IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ECB USA, INC., ATLANTIC VENTURES CORP., and G.I.E. C2B,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 19-731-RGA-CJB
SAVENCIA, S.A. and ZAUSNER FOODS CORP., on behalf of itself and as successor in interest to ZNHC, INC.,	)	
Defendants.	)	

REPORT AND RECOMMENDATION

In this case, Plaintiffs ECB USA, Inc., ("ECB"), Atlantic Ventures Corp. ("Atlantic Ventures") and G.I.E. C2B ("C2B") (collectively, "Plaintiffs") bring breach of contract and state law tort claims against Savencia, S.A. ("Savencia") and Zausner Foods Corp. ("Zausner") (collectively, "Defendants"). Pending before the Court are: (1) Zausner's motion to dismiss ("Zausner's Motion"), in which Zausner seeks to dismiss all counts of the operative First Amended Complaint ("FAC") against it, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), (D.I. 82); and (2) Savencia's motion to dismiss ("Savencia's Motion," and collectively with Zausner's Motion, "the Motions")), in which Savencia seeks dismissal for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and that all claims against it be dismissed for failure to state a claim pursuant to Rule 12(b)(6), (D.I. 84). For the reasons set forth below, the Court recommends that Zausner's Motion be GRANTED-IN-PART and DENIED-IN-PART and that Savencia's Motion be DENIED with respect to the personal jurisdiction grounds and GRANTED with respect to the Rule 12(b)(6) grounds.

I. BACKGROUND

A. Factual Background

1. The Parties and Related Entities

ECB and Atlantic Ventures are Florida corporations with their principal places of business located in that state. (FAC at ¶¶ 2-3) C2B is a French entity. (*Id.* at ¶ 4)

Defendants are all in the business of food, and in particular, cheeses. (*Id.* at ¶¶ 10, 12-14) Savencia is a French company with its principal place of business located in France. (*Id.* at ¶ 5) It is a "multinational conglomerate which manufactures and sells cheese and other dairy products in over 120 countries around the world[,]" (*id.* at ¶ 10), but has no contacts with the State of Delaware, (D.I. 85, ex. 1). Zausner is a Delaware corporation that "do[es] business throughout the United States." (FAC at ¶ 6) Zausner is wholly-owned by Savencia Cheese USA, LLC, which in turn is wholly-owned by Savencia. (*Id.* at ¶ 11)

2. Events Relating to Plaintiffs' Purchase of Schratter Foods, Inc.

The parties' overarching dispute centers on a transaction that occurred in 2014 and 2015. In that transaction, ECB and Atlantic Ventures purchased Schratter Foods, Inc. ("Schratter"), a distributor of specialty cheese and other dairy products in the United States. (*Id*. at ¶ 14) The terms of the purchase were set out in a Stock Purchase Agreement ("SPA") (FAC, ex. 1 ("SPA"))

The relevant events began in 2014. As of the beginning of that year, ZNHC, Inc. ("ZNHC"), a wholly-owned subsidiary of Zausner,[1] owned 75 percent of Schratter's shares, while Alain Voss, Schratter's President and Chief Executive Officer ("CEO"), owned 25% of Schratter's shares. (FAC at ¶¶ 11, 21(a); D.I. 92 at 4) In 2014, the FAC alleges that the

[1] Since that time, ZNHC merged with Zausner, such that Zausner is the successor by merger to ZNHC. (FAC at ¶ 7; D.I. 5 at 1; D.I. 92 at 4 n.2)

"Savencia Defendants"[2] were looking for a buyer for Schratter, (FAC at ¶ 19), and that the "Savencia Defendants" and Savencia's Chairman Alex Bongrain "devised a scheme [referred to in the FAC as 'the Scheme'] by which they were going to strip Schratter of its assets and sell the remaining portions of Schratter to an unwitting victim[.]" (*Id*.)

In order to execute the Scheme, it is alleged that the Defendants engaged the assistance of Mr. Voss and Bertrand Proust, Schratter's Chief Financial Officer. (*Id.* at ¶ 20) The FAC alleges that Defendants—primarily though Mr. Bongrain and Pierre Ragnet, who is described simply as "'Groupe Corporate Secretary' and President of U.S. Cheese Activities"—secretly "bought Voss' participation in the Scheme in June 2014 by entering into certain agreements" including the following:

- Defendants (via ZNHC) purchased Mr. Voss' 25% interest in Schratter for $3 million.
- Defendants paid Mr. Voss a bonus of $1 million for actions taken before June 30, 2015.
- Defendants paid Mr. Voss a bonus of 25% of the net proceeds from the sale of Corman Ship Supplies, LLC, ("Corman") which was a wholly-owned subsidiary of Schratter.
- Defendants sold to Mr. Voss Chocolate Stars, an unincorporated division of Schratter, for one dollar.
- Defendants financed Mr. Voss' "purchase" of Chocolate Stars' inventory with a promissory note in the amount of $676,852.97 which, to date, has not been paid.

[2] As will be further noted and discussed below, the FAC very often refers to Savencia and Zausner together as the "Savencia Defendants[,]" (FAC at 1), and often does not distinguish between the acts of Savencia or Zausner. Thus, when the FAC states that the "Savencia Defendants" did something, it often does not further specify whether the action was taken by employees of Savencia, or Zausner, or both (nor does it specify the specific person or people who did such acts).

- Defendants paid Mr. Voss a $350,000 annual salary for being CEO and President of Corman, a "shell company for which Voss provided no services[.]" and

- Defendants continued to pay Mr. Voss his then-current salary as President and CEO of Schratter, "even though he had been secretly stripped of all authority and his offices."

(*Id.* at ¶¶ 11, 21(a)-(g), 22) Furthermore, Plaintiffs allege that "Defendants recruited Proust as a co-conspirator to help create and maintain false and misleading financial records to cover up the fraud." (*Id.* at ¶ 23) Plaintiffs allege that Mr. Ragnet and Mr. Voss agreed to pay Mr. Proust a bonus of $50,000 after the completion of Schratter's sale, in exchange for his assistance with this fraud. (*Id.* at ¶ 24)

In August 2014, having identified Plaintiffs' principals Arno Leoni and Claude Blandin as potential buyers for Schratter, Defendants began negotiations with Mr. Leoni and Mr. Blandin. (*Id.* at ¶¶ 25-26) Defendants primarily negotiated through Mr. Bongrain, Mr. Ragnet and Mr. Voss. (*Id.* at ¶ 26) In their discussions with Plaintiffs, the "Savencia Defendants" "represented . . . . that Voss was Schratter's President and CEO [while] conceal[ing] that they had stripped him of all authority in June 2014." (*Id.* at ¶ 27) The FAC alleges that the "Savencia Defendants encouraged Plaintiffs to accept [Mr.] Voss as a fiduciary and a partner [in purchasing Schratter], to appoint him as President of Atlantic Ventures [a company that was to be formed to effectuate Schratter's purchase] and retain him as President and CEO of Schratter." (*Id.*; *see also id.* at ¶¶ 29, 30, 39) Mr. Voss allegedly used his purported status as President and CEO of Schratter to convince Mr. Leoni and Mr. Blandin of his reliability, "all in an effort to secure a victim to buy Schratter[.]" (*Id.* at ¶ 28)

From there, as Plaintiffs conducted a due diligence investigation regarding the potential purchase, the FAC alleges that "the Savencia Defendants and their co-conspirators" made a

series of false representations (the "false representations") about Schratter's financial condition and/or Voss' role at Schratter, in order to carry out the Scheme. (*Id.* at ¶¶ 32, 35) Among these false representations were the following:

- Schratter's financial statements correctly reflected Schratter's liabilities.
- Schratter's financial statements were accurate and were prepared and presented in accordance with U.S. GAAP.
- Schratter's internal controls and procedures were designed to ensure that its financial statements were accurate in all material respects.
- The information provided was a full, fair and accurate disclosure of all material information relative to Schratter's financial position and operations.
- No material information relative to Schratter's financial position and operations was withheld.
- Mr. Voss was the President and CEO of Schratter, in charge of overseeing all of Schratter's operations, and a trusted employee.
- Schratter's value as an operating business was a direct result of, and dependent upon, Mr. Voss being its President and CEO.
- Schratter's books and records were accurate in all material respects.
- The transactions set forth in Schratter's books and records represented bona fide transactions carried out in good faith and in compliance with all applicable laws and industry standards.
- Schratter's revenues, expenses, assets and liabilities had been properly recorded, in all material respects, in Schratter's books and records.
- Schratter was able to pay, and was current in the payment of, its debts and other obligations.
- Schratter's operations were conducted in the ordinary course of business.

- Schratter was in compliance with all covenants in its loan agreements and able to meet its financial obligations to its lenders.; and

- Schratter suffered no adverse events in the months before the closing of the sale.

(*Id*. at ¶ 32) Defendants also secretly "stripped Schratter of valuable assets" and "caused Schratter to pay vendors and debts related to Savencia while failing to pay third party debts, all in an effort to bleed the assets out of Schratter before closing the sale." (*Id.* at ¶¶ 33-34) Because of Mr. Voss' "position of trust and confidence with the Plaintiffs and their principals," however, the FAC alleges that in the due diligence period, "the Savencia Defendants and their co-conspirators were able to ensure that the due diligence investigation was successful, with no red flags being raised regarding the Scheme." (*Id.* at ¶ 35)

After the due diligence period concluded, the parties closed the purchase in several stages. On December 6, 2014, the parties to the SPA executed the SPA, with Mr. Voss' company Voss Enterprises Inc. and ECB as the buyers, ZNHC as the seller, and Zausner as the guarantor. (*Id.* at ¶ 38; SPA at 1, 75-76) Included in the SPA's text are a series of representations that very closely align with the content of nearly all of the false representations (set out above) that the "Savencia Defendants and their co-conspirators" allegedly made to Plaintiffs around the time of Schratter's purchase. (FAC at ¶ 32; SPA at ¶¶ III.7(a)-(c), III.8, III.9, III.20; *see also* D.I. 83 at 6-7; D.I. 85 at 8) Three days after the signing, Voss Enterprises, Inc. and ECB formed Atlantic Ventures for the purpose of closing the Schratter purchase. (FAC at ¶ 39) Atlantic Ventures was owned 55% by ECB and 45% by Voss Enterprises, Inc. (*Id.*; *see also id.*, ex. 1 at ex. C)) And on or about December 30, 2014, Atlantic Ventures closed on the SPA, buying Schratter for $27 million, which was payable in the following stages: $2 million at

closing, $15 million six months after closing, and $10 million in four equal annual installments. (FAC at ¶ 40; SPA at Article II.1(a)-(c))

The FAC then alleges that in the six months after the December 2014 closing, Mr. Voss and Mr. Proust, in conspiracy with the "Savencia Defendants, 'cooked the books' to make it appear that Schratter's business was doing far better than it really was"; they are alleged to have done so by "misreport[ing] Schratter's financial condition" in various ways, such as by "understating expenses, overstating revenue, and exaggerating the gross margins on sales." (FAC at ¶¶ 41-42) Mr. Voss and Mr. Proust, along with the "Savenica Defendants," are alleged to have also continued to conceal the Scheme thereafter, such that "the fraud continued." (*Id*. at ¶¶ 43, 45) This in turn caused Plaintiffs to not only pay the $2 million due at closing, but also to pay the $15 million that was due six months after closing. (*Id*. at ¶ 44)[3] And at some undefined point, Defendants are also alleged to have "induced [additional Plaintiff] C2B to loan millions of Euros to Schratter." (*See id.* at 2 & ¶ 80)

Defendants' malfeasance allegedly continued until 2017, at which point Schratter and Atlantic Ventures terminated Mr. Voss and Mr. Proust. (*Id.* at ¶¶ 45, 47) It was only at this point, "[w]ith [Mr.] Voss and [Mr.] Proust no longer in a position to mislead, conceal and 'cook the books,'" that Plaintiffs uncovered "significant financial fraud." (*Id.* at ¶ 48)[4] Further, in July

[3] In June 2015, the parties executed an Amendment No. 1 to the SPA, by which the purchase price was reduced by $3.9 million (to be deducted from the $10 million in future installment payments due). (SPA, ex. B ("Amendment No. 1") at 1 & § 3)

[4] In their briefing, Defendants argue that these allegations (i.e., that Plaintiffs learned of the fraud at issue no earlier than 2017) directly conflict with allegations in Plaintiffs' original Complaint (which asserted that Plaintiffs began to discover certain fraudulent misrepresentations made by Defendants about Schratter's financial condition as early as January 2015). (D.I. 83 at 5-6; D.I. 85 at 10) However, the United States Court of Appeals for the Third Circuit has explained that when a plaintiff amends a complaint, and in doing so asserts facts that contradict assertions the plaintiff made in an earlier complaint, the district court may not

2019, "[a]dditional elements of the fraud were exposed" such as that "in June 2014, [Mr.] Voss had been stripped of his offices and powers." (*Id.*)

Additional facts relevant to resolution of this Motion regarding the sale of Schratter and/or the content of the SPA will be set out in Section III below.

B. Procedural Background

Plaintiffs filed this lawsuit against Defendants and ZNHC in state court in Florida on October 23, 2018. (D.I. 1, ex. 1 at 1) On November 14, 2018, Zausner and ZNHC removed the case to the United States District Court for the Southern District of Florida ("Southern District of Florida"). (D.I. 1)[5] That same day, Zausner and ZNHC filed a motion to transfer the case to this Court (the "transfer motion"), pursuant to 28 U.S.C. § 1404(a) ("Section 1404(a)"). (D.I. 5) Just under two weeks later, on November 26, 2018, Zausner and ZNHC filed a motion to dismiss pursuant to Rule 12(b)(6). (D.I. 9) Three months later, on February 27, 2019, Savencia filed a motion to dismiss for lack of personal jurisdiction, whereby it also "join[ed]" Zausner and ZNHC's motion to transfer, "without waiving its jurisdictional arguments[.]" (D.I. 36 at 19; *see also id.* at 1, 20)

In April 2019, the Southern District of Florida Court granted the transfer motion. (D.I. 55) In doing so, it denied as moot Zausner/ZNHC's and Savencia's respective motions to

consider the content of the earlier complaint when ruling on a Rule 12(b)(6) motion to dismiss the amended complaint. *See W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank*, 712 F.3d 165, 172 (3d Cir. 2013); *Edwards v. Bayview Loan Servicing*, LLC, Civ. No. 16-425-RGA, 2017 WL 879283, at *4 (D. Del. Mar. 6, 2017). Thus, in this Report and Recommendation, the Court will not consider the content of the original Complaint in resolving Defendants' Rule 12(b)(6) Motions.

[5] Savencia was not served with the Complaint until November 2018, and so it was not a part of any filing made in the case up until that point. (D.I. 1 at 2 & n.2; D.I. 12)

dismiss, along with several other pending motions. (*Id.* at 15) The Southern District of Florida Court's Section 1404(a) transfer decision was based on its conclusions that: (1) in the SPA, Zausner (as successor to ZNHC) had agreed to a valid forum selection clause (the "forum selection clause") stating that any action brought in connection with the SPA would be brought in Delaware, (SPA at Art. XII.5); (2) the forum selection clause encompassed all claims in the Complaint; (3) no public interest factors prohibited transfer; and (4) Savencia, a non-party to the SPA, was bound by the forum selection clause. (D.I. 55 at 4-15)

The case was transferred to this Court in May 2019, and was assigned to United States District Judge Richard G. Andrews. (Docket Item, May 1, 2019) On August 12, 2019, Plaintiffs filed the FAC, and shortly thereafter, filed a corrected version of the FAC. (D.I. 77; D.I. 78)

On October 7, 2019, Defendants filed three motions: (1) Zausner's Motion to Dismiss; (2) Savencia's Motion to Dismiss; and (3) Zausner and Savencia's Motion for Sanctions, filed pursuant to Federal Rule of Civil Procedure 11, (D.I. 86).[6] Briefing on all three of these motions was completed by November 25, 2019. (D.I. 91; D.I. 95; D.I. 96) The District Court referred these three motions to the Court for resolution on January 2, 2020, (D.I. 100), and later referred this case to the Court for all purposes up through and including dispositive motions, (D.I. 118).

The Court heard oral argument on all three motions by videoconference on June 5, 2020. (D.I. 133 (hereafter, "Tr.")) During oral argument, Plaintiffs' counsel relied upon a significant number of legal authorities that were not cited in Plaintiffs' briefing papers; in light of this, the Court permitted Defendants the ability to file a supplemental letter brief addressing those authorities. (D.I. 131) Defendants did so on June 18, 2020. (D.I. 134)

[6] The Court will address the Motion for Sanctions in a separate Memorandum Order.

II. STANDARD OF REVIEW

A. Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) directs courts to dismiss a case when the court lacks personal jurisdiction over the defendant. When a defendant moves to dismiss a lawsuit for lack of personal jurisdiction, the plaintiff bears the burden of showing the basis for jurisdiction. *Power Integrations, Inc. v. BCD Semiconductor Corp.*, 547 F. Supp. 2d 365, 369 (D. Del. 2008). To satisfy its burden, the plaintiff must produce "'sworn affidavits or other competent evidence,'" since such a Rule 12(b)(2) motion "'requires resolution of factual issues outside the pleadings.'" *Marnavi S.p.A. v. Keehan*, 900 F. Supp. 2d 377, 385 (D. Del. 2012) (quoting *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 67 & n.9 (3d Cir. 1984)); *see also Perlight Solar Co. Ltd. v. Perlight Sales N. Am. LLC*, C.A. No. 14-331-LPS, 2015 WL 5544966, at *2 (D. Del. Sept. 18, 2015). In a case like this one, where a district court has not held an evidentiary hearing, the plaintiff must only make a *prima facie* showing that personal jurisdiction exists. *See Perlight Solar*, 2015 WL 5544966, at *2; *Hardwire, LLC v. Zero Int'l, Inc.*, Civil Action No. 14-54-LPS-CJB, 2014 WL 5144610, at *5 (D. Del. Oct. 14, 2014). All factual inferences to be drawn from the pleadings, affidavits and exhibits must be drawn in the plaintiff's favor at this stage. *Hardwire*, 2014 WL 5144610, at *5 (citing cases); *Power Integrations*, 547 F. Supp. 2d at 369.

In order to establish personal jurisdiction, a plaintiff typically must adduce facts sufficient to satisfy two requirements—one statutory and one constitutional. *Perlight Solar*, 2015 WL 5544966, at *2; *Hardwire*, 2014 WL 5144610, at *6. First, the Court must consider whether the defendant's actions fall within the scope of Delaware's long-arm statute. *Hardwire*, 2014 WL 5144610, at *6; *see also Power Integrations*, 547 F. Supp. 2d at 369. Second, the

Court must determine whether the exercise of jurisdiction comports with the defendant's right to due process. *Hardwire*, 2014 WL 5144610, at *6; *Power Integrations*, 547 F. Supp. 2d at 369 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

B. Rule 12(b)(6)

The sufficiency of pleadings for non-fraud claims is governed by Federal Rule of Civil Procedure 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). A claim alleging fraud or mistake, however, is subject to the more stringent pleading requirements of Federal Rule of Civil Procedure 9(b), which mandates that the "circumstances constituting fraud or mistake" be "state[d] with particularity[.]" Fed. R. Civ. P. 9(b); *see also Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007).

When presented with a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court conducts a two-part analysis. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the court separates the factual and legal elements of a claim, accepting "all of the complaint's well-pleaded facts as true, but [disregarding] any legal conclusions." *Id.* at 210-11. Second, the court determines "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.* at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). In assessing the plausibility of a claim, the court must "'construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Id.* at 210 (quoting *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)).

III. DISCUSSION

The Court will turn first to the Rule 12(b)(2) portion of Savencia's Motion. Thereafter, it will address both Defendants' Rule 12(b)(6) challenges to the FAC.

A. Personal Jurisdiction Over Defendant Savencia

As was noted above, when the Court assesses personal jurisdiction at this stage of the case, it is typically determining whether, in light of the defendant's contacts with Delaware, the plaintiff has made a *prima facie* showing that the Delaware long-arm statute is satisfied and that it would not violate due process for the defendant to be hauled into court here. In this case, however, Plaintiffs acknowledge that they cannot show that Savencia has sufficient contacts with Delaware in order to satisfy the long-arm statute or this traditional due process analysis. (D.I. 93 at 1, 8-9; Tr. at 67-68) Instead, Plaintiffs argue that there is personal jurisdiction here over Savencia because when Savencia joined Zausner's transfer motion, it: (1) thereafter became judicially estopped from arguing that there is no personal jurisdiction over it in Delaware, (D.I. 93 at 12-13); and/or (2) impliedly consented to personal jurisdiction in Delaware, (*id.* at 13-17).[7]

For the reasons set forth below, the Court concludes that there is personal jurisdiction over Savencia here. In the Court's view, the clearest basis for this conclusion is that Savencia impliedly consented to jurisdiction in Delaware by joining in Zausner's transfer motion.

The requirement that a court have personal jurisdiction is a "waivable right," and thus a defendant may expressly or impliedly consent to the personal jurisdiction of the court. *Burger*

[7] During oral argument, Plaintiffs also argued that the "law of the case" doctrine applied here, and that reliance on this doctrine (in light of the Southern District of Florida Court's decision on the motion to transfer) is another reason why Savencia's Rule 12(b)(2) Motion should be denied. (Plaintiffs' Hearing Presentation at Slides at 12, 15-16; Tr. at 48) However, nowhere in Plaintiffs' answering brief do they make explicit reference to the "law of the case" doctrine, and so the Court agrees with Defendants that this argument was waived. (D.I. 134 at 1) That said, for the reasons set out below, the Court need not rely on this doctrine to recommend that the relevant portion of Savencia's Motion be denied on personal jurisdiction grounds.

King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985); *see also Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). For example, a defendant (as did Zausner here) may expressly consent to personal jurisdiction in a particular jurisdiction by stipulating in a contract (via a valid forum selection clause) that their controversies with a plaintiff should be resolved in the courts of that jurisdiction. *Burger King*, 471 U.S. at 472 n.14; *Hardwire*, 2014 WL 5144610, at *6. Consent to personal jurisdiction can also be impliedly manifested in various ways. *Cf. S.E.C. v. Ross*, 504 F.3d 1130, 1149 (9th Cir. 2007) ("In general, we have held that a party has consented to personal jurisdiction when the party took some kind of affirmative act—accepting a forum selection clause, submitting a claim, filing an action—that fairly invited the court to resolve the dispute between the parties.").

In the Court's view, one such form of implied consent is what happened here: a defendant voluntarily joins in a motion to transfer its case to another district pursuant to Rule 1404(a), and, due to the manner in which it joined in that motion, impliedly consents to personal jurisdiction in the transferee forum. Helpful to the Court's conclusion in this regard is the decision in *Lockett v. Pinnacle Entertainment, Inc.*, Case No. 19-00358-CV-W-GAF, 2019 WL 4296492, at *4 (W.D. Mo. Sept. 10, 2019).

In *Lockett*, the district court began by noting how in 1948, Congress enacted Section 1404. Section 1404 allowed a district court "to override the plaintiff's choice of forum and empowered the court 'to transfer any civil action to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice.'" *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)). The *Lockett* Court explained how the range of transferee forums was then limited by two sets of constraints. First, pursuant to Rule 1404(a), that forum had to be one where the "where [the action] might have been

brought[,]" *id*. (quoting *Van Dusen*, 376 U.S. at 616) (certain alterations in original), which was widely understood to mean that the transferee court: (1) was a proper venue and (2) would have had personal jurisdiction over the defendant had the case been filed there initially, *id*. (citing 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Jurisdiction* ("Wright & Miller") § 3841 (4th ed. Apr. 2019 update)). Second, in *Hoffman v. Blaski*, 363 U.S. 335 (1960), the Supreme Court of the United States had ruled that parties could not alter these requirements by consenting to transfer. *Lockett*, 2019 WL 4296492, at *4 (citing *Hoffman*, 363 U.S. at 343-44). However, in 2011, Congress amended Section 1404 to permit transfer to "to any district or division to which all parties have consented." 28 U.S.C. § 1404(a) (2012). By this amendment, a court could transfer a case to a district of which all parties consent, even if that district would not have had venue or personal jurisdiction over the defendant when the case was filed, so long as the Section 1404 convenience and interest of justice factors also justify transfer to that district. *Lockett*, 2019 WL 4296492, at *5 (citing Wright and Miller § 3841).

Next, the *Lockett* Court addressed whether a defendant who consented to transfer under Section 1404(a) was necessarily consenting to venue and personal jurisdiction in the transferee court. The *Lockett* Court concluded in the affirmative, reasoning that since absent such consent, the defendant could only be transferred to a court pursuant to Rule 1404(a) "'where [the action] might have been brought'" (i.e., where venue and personal jurisdiction lay against that defendant), "it necessarily follows that consenting to a transferee court means that the party is consenting to venue and personal jurisdiction in that court." *Id*.[8] It reasoned that "[a]ny other

[8] In their briefing, Defendants argue to the contrary that Section 1404(a)'s reference to a district where the action "might have been brought" refers only to a district court in which venue would have been proper as to all defendants—not to a district that necessarily has personal jurisdiction over all defendants. (D.I. 96 at 7-8) However, the Third Circuit has flatly stated that Rule 1404(a) requires that all defendants must be subject to personal jurisdiction in a transferee

interpretation of [Section] 1404(a) would thwart the purposes of 'prevent[ing] the waste of time, energy and money and . . . protect[ing] litigants, witnesses and the public against unnecessary

court. *See Shutte v. Armco Steel Corp.*, 431 F.2d 22, 23 (3d Cir. 1970) ("No mention was made of [Section] 1404(a)'s limiting provision to the effect that a transfer is authorized by the statute only if the plaintiff had an 'unqualified right' to bring the action in the transferee forum at the time of the commencement of the action; i.e., venue must have been proper in the transferee district *and the transferee court must have had power to command jurisdiction over all of the defendants*.") (emphasis added); *see also Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 31-33 (3d Cir. 1993) (suggesting the same); *Human Genome Scis., Inc. v. Genentech, Inc.*, C.A. Nos. 11-082-LPS, 2011 WL 2911797, at *3 (D. Del. July 18, 2011); *see also Hoffman*, 363 U.S. at 344 (discussing Section 1404(a)'s "where it might have been brought" requirement in a manner indicating that the term encompasses a forum that is both a proper venue for the defendant and one where there is personal jurisdiction over the defendant).

Defendants' primary rejoinder to these authorities is its view that in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013), the Supreme Court held differently, when it stated that it "perceived 'no valid reason for reading the words 'where it might have been brought' to narrow the range of permissible federal forums beyond those permitted by federal venue statutes.'" *Id.* at 57 (quoting *Van Dusen*, 376 U.S. at 623); *see also* (D.I. 96 at 7-8). But for three reasons, the Court does not agree with Defendants' reading of *Atlantic Marine*. First, the portion of *Atlantic Marine* at issue does not clearly state that personal jurisdiction is not required in the transferee forum as to all defendants—that is, it was not *directly* speaking about the concept of personal jurisdiction at all. Second, this portion of *Atlantic Marine* is itself a quote from *Van Dusen v. Barrack*, 376 U.S. 612 (1964), a Supreme Court case that pre-dates the Third Circuit caselaw set out above. Clearly then, the Third Circuit does not believe that this portion of *Van Dusen* meant that Section 1404(a) would permit transfer of a defendant that was not subject to personal jurisdiction in the transferee court. Third, numerous courts, in opinions issued after *Atlantic Marine*, have still read Section 1404(a) as requiring that all transferred defendants be subject to personal jurisdiction in the transferee forum. *See Doe v. Bausch & Lomb, Inc.*, — F. Supp. 3d —, 2020 WL 1164189, at *4 (D. Conn. Mar. 11, 2020); *Lockett*, 2019 WL 4296492, at *4; *Yerramsetty v. Dunkin' Donuts N.E.*, Civil No. 2:18-CV-454-DBH, 2019 WL 362268, at *2 (D. Maine Jan. 29, 2019); *Riston v. Klausmair*, Civil Action No. RDB-17-03766, 2018 WL 4333752, at *10 (D. Md. Sept. 11, 2018); *Ragner Tech. Corp. v. Berardi*, 287 F. Supp. 3d 541, 547-48 (D.N.J. 2018); *Holman v. AMU Trans, LLC*, No. 14 C 04407, 2015 WL 3918488, at *2 (N.D. Ill. June 25, 2015); *SelectSun GmbH v. Porter, Inc.*, No. 14 Civ. 422 (PAC), 2014 WL 12812004, at *2 (S.D.N.Y. July 9, 2014); *Opperman v. Path, Inc.*, Case No. 13-cv-00453-JST, 2014 WL 246972, at *4 (N.D. Cal. Jan. 22, 2014); *cf. In re: Howmedica Osteonics Corp.*, 867 F.3d 390, 404 (3d Cir. 2017) (explaining why, as part of a Section 1404(a) transfer analysis, it can be appropriate to also consider severance of a defendant in order to, *inter alia*, "cure personal jurisdiction . . . defects").

inconvenience and expense' . . . as a conclusion that consent to a transferee court does not amount to a consent to personal jurisdiction would only increase the matters to be litigated in the action." *Id.* (quoting *Van Dusen*, 376 U.S. at 616) (alterations in original).

Next, the *Lockett* Court turned to the facts before it, in order to determine whether the defendants at issue there (referred to in the opinion as the "Foreign Subsidiary Defendants") had indeed consented to personal jurisdiction by requesting transfer to that Court. The *Lockett* action was originally filed in the United States District Court for the District of Nevada ("District of Nevada"). *Id.* at *1. While the case was pending there, the Foreign Subsidiary Defendants first filed a motion to dismiss for lack of personal jurisdiction; then, while that motion was pending, the Foreign Subsidiary Defendants joined a motion filed by all other defendants seeking transfer of venue under Section 1404(a) to the United States District Court for the Western District of Missouri ("Western District of Missouri"). *Id.* at *2. The District of Nevada Court later transferred all defendants to the Western District of Missouri. *Id.* at *2-3. Thereafter, the Foreign Subsidiary Defendants moved to dismiss the case against them for lack of personal jurisdiction in the Western District of Missouri. *Id*. at *3. Under the circumstances, the *Lockett* Court ultimately concluded that the Foreign Subsidiary Defendants had consented to personal jurisdiction in that Court, such that their motion to dismiss on personal jurisdiction grounds could not be granted. The *Lockett* Court's conclusion was bolstered by the fact that prior to seeking transfer, the Foreign Subsidiary Defendants could have waited for the District of Nevada Court to rule on their motion to dismiss for lack of personal jurisdiction—but instead they did not, and joined the other defendants' transfer motion. *Id*. at *7. Indeed, "[e]ven after being alerted that their consent to transfer could be viewed as a consent to personal jurisdiction in the Western District of Missouri, the Foreign Subsidiary Defendants [had] persisted in consenting to

transfer." *Id*. The *Lockett* Court noted that although the Foreign Subsidiary Defendants "easily could have withdrawn their consent to transfer at that point and [first] sought a resolution to the purported personal jurisdiction issues" before seeking transfer, they did not do so. This all suggested that consent to personal jurisdiction had been given.

In line with the decision in *Lockett*, here the Court concludes that Savencia did impliedly consent to personal jurisdiction in this Court. After this case was filed in the Southern District of Florida, Savencia (like the Foreign Subsidiary Defendants in *Lockett*) filed a motion to dismiss the claims against it due to lack of personal jurisdiction—and then, while that motion was pending, "join[ed]" in Zausner's and ZNHC's motion to transfer the case to this Court. (D.I. 36 at 1, 19-20). As with the Foreign Subsidiary Defendants in *Lockett*, Savencia could have (but did not) ask the Southern District of Florida Court to resolve the personal jurisdiction issue as to it first, before the Court adjudicated the transfer issue. (Tr. at 34) Instead, it: (1) pressed its request for a transfer of venue to the Southern District of Florida Court, noting that even though it was not a signatory to the SPA, it should "receive the benefit of the forum selection clause" therein, (D.I. 36 at 19-20); and (2) argued to that Court that the transfer of venue issue should be decided first, prior to any resolution of its motion to dismiss for lack of personal jurisdiction, (D.I. 54 at 11-12). Thereafter, in granting the transfer motion, the Southern District of Florida Court noted that because Savencia's rights and obligations were so "closely related to the dispute" it was "'foreseeable that it will be bound' by the forum selection clause" and that this justified transfer. (D.I. 55 at 14) Thus, the record is clear that Savencia affirmatively sought

transfer of venue to this Court pursuant to Section 1404(a), and thereby consented to personal jurisdiction in Delaware.[9]

Savencia makes two other arguments to the contrary that are worth addressing. Neither are persuasive.

First, Savencia argues that it "never consented to jurisdiction in any United States court[,]" including the courts of Delaware, because prior to transfer, it sufficiently notified the Southern District of Florida Court that it planned to object to personal jurisdiction in Delaware upon transfer. (D.I. 96 at 3-5) Here, Savencia points to the fact that when it joined the motion to transfer, it stated that it did so "without waiving its jurisdictional objections[.]" (*Id*. at 3 (citing D.I. 36 at 1, 19) (emphasis omitted)) And it also highlights the following statement it made to the transferor court in a motion to stay discovery pending resolution of the motion to transfer and Savencia's motion to dismiss on jurisdictional grounds ("motion to stay"):

> Accordingly, a stay on discovery is warranted until the Court determines whether the case was filed in the correct venue in the first place. If it was not, then Plaintiffs certainly need no jurisdictional discovery as to Savencia's contacts with the state of Florida, *as the relevant personal jurisdictional inquiry would be whether Savencia possessed sufficient minimum contacts with the state of Delaware to subject it to personal jurisdiction in that forum.*

(D.I. 54 at 12 (emphasis added) (*cited in* D.I. 96 at 3-4); s*ee also* Tr. at 32-33 (Defendants' counsel agreeing that this was the "clearest" indication made to the Southern District of Florida Court regarding personal jurisdiction in Delaware)) But as to the former statements, Savencia's

[9] Plaintiffs also made another argument as to why Savencia could be said to have impliedly consented to personal jurisdiction in this Court: that they did so by seeking "affirmative relief" from the Court by way of their filing (along with Zausner) the Motion for Sanctions. (D.I. 93 at 15-17; Plaintiffs' Hearing Presentation at Slides 18-19) The Court need not resolve this issue, in light of its decision set out above.

assertions that it was moving to transfer "without waiving its jurisdictional objections" was a reference to its objections to personal jurisdiction in *Florida*, not Delaware. (Tr. at 42 (Defendants' counsel conceding the same)) And as to the statement in its motion to stay, nothing about the statement clearly signals that Savencia was planning to object to personal jurisdiction in Delaware. Indeed, the statement's reference to what the "relevant personal jurisdiction inquiry" "would be" seems to have been intentionally oblique.[10] It would not have been difficult for Savencia to have added a sentence like the following, which would have left no doubt about its future intentions: "And when this case is transferred to Delaware, Savencia will explain why there is no personal jurisdiction there as to it."[11] Of course, if Savencia had been that blunt, it might have raised additional questions for the transferor court about whether the case against Savencia *should* be transferred in the first instance.

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[10] During oral argument, in what appeared to be a concession that this statement was less than clear about Savencia's future intentions, Defendants' counsel noted that "[in] any other construct, I would probably [have] be[en] even stronger in my articulation" of Savencia's objection to personal jurisdiction in Delaware. (Tr. at 44) But counsel nevertheless argued that "no more magic words are required." (*Id*. at 45)

Additionally, at times during oral argument, Defendants' counsel suggested that somewhere in one of its filings before the Southern District of Florida Court, Savencia might in fact have clearly stated that there was no personal jurisdiction over it in Delaware. (Tr. at 32-33) But if such a statement was made, Savencia has failed to bring it to the Court's attention, despite having ample opportunity and motivation to do so. It is too late to do so now.

[11] *Cf. Ragner Tech.*, 287 F. Supp. 3d at 547-49 (determining that even though the case had been transferred to the court from the Southern District of Florida pursuant to Section 1404(a), and even though this amounted to an implicit conclusion by the transferor court that the transferee district (the United States District Court for the District of New Jersey) was a proper venue and had personal jurisdiction over all defendants, certain defendants did not waive their right to challenge personal jurisdiction in the transferee court, because those defendants had clearly asserted to the transferor court that "*the District of New Jersey does not have personal jurisdiction over* [them]") (emphasis added); *see also Lockett*, 2019 WL 4296492, at *6 (distinguishing *Ragner Tech*. in this way).

Second, in their supplemental brief, (D.I. 134 at 2), Defendants relied on a decision from this Court: *Truinject Corp. v. Nestle Skin Health, S.A.*, C.A. No. 19-592-LPS-JLH, 2019 WL 6828984 (D. Del. Dec. 13, 2019), *report and recommendation adopted*, 2020 WL 1270916 (D. Del. Mar. 17, 2020). In *Truinject*, this Court found that a foreign parent corporation defendant, Nestle Skin Health S.A. ("Nestle S.A."), was *not* subject to personal jurisdiction in this Court, even though the case had been previously been transferred to this Court from the United States District Court for the Central District of California ("Central District of California"). 2019 WL 6828984, at *1, *6, *14. Critically, however, prior to transfer, Nestle S.A. *did not join* with other defendants who had requested transfer; instead, it had simply moved to dismiss the complaint in the Central District of California for, *inter alia*, lack of personal jurisdiction. *Id.* at *6. After Nestle, S.A. later contested personal jurisdiction in this Court post-transfer, the *Truinject* Court concluded that personal jurisdiction did not lie as Nestle, S.A. in Delaware. *Id.* at *11-13.[12] The difference in the two cases, then, is the fact that here, Savencia *joined* in the Section 1404(a)

[12] In doing so, the *Truinject* Court rejected the plaintiff's argument that personal jurisdiction existed as to Nestle S.A. in Delaware due to the existence of a forum selection clause in a series of contracts. *Truinject*, 2019 WL 6828984, at *11-13. Nestle, S.A. was not signatory to these agreements and the *Truinject* Court ultimately disagreed with the plaintiff's argument that Nestle S.A. should nevertheless be bound by the forum selection clause (and that there was thus personal jurisdiction over Nestle, S.A. in Delaware) because Nestle, S.A. was "closely related" to the agreements such that it was "foreseeable" that it would be bound by them. *Id.*

Notably, in concluding that this case against Savencia should be transferred to this Court along with the case against Zausner, the Southern District of Florida Court came to the opposite conclusion. There, (at Savencia's urging), it found that Savencia *was* so closely related to the SPA that it was foreseeable that it would be bound by the forum selection clause found therein. (D.I. 55 at 13-15)

transfer motion that brought it to this court (and thus, impliedly consented to personal jurisdiction here), while in *Truinject*, Nestle, S.A. did no such thing.[13]

Accordingly, the Court recommends that the Rule 12(b)(2) portion of Savencia's Motion be denied.

B. Motion to Dismiss for Failure to State a Claim

The Court next addresses the Rule 12(b)(6) arguments included in Defendants' Motions. In the FAC, Plaintiffs assert 10 Counts: Count I for breach of contract by ECB and Atlantic

[13] Because the Court has resolved this issue based on its conclusion that Savencia impliedly consented to jurisdiction in Delaware, it need not address Defendants' argument that the doctrine of judicial estoppel is an alternative basis on which to deny this portion of Savencia's Motion. That said, in the Court's view, the most similar case from this Court regarding a Rule 12(b)(2) decision is not *Truinject*, but instead *Orbis Opportunity Fund, LP v. Boyer*, Civil Action No. 20-cv-40-RGA, 2020 WL 3060368 (D. Del. June 9, 2020). (D.I. 132) In *Orbis*, like here, the plaintiffs had originally filed the action in the Southern District of Florida and had framed the complaint to establish personal jurisdiction in that venue. *Id*. at *1. Thereafter, all of the defendants sought to have the case transferred to Delaware pursuant to Section 1404(a), in light of a mandatory forum selection clause found in certain agreements that were relevant to the case. *Id*. at *1, *3. Once the case was transferred to this Court, certain of the defendants (the "individual Defendants") sought to dismiss the claims against them on various grounds, including lack of personal jurisdiction. *Id*. at *3. The *Orbis* Court ultimately agreed that the individual Defendants were judicially "estopped" from contesting personal jurisdiction in this Court, as any argument to the contrary had been "waived" when those defendants, "[i]n their own brief filed in the Southern District of Florida . . . specifically asked the court to dismiss, 'or in the alternative, transfer' [the case] to Delaware pursuant to the forum-selection clause." *Id*. at *4 (citation omitted). The *Orbis* Court noted that while the individual Defendants "may not have specifically filed a separate motion to transfer [in the Southern District of Florida,] they nonetheless asked for a transfer pursuant to a forum selection clause." *Id.* at *4. Thus, they were estopped from arguing that this Court lacked personal jurisdiction as to them.

Here, the Court has come to the same ultimate conclusion as did the *Orbis* Court (i.e., that the transferred defendant is precluded from pressing its motion to dismiss on jurisdictional grounds in the transferee court), premised on a similar, though slightly different, rationale (i.e., implied consent, rather than judicial estoppel). It does so in part so as to not have to determine whether Savencia has acted in "bad faith" (a requirement for a finding of judicial estoppel in this Circuit). *See MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013). But in the end, the result is the same as in *Orbis*.

Ventures against Zausner, (FAC at ¶¶ 53-56), Count II for fraud in the inducement by ECB against both Defendants, (*id.* at ¶¶ 57-61), Count III for fraud in the inducement by Atlantic Ventures against both Defendants, (*id.* at ¶¶ 62-66), Count IV for fraud by ECB against both Defendants, (*id.* at ¶¶ 67-71), Count V for fraud by Atlantic Ventures against both Defendants, (*id.* at ¶¶ 72-76), Count VI for fraud by C2B against both Defendants, (*id.* at ¶¶ 77-81), Count VII for aiding and abetting a breach of fiduciary duty by Plaintiffs against both Defendants, (*id.* at ¶¶ 82-88), Count VIII for conspiracy to commit breach of fiduciary duty by Plaintiffs against both Defendants, (*id.* at ¶¶ 89-93), and Count IX for conspiracy to commit constructive fraud by Plaintiffs against both Defendants, (*id.* at ¶¶ 94-99). Defendants refer to Counts II to VI as "the Fraud-Based Claims" and Counts VIII and IX as the "Conspiracy Claims[,]" and the Court will too. (D.I. 83 at 2; D.I. 85 at 3) The parties also agree that Florida substantive law applies to all claims. (D.I. 83 at 10-12; D.I. 85 at 20-21; D.I. 92 at 9)

Defendants, in their respective Motions, raise numerous challenges to Plaintiffs' claims. These challenges can be grouped into two categories: challenges pursuant to the relevant statute of limitations (or "time-bar" challenges), which apply to all counts, and other challenges, which apply to some or all counts. The Court will first take up the time-bar challenges, then turn to the other challenges.

1. Statute of Limitations

The parties' arguments over statute of limitations issues implicate several questions that the Court will address in order.[14]

[14] In raising these statute of limitations issues, Defendants are asserting an affirmative defense; a district court may dismiss a claim on the basis of an affirmative defense pursuant to Rule 12(b)(6), but only if the defense is evident from the face of the complaint at issue and no development of the factual record is required to determine whether dismissal is

a. Which state's statute of limitation law applies—Delaware's or Florida's?

The first issue for the Court to take up is whether Florida or Delaware law applies to questions about the relevant statute of limitations for Plaintiffs' claims. Defendants argue that Delaware law applies, (DI. 83 at 13; D.I. 85 at 17-18; D.I. 95 at 1-3); Plaintiffs (using varying rationales) argue that Florida law applies, (D.I. 92 at 14-19; D.I. 93 at 22).

The initial step in the inquiry is to determine which forum's choice of law rules apply. As has been noted, this case was transferred from Florida to Delaware pursuant to Section 1404(a) and the forum selection clause in the SPA. (D.I. 55) In such a scenario, the Supreme Court's decision in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013), unequivocally provides that Delaware's choice of law rules apply here:

> [W]hen a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules . . . [A] plaintiff who files suit in violation of a forum-selection clause enjoys no . . . "privilege" with respect to its choice of forum, and therefore it is entitled to no concomitant "state-law advantages." Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because "§ 1404(a) should not create or multiply opportunities for forum shopping," . . . we will not apply the *Van Dusen* rule [i.e., the rule stating that normally after a Section 1404(a) transfer, the transferee court applies the state law that would have applied were there no change of venue] when a transfer stems from enforcement of a forum-selection clause: The court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right.

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appropriate. *See Limberry v. Sears & Roebuck*, Civ. No. 09-1001-SLR, 2010 WL 1737112, at *3 (D. Del. Apr. 28, 2010) (citing cases).

Id. at 64-66 (citations omitted); *see also In re McGraw-Hill Global Educ. Holdings LLC*, 909 F.3d 48, 57 (3d Cir. 2018). Because this case was transferred to Delaware pursuant to the SPA's forum selection clause, *Atlantic Marine* requires that Delaware's choice of law rules govern. (Tr. at 98-99)[15]

The next step in the inquiry is to ask: Now that we know that Delaware choice of law rules apply, what do those rules tell us about which state's law applies to statute of limitations issues? Delaware's choice of law rules state that a statute of limitations issue is procedural, not substantive, in nature; thus, Delaware's own law generally determines whether an action is barred by the statute of limitations. *See Gavin v. Club Holdings, LLC*, Civil Action No. 15-175-RGA, 2016 WL 1298964, at *3 (D. Del. Mar. 31, 2016) (citations omitted); *see also David B. Lilly Co. v. Fisher*, 799 F. Supp. 1562, 1568 (D. Del. 1992) ("Generally, statutes of limitations are deemed to be procedural for conflict of law purposes and the Court would apply its own

[15] For the first time at oral argument, Plaintiffs' counsel argued that the rule of *Atlantic Marine* might apply differently to Zausner (a party to the SPA, who bargained for the forum selection clause and as to whom Delaware choice of law rules would thus surely apply, per *Atlantic Marine*) and Savencia (a *non*-party to the SPA, and as to whom Plaintiffs' counsel suggested Florida's choice of law rules might still apply). (Tr. at 133-34) The rule set out in *Atlantic Marine* suggests that Plaintiffs should not get the benefit of Florida's choice of law rules just because they filed their suit in what was decidedly the wrong venue (at least as to Zausner), in light of the SPA's forum selection clause. That mandate could be seen to be controverted if Plaintiffs' argument here were credited. And although Savencia was not a signatory to the SPA, in transferring the case pursuant to Section 1404(a), the Southern District of Florida Court concluded that it was foreseeable that Savencia would be bound by the forum selection clause. (D.I. 55 at 13-15) If that is so, then it seems right to say that the choice of law rules that apply to claims against Zausner (Delaware's) should also apply to claims against Savencia. Indeed, Plaintiffs' entire argument as to personal jurisdiction regarding Savencia was that Savencia's invocation of the forum selection clause in the transferor court meant that it should be *treated similarly* to SPA signatory Zausner with regard to the Section 1404(a)/personal jurisdiction issue. It seems contradictory then for Plaintiffs to argue that the two Defendants should nevertheless be *treated differently* for purpose of the Section 1404(a)/choice of law issue. For these reasons, to the extent that Plaintiffs' argument is not deemed waived for not having been raised prior to oral argument, the Court rejects it here.

state's statute of limitations.") (citations omitted). However, if a choice of law provision in a contract between the parties "specifically states that it includes statutes of limitations" issues, then Delaware choice of law rules allow that the contractually-chosen state's law applies to such issues. *Gavin*, 2016 WL 1298964, at *4; *see also Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, C.A. No.: N15C-02-059 EMD CCLD, 2015 WL 11120934, at *3 (Del. Super. Ct. Dec. 29, 2015) ("Under Delaware law, choice-of-law provisions in contracts do not apply to statutes of limitations, unless a provision expressly includes it."); *Juran v. Bron*, No. Civ.A. 16464, 2000 WL 1521478, at *11 (Del. Ch. Oct. 6, 2000) ("[W]hile generally choice of law provisions will be given effect, those provisions will only include the statute of limitations of the chosen jurisdiction if their inclusion is specifically noted.").

Here, Plaintiffs argue that the SPA's choice of law provision *does* "specifically state[]" that Florida law applies to statute of limitations issues. (D.I. 92 at 16) But one look at the provision is enough to demonstrate that this is not so. The provision reads: "[t]his Agreement shall be governed by, construed and enforced in accordance with the internal laws of the State of Florida applicable to contracts made and to be wholly performed within such State." (SPA at Art. XII.5) There is no *specific* or *express* reference to Florida's statute of limitations law there, or anything even close to it. (D.I. 83 at 13; Tr. at 100-01)[16] Accordingly, the Court finds that

[16] To the extent that Plaintiffs argue to the contrary that the choice of law provision's use of the term "enforced in accordance with the . . . laws of . . . Florida" amounts to a specific or express reference to the statute-of-limitations-related laws of Florida, (D.I. 92 at 17-18), the Court disagrees. This "enforced . . ." language surely is not the equivalent to a "specific" or "express" reference to Florida's statute-of-limitations law. While it could possibly be an indirect reference to that subject matter, *see Jahn v. 1-800-FLOWERS.COM, Inc.*, No. 00-C-446-C, 2002 WL 32362244, at *10 (W.D. Wis. Oct. 21, 2002), it might also be meant to refer to other subject matter entirely (such as to the concept of "enforce[ment]" of a judgment), (Tr. at 101-02).

Delaware's statute of limitations law applies to the claims in this case. *Pivotal Payments*, 2015 WL 11120934, at *3; *Juran*, 2000 WL 1521478, at *11.

b. Does the application of the Delaware borrowing statute or the decision in *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1 (Del. 2005) nevertheless result in the application of Florida's statute of limitations to the claims?

Next, Plaintiffs argue that even if Delaware's statute of limitations law applies, the application of Delaware's "borrowing statute" or the decision of the Delaware Supreme Court in *Saudi Basic* would result in the application of Florida's longer, four and five-year statute of limitations to the claims—not Delaware's shorter, three-year statute of limitations. (D.I. 92 at 14-16; D.I. 93 at 28; Tr. at 134-37; *see also* D.I. 95 at 2-3) The borrowing statute, Del. Code Ann. tit. 10, § 8121 ("Section 8121"), states as follows:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action. Where the cause of action originally accrued in favor of a person who at the time of such accrual was a resident of this State, the time limited by the law of this State shall apply.

Del. Code Ann. tit. 10, § 8121.

The Court does not believe that there are any circumstances in which the borrowing statute would cause Florida's statute of limitations to apply to Plaintiffs' claims. For one thing, by its terms, the borrowing statute does not apply here. The statute applies only in circumstances where "an action . . . [is] brought in a court of this State[.]" *Id*. Yet Plaintiffs did not bring this action in the courts of Delaware. Instead, they "brought" their claims in Florida (perhaps, at least in part, because they were seeking the benefit of Florida's more forgiving statute of limitations law); thereafter, they *fought* the case's transfer to Delaware. *See In re Winstar*

Commc'ns, Inc., 591 F. App'x 58, 60 & n.3 (3d Cir. 2015) (concluding that where the plaintiffs had originally filed suit in New York state court, the defendants had then removed the case to federal court in New York, and the case was thereafter transferred to this Court pursuant to 28 U.S.C. § 1406, the Delaware borrowing statute did not apply a dispute about the proper statute of limitations for plaintiffs' claims, since the borrowing "statute only applies where a plaintiff files in Delaware rather than a foreign forum to take advantage of a more generous Delaware statute of limitations" but in that case "the reverse [was] true, and [plaintiffs had] sought to take advantage of New York's more generous statute by filing in New York[,]" and thus "[t]he Delaware borrowing statute d[id] not apply in this situation")[17]; *see also* (Tr. at 107). Moreover, even if that conclusion is incorrect, and even if the "action" (that is, the claims that Plaintiffs have raised against Defendants in the FAC) could somehow have been said to have been "brought in" Delaware by Plaintiffs, then application of the borrowing statute would not benefit Plaintiffs. Application of the statute's literal terms would require resort to the limitations period of the "shorter" of the "the time limited by the law of this State [i.e., Delaware]" or the "time limited by the law of the state or country where the cause of action arose [i.e., Florida.]" *Id.* Here, this would be Delaware's shorter three-year statute-of-limitations period. *Cf. Weber v. McDonald's Sys. of Europe, Inc.*, 660 F. Supp. 10, 14 (D. Del. 1985) (applying Delaware's borrowing statute to plaintiffs' claims and concluding that Delaware's shorter statute of limitations resulted in the claims being time-barred, where the plaintiff originally filed the case

[17] In *In re Winstar*, there was some question at the appellate level as to whether the case had in fact been transferred to this Court pursuant to Section 1406, or instead (as in this case) due to the presence of a forum selection clause via Section 1404(a). 591 F. App'x at 60. The *In re Winstar* Court noted that even if the case had been transferred due to the presence of the forum selection clause, that would make no difference to its conclusion that Delaware's choice of law rules (and Delaware's shorter statute of limitations) applied. *Id.*

in federal court in the Southern District of Florida, and that Court transferred the action to this Court pursuant to 28 U.S.C. § 1406(a)).[18]

[18] In their briefing, Plaintiffs argue that even though an application of the literal terms of the borrowing statute should work to their detriment here, nevertheless the Court should ignore those terms and apply Florida's statute of limitations, based on the ruling in *Saudi Basic*. (D.I. 92 at 2, 14-16; D.I. 93 at 2, 28; Tr. at 134-35) As the Court has noted above, Delaware's borrowing statute does not apply here (such that the Court should simply apply Delaware's statute of limitations laws in the first instance). But if it did apply here, then the borrowing statute's language should control, and the result in *Saudi Basic* does not counsel differently.

In *Saudi Basic*, the Delaware Supreme Court explained that borrowing statutes such as Section 8121 are "typically designed to address a specific kind of forum shopping scenario—cases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations." 866 A.2d at 16. The *Saudi Basic* Court went on to conclude that even though applied literally in that case, the borrowing statute would have resulted in the application of Delaware's shorter statute of limitations to the defendant's counterclaims, the statute's terms should not be applied in that case. This was because under the facts of the case, not only was the "typical" scenario not at play, but instead the "forum shopping" party was the plaintiff, who had intentionally filed in Delaware in order to raise a limitations defense that would have been unavailable to it had it brought its claims where they arose—in Saudi Arabia. *Id.* at 17-18. Because applying the statute to defendant's detriment would have "subvert[ed its] fundamental purpose[,]" the *Saudi Basic* Court concluded that the statute should not be applied, and instead that the longer, Saudi Arabian statute of limitations was applicable (meaning that the counterclaims were not time-barred). *Id*.

In *Lambda Optical Solutions, LLC v. Alcatel-Lucent USA Inc.*, Civil Action No. 10-487-RGA-CJB, 2015 WL 5470210 (D. Del. Aug. 6, 2015), *report and recommendation adopted*, 2015 WL 5458273 (D. Del. Sept. 17, 2015), the Court explained why, in its view, *Saudi Basic* should be read to mean that "the Delaware borrowing statute's terms should apply in all circumstances unless there is clear evidence that applying the statute would reward a party who intentionally engaged in forum shopping by filing suit in Delaware." 2015 WL 5470210, at *5 (emphasis and citations omitted). For the reasons set out in *Lambda*, the Court believes that this interpretation is correct. And here, if the borrowing statute was applicable to the circumstances of this case, then *Saudi Basic*'s exception would not be relevant, since applying the borrowing statute would mean that the benefitting side (Defendants) would not be "reward[ed]" for "engag[ing] in forum shopping by filing suit in Delaware." That is because Defendants did not file suit anywhere (Plaintiffs did, in Florida). And Defendants did not "forum shop" by seeking to have this case brought to Delaware; the case was transferred here due to the SPA's valid forum selection clause, which both Plaintiffs and Zausner agreed to. *See Huffington v. T.C. Grp., LLC*, C.A. No. N11C-01-030 JRJ CCLD, 2012 WL 1415930, at *9 (Del. Super. Ct. Apr. 18, 2012).

c. Does the SPA's shortened survival period apply to the parties' contract claims?

With the Court so far having determined that Delaware's three-year statute of limitations period applies to all of Plaintiffs' claims, the next dispute is about whether at least certain aspects of Plaintiffs' contract claim in Count I should be governed by a shorter limitations period, due to the presence of particular language in the SPA. The relevant provisions are found in Article IX.6[19] of the SPA and Amendment No. 1 to the SPA. These portions of the SPA state that nearly all of the representations and warranties that Plaintiffs allege were breached in Count I would not remain in effect after 18 months from the SPA's December 2014 closing date (i.e., after June 30, 2016). (SPA at Article VIII.1 & ex. B ("Amendment No. 1") at § 6(c); D.I. 83 at 14 & n.5; *see also* FAC at ¶ 55)[20] The issue here is that such contractual agreements to shorten the relevant limitations period are void under Florida law, *see* Fla. Stat. Ann. § 95.03, but are enforceable under Delaware law so long as the shortened period is reasonable, *see* Del. Code Ann. tit. 10, § 8106(c); *HBMA Holdings, LLC v. LSF9 Stardust Holdings LLC*, C.A. No. 12806-VCMR, 2017 WL 6209594, at *6 (Del. Ch. Dec. 8, 2017). So if this issue is seen as one of "substantive" law, then Florida's law controls (as Plaintiffs suggest) and the provisions at issue are void. But if the issue is viewed as a "procedural"/statute of limitations issue, then Delaware's law controls (as

[19] The SPA alternately refers to its different portions as "Article[s]" and "Section[s]"; this opinion will use the two terms interchangeably.

[20] There are two provisions of the SPA alleged to have been breached in Count I—Article III.1 (addressing governmental licenses and permits, and which survives indefinitely) and Article III.11 (regarding compliance with laws, and which survived until December 31, 2018)—that were not to be subject to this 18-month limitations period. (Amendment No. 1 at § 6(c)).

Defendants suggest) and the provisions would surely have effect. (D.I. 83 at 14-15; D.I. 92 at 18-19; D.I. 95 at 3-4)[21]

At first blush, Defendants' argument seems promising, since the provisions at issue clearly *have to do with* the relevant statute of limitations. But in reality, these provisions are contractual provisions, which purport to limit the rights of the parties. The scope and import of such contractual provisions are an issue of substantive law, meaning that Florida law controls as to them. (Tr. at 138-40)

Two Delaware cases provide support for this conclusion. In *Case Financial, Inc. v. Alden*, Civil Action No. 1184-VCP, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009), the Delaware Court of Chancery assessed a contractual provision (in a contract with a choice of law provision favoring California law) stating that "[t]he respective representations and warranties of Seller and Buyer contained in this Agreement shall expire and terminate on the Closing Date." 2009 WL 2581873 at *12 & n.69. The *Case Financial* Court was uncertain as to whether this provision amounted to an agreement to shorten the limitations period for a breach of contract claim (as opposed to being a provision that simply limited the time period in which a *breach* of the contract could occur). *Id*. at *12-13. Importantly, though, in examining whether the clause should be interpreted to shorten the limitations period, the *Case Financial* Court looked to *California law* regarding the efficacy of such contractual provisions (and not to the law of the forum, Delaware). *Id.* at *13. Similarly, in *GRT, Inc. v. Marathon GTF Technology, Ltd.*, Civil Action No. 5571-CS, 2011 WL 2682898 (Del. Ch. July 11, 2011), the Court of Chancery

[21] If the provisions are in effect, Defendants argue that Count I must be dismissed as to all but the alleged breaches of Article III.1 and III.11, because the instant suit was not filed until October 24, 2018, more than two years after the 18-month survival period had lapsed. (D.I. 83 at 15)

assessed a shortened survival clause. The *GRT* Court concluded that because the contract at issue included a Delaware choice of law provision, and because Delaware law allows contracting parties to agree to provisions that shorten a limitations period, then a shortened survival clause in the contract should be enforceable. 2011 WL 2682898 at *11-12. In reaching this decision, the *GRT* Court suggested that had the parties' contract included a choice of law provision favoring another state's law, then it would then have assessed the shortened survival clause under that state's law instead. *Id.*

For these reasons, the Court concludes that although the parties to the SPA agreed to this shortened limitations period, Florida's statutory law applies and overrides the parties' choice, rendering these provisions void. *See N.P.V. Realty Corp. v. Nationwide Mut. Assur. Co.*, No. 8:14-CV-03235-T-17MAP, 2015 WL 3494127, at *3-4 (M.D. Fla. June 3, 2015). Thus, Plaintiffs' breach of contract claim in Count I is (like the other claims in the FAC) subject to Delaware's three-year limitations period (and nothing shorter).[22]

d. Applying Delaware's statutes of limitations law to the claims.

The Court now assesses how Plaintiffs' claims fare under Delaware's relevant statute of limitations. In the FAC, Plaintiffs bring claims for breach of contract (Count I), fraud or conspiracy to commit fraud, (Counts II-VI and IX), and aiding and abetting and conspiracy to commit a breach of fiduciary duty, (Counts VII-VIII). As has been noted above, it is not disputed that Delaware law provides that for all such claims, "no action . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action[.]" Del. Code Ann. tit. 10,

[22] The Court also rejects Defendants' position that Plaintiffs failed to fairly raise this issue in their briefing. (Tr. at 154-55; *see also* D.I. 134 at 3 n.3) The Court finds that Plaintiffs sufficiently made this argument in their answering brief. (D.I. 92 at 16, 18-19)

§ 8106(a). Since the instant suit was filed on October 23, 2018, that would mean that if the claims accrued prior to October 23, 2015, they would be time-barred.[23]

When did the claims accrue? A breach of contract claim begins to accrue "'at the time the contract is broken, not at the time when actual damage results or is ascertained.'" *AJZN, Inc. v. Yu*, Civil Action No. 13-149 GMS, 2015 WL 331937, at *8 (D. Del. Jan. 26, 2015) (quoting *Smith v. Mattia*, C.A. No. 4498-VCN, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010)). The Court understands Plaintiffs' theory of breach to be that the certain representations or covenants in the SPA were breached at the time of the SPA's execution in December 2014, (FAC at ¶ 55); thus, any breach claim would had to have been filed by at least December 2017. Similarly, a fraud claim accrues "'at the moment of the wrongful act and not when the effects of the act are felt.'" *Schiavone v. Bank of Am.*, C.A. No. 18-1269 (MN), 2019 WL 3802473, at *4 (D. Del. Aug. 13, 2019) (quoting *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, C.A. No. 4119-VCS, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010)). Here, Plaintiffs' fraud claims are connected to the SPA; Plaintiffs' theory (though it is a little unclear in the FAC) seems to be that prior to the execution of the SPA, Defendants made false representations that mirror the representations that ended up in the SPA (or otherwise took fraudulent actions that both pre-dated and post-dated the SPA's execution). (*See* FAC at ¶¶ 27-32, 58, 63, 68, 73, 78, 94)[24] So even giving Plaintiffs the benefit of a liberal construction, the *latest* that at least some of these

[23] In their briefing, Plaintiffs say that the instant action was filed on August 23, 2018, (D.I. 92 at 14; D.I. 93 at 28), and Defendants contend that the Complaint was filed on October 24, 2018, (D.I. 95 at 8-9). From the record, however, it appears that the date of filing was actually October 23, 2018. (D.I. 1, ex. 1 at 1-2; Tr. at 111)

[24] (*See also* FAC at ¶ 42 ("Both before and after the closing . . . Defendants [] misreport[ed] Schratter's financial condition, by, among other things, understating expenses, overstating revenue, and exaggerating the gross margins on sales."))

fraudulent acts were committed was in December 2014. Thus, Defendants are arguing that such fraud claims would had to have been brought at least by December 2017. (D.I. 83 at 16) Lastly, a breach of fiduciary duty claim accrues at the time of the alleged wrongful acts. *In re Dean Witter P'Ship Litig.*, No. CIV. A. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998). With respect to these claims, Plaintiffs' theory is that Mr. Voss breached his fiduciary duties during the mid-to-late 2014 diligence period and thereafter. (FAC at ¶¶ 27, 35 (*cited in* D.I. 92 at 28-29); *see also id*. at ¶¶ 82-93) Thus, at least if Defendants are correct, all of these claims would have needed to have been filed by mid-to-late 2017.[25]

Yet even if Defendants' application of the statute of limitations set out above is correct, for the reasons discussed in the next subsection below (regarding the equitable tolling doctrine), the Motions should not be granted on time-bar grounds.

e. Application of tolling doctrines

Plaintiffs assert two primary bases for tolling the statute of limitations—fraudulent concealment and equitable tolling. (D.I. 92 at 10-14) The Court need only address the latter here, as it concludes that Plaintiffs have sufficiently alleged facts indicating that the doctrine of equitable tolling could apply, as that doctrine has been extended under *Bovay v. H.M. Byllesby & Co.*, 38 A.2d 808 (Del. 1944) and *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168 (Del. 1976).[26]

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[25] The parties do not really address in detail whether or how Delaware's "continuing tort" rule would apply to the tort claims here. *See Rogers v. Bushey*, C.A. No. S17C-02-020 RRC, 2018 WL 818374, at *4 (Del. Super. Ct. Feb. 7, 2018); *Oakes v. Gilday*, 351 A.2d 85, 87 (Del. Super. Ct. 1976).

[26] In their answering brief to Savencia's motion to dismiss, Plaintiffs asserted a third ground for tolling the statute of limitations as to Savencia only, relating to the provisions of Del. Code Ann. tit. 10, § 8117. (D.I. 93 at 27) Similarly, the Court need not address this issue, in light of its conclusion in this subsection.

"Under the theory of equitable tolling [under Delaware law], the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary." *Dean Witter P'ship Litig.*, 1998 WL 442456, at *6; *see also Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008). "This doctrine tolls the limitations period until a[plaintiff] knew or had reason to know of the facts constituting the wrong." *Dean Witter P'ship Litig.*, 1998 WL 442456, at *6; *see also Weiss*, 948 A.2d at 451. At the motion to dismiss stage, a plaintiff must plead the applicability of the doctrine and must do so by alleging: (1) a fiduciary relationship; (2) actionable or fraudulent self-dealing; and (3) lack of inquiry notice. *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 193 (D. Del. 2000).[27]

The court understands Plaintiffs' equitable tolling theory to be that, *inter alia*: (1) Defendants encouraged Plaintiffs to take on Mr. Voss as a fiduciary, officer and director, and Mr. Voss indeed served as a fiduciary to Plaintiffs, both in his role as a partner and advisor prior to Schratter's purchase *and* in his role as Schratter's President and CEO and as President of Atlantic Ventures after Schratter's purchase; (2) Mr. Voss engaged in actionable self-dealing, in that in return for the receipt of various personal benefits from Defendants, he made false representations to Plaintiffs about Schratter, in order to convince Plaintiffs to move forward with Schratter's purchase and to cover up Schratter's true financial condition; and (3) Plaintiffs did not uncover the fraudulent scheme until mid-2017. (*See* FAC at ¶¶ 20-21, 27-30, 32-36, 41-48;

[27] Unlike with the doctrine of fraudulent concealment, whereby a plaintiff must demonstrate that the defendant engaged in an affirmative act of concealment or misrepresentation in order for the doctrine to apply, equitable tolling does not require such an affirmative act. *In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, Civ. A. Nos. 12111, 12353, 1995 WL 376942, at *7 (Del. Ch. June 21, 1995).

D.I. 92 at 12)[28] The focus of the parties' dispute is whether Plaintiffs can invoke the equitable tolling doctrine against *Defendants*, who (unlike Mr. Voss) are not alleged to have been in a fiduciary relationship with Plaintiffs. (D.I. 95 at 6-7; Tr. at 119-20)

Under Delaware law, the general rule is that a plaintiff cannot invoke the equitable tolling doctrine against non-fiduciaries. However, Delaware law recognizes an exception to this general rule. This was articulated in *Laventhol*, where the question for the Supreme Court of Delaware was whether shareholder plaintiffs could invoke the rule of *Bovay*[29] as to their claims against two accounting firm defendants. These two accounting firms had not had a fiduciary relationship with the plaintiffs, but they were alleged to have conspired with directors of the two relevant corporations (who did have fiduciary obligations to plaintiffs) in advancing a scheme to defraud the plaintiffs. *Laventhol*, 372 A.2d at 169-71. The *Laventhol* Court extended the rule of *Bovay* to apply to claims against the non-fiduciary defendants, reasoning that as a matter of substantive law, those who conspire with a fiduciary to breach his duties are also jointly and severally liable with that fiduciary for the breach. *Id.* at 170. Because the accountant defendants stood in the same legal position as the fiduciary defendants regarding the merits of the claims, the *Laventhol* Court concluded that there is "no reason why the principles of law governing the applicability of the statute of limitations should not apply in a like manner." *Id.* at 171. Therefore, *Laventhol* indicates that the statute of limitations can be equitably tolled as to claims against a non-

[28] The Court focuses here on the allegations as to Mr. Voss, thought it notes that Plaintiffs also allege that Mr. Proust served in a fiduciary role relevant to the equitable tolling claim. (D.I. 92 at 12-13 (citing FAC at ¶¶ 45-46))

[29] *Bovay* set forth the proposition that the benefit of the statute of limitations will be denied to a corporate fiduciary who has engaged in fraudulent self-dealing. *Cantor v. Perelman*, 414 F.3d 430, 439 (3d Cir. 2005) (citing *Bovay*, 38 A.2d at 820).

fiduciary defendant, where the plaintiff asserts that the defendant worked together with a fiduciary who engaged in wrongful self-dealing; such a claim will be tolled until the time when the plaintiff knew or had reason to know of the facts alleged to give rise to the wrong. *In re: IH 1, Inc.*, Case No. 09-10982 (LSS), 2016 WL 6394296, at *9 (Bankr. D. Del. Sept. 28, 2016); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Newark Recycling Ctr. Inc.*, C.A. No. N18C-04-313 WCC, 2019 WL 4751537, at *3 (Del. Super. Ct. Sept. 26, 2019).[30]

Reading the FAC in the light most favorable to the Plaintiff, it alleges throughout that Plaintiffs' fiduciary Mr. Voss was Defendants' *co-conspirator*, and that together they engaged in a scheme through which Mr. Voss (at Defendants' behest) engaged in self-dealing[31] to the detriment of Schratter and to Plaintiffs, all unbeknownst to Plaintiffs. (FAC at ¶¶ 21-46) Under *Laventhol*, just as claims against Mr. Voss could be equitably tolled in such a circumstance, they would so too be tolled here as to his co-conspirator Defendants.[32] And because the FAC alleges

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[30] Although *Laventhol* dates to 1976, recent cases appear to affirm its continuing viability. *Cantor*, 414 F.3d at 439 ("Our survey of the Delaware cases decided since *Laventhol* provides no persuasive basis for believing that the *Bovay* exception to the general rule is no longer viable, at least as applied to situations in which a fiduciary has enriched himself by breaching his fiduciary duty."); *In re: IH 1, Inc.*, 2016 WL 6394296, at *9, *16 (acknowledging that the rule in *Laventhol* had been applied at the pleading stage of the case, but finding at summary judgment that the cause of action at issue was barred by the statute of limitations); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 2019 WL 4751537, at *3 (recognizing the doctrine, but concluding that it did not apply to the facts of the case).

[31] The Court finds Defendants' suggestion that "Voss . . . [is] not even alleged to have engaged in self-dealing," (D.I. 95 at 7; *see also* Defendants' Hearing Presentation at Slide 15), to be curious. In the FAC, Plaintiffs allege, in some detail, that Defendants paid Mr. Voss vast sums of monies and provided him equity so that Mr. Voss would act against the best interest of Schratter (and in the interest of Defendants). (FAC at ¶¶ 21, 32-36, 41-46) Defendants do not explain, and the Court cannot see, how such allegations could be said to allege anything *but* self-dealing. *See Norman v. Elkin*, No. Civil Action No. 06-005-JJF, 2007 WL 2822798, at *5 (D. Del. Sept. 26, 2007); *see also* (Tr. at 122-23).

[32] Defendants did not argue that, even if the equitable tolling doctrine applied to some claims, it would not apply to all claims (e.g., non-conspiracy claims). Instead, they simply

that Plaintiffs were not on inquiry notice until 2017 at the earliest, (*id*. at ¶¶ 47-48),[33] this all would amount to a plausible allegation that the claims at issue (filed in October 2018) are not time-barred.

f. Conclusion

In sum, the three-year Delaware statute of limitations applies to the FAC's claims. The SPA's shortened survival period does not alter that limitations period as to the allegations in Count I. However, although Plaintiffs' claims could be argued to have all accrued as least as of December 2014 (and thus the applicable statute of limitations to have run at least by December 2017), Plaintiffs have plausibly pleaded a basis to believe that equitable tolling applies here, such that the statute of limitations had *not* run by the time of the filing of the original Complaint. Therefore, the Court recommends that Defendants' Motions be denied as to their argument that all the claims should be dismissed because they are time-barred.

2. Other Challenges to Plaintiffs' Claims

Next, Defendants raise other challenges to Plaintiffs' claims. The Court will address these challenges below.

a. Breach of Contract (Count I)

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argued that it did not apply at all. (*See* D.I. 95 at 5-9) So for now, the Court assumes that it could apply to toll the limitations period for all claims in the FAC.

[33] In their briefing, Defendants did not argue that even if the statute of limitations was tolled for a period of time, Plaintiffs nevertheless were on inquiry notice early enough to cause the claims to be untimely. (D.I. 95 at 8 (noting that such an "inquiry notice analysis is relevant only when Plaintiffs have shown that a tolling doctrine applies, and Plaintiffs have not")) To the extent that Defendants attempted to make such an argument for the first time at oral argument, (Tr. at 125-28, 156-57), the Court will not consider it here.

In Count I, Plaintiffs ECB and Atlantic Ventures bring breach of contract claims against Zausner. (FAC at ¶¶ 53-56)[34] Defendants raise two additional arguments as to why this claim should be dismissed.

First, Defendants argue that Plaintiffs fail to allege the occurrence of a condition precedent. (D.I. 83 at 28-29; D.I. 95 at 15) On that score, Article IX.3(c) of the SPA provides, in relevant part:

> (c) **Direct Claims**. Any claim by an Indemnified Party on account of a Loss which does not result from a Third-Party Claim (a "Direct Claim") shall be asserted by the Indemnified Party giving the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defenses by reason of such failure. Such notice by the Indemnified Party shall describe the Direct Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have 30 days after its receipt of such notice to respond in writing to such Direct Claim. . . If the Indemnifying Party does not so respond within such 30-day period, the Indemnifying Party shall be deemed to have rejected such claim, in which case the Indemnified Party shall be free to pursue such remedies as may be available to the Indemnified Party on the terms and subject to the provisions of this Agreement.

(SPA at Art. IX.3(c) (emphasis in original)) In Defendants' view, this language creates a condition precedent whereby only if ECB/Plaintiffs had given ZNHC/Zausner prior written notice of the claims here, and only if ZNHC/Zausner had failed to respond within a 30-day window, "then and only then" could Plaintiffs have brought suit regarding those claims. (D.I. 83

[34] Even though certain of the claims discussed below are brought by less than all Plaintiffs, the Court will simply refer to arguments as "Plaintiffs'" arguments, for ease of reference. And even though certain of the claims are brought against less than all Defendants, the Court will refer to arguments as "Defendants'" arguments.

at 29 (emphasis omitted); *see also* D.I. 95 at 15) And Defendants argue that because in their original Complaint, Plaintiffs stated that ECB had *not* made a formal, pre-suit demand on Zausner, this confirms that Plaintiffs cannot now make out a plausible breach of contract claim in the FAC. (D.I. 83 at 29 (citing D.I. 1 at ¶¶ 70-71))

However, so far as the Court can tell, there is no similar admission *in the FAC* confirming that no pre-suit demand was made. (*See* FAC) And to the contrary, the FAC does include an allegation that all "conditions precedent to bringing this action have been performed, satisfied, excused, or waived." (FAC at ¶ 52) Federal Rule of Civil Procedure 9(c) permits a plaintiff, in pleading conditions precedent, to "allege generally" that all such conditions precedent have occurred or been performed. Fed. R. Civ. P. 9(c); *Hildebrand v. Allegheny Cnty.*, 757 F.3d 99, 112 (3d Cir. 2014). Thus, in light of the record the Court can consider, *see supra* n.4, even if Defendants are correct about Article IX.3(c)'s meaning, their argument is not viable now. That is because it is plausible, based on the record, that Plaintiffs complied with the condition. (D.I. 92 at 33 n.7)

Second, Defendants assert that Plaintiffs fail to adequately plead the elements of a breach of contract claim, because Plaintiffs fail to state, with requisite factual specificity, *how* Zausner breached the SPA. (D.I. 83 at 30-32; D.I. 95 at 15; Tr. at 163-65); *see also DNA Sports Performance Lab, Inc. v. Club Atlantis Condo. Assoc., Inc.*, 219 So. 3d 107, 109 (Fla. Dist. Ct. App. 2017) (noting that the elements of a breach of contract claim are the existence of a contract, breach of that contract and resulting damages). But because Defendants had argued that all but two of the types of breaches of contract referenced in Count I were rendered invalid on statute of limitations grounds (a premise the Court ultimately has disagreed with herein), Defendants never provided a real argument regarding the insufficiency of those allegations of breach. Instead, they

did so only as to the two allegations of breach of contract that were not asserted to be time-barred: breach of Articles III.1 (regarding Schratter's having had all necessary governmental licenses and permits) and III.11 (regarding Schratter's compliance with all federal, state, local or foreign laws). (D.I. 83 at 31-32; D.I. 95 at 15; Tr. at 158-59, 162-64)[35] And as to those two Articles (that is, Article III.1 and III.11), in response, Plaintiffs did not really explain how the FAC *does* plausibly suggest that they have been breached (nor can the Court figure that out on its own). (D.I. 92 at 33-34) So the Court recommends that Zausner's Motion to Dismiss be granted as to this Count only with regard to the allegations of breach of Articles III.1 and III.11, and that it be denied as to this Count in all other respects.

b. Fraud Claims (Counts II through VI)

In Counts II and III, ECB and Atlantic Ventures respectively bring claims for fraud in the inducement against Defendants, (FAC at ¶¶ 57-66), and in Counts IV through VI, ECB, Atlantic Ventures and C2B respectively bring claims for fraud against Defendants, (*id.* at ¶¶ 67-81).[36] Defendants raise multiple grounds for dismissal of these claims. (D.I. 83 at 18-22; D.I. 95 at 9-12; *see also* D.I. 85 at 21-24) One of those arguments is that the claims should be dismissed for Plaintiffs' failure to satisfy the pleading requirements of Rule 9(b). The Court agrees that the

[35] Thus, the Court considers Defendants' arguments as to why the allegations are insufficient as to breach of the other 12 Articles referenced in Count I, (FAC at ¶ 55), to have been insufficiently developed and therefore waived at the pleading stage.

[36] At oral argument, for the first time, Plaintiffs' counsel suggested that all of the Fraud-Based Claims were styled as fraud in the inducement claims and that certain of these Counts "may be redundant" of each other. (Tr. at 194-96) The Court here will evaluate Plaintiffs' counts as they are pleaded in the FAC. But to the extent Plaintiffs do later attempt to re-plead these claims, they should address this "redundancy" issue.

claims are wanting on this ground; thus, it need not discuss Plaintiffs' other grounds for dismissal.[37]

In order to satisfy Rule 9(b), a plaintiff claiming fraud must allege, at a minimum, the "date, time and place of the alleged fraud" or must "otherwise inject precision or some measure of substantiation into a fraud allegation." *Frederico*, 507 F.3d at 200. And where allegations of fraud are brought against multiple defendants, "the complaint must plead with particularity . . . the [specific] allegations of fraud" applicable to each defendant. *MDNet, Inc. v. Pharmacia Corp.*, 147 F. App'x 239, 245 (3d Cir. 2005); *Hicks v. Boeing Co.*, Civil Action No. 13-393-SLR-SRF, 2014 WL 1284904, at *6 (D. Del. Mar. 21, 2014).

In their Fraud-Based Claims, Plaintiffs identify paragraphs 27 and 32 of the FAC as referencing the fraudulent misrepresentations that are at the heart of all five of these counts. (FAC at ¶¶ 58, 63, 68, 73, 78)[38] These allegations (i.e., that Defendants represented to Plaintiffs that Mr. Voss was Schratter's President and CEO at a time when in fact they had stripped Mr. Voss of all such authority, or that Defendants made 14 other different types of

[37] That said, the Court is not convinced that Defendants' other arguments would have been sufficient to warrant dismissal of all of these Fraud-Based Claims in their entirety. For example, Defendants argued that Plaintiffs' fraud allegations were not sufficiently independent of their allegations regarding breach of contract. (D.I. 83 at 20-21) But whether they are or not may depend on when and in what form such misrepresentations were made. *See LaPesca Grande Charters, Inc v. Moran*, 704 So. 2d 710, 712-13 (Fla. Dist. Ct. App. 1998); (D.I. 92 at 24-26) Additionally, Defendants argued that merger provisions in the SPA would bar these claims, (D.I. 83 at 18-19; D.I. 95 at 11-12), but the Court is not certain that the existence of such provisions would necessarily be a pleading bar here, *see Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1028-31 (11th Cir. 2017).

[38] Each of the five counts also allege that Defendants "concealed material information" from Plaintiffs, though they do not specify what "information" is being referenced. Thus, in order to explain why the counts fail to meet Rule 9(b)'s requirements, the Court will simply focus by way of example on the alleged fraudulent misrepresentations at issue.

misrepresentations, which largely mirror certain representations found in the SPA) are deficient in multiple ways from a Rule 9(b) perspective.

Most significantly, these allegations do not meet Rule 9(b)'s requirement that they sufficiently set out the "who" of the fraud. Instead, the FAC alleges that these misrepresentations were all made by the "Savencia Defendants" (a catch-all term for both Zausner and Savencia) or the "Savencia Defendants and their co-conspirators[.]" (FAC at ¶¶ 27-32) At no point is it clearly alleged whether any particular misrepresentation was made only by a Savencia representative, or by a Zausner representative, or by a co-conspirator, or by some or all of that group. *See Mosiman v. Madison Cos.*, Civil Action No. 17-1517-CFC, 2019 WL 203126, at *3 (D. Del. Jan. 15, 2019) (finding allegations that "'Defendants represented [or] misrepresented to Plaintiffs'" to be insufficiently vague for Rule 9(b) purposes when "Defendants" was defined to include many different individuals and entities); *see also Lum v. Bank of Am.*, 361 F.3d 217, 223-224 (3d Cir. 2004) (same). Additionally, although the FAC does suggest that in this time period, Mr. Bongrain, Mr. Ragnet and Mr. Voss were the primary negotiators for Defendants and Mr. Leoni and Mr. Blandin for Plaintiffs, (*id.* at ¶¶ 25-26), at no point does the FAC ever identify the speaker or the recipient of any particular misrepresentation, (*id*. at ¶¶ 27-32). *See Mosiman*, 2019 WL 203126, at *3; *see also Lum*, 361 F.3d at 223-24; *Hicks*, 2014 WL 1284904, at *7.

The allegations also do not sufficiently identify the "where" of the alleged misrepresentations. This includes not simply the failure to state "where" from a physical, geographical perspective the statements were made, but more importantly, the failure to indicate whether the statements were oral or written, or in what form they were communicated. *Cf. Skeans v. Key Commercial Fin. LLC*, Civil Action No. 18-1516-CFC, 2019 WL 3804692, at *5

(D. Del. Aug. 13, 2019) ("As to 'where' these allegedly false and misleading statements were made, plaintiff alleges that such statements were made through Mr. Billingsley's solicitations, promissory notes, and the Funding Agreement."), *report and recommendation adopted in relevant part*, 2019 WL 4635100 (D. Del. Sept. 24, 2019). This is particularly important here, where so many of the alleged misrepresentations mirror content in the SPA, but the FAC never makes it precisely clear whether it is referring to those SPA-related statements, or to similar written or oral statements that were made prior to the execution of that agreement.

Lastly, the allegations as to Count VI (brought by C2B) are in their own category of deficiency. The FAC almost never makes *any* allegation about C2B's involvement with the subject matter at issue, other than a reference about how the "Savencia Defendants induced C2B to loan millions of Euros to Schratter." (FAC at 2; *see also* D.I. 83 at 22)

As such, these allegations are deficient pursuant to Rule 9(b). Thus, the Court recommends dismissal of Counts II-VI on this basis.

c. Aiding and Abetting Breach of Fiduciary Duty Claim (Count VII)

In Count VII, Plaintiffs bring a claim for aiding and abetting a breach of fiduciary duty against both Defendants. (FAC at ¶¶ 82-88) Under Florida law, a plaintiff bringing such a claim must sufficiently allege: (1) a fiduciary duty on the part of the wrongdoer; (2) a breach of fiduciary duty; (3) knowledge of the breach by the alleged aider and abettor; and (4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *S&B/BIBB Hines PB 3 Joint Venture v. Progress Energy Fla., Inc.*, 365 F. App'x 202, 207 (11th Cir. 2010); *Fonseca v. Taverna Imports, Inc.*, 212 So. 3d 431, 442 (Fla. Dist. Ct. App. 2017).

Defendants challenge this claim on various grounds, one of which is that in it, Plaintiffs impermissibly "lump" their allegations against Zausner and Savencia together. (D.I. 83 at 28; D.I. 85 at 30-31) The Court agrees that this is a sound basis for dismissal of the claim.

Plaintiff brings Count VII against both Zausner and Savencia, and yet in the Count, Plaintiffs merely state that the "Savencia Defendants" "aided and abetted" Mr. Voss and Mr. Proust in breaching their fiduciary duties. (FAC at ¶¶ 85-86) And in their answering brief, when Plaintiffs attempt to explain why they believe Count VII's allegations are sufficient to withstand challenge, they point in support only to paragraphs 20, 27, 29 and 35 of the FAC. (D.I. 92 at 28-29; D.I. 93 at 31) But in each of those four paragraphs, the allegations address the "Savencia Defendants[']" conduct and how it relates to Mr. Voss' alleged breaches of fiduciary duty. (FAC at ¶¶ 20, 27, 29 & 35) Such allegations treat the two Defendants here as one combined whole. They never indicate what either of the two Defendants are said to have done individually. Nor do they make reference to any person employed by or who is the agent of each of those Defendants and who is said to have aided and abetted a breach. In lumping the two Defendants together in this way, the allegations are insufficient to meet Rule 8's requirements.[39] *See Adverio Pharma GmbH v. Alembic Pharms. Ltd.*, C. A. No. 18-73-LPS, 2019 WL 581618, at *6 (D. Del. Feb. 13, 2019) (granting dismissal and noting that "allegations lumping multiple defendants together without providing allegations of individual conduct are frequently [and were there] insufficient to satisfy the notice pleading standard"); *T-Jat Sys. 2006 Ltd. v. Expedia, Inc. (DE)*, C.A. No. 16-581-RGA-MPT, 2017 WL 896988, at *7 (D. Del. Mar. 7, 2017) (same).

[39] During oral argument, Defendants' counsel suggested that this claim must be pleaded with particularity pursuant to Rule 9(b). (Tr. at 177-78) But as Plaintiffs' counsel rightly noted, this argument was not fairly made in Defendants' briefs, (*id.* at 201-02), and will thus not be considered here.

Accordingly, the Court recommends that Count VII be dismissed.

d. Conspiracy Claims (Counts VIII and IX)

In Counts VIII and IX, Plaintiffs bring claims of conspiracy to commit breach of fiduciary duty against all Defendants, (FAC at ¶¶ 89-93), and conspiracy to commit constructive fraud against all Defendants, (*id.* at ¶¶ 94-99). Under Florida law, a civil conspiracy requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the commission of an overt act in furtherance of the conspiracy; and (4) damage to plaintiff as a result. *Eagletech Commc'ns, Inc. v. Bryn Mawr Inv. Grp.*, 79 So. 3d 855, 863 (Fla. Dist. Ct. App. 2012) (citation omitted). Furthermore, Florida law states that a valid claim must allege an independent underlying illegal act or tort on which the conspiracy is based. *See Carney v. IDI-DX, Inc.*, NO. 2:12-cv-00449-FtM-29DNF, 2013 WL 4080326, at *3 (M.D. Fla. Aug. 13, 2013); *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997).

Defendants challenge these conspiracy claims on various grounds. (D.I. 83 at 22-25; D.I. 85 at 25-28; D.I. 95 at 13-15; *see also* D.I. 92 at 29-32) The Court need only address certain of these challenges. With regard to Count VIII, just as the FAC's lumping together of the "Savencia Defendants" doomed the allegations in Count VII, the allegations regarding the "Savencia Defendants[']" wrongful acts in this Count are also insufficient. (FAC at ¶¶ 90-92) And with regard to Count IX, the Court has already explained why the underlying tort of fraud is not sufficiently pleaded, and so this count must fail as well. (D.I. 83 at 25)

IV. CONCLUSION

For the foregoing reasons, the Court recommends that Defendant Zausner's Motion be GRANTED-IN-PART and DENIED-IN-PART with respect to Count I and GRANTED with respect to Counts II-IX. The Court also recommends that Defendant Savencia's Motion be

DENIED with respect to personal jurisdiction grounds and GRANTED with respect to Rule 12(b)(6) grounds regarding Counts II-IX.

It seems at least possible to the Court that Plaintiffs, if given one more chance, could sufficiently amend their pleading to properly allege some or all of the claims in Counts II-IX. In light of that, because this is the first time the Court has found these claims to be deficiently pleaded, and because leave to amend should be given freely "when justice so requires[,]" Fed. R. Civ. P. 15(a)(2), the Court recommends that Plaintiffs be given leave to file one further amended complaint addressing the deficiencies as to these claims. The Court also recommends that if the District Court affirms its decision herein, Plaintiffs be given no more than 14 days to file such an amended complaint.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Dated: July 10, 2020

Christopher J. Burke

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE