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FILED
April 19, 2023
Hon. Gary K. Wolinetz, J.S.C.

AMENDED

COSMAX INC. AND COSMAX WEST CORP., Plaintiffs/Counter-Defendants, v. JONATHAN ROSENBAUM, STUART DOLLECK, LARD-NW, LLC, LARD-NW II, LLC, AND MICHAEL ROSENBAUM, Defendants/Counter-Plaintiffs/Third Party Plaintiffs, v. NU-WORLD CORP. Third-Party Defendant.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: MID-L-246-22 Civil Action CBLP Action AMENDED **ORDER AND STATEMENT OF REASONS**

THIS MATTER having come before the Court upon application of attorneys for Defendants Jonathan Rosenbaum and Stuart Dolleck ("Mr. Rosenbaum and Mr. Dolleck"), and

the Court having reviewed the submissions of counsel and any opposition thereto, and having heard oral argument on January 6, 2023, and for good cause shown:

IT IS on this 30th day of March 2023,

ORDERED that Mr. Rosenbaum and Mr. Dolleck's Motion to Dismiss the Amended Complaint filed by plaintiffs Cosmax Inc. and Cosmax West Corp. is **DENIED**, *without prejudice*, as discussed in the accompanying Statement of Reasons; and it is further

ORDERED that a copy of this Order shall be deemed served on all counsel of record upon its posting by the Court to the eCourts case jacket for this matter. Pursuant to R. 1:5-1(a), the Movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of this Order.

/s/ Gary K. Wolinetz
GARY K. WOLINETZ, J.S.C.

( ) Unopposed.
(X) Opposed.

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FILED

April 19, 2023

Hon. Gary K. Wolinetz, J.S.C.

AMEDNED

COSMAX INC. and COSMAX WEST CORP., Plaintiffs, v. JONATHAN ROSENBAUM, STUART DOLLECK, LARD-NW, LLC, LARD-NW II, LLC, and MICHAEL ROSENBAUM, Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION, CIVIL PART DOCKET NO.: MID-L-246-22 Civil Action CBLP Action AMENDED **ORDER AND STATEMENT OF REASONS**

This matter having been opened to the Court by motion of Kelley Drye & Warren, LLP, attorneys for defendants Michael Rosenbaum, Lard-NW, LLC ("Lard-NW"), and Lard-NW II, LLC ("Lard-NW II"), and the Court having reviewed the submissions of counsel, and having heard oral argument on January 6, 2023, and for good cause shown:

IT IS on this 30th day March 2023,

ORDERED that Michael Rosenbaum, Lard-NW, and Lard-NW II's Motion to Dismiss the Amended Complaint filed by plaintiffs Cosmax Inc., and Cosmax West Corp. (collectively

"Cosmax") is **GRANTED**, as discussed in the accompanying Statement of Reasons; and it is further

ORDERED that Plaintiffs have thirty (30) days from the date of this Order and Statement of Reasons are uploaded to eCourts to file a Second Amended Complaint that identifies the specific allegations against Michael Rosenbaum and the Lard Defendants underlying their fraud claims; and it is further

ORDERED that a copy of this Order shall be deemed served on all counsel of record upon its posting by the Court to the eCourts case jacket for this matter. Pursuant to R. 1:5-1(a), the Movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of this Order.

/s/ Gary K. Wolinetz
GARY K. WOLINETZ, J.S.C.

( ) Unopposed.
(X) Opposed.

STATEMENT OF REASONS

WOLINETZ, J.S.C.

PRELIMINARY STATEMENT

Defendants Michael Rosenbaum ("Michael Rosenbaum"), Lard-NW, LLC and Lard-NW II, LLC (collectively, the "Lard Defendants") jointly moved to dismiss the First, Second, and Third Counts of the Amended Complaint (the fraud claims) filed by plaintiffs Cosmax Inc., and Cosmax West Corp. (collectively, "Cosmax"). Additionally, Defendants Jonathan Rosenbaum ("Jonathan Rosenbaum") and Stuart Dolleck ("Dolleck") also jointly moved to dismiss the fraud claims, and the breach of contract claims solely against Dolleck. Where appropriate, Jonathan Rosenbaum, Michael Rosenbaum, Dolleck and the Lard Defendants are referred to, collectively, as the "NuWorld Defendants."[1]

This case arises out of Cosmax's purchase of NuWorld Corporation ("NuWorld" or the "Company") on November 13, 2017. At the time, NuWorld was one of the three largest cosmetics manufactures in the United States. Cosmax is a Korean cosmetics original design manufacturing company.

NuWorld was founded by Jonathan Rosenbaum in 1991. Jonathan Rosenbaum is the son of Michael Rosenbaum and was the CEO of NuWorld. Dolleck was the President of NuWorld.

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[1] In their respective briefs, the NuWorld Defendants cited 27 unpublished cases and Cosmax cited 20 unpublished cases to the Court. One case was cited by both parties. As counsel is aware, pursuant to R. 1:36-3, "no unpublished opinion shall constitute precedent or be binding upon any court." Therefore, I cannot cite unpublished cases in a decision. There are many reasons why certain cases are published and other cases are not. In the future, I respectfully urge counsel to carefully consider the use of unpublished cases, especially in the volume that they were relied upon in this motion. Citing a few key unpublished cases is fine. Citing close to 50 unpublished cases is not.

Michael Rosenbaum and the Lard Defendants were NuWorld shareholders. Michael Rosenbaum and the managers of the Lard Defendants were not officers or employees of the Company.

Jonathan Rosenbaum owned 30% of NuWorld's shares. Dolleck owned 20% of NuWorld's shares. The Lard Defendants collectively owned 40% of the Company (20% each). Michael Rosenbaum owned 10% of NuWorld's shares.

On November 13, 2017, as part of a Share Purchase Agreement (the "SPA"), Cosmax agreed to purchase all of NuWorld's outstanding shares for $50 million. The SPA detailed specific representations and warranties that were owed to Cosmax and the type of claims that could be brought by Cosmax against the company and the sellers.

In its Amended Complaint, Cosmax has asserted three separate fraud claims against the NuWorld Defendants: fraudulent misrepresentation, fraudulent inducement, and fraudulent concealment. Cosmax principally alleges that, leading up to the sale of NuWorld, the following events occurred: (1) NuWorld learned that a product, known as Gimme Brow, was filled and processed for one of its leading customers, Benefit Cosmetics, LLC ("Benefit"), was contaminated with bacteria, yeast, and a pathogen called *Pseudomonas aeruginosa*, which could have caused severe eye injuries and infections to consumers – especially those who have a compromised immune system; (2) NuWorld employees covered up the contamination and falsified certain test results to show that the positive results of contamination never occurred; (3) Benefit threatened to sue NuWorld and issued a worldwide recall of Gimme Brow from the market after investigations were done; (4) NuWorld concealed the product recall and risk of litigation from Cosmax; and (5) NuWorld did not disclose any of this information to Cosmax in the SPA or otherwise before the sale.

The NuWorld Defendants deny that they committed any fraud. Michael Rosenbaum and the Lard Defendants assert that they did nothing wrong and, in fact, are barely mentioned in the Amended Complaint. The NuWorld Defendants also claim that: (1) Cosmax's fraud claims and the breach of contract claims against Dolleck are not pleaded with adequate specificity, (2) Cosmax's fraud claims barred by the economic loss doctrine, and (3) the NuWorld Defendants had no duty to disclose the information about the Benefit recall because the Benefit issues were in the public sphere and available to Cosmax.

The motion to dismiss was argued on January 6, 2023. For the reasons stated below, and consistent with the stringent standards governing motions to dismiss in New Jersey, Jonathan Rosenbaum and Dolleck's joint motion to dismiss is **DENIED**, *without prejudice*. Michael Rosembaum and the Lard Defendants' joint motion to dismiss is **GRANTED**. However, Cosmax is given thirty days from the date this Order and Statement of Reasons are uploaded to eCourts to file a Second Amended Complaint that identifies the specific allegations against Michael Rosenbaum and the Lard Defendants underlying the fraud claims. As only one paragraph in its Amended Complaint substantively alleges that Michael Rosenbaum and the Lard Defendants committed fraud, Cosmax may not simply "lump" all the NuWorld Defendants as "Defendants" for each cause of action. See Am. Compl. ¶ 39. Instead, Cosmax must plead the specific fraudulent acts that Michael Rosenbaum and the Lard Defendants each allegedly did with particularity. R. 4:5-8(a).

THE AMENDED COMPLAINT

The Amended Complaint primarily focuses on the SPA and allegations surrounding NuWorld's conduct in the months leading up to the sale of the company to Cosmax. This section is only intended to highlight portions of the Amended Complaint, not delve into the minutiae of

the lengthy pleading as those allegations are set forth in Amended Complaint and the respective briefs of the parties. That said, I have carefully reviewed the Amended Complaint and all attachments provided by counsel that were specifically referenced in that document.

The SPA contains three sets of representations and warranties made pre-sale between NuWorld, the "Sellers" (Jonathan Rosenbaum, Dolleck, the Lard Defendants and Michael Rosenbaum), and the Sellers' Representative, NW Repco, LLC ("NW Repco"). NW Repco was created by the Sellers, though its manager, Jonathan Rosenbaum, to be bound by the SPA and take certain actions.

Article 3 contains the "Representations and Warranties of the Company." See Defs. Michael Rosenbaum & Lard Defendants Exh. A. Article 3 contains, among other things, allegedly false representations that induced Cosmax to enter into the SPA. Article 3A recites the "Representations and Warranties of the Sellers." Id. These representations concern each individual Seller's ability to sell their shares in NuWorld to Cosmax, but do not deal with the inner workings of the Company or the sale. Third, Article 3B are the "Representations and Warranties of the Sellers' Representative" Id.

As noted above, Article 3 of the SPA contained various representations and warranties that NuWorld made to Cosmax. Id. In the event that NuWorld's representations and warranties were inaccurate, the Sellers agreed to indemnify Cosmax for damages. Id. The SPA provided that $5 million of the purchase price was held in escrow to satisfy Cosmax's indemnification claims. Id. Unless the Sellers committed "actual fraud," Cosmax was limited to recovering $5 million it held in escrow pursuant to the SPA. Id. The SPA defined "actual fraud" as follows: "a Party shall not have committed 'actual fraud' unless they willingly and knowingly committed fraud against another party, with the specific intent to deceive and mislead such party." Id. Under the SPA, if

Cosmax asserted a claim for indemnification after the one-year anniversary of the closing but before the second anniversary of the closing, Coxmax's recovery of the escrowed monies was capped at $2.5 million. Id.

As mentioned earlier in this opinion, Cosmax's Amended Complaint alleged that Benefit issued a worldwide recall of Gimme Brow, a product that NuWorld filled and processed for Benefit, was contaminated. See Pl. Am. Compl. ¶ 2. Cosmax alleges that the contamination can cause serious and difficult to treat eye infections. Id.

According to Cosmax, NuWorld learned about the Gimme Brow contamination in the spring of 2017. See Pl. Am. Compl. ¶ 3. Benefit pulled its business and threatened to sue NuWorld shortly before Cosmax's purchase of NuWorld was set to close. Pl. Am. Compl. ¶ 43-52. Cosmax alleges that NuWorld hid: (1) the Gimme Brow contamination issue, (2) the recall, (3) claims of falsified test results, and (4) Benefit's threat of litigation from Cosmax and in the SPA until the sale of the Company closed, which is contrary to NuWorld's representations and warranties in the SPA. See Pl. Am. Compl. Part V. In short, Cosmax alleged that NuWorld engaged in fraud and a massive cover-up, by not advising Cosmax about NuWorld's issues with Benefit. Cosmax claims that it first learned of the Benefit matter from Jonathan Rosenbaum after it acquired the company from NuWorld. See Pl. Am. Compl. ¶ 53-55.

After the closing, Cosmax alleges that Benefit's insurer, XL Catlin ("XL"), sued NuWorld for "tens of millions of dollars" in damages allegedly suffered by Benefit as the result of the contamination and recall. See Pl. Am. Compl. ¶ 90-91. Cosmax alleges that a cover-up of this proportion could not have been consummated without the express knowledge and approval of at least Jonathan Rosenbaum, who exerted control over the Company and ran it like a family

business. See Pl. Am. Compl. ¶ 79. Ultimately, Cosmax resolved its litigation with XL, but only after it alleges that it paid a significant settlement. See Pl. Am. Compl. ¶ 90-91.

A few additional issues relevant to this motion that were pleaded in the Amended Complaint and are worthy of discussion. First, Cosmax alleges during Benefit's investigation of the source of the contamination, Alan Wormser, manager and sole shareholder of Lard-NW), emailed Jonathan Rosenbaum with an alert from an industry newsletter that referenced the Gimme Brow recall with these precise words and ellipses "See Benefit . . ." See Pl. Am. Compl. ¶ 39. Cosmax alleges that as a NuWorld shareholder and insider, Wormser would have known that NuWorld filled and packaged Gimme Brow for Benefit.

Cosmax also pleaded that Dolleck's loans from NuWorld had outstanding principal and interest of $560,000 as of March 2020. See Pl. Am. Compl. ¶ 125. According to Cosmax, while Dolleck has accepted his liability for these loans, they have not been paid. See Pl. Am. Compl. ¶ 130.

Finally, despite this laundry list of alleged misconduct against the NuWorld Defendants, only one paragraph mentions Michael Rosenbaum and the Lard Defendants in a substantive capacity:

> [I]n their Counterclaims filed in this litigation, the Officer Defendants [Jonathan Rosenbaum and Stuart Dolleck] admit that they both had knowledge of the contamination and recall prior to selling NuWorld to Cosmax. Likewise, Michael Rosenbaum, LardNW, LLC, and Lard-NW II, LLC (collectively, the 'Non-Officer Defendants') specifically deny in their Answer to Plaintiffs' Complaint that the NuWorld owners failed to provide Cosmax with information that would have led Cosmax to discover the Gimme Brow contamination and recall—a denial that they could only make if they themselves knew about the contamination and recall prior to Closing. Additionally, on November 3, 2017, Alan Wormser emailed Jonathan Rosenbaum and the NuWorld COO, forwarding an alert from an industry newsletter that mentioned the Gimme Brown recall, commenting only 'See Benefit . . .'
>
> See Pl. Am. Compl. ¶ 39 (citations omitted).

Cosmax has asserted claims for fraudulent misrepresentation, fraudulent inducement and fraudulent concealment against all the NuWorld Defendants, including Michael Rosenbaum and the Lard Defendants. I will discuss the parties' respective positions regarding those claims in the pages that follow, after a discussion of the standard in New Jersey governing motions to dismiss.

THE LEGAL STANDARD GOVERNING MOTIONS TO DISMISS

A motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to R. 4:6-2(e), is "judged by determining 'whether a cause of action is "suggested" by the facts.'" Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988))). A trial court's review under Rule 4:6-2(e) "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Ibid. (citations omitted). As part of its review, the trial court is obligated to "search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (citations omitted).

In "this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart-Morristown, 116 N.J. at 746 (citation omitted). Every reasonable inference of fact is to be construed in favor of the plaintiff. Ibid.; Velantzas, 109 N.J. at 192; Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). "Obviously, if the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

Guided by these principles, the Court must "treat the [plaintiff's] version of the facts as uncontradicted and accord it all legitimate inferences." Ibid. In so doing, the Court must not judge

"the truth of the facts alleged; [it must] accept them as fact only for the purpose of reviewing the motion to dismiss." Ibid. (citing R. 4:6-2(e)). Accordingly, this "examination of [the] complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach." Printing Mart-Morristown, 116 N.J. at 746.

Finally, the Court must treat a Rule 4:6-2(e) motion "with caution" and grant such a motion in "only the rarest of instances." Banco Popular N. Am., 184 N.J. at 165 (alteration omitted) (citing Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993) (quoting Printing Mart-Morristown, 116 N.J. at 772)).

MICHAEL ROSENBAUM AND THE LARD DEFENDANTS' MOVING BRIEF

Michael Rosenbaum and the Lard Defendants assert that Cosmax must plead fraud with specificity, including the dates and times, if necessary pursuant to R. 4:5-8(a). As a result, when dealing with multiple defendants, Michael Rosenbaum and the Lard Defendants note that Cosmax must make specific and separate allegations against each defendant – not lump all defendants together in a form of group pleading.

Michael Rosenbaum and the Lard Defendants argue that the Amended Complaint does not satisfy that pleading standard. For example, Cosmax does not assert Michael Rosenbaum or the Lard Defendants had any contact with Cosmax during the negotiations involving the purchase of Cosmax, made any representations to Cosmax, or concealed anything from Cosmax. According to Michael Rosenbaum and the Lard Defendants, what Cosmax did was simply take approximately twenty allegations in the original Complaint against NuWorld that were previously directed at Jonathan Rosenbaum and now restated those allegations against all defendants by changing "Jonathan Rosenbaum" to "Defendants". Michael Rosenbaum and the Lard Defendants assert that this was nothing more than a game of "find and replace". See Defs. Michael Rosenbaum & Lard

Defendants Br. 10. Michael Rosenbaum states in his brief he was not involved in NuWorld's daily business and had no knowledge of the Benefit recall.

Similarly, the Lard Defendants assert that the Amended Complaint does not sufficiently allege facts that either of those entities had any knowledge of the Benefit recall prior to the closing. According to Lard-NW II, it made no direct allegations against David Wormser, its manager and sole shareholder.

As for Lard-NW, the Amended Complaint alleges that Alan Wormser, forwarded an email blast to Jonathan Rosenbaum and Christopher Birrell (at NuWorld) sent by Global Cosmetics News, a London-based digital publisher of business information for the cosmetics industry. This e-mail allegedly mentioned the Benefit recall, but not Cosmax or NuWorld. See Pl. Am. Compl. ¶ 39. The text of the forwarding email from Alan Wormser, including the ellipses, states as follows: "See Benefit . . ." Id.

Aside from its failure to plead fraud with specificity, Michael Rosenbaum and the Lard Defendants claim that Cosmax is barred from turning a breach of contract into a fraud claim under the economic loss doctrine. Quoting Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2012), Michael Rosenbaum and the Lard Defendants note that "a tort remedy does not arise from a contractual relationship unless the breaching party owes an independent duty imposed by law." According to these defendants, a fraud claim can only precede a breach of contract claim if the alleged fraudulent conduct is "extrinsic" to the contract that governs the parties' relationship. State Cap. Title & Abstract Co. v. Pappas Bus. Servs., LLC, 646 F. Supp. 2d 668, 676 (D.N.J. 2009).

Setting aside the numerous unreported cases attached to each counsel's certification, all of which were submitted in violation of R. 1:36-3,[2] Michael Rosenbaum and the Lard Defendants emphasize that Cosmax's fraud claims are premised on the parties' written agreement, not on any independent duty that arose outside of the SPA. Nor, according to Michael Rosenbaum and the Lard Defendants, did Cosmax allege in the Amended Complaint that these defendants made any pre-contractual misrepresentations that could constitute fraud. As a result, Michael Rosenbaum and the Lard Defendants state that these claims are barred by the economic loss doctrine because a mechanism for dealing with fraud claims is referenced to the SPA.

Michael Rosenbaum and the Lard Defendants next assert that Cosmax did not adequately plead a claim of fraudulent concealment. Their argument is straightforward – none of these defendants had a duty to disclose because Cosmax did not adequately allege that they had any knowledge of facts that were wrongfully concealed. Even if these defendants had "superior knowledge," which they dispute, Michael Rosenbaum and the Lard Defendants assert that the Benefit recall was a matter of public knowledge.

JONATHAN ROSENBAUM AND DOLLECK'S MOVING BRIEF

Jonathan Rosenbaum and Dolleck assert that Cosmax is trying to obtain what it could not obtain at the bargaining table in Court – that is, indemnification for alleged contractual breaches by NuWorld, through contrived and duplicative fraud claims. According to Jonathan Rosenbaum and Dolleck, Cosmax alleges that it was not defrauded by anything these defendants said or did to

[2] R. 1:36-3 provides in relevant part that "No unpublished opinion shall be cited to any court by counsel unless the court and all other counsel are served with a copy of the opinion and all contrary unpublished opinions known by counsel." (Emphasis added). Counsel supplied me with copies of approximately 50 unpublished opinions, but did not provide an affidavit, certification or even and unsworn statement that they provided "all contrary unpublished opinions known by counsel."

them, but by the representations made by NuWorld contained in the SPA. In essence, Jonathan Rosenbaum and Dolleck contend that individual liability cannot be imposed on these defendants.

Jonathan Rosenbaum and Dolleck also incorporate the arguments raised in Michael Rosenbaum and the Lard Defendants' moving brief and note that the Amended Complaint did not allege any specific communications between Jonathan Rosenbaum and/or Dolleck and Cosmax that could evidence fraud.

Dolleck acknowledges that Cosmax alleges that he breached certain loans that Dolleck purportedly received from NuWorld. However, Dolleck states that: (1) these loans are not specifically identified in the Amended Complaint, and (2) Cosmax did not allege when the breached occurred. As a result, Dolleck contends that Cosmax did not plead if the loan term was breached during the statute of limitations period, if there even was a breach, and, therefore, Cosmax has not pleaded sufficient facts to make a valid cause of action.

COSMAX'S OPPOSITION BRIEF

In its Preliminary Statement, Cosmax claims that NuWorld Defendants' legal arguments are wrong, especially at this stage of the litigation. I will briefly highlight Cosmax's response to the NuWorld Defendants' contentions and provide more detail later in the opinion.

1. The economic loss doctrine does not preclude the fraud claims because the doctrine has never been applied in New Jersey state court to a fraud claim and, even if it did, it would not bar fraud claims based on representations of current fact that were made to induce a party to enter into a contract.
2. The notion that Jonathan Rosenbaum and Dolleck did not make misrepresentations to Cosmax, as opposed to NuWorld, is preposterous because it ignores the potential liability of each Seller to Cosmax for fraud.

3. The claims against Michael Rosenbaum and the Lard Defendants should not be dismissed because they alleged sufficient facts that these defendants were aware of the issues involving Benefit.
4. Contrary to the NuWorld Defendants' assertion regarding their fraudulent concealment claim, Cosmax has alleged a duty to disclose based on their partial disclosures in the SPA, which were misleading.
5. As for Dolleck's claim that Cosmax did not sufficiently allege that he breached loan agreements between himself and NuWorld, Cosmax states that it adequately pleaded the existence of these loan and that they were due and owing.

A. THE ECONOMIC LOSS DOCTRINE

Cosmax's major contention is that the NuWorld Defendants have not cited a single published New Jersey case where the economic loss doctrine barred a fraud claim. Cosmax emphasizes that the representations made by the NuWorld Defendants in the SPA were expressly made to induce it to execute and perform the contract and reflected the current status and condition of NuWorld when the business was sold. Cosmax asserts that NuWorld had a duty not to make false statements about the Company – which it breached – regardless of the contents of the SPA.

Cosmax further asserts that application of the economic loss doctrine in this matter would bar it from seeking punitive damages, which are an effective tool in dealing with fraudulent conduct. Such a determination would be contrary to the parties' agreement in the SPA to permit Cosmax to assert fraud claims in an action such as this.

B. PLEADING WITH SPECIFICITY IN GENERAL

i. THE FRAUD CARVE-OUT

Cosmax alleges that it has adequately alleged, through defendants' own statements, facts supporting an inference of each defendants' knowledge of the falsity of their representations. Cosmax notes that the text and structure of the SPA make clear that the Sellers are responsible for the inaccuracies in representations and warranties made by the "Company" – which emanate from and are attributable to the Sellers. See Pl. Opp. Br. 41.

Cosmax asserts that "Defendants do not and cannot explain what function the fraud carve-out could possibly serve – what an actionable fraud claim could even be – if it does not authorize Cosmax's fraud claims in this case." Pl. Opp. Br. 30. According to Cosmax, any other reading of the SPA, would render its express preservation of the fraud claims meaningless because Cosmax's only viable remedy for fraudulent misrepresentations in Article 3 of the SPA would be to sue itself - - the current owner of NuWorld.

ii. THE CLAIMS AGAINST MICHAEL ROSENBAUM AND THE LARD DEFENDANTS

As for Michael Rosenbaum and the Lard Defendants, Cosmax claims that it survives a motion to dismiss because it adequately alleged sufficient facts that these defendants knew of the Gimme Brow recall prior to closing. Cosmax asserts that other documents will be available in discovery, which has yet to occur. Cosmax emphasizes that pre-sale NuWorld was a closely held family company and the nature of the scheme supported a reasonable inference that Michael Rosenbaum and the Lard Defendants knew about it and were involved.

Regarding Lard-NW, Cosmax refers to the email blast that Alan Wormser received from an industry newsletter, which he forwarded to Jonathan Rosenbaum with the handwritten note "See Benefit . . ." Cosmax argues that this statement "coupled with the pending acquisition of

NuWorld and ensuing $10 million payday for Alan Wormser, makes it implausible that he was not referring to NuWorld's involvement in the Gimme Brow recall when he sent this email." Pl. Opp. Br. 36.

iii. FRAUDULENT CONCEALMENT

Cosmax asserts that the NuWorld Defendants' claim that a duty to disclose between transacting parties is not limited to situations where: (1) the parties have a fiduciary relationship, (2) the transaction itself is fiduciary, and (3) if one party reposes a trust and confidence in the other. Rather, Cosmax argues that it adequately pleaded that the NuWorld Defendants had a duty to disclose the complete truth regarding the Gimme Brow recall and contamination because of their partial misleading representations in the SPA. According to Cosmax, "Defendants disclosed some facts while omitting others that rendered their representations about the status of NuWorld's business deeply misleading." Pl. Opp. Br. 48. See also Pl. Opp. Br. 49, listing alleged partial misrepresentations in the SPA by the NuWorld Defendants.

iv. DOLLECK BREACHED HIS LOAN AGREEMENTS

Cosmax asserts that at the pleading stage it adequately alleged the existence of the loans and Dolleck's failure to pay them back. According to Cosmax, that is all that is required. The fact that Dolleck may have a statute of limitations defense to some of these loans does not, according to Cosmax, warrant dismissal of these claims.

MICHAEL ROSENBAUM AND THE LARD DEFENDANTS' REPLY BRIEF

Michael Rosenbaum and the Lard Defendants reiterate that Cosmax did not adequately plead in the Amended Complaint that these defendants had any involvement in the alleged cover-up involving Benefit, made any misrepresentations to Cosmax, or actively concealed anything from Cosmax. Michael Rosenbaum and the Lard Defendants emphasize that the representations

contained in Article 3 of the SPA were those of the "Company" – i.e. NuWorld – not Michael Rosenbaum or the Lard Defendants. See Defs Michael Rosenbaum and the Lard Defendants Reply Br. 6. The only representations that Michael Rosenbaum and the Lard Defendants made, who were passive shareholders and not officers nor employees, were contained in Article 3A of the SPA, and were contractually capped in accordance with their pro rata shares.

These defendants also restate that Alan Wormser's email to Jonathan Rosenbaum, which forwarded an industry newsletter and stated "See Benefit . . .", was public knowledge, revealed nothing and cannot sustain three separate fraud claims.

Next, Michael Rosenbaum and the Lard Defendants, citing to a federal case and numerous unpublished New Jersey cases, make the same arguments that they did in their moving brief regarding the economic loss doctrine. Michael Rosenbaum and the Lard Defendants then restate their arguments made in their moving brief that Cosmax did not adequately allege that these defendants committed fraud under New Jersey law.

JONATHAN ROSENBAUM AND DOLLECK'S REPLY BRIEF

Jonathan Rosenbaum and Dolleck reiterate that Cosmax's fraud claims must be dismissed because they are not particularized and are premised on representations made by NuWorld in the SPA – not these specific defendants. The fraud claims, according to Jonathan Rosenbaum and Dolleck, must be "willfully and knowingly committed against [Cosmax], with the specific intent to deceive and mislead [Cosmax]." See Defs. Jonathan Rosenbaum and Stuart Dolleck Reply Br. 3.

These defendants assert that the Amended Complaint did not meet this heightened pleading standard. Jonathan Rosenbaum and Dolleck further note that the contractual indemnification referenced in the SPA is limited to the monies that were placed in escrow at the closing. Further,

Dolleck disputes that Cosmax has pleaded the loan claims with the necessary specificity, which makes it impossible for him to ascertain: (1) if a valid contract exists, (2) did Dolleck breach the contract, and (3) did the breach occur during the relevant statute of limitations period.

THE COURT'S RULING

A. MICHAEL ROSENBAUM AND THE LARD DEFENDANTS

I will first deal with the claims of Michael Rosenbaum and the Lard Defendants. To reprise, Cosmax asserts that these defendants, along Jonathan Rosenbaum and Dolleck, participated in a massive fraud and cover-up involving the sale of NuWorld to Cosmax. Specifically, according to the Amended Complaint, it is alleged that: (1) NuWorld learned before the sale that a product known as Gimme Brow that it filled and processed for its customer, Benefit, was contaminated, which could have caused severe eye injuries to consumers, especially those with a compromised immune system; (2) NuWorld covered up the contamination and falsified certain test results; (3) Benefit threatened to sue NuWorld, and recalled Gimme Brow from the market; (4) NuWorld concealed the product recall and the risk of litigation from Cosmax; and (5) NuWorld did not disclose any of this information to Cosmax in the SPA or otherwise prior to the closing.

These are significant allegations of wrongdoing and fraud. However, even given the liberal standards set forth in Printing Mart, there are insufficient facts pleaded to even "suggest" a viable cause of action against Michael Rosenbaum and the Lard Defendants. The fact that Michael Rosenbaum is Jonathan Rosenbaum's father or that the Company was allegedly operated as a family business is not enough. Nor does the fact that Alan Wormser sent an ambiguous two-word email to Jonathan Rosenbaum referencing the Benefit recall, which was a matter of public knowledge.

What is necessary here are specific allegations of fraud against each defendant pleaded with particularity. That is missing in the Amended Complaint as to these defendants who were shareholders, not officers of the Company. There are no specific allegations that, aside from selling the Company, these defendants had anything to do with the massive fraud pleaded by Cosmax. There are no specific allegations that Michael Rosenbaum and the Lard Defendants communicated with Cosmax, made any misrepresentations to Cosmax, or concealed anything from Cosmax.

It appears, as counsel for these defendants suggest, that Cosmax simply replaced the name of "Jonathan Rosenbaum" from the original Complaint in various situations and replaced it with the word "Defendants" to encompass Michael Rosenbaum and the Lard Defendants. That is insufficient, even considering the liberal pleading standards in New Jersey, to further embroil these defendants in this litigation at this juncture. Perhaps evidence will emerge to substantiate these allegations in the future. But it is not adequately pleaded in the Amended Complaint.

Accordingly, I am **dismissing**, *without prejudice*, the claims against Michael Rosenbaum and the Lard Defendants on this basis alone – the lack of specificity in the pleaded fraud claims. Cosmax has thirty days to amend its Amended Complaint, if it elects to do so, to pursue claims against these defendants by asserting specific and particularized allegations against these defendants – not just "Defendants" in general as it did previously.

B. JONATHAN ROSENBAUM AND STUART DOLLECK

Next, I will address the claims against Jonathan Rosenbaum and Dolleck. These defendants incorporated the arguments raised by Michael Rosenbaum and the Lard Defendants as to the fraud claims. I found that Cosmax has pleaded sufficient facts against these defendants to "suggest" a cause of action. The question is whether the fraud claims survive under the economic loss doctrine and/or constitute fraudulent concealment in the context of a motion to dismiss where

I must give Cosmax all favorable inferences, construe all facts in its favor, and not concern myself with the ability of Cosmax to prove the allegations. Printing Mart-Morristown, 116 N.J., at 746.

Regarding the economic loss doctrine, "[u]nder New Jersey law, a tort remedy does not arise from a contractual relationship, unless the breaching party owes an independent duty imposed by law." Saltiel, 170 N.J., at 280. As a result, "plaintiff cannot convert basic contract claims into negligence claims in order to create a basis for the imposition of personal liability against corporate officers." Id., at 281. The District of New Jersey, per former Chief Judge Freda L. Wolfson, applying New Jersey law, explained the doctrine:

> The economic loss doctrine prohibits plaintiffs from recovering in tort economic losses to which their entitlement only flows from a contract. In other words, whether a tort claim can be asserted alongside a breach of contract claim depends on whether the tortious conduct is extrinsic to the contract between the parties. For instance, a plaintiff may be permitted to proceed with tort claims sounding in fraud in the inducement so long as the underlying allegations involve misrepresentations unrelated to the performance of the contract, but rather precede the actual commencement of the agreement.

State Capital Title, 646 F. Supp. 2d, at 676 (citations and quotations omitted).

Stated another way, are the fraud claims alleged by Cosmax regarding the Benefit situation, i.e. the contamination of the product, the cover-up, the false tests, the product recall, the threats to sue, extrinsic or intrinsic to the SPA? According to Cosmax, these allegations constitute fraud in the inducement, and it would never have entered into the deal if it had known the scope of pre-sale NuWorld's issues with Benefit. Thus, Cosmax's fraud claims are arguably extrinsic to the SPA. Further, the fraud claims do not concern post-sale NuWorld's ability to perform the SPA.

However, one could logically assert that the Benefit issue, at worst, constitutes "actual fraud" as detailed in the SPA. As a result, it would be intrinsic to the parties' contract and, thus, the new fraud claims should be dismissed under the economic loss doctrine. One could also claim

that what Cosmax really wants is to rewrite the deal that it negotiated over a lengthy period of time.

At this point, in the context of the liberal pleading standards in New Jersey on a motion to dismiss, and my obligation to accept the truth of the facts alleged, I believe the better course is to deny the motion on the fraud claims as to these defendants, including the fraudulent concealment claim, so discovery may proceed on these issues and the truth about what occurred emerges. After all, "[e]ven where no duty to speak exists, one who elects to speak must tell the truth when it is apparent that another may reasonably rely on the statements made." Strawn v. Caruso, 271 N.J. Super. 88, 105 (App. Div. 1994). If appropriate, of course, defendants may renew this issue on a motion for summary judgment after a period of discovery ensues.

Finally, Dolleck's motion to dismiss based on the loan issue is **DENIED**, *without prejudice*. This breach of contract claim is adequately pleaded, notwithstanding the fact that Cosmax did not allege the specific particulars of the loans at issue. Again, Cosmax does not have to prove the loans at this juncture, only allege that a cause of action is suggested by the facts. Printing Mart-Morristown, 116 N.J. at 746. Cosmax has done that.

CONCLUSION

Therefore, the motion to dismiss filed jointly by Jonathan Rosembaum and Stuart Dolleck is **DENIED**. The motion to dismiss filed jointly by Michael Rosenbaum and the Lard Defendants is **GRANTED**.