SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: L&R Saunders Assoc. d/b/a Radiology Professionals v. Bank of America
C.A. No. N11C-09-068

Notaries of America, Inc. v. Bank of America
C.A. No. N11C-09-069

L&R Saunders Prof'l Enter. Groups, Inc. d/b/a Nurse Practitioners of America v. Bank of America
C.A. No. N11C-09-070

L&R Saunders Prof'l Enter. Group, Inc. d/b/a Massage Therapists of America v. Bank of America
C.A. No. N11C-09-071

National Chiropractic Research Corp. v. Bank of America
C.A. No. N11C-09-072

Submitted: June 22, 2012
Decided: September 12, 2012

Upon Consideration of Defendant Bank of America's Motion to Dismiss Plaintiffs' Five Amended Complaints.
DENIED.

Dear Counsel:

Before the Court are Defendant's Motions to Dismiss in five cases with similar facts and legal claims. The motions stem from Defendant's agreements with Plaintiffs to provide royalties in exchange for the right to solicit each Plaintiff's members as credit card customers. Plaintiffs assert that Defendant breached the agreements by (1) not marketing the credit cards as required, and (2) by not returning the recruitment lists. Because the factual record requires further development, all five Motions to Dismiss are **DENIED**.

I. FACTUAL HISTORY[1]

There are five Plaintiffs and a joint Defendant on these Motions to Dismiss. The Plaintiffs are: (1) L&R Saunders Associates d/b/a Radiology Professionals ("Radiology Professionals"); (2) Notaries of America, Inc. ("Notaries"); (3) L&R Saunders Professional Entertainment Groups, Inc. d/b/a Nurse Practitioners of America ("Nurse Practitioners"); (4) L&R Saunders Professional Entertainment Group, Inc. d/b/a Massage Therapists of America ("Massage Therapists"); (5) National Chiropractic Research Corporation ("National Chiropractic").

Although each case has very similar facts, the facts are not identical. Each Plaintiff and MBNA America Bank, N.A. ("MBNA"), Bank of America's ("BOA" or "Defendant") predecessor in interest, executed agreements whereby MBNA agreed to market and provide credit card services to Plaintiffs' members. Plaintiffs received royalties from MBNA when its members signed up for credit cards under the agreements. Plaintiffs provided Defendant with membership recruitment lists. The agreements provided initial five year terms, but automatically renewed for successive two year periods, unless, in a writing at least ninety days prior to the original termination, either party stated its intention not to renew. The agreements provided that MBNA "shall make all credit decisions and shall bear all credit risks with respect to each Customer's account."[2]

Each Plaintiffs' agreement with BOA was effectuated at different times and involved somewhat different terms and durations. Some agreements were amended, while others were never amended. The contracts also included various renewal stages. But as discussed below each contract remained active in 2008. Furthermore,

[1] The facts included are taken in large part from Plaintiffs' Complaints.
[2] Amended Complaint, N11C-09-068 at Ex. A at 3.

each contract's terms were only slightly different; each agreement operated in the manner described and each is analyzed identically under this Motion.

In 2008, each Plaintiff began renegotiating with BOA. In June 2008, each Plaintiff received an email from BOA representative Julie Sills ("Sills"), who proposed new contract terms. In each complaint, Plaintiffs assert that Sills indicated Plaintiffs "could" wait to renegotiate the agreements later in the year "when things are better."[3] Negotiations continued and in October 2008, Plaintiffs received a final renewal proposal from Sills. Sills allegedly encouraged Plaintiff to wait to sign the agreement and stated she "could" get better terms.[4] Several days later, Sills allegedly indicated to all Plaintiffs that BOA was then unsure if the agreements would be extended. Plaintiffs were later informed that Sills was no longer a BOA employee.

Plaintiffs' complaints assert that BOA breached the agreements in two ways: (1) by failing to market the credit cards and; (2) by not returning the membership lists after the contract's termination. Defendant has attempted to challenge both assertions by asserting they are barred by the statute of limitations. Separately, Plaintiffs' complaints assert a fraudulent inducement claim based upon Sills' assertions regarding contract renewals.

II. PROCEDURAL HISTORY

Originally, Plaintiffs named both BOA and HSBC USA, Inc. ("HSBC") as Defendants. Plaintiffs' amended complaints assert three claims against Defendants: (I) breach of contract; (II) unjust enrichment; and (III) fraudulent inducement. HSBC was named in three of the five amended complaints. In December 2011, BOA filed motions for partial dismissal that sought to dismiss Counts I and II, or alternatively, for a more definitive statement regarding Count I. In January 2012, the Court held a status conference during which the Court suggested that BOA withdraw its motions for partial dismissal, without prejudice, to allow Plaintiffs to amend the complaints. In January 2012, Plaintiffs amended the complaints. In March 2012, Defendant moved to dismiss Plaintiffs' amended complaints and dismissed HSBC with prejudice. In Plaintiffs' Response, Plaintiffs agree that the unjust enrichment claim should be dismissed.

[3] Amended Complaint, N11C-09-068 at ¶35-36.
[4] *Id*. at ¶39.

III. CONTENTIONS

A. Defendant's Contentions

Defendant argues that Plaintiffs' claims are barred by the statute of limitations and require dismissal. Defendant challenges the recruitment list claims for failing to state a cognizable claim. Defendant contends that Plaintiffs' fraud claims are not entitled to relief because they have not been pled with particularity. Lastly, Defendant asserts that the fraud claims merely addressed speculative future behavior and do not constitute fraud. Defendant argues that the contract is not ambiguous at the motion to dismiss stage, but at oral argument reserved the right to potentially make that argument later.

B. Plaintiffs' Contentions

Plaintiffs argue that the statute of limitations does not bar the contract claims. However, Plaintiffs concede that the unjust enrichment claim may be dismissed because Defendant agrees there is a valid and enforceable contract.[5] Plaintiffs assert the membership lists remained Plaintiffs' property throughout the agreement and that BOA obtained no ownership interest. Therefore, Plaintiffs argue BOA was obligated to return the membership lists at the agreement's termination. Lastly, Plaintiff's contend the fraudulent inducement claim is sufficiently pled with particularity and entitles Plaintiffs to relief. Plaintiffs agree with Defendant that the contracts are not ambiguous.

IV. STANDARD OF REVIEW

Under Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[6] In analyzing a motion to dismiss under Rule 12(b)(6), the Court must accept all factual allegations as true and in the light most favorable to plaintiff.[7] "Allegations that are merely conclusory and lacking factual basis, however, will not survive a motion to

[5] Plaintiffs' unjust enrichment claims are **DISMISSED WITH PREJUDICE**.
[6] Del. Super. Ct. Civ. R. 12(b)(6).
[7] *Anderson v. Tingle*, 2011 WL 3654531, at *1 (Del. Super. Aug. 15, 2011).

dismiss."[8] The Court will not "draw unreasonable inferences in the plaintiff's favor."[9] Dismissal is appropriate where "the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[10] "An allegation, though vague or lacking in detail, is nevertheless well-pleaded if it puts the opposing party on notice of the claim being brought against it."[11]

"The complaint ordinarily defines the universe of facts from which the trial court may draw in ruling on a motion to dismiss."[12] A motion to dismiss is decided without a factual record; therefore, the trial court must not resolve factual disputes.[13] On a 12(b)(6) motion to dismiss, "if . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."[14]

V. FURTHER FACTUAL DEVELOPMENT IS REQUIRED

Although Plaintiffs do not explicitly assert that further discovery is required, the Court finds that factual development is needed.[15]

A. On the Present Record, the Court Cannot Determine when the Alleged Breach Occurred to Compute the Statute of Limitations.

A breach of contract claim must be brought within three years of the breach.[16] Such a claim accrues for statute of limitations purposes "at the time of the wrongful

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[8] *Lagrone v. American Mortell Corp*., 2008 WL 415267, at *6 (Del. Super. Sept. 4, 2008) (internal quotations omitted).
[9] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[10] *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011) (citations omitted).
[11] *VLIW Tech., L.L.C. v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).
[12] *See In re Santa Fe Pacific Corp. Shareholder Litigation,* 669 A.2d 59, 68 (Del. 1995) ("Generally, matters outside the pleadings should not be considered in ruling on a motion to dismiss").
[13] *Statoil Mktg. & Trading (U.S.) Inc. v. W. Ref. Yorktown, Inc.,* 2009 WL 5191825, *1 (Del. Super. Dec. 15, 2009).
[14] Super Ct. Civ. R. 12(b).
[15] *Universal Capital Management, Inc. v. Micco World, Inc.*, 2012 WL 1413598 (Del. Super. Feb 1, 2012) (denying 12(b)(6) motion without prejudice to later file as motion for summary judgment because further discovery necessary in light of facts beyond the pleadings).
[16] 10 *Del. C.* § 8106.

act, even if the plaintiff is ignorant of the cause of action."[17] "For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of the breach."[18]

In the instant case, determining the operative breach date is not possible on the present record. First, the agreements are noticeably silent regarding BOA's marketing responsibilities. There are no explicit provisions regarding BOA's agreed marketing efforts, duration, manner, or continuity. While the agreements required BOA to "market" the credit cards, the parties disagree regarding whether a marketing postponement constituted a breach.

According to Plaintiffs' amended complaints, BOA informed Plaintiffs in May 2008 "that marketing was being postponed due to high delinquency rates of Plaintiff's program."[19] Plaintiffs contend that the marketing postponement did not constitute a breach. Importantly, if the statute of limitations accrued from the marketing postponement notice, then the contract claims are time barred. Conversely, Plaintiffs contend it was not until August 2009 that BOA informed Plaintiffs it was completely ceasing marketing. Plaintiffs allege that this complete marketing cessation breached the agreements. Whether the contract was breached at the earlier marketing postponement or rather at the later complete marketing cessation will determine whether the claim is time barred.

The Court cannot determine the effective breach date upon the present record. Depending upon the parties' course of dealing, marketing duration, practices and expectations, Defendant's earlier marketing postponement may have constituted a complete marketing abandonment or may have merely been an inconsequential delay. The limited record provides no evidence clarifying this ambiguity. Therefore, Defendant's Motions to Dismiss the breach of contract claims as time barred are **DENIED**.

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[17] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).
[18] *Certainteed v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).
[19] Amended Complaint, N11C-09-068 at ¶ 11.

B. Further Discovery is Needed to Determine whether Defendant was Obligated to Return Plaintiffs' Membership Lists at the Contracts' Termination.

The Court may prohibit amendments to pleadings when there has been a "repeated failure to cure deficiencies" or to prevent prejudice.[20] Where a motion to dismiss puts a plaintiff on notice and yet, plaintiff fails "to take any corrective measures in [the] Amended Complaint" the Court should decline the parties' attempted amendment.[21] However, "[a]n allegation, though vague or lacking in detail, is nevertheless 'well-pleaded' if it puts the opposing party on notice of the claim being brought against it."[22]

BOA asserts the amended complaint is lacking because it does not state when BOA was obligated to return the recruitment lists. The amended complaints provide that "upon termination of the Bank of America Agreement, Bank of America was not to claim any ownership or interest in the lists."[23] Defendant argues that the contractual duty to not claim an ownership interest in the mailing lists is different from the affirmative duty to return the lists. Plaintiffs contend the amended complaints adequately plead that the mailings lists were to be returned at the contract's termination because no ownership interest inured.

Similar to the statute of limitations analysis, the Court cannot determine whether BOA was obligated to return the recruitment lists at the contract's termination. While the parties agree BOA could not claim to own the lists, whether this required Defendant to return the membership lists is unclear. Further factual development through discovery on both contract claims is necessary to resolve this lack of clarity. The Court cannot determine whether a duty arose to return the recruitment lists from the present record. No evidence in the procedurally limited record clarifies whether such a duty arose and as a result the Court cannot determine whether the contracts are ambiguous. Therefore, Defendant's Motions to Dismiss the membership lists claims as not cognizable are **DENIED**.

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[20] *Parker v. State*, 2003 WL 24011961 , at *3 (Del. Super. Apr. 30, 2004).
[21] *Bowers v. City of Wilmington*, 723 F.Supp.2d 700, 709 (D. Del. 2010).
[22] *VLIW Tech., L.L.C.*, 840 A.2d at 611.
[23] Amended Complaint, N11C-09-068 at ¶ 5.

C. Further Discovery is Required to Determine Whether Defendant Fraudulently Induced Plaintiffs to Reject Proffered Terms because More Favorable Terms "Could" be Available Later.

To state a fraud claim, a plaintiff must allege: (1) a false representation, usually one of fact; (2) with knowledge or a belief of the representation's falsity, or with reckless indifference to truthfulness; (3) with intent to induce the plaintiff's behavior; (4) that plaintiff reasonably relied upon the representation; and (5) damages resulting from the misrepresentation.[24] Superior Court Civil Rule 9(b) requires that the circumstances constituting fraud must be stated with particularity and include: (1) the time, place, and the false representation; (2) the identity of the person making the representation; and (3) the misrepresenter's intended gain.[25]

"A viable claim of fraud concerning a contract must allege misrepresentations of present facts."[26] Representations regarding future performance are regarded as predictions and are not fraudulent."[27] "The law is rightly reluctant to find that mere expressions of opinion about the future can buttress a claim of fraud. That a statement of opinion did not prove to be an accurate forecast of the future does not mean that the predicting party misstated any actual fact."[28] "A plaintiff must show more than a mere possibility of misconduct in order to be entitled to relief."[29] However, statements of future intent are fraudulent when particularized facts are provided inferring that a promise was made with no intent to comply.[30] Such a fraud claim requires a factual predicate regarding the speaker's state of mind; a general averment of a culpable mind is insufficient.[31] Rather, the plaintiff "must plead specific facts that lead to a reasonable inference that the promisor had no intention of performing at the time the promise was made."[32]

Defendant argues that if Sills speculated that more favorable terms "could" be possible, no fraudulent misrepresentation occurred. Rather, BOA argues Sills did nothing more than suggest that more advantageous terms might be available later.

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[24] *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983).
[25] Super. Ct. Civ. R. 9(b).
[26] *Carrow v. Arnold*, 2006 WL 3289582, at *8 (Del. Ch. Oct. 31, 2006) (internal quotations omitted).
[27] *Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch. Dec. 8, 2009).
[28] *Metro Comm. Corp. v. Advanced Mobilecomm Tech., Inc.*, 854 A.2d 121, 148 (Del. Ch. 2004).
[29] *Anderson v. Tingle*, 2011 WL 3654531, at *2 (Del. Super. Aug. 15, 2011).
[30] *Grunstein*, 2009 WL 4698541, at *13.
[31] *Id*.
[32] *Id*.

Defendant argues that Plaintiff has proffered no evidence suggesting that BOA knew that more favorable terms would not be available. Plaintiffs suggest that BOA offered renewal terms, but that despite Plaintiffs interest in accepting those terms, BOA withdrew the terms so that it could terminate the original contract. Defendant argues that Plaintiffs' argument is illogical because BOA never would have offered renewal terms if it intended to terminate the agreement.

Plaintiffs' fraudulent inducement claims may turn upon the meaning of the word "could" as used by Sills in her correspondence with Plaintiffs. Webster's provides that the word "could" may be used in three ways. An "auxiliary function in the past 'we found we *could* go,' in the past conditional 'we said we would go if we *could*,' and as an alternative to *can* suggesting less force or certainty or as a polite form in the present 'if you *could* come we would be pleased.'" [33] Sills may have employed the word "could" in the third way, as an alternative to can. If the Court employs the dictionary interpretation that "less force or certainty" is intended, Defendant's argument is persuasive.[34] In other words, Sills' statement would not constitute fraud because it was uncertain and merely speculative. However, the definitional restrictions do not address the reality that speakers often use words beyond their traditional meanings. Depending on how one reads Sills' alleged statements (which the Court must view in the light most favorable to Plaintiffs), it is conceivable that when Sills employed the word "could" she was not inferring any "less force or certainty" but rather, was stating that better terms ***will*** be available later.

At this procedural posture, the Court cannot conclude whether Sills' statements that more favorable terms "could" be possible in the future constituted fraudulent inducement. Little is provided in the amended complaints providing clues regarding the speaker's intended meaning. The context from which the Court can draw clues is potentially discoverable and not permissibly considered on a motion to dismiss. Although somewhat thinly pled, Plaintiffs' fraudulent inducement theory provides sufficient facts that could potentially lead to a reasonable conclusion that Defendant never intended to perform. Whether the representation made by BOA constituted fraud may turn largely on the speaker's intended usage of the word "could." Without further context, no conclusions regarding the statement's meaning can be presently made. Therefore, Defendant's Motions to Dismiss Plaintiffs' fraudulent inducement claims are **DENIED**.

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[33] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 140 (1993) (emphasis and internal citations original).
[34] *Id*.

VI. CONCLUSION

It is an appropriate exercise of discretion to deny the Motion to Dismiss to allow further development of the record.[35] Defendant's Motions to Dismiss Plaintiffs' five amended complaints are **DENIED**. Count II of each amended complaint is **DISMISSED WITH PREJUDICE**, being withdrawn by Plaintiffs

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

cc: Prothonotary

[35] *Universal Capital Management, Inc. v. Micco World, Inc.*, 2012 WL 1413598 (Del. Super. Feb 1, 2012) (denying 12(b)(6) motion without prejudice to later file as motion for summary judgment because further discovery necessary in light of facts beyond the pleadings).