STATE OF RHODE ISLAND

KENT, SC. **SUPERIOR COURT**

(FILED: February 28, 2025)

JOHN C. PONTE, and GREENWICH BUSINESS CAPITAL, LLC, formerly known as PONTE INVESTMENTS, LLC	:	
v.	:	**C.A. No. KC-2023-0536**
INDEPENDENCE BANK; ROBERT S. CATANZARO, individually and in his official capacity; ROBERT A. CATANZARO, individually and in his official capacity; HEATHER MARSHALL, individually and in her official capacity; BENJAMIN ANDREW, individually and in his official capacity; THOMAS M. BAIN, individually and in his official capacity; ROBERT FARIS, individually and in his official capacity; and WESCO INSURANCE COMPANY, doing business as AMTRUST FINANCIAL SERVICES GROUP	:	

DECISION

LICHT, J. Pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, Defendant Independence Bank (IB) and Defendants Robert A. Catanzaro (RAC), Robert S. Catanzaro (RSC), Robert Faris (Faris), Thomas M. Bain (Bain), Benjamin Andrew (Andrew), and Heather Marshall (Marshall) (collectively, Individual Defendants) respectively move to dismiss the Fifth Amended Complaint filed by Plaintiffs Greenwich Business Capital, LLC, formerly known as Ponte Investments, LLC (GBC) and John C. Ponte (Ponte) for failure to state a claim upon which relief may be granted. IB and the

Individual Defendants (collectively, Defendants) respectively assert that all counts of Plaintiffs' Fifth Amended Complaint should be dismissed on several grounds, including that the claims are barred by a contractual limitation clause, the Fifth Amended Complaint improperly relies on privileged testimony, the Fifth Amended Complaint improperly subjects the Individual Defendants to personal liability, and the Fifth Amended Complaint fails to state a claim for each cause of action asserted therein. However, Plaintiffs contend that Defendants miss the mark and fail to carry the heavy burden necessary for the Court to grant Defendants' respective motions to dismiss on any ground. For the reasons stated herein, this Court grants in part and denies in part the Defendants' Motions to Dismiss.

I

Facts and Travel

From 2015 to 2019, GBC[1] and IB entered various agreements that permitted GBC to act as an independent loan originator for IB's Small Business Administration Loan Advantage 7(a) Program (the SBA Loan Program). Fifth Am. Compl. ¶¶ 13-15. Throughout this business relationship, Plaintiffs remained independent of IB and neither acted as employees, officers, directors, or shareholders of IB nor as underwriters or application approvers for the SBA Loan Program. *Id.* ¶¶ 15-17. Rather, all underwriting, approval, and rule promulgation was undertaken exclusively by IB's officers and board of directors, who set forth the policies, procedures, and rules for the SBA Loan Program for third-party loan originators like Plaintiffs. *Id.* ¶¶ 18-21, 25-27. For example, RAC, RSC, and/or Marshall regularly communicated IB's directions and instructions on

[1] Ponte is the sole managing member of GBC. *See* Fifth Am. Compl. ¶ 12.

compliance with the SBA Loan Program to IB's independent loan originators, like GBC.[2] *Id.* ¶ 22.

Beginning in or around 2016, IB relocated a vast majority of its SBA Loan Program department to GBC's offices located at 5700 Post Road, East Greenwich, Rhode Island (the Post Road Office), assuring Plaintiffs that such a move complied with all applicable regulations, including those promulgated by the FDIC. *Id.* ¶¶ 29-31. Around the same time, GBC began offering interim financing to prospective loan applicants by and through purchase and sale of future receipts agreements and charging refundable applications fees. *Id.* ¶¶ 33-35, 38. IB assured Plaintiffs that they need not disclose any interim funding under the SBA Loan Program and never indicated that either business arrangement violated any applicable regulations or procedures. *Id.* ¶¶ 36-37. Although IB's SBA Loan Program department left the Post Road Office in 2017, GBC continued to extend interim financing to prospective applicants and continued to refer prospective applicants to IB without any indication from IB that it was out of compliance with any applicable rules or regulations. *Id.* ¶¶ 38-41.

Unbeknownst to Plaintiffs, IB was cited in 2017, 2018, and 2019 by the SBA for noncompliance and its mishandling of independent third-party originators. *Id.* ¶ 42. Also unbeknownst to Plaintiffs, the SBA deemed GBC a lender service provider (LSP) of IB in late 2018, which made GBC a related party to IB and subject to regulation by the SBA

[2] The particular procedure for the SBA Loan Program outlined by IB was that (1) GBC would originate potential loan applications, (2) GBC would then upload any loan applications and supporting material to a shared portal exclusively owned and operated by GBC, which IB had access to, (3) IB would download all loan application materials to its own internal file system, which GBC did not have access to, and (4) IB would independently commence its underwriting/approval process without participation by Plaintiffs. *See* Fifth Am. Compl. ¶¶ 23-24.

and FDIC. *Id.* ¶¶ 43-44. Thereafter, in late 2018, IB was placed under supervision by the SBA because of its wrongful conduct in conducting the SBA Loan Program, which ultimately led to IB having its SBA license suspended and RSC being banned for life from participating in SBA loan programs. *Id.* ¶ 45.

As a result of IB no longer offering the SBA Loan Program, GBC and IB ceased doing business together in 2019. *Id.* ¶ 46. After ceasing business together, Plaintiffs learned of IB's regular citations by the FDIC and the SBA in relation to the SBA Loan Program. *Id.* ¶ 47. In July 2019, IB became subject to a corrected consent order between IB, the FDIC, and the Rhode Island Department of Business Regulation's Division of Banking, which limited IB's business activities, including the SBA Loan Program; deemed IB's independent loan originators, such as GBC, independent selling organizations; and cited IB for its wholesale failings and deficiencies in relation to the SBA Loan Program (the Consent Order). *Id.* ¶¶ 48-49. Plaintiffs allege they had no knowledge or involvement in any of those areas. *Id.* ¶ 49. Plaintiffs allege that at no time prior to July 2019 did IB ever advise them of any compliance issues with the SBA Loan Program. *Id.* ¶ 51.

Thereafter, on or about March 27, 2020, the FDIC issued an Order of Investigation into IB regarding its SBA loan practices but IB failed to inform the same to GBC. *Id.* ¶ 52. In May 2020, the FDIC issued the first of three subpoena requests to GBC, which ultimately led to Plaintiffs finding out on September 27, 2022 that Ponte was a target of the Consent Order in the IB proceeding. *Id.* ¶¶ 53-57. On or about June 2, 2022, the FDIC issued a notice of potential administrative enforcement proceeding pursuant to 12 U.S.C. § 1818 against Ponte. *Id.* ¶ 58. On or about February 10, 2023, the

FDIC issued a formal Notice of Charges (NOC) against Ponte, thereby commencing an administrative enforcement proceeding, which alleged that Ponte was "in a position to materially influence IB and the SBA Loan Program," that he had harmed IB, that he had played a role in directing IB's conduct, that he had concealed "bridge loans" from IB and the SBA, and that he had altered SBA borrower information in submissions for SBA loans. *Id*. ¶¶ 59-60. The FDIC's NOC against Ponte was resolved by voluntary agreement in October 2024 but only after eighteen months of such information being public. *Id*. ¶ 62.

The original Complaint in this matter was filed on or about July 3, 2023. *See* Compl. On or about August 29, 2023, Plaintiffs filed their First Amended Complaint. *See* Am. Compl. Thereafter, on or about October 23, 2023, Plaintiffs filed their Second Amended Complaint. *See* Second Am. Compl. In response to the Second Amended Complaint, on or about December 14, 2023, Defendants filed respective motions to dismiss the Second Amended Complaint. *See* Mot. to Dismiss Second Am. Compl. However, due to Plaintiffs' counsel indicating to the Court that he intended to file a Third Amended Complaint, the motions to dismiss were deemed moot. On or about February 5, 2024, Plaintiffs filed their Third Amended Complaint. *See* Third Am. Compl. Defendants filed respective motions to dismiss the Third Amended Complaint on April 29, 2024, which, again, were deemed moot due to further amendments. *See* Mot. to Dismiss Third Am. Compl. Thereafter, on or about July 15, 2024, Plaintiffs filed their Fourth Amended Complaint. *See* Fourth Am. Compl. In response to Plaintiffs filing their Fourth Amended Complaint, Defendants filed respective motions to dismiss on or about August 2, 2024. *See* Mot. to Dismiss Fourth Am. Compl. However, Plaintiffs failed to

provide a substantive objection to the motions and instead put forth a boilerplate objection, as well as a motion for leave to amend the complaint further on or about November 21, 2024. *See* Obj. to Mot. to Dismiss Fifth Am. Compl.; *see also* Mot. for Leave to Am. Compl. Accordingly, the motions to dismiss were not heard, resulting in Plaintiffs filing their Fifth Amended Complaint on or about December 3, 2024. *See* Fifth Am. Compl.

According to the Fifth Amended Complaint, the following counts remain: Count I (breach of contract); Count II (fraud); Count III (misrepresentation); Count IV (tortious interference with contract); Count V (tortious interference with prospective business advantage); Count VI (civil conspiracy); Count VII (negligence); Count VIII (violation of R.I. Gen. Laws §§ 7-15-1, *et seq.* (Racketeer Influenced & Corrupt Organizations Act)); Count IX (bad faith in insurance coverage) (Wesco Insurance Company d/b/a AmTrust Financial Services Group only).

II

Standard of Review

"'The solitary purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the complaint.'" *Twenty Eleven, LLC v. Botelho*, 127 A.3d 897, 899–900 (R.I. 2015) (quoting *Tarzia v. State*, 44 A.3d 1245, 1251 (R.I. 2012). "'[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.'" *Id.* at 900 (quoting *Chhun v. Mortgage Electronic Registration Systems, Inc.*, 84 A.3d 419, 421–22 (R.I. 2014). "'In undertaking this review, we are confined to the four corners of the complaint and must

assume all allegations are true, resolving any doubts in [the] plaintiff's favor.'" *Id.* (quoting *Chhun*, 84 A.3d at 422). "Moreover, in most instances, one drafting a compliant [*sic*] in a civil action is not required to draft the pleading with a high degree of factual specificity. That is not to say, however, that the drafter of a complaint has no responsibilities with respect to providing some degree of clarity as to what is alleged; due process considerations are implicated, and we require that 'the complaint give the opposing party *fair and adequate notice* of the type of claim being asserted.'" *Hyatt v. Village House Convalescent Home, Inc.*, 880 A.2d 821, 824 (R.I. 2005) (quoting *Butera v. Boucher*, 798 A.2d 340, 353 (R.I. 2002)).

III

Analysis

Because the parties make various arguments pertaining to different counts of the Fifth Amended Complaint, the Court will take each argument one at a time.

A

Enforceability of Liability/Damages Limitation Clause

Section 14 of GBC and IB's 2018 Agreement states as follows:

> "14. **Limitation of Liability.**
>
> "UNDER NO CIRCUMSTANCES SHALL THE BANK BE LIABLE TO THE REFERRAL AGENT FOR EXEMPLARY, PUNITIVE, INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING. WITHOUT LIMITATION, ANY DAMAGES ARISING FROM LOSS OF USE OR LOST BUSINESS, REVENUE, PROFITS, DATA OR GOODWILL) ARISING IN CONNECTION WITH THIS AGREEMENT, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR ANY OTHER THEORY OR FORM OF ACTION, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY THEREOF." *See* Def.'s Mem. of Law in

> Supp. of Mot. to Dismiss (IB's Mem.), Ex. B – 2018 Agreement at 10.

IB contends that Section 14 bars Plaintiffs' claims. (IB's Mem. 10-13.) However, Plaintiffs argue that this liability/damage limitation clause is unenforceable due to unconscionability and/or violation of public policy as a result of IB's intentionally misleading and fraudulent conduct. (Pls.' Obj. to Defs.' Mot. to Dismiss (Pls.' Obj.) 18-20.) Further, Plaintiffs argue that the parties were not in equal bargaining positions due to IB's concealment of its noncompliance with SBA and FDIC regulations at the time the 2018 Agreement was entered. *Id.* at 20-21. Despite Plaintiffs' arguments to the contrary, IB maintains that there is no basis to invalidate Section 14 of the 2018 Agreement as the clause is unambiguous, the parties were of equal bargaining power as sophisticated commercial entities, and there are no public interest/injustice concerns that warrant refusing to enforce the clause. (IB's Mem. 10-13.)

"It is a general rule that a contract or agreement against public policy is illegal and void." *City of Warwick v. Boeng Corp.*, 472 A.2d 1214, 1218 (R.I. 1984). "Although the meaning of the phrase 'public policy' is vague, a contract or agreement is generally against public policy if it is injurious to the interests of the public, interferes with the public welfare or safety, is unconscionable, or tends to [cause] injustice or oppression." *Id.* The Rhode Island Supreme Court has enforced contract provisions that limit liability exposure where such language was unambiguously stated and agreed upon by equally sophisticated parties dealing at arm's length with one another. *See Rhode Island Hospital Trust National Bank v. Dudley Service Corp.*, 605 A.2d 1325, 1327 (R.I. 1992); *see also Ostalkiewicz v. Guardian Alarm, Division of Colbert's Security Services, Inc*., 520 A.2d

563, 566 (R.I. 1987); *see also Di Lonardo v. Gilbane Building Co.*, 114 R.I. 469, 472, 334 A.2d 422, 424 (1975).

Specifically, in *Dudley*, the Supreme Court was tasked with deciding whether a limitation of liability provision contained in a storage unit lease agreement that put liability for the loss of stored goods on the lessor was enforceable. *Dudley*, 605 A.2d at 1326-27. The Court held that the limitation of liability provision was enforceable because the contract's language expressly stated that the storage facility would not be responsible for the loss of goods stored in the facility for any reason and that the facility would not carry insurance to cover the loss of such goods. *Id.* at 1327-28. Because the storage facility and the service corporation lessor were deemed to be sophisticated parties dealing at arm's length when they entered the lease agreement, including the unambiguous liability limitation provision, the Court held that the provision was not violative of public policy and was enforceable as written. *Id.* at 1328.

Given that Section 14 includes clear, bolded language detailing the liability/damages limited by executing the 2018 Agreement, Section 14 cannot be deemed an ambiguous provision such that its enforcement would be improper. Further, even when viewing the facts in the light most favorable to Plaintiffs, an argument cannot be made that enforcement of Section 14 would be unconscionable on the basis that the parties were of unequal bargaining power. As was the case in *Dudley*, GBC and IB are sophisticated business entities who had been doing business amicably with one another for years under prior contractual agreements, such as the 2015 Agreement. As such, the sophistication of the parties is not a possible ground to bar enforcing the liability/damages limitation clause contained in the 2018 Agreement.

However, assuming all allegations to be true and viewing them in the light most favorable to Plaintiffs, it is possible that Section 14 of the 2018 Agreement could be against public policy given IB's alleged concealment of its noncompliance with SBA and/or FDIC regulations. Unlike in *Dudley*, where all the pertinent facts were known to the parties at the time of the lease agreement's execution, GBC was allegedly unaware at the time of the 2018 Agreement's execution that IB was actively being cited by the FDIC and/or SBA for noncompliance with rules and regulations. Plaintiffs allege that IB always assured Plaintiffs that the SBA Loan Program was running smoothly without any compliance issues. IB even represented to GBC in Section 8(a)(iv) of the 2018 Agreement that it was currently in compliance and shall henceforth comply with all applicable state and federal laws and regulations. *See* IB's Mem. Ex. B at 6. Because rampant fraud allegedly occurred, injustice and oppression would befall Plaintiffs if the liability/damage limitation clause was enforced, warranting this Court to bar enforcement of Section 14 at this time.[3] *See Boeng Corp.*, 472 A.2d at 1218.

[3] Although the parties do not touch upon this issue in this section of their memoranda, the liability/damage limitation clause contained in Section 14 could also be barred based on there being fraud in the inducement of the contract. Namely, the 2018 Agreement, including Section 14, could be invalidated due to Defendants allegedly inducing GBC to execute the agreement based on its representations that it was actively in compliance with all applicable laws and regulations. *See Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I. 2003) ("[F]raud vitiates all contracts . . . [A] party who has been induced by fraud to enter into a contract may elect either to rescind the contract, or to affirm the contract and sue for damages in an action for intentional deceit or misrepresentation . . . [I]f one is induced to enter into a contract based upon a fraudulent statement from the other party to the contract, then the party who has been fraudulently induced is not bound by the contract.") (Internal quotations omitted.) However, since the Court has raised this issue *sua sponte*, it does not base its decision on this ground but invites the parties to address the issue at a later stage in this litigation.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the liability/damages limitation clause could be against public policy, meaning the motion to dismiss cannot be granted.

B

The Individual Defendants' Personal Liability

The Individual Defendants contend that all claims should be dismissed insofar as they subject them to personal liability as there is no allegation in the Fifth Amended Complaint that the Individual Defendants acted outside of their official capacity as agents of their disclosed principal when dealing with Plaintiffs. (Defs.' Mem. 8-10.) However, Plaintiffs insist that the Individual Defendants should remain in the suit in their personal capacity because as IB's officers and/or board members they each owed an independent duty to Plaintiffs pursuant to FIL 44-2008, making them more than just mere agents or employees of IB.[4] (Pls.' Obj. 29-30.)

"It has long been settled that an agent acting on behalf of a disclosed principal is not personally liable to a third party for acts performed within the scope of his authority." *Cardente v. Maggiacomo Insurance Agency, Inc.*, 108 R.I. 71, 73, 272 A.2d 155, 156

[4] While Plaintiffs argue that FIL 44-2008 imposes an independent duty that renders the Individual Defendants susceptible to personal liability, this Court does not read FIL 44-2008 to create an additional duty. FIL 44-2008 is explicitly branded by the FDIC as "guidance," not a strict requirement. *See* FIL-44-2008, https://www.fdic.gov/news/inactive-financial-institution-letters/2008/fil08044a.html (last visited Feb. 18, 2025). For instance, the FDIC states that FIL 44-2008 is "**guidance** . . . intended to be **used as a resource** for implementing a third-party risk management program." *Id.* (emphasis added). The FDIC further states that "boards of directors and senior management **may use** [FIL 44-2008] to provide appropriate oversight and risk management of significant third-party relationships." *Id.* (emphasis added). Therefore, FIL 44-2008 does not impose an additional duty on the Individual Defendants but rather provides guidance that the Individual Defendants may opt to follow when working with third-party originators, like Plaintiffs.

(1971). However, "the *Cardente* rule comes into play only when an agent performs acts *within the scope of his or her authority*." *Kenney Manufacturing Co. v. Starkweather & Shepley, Inc.*, 643 A.2d 203, 209 (R.I. 1994). "An agent, however, may be personally liable for (1) unauthorized acts outside the scope of the agency, (2) for acts to which the agent has bound himself or herself—either expressly or impliedly—under a contract,[5] or (3) for acts within the scope of a duty that is otherwise independent of the agency relationship[.]" *Kennett v. Marquis*, 798 A.2d 416, 419 (R.I. 2002) (internal citations omitted, numbering added).

In *Kennett*, the Rhode Island Supreme Court contemplated whether the sellers' agent in a real estate transaction acted within the scope of her agency or if her conduct subjected her to personal liability. *Kennett*, 798 A.2d at 418-19. Ultimately, the Court found that none of the three exceptions listed above in which personal liability can be imputed applied to the agent's conduct. *Id.* at 419. The Court held that the agent's conduct was in furtherance of the negotiations for sale of the real estate, making her actions in testing the ground water on the property properly within her agency role for the sellers. *Id.* The Court also noted that there was no evidence that the agent negligently, knowingly, or intentionally supplied the parties with false information in connection to the real estate transaction as such an act could render her personally liable. *Id.*

This Court finds that there are sufficient allegations in the Fifth Amended Complaint to potentially subject RAC, RSC, and Marshall to personal liability. The Fifth Amended Complaint repeatedly details how RAC, RSC, and/or Marshall made various

[5] "We note that liability incurred in this manner derives from an implied contractual obligation **independent** of the principal-agent relationship." *Nicholson v. Buehler*, 612 A.2d 693, 697 (R.I. 1992) (emphasis added).

misrepresentations or omissions of material facts pertaining to the SBA Loan Program, including that the agreements between the parties were required/approved by the FDIC; that Plaintiffs were fully apprised of all SBA Loan Program parameters; that the FDIC approved relocation of IB's SBA Loan Program department to the Post Road Office; that Plaintiffs need not disclose their interim funding to potential loan applicants; that charging fully refundable application fees was permitted by the SBA; and that IB was compliant with all SBA and FDIC regulations. *See* Fifth Am. Compl. ¶¶ 14, 20, 22, 30, 36, 38, 41. Unlike in *Kennett*, where there was no indication that the agent negligently, knowingly, or intentionally conveyed false information to the aggrieved party, these allegations in the Fifth Amended Complaint indicate that RAC, RSC, and Marshall knowingly and intentionally hid the SBA Loan Program's noncompliance from Plaintiffs and instead routinely informed them that all was well. As such, assuming all allegations to be true and viewing them in the light most favorable to Plaintiffs, the Fifth Amended Complaint alleges that RAC, RSC, and Marshall acted beyond the scope of their employment, rendering them susceptible to personal liability.

While the Fifth Amended Complaint specifically identifies the misrepresentations and omissions of fact that RAC, RSC, and Marshall made, the Fifth Amended Complaint does not do so for Faris, Bain, and Andrew. Beginning with Faris and Bain, the Fifth Amended Complaint mentions that they, on behalf of IB's Board of Directors, directed, managed, and/or administered the SBA Loan Program. *Id.* ¶¶ 20-27. As for Andrew, the Fifth Amended Complaint notes that he was an underwriter for IB. *Id.* ¶¶ 25-26. The Fifth Amended Complaint alleges that Faris and Andrew would, from time to time, conduct monthly site visits on behalf of IB to audit GBC's loan origination platform

processes and/or procedures. *Id.* ¶ 27. Notably, however, no paragraph of the Fifth Amended Complaint alleges that Faris, Bain, and/or Andrew made any misrepresentations or omissions of material fact in connection to the SBA Loan Program. In this way, it cannot be said that the Fifth Amended Complaint supports the notion that Faris, Bain, and Andrew acted beyond the scope of their employment such that they may be subjected to personal liability for their alleged misconduct.

Therefore, because RAC, RSC, and Marshall allegedly made misrepresentations and omissions of material fact as to the SBA Loan Program that went beyond the scope of their employment, RAC, RSC, and Marshall cannot be dismissed from this matter in their personal capacity. However, because the Fifth Amended Complaint does not mention any misrepresentations or omissions of material fact made by Faris, Bain, and Andrew, all counts asserted against them in their personal capacity must be dismissed.

C

Protected Testimony

1

Testimonial Privilege

Defendants contend that all claims, especially Counts IV, V, and VI, should be dismissed because they are premised upon the content of privileged testimony provided in a judicial proceeding pursuant to a subpoena. (IB's Mem. at 13-16) (Defs.' Mem. 10-13). Plaintiffs reject this argument, contending that the Fifth Amended Complaint does not refer to any statements made by Defendants to a third party, such as the FDIC. (Pls.' Obj. 21-22.)

The Rhode Island Supreme Court has held that, in certain circumstances, "it is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy." *Francis v. Gallo*, 59 A.3d 69, 71 (R.I. 2013) (internal quotation omitted). As such, "[t]his Court has recognized that certain communications in connection with judicial proceedings are immune from suit because they enjoy an absolute privilege." *Ims v. Town of Portsmouth*, 32 A.3d 914, 927 (R.I. 2011). In other words, "statements made in judicial proceedings are privileged, and thus cannot form the basis for a defamation claim." *Gallo*, 59 A.3d at 71 (internal quotation omitted). "An absolute privilege, however, should be available only in situations in which the public interest is vital and apparent because such a privilege serves as a bar to an injured party from recovering recompense." *Ims*, 32 A.3d at 928.

"The key to establishing whether absolute privilege applies to a particular communication is determining whether it was made in the context of a judicial or quasi-judicial proceeding." *Id.* "When defining the scope of the testimonial privilege, the term 'judicial proceedings' has been held to refer to proceedings broader than those relating to traditional litigation. In this context, judicial proceedings include (1) 'all proceedings in which an officer or tribunal exercises judicial functions' and (2) 'hearings that are conducted by administrative bodies that make legal determinations.'" *Gallo*, 59 A.3d at 72 (quoting *Ims*, 32 A.3d at 928). "The privilege also protects testimony offered in quasi-judicial proceedings."[6] *Id.*

[6] The Rhode Island Supreme Court has recognized the testimonial privilege even where testimony is provided to a forum other than a traditional court. For instance, in *Francis v. Gallo*, 59 A.3d 69 (R.I. 2013), the Court held that testimony provided before the Rhode

The testimonial privilege does not apply in this case for several reasons. First, the testimonial privilege discussed in *Gallo* and *Ims* only concerned defamation claims, none of which are brought in this suit. Next, even if the testimonial privilege applies to all civil claims, not just defamation claims, the Fifth Amended Complaint does not mention the testimony that the Individual Defendants or any other agents of IB provided to the FDIC in connection to their investigation into the SBA Loan Program. Moreover, the gravamen of Plaintiffs' claims is based on what the Defendants failed to tell GBC, not what they told the FDIC. The allegations as pled are premised on Defendants misleading Plaintiffs throughout the four years in which the parties did business to believe that the SBA Loan Program, including GBC's participation in the program, was wholly compliant with applicable state and federal regulations when in fact IB was consistently notified by the FDIC that it was out of compliance. For these reasons, the testimonial privilege does not apply.

2

Qualified Privilege

The Individual Defendants argue that a qualified privilege shields them from liability as their testimony before the FDIC was made pursuant to a legal duty. (Defs.' Mem. 15-16.) However, Plaintiffs reject the notion that the Fifth Amended Complaint is based on any sort of privileged testimony as the complaint does not refer to any statements made by Defendants to a third party, such as the FDIC. (Pls.' Obj. 21.)

Island Department of Education (RIDE) constituted a "judicial proceeding" for purposes of the testimonial privilege because RIDE hearing officers schedule hearings, take evidence, consider the law, and issue decisions similar to the functions performed by trial judges. *Gallo*, 59 A.3d at 72. As such, a witness's testimony before RIDE was deemed to fall within the ambit of the testimonial privilege, preventing the plaintiff from pursing a defamation claim based on such testimony. *Id.*

"**A qualified privilege allows a person to avoid liability for a false and defamatory statement if** the publication is such that the publisher acting in good faith correctly or reasonably believes that **he has a legal, moral or social duty to speak out, or that to speak out is necessary to protect either his own interests, or those of third person[s], or certain interests of the public**." *Ims*, 32 A.3d at 930 (internal quotation omitted) (emphasis added). "Unlike absolute privilege, a qualified privilege may be lost if the allegedly defamatory statement is the product of ill will or malice." *Id.*

For much the same reason that the absolute privilege does not apply, the qualified privilege also does not apply. Namely, the Fifth Amended Complaint does not mention the testimony that the Individual Defendants provided to the FDIC. However, even if the Fifth Amended Complaint was based on such testimony, the allegations of the Fifth Amended Complaint indicate that the Individual Defendants intentionally lied to Plaintiffs as to the SBA Loan Program's compliance with SBA and FDIC regulations so that Plaintiffs would continue generating applicant referrals for Defendants. Accordingly, the Individual Defendants' fraudulent conduct renders the qualified privilege unavailable.

3

Anti-SLAPP

Defendants argue that all claims, especially Counts IV, V, and VI, should be dismissed because they are premised upon testimony protected by Rhode Island's anti-SLAPP statute. (IB's Mem. 16-17) (Defs.' Mem. 13-15). Plaintiffs counter that no portion of the Fifth Amended Complaint is based upon testimony provided to the FDIC or any other agency, rendering the anti-SLAPP statute inapplicable. (Pls.' Obj. 22.)

"The anti-SLAPP statute was enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims." *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752 (R.I. 2004). The statute specifically provides that "[a] party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims." G.L. 1956 § 9-33-2(a). "Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section[.]" *Id.* Subsection (e) defines a party's exercise of its right of petition or of free speech as "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern." Section 9-33-2(e).

However, even if speech qualifies under subsection (e), this conditional immunity does not apply where "the petition or free speech constitutes a sham." Section 9-33-2(a). "The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both: (1) [o]bjectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect

success in procuring the government action, result, or outcome, and (2) [s]ubjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects." *Id.*

As previously mentioned, the Fifth Amended Complaint does not reference any testimony provided before the FDIC. The testimony provided to the FDIC also does not constitute the sort of free speech that the anti-SLAPP statute was intended to protect. However, even if such testimony did underpin the Fifth Amended Complaint and constitute free speech in connection to a matter of public concern, the allegations in the Fifth Amended Complaint indicate that such testimony was a sham as the term is defined in § 9-33-2(a). Particularly, the Fifth Amended Complaint implies that IB and the Individual Defendants provided fraudulent information to the FDIC to protect themselves from any adverse repercussions stemming from their noncompliant SBA Loan Program.

Therefore, the Anti-SLAPP statute's conditional immunity does not apply.

D

Failure to State a Claim

1

Count I – Breach of Contract

IB argues that Count I for breach of contract must fail because neither the 2015 Agreement nor the 2018 Agreement place a burden on IB or the Individual Defendants to ensure GBC is compliant with all applicable regulations. (IB's Mem. 8-9.) Rather, both agreements contain provisions that require GBC itself to comply and abide with all SBA guidelines (2015 Agreement) and other applicable laws (2018 Agreement). *Id.*

Therefore, IB argues that the breach of contract claim has no actual breach to base its claim. *Id.*

"In a breach-of-contract claim, the plaintiff must prove both the existence and breach of a contract, and that the defendant's breach thereof caused the plaintiff's damages." *Fogarty v. Palumbo*, 163 A.3d 526, 541 (R.I. 2017).

Although Count I does not specifically name the 2015 Agreement and the 2018 Agreement, Count I states that the parties entered into "legally valid, binding and enforceable agreements." Fifth Am. Compl. ¶ 68. The 2015 Agreement and 2018 Agreement's provisions may properly be relied upon when discussing the viability of the breach of contract claim as these agreements are generally referenced in the Fifth Amended Complaint, the Fifth Amended Complaint in large part relies on these agreements to highlight the alleged wrongful conduct, and neither party seems to dispute such agreements' authenticity.[7] As such, Count I properly alleges the existence of a contract between the parties. Plaintiffs also allege that IB breached its various agreements with Plaintiffs in two main ways. First, Plaintiffs allege that IB breached by failing to comply with applicable laws when operating the SBA Loan Program, *id.* ¶ 70,

[7] "Ordinarily, when ruling on a motion to dismiss brought under Rule 12(b)(6) or Rule 12(c), 'a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.'" *Chase v. Nationwide Mutual Fire Insurance Co.*, 160 A.3d 970, 973 (R.I. 2017) (quoting *Alternative Energy, Inc. v. St. Paul Fire & Marine Insurance Co.*, 267 F.3d 30, 33 (1st Cir. 2001)). "'There is, however, a narrow exception 'for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.'" *Chase*, 160 A.3d at 973 (quoting *Alternative Energy, Inc.*, 267 F.3d at 33). Documents are considered to be central to a claim in the suit if "a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged)[.]" *Mokwenyei v. Rhode Island Hospital*, 198 A.3d 17, 22 (R.I. 2018) (internal quotation omitted).

which was an obligation placed on IB and GBC both in the 2015 Agreement and the 2018 Agreement. *See* IB's Mem. Ex. B at 6; *see also* IB's Mem. Ex. A – 2015 Agreement at 3. Second, Plaintiffs allege that IB breached the inherent duty of good faith and fair dealing by intentionally misrepresenting and/or omitting whether the SBA Loan Program complied with all applicable regulations. Fifth Am. Compl. ¶¶ 71-74. As to damages, although quite succinct, Count I adequately pleads that IB's conduct led to Plaintiffs' damages. *Id.* ¶ 76.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Count finds that Count I is adequately pled and the motion to dismiss should be denied for this claim.

2

Count III – Misrepresentation

Defendants argue that the misrepresentation claim is insufficient to survive a motion to dismiss because it fails to articulate what misrepresentations were made, whether such misrepresentations were of material fact, which of the Defendants actually made the misrepresentation, if the speaker intended for the misrepresentation to induce reliance, and whether such misrepresentation actually did induce reliance. (IB's Mem. 17-19) (Defs.' Mem. 16-19). However, Plaintiffs argue that all pleading requirements are met because the Fifth Amended Complaint articulates that Defendants represented to Plaintiffs prior to entering the 2018 Agreement that the SBA Loan Program was wholly compliant, which induced GBC to enter the 2018 Agreement. (Pls.' Obj. 22-23.) Plaintiffs argue that such reliance was reasonable given that they had no information or reason to believe that Defendants were not being truthful. *Id.* at 23. As a result of these

misrepresentations, Plaintiffs contend that they suffered both monetary and reputational harm. *Id.*

"The tort of negligent misrepresentation has four elements: (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 [or she] 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." *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 453 (R.I. 2013) (internal quotation omitted).

The Court finds that Count III for misrepresentation is adequately pled. The Fifth Amended Complaint states that Defendants represented to GBC that the SBA Loan Program, GBC's conduct, and IB's conduct were all in active compliance with applicable SBA rules and FDIC regulations when, unbeknownst to Plaintiffs, Defendants had continuously been cited by the SBA and FDIC for noncompliance in administering the SBA Loan Program. Fifth Am. Compl. ¶¶ 18, 22, 27-28, 30, 36, 38, 41-42, 47, 50, 85-86. The Fifth Amended Complaint also states that Defendants represented to GBC that it was an independent third party when IB had in fact designated GBC as a LSP within the SBA Loan Program. *Id.* ¶ 86. The Fifth Amended Complaint alleges that Defendants knew of their noncompliance with SBA and FDIC regulations as evidenced by them willfully concealing their continuous citations from Plaintiffs. *Id.* ¶ 86. The Fifth Amended Complaint notes that Defendants intentionally made such misrepresentations and/or omissions as to not risk losing GBC as a loan originator. *Id.* ¶ 44. The Fifth Amended

Complaint alleges that Plaintiffs reasonably relied to their detriment on Defendants' representations as to the compliance of the SBA Loan Program by continuing to originate loan applications for IB, which led to Plaintiffs' injuries, harm, and damages. *Id.* ¶¶ 87-89.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count III is adequately pled and the motion to dismiss should be denied for this claim.

3

Count II – Fraud

Because Count II for fraud contains much of the same elements as the misrepresentation claim, the arguments on this claim are largely analogous to that which is listed under Count III for misrepresentation. However, for the fraud claim, Defendants stress that Plaintiffs have failed to comply with Rule 9(b) of the Superior Court Rules of Civil Procedure in that the Fifth Amended Complaint makes blanket statements against all Defendants instead of alleging the fraud committed with specificity. (IB's Mem. 19-21) (Defs.' Mem. 16-19). Plaintiffs remain steadfast that the fraud claim comports with all requirements (Pls.' Obj. 22-24.)

"To establish a *prima facie* fraud claim, the plaintiff must prove that the defendant made a false representation intending thereby to induce [the] plaintiff to rely thereon and that the plaintiff justifiably relied thereon to his or her damage." *McNulty v. Chip*, 116 A.3d 173, 182–83 (R.I. 2015) (internal quotation omitted). While a fraud claim requires the same prima facie showing as a negligent misrepresentation claim, it slightly differs in that it requires a showing of culpability on the part of the representor, meaning that the

representor must have known the statement at issue to be false and intended to deceive. *See Francis v. American Bankers Life Assurance Co. of Florida*, 861 A.2d 1040, 1046 (R.I. 2004). Fraud claims are also subject to the specific requirements of Rule 9(b), which states that "all averments of fraud or mistake [must state] the circumstances constituting fraud or mistake . . . with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Super. R. Civ. P. 9(b).

The Rhode Island Superior Court previously considered whether certain fraud claims satisfied the particularity requirement set forth in Rule 9(b) in *The Rhode Island Industrial-Recreational Building Authority v. Capco Endurance, LLC*, No. PB 13-2069, 2014 WL 664406, at *1 (R.I. Super. Feb. 14, 2014). There, Judge Silverstein found that the complaint failed to plead with specificity how each individual allegedly participated in the fraudulent scheme. *Id.* at *4. The Court noted that blanket allegations against all defendants was not sufficient to identify each defendant's wrongful conduct. *Id.* The Court quoted language from the complaint that it found to be insufficient to allege fraud, including "Capco, by and through its officers and managers, including but not limited to [Caparco, Sr., Patricia Caparco, Hullinger, and McDonough] furnished . . . documents," "Capco, by and through its officers and managers, including but not limited to, [Caparco, Sr.], represented to [RIIRBA] and others that the reported 2009 figures were accurate," and "[a]t all material times, Capco and its officers and managers, including, but not limited to, [Caparco, Sr., Patricia Caparco, Hullinger, and McDonough] provided . . . information . . . to induce [RIIRBA, RIIFC, and Webster] to issue bonds, loan guarantees, and to enter into the financing transaction." *Id.* Judge Silverstein held that the complaint

should have alleged with specificity the details of who, what, where, and when the fraudulent acts occurred to properly plead fraud. *Id.*

Because claims for fraud and misrepresentation contain many of the same elements, the Court incorporates its analysis provided for Count III for misrepresentation. However, as previously noted, Plaintiffs have the additional burden of providing specificity for its fraud claim. Unlike in *Capco*, where the complaint wholly failed to identify with specificity the fraud perpetuated by the corporation and/or its agents, the Fifth Amended Complaint here contains allegations sufficient to plead fraud as it repeatedly alleges IB's misrepresentations and omissions of material fact made through RAC, RSC, and Marshall. Of particular importance, it is alleged that, despite senior management and the Board of Directors knowing of the SBA Loan Program's habitual noncompliance with SBA and FDIC regulations, RAC, RSC, and/or Marshall misrepresented to Plaintiffs (1) the SBA Loan Program's rules and procedures, (2) the permissibility of relocating the SBA Loan Program to Plaintiffs' Post Road Office, (3) the appropriateness of not disclosing Plaintiffs' interim funding to potential loan applicants and charging of refundable application fees, and (4) the SBA Loan Program's compliance with all applicable regulations. Fifth Am. Compl. ¶¶ 14, 20, 22, 27, 30, 36, 38, 41-42, 47, 50-51. Since the allegations specify the fraudulent conduct undertaken, the agents of IB who perpetuated the fraud, i.e., RSC, RAC, and Marshall, and the agents' specific knowledge of the SBA Loan Program's noncompliance while making such misrepresentations or omissions, the Court finds that Count II for fraud is sufficiently pled.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count II is adequately pled and the motion to dismiss should be denied for this claim.[8]

4

Count IV – Tortious Interference with Contract

Defendants collectively argue that Count IV must fail because Plaintiffs fail to identify what contractual relationship was allegedly impacted, how it was impacted, what intentional actions IB undertook to interfere, or how Plaintiffs have been damaged. (IB's Mem. 25-26) (Defs.' Mem. 24-25). In response, Plaintiffs contend that its allegations meet the notice pleading requirements and that additional specificity can only be provided once discovery is underway. (Pls.' Obj. 26-27.)

To establish a prima facie case of tortious interference with contractual relations, the aggrieved party must show "'(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting from therefrom.'" *Belliveau Building Corp. v. O'Coin*, 763 A.2d 622, 627 (R.I. 2000) (quoting *Smith Development Corp. v. Bilow Enterprises, Inc*., 112 R.I. 203, 211, 308 A.2d 477, 482 (1973)). "To establish intentional interference with contract, no showing of actual malice is necessary; rather, a showing of 'legal malice' will suffice." *Belliveau Building Corp.*, 763 A.2d at 627. Legal malice is defined as "an intent to do harm without justification." *Id.* (internal quotation omitted). "[A]fter the

[8] The Court finds that Count II for fraud is sufficiently pled against IB vis-à-vis the conduct of RAC, RSC, and Marshall. However, because the Fifth Amended Complaint fails to identify any misrepresentations, omissions of material fact, or fraudulent conduct specifically undertaken by Faris, Bain, and Andrew, the fraud claim cannot be based on the conduct of Faris, Bain, and Andrew.

plaintiff establishes these prima facie elements, [t]he burden of providing sufficient justification for the interference shifts to the defendant" *Id.* (internal quotation omitted).

There are various deficiencies with Count IV that mandate its dismissal. First, Count IV fails to articulate the third-party contracts that were particularly impacted by Defendants' wrongful conduct. Fifth Am. Compl. ¶ 91. Second, Count IV fails to articulate what wrongful conduct interfered with such third-party contracts. *Id.* ¶ 92. Third, Count IV fails to articulate how said tortious interference was willful and knowing but instead rattles off boilerplate language with no further elaboration. As such, even when viewing the facts in the light most favorable to Plaintiffs, Count IV is plainly devoid of any facts that articulate how exactly particular third-party contracts of Plaintiffs' were intentionally interfered with by Defendants' conduct.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count IV is inadequately pled and must be dismissed.

5

Count V – Tortious Interference with Prospective Business Advantage

Defendants argue that the claim must fail as (1) the testimony provided during hearings with the FDIC pursuant to a subpoena are not intentional, malicious acts to support this type of cause of action and (2) the Fifth Amended Complaint fails to allege that Defendants took any actions to interfere or that they did so with the intention to do harm without justification. (IB's Mem. 26-27) (Defs.' Mem. 25-26). However, Plaintiffs argue that the requisite malice is established by Defendants' knowing, intentional, and willful concealment of the SBA Loan Program's noncompliance, which necessarily

placed Plaintiffs in legal trouble with the FDIC and/or the SBA and subjected them to reputational harm. (Pls.' Obj. 27-28.)

"To prevail on a claim for intentional interference with prospective contractual relations, a party must establish the following: (1) the existence of a business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." *La Gondola, Inc. v. City of Providence by & through Lombardi*, 210 A.3d 1205, 1221 (R.I. 2019) (internal quotation omitted). "[T]he elements of the tort require showing an intentional and *improper* act of interference, not merely an intentional act of interference." *Id.* (internal quotation omitted). "Malice, in the sense of spite or ill will, is not required; rather legal malice—an intent to do harm without justification—will suffice." *Id.* (internal quotation omitted).

There are two main deficiencies with Count V that warrant dismissal. First, the Fifth Amended Complaint fails to articulate a single prospective business relationship that was impacted by Defendants' alleged conduct. Fifth Am. Compl. ¶ 96. The mere possibility that an unidentified future business relationship could come to fruition is not sufficient to constitute a prospective business advantage. *See La Gondola, Inc.*, 210 A.3d at 1222 ("As the trial justice noted, in the end it is not at all certain that the City and La Gondola would ever have agreed upon an appropriate rent for a five-year extension."). Second, while the Fifth Amended Complaint continuously alleges that Defendants engaged in wrongful misconduct in hiding the SBA Loan Program's noncompliance and GBC's status as a LSP from Plaintiffs, the Fifth Amended Complaint does not indicate how such improper conduct was undertaken to deliberately interfere with Plaintiffs'

prospective business relationships. Fifth Am. Compl. ¶¶ 96-99. As such, even viewing the facts in the light most favorable to Plaintiffs and drawing all conclusions in their favor, the Fifth Amended Complaint, as currently pled, is devoid of allegations that Defendants' alleged misconduct was an intentional and improper attempt to interfere with Plaintiffs' future business relationships. Rather, at most, the Fifth Amended Complaint indicates that Defendants' wrongful misconduct was undertaken to ensure that Plaintiffs continued to refer potential loan applicants to IB.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count V is inadequately pled and must be dismissed.

6

Count VII – Negligence

Defendants argue that Plaintiffs fail to allege a duty in negligence that IB owed Plaintiffs beyond the performance of contractual duties. (IB's Mem. 21-24) (Defs.' Mem. 20-21). Further, Defendants argue that the negligence claim is time-barred by the statute of limitations as Plaintiffs first became aware of IB's alleged administrative and managerial failures relative to the SBA Loan Program as of July 2019 but did not file the present action until July 2023, well over the three-year statute of limitation. (IB's Mem. 24-25) (Defs.' Mem. 22-24). However, Plaintiffs contend that Defendants violated a duty separate from those set forth in the contract, including the inherent duty of good faith and fair dealing and an additional duty to properly oversee the management and administration of the SBA Loan Program. (Pls.' Obj. 25.) As to the statute of limitations, Plaintiffs argue that the negligence claim is not time-barred as they did not become privy

to IB's continued noncompliance with the SBA Loan Program until February 2023 when the FDIC enforcement action took place against Ponte. *Id.* at 26.

"Actions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue[.]" G.L. 1956 § 9-1-14(b). "Generally, a cause of action accrues and the applicable statute of limitations begins to run at the time of the injury to the aggrieved party." *McNulty*, 116 A.3d at 181 (internal quotation omitted). "However, in certain narrowly circumscribed factual situations, this Court has explained that when the fact of the injury is unknown to the plaintiff when it occurs, the applicable statute of limitations will be tolled and will not begin to run until, in the exercise of reasonable diligence, the plaintiff should have discovered the injury or some injury-causing wrongful conduct." *Id.* (internal quotation omitted). "The reasonable diligence standard is based upon the perception of a reasonable person placed in circumstances similar to the plaintiff's, and also upon an objective assessment of whether such a person should have discovered that the defendant's wrongful conduct had caused him or her to be injured." *Id.* (internal quotation omitted).

The Fifth Amended Complaint alleges that Plaintiffs first became aware that IB was the subject of the Consent Order between the FDIC, IB, and the Rhode Island Division of Banking in or around July 2019. Fifth Am. Compl. ¶¶ 48-51. However, it is alleged that the subpoenas issued to Plaintiffs by the FDIC after July 2019 were understood by Plaintiffs to solely relate to the FDIC's Order of Investigation into IB. *Id.* ¶¶ 52-55. The Fifth Amended Complaint alleges that Plaintiffs were not aware that Ponte and/or GBC was a FDIC target until September 27, 2022, when the FDIC finally acquiesced to Plaintiffs and provided them a full copy of the Order of Investigation,

which detailed the investigation into Ponte. *Id.* ¶¶ 56-57. Assuming these allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, it is conceivable that Plaintiffs only became aware of their injuries on September 27, 2022, as this was the first point in time that the FDIC informed Plaintiffs that Ponte was being investigated. While Plaintiffs were on notice as of July 2019 that IB was running the SBA Loan Program in noncompliance with FDIC and SBA regulations, that IB had been continuously cited for such noncompliance prior to this point, and that IB was officially being investigated for said noncompliance as of that July, the allegations in the Fifth Amended Complaint indicate that the possible negative repercussions to Plaintiffs, i.e., that they were also facing legal issues due to their own unknowing noncompliance, were unknown to Plaintiffs until September 27, 2022. Therefore, the statute of limitations began tolling on September 27, 2022, meaning Plaintiffs had until September 27, 2025 to file their suit. Because Plaintiffs filed on July 3, 2023, Plaintiffs filed within the applicable statute of limitations.

Turning to the substance of a negligence claim, "[i]t is a bedrock principle of tort law that [t]o maintain a cause of action for negligence, the plaintiff must establish four elements: (1) a legally cognizable duty owed by [the] defendant to [the] plaintiff; (2) breach of that duty; (3) that the conduct proximately caused the injury; and (4) actual loss or damage." *Curreri v. Saint*, 126 A.3d 482, 486 (R.I. 2015) (internal quotation omitted). "Whether a defendant is under a legal duty in a given case is a question of law." *John Rocchio Corp. v. Pare Engineering Corp.*, 201 A.3d 316, 322 (R.I. 2019) (internal quotation omitted). "The economic loss doctrine provides that a plaintiff is precluded from recovering purely economic losses in a negligence cause of action." *Franklin Grove*

Corp. v. Drexel, 936 A.2d 1272, 1275 (R.I. 2007) (internal quotation omitted). "In other words, under this doctrine, a plaintiff may not recover damages under a negligence claim when the plaintiff has suffered no personal injury or property damage." *Id.* "Our rationale for abiding by the economic loss doctrine centers on the notion that commercial transactions are more appropriately suited to resolution through the law of contract, than through the law of tort." *Id.*

The main issue that Count VII poses is whether the Fifth Amended Complaint identifies a tort duty separate from the duties set forth under the parties' contracts. To start, the negligence claim cannot be based on the implied duty of good faith and fair dealing as Plaintiffs argue. This is an implied contractual duty contained in every contract to ensure that contractual objectives are achieved without either party engaging in conduct to destroy or injure the other party from receiving the fruits of the contract. *McNulty*, 116 A.3d at 185. As such, this is not a separate duty to sustain a negligence claim. Plaintiffs' only other remaining argument is that, as board members and officers, Defendants' willful concealment of IB's FDIC and SBA violations constitutes reckless disregard for their duties to Plaintiffs. However, this supposed duty is still based on the parties' contractual obligations and relationship between 2015 and 2019 and seeks redress for the same economic losses as does the breach of contract claims. Fifth Am. Compl. ¶ 105. For this reason, the Court finds that the negligence claim cannot be maintained as Plaintiffs fail to identify a duty owed to them other than that which stems from the parties' contractual obligations.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count VII is inadequately pled and must be dismissed.

7

Count VI – Civil Conspiracy

Defendants argue that Count VI must fail because it is not an independent basis of liability but rather must be brought in connection with an intentional tort of which there is no such claim here. (IB's Mem. 27-28) (Defs.' Mem. 26). Defendants also note that IB could not have conspired with its own employees to support this claim. (IB's Mem. 28-29) (Defs.' Mem. 26). However, Plaintiffs argue that Count VI is legally sufficient and that a conspiracy can occur between the Individual Defendants because they are board members and officers of IB, making them more than mere agents. (Pls.' Obj. 28-29.)

"To prove a civil conspiracy, plaintiffs had to show evidence of an unlawful enterprise." *Read & Lundy, Inc. v. Washington Trust Co. of Westerly*, 840 A.2d 1099, 1102 (R.I. 2004). "[B]ecause the intentional tort of civil conspiracy is not an independent basis of liability, and, instead, [i]t is a means for establishing joint liability for other tortious conduct[,] . . . it requires a valid underlying intentional tort theory." *Fogarty*, 163 A.3d at 543 (internal quotation omitted). Specifically, "the 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 accomplish a lawful objective by unlawful means." *Chain Store Maintenance, Inc. v. National Glass & Gate Service, Inc.*, No. CIV.A. PB 01-3522, 2004 WL 877599, at *10 (R.I. Super. Apr. 21, 2004) (internal quotation omitted). "Furthermore, [a] civil conspiracy claim requires the

specific intent to do something illegal or tortious." *Id.* at *11 (internal quotation omitted). "It is well-settled that a conspiracy between a corporation and its agents, **acting within the scope of their employment**, is a legal impossibility." *Id.* (internal quotation omitted) (emphasis added); *see also* 2 A.L.R.6th 387 (2005) ("The intracorporate conspiracy doctrine (sometimes referred to as intracorporate immunity) holds that a corporation, acting through its agents, cannot conspire with itself.").

Contrary to Defendants' arguments, the Fifth Amended Complaint does set forth an intentional tort that could support a claim of civil conspiracy—Count II for fraud. As such, Count VI has an independent intentional tort to rely on in asserting the claim of civil conspiracy. The Fifth Amended Complaint alleges that an agreement existed among IB and the Individual Defendants to misrepresent their compliance with SBA and FDIC regulations to Plaintiffs despite knowing that they were actively operating the SBA Loan Program in an illegal manner. Fifth Am. Compl. ¶¶ 101-103. While a civil conspiracy claim would not be viable if the alleged misconduct was within the scope of the agents' employment, *see Chain Store Maintenance Inc.*, 2004 WL 877599, at *11, the allegations at issue in the Fifth Amended Complaint refer to fraudulent acts undertaken by certain of the Individual Defendants. Because such fraudulent acts go beyond these Individual Defendants' scope of employment, it is conceivable that a civil conspiracy existed between IB and certain of the Individual Defendants. Specifically, because the Court found that Count II for fraud could be based on the conduct of RAC, RSC, and Marshall, the civil conspiracy claim is actionable against these three Individual Defendants and IB. As for Faris, Bain, and Andrew, the civil conspiracy claim cannot be maintained against

them as Count II for fraud is not predicated on conduct undertaken by these three individuals.

Therefore, assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count VI is adequately pled and the motion to dismiss should be denied for this claim.

8

Count VIII – Violation of Rhode Island's Racketeer Influenced & Corrupt Organizations (RICO) Statute, G.L. 1956 Chapter 15 of Title 7

Defendants argue that Count VIII must fail because (1) the allegation that IB knowingly received and derived income through the SBA Loan Program is not enough to constitute racketeering activity or the collection of a usurious debt as required for a RICO claim and (2) the RICO claim is predicated on privileged testimony provided to the FDIC. (IB's Mem. 29-30) (Defs.' Mem. 27). However, Plaintiffs argue that the claim satisfies the statutory elements because it "is based upon far more than the Defendants' exceedingly narrow interpretation" and meets "the requisite elements." (Pls.' Obj. 29.)

"Rhode Island General Laws § 7–15–2(a) makes it unlawful for 'any person who has knowingly received any income derived directly or indirectly from a racketeering activity . . . to directly or indirectly use or invest any part of that income, or the proceeds of that income in the acquisition of an interest in, or in the establishment or operation of any enterprise.'" *Carlsten v. The Widecom Group, Inc.*, No. PC 97-1425, 2003 WL 21688263, at *5 (R.I. Super. July 1, 2003) (quoting § 7–15–2(a)). "[T]he elements of a RICO offense are (1) the commission of one act of racketeering activity and (2) the use or investment of the proceeds of the racketeering activity in the establishment, conduct, or

operation of an enterprise." *State v. Brown*, 486 A.2d 595, 599 (R.I. 1985). An "enterprise" is defined under the RICO statute as "any sole proprietorship, partnership, corporation, association, or other legal entity, and any union or group of individuals associated for a particular purpose although not a legal entity." Section 7–15–1. The statute defines "racketeering activity" as "any act or threat involving murder, kidnapping, gambling, arson in the first, second, or third degree, robbery, bribery, extortion, larceny or prostitution, or any dealing in narcotic or dangerous drugs that is chargeable as a crime under state law and punishable by imprisonment for more than one year, or child exploitations for commercial or immoral purposes[.]" *Id.* The statute defines "unlawful debt" as "a debt incurred or contracted in an illegal gambling activity or business or that is unenforceable under state law in whole or in part as to principal or interest because of the law relating to usury." *Id.*

Given that RICO's definition of an enterprise includes all business entity categorizations, Count VIII properly alleges that IB is an enterprise as defined under § 7–15–1. Fifth Am. Compl. ¶ 110. The Fifth Amended Complaint also properly alleges that IB took funds from the SBA Loan Program and used those funds in running IB. *Id.* ¶¶ 111-112. However, there is no indication that any of the criminal offenses under the definition for racketeering activity categorize the complained of conduct in this matter. There is also no indication that the complained of conduct in this matter constitutes an unlawful debt. The RICO claim is not predicated on illegal gambling activity or usurious

practices but rather seeks redress for Defendants' noncompliance with SBA and FDIC rules and regulations, which Defendants intentionally hid from Plaintiffs. *Id.* ¶ 111.[9]

Therefore, even assuming the allegations in the Fifth Amended Complaint to be true and resolving any doubts in Plaintiffs' favor, the Court finds that Count VIII is inadequately pled and must be dismissed.

IV

Conclusion

Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** IB and the Individual Defendants' respective motions to dismiss the Fifth Amended Complaint. The Court grants the motions to dismiss as to Counts IV, V, VII, and VIII for failure to state a claim upon which relief may be granted. The Court denies the motions to dismiss as to Counts I, II, III, and VI. Furthermore, the Court grants the Individual Defendants' motion to dismiss personal liability against Bain, Faris, and Andrew.

[9] Beyond Count VIII falling short of complying with the requirements for a RICO claim, it is also possible that the RICO claim is improperly based on privileged testimony seeing that it references "false and/or misleading information [given] to third parties regarding the nature and scope of the Plaintiffs' respective involvement in the SBA Loan Program." Fifth Am. Compl. ¶ 111. However, because the complained of conduct plainly does not constitute racketeering activity or unlawful debt, this need not be addressed.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**John C. Ponte, et al. v. Independence Bank, et al.**
CASE NO:	**KC-2023-0536**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**February 28, 2025**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher M. Mulhearn, Esq.**
For Defendant:	**Kevin Hagan, Esq.** **Charles A. Tamuleviz, Esq.** **William Wynne, IV, Esq.** **Travis J. McDermott, Esq.** **Casey L. McCaffrey, Esq.**