IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIAFAIL, INC.,	)	
	)	
Plaintiff and Counterclaim Defendant	)	CONSOLIDATED
	)	
v.	)	C.A. No. 01-599 GMS and
	)	C.A. No. 01-678 GMS
LEARNING 2000, INC., JAMES RICHARD STORY, III, individually, ANTONIO SANTINI, individually, ILC, INC., SFD, INC,. and S & S ENTERPRISES,	)	
	)	
Defendants and Counterclaim Plaintiffs and Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
FRANK STUCKI,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 5, 2001, the plaintiff and counter-claim defendant, Liafail, Inc. ("Liafail") filed a complaint in the United States District Court for the Western District of Kentucky, setting forth various contractual theories of liability. The United States District Court for the Western District of Kentucky transferred this case to the United States District Court for the District of Delaware on August 29, 2001. This case became Civil Action Number 01-599-GMS.

On October 9, 2001, Learning 2000, Inc ("L2K") commenced Civil Action Number 01-678-GMS in the United States District Court for the District of Delaware. In that complaint, L2K alleges that Liafail violated, *inter alia*, Section 43 of the Lanham Act, 15 U.S.C. § 1125(a); Section 2532 of the Delaware Uniform Deceptive Trade Practices Act, and the Anti-Cybersquatting Consumer

Protection Act, 15 U.S.C. § 1125(d).

By stipulation of the parties, the court consolidated Civil Actions 01-599-GMS and 01-678-GMS on November 2, 2001.

Presently before the court is L2K's motion for summary judgment on all counts of Liafail's amended complaint. For the following reasons, the court will grant this motion in part and deny it in part.

II. STANDARD OF REVIEW

The court may grant summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). An issue is "genuine" if, given the evidence, a reasonable jury could return a verdict in favor of the non-moving party. *See*, *e.g.*, *Abraham v. Raso,* 183 F.3d 279, 287 (3d Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986)); *Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 654 (D. Del. 1999) (citing same). A fact is "material" if it bears on an essential element of the plaintiff's claim. *See, e.g., Abraham*, 183 F.3d at 287; *Lloyd*, 53 F. Supp. 2d at 654. On summary judgment, the court cannot weigh the evidence or make credibility determinations. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *International Union, United Auto., Aerospace & Ag. Implement Workers of America, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999) ("At the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact finder."). Instead, the court can only determine whether there is a genuine issue for trial. *See Abraham*, 183 F.3d at 287. In doing so, the court must

look at the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences, and resolving all reasonable doubts in favor of that party. *See, e.g., Pacitti v. Macy's*, 193 F.3d 766, 772 (3d Cir. 1999). With this standard in mind, the court will now describe the facts leading to the motion presently before the court.

III. BACKGROUND

Liafail is the owner of the "Lifetime Library," a series of multimedia programs that allow students to master skills in reading, writing, math, and other subjects at their own pace. In January 1997, Liafail and SFD, Inc. ("SFD") entered into an Exclusive Distribution Agreement and Agreement of Sale of Software (the "Original Agreement"). Under the Original Agreement, Liafail granted SFD the exclusive right to distribute "Lifetime Library" software in exchange for royalty payments. The Original Agreement also contemplated the eventual sale of title to the "Lifetime Library" software to SFD once SFD paid a threshold amount of royalties to Liafail.

Because disputes arose between the parties regarding their rights and obligations under the Original Agreement, Liafail and L2K entered into an agreement on May 12, 2000 ("the May 12 Agreement"). This agreement was to serve as a basis for a formal agreement to be drafted jointly by each of the parties' attorneys. Pursuant to the agreement, at a May 24, 2000 meeting of the L2K Board, Frank Stucki, Liafail's President and Keith Hanson, Liafail's Vice President, were elected to the L2K Board and began serving immediately.

The more "formal" agreement contemplated by the parties became embodied in the Agreement and Release of August 15, 2000 (the "Second Agreement"). The Second Agreement terminated the Original Agreement, restructured the relationship between the parties, and released and discharged L2K from claims Liafail might have had under the Original Agreement, or any other

agreements or understanding predating the Second Agreement.

The parties again restructured their relationship on September 27, 200 when Liafail and L2K, among others, entered into the Asset Purchase Agreement ("APA"). The APA provided, among other things:

> [t]hat the Original Agreement and the Second Agreement, to the extent not previously terminated or superseded, are hereby terminated and superceded. All rights and obligations of the parties with respect to the subject matter thereof shall be governed by this Agreement along with the License Agreement and the License Amendment.

APA § 6(1)(i).

Under the APA, Liafail agreed to transfer its interest in the "Lifetime Library" software to L2K upon payment of a sum of money. The APA contemplated, but was not conditioned upon, an Initial Public Offering ("IPO") of L2K stock. L2K was obligated to purchase the software only if the closing of the L2K stock IPO took place on or prior to June 30, 2001. Finally, the APA reflected Liafail's agreement to release and discharge L2K from any and all claims arising from any agreement or understanding which predated the APA.

Simultaneously with the APA's execution, Liafail and L2K entered into a License and Royalty Agreement (the "License Agreement"). In the License Agreement, Liafail agreed to license the Lifetime Library software to L2K pending the closing of the APA. In addition, the parties executed an Amendment to the License and Royalty Agreement (the "Amendment"). This Amendment was to become effective on July 1, 2001, if the APA did not close. L2K maintains that both parties anticipated that L2K would continue to sell the Lifetime Library as evidenced by their agreement to negotiate a new license agreement in good faith. Pending the execution of such an agreement, the Amendment stated that L2K could continue to sell the Lifetime Library software on

a non-exclusive basis until it successfully fulfilled the contracts that existed as of June 30, 2001.

IV. DISCUSSION

A. Count One - Recission

In Count I of the complaint, Liafail seeks to rescind the Second Agreement and the APA based upon: (1) L2K's alleged material breaches of the Agreements; (2) L2K's alleged material misrepresentations inducing Liafail to enter into those Agreements; and (3) an alleged failure of consideration. The court will consider each argument in turn.

1. Material Breach

It is well-settled that a material breach of a contract gives the non-breaching party the right to rescind that contract. *See e.g. Saienni v. G&C Capital Grow, Inc.*, 1997 WL 363919, at *2 (Del. Super. May 1, 1997); *Sheehan v. Hepburn*, 138 A.2d 810, 812 (Del. Ch. 1958). To establish a breach of contract claim, the plaintiff must identify facts in the record to prove (a) that it suffered a legally cognizable injury; and (b) that this injury was proximately caused by the defendant's alleged conduct. *See Great Lakes Chem. Corp. v. Pharmacia Corp*., 788 A.2d 544, 549 (Del. Ch. 2001).

In the present case, it is undisputed that both the Second Agreement and the APA expressly required L2K to exercise its best efforts in consummating its Public Offering. Liafail now argues that L2K did not use its best efforts, and therefore, breached the contract. The court recognizes that whether a party has exercised its best efforts is a fact intensive inquiry. *See Brown v. The Buschman Co.*, 2002 WL 389139, *5 (D. Del. March 12, 2002). Notwithstanding this fact, however, Liafail has not demonstrated that it can meet the other necessary elements to establish a breach of contract. Specifically, it has failed to identify any competent evidence to demonstrate that is has suffered a

legally cognizable injury and that this injury was proximately caused by L2K's alleged conduct. Instead, Liafail purports to rely on its damages expert's report for the proposition that, "the materiality of L2K's failure to use its best efforts is evidence in that, as a result of the delays occasioned by its lack of organization and existing resources, L2K missed the opportunity to pursue the transaction which served as the basis for the contract." Liafail's Answer Brief at 18 (citing Finch Report at 8-11.).

Upon review of the cited portion of the report, however, it is apparent that the expert merely opined that, "L2K was deficient in certain fundamental areas that would have made them more attractive to external investors and made their IPO more viable." Finch Report at 8. This opinion alone, however, fails to raise a factual issue with regard to injury and causation.[1] Indeed, L2K has provided deposition testimony from Liafail's own 30(b)(6) witness Michelle Moreno that the unfavorable market conditions could have prompted the underwriter to call off the IPO. *See* Deposition of Michelle Moreno at 159-161. Thus, because Liafail has not established the existence of each of the essential elements of this count, the court must grant L2K summary judgment.

2. Fraud in the Inducement

Liafail's alternative ground for recission of the Second Agreement and the APA rests upon its claim for fraud or material representation in the inducement of those contracts. Fraud and/or material representation in the inducement of a contract is a well-established basis for recission in Delaware.[2] *See e.g., Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982). To prevail on this claim under

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[1]Because the court has determined that the aforementioned sentence in the expert report is insufficient to raise a factual issue, it will deny L2K's motion to strike this sentence as moot.

[2]Pursuant to Section 13(c) of the APA, "[t]his Agreement shall be construed and enforced in accordance with the laws of the State of Delaware, without regard to its principles of conflicts

Delaware law, Liafail bears the burden of proving each of the following elements: (1) there was a misrepresentation; (2) L2K knew or believed the representation was false or made with reckless indifference to the truth; (3) the misrepresentation induced Liafail to enter into the APA; (4) Liafail's reliance on the misrepresentation was reasonable; and (5) Liafail was damaged as a result of its reliance on the misrepresentation. *See e.g., Associated/Acc Int'l, Ltd. v. DuPont Flooring Sys. Franchise Co.,* 2002 U.S. Dist. LEXIS 6464, at *14-15 (D. Del. Mar. 28, 2002). For the following reasons, the court concludes that Liafail's claim on this ground must fail.

When pleading fraud, "the circumstances constituting fraud . . . shall be stated with particularity." FED. R. CIV. P. 9(b). "This means the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). Liafail's fraudulent inducement claim falls far short of meeting this standard because it fails to identify, with the required specificity, when, by whom, to whom, and under what circumstances, the alleged false statements were made which induced Liafail to enter into the APA. Indeed, it is only in Liafail's answer brief to the present motion that it suggests, without citations to any supporting source, what it believes the fraudulent misrepresentations were.[3] Such conclusory allegations, which appear for the first time in an answer brief on summary judgment, are not sufficient to satisfy Rule

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of laws."

[3]Specifically, Liafail now contends that it is suing on the following representations: (1) that L2K had not disclosed ownership of the Library to the underwriters when it solicited the opinions it passed on to Liafail; (2) that L2K had never defined or disclosed its capital structure and misled Liafail as to the ownership of its stock; (3) that L2K did not have the wherewithal to provide complete financial information; (4) that L2K had secured the participation of various directors; and (5) that L2K had no reasonable belief that it could successfully pursue an IPO. *See* Answer Brief at 28. Liafail has not provided any further detail regarding these alleged misrepresentations.

9(b)'s mandate.[4] *See Schaller Tel. Co. v. Golden Sky Sys.*, 298 F.3d 736, 746 (8th Cir. July 31, 2002). Finally, even were the court to accept these statements, Liafail has failed to provide evidence as to who, when, and how the alleged statements were made. In light of this conclusion, the court need not address the remainder of Liafail's arguments as to why summary judgment would be inappropriate since each of those arguments assumes a properly pled fraud claim. Accordingly, the court will grant summary judgment on this claim.

3. Failure of Consideration

The express terms of the APA state that:

> in consideration of the mutual promises and covenants set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree . . .

APA at 1. As a final alternative ground for its recission claim, however, Liafail nevertheless alleges that there was a failure of consideration. Specifically, Liafail argues that, if the APA enabled L2K to avoid all of its liability under the Original Agreement, and to also avoid its obligation under the Second Agreement to pay a minimum $4 million regardless of the outcome of the IPO, then Liafail received, and L2K gave, nothing of value in the APA beyond that to which Liafail was already entitled in the Second Agreement. Liafail maintains that, in such a circumstance, the recital of consideration contained in the APA could not preclude Liafail from canceling it based on a failure of consideration. *See* 32A C.J.S. Evidence § 953 (noting that "a recital in a written instrument as

[4]Furthermore, Liafail's conclusory allegations that unspecified communications induced it to enter into the APA are inherently suspect because Nicholas Quinn, Liafail's CEO and director, could not identify a single false or misleading statement that L2K made in order to induce Liafail to enter into the APA. *See e.g.*, Deposition of Nicholas Quinn at 107-108, 119, 140.

to the payment or receipt of the consideration is not conclusive . . . and may be contradicted, modified, or explained."). The court must disagree that there was insufficient consideration.

Valid consideration confers a benefit upon the promisor or causes a detriment to the promisee and must be an act, forbearance, or return promise bargained for and given in exchange for the original promise. *See e.g. First Mortg. Co. of Pa. v. Federal Leasing Corp.*, 456 A.2d 794, 795 (Del. 1982). According to the terms of the APA, L2K's legal detriment consisted of, among other things, its release of all claims arising out of the Original Agreement and the Second Agreement. *See* APA Section 6(1)(iii), (iv), (v), and (vii). Furthermore, it has long been established that the release of a dispute is legal consideration. *See* Restatement (Second) of Contracts § 74 (1981). Accordingly, L2K is entitled to summary judgment on this claim.

B. Count Two - Breach of the 1997 Agreement

Liafail next alleges that L2K breached the parties' 1997 Original Agreement. However, if the language of a contract "clearly establishes a release from liability, 'the presumption is that the parties executing such a formal agreement intended what they said.'" *Conley v. Dan-Webforming Int'l. A/S (Ltd,)*, 1992 WL 401628, at *10 (D. Del. Dec. 29, 1992). In the present case, the APA provides, in relevant part:

> Section 6(1) *Prior Agreements*. Upon execution of this Agreement, the parties hereby agree:
>
> (i) That the Original Agreement and the Second Agreement, to the extent not previously terminated or superseded, are hereby terminated and superseded. All rights and obligations of the parties with respect to the subject matter thereof shall be governed by this Agreement with the License Agreement and the License Amendment.
>
> (ii) Liafail hereby releases, discharges and acquits L2K, its successors and assigns, and its management, agents, servants and employees, from any and all payments, monies, claims, demands,

> actions, liabilities, damages, costs, expenses, Royalties, and division of Net Profits arising out of the Original Agreement, the Second Agreement or any subsequent agreements or undertakings between the parties prior to this Agreement, except for the License Agreements.

Frank Stucki confirmed at his deposition that all parts of the 1997 Agreement were encompassed and intended to be terminated by the APA. *See* Deposition of Frank Stucki at 141-142. Liafail's understanding as to the effect of this release is further confirmed by discussions between Liafail's president, Frank Stucki, and vice president, Keith Hansen ("Hansen"), about the prospects of success on a breach of contract claim under the 1997 Agreement. Specifically, at his deposition, Hansen testified that they discussed

> the fact that, gee, we provided releases when Learning 2000 had really violated the first contract right and left, owed us money every place. We released them from that responsibility on the basis of promises that they made that we would have an IPO and everything would be fixed. They didn't hold up their end. Now we're sitting without an IPO and we have released them. So we don't have a basis to go back for damages under the first contract.

Deposition of Keith Hansen at 185. Frank Stucki confirmed that he and Hansen discussed his concern that Liafail might not be able to sue L2K for damages under the Original Agreement because Liafail had given L2K releases in the APA. *See* Deposition of Frank Stucki at 132-133. He further testified that this reflected his understanding about how the release worked. *See id*.

Notwithstanding this clear intent to release any claims pre-dating the APA, Liafail now wishes to be relieved from the bargain that it has struck "in light of L2K's fraudulent inducement." As the court discussed above, however, Liafail has failed to state a fraud claim. Accordingly, the court will grant L2K's motion for summary judgment on this claim.

C. Count Three - Fraud

As discussed in Section IV.A, *supra*, Liafail has failed to identify any alleged fraudulent statements with the required specificity in its pleadings. Thus, the court is constrained to grant L2K's motion for summary judgment on this claim.

D. Count Four - Negligent Misrepresentation

In any negligence cause of action, the plaintiff must establish that: (1) the defendant owed a duty; (2) the duty was breached; and (3) the breach was the proximate cause of damages. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §30, at 164-165 (5th ed. 1984). In the present case, Liafail alleges that L2K "supplied Liafail with false information regarding the financial condition of the company, the feasibility of a public offering and/or their intentions with regard to the offering." Amended Complaint at ¶ 133.

Liafail has not, however, proffered any evidence with regard to whether the alleged misrepresentations proximately caused damages to Liafail. If Liafail does not demonstrate "a pecuniary loss caused by" the alleged negligent misrepresentation, its claim "must fail." *Darnell v. Myers*, 1998 WL 294012, at *5 (Del. Ch. May 27, 1998). As Liafail has not raised a genuine issue of material fact that it has suffered damages and that those damages were causally related to actionable misrepresentations, the court must grant summary judgment in L2K's favor.

E. Count Five - Breach of the APA

L2K's motion for summary judgment on this claim depends on the alleged failure of various conditions. In response, Liafail has alleged that all the items L2K identifies as conditions precedent were in fact fulfilled, waived, or prevented from occurring by L2K's own actions.

One of the conditions precedent that would have to have been fulfilled before L2K's obligations matured was that Liafail would enter into certain agreements within seven days of the

APA's effective date. At his deposition, Frank Stucki admitted that, while Liafail had not entered into those agreements within the seven days, it was because L2K had granted Liafail an extension. *See* Deposition of Frank Stucki at 199-201. His counsel, who would have handled the agreement negotiations, also had this understanding. *See* Deposition of Russel Holloway at 154, Deposition of Susan Neumeyer at 266. In fact, Susan Neumeyer testified at her deposition that this belief was reinforced by the participation of the attorneys handling the IPO in the negotiations. *See* Deposition of Susan Neumeyer at 204. These negotiations took place without any indication that L2K considered the delay a material breach of the agreement, or that the attorneys themselves considered it in any way material to the success of the IPO. *See id*. Thus, there remains a genuine issue of material fact with regard to whether the agreements were material requirements of the APA.

L2K next claims that its obligation to go forward with the transaction was contingent on the correctness and truth of Liafail's representations. To the extent that any of Liafail's representations or warranties failed, L2K would no longer have an obligation to go forward with the transaction. L2K now argues that Liafail's actions in the current lawsuit breached the representations it made in the APA that, *inter alia*, Liafail had received sufficient consideration and that the parties desired for their relationship and respective rights and obligations to be governed by the APA. Liafail in turn contends that it was only L2K's revelation that it never intended to honor its commitments and its alleged misrepresentations of various facts which led Liafail to "disavow" its obligation to abide by these statements. Were the court to credit L2K's argument on this point, it would have to find against Liafail, as the court has already granted L2K's motion for summary judgment on the fraud and negligent misrepresentation claims. However, the court need not reach this decision as it finds L2K's contentions on this point to be frivolous. L2K's obligations to perform would have matured,

if at all, well before this lawsuit commenced. Thus, it cannot use Liafail's current representations as an excuse for its alleged failure to perform.

L2K next argues that it was not obligated to consummate the transaction until it was, in its sole discretion, satisfied with the results of its due diligence review of the assets. L2K now contends that the record is devoid of any competent evidence demonstrating that it was afforded an opportunity to complete a due diligence review of the assets, and satisfy itself as to the sufficiency and accuracy of the review. In response, Liafail maintains that, in the two years L2K served as its distributor, it had ample time and opportunity to perform its due diligence. Moreover, it argues that L2K has not pointed to one instance in which Liafail refused to provide L2K with requested information. Indeed, Liafail asserts that it gave L2K full access to the Lifetime Library, even to the extent of turning over the source code for the new product. *See* Deposition of Frank Stucki at 59-60. On these contested facts, the court cannot determine the effect of this alleged condition precedent. Thus, to grant summary judgment on this ground would be improper.

L2K further contends that it was not obligated to proceed with the IPO unless certain market conditions existed. However, no particular market conditions had to exist before L2K was obligated to make a good faith attempt to ready the company for moving forward in accordance with the parties' joint plans. The court thus finds L2K's argument on this point unavailing.

L2K next offers that, before the IPO could proceed, the lead underwriter had to retain co-managers for the IPO. In turn, Liafail offers deposition testimony that three co-managers remained "in the mix" at the time the IPO preparations were halted. *See* Deposition of Michelle Moreno at 160, 172. Moreover, Liafail argues that, while a co-manager would have been desirable, nothing in the APA conditioned any obligation on the hiring of a co-manager. Thus, the court will not grant

L2K's motion for summary judgment on this ground.

With regard to L2K's remaining two arguments, namely that Liafail's audit was not completed and the Lifetime Library's relationship with certain companies had not been clarified, the court finds these arguments unpersuasive as well. Liafail submits that its audit was conducted by Ernst & Young, the accountants engaged to do so by L2K. According to the record, Ernst & Young indicated that it did not require any further information from Liafail. *See* Deposition of Susan Neumeyer at 179, Deposition of Frank Stucki at 666. Frank Stucki further testified that L2K had "called off" Ernst and Young. *See* Deposition of Frank Stucki at 213. Liafail was not informed that Ernst & Young needed any further information, and in fact, Ernst & Young testified that it too had set aside this question pending resolution of issues for which L2K had yet to provide information. *See* Deposition of Clint Adams at 322. Similarly, with regard to the Library's relationship with two companies, Liafail argues that it obtained signed extensions in the form suggested by L2K's attorneys after working with the attorneys for a long period of time. *See* Deposition of Susan Neumeyer at 203, 264-265. In light of these contested issues, the court concludes that summary judgment on this claim would be inappropriate.

F. Counts Six, Seven and Eight - Lanham Act, Common Law Trademark Infringement and Unfair Trade Practices/Unfair Competition

To prevail on these claims, Liafail must demonstrate that: (1) L2K used a false designation; (2) that such use of a false designation occurred in interstate commerce in connection with goods and services; (3) that such false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship, or approval of L2K's goods or services by another person; and (4) that Liafail has been or is likely to be damaged. *See AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1428 (Fed. Cir. 1994)*; see also Major League Baseball Promotion Corp. v. Colour-*

Tex, Inc., 729 F. Supp. 1035, 1039 (D.N.J. 1990) (noting that the same elements apply to federal and common law trademark infringement claims, as well as unfair competition claims).

In its motion, L2K argues that summary judgment is appropriate because: (1) Liafail has failed to demonstrate any evidence of damages; (2) L2K has an exclusive license to use the term "Lifetime Library;" and (3) L2K is not selling the product unless the sale is pursuant to contracts existing as of June 30, 2001. For the following reasons, the court concludes that genuine issues of material fact exist.

Liafail has adduced evidence that L2K itself recognizes the "Lifetime Library" as Liafail's trademark. *See* Deposition of Richard at 217; Deposition of Russel Holloway at 76. Furthermore, and as the court recognized in its October 23, 2002 Memorandum and Order, Liafail has pointed to evidence demonstrating that its educational software product was developed and marketed as the "Lifetime Library" long before L2K had any involvement with the product. *See* October 23, 2002 Memorandum and Order at 8. Moreover, Liafail argues that L2K's right to use the Lifetime Library name as a licensee only applied if it used the name in accordance with a valid agreement between the parties. Liafail contends that, although there is no valid agreement in effect between the parties, L2K nevertheless continues to sell the library. In turn, L2K maintains that, as the exclusive licensee, it was the entity that brought Lifetime Library "its claim to fame" and that it continues to act in accordance with the parties' Amendment to License and Royalty Agreement. *See* Amendment to License and Royalty Agreement § 3 (stating that, [n]otwithstanding anything to the contrary in the License Agreement, L2K may continue to sell the Licensed Product on a nonexclusive basis but only to fulfill L2K's contracts existing on June 30, 2001, or if earlier, on the date of the termination of the [APA]."). Liafail, however, points to Russell Holloway's deposition testimony that L2K is

currently selling to customers based on word of mouth and referrals from existing customers. *See* Deposition of Russell Holloway at 52. In light of these contested factual issues, the court concludes that a grant of summary judgment on this count would be improvident.

G. Counts Nine and Ten - Interference and Tortious Interference

To state a claim for tortious interference, the plaintiff must prove that: (1) a valid contract existed, (2) the defendants knew of the contract, (3) the defendants undertook an intentional act that was a significant factor in causing a breach of the contract; (4) a lack of justification for the defendant's action; and (5) injury as a result of the intentional acts. *See Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *24 (Del. Ch. March 13, 2000).

L2K argues that summary judgment is appropriate on this claim because Liafail cannot identify "a specific contract or potential business opportunity" that was compromised by L2K's representations. *Kirkwood Kin Corp. v. Dunkin Donuts*, 1997 Del. Super. LEXIS 30, *43 (Del. Super. 1997). Specifically, L2K contends that neither Liafail, nor its 30(b)(6) witness, has identified the specific representations at issue, nor has either of them proffered evidence to show that these representations in fact thwarted a specific contract or business opportunity. For the following reasons, the court must agree.

The business relationships that Liafail has identified with respect to these counts are Kentucky Educational Television ("KET"), the United States Army, and Northwest Technical College. Liafail designated Frank Stucki as its Rule 30(b)(6) witness with respect to Liafail's tortious interference claim. Frank Stucki had no knowledge of Liafail's claim regarding Northwest Technical College. Nor did Liafail provide a basis for that claim in its Answer Brief. Thus, the court will grant summary judgment on any claim of interference or tortious

interference with regard to Northwest Technical College.

When asked to identify the alleged interfering statements on which Liafail's claim with respect to the United States Army is based, Frank Stucki testified that L2K "made no statements to the Army." *See* Deposition of Frank Stucki at 1335-1336. He further states that the allegation with regard to the Army is based solely on the fact that a meeting took place between the Army and L2K. *See id*. at 1335-1336. Liafail has "no information whatsoever what was said by [L2K] to the Army at that meeting." *Id*. at 1335-1338. Finally, Frank Stucki could not identify a single false verbal or written statement that L2K made to the Army. *See id*. at 1354-1355. Although Liafail points to William Haynes' ("Haynes") testimony that he admitted to forwarding information to an Army representative and arranging for a demonstration of the product, this purported evidence fails to even arguably demonstrate that L2K compromised Liafail's relationship with the Army.

Finally, with respect to its KET claims, Frank Stucki testified that L2K "implied" to KET that Liafail and L2K "were best of friends" and that L2K "had sold 20-some million dollars worth of software to Gateway and that they were expanding their business operations." Deposition of Frank Stucki at 1339-1340. He had no further information to provide on the KET allegations. Liafail now argues, however that Haynes testified that he and Holloway had met with KET about a new video series that KET had developed. *See* Deposition of William Haynes at 162-163. This alleged meeting, however, without more, does not begin to satisfy Liafail's burden of establishing a genuine issue of material fact with regard to each of the elements of this claim. Accordingly, the court concludes that summary judgment is appropriate.

H. Count Eleven - Business Defamation

Liafail's business defamation count asserts that the "[d]efendants have made false statements to others about Liafail." Amended Complaint at ¶ 207. However, the court finds that there exists no genuine factual dispute regarding the falsity of those statements because Liafail has failed to identify the statements. Nor has it identified to whom, by whom, or when those statements were made. Nevertheless, it contends that these unidentified statements to unidentified persons have "harmed Liafail's standing in the marketplace and created confusion." *Id*. at ¶ 208. Liafail further asserts that these statements have "maligned [its] business reputation and inflicted injury on Liafail." *Id*. at 211. As Liafail has failed to adduce any evidence whatsoever of even one such false statement, the court must grant summary judgment on this count.

I. Count Twelve - Injurious Falsehood

Liafail next asserts that, as a result of L2K's alleged false statements, it has been deprived of business relationships with Microsoft, Compaq, and the Army. *See* Deposition of Frank Stucki at 1353-1354, 1357. However, Frank Stucki also admitted at his deposition that Liafail is not aware of "a single" false verbal or written statement made by L2K to Microsoft, Compaq, or the Army. *Id*. at 1354-58. Nor does Liafail point to any such evidence in its responsive papers to the present motion. The court will, therefore, grant summary judgment on this ground.

J. Count Thirteen - Conspiracy

The only argument raised by L2K with regard to Liafail's conspiracy claim is the alleged absence of any other substantive claim. However, as the court has found genuine issues of

material fact on several of Liafail's counts, it must allow the conspiracy claim to also proceed.

K. Count Fourteen - Conversion

Conversion is the "wrongful exercise of dominion over the property of another, in denial of his right, or inconsistent with it." *Acierno v. Preit-Rubin, Inc.*, 199 F.R.D. 157, 165 (D. Del. 2001) (citation omitted). In order to establish a successful conversion claim, Liafail must establish that, at the time of the alleged conversion: (1) it held an interest in the property; (2) it had a right to possession of the property; and (3) L2K converted the property. *See Arnold v. Society for Sav. Bancorp, Inc.*, 678 A.2d 533, 536 (Del. 1996).

In the present case, Liafail contends that the property that has allegedly been taken away from it, and over which L2K has allegedly exercised dominion, are sales of the Lifetime Library. In support of this proposition, Liafail argues that "[e]ach such unauthorized sale deprives Liafail of that sales opportunity, thereby causing damages." *See* Liafail's Answer Brief at 37. It then concedes that, "Liafail certainly retains some control over its asset, the Lifetime Library tradename, source code, and related intellectual property . . . ." *Id*. Nevertheless, it concludes its four sentence response on this count by summarily stating that, "L2K's actions [are] inconsistent with Liafail's right to determine the use of this property [and] satisfy the elements of conversion in a manner sufficient to preclude summary judgment." *Id*.

Given that Liafail has admitted that it still retains at least some control over its asset, the court is unpersuaded that there remains a genuine issue of material fact with regard to whether L2K has converted the property. Nor does Liafail's summary response cite to any evidence, competent or otherwise, which would raise such an issue. Specifically, Liafail has not identified any sale made by L2K over which L2K exercised improper dominion. As such, the court

concludes that Liafail has failed to meet its burden of establishing the elements required for a claim of conversion.

L. Count Fifteen - Duty of Good Faith

Liafail next contends that, as the exclusive distributor of Liafail's product, "L2K owed [it] a duty to act in good faith to maximize the value of the Lifetime Library and the profits to Liafail." Amended Complaint at ¶ 231. In support of this argument, Liafail recites the unimpressive proposition that Delaware recognizes the duty of good faith and then states, "[t]his principle appears so obvious as to require little discussion . . . ." Liafail's Answer Brief at 38. It then immediately ends its discussion of this issue by stating that, "Liafail has raised ample evidence of bad faith and must, therefore, be afforded the opportunity to present this claim to a jury." *Id*. Notwithstanding Liafail's confident language, it has failed to point to any evidence to support its claim. Thus, in light of Liafail's boilerplate arguments on this point, the court will grant summary judgment in L2K's favor.

M. Count Sixteen - Alter Ego

To prevail on an alter ego claim under Delaware law, L2K must first show that the parent and subsidiary "operated as a single economic entity." *Harper v. Delware Valley Broadcasters, Inc*., 743 F. Supp. 1076, 1085 (D. Del. 1990), *aff'd* 932 F.2d 959 (3d Cir. 1991). L2K must also demonstrate that an "overall element of injustice or unfairness . . . [is] present." *Id*. Effectively, "the corporation must be a sham and exist for no other purpose than as a vehicle for fraud." *In re Sunstates Corp. Shareholder's Litig.*, Del. Ch. 788 A.2d 530, 534 (Del. Ch. 2001).

The United States Court of Appeals for the Third Circuit has set forth several considerations for a court to consider in determining whether a "single economic unit" existed.

See United States v. Pisani, 646 F.2d 83, 88 (3d Cir. 1981). These consideration are as follows: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *See id*. Moreover, the situation must present an element of injustice or fundamental unfairness. *See id*. However, the *Pisani* list of factors is not conjunctive, nor is it an exclusive list. *See Galgay v. Gangloff*, 677 F. Supp. 295, 299-300 (M.D. Pa. 1987).

Liafail first points to Story's deposition testimony wherein he conceded that "ILC" is a "shell corporation" owned by Santini and himself. As the Fourth Circuit has recognized, however, this testimony is insufficient to demonstrate a disregard of corporate formalities such that would justify piercing the corporate veil. *See Huennekens v. Reczek*, 43 F.ed Appx. 562, 567 (4th Cir. 2002)) (finding the fact that an individual capitalized a shell corporation to be insufficient).

Liafail next purports to offer Anthony Santini's deposition testimony for the proposition that he left virtually all of the decision-making to Richard Story. *See* Liafail's Answer Brief at 38 (citing Santini at 38-41). After reviewing the cited excerpts of Santini's deposition testimony, the court finds no support for Liafail's assertion that he testified in such a manner. Accordingly, it will afford this "fact" no weight.

Liafail next cites Richard Story's deposition testimony for the proposition that he and Santini were accused of mismanaging L2K. *See id*. (citing Story at 257). The court again disagrees that Story so testified. Indeed, Story merely testified that he and Santini expanded the

board of directors to avoid micromanaging the company. *See* Deposition of Richard Story at 257. This can hardly be construed as "mismanagement." Thus, the court again declines to credit Liafail's statements in this regard.

Again, citing Santini's deposition testimony, Liafail asserts that Story had free reign to run the company. *See* Liafail's Answer Brief at 38. Santini actually testified, however, that he told Story "to go ahead, do whatever he [Story] needed to do" and that Santini was not involved in "negotiating the deal between Learning 2000 and Liafail." *See* Deposition of Anthony Santini at 11, 14-16. The court is again not persuaded that this testimony raises any factual issues as it is within a board's prerogative to delegate negotiations to the chairman of the board in a valid exercise of its business judgment. *See e.g. State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *4 (Del. Ch. Feb. 24, 2000).

Furthermore, contrary to Liafail's suggestion, the record does not establish that Story, or anybody else at L2K, attempted to "create the impression of solvency" or that there was any threat of insolvency during the relevant period of time. Although the record does reflect that some employees' salaries were deferred at some point in time, Liafail's theory that this was related to insolvency is mere speculation unsupported by any facts. As such, this speculation will not preclude the entry of summary judgment.

With regard to Liafail's statement that Story "was repaid his initial $100,000" loan to L2K, the court is unclear as to how this fact entitles Liafail to pierce L2K's corporate veil. Were Liafail's theory to be correct, no corporation could pay its debts without running into the risk of alter ego liability.

Liafail next points out that L2K improperly "routinely" made payments on Story's

American Express card and transferred large sums of cash to other entities owned by Story and Santini. However, the mere making of payments and transfers alone does not create alter ego liability. *Cf Canario v. Lidelco, Inc.*, 782 F. Supp. 749, 760 (E.D.N.Y. 1992) (finding that purchasing a private airplane with corporate funds, taking personal income tax deductions for the airplane's depreciation while the corporation paid for its upkeep, and keeping all profits upon the airplane's sale "does not . . . rise to the level necessary to pierce the corporate veil.). Nor does Liafail identify any facts from which the court, or a jury, could reasonably determine that either of these actions were improper.

Finally, Liafail contends that L2K was unable to produce a set of corporate documents or resolutions which did not suffer from "glaring inconsistencies" and that it could not explain its capital structure. *See* Liafail's Answer Brief at 38 (citing Thompson at 122-134, Adams at 26, 53-54, 59, 87, 110-111). Conversely, L2K argues that Julie Thompson testified that: (1) she produced the documents requested of her; (2) there were no pieces of information that were requested of her that she was unable to provide; and (3) everything Ernst & Young asked for, she was able to give them. *See* Deposition of Julie Thompson at 122, 124. With respect to Clint Adam's testimony, the only outstanding documents as of the time the underwriter called off the IPO were up-to-date board minutes and board minutes showing that a number of stock options and warrants had been issues. *See* Deposition Testimony of Clint Adams at 53-54, 87, 110-111.

Moreover, when the IPO was aborted, Ernst & Young stopped working on its audit. Thus, it is hardly surprising that its due diligence of L2K's records was left somewhat incomplete. Accordingly, even crediting Liafail's evidence that the corporate records may have been in imperfect form, the court concludes that, in light of the dearth of evidence on this count,

it is constrained to grant summary judgment in L2K's favor.

N. Count Seventeen - Unjust Enrichment

Liafail next asserts that L2K has engaged in "extra-contractual actions" from which it has profited to Liafail's detriment. Liafail does not dispute the long-recognized principle that a plaintiff cannot recover on an unjust enrichment theory where the parties' relationship is governed by an express contract. *See e.g. Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 (Del. Super. Ct. 1980). Its argument that the present case falls outside this principle because the alleged actions are "extra-contractual" is unavailing. Rather, it is clear that, in this litigation, Liafail merely disputes which contract governs the relationship between the parties and whether that contract was breached. It does not dispute the existence of a contractual relationship. Therefore, recovery under an unjust enrichment claim is precluded as a matter of law.

O. Count Eighteen - Injunctive Relief

L2K contends that this count must fail because Liafail cannot establish a right to relief under any of the substantive causes of action. However, because the court has determined that genuine issues of material fact exist with regard to a number of Liafail's claims, L2K's argument on this point must fail.

V. CONCLUSION

Following a careful review of the record before it, the court has concluded that factual issues remain with regard to Counts Five, Six, Seven, Eight, Thirteen, and Eighteen. The court will grant summary judgment in L2K's favor on the remaining counts.

On a final note, as the court found it unnecessary to reach the portion of Shawn Kiehn's Affidavit which L2K now asserts is inadmissible hearsay, the court will deny L2K's motion to strike it as moot.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. L2K's Motion for Summary Judgment (D.I. 253) is GRANTED in part and DENIED in part.
2. L2K's Motion to Strike Finch's Report (D.I. 297) is declared MOOT.
3. L2K's Motion to Strike the Affidavit of Shawn Kiehn (D.I. 300) is declared MOOT.

Dated: November 25, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE