federal Practice and Procedure* § 1840 (3d ed. 2004) ("In a sense, the derivative suit is an exception to the general rule that one is not bound by an in-personam judgment in an action in which he is not a party, inasmuch as all nonparty shareholders will be bound and cannot subsequently assert the right advanced in the derivative action. This is analogous to the binding effect of the judgment in a class action or in other forms of representational litigation. . . . A derivative action that is settled with court approval after appropriate notice will be given effect in a subsequent derivative suit on behalf of the same corporation in which the same claim is asserted."); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 Tenn. L. Rev. 81, 117–18 (1998) (discussing the unavailability of opt-out option in derivative suits).

[68] *See* Compl. ¶¶ 26, 94, 125.

proportionate interest in TOF III, the injury was neither direct nor something that existed independently of the Funds.[69] For all of these reasons, therefore, I conclude that Counts III and VII are derivative in nature.

2. Are the derivative claims barred by principles of res judicata and release?

I next examine whether the derivative claims—including Counts III and VII, as well as those claims acknowledged by the Carriers to be derivative—are barred by the principles of res judicata and release.

The Final Judgment stated that the following claims are "released with prejudice": "any and all direct, indirect and/or *derivative* claims, demands, rights, liabilities, causes of action, or lawsuits whatsoever . . . that have been . . . or . . . that could have been asserted in any forum by Plaintiffs, any Settlement Class Member, any Settling Fund, or any Individual Settling Insurance Plaintiff."[70] Similarly, the notice of settlement (the "Notice of Settlement") notified the Carriers that, if they opted out of the Settlement Class:

> You will not be legally bound by anything that happens in the Actions with respect to Released Claims, except that the final judgment entered by the Court will operate to preclude you from commencing or continuing to maintain any Released Claims that were, could have been or could be asserted by or

---

69 *See, e.g.*, *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that where "[t]he diminution in the value of their interests flows from the damage inflicted directly on the Partnership . . . . [the] cause of action is derivative in nature").

70 Final Judgment ¶¶ 13, 15 (emphasis added).

> on behalf of the Settling Funds (the "Released Fund Claims").[71]

Thus, the Released Fund Claims include any derivative claims that might have been asserted on TOF III's behalf. A well-settled principle of Delaware law is that, "in a stockholder's derivative suit a judgment entered . . . upon an approved settlement is [r]es judicata and bars subsequent suit on the same claim [on] behalf of the Corporation."[72]

Tremont acknowledges that the Carriers' decision to opt out of the Settlement Class allows them to continue pursuing *direct* claims. Based on the Settlement, however, Tremont argues that the Carriers are precluded from pursuing *derivative* claims. In opposition to that contention, the Carriers proffer two arguments as to why their derivative claims should not be dismissed: (1) the derivative claims are actually direct; and (2) the circumstances of this case warrant disregarding the distinction between direct and derivative claims.

As discussed in Section II.C.1, *infra*, a derivative claim does not become direct simply because the parties elected to opt out of a settlement. The Carriers better argument, therefore, is that principles of equity control here and warrant disregarding the distinction between direct and derivative claims.

---

71 Measley Aff. Ex. B, Notice of Settlement, ¶ 15.

72 *See Ezzes v. Ackerman*, 234 A.2d 444, 445 (Del. 1967).

The Carriers rely heavily on *In re Cencom Cable Income Partners, L.P.*[73] and *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*[74] for the proposition that, in the context of limited partnerships, Delaware courts will disregard the distinction between direct and derivative suits in certain circumstances to comport with principles of equity.

In *Cencom*, the Court considered whether to apply the direct versus derivative distinction to claims brought by limited partners in the context of a limited partnership that had been dissolved.[75] In deciding to disregard the distinction, the Court observed that:

> I am not prone to mechanistic or formalistic application of pleading requirements where doing so only tends to frustrate efficient claim resolution. Unless prevented by some positive and mandatory law, equity regards substance rather than form. I find the claims for breach of fiduciary duty and breach of the partnership agreement are, in substance, direct claims and may be prosecuted by a class of the limited partners, under Rule 23(b)(1).[76]

Similarly, the Court in *Anglo American*, relying on *Cencom*, allowed claims that normally would be regarded as derivative to be brought as direct claims. The partnership in *Anglo American* was structured such that "whenever the value of the Fund is reduced,

---

73 2000 WL 130629 (Del. Ch. Jan. 27, 2000).

74 829 A.2d 143 (Del. Ch. 2003).

75 *Cencom*, 2000 WL 130629, at *4 ("In this case, however, the partnership's business is complete, the liquidation sale is over, and the only two parties to the partnership are now clearly adversaries.").

76 *Id.* at *6.

the injury accrues irrevocably and almost immediately to the current partners but will not harm those who later become partners."[77] The Court explained the rationale for disregarding the direct/derivative distinction by stating:

> In the partnership context, the relationships among the parties may be so simple and the circumstances so clear-cut that the distinction between direct and derivative claims becomes irrelevant. Similarly, in some instances, the relationships among the parties and the function and structure of the partnership itself may diverge from the corporate model so dramatically that some claims, which in a corporate context might be classified as derivative, *must* be brought as direct claims in order to enable the injured parties to recover while preventing a windfall to individuals or entities whose interests were not injured.[78]

The Carriers' reliance on *Cencom* and *Anglo American*, however, is misplaced. Those cases arise out of materially different sets of facts. *Cencom* involved a partnership that had been liquidated or dissolved. In fact, this Court has described *Cencom* as being "limited to its own unique set of facts."[79] Although the Complaint at bar alleges that Tremont "has essentially ceased all business operations and no longer operates as a going concern,"[80] there is no dispute that the Tremont entities still are in a "wind up mode."[81] I see no basis for expanding *Cencom* to entities in the process of "winding-up," such as

---

77 *Anglo American*, 829 A.2d at 152.

78 *Id.* at 150–51.

79 *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004).

80 Compl. ¶ 63.

81 Pls.' Answering Br. 21.

TOF III, as long as those entities are "relevant as [] distinct legal creature[s] for the purpose of resolving the final claims between [the disputing] parties."[82]

Similarly, *Anglo American* arose out of a concern that the "recovery would flow to partners that had joined the fund *after* the harm occurred, and would provide no relief to the former partners who were actually harmed by the alleged conduct."[83] Because the Funds in this case have had no new investors since December 11, 2008, by which date litigation had been commenced against Madoff, any recovery on behalf of TOF III would benefit all investors, including those who actually were harmed. Hence, the facts of this case are not analogous to the facts that gave rise to the exceptions in *Cencom* and *Anglo American*. Therefore, I see no reason to disregard the derivative nature of the Carriers' claims.

As a final argument, the Carriers aver that it would be inequitable and result in a windfall to Tremont if this Court were to dismiss the Carriers' derivative claims without their having received any consideration in exchange. Tremont vigorously disputes the Carriers' contention that they received no consideration for the settlement of the derivative aspects of their claims in the Southern District Action. Tremont argues that, in accordance with the Plan of Allocation to be approved by the District Court, the Carriers

---

82 *See Cencom*, 2000 WL 130629, at *6; *see also Agostino*, 845 A.2d at 1125 (distinguishing *Cencom* based on defendant's existence "as a distinct legal creature").

83 *Ernst & Young Ltd. Berm. v. Quinn*, C.A. No. 09-CV-1164, at 16–17 (D. Conn. Oct. 26, 2009) (limiting the holding of *Anglo American*).

will receive funds from the Fund Distribution Account as investors in the Settling Funds.[84] The Carriers contend that the Fund Distribution Account does not represent consideration for the settlement of the derivative claims, but rather a distribution made by the BLMIS Trustee to pay claims that the Trustee agreed to allow.[85] Moreover, the Carriers point out that the Fund Distribution Account was funded by a settlement between Defendants and the Trustee regarding claims of the Trustee as to which the various Tremont funds were "net winners."[86]

As a threshold matter, I reiterate that this matter is before me on a motion to dismiss under Rule 12(b)(6). Consequently, the Court must be mindful of the "record" that properly is before it on such a motion. With that in mind, I have limited my consideration to the allegations in the Complaint, the documents integral to the Complaint, and those matters as to which the Court may take judicial notice under Delaware Uniform Rules of Evidence Rules 201 and 202.[87] The latter category includes documents filed of record in the Southern District Action that are not likely to be in dispute.

---

84 *See* Letter from Robert S. Saunders, Att'y for Defs., to the Court (Sept. 14, 2012).

85 *See* Letter from Michael P. Kelly, Att'y for Pls., to the Court (Sept. 26, 2012).

86 *Id.*

87 *See, e.g.*, *Wilm. Sav. Fund Soc'y, FSB v. Stewart Guar. Co.*, 2012 WL 5450830, at *2 (Del. Super. Aug. 31, 2012); *In re Encore Energy P'rs LP Unitholder Litig.*, 2012 WL 3792997, at *6 n.28 (Del. Ch. Aug. 31, 2012).

In that regard, I recite below some of the important disclosures made during the settlement of the Southern District Action, the *In re Tremont Group Holdings, Inc., Securities Litigation*. A notice of the proposed settlement disclosed that:

> In addition to asserting class claims, the State Law Actions also included derivative claims. In a derivative action, one or more people and/or entities who are shareholders in a corporation or as here, shareholders or limited partners of an investment fund . . . , sue on behalf of the fund, alleging that the fund was injured, and seek recovery on behalf of the fund. These are claims that belong to the respective funds and *once released (as they will be by this Settlement), they cannot be maintained by the funds or any of the shareholders or limited partners*.[88]

Similarly, a supplemental notice stated that:

> If you ask to be excluded . . . your right, if any, to receive a payment from the Fund Distribution Account will not be affected . . . . You will not be legally bound by anything that happens in the Actions with respect to Released Claims, except that the final judgment entered by the Court will operate to preclude you from commencing or continuing to maintain any Released Claims that were, could have been or could be asserted by or on behalf of the Settling Funds (the "Released Fund Claims"). *You also may be able to sue (or continue to sue) the Settling Defendants or Released Parties in the future, although not with respect to any of the Released Fund Claims.*[89]

---

[88] Notice of Pendency of Consol. Actions, Proposed Settlement, Hr'g on Proposed Settlement, and Mot. for Att'ys' Fees and Expenses at 11, *In re Tremont Securities Law, State Law and Insurance Litig.*, No. 08-11117 (S.D.N.Y. Feb. 25, 2011), ECF No. 392-2 (emphasis added).

[89] Supplemental Notice of Pendency of Consol. Actions, Proposed Settlement, Hr'g on Proposed Settlement, and Mot. for Att'ys' Fees and Expenses at 12, *In re Tremont Securities Law, State Law and Insurance Litig.*, No. 08-11212 (S.D.N.Y. June 28, 2011), ECF No. 112 (emphasis added).

"Released Claims" are defined in a stipulation of final settlements as "any and all direct, indirect and/or derivative claims, demands, rights, liabilities, causes of action, or lawsuits whatsoever . . . that have been . . . or . . . that could have been asserted in any forum by Plaintiffs, any Settlement Class Member, any Settling Fund, or any Individual Settling Insurance Plaintiff."[90] Finally, "Settling Funds" are defined as "the Rye Funds and the Tremont Funds."[91]

These disclosures make clear that the derivative claims held by the Funds were released by the Settlement. Nonetheless, the Carriers argue that they have not received and will not receive consideration for the settlement of the Funds' claims. The real issue, however, is not whether *the Carriers* received consideration for the settlement of those claims, but rather whether *the Funds* received consideration for the settlement of their derivative claims. The Carriers have not alleged facts from which the Court reasonably could infer that the Funds did not receive consideration for the settlement of their derivative claims.

With respect to any claims that were or could have been asserted derivatively on behalf of the Funds, there was an opportunity at the settlement stage for objections and review by the Court.[92] Judge Griesa, who oversaw the litigation of the Southern District

---

90 Stipulation of Partial Settlement ¶ 1.47, *In re Tremont Securities Law, State Law and Insurance Litig.* No. 08-11117 (S.D.N.Y. Feb. 25, 2011), ECF No. 392-1.

91 *Id.* ¶ 1.57.

92 *See In re Pfizer Inc. S'holder Deriv. Litig.*, 780 F. Supp. 2d 336, 340 (S.D.N.Y. 2011) (holding that a Court, in analyzing the substantive terms of a settlement,

Action, approved the settlement of the derivative claims in that case. To the extent that the Funds, and indirectly the Carriers, may have believed that they did not receive an adequate benefit from the settlement of those claims, their recourse was to object to the Settlement.[93] Such objections, however, are not appropriate at this time or in this Court. Nor do they provide a basis for disregarding the distinction between a direct and a derivative claim.[94]

In sum, I have concluded that Counts III, VII, VIII, IX, X, XI, and XII are derivative, and that it is not appropriate to disregard the derivative nature of those claims. As a result, those counts are barred by principles of res judicata and release by operation of the Final Judgment.[95] Having determined to dismiss these claims on that basis, I need

---

considers "any shareholder objections to the settlement"); Fed. R. Civ. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval.").

93 *See, e.g.*, Fed. R. Civ. P. 23.1; 7C C. Wright & A. Miller, *Federal Practice and Procedure* § 1840 (3d ed. 2004).

94 *In re Louisiana-Pacific Corp. Derivative Litigation*, 705 A.2d 238 (Del. Ch. 1997), is instructive in this regard. In that case, Chancellor Allen noted that where individuals "are to receive directly no consideration in exchange for the 'release' of their rights, it seems most elementary that the court would be unauthorized to release the property." *Id.* at 240. Nevertheless, the Court was unwilling to apply that principle to the derivative claims in that case. *Id.* at 241 (entering an order approving settlement of derivative claims, while allowing the "assertion of direct claims"). Thus, even if *the Carriers* will not receive consideration for the settlement of their derivative claims—an assertion strenuously contested by Tremont—that would not provide a basis under Delaware law for refusing to give effect to the release of the derivative claims.

95 *See supra* note 72 and accompanying text.

not reach the question of whether the Carriers satisfied the demand requirements applicable to their derivative claims.[96]

D. Motions to Dismiss Under Court of Chancery Rule 12(b)(6)

Tremont also seeks to dismiss the remaining five claims—*i.e.*, Count I (breach of contract), Count II (breach of covenant of good faith and fair dealing), Count IV (fraud), Count V (intentional misrepresentation), Count VI (negligent misrepresentation), and Count XIII (civil conspiracy/aiding and abetting)—pursuant to Rule 12(b)(6) for failure to state a claim.

Under Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[97] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'well-pleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[98]

---

96 Based on the generally derivative nature of the claims, I also need not address the question of whether the Carriers failed to state a claim for breach of fiduciary duty (Counts III & VIII) and unjust enrichment (Counts VII & XII).

97 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

98 *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[99] If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[100] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[101] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[102]

With these principles in mind, I now turn to whether the Complaint sufficiently pleads the causes of action asserted in Counts I, II, IV, V, VI, and XIII.

1. Breach of contract

To survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must have pled: (1) the existence of a contract, whether express or implied; (2) a breach of an obligation imposed by that contract; and (3) damage suffered by the plaintiff as a result.[103]

---

99 *Id.* at *5 & n.13.

100 *Id.* at *6.

101 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

102 *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

103 *See, e.g., VLIW Tech., LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003); *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *7 (Del. Ch. Dec. 22, 2010).

In alleging a breach of contract, a plaintiff need not plead specific facts to state an actionable claim. Rather, 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."[104] Such a statement only must give the defendant fair notice of a claim and is to be liberally construed.[105]

Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss.[106] When interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."[107] As part of that review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."[108] Additionally, when interpreting a contractual provision, a court attempts to reconcile all of an agreement's provisions when read as a whole, giving effect to each and every term. In doing so, courts apply the well-

---

104 Ct. Ch. R. 8(a)(1).

105 *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979); *see also Conley v. Gibson*, 355 U.S. 41, 47 (1957). This simplified pleading standard applies to all civil actions, with limited exceptions. Court of Chancery Rule 9(b), for example, requires greater particularity in averments of fraud or mistake.

106 *See, e.g.*, *Schuss v. Penfield P'rs, L.P.*, 2008 WL 2433842, at *6 (Del. Ch. June 13, 2008); *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

107 *Schuss*, 2008 WL 2433842, at *6.

108 *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.*, 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005)).

settled principle that "contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'"[109]

If the contractual language is "clear and unambiguous," the ordinary meaning of the language generally will establish the parties' intent.[110] A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[111] On a motion to dismiss, a trial court cannot choose between two different reasonable interpretations of an ambiguous document.[112] Where ambiguity exists, "[d]ismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law."[113]

It is undisputed that a contract existed between the parties in the form of the LPA and that the Carriers suffered damages. Tremont denies, however, that the Carriers have alleged a breach of the LPA or any other relevant contract.

---

109 *Schuss*, 2008 WL 2433842, at *6.

110 *Brandywine River Prop., Inc. v. Maffet*, 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

111 *See Pharmathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855, at *11 (Del. Ch. Jan. 16, 2008); *see also United Rentals, Inc. v. Ram Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) ("Ambiguity does not exist simply because the parties do not agree about what the contract means.").

112 *See Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1289 (Del. 2007).

113 *Id.* (quoting *Vanderbilt Income & Growth Assoc. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)) (internal quotation marks omitted).

Count I of the Complaint alleges that Tremont breached the LPA and the PPM[114] by: (1) "failing to analyze, evaluate, and monitor the Madoff-related investments in any manner whatsoever";[115] and (2) "fail[ing] to perform any meaningful due diligence or analyze, evaluate, and monitor the investments of [TPI]."[116]

Tremont contends that the Complaint fails to allege adequately a claim for breach of contract because the LPA and the PPM do not contain contractual provisions requiring TPI to analyze, monitor, or perform diligence on the Funds' Madoff-related investments.[117]

The PPM, however, states that TPI was "responsible for selecting the Partnership's Managers, allocating assets among Managers and monitoring the Partnership's investments."[118] The PPM further provides that, "[i]n selecting Managers, [TPI] collects, analyzes and evaluates information regarding the personnel, history and

---

114 Although the Complaint alleges that "Tremont breached the terms of the [LPA] and the PPM . . . ," it does not set forth how any Defendant could have "breached" the PPM as a matter of contract law. Compl. ¶ 83. Perhaps the Carriers meant that Tremont breached the warranty in the LPA concerning the truthfulness of representations in the PPM. *See* LPA § 3.04(a).

115 Compl. ¶ 83.

116 *Id.* ¶ 86.

117 Tremont also argues that Count I is barred by the Exculpation Provision. Opening Br. of the Tremont Defs. in Supp. of their Mot. to Dismiss the Compl. ("Tremont Opening Br.") 18. In Part II.B, *supra*, I held that the Complaint pleads a claim against Tremont sufficient to satisfy the grossly negligent, willful, or reckless requirement specified in the Exculpation Provision.

118 Compl. ¶ 29; PPM iv.

background, and the investment styles, strategies and performance of professional investment management firms."[119]

Tremont downplays the significance of these statements, noting that the PPM qualifies them as follows: "This summary is qualified in its entirety by the more detailed information appearing elsewhere herein and by the terms of the [LPA], which is included as Exhibit I to this [PPM]."[120] Tremont also relies upon Section 3.04 of the LPA, which states that "the General Partner and its Affiliates shall not be obligated to do or perform any act or thing in connection with the business of the Partnership not expressly set forth herein." The Carriers respond by emphasizing that the LPA warranted that the PPM "does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading."[121]

The LPA is ambiguous as to whether it incorporated the promises made in the PPM. On the one hand, the LPA states that the General Partner and its Affiliates are not obligated to do anything not set forth within the provisions of the LPA. On the other hand, the LPA warrants that the PPM does not contain untrue statements of material fact or omit to state a material fact. Because these two contractual provisions appear to

---

119 Compl. ¶ 43; PPM 3.

120 PPM ii.

121 Compl. ¶ 46; LPA § 3.04(a).

conflict, Tremont conceivably could show that the LPA is ambiguous.[122] Moreover, "[b]ecause any ambiguity must be resolved in favor of the nonmoving party, [Defendants here] are not entitled to dismissal under Rule 12(b)(6) unless the interpretation of the contract on which their theory of the case rests is the '*only* reasonable construction as a matter of law.'"[123] In this case, I find that the Carriers have pled sufficient facts to make it conceivable that they could prove that TPI had an obligation to fulfill the alleged obligations.

The Complaint also alleges facts that conceivably could support a reasonable inference that Tremont breached these obligations under the LPA, and indirectly the PPM, by: (1) "failing to analyze, evaluate, and monitor the Madoff-related investments in any manner whatsoever";[124] and (2) "fail[ing] to perform any meaningful due diligence or analyze, evaluate, and monitor the investments of [TPI]."[125] Therefore, I must deny Defendants' motion to dismiss Count I.

---

122 *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 836 (Del. Ch. 2007) ("[T]he conflicting provisions of this contract render it decidedly ambiguous.").

123 *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008).

124 Compl. ¶ 83.

125 *Id.* ¶ 86.

2. Breach of the implied covenant of good faith and fair dealing

In Delaware, the implied covenant of good faith and fair dealing attaches to every contract by operation of law.[126] It requires contracting parties "to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[127] Otherwise, "parties to a contract could undermine and frustrate every legal obligation entered into."[128] The implied covenant acts as a way to import terms into an agreement to address unanticipated developments or to fill gaps in the contract's provisions.[129] To state a claim for breach of the implied covenant, a litigant must allege: (1) a *specific* obligation implied in the contract; (2) a breach of that obligation; and (3) resulting damages.[130] Moreover:

> Since a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation.[131]

---

126 *Gloucester Hldg. Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 128 (Del. Ch. 2003).

127 *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation marks and citations omitted).

128 *Gloucester Hldg. Corp.*, 832 A.2d at 128 (internal quotation marks and citations omitted).

129 *Matthew v. Laudamiel*, 2012 WL 605589, at *16 (Del. Ch. Feb. 21, 2012) (citing *Dunlap*, 878 A.2d at 442).

130 *Id.* (citing *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov.10, 1998)).

131 *Fitzgerald*, 1998 WL 842316, at *1 (citations omitted).

In seeking dismissal of the Carriers' implied covenant claim, Tremont argues that the Complaint does not allege a "specific implied contractual obligation" or how the breach of that obligation denied the Carriers the fruit of the contract.[132]

In their Answering Brief, the Carriers assert that TPI had a specific, implied contractual obligation "to collect, analyze, and evaluate information when selecting investment managers and to monitor their performance after selection."[133] The Complaint, however, does not identify any specific, implied contractual obligation.[134] Instead, the Complaint only generally alleges that Tremont had an "obligation to refrain from unreasonable conduct that would prevent Plaintiffs' receiving the benefit of their bargain and fulfilling their reasonable expectations."[135] But, that conclusory statement does not amount to pleading a "*specific* implied contractual obligation," as required by

---

132 *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) ("[T]he implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." (internal quotation marks and citations omitted)).

133 Pls.' Answering Br. 29.

134 *See* Compl. ¶¶ 91–92.

135 *See id.* ¶ 91.

Delaware law.[136] "General allegations of bad faith conduct are not sufficient" to state a claim for breach of the implied covenant of good faith and fair dealing.[137]

"Under Rule 15(aaa), a party cannot use its brief as a mechanism to informally amend its complaint."[138] In terms of the Carriers' implied covenant claim, the Complaint is facially deficient because it fails to plead a specific, implied contractual obligation. Thus, I grant Tremont's motion to dismiss Count II.

3. Fraud or intentional misrepresentation

The elements of fraud under Delaware law[139] are: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant's knowledge or belief that

---

136 *See supra* note 132 regarding the implied covenant of good faith and fair dealing; *see also Fitzgerald*, 1998 WL 842316, at *1 ("Since a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue, the plaintiff must advance provisions of the agreement that support this finding in order to allege sufficiently a specific implied contractual obligation." (internal citations omitted)).

137 *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

138 *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *13 n.83 (Del. Ch. Jan. 11, 2010) (citing Ct. Ch. R. 15(aaa)).

139 Tremont contends that New York law governs the Carriers' claims for fraud and intentional misrepresentation because New York has the most significant relationship to the parties in this case. The Carriers, on the other hand, rely on Section 9.04 of the LPA, a choice of law provision designating the laws of Delaware as controlling. Because New York law and Delaware law are virtually the same for the two torts at issue, I need not decide which state's law applies to the Carriers' fraud and intentional misrepresentation claim. Instead, I assume for purposes of the motion to dismiss that Delaware law applies. *See, e.g.*, *Outdoor Techs. Inc. v. Allfirst Fin. Inc.*, 2000 WL 141275, at *3 (Del. Super. Jan. 24, 2000) ("For the purposes of this Motion [to Dismiss], the provisions of the UCC and the

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.[140] To state a claim for intentional misrepresentation, the Carriers must allege: (1) deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) that the defendant acted with scienter; (3) an intent to induce plaintiff's reliance upon the concealment; (4) causation; and (5) damages resulting from the concealment.[141]

Additionally, Court of Chancery Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." That is, "[t]o satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations."[142] "Conditions of the mind, notably scienter in a fraud claim, may be

---

common law doctrines relied upon are virtually identical in both States. Thus, the Court will save the choice of law determination for a later date, if needed.").

140 *See Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

141 *See Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

142 *See, e.g.*, *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *12 (Del. Ch. Dec. 22, 2010); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7 (Del. Ch. Dec. 23, 2008).

averred generally."[143] Essentially, the particularity requirement obligates plaintiffs to allege the circumstances of an alleged fraud "with detail sufficient to apprise the defendant of the basis for the claim."[144]

Tremont argues that the Complaint fails to state a claim for fraud or intentional misrepresentation for two independent reasons. First, they assert that the Complaint fails to allege that Tremont's statements were false or misleading. And second, Tremont challenges the sufficiency of the Complaint because it fails to allege fraudulent intent.

As a preliminary matter, Tremont denies having represented that TOF III's investments would be subject to a robust due diligence process. It asserts that TGH's website cannot support a fraud claim because the PPM contained a non-reliance provision. Even if that were true,[145] however, the Complaint alleges that the PPM itself represented that the investments were subject to a due diligence process.[146] Moreover, as

---

143 *See Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 149 (Del. Ch. 2003) (citing Ct. Ch. R. 9(b) which states that "Malice, intent, knowledge and other condition of mind of a person may be averred generally.").

144 *See Narrowstep*, 2010 WL 5422405, at *12 (citing *Grunstein v. Silva*, 2009 WL 4698541, at *14 (Del. Ch. Dec. 8, 2009)).

145 *See, e.g.*, *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 524 n.19 (Del. Ch. 2005) ("Specific non-reliance clauses have been . . . held to bar fraud claims premised on reliance on representations extrinsic to commercial contracts."); *Progressive Int'l Corp. v. E.I. duPont de Nemours & Co., Inc.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002) ("To allow [the buyer] to assert, under the rubric of fraud, claims that are explicitly precluded by contract, would defeat the reasonable commercial expectations of the contracting parties and eviscerate the utility of written contractual agreements.").

146 *See* Compl. ¶ 43; *see also* Compl. ¶¶ 44–45.

discussed in Section II.D.2, *supra*, Tremont warranted in the LPA that the PPM contained no false statements.

Tremont next avers that even if it made the alleged representations, the Complaint does not allege that the statements were false at the time they were made. The Complaint specifically states, however, that "[w]hen making these representations, Tremont knew that it had not performed, did not intend to perform, and would deliberately fail to perform any due diligence or monitoring activities with respect to the Madoff-related investments."[147] Tremont attempts to dismiss this statement as merely a conclusory assertion of a future fact, which cannot support a fraud claim.[148] Yet, the Complaint alleges that Tremont made statements suggesting that due diligence had been performed when Tremont made those statements, when it *had not been*.[149] Therefore, the Carriers sufficiently have pled that Tremont made statements that were false when they were made.

Tremont also argues that the Complaint fails to allege scienter or fraudulent intent—*i.e.*, that Tremont knew that its statements were false or misleading or that it had an interest in deceiving the investors in the funds it managed. Because, as previously noted, conditions of the mind, including scienter in a fraud claim, may be averred

---

147 Compl. ¶ 37; *see also* Compl. ¶¶ 69–71.

148 Tremont Reply Br. 21 (citing *Sanders v. Devine*, 1997 WL 599539, at *9 (Del. Ch. Sept. 24, 1997)).

149 Compl. ¶ 106 ("Tremont knew that no such due diligence or monitoring activities *had been* performed." (emphasis added)).

generally, it is sufficient that the Complaint alleges Tremont knew that its statements were false because it had invested in Rye Select without conducting due diligence.[150] Those allegations, together with the averment that Tremont received millions of dollars in fees,[151] also adequately plead that Tremont had an interest in deceiving the investors. Thus, the Carriers sufficiently have pled the scienter element of both the torts in question.

For all of these reasons, I find that the Carriers adequately have pled both fraud and intentional misrepresentation. Therefore, I deny Tremont's motion to dismiss Counts IV and V.

4. Negligent misrepresentation

A claim for negligent misrepresentation requires: (1) a particular duty to provide accurate information, based on the plaintiff's pecuniary interest in that information; (2) the supplying of false information; (3) failure to exercise reasonable care in obtaining or communicating information; and (4) a pecuniary loss caused by justifiable reliance on the false information.[152]

Tremont avers that the Carriers' claim of negligent misrepresentation is barred by the LPA's Exculpation Provision, which prevents recovery on anything other than claims resulting from gross negligence, willful misfeasance, bad faith, or reckless disregard of duties. In particular, Tremont emphasizes that the Complaint merely alleges that it "acted

---

150 *See* Compl. ¶¶ 62, 106, 113.

151 Compl. ¶ 57.

152 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 147 n.44 (Del. Ch. 2003) (citing *Glosser v. Cellcor, Inc.*, 1994 WL 593929, at *22 (Del. Ch. Oct. 17, 1994)).

negligently by failing to investigate, confirm, prepare, and review with reasonable care the information represented and disseminated."[153]

To overcome the Exculpation Provision, the Carriers urge the Court to construe their negligent misrepresentation claim broadly to include grossly negligent, willful, and reckless conduct as "detailed in the previous section regarding the claims for fraud and intentional misrepresentation."[154] By asserting a negligent misrepresentation claim based on conduct reflecting a higher degree of culpability, however, the Carriers effectively are reasserting their claims for fraud or intentional misrepresentation. "Negligent misrepresentation differs from fraud only in the level of scienter involved; fraud requires knowledge or reckless indifference rather than negligence."[155] Further, under Delaware law, reckless indifference in the context of this dispute equates to gross negligence. Hence, there is no material distinction between the Carriers' claims for fraud or intentional misrepresentation and for negligent misrepresentation.

When presented with two redundant or identical claims, a court may decline to consider one claim or the other.[156] Here, I conclude that the Carriers' claim for negligent misrepresentation is either barred by the Exculpation Provision or duplicative of the fraud

---

153 Compl. ¶ 121.

154 Pls.' Answering Br. 36–37 (citing Compl. ¶¶ 46, 57, 62, 69, 107, 114).

155 *Glosser*, 1994 WL 593929, at *21 n.46.

156 *See, e.g.*, *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *17 (Del. Ch. May 18, 2009) (declining to consider a civil conspiracy claim because it would be redundant of the relief for aiding and abetting), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

and intentional misrepresentation claims. Therefore, I dismiss Plaintiffs' claim for negligent misrepresentation (Count VI).

5. Civil conspiracy or aiding and abetting breach of fiduciary duty

Tremont further contends that Count XIII of the Carriers' Complaint fails to state a claim for civil conspiracy or aiding and abetting a breach of fiduciary duty. Because the Carriers plead these claims in the alternative,[157] I address each of them independently.

a. Aiding and abetting breach of fiduciary duty

The elements for a claim of aiding and abetting a breach of fiduciary duty are: "(1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary."[158]

TGH asserts, as a preliminary matter, that it cannot be held liable for aiding and abetting a breach of fiduciary duty because there was no underlying breach of fiduciary duty by TPI. In that regard, Tremont argues that the LPA limits the potential liability for such breaches by TPI to claims of gross negligence. As discussed in Part II.B, however, this Court has found that the Complaint adequately pleads gross negligence.

TPI also contends that it could not have breached a fiduciary duty to the Carriers because a limited partnership entity does not owe fiduciary duties to its limited partners.

---

157 *See* Compl. ¶ 165 ("*As an alternative*, Plaintiffs request that the Court hold Tremont Group and the Individual Defendants liable for aiding and abetting the wrongful acts of Tremont Partners described above." (emphasis added)).

158 *See Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007).

TPI correctly cites *Klig v. Deloitte LLP*[159] for the proposition that, *as an entity*, it did not owe a duty to its partners. TPI ignores the fact, however, that it might owe fiduciary duties in its capacity as the general partner of the Funds. "Unquestionably, the general partner of a limited partnership owes direct fiduciary duties to the partnership and to its limited partners."[160] The Complaint does allege that TPI breached its fiduciary duties to the limited partners of the Funds.[161] Thus, because the issue before me is whether TGH conceivably could be liable for aiding and abetting a breach of fiduciary duty by TPI based on the allegations in the Complaint, TPI's argument that there was no "fiduciary relationship" fails.

Tremont also denies the presence of the third element of aiding and abetting a breach of fiduciary duty, arguing that TGH did not have "actual knowledge" of, or *knowingly* participate in, TPI's breach. "Knowing participation in a fiduciary breach requires that the nonfiduciary act with the knowledge that the conduct advocated or assisted constitutes such a breach."[162] The Carriers rely on their allegations that TGH dominated and controlled TPI to satisfy the "knowing participation" element. Specifically, the Complaint alleges that TGH was "aware of the existence of [TPI's]

---

159 36 A.3d 785, 798 (Del. Ch. Nov. 21, 2011) ("This duty is owed by Active Parties, not by the partnership as an entity.").

160 *Wallace ex rel. Cencom Cable Income P'rs II, L.P. v. Wood*, 752 A.2d 1175, 1180–82 (Del. Ch. 1999).

161 Compl. ¶¶ 34, 36, 93–104, 130, 137.

162 *Triton Const. Co.*, 2009 WL 1387115, at *16 (citing *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)), *aff'd*, 988 A.2d 938 (Del. 2010) (TABLE).

fiduciary duties" and that TGH exerted "exclusive control over TPI."[163] Under Delaware law, "the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal."[164] In this case, TPI could be considered TGH's agent, and TPI's knowledge could be imputed to TGH. Thus, the third element, knowing participation, also has been satisfied here.[165]

Therefore, I deny Tremont's motion to dismiss the aiding and abetting aspect of Count XIII.

b. Civil conspiracy

To state a claim for civil conspiracy, the Carriers must allege facts sufficient to show: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof."[166]

Tremont contends that the civil conspiracy claim should be dismissed because the Complaint does not adequately allege any "agreement" or act in furtherance of a conspiracy. Tremont cites *In re Transamerica Airlines, Inc.*[167] for the contention that "a

---

163 *See* Compl. ¶¶ 166–67.

164 *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) (citing *J.I. Kislak Mortg. Corp. v. William Matthews Bldr., Inc.*, 287 A.2d 686, 689 (Del. Super. 1972), *aff'd*, 303 A.2d 648 (Del. 1972)).

165 *See MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *10 (Del. Ch. May 16, 2007).

166 *See Matthew v. Laudamiel*, 2012 WL 605589, at *8 (Del. Ch. Feb. 21, 2012).

167 2006 WL 587846 (Del. Ch. Feb. 28, 2006).

corporation generally cannot be deemed to have conspired with its wholly owned subsidiary."[168] The purpose of this rule is to ensure that the first element of civil conspiracy is met: the requirement that there be two or more persons or entities in a conspiracy. Thus, it is generally true that: "A corporation cannot conspire with itself any more than a private individual can, and . . . the acts of the agent are the acts of the corporation."[169] That proposition, however, is not without exceptions.[170]

Here, the Complaint alleges that TPI is a wholly-owned subsidiary of TGH.[171] That relationship could provide a basis for precluding the Carriers' claim for civil conspiracy under *Transamerica*, but only if TPI was acting for reasons outside the normal course of its business.[172] The Carriers' Complaint, however, contains no such

---

168 *Id.* at *7.

169 *See Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.*, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (quoting *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952)).

170 S*ee Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 n.37 (Del. Ch. 2006); *Hospitalists of Delaware, LLC v. Lutz*, 2012 WL 3679219, at *11 n.67 (Del. Ch. Aug. 28, 2012) ("To the extent BCV attempts to rely on *Transamerica* as supporting a per se rule that business entities cannot conspire with their affiliates or subsidiaries, I do not read *Transamerica* so broadly.").

171 *See* Compl. ¶ 6.

172 *See Allied Capital Corp.*, 910 A.2d at 1042 ("Rather, this case more generally lacks the factual foundation often assumed in circumstances when commonly-owned entities are subjected to claims for concerted action. That factual foundation is that the parent and subsidiary share common economic interests."); *Transamerica*, 2006 WL 587846, at *6 (That "a corporation generally cannot be deemed to have conspired with its wholly owned subsidiary, or its officers and agents . . . . does not apply, however, when the officer or agent of the corporation

allegations. I, therefore, grant Tremont's motion to dismiss the civil conspiracy aspect of Count XIII.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I grant Defendants' motions to dismiss all claims against the Individual Defendants under Rule 12(b)(2) for lack of personal jurisdiction. I also grant the motions to dismiss Counts II, III, VI, VII, VIII, IX, X, XI, and XII, but I deny the motions to dismiss Counts I, IV, and V. Finally, I grant the motions to dismiss the civil conspiracy aspect of Count XIII, but deny the motions as to the aiding and abetting aspect of that Count.

IT IS SO ORDERED.

---

steps out of [its] corporate role and acts pursuant to personal motives." (citations omitted)).