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Case No. N14C-08-010 PRW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AGNIESZKA KOSTYSZYN and MAREK KOSTYSZYN,	)	
Plaintiffs,	)	
v.	)	
GIANMARCO MARTUSCELLI, GILDA MARTUSCELLI, The ESTATE OF BRETT J. HARRIS FROZEN ENDEAVORS, INC., a Delaware Corporation, AJT, INC., a Delaware Corporation, and CHESAPEAKE INN, INC., a Maryland Corporation,	)	C.A. No.: N14C-08-010 PRW
	)	TRIAL BY JURY OF TWELVE DEMANDED
Defendants.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

On December 1, 2011, Plaintiffs Agnieszka Kostyszyn and Marek Kostyszyn ("Plaintiffs") purchased a business from Defendant Frozen Endeavors, Inc. ("Endeavors") called Paciugo Gelato and Café (the "Business") and located in the Christiana Mall. Plaintiffs are sophisticated business owners who, *themselves*, conducted due diligence and negotiated the terms of a transaction involving a fully integrated business purchase agreement (the "Agreement"), expressly acknowledging in writing that (i) they did not seek independent legal counsel and (ii) they "sought their own independent advice".

After operating the business for more than 18 months, Plaintiffs asked the Court of Chancery to cancel the purchase, alleging fraud and breach of contract. The Court of Chancery dismissed the Complaint. Plaintiffs now have re-filed essentially the same complaint in this Court. In their Verified Chancery Complaint, Plaintiffs indiscriminately asserted all eight of their Counts against all six of the named Defendants. And Plaintiffs have reprised that same indiscriminate litigation conduct here——despite a specific request to reconsider the existence of a faithful basis for doing so.[1]

Plaintiffs' re-filed Complaint likewise fails to address the pleadings deficiencies upon which the parties joined issue in briefs submitted to the Court of Chancery. For example, Plaintiffs allege both "fraud" and "intentional misrepresentation" in separate counts without identifying a single specific statement made by a specific person at any specific time. And Plaintiffs' continue to assert claims for breach of contract and warranties against multiple-named defendants who are not parties to the Agreement or bound by any of the Agreement's express warranties. For the reasons set forth more fully below, the Complaint fails to meet the

[1] For example, Plaintiffs persist in naming all six Defendants as defendants to their claim for breach of contract, when the only signatories to the Agreement were Plaintiffs and Endeavors.

requirements of Rules 9(b) and 12 (b)(6) for failure to allege fraudulent misconduct with any measure of particularity and for failure to state any claim upon which relief can be granted, and Defendants respectfully request that the Complaint be dismissed in its entirety and prejudice.

NATURE AND STAGE OF PROCEEDINGS

On August 22, 2013, Plaintiffs filed a complaint in the Court of Chancery against Gianmarco Martuscelli, Gilda Martuscelli, the Estate of Brett J. Harris, Endeavors, and Martuscelli Enterprises, Inc. (C.A. No. 8828-MA). The original complaint contained eight counts: (i) breach of contract; (ii) breach of warranty; (iii) indemnification; (iv) equitable fraud; (v) fraud; (vi) negligent misrepresentation; (vii) intentional misrepresentation; and (viii) breach of the duty of good faith and fair dealing. Plaintiffs' original complaint contained nine prayers for relief, requesting declaratory relief, money damages, rescission (denominated as cancellation of the documents underlying the sale of the Business), an accounting, and "[s]uch other and further relief as this Court deems just and equitable under the circumstances." Plaintiffs amended their original complaint on September 5, 2013. The Verified Amended Complaint (the "Chancery Complaint") corrected the name of Endeavors, dismissed Martuscelli Enterprises, Inc., and added AJT, Inc. ("AJT"), and Chesapeake Inn, Inc. ("CI") as defendants. The Chancery Complaint otherwise contained the same counts and prayers for relief as the original.

On June 30, 2014, the Court of Chancery dismissed Plaintiffs' equitable claims with prejudice because, "[n]owhere in the [Chancery Complaint] have plaintiffs pled the existence of a fiduciary, special, or confidential relationship between the parties that would give rise to a claim sounding in equity and, hence, subject matter jurisdiction in this Court." Ex. A. at ¶ 12. The Court held that Plaintiffs were not entitled to rescission or cancellation of the Agreement or an "accounting" of Endeavors. Plaintiffs' remaining claims were dismissed without prejudice.

Plaintiffs transferred the action to this Court, *sans* the equitable claims, and Defendants' have filed a motion to dismiss based largely upon the same pleadings-stage infirmities that they identified in support of their prior motion to dismiss—pleadings-stage infirmities that the Court of Chancery deferred ruling upon for lack of subject matter jurisdiction. This is Defendants' Opening Brief in Support of their Motion.

STATEMENT OF FACTS

A. The Parties.

Plaintiffs are Delaware residents and the owners of the Business, located at Suite 1697 Christiana Mall, Newark, Delaware. Compl. ¶ 1-2, 9.

Defendants are the Estate of Brett J. Harris ("Harris"), Gianmarco Martuscelli ("Gianmarco"), his wife, Gilda Martuscelli, Endeavors, AJT, and CI. Compl. ¶¶ 3-8. AJT owns and operates La Casa Pasta Restaurant in Newark, Delaware. Compl. ¶ 7. CI owns and operates the Chesapeake Inn restaurant and marina, located in Chesapeake City, Maryland, and formerly owned and operated the Canal Creamery and Sweet Shoppes (the "Creamery") also located in Chesapeake City. Compl. ¶ 8.

Harris was a principal in Endeavors, and business manager at CI and AJT. Compl. ¶ 5. Gianmarco was a principal in Endeavors, and CI. Compl. ¶ 3. Gilda is a principal of Endeavors, but not of AJT or CJ. Neither Gilda nor Gianmarco own any interest in AJT, which is a separate enterprise owned and operated by Gianmarco's parents. *Cf.* Compl. ¶3-4.[2]

[2] As required on a motion to dismiss, Defendants generally accept all well-pleaded allegations as true; however, Defendants have advised Plaintiffs multiple times that Gilda is not a principal of CI or AJT and Plaintiffs refuse to correct this misstatement of fact.

B. The Negotiation of the Sale of Paciugo Gelato and Café.

In late 2011, the Plaintiffs met with Gianmarco and Harris and negotiated the Agreement for the purchase and sale of the Business. Compl. ¶¶ 9 and 14, *see also* Compl. at Ex. 2. Plaintiffs allege in sweeping fashion that they based their decision to purchase the Business for $272,500.00, "on the representations of Defendants, GIANMARCO and HARRIS...concerning the financial condition, operating results, income and expenses of Paciugo..." and, "sales information reported by GIANMARCO and HARRIS at the first meeting with MAREK and subsequent statements provided to MAREK including business earnings, on site sales of the business, catering sales, and profit analysis." Compl. ¶ 10. Plaintiffs make these allegations despite the existence of an integration clause contained at Section 9(c) of the Agreement. Compl. at Ex. 2, § 9.c.

Plaintiffs allege that at "the first meeting" between Gianmarco, Harris, and Marek Kostyszyn at the Chesapeake Inn, Gianmarco and Harris provided Profit Statement 1, reflecting a "profit" of $7,186.21. Compl. ¶ 14; *see also* Compl. at Ex. 1. Profit Statement 1 is a document which provides the actual retail sales, catering sales, rent cost, insurance cost, ingredient cost, royalties paid, and payroll for the Business in months of July 2010 through August 2011. Compl. at Ex. 1. The "net w/ payroll" figure is what is referred to by Plaintiffs as reflecting the "profits" of the Business. The "net w/payroll" figure is negative from July 2010 through March 2011, and reflects positive figures from April 2011 through August 2011, resulting in a grand total for 14 months of operation of $7,186.21 "net w/payroll." *Id.* Profit Statement 1 does not include any costs associated with tax liabilities, advertising, or debt financing. *Id.*

C. The Agreement.

Plaintiffs and Endeavors executed the Agreement on December 1, 2011. Compl. ¶ 9 and Ex. 2. The Agreement provided in a simple and straightforward manner (i) the terms on which Plaintiffs would pay the purchase price of $272,500.00 for the trade name of the Business, the goodwill of the Business, and the furniture, fixtures, and equipment per an attached list; (ii) the grant of a note and security interest in the purchased assets; (iii) representations and warranties by Endeavors, including that the Business would be free of all liens and encumbrances except for a lien associated with the $70,000.00 business loan from M&T Bank, which Endeavors was required to satisfy; (iv) mutual indemnification; (v) settlement terms; (vi) allocation of taxes; and (vii) various general provisions, including an integration clause. Compl. at Ex. 2. The Agreement also required the Plaintiffs to assume a 10-year lease with Christiana Mall, LLC (the "Mall Lease") that had commenced on March 17, 2010, with a termination date of April 30, 2020. Compl. ¶¶ 10-13. The Mall Lease assumed by the Kostyszns remains subject to a personal guaranty originally provided by the Martuscellis. *Id.*

Several provisions of the Agreement are pertinent to the present motion. First, the Agreement's integration clause provides as follows:

> The Agreement contains the entire agreement between all parties hereto with respect to the subject matter hereof and supersedes all prior agreements or understandings among the parties hereto with respect thereto.

Compl. at Ex. 2, § 9.c. Second, the Agreement includes the following representations by Frozen Endeavors that:

> Seller is the owner of and has good and marketable title to the Business and property referred to in this Agreement, free of all debts, liens, security interests and encumbrances other than a lien to M & T Bank to be satisfied upon full payment of the purchase price...

> ...Seller shall continue to purchase gelato for Chesapeake Inn, Canal Creamery & Sweet Shoppe and La Casa Pasta for a period of ten years so long as Buyer does not breach its obligations under this Agreement or the companion note and security agreement or Buyer's lease with Christiana Mall, LLC.

Compl. at Ex. 2, § 5(d). Finally, the indemnification clause at issue provides as follows:

> Seller shall indemnify Buyer and hold it safe and harmless from all claims or losses sustained by Buyer as a result of any liability incurred by or assumed by Seller prior to the date of settlement or from any claim or loss arising from a breach of any representation or warranty contained herein.

Id., § 6.a. Contemporaneously with the Agreement and other documents required to close the sale of the Business, the Plaintiffs executed an "Acknowledgment," in which they expressly represented[3]:

> We hereby acknowledge that we ... have chosen to enter into a purchase transaction in order to purchase Paciugo Gelato and Cafe in Christiana Mall, Delaware from Frozen Endeavors, Inc. without seeking independent legal counsel...
>
> ...To the extent that we have any questions concerning the documents, which include an Agreement of Sale, a Security Agreement, and two Promissory Notes, and a Financing Statement, [] we have sought our own independent advice and have determined it is in our best interest to enter into this transaction and execute said documents, and that said documents reflect the terms that we agreed upon with the Seller...
>
> ...We further acknowledge that we have read all of the aforesaid documents and have an understanding of their legal significance...

D. Performance of the Agreement.

The Plaintiffs paid the entire purchase price as provided in the Agreement, completing the payment on December 31, 2011. (Compl. ¶ 11). Endeavors satisfied the over $70,000.00 lien to M&T Bank in 2013. Compl. ¶ 24.

[3] The Acknowledgement is attached hereto as Exhibit B and is incorporated by reference in the Complaint as part of the transaction documents they are seeking to cancel relating to the sale, which included the Acknowledgment, the Agreement of Sale, a Security Agreement, two Promissory Notes, and a Financing Statement. Thus, it can be considered for purposes of Defendants' Motion to Dismiss. *See Zucker v. Andreessen*, 2012 WL 2366448, at *2 (Del. Ch.).

In accordance with the Agreement, from the time of closing up to the filing of the Complaint in September 2013 (and continuing to this date), Endeavors continued to purchase gelato from the Business for the Chesapeake Inn and La Casa Pasta. Compl. ¶¶ 22, 27. Endeavors ceased purchasing gelato for the Creamery beginning in April 2013, because, "Defendant GIANMARCO ... sold his interest in the Creamery prior to the end of the three year lease," between the Chesapeake Inn and the lessor of the Creamery's space. Compl. ¶ 21. Gianmarco did so because the Creamery was not financially viable and he could not afford to continue to operate it at a loss. *Id.*

E. The Present Dispute.

Plaintiffs commenced this action after an e-mail exchange in early July 2013 initiated by Marek Kostyszyn and directed to Gianmarco (the "Gianmarco E-mail"). Compl. ¶¶ 21, 23-24.[4] In the e-mail, Gianmarco explained that he sold his interest in the Creamery prior to the end of the three-year lease between Chesapeake Inn and the lessor of the Creamery's space, "because I lost money in the past two years (2011 and 2012). I could not afford to continue to lose money at that location." Compl. ¶ 21. Gianmarco also stated, "I never owned the creamery; I signed a lease for 3 years; I am not sure where you are getting 10 years." Compl. ¶ 23. Finally, Gianmarco stated,

> I (GIANMARCO) lost money at Paciugo and the Creamery but I tried to [sic] my best and it wasn't good enough. BJ (HARRIS) and I sold Paciugo because we were both losing too much money (BJ lost all his savings and had nothing left). We sold you the business while still owing the bank over $70k in a loan that I just finished paying off this year. We didn't make any money from you or anything associated with Paciugo. We were absentee owners who couldn't afford to pay the bills any longer.

[4] Plaintiffs quote selectively and repeatedly from the July 2013 Gianmarco E-mail, but do not favor the Court with the courtesy of the entire exchange, from which the entire context may be understood. The Gianmarco E-mail is incorporated by reference in the Complaint and therefore it is attached for the Court's convenience hereto as Exhibit C.

Compl. ¶ 24. According to Plaintiffs, the Gianmarco E-mail renders both Profit Statement 1 and certain provisions of the Agreement actionable fraudulent misrepresentations.

ARGUMENT[5]

I. PLAINTIFFS' FRAUD CLAIMS FAIL UNDER RULE 9(B).

Plaintiffs have failed to adequately plead claims for fraud or misrepresentation with particularity as required under Superior Court Civil Rule 9(b). A well-pleaded fraud claim must include at least "the time, place, and contents of the false representations." *Browne v. Robb,* 583 A.2d 949, 955 (Del. 1990). In order to satisfy this strict standard, non-conclusory factual allegations must include "that (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose, (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth, (3) the defendant intended to induce the plaintiff to act or refrain from acting, (4) the plaintiff acted in justifiable reliance on the representation, and (5) the plaintiff was injured by its reliance." *DCV Holdings, Inc. v. ConAgra, Inc.,* 889 A.2d 954, 958 (Del. 2005). "Under common law fraud, the representation must not only be material, but must concern an essential part of the transaction." *Princeton Inc. Co. v. Vergano,* 883 A.2d 44, 54 (Del.Ch.2005); *see also, E.I. Du Pont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457, 462 (Del.1999). Further, Plaintiffs

[5] In briefing before the Court of Chancery, Plaintiffs argued that Maryland law, not Delaware, applied to the interpretation of the Agreement. The Agreement, however, is ambiguous, and states "the provisions of this agreement shall be enforced to the fullest extent permissible under Maryland or Delaware law." Nevertheless, Defendants respectfully submit that "when parties of whatever geographic residence direct their commercial affairs so clearly in the direction of Delaware and intend to conduct a business in several states - both factors that apply here - the contracting parties' own conduct also supports Delaware's connection to the fraud claims." *Kronenberg v. Katz,* 872 A.2d 568, 589 (Del. Ch. 2004) (citing *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.,* 1998 WL 437137, at *5 (Del. Super. June 10, 1998)). In any event, as the applicable laws of Delaware and Maryland are substantially identical, "[w]here the choice of law would not influence the outcome, the court may avoid making a choice." *Id.*

may plead scienter generally, but in cases (as here) involving allegations of promissory fraud, plaintiffs are required to plead scienter with greater specificity in order to distinguish a promissory fraud claim from a breach of contract claim. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.,* 906 A.2d 168, 208 (Del. Ch. 2006). In the present case, Plaintiffs' fraud claims suffer fatal pleadings-stage deficiencies in both in substance and form, and therefore, fail as a matter of law.

A. Plaintiffs Fail to Allege Any Misrepresentation of Fact.

Here, Plaintiffs have failed to allege or identify *any* representation made by *any* of the Defendants which was false at the time it was made, and Plaintiffs have not identified *any* material fact which Defendants had a duty to disclose, but was not disclosed.[6] Plaintiffs only identify Profit Statement 1 and the express representations contained in the Agreement as the basis of the alleged fraud for the reasons that follow, neither constitute a misrepresentation of fact.

1. Plaintiffs Have Failed to Identify Any Specific Deficiencies in Profit Statement 1.

Plaintiffs conclusorily allege that Profit Statement 1, which reflected a profit of only $7,186.21 from the 14-month period of July 2010 through August 2011, was false at the time it was provided to them. Compl., Ex. 1. Plaintiffs insist that its falsity is established by a statement in the Gianmarco E-mail that he had been "losing too much money." *See, e.g.,* Compl. ¶¶ 29, 74; Ex. C. But that statement is not inconsistent at all with what was reflected in Profit

[6] Although the fraud/misrepresentation claim is brought against all Defendants, the Complaint alleges that only Gianmarco and Harris had any communications with Plaintiffs in connection with their decision to purchase Paciugo. Compl. ¶ 10. Thus, aside from the other deficiencies of those claims discussed at length herein, the fraud/misrepresentation claims must be dismissed as a matter of law against all parties except Gianmarco and Harris.

Statement 1 and Plaintiffs do not even attempt to explain how the Gianmarco E-mail renders Profit Statement 1 a false representation.

Profit Statement 1 provided the "net w/ payroll" figures for the Business during a 14-month period. That period resulted in a profit to the Business of only $7,186.21. The Business had to service a $70,000 loan to M&T Bank. Plaintiffs were aware of both the M&T loan, its amount, and that Profit Statement 1 did not include or account for that debt service—and they do not allege any facts to the contrary. Thus, Profit Statement 1 clearly reflected that Gianmarco was not making any money at the Business – which is entirely consistent with Gianmarco's later email statements that he and his business partner were losing money.[7]

Plaintiffs also allege in conclusory fashion that "Defendants" (though not any particular Defendant) employed "improper accounting methods" in preparing Profit Statement 1. Compl. ¶ 59. But Plaintiffs do not identify which (if any) entry or series of entries on Profit Statement 1 utilizes an improper or deficient accounting methodology or how they should have been accounted for properly. They do not allege that it was not prepared in accordance with GAAP, nor do they allege that any particular category of underlying information was improperly accounted for or otherwise incorrectly calculated. The alleged "accounting improprieties" appear to rest entirely on the semantic discrepancy between Profit Statement 1 reflecting a $7,000 "profit" (*i.e.*, that the Business was technically making money (though without consideration for the M&T loan service)) and the Gianmarco E-mail which states that they were "losing money." Non-conclusory allegations of fraud and improper accounting require considerably more.

[7] It is also notable that Gianmarco refers to having been absentee business owners, and the impact that fact had on their profitability. Profit Statement 1 reflects that the single largest expense at Paciugo was payroll.

2. Plaintiffs Have Failed to Allege that Section 5(d) Was False When Made.

Plaintiffs allege that Section 5(d) of the Agreement was a false representation when it was made:

> Seller shall continue to purchase gelato for Chesapeake Inn, Canal Creamery & Sweet Shoppe, and La Casa Pasta for a period of ten years so long as Buyer does not breach its obligations under this Agreement or the companion note and security agreement or Buyer's lease with Christiana Mall, LLC.

Compl. ¶¶ 33-37, 61, 78. A misrepresentation of fact involves, "either a past or contemporaneous fact or a future event that falsely implies an existing fact." *Grunstein v. Silva*, 2009 WL 4698541, at *13 (Del. Ch.) (internal quotations and citation omitted). Contractual provisions that amount to nothing more than, "[r]epresentations as to what will be performed or will take place in the future are regarded as predictions and hence are not fraudulent...." *Id.* (internal quotation and citation omitted). In order to state a claim for fraud based on a promise in a contract, Plaintiffs must show more than a later failure to perform; Plaintiffs must show that the representation was false when made (*i.e.*, as discussed below, Endeavors had no intention of performing the promise at the time it was made). *Grunstein v. Silva*, 2014 WL 4473641, *37 (Del. Ch.); *Bean v. Fursa Capital Partners*, 2013 WL 755792, *4 (Del. Ch.) (citing *MicroStrategy, Inc. v. Acacia Research Corp.*, 2010 WL 5550455, *15 (Del. Ch.)). Plaintiffs have failed to meet this burden, and merely attempt—impermissibly under Delaware law—to bootstrap a claim for fraud to their breach of contract claim. *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch.) (citation omitted).

Plaintiffs fail to allege any facts to support an inference that the representation contained in § 5(d) was untrue when made on December 1, 2011. To the contrary, the Complaint actually contains allegations that confirm that La Casa Pasta, the Chesapeake Inn have and continue to

purchase gelato from the Business. And the Complaint also confirms that the Creamery continued to purchase gelato from the Business until it closed. This compliance with § 5(d) precludes an inference that it was false when made. *See, e.g.*, *Bean*, 2013 WL 755792, at *4 (finding that when defendant complied with contractual provision for a period of time following the execution of the contract, there could be no inference that the contractual representation was false when made without additional, specific facts to support such an allegation).

B. To the Extent Their Common Law Fraud and Misrepresentation Claims Are Based on Section 5(d) of the Agreement, Plaintiffs Have Failed to Allege Scienter With the Requisite Particularity.

In order to satisfy the particularity requirements of Rule 9(b), Plaintiffs must plead specific facts creating an inference that, at the time of the Agreement, Endeavors or Gianmarco had no intention of honoring Section 5(d). A plaintiff may not, in cases involving promissory fraud, simply rely upon general allegations of scienter. *Trenwick,* 906 A.2d at 208; *Grunstein*, 2009 WL 4698541, at *13 (internal quotations and citations omitted) (failure to keep a promise does not prove that the promise was false when made); *MicroStrategy Inc.*, 2010 WL 5550455, at *15 ("when a plaintiff pleads a claim of promissory fraud, in that the alleged false representations are promises or predictive statements of future intent rather than past or present facts, the plaintiff must meet an even higher threshold [than the Rule 9(b) scienter pleading standard].").

Plaintiffs' Complaint acknowledges that La Casa Pasta and the Chesapeake Inn continue to purchase gelato from the Business in accordance with Section 5(d) and therefore defeat any conceivable inference that Section 5(d) was never intended to be honored in the first place. In that respect, the Complaint supports the opposite inference.

C. Plaintiffs' Negligent Misrepresentation Was Dismissed by the Court of Chancery.

The Court of Chancery's June 30 decision acknowledged Defendant's argument that: "plaintiffs' only claims sounding in equity – equitable fraud/negligent misrepresentation – fail as a matter of law under Rule 12(b)(6)." Ex. A at 12. The Court concluded that "under both Maryland and Delaware law, [] plaintiffs' claim of equitable fraud should be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim." *Id.* Plaintiffs' continued pursuit of a claim for negligent misrepresentation fails because the Court of Chancery already dismissed it, as "a claim for innocent or negligent misrepresentation is, in essence, duplicative of a claim for equitable fraud," *See Stephenson v. Capano,* 462 A.2d 1069, 1074 (Del. 1983), and, in any event, because the Superior Court lacks subject matter to consider such causes of action. *See Mark Fox Grp., Inc. v. E.I. duPont de Nemours & Co.,* 2003 WL 21524886, at *5 (Del. Ch. 2013) ("In addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action.").

II. PLAINTIFFS' CONTRACT CLAIMS FAIL TO STATE A CLAIM.

Plaintiffs' breach of contract (Count I) and breach of warranty (Count II) claims fail as a matter of law because, even accepting Plaintiffs' allegations as true, the alleged conduct underlying Plaintiffs' claims does not breach any obligations imposed by the Agreement. Because Plaintiffs' indemnification claim is predicated upon the breach of warranty claim, it too must fail.

A. Plaintiffs Contractual Claims Against Defendants Other Than Endeavors Fail As A Matter of Law.

Only Endeavors and Plaintiffs are parties to the Agreement. For this reason alone, all claims based on the Agreement must be dismissed against all defendants except Frozen Endeavors. *Seaport Village Ltd. v. Seaport Village Operating Co., LLC*, C.A. No. 8841-VCL at p. 4) (Ex. D hereto) ("only parties to a contract are bound by that contract," and "only a party to a contract may be sued for breach of that contract."); *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999) (holding that it is a general principle of contract law that only parties to a contract may be sued for breach of that contract).

B. Plaintiffs' Breach of Contract Claims Complain of Conduct Not Proscribed by the Agreement.

Plaintiffs allege breaches of §5(d) of the Agreement by Defendants by (i) selling ice cream instead of gelato and thereby reducing the amount of gelato they purchased (Compl. ¶ 19, 36), and (ii) closing the Creamery and not purchasing gelato for that store for a 10-year period. Compl. ¶¶ 35-38.[8] A cognizable claim for breach of contract requires "first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). Plaintiffs' claims fail here because the contract obligations they read into § 5(d) simply do not exist.

Section 5(d) obligates Endeavors to purchase gelato for La Casa Pasta, the Chesapeake Inn, and the Creamery from the Business for 10 years following the sale, which Endeavors has

[8] Plaintiffs also allege breach of § 5(a) of the Agreement. Section 5(a) requires the lien to M & T Bank to be satisfied upon full payment of the purchase price. "Full payment" of the purchase price occurred on December 31, 2011 and the M&T the lien was satisfied in 2013. Because Plaintiffs do not allege any harm or seek any resulting damages as the result of the delay between full payment and satisfaction, the breach of contract claim based on Section 5(a) fails to state a claim.

done and continues to do with respect to La Casa Pasta and the Chesapeake Inn. The Agreement does not, as Plaintiffs allege, obligate all of the Defendants to (i) purchase gelato whether or not there is demand for it; (ii) stop selling or never sell ice cream; or (iii) remain in business if it is commercially unreasonable to do so. Plaintiffs' interpretation of the Agreement to include such obligations reads into Section 5(d) requirements that simply does not exist. To read Section 5(d) in such a manner fails its plain language, and, in any event, cannot reasonably be interpreted in such a way, lest it produce an unintended and commercially unreasonable result. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) (citation omitted) (explaining that an unreasonable interpretation of a contract is one that produces an absurd result or one that no reasonable person would have accepted when entering the contract).[9]

C. Plaintiffs Have Not Alleged That Defendants Breached Any Express Warranty.

The Agreement contains only four express warranties. The Complaint, however, alleges that Defendants breached "express warranties contained in the Agreement" by "improper accounting and other business practices in an overstatement of profits and revenues substantially inflated revenue projections." Compl. ¶ 44. Plaintiffs fail to identify which of the four express warranties contained in the Agreement this alleged conduct violated. *Id.* This is not coincidental given that none of the express warranties contained in the Agreement concerns accounting or

[9] Indeed, even in the case of requirements contracts—which the Agreement is not—parties are permitted to decrease their requirements to zero without breaching, as long as they do so in good faith. *See* 6 *Del. C.* §2-306(1); *see also XO Comm'n, LLC v. Level 3 Comm'n, Inc.*, 948 A.2d 1111, 1120 (Del. Ch. 2007) (stating that a party to a requirements contract may "reduce his requirements to zero if he [is] acting in good faith"); *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 638 (8th Cir. 1957) (holding that "[u]nder requirement contracts, a buyer does not breach his contract when requirements for supplies diminish or when he ceases to have requirements by reason of his going out of business." Here, none of the hallmarks of bad faith exist. And *nor is bad faith alleged*—Plaintiffs concede that Defendants' business was faltering and losing money. Compl. ¶¶ 21, 24, 26, 31.

other business practices, profit or revenue statements, or income projections. Consequently, Plaintiffs have failed to allege a breach of an express warranty.

D. Plaintiffs Are Not Entitled to Indemnification.

Plaintiffs seek indemnification under Section 6(a) of the Agreement. To the extent that Plaintiffs fail to state a claim for breach of any express representation or warranty contained in the Agreement, their indemnification claim must also fails to state a claim.

III. PLAINTIFFS' CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING FAILS TO STATE A CLAIM.

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law.[10] To state a claim for breach of the implied covenant, a plaintiff "must allege (1) a specific implied contractual obligation, (2) a breach of that obligation by the defendant, and (3) resulting damage to the plaintiff." *Overdrive, Inc. v. Baker & Taylor, Inc.,* 2011 WL 2448209, at *8 (Del. Ch.). Imposing an obligation via the implied covenant "is a cautious enterprise and instances should be rare." *Nemec v. Shrader,* 991 A.2d 1120, 1128 n. 24 (Del. 2010). As the Court of Chancery has held:

> [T]he implied covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal. Rather, a party may only invoke the protections of the covenant when it is clear from the underlying contract that "the contracting parties would have agreed to proscribe the act later complained of ... had they thought to negotiate with respect to that matter."

Winshall v. Viacom Intern., Inc., 55 A.3d 629, 638 (Del. Ch. 2011); *aff'd, Winshall v. Viacom Intern., Inc.* 76 A.3d 808, 816 (Del. 2013) ("The implied covenant cannot be applied to give the

[10] Maryland does not recognize an independent cause of action for the breach of duty of good faith and fair dealing. *Mount Vernon Props. v. LLC Branch Banking & Trust Co.,* 907 A.2d 373 (Md. App. 2006).

plaintiffs contractual protections that they 'failed to secure for themselves at the bargaining table'"); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

The Complaint fails the exacting standard above. It *only* alleges that, "[t]hrough their breaches of contract, breaches of warranty, fraud, negligent misrepresentation and/or intentional misrepresentation, as alleged above, [all Defendants], breached the covenant of good faith and fair dealing." Compl., ¶ 78. This lone allegation is wholly inadequate as a matter of law to state a claim. *See, e.g., Kuroda,* 971 A.2d at 888.

IV. MANY OF THE CLAIMS IN THE COMPLAINT ARE INAPPLICABLE TO ONE OR MORE OF THE PARTIES AGAINST WHOM THEY ARE ASSERTED.

As noted above, Plaintiffs have been advised on numerous occasions that certain of the causes of action brought in their Complaint are inapplicable against one or more of the parties against whom they are asserted. To date, despite having had over a year in which to amend the complaint to perform basic due diligence and address those concerns, Plaintiffs have failed to do so. Most egregiously, Plaintiffs (1) raise blanket fraud allegations against parties with whom they do not allege to have had any communication whatosever, much less communications amounting to false representations; and (2) raise blanket breach of contract claims against individuals and entities not a party to the Agreement in question, or any other agreement identified in the Complaint. *Id.* Defendants have had to expend time and resources to oppose these claims, which can have no good faith, non-frivolous basis in the facts alleged.[11]

[11] In order to avoid confusion and to facilitate the Court's review, attached as Ex. E is a chart which summarizes the basis for dismissal for each cause of action as to each of the Defendants.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court dismiss the Complaint with prejudice, and award Defendants their attorney's fees and costs, and such other and further relief as the Court deems proper.

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4817-8123-3950, v. 1