

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JAMES CABLE, LLC,)
)
Plaintiff,)
)
v.) C.A. No. 3637-VCL
)
MILLENNIUM DIGITAL MEDIA)
SYSTEMS, L.L.C., (d/b/a)
BROADSTRIPE), HIGHLAND CAPITAL)
MANAGEMENT, L.P., and HIGHLAND)
CAPITAL,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

Submitted: March 6, 2009

Decided: June 11, 2009

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LAMB, Vice Chancellor.

A cable company that agreed to sell substantially all of its assets to another cable company brings this action to remedy the buyer's alleged breach of the asset purchase agreement. After signing the asset purchase agreement, cable company valuations fell, leading to disputes between the parties. The buyer refused to close, citing alleged breaches by the seller, and the seller filed this lawsuit. Thereafter, the buyer filed for bankruptcy, following which the claims against the buyer were stayed pursuant to the federal bankruptcy code.

In its complaint, the seller asserts a panoply of creatively crafted claims against the buyer's controlling stockholder in an attempt to reach the deeper pockets of that company. The buyer's controlling stockholder is not a party to the asset purchase agreement and did not enter into any written agreement to provide funding. The seller claims that the buyer's controlling stockholder promised, to the seller and the buyer, that it would provide funding for the transaction. The seller's complaint, however, contains no well pleaded facts to support its claim regarding the purported promises to fund. Therefore, the claims against the buyer's controlling stockholder will be dismissed. The claims against the buyer will remain stayed pursuant to the federal bankruptcy code.

I.

A. The Parties

Plaintiff James Cable, LLC is a Delaware limited liability company with its principal place of business in Michigan. James Cable owns and operates cable television systems and provides internet service to customers in various geographic markets in the United States.

The defendants in this action are Millennium Digital Media Systems, L.L.C. (doing business as Broadstripe), Highland Capital Management, L.P., and Highland Capital.¹ Broadstripe is a Delaware limited liability company, with its principal place of business in Missouri. Like James Cable, Broadstripe owns and operates cable television systems and provides internet services to customers in the United States. Broadstripe is also a provider of telephone services. Highland Management is a Delaware limited partnership and is alleged to have controlling ownership of Broadstripe.² Highland Capital is a private hedge fund managed by Highland Management.

¹ Highland Management and Highland Capital are collectively referred to herein as “Highland.”

² In the pitch to James Cable in June 2007, Highland Management was held out as having over \$37 billion under management. James Cable did not know the precise legal name of Highland Capital, but believed it to be one of the 43 Highland entities filed with the Delaware Secretary of State. Highland did not provide the precise name for Highland Capital in its papers because it believed that the name was not critical for the present purposes.

B. The Facts³

1. The Asset Purchase Agreement

On October 31, 2007, James Cable and Broadstripe entered into an asset purchase agreement (the “APA”) pursuant to which Broadstripe agreed to buy certain assets defined as the “System” from James Cable. The APA includes a formula for calculating the purchase price based, in part, on the number of subscribers to be transferred. At the time of the filing of the amended complaint, James Cable alleged that the value of the System was over \$115 million according to the APA’s formula. The APA does not contain any financing language.

In the APA, Broadstripe represented that it had the financial capability to consummate the transaction. The amended complaint alleges that Broadstripe and Highland communicated to James Cable that Highland was the source of Broadstripe’s financial capability.⁴ It further alleges that these representations “were sufficient to convey to a reasonable businessman that Broadstripe possessed

³ The facts in this opinion, which must be treated as true for the purpose of this motion to dismiss, are drawn from the well pleaded allegations of the amended complaint and the exhibits attached thereto. *See, e.g., In re Tyson Foods, Inc.*, 919 A.2d 563, 571 (Del. Ch. 2007); *see also* Ct. Ch. R. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for any purpose.”). James Cable attached to its amended complaint the letter of intent (the “LOI”), the asset purchase agreement, and written communications between the parties relating to the transaction at issue.

⁴ In its amended complaint, James Cable notes that the LOI for the transaction stated that questions regarding the financing may be directed to Broadstripe’s CFO or Broadstripe’s primary investor, Highland Capital, as evidence that Highland was to fund the APA. Also in its amended complaint, James Cable lists various statements by representatives of Broadstripe and Highland that it claims show that the parties intended Highland to provide or be heavily involved in the financing.

the right to require Highland to fund the APA transaction, and that Highland had agreed to be so bound.”⁵ Highland, however, is not a party to the APA and Highland did not enter into a commitment letter or any other written agreement to fund the transaction.

2. The Disputes Begin

On February 14, 2008, the parties agreed to work towards a closing by the month’s end. A week later, Broadstripe’s CFO informed James Cable’s CFO that Broadstripe would be unable to close at the end of the month because it was unable to deliver the purchase price. Cable company valuations had declined significantly during the period between the execution of the APA in October 2007 and February 2008. James Cable alleges that Highland convinced Broadstripe to breach the APA because Highland no longer liked the economics of the deal and wished to avoid funding the transaction. From late February until mid-March, James Cable and its controlling owner, GoldenTree Asset Management LP, engaged in numerous conversations with Highland and Broadstripe regarding the transaction. James Cable demanded adequate assurances that the deal would close. Highland and Broadstripe told James Cable it had no reason to be insecure, but refused to provide assurances that they would proceed to closing.

⁵ Am. Compl. ¶ 25.

3. The Original Complaint

On March 20, 2008, James Cable filed its original complaint in this action seeking, *inter alia*, a declaration that Broadstripe committed a material, anticipatory breach and repudiation of the APA. A hearing on James Cable's motion to expedite was held on March 27, 2008. At the hearing, Broadstripe argued that it had not repudiated the APA and indicated a willingness to close as soon as the closing conditions were met. Also at the hearing, Broadstripe, through its counsel, stated that the representation about its financial capability to complete the transaction was true when made and that it then had the financial capability to finance the deal through existing equity investors, such as Highland Capital, new equity investors, and through the debt markets. The court denied James Cable's motion to expedite and suggested that the parties set a date certain for closing.

4. The Disputes Continue

From late-March until mid-April, the parties exchanged a series of letters regarding various disputes related to the APA. This exchange came to an end on April 16, 2008, when Broadstripe sent a letter to James Cable purporting to terminate the APA. Broadstripe's letter claimed that James Cable was in material breach of the APA by (1) giving away free premium channels in the Westlake-Moss area and (2) dramatically raising its number of subscribers by materially increasing its use of door-to-door contractors, materially increasing its use of free

installations, and introducing an amnesty program. In its April 16 letter, Broadstripe also stated that because of those breaches it could not rely on the preliminary adjustment report by James Cable identifying 66,997 Key Revenue Generating Units (“KRGUs”).⁶ James Cable alleges that these purported breaches are not grounds for termination of the APA and are merely excuses by Broadstripe and Highland to avoid their obligations related to the APA. James Cable asserts that Broadstripe knew about the Westlake-Moss area subscriber issue since June 2007 and that the efforts to increase subscribers were made in the ordinary course of business.

5. The Amended Complaint

On April 21, 2008, James Cable responded to Broadstripe’s April 16 letter and stated that if Broadstripe did not rescind its letter within 48 hours it would deem Broadstripe’s repudiation as final and would treat the repudiation as a total breach of the APA. Broadstripe failed to rescind its letter and, on April 24, 2008, James Cable filed its amended complaint.

⁶ KRGU was defined in the APA as “the sum of Basic Subscribers and High Speed Data Units. For the avoidance of doubt, a subscriber may be counted as a Basic Subscriber and also counted as a High Speed Data Unit.” The purchase price calculation was based, *inter alia*, on the number of KRGUs transferred. The APA required a minimum of 57,000 KRGUs and set no maximum. Broadstripe was, however, required to list any discounts provided to customers on Schedule 4.23 of the APA and was required to operate the business in the usual, regular, and ordinary course. Ex. E; Am. Compl. ¶¶ 89-90.

In its amended complaint, James Cable claims that Highland tortiously interfered with the APA and engaged in civil conspiracy with Broadstripe to dishonor the APA. James Cable also alleges that Highland acted in bad faith in an attempt to insulate itself from its alleged obligation to fund the transaction. Furthermore, James Cable claims that it is entitled to recovery against Highland based on a promissory estoppel theory, due to Highland's statements that allegedly amount to a promise to provide funding for the transaction. Lastly, James Cable claims that Highland breached an agreement with Broadstripe to provide funding for the transaction and alleges that James Cable was a third party beneficiary of that agreement.

6. The Motion To Dismiss

In November 2008, this court heard argument on the defendants' motion to dismiss and reserved judgment. On January 2, 2009, Broadstripe filed a voluntary petition with the United States Bankruptcy Court for the District of Delaware seeking protection under Chapter 11 of the Bankruptcy Code.⁷ Consequently, all claims against Broadstripe in this court were automatically stayed under 11 U.S.C. 362(a). There was some initial uncertainty as to whether the automatic stay also applied to the claims against the Highland entities. On March 6, 2009, however, Highland filed with this court a ruling from the bankruptcy court suggesting that

⁷ See 11 U.S.C. § 1101 *et seq.*

this case could proceed against Highland. This is the courts' ruling on the motion to dismiss the claims asserted against Highland.

II.

Highland moves to dismiss the amended complaint in this case pursuant to Delaware Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. If “it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts that can be inferred from the pleadings” the court will grant the defendant’s motion.⁸ For the purpose of this motion, the court will, as it must, grant the plaintiff all reasonable inferences that may be drawn from the complaint.⁹ The court, however, “is required to accept only those reasonable inferences that logically flow from the face of the complaint and is not required to accept every strained interpretation of the allegations proposed by the plaintiff.”¹⁰ Moreover, conclusory allegations unsupported by facts contained in a complaint will not be accepted as true.¹¹

⁸ *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *2 (Del. Ch. July 19, 2005); accord *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).

⁹ *Malpiede*, 780 A.2d at 1083.

¹⁰ *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citations and quotations omitted); see also *In re Lukens Inc. S’holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) (“[A] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs’ favor unless they are reasonable inferences.”) (citations and quotations omitted).

¹¹ James Cable correctly states that Delaware law provides a liberal notice pleading standard in cases such as this one where no fraud is alleged, but incorrectly argues that this standard alleviates the need to make allegations of specific facts. Ans. Br. at 33. See, e.g., *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc’n Corp.*, 672 A.2d 35, 38 (Del. 1996)); see also *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168,

III.

The claims in James Cable’s amended complaint spring from Highland’s alleged obligation to provide funding for the transaction at issue. The allegations against Highland are conclusory, unsupported by specific facts, and inconsistent with the structure of the APA, which was heavily negotiated by sophisticated parties. Accordingly, the court will dismiss all of James Cable’s claims against Highland.

A. The Tortious Interference With Contractual Relations Claim

In count III of its amended complaint, James Cable alleges that Highland tortiously interfered with the APA by refusing to provide funding and by directing Broadstripe to repudiate the APA. To properly plead a claim for tortious interference with contractual relations, a plaintiff must allege “(1) a valid contract, (2) about which the defendants have knowledge, (3) an intentional act by defendants that is a significant factor in causing the breach of the [contract], (4) done without justification, and (5) which causes injury.”¹²

Highland argues that James Cable failed to adequately plead the fourth element of tortious interference—that Highland’s actions were done without

188 (Del. Ch. 2006) (The court “should not give weight to conclusory allegations not grounded in allegations of fact.”); *In re Lukens*, 757 A.2d at 727 (“[N]either inferences nor conclusions of fact unsupported by the allegations of specific facts . . . are accepted as true”) (citations and quotations omitted).

¹² *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1182 (Del. Ch. 1999).

justification. Delaware law, which controls the APA, shields companies affiliated through common ownership from tortious interference with contract claims when the companies act in furtherance of their shared legitimate business interests. In *Shearin v. E.F. Hutton Group, Inc.*, Chancellor Allen noted that other cases had applied the affiliate privilege to situations where a parent allegedly tortiously interfered with a subsidiary's contract and held that the privilege also applied to discussions between wholly owned affiliates with a common parent.¹³ The court based its ruling, in part, on the fact that “[s]uch entities share a commonality of economic interests which underlay the creation of an interference privilege.”¹⁴ To overcome the affiliate privilege, a plaintiff must adequately plead that the defendant “was motivated by some malicious or other bad faith purpose.”¹⁵ As explained in *Allied Capital Corp. v. GC-Sun Holdings, L.P.*:

Chancellor Allen [in *Shearin*] acknowledged that the test for holding a parent corporation liable for tortious interference had to be high or every-day consultation or direction between parent corporations and subsidiaries about contractual implementation would lead parents to be always brought into breach of contract cases. He also feared that the option of efficient breach—the conscious decision to breach a contract and pay the required damages because of the potential for profit even after the payment of those damages—would be chilled by holding the parent responsible in tort. For these reasons, Chancellor

¹³ 652 A.2d 578, 589, 591 (Del. Ch. 1994).

¹⁴*Id.* at 591 n.14. James Cable admits that Highland and Broadstripe share common economic interests by alleging that Highland Management “is the general partner or managing member of, and/or manages the entity that indirectly owns and/or controls Broadstripe.” Am. Compl. ¶ 12.

¹⁵ *Shearin*, 652 A.2d at 591.

Allen indicated that plaintiffs could only hold a parent corporation liable for tortious interference under a stringent bad faith standard.¹⁶

James Cable alleges that Highland's actions in directing Broadstripe's repudiation of the APA were taken in bad faith but fails to provide any well pleaded factual support for its conclusory claim. James Cable's fact-based allegations, even viewed with reasonable inferences in its favor, fall squarely within the affiliate privilege.¹⁷ These allegations suggest that Highland and Broadstripe acted in concert, in furtherance of their shared legitimate economic interests, to avoid an undesirable financial transaction.¹⁸ In conclusory fashion,

¹⁶ 910 A.2d 1020, 1039 (Del. Ch. 2006).

¹⁷ When companies affiliated through joint ownership “confer with respect to a contract to which one of them is a party and a breach of that contract follows, there can be no non-contractual liability to the affiliated corporation, which is privileged to consult and counsel with its affiliates, unless the plaintiff pleads and proves that the affiliate sought not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiff.” *Id.* James Cable does not allege that Highland sought to injure it, but rather argues that *Shearin* contemplates other bad faith purposes earlier in the opinion and that Highland's actions, done solely in its own interest, constitute bad faith. James Cable cites *Allied*, which applied *Shearin* by analogy in a conspiracy claim. 910 A.2d 1020. The *Allied* court stated that “[t]he potential for a controller to use its control of a subsidiary, not to enrich the subsidiary, but to divert value from the subsidiary to itself in a bad faith manner, is what motivated *Shearin*'s bad faith test.” *Id.* at 1042. In *Allied*, the defendants allegedly transferred assets between affiliates in an attempt to avoid its obligations. *Id.* at 1040. Here, however, James Cable fails to sufficiently allege that Highland had any obligation to fund the transaction and therefore also fails to sufficiently allege any divergent interests between Highland and Broadstripe.

¹⁸ *See, e.g.*, Am. Compl. ¶ 1 (alleging that Broadstripe regrets the per-subscriber price it agreed to pay and suggesting that the defendants had buyer's remorse); ¶¶ 3-7, 89, 90 & Ex. E (alleging that Broadstripe informed James Cable that it terminated the APA because James Cable was in material breach of various sections of the APA); ¶ 32 (alleging that Broadstripe was aware that cable company valuations had declined since the signing of the APA, making the purchase of James Cable less favorable to Broadstripe); ¶ 55 (alleging that Broadstripe transformed adjustment items into purported grounds to avoid closing “for the apparent purpose of concealing or distracting from its own inability to pay”).

James Cable alleges that Highland acted solely “to advance the economic interest of the Highland defendants, and not for any legitimate purpose.”¹⁹ But, the only pleaded reason for a divergence in the interests of Broadstripe and Highland revolves around Highland’s alleged obligation to fund the transaction.

As discussed below, James Cable does not adequately allege facts to support an inference that Highland had any obligation to fund. To the contrary, the amended complaint and the exhibits attached thereto show that the parties negotiated a transaction where the responsibility to arrange financing fell on Broadstripe’s shoulders.²⁰ James Cable does not sufficiently allege any purpose behind Highland’s actions outside of an economic interest it shared with Broadstripe. Accordingly, Highland’s alleged actions related to Broadstripe’s repudiation of the APA, taken as true for the purposes of this motion to dismiss, are protected by the affiliate privilege and are insufficient to state a claim for tortious interference with contractual relations.

¹⁹ *Id.* at ¶ 166.

²⁰ APA § 5.5 (Broadstripe represents that it, not it and Highland, had the financial capability necessary to consummate the transaction).

B. The Promissory Estoppel Claim²¹

James Cable also claims, based on a promissory estoppel theory, that Highland is liable for damages resulting from the repudiated APA. To state a claim for promissory estoppel, a plaintiff must plead facts alleging that or allowing for a reasonable inference that “(i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.”²² Promissory estoppel requires “a real promise, not just mere expressions of expectation, opinion, or assumption.”²³ In addition, the promise must be reasonably definite and certain.²⁴ *Black’s Law Dictionary*

²¹ For both James Cable’s promissory estoppel claim and its breach of contract/third party beneficiary claim the court must first decide which law applies. *See, e.g. Pharmathene, Inc. v. Siga Techs., Inc.*, 2008 WL 151855, at *6 (Del. Ch. Jan. 16, 2008). Delaware applies the most significant relationship test from the Restatement (Second) of Conflicts of Laws, which examines the following factors in determining which law to apply: “(1) the place of contracting; (2) the place of negotiation of the contract; (3) the subject matter of the contract; and (4) the domicile, residence, nationality, place of incorporation, and place of business of the parties to the contract.” *Id.* Here, James Cable’s amended complaint does not contain allegations of where the purported promises were made or where the purported contract was negotiated and entered into. Both parties cite Delaware law, which is the law governing the APA and the law under which James Cable, Broadstripe, and various Highland entities were formed. Therefore, given the absence of detail and argument suggesting the court should do otherwise, the court will apply Delaware law.

²² *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000); *see also Territory of U.S. Virgin Islands v. Goldman, Sachs, & Co.*, 937 A.2d 760, 804 (Del. Ch. 2007).

²³ *Addy v. Piedmonte*, 2009 WL 707641 (Del. Ch. Mar. 18, 2009) (citing *Metro. Convoy Corp. v. Chrysler Corp.*, 208 A.2d 519, 521 (Del. 1965)).

²⁴ *See, e.g., Cont’l Ins. Co. v. Rutledge & Co. Inc.*, 750 A.2d 1219, 1233 (Del. Ch. 2000).

defines a promise as “[t]he manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person’s assurance that the person will or will not do something.”²⁵

In its amended complaint, James Cable fails to allege any “definite and certain” promise Highland made that could have possibly induced James Cable to enter into the APA. Some of the alleged promises were made by Broadstripe.²⁶ These promises are barred by the APA’s integration clause, which states that the written documents executed in connection with the APA “constitute the entire agreement between the parties with respect to the subject matter hereof and supercede all prior understandings and agreements with respect thereto.”²⁷ Other alleged promises were made after the signing of the APA on October 31, 2007.²⁸

The remaining statements Highland allegedly made do not amount to a real promise, even if James Cable’s allegations are taken as true and are combined with

²⁵ BLACK’S LAW DICTIONARY 1249 (8th ed. 2004).

²⁶ *See, e.g.*, Am. Compl. ¶ 27(i) (alleging that Broadstripe executives stated that “Highland is behind us” and “Highland wants this to happen”); ¶ 58 (alleging that Broadstripe assured GoldenTree representatives that “Highland fully supported the transaction and, if necessary, would provide funds to Broadstripe for Broadstripe to complete the closing”). Even assuming Broadstripe was acting as Highland’s duly authorized agent, these statements are still insufficient to support a promissory estoppel claim due to their lack of pleaded facts or supporting detail.

²⁷ APA § 13.

²⁸ James Cable admits that it did not rely on statements made after the signing of the APA, but argues that those statements listed in the amended complaint support the inference that Highland made similar prior promises. The alleged statements, however, are void of any promises and, at most, suggest that Highland was investigating the possibility and feasibility of financing the transaction post-signing. Am. Compl. ¶¶ 27, 71.

all reasonable inferences. In paragraph 8 of the amended complaint, in extremely vague terms, James Cable alleges that Highland and Broadstripe said that Highland would ensure Broadstripe's financial capability for the transaction and would provide funding to complete it. This claim does not allege when the promise was made, to whom it was made, or any other specifics.

Paragraph 27(a) of the amended complaint alleges that the LOI "identified Highland Capital as both the primary investor and the source of answers to questions about the financing." This language does not reflect a promise. It does not convey an intent to act in connection with the funding of the transaction. At most, it creates a promise to answer questions (a promise that is not alleged to be breached) and is a representation that Highland is Broadstripe's primary investor (a claim James Cable does not dispute).

Paragraph 27(h) of the amended complaint alleges that Highland representatives "pitched themselves for purposes of a transaction with James [Cable], and made representations about the advantages of doing a transaction with a company controlled by Highland." These allegations also fail to identify a promise because they fail to identify any manifestation of an intention to act or any commitment by Highland. This allegation does not identify a promise by Highland, but merely contains an admittedly true statement about the ownership

structure of Broadstripe and an allegation that Highland touted its financial capabilities.

Paragraph 29 alleges that Highland was obligated to fund the APA due to “its own acts and representations and the acts and representations of Broadstripe.” This allegation contains absolutely no facts and is merely an unsupported conclusion.

In paragraphs 189 and 190 of the amended complaint, James Cable alleges that in June 2007 Highland promised that it “was behind the transaction that Broadstripe was negotiating,” “was responsible for questions about the financing of the proposed transaction,” and was “Broadstripe’s primary investor.” Yet again, these alleged statements do not express an intention to act or any commitment by Highland, outside of possibly a commitment to answer financing questions.

Due to the lack of an adequately pleaded promise, James Cable’s promissory estoppel claim fails. While not necessary for the court’s determination and an issue generally not decided at the motion to dismiss stage, the court notes that the amended complaint and its exhibits strongly suggest that James Cable could not have reasonably relied on a promise by Highland to fund. The buyer’s ability to pay the purchase price is generally the single most important concern of a seller.²⁹

²⁹ 2 LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 12:04 (2001).

In sophisticated merger and acquisition activity with large amounts of money at stake, such as here, the parties typically reduce even seemingly insignificant matters to writing. Parties generally include an integration clause, like the one found in the APA, that expressly states the written agreements compose the entire understanding of the parties.³⁰ Section 5.5 of the APA states that Broadstripe (not Broadstripe and Highland) had the financial capability necessary to fund the purchase price. If James Cable could have convinced Highland to fund the deal, Highland's obligations would likely have been extensively negotiated and reduced to writing with a substantial amount of detail.

C. The Breach Of Contract/Third Party Beneficiary Claim

James Cable alleges that Broadstripe and Highland entered into a contract whereby Highland agreed to provide funding to enable Broadstripe to consummate the APA. James Cable claims it is a third party beneficiary of the alleged Broadstripe/Highland contract. As with its promissory estoppel claim, James Cable fails to allege sufficient facts to support its third party beneficiary claim.

A third party beneficiary's rights are measured by the terms of the contract. Here, James Cable does not adequately allege facts to support the existence of a contract under which the court could possibly analyze its purported rights.³¹ James

³⁰ APA § 13. James Cable creatively end-runs the integration clause by arguing that Highland is not a party to the APA and therefore not covered by the clause.

³¹ *NAMA Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007).

Cable alleges that the Broadstripe/Highland contract was entered into sometime prior to June 15, 2007, but does not allege any other facts that would allow the court to reasonably infer the most basic elements of a contract—(1) a bargain, (2) in which there is manifestation of mutual assent to the exchange, and (3) consideration.³² The amended complaint fails to define what the bargain was and how mutual assent was manifested. Furthermore, James Cable fails to sufficiently allege what consideration Broadstripe provided to Highland to induce Highland to enter into a funding agreement. This lack of fact-based allegations in the complaint prevents the court from cobbling together claims sufficient to establish a contract, much less a contract intended to benefit James Cable as a third party.

The failure to plead facts suggesting third party beneficiary status is a second, independent, reason that James Cable’s breach of contract/third party beneficiary claim must fail. To properly allege the creation of third party beneficiary rights, James Cable must allege that “(i) the contracting parties . . . intended that [James Cable] benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to [James

³² See *Ramone v. Lange*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006). The allegations that James Cable relies on in its breach of contract/third party beneficiary claim are largely the same allegations discussed in connection with the promissory estoppel claim. These allegations do not even give rise to a reasonable inference that a certain and definite promise was made regarding the funding.

Cable], and (iii) the intent to benefit [James Cable] must be a material part of the parties' purpose in entering into the contract."³³ James Cable does not allege facts suggesting that even one of the required elements is met, but instead summarily states "James [Cable] is an intended third party beneficiary of the Broadstripe-Highland contract."³⁴ Merely alleging that it was an intended beneficiary is simply an unsupported legal conclusion and insufficient to state a claim upon which relief can be granted.³⁵

D. The Civil Conspiracy Claim

Finally, James Cable alleges that Broadstripe and Highland conspired to tortiously interfere with the APA. In Delaware, civil conspiracy is not an independent cause of action and must arise from some underlying wrong.³⁶ Since James Cable has failed to adequately allege that Highland engaged in any wrongdoing, the civil conspiracy claim against Highland must also fail.³⁷

³³ *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001); *see also Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 270 (Del. Ch. 1987) ("In order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party—whether it be a creditor of the promisee or an object of his or her generosity—should be a material part of the contract's purpose.") (emphasis in original).

³⁴ Am. Compl. ¶ 179. Even if a Broadstripe-Highland funding contract existed (and the court holds that its existence is not sufficiently alleged), such a contract would likely expressly state that there were no intended third party beneficiaries. Thus, James Cable's great lack of detail about Broadstripe's and Highland's intent to benefit James Cable is even more troubling.

³⁵ "A trial court is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'" *In re Gen. Motors*, 897 A.2d at 168 (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

³⁶ *Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998).

³⁷ *See, e.g., id.; Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. 1986).

IV.

For the foregoing reasons, all claims against the Highland defendants are
DISMISSED. IT IS SO ORDERED.