IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRIAN F. ADDY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3571-VCP
	)	
JOHN A. PIEDMONTE, JR., G. WOODWARD STOVER, II, MAV ORCUTT INVESCO, LLC, MAV KENTUCKY INVESCO, LLC, YOST VENTURES, LLC, WESTSIDE EXPLORATION, LLC, WESTSIDE EXPLORATION DELAWARE I, LLC, WESTSIDE EXPLORATION DELAWARE II, LLC, WESTSIDE EXPLORATION DELAWARE III, LLC, SISQUOC VENTURES, LLC, MICHIGAN AVENUE VENTURES, LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: November 6, 2008
Decided: March 18, 2009

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PARSONS, Vice Chancellor.

This dispute revolves around oil and gas exploration investments.[1] Plaintiff is a sophisticated investor who contributed more than $3 million to oil and natural gas extraction projects in California and Kentucky for the promise of a substantial return on his investment in addition to certain fees and an opportunity for an ownership share of the projects. According to Plaintiff, Defendants induced his participation with those promises and then failed to make good. At its heart, this dispute involves the interrelationship of several written contracts each purporting to integrate fully the agreement among the parties with the terms of notes that were described in summary fashion in informal documents, but never formally issued. Further complicating the controversy is the fact that Defendants occupy two camps: one set of parties who ultimately received Plaintiff's money, and a second set who allegedly served solely as pass-through vehicles for the money. Only the latter group of Defendants filed the motion to dismiss that is the subject of this opinion.

For the reasons stated in this opinion, I grant the motion to dismiss as to Plaintiff's claims against the moving Defendants for breach of fiduciary duty, but deny the motion in all other respects.

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[1] For purposes of this opinion, I refer to only two of the three investments challenged in this litigation because the pending motion by certain of the defendants seeks dismissal of only the claims related to those two investments.

I. FACTUAL BACKGROUND[2]

A. The Parties

Plaintiff, Brian F. Addy, is an individual currently residing in Colorado, who participated in three investments in oil and gas exploration ventures that form the basis for this litigation. The pending motion to dismiss involves two of those ventures referred to as the Orcutt investment and the Kentucky investment. The Complaint names eleven Defendants. Six of those Defendants (the "Moving Defendants") filed the motion to dismiss. Five of the Moving Defendants are limited liability companies organized under Delaware law with principal places of business in East Lansing, Michigan. They are: MAV Orcutt Invesco, LLC ("MAV Orcutt"); MAV Kentucky Invesco, LLC ("MAV Kentucky"); Michigan Avenue Ventures, LLC ("MAV"); Yost Ventures, LLC ("Yost"); and Sisquoc Ventures, LLC ("Sisquoc"). MAV Orcutt is the Lead Purchaser for the Orcutt investment and Yost is the sole member and owner of MAV Orcutt. MAV Kentucky is the Lead Purchaser for the Kentucky investment. The sixth Moving Defendant, G. Woodward Stover, II, is an individual residing in Michigan. Stover manages MAV Orcutt, Yost, and MAV, and is a member of Sisquoc.

The other five Defendants have not moved to dismiss the Complaint (the "Westside Defendants" or "Nonmoving Defendants"), but they also are integrally

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[2] The Factual Background, as required on a motion to dismiss under Court of Chancery Rule 12(b)(6), is drawn from the Verified Second Amended Complaint (the "Complaint") and the Participation Agreements, Guaranties, and Summaries of Note Terms incorporated in the Complaint.

involved in the three investment deals at issue. The Westside Defendants are: Westside Exploration, LLC ("Westside"), a Michigan limited liability company; John A. Piedmonte, Jr., an individual residing in Michigan who serves as President of and controls Westside; and three Delaware limited liability companies owned equally by Westside and Sisquoc, namely, Westside Exploration Delaware I, LLC ("Westside I"), Westside Exploration Delaware II, LLC ("Westside II"), and Westside Exploration Delaware III, LLC ("Westside III").

B. The History

In early 2006, Defendants Piedmonte and Stover offered two investment opportunities to Plaintiff Addy. Defendants made their pitches to Addy at roughly the same time. Within three months, Addy contributed cash to the two investments in an aggregate amount exceeding $3 million. Pursuant to agreements with two of the Defendant LLC's, MAV Orcutt and MAV Kentucky, Addy directly provided money to those Defendants, which undertook to purchase participation units in the investments from two of the Westside Defendants in exchange for notes. The money ultimately ended up in the hands of Westside I and Westside II, each of which are owned 50% by an entity controlled by Piedmonte and 50% by an entity controlled by Stover.

1. The Orcutt Investment

In March 2006, Nonmoving Defendant Piedmonte and Moving Defendant Stover invited Addy to invest in the Orcutt Oil Field project located in Santa Barbara County, California. According to Piedmonte and Stover, the Orcutt Oil Field was expected to produce over 260 million barrels of oil. Piedmonte and Stover represented to Addy that,

in exchange for a cash contribution, he would receive repayment of the principal amount plus interest, participation fees, equity kickers, first-priority security interests in the underlying assets, and the right to participate in the form of a working interest contingent on the project's success.

On or about March 27, 2006, Yost, through its wholly-owned affiliate MAV Orcutt, provided to Addy a participation agreement (the "Orcutt Participation Agreement") that offered him the opportunity to purchase participation units in the Orcutt Oil Field project.[3] Under the Orcutt Participation Agreement, MAV Orcutt, acting as Lead Purchaser, committed or proposed to commit to purchase a substantial amount, in the range of $1 million to $5.55 million, of notes from Westside I or an as-yet-to-be-formed affiliate.[4] In turn, MAV Orcutt agreed to transfer to Addy a ratable participation in the notes in exchange for $2,171,053.[5] According to the Complaint, the Orcutt Participation Agreement, ultimately obligated MAV Orcutt to purchase that amount in notes from Westside I. MAV Orcutt also agreed to receive principal and interest repayments from Westside I and distribute them to Addy — in that sense basically serving as a pass-through vehicle.

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[3] Stover serves as manager of both Yost and MAV Orcutt.

[4] App. of Exs. to Defs.' Mot. to Dismiss Counts I-III and VII-XI of Pl.'s Second Am. Compl. ("Defs.' App.") Ex. 3, Orcutt Participation Agreement, at 1.

[5] *Id.* at 1, 8.

The Orcutt Participation Agreement states that MAV Orcutt and Westside I were "finalizing the transaction documents" including a Note Purchase Agreement, Security Agreement, Revenue Participation Agreement, Piedmonte and Westside I's Guaranty, and 20% Senior Secured Participating Note due October 2007.[6] The Orcutt Participation Agreement referred to those documents, collectively, as the "Note Purchase Documents" and stated that Yost expected them to be executed and delivered by April 15, 2006.[7] The Agreement also included as attachments an Executive Summary and Summary of Note Terms (the "Orcutt Summary") and unsigned guaranties of Piedmonte, Stover, and Westside.

According to the Orcutt Participation Agreement, the attached Orcutt Summary summarized the "principal terms of the Notes."[8] The Orcutt Summary briefly describes the operating and note-issuing entities and some of their principals and officers, the Orcutt Oil Field and its operations, and the type of oil resource in the Orcutt Oil Field. Additionally, a chart delineates the primary terms of the Notes, including the issuer, guarantors, priority, interest rate, use of investment monies, participation and placement fees, and several other terms. As the issuer, the Orcutt Summary names Westside Exploration Orcutt, LLC, an entity which was never created. The Summary also lists that entity, Westside, Piedmonte, and Stover as guarantors of the Notes, and MAV Orcutt as

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6 *Id.* at 1.

7 *Id.*

8 *Id.*

Lead Purchaser. As for the use of the investment proceeds, the Orcutt Summary states they will be used for "[t]ransaction and offering expenses," and for "acquisition of Orcutt Oil Field interests and for other development costs and purposes at the discretion of Westside Exploration Orcutt, LLC."[9] The Summary further provides that "[Westside Exploration Orcutt, LLC] would not pay the Manager any commission or other remuneration in connection with the offering, except reimbursement of travel expenses and other out of pocket expenses."[10] Yet, nowhere in the Orcutt Summary is the term "Manager" defined. I note, however, that Yost signed the Orcutt Participation Agreement as "Manager" of MAV Orcutt through its "Manager," Stover.

The Orcutt Summary indicates that the Notes bear interest at a rate of 20%. The holders of the Notes are to receive a 2% Placement Fee at the time of the investment, and a $750,000 Participation Fee to be paid in four quarterly installments of $187,500 beginning on December 31, 2007.

In early April 2006, Stover and Piedmonte informed Addy that the Orcutt Oil Field project required his investment immediately. They also stated that the Orcutt Participation Agreement, Orcutt Summary, and guaranties documented their agreement and that the guaranties were effective immediately. On or about April 24, 2006, Stover sent to Addy two executed copies of the Orcutt Participation Agreement, with copies of

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9 Pl.'s Answering Br. in Opp'n to Stover Defs.' Mot. to Dismiss Counts I-III and VII-XI of Pl.'s Second Am. Compl. ("PAB") Ex. 1, Orcutt Summary, at 7.

10 *Id.* at 8.

the Orcutt Summary, Stover's executed guaranty, and Piedmonte's executed guaranty. Addy alleges that on June 7, 2006, based on those documents and Stover's and Piedmonte's representations, he transferred $2,171,053 to MAV Orcutt. Shortly afterward, MAV Orcutt paid Addy the 2% Placement Fee in the amount of $43,421.06. But, Addy has neither received repayment of the principal and interest for the Orcutt investment nor been paid any portion, pro rata or otherwise, of the $750,000 Participation Fee.

2. The Kentucky Investment

In March 2006, after proposing the Orcutt investment to Addy, Stover and Piedmonte offered Addy the opportunity to invest in a natural gas exploration project located in Kentucky. According to Addy, Stover and Piedmonte presented a transaction resembling the Orcutt investment, the benefits of which would include the repayment of interest and principal, an equity kicker, overriding royalty interest, and net revenue interest.[11] Yost, through its affiliate MAV Kentucky, sent a Participation Agreement for the Kentucky project (the "Kentucky Participation Agreement" or, collectively with the Orcutt Participation Agreement, the "Participation Agreements") to Addy, together with a Summary of Note Terms (the "Kentucky Summary") and unsigned guaranties of Stover, Piedmonte, and Westside.

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[11] Compl. ¶ 37.

The terms of the Kentucky Participation Agreement and Summary substantially track the Orcutt Participation Agreement and Summary.[12] The Kentucky Notes were to be due on December 31, 2006. Like the Orcutt Participation Agreement, the Kentucky Participation Agreement referred throughout to a similar set of anticipated Note Purchase Documents. The Kentucky Summary identified MAV Kentucky as the Lead Purchaser and listed Westside as the issuer and a guarantor, and Piedmonte as an additional guarantor.[13] The Summary also provided that the investment proceeds would be used for "[t]ransaction and offering expenses" and "development of mineral acreages."[14] Additionally, the Kentucky Summary stated that "[Westside] would not pay the Manager any commission or other remuneration in connection with the offering, except reimbursement of travel expenses and other out of pocket expenses."[15] As with the Orcutt investment, the term "Manager" was not defined in the Kentucky Participation

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12 *See generally* Orcutt Participation Agreement; Orcutt Summary; Defs.' App. Ex. 1, Kentucky Participation Agreement; PAB Ex. E, Kentucky Summary. The Kentucky Summary contained only the chart of Note terms, which specified the issuer, guarantors, priority, interest rate, use of investment monies, participation, and placement fees. Unlike the Orcutt Summary, it did not contain an Executive Summary comprising descriptions of the project, the type of commodity, the entities involved, and those entities' principals and officers.

13 Stover is not listed in the Kentucky Summary as a guarantor of the Kentucky investment, but ultimately he did execute a guaranty of some of MAV Kentucky's obligations.

14 Kentucky Summary at 2.

15 *Id.* at 3.

Agreement or Kentucky Summary, but Yost signed the Kentucky Participation Agreement as "Manager" through its "Manager" Stover.

The Kentucky Participation Agreement and Kentucky Summary both provided that the Notes would issue with a 20% interest rate. In addition, the Kentucky Summary provided for certain types of "Profits Participation."

Addy alleges that after he received the Kentucky Participation Agreement, Stover and Piedmonte informed him that they needed his investment immediately. On April 17, 2006, Stover sent to Addy the Kentucky Summary, two executed copies of the Kentucky Participation Agreement, and executed guaranties from Stover and Piedmonte. On April 18, based on that documentation and the oral representations of Stover and Piedmonte, Addy transferred $937,500 to MAV Kentucky. No Note Purchase Documents for the Kentucky investment were ever created.

MAV Kentucky repaid Addy's cash contribution of $937,500 with 20% interest. Addy alleges, however, that he also is owed an equity kicker pursuant to the Profits Participation section of the Kentucky Summary.

C. Procedural History

Addy commenced this action on February 25, 2008. On July 24, Addy filed his Verified Second Amended Complaint (the "Complaint"). The Complaint asserts eleven claims. Counts I and III accuse the Defendants involved with the Orcutt and Kentucky Participation Agreements, respectively, with breach of contract. Count II is for breach of the guaranties of Piedmonte, Stover, and Westside as to the Orcutt investment. Count IV asserts that Piedmonte and Westside breached their guaranties as to the Kentucky

investment. Counts V and VI relate to the third investment, which is not currently before the Court. Count VII is for equitable fraud or, in the alternative, fraud against "Yost and/or Stover and Piedmonte."[16] Count VIII alleges breaches of fiduciary duty by Stover and Piedmonte. Count IX asserts a claim in the alternative for promissory estoppel against MAV Orcutt, MAV Kentucky, Yost, Stover, Piedmonte, and Westside. Further pleading in the alternative, Addy seeks an accounting against all Defendants in Count X. And, finally, Count XI also asserts in the alternative a claim for unjust enrichment, constructive trust, resulting trust, or equitable lien as to MAV Orcutt, MAV Kentucky, Yost, Westside, Westside I, Westside II, and Westside III.

On August 11, the Moving Defendants moved to dismiss Counts I-III and VII-XI of the Complaint. I now turn to the substance of that motion.

D. Parties' Contentions

In the Complaint, Addy asserts that all Defendants, moving and nonmoving, owe a significant debt to him pursuant to the various documents and representations related to his cash contributions to the Orcutt and Kentucky projects. Specifically, with respect to the Orcutt investment, Addy asserts that Defendants must repay the principal and interest from his $2,171,053 contribution and his pro rata portion of the $750,000 Participation Fee. Regarding the Kentucky investment, Addy contends Defendants owe him an equity kicker in line with the Profits Participation section of the Kentucky Summary. In seeking to hold the Moving Defendants accountable for those debts, Addy urges the Court to find

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[16] Compl. at 31.

MAV Orcutt and MAV Kentucky, in their capacity as Lead Purchasers for the two investments, liable for the obligations outlined in the Participation Agreements. Additionally, Addy claims Stover's guaranties obligate him to pay principal, interest, equity kickers, and participation and placement fees, and not just, as Defendants contend, to guaranty that any funds the Lead Purchasers receive will be distributed to the proper parties, whether it be the Westside Defendants or Addy. Addy also asserts that certain Moving Defendants breached the Participation Agreements by retaining a portion of his investment money and failing to use it to purchase participation units in the notes, and by failing to procure executed and final Note Purchase Documents. Addy further contends that the Moving Defendants committed fraud by failing to disclose the fact they retained a portion of his money earmarked for the Kentucky investment in contravention of representations on which Addy relied in making the investments at issue. Finally, Addy alleges Stover breached his fiduciary duty owed to Addy.

The Moving Defendants request that the claims asserted against them in Counts I-III and VII-XI be dismissed for a variety of reasons. Moving Defendants MAV Orcutt and MAV Kentucky assert that their obligations were defined by the express language in the Participation Agreements, that those Agreements are unambiguous and fully integrated, and, therefore, that no additional documents or other extrinsic evidence may be considered in interpreting them. The Moving Defendants further assert that the scope of their obligations extends only to their role as middlemen for the investments, *i.e.*, that the Participation Agreements and Stover's guaranties only bind them to deliver Addy's money to the Westside Defendants and to distribute to Addy his share of any funds they

receive from the Westside Defendants. The Moving Defendants strenuously deny they had any obligation to ensure the repayment of principal, interest, participation or placement fees, or equity kickers to Addy, unless they received such a payment from the Westside Defendants or explicitly agreed to make such payments in a guaranty. In seeking dismissal of the breach of fiduciary duty claims, the Moving Defendants deny the existence of any fiduciary relationship between them and Plaintiff. Finally, Yost independently moves for dismissal on the basis that it is not a party to the agreements in issue.

Both sides to this litigation seem to agree that the agreements governing the Orcutt and Kentucky investments include, at a minimum, the executed Participation Agreements and guaranties for each investment and the oral agreements Addy had with the respective Westside Defendants, including Piedmonte. The Summaries contain the terms of the anticipated, but never finalized, Note Purchase Documents for the two investments. A major premise of the Moving Defendants' motion to dismiss, however, is that the obligations of those Defendants under the Participation Agreements and guaranties to which they are parties are limited to the terms of those documents, and do not include any representations or obligations contained in the Orcutt Summary or the Kentucky Summary.[17] Addy takes the contrary position that the Summaries inform the proper

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[17] For example, the Moving Defendants contend that the agreement memorializing their obligations to Addy as to the Orcutt investment are only the Orcutt Participation Agreement and Stover's guaranty of that investment. Addy, on the other hand, asserts that the Moving Defendants' obligations in that regard also include the Orcutt Summary and any representations made by Stover and

construction of the Participation Agreements and guaranties, and reflect representations for which at least some of the Moving Defendants may be held liable.

II. ANALYSIS

A. Standard of Review

A court should not grant a motion to dismiss pursuant to Rule 12(b)(6) "unless it can be determined with reasonable certainty that the [nonmoving party] could not prevail on any set of facts reasonably inferable" from the pleadings or any documents incorporated therein.[18] The court may consider, in addition to the complaint, any documents integral to the complaint that are incorporated by reference therein.[19] The court must assume the truthfulness of the well-pleaded allegations and must afford the nonmoving party "the benefit of all reasonable inferences."[20] Mere conclusory allegations, however, will not be accepted as true without specific supporting allegations of fact.[21] The standard of review under Rule 12(b)(6) does not compel the court to accept

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Piedmonte pertaining to the Orcutt investment. The parties hold similarly opposing views on the scope of the Moving Defendants' obligations with respect to Addy's investment in the Kentucky project.

[18] *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (quoting *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002)).

[19] *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612-13 (Del. 1996). I, therefore, consider the language of the Participation Agreements, Guaranties, and Summaries of Note Terms referred to in and attached to the Complaint to be part of the record on the pending motion to dismiss.

[20] *Id.*

[21] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

all legal conclusions and strained interpretations of fact offered by the nonmoving party.[22]

Consistent with the standard for assessing a Rule 12(b)(6) motion to dismiss for failure to state a claim, I have not considered the affidavit of John A. Piedmonte, Jr. In a brief related to the Moving Defendants' motion to dismiss, the Nonmoving Defendants submitted the Piedmonte affidavit to "provide the Court with an accurate and correct recital of the facts . . . ."[23] Under Rule 12(b)(6), however, the Court may not consider matters outside the pleadings.[24] As previously noted, the only exceptions to this prohibition relate to documents that are integral to a plaintiff's claim and incorporated into the complaint or are not being relied upon to prove the truth of their contents.[25] The Piedmonte affidavit does not fall under either exception.

B. The Pending Motion to Dismiss

The Complaint contains eleven claims for relief, or counts, against the eleven Defendants, both moving and nonmoving. The pending motion seeks dismissal of eight of the eleven counts as to the Moving Defendants only, namely, Stover, MAV Orcutt, MAV Kentucky, MAV, Sisquoc, and Yost. The only counts addressed in the motion are Counts I-III and VII-XI. Although some of these counts also may apply to one or more

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22 *In re Gen. Motors (Hughes) S'holder Litig.*, 867 A.2d 162, 168 (Del. 2006).

23 Nonmoving Defs.' Answering Br. in Response to Moving Defs.' Mot. to Dismiss Counts I, II, III, VII, VIII, IX, X, and XI of Pl.'s Second Am. Compl. at 2.

24 *Haber v. Bell*, 465 A.2d 353, 357 (Del. Ch. 1983).

25 *See Vanderbilt Income & Growth Assocs.*, 691 A.2d at 613.

of the Nonmoving Defendants (Piedmonte, Westside, Westside I, Westside II, and Westside III), the motion to dismiss does not involve any claims against those Defendants.

This memorandum opinion is loosely organized by subject rather than by count. First, I address Addy's breach of contract claims based on the Participation Agreements. Second, I consider the arguments as to the breach of guaranty claim against Defendant Stover. After that, the opinion discusses in turn the motion to dismiss the claims for breach of fiduciary duty, fraud and equitable fraud, unjust enrichment, promissory estoppel, and for equitable relief, including specific performance, an accounting, a constructive or resulting trust, and an equitable lien.

1. Breach of contract claims against MAV Orcutt, MAV Kentucky and Yost (Counts I and III)

Addy alleges the Moving Defendants committed contractual breaches by failing to honor the provisions of the Orcutt and Kentucky "investment agreements." Plaintiff asserts that each "investment agreement" includes the relevant Participation Agreement, Guaranties, and Summary of Note Terms. The Moving Defendants contend there is no such thing as an "investment agreement" as Addy uses that term. Instead, the Moving Defendants argue that there are several separate and independent agreements as to both the Orcutt and Kentucky ventures. According to the Moving Defendants, their relationships with Addy are governed solely by the Participation Agreements and Stover Guaranties, while the Orcutt and Kentucky Summaries create a contract among Addy and certain of the Nonmoving or Westside Defendants that in no way binds the Moving

Defendants. On the Moving Defendants' motion to dismiss, I must determine if there is any set of facts reasonably inferable from the Complaint and related documents upon which Addy may succeed on his claims.

The relationships among the parties under the various contracts is, at best, murky. Moving Defendants Yost, MAV Orcutt, and MAV Kentucky claim that they only undertook the obligation to collect money from Addy and use it to purchase participation units in the Orcutt and Kentucky investments from Westside. The Moving Defendants claim they have no obligations to honor the terms of the nonexistent Notes purchased from Westside, even if the Nonmoving Defendants default. Meanwhile, the Moving Defendants and the Nonmoving Defendants have overlapping ownership or control interests. For example, Moving Defendant Stover manages MAV Orcutt and Yost, which acted as signatory to the Participation Agreements in its capacity as manager of MAV Orcutt and MAV Kentucky. At the same time, Stover controls Sisquoc, which owns a 50% interest in Nonmoving Defendants Westside I, II, and III, which ultimately received most of the money that Addy provided.

a. Whether Yost is a party to the Participation Agreements

First, I address whether Addy has pleaded sufficiently that Yost undertook any contractual obligations pursuant to the Orcutt and Kentucky investments. Yost independently presents the defense that it is not a party to the Participation Agreements and, as a nonparty, it has no liability of any kind as to either the Orcutt or Kentucky Participation Agreements. Yost claims it signed the Participation Agreements in its capacity as a manager of MAV Orcutt and MAV Kentucky. While it generally is true

that an entity cannot be held liable for agreements to which it is not a party,[26] Addy has pleaded sufficient facts to overcome a motion to dismiss based on Yost's connection to the Participation Agreements. Yost is a signatory to the contracts as manager of MAV Orcutt and MAV Kentucky, and wholly owns the former entity. In and of itself, this does not necessarily make Yost a party to the contracts.[27] The Participation Agreements, however, state that "Yost Ventures, LLC, . . . through its wholly owned affiliate, [MAV Orcutt or MAV Kentucky, as the case may be], . . . has committed or proposes to commit . . . to purchase . . . Notes to be issued by Westside."[28] The Participation Agreements further provide that "Yost anticipates that the Note Purchase Documents will be executed and delivered" by a certain date.[29] If Yost merely were signing as manager of MAV Orcutt and MAV Kentucky, Yost simply could have executed the signature block. Yet, Yost went further, communicating expectations about the completion and execution of the Note Purchase Documents. Moreover, the language of the Participation Agreements indicates that rather than representing that MAV Orcutt or MAV Kentucky committed to purchase the Notes, Yost itself committed to purchase Notes through MAV Orcutt and

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26 *Am. Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 343 (Del. Ch. 2003) ("[A] fundamental principal of contract law provides that only parties to a contract are bound by that contract.").

27 *See Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *7 (Del. Ch. Mar. 4, 2004) ("[A]n ownership interest is insufficient to render a parent company liable for its subsidiary's breach of contract.").

28 Orcutt Participation Agreement at 1; Kentucky Participation Agreement at 1.

29 *Id.*

MAV Kentucky. At this stage of the proceedings, therefore, the facts alleged are sufficient to raise a reasonable inference that Yost is a party to the Agreements.

b. Kentucky investment

Addy lodges five specific allegations of breach of contract against MAV Kentucky in regards to what he calls the Kentucky Investment Agreement. The Kentucky Investment Agreement, according to Addy, consists of the Kentucky Participation Agreement, the Kentucky Summary, the executed Kentucky Guaranties, and the representations made by Stover and Piedmonte.[30] Addy contends MAV Kentucky breached the agreement between them by:

> (a) keeping a portion of Addy's investment rather than investing the entire amount in Westside or its Affiliate, (b) failing to obtain the Note Purchase Documents . . . , (c) failing to pay Addy the equity kicker plus all accrued interest, (d) failing to secure Addy's first priority position with regard to his investment, and (e) transferring and/or encumbering the collateral securing Addy's investment.[31]

Moving Defendant MAV Kentucky denies these allegations of breach because it is only a party to the Kentucky Participation Agreement, and the obligations attributed to it by Addy are not contained within the four corners of that document. MAV Kentucky contends that the Kentucky Participation Agreement is an unambiguous, fully integrated contract that represents the final agreement between the parties, and, therefore, extrinsic evidence may not be used to expand or vary its meaning. Further, MAV Kentucky

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30 Compl. ¶ 45.

31 *Id.* ¶ 104.

asserts that the only support for the obligations Addy allegedly breached appears in the Kentucky Summary, which, contrary to Addy's position, is not incorporated by reference into the Kentucky Participation Agreement.

1. Whether evidence outside the four corners of the Kentucky Participation Agreement may be considered

MAV Kentucky's motion to dismiss Count III largely depends on the Court looking solely to the four corners of the Kentucky Participation Agreement as the source of MAV Kentucky's obligations to Addy. Conversely, to state a claim for breach of contract against MAV Kentucky, the Complaint must allege facts sufficient to support a reasonable inference that other things, such as the Kentucky Summary, form part of the agreement between Addy and MAV Kentucky. Accordingly, I must determine whether extrinsic evidence may be considered in discerning the parties' intentions. In that regard, I consider first whether the Kentucky Participation Agreement is fully integrated; second, whether the Kentucky Summary is incorporated by reference into the Kentucky Participation Agreement; and third, whether the contract is ambiguous.

The court's ultimate goal in contract interpretation is to determine the parties' shared intent.[32] "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."[33] Delaware adheres to the objective theory of

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32 *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 461 (Del. Ch. 2008).

33 *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).

contracts.[34] In that respect, "the court looks to the most objective indicia of that intent: the words found in the written instrument."[35] A contract is not rendered ambiguous solely because parties do not agree as to its construction.[36] Contract language must be susceptible to two or more reasonable interpretations to be deemed ambiguous.[37] Moreover, parol or extrinsic evidence cannot be used to manufacture an ambiguity in a contract that facially has a single reasonable meaning.[38]

Under the parol evidence rule, where the written contractual language is susceptible to more than one reasonable interpretation, the court will consider proffered admissible evidence bearing upon the objective circumstances relating to the background of the contract.[39] "In some cases, determining whether a contract is susceptible to more than one interpretation requires an understanding of the context and business circumstances under which the language was negotiated; seemingly unequivocal language may become ambiguous when considered in conjunction with the context in

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34 *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).

35 *Sassano*, 948 A.2d at 461.

36 *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

37 *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008).

38 *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

39 *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. June 6, 1996).

which the negotiation and contracting occurred."[40] Such extrinsic evidence may include overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry.[41] Upon examination of the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."[42]

The applicability of the parol evidence rule also may be triggered by an integration clause in the contract. Clauses indicating that the contract is an expression of the parties' final intentions generally create a presumption of integration.[43] Courts, however, may consider extrinsic evidence to discern if the contract is completely or partially integrated.[44] Furthermore, in determining whether a contract is fully integrated, the court focuses on whether it is carefully and formally drafted, whether it addresses the questions

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40 *Id.* at *10 n.10.

41 *United Rentals*, 937 A.2d at 834-35.

42 *U.S. West*, 1996 WL 307445, at *10.

43 *Carrow v. Arnold*, 2006 WL 3289582, at *5 (Del. Ch. Oct. 31, 2006).

44 *See* II E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.3, at 231 (3d ed. 2004) ("According to Corbin, account should always be taken of all circumstances, including evidence of prior negotiations, since the completeness and exclusivity of the writing cannot be determined except in the light of those circumstances. The writing cannot prove its own completeness and accuracy. The trend clearly favors Corbin. The Restatement Second commentary agrees that a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties.") (internal citations and quotation marks omitted).

that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties.[45]

Paragraph 24 of the Kentucky Participation Agreement plainly purports to be an integration clause.[46] MAV Kentucky contends that the integration clause restricts the contract between it and Addy to the Participation Agreement, and that no extrinsic or parol evidence may be considered in construing that contract. MAV Kentucky also asserts that consideration of extrinsic evidence, such as the Kentucky Summary, is precluded because there are no ambiguities in the Kentucky Participation Agreement as written. Instead, according to MAV Kentucky, the Summary actually constitutes a separate contract formed between Addy and one or more of the Westside Defendants, to which MAV Kentucky is not a party and, therefore, is not bound.

In determining whether the Kentucky Participation Agreement is fully integrated, I must consider whether it is carefully and formally drafted. As stated above, the Kentucky Participation Agreement stipulates in Paragraph 1 that "[i]n the event that the initial closing of purchase and sale of Notes does not occur by March 15, 2006, this Participation Agreement will automatically terminate and Lead Purchaser will return all

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[45] *Hynansky v. Vietri*, 2003 WL 21976031, at *3 (Del. Ch. Aug. 7, 2003) (citation omitted).

[46] Paragraph 24 of the Kentucky Participation Agreement provides in pertinent part: "This Agreement: (a) embodies the entire agreement between the Parties, supersedes all prior agreements and understandings, if any, relating to the subject matter hereof, and may be amended only by an instrument in writing executed jointly by the Manager of each Party . . . ."

Participation Amounts . . . ." But, the Kentucky Participation Agreement itself bears a date of March 21, 2006.[47] Moreover, the date by Addy's signature in the signature block on page 8 of the Agreement is April 18, 2006. Stover did not send the executed copies of the Kentucky Participation Agreement to Addy until April 17, 2006.[48] Thus, the Agreement did not even arguably become effective until about a week, and probably more like a month, after the stated expiration date.[49] That is, read literally, the Kentucky Participation Agreement terminated before it was even signed by the parties. These discrepancies and internal inconsistencies contradict the notion that the Participation Agreements were carefully drafted.

The Kentucky Participation Agreement is a contract between Addy and MAV Kentucky[50] for participation in the purchase of "up to $2,375,000 of 20% Senior Secured Participating Notes ('Notes') of [one of the Westside Defendants] . . . by [MAV Kentucky]."[51] It states that MAV Kentucky and Westside "are finalizing the transaction

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47 *See generally* Kentucky Participation Agreement.

48 Compl. ¶ 45.

49 Kentucky Participation Agreement ¶ 1.

50 Most of the parties' arguments regarding the alleged breach of the Participation Agreements are stated in terms of the obligations of MAV Orcutt and MAV Kentucky. As indicated previously in Section II.B.1.a, Addy also contends Yost breached those Agreements. For the sake of brevity and because Addy's breach of contract claims against Yost are not as clearly specified, I refer only to MAV Kentucky and MAV Orcutt in this and the following sections. The same analysis, however, applies as to Yost for purposes of the pending motion to dismiss.

51 Kentucky Participation Agreement at 1.

documents which include a Note Purchase Agreement, Security Agreement, Revenue Participation Agreement, . . . and 20% Senior Secured Participating Note due December 31, 2006 (collectively, the 'Note Purchase Documents'),"[52] and that "Yost anticipates that the Note Purchase Documents will be executed and delivered . . . by April 15, 2006."[53] The Kentucky Participation Agreement further provides:

> This will confirm that if closing of the Purchase and Sale of Notes occurs, on substantially the same terms contained in the Summary of Note Terms, [Addy has] agreed to purchase a ratable participation in, and to assume a ratable part of the aggregate obligations of [MAV Kentucky] with respect to, the Note Purchase Documents . . . .[54]

It is reasonable to infer from this language that the parties' agreement includes at least some obligations relating to the Notes and Note Purchase Documents.

Yet, no Notes or Note Purchase Documents were executed or delivered to Addy in connection with his investment in the Kentucky project. Hence, Addy and MAV Kentucky contracted to assume obligations under documents that do not exist, *i.e.*, the Notes and the Note Purchase Documents. Because the Kentucky Participation Agreement memorializes a transaction revolving around the transfer of Notes, the fact that no Notes or Note Purchase Documents were ever executed strengthens the inference that the contract was neither carefully nor formally drafted. Based on the absence of such formal documents, it also is reasonable to infer that, if the Kentucky Participation

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52 *Id.* at 1.

53 *Id.*

54 *Id.*

Agreement does not include the Kentucky Summary, it fails to answer questions that ordinarily would arise out of the subject matter of the Agreement. Likewise, the fact that no Note Purchase Documents were ever signed raises questions about whether the Kentucky Participation Agreement expresses the final intentions of the parties. Therefore, I find that Agreement is not integrated and that extrinsic evidence, such as the Kentucky Summary, may be used to interpret its meaning.

Addy also argues, and the Moving Defendants dispute, that the Kentucky Participation Agreement incorporates by reference the Kentucky Summary. "When an executed contract refers to another instrument and makes the conditions of the other instrument a part of it, the two will be interpreted together as the agreement of the parties."[55] The Kentucky Participation Agreement specifically refers to the Kentucky Summary, and at least arguably provides that it sets forth, on "substantially the same terms," the obligations of the parties.[56] While there appears to be little or no question that the Kentucky Summary constitutes a part of the underlying contracts as to the Kentucky investment, the parties disagree over whether the terms of the Summary are binding on MAV Kentucky and Yost. I need not determine for purposes of the motion to dismiss, however, that the Kentucky Summary is incorporated by reference into the Kentucky Participation Agreement such that it would bind MAV Kentucky and Yost as parties to the Summary. Rather, I conclude that the references to the Kentucky Summary in the

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55 *Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 231 A.2d 450, 456 (Del. Ch. 1967).

56 Kentucky Participation Agreement at 1.

Kentucky Participation Agreement and the absence of any formal Note Purchase Documents make it reasonable to conclude that the Summary must be considered in construing the Participation Agreement.

Genuine issues exist as to the extent to which the Kentucky Summary creates any obligations on the part of MAV Kentucky, and that fact in and of itself renders resolution of the current dispute on a motion to dismiss inappropriate. Still, it is not clear which of the numerous parties involved in these transactions are bound by those Note terms. The allegations in the Complaint based on communications from Stover and Piedmonte support the view that the Kentucky Summary represents part of the contractual relationship among Addy and certain of the Defendants, including some or all of the Westside or Nonmoving Defendants. In addition, I find that Addy conceivably could prove from the facts alleged in the Complaint that MAV Kentucky and Yost breached one or more contractual obligations grounded at least in part on evidence extrinsic to the Kentucky Participation Agreement, such as the Kentucky Summary arguably is. I turn next, therefore, to the specifics of Addy's breach of contract allegations.

2. Whether Addy has sufficiently pleaded a breach of the agreement regarding the Kentucky investment by MAV Kentucky and Yost

In his initial allegation of breach Addy asserts that MAV Kentucky improperly retained a portion of his $937,500 investment in the Kentucky project. Addy claims MAV Kentucky was required to invest the entire amount in the purchase of Notes from the Westside Defendants. Under the heading "Use of Proceeds," the Kentucky Summary lists "(1) [t]ransaction and offering expenses and (2) development of mineral acreages" as

permissible uses.[57] Under the heading "Plan of Offering," the Summary states "[Westside] will not pay [MAV Kentucky] any commission or other remuneration in connection with the offering, except reimbursement of travel and other out of pocket expenses."[58] Addy alleges Stover, the manager of MAV Kentucky's manager, Yost, kept 20% of the investment money Addy contributed in connection with the investment in the Kentucky project.[59]

Notably, the provisions on which Addy bases his allegations of breach for keeping a portion of the investment money appear only in the Kentucky Summary. The thrust of MAV Kentucky's argument against liability is that the Kentucky Participation Agreement contains no prohibition on retaining some of Addy's money. Because, according to MAV Kentucky, the Kentucky Participation Agreement is a fully-integrated, unambiguous document, nothing outside its four corners, such as the Kentucky Summary, may be used to alter its terms. As discussed in Section II.B.1.b.1, however, the Kentucky Participation Agreement may not be fully integrated and it may be necessary to consider extrinsic evidence to ascertain the scope of the parties' obligations under that Agreement. For example, it is conceivable that, when read in conjunction with the representations and undertakings in the Kentucky Summary, the Kentucky Participation Agreement may proscribe the retention of Addy's money and require that it be invested directly in

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57 Kentucky Summary at 2.

58 *Id.* at 3.

59 Compl. ¶¶ 82-83.

Westside for purposes of the Kentucky project. In this respect, therefore, Addy sufficiently has pleaded a breach of contract claim to survive the pending motion to dismiss.

I reach a similar conclusion regarding the allegations in the Complaint that MAV Kentucky breached the contract concerning his investment in the Kentucky project by failing to obtain the Note Purchase Documents contemplated under the Kentucky Participation Agreement in exchange for his payment of $937,500. In support of the motion to dismiss, MAV Kentucky argues that under the plain terms of the Participation Agreement, it is not responsible for any failure to obtain the Note Purchase Documents. They note that the Kentucky Participation Agreement provides MAV Kentucky "shall not be responsible in any manner to [Addy] for: (a) the effectiveness, enforceability, genuineness, validity, or due execution of the Note Purchase Documents or any other documents . . . ."[60] But, this argument is not persuasive. The Kentucky Participation Agreement and the attached Kentucky Summary imply that MAV Kentucky or persons or entities cooperating with it would supply Note Purchase Documents for Addy's consideration and execution. The Complaint alleges that no such documents were ever tendered to Addy.[61] The Participation Agreement provides MAV Kentucky "will exercise the same care in administering the Note Purchase Documents as it exercises with

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60 Kentucky Participation Agreement ¶ 13.

61 Compl. ¶ 54.

respect to similar transactions entered into solely for its own account . . . ."[62] A reasonable inference from this provision is that MAV Kentucky undertook to make some effort to ensure the Note Purchase Documents were prepared. It is reasonably conceivable, under the facts alleged by Addy, that MAV Kentucky never made any attempt to negotiate or otherwise obtain the Note Purchase Documents and may have known from the outset that those Documents would never be issued. At a minimum, I consider the agreement concerning the Kentucky investment ambiguous in that regard; thus, the proper interpretation of that agreement cannot be resolved in the context of the pending motion to dismiss and may require consideration of extrinsic evidence.[63]

c. Orcutt investment

Addy alleges MAV Orcutt breached the agreement between them regarding the Orcutt investment by:

> (a) keeping a portion of Addy's investment rather than investing the entire amount in Westside or its Affiliate, (b) failing to obtain the Note Purchase Documents . . . , (c) failing to pay Addy the principal he invested, all accrued interest and the pro rata quarterly installment of the $750,000 Participation Fee, (d) failing to secure Addy's first priority position with regard to his investment, and (e) transferring

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62 Kentucky Participation Agreement ¶ 13.

63 For purposes of the Moving Defendants' motion to dismiss, my conclusion that the motion must be denied as to Count III based on the first two alleged breaches of the Kentucky Participation Agreement renders it unnecessary to consider the other three alleged breaches. Similar reasoning would apply to those allegations, but there is no reason to focus on them further at this preliminary stage of the litigation.

> and/or encumbering the collateral securing Addy's investment.[64]

Moving Defendant MAV Orcutt posits the same arguments against its liability for these alleged breaches as MAV Kentucky did in the context of the allegations concerning the Kentucky investment. That is, MAV Orcutt denies any liability for breach of contract because the allegations do not stem from within the four corners of the Orcutt Participation Agreement, which it argues constitutes an unambiguous, fully-integrated contract.

1. Whether evidence outside the four corners of the Orcutt Participation Agreement may be considered[65]

At this preliminary stage, the record does not show that the Orcutt Participation Agreement is fully integrated; thus, I may consider extrinsic evidence, such as the Orcutt Summary arguably is, in interpreting its meaning. I reach this conclusion for two reasons: (1) the Orcutt Participation Agreement, like the Kentucky Participation Agreement, contains conspicuous inconsistencies that belie the argument that it and the

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64 Compl. ¶ 89.

65 Because the Orcutt Participation Agreement largely resembles the Kentucky Participation Agreement, the analysis of whether the Court properly may consider extrinsic evidence in construing MAV Orcutt's obligations pertaining to Addy's investment in the Orcutt project is similar to the analysis in Section II.B.1.b.1, *supra*. Notable differences in the Orcutt Participation Agreement are the identification of MAV Orcutt as Lead Purchaser and Westside I as assignor of the Notes, and the different due date and dollar amount for the Notes. *See generally* Orcutt Participation Agreement.

related documents it references are formally or carefully drafted documents;[66] (2) the Notes and Note Purchase Documents were never produced,[67] which contradicts the notion that the Orcutt Participation Agreement either addresses questions that arise naturally from the subject matter or expresses the final intentions of the parties.[68] For

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66 *See Hynansky v. Vietri*, 2003 WL 21976031, at *3 (Del. Ch. Aug. 7, 2003) (whether a contract is formally and carefully drafted is a relevant factor in determining whether a contract is fully integrated). For example, the Orcutt Participation Agreement provides for its automatic termination if the purchase of the Notes does not occur by April 15, 2006. Yet, Stover did not send the two executed copies of the Agreement to Addy until April 24, 2006. Compl. ¶ 29. Additionally, Addy's signature is dated June 6, 2006, and he wired his investment contribution on June 7. Orcutt Participation Agreement at 8; Compl. ¶ 30. From these inconsistencies, it is reasonable to infer that the purchase of Notes did not occur until June 2006, by which time the Orcutt Participation Agreement already would have terminated by its own terms.

67 In response to Addy's inquiry about the lack of Note Purchase Documents, Stover wrote in an August 10, 2006 e-mail: "Orcutt documentation. Working on your documentation and will have something to you by the end of the week." Compl. ¶ 53. In June 2007, Piedmonte's counsel wrote Addy that the Orcutt investment was never documented because, due in part to tax issues, "it did not make sense to have this investment go into MAV Orcutt, LLC." *Id.* ¶ 54. At the same time, Addy was presented with drafts of the Note Purchase Documents for the Orcutt investment that also required Addy to participate in a new investment, which he declined. *Id.*

68 *See Hynansky*, 2003 WL 21976031, at *3 (whether a contract addresses questions that would naturally arise out of the subject matter and expresses the final intentions of the parties relates to a determination of contract integration). The Orcutt Participation Agreement is a contract between Addy and MAV Orcutt regarding the purchase of 20% Senior Secured Participating Notes of Westside I. Orcutt Participation Agreement at 1. The Participation Agreement contains numerous references to the Notes, Note Purchase Documents, and the Orcutt Summary, and explicitly contemplated the issuance of Note Purchase Documents. *See id.* Yet, those documents were never signed or created. These circumstances militate against treating the Participation Agreement as a fully-integrated document.

similar reasons to those discussed as to the Kentucky Participation Agreement, I need not decide at this stage whether the Orcutt Participation Agreement incorporates by reference the Orcutt Summary. Whether it does or not, I find that the references to the Orcutt Summary in the Orcutt Participation Agreement and the absence of any formal Note Purchase Documents make it reasonable to conclude that the Summary must be considered in construing the Participation Agreement.

2. Whether Addy has sufficiently pleaded a breach of the agreement regarding the Orcutt investment by MAV Orcutt and Yost

Addy's allegations of breach of contract against MAV Orcutt closely parallel those he made against MAV Kentucky. Because the two Participation Agreements are substantially similar, as are the Kentucky Summary and the Orcutt Summary, there is no reason to repeat my reasons for finding that Addy sufficiently has pleaded a breach of contract claim against MAV Orcutt for keeping a portion of his investment money and failing to obtain the Note Purchase Documents.[69] The allegations of breach differ, however, in one important respect: as to the Orcutt investment, Addy contends MAV Orcutt failed to pay him the principal, interest, and pro rata quarterly installment of the $750,000 Participation Fee.[70] Accordingly, I briefly address the sufficiency of that aspect of the breach of contract claim against MAV Orcutt.

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69 *See* Compl. ¶ 89(a)-(b).

70 The analogous portion of Count III against MAV Kentucky alleges that MAV Kentucky breached by failing to pay the equity kicker plus accrued interest. *Id.* ¶ 104(c).

Paragraph 2 of the Participation Agreement for the Orcutt investment provides that Addy "is with full recourse to [MAV Orcutt] to the extent of the Participation Amount plus Interest . . . ."[71] On its face, this provision supports a reasonable inference that Addy may demand that MAV Orcutt return to him his outstanding principal and interest in connection with the Orcutt investment.

The Moving Defendants argue that any obligations MAV Orcutt might have had under Paragraph 2 are negated by Paragraph 15, which states:

> No amount paid by [Addy] to purchase any participation in the obligations of Westside under the Note Purchase Documents shall be considered a loan by [Addy] to [MAV Orcutt]. [MAV Orcutt] shall have no obligation to repurchase the participations sold under this Agreement upon any default by Westside under any of its obligations or otherwise.[72]

Even ignoring the fact that no Note Purchase Documents for the Orcutt investment were ever executed, Paragraph 15 merely states that the principal provided by Addy does not constitute a loan to MAV Orcutt. Accordingly, Addy might be precluded from arguing that MAV Orcutt owes him principal and interest stemming from the default of a loan. There is no reason to believe, however, that Addy could not bring a claim based on the explicit language of Paragraph 2, which gives him full recourse against MAV Orcutt for the unpaid principal and interest regardless of whether that money constituted a loan. Nor does the further provision in Paragraph 15 that MAV Orcutt has no obligation to

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71 Orcutt Participation Agreement ¶ 2.

72 *Id.* ¶ 15.

repurchase the participation units in the Orcutt investment if Westside defaults necessarily negate Paragraph 2, or vice versa. Under this provision, MAV Orcutt is not obligated to repurchase the participation units from Addy in the event of a Westside default. Nevertheless, one reasonably could interpret Paragraph 2 as operating independently of Paragraph 15.[73] While Paragraph 2 empowers Addy generally to seek repayment from MAV Orcutt of its principal and interest, Paragraph 15 precludes Addy from forcing MAV Orcutt to repurchase the participation units. Repurchase of the participation units conceivably may have a different value than the principal and interest. If Westside had fulfilled some of its obligations, the participation units would have a decreased repurchase price, whereas if Westside had not fulfilled any of its obligations, including the obligations to pay placement and participation fees, the repurchase price might exceed the amount of principal and interest. Therefore, Addy may be able to prove, based on the facts alleged in the Complaint, that MAV Orcutt is liable to him for principal and interest on the Orcutt investment.

As to the pro rata quarterly installment of the $750,000 Participation Fee, MAV Orcutt argues that it constitutes an "Additional Return," as defined in the Orcutt Participation Agreement, for which Addy has no recourse against MAV Orcutt.

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[73] *See, e.g.*, *Council of the Dorset Condo. Apartments v. Gordon,* 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions illusory or meaningless.") (internal quotation marks and citations omitted).

Paragraph 2 of the Agreement provides: "[t]he Participation hereunder is . . . without full recourse as to Additional Returns, as defined below."[74] Paragraph 3 provides:

> [MAV Orcutt] shall promptly credit to [Addy's] account [his] Pro Rata Part of each payment of principal, interest and all royalty payments, working interest revenue, mineral interests, participations, mineral leases, joint operating agreements received under the Revenue Participation Agreement and any cash payments by Westside in lieu of the Revenue Participations (collectively, "Additional Returns") received by [MAV Orcutt] under the Note Purchase Documents.[75]

Paragraph 4 of the Agreement states that, upon Addy's written request, MAV Orcutt "shall use its best efforts to provide . . . such information as is then in [MAV Orcutt's] possession in respect of the current status of . . . Additional Returns made by Westside under the Note Purchase Documents . . . ."[76]

One reasonable interpretation of the language in the Orcutt Participation Agreement concerning "Additional Returns" is that Addy is without recourse against MAV Orcutt for the Participation Fee, as MAV Orcutt argues. Under another reasonable interpretation, however, if one of the Westside Defendants paid the Participation Fee or some portion of it to MAV Orcutt, Addy could seek payment of that money from MAV Orcutt. The Participation Agreement explicitly requires MAV Orcutt to "promptly credit [such payments] to [Addy's] account."[77] The Agreement also requires MAV Orcutt to

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74 Orcutt Participation Agreement ¶ 2.

75 *Id.* ¶ 3.

76 *Id.* ¶ 4.

77 *Id.* ¶ 3.

provide Addy with any information in its possession regarding the status of the Participation Fee. Based on the facts alleged in the Complaint, it is conceivable that MAV Orcutt received payments or, at least, information regarding the Participation Fee from Westside. Therefore, the Moving Defendants have failed to show that they are entitled to dismissal of the breach of contract claim against MAV Orcutt for failure to state a claim.

2. Breach of guaranty claims against Stover (Count II)

Addy claims that Stover breached his Guaranty relating to the Orcutt investment (the "Orcutt Guaranty") because Addy has not received the principal and interest of his contribution or his pro rata portion of the Orcutt Participation Fee. Stover argues that his obligations under the Orcutt Guaranty are triggered only if MAV Orcutt fails to honor its narrow obligations under the Orcutt Participation Agreement, *i.e.*, Stover pays only if Westside pays MAV Orcutt, but MAV Orcutt does not pay Addy.

Paragraphs C and D of the Recitals section of the Orcutt Guaranty provide:

> C. It is a condition precedent to [Addy's] purchase of Participations in the Notes that [MAV Orcutt's] principal obligations with respect to the Notes be guarantied by [Stover].
>
> D. ***[Stover] is willing to guaranty collection of*** and [MAV Orcutt's] obligations with respect to ***the principal amount of the Notes*** to the extent set forth herein.[78]

A reasonable inference can be drawn from Paragraph C that Stover guarantied any obligations of MAV Orcutt pursuant to the Orcutt Participation Agreement with respect

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[78] Defs.' App. Ex. 4, Orcutt Guaranty, ¶¶ C, D (emphasis added).

to the Notes related to the Orcutt investment. Paragraph D supports a further, consistent reasonable inference that Stover additionally guarantied in Paragraph D the collection of the principal amount of the Notes. These provisions do not conflict, but rather describe guaranties of complementary obligations.

The only question remaining is whether the obligation to "guaranty collection of . . . the principal amount of the Notes" is circumscribed elsewhere in the Orcutt Guaranty. Nothing in the Guaranty itself or the Orcutt Participation Agreement appears to limit that obligation. In fact, several provisions in the Guaranty purport to reinforce Stover's obligations. For example, Section 2.1 of the Orcutt Guaranty provides that "[Stover] hereby irrevocably and unconditionally guaranties, as surety, the collection in full of all Note Principal." This provision is not limited to a guaranty of the obligations of MAV Orcutt. Section 2.3(a) expressly states that Stover's obligations are not dependent upon MAV Orcutt's obligations, as they are narrowly construed by the Moving Defendants: "The obligations of [Stover] hereunder are independent of the obligations of [MAV Orcutt] and the obligations of any other guarantor of the obligations of [MAV Orcutt] . . . ." Additionally, the Orcutt Participation Agreement provides in Paragraph 2: "The Participation hereunder is with full recourse to [MAV Orcutt] to the extent of the Participation Amount plus Interest . . . . The recourse obligations of [MAV Orcutt] will be secured by the Unconditional Guaranty of Collection of G. Woodward Stover, II . . . ."[79] The Orcutt Guaranty, therefore, reasonably can be interpreted to mean

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[79] Orcutt Participation Agreement at 2.

that Stover fully and unconditionally guarantied, at a bare minimum, the repayment of Addy's principal.

Addy claims that Stover also is liable for Addy's pro rata portion of the Participation Fee and the interest on his principal contribution as well, whether or not the Westside Defendants defaulted on their obligations. This argument depends on the analysis in Section II.B.1.c, *supra*, of whether the agreement between the Moving Defendants and Addy consists of the Orcutt Summary, as well as the Orcutt Participation Agreement and Orcutt Guaranty. If Addy ultimately proves that the Orcutt Summary either forms part of the agreement or may be considered as extrinsic evidence for purposes of construing that agreement, the Guaranty would be effective for the Orcutt investment. The Orcutt Summary expressly provides that "[t]he Notes will be guaranteed by Westside Exploration Orcutt, LLC, Westside Exploration, LLC, John A. Piedmonte, Jr., and ***G. Woodward Stover, II*** . . . ."[80] This creates a reasonable inference that Stover guarantied all obligations under the Notes and not just those to distribute funds received from Westside or to repay the principal. Thus, at the motion to dismiss stage, it is conceivable that Addy could prove on the facts alleged in the Complaint that MAV Orcutt and Yost are liable for the Participation Fee and interest on the Orcutt investment and that Stover guarantied those obligations.

Furthermore, the Orcutt Guaranty purports to unconditionally and irrevocably ensure the obligations of MAV Orcutt. For example, Section 2.3 of the Guaranty

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[80] Orcutt Guaranty at 1 (emphasis added).

provides that Stover's obligations are "irrevocable, absolute, independent and unconditional and shall not be affected by any circumstance other than . . . payment in full of the Note Principal." Section 2.4 makes several waivers that appear to strengthen Stover's obligation to guaranty Addy's investment in the Orcutt project. For example, Stover waives "any defenses arising by reason of the incapacity, lack of authority or any disability or other defense of [MAV Orcutt] including, without limitation, any defense based on or arising out of the lack of validity or the unenforceability of the Note Principal[81] or any agreement or instrument relating thereto . . . ." Section 2.4(c) contains a waiver of "any defense based upon [Addy's] errors or omissions in the administration of the Note Principal . . . ." In sum, the plain language of the Orcutt Guaranty implies that Stover intended to, and did, provide an ironclad, absolute guaranty of MAV Orcutt's obligations, as well as the principal amount. As discussed above, one reasonable inference from the facts alleged in the Complaint is that MAV Orcutt is liable for the principal, the interest, and a portion of the $750,000 Participation Fee, along with other obligations such as obtaining the Note Purchase Documents. Accordingly, the Moving Defendants' motion to dismiss the breach of guaranty claim against Stover in Count II must be denied.

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[81] Section 1.1 defines "Note Principal" as "the initial principal amount of the Notes." The amount is not specified explicitly in the Orcutt Guaranty, but the Orcutt Participation Agreement lists Addy's "Participation Amount" as $2,171,053. Orcutt Participation Amount at 8.

3. Breach of fiduciary duty claim against Stover (Count VIII)

Addy claims Stover breached a fiduciary duty by inducing his participation in the Orcutt and Kentucky investments and engaging in self-dealing by retaining a portion of Addy's cash contribution. Under Delaware law, a fiduciary relationship arises where one person places special trust in another or where one person has a special duty to protect the interests of another.[82] Generally, the fiduciary enjoys a position of superiority in knowledge or expertise upon which the other person relies.[83] A fiduciary relationship requires "confidence reposed by one side and domination and influence exercised by the other."[84]

The allegations in the Complaint do not show the existence of a fiduciary relationship between Stover and Addy regarding the transactions at issue. Thus, I find that Stover did not owe a fiduciary duty to Addy for several reasons. First and foremost, both Participation Agreements include provisions under which Addy represented that he conducted an independent investigation into Westside, including its business and financial welfare, and that he did not rely on any statements made or investigations performed by the Lead Purchasers, *i.e.*, MAV Orcutt and MAV Kentucky. Addy also

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82 *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 624-25 (Del. Ch. 2005) *rev'd in part on other grounds*, 901 A.2d 106 (Del. 2006).

83 *Id.* at 625.

84 *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *8 (Del. Ch. Aug. 3, 2004) (quoting *Gross v. Univ. of Chi.*, 302 N.E.2d 444, 453-54 (Ill. App. Ct. 1973)).

represented he was an "accredited or institutional investor."[85] Paragraph 12 of the Participation Agreements provides:

> [Plaintiff] represents and warrants that: (a) it is an accredited or institutional investor experienced in making debt and equity high risk venture capital investments to private and development stage companies, (b) [Plaintiff] has conducted, to the extent it deemed necessary, an independent investigation of Westside, including, without limitation, an investigation related to Westside's business and the creditworthiness of Westside, and the risk involved to [Plaintiff] in the advance of its funds pursuant to the Loan Agreement and this Agreement; and (c) [Plaintiff] has not relied upon Lead Purchaser for any such investigation or assessment of risk.[86]

The only reasonable inference from these representations is that Addy did not repose any special trust in Stover or impose on him any special duty to protect his interests. Nor does the Complaint support an inference that Stover occupied a position of superior knowledge and expertise where Addy declared that he was an "accredited or institutional investor experienced in making debt and equity high risk venture capital investments to private and development stage companies" and had conducted his own due diligence.[87]

Even assuming Addy's expertise does not include oil and gas exploration ventures and his representations that he is an "accredited and experienced investor" do not preclude his reposing special trust in Stover, Addy has not sufficiently pleaded that

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85 Orcutt Participation Agreement ¶ 12; Kentucky Participation Agreement ¶ 12.

86 *Id.*

87 *Id.*

Stover owed a fiduciary duty to him. The Court of Chancery generally does not apply fiduciary duty doctrine to ordinary commercial transactions:

> [I]t is vitally important that the exacting standards of fiduciary duties not be extended to quotidian commercial relationships. This is true both to protect participants in such normal market activities from unexpected sources of liability against which they were unable to protect themselves and, perhaps more important, to prevent an erosion of the exacting standards applied by courts of equity to persons found to stand in a fiduciary relationship to others.[88]

Bargained-for commercial relationships between sophisticated parties do not give rise to fiduciary duties.[89] In addition, this Court is chary of expanding the scope of fiduciary duty to a broad set of commercial relationships which traditionally has been regulated by normal market conditions, rather than the scrupulous concerns of equity for persons in special relationships of trust and confidence.[90]

Here, Addy entered into an agreement to purchase participation units in the Kentucky and Orcutt projects. He entered into the Participation Agreements after ample opportunity to review their terms and negotiate new terms if required. In fact, Addy had the contract for three months, in the case of the Orcutt investment, and several weeks, in the case of the Kentucky investment, before contributing any money. Therefore, Addy's claim that Stover breached his fiduciary duties is without merit, and should be dismissed.

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88 *Wal-Mart Stores*, 872 A.2d at 627.

89 *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *6 (Del. Ch. May 27, 2005).

90 *Wal-Mart Stores*, 872 A.2d at 628.

4. Fraud and equitable fraud claims against Yost and Stover (Count VII)

Addy alleges Moving Defendants Yost and Stover committed equitable fraud, or in the alternative, common law fraud, in several respects regarding the Kentucky and Orcutt investments. Specifically, Addy alleges Stover, the manager of Yost, and Yost, the manager and owner of MAV Orcutt and the manager of MAV Kentucky, falsely represented in both the Kentucky and Orcutt Summaries that they would not be paid "any commission or other remuneration in connection with the offering, except reimbursement of travel and other out of pocket expenses."[91] In addition, the Orcutt Summary provides that the investment proceeds will be used for "[t]ransaction and offering expenses" and "acquisition of Orcutt Oil Field interests and for other development costs and purposes."[92] Similarly, the Kentucky Summary provides that the investment proceeds will be used for "[t]ransaction and offering expenses" and "development of mineral acreages" in the Kentucky and Orcutt fields.[93] According to the Complaint, however, Stover and Yost kept approximately 20% of the money provided by investors for the Orcutt and Kentucky projects.[94] Addy also argues that Stover and Yost committed equitable or common law fraud by failing to disclose that they withheld some as-yet-undetermined portion of his cash contribution to the Kentucky and Orcutt investments. If

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91 Orcutt Summary at 8; Kentucky Summary at 3.

92 Orcutt Summary at 7.

93 Kentucky Summary at 2.

94 Compl. ¶ 128.

he had known this information, Addy allegedly would not have agreed to provide funding for the Orcutt investment or any other investment.

In Delaware, success on a claim of common law fraud requires a showing that: (1) a defendant made a false representation, usually one of fact; (2) the defendant had knowledge or believed 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.[95] In addition to overt representations, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak.[96] Equitable fraud differs from common law fraud in one important respect: a plaintiff is not required to show that the defendant committed fraud knowingly or recklessly.[97] In other words, innocent or negligent misrepresentations or omissions suffice to prove equitable fraud.[98]

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95 *Kronenberg v. Katz*, 872 A.2d 568, 585 n.25 (Del. Ch. 2004).

96 *Id.*

97 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 144-45 (Del. Ch. 2003).

98 An equitable fraud claim is merely a fraud claim with a reduced state of mind requirement. *Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, at *8 (Del. Ch. Apr. 10, 2008). *See also Mark Fox Group, Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, at *5 n.15 (Del. Ch. July 2, 2003) ("The count at issue was entitled 'equitable fraud,' but it is well known that such a term refers interchangeably to claims based on negligent or innocent misrepresentation.")

The Moving Defendants argue that Addy has failed to plead any of the elements of fraud with the particularity required to satisfy Court of Chancery Rule 9(b). Under Rule 9(b), all averments of fraud or mistake in a pleading must state the circumstances of the fraud or mistake with particularity.[99] Thus, a party asserting a claim for fraud must allege with particularity the time, place, and contents of the false representation, the identity of the person or persons making the representation, and what they intended to obtain thereby.[100] Essentially, to satisfy Rule 9(b), the plaintiff must allege circumstances sufficient to fairly apprise the defendant of the basis for the claim.[101]

Addy alleges, for example, that Yost and Stover committed fraud through the representations in the Orcutt and Kentucky Summaries that the use of the investment proceeds would be restricted to transaction and offering expenses and would not be used to pay the "Manager" beyond reimbursement of travel and out-of-pocket expenses. It is undisputed that the Summaries were attached to, and referred to in, the Participation Agreements. Addy alleges Defendants sent him both the Orcutt Participation Agreement and Orcutt Summary on March 27, 2006 and the Kentucky Summary and executed Kentucky Participation Agreement on April 17. Furthermore, Addy alleges that Stover and Yost gave him the Summaries to induce him to contribute over $3 million to the two

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99 Ct. Ch. R. 9(b); *see also Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *4 (Del. Ch. Dec. 20, 2005) (citation omitted).

100 *See* Ct. Ch. R. 9(b); *H-M Wexford LLC*, 832 A.2d at 145 (citations omitted).

101 *H-M Wexford LLC*, 832 A.2d at 145 (citations omitted).

investments. These allegations provide sufficient notice to Stover and Yost for purposes of defending against the fraud claim. Therefore, Addy has satisfied the pleading requirements of Rule 9(b).

The Moving Defendants also seek dismissal of the fraud claims based on Paragraph 13 of the Participation Agreements, which purports to exculpate the Lead Purchasers, *i.e.*, MAV Orcutt and MAV Kentucky, from responsibility for any misrepresentations. In pertinent part, Paragraph 13 provides: "Lead Purchaser shall not be responsible to [Addy] for . . . any representation, warranty, document, certificate, report, or statement herein made or furnished under or in connection with any of [the Note Purchase Documents] . . . ."

For a contract to bar fraud claims, the contract must contain language that, when considered in the context of the contract as a whole, can be said to constitute a clear anti-reliance clause by which the plaintiff has promised contractually that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.[102] The presence of a standard integration clause alone, which does not contain an explicit anti-reliance representation and is not accompanied by other contractual provisions demonstrating with clarity that the plaintiff had agreed that it was not relying on facts outside the contract, will not suffice to bar fraud claims.[103]

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102 *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).

103 *Id.*

Anti-reliance provisions create a dilemma for courts. On the one hand, anti-reliance provisions may be viewed as immunizing fraudulent behavior. Delaware courts disfavor giving the proverbial stamp of approval to agreements that were never intended to be honored.[104] A tension exists between contractual provisions that purport to exculpate fraud and the Delaware courts' long recognition that "[a] perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it,"[105] that "fraud vitiates every contract, and [that] no man may invoke the law to enforce his fraudulent acts."[106] On the other hand, Delaware courts do not lightly ignore contractual provisions freely negotiated by the parties and the burdens they might impose.[107] To do so might inhibit the efficiency of commercial relationships and undermine the traditions of contractual freedom established by American markets.[108]

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104 *Abry Partners V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006).

105 *Webster v. Palm Beach Ocean Realty Co.*, 139 A. 457, 460 (Del. Ch. 1927).

106 *Slessinger v. Topkis*, 40 A. 717, 718 (Del. Super. 1893).

107 *See, e.g., Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 2005 WL 3753046, at *14 (Del. Ch. Dec. 8, 2005) (recognizing as a "fundamental principle that parties should have the freedom to contract and that their contracts should not easily be invalidated").

108 *But see Abry Partners*, 891 A.2d at 1062 ("[A] concern for commercial efficiency does not lead ineluctably to the conclusion that there ought to be no public policy limitations on the contractual exculpation of misrepresented facts. Even commentators who recognize that there are aspects of bargaining in which it is

Accordingly, Delaware courts have "consistently [held] that sophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract."[109] A balance must be struck, however, between the competing interests of allowing sophisticated parties to fashion agreements among themselves without intervention by the courts and of protecting parties from counterparties attempting to wash clean their own outright lies and fraud.[110] Because the Complaint alleges that the Moving and Westside Defendants may have operated together to perpetrate a fraud that induced Addy to hand over $3 million of his money, I must consider the appropriate balance in the circumstances of this case.

In *Abry Partners V, L.P. v. F&W Acquisition LLC*,[111] a private equity firm sold the shares of a publishing company to another private equity firm under an agreement that

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often expected that parties will lie – such as when agents refuse to disclose or misrepresent their principals' reservation price – there is little support for the notion that it is efficient to exculpate parties when they lie about the material facts on which a contract is premised.") (citations omitted).

109 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 n.18 (Del. Ch. 2003). *See also Abry Partners*, 891 A.2d at 1057 ("The teaching of this court . . . is that a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent inducement claim.").

110 *See Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004) ("Because Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract.").

111 891 A.2d 1032 (Del. Ch. 2006).

contained an integration clause and a clause which purported to exculpate the seller from an action for rescission of the transaction. The buyer sought rescission of the sale, claiming that it was defrauded by the seller. The defendant moved to dismiss for failure to state a claim based on the exculpation clause. There, the seller did not manage the company being sold and relied on the company for many of the factual representations in issue. The seller, therefore, did not have the same access to information as the company or its employees who made many of the allegedly fraudulent representations.[112] Although chary of allowing a sophisticated party to back out of a deal it freely negotiated, the court noted that Delaware courts only reluctantly give effect to clauses exculpating a party's own fraudulent behavior. Ultimately, the court in *Abry Partners* held that the clause did not bar intentional fraud claims because it did not contain explicit representations that the buyer did not rely on the seller's representations in its decision to enter the agreement. Instead, the clause purported to exculpate the seller from rescission claims even if they arose out of false representations of fact made by the seller. The court found that the seller was not shielded from liability for any instances in which it knew that the company's contractual representations and warranties were false or it lied to the buyer about a contractual representation and warranty, *i.e.*, where the seller intentionally lied about a contractually-represented fact.[113]

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112 *Id.* at 1062-63.

113 *Id.* at 1064.

This case raises a similarly difficult question of whether a contract may exculpate a contracting party from a claim based on an intentionally false representation of fact. Here, there are two or more sophisticated parties to a contract, integration and exculpation language, and fraud claims. The Summaries contain the allegedly fraudulent statements. Those Summaries were attached to the Participation Agreements presented to Addy. The Moving Defendants contend that only the Participation Agreements, and the attached Guaranties, govern their relationship with Addy, while, in the absence of formal Note Purchase Documents or Notes, the attached Summaries may reflect the terms of a contract between Addy and the Westside Defendants. The Participation Agreements both contain an integration clause and an exculpatory provision. They also include representations by Addy that he is a sophisticated and accredited investor, and that he did not rely on MAV Orcutt or MAV Kentucky for investigations into Westside's business or creditworthiness. The Participation Agreements do not, however, contain a provision whereby Addy represented that he did not rely on representations made by any of the Moving Defendants in entering into the agreement.

Although Defendants Stover and Yost attempt to wield the exculpation provision as a sword to strike down Addy's fraud claims, I find their argument flawed. The exculpatory language in Paragraph 13 does not clearly disclaim Addy's reliance on the Moving Defendants' representations; rather, it seeks to free them from responsibility for any false statements of fact in those representations. The facts alleged in the Complaint support a reasonable inference that the Moving Defendants knew that certain statements made by Stover, Yost, or the Westside Defendants were false, and that they used those

statements to induce Addy's contribution. Thus, based on the public policy of this State, the Defendants may not invoke the exculpatory provision to avoid liability for those statements, and Addy has properly stated a claim that Stover and Yost, who allegedly controlled MAV Orcutt and MAV Kentucky, committed fraud in connection with the allegedly false statements in the Summaries.[114]

Like the seller in *Abry Partners*, the Moving Defendants may not have had the same access to information as the Westside Defendants. Yet, Addy's allegations create a reasonable inference that the Moving Defendants knew the challenged statements were false. Stover presented the Summaries containing the allegedly false statements to Addy and represented, on the first page of the Participation Agreements, that Yost and MAV Orcutt or MAV Kentucky were "finalizing the transaction documents," including the Note Purchase Documents, and expected to take on obligations under the Notes which, upon closing of the transaction with Addy, he would assume to the degree of his Participation Amount. Assuming the truth of the allegations in the Complaint, as I must on a motion to dismiss under Rule 12(b)(6), one reasonable inference from these facts is

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[114] *See Abry Partners*, 891 A.2d at 1063-64 (finding, in the absence of an explicit anti-reliance clause, seller could be liable for fraud where it knew that representation was false and either directly communicated to buyer or knew that another party had communicated to buyer). This reasoning applies directly to Addy's claim for common law fraud. Because the relationship between the Participation Agreements and the Summaries is not clear for the reasons discussed previously in this opinion and the factual record has not yet been developed, I also deny the motion to dismiss the equitable fraud claim at this time. *See, e.g.*, *Cargill, Inc. v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1129 (Del. Ch. 2008) (denying motion to dismiss where "issues deserve careful consideration and will benefit from further development of the record").

that at least some of the Moving Defendants knew the statements regarding finalizing the transaction documents were false.

Both common law fraud and equitable fraud require proof of justifiable reliance.[115] In other cases, anti-reliance clauses have precluded a plaintiff from claiming she justifiably relied on the representations of a defendant.[116] Here, the absence of clear anti-reliance language combined with the possibility, based on the allegations in the Complaint, that the Moving Defendants lied about certain aspects of the transactions lead me to conclude that the provisions of the Participation Agreements do not preclude Addy from proving reliance. Addy's allegations regarding the interrelatedness of the Moving and Westside Defendants and the attachment of the Summaries (containing false statements) to the Participation Agreements (containing exculpatory language) bolster the inference that Addy justifiably relied on the alleged misrepresentations.

5. Unjust enrichment claim against MAV Kentucky, MAV Orcutt, and Yost (Count XI)

Addy alleges that the Participation Agreements, Guaranties, and Summaries, which he dubs collectively as the "investment agreements," operate together to govern

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115 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 (Del. Ch. 2003) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Harman v. Masoneilan Inc.*, 442 A.2d 487, 499 (Del. 1982); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996)).

116 *See H-M Wexford LLC*, 892 A.2d at 142-43 ("[S]ophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract.").

the agreement among the parties, and that Defendants have breached, or committed fraud with respect to, those agreements. In the alternative, Addy asserts a claim for unjust enrichment. He contends the Moving Defendants have been unjustly enriched by inducing him to contribute cash and refusing to honor their obligations pursuant to the "investment agreements." Relatedly, Addy also asserts that, in the event no enforceable contract is found, the Moving Defendants induced him to participate in the Orcutt and Kentucky investments by promising, among other things, repayment of principal and interest, participation and placement fees, and equity kickers, but failed to deliver those benefits. The Moving Defendants respond that each contract must be analyzed separately, and that all of Addy's claims are grounded in those contracts. Further, the Moving Defendants argue that a cause of action for unjust enrichment does not lie when, as here, a contract specifies the obligations between the parties.

Unjust enrichment involves "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[117] In determining whether to award a remedy based on unjust enrichment, courts look for proof of the following elements: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy

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[117] *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

provided by law.[118] Further, in evaluating a party's claim for an equitable remedy based on unjust enrichment, courts engage in a threshold inquiry to determine whether a contract already governs the parties' relationship.[119] If a contract exists between the complaining party and the party alleged to have been unjustly enriched that governs the matter in dispute, then the contract remains "the measure of [the] plaintiff's right."[120]

The Moving Defendants argue that a contract governs all aspects of their relationship with Addy, and therefore, the claims for unjust enrichment must be dismissed. If, however, this Court ultimately adopts the Moving Defendants' argument that the Participation Agreements and the Guaranties constitute the only contracts between them and Addy, the facts alleged in the Complaint still might support a finding of unjust enrichment based on the interrelationships among the Moving Defendants and the Nonmoving Defendants, and their various contracts with Addy. For example, Addy alleges the Moving Defendants improperly retained a portion of his cash contribution rather than purchasing participation units from the Nonmoving Defendants. If this

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118 *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998).

119 *MetCap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *19 (Del. Ch. May 16, 2007).

120 *Id.*; *see also Bakerman v. Sidney Frank Imp. Co.*, 2006 WL 3927242, at *18 (Del. Ch. Oct. 16, 2006) ("When the complaint alleges an express, enforceable contract that controls the parties' relationship, however, a claim for unjust enrichment will be dismissed."); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) (dismissing an unjust enrichment claim "when the existence of a contractual relationship [was] not controverted").

occurred, the relationship of the parties may not be governed by contract, because according to the Moving Defendants, nothing in the Participation Agreements or the Guaranties prohibits them from doing so. Under this set of circumstances, the Moving Defendants would remain susceptible to a claim for unjust enrichment due to conduct that Addy avers is inequitable, even if it is not governed by any contract. The reason is that the interrelatedness of the Moving Defendants with the other Defendants and of the several agreements different Defendants had with Addy makes it impossible in the context of a Rule 12(b)(6) motion to dismiss to say that Addy could not conceivably be entitled to some form of quasi-contractual or other equitable relief. Thus, Plaintiff has properly stated a claim, in the alternative, for unjust enrichment.[121]

6. Promissory estoppel claim against MAV Kentucky, MAV Orcutt, Yost, and Stover (Count IX)

Under Delaware law, a plaintiff asserting a claim for promissory estoppel must show by clear and convincing evidence that: (1) a promise was made; (2) the promisor reasonably expected to induce action or forbearance by the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) the promise binds the parties because injustice can be avoided only by its enforcement.[122] Promissory

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[121] *See, e.g.*, *Cantor Fitzgerald, L.P.*, 1998 WL 326686, at *6 ("[U]nless and until this Court determines that the defendants' obligations are governed ***exclusively*** by contract, Plaintiff has properly stated a claim for unjust enrichment.") (emphasis added).

[122] *Territory of U.S. V.I. v. Goldman, Sachs & Co.*, 937 A.2d 760, 804 (Del. Ch. 2007), *aff'd*, 956 A.2d 32 (Del. 2008) (TABLE) (citing *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003)).

estoppel requires a real promise, not just mere expressions of expectation, opinion, or assumption.[123] The promise also must be reasonably definite and certain.[124]

As with unjust enrichment, the Complaint also supports a reasonable inference that promissory estoppel occurred in connection with the Moving Defendants' alleged promises of repayment and equity interests. Based on the record before me, and drawing all inferences in Plaintiff's favor, I find that Addy could show the existence of a promise or promises by one or more of the Moving Defendants upon which he reasonably relied. Determining whether the other elements for promissory estoppel are met will require a fact intensive inquiry into the details of the parties' dealings. Those issues cannot be resolved on a motion to dismiss.[125] Thus, the motion to dismiss Plaintiff's promissory estoppel claim is denied.

7. Claims for equitable relief against MAV Kentucky, MAV Orcutt, Yost, Stover, Sisquoc, and MAV (Counts X and XI)

Plaintiff requests equitable and other relief, in some cases alternatively, in the form of money damages, an accounting, an equitable lien, specific performance, and imposition of a constructive or resulting trust. Addy's requests for such relief are not claims in and of themselves, but types of remedies dependent on the viability and outcome of the underlying causes of action, such as those for breach of contract and

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123 *Metro. Convoy Corp. v. Chrysler Corp.*, 208 A.2d 519, 521 (Del. 1965).

124 *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1233 (Del. Ch. 2000).

125 *See Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 74 (2d Cir. 1989).

equitable fraud.[126] Because I find that Addy has properly stated several different claims as to the Moving Defendants, at least some of which sound in equity, I see no basis for dismissing his specific requests for equitable relief as to any of those Defendants.[127]

III. CONCLUSION

For the reasons stated in this opinion, the Moving Defendants' motion to dismiss is granted in part and denied in part. In particular, I grant the motion to dismiss regarding Plaintiff's claims for breach of fiduciary duty as set forth in Count VIII of the Complaint. In all other respects, the motion to dismiss is denied.

IT IS SO ORDERED.

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[126] *See Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 25, 2005) ("An accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a judgment for the amount ascertained to be due to either as a result."); *Hogg v. Walker*, 622 A.2d 648, 652 (Del. 1993) (A constructive trust "is an equitable remedy of great flexibility and generality, and is viewed as 'a remedial [and] not a substantive' institution.") (citations omitted); *Taylor v. Jones*, 2006 WL 1510437, at *3 n.9 (Del. Ch. May 25, 2006) ("[A] resulting trust is not a trust at all; it is a form of equitable remedy.") (citations and quotation marks omitted); *Branca v. Branca*, 443 A.2d 929, 931 (Del. 1982) ("A principal reason for impressing an equitable lien is to prevent unjust enrichment . . . .") (citations omitted); *Szambelak v. Tsipouras*, 2007 WL 4179315, at *4 (Del. Ch. Nov. 19, 2007) ("Specific performance of a contract is an equitable remedy firmly committed to the sound discretion of the Court.") (citation omitted).

[127] *See, e.g., Rhodes v. Silkroad Equity, LLC*, 2007 WL 2058736, at *11 (Del. Ch. July 11, 2007) (declining to dismiss plaintiff's request for an accounting where underlying fiduciary duty claims were properly stated).