STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

(FILED: February 15, 2013)

SIEMENS FINANCIAL SERVICES, INC. and SIEMENS MEDICAL SOLUTIONS USA, INC.	:	
V.	:	**C.A. No. PB 09-1677**
STONEBRIDGE EQUIPMENT LEASING, LLC, NEW ENGLAND RADIOLOGY & LAB SERVICES, P.C., MUHAMMAD M. ITANI and BISHER I. HASHEM	:	

DECISION

SILVERSTEIN, J. Before this Court are two motions brought by Plaintiffs Siemens Financial Services, Inc. ("Siemens Financial") and Siemens Medical Solutions USA, Inc. ("SMS") (collectively, "Plaintiffs" or "Siemens"): (1) a Motion to Strike or Otherwise Disregard Deposition Testimony, and (2) a Motion for Summary Judgment on all of their Claims and the Defendants' Counterclaims. Defendants Stonebridge Equipment Leasing, LLC ("Stonebridge"), Muhammad M. Itani ("Itani"), and Bisher I. Hashem ("Hashem") (collectively "Defendants") oppose both motions. Essentially, the Plaintiffs are seeking to recover for breaches of contract relating to leased medical equipment and the guaranties associated with those leases. Defendants allege—as both their affirmative defenses and two of their remaining Counterclaims—that the contracts and guaranties were procured by fraud and/or intentional misrepresentation. Defendants also assert a counterclaim for unfair or deceptive business practices under Mass. Gen. Laws ch. 93A.

I

Facts and Travel

Around 2005 a number of physicians and investors—including Defendants Itani and Hashem and non-party Dr. Fathalla Mashali ("Dr. Mashali")—became interested in opening a medical imaging center in Woonsocket, Rhode Island. See Stonebridge Dep. 31:21-48:6. Dr. Mashali contacted Siemens about equipment for the imaging center. See Vassallo Dep. 12:1-19. After the initial discussions, however, Dr. Mashali had to back out of direct involvement because he had a conflict of interest under anti-kickback laws. (Stonebridge Dep. 48:7-49:14.) Nevertheless, two executives from Dr. Mashali's company New England Medical Care ("NEMC")—Controller George Conduragis and CEO Paul Vallera—continued to work on the business plan for the proposed imaging center. See Conduragis Dep. 17:8-38:11; Vassallo Dep. 100:5-101:19.

In 2006, a business plan was formulated for the imaging center. Siemens provided a template for the business plan, and Conduragis and Vallera worked on the plan for Stonebridge. See Conduragis Dep. 23:4-24-5; 38:12-42:19; 45:21-46:4; 67:3-70:11; Vassallo Dep. 179:15-180:16, 185:15-186:7. At least two drafts of the business plan were prepared: one in April 2006 and one in October 2006. (Vassallo Dep. 179:15-180:16, 185:15-186:7, Exs. A, ZZ.) While the drafting was underway, the Plaintiffs also provided the Defendants with a report entitled "A Demographic and Economic Profile of the Area Surrounding Woonsocket, RI" (the "Demographic Profile"). (Mawn Aff., ¶11, Ex. A.)

When setting up the imaging center, two entities were created: New England Radiology & Laboratory Services ("NERLS"), which would actually operate the center, and Stonebridge Equipment Leasing, which would lease the equipment from Siemens, and then sublease the

equipment along with office space to NERLS.[1] See Stonebridge Dep. at 178:24-179:22; Hashem Dep. 95:11-96:10. On March 29, 2007, Stonebridge and SMS entered into a Master Equipment Lease Agreement[2] ("Master Agreement") and six Leasing Schedules ("Leasing Schedules") (collectively, the "Leases") covering the lease of medical diagnostic imaging equipment, including MRI, CT, and radiography machines (the "Leased Equipment"). (Compl. Ex. A-G.) Defendants Itani and Hashem also entered into personal guaranty agreements (the "Guaranties") for the repayment of the obligations created by the Leases.[3] (Compl. Ex. H-I.)

As contemplated, Stonebridge and NERLS entered into a sublease agreement ("Sublease") whereby NERLS subleased the Leased Equipment and office space from Stonebridge.[4] (Compl. Ex. J.) SMS consented to the sublease provided that timely payments were made and ownership of the Leased Equipment remained with SMS. (Compl. Ex. K.) SMS later assigned all of its rights and remedies under five of the six Leasing Schedules, as well as the Guaranties, to Siemens Financial, but SMS retained its rights and remedies under Leasing Schedule #13275, along with its related guaranty. (Mawn Aff. ¶¶ 8-9; Mawn Dep. 14:9-20; Abreu Aff. ¶ 8; Abreu Dep. 22:15-23.)

NERLS opened for business in approximately June 2007. (Rami Itani Dep. 18:1-7.) However, NERLS made only one payment to Stonebridge pursuant to the Sublease. (Stonebridge Ans. to Interrog. 16; Stonebridge Dep. 261:23-262:15.) Stonebridge stopped making payments under the Leases to the Plaintiffs in November 2008. (Resp. to Req. for

[1] NERLS' obligations to Stonebridge for the office space and the sublease of the equipment were bundled into one payment, and Dr. Mashali personally guaranteed those payments. (Stonebridge Dep. 178:24-180:2). Dr. Mashali has filed for personal bankruptcy. Id. at 180:3-4.
[2] The Master Agreement was "Dated: 12/14/06" and signed by Itani on behalf of Stonebridge on February 19, 2007 and by John P. Boyle on behalf of SMS on March 29, 2007.
[3] The Guaranties were signed on February 19, 2007 and February 26, 2007, respectively.
[4] This "Facility & Equipment Use Agreement" was made on February 9, 2007 and its terms were to begin on June 1, 2007 and end on May 30, 2012. (Compl. Ex. J.)

Admission 11.) In letters dated December 16, 2008, Plaintiffs notified each Defendant that they were in default of their obligations under their respective Leases and Guaranties and demanded payment and return of all the Leased Equipment. (Compl. ¶¶ N-S.)

On March 29, 2009, the Plaintiffs filed a fourteen-count Complaint for replevin and breach of contract damages against the Defendants.[5] The Defendants responded by asserting affirmative defenses and a four-count Counterclaim alleging Intentional Misrepresentation, Negligent Misrepresentation, Fraud and Deceit, and a violation of Mass. Gen. Laws ch. 93A, which makes unfair or deceptive business practices unlawful. After this Court's July 2009 issuance of a writ of replevin, the Defendants voluntarily surrendered the Equipment in October 2009. The equipment was then sold for $600,000.

The Plaintiffs filed a Motion to Dismiss the Defendants' Counterclaims. This Court denied the motion as to the Intentional Misrepresentation, Fraud and Deceit, and Mass. Gen. Laws ch. 93A Counterclaims because the Defendants had alleged fraud in the inducement of the Leases; thus, this Court held that the integration and waiver clauses in the Leases and Guaranties do not bar the Counterclaims. Siemens Financial Services, Inc. and Siemens Medical Solutions USA, Inc. v. Stonebridge Equipment Leasing et al., C.A. No. PB 09-1677, Nov. 24, 2009, Slip. Op. at 15-16. The Court did, however, dismiss the Defendants' Negligent Misrepresentation Counterclaim because that cause of action was barred by the waiver and integration clauses. Id. at 16.

Thus, the remaining Claims are for breach of contract against Stonebridge (Counts III-VIII) and breach of the Guaranties against Itani and Hashem (Counts IX-XII); the remaining Counterclaims are Intentional Misrepresentation (Count I), Fraud and Deceit (Count III), and a

[5] NERLS was originally a defendant, but NERLS and the Plaintiffs agreed to dismiss all claims against each other on September 15, 2009.

violation of Mass. Gen. Laws ch. 93A (Count IV). The Plaintiffs seek summary judgment in their favor on all Claims and Counterclaims. Additionally, after the Defendants used deposition testimony of Dr. Mashali to support their arguments in opposition to summary judgment, the Plaintiffs filed a "Motion to Strike or Otherwise Disregard Certain Portions of Dr. Fathalla Mashali's Testimony."

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113. Further, testimony should not be considered where the witness "laid no foundation for his personal knowledge[,] . . . gave no indication of the source of his knowledge, and . . . made no showing that he was competent to testify to the facts alleged in his affidavit." Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513-14 (R.I. 1983) (noting affidavit amounted to "little more than hearsay").

When it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter.

Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)). "Nevertheless, Rule 56 of the Superior Court Rules of Civil Procedure constitutes a procedural device that, in the proper circumstances, plays an appropriate role in separating the wheat from the chaff in the litigation process." Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 557 (R.I. 2009).

III

Discussion

A

Motion to Strike

The Plaintiffs request that the Court strike or otherwise disregard Dr. Mashali's deposition testimony that is cited in the Defendants' Memorandum in Opposition to Summary Judgment. The Plaintiffs argue that Dr. Mashali's testimony is inadmissible because he is not competent to testify with respect to: (1) the business plan developed by the Defendants in an effort to convince SMS to provide financing, or (2) the resulting agreements between the Defendants and SMS. Defendants respond by pointing to passages in Dr. Mashali's testimony that purportedly establish his personal knowledge.

Dr. Mashali's deposition testimony was sometimes contradictory and frequently unresponsive to the questions posed. Parts of his testimony are based on his personal knowledge, while others are not. Therefore, the Court will discuss the statements most relevant to the Motion for Summary Judgment.

Dr. Mashali may not testify as to the use of information in the formulation of the business plan because he did not help create the business plan. See Nichola, 463 A.2d at 513-14; Mashali Dep. 17:21-18:1 (noting that he was not "directly involved" in the imaging center business planning). For example, the following testimony of Dr. Mashali cannot be considered:

> "Q. Did George Conduragis, to your knowledge, have any involvement in putting together a business plan for the imaging center?
>
> A. I think that most of the documents came from Siemens. So, I don't really think that he offered as much input other than presenting Siemens' documents." Id. at 18:15-22.

In addition to being nonresponsive to the question, Mashali never established that he had any knowledge of the contents of the business plan, let alone the source of related documents. See Nichola, 463 A.2d at 513 (describing affiant's failure to describe his source of knowledge). Later, Dr. Mashali further demonstrates his lack of personal knowledge about the business plan by failing to remember whether he had reviewed it; nevertheless, he then claimed that 99 percent of it came from Siemens:

> "Q. Do you ever recall reviewing this particular business plan?
>
> A. That I don't know.
>
> Q. Do you know who prepared this business plan?
>
> A. I think -- looking at the circles this is what Siemens provided. So, I believe that probably 99 percent of that is provided by Siemens. Maybe one page here where who is going to contribute was provided by Mr. Itani, but most of the stuff here was provided by Siemens." Id. 34:15-35:2 (emphasis added).

At no point had Dr. Mashali clearly indicated the basis of his personal knowledge about the business plan, thus his testimony about its contents is speculation. Dr. Mashali did not show how he has personal knowledge of what documents were incorporated into the business plan, let alone how much comparative weight the documents carried. See Nichola, 463 A.2d at 513. Dr. Mashali also testified that reimbursement rates for procedures were discussed at a meeting, then continued "I think most of the documents about reimbursement -- almost all of it came from Siemens. I didn't have any access to any -- we didn't do those procedures." Id. at 29:17-20. While he then claimed that he thought that Vassallo had provided documents to him, Dr. Mashali later recanted that statement and testified that he "didn't personally get any documents." (Id. at 29:24-30:6; 67:10-11; 68:5-7). Therefore, Dr. Mashali's statements about the contents of the business plan must be stricken.

The record does support Dr. Mashali's personal knowledge that he saw documents passed to Conduragis and/or Itani. Id. at 68:13-23 (reimbursement rates); 69:24-70:7 (demographic information). Dr. Mashali also testified that Conduragis told him that Conduragis got a map, reimbursement rates, and projections from Vassallo. Id. at 105:7-106:7. While this would normally be stricken as inadmissible hearsay, it can be considered here to the extent that it rebuts Conduragis' deposition testimony. However, while this testimony can be considered, its evidentiary value is only to the proposition that Stonebridge had the information. Dr. Mashali did not have any personal knowledge as to whether the Defendants' use of or reliance on the information discussed, as evident from his lack of knowledge about the business plan.[6]

[6] Even if Mashali's testimony about Conduragis' use of documents purportedly given to him by Vassallo was considered, the relevant information consists of projections so the dispute of fact is not material. See infra Sec. III.B.2.c-d.

Therefore, the Motion to Strike is granted in part and denied in part as indicated above. Accordingly, the Court will disregard the inadmissible statements in its consideration of the Motion for Summary Judgment.

B

Motion for Summary Judgment

1

Choice of Law

In deciding the Plaintiffs' Motion to Dismiss the Defendants' Counterclaims, this Court held that "the substantive law of Massachusetts should apply to the Defendants' counterclaims." Siemens Financial Services, Inc. and Siemens Medical Solutions USA, Inc. v. Stonebridge Equipment Leasing et al., C.A. No. PB 09-1677, Nov. 24, 2009, Slip. Op. at 15. Applying a torts-based analysis and responding to Plaintiffs' argument that New Jersey law should apply, the court stated:

> "The Defendants claim that most of the meetings that took place among Itani, Hashem, and the Plaintiffs' agents, who allegedly made misrepresentations, took place in South Easton, Massachusetts. Additionally, the Leases and the guaranties, which were allegedly procured through fraud, were executed by Stonebridge, Itani, and Hashem in Massachusetts. While the Plaintiffs are Delaware corporations, registered to transact business in Rhode Island, their agent who primarily interacted with Itani and Hashem concerning the proposed facility, has an office in Burlington, Massachusetts. Furthermore, Defendants Itani and Hashem, who are domiciled in Massachusetts, are also the owners and members of Stonebridge Equipment Leasing, which is a Massachusetts limited liability company with a place of business in Woonsocket, Rhode Island. Although the Leased Equipment is located in Rhode Island, it is clear the parties' relationship, particularly concerning negotiations for the agreements, was centered in Massachusetts. The only connection to New Jersey is the boilerplate Leases executed by the parties." Id. at 8-9.

In connection with this Motion for Summary Judgment, the Plaintiffs now argue that Rhode Island law should apply to the Defendants' Counterclaims. To support this argument, the Plaintiffs contend that "[d]iscovery has since confirmed that no statement alleged to be a misrepresentation was ever made, much less made in the Commonwealth of Massachusetts, whereas the equipment and imaging center at the heart of the dispute are located in Rhode Island." (Pls.' Mem Supp. Summ. J. 21.) The Defendants respond that "[t]he discovery developed in this case does not alter [the Motion to Dismiss] ruling, but rather has buttressed the averments in the Defendants' Counterclaim that most of the meetings and activities that are the subject of this dispute took place in Massachusetts." (Defs.' Mem. Opp. Summ. J. 8.)

The Court cannot rest on its Motion to Dismiss Decision because the standard is different when a party moves under Super. R. Civ. P. 56, as opposed to Super. R. Civ. P. 12(b)(6). Contrast Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (on Rule 12(b)(6) motion, the court "examines the allegations contained in the plaintiff's complaint, assumes them to be true, and views them in the light most favorable to the plaintiff") with Hill, 11 A.3d at 113 (on Rule 56 motion, nonmoving party must "prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions") (internal quotations and citations omitted). Here, the Court remains satisfied that Massachusetts law should apply to the Defendants' Counterclaims. There is evidence in the record to support the allegations that the statements which are alleged to be misrepresentations, if made, were made in Massachusetts. Dr. Mashali references multiple meetings with Richard Vassallo at Attorney Filipek's Office in South Easton, MA. (Mashali Dep. 1, 20:13-21.) Additionally, the Defendants rely heavily upon a presentation that allegedly occurred at Thomas Quin's Office in Norwood, MA. (Vassallo Dep. 45:4-52:7.) Moreover, the Plaintiffs only point

to the fact that the equipment and imaging center are located in Rhode Island; they do not allege that any purported misrepresentations occurred in Rhode Island. In its previous analysis, the Court recognized that the situs of the subject matter of the Leases was not the sole or even primary factor, but rather the place where the allegedly fraudulent statements were made was paramount. Siemens, C.A. No. PB 09-1677, at 9 ("Although the Leased Equipment is located in Rhode Island, it is clear the parties' relationship, particularly concerning negotiations for the agreements, was centered in Massachusetts.") Accordingly, the Court will continue to apply Massachusetts law to the Defendants' Counterclaims.

As to the law governing the breach of contract Claims, the Plaintiffs argue that New Jersey law controls, as is contemplated by the choice of law provision in the Leases and Guaranties.[7] Presumably, the Plaintiffs also mean for this argument to apply to the Defendants' affirmative defenses. The Defendants do not directly confront this issue in their objection memorandum, but it seems as though they do not think that New Jersey law should apply to any of the Claims. Fortunately, the Court need not and will not decide this issue.[8] See National

[7] The choice of law provision provides: "The agreement and the lease . . . shall be governed and construed in accordance with the laws of the state of New Jersey without giving effect to the principles of conflict of laws thereof." (Compl. Ex. A.)

[8] For the parties' edification, had the Court needed to decide this issue, the Supreme Court spelled out the rule that would govern this situation in a case uncited by either party, Sheer Asset Management Partners v. Lauro Thin Films, Inc., 731 A.2d 708, 710 (R.I. 1999):

> "As a general rule, parties are permitted to agree that the law of a particular jurisdiction will govern their transaction. Rhode Island law recognizes choice of law clauses, with some limitations. For example, this Court has previously stated that 'the right of parties to a contract to have their reciprocal duties and obligations under that contract governed by the law of some particular jurisdiction is limited to the selection or stipulation by them of the law of a jurisdiction which has a real relation to the contract.' Moreover, the Restatement (Second) Conflict of Laws § 187(2)(a) (1971) states that '[t]he law of the state chosen by the parties to govern

Refrigeration, Inc. v. Standen Contracting Co., Inc., 942 A.2d 968, 973-74 (R.I. 2008) ("A motion justice need not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court."). Neither party has pointed to any difference in the relevant law among Rhode Island, New Jersey, or Massachusetts. Furthermore, both sides imply that the law does not actually conflict. See Defs.' Mem. Opp. Summ. J. 8.) ("In any event, whether Massachusetts or Rhode Island or New Jersey law applies, if the contracts at issue were procured by fraud, they are vitiated and subject to rescission."); Pls.' Reply Mem. Supp. Summ. J. 10 (certain evidence "could not possibly form a binding obligation under either Rhode Island or Massachusetts law.").

2

Plaintiffs' Claims and Defendants' Misrepresentations and Fraud Counterclaims

The Defendants do not argue that they did not breach the terms of the Leases by non-payment. Their theory is wholly based on affirmative defenses—which are essentially the same as their Counterclaims—that the contracts were procured by fraud in the inducement and/or intentional misrepresentations. They claim that because there was fraud in the formation of the contracts, they are entitled to rescission.

In order to establish claims of fraudulent misrepresentation, a plaintiff must show that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff reasonably relied upon the representation as true and acted upon it to his damage. Russell v. Cooley Dickinson Hosp., Inc.,

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> their contractual rights and duties will be applied * * * unless * * * the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice.' Among those jurisdictions in which there is a reasonable basis for choosing the law of that jurisdiction are: (1) the place of performance of one of the parties; (2) the domicile of one of the parties; or (3) the principal place of business of a party."

772 N.E.2d 1054, 1066 (Mass. 2002) (citing Danca v. Taunton Sav. Bank, 429 N.E.2d 1129, 1133 (1982)). Additionally, a statement on which liability for misrepresentation may be based must be one of fact, not of opinions, conditions to exist in the future, or matters promissory in nature. Stolzoff v. Waste Systems Intern., Inc., 792 N.E.2d 1031, 1041 (Mass. App. Ct. 2003); see also Zimmerman v. Kent, 575 N.E.2d 70, 79 (Mass. App. Ct. 1991). In order to constitute a "fact," the statement's content must be "susceptible of knowledge" at the time it is made. Zimmerman, 575 N.E.2d at 79.

Plaintiffs argue that no facts support the Defendants' Counterclaims for intentional misrepresentation, fraud, deceit, or affirmative defenses based thereon. To support this claim, the Plaintiffs contend that: (1) the Plaintiffs made no misrepresentations; (2) the Defendants did not reasonably rely on any alleged misrepresentations by Plaintiffs; (3) the alleged representations were non-actionable projections; and (4) the Defendants can never establish actual or proximate causation. The Defendants counter that four factual disputes preclude summary judgment: (1) Siemens provided more than medical equipment and financing; (2) Siemens provided demographic and economic data to the Defendants upon which they reasonably relied to their detriment; (3) Siemens sold a $40,000 "Compass Program" to the Defendants, but never provided services; and (4) Siemens provided financial projections for the business plan.

a

The Compass Program

Regarding the Compass Program, the Defendants argue that "Siemens required that Stonebridge purchase the consulting product as part of Siemens' underwriting of the lease obligations, and the unpaid cost of the program ($36,000) was added to the lease balances."

(Defs.' Mem. Opp. Summ. J. 12.) To support this argument, Defendants cite to Vassallo's deposition testimony at page 179, lines 1-10. That testimony reads:

> "Q. . . . There were three large pieces of equipment that were leased, and then a $40,000 Compass Program was added to the leases. Do you remember anything about that?
>
> A. I think the Compass Program, now that I look at this document, the Compass Program typically was paid for, it was cash, so they got – looks like they got approval to include it in the lease. So that only a $4,000 deposit was required as opposed to a payment of $40,000."

This testimony does not support the statement that Siemens required that Stonebridge to purchase the Compass Program, and it makes no mention of underwriting. It is also unclear from a wider perusal of the deposition transcript exactly which document Vassallo was looking at. See id. at 177:24-179:21. While the Defendants are correct that they paid $4,000 and no services were provided, there is no evidence to support a misrepresentation of fact, and the $4,000 was later credited toward the Leases.

b

Allegation that Siemens Would Provide More Than Medical Equipment and Financing

Apart from the Compass Program, the Defendants allege that the Plaintiffs fraudulently induced the Defendants to enter into the Leases "by offering and providing consulting services and data that turned out to be fraudulent." (Defs.' Mem. Opp. Summ. J. 11.) To support this claim, Defendants point to a presentation made by Vassallo. The Defendants allege that Vassallo, orally and through PowerPoint slides, represented that: (1) "Siemens would provide the service of assessing the market and the demand for the prospective client;" (2) "Siemens would create a business plan for the prospective client," and (3) "Siemens would provide consulting services to its prospective client including targeting marketing opportunities with both referring physicians and the general public." Id. at 11-12. This is a distortion of the record. The

Defendants use of "would" implies that Siemens agreed to provide such services. However, the record only indicates that the presentation was about the full panoply of services that Siemens is able to provide. See Vassallo Dep. 151:6-157:4. Specifically, Vasallo stated, "We [i.e., Siemens] could help with the planning stage, we could help with the building stage, and we could help with the operational stage. Not that that's what we're committing to, not that that's what we wanted to do, it was just the full scope of the services they provide." Id. 155:6-11 (emphasis added). Therefore, there is no misrepresentation to form the basis of an affirmative defense or Counterclaim.

c

Numbers in the Business Plan

Next, the Defendants claim that there are disputed issues of material fact as to the source of certain numbers in the business plan. The Defendants claim that "[s]ome witnesses say that Siemens absolutely was the source of the numbers (Mashali and Itani) . . ." without citation to the record. (Defs.' Mem. Opp. Summ. J. 13.) Then, the Defendants claim that "Stonebridge, Itani, and Hashem should be allowed at trial to show that Siemens made false representations of material fact with knowledge of their falsity for the purpose of inducing them to act thereon by entering into the leases and guaranties, and that they reasonably relied upon the representations as true and acted upon it to their damage." Id. at 14. Again, the Defendants provide no citation to the record to support this conclusion.

Although counsel to the parties are responsible for directing the Court to the pertinent portions of the record, the Court came upon some relevant information in its review of portions of the record cited for other purposes and some uncited portions. Itani, in his Rule 30(b)(6) deposition for Stonebridge, first claims that certain documents—a profit/loss statement, revenue

model, staffing model, and equipment model—were given to him by Quin, and Quin told Itani that Siemens provided the numbers.[9] (Stonebridge Dep. 304:12-311:12.) The statement that Siemens was the source of the numbers is, on its face, hearsay; however, because this testimony could potentially rebut evidence that Siemens did not provide the numbers, it can create a dispute of fact. Similarly, Itani's testimony may create a dispute about the source of the numbers used in the business plan. See Stonebridge Dep. 323:3-12 (testifying that Vassallo was the source of the numbers in the business plan). Nevertheless, these disputes of fact—the source of certain numbers provided to Itani and the source of certain numbers in the business plan—are not material because the numbers are non-actionable projections and the Defendants did not rely on the numbers. See Super R. Civ. P. 56(c) (requiring genuine issue of material fact to defeat summary judgment).

The Defendants admit that the numbers are projections. (Stonebridge Dep. 304:21-25; 329:10-330:1.) Liability for fraud or misrepresentation must be based on a statement of fact; not on opinion, conditions to exist in the future, expectation, estimate, or judgment. Stolzoff, 792 N.E.2d at 1041; Zimmerman v. Kent, 575 N.E.2d 70, 75 (Mass. App. Ct. 1991). Because the projections relate to predictions of the future—e.g., number of days in operation per year, number of procedures per day, projected income, year-to year growth, etc.—they cannot form the basis of a misrepresentation claim.

Finally, even if the numbers were provided by Siemens, and those numbers were actionable, the Defendants did not rely on them. Reasonable reliance upon the representation as true is required for a claim of misrepresentation. See Russell, 72 N.E.2d at 1066. Itani repeatedly described how he cut the projections in half, on his belief that they were exaggerated.

[9] These documents comprise Exhibit 24 to the Stonebridge Deposition. A copy of this exhibit was not supplied in connection with this motion.

(Stonebridge Dep. 320:11-23, 321:21-23, 331:1-17.) Therefore, Stonebridge did not actually rely on the projections.

d

The Demographic Profile

Finally, the Defendants contend that the Plaintiffs made factual misrepresentations about the perceived need for and viability of an imaging center in Woonsocket because the Plaintiffs provided the Demographic Profile to the Defendants. The Plaintiffs admit that they provided this report to the Defendants. See Pls.' Mem. Supp. Summ. J. 18. On the first page inside the cover, the Demographic Profile contained a disclaimer:

> "The report is provided as a convenience to assist the customer in understanding various healthcare market scenarios. The customer should not assume any expressed or implied warranties regarding this report. The forecasts are based upon the best available data but should not be taken as a prediction of the future. We encourage the customer to seek independent verification of current or future demand for healthcare services." (Mawn Aff., Ex A., at 01132)

"Although disclaimers, under Massachusetts law, do not serve as automatic defenses to allegations of fraud, they obviously may be considered when assessing the reasonableness of a party's reliance." Rodi v. Southern New England School of Law, 532 F.3d 11, 17 (1st Cir. 2008). While the Court acknowledges that the disclaimer is only a few sentences in a 125 page report, it is on the first page inside the cover, and that page contains only the disclaimer quoted above, a one sentence dissemination restriction, and title and author information. See Mawn Aff., Ex A., at PLTFS 01132. Furthermore, the disclaimer's content clearly states that the information contained in the Demographic Profile consists of "forecasts," thus it relates to conditions to exist in the future. Therefore, it would not be reasonable for the Defendants to rely on the contents, and the alleged misrepresentations are not actionable because they are

projections. See Rodi, 532 F.3d at 17; Stolzoff, 792 N.E.2d at 1041; Zimmerman, 575 N.E.2d at 75.

The Defendants have not shown that there is a genuine dispute of material fact as to their fraud and misrepresentation affirmative defenses and Counterclaims. Therefore, the Plaintiffs are entitled to summary judgment on their Claims and Counts I and III of the Defendants' Counterclaim.[10]

3

Defendants' 93A Counterclaim

Mass. Gen. Laws ch. 93A is a unique Massachusetts statute; thus, it requires a separate analysis from the misrepresentation claims. The statute provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Mass. Gen. Laws ch. 93A, § 2(a). Additionally, the statute requires that "the alleged . . . unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." Id. § 11. Therefore, the Court must determine whether the conduct alleged by the Defendants occurred primarily and substantially within Massachusetts, and whether that conduct constitutes an unfair or deceptive practice.

a

Did the Actions Occur Primarily and Substantially in Massachusetts?

Dr. Mashali references multiple meetings with Richard Vassallo at Attorney Filipek's Office in South Easton, MA. (Mashali Dep. 1, 20:13-21.) Additionally, the Defendants allege that misrepresentations occurred during a presentation at Thomas Quin's Office in Norwood, MA. (Vassallo Dep. 45:4-52:7.) At a minimum, the Defendants have created an issue of fact as

[10] Because the Court resolves these issues in favor of the Plaintiffs, the Court need not address the alternative arguments advanced by them. See Pls.' Mem. Supp. Summ. J. 29-30, 32-39.

to whether the allegedly unfair or deceptive acts occurred primarily and substantially in Massachusetts.

b

Was Siemens' Conduct Unfair or Deceptive?

"Conduct is unfair or deceptive if it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness or immoral, unethical, oppressive or unscrupulous." Rodi, 532 F.3d at 19; see also Maruho Co., Ltd. v. Miles, Inc., 13 F.3d 6, 10 (1st Cir. 1993) (quoting Tagliente v. Himmer, 949 F.2d 1, 7 (1st Cir.1991)) (noting that claimant must "show conduct that involves some kind of 'rascality.'"). As described above, the Defendants do not have a claim for misrepresentation because there was no evidence of an actionable misrepresentation, and even if there was, there is no evidence that the Defendants reasonably relied on the purported misrepresentations. Under Mass. Gen. Laws ch. 93A, however, if the Defendants could show how these facts fall within at least the penumbra of one of the listed unfairness or unethical concepts, then it would be the court's duty to deny summary judgment. See Rodi, 532 F.3d at 19. But the Defendants only advanced the same misrepresentation claims described above as the basis for their 93A claim, and they have not argued a separate 93A theory that the actions of the Plaintiffs were allegedly unfair or deceptive.[11] Therefore, the Court grants summary judgment to the Plaintiffs on Defendants' Counterclaim Count IV.

[11] The Court notes that the Defendants did not actually make any direct 93A argument in its Objection Memorandum.

IV

Conclusion

This Court finds that there are no genuine issues of material fact because nothing in the record supports the Defendants' allegations of misrepresentations by the Plaintiffs, or the Defendants' reasonable reliance thereon. Therefore, the Court grants the Plaintiffs Motion for Summary Judgment on all Claims and Counterclaims. The Defendants did not dispute the Plaintiffs' damages calculations. See Abreu Aff. ¶¶ 11, 18, Ex. B.; Mawn Aff. ¶ 19; Mawn Dep., Ex. 8. However, while the Master Lease provides for reasonable attorneys' fees, costs, and expenses, the Plaintiffs have not proven the amount of attorneys' fees, costs, or expenses, or the reasonableness thereof. Thus, those amounts remain unresolved.

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