IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BEYOND RISK TOPCO HOLDINGS, L.P., et al.,	)	
Plaintiffs/Counterclaim Defendants,	)	C.A. No.: N24C-01-221-EMD CCLD
v.	)	
NORMAN CHANDLER, et al.,	)	
Defendants/Counterclaim Plaintiffs,	)	
v.	)	
ATLANTIS GROUP, LLC,	)	
Defendant.	)	

Submitted: June 3, 2024
Decided: September 24, 2024
Redacted: October 2, 2024[1]

Upon Defendant Law's Motion to Dismiss Count III
GRANTED

Upon Plaintiffs' Motion to Dismiss the Counterclaims
***DENIED** as to Counterclaim I and Counterclaim IV*

Upon Plaintiffs' Motion to Dismiss the Counterclaims
***GRANTED** as to Counterclaim II and Counterclaim III*

Raymond J. DiCamillo, Esquire, Kevin M. Gallagher, Esquire, Nicholas F. Mastria, Esquire, Richards, Layton & Finger, P.A., Wilmington Delaware, Marshall R. King, Esquire, Andrei F. Malikov, Gibson, Dunn & Crutcher LLP, New York, New York. *Attorneys for Plaintiffs and Counterclaim Defendants Beyond Risk Topco Holdings L.P. and BR Intermediate Holdings, LLC.*

[1] The Court granted the Application Pursuant to Superior Court Rule 5(g)(4) for Further Confidential Treatment of Portions of the Court's Opinion on the Motion to Dismiss on October 2, 2024. (D.I. No. 90).

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DAVIS, J.

I. INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court, stemming from a dispute over the 2021 acquisition (the "Acquisition") of non-parties Arsenal Insurance Management, LLC ("AIM") and Arsenal Health, LLC ("Arsenal Health" and, together with AIC, "Arsenal") by Plaintiffs Beyond Risk Topco Holdings, LP ("Topco") and BR Intermediate Holdings, LLC ("BR Intermediate" or "Purchaser" and, together with Topco, "Beyond Risk," "Plaintiffs," or "Counterclaim-Defendants").

Plaintiffs originally initiated this civil action in the Court of Chancery.[2] Plaintiffs filed their Complaint on January 26, 2023.[3] The Complaint alleges breach of contract and fraud claims against Defendants Norman Chandler ("Chandler") and Lansera, Inc. ("Lansera" and, together with Mr. Chandler, "Sellers" or "Counterclaim-Plaintiffs"), and aiding and abetting fraud against Defendants Justin Law and Atlantis Group, LLC ("Atlantis").[4]

Mr. Law filed a Motion to Dismiss for lack of personal jurisdiction and failure to state a claim on March 22, 2023 (the "Law Motion").[5] Plaintiffs oppose the Law Motion.[6]

On June 20, 2023, Sellers filed their Amended Answer and Counterclaims. The Counterclaims allege breach of contract against BR Intermediate, and breach of the implied

[2] The Parties rely on their briefs as filed in the Court of Chancery. Therefore, the Parties discuss that Court's rules of civil procedure, and references to "this Court" necessarily indicate Chancery caselaw.
[3] Hereinafter "Compl." (D.I. No. 1). Docket numbers herein refer to the Superior Court docket, on which the Parties re-filed their briefs after the case was transferred.
[4] *Id.*
[5] Hereinafter "Law MTD" (D.I. No. 37).
[6] Hereinafter "Opp'n Law MTD" (D.I. No. 22).

covenant of good faith and fair dealing, fraud, and tortious interference with contract against all Plaintiffs.[7] Atlantis also filed the Amended Answer on that date.[8]

On August 4, 2023, Plaintiffs filed a Motion to Dismiss the Amended Counterclaims (the "Counterclaim Motion") against Sellers.[9] Sellers oppose the Counterclaim Motion.[10]

The Court of Chancery held a hearing on the Law Motion and the Counterclaim Motion on October 20, 2023.[11] Without hearing argument on the Motions, the Court expressed that it did not believe it had jurisdiction over the claims.[12] The Parties subsequently stipulated to transfer the action to this Court.[13] The Court of Chancery granted the transfer on January 18, 2024.[14]

Presently before the Court are the Law Motion and the Counterclaim Motion. The Court held a hearing on the motions on June 3, 2024. At the conclusion of the hearing, the Court took the matters under advisement.

For the reasons set forth below, the Court (i) **GRANTS** the Law Motion as to Count III; (ii) **DENIES** Plaintiffs' Motion to Dismiss the Counterclaims as to Count I and Count IV; (iii) and **GRANTS** Plaintiffs' Motion to Dismiss the Counterclaims as to Count II and Count III.

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[7] Hereinafter "Answer" or "CC." (D.I. No. 17).
[8] Atlantis is not a party to the Counterclaims. (*See, e.g.*, Law. Mot. at 1 n.2).
[9] Hereinafter "MTD CC" (D.I. No. 24).
[10] Hereinafter "Opp'n MTD CC" (D.I. No. 26).
[11] *See Letter to the Honorable Eric M. Davis from Kevin M. Gallagher Requesting a Motion to Dismiss Hearing Regarding Recently-Transferred Action* (hereinafter "Transfer Letter") (D.I. No. 3). The Court of Chancery also addressed a separate advancement action for which Defendants sought judgment on the pleadings. That action remains pending in the Court of Chancery (C.A. No. 2023-0248-MTZ) (*see Letter to The Honorable Morgan T. Zurn, dated November 10, 2023, from Kevin M. Gallagher (#5337) regarding transfer to Superior Court* (Chancery D.I. No. 83) (Transaction 71377157).
[12] *See* Transfer Letter.
[13] *Id.*
[14] *Id.*

II. RELEVANT FACTS

A. THE PARTIES AND RELEVANT NON-PARTIES

1. Plaintiffs

Topco is a Delaware limited partnership with its principal place of business in Arizona.[15] Topco is the ultimate parent of BR Intermediate.[16] BR Intermediate is a Delaware limited liability company with its principal place of business in Arizona.[17] It is a wholly owned subsidiary of Topco. Together, "Beyond Risk is an alternative risk insurance services company, which owns and oversees the operations of several companies that focus on helping small and medium-sized businesses manage exposures and reduce the total cost of managing risk."[18]

2. Defendants

Mr. Chandler is a citizen of Alabama.[19] Mr. Chandler was a founder of non-party Arsenal and was its former Chief Executive Officer.[20] Prior to the acquisition of Arsenal by Beyond Risk, Mr. Chandler was the sole owner of AIM and Arsenal Health.[21] Mr. Chandler serves as director, president, secretary, and treasurer of Atlantis.[22]

Lansera is an Alabama corporation with its principal place of business in Alabama.[23] Lansera was formed by Mr. Chandler "in order to facilitate tax reorganization required by Beyond Risk to complete the" sale of Arsenal to Beyond Risk.[24] When the Acquisition closed, Mr. Chandler was the sole stockholder and president of Lansera.[25]

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[15] Compl. ¶ 10.
[16] *Id.*
[17] *Id.* ¶ 11.
[18] MTD CC at 5.
[19] CC ¶ 9.
[20] *Id.*
[21] *Id.*
[22] Compl. ¶ 12.
[23] CC ¶ 10.
[24] *Id.*
[25] Compl. ¶ 13.

Atlantis is an Alabama limited liability company with its principal place of business in Alabama.[26] Mr. Law hold 66.66% of the units in Atlantis.[27] Lansera holds a 33.33% interest in Atlantis.[28] Mr. Chandler formed Atlantis as a "vehicle to receive the Rollover Equity Interests and ensure that Law benefited from the sale of Arsenal."[29] Mr. Chandler serves as Atlantis's director, president, secretary, and treasurer.[30]

Mr. Law is the former Chief Operating Officer of Arsenal.[31] He is a citizen of Alabama.[32]

3. Non-Parties

Mr. Chandler founded AIM in 2006 "to manage captive insurance companies, risk retention groups, and other alternative insurance entities.[33] In 2019, Mr. Chandler and two partners formed Arsenal Health to administer self-funded medical plans. Arsenal offered its services through brokers under the d/b/a "Iron ReHealth" ("Iron Re").[34] Mr. Chandler claims that "as of December 2021, no other program like it existed in the United States."[35]

Arsenal's revenue derived primarily from fees or commissions for "(a) administering self-funded health benefit plans set up on behalf of plan sponsors (i.e., employers), (b) captive management services, (c) underwriting stop-loss policies on behalf of Iron Re, and (d) placing reinsurance to backstop Iron Re's risk."[36]

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[26] *Id*. ¶ 14.
[27] *Id*. ¶ 2; Answer ¶ 2.
[28] *Id*. ¶ 13.
[29] *Id*. ¶ 148; Answer ¶ 148 ("Defendants admit Chandler created Atlantis as a vehicle to receive the Rollover Equity Interests and enable Law potentially to benefit from Arsenal's sale.").
[30] *Id*. ¶¶ 2, 12.
[31] *Id*. ¶ 15.
[32] Law MTD at 1.
[33] CC ¶ 17.
[34] *Id*. ¶ 19.
[35] *Id*.
[36] *Id*. ¶ 23.

B. THE ACQUISITION AND AGREEMENTS

The self-funded medical plans Arsenal administered were funded through contributions from plan sponsors on behalf of plan participants (the sponsor's employees and their families).[37] Plans were responsible for paying participants claims up to an annual threshold (typically $10,000 per participant for the plans managed by Arsenal), and plan sponsors contracted for stop-loss insurance coverage to address claims in excess of that per-participant threshold.[38] Arsenal's clients' stop-loss provider was Iron Re (also managed by Arsenal).[39]

Sponsors of self-funded plans are exposed not only to the risk of unexpectedly high per-participant claims (mitigated through the per-participant stop-loss coverage), but also unexpectedly high aggregate volume or value of claims on a plan-wide basis, impacting the self-funded layer.[40] This risk can be mitigated through "level-funding"— "self-funded options that package together a self-funded plan with extensive stop-loss coverage that significantly reduces the risk retained by the employer."[41]

Beyond Risk alleges that Arsenal misled potential clients and renewing existing clients to believe Arsenal was administering level-funded health plans.[42] Beyond Risk claims to have been unaware of this when its management was introduced to Mr. Chandler and Mr. Law in June 2021 and "began discussing and gaining a better understanding of Arsenal with an eye toward a potential acquisition."[43] Blake Wakefield, Beyond Risk's Chief Executive Officer and

[37] MTD CC at 6 (citing CC ¶ 23).
[38] *Id*. (citing CC ¶ 20).
[39] *Id*.
[40] Opp'n Law MTD at 5-6 (citing Compl. ¶¶ 25-26).
[41] *Id*.
[42] *Id*.
[43] Compl. ¶ 20.

a member of Topco's board, and Andrew Behrends, Beyond Risk's Chief Financial Officer, primarily represented Beyond Risk in these discussions.[44]

Beyond Risk contends that Arsenals' "undisclosed false marketing practice caused Arsenal's clients to expect that no additional funding or payments would be required beyond their monthly contributions . . ." which "left Arsenal essentially unable to recoup any expenses on Iron Re's behalf, without running the risk of jeopardizing client and broker relationships and losing business."[45]

Beyond Risk claims that Mr. Law and Mr. Chandler knew of and communicated about the accumulating deficit in Arsenal's client health plans, "which had reached $7.8 million in May 2021" and that "by the time Beyond Risk's due diligence was underway, Law and Chandler knew that Arsenal's mismanagement and defective underwriting of client plans had consistently resulted in higher claims and expenses than contributions in the aggregate. They chose to cover up this fact from Beyond Risk."[46] Beyond Risk maintains that this practice continued throughout the pre-Acquisition period, with Mr. Chandler and Mr. Law "affirmatively concealing and misrepresenting material facts to induce Beyond Risk to close the transaction."[47]

Defendants counter, contending that, during the negotiations period, "Wakefield and Behrends made numerous representations and promises to Chandler to induce him to agree to Beyond Risk's acquisition—many of which were false.[48] At a July 20, 2021, meeting, Defendants assert that:

> Chandler and Law inquired about Beyond Risk's post-acquisition plans for Arsenal. Chandler and Law laid out certain conditions for how Arsenal must operate after the acquisition, which were non-negotiable. Those conditions

[44] CC ¶ 29.
[45] Compl. ¶ 56.
[46] *Id*. ¶ 74.
[47] Opp'n Law MTD at 7 (citing Compl. ¶¶ 38, 45).
[48] CC ¶ 30.

> included: (1) not outsourcing Arsenal's internal functions, and instead growing them internally as the business grew; (2) not replacing Iron Re as Arsenal's business grew, and instead growing Iron Re along with Arsenal; and (3) soliciting and taking seriously Chandler's input on Beyond Risk and Arsenal. Wakefield and Behrends agreed to each of the conditions.[49]

Defendants claim that Mr. Chandler later sought and received additional assurances from Mr. Wakefield and Mr. Behrends that "no changes would be made to Arsenal's operations without Chandler's agreement."[50]

Beyond Risk tendered an initial term sheet on August 20, 2021, and a final term sheet on September 22, 2021.[51] Ultimately, the consideration proposed "remained largely unchanged" in the final agreement: "cash and equity at closing, and an uncapped earn-out payment of at least $9.9 million."[52] Defendants allege that:

> Under the final term sheet, the earn-out would be triggered if Arsenal's 2023 EBITDA met or exceeded $5 million, a moderate increase over 2021 EBITDA of $4.3 million. In discussing the term sheet, Behrends told Chandler Beyond Risk wanted to set a low earn-out threshold so Sellers would "buy in" to Beyond Risk's growth plans. The support Wakefield and Behrends committed to Arsenal's growth, and their representations of Beyond Risk's imminent meteoric rise, gave Sellers comfort that the earn-out was a virtual certainty.[53]

Defendants state that Mr. Chandler was "persuaded" by these "representations and promises" and executed the final term sheet on September 24, 2021, after which the parties proceeded with due diligence.[54]

1. The UPA

The Acquisition closed on December 23, 2021, at which time the parties executed the Unit Purchase Agreement ("UPA" or "Purchase Agreement").[55] The parties to the UPA are

[49] *Id.* ¶ 31.
[50] *Id.* ¶ 36.
[51] *Id.* ¶ 37.
[52] *Id.*
[53] *Id.* ¶ 38.
[54] *Id.* ¶ 39.
[55] Hereinafter "UPA" (D.I. No. 1, Ex. 1).

Topco, BR Intermediate, AIM, Lansera, Arsenal Health, Mr. Chandler and a "Seller Representative." The total purchase price was $43 million, comprised of cash consideration and Topco equity.[56]

Pursuant to the UPA, the Acquisition was structured as follows, "as explained in the Recitals to the UPA and the supporting agreements referenced therein:"[57]

> (a) As a preliminary matter, Chandler formed Defendant Lansera and contributed 100% of AIM's shares to Lansera. Chandler also formed Atlantis, with 66.66% of its units owned by Law and 33.33% owned by Lansera.
>
> (b) Lansera contributed a portion of its ownership interests in AIM to Topco, which in turn contributed those interests to its subsidiary and ultimately to Plaintiff BR Intermediate Holdings. In exchange, Lansera received rollover equity consisting of [**REDACTED**] units in Topco, at the agreed value of $[**REDACTED**].
>
> (c) Chandler sold 100% of Arsenal Health's shares and Lansera sold the balance of its AIM shares to BR Intermediate Holdings as well. In exchange, Chandler and Lansera received $[**REDACTED**] in proceeds, with portions of the proceeds placed in escrow and subject to certain post-closing adjustments.
>
> (d) Lansera then contributed its rollover equity in Topco to Atlantis, thereby providing Law with his portion of the transaction consideration.[58]

UPA Section 2.06 detailed the Earnout Payment.[59] UPA Section 2.06(d) sets out how to calculate the Earnout Payment.[60] UPA Section 2.06(f) provides for Acknowledgments by the Seller Parties.[61] Finally, UPA Section 2.06(g) details Earnout Covenants.[62]

[56] CC ¶ 39.
[57] Compl. ¶ 40.
[58] *Id.*
[59] UPA § 2.06.
[60] *Id.* § 2.06(d).
[61] *Id.* § 2.06(f).
[62] *Id.* § 2.06(g).

Plaintiffs allege Mr. Chandler and Lansera breached a number of UPA Representations and Warranties:[63] These include: UPA Section 4.05;[64] UPA Section 4.06;[65] UPA Section 4.10;[66] UPA Section 4.18;[67] and UPA Section 4.24(e), (j), (n), (p), and (q).[68]

Article VII contains the UPA's indemnification provisions.[69] This includes indemnification for the Purchaser Indemnified Parties[70] and Indemnification of the Seller Indemnified Parties.[71]

UPA Section 9.11 contains its forum selection clause:

> 9.11 Governing Law; Jurisdiction. All issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement and the exhibits and schedules hereto, and all claims and disputes arising hereunder or thereunder or in connection herewith or therewith, whether purporting to sound in contract or tort, or at law or in equity, shall be governed by, and construed in accordance with, the Laws of the State of Delaware, without giving effect to any choice of Law or conflict of Law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of Delaware. The parties hereto hereby agree and consent to be subject to the exclusive jurisdiction of the state courts located in Wilmington, Delaware, or the United States District Court for the District of Delaware, and hereby waive the right to assert the lack of personal or subject matter jurisdiction or improper venue in connection with any such suit, action or other proceeding. . . . [72]

Finally, the Disclosure Schedules to the UPA note that:

> The disclosures set forth in any one section or subsection of any Disclosure Schedule shall apply only with respect to the indicated section or subsection of such Disclosure Schedule, except to the extent that it is readily apparent on its face such disclosure also is responsive to another section or subsection of any other Disclosure Schedule.[73]

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[63] Compl. ¶ 139.
[64] UPA § 4.05(b) ("Financial Statements").
[65] *Id.* § 4.06. ("No Undisclosed Liabilities").
[66] *Id.* § 4.10(b) ("Contracts and Commitments").
[67] *Id.* § 4.18(b) ("Permits; Compliance with Laws").
[68] *Id.* § 4.24 ("Operational Matters").
[69] *Id.* § 7.02.
[70] *Id.* § 7.02(a).
[71] *Id.* § 7.03.
[72] *Id.* § 9.11.
[73] *Id.* (Disclosure Schedules, Terms and Conditions (5)).

2. Contribution Agreement

This Contribution Agreement was executed along with the UPA.[74] It contains the following pertinent provision:

> 5. Topco LPA. Each of Chandler and Law acknowledge and agree, as a condition to the contribution of the Rollover Equity Interests from Assignor to Assignee and Assignee's ownership of the Rollover Equity Interests, to be bound by and subject to all of the terms and conditions applicable to an "Executive Partner", as such term is defined in the Second Amended and Restated Agreement of Limited Partnership of Topco, as amended (the "Topco LPA"), for all purposes under the Topco LPA. Topco shall be a third-party beneficiary hereunder and shall be authorized to enforce this Section 5. No amendment may be made to this Section 5 without the prior written consent of Topco.[75]

3. Employment Agreement (Mr. Law)

AIM and Mr. Law executed an employment agreement (the "Employment Agreement") on December 23, 2021.[76] Mr. Law asserts that his employment rights derive only from the Employment Agreement, including its forum selection clause:[77]

> This Agreement, the rights and obligations of the parties hereto, and any claims or disputes relating thereto, shall be governed by and construed in accordance with the laws of the State of Alabama (without regard to its choice of law provisions). If legal action is brought at any time based on any controversy or claim arising out of, or relating to this Agreement or Employee's employment with the Company, Employee agrees to submit to the jurisdiction and venue of the state or federal courts in Birmingham, Alabama, and waives any challenge to jurisdiction and venue of any action brought in such state or federal court in Birmingham, Alabama. The parties hereby agree that the governing law and venue set forth in this Section is expressly, knowingly, and voluntarily agreed to by the parties.[78]

[74] D.I. No. 40, Ex. A.
[75] Contribution Agreement § 5.
[76] Hereinafter "Law Empl. Agreement" (D.I. No. 22, Ex. 1). Mr. Chandler also executed an Employment Agreement simultaneous with signing the UPA (D.I. No. 25, Ex. A).
[77] Reply ISO Law MTD at 14.
[78] Law Empl. Agreement § 17.

4. LPA

The Beyond Risk Topco Holdings, L.P. Second Amended and Restated Agreement of Limited Partnership" ("LPA" or "LP Agreement" or "Topco LPA") is dated October 6, 2021.[79] The General Partner is designated as [**REDACTED**] and the Limited Partners are [**REDACTED**]. Atlantis (through Mr. Chandler) also agreed to be a party to the LPA through a "Joinder Agreement to Limited Partnership Agreement."

The LPA contains the following pertinent provisions.

> Article I Definitions . . . "Executive Partner" means any Partner who is or was an Executive or any Partner that has any direct or indirect stockholders, partners, trust grantors, beneficiaries, members or other owners who are or were Executives or Permitted Transferees of Executives. A Partner may be both an Executive Partner and an Other Investor.[80]
>
> 2.4 Purpose. The purpose and business of Holdings LP shall be (i) to hold (including through one or more Subsidiaries) the equity securities of the Operating Companies and their Subsidiaries and to perform such other obligations and duties as are imposed upon Holdings LP under this Agreement, the Contribution and Exchange Agreements, any Equity Agreements and the other agreements, instruments or documents contemplated hereby and thereby, as the same may be amended or modified from time to time, (ii) to exercise all rights and powers granted to Holdings LP (whether as a holder of the Operating Companies' equity securities or otherwise) under their Subsidiaries' constituent documents, the Purchase Agreement, and the other agreements, instruments or documents contemplated hereby and thereby, as the same may be amended or modified from time to time, (iii) to manage and direct the business operations and affairs of the Operating Companies (including the development, adoption and implementation of strategies, business plans and policies concerning the conduct of the Operating Companies' business) and (iv) to engage in any other lawful acts or activities for which limited partnerships may be organized under the Delaware Act.[81]

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[79] Hereinafter LPA (Ex. D to the UPA—*i.e*. D.I. No. 1, Ex. 1, Ex. D (*see p. 131 of the UPA pdf document*)). Capitalization and emphasis is as it appears in the LPA.

[80] LPA Art. I. *See als*o Reply ISO Law MTD at 3:

> The LPA explicitly identifies the provisions applicable to Executive Partners. *E.g*., LPA §5.6(d) (Executive Partners have loyalty duty); §6.6 ("Each Executive Partner shall … bring all investment or business opportunities to [Topco] . . . within the scope and investment objectives related to the business of [Topco]"); §6.9(a)-(b) (Executive Partner non-competition and non-solicitation clauses); §6.10 (limiting remedies of Executive Partners). The forum selection clause is not one of those provisions.

[81] *Id*. § 2.4.

> 14.9 Consent to Jurisdiction. With respect to any lawsuit, action or proceeding arising under or relating to this Agreement or the transactions contemplated hereby or for recognition or enforcement of any judgment in respect hereof, each of the parties hereto agrees to the exclusive jurisdiction of the Court of Chancery of the State of Delaware and any state appellate court therefrom within the State of Delaware, if jurisdiction is unavailable in such court, any state or federal court located within the State of Delaware . . . .[82]

C. POST-ACQUISITION AND LITIGATION

Defendants contend that "immediately after Closing, Beyond Risk reneged on the guarantees made to Sellers pre-Closing and began implementing plans calculated to reduce Arsenal's revenue."[83] Defendants allege that this "plan not only rendered the earn-out illusory, it destroyed Arsenal as a going concern. The speed within which that scheme was implemented, beginning mere days after the Closing, demonstrates the plan was intended all along and that the assurances of support for Arsenal's growth were false when made."[84]

Defendants describe the "multi-faceted scheme" to include:

> (a) diverting Arsenal's corporate opportunities; (b) undermining Arsenal's relationships with insurance brokers and recruiting those brokers to work for other affiliates; (c) prohibiting affiliates from cross-selling to Arsenal; (d) directing Arsenal to invest substantial resources into initiatives that would serve Beyond Risk's other affiliates and not Arsenal; (e) barring Arsenal from pursuing its target clients; (f) inflating the pricing of Arsenal products to unsellable levels; and (g) unjustly terminating Chandler and Law.[85]

Defendants charge that "Beyond Risk's fraudulent scheme to destroy the value of the earn-out succeeded. On January 26, 2023, shortly after the period for measuring the earn-out started, Beyond Risk declared Arsenal to be insolvent and caused it to file a bankruptcy

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[82] *Id.* § 14.9.
[83] CC ¶ 5.
[84] *Id.*
[85] *Id.* ¶ 43. See also *id.* ¶ 85 (noting that Mr. Chandler and Mr. Law were terminated on October 18, 2022 allegedly for "Cause" but that their termination "letters lacked any factual detail as to the alleged conduct, and denied Chandler and Law the required notice and opportunity to cure. Neither Chandler nor Law received accrued benefits or severance pay.").

petition."[86] Defendants state that "Beyond Risk has attempted to divert attention from its own malfeasance by peddling a narrative attributing Arsenal's planned failure to false accusations of wrongdoing by legacy management."[87]

Beyond Risk maintains that, although it "remained in the dark until after the closing," it learned after the Acquisition that "Arsenal had falsely marketed its health plans so as to lead plan sponsors to believe that their healthcare expenditures were capped, when in reality they remained liable for costs and expenses in excess of their monthly contributions, up to the full amount of the self-insured layer."[88] Beyond Risk alleges that Arsenal "encouraged that misperception" by including misleading information in its promotional materials, by "causing Iron Re to pay deficits incurred by client plans that accumulated claims and expenses in excess of their contributions within the self-funded layer" and failing to recoup those deficit payments on Iron Re's behalf.[89]

As a result, Beyond Risk alleges:

> Arsenal breached its contractual obligations to Iron Re and allowed Iron Re to become significantly underfunded, and [also] breached its contractual and fiduciary obligations to the health plans and plan sponsors, by failing to keep accurate books and records and allowing the plans to become underfunded as well. Arsenal had failed to make required filings with the U.S. Department of Labor on behalf of the plans, filed inaccurate forms in other instances, and failed to conduct required audits for certain plans. Arsenal further engaged in transactions on behalf of ERISA plans with related parties (including accounting firms and service providers in which Chandler and/or related individuals had an ownership interest), exposing Arsenal to liability for prohibited transactions under ERISA. As a result of Arsenal's conduct, at the time of the Acquisition, it was exposed to millions of dollars in potential liabilities—to clients, the U.S. Department of Labor, and others—and had no viable ongoing business.[90]

[86] *Id.* ¶ 7.
[87] *Id.*
[88] Compl. ¶¶ 6, 8.
[89] *Id.* ¶ 6.
[90] *Id.* ¶ 7.

Moreover, Beyond Risk maintains that Mr. Chandler "knew about most of the misconduct" and "affirmatively misrepresented Arsenal's compliance status in the Purchase Agreement and undertook steps to conceal his fraud even after closing."[91] Beyond Risk states that it would not have agreed to acquire Arsenal had it known "the true facts about Arsenal's false marketing, highly defective underwriting practices, significant capital deficits of Iron Re, breaches of contractual and fiduciary duties, and/or regulatory noncompliance . . . ."[92]

Beyond Risk delivered to Chandler a Direct Claim Notice pursuant to the UPA on October 19, 2022, and a Supplemental Direct Claim Notice on January 19, 2023, seeking indemnification under UPA Section 7.02 for at least $43 million, based on its allegations of fraud and breaches of representations of warranties.[93] Mr. Chandler rejected the October demand on November 17, 2022.[94]

Defendants delivered to BR Intermediate a Direct Claim Notice on February 19, 2023, seeking indemnification pursuant to UPA Section 7.02 for at least $10.5 to $40 million.[95] BR Intermediate rejected the demand on March 21, 2023.[96]

On January 26, 2023, Arsenal filed for bankruptcy under Chapter 11.[97] That same day, Plaintiffs filed their Complaint in the Court of Chancery. The Complaint alleges the following three counts:

- Count I: Contractual Indemnification, Article VII of the UPA Against Chandler and Lansera;[98]
- Count II: Fraud Against Mr. Chandler and Lansera;[99]

[91] *Id*. ¶ 8.
[92] *Id*. ¶ 9.
[93] *Id*. ¶ 122.
[94] *Id*. ¶ 123.
[95] CC ¶ 86.
[96] *Id*.
[97] *In re Arsenal Intermediate Holdings, LLC, et al.*, Case No. 23-10097 (CTG) (Bankr. D. Del.).
[98] Compl. ¶¶ 124-37.
[99] *Id*. ¶¶ 138-44.

- Count III: Aiding and Abetting Fraud Against Mr. Law and Atlantis.[100]

Defendants Lansera and Mr. Chandler assert the following Counterclaims, filed in the Court of Chancery on June 30, 2023:

- Counterclaim I: Contractual Indemnification, Article VII of the UPA Against BR Intermediate;[101]
- Counterclaim II: Breach of the Implied Covenant of Good Faith and Fair Dealing Against all Counterclaim-Defendants;[102]
- Counterclaim III: Fraud—Against All Counterclaim-Defendants.[103]

Finally, Mr. Chandler individually asserts Counterclaim IV: Tortious Interference with Contract Against All Counterclaim-Defendants.[104]

III. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[105] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[106]

[100] *Id*. ¶¶ 145-49.
[101] CC ¶¶ 87-95.
[102] *Id*. ¶¶ 96-104.
[103] *Id*. ¶¶ 105-08.
[104] *Id*. ¶¶ 109-14.
[105] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[106] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).

IV. DISCUSSION

A. THE COURT DOES NOT HAVE JURISDICTION OVER MR. LAW.

The Court will first address the Law Motion. In the Law Motion, Mr. Law argues that Complaint Count III should be dismissed as to him. As a preliminary matter, the Court recognizes that the parties disagree as to what extent Mr. Law is subject to the LPA generally and its forum selection clause in particular.

Mr. Law makes two arguments in the Law Motion on why the Court must dismiss Count III.[107] First, Mr. Law contends that the forum selection clause in the LPA—the "sole basis" for this Court's exercise of personal jurisdiction over him—is inapplicable to this dispute because the claims against him "arise[] under the UPA."[108] Second, Mr. Law asserts that Plaintiffs have failed to state a claim for aiding and abetting fraud against him because the element of "substantial assistance" has been inadequately plead.[109] The Court only needs to address the first argument regarding personal jurisdiction.

Mr. Law argues that, as a non-party under the LPA, he is not bound by its forum selection clause pursuant to which "the parties hereto" agree to jurisdiction.[110] Mr. Law contends that he only "agreed to be bound by the LP Agreement as an Executive Partner" through execution of the Contribution Agreement.[111] Mr. Law argues that the Contribution Agreement does not contain a general joinder, so it therefore only subjects him to the terms applicable to an

[107] *See* Law MTD at 1 n.2 ("Defendants are no longer seeking to move to dismiss on behalf of Atlantis Group, LLC.").
[108] *Id*. at 8.
[109] Law MTD at 1, 15.
[110] Reply ISO Law MTD at 3 (quoting LPA § 14.9).
[111] Law MTD at 5.

Executive Partner in the LPA.[112] He states those terms are explicitly identified in the LPA and do not include the forum selection clause.[113]

Beyond Risk contend that Mr. Law is subject to the forum selection clauses in both the LPA and the UPA, and therefore this Court has jurisdiction to consider Count III against him.[114] Beyond Risk argues that the claims at issue "relate[] to the LPA and transactions contemplated under the LPA," thereby subjecting Mr. Law to that agreement's forum selection clause.[115] Further, Beyond Risk argues that Mr. Law is also bound by the forum selection clause contained in the UPA by virtue of his receipt of direct benefits from that contract, even though he is not a signatory to it.[116] Beyond Risk also denies Mr. Law's argument that "substantial assistance" has been inadequately plead.[117]

Beyond Risk argues that Mr. Law's execution of the Contribution Agreement subjects him to the LPA, including its forum selection clause.[118] As discussed further below, Beyond Risk contends that Mr. Law's "receipt of the proceeds for facilitating the fraudulent scheme at the heart of this case . . . was conditioned on his consent to, among other things, the exclusive jurisdiction of this Court as to any lawsuit relating to the Topco LPA or the transactions contemplated thereunder."[119]

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[112] Reply ISO Law MTD at 3 (citing Contribution Agreement § 5).
[113] *Id*. (listing examples of terms applicable to Executive Partners, *e.g*. LPA:
> §5.6(d) (Executive Partners have loyalty duty); §6.6 ("Each Executive Partner shall … bring all investment or business opportunities to [Topco] … within the scope and investment objectives related to the business of [Topco]"); §6.9(a)-(b) (Executive Partner non-competition and non-solicitation clauses); §6.10 (limiting remedies of Executive Partners).

[114] Opp'n Law MTD at 16-18.
[115] *Id*. at 19.
[116] *Id*. at 27.
[117] *Id*.
[118] Opp'n Law MTD at 16.
[119] *Id*. at 19.

In his Reply brief, Mr. Law responds that because the LPA's forum selection provision is not expressly enumerated as being applicable to "non-signatory Executive Partners," a reading of the provision to say otherwise is contrary to Delaware principles of contract interpretation.[120] Mr. Law compares the provision to that in *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, in which the Court of Chancery rejected a claim that a joinder covering specified provisions of an agreement—not including a forum selection clause—nevertheless bound the signer to that clause, stating that, to do so "would render the provision . . . granting consent to be bound by the enumerated provisions mere surplusage."[121]

1. The LPA does not cover the claim at issue.

When a party properly consents to jurisdiction by contract, that "party is bound only by the terms of the consent, and such consent applies only to those causes of action that are identified in the consent provision."[122]

Mr. Law contends that the LPA's forum selection provision "limits consent to 'any lawsuit, action or proceeding arising under or relating to this Agreement or the transactions contemplated hereby . . .'"[123] Mr. Law maintains that Plaintiffs fraud claim arises under the UPA because: (i) "Plaintiffs allege they were induced ***to enter the UPA***, not the LP Agreement, as a result of alleged misrepresentations ***in the UPA;***" and (ii) "Count I seeks indemnification under the terms of the UPA."[124]

According to Mr. Law, Delaware courts consistently decline to apply "arising under" language in forum selection clauses unless the claims or rights at issue stem directly from the

[120] Reply ISO Law MTD at 4 (citing LPA § 14.9).
[121] *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, 2021 WL 4949179, at *21 (Del. Ch. Oct. 25, 2021).
[122] *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1132 (Del. Ch. 2008) (internal citations omitted).
[123] Law MTD at 7.
[124] *Id*. at 8 (emphasis supplied) (citing Compl. ¶ 9).

agreement containing the forum selection clause.[125] For example, in *Green Isle Partners, Ltd., S.E. v. Ritz-Carlton Hotel Co., LLC*, the Court of Chancery "declin[ed] to apply 'arising out of' forum clause when agreement 'does not address [the] subject matter' of claims and 'does not create ... or even refer to' rights at issue."[126]

Beyond Risk responds that the claim against Law does "relate to" the LPA, citing *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr*. for the proposition that:

> [N]arrow forum selection clauses only cover claims dealing directly with rights embodied in the relevant contract. Broad forum selection clauses, on the other hand, which expressly cover, for example, all claims between the contracting parties that "arise out of" or "relate to" a contract, apply not only to claims dealing directly with the terms of the contract itself, but also to any issues that touch on contract rights or contract performance.[127]

Beyond Risk alleges that the equity interests and Executive Partner status Mr. Law received as a result of having "aided and abetted the fraudulent scheme against Beyond Risk" "are creatures of and governed by contract—the Topco LPA—and Law obtained them by aiding the fraudulent inducement of Beyond Risk to acquire Arsenal."[128] Beyond Risk states there is therefore a "direct link between the contract rights secured by Law through the fraudulent inducement scheme at issue here . . . ."[129]

With respect to "the transactions contemplated by" the LPA, Mr. Law contends using "'the' signifies the phrase relates to specific transactions, not a generalized ability to engage in

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[125] *Id*.
[126] *Id*. (quoting *Green Isle Partners, Ltd., S.E. v. Ritz-Carlton Hotel Co., LLC*, 2000 WL 1788655, at *5 (Del. Ch. Nov. 29, 2000)).
[127] *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr*., 2011 WL 4552508, at *5 (Del. Ch. Sept. 14, 2011) (internal citations and quotations omitted).
[128] Opp'n Law MTD at 19-20 (citing *Centene Corp. v. Accellion, Inc.*, 2022 WL 898206, at *11 for the proposition that an agreement "related to" an earlier-executed agreement as "part of the broader contractual relationship between the parties.").
[129] *Id*. at 21.

unspecified future transactions."[130] Mr. Law argues that the LPA "regulates the governance of the LP" and "specifically defines transactions that are 'contemplated'" including indemnification, distributions, "and the GPW and Bevcap Purchase Agreements, which are denoted 'Transaction Documents' . . . There is no basis to argue in the context of the LP Agreement that a transaction governed by a different contract signed two months later (*i.e.*, the UPA) unrelated to the governance of the LP was 'contemplated by' the LP Agreement."[131]

Mr. Law contends that Beyond Risk cannot show any 'tangible, nonspeculative relationship' between the LP Agreement and the claims at issue in this case.[132] Therefore, Topco's LP Agreement is, at most, indirectly and incidentally implicated.[133]

Beyond Risk responds that the LPA "goes far beyond" regulating the governance of the LP, and that it "envisions transactions like Beyond Risk's acquisition of Arsenal and creates the contract rights wrongfully obtained by Law in the Acquisition . . . ."[134] Beyond Risk notes that LPA Section 2.4 describes Topco's "purpose and business" in part as "to hold (including through one or more Subsidiaries) the equity securities of the Operating Companies," "to exercise all rights and powers granted to [Topco]" under its "Subsidiaries' constituent documents . . . and the other agreements, instruments or documents contemplated hereby and thereby," and "to manage and direct the business operations and affairs of the Operating Companies."[135] "Operating

[130] Law MTD at 9 (quoting *ION Geophysical Corp. v. Fletcher Int'l, Ltd.*, 2010 WL 4378400, at *7 (Del. Ch. Nov. 5, 2010) (internal citation omitted) ("The definite article 'the' is generally used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance.").
[131] *Id*. (citing LPA §§ 6.4, 4.2; Art. I).
[132] *Id*. at 11-12 (quoting *Green Isle Partners,* 2000 WL 1788655, at *5 (Finding that the scope of an Attornment Agreement's forum selection clause covering "all actions or proceedings in any way, manner or respect, arising out of or from or related to this Agreement . . . " "although broad, is not limitless. At the very least that language requires that there be some tangible, nonspeculative relationship between the lawsuit and the Attornment Agreement.").
[133] *Id*.
[134] Opp'n Law MTD at 22-23.
[135] *Id*.

Companies" include "various companies that Topco had previously acquired, as well as 'any other entity designated by the Board as an Operating Company.'"[136]

Beyond Risk contends that "transactions contemplated by" is "an open-ended category" that could have been—but was not—expressly limited in application to defined Transaction Documents.[137] As for the "specific" transactions listed by Mr. Law, Beyond Risk avers these "cherry-picked" examples are among "numerous" others contemplated or mentioned in the LPA, including "authorization for future 'acquisition[s],' Topco LPA § 5.1(b)(ii), and the procedure for 'Issuance of Additional Units and Interests,' *id*. § 3.1(b), through which Law became the beneficial owner of millions of dollars' worth of Topco units."[138]

Beyond Risk's argument here stretches the language of the LPA too far. Mr. Law is not a party to the LPA. Mr. Law did agree, through the Contribution Agreement, to be bound by certain provisions of the LPA relating to an Executive Partner. However, not every provision in the LPA applies to Executive Partners. The LPA expressly identifies the provisions applicable to Executive Partners, *e.g.*, LPA §5.6(d) (Executive Partners have loyalty duty); §6.6 ("Each Executive Partner shall … bring all investment or business opportunities to [Topco] . . . within the scope and investment objectives related to the business of [Topco]"); §6.9(a)-(b) (Executive Partner non-competition and non-solicitation clauses); §6.10 (limiting remedies of Executive Partners). The forum selection clause is not one of those provisions.

Mr. Law agreed to be bound by specific provisions in the LPA, not including the forum selection clause. Nor are the "transactions contemplated by" the agreement unlimited. The Court

[136] *Id*. at 23 (citing LPA Art. I).
[137] *Id*. at 25-26.
[138] *Id*. at 24-25.

is loathe to find express waiver to personal jurisdiction on these facts. Therefore, the LPA's forum selection clause cannot form the basis for this Court to exercise jurisdiction over Mr. Law.

2. Mr. Law is not bound by the UPA.

Beyond Risk argues that Mr. Law is a "direct beneficiary" of the UPA and is therefore bound by the UPA's forum selection clause as well.[139]

> [A] court can enforce a forum selection provision against a non-signatory if the following three elements are met: (i) the agreement contains a valid forum selection provision; (ii) the non-signatory has a sufficiently close relationship to the agreement, either as an intended third-party beneficiary under the agreement or under principles of estoppel; and (iii) the claim potentially subject to the forum selection provision arises from the non-signatory's standing relating to the agreement.[140]

Beyond Risk contends that "the first and third elements could not reasonably be disputed" and that the second element is met.[141]

Beyond Risk argues that despite Mr. Law not being a signatory to the UPA, that agreement "reflected his close involvement and important role from the Seller's Side."[142] Beyond Risk points to several provisions within the UPA directly applicable to Mr. Law, including his inclusion on the list of Arsenal's Retained Employees; a specification that a new employment agreement between Mr. Law and Arsenal would be delivered at closing; and "a subset of representations and warranties [that] were limited to 'the Knowledge of the Compan[y],' which was defined to include Law's 'actual knowledge . . . .'"[143] Beyond Risk

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[139] *Id*. at 27.
[140] *Fla. Chem. Co., LLC v. Flotek Indus., Inc*., 2021 WL 3630298 (Del. Ch. Aug. 17, 2021) (citing *Cap. Grp. Companies, Inc. v. Armour*, 2004 WL 2521295, at *5 (Del. Ch. Oct. 29, 2004).
[141] Opp'n Law MTD at 27. Mr. Law does not address whether the UPA's forum selection clause is valid, but, as Beyond Risk notes, his "codefendants, Chandler and Lansera, have sought to avail themselves of that provision as a basis for this Court to exercise jurisdiction over their counterclaims against Plaintiffs." (*id*. at 27-28 (citing Am. Answer & CC ¶ 13)). As for the third element, Beyond Risk quotes Law's Motion at 8: "This lawsuit and its claims arise under the UPA."
[142] Opp'n Law MTD at 9.
[143] *Id*.

contends that Mr. Law is a beneficiary of the UPA such that he is subject to its forum selection clause.

"A non-signatory is considered closely related to an agreement where he or she receives a direct benefit from the agreement."[144] Courts have also found non-signatories to be "'closely related' to an agreement if they are a direct beneficiary of the transaction governed by the agreement."[145]

Delaware courts "have deemed both pecuniary and non-pecuniary benefits sufficient" to consider a non-signatory closely related, and the "case law on this point is clear: to be bound by forum selection clauses, non-signatories must actually receive a benefit under or by way of the contract. Defendants in those cases received direct benefits from the contracts like permitted stock transfers, lucrative leases, a seat on a board of directors, or cash."[146]

Beyond Risk contends that Mr. Law received pecuniary benefits in the form of becoming "the beneficial owner of 66.6% of the equity portion of the consideration that Defendants received from Beyond Risk—Topco units worth over $[**REDACTED**];"[147] and his retention as COO of Arsenal at increased salary.[148] Beyond Risk states that Mr. Law "received these direct benefits as a result of the Acquisition specifically because of Beyond Risk's contractual commitment under the UPA."[149]

Beyond Risk maintains that Mr. Law also received non-pecuniary benefits when he "gained the status of Executive Partner under the Topco LPA."[150] Beyond Risk notes that

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[144] *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2020 WL 2220148, at *3 (D. Del. May 7, 2020).
[145] *Id*. (citing *Ninespot, Inc. v. Jupai Holdings Ltd*., 2018 WL 3626325, at *4-5 (D. Del. July 30, 2018)).
[146] *Sustainability Partners LLC v. Jacobs*, 2020 WL 3119034, at *6 (Del. Ch. June 11, 2020) (internal citations and quotations omitted).
[147] Opp'n Law MTD at 29 (citing Compl. ¶ 121).
[148] *Id*. at 31.
[149] Opp'n Law MTD at 32.
[150] *Id*. (citing *Baker v. Impact Holding, Inc.*, 2010 WL 1931032, at *4 (Del. Ch. May 13, 2010) ("I find a right to a seat on the board of directors of Holding, a company in which Impact Investments, of which Baker is a manager, has

Delaware law prohibits "third-party beneficiaries from reaping the benefits of a contract they seek to enforce, while, at the same time, avoiding the burdens or limitations of the contract, such as a forum selection clause."[151] Therefore, "[g]iven the substantial benefits derived by Law from the UPA, he is bound by its forum selection clause."[152]

Mr. Law disputes that he was a direct beneficiary of the UPA and as such, is not subject to its forum selection clause.[153] Mr. Law argues that all benefits Beyond Risk identifies as direct are not sufficient to bind him to the UPA.[154]

First, Mr. Law insists that his "speculative future interest" in Topco equity is "too indirect."[155] Mr. Law compares these circumstances to those in *Neurvana Med., LLC v. Balt USA, LLC.*[156] In *Neurvana*, the Court of Chancery held that a plaintiff had failed to demonstrate it had received a benefit "so directly . . . as to be bound by" the forum selection clause in an agreement to which it was not a signatory because it received those benefits through a different entity and "the mere 'contemplation' of a benefit does not directly confer one."[157]

Mr. Law asserts his "interest in Topco (through Atlantis) is indirect and contingent. A holder of Class P Atlantis Units, [Mr.] Law (and other Atlantis Members) has no ownership right in any 'specific Company property' (e.g., Topco units)."[158] Mr. Law contends that only Mr. Chandler has governance rights in Atlantis;[159] that distributions to Members are at Mr.

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a substantial investment, is sufficient to constitute a direct benefit to Baker. Thus, I find that because the SHA expressly names him as a director of Holding, Baker received a direct benefit from the SHA.").

[151] *Id*. at 33 (quoting *Hadley v. Shaffer*, 2003 WL 21960406, at *6 (D. Del. Aug. 12, 2003)).

[152] *Id*.

[153] Reply ISO Law MTD at 9 (citing *Partners & Simons, Inc. v. Sandbox Acquisitions, LLC*, 2021 WL 3161651, at *4 (Del. Ch. July 26, 2021) (internal quotations and citations omitted) ("[I]ndirect benefits have been deemed insufficient to satisfy the test.").

[154] *Id*.

[155] *Id*. at 11.

[156] *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 4464268 (Del. Ch. Sept. 18, 2019).

[157] *Id*. at *4 ("Any profits or other benefits Balt International could derive from the Purchase Agreement would be indirect, in that they would only materialize through a separate agreement with Balt USA.").

[158] Reply ISO Law MTD at 10 (citing Atlantis Operating Agreement §4.3(c)).

[159] *Id*. at 10-11 (citing Compl. ¶ 12; Atlantis Operating Agreement §6.1 & Schedule C).

Chandler's sole discretion;[160] and that, because "Atlantis is a 'special purpose vehicle' for Topco equity and has no other business, Atlantis can only make a distribution if it sells Topco equity. Its ability to make a distribution is constrained by the inability to sell Topco equity."[161]

Mr. Law claims that his continued employment was not a direct benefit, and that, moreover, his employment was governed by a separate Employment Agreement with its own forum selection clause.[162] Mr. Law states that the UPA only addresses his employment insofar as it preserves his position through closing, but reserves the acquirer's ability to terminate him thereafter.[163] In contrast, "[f]or employment to constitute a direct benefit, an agreement must 'expressly name [individuals] to their posts in the post-transaction entity.' That an employee continues in place after a transaction, 'is insufficient to bind' the employee to a transaction contract she did not sign."[164]

Finally, Mr. Law argues that his status as an Executive Partner was not a direct benefit because he was not designated as such in the UPA.[165]

The Court finds that the benefits Mr. Law received are not sufficiently direct enough to bind him as a non-signatory to the UPA to a forum selection provision in the UPA that contains an contractual waiver to jurisdiction. The Court has to be concerned with due process. No one has argued that the Delaware Long-Arm Statute coupled with minimum contacts warrants the Court exercising personal jurisdiction over Mr. Law. The Court is cognizant of third-party

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[160] *Id*. at 11 (citing Atlantis Operating Agreement §7.1).
[161] *Id*.
[162] *Id*. at 14 (citing Employment Agreement §§3(a), 17) (D.I. No. 22 Ex. 1)). The Employment Agreement designates Birmingham, Alabama as the forum for resolving disputes.
[163] *Id*. (citing UPA §6.05).
[164] *Id*. at 15 (quoting *Golden v. ShootProof Holdings, LP*, 2023 WL 2255953, at *7 (Del. Ch. Feb. 28, 2023) (quotations omitted)).
[165] *Id*. at 15-16 (citing *Golden*, 2023 WL 2255953, at *7 (noting that the Court of Chancery has "rejected efforts" to apply its holding in *Baker*, 2010 WL 191032, that a director had received a direct benefit when his position was expressly named in the subject agreement to situations where the agreement did not expressly designate the position).

beneficiary law but is reluctant to use that to demonstrate express waiver on personal jurisdiction to a non-signatory of the UPA.

The Court finds that the forum selection clauses under either the UPA or the LPA do not permit this Court to exercise personal jurisdiction over Mr. Law. Accordingly, the Court will **GRANT** the Law Motion and will dismiss Count III based on lack of personal jurisdiction.

B. THE COUNTERCLAIM MOTION

1. Defendants State a Claim for Contractual Indemnification.

"A claim for indemnification based on the breach of a representation and warranty is a claim for breach of contract. A breach of contract claim, in turn, requires: '(1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiff.'"[166] The Parties do not dispute that the Earnout Covenant is a valid contractual obligation.[167]

a. Breach

Beyond Risk argues that Defendants have alleged no breach of the UPA by BR Intermediate.[168] Defendants respond that the Counterclaims allege numerous specific actions it claims were designed to "decrease Arsenal's revenue and 'avoid exposure to the Earnout.'"[169] These include:

- giving Arsenal's know-how to other Beyond Risk Affiliates "to recreate the Iron ReHealth program," then "eliminate Arsenal by restricting its market and product offerings" (CC ¶53);
- continuously restricting Arsenal's market while launching competing programs (CC ¶¶57-58);
- installing [Beyond Risk Vice President of Operations] Dan Cho to interfere with Chandler's management (CC ¶60);

[166] *Great Hill Equity Partners IV*, 2018 WL 6311829, at *45 (Del. Ch. Dec. 3, 2018) (quoting *Cedarview Opportunities Master Fund v. Spanish Broad., Inc*., 2018 WL 4057012, at *6 (Del. Ch. Aug. 27, 2018)).
[167] *See, e.g.,* Opp'n MTD CC at 14 (citing MTD CC at 16).
[168] MTD CC at 16.
[169] Opp'n MTD CC at 15 (quoting CC ¶ 75).

- driving up the cost of Arsenal's products to unsellable levels (CC ¶¶61- 64);
- forming a new [managing general underwriter] taking critical revenue from Arsenal (CC ¶66);
- poaching brokers and employees and diverting corporate opportunities (CC ¶¶68-73);
- directing Affiliates not to refer business to Arsenal (CC ¶74);
- sabotaging critical plan deficit collection efforts (CC ¶¶76-79);
- wasting Arsenal resources to develop initiatives Beyond Risk knew would not be implemented at Arsenal (CC ¶¶81-82); and
- terminating Chandler and Law to silence their opposition to Beyond Risk's scheme (CC ¶¶6, 83-85).[170]

Defendants assert that these allegations "are more than sufficient to plead a reasonably conceivable breach" by Beyond Risk.[171]

However, Beyond Risk next contends that the "sole covenant" Defendants argue was breached or unfulfilled was Beyond Risk's promise in UPA Section 2.06(g) "'not [to] take or permit any of its Affiliates to take any action with the ***sole intent*** of avoiding or reducing the payment of the Earnout Payment.'"[172] Beyond Risk asserts that Defendants "allege nothing to suggest that Beyond Risk ever took any action with the intent, let alone the sole intent, of reducing the Earnout Payment, and therefore fail to plead any breach."[173]

When interpreting a contract, the Court is "bound by the language within the contract unless that language is ambiguous. Stated differently, 'the role of a court [in contract construction] is to effectuate the parties' intent. In doing so, [the court is] constrained by a combination of the parties' words and the plain meaning of those words . . . .'"[174]

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[170] *Id*.
[171] *Id*. (citing *Quarum v. Mitchell Int'l, Inc*., , 2020 WL 351291, at *2 (Del. Super. Jan. 21, 2020) "(denying motion to dismiss earnout breach where plaintiff 'contends … defendant] depressed the amount of the [e]arnout by sidelining [plaintiff] and diverting resources, including customers'" (citation and internal quotation marks omitted).").
[172] MTD CC at 16 (quoting UPA § 2.06(g)) (emphasis supplied—not in original).
[173] *Id*. at 16-17.
[174] *GreenStar IH Rep, LLC v. Tutor Perini Corp*., 2017 WL 5035567, at *6 (Del. Ch. Oct. 31, 2017), *judgment entered*, (Del. Ch. 2017), *aff'd*, 186 A.3d 799 (Del. 2018), and *aff'd*, 186 A.3d 799 (Del. 2018) (quoting *Lorillard Tobacco Co. v. Am. Legacy Found*., 903 A.2d 728, 739 (Del. 2006)).

Beyond Risk asserts the "sole intent" language of the UPA is a "deliberate drafting choice that Sellers 'negotiated for and insisted on,'—and agreed to by signing the UPA. Sellers may not now 'seek[] to avoid [their] own contractual bargain.'"[175] Beyond Risk contends that this language reflects the Parties' agreement "that Section 2.06(g) would prohibit actions motivated *solely* by the objective of 'avoiding or reducing' the Earnout Payment, but would otherwise impose no restrictions so long as Beyond Risk's actions were motivated in part by any other objective—even if also motivated by an intent to reduce the Earnout Payment."[176] Beyond Risk maintains that Defendants' allegations "effectively negate" their claim because those allegations "confirm that whatever actions Beyond Risk is alleged to have taken, its supposed conduct was consistently motivated by at least one other objective—benefitting Beyond Risk's other subsidiaries."[177]

Defendants reply that Beyond Risk's argument fails because "[e]ven if if Beyond Risk's argument is considered a reasonable inference from the pleaded facts, it is not the ***only*** reasonable inference."[178] Defendants explain that, had Beyond Risk not been motivated by "the avoidance of the Earnout, the transfer of Arsenal's profit-generating activities to other subsidiaries was economically neutral for Beyond Risk. It would capture the revenues and expenses from the diverted activities regardless of which subsidiary was credited with the business."[179] Because all reasonable inferences on a motion to dismiss must be drawn in favor of

[175] MTD CC at 17-18 (quoting CC ¶ 45; *Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations LLC*, 114 A.3d 193, 195 (Del. 2015)).
[176] *Id*. at 17 (emphasis supplied).
[177] *Id*. at 18-19 (citing, *e.g.*, CC ¶¶ 51, 53, 56, 59, 66, 68, 70, 71, 72, 75, 82); *see also Busch v. Westell Techs., Inc.*, 2023 WL 2333823, at *2 (Del. Ch. Mar. 2, 2023) (internal citation and quotations omitted) ("A claim may also be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law.").
[178] Opp'n MTD CC at 16.
[179] *Id*. at 16-17 (quoting *In re Edgio, Inc. S'holders Litig.*, 2023 WL 3167648, at *6 (Del. Ch. May 1, 2023)).

the non-moving party—Defendants—the Counterclaims therefore state the claim and the motion should be denied.[180]

Beyond Risk insists that Defendants' express attribution of other intent defeats any "inference."[181] However, at this stage of the proceedings, Defendants have carried their pleading burden insofar as facts supporting a breach of UPA Section 2.06(g).

b. Breach—Repudiation

"A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions."[182]

Beyond Risk contends that "Sellers also have not alleged and cannot allege that Beyond Risk 'repudiated its obligation to pay the Earnout Payment.'"[183] Beyond Risk asserts that there can be no repudiation for three reasons: (i) No obligation to pay has yet been triggered, and therefore no breach can have occurred;[184] (ii) There have been no unequivocal statements of an intent not to perform;[185] and (iii) Defendants appear to be claiming anticipatory repudiation without any actual breaches of the UPA.[186]

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[180] *Id*.
[181] *See, e.g.*, Reply ISO MTD CC at 5 (emphasis supplied) ("Sellers miss the point . . . Beyond Risk is not seeking an *inference* that it acted with other intentions; rather, it is simply accepting Sellers' express allegations of that fact, allegations that Sellers cannot disavow on this motion.").
[182] *Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245, at *8 (Del. Ch. Jan. 31, 2013) (internal quotations and citation omitted).
[183] MTD CC at 20 (quoting CC 93).
[184] *See* MTD CC at 20-21 ("Sellers allege nothing to suggest that BR Intermediate has refused to perform its contractual duties. Nor can they: The Earnout Period runs until December 31, 2023, UPA, Art. I at 6, so BR Intermediate's duty to 'pay or cause to be paid … the Earnout Payment' under UPA Section 2.06(d) would not need to be performed for many months in any circumstances.").
[185] *See* Reply ISO MTD CC at 9 (quoting *Veloric v. J.G. Wentworth, Inc*., 2014 WL 4639217, at *16 (Del. Ch. Sept. 18, 2014)) ("Sellers allege no such [unequivocal statement that no Earnout Payment is forthcoming] and nothing suggesting an outright refusal to perform, in the event that Purchaser's obligations under the UPA are triggered. Therefore, Sellers have failed to state an anticipatory repudiation claim as to UPA Sections 2.06(d) & (f) 'for lack of a valid premise.'").
[186] MTD CC at 24.

Beyond Risk argues that the circumstances here are similar to those in *Veloric v. J.G. Wentworth, Inc.*, in which the Court of Chancery rejected an anticipatory repudiation claim because the plaintiffs failed to establish that a contractual prerequisite to the defendants' obligation to make certain payments had occurred.[187] Without an obligation for defendants to have repudiated, the court held that plaintiffs had "failed to state a claim for lack of a valid premise . . . ."[188] Beyond Risk contends that "as in *Veloric*, where no [condition precedent had] occurred, so no payment could have been due and no repudiation had occurred, no 'obligation to pay the Earnout Payment' has been or could have been triggered here yet, while the Earnout Period is ongoing, and Sellers' claim therefore fails 'for lack of a valid premise.'"[189]

Defendants respond that Beyond Risk's "assertion is, at best, bizarre, given the alleged diversion of Arsenal's business lines, the disavowal of Beyond Risk's contractual obligations in the Complaint and Arsenal's bankruptcy filing and wind-up."[190] Defendants argue that Beyond Risk "mischaracterize[s] *Veloric* . . . incorrectly arguing Purchaser could not repudiate a future payment obligation. The Court there found that statements by the defendants alleged to constitute a disavowal of contract obligations that had not yet been triggered, were insufficiently unequivocal to constitute repudiation."[191] As to unequivocal statements, Defendants maintain that the "numerous specific instances of Counterclaim-Defendants misconduct that, combined with causing Arsenal's bankruptcy, eliminated any possibility of an Earnout Payment" adequately allege Beyond Risk's "intent not to perform."[192]

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[187] *See Veloric*, 2014 WL 4639217, at *16.
[188] *Id*.
[189] MTD CC at 22.
[190] Opp'n MTD CC at 18-19 (quoting MTD CC at 20 (quoting CC ¶ 93)).
[191] *Id*. at 20-21.
[192] *Id*. at 21 (discussing *Neurvana*, 2020 WL 949917)

Finally, Defendants assert that Beyond Risk cites "no authority that the conduct evidencing anticipatory repudiation must constitute an independent contractual breach. Even if such requirement existed, Sellers adequately pleaded that the misconduct constituting repudiation independently breached the Earnout Covenant."[193]

As above, the Court finds that Defendants have alleged sufficient facts at this stage of the proceedings to overcome a motion to dismiss.

c. Damages

Beyond Risk contends that Delaware law requires a "'cognizable injury' that logically flows from the claimed breach must be alleged."[194] Beyond Risk charges that Defendants' "position appears to be that pleading a breach, one element of a breach of contract claim, translates to adequately alleging damages, a separate element of the same claim. That is plainly wrong: 'An essential element of any claim for breach of contract is cognizable injury,' which must be satisfied by 'alleg[ing] specifically in what way the [alleged] breach of the [UPA] caused the[] claimed effects."[195]

Defendants respond that "Delaware's notice pleading standard applies to damages. . . . Sellers allege sufficient facts to put Counterclaim-Defendants on notice of their damages."[196] Defendants assert that they have therefore "adequately alleged damages from pleading breach of

[193] *Id*. at 21-22 (citations omitted).
[194] MTD CC at 25 (quoting *Great Lakes Chem. Corp. v. Pharmacia Corp*., 788 A.2d 544, 549 (Del. Ch. 2001) (internal citation omitted) ("An essential element of any claim for breach of contract is cognizable injury. . . . This claim, however, is a *non sequitur* because the injury does not logically flow from the breach. Nothing in the complaint links the alleged breach and the claimed injury . . . .").
[195] Reply ISO MTD CC at 11 (quoting *Great Lakes Chem,* 788 A.2d, 549).
[196] Opp'n MTD CC at 34 (citing *VLIW Tech., LLC v. Hewlett-Packard Co*., 840 A.2d 606, 613 (Del. 2003)) ("[T]he complaint alleges that VLIW, '. . . has been damaged by H–P's breach of the 1990 Agreement.' Thus, VLIW's complaint alleged . . . damages resulting from that breach. Accordingly . . . defendants were on fair notice of the claims that VLIW asserted against them.").

the Earnout Covenant and repudiation of the Earnout Payment . . . and 'entitle[ment] to indemnification for all losses resulting from Counterclaim-Defendants' misconduct[.]'"[197]

Beyond Risk contends these damages are "purely speculative, and may never materialize."[198] Because the damages are "entirely contingent on Arsenal achieving an EBITDA of at least $5.3 million by the end of 2023" pursuant to the terms of the UPA, Sellers have failed to allege "some factual basis for Chandler's supposed "belie[f that] the earn-out would be triggered . . . ."[199]

The Court finds that the better argument is that Defendants have adequately pled the *existence* of damages:

> The fact that damages cannot be calculated without discovery is of no moment. Even at trial, "the 'law does not require certainty in the award of damages where a wrong has been proven and injury established. Responsible estimates that lack mathematical certainty are permissible so long as the Court has a basis to make a responsible estimate of damages.'"[200]

Because all elements of contractual indemnification have been adequately pled, the Counterclaim Motion is **DENIED** as to Counterclaim I.

2. Defendants Fail to State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

"The implied covenant 'is "a limited and extraordinary legal remedy" that addresses only events that could not reasonably have been anticipated at the time the parties contracted.'"[201]

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[197] *Id*. at 35 (citing CC ¶¶ 92-94).
[198] MTD CC at 26 (quoting *Aviva Life & Annuity Co. v. Am. Gen. Life Ins. Co.*, 2014 WL 1677798, at *13 (Del. Ch. Apr. 29, 2014)).
[199] *Id*. at 25-26 (citing CC ¶ 44).
[200] Opp'n MTD CC at 35 (quoting *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999) (citing *Red Sail Easter Limited Partners, L. P. v. Radio City Music Hall Prods., Inc*., 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992))).
[201] *Brinckerhoff v. Enbridge Energy Co*., 2011 WL 4599654, at *11 (Del. Ch. Sept. 30, 2011), *aff'd*, 67 A.3d 369 (Del. 2013), and *aff'd*, 67 A.3d 369 (Del. 2013) (quoting *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010) (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010))).

"Where the contract speaks directly regarding the issue in dispute, existing contract terms control such that implied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty unattached to the underlying legal documents."[202] As such, a complaint that does not identify, "as it must, a gap in the [agreement] to be filled by implying terms" "fail[s] to state a claim for breach of the implied covenant."[203]

"To state a claim for breach of the implied covenant, a litigant must allege a specific obligation implied in the contract, a breach of that obligation, and resulting damages."[204]

Beyond Risk argues that Defendants have failed to identify a gap in the UPA because Section 2.06(g) expressly covered the alleged breach. Beyond Risk asserts that the Court should not imply an obligation via the implied covenant where sophisticated parties such as Defendants could have bargained for and included terms in contract:

> In exchange for tens of millions of dollars of consideration, Sellers agreed to express contractual terms that provided Beyond Risk with virtually unfettered authority to oversee and manage Arsenal. Sellers cannot rely on the implied covenant to seek "contractual protections that [they] 'failed to secure for themselves at the bargaining table.'"[205]

Defendants reply that:

> Whether or not it is true that "virtually unfettered authority to oversee and manage Arsenal," such power was not a license for abuse. "[T]he law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith"' thus, "the implied covenant requires that the 'discretion-exercising party' make that decision in good faith."[206]

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[202] *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *3 (Del. Ch. Jan. 30, 2015) (internal citations and quotations omitted; cleaned up).
[203] *Id*. at *4.
[204] *Id*. at *3 (internal citations and quotations omitted; cleaned up).
[205] MTD CC at 28-29 (quoting *S'holder Representative Servs. LLC v. Albertsons Cos*., 2021 WL 2311455, at *8 (Del. Ch. June 7, 2021) (internal citations omitted)).
[206] Opp'n MTD CC at 24 (quoting *Amirsaleh v. Bd. of Trade of N.Y., Inc*., 2008 WL 4182998, at *1, 8 (Del. Ch. Sept. 11, 2008)).

Defendants therefore contend that the implied covenant "required" Beyond Risk "to exercise their control in good faith . . . *i.e*., in a manner that would not frustrate Sellers' reasonable expectation of a possible Earnout. Even if the abuse of that control was not explicitly barred by the UPA, it violated the implied covenant."[207] Defendants argue that "corollary applications" of the doctrine are recognized depending on circumstances, thereby authorizing "courts to imply contract terms the parties did not contemplate or address, particularly 'terms that are so obvious . . . the drafter would not have needed to include the conditions as express terms in the agreement.'"[208]

Beyond Risk responds that Defendants have nevertheless failed to identify a factual basis for an expansion of the UPA's express terms.[209] Beyond Risk contends that the "deliberate drafting choices" in the UPA "refute Sellers' attempt to expand the Earnout Covenants' bespoke, narrow terms by implication."[210] Combined with Defendants' "failure to offer any reason to believe that Purchaser would have been willing to accept an obligation broader (or of a longer duration) than what it agreed to, further supports dismissal of this claim."[211]

The Court finds that Defendants have failed to justify the application of the implied covenant here. As the Supreme Court has stated, it is a "cautious enterprise" and a "limited and extraordinary legal remedy."[212] The UPA addresses the conduct at issue, leaving no room to apply the covenant.

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[207] *Id*. (citing *Amirsaleh*, 2008 WL 4182998, at *8); *see also Dunlap v. State Farm Fire & Cas. Co*., 878 A.2d 434, 444 (Del. 2005) (emphasis supplied) (internal citations and quotations omitted) ("In sum, the implied covenant of good faith is the obligation to preserve the *spirit* of the bargain rather than the letter, the adherence to *substance* rather than form.").
[208] *Id*. at 23-24 (quoting *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017)).
[209] MTD CC at 27.
[210] *Id*. at 31.
[211] *Id*.
[212] *See, e.g., Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 920 (Del. 2021) (internal citations and quotations omitted).

3. Defendants Do Not State a Claim for Fraud.

In Delaware, the elements of fraud are: (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) causally related damages to the plaintiff.[213]

"Although notice pleading is sufficient to survive a motion to dismiss under Rule 12(b)(6), Rule 9(b) requires that the circumstances constituting any alleged fraud be stated with particularity."[214] To satisfy the Rule 9(b) standard, "a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations. Essentially, the plaintiff is required to allege the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim."[215]

Beyond Risk contends that Defendants fail to plead false representation, justifiable reliance, or damages with the required particularity.[216]

Defendants assert that in a case such as this, where Mr. Chandler was not "privy to Counterclaim-Defendants' communications either internally or with their Affiliates," "'[t]he particularity requirement [of Rule 9(b)] must be applied in light of the facts of the case, and less particularity is required when the facts lie more in the knowledge of the opposing party than of

[213] *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 773 (Del. Ch. 2014) (internal citations omitted).
[214] *Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int'l Fund, L.P.*, 829 A.2d 143, 149 (Del. Ch. 2003).
[215] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1050 (Del. Ch. 2006) (internal citations and quotations omitted).
[216] MTD CC at 36.

the pleading party.'"[217] Under this standard, Defendants contend they have adequately pled fraud.

a. Earnout Covenant

Defendants contend that Beyond Risk:

> [K]nowingly made materially false representations and omissions of material facts regarding Beyond Risk's plans for Arsenal before Closing. Counterclaim-Defendants also falsely committed to contract covenants in which they promised not to take or permit actions with the sole intent of reducing or avoiding the Earnout Payment. Such misrepresentations were made with the intent that Sellers would rely to their detriment which, in fact, Sellers did by entering into the UPA and selling Arsenal in accordance with its terms.[218]

Beyond Risk asserts that this allegation fails to state a claim for fraud because "(i) there was nothing false about Beyond Risk's commitment, and (ii) Delaware law bars Sellers' attempt to bootstrap a meritless contract claim into a fraud claim."[219]

Improper "bootstrapping" in this context refers to a plaintiff's attempt to attach a fraud claim to one for breach of contract "merely by alleging that a contracting party never intended to perform its obligations."[220] The bootstrapping is "improper because the plaintiff has simply tacked on conclusory allegations that the defendant made the contract knowing it would not or could not deliver on its promises."[221] Conversely, a court will not find that improper bootstrapping has occurred:

> (1) where a plaintiff has made particularized allegations that a seller knew contractual representations were false or lied regarding the contractual representation, (2) where damages for plaintiff's fraud claim may be different from plaintiff's breach of contract claim, (3) when the conduct occurs prior to the execution of the contract and thus with the goal of inducing the plaintiff's signature

[217] Opp'n MTD CC at 25 (quoting *H-M Wexford LLC v. Encorp, Inc*., 832 A.2d 129, 146 (Del. Ch. 2003) (citing *Carello v. PricewaterhouseCoopers*, 2002 WL 1454111, at *8 (Del. Super. July 3, 2002)).
[218] CC ¶ 106.
[219] MTD CC at 36.
[220] *Narrowstep, Inc. v. Onstream Media Corp*., 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010) (internal citations omitted).
[221] *Pilot Air Freight, LLC v. Manna Freight Sys., Inc.*, 2020 WL 5588671, at *25 (Del. Ch. Sept. 18, 2020) (internal citation omitted).

> and willingness to close on the transaction or (4) when the breach of contract claim is not well-pled such that there is no breach claim on which to "bootstrap" the fraud claim.[222]

Beyond Risk alleges that Defendants "expressly base their claim on allegations that Beyond Risk—*i.e.*, a contracting party—falsely committed to—*i.e.*, never intended to perform—contract covenants."[223] Beyond Risk asserts that "'[c]ouching an alleged failure to comply with the [UPA] as a failure to disclose an intention to take certain actions arguably inconsistent with that agreement is exactly the type of bootstrapping this Court will not entertain.'"[224] Beyond Risk contends that "the only the only allegedly 'false' aspect of the Earnout Covenant is that Purchaser supposedly did not intent to perform it. That is precisely the circumstance in which the bootstrapping doctrine precludes a fraud claim."[225]

Defendants disagree, arguing that the Counterclaim is explicit that Beyond Risk "intended from the start to impair or destroy the value of the Earnout, putting the lie to their representations that Beyond Risk would enhance Arsenal's growth and that the Earnout was valuable consideration."[226] Further, "that the representations were knowingly false from the start is reasonably and readily inferable from the fact that the diversion of Arsenal's profitable business opportunities and relationships began immediately after Closing. This Court has recognized that close proximity between a representation and its apparent breach supports an inference of fraud."[227]

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[222] *Id*. at *26 (internal citations and quotations omitted).
[223] MTD CC at 37 (quoting *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp*., 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004)).
[224] *Id*.
[225] Reply ISO MTD CC at 18-19 (citing *Black Horse Cap., LP v. Xstelos Hldgs., Inc*., 2014 WL 5025926, at *25 (Del. Ch. Sept. 30, 2014) (finding impermissible bootstrapping where "[t]he gravamen of the fraud complaint … was … about future performance or non-performance"); *Narrowstep*, 2010 WL 5422405, at *15 ("plaintiff cannot plead fraud 'merely by alleging that a contracting party never intended to perform its obligations'")).
[226] Opp'n MTD CC at 27 (citing Countercls ¶¶ 51-52, 106).
[227] *Id*. (citing *Kane v. NVR, Inc.*, 2020 WL 3027239, at *6 (Del. Ch. June 5, 2020) ("inferring

Defendants rely heavily on "reasonable inferences." The Court understands that those inferences must be drawn in Defendants' favor, however, the fraud claim with respect to the Earnout Covenant satisfies the definition of an improperly bootstrapped allegation. Without a stronger independent factual basis, the fraud claim has not been alleged with sufficient particularity to satisfy Rule 9(b). The Court will dismiss the fraud claim as it relates to the Earnout Covenant is concerned.

b. Extra-Contractual Statements

Defendants allege that Beyond Risk's negotiators guaranteed that it would:

> [N]ot outsource any internal functions of Arsenal, and instead improve and grow those functions; (b) grow Iron Re, the medical stop-loss reinsurer covering the health plans administered by Arsenal Health and which AIM managed in exchange for substantial fees; (c) solicit Chandler's input on Beyond Risk and Arsenal; (d) not change anything about Arsenal's operations without Chandler's approval; and (e) make Beyond Risk's other affiliates available for Arsenal to learn from them.[228]

Beyond Risk assert that Defendants' "claim should be dismissed as 'fraud by hindsight' unless they have alleged contemporaneous facts, indicating that [Beyond Risk] did not intend to follow through in the alleged promises, which 'permit[] an inference of falsity or bad faith.'"[229] Without such contemporaneous facts, Beyond Risk argues that Defendants' claim fails "while also confirming that Sellers could not have justifiably relied on any purported extra-contractual promises."[230]

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representation false when made from 'proximity of only 11 days' between representation and breach"); and *In re P3 Health grp. Holdings, LLC*, 2022 WL 15035833, at *5 (Del. Ch. Oct. 26, 2022) ("pre-closing EBITDA projections immediately contradicted by negative post-closing projections supported fraud inference".).

[228] CC ¶ 3.

[229] MTD CC at 39 (quoting *Mooney v. E. I. du Pont de Nemours & Co*., 2017 WL 5713308, at *6 (Del. Super. Nov. 28, 2017), *aff'd*, 192 A.3d 557 (Del. 2018)) (see also *Neurvana*, 2020 WL 949917, at *25) ("Balt USA's statement that it could secure CE Mark approval within forty-five days is a forward-looking opinion, and such opinions are generally not actionable as fraud. . . . And the 45-day prediction is a pure expression as to what might happen in the future and not alleged to be based on any specific fact known at the time the statement was made..).

[230] *Id*.

Defendants reject the contention that Beyond Risk's statements were merely "'puffery' or 'vague statements of corporate optimism.' . . . Nor were they 'statements regarding managements' expectations for a company's future performance.'"[231] Rather, Defendants contend these "were promises that Beyond Risk would use its resources to enhance Arsenal's growth trajectory, promises Counterclaim-Defendants never intended to keep. The ability and intent to discharge such promises were knowable, and Counterclaim-Defendants were in a position to know them."[232]

The Court finds it difficult to characterize the statements at issue here as anything other than "the softest of information, and very difficult to base a fraud claim on for good reason."[233] The statements are simply statements of expectation or opinion about the future and the hoped-for results of business strategies. Such opinions and predictions are generally not actionable under Delaware law.[234]

The Court observes that Defendants therefore cannot adequately plead justifiable reliance based on these extra-contractual statements.[235] The parties engage in a lengthy discussion about whether the presence of integration clauses in the UPA and the Employment Agreements bar consideration of these statements.[236] The Court notes that the issue here is one of materiality,

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[231] Opp'n MTD CC at 30-31 (quoting MTD CC at 40-41, 38-39) (additional citations omitted)).
[232] *Id*. at 31 (citing *Abry Partners*, 891 A.2d, 1050) ("While knowledge may be pled generally, when a plaintiff pleads a claim of fraud that charges that the defendants knew something, it must allege sufficient facts from which it can reasonably be inferred that this 'something' was knowable and that the defendants were in a position to know it.").
[233] *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P*, 2006 WL 4782378, at *31 (Del. Ch. Aug. 10, 2006) (internal citations omitted).
[234] *Id*.
[235] *See, e.g., Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *12 (Del. Ch. June 6, 2018) (internal citations and quotations omitted) ("Justifiable reliance requires that the representation relied upon involve a matter which a reasonable person would consider important in determining his choice of action in the transaction in question, *i.e.*, that the matter misrepresented is material.").
[236] *See* MTD CC at 40-46; Opp'n MTD CC at 31-33.

and must be supported with particular facts. Without more to support these allegations, the statements seem to fall into the non-actionable category of "opinions and predictions."

c. Damages

Beyond Risk contends, again, that Defendants have failed to allege damages as a result of the alleged fraud with sufficient particularity to survive the motion to dismiss.[237]

Defendants respond that Delaware's notice pleading standard applies to damages and that Defendants allege sufficient facts to put Counterclaim-Defendants on notice of their damages claim.[238] Further:

> When a party sues based on a written representation in a contract . . . satisfying the remaining elements at the pleading stage is relatively straightforward. It is reasonably inferable that the defendants intended to induce reliance on the representations because they appeared in a written agreement. For the same reason, it is reasonably inferable that the plaintiff relied on the representations when entering into the agreement. The plaintiff can claim causally related harm because it entered into an agreement it otherwise would not have signed.[239]

Defendants contend that they have sufficiently plead damages as a direct and proximate result of Counterclaim-Defendants' fraudulent statements and omissions. Defendants have alleged that Defendants were "damaged by, among other things, agreeing to an earn-out in lieu of additional upfront consideration, when, had they known the truth, they would not have agreed to the UPA on its terms."[240]

Although Defendants' argument as to damages is persuasive, they have failed to adequately plead the other elements of fraud with particularity. Therefore, the Court will **GRANT** the Counterclaim Motion as to Counterclaim III.

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[237] MTD CC at 46.
[238] Opp'n MTD CC at 34 (citing *VLIW Tech.*, 840 A.2d, 613) ("[T]he complaint alleges that VLIW, '. . . has been damaged by H–P's breach of the 1990 Agreement.' Thus, VLIW's complaint alleged . . . damages resulting from that breach. Accordingly . . . defendants were on fair notice of the claims that VLIW asserted against them.").
[239] *Prairie Cap. III, L.P. v. Double E Holding Corp*., 132 A.3d 35, 62 (Del. Ch. 2015).
[240] Opp'n MTD CC at 37 (quoting CC ¶ 104).

4. Defendant Chandler States a Claim for Tortious Interference With Contract.

Under Delaware law, the elements of a claim for tortious interference with a contract are: (1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury.[241]

"The [affiliate] privilege supplies a defense to overbroad attacks on the 'justification' for a controller's involvement with its affiliates' contracts that might otherwise convert any of the controller's business judgments into personal guarantees."[242] "[A] defendant acts in bad faith when it is not pursuing the legitimate profit seeking activities of the affiliated enterprises."[243]

Beyond Risk summarizes Mr. Chandler's claims as:

> (i) Chandler's Employment Agreement with Arsenal was a contract; (ii) Beyond Risk knew of this contract; (iii) Beyond Risk's CEO "caused Arsenal to breach its contractual obligation to pay Chandler the benefits to which he was entitled" by terminating Chandler, "claiming falsely and without justification that such termination was 'for Cause,'" and "denying him the required notice and the opportunity to cure any claimed failure on Chandler's part"; (iv) Beyond Risk's "intentional" actions were "taken in bad faith" and "without any legitimate business purpose"; and as a result, (v) "Chandler has been damaged."[244]

Beyond Risk states the allegations are "sparse and conclusory" and therefore insufficient to overcome the "high bar" of the affiliate privilege.[245]

Mr. Chandler bases his claims here on the same facts for which he relies to argue the breach of the Earnout Covenant.[246] Fundamentally, Mr. Chandler argues that his "pretextual

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[241] *Bhole, Inc. v. Shore Invs., Inc*., 67 A.3d 444, 453 (Del. 2013) (internal citation and quotations omitted).
[242] *Surf's Up Legacy Partners, LLC v. Virgin Fest, LLC*, 2021 WL 117036, at *6 (Del. Super. Jan. 13, 2021) (internal citation omitted).
[243] *Skye Mineral Invs., LLC v. DEX Cap. (U.S.) Ltd*., 2020 WL 881544, at *33 (Del. Ch. Feb. 24, 2020) (citation, alternation, and internal quotation marks omitted)).
[244] MTD CC at 49-50 (citing CC ¶¶ 84-85, 109-14).
[245] *Id*. at 50; *see id*. (quoting *AM Gen. Hldgs. LLC v. Renco Grp., Inc*., 2013 WL 5863010, at *13 n.89 (Del. Ch. Oct. 31, 2013) (Defendants fail to "allege behavior beyond a failure to comply with the terms of a contract," as they must "to seek remedies beyond those contemplated by the contractual terms governing its breach.").
[246] Opp'n MTD CC at 40 (citing CC ¶ 51 ("Key components of Beyond Risk's plan included: … unjustly terminating Chandler")).

'for cause' termination was a part of the same misconduct designed to avoid the Earnout" and that because avoiding the "Earnout obligation is not a legitimate profit-seeking activity . . . Sellers' numerous misconduct allegations support an inference, at the pleadings stage, that Counterclaim-Defendants were 'motivated by some malicious or other bad faith purpose' by causing a breach of Chandler's Employment Agreement."[247]

Here, Mr. Chandler's reliance on inference is sufficient to survive the motion to dismiss. The affiliate privilege turns on justification, and the allegations of bad faith here are enough to support a reasonable inference drawn in his favor that Beyond Risk was not pursuing legitimate business interests when he was terminated by Arsenal. In contrast to the bad faith argued in support of "corollary applications" of the implied covenant doctrine, above, here the allegations are sufficient to allow the claim to proceed. Accordingly, the Court will **DENY** the Counterclaim Motion as Counterclaim IV.

V. CONCLUSION

For the reasons stated above, the Court will **GRANT** the Law Motion and will dismiss Count III based on lack of personal jurisdiction. In addition, the Court **DENIES** Plaintiffs' Motion to Dismiss the Counterclaims as to Counterclaims I and IV; and **GRANTS** Plaintiffs' Motion to Dismiss the Counterclaims as to Counterclaim II and III.

IT IS SO ORDERED.

September 24, 2024
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

[247] *Id*.