Southern Advanced Materials LLC v Abrams
2016 NY Slip Op 31798(U)
September 29, 2016
Supreme Court, New York County
Docket Number: 650773-2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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SOUTHERN ADVANCED MATERIALS LLC,

Plaintiffs,

Index No.: 650773-2015

-against-

DECISION AND ORDER

ROBERT S. ABRAMS, individually and as trustee of the ROBERT S. ABRAMS LIVING TRUST, ROBERT S. ABRAMS LIVING TRUST, and John Does 1-10,

Defendants.

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ROBERT S. ABRAMS and
ROBERT S. ABRAMS LIVING TRUST,

Plaintiffs,

Index No.: 650795-2015

-against-

SOUTHERN ADVANCED MATERIALS, LLC,

Defendant,

-against-

ROBERT S. ABRAMS,

Counterclaim-Defendant.

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Saliann Scarpulla, J.:

Under Index No. 650773/15, defendants Robert S. Abrams ("Abrams") and Robert S. Abrams Living Trust ("Trust") move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss plaintiff Southern Advanced Materials, Inc.'s ("SAM") second amended complaint (seq. no. 003). Under Index No. 650795/15, plaintiff Robert S. Abrams ("Abrams") moves to dismiss the counterclaims asserted by defendant SAM (seq. no. 003). The motions are consolidated for disposition.

Unless otherwise noted, the following allegations are taken from SAM's Second Amended Complaint ("complaint") or the documents attached thereto. SAM is a limited liability investment company, which was formed in order to invest in nonparty CV Holdings, LLC ("CVH"). CVH was a limited liability holding company, formed around December 22, 1998, "that owned various subsidiary operating companies involved with the manufacturing of plastic vials and other products." Abrams was a member and Manager of CVH. At a certain point, "Abrams purports to have transferred the entirety of his membership interest in CVH to the Trust, making the Trust the owner at the time of the relevant conduct of 100% of the Company's Class A common shares and approximately 64% of the Company's total outstanding stock (*i.e.*, common and preferred)." Abrams is the sole beneficiary and trustee of the Trust.

Prior to SAM's investment, Abrams secured investments from Wachovia Capital Associates, Inc., BNY Capital Corporation, MassMutual High Yield Partners II LLC,

Massachusetts Mutual Life Insurance Company, and Smart Plastics LLC ("Smart Plastics"). Each of these investors was a Preferred investor.

Between August 2001 and February 2002, SAM invested $10 million for 8,883 Class C Preferred interests in CVH. Later, "SAM invested an additional $2.3 million in CVH, increasing its total investment to $12.3 million and its ownership to approximately 8.43% of CVH's common interests."

SAM alleges that "[i]n order to induce SAM to acquire CVH interests, Abrams, as a stock promoter, made a number of promises to SAM, which are reflected in a letter signed by Abrams personally, dated August 6 2001" ("Promoter Agreement"). The August 6, 2001 letter, on Capitol Vial, Inc. letterhead, and addressed to Stephen L. Parr at Capital Strategies Advisors, Inc., begins: "[b]elow is a description of our agreement for your LLC (Southern Advanced Materials) to raise funds on behalf of CV Holdings, LLC." The letter contains promises made by Abrams individually, such as: "[SAM] will have the right to sell any or all units to me for the value of the initial investment plus a rate of 7% (compounded annually) until August 1, 2003. I will have 120 days after notice to provide payment" ("put right"). Paragraph seven of the Promoter Agreement states:

> [n]otwithstanding anything to the contrary and in order to help clarify our agreement, the minimum IRR shortfall agreement will not be construed to cap the returns of the preferred investor. The shortfall agreement provides for the common shareholders to supplement the annual return of the preferred investor by 10%/year should the preferred investor generate a return below 30%/year on average.

According to SAM, from the period of SAM's initial investment until the transaction at the center of SAM's suit, SAM never received a distribution from CVH or Abrams. Furthermore, SAM believed, from its initial investment, that its investment would be on the same terms as another Class C Preferred shareholder, Smart Plastics. However, SAM alleges that it determined that "Smart Plastics had received a more favorable position in CVH pursuant to an undisclosed side agreement that promised additional preferred interests to Smart Plastics." SAM alleges that because Abrams did not want SAM to exercise the put right in the Promoter Agreement, Abrams agreed in a February 12, 2004 letter, on CVH letterhead, that "CV Holdings will resolve the matter with Driehaus. SAM will receive additional shares equal to one-half of the number of additional shares obtained by Driehaus," in exchange for SAM's agreement not to communicate with Driehaus before a settlement was reached between CVH and Smart Plastics ("Make Good Agreement").[1] According to SAM, in February 2004, in reliance on Abrams's representations to provide SAM with additional shares in the event that Smart Plastics was given additional shares, SAM made its second investment in CVH as described above.

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[1] I note that Richard H. Driehaus executed the First Amendment to Fourth Amended and Restated Operating Agreement and Fourth Amended and Restated Members Agreement of CV Holdings, L.L.C. ("First Amendment") as the Manager of Smart Plastics II, LLC.

Relevant Provisions of the Operating Agreement

The Fourth Amended and Restated Operating Agreement, dated August 1, 2001, was executed by Abrams, SAM, and the other shareholders of CVH ("Operating Agreement").[2] Section 7.1 (a) designates Abrams as the "Manager" of CVH. Section 8.1 identifies Abrams as the majority holder of Class A Common interests.[3]

Section 13.1 states that "[CVH] shall be dissolved upon the approval of the Class A Common Members holding a majority of the Class A Common Interests and Super-Majority Consent or upon the disposition by [CVH] of substantially all of its assets."

Pursuant to the Section 13.3 ©, in the event that CVH dissolves, asset distribution occurs under Section 13.2, and

> (B) the amount to be distributed related to such dissolution under Section 9.7(c)(iii) or Section 13.2(b)(iv) (to the extent it relates to 9.7(c)(iii)) to each Preferred Member in respect of its Preferred Interest is less than the Minimum IRR Shortfall Amount at such time, then there shall accrue and become immediately due and payable to each Preferred Member an amount equal to the Preferred Return (either Class A/B Preferred Return or Class C Preferred Return) for the particular Preferred Member.

Section 14.4 (a) states, in part,

> each Class B Common Member and Preferred Member agrees for the benefit of the Company and the Class A Common Member that if (I) the Class A Common Members shall propose to consummate any sale of all of the Class A Common Interests held by them to any person or group of persons unaffiliated with Abrams or any of the other Class A Members

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[2] The parties subsequently executed the First Amendment.

[3] Pursuant to Section 10.10 of the Operating Agreement, the Trust was bound by the Operating Agreement.

> (collectively, the "**Go-Along Person**") and (ii) at the option of the Class B Common Members and the Preferred Members, the Class B Common Members and the Preferred Members shall have received from a nationally recognized investment banking firm or public accounting firm, selected by the Class B Common Members and the Preferred Members and not affiliated with the Class B Common Members and the Preferred Members or the Go-Along Person and not otherwise involved in the proposed sale, a written opinion . . . stating that the consideration or net proceeds to be received by such Class B Common Members and Preferred Members in connection with such proposed sale is fair to such Class B Common Members and Preferred Members from a financial point of view, then (at the option of the Class A Common Members exercisable by written notice to each Class B Common Member and Preferred Member) each Class B Common Member and Preferred Member shall be obligated severally to dispose of all its Class B Common Interests and Preferred Interests to the Go-Along Person on the same terms and conditions as the Class A Common Members . . . .

Section 16.14 contains an integration clause, and Section 12 of the First Amendment contains a similar integration clause. Section 12 states,

> [t]his Amendment supercedes all agreements previously made between the parties relating to its subject matter. Except for the Operating Agreement, Members Agreement, the Subscription Agreement and the Current Contribution Agreement, as defined in the Operating Agreement, there are no other understandings or agreements between the parties, and this Amendment, the Operating Agreement, the Members Agreement, the Subscription Agreements, and the Current Contribution Agreement contain the entire agreement of the parties.

Relevant Provisions of the Members Agreement

Pursuant to Section 1.2 of the Fourth Amended and Restated Members Agreement ("Members Agreement") , CVH's manager could not engage in the following absent "'Majority Consent'" of the shareholders:

[* 7]

> (j) entering into or permitting to exist any transaction (including, without limitation, the purchase, sale, lease or exchange of any property or the rendering of any service) with [CVH] or any Affiliate of [CVH], or any officer, director or stockholder of [CVH], except for transactions in the ordinary course of and pursuant to the reasonable requirements of the business of the Company and upon fair and reasonable terms that are no less favorable to [CVH] than would be obtained in a comparable arms-length transaction with a Person that is not an Affiliate, officer or director of [CVH].

The Sale to Wendel

SAM alleges that "[b]y 2010, Abrams began seeking a buyer for the Operating Subsidiaries of CVH, that is, the assets of CVH." SAM further alleges that "in or about December 2013, [Abrams] was introduced to Wendel [S.A. ('Wendel')]."

SAM alleges that Abrams and Wendel later structured the sale of CVH as follows:

> [u]nder the terms of the proposed purchase agreement, and in accordance with both Abrams' desire to transfer to himself substantial assets for his own personal benefit, and Wendel's desire to purchase only certain CVH subsidiaries without taking any CVH liabilities, CVH was to be fundamentally restructured as a condition precedent to Wendel's purchase of the CVH membership interests. Thus, as reflected in Schedule A to the Wendel Purchase Agreement . . . , Abrams was to cause CVH to cancel its $1 option in SiO2 [SiO2 Medical Products, Inc. ("SiO2")] and transfer SiO2 (with an equity value of at least $200 million) to himself; and transferred numerous other valuable assets to himself including CVH subsidiary CMD, a $43 million Note SiO2 owed to CVH, patents from a patent portfolio worth approximately $35 million, certain manufacturing facilities, and whole life insurance policies estimated to be worth over $60 million. With the exception of the cancellation of the SiO2 Option, none of the other asset transfers were disclosed to Preferred Investors until after they had agreed to the transaction.

Following a letter to SAM in which Abrams notified SAM of his intention to sell the Class A Common interests of CVH, in a November 3, 2014 letter on CVH letterhead,

"[Abrams], as representative of the Class A Common Members" informed SAM that, according to Section 14.4 of the Operating Agreement:

> [CVH] hereby provides notice that as a result of the Class A Common Representative's exercise of his rights to effect a sale of all of the equity interests of [CVH], each of the other members of the Company, including [SAM], is obligated to dispose of all its Class B Common Interests and Preferred Interests . . . .

The letter stated that each member was required to execute the sale documents in a prompt manner.

The Retained Claims Agreement

After several communications between SAM, CVH, and their representatives, SAM continued to refuse to consent to the transaction. In a November 26, 2014 letter on CVH letterhead, Abrams and SAM reached an agreement ("Retained Claims Agreement"), which stated that: "SAM will enter into the Sale Documents, subject to the following conditions set forth in this Agreement." Further, in that agreement, Abrams agreed that SAM's "Retained Claims"[4] would not be waived by signing the sale

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[4] "Retained Claims" are defined in the Retained Claims Agreement as:

> [a]ny and all Potential Claims which any SAM Related Party has or may have had against the Company, or Mr. Abrams (individually or in his capacity as Manager of the Company or Class A Member of the Company or as assignee pursuant to the Assumption Agreement) based on an insufficient offer, breach of contract, breach of the covenants of good faith and fair dealing, breach of fiduciary duty, and all other claims permitted under Delaware law, arising in connection with, or relating to, the Sale Transaction (including the allocation of proceeds, the Closing Amount), the applicability of the Class C Preferred Return (as defined in the LLC Agreement) to the Sale Transaction, the applicability of the Go Along

[* 9]

documents, and Abrams assumed the liability of the Retained Claims. The Retained Claims Agreement further stated that,

> [p]ursuant to the Sale Documents, SAM will receive $31 million in cash . . . within one week of the closing of the Sale Transaction . . . and no later than any of the other preferred or common members of [CVH] (other than Mr. Abrams) and will irrevocably release all of the Released Claims on behalf of SAM and the other SAM Related Parties, which shall not include the Retained Claims (with the liability for the Retained Claims being transferred to Mr. Abrams).

The agreement also provided SAM with an option to choose between entering a warrant purchase agreement where SAM would receive a warrant to buy $36 million SiO2 Junior Preferred stock; litigate SAM's Retained Claims; or receive payment equal to, on a proportionate basis, the most favorable terms granted to any other Common or Preferred member (the "True-Up Option"). Further, the Retained Claims Agreement indicated that within two months of the closing, Abrams would provide information to SAM "regarding all the final terms of the Sale Transaction, including the disposition of SiO2, the allocation of proceeds of the Sale Transaction and the valuation of SiO2." According to the agreement, after receiving that information, SAM would have 30 days to exercise the True-Up Option.

Obligation provision in Section 14.4 of the LLC Agreement to the Sale Transaction, the valuation methodology of S[i]O2, the cancellation of the option of the Company to acquire the stock of SiO2 or matters relating thereto.

[* 10]

The Purchase Agreement

SAM alleges that "[t]he transaction terms were finalized by execution of the Purchase Agreement on December 23, 2014, and the sale was consummated on January 29, 2015." The Purchase Agreement was entered into by CSP Technologies North America (Parent), Inc. as "'**Buyer**,'" CVH as "'**Target**,'" and the CVH shareholders and Abrams as "'**Sellers**.'" Abrams signed the agreement as the Manager of CVH, the trustee of the Trust, as Seller Representative, Manager of CVRA, LLC, Manager of Capitol R.A. LLC, and Manager of R.A.Vials LLC.

The Purchase Agreement states that "the Sellers intend to cause the restructuring transactions set forth on Schedule A (**the 'Pre-Closing Restructuring'**) to be consummated at or prior to the Closing (as defined herein), which transactions will be deemed for all purposes of this Agreement to have occurred prior to the Closing."

The Purchase Agreement also contains a Release ("Release") that states, in part,

> [f]rom and after the Closing, each Seller, on behalf of such Seller and such Seller's Affiliates and each of its and their respective officers . . . hereby fully, finally and irrevocably releases, acquits and forever discharges the Companies and any and all of their successors and assigns, together with their present and former managers . . . from any and all manner of claims . . . .

The Release also contains language limiting its application:

> the Released Matters shall not include, and nothing in this Agreement shall affect or be construed as a waiver or release by Releasing Parties of, any Potential Claims arising out of or relating to the (1) payment of the Purchase Price in accordance with the terms and conditions of this

Agreement, or the rights of the Sellers under the Transaction Documents . . . .

Transfer of SiO2 Option

Pursuant to the Option/Nominee Agreement, dated December 31, 2011, Abrams held legal title to the SiO2 shares, however, the agreement states that "CVH may, at any time during the period [Abrams] owns legal title to the SiO[2] Shares . . . elect to acquire the SiO[2] Shares from Abrams for One Dollar . . . and [Abrams] shall sell SiO[2] Shares to CVH for the Exercise Price" ("SiO2 Option").

The SiO2 Option was specifically discussed in Schedule A of the Purchase Agreement. The relevant portion of Schedule A states,

> [p]rior to the Closing, Capitol Medical Devices, Inc., a Delaware corporation (**"CMD"**), shall be merged with and into SiO2 . . . with SiO2 surviving the merger . . . and [CVH] and Abrams shall then terminate that certain Option/Nominee Agreement . . . by and between Abrams and [CVH], pursuant to which [CVH] has an option to purchase all of the outstanding capital stock in SiO2 held by Abrams for $1.00.

SAM alleges that Abrams's conduct with respect to SiO2 was improper because "[a]t the time of the transfer to Abrams, SiO2's equity was reportedly valued at $200 million, with an enterprise value of over $300 million when adjusted for SiO2's outstanding debt."

SAM's Claims and Counterclaims

As a result of Abrams's Pre-Closing Restructuring, SAM alleges that it did not receive its proper pro rata share of the improperly transferred assets, which amounts to at

least $15 million above the $31 million received by SAM. SAM also alleges that it did not get the preferred return it deserved, in the sum of $42,000,000.

SAM commenced this action against on March 13, 2015. The complaint contains six causes of action, five sounding in breach of contract, and one for breach of fiduciary duty. Defendants move to dismiss all six claims.

Abrams and the Trust commenced an action against, among others, SAM, and filed a second amended complaint in that action. In answering that complaint, SAM propounded two counterclaims against Abrams. Abrams moves to dismiss those two counterclaims.

In the first counterclaim, SAM alleges that Abrams committed fraud when he concealed from SAM information relating to the transaction. SAM alleges that, under the Retained Claims Agreement, Abrams was required to provide SAM with information concerning how the proceeds of the transaction were allocated, and then SAM had 30 days to exercise the True-Up Option. SAM alleges that according to the false or misleading information Abrams provided, set forth in the Seller Payoff Schedule, it appeared that SAM received the highest payment of the Preferred investors. Based upon this allegedly misleading information, SAM alleges that it did not exercise the option.

SAM alleges that it later learned that the information Abrams originally provided in the Seller Payoff Schedule contained misrepresentations. For example, the amount paid to Smart Plastics was represented as $17.5 million, instead of $22.8 million, which

was the amount actually paid to Smart Plastics by Abrams. Based on the higher amount, SAM believes it should have received $43.1 million. Furthermore, SAM alleges that "Abrams . . . intentionally concealed from SAM the fact that he was paying other investors the very Preferred Return he refused to pay to SAM. . . . SAM only learned . . . in late December 2015 [that] Peachtree was paid its full 10% Preferred Return, ***in addition to*** receiving a distribution on its equity interest in [CVH]." SAM therefore alleges that, in reliance upon Abrams's misrepresentations about these payments, SAM did not to exercise the True-Up Option, and, in addition, incurred litigation costs.

In the second counterclaim, SAM alleges fraudulent inducement related to the Retained Claims Agreement. SAM alleges that "Abrams used his position [as Manager] to cause CVH to pay him excessive amounts of compensation through personal benefits paid, received or transferred to Abrams and his affiliates, such as payments for homes, private plane trips, insurance with cash value, cars, bonuses and other substantial benefits." SAM alleges that Abrams concealed this self-dealing on CVH's financial statements. Ignorant of these facts, SAM entered into the Retained Claims and the Purchase Agreements. SAM further alleges that "as a result of Abrams' undisclosed self-dealing, CVH was forced to carry significantly more debt than necessary, and at a very high interest rate, which artificially depressed the amount SAM should have otherwise received in the Wendel Transaction by millions of dollars."

Discussion

On a motion to dismiss, the "court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). Nonetheless, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*id.*).

Derivative and Direct Claims under Delaware law

The parties agree that Delaware law applies to all substantive claims. "Stockholders may sue on their own behalf . . . to seek relief for direct injuries that are independent of any injury to the corporation" (*Parnes v Bally Entertainment Corp.*, 722 A2d 1243, 1245 [Del 1999]). "[W]hether a stockholder's claim is derivative or direct . . . . must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2), who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" (*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1033 [Del 2004]). To make this determination, the court must examine "'the body of the complaint, not the plaintiff's designation or stated intention'" (*Agostino v Hicks*, 845 A2d 1110, 1121 [Del Ch 2004] [citation omitted]).

"[A] direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim" (*Tooley*, 845 A2d at 1037). The Supreme Court of Delaware has stated that "[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated" (*Parnes*, 722 A2d at 1245). However, claims that are for corporate mismanagement, even in the context of a merger, and that do not attack the merger itself are derivative claims (*see Kramer v Western Pacific Industries*, 546 A2d 348, 352-354 [Del 1988]; *see also Tooley*, 845 A2d at 1038 [approving of holding in *Kramer*]).

Further, when it comes to breach of contract claims,

> *Tooley* and its progeny do not, and were never intended to, subject commercial contract actions to a derivative suit requirement. . . . It would be inconsistent with . . . legal principles [related to contract law] to subject commercial parties to a burdensome demand excusal process before allowing them to sue on their own commercial contracts

(*NAF Holdings, LLC v Li & Fung (Trading) Limited*, 118 A3d 175, 179, 181 [Del 2015]; *see also CMS Inv. Holdings, LLC v Castle*, 2015 WL 3894021, *8, 2015 Del Ch LEXIS 169, *26-27 [Del Ch 2015] [finding that allegations regarding breach of the LLC agreement gave rise to direct claims against individual defendants]). Indeed, the Supreme Court of Delaware in *Citigroup Inc. v AHW Investment Partnership* stated, "as we explained in *NAF Holdings*, when a plaintiff asserts a claim based on the plaintiff's own

right, such as a claim for breach of a commercial contract, *Tooley* does not apply" (*Citigroup,* 2016 WL 2994902, *10; 2016 Del LEXIS 310, *40 [Del 2016]).

I. SAM's Complaint

a. The First Cause of Action: Breach of the Operating Agreement, §§ 9.7 and 13.3

According to the complaint, SAM alleges that Sections 9.7 and 13.3 of the Operating Agreement provide it, as a Class C Preferred shareholder, with a preferred return of 10% on its investment in the event of a dissolution of CVH, if the investment did not generate a return of 30% per year.

SAM argues that the Pre-Closing Restructuring constituted a dissolution under Section 13.1. Additionally, SAM alleges that it did not receive a return of 30% per year on its investment. SAM argues that the alleged dissolution should have triggered payment of a preferred return to SAM, rather than obligations under Section 14.4. In its complaint, SAM alleges,

> [b]y its express terms, Section 14.4 is applicable in connection with a sale of the Class A common interests (*i.e.*, a stock sale) . . . . Yet, the Wendel Transaction involved significant asset dispositions in addition to the sale of the Class A interests, most notably the transfer to Abrams of SiO2 and the $43 million note it owed to CVH and other substantial assets . . . . Thus, the Wendel Transaction was not simply a stock sale as to which Section 14.4 might apply . . . .

In their motion papers, defendants argue that this claim is barred because (1) it is a derivative claim, which SAM has no standing to bring; (2) in the Release, SAM, as a seller, discharged any and all claims it possessed as against CVH and its managers; and

(3) the transaction constituted an equity sale under Section 14.4, and it was not a dissolution that would trigger the obligations set forth under Section 13.3.

In opposition to the motion, SAM argues that because the claim is based upon the breach of a commercial contract, it is not derivative, that the claim is not barred by the Release, and that the claim should survive the motion to dismiss.

First, I find that this claim is not derivative, but is direct in nature. Here, SAM claims that it entered into the Operating Agreement, along with Abrams, who breached the terms thereof. It is SAM's contention that the terms of the contract promised SAM the benefit of a preferred return to be paid by CVH. SAM alleges that, even though the conditions for payment of the return to SAM arose, SAM never received payment. Thus, the claim is grounded in the alleged breach of a commercial contract, resulting in individual damages to SAM (*see NAF*, 118 A3d at 179, 181; *CMS*, 2015 WL 3894021 at *8, 2015 Del Ch LEXIS at *26-27).

The Purchase Agreement states that the Release does not apply to "any Potential Claims arising out of or relating to the (1) payment of the Purchase Price in accordance with the terms and conditions of this Agreement, or the rights of the Sellers under the Transaction Documents."[5] The Retained Claims Agreement, entered into less than a

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[5] The Purchase Agreement further defines "'**Transaction Documents**'" as "this Agreement . . . and all other written agreements, documents and certificates contemplated by any of the foregoing documents or entered into by the Parties on or about the Closing Date and relating to the Transactions, <u>other than</u> the Confidentiality Agreement."

month before the execution of the Purchase Agreement and related to the transaction, qualifies as a Transaction Document and is exempt from the Release.

Moreover, the Retained Claims Agreement reflects Abrams and SAM's intent to enter into the Purchase Agreement subject to the Retained Claims Agreement (*see Eagle Industries, Inc. v DeVilbiss Health Care, Inc.*, 702 A2d 1228, 1232 [Del 1997]). In the Retained Claims Agreement, Abrams and SAM agreed that liability for the Retained Claims, which included claims against CVH and its managers pertaining to the transaction, was transferred to Abrams. Thus, SAM may bring claims against Abrams.

The question concerning the nature of the transaction cannot be determined on this motion to dismiss. According to SAM, the Purchase Agreement reflected the sale of all of CVH's equity, as well as the Pre-Closing Restructuring, which is allegedly a dissolution under Section 13.3. In their reply memorandum, defendants argue that "the alleged diversion of assets to Abrams [cannot] be considered a dissolution or sale of substantially all of CVH's assets since, among other reasons, Wendel paid $360 million to acquire CVH without any of those assets and it continues to exist and do business." According to defendants' moving memorandum, the SiO2 Option,"was at best a worthless option or at worst a massive liability."[6] Additionally, Abrams argues that the assumption of liabilities is contemplated under Section 14.4 of the Operating Agreement.

[6] Defendants also note that because of the terms of SiO2's credit arrangements, if CVH exercised the SiO2 Option, it would have accelerated SiO2's debt.

At this point, I cannot determine whether such Pre-Closing Restructuring effectively dissolved CVH under that definition in the Operating Agreement. It is not irrefutably set forth in the papers whether the alleged transfers to Abrams were liabilities or assets. Thus, because the Operating Agreement §§ 13.1 and 13.3 state that, under certain conditions, Preferred investors are afforded a preferred return, I deny the motion to dismiss this claim.

b. The Second Cause of Action: Breach of the Promoter Agreement

SAM alleges that pursuant to paragraph seven of the Promoter Agreement, SAM was guaranteed a return of 10% on its investment, if its investment did not generate a return of 30% per year. SAM alleges that it did not receive a 30% per year return on its investment in CVH, and did not receive its 10% return.

Defendants argue that the claim is derivative and that it is barred by the integration clause in the Operating Agreement and its First Amendment. Additionally, defendants argue that even if I consider the Promoter Agreement, that SAM has not made out its claim. Further, defendants argue that the claim is barred by the Release.

In opposition, SAM argues that the claim is direct, as it seeks damages for breach of a contract to which SAM is a party. Further, SAM argues that the integration clause does not bar this claim as "the Operating Agreement and the Promoter Agreement are distinct agreements with different obligors and parties on separate subject matters." According to SAM, pursuant to the Operating Agreement, CVH, but not Abrams, must

pay SAM—and similarly situated shareholders—a preferred return should dissolution occur; however, pursuant to the Promoter Agreement, Abrams, but not CVH, must pay SAM alone a preferred return no matter the form of the transaction. Moreover, SAM also argues that Abrams's conduct contradicts his argument that the integration clause bars the Promoter Agreement. Finally, SAM argues that the integration clause lacks the specificity to halt his claim at this stage.

First, I find that this claim is direct, not derivative. As set forth above, the Delaware Courts did not intend to subject commercial contract actions to a derivative suit requirement (*NAF Holdings, LLC*, 118 A3d at 179, 181). SAM contends that the terms of the contract promised SAM the benefit of a preferred return to be paid by Abrams, and that Abrams breached the contract. Thus, the claim is grounded in the alleged breach of a commercial contract, resulting in individual damages to SAM.

"Absent fraud or other unconscionable circumstances . . . , the existence of an integration clause between sophisticated parties is conclusive evidence that the parties intended the written contract to be their complete agreement" (*Progressive Intl Corp. v E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, *7, 2002 Del Ch LEXIS 91, *25 [Del Ch 2002] [internal footnote omitted]). "However, the power of the merger clause does not extend to antecedent contracts or events which are beyond the scope of the contract encompassing the clause" (*One Beacon America Ins. Co. v. Comsec Ventures Intern., Inc.*, 2010 WL 114819, *4, 2010 US Dist LEXIS 1193, *13 [ND NY 2010]; *cf*

ESG Capital Partners II, LP v Passport Special Opportunities Master Fund, LP, 2015 WL 9060982, *11, 2015 Del Ch LEXIS 302, *34-35 [Del Ch 2015] [finding that subsequent subscription agreement, containing an integration clause, superseded the terms of a side letter, which "relat[ed] to the subject matter of the Subscription Agreement"]).

In its opposition, SAM argues that the integration clause does not prohibit its Promoter Agreement claim. It argues that "[t]he law is clear that when a promoter of corporate stock – such as Abrams – states that the stock will pay a certain amount, that is an '*independent agreement* by the promoter[]' that is independently enforceable" (pl's mem at 19 quoting 17 Williston on Contracts § 51:24 [4th ed]). However, paragraph seven does not contain a promise where Abrams, individually, promises any return. That paragraph states that "the minimum IRR Shortfall agreement will not be construed to cap the returns of the preferred investor," and then further states that "[t]he shortfall agreement provides for the common shareholders to supplement the annual return of the preferred investor by 10%/year should the preferred investor generate a return below 30%/year on average" (*cf. Crook v Scott*, 65 AD 139, 142 [1st Dept 1901] [finding that defendants, "'jointly and severally,'" promised to pay plaintiff dividend on stock] affd 174 NY 520). Moreover, even if I found that the Promoter Agreement was not barred by the integration clause, I would still find that the claim was non-cognizable for similar reasons—namely, in paragraph seven there is no individual promise by Abrams to support a breach of contract claim. Accordingly, the second cause of action is dismissed.

c. The Third Cause of Action: Breach of the Operating Agreement, Section 14.4

SAM alleges that Section 14.4 does not apply because that section only applies to a sale of interests and where the transaction occurs with an unaffiliated entity; because it requested a fairness opinion, but one was not provided; and because the section would have required Preferred members to take on liabilities in the transaction, but Section 14.4(b) indicates that such members would not need to do so. Moreover, SAM alleges that even if Section 14.4 applied, Abrams nonetheless breached the provision. SAM alleges that Abrams breached Section14.4 in that this provision requires pro rata distributions of the sale proceeds among each of the members, because "it is clear that Abrams was simply negotiating individual terms with each of the Preferred Investors that bore no relation to their respective shares of the Wendel Transaction proceeds under Section 14.4." Additionally, SAM alleges that the Trust received better terms than the Preferred investors due to the Pre-Closing Restructuring. SAM alleges that absent Abrams's actions, its pro rata share would be more than $47 million.

In their motion papers, defendants argue that this claim is derivative in nature and, as a result should be dismissed. With respect to Section 14.4, defendants argue "that the sale of the ***interests*** of the Class A Common holders needs to be to an unaffiliated third party," and Wendel is undoubtedly unaffiliated. Further, defendants argue that the non-Class A members never requested a written opinion, as they were required to do under Section 14.4. Defendants further argue that, based upon the purchase price, SAM

received more than its pro rata distribution, and if the Preferred members each received more than their pro rata share, this does not violate Section 14.4. Moreover, with respect to the Preferred members receiving compensation on the same terms and conditions as the Class A members, defendants argue that even if SAM's allegations are true, the Trust and not Abrams was a Class A Common member.

Because SAM seeks damages for breach of a commercial contract, resulting in an injury to itself, the alleged failure to receive its proper pro rata share, which is distinct from an injury to CVH, it is a direct claim (*see NAF*, 118 A3d at 179, 181).

Here, by its terms, Section 14.4 applies to the Class A Common member's sale of interests, and therefore the section is not inapplicable because assets were transferred to Abrams during the Pre-Closing Restructuring; the interests went to Wendel, who is unaffiliated. However, Section 14.4 does not apply because a condition precedent was not met. Section 14.4 states that a fairness opinion would be made available "at the option of the Class B Common Members and the Preferred Members," and SAM alleges that it requested a fairness opinion and was not granted one. The provision does not state that both the Class B Common members and the Preferred members must jointly exercise that option in order to receive the opinion. Because I find Section 14.4 inapplicable, SAM's claim for breach of Section 14.4 of the Operating Agreement is dismissed.

Even if I found that Section 14.4 applied, I would still dismiss this claim. Putting to the side the Pre-Closing Restructuring, SAM does not allege that it did not receive its pro rata share; it only alleges that other investors, such as Smart Plastics received more.

However, Section 14.4 is not violated because other investors may have received more than their pro rata share. Additionally, SAM does not point to any other provision of the Operating Agreement stating that members could not receive more than their pro rata share. Finally, Section 14.4 was not breached because Abrams allegedly received assets due to the Pre-Closing Restructuring. Section 14.4 requires Class B Common members and Preferred members to sell their stock "on the same terms and conditions as the Class A Common Members." Here, the Class A Common member was the Trust, but the assets were transferred to Abrams as part of the Pre-Closing Restructuring.

d. The Fourth Cause of Action: Breach of Members Agreement, Section 1.2 (j)

In this cause of action, SAM alleges a breach of the Members Agreement §§ 1.2 (j) and 1.4 (b). The Members Agreement constitutes an agreement between Abrams, SAM, and the other shareholders.

SAM alleges that Abrams breached the Members Agreement by cancelling the SiO2 Option and transferring SiO2, CMD, a $43 million note, life insurance policies, and patents in connection with the transaction, without obtaining the necessary consent. As for the transfer of SiO2, SAM alleges that the consent Abrams received was defective. This is so, according to SAM, because the Preferred investors' consent was uninformed, as Abrams undervalued SiO2. Further, SAM alleges that Abrams did not disclose the extent of self-dealing, and that there are other infirmities related to the consents received.

In support of the motion, defendants argue that this claim fails because: (1) it is a derivative claim; and (2) the cancellation of the SiO2 Option and PSA transfers were approved by a supermajority of disinterested members, which goes above and beyond Section 1.2 (j)'s consent requirement.

I find that because this claim sets forth an injury that is first and foremost an injury to CVH, it is a derivative claim. In this claim, SAM alleges that a proper vote was not held for actions taken by Abrams concerning the transaction. The claim that corporate formalities were not respected is a claim where the primary injury is suffered by the corporation, and any injuries to SAM are secondary to that harm (*see Tooley*, 845 A2d at 1039 ["a court should look to the nature of the wrong and to whom the relief should go"]). As SAM does not have standing to bring this derivative claim (*see Kramer*, 546 A2d at 354), I dismiss this cause of action.

e. The Fifth Cause of Action: Breach of Fiduciary Duty

SAM alleges that Abrams breached his fiduciary duties as Manager pursuant to Section 7.10 (a) of the Operating Agreement and that the Trust breached its fiduciary duties under Delaware law as the controlling member of CVH. Specifically, SAM alleges that Abrams and the Trust structured the transaction to allow Abrams to appropriate CVH's assets. SAM alleges that "[b]ecause the breaches of fiduciary duty relate to Defendants' conduct in connection with the structuring and execution of the Wendel Transaction, SAM's claims are direct under applicable law." As a result of Abrams's and

the Trust's actions, SAM alleges that it did not receive its preferred return or its proper pro rata share of the transaction and has incurred expenses through litigation.

In addition to arguing that this claim is derivative and that it is prohibited by the Release, defendants argue that this claim should be dismissed on the grounds that Abrams was not a member of CVH, and instead the Trust was a member. Further, defendants argue that, as Manager, Abrams could not have authorized the transaction without the members' approval. Moreover, according to defendants, "even if SiO2 were included in the calculation of CVH's value . . . SAM's *pro rata* share would not have been greater because SiO2 afforded no additional value to CVH. SiO2 was a highly leveraged developing company."

The fifth cause of action for breach of fiduciary duty attacks the terms of the transaction between CVH and Wendel, and the consequence of that transaction upon SAM. SAM alleges that it was the Trust, in the role of majority shareholder, and Abrams, in his role as Manager, who led CVH into this transaction. According to SAM, its alleged injuries are linked to the terms of the transaction as they were planned and structured. These claims are direct (*see Parnes*, 722 A3d at 1245; *cf Kramer*, 546 A2d at 352-354). Additionally, this cause of action is not prohibited by the Release, because the Release does not apply to "any Potential Claims arising out of or relating to the (1) payment of the Purchase Price in accordance with the terms and conditions of this Agreement, or the rights of the Sellers under the Transaction Documents."

Under Delaware law, a cause of action for breach of fiduciary duty requires evidence of (1) the existence of a fiduciary duty, and (2) breach of the fiduciary duty by the defendant (*Beard Research, Inc. v Kates*, 8 A3d 573, 601 [Del Ch 2010] affd sub nom *Asdi, Inc. v Beard Research, Inc.*, 11 A3d 749 [Del 2010]). "[U]nless the operating agreement provides otherwise, a manager of a Delaware LLC owes fiduciary duties to both the LLC and its members" (*Schroder v Pinterest Inc.*, 133 AD3d 12, 22 [1st Dept 2015] [applying Delaware law to cause of action]). "Under Delaware law a shareholder owes a fiduciary duty [to other shareholders] only if it owns a majority interest in or exercises control over the business affairs of the corporation" (*Ivanhoe Partners v Newmont Min. Corp.*, 535 A2d 1334, 1344 [Del 1987]).

> As to the second element, fiduciaries may not use their positions of trust and confidence to further their private interests. The core of the fiduciary duty is the notion of loyalty, and a fiduciary must always act in a good faith effort to advance the interests of those to whom the duty is owed

(*Schroeder*, 133 AD3d at 22 [internal citation omitted] [applying Delaware law to fiduciary duty claim]).

Here, SAM alleges breach of fiduciary duty by the defendants for structuring the transaction to deprive the Preferred investors of the preferred return, while permitting Abrams to take substantial CVH assets for himself. Further, SAM alleges that "Abrams misrepresented and/or concealed numerous material facts from the Preferred Investors in order to effect his and the Trust's scheme." These facts include SiO2's value, payment to other Preferred shareholders, and the extent of assets Abrams allegedly took for himself.

The Trust's authority as majority shareholder and Abrams's authority as Manager are limited by fiduciary obligations. These facts are sufficient to state a direct claim for breach of fiduciary duty, and dismissal of this claim is denied.

f. The Sixth Cause of Action: Breach of the Make Good Agreement

Under the sixth cause of action, SAM alleges that Abrams breached the Make Good Agreement, by failing to grant SAM an additional number of Class C Preferred shares equal to half the number of additional shares granted by CVH to Smart Plastics. SAM alleges that Abrams breached the Make Good Agreement when additional Class C Preferred shares were issued to Smart Plastics "at about the time of the Wendel Transaction," but did not issue shares to SAM, which would have increased SAM's ownership interest in CVH.

Defendants seek to dismiss this claim on the grounds that it is barred by the First Amendment's integration clause, signed subsequent to the Make Good Agreement, and by the applicable statute of limitations, and on the ground that the claim is derivative. Defendants also argue that this claim is based upon speculation, because SAM previously alleged that Smart Plastics received a note, and not shares, which would not constitute a breach of the Make Good Agreement.

In opposition, SAM argues that the claim is timely and that it is not barred by the integration clause in the Operating Agreement. SAM also contends that its allegations and an inference flowing from these allegations are sufficient to state a claim. In its complaint, SAM alleges "upon information and belief, including in reliance upon the size

of the payments made to Smart Plastics in connection with the Wendel Transaction, such additional shares were paid to Smart Plastics at or about the time of the Wendel Transaction." SAM alleges that Smart Plastics agreed to the transaction upon payment of "an additional $5.3 million through an undisclosed note."

Here, SAM's inference that the extra monies paid to Smart Plastics at the time of the transaction must mean that Abrams issued additional shares to Smart Plastics, triggering a contractual duty to SAM, is based on speculation. There are no facts pled to support this conclusory allegation. Therefore, I dismiss this claim.

II. Abrams' Motion to Dismiss SAM's Counterclaims

Abrams moves to dismiss SAM's two counterclaims, which sound in fraud, and fraudulent inducement under the Retained Claims Agreement. Abrams first argues that both counterclaims amount to improper claim splitting. Abrams contends that the counterclaims are based on the same transactions, facts, and occurrences as those set forth in SAM's complaint and, therefore, must be dismissed on the grounds that "'[a] party is required to bring all of its claims arising out of a transaction in a single complaint' and may not split them into separate suits" (pl's mem at 7 quoting *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 436 [2007]).

Here, SAM commenced an action alleging breach of contract and breach of fiduciary duty arising from the transaction. SAM subsequently alleged two counterclaims for fraud and fraudulent inducement against Abrams, also arising out of the same transaction, in Abrams's and the Trust's suit against it. As all claims were brought before

this court, arise out of the same transaction, and involve the same parties, there is no question that SAM, upon discovery of the alleged grounds for its fraud claim, could have sought permission to amend its complaint in the companion action, rather than interposing the counterclaims. The two cases, however, have been consolidated for litigation. Accordingly, I see no reason to dismiss the fraud claims on this ground just to require SAM to amend the complaint and plead the fraud claims therein. Additionally, I decline to award Abrams sanctions and attorneys' fees in conjunction with SAM bringing its counterclaims in this action rather than amending its complaint, as I do not find this conduct frivolous under the circumstances.

a. SAM's First Counterclaim: Fraud

In this counterclaim, SAM alleges that, based upon Abrams's misrepresentations, SAM did not choose the True-Up Option set forth in the Retained Claims Agreement. The True-Up Option states that

> [i]f any of the other preferred or common members of [CVH] receive more favorable terms than SAM with respect to the Sale Transaction, then SAM shall be entitled to receive the same as such preferred or common member on the same terms and conditions as such member on a per membership interest basis, so long as SAM makes such election prior to the Deadline.

The Retained Claims Agreement requires Abrams, within two months of closing, to provide SAM with details "regarding all the final terms of the Sale Transaction, including the disposition of SiO2, the allocation of proceeds of the Sale Transaction and the valuation of SiO2." SAM then had 30 days from receipt of the information to state if it would exercise the True-Up Option.

Abrams argues that SAM's first counterclaim should be dismissed because SAM does not allege that Abrams made a false statement, and SAM is unable to allege this claim with the requisite particularity. Abrams argues that SAM offers only two purported false statements as examples. First, SAM alleges that, in the Seller Payoff Schedule, Abrams misrepresented the amount of proceeds from the transaction he paid to Smart Plastics. As to Smart Plastics, Abrams argues that "[w]hether or not Abrams personally conveyed a side note to [that investor] would not – and could not – affect the truth or falsity of CVH's Payoff Schedule." The second example SAM offers to support this counterclaim is that "[Abrams] intentionally concealed from SAM the fact that he was paying other investors the very Preferred Return he refused to pay to SAM." SAM names only one investor, Peachtree, that allegedly received a preferred return on top of its pro rata share. Abrams additionally argues that "even if Peachtree's distribution payment encompassed an amount equivalent to its Preferred Return, SAM never alleges that CVH, through Abrams, agreed to calculate Peachtree's distribution in that manner." Further, Abrams argues that SAM's claims are speculative, and should, therefore, be dismissed.

In opposition to Abrams's motion, SAM argues that "[t]here is no difference between money that came from the sale proceeds and money that came from Abrams personally. . . . Abrams, as the manager of CVH, was responsible for distributing the $360 million (minus debt) received from Wendel to the Preferred Investors." SAM argues that the heart of its fraud claim is Abrams concealing the payment of extra monies to Smart

Plastics and Peachtree around the same time as the transaction. SAM also argues that it has properly pleaded damages, including litigation costs and punitive damages.

> Common law fraud in Delaware requires: 1) the existence of a false representation, usually one of fact, made by the defendant; 2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) the defendant had the intent to induce the plaintiff to act or refrain from acting; 4) the plaintiff acted or did not act in justifiable reliance on the representation; and 5) the plaintiff suffered damages as a result of such reliance

(*H-M Wexford LLC v Encorp, Inc.*, 832 A2d 129, 144 [Del Ch 2003]). "[F]raud need not take the form of an overt misrepresentation; it also may occur through concealment of material facts, or by silence when there is a duty to speak" (*Vichi v Koninklijke Philips Electronics, N.V.*, 85 A3d 725, 809 [Del Ch 2014]).

"Seller Payoff Schedule" is defined in the Purchase Agreement as "the schedule attached to this Agreement setting forth the amounts necessary to pay in full the portion of the Purchase Price attributable to the sale of the Interests by the Sellers other than the Trust, together with the wire instructions for each Seller." By definition, the Seller Payoff Schedule displayed amounts paid by Wendel for the sellers' interests, not the total amount of compensation a shareholder may have received, such as additional amounts paid by Abrams individually. SAM does not allege that the amounts in the Seller Payoff Schedule misrepresent amounts that Wendel paid for the sellers' interests. Thus, SAM's claim that the Payoff Schedule misrepresented the amount paid to Smart Plastics because Smart Plastics received an additional amount through a side note with Abrams, as SAM

concedes in its complaint in 650773/15, is dismissed for failure to state a misrepresentation (*see H-M Wexford*, 832 A2d at 144).

In opposition to Abrams's motion, SAM argues that the Seller Payoff Schedule similarly contains a misrepresentation because it did not show that Peachtree received a $3 million side note from Abrams. This contention, however, is not alleged in SAM's pleading, and, even if it were, it would be dismissed for the same reason that its allegation regarding Smart Plastics' side note fails.

SAM additionally argues that "the point is *not* whether the Seller Payoff Schedule accurately represented the *amount* that Peachtree received on the Wendel Transaction. Rather, SAM's claim with respect to Peachtree is based on the fact that Abrams misrepresented the *nature* of the payment" (def's mem at 14). SAM's argument that "Delaware law recognizes fraud claims based on a party's '*failure to state additional or qualifying matter*'" fails to fully encapsulate that statement of law (*id.* quoting *Corp. Prop. Assoc. 14 Inc. v CHR Holding Corp.*, 2008 WL 963048, *6, 2008 Del Ch LEXIS 45, *24 [Del Ch 2008]). The entire quotation from the case SAM cites reads, "[i]n other words, once a party chooses to speak, he can be held liable if he makes '[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter'" (*Corp. Prop. Assoc.*, 2008 WL 963048 at *6, 2008 Del Ch LEXIS 45 at *24 [citation omitted]). However, SAM does not allege that Abrams made any statements regarding the preferred

return.[7] Failing to proffer another argument for Abrams's liability under this cause of action, the claim for fraud is dismissed (*see H-M Wexford*, 832 A2d at 144).

b. SAM's Second Counterclaim: Fraudulent Inducement

In the second counterclaim, SAM alleges that Abrams misrepresented "personal benefits paid, received or transferred to Abrams and his affiliates" by classifying them as "CVH operating expenses (rather than compensation to Abrams) in CVH's financial statements and omitting other such payments." SAM alleges that "[i]n 2013 alone, CVH paid $3.2 million for Abrams' life insurance with substantial cash value; $1.8 million in airplane and other travel expenses for Abrams, $198,000 for his California rent, and $50,400 for his New York City rent." SAM alleges that Abrams concealed this self dealing over the years, and that had SAM known of Abrams's self-dealing, it would not have entered into the Retained Claims Agreement. SAM further alleges, "[u]pon information and belief, as a result of Abrams' undisclosed self-dealing, CVH was forced to carry significantly more debt than necessary, and at a very high interest rate, which artificially depressed the amount SAM should have otherwise received in the Wendel Transaction by millions of dollars."

Abrams argues that this claim should be dismissed on the grounds that: (1) it is barred by the Release; (2) it is a derivative claim for which SAM has no standing; and (3) SAM fails to plead the elements of this claim.

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[7] To the extent SAM argues in its opposition that Abrams falsely stated that no shareholders were receiving a preferred return in connection with the transaction, this contention is not in SAM's pleading, and will not be reviewed here.

In opposition, SAM argues that the claim is direct, that it has adequately pleaded its fraudulent inducement claim, and that the claim is not barred by the Release.

To state a cause of action for fraudulent inducement, a plaintiff must allege,

> (1) a false representation of material fact; (2) the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; (3) the defendant's intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damages to the plaintiff as a result of such reliance

(*CSH Theatres, LLC v Nederlander of San Fransisco Assoc.*, 2015 WL 1839684, *21, 2015 Del Ch LEXIS 115, *68-69 [Del Ch 2015] [citation omitted]). Additionally, fraud claims are subject to CPLR 3016 (b)'s pleading standards.8

Here, there is no objective connection between Abrams's alleged self-dealing and the Retained Claims Agreement. SAM attempts to create a connection to support this claim by alleging that if it had knowledge of Abrams's alleged falsifying of company records, it would not have entered into the agreement. However, SAM has offered no facts that Abrams concealed his own self-dealing with the intent to induce SAM to enter into the Retained Claims Agreement. Further, this claim is not pled with the requisite particularity. Although SAM generally alleges that Abrams engaged in self-dealing, and therefore misrepresented CVH's operating expenses in financial statements, SAM offers no specific examples of those statements.

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[8] Although the parties agree that Delaware law applies to the substantive claims, SAM is correct in stating that the CPLR applies to the appropriate pleading standards (*see Shareholder Representative Services LLC v Sandoz Inc.*, 2015 WL 1209358, *5, 2015 NY Misc LEXIS 740, *14 [Sup Ct, NY County 2015] ["The pleading requirements of CPLR 3016(b) are a matter of procedure governed by the law of the forum."].

Moreover, this claim of generalized self-dealing by Abrams, which is not an attack upon the transaction, entails harm first and foremost to CVH, and, therefore, by its nature, is a derivative claim (*see Tooley*, 845 A2d at 1039). Because SAM does not have standing to bring this derivative claim (*see Kramer*, 546 A2d at 354), and because the allegations fail to state a claim pursuant to CPLR 3211 (a) (7), the court dismisses this counterclaim.

Having dismissed both of SAM's counterclaims, I decline to analyze its request for punitive damages.

In accordance with the foregoing, it is

ORDERED that the court grants defendants' Robert S. Abrams and Robert S. Abrams Living Trust's motion to dismiss, under Index No.: 650773/15 (mot. seq. 003) to the extent that the Court dismisses the second, third, fourth, and sixth causes of action, as set forth in plaintiff Southern Advanced Materials, LLC's Second Amended Complaint, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the Second Amended Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the court grants plaintiff Robert S. Abrams and Robert S. Abrams Living Trust's motion to dismiss Southern Advanced Materials, LLC's counterclaims, under index No. 650795/15 (mot. seq. 003) to the extend of dismissing Southern Advanced Materials, LLC's counterclaims, and the motion is otherwise denied; and it is further

ORDERED that the parties appear for a status conference in Room 208, 60 Centre Street, on November 30, 2016 at 2:15 p.m.

Dated: New York, New York

September 29, 2016

ENTER:

HON. SALIANN SCARPULLA

J.S.C.