IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AIRBORNE HEALTH, INC. and WEIL, GOTSHAL & MANGES LLP Plaintiffs, v. SQUID SOAP, LP Defendant.	)	C.A. No. 4410-VCL

MEMORANDUM OPINION

Submitted: June 18, 2010
Decided: July 20, 2010

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LASTER, Vice Chancellor.

Plaintiffs Airborne Health, Inc. ("Airborne") and Weil, Gotshal & Manges LLP ("Weil") have moved to dismiss the lone remaining counterclaim asserted by defendant Squid Soap, LP ("Squid Soap") for failure to state a claim on which relief can be granted. Their motion is granted.

I. FACTUAL BACKGROUND

The current motion revisits an aspect of this case that I addressed in *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126 (Del. Ch. 2009) (the "Pleadings Decision"). Airborne and Weil filed this action seeking a declaration that they had no liability to Squid Soap and had complied with their obligations under an Asset Purchase Agreement dated June 15, 2007 (the "APA"). Squid Soap responded with a barrage of counterclaims. In the Pleadings Decision, I granted the plaintiffs' Rule 12(c) motion and entered a Rule 54(b) judgment in the plaintiffs' favor on all of Squid Soap's counterclaims, including a counterclaim for extra-contractual fraud.

After I issued the Pleadings Decision, Squid Soap moved to modify the judgment. Squid Soap asked that the dismissal be without prejudice as to its counterclaim for extra-contractual fraud so that Squid Soap could re-plead that counterclaim with particularity. I granted the motion, and Squid Soap filed a second amended answer and counterclaim asserting only that claim (the "Amended Counterclaim"). Airborne and Weil have now moved to dismiss the Amended Counterclaim pursuant to Rule 12(b)(6). The facts are drawn from the well-pled allegations of the Amended Counterclaim.

A. A Refresher On Squid Soap

Squid Soap was formed to capitalize on John Lynn's invention of a soap dispenser that leaves a small spot of ink on a child's hand that only can be removed after twenty seconds of hand washing. Lynn named the product "Squid Soap." The company and its product enjoyed favorable early publicity, and major retailers like Wal-Mart, Target, CVS, and Walgreen's stocked Squid Soap.

In early 2007, various companies and investment groups approached Lynn seeking to capitalize on Squid Soap's potential, and Squid Soap began to explore its alternatives. One suitor was Capital Southwest Corporation, a business development company. Squid Soap's discussions with Capital Southwest progressed to the point that Capital Southwest suggested a candidate to run Squid Soap, Joseph Rainone. Capital Southwest also suggested that Elise Donahue, then-CEO of Airborne, could add value as a Squid Soap director. Lynn contacted Donahue, who decided instead to pursue Squid Soap for Airborne.

B. The March 23 Telephone Call

Lynn's first telephone call with Donahue took place on March 23, 2007. During this call, Donahue said that she would prefer to buy Squid Soap rather than serve on its board. To throw cold water on a potential deal with Capital Southwest, Donahue touted Airborne's marketing prowess, strong brand name, and perfect synergies with Squid Soap. Donahue suggested that Airborne was a better fit for Squid Soap than Capital Southwest, which only brought money to the table and was not a perfect strategic partner like Airborne.

C. The New York Meeting

On April 4, 2007, Lynn and Greg Deisher, Squid Soap's CEO, met with Donahue and Rainone at the Le Parker Meridien Hotel in New York. During the meeting, Donahue continued to make representations about Airborne, its marketing strength, its brand name, and the benefits of putting the Airborne name on Squid Soap. She represented that:

- Airborne would use its very strong brand name to sell Squid Soap by putting Airborne's name on Squid Soap's packaging and by marketing Squid Soap beside Airborne on end caps in stores.
- Airborne had great relationships with all the retailers in the United States where hygiene and soap products were sold, which Airborne would use along with its great name to get Squid Soap into retailers where Squid Soap was not currently being sold.
- Airborne's brand and customer loyalty made it the number one selling product on a unit basis in America in the cough and cold aisle.
- The Airborne brand was very strong and would help to sell Squid Soap.
- Airborne had the marketing expertise and resources to launch Squid Soap the right way.

D. The Bonita Springs Meeting

On April 10, 2007, Lynn and Deisher met with Donahue and Sonya Brown of Summit Partners, Aiborne's controlling stockholder, in Airborne's offices in Bonita Springs, Florida. Donahue repeated the representations made in her initial call with Lynn and during the meeting in New York. She also pointed out that Airborne was the second fastest growing company in America and a "marketing machine."

E. The Letter of Intent

On May 8, 2007, a Weil partner emailed a letter of intent to Lynn. The letter of intent contained the following representation:

> The Airborne team's experience in the consumer industry, our expertise in executing acquisitions, and our strong track record in supporting the growth and success of leading brands uniquely positions us as a great partner for [Squid Soap] and to leverage synergies with the Airborne brand. Moreover, an affiliation with our company would provide the ownership stability, strategic guidance, and financial resources necessary for [Squid Soap] to achieve its long-term goals.

The letter of intent was drafted by Weil and signed by Donahue.

F. The Addison Meeting

On May 9, 2007, the parties met at the Addison Marriott in Addison, Texas. The Squid Soap attendees were Lynn, Deisher, and Steve Moats, Squid Soap's Executive Vice President of Sales. The Airborne attendees were Donahue, Tom Anderson, Airborne's Director of Sales – West, and Dave Kaplan, whose title and role the Amended Counterclaim does not provide. Rainone also attended. At the meeting, Airborne's representatives made additional representations that included the following:

- Airborne would use its very strong brand name to sell Squid Soap by putting Airborne on Squid Soap's packaging and by marketing Squid Soap beside Airborne on end caps in stores.
- Airborne had great relationships with all the retailers in the United States where hygiene and soap products were sold, which Airborne would use along with its great name to get Squid Soap into retailers where Squid Soap was not currently being sold.
- Airborne's brand and customer loyalty made it the number one selling product on a unit basis in America in the cough and cold aisle.
- The Airborne brand was very strong and would help to sell Squid Soap.

- Airborne had the marketing expertise and resources to launch Squid Soap the right way.

- Airborne had the resources to launch Squid Soap like it deserved to be launched because it was an extremely profitable, virtual company with lots of revenue and very low fixed costs.

- Partnering with Airborne would take Squid Soap to the next level.

G. The Target Presentation

On May 17, 2007, Airborne gave a Squid Soap-related PowerPoint presentation to Target Corporation at Target's corporate headquarters in Minneapolis, Minnesota. The presentation was authored by Airborne and presented by Rainone, whom Airborne had hired as President of its already-formed Squid Soap division. Anderson also attended for Airborne. Moats attended for Squid Soap.

The Amended Counterclaim singled out four slides from the presentation. The first bore the title "Airborne has unprecedented levels of customer loyalty." It then listed the following bullet points:

- 98% of Airborne users have recommended Airborne by name

- Airborne has the #1, #2 and #10 SKU's in the entire Cough/Cold category

- 96% of heavy users and 91% of regular users plan to buy the same or more Airborne over the next 12 months

- Effectiveness is the #1 reason for repeat purchases (88% vs. 74% last year)

- Brand awareness increased from 28% in 2005 to 49% in 2006 to 57% in 2007

- Awarded a Top 50 Marketer by Advertising Age

The second bore the title "Airborne's Truly Unique Marketing Has Created the 'Airborne Buzz.'" The slide then listed the following bullet points:

- Celebrity Endorsements
- Late Night/ET Green Room Sampling
- Sponsor Sundance Film Festival
- Seasonal TV Media Tours
- Website banners.
- Airline Clubs sampling and In-Air Movie ads
- Ski Lodge Pillow Top Samples and coupons.
- Airport and Mass Transit Billboards.
- Taxi Cab Toppers
- Teachers Trust Fund
- Traditional TV, FSI's and more…….

The third slide bore the title "We're redesigning our packaging." It showed a graphic of the new Squid Soap bottle, branded "Squid Soap by Airborne," and stated:

- New Airborne® branding brings trust and high levels of consumer awareness
- Package shows product and provides consumer education of front panel

The fourth slide was titled ". . . and we're ready to GROW!" It trumpeted the "Marketing Power of Airborne," including the ability to "Leverage Airborne's loyal consumer base," "Drive trial and educate the consumer," "Build pediatrician and doctor support," and "Create strong programs targeting 'prevention.'" The slide also referred to a "New products pipeline," and listed as sub-bullets "Generating efficacy claims –

pandemic flu studies," "Pursuing innovative new technologies," and "Testing new formulas." The slide concluded, "Our goal is to drive category growth by bringing innovation and efficacy to the soap aisle."

H. The Witchita Falls Meeting

On May 24, 2007, Rainone flew to Dallas to visit Squid Soap's distribution facilities in Wichita Falls. Ron Mallonee, a principal of Squid Soap, picked up Rainone from the airport in Dallas and drove him to Wichita Falls. During the two-hour drive and subsequent tour of Squid Soap's facilities, Rainone made representations to Mallonee, including the following:

- Airborne would put Squid Soap next to Airborne on end caps because Airborne's strong brand name would be an immediate draw to Squid Soap.
- Airborne would put significant money into advertising Squid Soap for the 2007 fall and winter flu season.
- Airborne's established market presence would get Squid Soap more out of every advertising dollar than Squid Soap could alone.
- Airborne would make a family brand out of Squid Soap.
- Airborne would develop other products from Squid Soap's technology, such as a portable hand marker that a mother could carry in her purse to mark her child's hand.
- Airborne planned to capitalize on its established market presence and large advertising budget to grow Squid Soap beyond a single product and establish it as a family brand.

I. Telephone Conferences

In addition to the initial telephone call and meetings described above, the Amended Counterclaim alleges that there were many telephone conferences between the parties, including but not limited to calls on May 1, 2, and 7 and June 1, 2, 10, 11, and 12,

2007. During these calls, Airborne representatives, most often Donahue and Rainone, made representations to Squid Soap's representatives, including Lynn, Deisher, Mallonee, and Moats. Sullivan and other Weil attorneys participated in several of the telephone conferences.

In those calls, Airborne repeatedly represented that:

- Airborne was the second fastest growing company in America and was a marketing machine.
- Airborne would use its very strong brand name to sell Squid Soap by putting Airborne on Squid Soap's packaging and by marketing Squid Soap beside Airborne on end caps in stores.
- Airborne had great relationships with all the retailers in the United States where hygiene and soap products were sold, which Airborne would use along with its great name to get Squid Soap into retailers where Squid Soap was not currently being sold.
- Airborne's brand and customer loyalty made it the number one selling product on a unit basis in America in the cough and cold aisle.
- The Airborne brand was very strong and would help to sell Squid Soap.
- Airborne had the marketing expertise and resources to launch Squid Soap the right way.
- Airborne would take Squid Soap and turn it into a household name.
- Airborne had the resources to launch Squid Soap like it deserved to be launched because it was an extremely profitable, virtual company with lots of revenue and very low fixed costs.
- Partnering with Airborne would take Squid Soap to the next level.

J. The Singular Basis For The Alleged Falsity Of All Of The Representations

Squid Soap contends that in reliance on Airborne's repeated touting of its marketing prowess, customer loyalty, positive brand-name recognition, and vision for

Squid Soap's future, Squid Soap decided to enter into a deal with Airborne rather than Capital Southwest or another suitor. Despite listing numerous representations during multiple meetings and teleconferences, Squid Soap contends that all of Airborne's representations were false and misleading for a singular reason: Airborne failed to disclose legal proceedings that threatened its continuing success.

Two pending proceedings allegedly rendered Airborne's statements false and misleading. The first was a class action against Airborne in California state court, filed in May 2006, which asserted various claims for false or misleading advertising, consumer fraud, deceptive or unfair business practices, concealment, omission, and unfair competition (the "California Action"). The Center for Science in the Public Interest, a non-profit organization with significant expertise in litigation over product mislabeling, joined the California Action on the plaintiffs' side. Weil was representing Airborne in the California Action at the same time it was negotiating the APA for Airborne. On June 25, 2007, just ten days after the parties signed and closed on the APA, Weil removed the California Action to federal court. In March 2008, nine months after signing the APA with Squid Soap, Airborne settled the California Action for $23.5 million. Airborne also agreed to place ads offering rebates in magazines such as Better Homes & Gardens, Parade, People, and Newsweek. The settlement spawned an avalanche of adverse publicity.

The second was a regulatory investigation. On March 8, 2005, the Federal Trade Commission issued a "matter initiation notice" regarding an investigation of instances of false marketing by Airborne. On February 22, 2007, the FTC issued a "civil

investigation demand." After the media storm generated by the settlement of the California Action, the FTC and the Attorneys General for thirty-two states sued Airborne and its founders for false marketing. Airborne eventually agreed to a $30 million settlement with the FTC and a $7 million settlement with the Attorneys General, escrowed another $6.5 million for additional consumer claims, and committed to completely revamp its marketing program. As part of the FTC settlement, Airborne agreed to send a "Government Ordered Disclosure" to all of its distributors, resellers, and retailers which recited that the FTC had charged Airborne with "making deceptive claims for Airborne Effervescent Health Formula and other Airborne branded products" and that "[a]ccording to the FTC, [Airborne] lacked scientific evidence that [its] products prevent colds, protect against germs, . . . or protect against colds . . . ."

Squid Soap does not allege that Airborne affirmatively denied the existence of these or other legal proceedings. Squid Soap also does not allege that Airborne made any soft extra-contractual representations about legal proceedings or the absence thereof.

The only specific statement regarding litigation that Airborne made was a representation in the APA. This representation stated only that "[t]here are no Legal Proceedings pending or, to the Knowledge of Purchaser, threatened that are reasonably likely to prohibit or restrain the ability of Purchaser to enter into this Agreement or consummate the transactions contemplated hereby." In the Pleadings Decision, I held that by making this representation, Airborne represented only that there was not any litigation affecting Airborne's ability to sign the APA and close the deal. 984 A.2d at

138. Viewing the pleadings in the light most favorable to Squid Soap, I concluded that Airborne's representation in Section 6.3 was accurate. *Id*. at 140.

By contrast, the litigation representation that Airborne bargained for from Squid Soap was much more broadly worded and categorically different from what Squid Soap obtained from Airborne. It stated:

> Except as set forth in Schedule 5.12, there is no Legal Proceeding pending or, to the Knowledge of [Squid Soap], threatened against [Squid Soap] (or to the Knowledge of [Squid Soap], pending or threatened, against any of the officers, directors or key Employees of [Squid Soap] with respect to their business activities on behalf of [Squid Soap]), or to which [Squid Soap] is otherwise a party, before any Governmental Body; nor to the Knowledge of [Squid Soap] is there any reasonable basis for any such Legal Proceeding.

This litigation representation addressed the existence of any "Legal Proceedings" of any kind. As explained in the Pleadings Decision,

> For this representation to be true, Squid Soap had to disclose on Schedule 5.12 any legal proceeding to which it was a party, or which it knew was threatened against it, or which it knew was pending or threatened against its officers, directors, or key employees and related to their business activities for Squid Soap. The representation is an example of the "informational" approach in which, "[i]n effect, the Company warrants that it has delivered a list of *all* litigation to the Buyer, but makes no representation as to how any of the disclosed lawsuits will come out, or the effect on the Company of losing one or more of them." 2 Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 11.04[10] at 11-60 (2001) (emphasis added).

984 A.2d at 137. Squid Soap negotiated the APA with the assistance of its counsel, Vinson & Elkins. *Id.* at 144. Squid Soap did not obtain a broader representation.

K. Squid Soap Fails to Prosper.

After the closing of the APA, Squid Soap failed to prosper. Airborne entered into the settlements described above. Airborne's problems affected Squid Soap, now rebranded as Squid Soap By Airborne. Squid Soap alleges that Airborne's difficulties "killed Squid Soap in its infancy."

II. ANALYSIS

Dismissal under Rule 12(b)(6) is "inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 97 (Del. 2007) (citing *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006)). To survive a motion to dismiss, "a complaint must plead enough facts to plausibly suggest that the [claimant] will ultimately be entitled to the relief [it] seeks." *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

The Amended Counterclaim solely asserts a claim for extra-contractual common law fraud. This claim requires "(1) a false representation of material fact; (2) made by a person with knowledge that the representation is false, or with reckless indifference to the truth; (3) an intention to induce the person to whom it made to act or refrain from acting in reliance upon it; (4) causing that person, in justifiable reliance upon the false statement, to take or refrain from taking action; (5) causing such person to suffer damage by reason of such reliance." Donald J. Wolfe, Jr. & Michael A. Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 2.03[b][1], at 2-32 (2009).

There are three recognized species of common law fraud: (1) affirmative falsehoods, (2) active concealment, and (3) silence in the face of a duty to speak. *Metro Commc'n Corp. BVI v. Advanced MobleComm Tech. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2004) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)). Squid Soap invokes all three species of fraud.

Court of Chancery Rule 9(b) requires that "[i]n all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." In the Pleadings Decision, I dismissed Squid Soap's claim for extra-contractual fraud because its allegations were "generalized and non-specific." 984 A.2d at 142. The original counterclaim did not identify "any person or the time, place, or contents of [any alleged] misrepresentation." *Id*. I quoted the following passage as a representative example of Squid Soap's generalized allegations:

> Airborne made misrepresentations regarding its marketing prowess and ability, positive brand-name recognition, and the opportunities for joint marketing of Squid Soap under Airborne's brand name. Airborne intentionally misrepresented, actively concealed, and failed to disclose facts and the truth about the value of its brand image, the impending downfall of its marketing and reputation, and the certain effect on its ability to market Squid Soap's products. Airborne knew or should have known that the public allegations made against its products and marketing would not only devastate its brand name and customer loyalty—thereby sinking any products associated with Airborne—but would also drain Airborne of its resources and energy in recovering from the devastation.

Id. In the Amended Counterclaim, Squid Soap took seriously its pleading obligation to provide "detail about what was actually said, who said it, where, [and] when." *Id*. The Amended Counterclaim provides this level of detail for multiple meetings and

teleconferences. But although Squid Soap's Amended Counterclaim is now sufficiently particularized, the allegations do not plead a claim for fraud.

A. Airborne Did Not Make A False Representation of Material Fact.

To the extent Squid Soap's fraud claim relies on affirmative falsehoods, it fails because Airborne did not make a false representation of material fact. Airborne did not deny that it faced litigation. Nor did Airborne make any more general, but still inaccurate statement about the type of litigation it faced. Outside of the accurate representation in the APA, Airborne said nothing about litigation at all.

The statements that Airborne made were puffery. "Puffery is a 'vague statement' boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation." David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1397 (2006). Under Delaware law, a company's optimistic statements praising its own "skills, experience, and resources" are "mere puffery and cannot form the basis for a fraud claim." *Solow v. Aspect Res.*, LLC, 2004 WL 2694916, at *3 (Del. Ch. Oct.19, 2004)

The bullet points set forth in the Factual Background repeat virtually *verbatim* the allegations of Squid Soap's Amended Counterclaim. As those bullet points show, the allegedly fraudulent statements made by Airborne amount to nothing more than vague statements of corporate optimism designed to boost the appeal of Airborne as a potential transaction partner for Squid Soap. For instance, Airborne bragged about its "very strong brand name," "established market presence," and "unprecedented levels of customer loyalty." These are classically vague statements that a commercial party routinely makes

during deal-making courtship. *See, e.g.*, *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *8 (Del. Ch. Dec. 23, 2008) (holding statements to be "mere pun and puffery" where defendant "promised that with his expertise and management he would expand the mail business" and that existing "postal business and the Fleet were just a 'postage stamp of [what the defendant could] orchestrate this mail business to be'"); *Lazard Debt Recovery GP, LLC. v. Weinstock*, 864 A.2d 955, 971 (Del. Ch. 2004) (holding statements in which party touted its "ideal work environment" and "unique resources" to be "at best enthusiastic puffery that no rational prospective investor . . . would find material"). A sophisticated seller like Squid Soap, advised by expert counsel, could not reasonably rely on Airborne's boasts and blandishments.

B. Airborne Did Not Engage In Active Concealment.

To the extent Squid Soap claims fraud based on active concealment, it fails because Squid Soap has not alleged facts supporting a plausible inference that Airborne actively concealed information about pending litigation. Squid Soap alleges in conclusory fashion that Airborne "hid" and "fraudulently concealed" the California Action and regulatory investigation. Squid Soap particularly takes umbrage at the post-closing removal of the California Action, decrying it as "reek[ing] of intentional deceit and concealment."

Squid Soap does not support these conclusory assertions with any pled facts. The California Action was a matter of public record. Squid Soap could have performed a litigation search. Or Squid Soap readily could have learned about all of Airborne's

litigation exposure through the simple expedient of asking Airborne. The Amended Counterclaim does not allege that Squid Soap asked.

The absence of inquiry is telling. Squid Soap did not chance upon Airborne as a callow bumpkin ripe for the big city grifter. Squid Soap explored strategic alternatives with the assistance of a well-known and sophisticated law firm. Squid Soap then selected Airborne as its transaction partner, conducted the due diligence that Squid Soap and its counsel deemed adequate, and negotiated the APA.

Parties engaging in M & A activity with the assistance of AmLaw 100 law firms ask questions. Firms like Vinson & Elkins have lengthy, itemized questionnaires called due diligence checklists that are sent to the other side in the course of a deal. In 2007, sample checklists were readily available in practitioners' pieces and in treatises on due diligence, and likely could be found (as today) on the internet.[1]

If Squid Soap had asked about litigation and was not told about the California Action or the regulatory proceedings, then Airborne would have a problem. If Squid Soap sent over a due diligence checklist and the litigation information was withheld, there would be a claim. If Airborne had made a misleading partial disclosure or offered a half-truth designed to put Squid Soap off the scent, then the motion to dismiss would be

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[1] *See, e.g.*, John F. Seegal, *2007 Initial Due Diligence Checklist, in Acquiring or Selling the Privately Held Company*, 1610 PLI Corp. 365 (2007); *see generally* Peter Howson, *Due Diligence* (2003); Alexandra Reed Lajoux & Charles M. Elson, *The Art of M&A Due Diligence* (2000); Gordon Bing, *Due Diligence Techniques and Analysis* (1996); *cf.* Buying A Business: Due Diligence Checklist, http://smallbusiness.findlaw.com/business-forms-contracts/be3_8_1.html (last visited July 18, 2010).

denied. Under any of those circumstances, a court could infer active concealment at the pleadings stage. The Amended Counterclaim does not describe any of these scenarios. Not volunteering when not asked is not active concealment.

C. Airborne Had No Duty To Speak.

To the extent Squid Soap claims fraud grounded on silence in the face of a duty to speak, it fails because Airborne did not labor under any duty of that sort. Airborne was an arms' length counter-party negotiating across the table from Squid Soap. Airborne had no affirmative disclosure obligation. *See Property Assoc. 14 v. CHR Holding Corp.*, 2008 WL 963048, at *6 (Del.Ch. April 10, 2008) (holding that in the absence of a special relationship, one party to a contract is under no duty to disclose "'facts of which he knows the other is ignorant'" even if "'he further knows the other, if he knew of them, would regard [them] as material in determining his course of action in the transaction in question'") (quoting Restatement (Second) of Torts § 551 cmt. a (1977)).

Airborne also did not assume a disclosure obligation under a partial disclosure theory. A partial disclosure may be technically true yet actionably misleading. *See Norton v. Poplos*, 443 A.2d 1, 5 (Del. 1982) ("[A]lthough a statement or assertion may be facially true, it may constitute an actionable misrepresentation if it causes a false impression as to the true state of affairs, and the actor fails to provide qualifying information to cure the mistaken belief."). The Amended Counterclaim does not identify any actionably misleading partial disclosure about litigation that would tend to create a false impression. Puffing about business prowess does not do the trick.

Contrary to Squid Soap's arguments, the representation that Squid Soap bargained for in the APA was not a partial disclosure. It was the specific information that Squid Soap (with Vinson & Elkins' assistance) obtained. That representation was accurate. Pleadings Decision, 984 A.2d at 140. By not bargaining for a broader representation, Squid Soap assumed the risk that its due diligence into litigation might be inadequate. The limited litigation representation did not give rise to an affirmative duty to speak.

III. CONCLUSION

Squid Soap has failed to plead a claim for extra-contractual fraud against Airborne. Lacking an underlying wrong, Squid Soap's claims against Weil for aiding and abetting and conspiracy likewise fail. The Amended Counterclaim is dismissed with prejudice. IT IS SO ORDERED.