IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CP KELCO U.S., INC., Plaintiff/Counterclaim Defendant	)	
v.	)	Civil Action No. 01-240-RRM
PHARMACIA CORPORATION, Defendant/Counterclaim Plaintiff/Third-Party Plaintiff,	)	
v.	)	
LEHMAN BROTHERS MERCHANT BANKING PARTNERS II, L.P. HERCULES INCORPORATED, and HERCULES 2000, LLC Third-Party Defendants	)	

MEMORANDUM OPINION

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Wilmington, Delaware
October 2, 2002

Thynge, U.S. Magistrate Judge

I. Introduction

On April 11, 2001, plaintiff CP Kelco U.S., Inc. ("CP Kelco"), a Delaware corporation, brought this action against Pharmacia Corporation ("Pharmacia"), also a Delaware corporation, in connection with CP Kelco's purchase of the biogums business assets of Pharmacia (formerly, the Monsanto Company).[1] CP Kelco alleges that Pharmacia fraudulently misrepresented the financial condition of its Biogums Business resulting in an unfairly high purchase price. On June 1, 2001, Pharmacia filed its Answer and Counterclaims (D.I. 7). On June 14, 2001, Pharmacia filed a Third-Party Complaint (D.I. 8) against Lehman Brothers Merchant Banking Partners II, L.P. ("Lehman Brothers"), Hercules Incorporated ("Hercules"), and Hercules 2000, LLC ("Hercules 2000").[2] Presently before the court is defendant Pharmacia's Rule 56(c) motion for summary judgment (D.I. 107).[3]

[1] The assets purchased in the transaction at issue included the Kelco Company ("Kelco") and the other biopolymers business of Monsanto and are referred to collectively as the "Biogums Business." Food gums and biogums (or "biopolymers") are two particular types of the general category of hydrocolloids. These gums are used in a wide range of applications including oil and gas drilling, industrial manufacturing, and prepared foods. In April 2000, while the transaction between Monsanto and CP Kelco was pending, Pharmacia and Upjohn merged with and into Monsanto with Pharmacia being the surviving company (Hereafter, "Monsanto" and "Pharmacia" are used interchangeably where contextually appropriate or are alternatively referred to as the "Seller"). In the asset purchase agreement as executed, CP Kelco is the buyer and Pharmacia is the seller. CP Kelco was created by Hercules and Lehman Brothers to purchase the Biogums Business. CP Kelco "is a wholly-owned subsidiary of CP Kelco ApS, a private limited company organized under the laws of Denmark with offices in Wilmington, Delaware. CP Kelco ApS is owned, in turn, by Hercules and by Lehman FG Newco, Inc., the company through which Lehman [Brothers] made its investment in CP Kelco." D.I. 1, ¶ 10. Hercules and Lehman Brothers indirect ownership interest in CP Kelco is 28% and 72% respectively.

[2] Hercules and Hercules 2000's motion for judgment on the pleadings (D.I. 105) was granted on September 19, 2002. *See CP Kelco, U.S., Inc. v. Pharmacia Corp.*, No. 01-240-RRM (D.Del. Sept. 19, 2002).

[3] For the purpose of this motion, Hercules, Lehman Brothers, and CP Kelco (which was assigned Hercules 2000's rights, duties, and obligations under the final purchase agreement) are referred to collectively as the "Buyers."

II. Facts

In October 1999, Monsanto, through its investment advisor, Goldman Sachs & Company ("Goldman Sachs"), issued a Confidential Memorandum (the "Confidential Memorandum" or "Offering Memorandum") for the sale of its Biogums Business which projected revenues of $284 million in 2000. On October 11, 1999, Israel J. Floyd, Hercules' general counsel, and, on October 27, 1999, Harry A. Tucci, then-senior vice president of Hercules and later chief executive officer of CP Kelco, each signed a confidentiality letter agreement and received a copy of the Confidential Memorandum. The confidentiality letter agreements contain language that disclaims the signatory's reliance on any information contained therein. The Confidential Memorandum contains cautionary language regarding the Biogums Business' financial forecasts and, also, disclaims any representation or warranties as to the accuracy or completeness of the estimates and projections set forth in that document.

Hercules teamed with Lehman Brothers to complete the acquisition of the Biogums Business. In a November 9, 1999 "non-binding preliminary indication of interest" from Tucci to Monsanto, Tucci noted the strategic value to Hercules of combining the Biogums Business with its own existing food gums business (the "Hercules Food Group" or "HFG"). This combination was expected to create "a worldwide leading producer in hydrocolloids and texturing agents" and the letter indicated that "Hercules [was] prepared to offer a cash purchase price for the [Biogums] Business of approximately Seven Hundred Ten Million Dollars (U.S. $710,000,000)."[4] Despite the disclaimers contained in the Confidential

[4] A-222. References to documents of record are made directly to the record document. References cited "A-____" are to the appendix filed contemporaneously with Pharmacia's briefs in support of the motion. References cited "B-____" are to the appendix filed contemporaneously with CP Kelco's brief opposing the motion.

Memorandum, Tucci stated that the $710 million dollar purchase price had been calculated in "reli[ance] on the accuracy and completeness of the Confidential Information Memorandum" and that Hercules "expect[ed] that during the due diligence, substantially more information will be made available about the [Biogums] Business and the related financial information and underlying management assumptions."[5] The letter concluded by stating that Hercules was "prepared to promptly proceed to due diligence and thereafter negotiation of mutually definitive agreements."[6] A due diligence review was promptly commenced by Hercules, Lehman Brothers.

From October 1999 through February 2000, Hercules and Lehman Brothers, assisted by their legal and financial advisors–Simpson Thacher & Bartlett, Ballard Spahr Andrews & Indersoll and Deutsche Bank–conducted a due diligence review of the Biogums Business. This review included: a review of documents contained in a "data room" Monsanto prepared for potential Biogums Business bidders, attending a two-day management presentation in Chicago, Illinois, participation in several telephone conferences, the submission of written questions to and the receipt of written responses from Monsanto, and site visits to the Biogums Business' Okmulgee, Oklahoma plant.

In a February 2, 2000 letter from Vincent J. Corbo, Ph.D., Hercules' chief executive officer and president, to John Vaske of Goldman Sachs, Corbo advised that Hercules had conducted an "extensive review" of the Biogums Business. Based on that due diligence review and Hercules' "expertise in the field of hydrocolloids,"[7] it continued to believe that the Biogums Business would provide a beneficial combination with the HFG and proposed

[5] A-223.
[6] A-224.
[7] A-1116.

an all cash price of $665 million for the Biogums Business. Monsanto rejected this proposal. On February 16, 2000, Hercules and Lehman Brothers sent a letter containing a $685 million "final offer" for the Biogums Business. Monsanto accepted this offer and the parties began negotiations over the terms of an asset purchase agreement (the "Asset Purchase Agreement" or "Agreement"). The Asset Purchase Agreement was signed on February 22, 2000 by Monsanto, Hercules and Lehman Brothers and contained a $685 million purchase price. Two sections of the Agreement, §§ 3.26 and 5.11, contain disclaimers as to representations and warranties on the part of the sellers and the Buyers' acknowledgment of their responsibility to conduct an independent evaluation of the Biogums Business.

After the Agreement was signed, Lehman Brothers requested that their auditors, Ernst & Young, LLP ("Ernst & Young"), conduct further due diligence of the Biogums Business. In late February 2002, Ernst & Young began this additional review. During this time-period, on March 17, 2000, Francisco Diaz, president of the Biogums Business, made a presentation to the Buyers which included a revised forecast of $285.5 million in revenue for 2000. Following its due diligence review, Ernst & Young created a memorandum dated May 3, 2000 (the "May 3, 2000 Ernst & Young memorandum") disputing the 1999 audited financial results prepared for Monsanto by Deloitte & Touche, LLP ("Deloitte & Touche") and certain inventory amounts then carried by the Biogums Business. The possibility of sales being "pulled forward" was also specifically mentioned as a concern. Deloitte & Touche stood by their 1999 audit and made none of the adjustments suggested by Ernst & Young. Despite Deloitte & Touche's position, Hercules and Lehman Brothers sought a reduction in the $685 million purchase price recited in the Asset Purchase Agreement.

On June 14, 2000, Pharmacia offered a $60 million purchase price reduction in exchange for: a waiver of certain closing conditions, indemnification for issues raised in the May 3, 2000 Ernst & Young memorandum and in two June 6, 2000 letters from Tucci to the Seller expressing concerns about the financial condition of the Biogums Business, and advancing the closing date from September 30 , 2000 to July 30, 2000. To facilitate the Buyers' financing of the transaction based on a July closing date, Lehman Brothers requested that a full financing statement for the second quarter be provided to them by July 5, 2000. Those reports were provided to the Buyers on July 3, 2000 and contained a reduction in projected 2000 revenue to $277 million. Diaz' version of this report included additional information from the Biogums Business' sales and operations planning process (the "S&OP") which was forecasting only $256 million in 2000 revenue. This information was not shared with the Buyers. Negotiations between the parties during July 2000 led to a $93 million purchase price reduction and a revised purchase price of $592 million. This revised price was reflected in an amendment to the Asset Purchase Agreement signed on August 10, 2000 ("Amendment No. 1"). In addition to the purchase price adjustment, Amendment No. 1 contained certain waivers of closing conditions and indemnification limitations.

On September 15, 2000, a second amendment to the Agreement was executed ("Amendment No. 2") by which the Buyers substituted CP Kelco for and in place of Hercules 2000 as "Buyer" under the Agreement, thereby assigning to CP Kelco all of Hercules 2000's rights, duties, and obligations under the Agreement.

On September 21, 2000, Jerry Hunter, the Buyers' CFO, contacted Dana Conley, finance director for the Biogums Business, because he needed information on current

finances of the Biogums Business for a bring-down due diligence session on September 22, 2000. At that session, the high yield bonds that were to be sold as part of the purchase financing were to be priced. According to Hunter, Conley indicated to him in their September 21 conversation that, looking at September 2000 forward, the revenue numbers which had been provided to the Buyers –$277 million in 2000–were still achievable.

The transaction closed on September 28, 2000.

On October 3, 2000, Conley and Eric Meerbergen, Biogums Business' vice president for marketing and strategic planning, provided Hunter with a document dated October 2, 2000 entitled "Kelco Biopolymers 2000 Forecast Review" that showed preliminary September 2000 actual revenues $9.4 million short of previous estimates and a projected $251 million in net sales for 2000, $26 million less that the $277 million previously forecast.

On April 11, 2001, CP Kelco filed a ten-claim complaint (D.I. 1). The basis of the complaint is that Pharmacia fraudulently concealed and misrepresented the actual financial and business condition of the Biogums Business. On June 1, 2001, Pharmacia filed its answer and counterclaims (D.I. 7). On February 15, 2002, Pharmacia filed a motion for summary judgment (D.I. 107). Briefing on that motion was completed on April 10, 2002. This is the court's decision on Pharmacia's motion and its one remaining counterclaim against CP Kelco.

III. Legal Standard for Summary Judgment

A grant of summary judgment pursuant to Fed. R. Civ. P. 56(c) is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law."[8] A fact is material if resolution of the dispute over that fact "might affect the outcome of the suit under the governing law"[9] and it is "the substantive law . . . [that] determine[s] which facts are material."[10] The requirement that the dispute be "genuine" is met "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[11] A Rule 56(c) movant can meet its burden of establishing a lack of a genuinely disputed material fact by demonstrating "that there is an absence of evidence to support the nonmoving party's case."[12] In that circumstance, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[13]

IV. POSITIONS OF THE PARTIES

CP Kelco's complaint (D.I. 1) sets forth ten claims: (**I**) Breach of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, (**II**) Fraud: Misrepresentations and Non-Disclosures In Connection with the Purchase Agreement, (**III**) Fraudulent Misrepresentations and Non-Disclosures in Connection with the Amendment to the Purchase Agreement, (**IV**) Fraudulent Misrepresentations and Non-Disclosures in Connection with the September 28 Closing of the Purchase, (**V**) Breach of Warranty and Representation as to the June 2000 Financial Statements, (**VI**) Breach of Representations and Warranties as to Compliance with Covenants, (**VII**) Breach of Environmental

[8] Fed. R. Civ. Pro. 56(c).

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[10] *Id.* Therefore, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-248 (emphasis in original).

[11] *Id.* at 248.

[12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[13] *Id.* at 323.

Representations and Warranties, (**VIII**) Breach of the Implied Covenant of Good Faith and Fair Dealing, (**IX**) Equitable Fraud, and (**X**) Punitive Damages.

The primary allegation underlying each of CP Kelco's claims is that Pharmacia deceived CP Kelco about the true value of the Biogums Business. Purportedly, this was accomplished by deliberately concealing material information concerning the Biogums Business known to, and relied upon by, Pharmacia in managing the Biogums Business while the Seller simultaneously provided the Buyers incomplete or misleading financial information and disavowed the existence of the allegedly concealed information. CP Kelco is explicit in asserting that the harm it suffered–overpaying for the Biogums Business–was the result of fraud and not unrealized financial projections made with a good faith, yet erroneous, belief. The fact that Pharmacia was aware that certain information provided to the Buyers was inaccurate is shown, according to CP Kelco, from S&OP projections, created internally and given to Pharmacia management on a monthly basis, which contradicted the projections provided to the Buyers. The Buyers characterize the monthly S&OP "roll-ups" as a second, secret, set of books that, if not concealed would have revealed to the Buyers a more accurate picture of the financial condition of the Biogums Business. That information would have enabled the Buyers to perform due diligence adequate to support an informed decision as to whether, and at what price, to proceed with the transaction. CP Kelco contends that the very information necessary for such adequate due diligence to have been performed was excluded from materials made available to the Buyers in the data room because that information would have contradicted the misleadingly positive picture of the Biogums Business that had otherwise been presented to the Buyers.

CP Kelco also alleges that misrepresentations and omissions with regard to certain inventory issues and with regard to the practice of pulling forward sales further obstructed its ability to get an accurate picture of the business it was purchasing.

Pharmacia attacks CP Kelco's allegations of fraud by asserting that the Buyers can not satisfy the elements of a fraud claim. As its first line of defense, Pharmacia maintains that there is no evidence of any material misrepresentations or omissions. Pharmacia also vigorously argues that, even if there were material misrepresentations or omissions, CP Kelco could not have justifiably relied on financial forecasts made by Pharmacia due to cautionary language contained in the October 1999 confidentiality letter agreements, the Offering Memorandum, and the Asset Purchase Agreement. In addition to the cautionary statements in those documents, Pharmacia contends that Amendment No. 1 represented a *quid pro quo* in which CP Kelco specifically waived any right to recover for the very breaches alleged in the complaint in exchange for a $93 million purchase price reduction. CP Kelco characterizes Pharmacia's contentions as an argument that it had negotiated a "license to commit fraud."

V. ANALYSIS

A. Claims I, II, III, IV, and IX

Pharmacia maintains that, as a matter of law, CP Kelco's Claims I, II, III, IV, and IX each fail because the elements of each theory of recovery set forth in those claims include a requirement that the complaining party establish that it justifiably relied on an allegedly damaging material misrepresentation or omission.[14] Pharmacia argues that cautionary

[14] In a claim asserting breach of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 (Claim I), "a plaintiff must show that the defendant (1) made a misstatement or an omission of a material fact (2) with scienter (3) in connection with the purchase or the sale of a security (4) upon which the plaintiff reasonably relied and (5) that the plaintiff's reliance was the proximate cause of his or her injury." *In re Ikon*

disclaimers–-contained in paragraph 10.b of the October 1999 confidential letter agreements, the first page of the October 1999 Confidential Memorandum, and sections 3.26 and 5.11 of the Agreement–-make it impossible for CP Kelco to have justifiably relied on the purportedly fraudulent projections or other information provided to the Buyers by Pharmacia.

With regard to the section 10(b) and Rule 10b-5 allegations asserted in Claim I, Pharmacia contends that those cautionary disclaimers make the misstatements or omissions complained of immaterial under the "bespeaks caution" doctrine which recognizes that forward-looking statements[15] are immaterial as a matter of law when accompanied by appropriate cautionary language. Pharmacia maintains that appropriate cautionary language was included in the earliest communications between the parties as well as in the Asset Purchase Agreement.

Paragraph 10.b of the October 1999 confidentiality letter agreements signed by

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Office Solutions, Inc., 277 F.3d 658, 666 (3d Cir. 2002). Claims II, III, and IV allege fraudulent misrepresentation in connection with the Asset Purchase Agreement, Amendment No. 1 to the Agreement, and in connection with the closing of the purchase. Under Delaware law, the elements of common law fraud are (1) a false representation of material fact, (2) made knowingly, (3) with intent to be believed, (4) to one who is unaware of the falsity of the statement, (5) who justifiably relies on the statement, (6) and is injured as a result of that reliance. *J.A. Moore Construction Co. v. Sussex Associates Ltd. Partnership*, 688 F.Supp. 982, 989 (D. Del. 1988); *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983). Claim IX alleges equitable fraud, the elements of which are the same as common law fraud except there is no requirement that a plaintiff establish that the defendant knowingly made the allegedly material misrepresentations. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1061 (Del. 1996).

[15] The Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-5(i)(1)(1997), describes a "forward-looking statement" as:

> (A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items; (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer; (C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission; (D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C); (E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or (F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

Hercules' Floyd and Tucci contains the disclaimer that:

> Nothing contained in any discussions between Monsanto and Recipient or in any Confidential Information shall be deemed to constitute a representation or warranty. Except for the matters set forth in this Agreement or in any such formal written contract, neither party shall be entitled to rely on any statement, promise, agreement or understanding, whether oral or written, or any custom usage of trade, course of dealing or conduct.[16]

The Confidential Memorandum received upon the signing of the confidentiality letter agreements contains the following cautionary language regarding the Biogums Business' financial forecasts:

> The information contained in this Memorandum was obtained from the Business and other sources. Any estimates and projections contained herein have been prepared by the management of the Business and involve significant elements of subjective judgment and analysis which may or may not be correct. Neither Monsanto nor the Business nor Goldman, Sachs & Co. makes any representation or warranty, expressed or implied, as to the accuracy or completeness of the information contained in this Memorandum, and nothing contained herein is, or shall be relied upon as, a promise or representation, whether as to the past or the future. This Memorandum does not purport to contain all of the information that may be required to evaluate such transaction and any recipient hereof should conduct its own independent analysis of the Business and the data contained or referred to herein. Goldman, Sachs & Co. has not independently verified any of such information and assumes no responsibility for its accuracy or completeness. Neither Monsanto nor the Business nor Goldman, Sachs & Co. expects to update or otherwise revise the Memorandum or other materials supplied herewith.[17]

Sections 3.26 and 5.11 of the Asset Purchase Agreement each contain cautionary language. In conspicuous type, section 3.26 explicitly disclaims any representations or warranties on the part of Pharmacia (other than those expressly excluded from the disclaimer) and requires that the buyers rely on their own examinations of the Biogums Business. It states:

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[16] A-215.
[17] A-129.

> EXCEPT AS SPECIFICALLY AND EXPRESSLY SET FORTH IN THIS ARTICLE 3, (I) SELLER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, AT LAW OR IN EQUITY, RELATING TO THE ASSETS, ASSUMED LIABILITIES OR THE BUSINESS, INCLUDING, WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY AS TO THE VALUE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR FOR ORDINARY PURPOSES, OR ANY OTHER MATTER, (ii) SELLER MAKES NO, AND HEREBY DISCLAIMS ANY, OTHER REPRESENTATION OR WARRANTY REGARDING THE ASSETS, ASSUMED LIABILITIES OR THE BUSINESS AND (iii) THE ASSETS THE ASSUMED LIABILITIES AND THE BUSINESS BEING TRANSFERRED TO BUYER ARE CONVEYED ON AN "AS IS WHERE IS" BASIS AS OF THE CLOSING, AND BUYER SHALL RELY UPON ITS OWN EXAMINATION THEREOF. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SELLER MAKES NO REPRESENTATION OR WARRANTY REGARDING ANY ASSETS OTHER THAN THE ASSETS OR ANY LIABILITIES OTHER THAN THE ASSUMED LIABILITIES OR ANY BUSINESS OTHER THAN THE BUSINESS, AND NONE SHALL BE IMPLIED AT LAW OR IN EQUITY.[18]

Section 5.11 includes waiver of reliance by the buyer on information provided to them by the seller:

> Buyer agrees that neither Seller nor any other person or entity will have or be subject to any liability to Buyer or any other person resulting from the distribution to Buyer, or Buyer's use of, the Confidential Memorandum prepared by Goldman, Sacks & Co. dated October 1999 (the "Confidential Memorandum') and any information, document, or material made available to Buyer in certain "data rooms," management presentations or any other form in expectation of the transactions contemplated by this Agreement. In connection with Buyer's investigation of the Business, Buyer may have received from or on behalf of Seller certain projections, including projected statements of operating revenues and income from operations of the Business. Buyer acknowledges that there are uncertainties inherent in attempting to make such estimates, projections and other forecasts and plans, that the Buyer is familiar with such uncertainties, that Buyer is taking full responsibility for making its own evaluation of the adequacy and accuracy of all estimates, projections and other forecasts and plans so furnished to it (including the reasonableness of the assumptions underlying such estimates, projections and forecasts), and that Buyer shall have no claim against Seller or its Affiliates with respect thereto. Accordingly, Seller makes no representation or warranty with respect to such estimates, projections and other forecasts and plans (including the reasonableness of the assumptions

[18] A-1146.

underlying such estimates, projections and forecasts).[19]

Pharmacia cites *In re Donald J. Trump Casino Securities Litigation*[20] to support its contention that these cautionary disclaimers are adequate to bring the alleged misstatements under the "bespeaks caution" doctrine as to Claim I.

Pharmacia further relies on *Great Lakes Chem. Corp. v. Pharmacia Corp.*[21] as support for the proposition that parties can waive the ability to assert even a fraud claim when, as here, sophisticated parties negotiate and agree to cautionary terms like those above. Pharmacia argues the court is doing a disservice to independent parties' bargained-for expectations if a party disappointed with the results of its bargain may convince the court to rewrite its contract. Pharmacia maintains that under *Great Lakes*, the cautionary disclaimers agreed to by the Buyers preclude justifiable reliance on the alleged misrepresentations of Pharmacia's management as required to support Claims I, II, III, IV, and IX.

CP Kelco argues that the disclaimers upon which Pharmacia relies are not equivalent to those found to have satisfied the "bespeaks caution" doctrine in *Trump* and that no case has ever held that the "bespeaks caution" doctrine protects a defendant committing outright fraud. CP Kelco also argues that the facts of *Great Lakes* are distinguishable from those here and, therefore, the holding of *Great Lakes* is inapplicable to its claims. CP Kelco further contends that no Delaware case dismissing a complaint alleging fraudulent misrepresentation has done so under facts consistent with those alleged in this case.

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[19] A-1154-55.
[20] 7 F.3d 357 (3d Cir. 1993).
[21] 788 A.2d 544 (Del. Ch. 2001).

1. "Bespeaks Caution"

Similar to CP Kelco's allegations in this case, the principal allegation of the plaintiffs in *Trump*, was that the defendants "had neither an honest belief in nor reasonable basis for one statement in the . . . [bond offering] prospectus: 'The Partnership believes that funds generated from the operation of the Taj Mahal [casino] will be sufficient to cover all of its debt service (interest and principal).'"[22] The plaintiff also alleged material omissions regarding the required income to service the casino's debt load and the casino's "unprecedented" debt to equity ratio.[23]

The *Trump* court noted that, so long as the alleged misrepresentations or omissions are deemed material, misstatements regarding such "soft information" as opinions, predictions and other forward-looking statements "may be actionable if the speaker does not genuinely and reasonably believe them."[24] There, however, in addition to the *extensive* and detailed cautionary statements prominently set forth throughout the prospectus, the allegedly misleading statement quoted above was immediately followed by the reservation that "[n]o assurance can be give, however, that actual operating results will meet the Partnership's expectations."[25] In applying the "bespeaks caution" doctrine, the *Trump* court found the plaintiff's alleged misrepresentations and omissions to be immaterial as a matter of law because "the cautionary statements were tailored precisely to address the uncertainty concerning the Partnership's prospective ability to repay the bondholders."[26] The court warned, however, that "a vague or blanket (boilerplate) disclaimer which merely

[22] *Trump*, 7 F.3d at 366.
[23] *Id.*
[24] *Id.* at 368.
[25] *Id.* at 371.
[26] *Id.* at 371-372.

warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation."[27]

Unlike the cautionary disclaimers in *Trump*, the disclaimers relied on by Pharmacia are not precisely tailored to address the allegation that certain financial information known, and relied upon, by Pharmacia's management was affirmatively excluded from the materials provided to the Buyers in the data room. Those disclaimers merely recited that the Buyers were to conduct an independent evaluation of the Biogums Business. The disclaimers provided no indication that there was existing information in the Seller's possession, but concealed from the Buyers, that contradicted the information that was provided. Indeed, the language of section 5.11 precludes liability "resulting from *the distribution to Buyer* . . the Confidential Memorandum . . . and any information, document, or material *made available to Buyer* in certain 'data rooms' . . . [and that] the Buyer is taking full responsibility for making its own evaluation of the adequacy and accuracy of all estimates, projections and other forecasts and plans *so furnished to it*."[28] CP Kelco is alleging it was defrauded because certain information was *not* distributed, furnished, or made available to it that would have made it possible for the Buyers to make their own, adequately informed, evaluation of the Biogums Business. It is the omission of information that CP Kelco alleges caused its harm. The Third Circuit was similarly faced with a "bespeaks caution" defense to an allegedly material omission from an attorney's opinion letter. There, when analyzing the kind of tailored disclaimer required by *Trump*, the court stated that,

> for the ["bespeaks caution"] doctrine to even conceivably preclude plaintiffs'

[27] *Id.* at 371.
[28] A-1154-55 (emphasis added).

> claims in this case it would be necessary . . . to have included a disclaimer stating, that there was a possibility that . . . the opinion letter was a sham commissioned to construct a facade of legitimacy for a trading program that both [the issuer and defendant] knew was a farce.[29]

There, as here, the disclaimers were not tailored to address the omission specifically alleged. Moreover, it can not be the case that the "bespeaks caution" doctrine protects outright fraud as such protection could encourage fraudulent behavior. As the court pointed out in *Gurfein v. Sovereign Group*:

> Under defendants' apparent interpretation of the "bespeaks caution" approach, one could construct a completely inaccurate and fraudulent offering memorandum, yet be shielded from a fraud claim as long as there was language in the document cautioning investors of the specific risks. To the extent that such a rule would allow, if not encourage, fraud and non-disclosure on the part of corporate actors, it clearly is not a viable application of the "bespeaks caution" doctrine. [30]

Because the disclaimers relied upon by Pharmacia are not tailored precisely to address the fraud alleged by CP Kelco, the "bespeaks caution" doctrine does not protect any misrepresentations or omissions on the part of Pharmacia.

2. Contractual Waiver of Allegations of Fraud

Pharmacia contends that when sophisticated parties negotiate an arms-length agreement that includes disclosures like those contained in the documents associated with this transaction, fraud claims based on projections and forecasts are barred because, as

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[29] *Kline v. First W. Gov't Sec. Inc.*, 24 F.3d 480, 489-90 (3d Cir. 1994). Pharmacia is correct that *Kline* involved a suit alleging fraudulent omissions from an opinion letter regarding the tax consequences of certain investments and not, as here, financial projections used for the operation of a business. Pharmacia is incorrect, however, in its assertion that that dissimilarity means *Kline* has no application to this case. *Kline*'s comments on the content of cautionary disclaimers necessary to invoke the "bespeaks caution" doctrine in response to an allegation of fraud by omission, which is an issue in this case, are relevant to this court's analysis. That *Kline* considered whether the disclaimers in that case were sufficient to satisfy a "bespeaks caution" defense to allegations aimed at a different form of fraud by omission than is alleged in this case does not negate the validity of reference to *Kline* to demonstrate the level of candor such disclaimers would generally be required to contain.

[30] 826 F.Supp. 890 (E.D. Penn. 1993).

a matter of law, the complaining party could not have justifiably relied on those projections. Pharmacia relies heavily on *Great Lakes Chemical Corp. v. Pharmacia Corp.*[31] as support for this proposition. Although it is accurate to say that there can be factual settings in which suitably tailored disclaimers may bar certain fraud actions, the court disagrees with the argument that merely demonstrating that sophisticated parties negotiated terms of a purchase agreement including disclaimers like those relied upon in this case creates an automatic bar to any fraud claim that might be asserted.

On the surface, the facts of *Great Lakes* appear to be very similar to those of this case. The defendant announced its desire to sell one of its subsidiaries. The plaintiff received a descriptive memorandum containing projected sales for the subsequent two years. The plaintiff indicated its interest in submitting a bid and the parties began negotiation of the purchase. The plaintiff retained industry consultants and a well-respected law firm to assist its due diligence efforts. During the negotiations, management of the subsidiary having knowledge of negative developments affecting the subsidiaries business were directed not to speak directly with the plaintiff's personnel. The plaintiff was to be provided information solely through the conduit of the defendant's negotiators. The plaintiff submitted a successful bid and the transaction closed.[32]

The plaintiff's suit alleged fraud and breach of contract based on purportedly material misrepresentations and omissions about past and current events affecting the subsidiary's business. The plaintiff alleged that the defendant had concealed material information about changes in the market for one of the subsidiary's major products, that declining sales by the subsidiary were attributable to specific temporary factors apart from the changing

[31] 788 A.2d 544 (Del. Ch. 2001).
[32] *See Great Lakes*, 788 A.2d 545-546.

market, and that known interference with one of the subsidiary's patents was expressly denied.[33] There, as here, the defendants argued that disclaimer provisions in the purchase agreement, strikingly similar to the disclaimer provisions contained in the Asset Purchase Agreement signed by CP Kelco, barred justifiable reliance on the alleged omissions and misrepresentations.[34]

The *Great Lakes* court dismissed the fraud claims in the complaint because it found that the plaintiff could not have justifiably relied on the alleged misrepresentations in a situation where, as had there occurred, "two highly sophisticated parties, assisted by industry consultants and experienced legal counsel, entered into carefully negotiated disclaimer language after months of extensive due diligence."[35] Importantly, however, this conclusion was reached based on facts that are different from those in this case. The most important difference being the fact that reliance on one of the primary bases of the plaintiff's fraud allegation was not justifiable in light of new information received by the plaintiff the day after the alleged misrepresentations occurred. That new information should have put the plaintiff on notice of the inaccuracy of the alleged misrepresentation. In a telephone conference, the plaintiff expressed concern over reduced sales in the prior two months. The defendant's representatives explained the decline as the result of "temporary reductions in orders and some accelerated shipments at the end of [the previous year]."[36] The very next day, the defendant revised its *pro forma* financial projections for the current year to lower projected sales by $9.8 million and gave those newly reduced projections to

[33] *Id.* at 551.
[34] *Id.*
[35] *Id.* at 555.
[36] *Id.* at 553.

the plaintiff the following day.[37] This was the second lowering of projections in a period of two months and accounted for a 27% reduction in projected sales for the then-current year from the original projection provided to the plaintiff.[38] It was in that factual setting that the court stated that "[t]o allow [the plaintiff] to assert, under the rubric of fraud, claims that are explicitly precluded by contract, would defeat the reasonable commercial expectations of the contracting parties and eviscerate the utility of written contractual agreements."[39] That is not the situation here.

Reasonable commercial expectations do not include one party to a transaction concealing financial information contradicting its disclosed projections and taking steps to assure that such negative information is not discovered by the other party's due diligence, as is alleged in this case.[40] Contrary to promptly updating the Buyers on negative information from Pharmacia's monthly S&OP "roll-ups," Pharmacia purportedly kept that information to itself and did not lower its initially provided revenue projections until after being confronted with the May 3, 2000 Ernst & Young memorandum. Even then, CP Kelco presents evidence that the newly reduced projections then provided to the Buyers still substantially overstated the strength of the Biogums Business compared to data from the

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[37] *Id.* at 554.

[38] *Id.* at 546.

[39] *Id.* at 556.

[40] In the context of a Rule 10b-5 case, the Third Circuit noted that even "a sophisticated investor is not barred by reliance upon the honesty of those with whom he deals in the absence of knowledge that the trust is misplaced. Integrity is still the mainstay of commerce and makes it possible for an almost limitless number of transactions to take place without resort to the courts." *Straub v. Vaisman & Co., Inc.*, 540 F.2d 591, 598 (3d Cir. 1976). The belief that honesty and integrity is expected in commercial transactions was echoed by Leslie J. Fabuss, managing director at Lehman Brothers. When asked, "[a]s an experienced M&A professional, was there any risk, in your mind, as to the chance of success in the second half of 2000 as to [the projections provided to the Buyers in July 2000]?" Fabuss answered "when you have it both orally and on paper that [the Biogums Business is] going to have . . . specific sales in specific geographies, to specific customers, for specific applications, in que three and que four, and that's what they're telling you, you expect that they are going to, both orally and in writing, lie to you? No, not in front of a $700 million securities offering, okay. That doesn't normally happen in my business." A-2202.

S&OP provided to Pharmacia's management. There is evidence that purportedly hidden S&OP "roll-ups" had been used throughout 2000 by Pharmacia management, in part, to determine the amount of sales to be pulled forward to ensure that actual monthly revenues appeared to support the projections presented to the Buyers. Unlike the situation in *Great Lakes* where projections were updated and presented to the plaintiffs when negative financial information became known, Pharmacia's actions here did not put CP Kelco on similar notice of the true nature of the Biogums Business' revenue prospects. The holding of *Great Lakes* is not applicable to the facts in this case and CP Kelco could justifiably rely on information presented, or made available, to it with the representation that there was no additional contradictory information being concealed from it.

The parties have each filed thousands of pages of documentary evidence with regard to alleged misrepresentations or omission of material facts. For instance, there is substantial disagreement between the parties as to what the S&OP actually was. CP Kelco asserts that the S&OP was a secret second set of financial forecasts that provided a more accurate, and negative, picture of the financial condition of the Biogums Business. Pharmacia characterizes the S&OP as a manufacturing planning tool that was not a substitute for financial forecasting. Pharmacia argues further that, even if the S&OP was material, any assertion that the S&OP was hidden from the Buyers is false because the existence of the S&OP was revealed to the Buyers. Even if the Buyers knew of the existence of the S&OP, however, there are disputes regarding the whether the S&OP was actually a financial planning tool that was providing monthly forecasting information to Pharmacia management about the then-current state of the Biogums Business as well as whether, and to what extent, that information was concealed from the Buyers. Knowledge

of the S&OP's existence does not preclude the possibility that Pharmacia concealed the fact that the system was producing financial figures material to, and relied on by, Pharmacia management in running the Biogums Business during the negotiations of the transaction. Such concealment would prevent the Buyers, who had no access to information contrary to that provided to them, from discovering that arguably more accurate information. Asserting that an entity conducted inadequate due diligence is not a defense if the party making that assertion is able to conceal information required for adequate due diligence. The current record leaves unresolved a genuine dispute regarding the materiality of information pertaining to the S&OP.[41]

Pharmacia argues that even if the court were to find that a genuine dispute of material fact existed as to the S&OP, Amendment No. 1 renders that dispute immaterial because of the waivers included in paragraph 10.b of that amendment ("Effect of Disclosure; Buyer's Waiver of Indemnification With Respect to Matters Disclosed") which states:

> Seller shall have no obligation to indemnify or reimburse Buyer (or any Buyer Protected Party), and neither Buyer nor any Buyer Protected Party shall have any right to seek indemnification, for (i) any Loss incurred as a result of, with respect to, or arising out of any Matter that has been Disclosed or (ii) any claim for a breach of the representation contained in Section 3.7 of the Agreement to the extent that such breach is with respect to the matters waived in clause (x) of the second sentence of Section 7 of this Amendment.[42]

"Disclosed" matters include those listed on Exhibit 1 to Amendment No. 1. Exhibit 1,

[41] It is sufficient to preclude a grant of summary judgment that there is some genuine dispute as to a material fact, since this court has determined such dispute exists with respect to information provided to the Buyers about the S&OP projections and how they related to the financial status of the Biogums Business, the court need not analyze the parties' contentions with regard to whether there were additional materially misleading statements or omissions related to the inventory practices of the Biogums Business or the use of pulled- forward sales.

[42] A-1624.

entitled "Supplemental Disclosure," includes the May 3, 2000 Ernst & Young memorandum, and the two June 6, 2000 letters sent to the Seller by Tucci. Paragraph 7 of the Amendment No. 1 is a "Waiver of Certain Closing Conditions." Through that paragraph Buyers waived the ability to assert a breach based upon:

> (x) [Asset Purchase Agreement] Section 8.1 (with respect to the representation contained in Section 3.7 that "[s]ince December 31, 1999, there have been no events, changes, effects or developments which have had or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect") and Section 8.7 of the Agreement, in each case with respect to the results of operations and financial condition of the Business through, and expectations of future results of operations and financial condition of the Business as of, the Closing Date, (y) in Section 8.6 of the Agreement with respect to the results of operations and financial condition of the Business through June 30, 2000 and (z) in Section 8.8.[43]

Pharmacia describes the Amendment No. 1 as a *quid pro quo* among the parties. In exchange for the $93 million purchase price reduction, Pharmacia contends that the Buyers agreed to waive *any* complaints and close the deal. CP Kelco responds that Amendment No. 1 did not result in the all-encompassing waivers suggested by Pharmacia. The Buyers point out that Amendment No. 1 was directed primarily to section 8 of the Asset Purchase Agreement and did not eliminate the Seller's obligations with regard to other sections of the Agreement. For example the Seller was still obligated to: attest to the accuracy of the financial statements (§ 3.6), to give Buyers certain requested information (such as all environmental reports, § 3.19, and information relating to the business and its assets, § 5.2), to provide reasonable cooperation to assist the Buyers' financing efforts (§ 5.16), and to run the business in the ordinary course and in a manner preserving the business' assets, goodwill and customer relationships (§ 5.1). Furthermore, the Buyers note that Amendment No. 1 adds a *new* representation by Pharmacia, in section 6 of the

[43] A-1623.

amendment, warranting the accuracy of the June 30 financial statements. It is logically inconsistent to argue that Amendment No.1 served as a waiver of CP Kelco's ability to assert any breaches of warranty while simultaneously proclaiming a new warranty as to the accuracy of the June 30 financial statements. Such a reading would mean that section 6 of Amendment No. 1 (set forth below in discussion of Claim V), which created that new warranty, was mere surplusage. That reading must certainly be incorrect.

Importantly, although CP Kelco acknowledges that Amendment No. 1 limits certain claims for indemnification under contractual warranties, it contends that the amendment does not purport to deal with fraud. Pharmacia responds that this argument is without merit as there can be no fraud without material misrepresentation and, as a matter of law, financial projections and forecasts are not "material." This response illustrates some of the disconnect between the opposing parties' arguments. The basis of CP Kelco's fraud claims is not that it was damaged due to its reliance on misrepresented forecasts and projections, the inaccuracy of which it could have learned through adequate due diligence. Rather, CP Kelco argues it was damaged by Pharmacia's withholding of information which crippled the Buyers' ability to perform its required due diligence. Evidence of this alleged fraudulent concealment and misrepresentation of material financial information up to the time of closing is in the present record. The existence of this evidence and the fact that there is a genuine dispute as to the extent of the waiver resulting from Amendment No. 1 leads to a determination that there could have been a material misrepresentation on which CP Kelco could have reasonably relied.

Pharmacia does not argue the scienter element of the relevant theories of fraud set forth in note 14, above. For the most part, Pharmacia acknowledges what was and was

not disclosed to the Buyers but argues that any particular alleged to be misrepresented was immaterial or not subject to reasonable reliance. Nor does Pharmacia dispute the occurrence of the alleged damage; that the Biogums Business was worth less than what was represented to the Buyers (accepting that the Buyers could justifiably rely on that as a material representation) and the Buyers, therefore, overpaid for the business. Pharmacia does vigorously dispute that the Buyers could justifiably rely on the alleged misrepresentations.

As explained above, Pharmacia has failed to establish that there is an absence of any evidence to support CP Kelco's fraud claims. Consequently, summary judgment is denied as to Counts I, II, III, IV, and IX.

B. Claim V

Claim V alleges that Pharmacia breached its warranty and representation as to the June 2000 Financial Statements. Section 6 of Amendment No. 1 amends the following to section 3.6 of the Asset Purchase Agreement:

> The unaudited balance sheet of the Business as of June 30, 2000 and the related unaudited statement of income for the six months ended June 30, 2000 have been prepared from the accounting books and records of the Business in conformity with the accounting principles disclosed in the notes thereto and present, in all material respects, the financial position of the Business as of the date thereof and the results of the operations of the Business for the six months ended June 30, 2000, in accordance with the Applicable Accounting Principles, for unaudited statements covering an interim period, consistently applied except as otherwise provided therein and in the notes thereto.[44]

In that same section, Pharmacia also represented and warranted the accuracy of the statement set out in the above-quoted paragraph. Pharmacia breached amended section 3.6 of the Agreement because, CP Kelco alleges, the June 2000 financial statements were

[44] A-1623.

inaccurate and materially misleading due to the fact that they included pulled forward sales as earned revenue and failed to include expenses and write-offs properly attributable to the first six months of 2000.

Pharmacia argues that by Amendment No. 1, CP Kelco waived its right to bring this claim. As discussed in the previous section, it seems illogical that the new warranty expressed in section 6 of Amendment No. 1 was simultaneously waived by another section in the same Amendment No. 1.

With regard to the specifically recited bases for Claim V, however, CP Kelco presents no evidence of any specific expenses and write-offs properly attributable to the first six months of 2000 that were excluded from the June 2000 financials. Although CP Kelco argues that including pulled-forward sales made the June financials materially misleading, it does not state how their inclusion makes the June 2000 financials inaccurate. As Pharmacia points out, CP Kelco does not argue that the pulled-forward sales were not genuine sales. They were actual sales that, although pulled-forward, reflect product delivered to customers in June and were properly booked as June sales. Disputes over the advisability of pulling forward sales does not make the June financials inaccurate due to the inclusion of those actual sales. Giving CP Kelco the benefit of all reasonable inferences from the evidence in the record, however, it is possible that a jury could reasonably agree with CP Kelco's contention that the June 3, 2000 financial information was artificially inflated by an undisclosed amount of pulled-forward sales, thereby creating a materially misleading picture of the financial health of the Biogums Business. Because such a determination is reasonably possible, the summary judgment as to Claim V is denied.

C. Claim VI

Claim VI alleges Pharmacia breached its representations and warranties as to compliance with covenants. Specifically, CP Kelco contends a breach of the Closing Certificate, certified by Pharmacia on September 28, 2000, which warranted that "the Seller has performed in all material respects the material covenants and agreements of the Seller to be performed by it at or prior to closing."[45] CP Kelco alleges that warranty was false when made due to Pharmacia's breach of at least three covenants before the closing: (1) Section 5.1 - covenant to run the Biogums Business in the ordinary course of business, (2) Section 5.2 - covenant to provide access to financial information, and (3) the covenant to cooperate with CP Kelco in obtaining financing.

CP Kelco alleges that use of excessive pull-forwards to inflate pre-closing sales was not operation of the business in the ordinary course. This practice is alleged to have jeopardized customer relationships by repeatedly instructing the sales force to go back to customers and seek to have those customers accept early delivery of their orders. CP Kelco maintains that Pharmacia covenanted to provide the Buyers with a response to any reasonable request for information, but that Pharmacia continually withheld information that would have exposed the true financial condition of the Biogums Business despite the Buyers' reasonable requests for such information. Finally, CP Kelco asserts that the entire transaction was contingent upon its financing requirements. CP Kelco argues that financial information provided to it was really financial misinformation that ultimately jeopardized the integrity of the transaction's financing when the Pharmacia's purported fraud was discovered after closing.

[45] B-2116.

Pharmacia contends that each of these allegations lack merit. First, Pharmacia maintains that pulled-forward sales were ordinary practice for the Biogums Business, both during its ownership *and* subsequent to closing under CP Kelco's ownership. According to Pharmacia, the evidence establishes that CP Kelco's own customer surveys fail to indicate any complaint with regard to pulled-forward sales. Furthermore, Pharmacia returns to its argument that by Amendment No. 1, CP Kelco waived its right to pursue this claim. Pharmacia disputes the allegation that CP Kelco was denied access to reasonably requested information, asserting, in essence, the opposite; that the Buyers had expert counsel and advisors that had access to information even beyond that which Pharmacia was contractually obligated to provide. Pharmacia states that after the Agreement was signed, it gave Ernst & Young "unfettered access" to the financial books and records of the Biogums Business. Finally, Pharmacia asserts that securing a financing arrangement was solely the responsibility of CP Kelco. That being the case, Pharmacia contests CP Kelco's position that the Agreement contained an implicit "requirement that Monsanto/Pharmacia assist CP Kelco in preparing accurate financials, to the best of Monsanto/Pharmacia's ability."[46] Despite its argument that it had no contractual duty to provide any financial forecasts or projections, Pharmacia contends the record evidences numerous instances of its providing financial information to the Buyers.

The factual bases underlying each of these alleged breaches of the Agreement covenants implicate disputed facts underlying the plaintiff's ultimate argument, that it was defrauded, and with regard to the extent of waiver resulting from Amendment No. 1. A resolution of those disputes is necessary before a determination of whether these

[46] D.I., ¶ 202.

contractual covenants were breached can be made. The current existence of those disputes precludes a grant of summary judgment and, therefore, the motion as to Claim VI is denied.

D. Claim VII

Claim VII alleges that Pharmacia breached Sections 3.19(b) and 3.19(d) of the Asset Purchase Agreement concerning certain environmental representations and warranties with regard to its Okmulgee, Oklahoma plant (the "Okmulgee Plant"). Section 3.19(b) warranted that:

> There is no pending or, to the Seller's Knowledge, threatened civil or criminal litigation, potentially responsible party ("PRP") notice letter, formal administrative proceeding, or investigation, inquiry or information request by any governmental authority, relating to any Environmental Law involving the Business or the Assets.[47]

Section 3.19(d) states that:

> Seller has made available to Buyer complete and accurate copies of all written third-party environmental reports, governmental investigations and corporate audits relating to the Real Property or the Business that were issued or conducted during the five years prior to the Closing Date and are in the possession, custody or control of Seller.[48]

CP Kelco alleges that Pharmacia breached these representations by withholding information it possessed relating to a United States Environmental Protection Agency ("EPA") investigation of the wastewater treatment facility owned by the City of Okmulgee, Oklahoma for longstanding violations of the city plant's permit limitations. That investigation might result, in turn, in the city facility limiting the amount of wastewater from Pharmacia's Okmulgee Plant that it could treat. Such limitation would reduce the production capacity of the Okmulgee Plant and/or require the plant owner to spend millions

[47] A-1142.
[48] A-1142-43.

of dollars to build its own wastewater treatment facility.

Pharmacia maintains that there has been no evidence presented that, at the time of the closing, the Okmulgee Plant was not in compliance with the relevant environmental laws or its effluent permits. Furthermore, Pharmacia contends that the environmental warranty sections deal with pending or threatened litigation "involving the Business" and the "Business" referred to therein was the Biogums Business and not city's wastewater treatment plant. Therefore, it is argued, the environmental warranties of section 3.19 relate only to the Okmulgee Plant.

The Okmulgee Plant had a number of water discharge permits and air permits (and related documents including environmental assessments and government audits) which were made available to the Buyers as early as December 1999. Additionally, Pharmacia notes that many problems associated with the city's wastewater treatment plant were public knowledge and could have been discovered by CP Kelco had CP Kelco not elected to do limited environmental due diligence. Pharmacia points out that the Buyers could have discovered that thousands of violations by the city's plant had been reported to environmental agencies with jurisdiction over that facility. Also, the fact that there had been a massive fish kill resulting from discharges originating from the city's plant during the pendency of the transaction had been widely reported in the media. Pharmacia contends that the possibility of EPA issues with the Okmulgee Plant was revealed to Matt Sonneveld, a vice president at Hercules, by Okmulgee Plant operations manager Michael Veltri during one of Sonneveld's visits to the plant. Finally, Pharmacia asserts recovery for any purported breach of section 3.19 is qualified by section 10.1(e) of the Asset Purchase Agreement which limits recovery to:

> Loses arising out of any breach of the representations and warranties set forth in Section 3.19 . . . arising out of a Third Party Claim that is not initiated, instigated or encouraged by Buyer and costs resulting from a condition existing prior to the Closing Date that violated an Environmental Law in effect on the Closing Date, based on the nature and extent of the operation of the Business as conducted on the Closing Date.[49]

CP Kelco candidly, and correctly, admits that facts relating to what it did know, or should have known through adequate environmental due diligence, with regard to the Okmulgee Plant may negatively impact its ability to prevail on any fraud claim with regard to misrepresentations concerning the Okmulgee Plant. Unlike the facts concerning internal revenue figures which might have been hidden because Pharmacia controlled who could access that information, the facts pertaining to the Okmulgee Plant were largely discoverable. Those facts, however, do not limit the duty imposed on Pharmacia by section 3.19 of the Asset Purchase Agreement to affirmatively disclose certain specific information.

With regard to the breach of that affirmative duty, however, CP Kelco presents no evidence that there were any written third-party reports, investigations or audits relating to the Okmulgee Plant pertaining to the five-year period prior to September 28, 2000 that were in the possession, custody, or control of the Seller and not made available to the Buyers. As such, there has been no breach of section 3.19(d).

The determination of whether Claim VII survives Pharmacia's motion for summary judgment, therefore, requires a finding that the facts presented create a reasonable inference that Pharmacia breached the warranty contained in section 3.19(b). That determination must be made against the backdrop of the section 10.1(e) definition of the particular losses resulting from a breach of section 3.19 for which recovery may be sought. CP Kelco does not dispute the limitation imposed by section 10.1(e), rather, it points out

[49] A-1169.

that "Third Party Claim" is defined in section 10.6(a) as "a claim or demand made by any unaffiliated person, firm, governmental authority or entity."[50] It argues that the City of Okmulgee, as a governmental entity or authority, clearly comes within that definition and has caused a loss to CP Kelco as a result of the imposition of a waste pre-treatment requirement on the Okmulgee Plant. This requirement is contained in an Industrial User Permit issued to the Okmulgee Plant that was sent to CP Kelco on February 28, 2002. That permit requires that CP Kelco construct a waste pre-treatment system for wastewater emitted from the Okmulgee Plant by June 2003. Unfortunately for CP Kelco, with regard to Claim VII, these facts do not implicate a breach of section 3.19(b) that would require indemnification from Pharmacia.

There has been no "claim" made against CP Kelco's Okmulgee Plant based on a condition at that plant existing on September 28, 2000, based on the nature and extent of the plant's operation on that date. On the closing date there was no pending or threatened litigation or other action recited in section 3.19(b), and none has since been brought. On the closing date the plant was in compliance with its current effluent permits. Indeed, on April 11, 2001, the same date as CP Kelco's complaint against Pharmacia was filed, CP Kelco filed a Request for Show of Cause Hearing in opposition to a proposal by the City of Okmulgee to reduce the Okmulgee Plant's permitted discharge levels. In that document CP Kelco states that it:

> will demonstrate that it is in *full compliance* with the terms and conditions of its Permits. Permittee [CP Kelco] will demonstrate that there has been no change in the POTW [the city's public wastewater treatment plant] that requires the Permit modification sought by the City. Permittee will also demonstrate that Permittee's discharges do not threaten to interfere with operation of the POTW and do not present an endangerment to the

[50] B-1005.

> environment. Instead, Permittee will demonstrate that operation and maintenance of the POTW has been the cause of the current problems with the POTW. Permittee respectfully suggests that the City should not be allowed to create the situation which is then cited as a reason for modification of the Permit.[51]

CP Kelco argued that, as of April 11, 2001, its Okmulgee Plant was operating in an environmentally compliant manner and that any environmental problems were caused, not by its plant, but by the city's plant. Not surprisingly, perhaps, CP Kelco makes no effort to distinguish its apparently contradictory positions in the Request for Show of Cause Hearing and its complaint in this case.

The fact that in 2002, the City of Okmulgee changed the Okmulgee Plant's permit with regard to its use of the city's wastewater plant is not a claim the loss for which CP Kelco can seek indemnification from Pharmacia. Consequently, Pharmacia's motion for summary judgment as to Claim VII is granted.

E. Claim VIII

In Claim VIII CP Kelco alleges that "Monsanto/Pharmacia" breached [its] covenant of good faith and fair dealing by engaging in the fraudulent concealments and fraudulent non-disclosures particularized in the [facts alleged] and by operating Kelco in a manner designed solely to obtain an artificially high sales price for Kelco."[52] The covenant of good faith and fair dealing "'requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the contract.'"[53] To establish arbitrary or unreasonable conduct, the plaintiff "must demonstrate that the conduct at issue involved fraud, deceit, or

[51] A-1978 (emphasis added).

[52] D.I. 1, ¶ 211.

[53] *Continental Insurance Co. v. Rutledge & Company, Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 1234) (quoting *Wilgus v. Salt Pond Investment Co.,* 498 A.2d 151, 159 (Del. Ch. 1985)).

misrepresentation."[54]

Pharmacia acknowledges that Delaware law implies a covenant of good faith and fair dealing in every case but contends that by section 3.26 CP Kelco waived that covenant. The relevant part of that section states, "SELLER MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR *IMPLIED*, AT LAW OR IN EQUITY, RELATING TO THE ASSETS, ASSUMED LIABILITIES OR THE BUSINESS."[55] CP Kelco is stunningly silent with regard to this argument by Pharmacia. In fact, when addressing Pharmacia's separate argument that section 3.6, and section 5.11, served to bar CP Kelco's fraud claims, CP Kelco distinguished a "conspicuous waiver of warranties" from "questions of claims for fraud."[56] Because section 3.6 expressly refers to a waiver of implied warranties in connection with the Asset Purchase Agreement, and in light of CP Kelco's failure to dispute Pharmacia's argument on that point, Pharmacia's motion for summary judgment as to Claim VIII is granted.

F. Claim X

Claim X contends that CP Kelco is entitled to punitive damages based on the allegation that "Monsanto/Pharmacia's conduct in deceiving the Buyers and misleading purchasers of debt in CP Kelco was willful, wanton and malicious. Monsanto/Pharmacia's conduct was in direct disregard of the rights of the Buyers, and reflected a conscious indifference for the damage that would be caused to the Buyers."[57] Because there are disputes based on record evidence regarding what was or was not properly revealed to the Buyers and there exist contradictory arguments as to whether the alleged fraudulent

[54] *Id.* (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992)).
[55] A-1146 (emphasis added).
[56] *See* D.I. 143 at 57.
[57] D.I. 1, ¶ 217.

misrepresentation and concealment of certain information from the Buyers rises to the level of "wanton or willful disregard for the rights of plaintiff,"[58] it is premature to grant summary judgment on this claim and, because of the existence of those disputes, that question is properly left for a jury to determine. Therefore, defendant's motion for summary judgment as to Claim X is denied.

G. Pharmacia's Counterclaim

Pharmacia's Count Three, the sole remaining counterclaim asserted by Pharmacia,[59] concerns disputes over CP Kelco's alleged breach Sections 6.1(a) and 6.1(b) of the Asset Purchase Agreement pertaining to benefits to be provided by CP Kelco to Pharmacia employees of the Biogums Business who were to continue their employment with CP Kelco after the transaction closed (the "Transferred Employees"). Section 6.1(a) concerned the continuing employment of the Transferred Employees and the positions and benefits to be provided to them by CP Kelco. Section 6.1(b) states that if CP Kelco terminated any Transferred Employee without cause during the twelve-month period following the closing of the transaction, CP Kelco was required to pay that employee:

> an amount at least equal to (i) the base severance pay that such Transferred Employee would have received under Seller's severance plan disclosed on the Disclosure Schedule upon such a termination of employment of the Transferred Employee by Seller or (ii) if higher, the amount required by the law of any jurisdiction outside the United States for each such Transferred Employee residing in such jurisdiction.[60]

The Disclosure Schedule referenced in section 6.1(b) is entitled "Monsanto Separation Plan, Summary Overview, January 1998" and sets forth benefits to be paid to employees

[58] *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983). To make this showing, the Delaware Supreme Court stated that a defendant's "conduct must reflect a 'conscious indifference' or 'I don't care' attitude." *Id.*

[59] The parties independently resolved the issues contained in Count One and Count Two of Pharmacia's counterclaim.

[60] A-1159.

in the event of involuntary separation. Those benefits are divided into "Enhanced Benefits," "Standard Benefits," and "Limited Benefits."[61] The allegation is apparently (although Pharmacia does not explicitly so allege in its counterclaim) that the Transferred Employees should have received severance according the "Enhanced Benefits" formula but that CP Kelco has only paid "Standard Benefits" severance pay.

CP Kelco asserts that it has made severance payments in compliance with its obligations under Section 6.1. Because Pharmacia has offered no evidence that the "base severance" CP Kelco must pay certain employees under section 6.1(b) was synonymous with the "Enhanced Severance" described in the Disclosure Schedule or the identities of the "numerous Transferred Employees"[62] that are purportedly owed additional severance pay, summary judgment as to Count Three of Pharmacia's counterclaim is denied.

VI. Conclusion

For the reasons stated above, Pharmacia's motion for summary judgment is GRANTED in part and DENIED in part. Pharmacia's motion for summary judgment on its counterclaim is DENIED. An appropriate order consistent with this memorandum will follow.

[61] A-55-56.
[62] D.I. 7, ¶ 30.