

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 22, 2015)

THE RHODE ISLAND INDUSTRIAL- :
RECREATIONAL BUILDING :
AUTHORITY, :
Plaintiff, :

v. :

C.A. No. PC 14-6055

CAPCO STEEL, LLC; :
CAPCO ENDURANCE, LLC; :
MICHAEL J. CAPARCO, SR.; and :
MICHAEL J. HULLINGER, :
Defendants. :

DECISION

SILVERSTEIN, J. Before the Court for decision are two motions to dismiss all counts contained in Plaintiff The Rhode Island Industrial-Recreational Building Authority’s (RIIRBA) Complaint. Defendants Capco Steel, LLC (Capco Steel), Capco Endurance, LLC (Capco Endurance)¹, and Michael J. Caparco, Sr. (Caparco) seek to dismiss the Complaint pursuant to Super. R. Civ. P. 9(b), 12(b)(6), and 12(c)²; Defendant Michael J. Hullinger (Hullinger) seeks to dismiss the three counts alleged against him pursuant to Super. R. Civ. P. 12(b)(6). Count I of RIIRBA’s Complaint—alleging breach of agreements—applies only to the Capco Defendants. The remaining counts (Counts II through IV) are asserted against all Defendants and set forth claims for fraudulent misrepresentation and concealment, civil conspiracy, and negligent misrepresentation and concealment, respectively.

¹ Collectively, Capco Steel and Capco Endurance will hereinafter be referred to as the “Capco Defendants.”

² Despite Defendants’ failure to file an answer in this matter, a motion for judgment on the pleadings is proper here because Defendants’ motion seeks to test the sufficiency of the Complaint. See Swanson v. Speidel Corp., 110 R.I. 335, 337-38, 293 A.2d 307, 309 (1972).

I

Facts and Travel

The Court recites the pertinent facts of this matter as they appear directly in the Complaint.³ RIIRBA—established by the General Assembly pursuant to G.L. 1956 §§ 42-34-1, et seq.—is a Rhode Island public corporation tasked with promoting industrial and recreational expansion in Rhode Island by insuring mortgage payments for a variety of facilities. Capco Steel is a Rhode Island limited liability company engaged in the fabrication and erection of steel and is a wholly-owned subsidiary of Capco Endurance. Capco Endurance serves as the holding company of Capco Steel. Both entities were formed in 2005 and are partly owned by Caparco and his family. Capco Endurance was additionally owned by two limited partnerships (LPs), Endurance Capital, LP and Endurance Capital Institutional Partners I, LP. At all times relevant

³ While the Court must look no further than the Complaint and assume all allegations therein to be true, DeCiantis v. R.I. Dep't of Corr., 840 A.2d 1090, 1092 (R.I. 2003), it may consider those documents that are attached to the Complaint and incorporated by reference therein. See Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (citing Super. R. Civ. P. 10(c)). As the Bowen Court makes explicit, “[t]he mere fact that a pleading mentions or refers to a document-without attaching it to the pleading-does not cause that document to be incorporated by reference as if the pleader had appended it to the pleading.” Id. at 726. Specifically, documents “attached to a pleading as an exhibit, [are] a part of the pleading for all purposes. The reference should be explicit *and the exhibit annexed to the complaint.*” 1 Robert B. Kent, Rhode Island Rules of Civil Procedure with Commentaries § 10.3 (2006) (emphasis added).

In this case, the moving parties rely on documents that were not attached to RIIRBA’s Complaint in support of its Super. R. Civ. P. 12(b)(6) and 12(c) motions. Unless the Court were to treat their motions as motions for summary judgment under Super. R. Civ. P. 56—which would be imprudent at this juncture—the Court will not consider these documents in its Decision. See Bowen, 818 A.2d at 726 (citing Super. R. Civ. P. 12(b)) (finding trial justice improperly considered documents beyond the pleadings without converting the motion into one for summary judgment which would then allow plaintiffs opportunity to present additional pertinent material); cf. Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988) (“If a trial justice, in ruling on a motion to dismiss, considers matters outside the scope of the complaint, the motion is converted into a motion for summary judgment.”). The law in Rhode Island is clear as to this point and the Court declines Defendants’ invitation to review the documents appended to their memoranda.

hereto, Caparco was the Chief Executive Officer and member of the Capco Defendants. Hullinger was manager of the two LPs that held approximately three-fourths of the preferred membership interests in Capco Endurance.

The instant allegations against Defendants stem from RIIRBA's ongoing payment obligations to Webster Bank, N.A. (Webster) that were triggered as a result of the Capco Defendants' default on their payment obligations under a bond transaction in March 2012. Based on a need to restructure its financing and credit facilities as a result of declining profit margins, the Capco Defendants approached the Rhode Island Industrial Facilities Corporation (RIIFC) and Webster with a proposed bond transaction. Pursuant to the terms of the proposed transaction, RIIFC would issue bonds valued at \$6,000,000 to be purchased by Webster as part of a financing transaction containing other financial accommodations by Webster not here significant. RIIRBA would insure the repayment of the bonds up to \$5,000,000 to be made by the Capco Defendants. During the discussions surrounding the proposed transaction, RIIRBA received several documents, including the Capco Defendants' financial statements through October 2009. In addition, RIIRBA received an email from Hullinger that attached the Capco Defendants' line of credit renewal application with Bank of America (the lender providing the Capco Defendants' previous credit facilities) which projected an approximate net income of \$1,000,000 before taxes. Importantly, in that same email, Hullinger expressly stated "based on actual financial results through August 2009 and monthly forecasts for September through December 2009[,] * * * [a]ctual operating results through December 31, 2009 since preparation of the attached [Bank of America renewal application] forecast have confirmed the approximate \$1 million net income before taxes originally forecast." (Compl. ¶ 25).

Thereafter, in early February 2010, Webster agreed to purchase the RIIFC bonds and provide the term loan and credit facility to the Capco Defendants, the other financial accommodations referred to above. On February 4, 2010, a Bond Insurance Application was sent to RIIRBA by the Capco Defendants which required, *inter alia*, the Capco Defendants to send to RIIRBA their “[m]ost current Certified Financial Statement” prior to the transaction’s closing date of June 15, 2010. *Id.* ¶¶ 27-28. That Bond Insurance Application requested the \$5,000,000 insurance from RIIRBA on the Capco Defendants’ repayment of the bonds and was signed by Caparco. Along with the Application, the Capco Defendants also submitted additional materials for RIIRBA’s review, including their audited financial statements for 2006 through 2008, unaudited 2009 financial statements, and a spreadsheet with a ten-year review and three-year forecast, including data for 2009. After a review of all of these materials, RIIRBA’s staff recommended approval of the insurance commitment. On April 9, 2010, RIIRBA’s board adopted a resolution that authorized the issuance of insurance for the bond transaction. As explained in the Complaint, the board’s authorization was subject to a requirement that the Capco Defendants submit to RIIRBA a written certification that there has been no material adverse change in the Capco Defendants’ financial position since RIIRBA’s receipt of the last audited financial statements (*i.e.*, the 2008 statements).

That same day—April 9, 2010—RIIRBA claims the Capco Defendants received their 2009 financial statements from their auditor (the 2009 Audit Report). RIIRBA claims the 2009 Audit Report indicated a material adverse change in the Capco Defendants’ financial position had occurred since the delivery of the 2009 unaudited financial statements to RIIRBA. Specifically, while the 2009 unaudited financial statements reported to RIIRBA a net income of \$1,271,385, the 2009 Audit Report demonstrated a net income of only \$552,621. As purportedly

required pursuant to the Bond Insurance Application, RIIRBA claims the Capco Defendants, Caparco, and Hullinger should have submitted the 2009 Audit Report to RIIRBA for its review prior to the transaction's closing on June 15, 2010.

As part of the closing, Caparco executed several documents on behalf of the Capco Defendants: a Mortgage Insurance Agreement, a Regulatory Agreement, a Security Agreement, a Lease Agreement, a Bond Purchase Agreement, and a Certificate of Obligor. Pursuant to the terms of the Lease Agreement, the Capco Defendants specifically represented:

“The financial information concerning [the Capco Defendants] for the fiscal year ended December 31, 2009, [that] has been given to [RIIRBA] * * * presents fairly the financial position and results of operations of [the Capco Defendants] at the dates and for the periods indicated and there has been no material adverse change since such date with respect to the net worth of [the Capco Defendants] or of any other matters contained or referred to therein.” Id. ¶ 48(d)(ii).

The various agreements also contained provisions that a breach under any specific agreement constituted a breach under the other related agreements.

As stated above, the Capco Defendants defaulted on their payment obligations under the bond transaction in March 2012. Pursuant to the structuring of the transaction, upon the Capco Defendants' default, RIIRBA became obligated to make such payments to Webster up to the \$5,000,000 insurance it agreed to provide on the bonds. RIIRBA began making such payments at that time and continues to make such payments. RIIRBA filed a prior complaint against the Capco Defendants, Caparco, and Hullinger, as well as several other individuals and entities, on May 1, 2013, arising out of the bond transaction at issue here. On February 14, 2014, the Court dismissed without prejudice all of the counts against the presently-named Defendants. See R.I. Indus.-Recreational Bldg. Auth. v. Capco Endurance, LLC, No. PB 13-2069, 2014 WL 664406 (R.I. Super. Feb. 14, 2014) (Silverstein, J.). Only one count against the Capco Defendants'

accounting firm, Feeley & Driscoll, P.C. (F&D), remains in that separate civil action. Following that dismissal, RIIRBA filed a second Complaint (the present matter) on December 9, 2014. Both of the motions to dismiss were filed on February 2, 2015. RIIRBA's Complaint, in essence, alleges that the Capco Defendants, Caparco, and Hullinger either intentionally concealed the 2009 Audit Report from RIIRBA or negligently failed to disclose it prior to the closing.

II

Standard of Review

In recent years, despite the United States Supreme Court's adoption and utilization of a new standard of review for motions to dismiss brought under Rule 12(b) of the Federal Rules of Civil Procedure⁴, the Rhode Island Supreme Court has consistently maintained that "a Rule 12(b)(6) motion to dismiss should be granted only 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 421-22 (R.I. 2014) (quoting Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008)). The "new Federal guide of plausibility"—as set forth in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009)—requires "'[f]actual allegations must be enough to raise a right to relief above the speculative level,' and a plaintiff must 'nudge[] their claims across the line from conceivable to plausible.'" Chhun, 84 A.3d at 422 (quoting Twombly, 550 U.S. at 555, 570). On the other hand, the traditional Rhode Island standard—the so-called "notice pleading standard"—requires "the complaint give the opposing

⁴ Rule 12(b) of the Superior Court Rules of Civil Procedure is "nearly identical" to the federal rule, and the Supreme Court has expressly permitted courts to look to federal court decisions interpreting Rule 12(b) for guidance. See Hall v. Kuzenka, 843 A.2d 474, 476-77 (R.I. 2004).

party fair and adequate notice of the type of claim being asserted.” Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992). As explained in Haley, “[t]he plaintiff is not required to plead the ultimate facts that must be proven in order to succeed on the complaint . . . [or] set out the precise legal theory upon which his or her claim is based.” Thus, our approach—one which originated in Conley v. Gibson, 355 U.S. 41 (1957) but, according to Twombly, 550 U.S. at 563, has since “earned its retirement”—instructs a court to grant a motion to dismiss unless it is clearly apparent that the plaintiff can prove “no set of facts” to support its complaint. See, e.g., Chhun, 84 A.3d at 422 n.5; Collins v. Fairways Condos. Ass’n, 592 A.2d 147, 148 (R.I. 1991); Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 12, 227 A.2d 582, 584 (1967).⁵

In ruling on a motion to dismiss, a trial justice “must look no further than the complaint, assume that all allegations in the complaint are true, and resolve any doubts in a plaintiff’s favor.” R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989). Indeed, “the sole function of a motion filed pursuant to [Rule] 12(b)(6) is to test the sufficiency of the complaint.” Ryan v. State, Dep’t of Transp., 420 A.2d 841, 842 (R.I. 1980); see also McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (“[I]t is [the court’s] function to examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts.”). Similarly, Super. R. Civ. P. 12(c) “provides a trial court with the means of disposing of

⁵ While Defendants here request the Court to adopt the federal plausibility standard in its review of their motions to dismiss, our Supreme Court has yet to either expressly adopt or reject this standard; most recently, the Court reiterated its intention to “leave the Twombly and Iqbal conundrum for another day.” Chhun, 84 A.3d at 423; see also DiLiberio v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 1013, 1016 (R.I. 2015). This Court, in past decisions, however, has indicated that “our Supreme Court’s overall approach in analyzing a [Rule] 12(b)(6) motion does not conflict with the holding in [Iqbal] that a complaint that includes well-pleaded factual allegations and a plausible claim of relief should survive a motion to dismiss.” Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, No. PB 09-1677, 2009 WL 4479246, at *2 (R.I. Super. Nov. 24, 2009) (Silverstein, J.). In any event, this Court will continue to apply the standards long accepted and applied in our jurisdiction.

a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.” Chariho Reg’l Sch. Dist. v. Gist, 91 A.3d 783, 787 (R.I. 2014) (quoting Haley, 611 A.2d at 847). A motion brought under Super. R. Civ. P. 12(c) is tantamount to a motion to dismiss under Super. R. Civ. P. 12(b)(6) and invokes the same standards as presented herein. See id. Plainly, regardless of which standard the Court invokes, “[t]he standard for granting a motion to dismiss is a difficult one for the movant to meet.” Pellegrino v. R.I. Ethics Comm’n, 788 A.2d 1119, 1123 (R.I. 2002).

III

Discussion

All named Defendants request the Court dismiss Counts II through IV (fraudulent misrepresentation and concealment, civil conspiracy, and negligent misrepresentation and concealment, respectively) of RIIRBA’s Complaint. Additionally, the Capco Defendants seek the dismissal of Count I (breach of agreements) which is brought only against them. The Court will address each Count in turn.

A

Breach of Agreements (Count I)

1

Existence of a Contract

Under Count I of the Complaint, RIIRBA contends that the Capco Defendants breached their “representations, warranties, covenants, or obligations” under several of the agreements executed in connection with, or at the closing of, the bond transaction. (Compl. ¶ 59). Specifically, RIIRBA alleges that pursuant to the terms of the Regulatory Agreement (signed at the closing), the Capco Defendants had warranted that “there has been no material adverse

change to [the Capco Defendants'] financial position since the date of the most recent audited financial statements for [the Capco Defendants] delivered to [RIIRBA].” Id. at ¶ 60. With the Complaint alleging the Capco Defendants indeed suffered a “material adverse change” to their financial position (i.e., an approximate \$700,000 decrease in projected net income) since RIIRBA’s receipt of the 2008 audited financial statements, RIIRBA argues the Capco Defendants breached the Regulatory Agreement. Moreover, pursuant to the terms of that Agreement, a breach therein would also constitute a breach under the other agreements that were executed by the Capco Defendants at the closing, which included the Security Agreement, the Lease Agreement, and the Mortgage Insurance Agreement. RIIRBA’s Complaint also alleges that because the Capco Defendants did not accurately and fairly represent their financial position, the Capco Defendants’ conduct breached the Lease Agreement.

In their motion, the Capco Defendants argue that Count I should be dismissed because the Complaint does not allege that any of the agreements were executed by and between the Capco Defendants and RIIRBA. The Capco Defendants allege that the Mortgage Insurance Agreement was signed by RIIRBA, RIIFC, and Webster, not the Capco Defendants. Moreover, they argue neither RIIRBA nor the Capco Defendants were parties to the Security Agreement, Lease Agreement, or Bond Purchase Agreement. As the Court has indicated above, these agreements, albeit expressly referenced in the Complaint, were not attached thereto and thus, under our Supreme Court’s specific instructions for reviewing motions to dismiss, the Court will not consider these documents. See 2 n.3, supra, (citing Bowen, 818 A.2d 721, as support for Court’s refusal to consider matters outside the pleading or, in the alternative, to treat this motion as one for summary judgment). Therefore, the Court must determine whether the Complaint has sufficiently set forth any set of facts to establish that an agreement actually existed between

RIIRBA and the Capco Defendants which required the Capco Defendants to make certain representations about its financial position at the June 15, 2010 closing. See, e.g., Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (finding dismissal appropriate when plaintiff can prove no set of facts in support of his or her claim to entitle plaintiff to relief from defendant).

“The determination of whether a contract exists is a question of law.” Haviland v. Simmons, 45 A.3d 1246, 1257 (R.I. 2012). It is well-settled in Rhode Island that an action for breach of agreement, also referred to as a breach of contract action, requires there be a valid contract where the parties intended to be bound by the terms of the agreement. R.I. Five v. Med. Assocs. of Bristol Cnty., Inc., 668 A.2d 1250, 1253 (R.I. 1996); see also Smith v. Boyd, 553 A.2d 131, 133 (R.I. 1989) (“In general, assent to be bound is analyzed in two steps: offer and acceptance.”). “In an expressed contract the terms and conditions of the contract are assented to orally or in writing by the parties.” J. Koury Steel Erectors, Inc. of Mass. v. San-Vel Concrete Corp., 120 R.I. 360, 365, 387 A.2d 694, 697 (1978). As a result, “[t]o establish either an express or an implied contract, one must prove mutual agreement and intent to promise.” Id. Therefore, “[u]nder traditional contract theory, an offer and acceptance are indispensable to contract formation, and without such assent a contract is not formed.” Smith, 553 A.2d at 133. Once an agreement to be bound by a contract’s terms arises, an action will lie for every breach of that contract. Rendine v. Catoia, 52 R.I. 140, 158 A. 712, 713 (1932).

In the Complaint, there are a series of agreements that were alleged to be breached by the Capco Defendants. However, the only factual averment indicating a mutual agreement to be bound by certain terms, which was entered into with the Capco Defendants, appears in paragraph 58, which reads “on June 15, 2010, [the Capco Defendants] executed and entered into or acknowledged and approved a Bond Insurance Application and numerous Related Agreements to

which [RIIRBA] was either a party or third-party beneficiary” (Compl. ¶ 58). While the Complaint focuses most of the allegations on the numerous breaches committed by the Capco Defendants under the terms of those various agreements, it fails to set forth exactly which of these *specific* agreements the Capco Defendants entered into *with RIIRBA* and were breached thereafter. RIIRBA simply relies on its allegation that a breach of one of the agreements constituted a breach of the other agreements, pursuant to the structuring of the transaction.

However, while not specifically alleged in the Complaint, the Capco Defendants in their memorandum concede that RIIRBA was, in fact, a party to the Regulatory Agreement with Capco, but deny that RIIRBA was a party to any other agreement. As alleged in the Complaint and explained above, the Regulatory Agreement contained a specific provision which required the Capco Defendants to represent that there had been no change in their financial position since RIIRBA’s receipt of their last audit reports. RIIRBA claims there had been such a change in financial position from the 2008 audits to the 2009 Audit Report. Taken together, the Complaint—assuming the allegations to be true and viewing the facts in the light most favorable to RIIRBA—has sufficiently set forth allegations that establish the existence of contractual rights among the parties with respect to at least one of the contracts entered into in conjunction with the bond transaction.

Based on the allegations in the Complaint, the “most recent audited financial statements for [the Capco Defendants] delivered to [RIIRBA]” were the 2008 statements.⁶ See Compl. ¶ 60.

⁶ The Capco Defendants contend in their memorandum that RIIRBA’s counsel acknowledged that the 2009 Audit Report was indeed delivered to the Rhode Island Economic Development Corporation (RIEDC) by the Capco Defendants. The RIIFC, as a subsidiary of the RIEDC, would then have received the 2009 Audit Report, as required to comply with the agreements. Therefore, as the Capco Defendants argue, because there was no “material adverse change” from the time the 2009 statements were delivered to the June 15, 2010 closing, there could be no breach. While this argument was raised in their papers and again at the motion hearing, there is

The Complaint additionally alleges a breach of the Lease Agreement by reason of the Capco Defendants having misled RIIRBA and for violating the provision that attested that “[t]he financial information concerning [the Capco Defendants] for the fiscal year ended December 31, 2009, [that] has been given to [RIIRBA] * * * presents fairly the financial position and results of operations of [the Capco Defendants] at the dates and for the periods indicated” Id. ¶ 48(d)(ii); see also id. ¶¶ 49(d), 63. Thus, under our traditional notice pleading standards, the Complaint has sufficiently pled the necessary facts to maintain a breach of agreement action because it alleges that a material adverse change in the Capco Defendants’ financial position had occurred since the date of RIIRBA’s receipt of the 2008 audit report and the Capco Defendants failed to apprise RIIRBA of that change. Setting aside any allegation that the Capco Defendants either intentionally or negligently concealed the 2009 Audit Report or misrepresented their financial position, the plain fact that the Capco Defendants suffered a material adverse change in violation of the provision in the agreements makes clear to the Court that Count I may proceed at this juncture. Notwithstanding this finding, the Court must next resolve whether such an action may be maintained in light of RIIRBA’s alleged waiver of its right to receive the 2009 Audit Report prior to the bond transaction closing.

2

Waiver

In moving to dismiss Count I, the Capco Defendants argue that RIIRBA’s right to receive the 2009 Audit Report was a condition precedent to the June 15, 2010 closing and, as a result of

simply no basis for these allegations at this time. There is no allegation in the Complaint that the 2009 statements were delivered to the RIEDC or that RIIRBA’s counsel approved such delivery. As the Court here has declined to convert this motion into one for summary judgment, the Court must again decline the Capco Defendants’ invitation for the Court to reference certain exhibits attached to their memorandum in support of their argument. See Bowen, 818 A.2d at 725-26.

RIIRBA proceeding with the closing without them, RIIRBA effectively waived that condition. As alleged in the Complaint, RIIRBA's authorization to provide insurance on the bonds was predicated on the requirement that "prior to the Closing, Capco shall submit to [RIIRBA] [the Capco Defendants'] *most currently fully audited financial statement*, together with certification that there has been no material adverse change in [the Capco Defendants'] financial position since the date of the most recent audited financial statements delivered to [RIIRBA]." (Compl. ¶ 33) (emphasis added) (internal quotation marks omitted). This condition—originating in RIIRBA's Final Resolutions of Approval and incorporated into the Regulatory Agreement entered into between RIIRBA and the Capco Defendants—is alleged by the Capco Defendants to have been waived because RIIRBA knew at the time of the closing that it had the right to review the 2009 Audit Report but did not do so. In response, RIIRBA claims that the alleged breaches are not for the Capco Defendants' failure to provide the financial information. Rather, it claims the breaches were for their warranty that there had been no material adverse change since their delivery of the 2008 audited financial statements and for breaching certain representations that the Capco Defendants had fairly and accurately presented their financial position leading up to the closing. Moreover, RIIRBA claims that there can be no waiver because it simply did not know the 2009 Audit Report was even available prior to the closing to substantiate any claim that they waived reviewing it when they closed.

It is well-settled in Rhode Island that "[courts] will not lightly infer, to the extent that the record supports such an inference, the waiver of contractual provisions; evidence supporting an inference of waiver must be manifest and apparent." Haydon v. Stamas, 900 A.2d 1104, 1113 (R.I. 2006) (citing 1800 Smith St. Assocs., LP v. Gencarelli, 888 A.2d 46, 54-55, 55 n.4 (R.I. 2005) and Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 65-66 (R.I.

2005)); see also Romualdo P. Eclavea & Eric C. Surette, 28 Am. Jur. 2d Estoppel and Waiver § 195, at 661 (2d ed. 2011) (“The standard for an implied waiver is high, and factual findings are required. A waiver will not be inferred lightly as something more than a mere inference of intent is required.”). Waiver is consistently defined as “the voluntary intentional relinquishment of a known right [and] [i]t results from action or nonaction” Haxton’s of Riverside, Inc. v. Windmill Realty, Inc., 488 A.2d 723, 725 (R.I. 1985) (quoting Pacheco v. Nationwide Mut. Ins. Co., 114 R.I. 575, 337 A.2d 240 (1975)). With respect to implied waiver, there must be a “clear, unequivocal, and decisive act of the party who is alleged to have committed waiver.” Sturbridge Home Builders, 890 A.2d at 65 (internal quotation marks omitted). More specifically, “[a]n implied waiver may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it.” Id. The party seeking to establish the existence of a waiver holds the burden of proof and such inquiries are determinations of fact. Gencarelli, 888 A.2d at 54-55.

Here, the question of whether RIIRBA waived any provision in the agreements entitling it to receive and review the 2009 Audit Report prior to the closing is based largely on factual determinations. The Capco Defendants argue, because RIIRBA elected to close the transaction without first receiving the 2009 Audit Report (a provision specifically included for RIIRBA’s benefit), a waiver could be inferred. However, key to that conclusion would be the fact that RIIRBA intended the contract provision to refer to the 2009 Audit Report—and not the 2008 audits. In other words, for the Court to determine a waiver existed as to this contractual provision with respect to the 2009 Audit Report, the Court would need some evidence before it that RIIRBA knew or should have known that the 2009 Audit Report was available for its review

and it nonetheless proceeded to the closing without it. Absent any such proof (as there is nothing in the Complaint to suggest it should have known of the 2009 Audit Report's availability, especially considering the allegations that the Capco Defendants concealed its existence), the Court is not prepared to infer a waiver from RIIRBA's conduct. Thus, the fact that RIIRBA closed the transaction with (only) the 2008 audited statements does not show any "clear" or "unequivocal" intent to waive the requirement in the contract for the Capco Defendants to deliver the most current audit. See Sturbridge Home Builders, 890 A.2d at 65; Eclavea & Surette, supra, § 195, at 660-61 (explaining implied waiver requires intent to be clearly demonstrated by surrounding facts). If RIIRBA believed the 2008 audit report was indeed the "most current fully audited financial statement," then the mere fact that it closed the transaction cannot be a voluntary and knowing relinquishment of any provision emplaced in the contract for their benefit to receive the 2009 Audit Report when they were available.

Assuming the Court could—at this stage—find the surrounding circumstances evidenced an implied waiver of receiving the 2009 Audit Report, the Capco Defendants suggest such a finding would be completely dispositive of the allegations set forth in Count I. The Court disagrees. Moreover, whether RIIRBA had any duty to investigate the presence of material adverse changes in the 2009 Audit Report (to purportedly substantiate the claims of waiver) is an issue more appropriate for the Court's analysis with respect to the existence of any misrepresentation and concealment. As will be discussed infra, there was no duty on behalf of RIIRBA to exercise reasonable diligence in the face of fraudulent statements about the Capco Defendants' financial position. Without any basis for RIIRBA to suspect the contrary, there can be no waiver inferred at this time. Accordingly, the Court holds that RIIRBA has in Count I stated a cause of action as to the Capco Defendants.

B

Fraudulent and Negligent Misrepresentation and Concealment (Counts II and IV)

RIIRBA's Counts II and IV set forth claims of fraudulent misrepresentation and concealment and negligent misrepresentation and concealment against all of the named Defendants. In brief, RIIRBA alleges that the Capco Defendants, Caparco, and Hullinger induced it to provide insurance on the RIIFC bonds by way of financial documents and other representations delivered to RIIRBA prior to the closing of the transaction that either intentionally or negligently misstated and concealed the Capco Defendants' financial position. RIIRBA argues it reasonably relied on the Capco Defendants, Caparco, and Hullinger's misrepresentations about the Capco Defendants' net income and overall financial condition in considering whether to approve issuing insurance on the bonds. In sum, if Defendants had revealed the 2009 Audit Report to RIIRBA prior to the closing date, RIIRBA alleges it would have refused to proceed with the closing.

Defendants⁷ argue the allegations set forth in the Complaint do not rise to the level of particularity required to maintain an action for fraud pursuant to Rule 9 of the Superior Court Rules of Civil Procedure. In pleading special matters, Rule 9(b) emplaces the following requirement on plaintiffs: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Defendants put forth several arguments as to why RIIRBA's claims lack the necessary particularity: (i) the financial

⁷ For purposes of this section, the Capco Defendants in their memorandum incorporate by reference the arguments advanced in Hullinger's memorandum in support of their motions to dismiss for failure to state a claim of fraud with the requisite particularity required under Super. R. Civ. P. 9(b) (Rule 9). Accordingly, as the arguments are similar between the parties as to these two counts, the Court will treat the Defendants' motions together, but will expressly address them separately where required.

projections submitted to RIIRBA cannot form the basis of fraud; (ii) RIIRBA has insufficiently showed reasonable reliance on the financial documents to support any claim for misrepresentation; and (iii) RIIRBA failed to exercise reasonable diligence in seeking out the 2009 Audit Report prior to effectuating the closing on the transaction.

1

Rule 9(b) Legal Standard

As with other rules of civil procedure in Rhode Island, our Supreme Court has instructed that in interpreting Rule 9(b), courts may look to the federal courts' interpretation of the rule. Henderson v. Newport Cnty. Reg'l Young Men's Christian Ass'n, 966 A.2d 1242, 1246 (R.I. 2009) ("This [C]ourt has stated previously that where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule." (quoting Crowe Countryside Realty Assocs., Co. v. Novare Eng'rs, Inc., 891 A.2d 838, 840 (R.I. 2006))). Rule 9(b) imposes heightened pleading requirements for alleging fraud-based claims and is often referred to as the particularity requirement.⁸ Alex & Ani, LLC v. Elite Level Consulting, LLC, 31 F. Supp. 3d 365, 371 (D.R.I. 2014); Haft v. Eastland Fin. Corp., 755 F. Supp. 1123, 1126 (D.R.I. 1991). "What constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule [which is] to give fair notice to the adverse

⁸ In this case, Count IV alleges negligent misrepresentation and concealment against all Defendants. In line with its prior decisions, the Court determines that while Rule 9(b) on its face may not seem to extend to actions for negligent misrepresentation, the First Circuit has indicated that the rule will so apply. See N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 15 (1st Cir. 2009) ("[O]ne might think that negligent misrepresentation . . . [was] not on [its] face subject to Rule 9(b), but the case law here and in other circuits reads Rule 9(b) expansively to cover associated claims where the core allegations effectively charge fraud."); see also Przygoda v. Clifford J. Deck, CPA, Inc., No. PB 09-1336, 2010 WL 1956239, at *4-5 (R.I. Super. May 12, 2010) (Silverstein, J.) (dismissing plaintiff's count for negligent misrepresentation for his failure to meet the particularity requirement under Rule 9(b)).

party and to enable him to prepare his responsive pleading.” Women’s Dev. Corp. v. Central Falls, 764 A.2d 151, 161 (R.I. 2001) (quoting 1 Kent, R.I. Civ. Prac. § 9.2 at 92 (1969)); see also Przygoda, 2010 WL 1956239, at *5 (“Based on the purposes of Rule 9(b), when a fraud count is conclusory and lacking in specifics, it is too vague to meet the Rule 9(b) standard.” (citing Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir. 1991))).

In order to satisfy Rule 9(b)’s requirements, “[a] plaintiff must plead ‘the who, what, when, where, and how: the first paragraph of any newspaper story.’” Haft, 755 F. Supp. at 1128 (quoting DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)); see also Hayduk v. Lanna, 775 F.2d 441, 444 (1st Cir. 1985) (“Rule 9(b) requires ‘specification of the time, place and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred.’” (quoting McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980))); see generally 5A Wright & Miller, Federal Practice & Procedure Civil § 1297 (3d ed.) (discussing Rule 9(b)’s particularity requirement). As the Haft court stated, the fundamental purpose behind Rule 9(b) is to safeguard defendants from frivolous claims that would damage their reputations or goodwill. Haft, 755 F. Supp. at 1130 (“Although it is of the utmost importance to keep the courtroom doors open to those who have been wronged, the particularity requirement creates a very delicate balance between the rights of such individuals and the rights of those who are accused.”). Importantly, the First Circuit has also instructed that the particularity requirement still applies even if the alleged fraud relates to those matters within the defendant’s knowledge. Wayne Inv., Inc. v. Gulf Oil Corp., 739 F.2d 11, 14 (1st Cir. 1984); accord New England Data Servs., Inc. v. Becher, 829 F.2d 286, 288 (1st Cir. 1987).

Application

RIIRBA, here, has sufficiently pled the requisite specification to sustain an action sounding in fraud against all Defendants, except as to Caparco. For the reasons stated below, the Court denies in part and grants in part Defendants' motions relative to Counts II and IV.

It is well-settled in Rhode Island that a plaintiff claiming fraudulent misrepresentation “must show not only that the defendant had an intention to deceive, but the complainant also must present sufficient proof that the party detrimentally relied upon the fraudulent representation.” Asermely v. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999). Generally, a plaintiff must establish the following elements to prevail on a claim for the tort of fraudulent misrepresentation: “1) that the defendant made a false representation of material fact; 2) that the defendant intended thereby to deceive the plaintiff; 3) that the defendant intended that the plaintiff rely on the representation; 4) that the plaintiff did rely on the representation as true; and 5) that the plaintiff was injured as a result.” Kelly v. Tillotson-Pearson, Inc., 840 F. Supp. 935, 940 (D.R.I. 1994); see Siemens Fin. Servs., Inc. v. Stonebridge Equip. Leasing, LLC, 91 A.3d 817, 820 n.4, 821 (R.I. 2014) (applying Massachusetts law but noting no conflict with Rhode Island jurisprudence) (“A party claiming intentional misrepresentation must show that the other party ‘made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the [claimant] to act thereon, and that the [claimant] reasonably relied upon the representation as true and acted upon it to his damage.’” (quoting Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 772 N.E.2d 1054, 1066 (2002))).

Similarly, our Supreme Court has reviewed the elements necessary to establish a prima facie case of negligent misrepresentation:

“(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” Zarella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1257 (R.I. 2003) (quoting Mallette v. Children’s Friend and Serv., 661 A.2d 67, 69 (R.I. 1995)).

Negligent misrepresentation is a lesser included claim of fraudulent misrepresentation and that the only difference between the two causes of action is that instead of knowing a particular statement was false, a party failed to exercise reasonable care to ensure its truth and accuracy. See Przygoda, 2010 WL 1956239, at *4 (citing Am. Jur. Fraud § 128); see also 37 C.J.S. Fraud § 77 (“The difference between intentional or fraudulent misrepresentation and negligent misrepresentation is that the latter only requires that the statement or omission was made without a reasonable basis for believing its truthfulness, rather than an actual knowledge of its falsity.”).

In order to succeed on a claim for misrepresentation—by way of actual intent or negligence—that is based on concealment, it is generally understood that a plaintiff must prove the defendant owed a “duty to speak” because mere silence, in the absence of such duty, is not fraud. See McGinn v. McGinn, 50 R.I. 236, 240, 146 A. 636, 638 (1929); Home Loan & Inv. Ass’n v. Pattera, 105 R.I. 763, 767, 255 A.2d 165, 167 (1969) (“[O]ne party to a transaction is under no duty to speak out to the other concerning everything he knows about the matter, and that silence, even if meditated and upon a material fact, will not necessarily allow the other party to the transaction to set it aside as fraudulent.”). In McGinn, our Supreme Court stated that where a party acts upon another’s incorrect statement believing it to be true, and the declaring party subsequently becomes aware that the statement is untrue, remaining silent during the

remainder of the transaction will constitute passively fraudulent conduct. See McGinn, 50 R.I. 236, 240-41, 146 A. at 638.

“Whether a person has a duty to disclose turns on the specific circumstances of the case. This is a flexible inquiry; one that examines the facts of each case to determine whether they give rise to a duty to disclose.” W. Reserve Life Assur. Co. of Ohio v. Caramadre, 847 F. Supp. 2d 329, 337 (D.R.I. 2012) (internal citations omitted). Indeed, according to one federal appeals court,

“[A] party is under a duty to speak, and therefore liable for non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party [sic] to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.” Cent. States Stamping Co. v. Terminal Equip. Co., 727 F.2d 1405, 1408 (6th Cir. 1984).

The Restatement (Second) Torts—discussing liability for nondisclosure—recognizes a duty may exist where, inter alia, a party to a business transaction has acquired subsequent information that renders a prior representation untrue or misleading, or where a party knows the other party is under a mistake as to facts basic to the transaction and that other party, based on the particular circumstances, would reasonably expect their disclosure. Restatement (Second) Torts § 551(2)(c), (e), at 119 (1977).

Much of Hullinger’s argument is predicated on the absence of any such duty to disclose the 2009 Audit Report to RIIRBA emanating from their prior correspondences about the Capco Defendants’ net worth figures because Hullinger had no “special relationship” with RIIRBA. Similarly, the Capco Defendants and Caparco argue the information supplied to RIIRBA constituted financial predictions and estimations of future performance—not “material facts.” RIIRBA does not dispute that the statements made by Hullinger in January 2010 regarding the

Capco Defendants' net income in 2009 were not knowingly false at the time they were made. Rather, it argues that based on the prior representations made to RIIRBA, when he subsequently learned of the alleged "material adverse change," he became aware that his prior statements were untrue. In turn, such a revelation thereby triggered Hullinger's duty to disclose the 2009 Audit Report or correct his prior representations. Thus, whether he intentionally concealed the report and failed to disclose the material adverse change or whether he failed to exercise reasonable care in disclosing the report, it is clear a duty nonetheless existed. As a result, when Hullinger, Caparco, and the Capco Defendants failed to do so, they became liable for fraudulent and negligent misrepresentation based on a theory of concealment.

RIIRBA's arguments that the statements made by Defendants in January 2010 subsequently became untrue in light of the 2009 Audit Report satisfy the heightened pleading standards set forth in Rule 9(b), albeit by a somewhat close margin. In its Complaint, RIIRBA alleges in paragraphs 17 and 18 that due to the downturn in business, "Hullinger projected that [the Capco Defendants] faced a loss of \$8 million in 2009" and that despite a significant revenue loss, "[the Capco Defendants] projected a before-tax profit of approximately \$1 million through December 31, 2009." (Compl. ¶¶ 17-18). The information that was alleged in the Complaint to be delivered to RIIRBA on January 4, 2010, prior to the closing on the bond transaction, consisted of "written statements from Caparco dated December 30, 2009 and December 31, 2009;" copies of the Capco Defendants' financial statements through October 2009; a September 2009 financial covenant; and, the credit renewal that was submitted to Bank of America with attached financial information. *Id.* ¶¶ 22-25. The Complaint specifically references that the financial information attached to an email sent by Hullinger to RIIRBA "projected a 2009

before-tax profit of approximately \$1 million and a net worth for [the Capco Defendants] of approximately \$11.2 million.” Id. ¶ 24.

The beginning of the Court’s inquiry is thus whether there was a misrepresentation of a “material fact.” It is generally understood that “when persons deal with each other at arm’s length, if they make statements of fact as distinguished from statements of opinion, the statements should be true.” McGinn, 50 R.I. 236, 146 A. at 638. Here, the Complaint distinguishes the statements of opinion seemingly made by Hullinger—the financial documents delivered to RIIRBA which largely forecast the Capco Defendants’ future performance—from those statements asserting factual representations. Critically, the Complaint alleges that in Hullinger’s email on January 4, 2010, he stated that the financial information was “based on actual financial results through August 2009 and monthly forecasts for September through December 2009” (Compl. ¶ 25). Hullinger continued to state that “[a]ctual operating results through December 31, 2009 since preparation of the attached [Bank of America renewal application] forecast *have confirmed the approximate \$1 million net income before taxes originally forecast.*” Id. (emphasis added). The implication from the email is that while Defendants initially projected their financial position with certain data through August 2009, Hullinger apparently determined that the net income value projection was confirmed by the actual results of the Capco Defendants at the end of 2009. Importantly, Hullinger in his email represented as much to RIIRBA at least six months prior to the bond transaction’s closing. While Defendants argue the Complaint’s allegations cannot substantiate a claim for a misrepresentation of a material fact because the \$1 million representation was nothing more than an estimation about what their financial position would be at the end of the year, the Court comes to a different conclusion. See Siemens Fin. Servs., 91 A.3d at 823 (“A statement on which

liability for fraud may be based must be one of fact; it may not be one of opinion, or conditions to exist in the future, or matters promissory in nature.” (quoting Stolzoff v. Waste Sys. Int’l, Inc., 792 N.E.2d 1031, 1041 (Mass. App. Ct. 2003))).

Defendants seemingly argue that, assuming the statements made by Hullinger were projections, there are no supporting facts to form the basis of RIIRBA’s misrepresentation claims. Indeed, projections, in and of themselves, are merely estimates of future performance and are not grounded in substantiated facts. Id. at 823 (“[A]ny forecasts of the future performance of [a business] cannot form the basis of a misrepresentation claim or defense.”). The problem with Defendants’ arguments is that they ignore the express language of the allegations in the Complaint; Hullinger clearly represented that the financial statements and spreadsheets originally submitted to RIIRBA were “confirmed” by the Capco Defendants’ “actual operating results through December 31, 2009.” See Compl. ¶ 25. At that point, the representations were to an existing fact and no longer merely financial forecasts of future performance. See Grassi v. Gomberg, 81 R.I. 302, 304, 102 A.2d 523, 524 (1954) (“There is no question that the law here as elsewhere is that the false representation must be of an existing fact.”).

Once a statement of fact has been asserted, the inquiry must then shift to whether Hullinger, Caparco, and the Capco Defendants were under any duty to disclose the 2009 Audit Report which allegedly made Hullinger’s prior representations untrue or misleading. See Restatement (Second) Torts § 551(2). The duty to disclose, or duty to speak, “does not depend on the existence of a fiduciary relationship between the parties. It may arise in any situation where one party imposes confidence in the other because of that person’s position, and the other party knows of this confidence.” Cent. States Stamping, 727 F.2d at 1409.

Hullinger's reliance on the Rhode Island federal district court decision in Caramadre is misplaced. A "special relationship" between the parties or some other "objective circumstances" that would lead a plaintiff to expect a disclosure of the material fact is only one basis of a party's duty to disclose. See Caramadre, 847 F. Supp. 2d at 338 (quoting Restatement (Second) Torts § 551(2)(e)). The Restatement provides in subsection 2(c) that a party in a business transaction who subsequently learns of information that renders a prior representation untrue or misleading is under a duty to disclose that information prior to the consummation of the transaction. See Restatement (Second) Torts § 551(2)(c). When Hullinger learned of the 2009 Audit Report (which allegedly revealed a "material adverse change" to the net income representation), his duty to disclose that information to RIIRBA was triggered. The same holds true for negligent misrepresentation cases. See Restatement (Second) Torts § 552 (finding liability should exist where party in business transaction supplies false information to guide others in the transaction but failed to exercise reasonable care in communicating that information and thereby caused pecuniary loss through that party's justifiable reliance on that false information). Moreover, the alleged disclosure requirements in the contracts executed at the closing have nothing to do with whether Hullinger's duty to disclose was somehow affected or obviated. As a result, there is a sufficient factual predicate set forth in the Complaint to determine that a duty to disclose existed for Hullinger to supplement or correct his prior representations that were, as alleged, made negligently or fraudulently. See Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 635 (Tex. App. 1993) ("[E]ven in arms-length transactions, a duty to disclose arises if a party knows, or should have known, its prior statement was false."); Peter A. Alces, Law of Fraudulent Transactions § 2:7 ("In fraudulent concealment cases, whether a duty to disclose exists is a matter of law, to be decided by the court."). But see Wilby v. Savoie, 86 A.3d 362, 373 (R.I.

2014) (applying Vermont law) (“In arm’s-length transactions, however, where facts are equally within the means of knowledge of both parties, neither party is required to speak, in the absence of inquiry respecting such matters.” (quoting Lay v. Pettengill, 38 A.3d 1139, 1144 (Vt. 2011)) (internal quotation marks omitted)).

Next, the inquiry then must turn to the second major prong of establishing a claim for fraudulent or negligent misrepresentation: the plaintiff is required to demonstrate that he or she “justifiably relied” on the alleged misrepresentation made by the defendant. See Kelly v. Tillotson-Pearson, Inc., 840 F. Supp. 935, 940 (D.R.I. 1994) (finding justifiable reliance required to establish a prima facie case of both fraudulent and negligent misrepresentation); E. Providence Loan Co. v. Ernest, 103 R.I. 259, 263, 236 A.2d 639, 642 (1968) (stating it is “fundamental to actions predicated on the theory of deceit that a plaintiff must present evidence which shows he was induced to act because of his reliance upon the alleged false representation”). Defendants in this case cite to this Court’s prior decision in Stanley Weiss Assocs., LLC v. Energy Mgmt. Inc., No. 02-1794, 2004 WL 877540, at *4 (R.I. Super. Apr. 7, 2004) (Silverstein, J.), for the proposition that RIIRBA was a sophisticated party and, accordingly, cannot rely on those statements an ordinary person might have relied on. RIIRBA, as they allege, possessed a level of knowledge to independently evaluate the financial information provided to it before the closing on the bond transaction. Importantly, they argue that RIIRBA failed to investigate or seek out the 2009 Audit Report, which would have indicated or revealed the material adverse change in the Capco Defendants’ financial position. Specifically, Defendants argue RIIRBA cannot rely on the statements made by Hullinger because, in exercising reasonable diligence, RIIRBA could have sought out and reviewed F&D’s 2009 Audit Report.

In pertinent part, this Court stated the following in Stanley Weiss:

“Reasonable reliance is measured objectively, yet consideration is given to certain subjective attributes of the individual, such as his or her sophistication. ‘[O]ne who has special knowledge, experience and competence may not be permitted to rely on statements for which the ordinary man might recover, and that one who has acquired expert knowledge concerning the matter dealt with may be required to form his own judgment, rather than take the word of the defendant.’” Id. (quoting W. Page Keeton, Prosser and Keeton on Torts § 108, at 751 (5th ed. 1984)).

Furthermore, Defendants rely on the case of J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1258-59 (1st Cir. 1996) to support their contention that RIIRBA was under some affirmative duty to exercise due diligence when fraudulent concealment is at issue. However, the First Circuit’s decision invokes principles of reasonable diligence in the context of whether the tolling of the statute of limitations is appropriate when a party fraudulently conceals a party’s cause of action. See id. at 1259 (“[W]hen the party seeking to toll the statute by fraudulent concealment alleges affirmative acts of concealment, the burden of showing reasonable diligence falls on that party. Thus, in this Circuit, by alleging affirmative acts of fraudulent concealment Appellants are required to show due diligence.” (internal citations omitted)). Based on those principles, Defendants contend in their papers that the 2009 Audit Report could not have been concealed, as all RIIRBA had to do was request it before the closing date. The Court disagrees and declines to interpret the First Circuit’s decision as requiring RIIRBA to do so.

The fraudulent concealment doctrine, as utilized by the J. Geils court, clearly applies to situations where a party has concealed a cause of action rather than the situation presented here which is whether a party can reasonably rely on a party’s misrepresentation of a material fact in a business transaction. Indeed, as RIIRBA correctly cites, it is well-settled in this state, as well as elsewhere, that “where one relies upon another’s representation of an existing fact and is thereby misled to his damage he may maintain an action for deceit, *notwithstanding his failure to make*

further inquiry which was open to him at the time and which would have disclosed the falsity of such representation.” Campanelli v. Vescera, 75 R.I. 71, 74, 63 A.2d 722, 724 (1949) (emphasis added). Specifically, as stated in comment a to section 540 of the Restatement (Second) Torts, entitled “Duty to Investigate,” the duty to investigate “is no defense to one who has made a fraudulent statement about his financial position that his offer to submit his books to examination is rejected.” Restatement (Second) Torts § 540 cmt. a (1977). Although RIIRBA could have investigated or sought out the 2009 Audit Report prepared by F&D, allegedly available two months prior to the closing on June 15, 2010, the fact that it failed to do so does not diminish the merits of its fraudulent or negligent misrepresentation claims against Defendants. While a duty to investigate might be triggered if there is reason to believe the statement was false, there is simply nothing before the Court which would suggest RIIRBA should have distrusted the representations of the Capco Defendants’ financial position leading up to the closing.⁹

Additionally, as to the issue of sophisticated parties, the Stanley Weiss case dealt with certain representations made during the negotiations of a lease agreement; specifically, whether the plaintiff could expect there would be any guarantees on the lease agreement despite the fact that he was entering into an agreement with a limited liability company where he had significant

⁹ At the motion hearing, Defendants cited to a New York federal district court case, among others, to argue that there was a growing trend to establish that a plaintiff may have to exercise reasonable diligence in order to prevail on a misrepresentation claim. See JP Morgan Chase Bank v. Winnick, 350 F. Supp. 2d 393, 405-08 (S.D.N.Y. 2004). The Winnick case, however, suggests that a duty to inquire is triggered only in those situations where “the plaintiff may be said to have been ‘placed on guard or practically faced with the facts’ of the complained of fraud” Id. at 408. The court there cited several other cases, all of which supported the contention that there had to be some level of suspicion, based on the circumstances of the parties’ relationship to signal the existence of fraud and impose a duty on the plaintiff. In the case at bar, however, the Court can in no way conclude, on these motions to dismiss, that there were any facts on which RIIRBA should have had some inclination that the representations made by Hullinger and the Capco Defendants were potentially fraudulent. Absent such facts, RIIRBA cannot be faulted for failing to exercise any increased diligence in preparing for the transaction’s closing.

experience in real estate dealing with single purpose entities and personal guarantees. See Stanley Weiss, 2004 WL 877540, at *4-5. However, in the situation here, RIIRBA was given actual financial documents with both historical and projected data. There was evidence before it attesting to the financial position of the Capco Defendants. When Hullinger communicated to RIIRBA that the actual operating results through December 31, 2009, since the preparation of those financial forecasts and documents had confirmed those numbers and calculations, there was no reason for RIIRBA to disbelieve those representations. Furthermore, RIIRBA maintains that because of the concealment, it never had any reason to believe the 2009 Audit Report prepared by F&D were actually available. This situation, therefore, is certainly distinguishable from this Court's decision in Stanley Weiss. Because of RIIRBA's reliance on the representations made by Hullinger, as set forth in the Complaint, RIIRBA alleges it was induced to enter into the transaction, ultimately to its detriment.

The Court need not determine the exact role that Hullinger played in connection with the transaction on behalf of the Capco Defendants on these motions to dismiss. It is enough, at this stage, that the Complaint alleges Hullinger was the president and manager of two limited partnerships that were each members of Capco Endurance *and* that at least one of those limited partnerships—"principally" through Hullinger—"actively managed and worked closely with [the Capco Defendants'] management team to provide high-level strategic as well as detailed cash flow and financial forecasting support." See Compl. ¶¶ 5, 13. Essentially, he was responsible for providing materially-relevant information to RIIRBA as part of the lead-up to the transaction's closing. Given the fact that Hullinger was the principal individual alleged to have made these representations about the Capco Defendants' financial position, the Complaint sufficiently has pled the requisite facts with particularity to establish a claim for fraudulent or

negligent misrepresentation against Hullinger¹⁰ and the Capco Defendants. See U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004) (“Rule 9(b) requires that a plaintiff’s averments of fraud specify the time, place, and content of the alleged false or fraudulent representations.”). However, the Court finds the Complaint has wholly failed to allege any fraudulent or negligent misrepresentations on behalf of Caparco. There is simply nothing in the Complaint which would put Caparco on reasonable notice of a claim against him sounding in fraud where the Complaint does not allege the necessary details of what

¹⁰ Hullinger additionally argues that the Complaint has failed to allege any basis for his personal liability. In support, he argues that there are no allegations that he was a corporate officer or director that would subject him to such liability, and, even if he was, he did not participate in any of the transaction’s closing activities. This argument fails for a few reasons. Hullinger, as an individual, is the manager of two LPs that are members of only one of the limited liability companies (LLCs) that comprise the Capco Defendants. At first blush, Hullinger seems protected from any personal liability because of the various corporate forms. However, Hullinger need not be termed a corporate officer or director of the Capco Defendants for liability to attach, he need only be termed an agent of the Capco Defendants. See R.I. Econ. Dev. Corp. v. State Comm’n for Human Rights, No. PB-02-0882, 2002 WL 1804070, at *5 (R.I. Super. June 27, 2002) (Silverstein, J.) (“[I]t is a fundamental principle of agency law that an agent has the authority to ‘do all of those acts, which are reasonably necessary and proper in order to carry into effect the main authority conferred.’” (quoting Fletcher Encyclopedia of the Law of Private Corporations § 440 (1998))). As a result, taking the allegations in the Complaint as true and resolving doubts in RIIRBA’s favor, RIIRBA adequately alleges that Hullinger was acting on behalf of the Capco Defendants, in the scope of his authority, when he corresponded with RIIRBA.

Hullinger’s liability is grounded in the simple fact that he engaged in tortious and fraudulent conduct in the scope of his agency authority. See Keyser v. Miller, 47 S.W.3d 728, 732 (Tex. App. 2001) (“[A] corporate agent knowingly participating in a tortious or fraudulent act may be held individually liable, even though he performed the act as an agent for the corporation. Knowing participation in a tortious act will render the corporate agent personally liable, while the mere breach of a corporate contractual obligation will not. It is not necessary that the ‘corporate veil’ be pierced in order to impose personal liability, as long as it is shown that the corporate officer knowingly participated in the wrongdoing.”), rev’d on other grounds, 90 S.W.3d 712 (Tex. 2002) (“[A] corporate agent is personally liable for his own fraudulent or tortious acts.”); see also Restatement (Second) Agency § 343 (1958) (“An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.”). When Hullinger conveyed the financial information to RIIRBA, and attested to the Capco Defendants’ “actual operating results,” he was, without question, acting as an agent of the Capco Defendants. Ultimately, in looking only to the four corners of the Complaint, Hullinger is properly named as a Defendant in the case at bar.

misrepresentations he made and to whom, when he made them, and any other relevant and required details. See Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996) (“Rule 9 imposes a heightened pleading requirement for allegations of fraud in order to give notice to defendants of the plaintiffs’ claim, to protect defendants whose reputation may be harmed by meritless claims of fraud, . . . and to prevent the filing of suits that simply hope to uncover relevant information during discovery.”).

For example, on January 4, 2010, when Hullinger allegedly made his misrepresentations, the Complaint only alleges that Caparco submitted to RIIRBA “an initial package of materials” with copies of the Capco Defendants’ financial statements through October 2009—there is no allegation that those statements were misrepresenting an existing fact. See Compl. ¶ 22. Moreover, the Complaint merely alleges Caparco was copied on the January 4 email to RIIRBA from Hullinger. Simply, there is no factual basis to discern what role he played in the representations by Hullinger or any reason for the Court to believe that the misrepresentations forming the basis of RIIRBA’s claims also stemmed from the information that Caparco sent to RIIRBA. While he played a role in the closing of the bond transaction by executing various documents and likely may have known of the 2009 Audit Report, there is no alleged prior statement of material fact to establish that a duty to disclose would have subsequently existed. See Haft, 755 F. Supp. at 1130 (“Although it is of the utmost importance to keep the courtroom doors open to those who have been wronged, the particularity requirement creates a very delicate balance between the rights of such individuals and the rights of those who are accused. . . . To

allow the instant complaint swings the balance too far in the direction of the plaintiff.”). Therefore, the Court must grant the motion to dismiss with respect to Caparco individually.¹¹

Based on a theory of nondisclosure and concealment, RIIRBA has sufficiently pled fraudulent or negligent misrepresentation against Hullinger and the Capco Defendants to sustain its Counts II and IV at this time and survive Defendants’ motions.

C

Civil Conspiracy (Count III)

In addition to Counts I, II, and IV, Defendants have moved to dismiss Count III which alleges a claim for civil conspiracy against all named Defendants for conspiring to misrepresent and conceal the Capco Defendants’ financial position prior to the transaction’s closing. In support of their motions, Defendants argued at the motion hearing that RIIRBA cannot maintain an action for civil conspiracy because—assuming the Court were to find that Hullinger or Caparco were agents of the Capco Defendants—there can be no claim of conspiracy between a corporation and its agents. See Chain Store Maint., Inc. v. Nat’l Glass & Gate Serv., Inc., No. PB 01-3522, 2004 WL 877599, at *10-11 (R.I. Super. Apr. 21, 2004) (Silverstein, J.). In Chain Store Maint., this Court reviewed the applicable law for establishing a claim for civil conspiracy and stated “[a] claimant must establish that ‘(1) there was an agreement between two or more parties and (2) the purpose of the agreement was to accomplish an unlawful objective or to

¹¹ It is worth noting that Caparco moved to dismiss under Super. R. Civ. P. 12(b)(6) and moved for judgment on the pleadings under Super. R. Civ. P. 12(c). As this Court stated in Przygoda, judgment on the pleadings is only appropriate when a trial is of no use to determine the merits of a plaintiff’s claim. See Przygoda, 2010 WL 1956239, at *6 (citing Haley, 611 A.2d at 848). Similar to that case, the Court here has not made determinations that there are no factual issues in dispute, but rather—with respect to Caparco specifically—RIIRBA has not pled allegations of misrepresentations grounded in fraud with the requisite specificity under Rule 9(b) or even enough factual allegations to state a claim for relief. See id. As a result, Caparco is dismissed pursuant to Rule 9(b) and Super. R. Civ. P. 12(b)(6) and not Super. R. Civ. P. 12(c).

accomplish a lawful objective by unlawful means.” Id. at *10 (quoting Smith v. O’Connell, 997 F. Supp. 226, 241 (D.R.I. 1998)). Furthermore, “civil conspiracy is not an independent basis of liability. It is a means for establishing joint liability for other tortious conduct; therefore, it ‘requires a valid underlying intentional tort theory.’” Read & Lundy, Inc. v. Wash. Trust Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) (quoting Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268 (D.R.I. 2000)).

In relevant part, the Court also noted:

“It is well-settled that ‘a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility.’ Marmott v. Md. Lumber Co., 807 F.2d 1180, 1184 (4th Cir. 1986); Fairley v. Andrews, 300 F. Supp. 2d 660, 668 (N.D. Ill. 2004). See also Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974) (stating that ‘a corporation cannot conspire with its own employees’). The policy behind the intracorporate conspiracy doctrine ‘is to preserve independent decision-making by business entities and their agents free of the pressure that can be generated by allegations of conspiracy.’ Fairley, 300 F. Supp. 2d at 668.” Chain Store Maint., 2004 WL 877599, at *11.

In this case, as explained above, the Complaint has failed to allege the requisite facts with particularity to demonstrate Caparco’s involvement in any fraudulent or negligent misrepresentation of the Capco Defendants’ financial position. Consequently, Caparco is ineligible to serve as a party to any agreement to accomplish an unlawful objective. See Chain Store Maint., 2004 WL 877599, at *10. Because an action for civil conspiracy requires two or more parties, this count cannot proceed as there can be no civil conspiracy between Hullinger and the Capco Defendants due to the fact that Hullinger was acting as a corporate agent for the Capco Defendants. See supra 30 n.9. Accordingly, without further belaboring this point, Count III must be dismissed.

IV

Conclusion

After carefully considering the parties' arguments advanced in their papers and at the hearing on the motions, and after a review of the applicable case law and authority on the issues presented herein, the Court holds the following: the Capco Defendants' motion to dismiss Count I is denied; the Defendants' motions to dismiss Counts II and IV are denied with respect to Hullinger and the Capco Defendants but granted with respect to Caparco; and, lastly, Defendants' motions to dismiss Count III are granted. The Court has found that RIIRBA has sufficiently pled that an agreement existed between RIIRBA and the Capco Defendants and that the allegations in its Complaint have stated with particularity the time, place, and content of the fraudulent and negligent misrepresentations required under Rule 9(b) to maintain its action against Hullinger and the Capco Defendants.¹² However, as the Court explained, the Complaint does not set forth the requisite particularity with respect to Caparco's involvement in any alleged fraudulent or negligent misrepresentations and concealment of financial data. As a result, those

¹² The Court notes that Defendants have moved to dismiss RIIRBA's allegations on the theory that there was in fact no material adverse change demonstrated in the 2009 Audit Report prepared by F&D as demonstrated by their own financial data and calculations. As the Court has declined to treat their motion as a motion for summary judgment, the Court will not address this argument. Whether RIIRBA may still maintain a breach of an agreement action or misrepresentation claims upon consideration of Defendants' proffered evidence is an issue for another day. Additionally, the Court notes that several other arguments were advanced in support of Defendants' motions, including issues of judicial estoppel and Hullinger's claimed protection under the economic loss doctrine. As judicial estoppel is largely discretionary and because Hullinger is neither a commercial entity nor a party to the contractual agreements, the Court need not discuss these grounds for dismissal at this time. See Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1276 (R.I. 2007) (noting economic loss doctrine's application is limited to disputes involving commercial entities).

counts, as well as the count of civil conspiracy, must be dismissed. Accordingly, Defendants' motions are denied in part and granted in part.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **The Rhode Island Industrial-Recreational Building Authority v. Capco Steel, LLC, et al.**

CASE NO: **PC 14-6055**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **July 22, 2015**

JUSTICE/MAGISTRATE: **Silverstein, J.**

ATTORNEYS:

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