IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMCAST SPECTACOR L.P.	:	CIVIL ACTION
v.	:	
CHUBB & SON, INC., et al.	:	NO. 05-1507

MEMORANDUM

Dalzell, J. August 8, 2006

Comcast Spectacor, L.P., d/b/a the Philadelphia Flyers, claims that, relying on defendants' representations, it bought certain performance bonus insurance for one of its professional ice hockey players. It alleges that defendants then executed a "bait and switch" by changing the terms of that insurance without notifying Comcast.

Comcast now sues James J. McCarthy, Chubb & Son, Inc., ICL, Ltd., ASU International, Inc., HCC Insurance Holdings, Inc., and Certain Underwriters at Lloyd's, London. The second amended complaint asserts six counts against each defendant: (1) breach of contract and breach of implied duty of good faith and fair dealing; (2) bad faith; (3) intentional and/or negligent misrepresentation; (4) promissory estoppel/detrimental reliance; (5) unjust enrichment; and (6) rescission/reformation. We have jurisdiction over this matter pursuant to 28 U.S.C. § 1332.

Each defendant moves separately to dismiss all counts under Fed. R. Civ. P. 12(b)(6). HCC also moves to dismiss under Fed. R. Civ. P. 12(b)(2). On June 1, 2006, we ordered the parties to conduct discovery and submit briefs on the issue of agency because we are treating that issue as a summary judgment

matter,[1] and we also ordered Comcast and HCC to conduct discovery and submit briefs on the issue of personal jurisdiction. They have done so. Today we resolve the jurisdictional question as to HCC, the summary judgment motions concerning agency,[2] and the

[1] The motions to dismiss and Comcast's response thereto ask us to consider documents outside of the pleadings that were relevant to the question of agency, the theory upon which Comcast largely bases its claims. If a defendant files a motion to dismiss under Rule 12(b)(6) and presents matters outside the pleadings, Rule 12(b) permits us to treat the motion as one for summary judgment, to be disposed of under Rule 56, after the parties have been given "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). To consider the parties' documents and to ensure this case proceeds against the proper defendants, we notified the parties that, pursuant to Rule 12(b), we would treat the motions to dismiss as motions for summary judgment as to the issue of agency only and afforded them time for discovery and supplemental briefing.

[2] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party "must adduce more than a mere scintilla of evidence in its favor, and cannot simply reassert factually unsupported allegations contained in its pleadings." Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

remaining matters in the motions to dismiss.[3]

I. Factual and Procedural Background

Comcast Spectacor, L.P. does business as the Philadelphia Flyers ("Comcast" or "The Flyers"), which operates the National Hockey League ("NHL") franchise in Philadelphia.[4] See Second Am. Compl. ¶ 18. The Flyers employed Joni Pitkanen as a professional ice hockey player at all times relevant to this

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[3] The Court may grant a motion to dismiss under Rule 12(b)(6) "only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In other words, we will not grant such a motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Semerenko v. Cendant Corp., 223 F.3d 165, 173 (3d Cir. 2000) (permitting dismissal "only if it appears that the [plaintiffs] could prove no set of facts that would entitle [them] to relief"). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendants on notice of the essential elements of the plaintiffs' cause of action." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996).

Even if the allegations are insufficient by themselves, we will still deny a motion to dismiss so long as the allegations "in addition to inferences drawn from those allegations, provide a basis for recovery." Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 124-125 (3d Cir. 1998); see also Scheuer, 416 U.S. at 236 ("[T]he allegations of the complaint should be construed favorably to the pleader."); Emerson v. Thiel College, 296 F.3d 184, 188 (3d Cir. 2002) ("A complaint will withstand an attack under Federal Rule of Civil Procedure 12(b)(6) if the material facts as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery.").

[4] Comcast Spectacor also operates the Philadelphia 76ers, a National Basketball Association franchise. See Second Am. Compl. ¶ 23 n.1.

case. See id. ¶ 19. For the 2003-2004 NHL season, Pitkanen received a base salary of $592,500 and was eligible for six performance bonuses worth up to $2,600,000. See id. Pitkanen's receipt of each bonus depended on whether he achieved certain individual awards or statistical plateaus. See id. ¶ 20. If he achieved two or more of those bonus milestones, he would receive "the amount for each bonus earned plus the difference between the total amount earned and $2,600,000." ASU and HCC Appendix, Ex. A to Stanley Aff., Contract Agreement for Joni Pitkanen ¶ 4(ii).

To account for the possibility of having to pay performance bonuses, The Flyers sometimes purchased insurance for certain players. See Second Am. Compl. ¶ 22. In previous seasons Comcast had placed performance bonus coverage for other Flyers' and Philadelphia 76ers' players through James McCarthy, who is said to be an insurance agent. See id. ¶ 23.

McCarthy sent Lewis Bostic, Vice-President of Risk Management at Comcast Spectacor, L.P., a letter dated July 10, 2003. See id. ¶ 24. Comcast alleges that this letter "specifically sets forth that McCarthy is an agent of underwriters who could place coverage for 'all performance bonuses.'" Id. This letter stated, in full:

> Dear Lew:
>
> I realize that the Performance Bonus Clauses in the CBA (Exhibit 5) have become an anathema to many, if not all General Managers, but insurance is still available to enable you to budget your bonus arrangements with the players for this year. In fact, it

> is still available for all performance bonuses.
>
> As I mentioned before, I have access to the principal underwriters who are based here in Boston and who I have had a relationship with for the past 40 years and I would be able to forward to you the best quotes as I have in the past.
>
> I will also be glad to direct you to these underwriters with whom you could speak on a personal basis and at no obligation to yourself to determine in advance the amount of insurance that will be available *prior* to negotiating a player's final contract. You also might consider a team bonus situation where all bonuses could be combined.
>
> I will call you sometime soon.
>
> Very truly yours,
>
> James J. McCarthy

Id. Ex. A.

On or about July 10, 2003, after receiving McCarthy's letter, Bostic is said to have "contacted McCarthy via telephone, unequivocally requesting insurance coverage for *any* of Pitkanen's six (6) performances being achieved." Id. ¶ 24. Comcast also avers that "during the telephonic communication, [McCarthy] verbally identified himself as an agent of Lloyd's of London, Chubb, ASU, HCC and ICL, [and] indicated that he would endeavor to obtain the requested coverage." Id. ¶ 25. During this conversation, McCarthy and Bostic allegedly did not discuss as to any player the possibility of coverage that would activate with a minimum of two bonus milestones being reached. Id.

On July 17, 2003, Bostic sent McCarthy the following

letter, along with copies of contracts for Pitkanen and another player:

> Re: Performance Bonus Coverage
>
> Dear Jim:
>
> I am enclosing copies of the contracts for two of our players. Both contracts contain bonus clauses and we would like to investigate the availability of coverage on those bonuses.
>
> Once you have reviewed these agreements, I would appreciate it if you would contact me so that we might develop a strategy to proceed and market these contracts for coverage. If you need additional information, let me know as soon as possible.
>
> Thank you for your attention to this matter.
>
> Very Truly Yours:
>
> Lewis R. Bostic
> Vice President

Second Am. Compl. Ex. B; see also ASU and HCC Appendix, Ex. A to Stanley Aff. Comcast relies on this cover letter for the proposition that it "requested insurance coverage as to all performance bonuses that Pitkanen was eligible to earn, totaling $2,600,000.00." Second Am. Compl. ¶ 26.

Pitkanen's contract listed six "2003-04 INDIVIDUAL 'A' NHL PERFORMANCE BONUSES." ASU and HCC Combined Appendix Supporting Dismissal, Ex. A. Immediately after the bonus schedule, the contract stated that "If Player achieves two (2) or more of the 'A' bonuses, Player shall be paid the amount for each bonus earned plus the difference between the total amount earned

and $2,600,000." Id. ¶ 4(ii). It also stated that "If Player achieves less than two (2) 'A' bonuses, Player shall be paid only those bonus amounts earned." Id. ¶ 4(iii).

Typically, when McCarthy received player information from Bostic or other Comcast representatives, he transmitted this information to ASU so that it could search the insurance market for the requested coverage. See McCarthy Dep. 54:11-55:11, June 22, 2006. When McCarthy's office received Bostic's letter and the player contracts, it forwarded them to ASU. See id. 125:17-126:10. ASU received them on or about July 31, 2003. See ASU and HCC Appendix, Ex. 8 Stanley Aff. ¶ 7. Jeff Stanley, who from 2003 to 2004 was a Sports Underwriter at ASU and McCarthy's primary contact there, then contacted insurers with whom ASU had relationships to ask about available coverage and terms. See id. ¶ 10. According to Stanley, neither McCarthy nor Bostic advised him that Comcast was seeking coverage for each of the individual bonuses in the Pitkanen contract. See id. ¶¶ 2-3, 9, 14-15.

On September 9, 2003, Stanley faxed McCarthy a "pricing indication" and "specimen policy language" for Pitkanen. Id. ¶ 11, Ex. B; see also Pl.'s Supp. Mem. Ex. A. The first full paragraph of the specimen policy stated that: "This Insurance is to indemnify the Assured the Sum Insured should the Insured Player attain a minimum of two (2) out of six (6) bonuses listed in the Bonus Schedule during the period of this Insurance . . . ." Stanley Aff. Ex. B.

On September 15, 2003, Stanley faxed to McCarthy an

"active quote" for Pitkanen's bonus insurance. Stanley Aff. ¶ 12 Ex. C; see also Pl.'s Supp. Mem. Ex. B. The quotation could be bound within ten days, a point emphasized in Stanley's cover letter and on the face of the quotation: "QUOTATION VALID FOR 10 DAYS ONLY." Stanley Aff. Ex. C. Consistent with the earlier specimen language, the first sentence of the quote stated that: "The Assured shall receive $1,675,000 if the Insured Person achieves at least two (2) of the following six (6) bonuses during the 2003-2004 NHL Regular Season . . . ." Id. The quote also stated, in bold print, "Final contract must be received and approved by Underwriters. This quote is subject to full agreement on Policy Wordings by all parties." Id.

McCarthy does not recall receiving the documents of September 9 or 15, 2003, or forwarding them to Bostic. See McCarthy Dep. 170:2-10, 24, 171:1-11, 189:1-15. Bostic contends he did not receive these documents, nor did anyone convey the contents to him prior to the placement of Pitkanen's coverage. See Pl.'s Supp. Br., Ex. E Bostic Aff. ¶¶ 10-13 (undated).

McCarthy is not the only person with whom Bostic spoke regarding the Pitkanen policy. Comcast also alleges that "[b]etween July 17, 2003 and October 9, 2003, Bostic engaged in frequent telephonic and e-mail communications with Steve Perlini ('Perlini'), an employee of underwriter, ASU, who, at all relevant times, identified himself as being an agent and representative of Lloyd's of London, Chubb, and ICL." Second Am. Compl. ¶ 27. In "each communication with Perlini," Bostic is

said to have "unequivocally set forth that Comcast was only interested in coverage for Pitkanen's bonuses that would activate if *any* of the bonuses were realized." Id. Perlini allegedly did not "disclose to Bostic the possibility of placing coverage that would activate only if a minimum of two (2) bonuses were achieved." Id.

Comcast avers that "[o]n or about October 9, 2003, McCarthy represented to Bostic during a telephone conversation, and Perlini represented to Bostic via an email communication, that the requested coverage would be placed via three (3) separate policies effected by Chubb, ASU, HCC, Lloyd's of London, and ICL, except that the maximum coverage would have to be limited to $2,175,000.00 instead of the full $2,600,000.00 initially sought by Comcast." Id. ¶ 30. Comcast further alleges that McCarthy and Perlini assured it that the $2,175,000 covered "*any* of Pitkanen's contractual bonuses being achieved." Id. ¶ 31.

According to Perlini, on October 9, 2003, McCarthy called ASU to inquire whether the insurance quotation offered on September 15, 2003 -- which by its terms had expired on September 25, 2003 -- was still available. See Perlini Dep. 117:4-118:2. Because Stanley, McCarthy's main ASU contact, was not available, Perlini took the call. See id. 44:9-45:9, 115:12-22. Perlini reviewed the file and verified with Underwriters -- the insurer for part of the risk -- and ICL -- the Correspondent for the other risk component -- that the original quotation was still

valid. See Perlini Dep. 118:15-119:7; see also infra n.5-8. After the verification, and also on October 9, 2003, Perlini had a conference call with McCarthy and Bostic during which they discussed possible coverage for Pitkanen. See Perlini Dep. 52:12-53:1, 13-24, 54:4.

That same day at 1:23 p.m., Marc Idelson of ASU had sent information about Pitkanen to Matt Powers, a certified underwriter for Chubb & Son who handled underwriting matters for Chubb Custom Insurance Company. See Chubb Supp. Br., Powers Decl. ¶¶ 1-2 and Ex F. At 4:34 p.m., Powers e-mailed Idelson and Perlini offering $500,000 of coverage, subject to certain conditions being satisfied. See Powers Decl. ¶ 3 and Ex F.

Meanwhile, after the conference call, Bostic and Perlini exchanged the following e-mails, all on October 9, 2003. See Perlini Dep. 53:2-12. At 4:07 p.m., Bostic wrote to Perlini:

> Subject: Joni Pitkenin [sic]
>
> Please bind coverage this date on the captioned player at $1,675,000 for premium of $418,750. We also authorize you to bind coverage in the amount of $2,340,000 [f]or a premium of $585,000 if and when you can put it together.

Second Am. Compl. Ex. C.

At 4:26 p.m., Perlini, who had received the insurers' prior approval for $1,675,000, see Perlini Dep. 60:17-61:7, responded:

> Lew,
>
> This will confirm we have effected coverage for the above captioned for a Limit $1,675,000 for Premium of $418,750. We will advise you by tomorrow if we can increase this Limit to $2,340,000 for Premium of $585,000.
>
> Attached are our wiring instructions. Please have Premium wired to this account by Monday 10/13/03.
>
> Thanks,
>
> Steven L. Perlini
> Assistant Vice President
>
> ASU International, Inc.
> . . .

Second Am. Compl. Ex. C.

Then, at 4:42 p.m., pursuant to the e-mail he had received eight minutes earlier from Powers at Chubb, see Perlini Dep. 61:7-12, Perlini e-mailed Bostic that another $500,000 of coverage -- less than the $665,000 that Bostic requested -- was available, subject to the same terms Powers had specified.

> Lew,
>
> This will confirm that we are able to provide another $500,000 in capacity on this risk. The final Limit is $2,175,000 and Premium is $543,750 plus applicable surplus lines tax. This is subject to our receipt and approval of a signed copy of his contract as well as agreement on the Policy wording by all parties. If you can forward the contract to us ASAP we'll get the wording over shortly.
>
> Please let me know if you have any questions.
>
> Thanks - Steve

Second Am. Compl. Ex. C.

Comcast states that, on or about October 9, 2003, it accepted the insurance contract and forwarded a one-time premium payment of $543,750, plus applicable surplus lines tax of three percent. Id. ¶ 31.

On October 21, 2003, at 5:29 p.m., Marc Idelson of ASU e-mailed Bostic:

> Lew,
>
> Attached please find a copy of the wording. Please confirm that you are OK with what I added (per our telephone conversations) regarding being compared to defenseman who played in 42 games with the club.
>
> Thanks,
>
> Marc

HCC and ASU Reply Ex. 5. On the first page of the "wording," the first full paragraph stated -- in language identical to the September 9 specimen and consistent with the September 15 active quote -- that: "This Insurance is to indemnify the Assured the Sum Insured should the Insured Player attain a minimum of two (2) out of six (6) bonuses listed in the Bonus Schedule during the period of this Insurance . . . ." Id.

Bostic responded at 5:41 p.m. the same day: "Marc: The wording look sfine [sic] to me, go with it. Thanks for your assistance." Id.

The following day, Jack Woodbury, Senior Vice-President of ASU, sent McCarthy a letter telling him that "In accordance with your instructions, we have effected the following Insurance.

Please examine this document carefully and call me if you have any questions." Pl.'s Resp. Ex. F. The body of the letter included the text of the policy, and, yet again, the first full paragraph of text stated: "This Insurance is to indemnify the Assured the Sum Insured should the Insured Player attain a minimum of two (2) out of six (6) bonuses listed in the Bonus Schedule during the period of this Insurance . . . ." Id.

McCarthy does not recall transmitting Woodbury's letter to Bostic, see McCarthy's Dep. 140:14-16, and would not have done so under his standard operating procedure since the premium had already been paid and the coverage placed, see id. 167:1-20. Bostic contends that the first time he learned of the policy wording was around January of 2004 when McCarthy hand delivered a copy of the actual policy to him. See Bostic Aff. ¶ 14. McCarthy confirms that he and Marc Idelson of ASU visited Bostic on January 5, 2004, and that Idelson physically handed the policy to Bostic then. See McCarthy Dep. 133:5-134:15, 171:12-19.

This policy consisted of three separate policies with total coverage of $2,175,000. See Second Am. Compl. ¶ 31. Chubb insured a policy for $500,000.[5] The Underwriters named as

[5] Policy Number 7953-51-90 states that "Chubb Custom Insurance Company (herein called the Company) does insure the Named Insured" for up to $500,000 for a premium of $125,000. See Pl.'s Resp. Ex. H at unnumbered page 1. The "Policy of Insurance" is on Chubb letterhead and is signed by Chubb's Secretary, President, and Authorized Representative. Id.

ASU is identified on the first page as the "Producer," id., and later as the party to whom notice should be given "of any happening or circumstance which could give rise to a claim under this insurance," id. at unnumbered pages 4-5. The policy also

defendant here[6] insured a policy for $675,000.[7] Another Underwriters at Lloyd's, London, which is not a defendant here, insured a policy for $1,000,000.[8]

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states that no insurance "other than Insurance placed by ASU International, Inc., shall be effected by the Assured to protect the Interest insured hereunder without prior written approval of Underwriters." Id. at unnumbered page 3.

[6] According to the sworn affidavit of David Bruce, who has been an underwriter at Underwriting Syndicate 33 at Lloyd's, London for thirty-four years, Comcast has sued the Underwriters at Lloyd's, London that provided the $675,000 policy. See Underwriters Supp. Br. 6-7; Bruce Aff. ¶ 1 n.1. The Underwriters at Lloyd's, London that provided the $1,000,000 is a separate and distinct group of Underwriters. See id. That syndicate is not a party here.

[7] The "Declaration Page" of Certificate No. L. 004324 specifies that "Insurance is effective with certain UNDERWRITERS AT LLOYD'S, LONDON" at "Percentage 100%." See Pl.'s Resp. Ex. I, Declaration. The sum insured is $675,000, with a premium of $168,750. See id. Provisions at unnumbered page 1.

An ASU representative signed the policy as a "Correspondent." Id., Declaration. ASU is also the entity to which the premium must be paid, see id., Provisions at 2, and to which the insured must give notice of an event that could give rise to a claim, see id. at 4. No insurance, "other than Insurance placed by ASU International, Inc., shall be effected by the Assured to protect the Interest insured hereunder without prior written approval of Underwriters." Id. at 3.

[8] The "Certificate" for policy number ICL-1110-03-1513 states: "This insurance is effected with certain Underwriters at Lloyd's, London (hereinafter called the 'Insurer') through the following Correspondent: ICL Ltd.," whose Canadian address is given. Pl.'s Resp. Ex. E at unnumbered page 1. The limit of indemnity is $1,000,000, and the premium is $250,000. Id. at 2. "SECURITY" is "100% Certain Underwriters, Lloyd's of London." Id. Underwriters makes the claims determinations and pays valid claims. Id. at 6.

The Certificate explains that "This insurance is issued in accordance with the limited authorization granted to the Correspondent by certain Underwriters at Lloyd's, London." Id. at unnumbered page 1. The IC London logo appears in the upper left-hand corner of the Certificate, and its name and address are given in the upper right-hand corner. See id. An unidentifiable signature appears below the instruction that "This Insurance is

At the end of the 2003-2004 NHL season, Pitkanen had achieved one of his six performance goals entitling him to one of the bonuses. Id. ¶ 33. By achieving a "plus minus" that netted to "plus 15,"[9] his contract entitled him to a $400,000 bonus. Id. ¶ 34 & n.3. Comcast paid him the $400,000 bonus and "submitted a claim to Defendants, McCarthy, ASU, HCC, ICL, Chubb and Lloyd's of London for reimbursement of the $400,000.00 bonus." Id. ¶¶ 35-36. Comcast avers that all six defendants denied the claim, citing an insurance policy provision "requiring Pitkanen to achieve a minimum of two (2) out of six (6) bonuses listed in the Bonus Schedule" before a claim would be paid. Id. ¶¶ 37-38.

Comcast alleges it contracted for insurance coverage to activate if Pitkanen earned any of his bonuses. See id. ¶ 39. Comcast states that it never agreed to -- nor did defendants ever mention -- coverage that would trigger only when Pitkanen earned at least two of six bonuses. See id. ¶¶ 28-29. Defendants are said to have "unilaterally added in" those terms without Comcast's knowledge or consent after Comcast had paid the

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not valid unless signed by an authorized representative of the Correspondent." Id. The Schedule identifies "IC Group, Inc.," which has the same address as "ICL Ltd.," as the party whom the Assured should notify "in the event of any happening or circumstance which could give rise to a claim under this insurance." Id. at 5.

[9] Each time Pitkanen was on the playing surface of the ice when his team scored a goal, he received a "plus." Conversely, each time he was on the playing surface when the opposing team scored a goal, he received a "minus." Second Am. Compl. ¶ 34 n.3.

premium. Id. ¶ 38. Notably, Comcast claims that McCarthy and Perlini held themselves out as agents of ASU, Chubb, HCC, ICL, and Underwriters and "were recognized as the same by [those defendants] by virtue of the fact that those entities allowed McCarthy and Perlini to solicit, procure and place the insurance coverage that is the subject of this litigation." Id. ¶ 32.

On January 31, 2006, we denied without prejudice defendants' motion to dismiss Comcast's first amended complaint. See Order of Jan. 31, 2006 ¶ 1. Finding that Comcast's needlessly vague pleading failed to comply with Fed. R. Civ. P. 9(b), we allowed Comcast "a second and final amendment, if it [could] be done in conformity with Fed. R. Civ. P. 9(b) and the guidance . . . provided herein." Id. ¶ w. Comcast submitted a second amended complaint ("complaint"), and defendants again moved to dismiss.

Both sides asked us to consider documents outside of the pleadings that are relevant to the question of agency. To do so, and thereby ensure this case proceeds against the proper defendants, on June 1, 2006 we notified the parties that, pursuant to Fed. R. Civ. P. 12(b),[10] we would treat the motions to dismiss as motions for summary judgment as to the issue of agency only. In compliance with that order, the parties have

[10] If a defendant brings a motion to dismiss under Rule 12(b)(6) and presents matters outside the pleadings, Rule 12(b) permits us to treat the motion as one for summary judgment, to be disposed of under Rule 56, after the parties have been given "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

conducted discovery and submitted supplemental briefs on this matter. We also ordered HCC and Comcast to conduct discovery and submit briefs concerning our in persona jurisdiction over HCC, which they have done.

II. Legal Analysis[11]

These motions to dismiss contend -- as had the previous motions -- that Comcast has failed to meet the heightened pleading standard under Fed. R. Civ. P. 9(b). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[12] Comcast has never contested that its pleadings

[11] Because we exercise diversity jurisdiction pursuant to 28 U.S.C. § 1332, we apply the substantive law of the state in which we sit. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[12] Under Rule 9(b), plaintiffs must "plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged," and that "allegations of 'date, place or time' fulfill these functions," as do "alternative means" that "inject[] precision and some measure of substantiation into [the] allegations of fraud." Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984). "Plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation." Lum v. Bank of America, 361 F.3d 217, 223-224 (3d Cir. 2004). Where there are multiple defendants, "a plaintiff must plead predicate acts with particularity with respect to each defendant, thereby informing each defendant of the nature of its alleged participation in the fraud . . . . but the requirements of Rule 9(b) may be relaxed where factual information is exclusively within the opposing party's knowledge or control." Eli Lilly and Co. v. Roussel Corp., 23 F.Supp.2d 460, 492 (D.N.J. 1998). "[E]ven under a non-restrictive application of the rule, pleaders must allege that the necessary information lies within defendants' control, and their allegations must be accompanied by a statement of the facts upon which the allegations are based."

are subject to Rule 9(b)'s requirements, but instead has asserted that it satisfies Rule 9(b)'s requirements as applied in this Circuit. Citing to paragraphs 24 through 32 of its second amended complaint, it argues that it provided the time, identity, and content of misrepresentations with "pinpoint specificity." Pl.'s Resp. 15. Indeed, unlike the hopelessly ambiguous first amended complaint, the second amended complaint specifies three occasions on which McCarthy and Perlini allegedly identified themselves as agents of the other defendants. It does not allege a single representation by Chubb, HCC, ICL, or Underwriters. Claims against those defendants rest on Comcast's theory that they are liable for any representations made by their agents, McCarthy and Perlini.

We address the motion to dismiss our exercise of jurisdiction over HCC, the motions for summary judgment concerning the alleged agency relationships, and the remaining issues in the motions to dismiss.

A. Jurisdiction over HCC

Once a defendant makes a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), "the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66-67 n.9 (3d Cir.

Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989).

1984). Thus, a plaintiff may never "rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss for lack of in personam jurisdiction." Id. (citing International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700 (3d Cir. 1982)). Still, when the evidence the plaintiff submits conflicts with the defendant's evidence, we "accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142, n.1 (3d Cir. 1992).

Our Court of Appeals has made clear that "courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is clearly frivolous." Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 456 (3d Cir. 2003) (quotation and citation omitted). Because Comcast's claim against HCC, as presented in the second amended complaint, was not clearly frivolous, we allowed the parties to conduct jurisdictional discovery.

It is uncontested that HCC, the parent company of ASU, is not a resident of Pennsylvania.[13] "A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state." Provident Nat. Bank v. California Federal Sav. &

[13] HCC is a holding company organized under the laws of Delaware with its principal office in Texas. See ASU and HCC Appendix, Ex. 6 Martin Aff. ¶ 3; see also Second Am. Compl. ¶ 6.

Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987) (citing Fed. R. Civ. P. 4(e)). Pennsylvania's long-arm statute, which provides for both general and personal jurisdiction, reaches "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. C.S.A. § 5322(b); see also 42 Pa. C.S.A. § 5301(a)(2)(iii) (authorizing jurisdiction over corporations that carry on "a continuous and systematic part of its general business within this Commonwealth"). To comport with constitutional requirements and satisfy its burden of establishing with reasonable particularity that sufficient contacts exist between the defendant and the forum state, "the plaintiff must establish either that the particular cause of action sued upon arose from the defendant's activities within the forum state ('specific jurisdiction') or that the defendant has 'continuous and systematic' contacts with the forum state ('general jurisdiction')." Provident Nat. Bank, 819 F.2d at 437 (citations omitted).[14]

Comcast offers no evidence of direct contact between HCC and any Comcast representative in Pennsylvania or elsewhere. It asserts that we can exercise jurisdiction over HCC because HCC

[14] While the second amended complaint advances on a theory of general jurisdiction, see Second Am. Compl. ¶ 7, Comcast also seems to argue for specific jurisdiction, see Pl.'s Resp. 26. As we discuss herein, regardless of which theory we apply, we lack personal jurisdiction over HCC.

established "minimum contacts," see Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102, 116 (1987), through ASU "engaging in business with The Flyers in Pennsylvania," Pls.' Resp. 26. Relying on an "alter ego" theory, Comcast asks us to impute ASU's conduct to HCC for purposes of personal jurisdiction over HCC.

Comcast has the burden of proving that the "alter ego" theory properly applies here. See Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 562 (E.D. Pa. 1996). To meet that burden, it must satisfy at least one of three tests: (1) show that the independence of the two entities has been disregarded; (2) show that HCC exercises such total control over ASU that both companies should be considered one company for purposes of a jurisdictional analysis; or (3) prove that ASU performs important functions which HCC would otherwise have to perform itself. See Brooks, 943 F. Supp. at 562-63 (citing Gallagher v. Mazda Motor of America, 781 F. Supp. 1079, 1084-85 (E.D. Pa. 1992)).

Comcast points to what is said to be information on HCC's Web site. See Pl.'s Resp. Ex. G. According to this page, "HCC is an international insurance holding company and a leading specialty insurance group based in Houston, Texas, operating from office in the USA, Bermuda, the United Kingdom and Spain. HCC's operations consist of underwriting agencies, brokers and insurance companies. . . ." Id. (format altered). According to Comcast, because underwriting is conducted by HCC's wholly-owned subsidiaries, and not HCC, "an inference of one corporation may

be made." Pl.'s Resp. 27.

Comcast also finds support for its jurisdictional argument in HCC's "evasive" responses to Comcast's requests for admission. Pl.'s Supp. Br. 18. In one response, HCC denies transacting business in Pennsylvania, a denial Comcast finds "wholly inexplicable" because McCarthy sent letters to Bostic on ASU letterhead that states: "A Subsidiary of HCC Insurance Holdings, Inc." Pl.'s Supp. Br. Ex. C. Comcast also objects to HCC's response to the following requests for admission: "Between the dates of July 10, 2003 and June 3, 2004, correspondences from ASU, bearing the HCC logo and corporate name were sent to Plaintiff" and "to other recipients in Pennsylvania." Pl.'s Supp. Br. Ex. I. HCC states that it cannot admit or deny the matters after reasonable investigation, but it does admit "that all subsidiaries of HCC may utilize the HCC logo." Pl.'s Supp. Br. Ex. J. It also objects to the requests because they fail to "refer to any specific types, piece, or example of ASU letterhead," and are therefore "unreasonably vague, and unduly and improperly ambiguous and burdensome for HCC to determine whether a specific logo appears on each form or piece of ASU letterhead." Id. Comcast deems these responses evasive, and asks us to strike them and to regard the requests as admitted, pursuant to Fed. R. Civ. P. 36(a).[15] Based on such admissions,

[15] Fed. R. Civ. P. 36(a) provides, in relevant part:

> The party who has requested the admissions may move to determine the sufficiency of the answers or objections.

Comcast asserts that our jurisdiction over HCC would be proper.

In support of its motion, HCC submits the affidavit of Christopher L. Martin, the Executive Vice-President and Secretary of HCC Insurance Holdings, Inc., the corporate parent of ASU.[16] See ASU and HCC Appendix Ex. 6 Martin Aff. ¶¶ 1, 12. According to Martin, HCC's primary business purpose is to hold interests in companies working in the financial services sector, including those specializing in various types of insurance. See id. ¶¶ 4, 12. HCC is not an insurance company, and therefore does not issue insurance policies or administer, process, evaluate, adjust, approve, or deny claims for insurance policies issued to Pennsylvania policyholders. See id. ¶ 11. It also does not have customers or sell goods or service. See id. ¶ 10.

Martin further states that HCC and ASU operate as separate corporate entities and observe all corporate formalities, including maintaining separate offices, employees, directors, officers, accounts, records, and minutes. See id. ¶¶ 13-14. Also, according to Martin, HCC has never done any of the following within Pennsylvania: transacted business; been qualified or registered to do business; owned or leased property; maintained an office, telephone number, or post office box; had

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> Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

[16] ASU is now known as HCC Specialty Underwrites, Inc., id. at ¶ 12, but we refer to it as ASU because the parties do.

employees or agents conducting business on its behalf; contracted to supply services or things; or been assessed or paid taxes. Id. ¶¶ 5-9.

HCC is not identified in the policies at issue here, and HCC and Bostic agree that HCC did not contract with Comcast to provide any services. See id. ¶ 16; Bostic Dep. 166:8-11, June 19, 2006. In fact, Bostic did not even know what HCC was or what it did. See Bostic Dep. 164:20-24.

Upon review of this record, we have little difficulty finding that Comcast has not satisfied its burden of establishing jurisdictional facts. Comcast has not rebutted HCC's evidence that it is ASU's holding company, maintains a separate corporate entity from ASU, does no business itself in Pennsylvania on a regular basis, and did no work on the Pitkanen policy.

HCC's Web site representation that it is a "holding company" with "operations consist[ing] of underwriting agencies, brokers and insurance companies" is wholly consistent with Martin's affidavit stating that HCC is a holding company with interests in insurance companies. Nothing about that arrangement suggests that HCC exercises total control over ASU such that ASU's activities could be imputed to HCC for the purpose of personal jurisdiction, nor has Comcast cited any record evidence of HCC exercising complete control over ASU. Therefore, we will not attribute to HCC the actions of ASU, or its employee

Perlini.[17]

Comcast's reliance on several of HCC's responses to the request for admissions is equally unavailing. Even if HCC had admitted that its logo appeared on the correspondence in question, "[m]ere identity of corporate logos, without more, cannot be sufficient to establish that one company dominated another's business activities or acted as the alter ego of it." Smith v. S&S Dundalk Engineering Works, Ltd., 139 F. Supp. 2d 610, 621 (D.N.J. 2001).

In sum, Comcast has failed to meet its burden of establishing that the "alter ego" theory applies here. We thus cannot impute ASU's actions to HCC. There is also no record evidence that HCC has engaged in either "continuous and systematic contacts" or "minimum contacts" with Pennsylvania.

We therefore lack jurisdiction over HCC and shall dismiss all claims against it.

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[17] The record also amply demonstrates that McCarthy is not HCC's agent. It is undisputed that HCC has never appointed or authorized McCarthy to act on its behalf or to represent himself as its agent, nor has it given him authority to bind HCC or contract on its behalf. See Martin Aff. ¶ 15. Bostic himself did not know of anything that HCC had done to recognize McCarthy as its agent. See Bostic Dep. 172:15-17. McCarthy affirms that he did not conduct business with HCC regarding the Pitkanen policy. See McCarthy Dep. 231:11-18.

In light of our discussion of agency, see infra, these facts establish that McCarthy is not an agent of HCC. Thus, his actions cannot be attributed to HCC and do not provide a basis for us to exercise jurisdiction over HCC.

B. Agency

Comcast's claims against Chubb, ICL, and Underwriters are wholly grounded on the theory that McCarthy and Perlini are agents of those defendants and that McCarthy and Perlini made representations to Comcast for which those defendants are liable.[18] Comcast further contends that the agency relationship at issue here -- that between an insurance agent or broker and the insureds and insurers with whom he does business -- presents a question of fact for a jury.

Because Comcast is asserting an agency relationship, it "has the burden of proving it by a fair preponderance of the evidence." Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 602 A.2d 1348, 1351 (Pa. Super. Ct. 1992). "The basic elements of agency are 'the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.'" Scott v. Purcell, 415 A.2d 56, 60 (Pa. 1980) (quoting the Restatement (Second) of Agency § 1, Comment b (1958)). Apparent authority is the "power to bind a principal which the principal has not actually granted but which he leads persons with whom his agent deals to believe that he has granted," for instance where "the principal knowingly permits the agent to exercise such power or if the principal holds the agent

[18] Having found that we lack jurisdiction over the person of HCC, we do not address Comcast's claims against it, which are the same as those it raised against all other defendants.

out as possessing such power." Revere Press, Inc. v. Blumberg, 246 A.2d 407, 410 (Pa. 1968).

The general rule in Pennsylvania is that the insurance broker is an agent of the insured:

> Where a person desiring to have his property insured applies not to any particular company or its known agent, but to an insurance broker, permitting him to choose which company shall become the insurer, a long line of decisions has declared the broker to be the agent of the insured; not of the insurer.

Taylor v. Crowe, 282 A.2d 682, 683 (Pa. 1971) (quoting Taylor v. Liverpool & L & G Ins. Co., 68 Pa. Super. 302, 304 (1917)).[19] In Crowe, the insureds trusted the broker to "go out and buy . . . the best insurance" he could get and "it didn't concern [the insureds] where he was getting it (insurance) or who he was getting it from." Id. at 683. Crowe also found that the case for lack of agency between a broker and insurer was particularly strong where the broker approached the insurers through another broker that placed the coverage, did not even know with which companies that second broker would place the coverage, and did not have contact with the insurers himself. See id. at 684.

However, a broker "in some situations can be an agent for the insured in some respects and an agent for the insurer in other respects." Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mut. Ins. Co., 641 F. Supp. 297, 303 (E.D. Pa. 1986).

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[19] The Pennsylvania Administrative Code similarly provides that "[w]hen a broker is authorized by the client to secure insurance, the broker shall be considered the legal agent of the client." 31 Pa. A.C. § 37.45.

For a broker to be the agent of the insurer "there must be some evidence of an authorization, or some fact from which a fair inference of an authorization by the company might be deduced to make an insurance broker the agent of the company." Crowe, 282 A.2d at 684 (quoting Couch on Insurance 2d Section 25:95).

For instance, in Sands v. Granite Mut. Ins. Co., 331 A.2d 711 (Pa. Super. Ct. 1974), a divided panel relied on the following facts to conclude that the insurance broker had authority to bind the insurer: (1) in two previous insurance policies involving all the same parties, the insurer did not approve the policies until several weeks after coverage purportedly began; (2) the insurance policy listed the broker as both an "authorized representative" and a counter-signatory of the insurance, and documentary evidence indicated the authorized representative could bind the insurer; (3) the broker was permitted to set insurance rates -- a privilege no other broker enjoyed with this insurer -- and deduct commissions directly from premium payments as the broker received them; and (4) the insurer and the broker both submitted an application to the Insurance Commissioner of the Commonwealth to license the broker as an agent of the insurer. See id. at 715.[20]

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[20] That court also noted one commentator's suggestion that:

> where a broker holds himself out as a general agent, solicits a policy, collects a premium a part of which he retains as his commission according to his custom, and a policy is issued upon information procured by him, he is an agent of the insurer by implication as to the insured who, in good faith, dealt with him as such.

Later decisions made clear that collecting a premium, and deducting commissions directly from that premium, are insufficient to make one an agent of the insurer if the insurer did not hold out the insurance agent as an "authorized representative," and the insured did not request that his insurance be placed with any particular company. See Kairys v. Aetna Cas. & Sur. Co., 461 A.2d 269, 276 (Pa. Super. Ct. 1983); see also Rich Maid, 641 F. Supp. at 305 (evidence that insurance agent collected premiums from insured did not make him agent of insurer). Also, a prior relationship between a broker and the insured may suggest that a broker is the insured's agent. See Rich Maid, 641 F. Supp. at 304.

Given the case-specific inquiry involved, the question of whether one is a broker or agent is usually a question of fact for a jury, see id. at 304 (E.D. Pa. 1986), though our courts regularly decide the matter at the summary judgment stage when there is insufficient evidence to take the issue to a jury, see, e.g., id. at 305 (holding that insurance agent was agent for insured); MIC Prop. & Cas. Ins. Corp. v. Crawford, No. 01-714, 2001 U.S. Dist. LEXIS 24212, at *8 (E.D. Pa. Oct. 29, 2001) (holding that broker was agent of insured where insured instructed broker "to obtain insurance without specifying a particular insurer"); Luber v. Underwriters at Lloyd's, No. 92-2200, 1992 WL 346467, at *4 (E.D. Pa. Nov. 16, 1992) (holding

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331 A.2d at 715-16 (citing 3 Couch on Insurance 2d Section 26:25 (1960)).

that insurance broker was insured's agent where broker submitted insured's application to an insurance brokerage that placed it with insurer with whom it had an agency agreement); cf. Nationwide Mutual Ins. Co. v. Starlight Ballroom Dance Club, Inc., No. 04-3393, 2004 WL 2966922, at *2 (E.D. Pa. Dec. 21, 2004) (finding, on motion for reconsideration to open default judgment, that insurance agent was agent of insureds where they let agent decide from whom to purchase the insurance).

Comcast alleges that not only did McCarthy and Perlini "hold[] themselves out as agents" of the corporate defendants, but also the corporate defendants recognized them as such by "allow[ing] [them] to solicit, procure and place" the policy at issue. Second Am. Compl. ¶ 32. All defendants, including McCarthy, contend that McCarthy is an insurance broker, and not an agent of any of the corporate defendants. As for Perlini, he and his employer, ASU, as well as Chubb, ICL, and Underwriters, deny that either Perlini or ASU is an agent of Chubb, ICL, or Underwriters.

To determine if a genuine issue of material fact exists as to McCarthy's or Perlini's agency status, we search the record for "some evidence of an authorization, or some fact from which a fair inference of an authorization by the [defendants] might be deduced." Crowe, 282 A.2d at 684 (citation omitted).

To begin, Bostic had used McCarthy's services before.[21]

[21] We note that regarding which players' coverage Comcast placed through McCarthy before Pitkanen's, the record offers

With earlier performance bonus policies for other players in earlier times, and with Pitkanen's policy, Bostic never requested that McCarthy place the insurance with any particular company. See Bostic Dep. 24:6-8, 23-24, 25:1-12, 26:12-15, 33:20-24, 51:8-52:1, 55:2-22, 203:15-204:5. With the earlier policies, Bostic had told McCarthy that Comcast wanted the "best price" and the "broadest coverage," id. 55:7-8, 19-22, and with the Pitkanen policy, Bostic also said he wanted the "best coverage" for the "best price," id. 203:18; see also id. 103:23-104:1 ("We were seeking quotations on the coverage and weren't limiting him to any specific carrier."), 105:13-15 ("Mr. McCarthy was free to pursue the best available coverage at the best available price.").

These facts show that this case falls squarely within Crowe's description of an insurance broker who is an agent of the insured. However, Comcast argues that this record shows that McCarthy, like the insurance broker in Sands, in fact had authority to bind the insurers. Indeed, the second amended complaint alleges that McCarthy twice presented himself as the corporate defendants' agent -- in his letter of July 10, 2003, and in a phone conversation he had with Bostic on or about the same date. We examine what discovery has revealed about those allegations, as well as the allegation that Perlini made

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conflicting evidence. This dispute is immaterial to our analysis here; the material -- and undisputed -- fact is that Bostic and McCarthy had worked together on insurance policies before the Pitkanen coverage.

representations of agency in "frequent" communications between Perlini and Bostic from July 17, 2003 until October 9, 2003.

First, Comcast avers that the July 10, 2003 letter from McCarthy to Bostic "specifically sets forth that McCarthy is an agent of underwriters who could place coverage for 'all performance bonuses.'" Second Am. Compl. ¶ 24. It also describes the letter as one in which McCarthy "identified himself as an agent of the remaining Defendants, vested with the authority to act on behalf of Chubb, ASU, HCC, Lloyd's of London, and IC London." Pl.'s Resp. 5.

Comcast's description misrepresents the text. McCarthy stated that he had "access to" and a "relationship with" the "principal underwriters" in Boston. He did not identify the corporate defendants, claim to be their "agent," or represent that he had the authority to act on behalf of them or any other insurer. We will not distort such plain text and must reject Comcast's attempt to do so.

Moreover, the recipient of the letter, Comcast's Bostic, did not understand it to mean what Comcast claims it does. When asked in his deposition if he knew what McCarthy was referring to by stating "I have access to," Bostic replied, "No, I just thought it was puff and fluff. . . . Basically he was looking for business. We hadn't done anything since Kenny Thomas. This letter comes in. It's basically, you know, hey, I'm here, I'm available. I've got all the contacts you need. Give me a call." Bostic Dep. 84:4-7, 11-15. Bostic did not even

know which "principal underwriters" McCarthy was referring to: "I don't recall having any idea what he was even referring to, no." Id. 85:9-10.

Any fair reading of the text will not support Comcast's characterization of the letter. Bostic's understanding of the language fortifies that conclusion.

Second, Comcast alleges that on or about July 10, 2003 Bostic responded to the letter by contacting McCarthy on the telephone and that "during the telephonic communication, [McCarthy] verbally identified himself as an agent of Lloyd's of London, Chubb, ASU, HCC and ICL, [and] indicated that he would endeavor to obtain the requested coverage." Second Am. Compl. ¶ 25.

Bostic testified that, following the letter, his first attempted communication with McCarthy was a telephone message he left on July 15, 2003. See Bostic Dep. 87:14-89:17. Bostic did not remember when he next spoke with McCarthy, nor whether McCarthy contacted him by telephone or in writing. See id. 90:13-91:5, 95:5-17. When asked about "the nature of any conversations in general with Mr. McCarthy concerning Joni Pitkanen after you left him a message on July 15th of 2003 to call you back," Bostic said, "I don't recall any -- the contents of any conversation I had." Id. 97:11-16.

Bostic was also asked to reveal everything McCarthy said that supports the averment that he "verbally identified himself as an agent of, among others, ICL" during a July 10, 2003

telephone conversation. Bostic responded, "I really don't recall what all that's about. What all that was." Id. 198:10-21. Given the same question regarding Chubb, ASU, and HCC, Bostic said, "I don't recall." Id. 200:17-201:1. With respect to Underwriters, his response was, "I don't recall really. I just got the impression that that's what was going on." Id. 199:11-23. In fact, Bostic did not have a specific recollection of McCarthy stating that he was the agent of any of the corporate defendants. See id. 111:14-17, 112:15-22.

There is nothing of record to support Comcast's allegation that on or about July 10, 2003 -- or at any other time -- McCarthy "verbally identified himself" to Bostic as an agent of the other defendants. Having now determined that both allegations that McCarthy represented himself as an agent of the corporate defendants lack any evidentiary support, we now turn to Perlini's alleged representations.

Comcast alleges that "Between July 17, 2003 and October 9, 2003, Bostic engaged in frequent telephonic and e-mail communications with Steve Perlini ('Perlini'), an employee of underwriter, ASU, who, at all relevant times, identified himself as being an agent and representative of Lloyd's of London, Chubb, and ICL." Second Am. Compl. ¶ 27.

Bostic was asked if he had "a specific recollection of Perlini ever identifying himself as being an agent or any type of authorized representative of Lloyd's of London, or Chubb, or ICL," to which he responded, "No, I didn't know how Perlini fit

into the equation." Bostic Dep. 127:22-128:3. Bostic also did not remember anyone representing to him that ASU was an agent or authorized representative of the Underwriters at Lloyd's, Chubb, or ICL. See id. 129:7-14. Bostic was asked to describe everything that Perlini said from July 17, 2003 to October 9, 2003, "whether specific or general, that led [him] to believe that [Perlini] was an agent and representative of Chubb." Id. 204:6-14. Bostic replied, "I don't recall all the conversations. Again, it's a general, overall feeling like I had and an understanding on my part. . . ." Id. 204:15-17.

Perlini testified that he e-mailed Bostic and spoke with him in a telephone conversation on October 9, 2003, but he does not recall communicating with him on any other day. See Perlini Dep. 35:22-37:21, 58:10-59:20, June 23, 2006. Bostic contends that he communicated with Perlini over the course of a couple of weeks, but he, too, does not recall any letters, e-mails, or faxes other than those of October 9, 2003. See Bostic Dep. 168:1-23. Therefore, the only record evidence of written communications between Bostic and Perlini is that of the e-mails of October 9, 2003 quoted above.

Bostic's and Perlini's disagreement as to the number of their communications is immaterial. What is material, however, is that Bostic's testimony gives no support for the claim that Perlini -- or his employer -- "identified himself" as an agent and representative of Chubb, ICL, or Underwriters.

In light of the testimony of Bostic -- who is the only

Comcast representative alleged to have received any representations from defendants -- one can only wonder how Comcast could advance such baseless allegations about specific representations of agency, especially in the complaint's third iteration. These fanciful allegations support no claims against defendants. We do not, however, end our inquiry yet. Since we permitted discovery on agency -- because we accepted, as we had to, Comcast's now-discredited allegations as true -- we consider all relevant evidence unearthed during discovery to determine whether there is any support elsewhere for Comcast's agency argument. We begin with Bostic's general testimony about his "understanding" that McCarthy and Perlini were agents of the corporate defendants, and then turn to more defendant-specific evidence.

Bostic repeatedly testified that he had an "understanding" and "impression" that McCarthy and Perlini were agents of the corporate defendants. He based his "understanding" on "conversations [that] dealt with issues that seemed to indicate that they were representatives, and that they had all the authority necessary to write the coverage and bind the coverage," Bostic Dep. 171:17-21, and because Perlini allegedly "was negotiating terms and conditions . . . [and] premium," id. 202:13-15, and did not tell Bostic that he had to check with anyone when they were discussing coverage, see id. 130:22-132:9. In further support, Bostic referenced "[v]arious conversations . . . [and] people [McCarthy] had mentioned during those

conversations." Id. 111:3-5. When asked to explain "what was it about those various conversations that led you to believe that [McCarthy was the corporate defendant's agent]," Bostic responded, "I'm not sure I understand your question. I mean, how much clearer can I be? Mr. McCarthy and I had conversations. It was my understanding from those conversations and the policies he had provided on other players, that he was the agent for these companies." Id. 111:6-13.

Bostic also held this "understanding" because McCarthy "never indicated at any time on any of the three policies that he had to check with anyone once we said bind the coverage." Id. 114:13-15. Bostic's earliest contacts with McCarthy left him the "impression" that McCarthy "represented" insurers who provided bonus insurance because McCarthy had written a letter wherein he said that "he had contacts and that he had dealings with the top people in the business and that he could put us directly in touch with them if we wanted to." Id. 28:17-29:19.[22] But when questioned about McCarthy's binding authority for previous policies Comcast had placed through him, Bostic admitted that he did not know what kind of authority McCarthy had:

> Q. . . . Now, I'm going to ask you to assume for purposes of these questions that binding authority means the authority to bind an insurer to a risk before they independently, the insurer, review and approve it.

[22] Underwriters' counsel called for the production of this letter, see Bostic Dep. 29:20-22, but Comcast had not produced it as of when the parties submitted their supplemental briefs, see Chubb Supp. Br. 19 n.1.

> Now, as you sit here now, do you have any knowledge or impression that Mr. McCarthy had authority from any of these insurers to bind them to either one of these insurance risks without them first reviewing and approving it independently?
>
> A. I have no idea what his binding authority was, if you want to phrase your question that way.

Id. 71:24-72:13.

Bostic is unaware of any conduct by, or documentation[23] from, Underwriters, Chubb, or ICL that led him to believe McCarthy or Perlini were their agents or authorized representatives, see id. 135:18-136:7, 136:8-137:6, 137:17-138:10, nor does he recall directly communicating with anyone from these companies, see id. 134:9-15, 22-135:1, 135:2-10. He does not have a "specific recollection" of McCarthy saying "I am the agent of [Lloyd's of London, Chubb, ASU, HCC, and ICL]." Id. 112:16-21. He further testified that Perlini did not tell him that he was an agent of Underwriters, Chubb, or ICL, see id. 174:9-175:7, and he does not remember Perlini specifically stating that he was an authorized representative of those companies, see id. 176:5-177:8. As for ASU, "[f]or whatever reason it was my impression that ASU was an agent of Lloyd's, or a Lloyd's underwriter . . . ." Id. 129:24-130:2. However, Bostic admitted that he knew ASU was in the "insurance business"

[23] For purposes of the deposition, the parties defined "documentation" as "any correspondence, agreements, letters, et cetera, et cetera, apart from the policy itself, anything whatsoever." Bostic Dep. 136:19-23.

and assumed it was a broker or agent, but did not know whether it was "an agency, a middle, a broker." Id. 162:9-163:12. Bostic also said Comcast did not solicit ASU to provide any services for it, though he did have direct conversations with ASU's representatives after McCarthy had contacted ASU. See Bostic Dep. 163:17-164:19.

As for McCarthy, he testified that he never told Bostic -- or suggested through oral or written communication -- that he was an agent or authorized representative of Underwriters, Chubb or ICL. See McCarthy Dep. 130:9-131:1, 132:1-14; 236:15-18, 237:1-5. Nor did McCarthy ever suggest to anyone at Comcast at any time that he had authority to bind insurance coverage on behalf of any company. See id. 237:6-10. McCarthy testified that he "had no binding power whatsoever" with respect to insurance companies, see id. 237:11-14, and did not create quotations, but only passed along those that others had made, see id. 238:9-10. McCarthy also testified that ASU could only bind insurance if an insurer had first decided to accept the risk and on what terms it would do so. See id. 240:11-18.

Turning to defendant-specific evidence, Bostic does not remember McCarthy or Perlini ever mentioning ICL to him. See Bostic Dep. 207:19-24. The first time he ever heard of ICL was when he read the policy in December of 2003 or January of 2004. See id. 148:24-149:11, 204:19-21. Indeed, ICL and McCarthy were unaware of one another prior to this lawsuit. See McCarthy Dep. 236:19-237:5; Lacroix Decl. ¶¶ 1-2, July 7, 2006. As for ICL's

relationship with Perlini's employer, ICL's representative declared under penalty of perjury that ICL had dealt with ASU, but the two companies do not have a governing agreement, ASU is not ICL's agent, ASU is not authorized to act on ICL's behalf, and ASU did not purport to do so in this matter. Lacroix Decl. ¶ 3.

Underwriters' representative -- who is an underwriter who has worked for Underwriting Syndicate 33 at Lloyd's for thirty-four years -- swore that Underwriters had never heard of McCarthy before this lawsuit. See Bruce Aff. ¶¶ 1, 4, July 12, 2006. Underwriters received Comcast's information about Pitkanen from a London insurance broker, Rattner Mackenzie Limited, which got it from ASU after McCarthy sent it. See id. ¶ 6. On September 9 or 10, 2003, Underwriters agreed to subscribe to $675,000 of the insurance risk that Rattner presented on certain terms and for a certain minimum premium rate. See id. ¶ 11. Underwriters did not license McCarthy, Perlini, or ASU as its agent or representative. See id. ¶ 9(a). Any insurance risk that ASU submitted to Underwriters could only be placed with Underwriters if Underwriters had set the premium rates, approved the risk, and determined the terms; McCarthy, Perlini, or ASU had authority to inform insureds that differing terms will apply. See id. ¶¶ 7-8.

Regarding Chubb, the undisputed record evidence is that ASU's Idelson forwarded Pitkanen's information to Chubb's Powers on October 9, 2003 at 1:23 p.m., see Chubb's Supp. Br. Ex. E;

Chubb offered $500,000 coverage on certain terms at 4:34 p.m., see id., and after that Perlini relayed the offer to Bostic. Bostic said Chubb "was never mentioned in any of our conversations with either ASU or McCarthy," Bostic Dep. 210:22-24, and he only became aware that Chubb was involved after receiving the policy, see id. 210:10-18. McCarthy also testified that he never mentioned Chubb to Bostic. See McCarthy Dep. 235:19-23. McCarthy also stated that he never directly communicated with Chubb regarding Pitkanen's policy or any type of contractual bonus insurance coverage. See id. 235:24-236:5, 131:10-17.

Comcast contends that Chubb's Web site offers proof that ASU is an agent of Chubb. Using a "Find an Agent" search function on Chubb's Web site, Comcast apparently produced a results page that states: "For your ZIP code 02144, we found 14 Chubb agents or brokers within a radius of 50 miles. Please note that in some territories the firms listed below may act as brokers for Chubb." Pl.'s Resp. Ex. C. "ASU INTERNATIONAL LLC" is one of the entities listed. Id. According to Comcast, "ASU is clearly identified in this index as a Chubb 'agent.'" Pl.'s Resp. 15. Comcast neglects to mention that the Web page expressly identifies ASU as an "agent or broker" (emphasis added). Bostic also did not rely on this Web site in his dealings with Perlini or McCarthy since he was unaware that Chubb was involved until months later. See Bostic Dep. 210:10-18.

As for McCarthy being an alleged agent of ASU, Jeffrey

Stanley, ASU's sports underwriter and McCarthy's primary contact, swore that McCarthy was an independent broker who represented the interests of his clients, the professional sports franchisees. See Stanley Aff. ¶ 5. Stanley also testified that McCarthy did not work at ASU's direction, but rather contacted ASU when he wanted it to determine if various insurers had any interest in insuring certain risks, as he did with the Pitkanen policy. See id. ¶¶ 6-7, Ex. A.

McCarthy confirmed that he was not subject to any exclusivity agreement that would preclude him from using other companies that provided ASU's services, see McCarthy Dep. 240:19-241:22. He also reported that ASU never paid for any of the operating expenses of his business or sponsored him for any type of license. See id. 132:15-133:4. He also verified that on November 17, 1999 he and ASU executed an agreement that identified McCarthy as the "BROKER" who "acknowledges that he/she is the agent of the insured and is not the agent of, and has no authority to bind, ASU or any of its principals." Id. 39:2-47:11; see also ICL Supp. Br. Ex. E Broker/Agent Agreement.

From the late 1990s to 2003 -- the time during which McCarthy placed such bonus insurance -- he acted as a self-described "middleman" between sports teams and ASU, and he placed all such coverage through ASU. See McCarthy Dep. 29:18-30:5, 150:5-20.

Rehearsing the key uncontested facts, Bostic, who had worked with McCarthy to place players' insurance, asked McCarthy

to get the best insurance for Pitkanen's bonuses and never directed him to any particular insurer. Bostic does not specifically recall McCarthy or Perlini saying he was the agent of Chubb, ICL, Underwriters or any combination of them. Comcast provides no documentary evidence of such an agency. Chubb, Underwriters, and ICL did not represent to Bostic that McCarthy, Perlini, or ASU were their agents or authorized representatives. McCarthy, Perlini, and ASU did not in fact have authority to write policies for the other defendants or to bind them to any policy absent their express authorization. McCarthy approached ASU, and it sought insurers for the risk. McCarthy had no contact with the insurers. The insurers set the rates and terms and agreed to accept the risk, and then Perlini, pursuant to Bostic's request, effected the policies that the insurers had authorized. Comcast wired the premium to ASU.

Comcast is left with Bostic's general "understanding," "impression," and "feeling" that McCarthy, Perlini, and ASU were agents of the other defendants and had authority to bind those firms. It has notably failed to identify "evidence of an authorization, or some fact from which a fair inference of an authorization by the company might be deduced." Crowe, 282 A.2d at 684 (citation omitted). Soliciting, procuring, and placing insurance is precisely what a broker does, see Rich Maid, 641 F.Supp. at 303, contrary to Comcast's suggestion that such actions imply the alleged agency relationship, see Second Am.

Compl. ¶ 32.[24]

Comcast's reliance on Sands is unhelpful because none of the factors that led that court to find that the insurance broker could bind the insurer exists here. Bostic's "understanding" regarding binding authority is not supported by any document or specific statement from any defendant. Read most generously, this unsupported "understanding" cannot constitute Rule 56's "specific facts" to refute the weighty evidence that negates the existence of any agency relationships.

The only conclusion the record supports is that McCarthy, Perlini, and ASU were not agents of Chubb, ICL, or Underwriters. McCarthy was Comcast's insurance broker and its agent, not the agent of any other defendant.

The record also shows that McCarthy was not ASU's agent. He was an independent broker who had a broker's agreement with ASU, nothing required him to use ASU's services, and ASU did not pay his operating costs. Accordingly, he was not ASU's agent. See Kairys v. Aetna Casualty and Surety Co., 461 A.2d 269, 276 (Pa. Super. Ct. 1983) (holding that insurance broker was not agent of intermediate insurance agency -- through which he placed ninety-eight percent of his business -- because even though broker was required to submit clients' applications to the intermediary first, he could then use another agency if he

[24] Because McCarthy only placed performance bonus insurance through ASU, Comcast rhetorically but erroneously concludes that, "by operation of law," McCarthy was "captive to ASU" and therefore is ASU's agent. Pl.'s Supp. Br. 7.

chose).

On this record, no genuine issue of material fact exists as to McCarthy's or Perlini's agency. No agency relationships existed, and Chubb, ICL, and Underwriters cannot be held liable for any of the alleged misrepresentations McCarthy or Perlini made.

Nor can Pennsylvania's reasonable expectations doctrine, which Comcast invokes, sustain its claims against the insurers.[25] Under this doctrine, "[t]he reasonable expectations of the insured is the focal point of the insurance transaction . . . regardless of the ambiguity, or lack thereof, inherent in a given set of documents." UPMC Health System v. Metropolitan Life Ins. Co., 391 F.3d 497, 502 (3d Cir. 2004) (quoting Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978)). Courts apply this doctrine when the representations of an insurer or its agent -- not those of an insurance broker who is the insurers' agent -- give the insured cause to have certain expectations. See, e.g., UPMC Health System v. Metropolitan Life Ins. Co., 391 F.3d 497 (3d Cir. 2004); Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997);[26] Tonkovic v. State Farm

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[25] The parties disagree as to whether the doctrine can apply to sophisticated commercial insureds such as Comcast. Given our decision on the question of agency, we need not reach that question.

[26] Reliance, alone among these cases, applied the doctrine where an insured used its own broker to purchase a policy from an insurer. See Reliance Ins. Co. v. VE Corp., No. 95-538, 2000 WL 217511, at *3-4 (E.D. Pa. Feb. 10, 2000). The insurer issued the original policy in conformity with the requests of the insured

Mut. Auto. Ins. Co., 521 A.2d 920 (Pa. 1987); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346 (Pa. 1978); Rempel v. Nationwide Life Ins. Co., Inc., 370 A.2d 366 (Pa. 1977); Matcon Diamond, Inc. v. Penn Nat. Ins. Co., 815 A.2d 1109 (Pa. Super. Ct. 2003); Dibble v. Security of America Life Ins. Co., 590 A.2d 352 (Pa. Super. Ct. 1991). As our Court of Appeals has explained, an insured's expectation can prevail over a policy's terms "where the insurer or its agent creates in the insured a reasonable expectation of coverage." Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1311 (3d Cir. 1994) (emphasis added).

Here, neither the insurers nor, as we have now determined, their putative agents made any representations to Comcast about what the terms of the Pitkanen policy would be. Because Comcast's expectations about the terms are grounded solely in McCarthy's and Perlini's representations, the reasonable expectations doctrine cannot be used to sustain claims against the insurers.[27]

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and its broker, but the next year renewed the policy on materially different terms without notifying the insured or its broker. Id. at *5-6. Thus, the insurer's representations in the original policy created in the insured an expectation that the renewal policy would have the same terms. Here, the insurers did not make any representation to Comcast prior to issuing the Pitkanen policy, so Comcast could not have developed any expectations about that coverage based on words or actions of the insurers or their agents.

[27] Even if the doctrine applied, it would not help Comcast on these facts. Perlini's only alleged representation about the policy wording was on October 9, 2003. When Comcast paid the premium, Perlini informed Bostic that the coverage was effective

As discussed already, the second amended complaint is grounded in the allegation that defendants defrauded Comcast by promising to provide insurance on certain terms and failing to do so. The claims against Chubb, ICL, and Underwriters are based entirely on McCarthy's and Perlini's alleged actions as those defendants' purported agents.[28] On the record developed under Rule 56, we find that the alleged agency relationship does not exist. Therefore, these three defendants are entitled to judgment in their favor.

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only after "agreement on the Policy wording by all parties," and Idelson e-mailed the wording to Bostic eleven days later. The first full paragraph of the first page gave the two-bonus minimum. Given this, there was no reason for Bostic to have had any contrary expectation.

[28] Count I's breach of contract and breach of implied duty of good faith and fair dealing claim alleges that defendants' agents -- McCarthy and Perlini -- offered coverage for Pitkanen achieving any performance bonus, Comcast accepted that insurance and paid for it, and defendants failed to provide the promised insurance. See Second Am. Compl. ¶¶ 46-51, 53-54. Count II's bad faith claim alleges that Comcast contracted for certain insurance -- the same as described in the breach of contract claim -- and defendants denied a claim made pursuant to those terms. See id. ¶¶ 55-63. Count III's intentional and/or negligent misrepresentation claim avers that defendants, through their agents, made misrepresentations about key facts and policy provisions upon which Comcast relied to its detriment. See id. ¶¶ 64-70. Count IV's promissory estoppel/detrimental reliance claim alleges that defendants' acts or omissions caused Comcast to detrimentally rely on their promise that it would indemnify Comcast for paying Pitkanen if he achieved any bonus. See id. ¶¶ 71-74. Count V's unjust enrichment claim states that Comcast paid defendants based on its reasonable expectation that the policy would cover Pitkanen achieving any bonus, and defendants retained the premium without honoring their obligation to pay when Pitkanen earned a bonus. See id. ¶¶ 75-78. Finally, Count VI's rescission/ reformation claim alleges that defendants' actions or omissions caused Comcast to have the mistaken belief that defendants would indemnify Comcast if Pitkanen achieved any bonus. See id. ¶¶ 79-83.

With respect to claims against McCarthy and ASU, although we conclude they are not agents of the other defendants, that does not end our inquiry. Because they had direct communications with Comcast, we must also consider whether Comcast can state claims against them based on those communications. We now examine each of the counts against McCarthy and ASU,[29] mindful of Fed. R. Civ. P. 9(b)'s requirements.

C. Breach of Contract

Comcast alleges that McCarthy and ASU breached the terms of the insurance contract and breached their implied duty of good faith and fair dealing by failing to provide the coverage they promised to Comcast. In the alternative, Comcast claims that McCarthy and ASU (via Perlini) "breached an oral contract with Comcast by failing to provide the insurance coverage which they agreed to obtain, . . . for any of Pitkanen's bonuses being achieved . . . ." Second Am. Compl. ¶ 52.

To establish a cause of action for breach of contract, plaintiffs must plead: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). It is

[29] McCarthy has submitted his own briefs throughout this case, but since he also expressly relies on ASU's arguments, see McCarthy's Br. in Support of Mot. to Dismiss 3, we also treat ASU's arguments, where relevant, as McCarthy's.

basic contract law that only a party to a contract can be liable for breach of that contract. See Electron Energy Corp. v. Short, 597 A.2d 175, 177 (Pa. Super. Ct. 1991). Also, "Pennsylvania law does not recognize a separate claim for breach of implied covenant of good faith and fair dealing." Blue Mountain Mushroom Co., Inc. v. Monterey Mushroom, Inc., 246 F. Supp. 2d 394, 400-01 (E.D. Pa. 2002) (citing cases); see also Pym v. Einstein Practice Plan, Inc., No. 003577, 2004 WL 2439241, at *1 (Pa. Com. Pl. Ct. July 21, 2004) (dismissing claim for breach of duty of good faith and fair dealing because contract claim failed). Comcast does not dispute that we must dismiss the claim for breach of implied duty of good faith and fair dealing if we dismiss the breach of contract claim.

None of the three policies at issue imposes any duty upon McCarthy, nor is he mentioned anywhere in the documents. We shall therefore dismiss the breach of contract claim against him, as well as the claim for breach of implied duty of good faith and fair dealing.

ASU is identified as the "Producer" in the $500,000 policy and the "Correspondent" in the $675,000 policy. See Pl.'s Resp. Exs. H, I. The insurers are Chubb and Underwriters, and only they could make claim determinations and pay out claims. See id. ASU contends that it facilitated placement with the insurers by providing them with information to evaluate the risk and calculate the premium, but it denies having the authority to bind coverage or assume risk, a representation the record

confirms. Apparently because ASU is a Producer and Correspondent, Comcast asserts that ASU is a "substantial and real party to the contract, or at the very least a third party beneficiary." Pl.'s Resp. 25.[30] However, the only duty that ASU owed Comcast under the policies was the duty to accept notice of events giving rise to a claim. Comcast has not identified any authority holding that merely accepting notice converts a party into an insurer; common sense counsels otherwise. Therefore, Comcast has failed to plead the breach of any obligation that ASU owed it under the insurance policies. We shall dismiss the breach of contract claim, as well as the claim for breach of implied duty of good faith and fair dealing.

In the alternative, Comcast claims that McCarthy and ASU breached an oral contract by failing to provide insurance coverage for any of Pitkanen's bonuses. The complaint makes no allegation that McCarthy or Perlini ever agreed to obtain

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[30] In making a similar argument with respect to ICL, Comcast cites to Caciolo v. Masco Contractor Services East, Inc., No. 04-962, 2004 WL 2677170 (E.D. Pa. Nov. 22, 2004), for the proposition that privity of contract is typically "a mandatory prerequisite for a party to bring a breach of contract claim, ... [but] [t]his rule is not ironclad," id. at *2 (internal quotations and citation omitted). Caciolo is inapposite. That court made clear that such exceptions might apply to "parties who lack privity [who] can bring a cause of action for breach of contract if they can show themselves to be intended third party beneficiaries of the contract." Id. In other words, applying that rule here would mean that ASU (or ICL) might be able to sue for breach of contract, not that Comcast can sue ASU (or ICL).

insurance that was triggered upon any bonus being achieved. The complaint does allege that McCarthy said that "he would endeavor to obtain the requested coverage." Second Am. Compl. ¶ 25. To "endeavor to obtain" cannot constitute a firm agreement to obtain.

More importantly, under Pennsylvania law, "it is well established that evidence of preliminary negotiations or a general agreement to enter a binding contract in the future fail as enforceable contracts because the parties themselves have not come to an agreement on the essential terms of the bargain and therefore there is nothing for the court to enforce." ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 666 (3d Cir. 1998). Thus, even if Bostic contemplated or generally agreed with McCarthy or an ASU representative that they would at some point enter a contract for either one to provide certain insurance -- an allegation notably absent in the complaint -- such a discussion could not sustain this claim. Therefore, we shall also dismiss the breach of oral contract claim against McCarthy and ASU.

D. Bad Faith

Count II advances a bad faith claim pursuant to 42 Pa.C.S.A. § 8371, which prohibits insurance companies from acting with bad faith towards insureds. Section 8371 provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following

> actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

"[T]o recover under a claim of bad faith, the plaintiff must show that the defendant did not have a reasonable basis for denying benefits under the policy and that defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." Terletsky v. Prudential Property and Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994). As one court succinctly described, "the crux of a bad faith claim under § 8371 is denial of coverage by an insurer when it has no good reason to do so." Hyde Athletic Industries, Inc. v. Continental Cas. Co., 969 F. Supp. 289, 307 (E.D. Pa. 1997) (citation omitted).

McCarthy and ASU seek dismissal on the grounds that they are not "insurers" under Section 8371. Neither the Bad Faith Statute nor the Pennsylvania Supreme Court has defined "insurer" for purposes of Section 8371. Comcast urges a liberal construction of "insurer," pursuant to 1 Pa. C.S.A. § 1928, which states that statutes should generally "be liberally construed to effect their objects and to promote justice."[31] We agree with

[31] Comcast also cites to, inter alia, O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901 (Pa. Super. Ct. 1999), where the court concluded "that a narrow construction of section 8371 . . . is contrary to the purpose of the statute to deter bad faith conduct of insurers," id. at 904, and "that the broad language of section 8371 was designed to remedy all instances of bad faith conduct by an insurer, whether occurring before, during or after

Judge Van Antwerpen in T & N PLC v. Pennsylvania Ins. Guar. Ass'n, 800 F. Supp. 1259 (E.D. Pa. 1992), where he held after considering all relevant Pennsylvania statutes and rules of construction that "it is generally recognized that an insurer issues policies, collects premiums, and in exchange assumes certain risks and contractual obligations." Id. at 1262-63 (assessing meaning of "insurer" within Section 8371).

McCarthy did not issue any of the three policies, collect any premium, or assume any risks or obligations under the policies. Since he is not an insurer, we shall dismiss this count against him.

As for ASU, it did collect the premiums on behalf of the insurers, but the insurers issued the policies and assumed all risks and material obligations under the policies. Nevertheless, Comcast contends that ASU qualifies as an insurer under Brown v. Progressive Ins. Co., 860 A.2d 493, 498 (Pa. Super. Ct. 2004). In Brown, a policy identified two insurers and there was "a total lack of guidance in the policy itself as to who [was] the insurer." Id. at 499. To determine who the insurer was, the court examined the policies and the companies' actions. See id. at 498-500. Here, the policies expressly identify the insurers -- Chubb and Underwriters -- so Brown's test is simply unnecessary. ASU placed the insurance as a

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litigation," id. at 906. O'Donnell is only concerned with insurers' conduct, and makes no suggestion that their conduct should be broadly construed.

Correspondent and Producer, but the policies make clear that ASU did not insure the risk itself. Accordingly, we shall dismiss this count against it.

E. Intentional and/or Negligent Misrepresentation

Comcast alleges that defendants made intentional and/or negligent misrepresentations to it about the terms of the policy, and that by relying on those misrepresentations Comcast entered into the contracts of insurance.

The elements of a negligent misrepresentation claim are:

> (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994). "[N]egligent misrepresentation differs from intentional misrepresentation in that to commit the former, the speaker need not know his or her words are untrue, but must have failed to make reasonable investigation of the truth of those words." Id.

The complaint offers only one allegation of what may be considered an actual "misrepresentation of material fact,"[32]

[32] The complaint does make one allegation that McCarthy "indicated" to Bostic, in a phone conversation on or about July 10, 2003, that he would "endeavor to obtain the requested

which is said to have taken place on or about October 9, 2003. At that time:

> McCarthy represented to Bostic during a telephone conversation, and Perlini represented to Bostic via an email communication, that the requested coverage would be placed via three (3) separate policies . . . . [and] after being assured by McCarthy and Perlini that $2,175,000.00 of coverage for *any* of Pitkanen's contractual bonuses being achieved was to be placed . . . Comcast accepted said contract for said insurance coverage and forwarded one-time premium payment. . . .

Second Am. Compl. ¶¶ 30-31. In other words, McCarthy and Perlini allegedly misrepresented a material fact by informing Bostic that the policy would trigger if Pitkanen achieved any bonus, when in fact it required him to achieve at least two bonuses.

Considering first the Perlini allegation, we have already set forth the e-mails of October 9, 2003, see supra, and there is simply nothing in them that can be construed as representing that coverage would trigger when Pitkanen achieved any bonus. Comcast therefore does not state a misrepresentation claim against ASU, so we shall dismiss this count against it.

All that remains is McCarthy's alleged verbal representation on October 9, 2006. He urges dismissal of this count based on the economic loss doctrine and the gist of the

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coverage," which Bostic described as "insurance coverage for *any* of Pitkanen's six (6) performances being achieved." Second Am. Compl. ¶¶ 24-25. Of course, an indication of an "endeavor to obtain" certain coverage cannot be deemed a representation about the actual contents of the policies at issue because those policies had not yet been written.

action doctrine.

Pennsylvania courts have found that the economic loss doctrine "bar[s] a plaintiff from recovering purely economic losses suffered as a result of a defendant's negligent or otherwise tortious behavior, absent proof that the defendant's conduct caused actual physical harm to a plaintiff or his property." Ellenbogen v. PNC Bank, N.A., 731 A.2d 175, 188 n.26 (Pa. Super. Ct. 1999) (citation omitted). However, just last month the Pennsylvania Superior Court addressed whether the economic loss doctrine applied to a negligent misrepresentation claim.[33] It held "that, based on our Supreme Court's holding in Bilt-Rite Contractors, Inc. v. Architectural Studio, 581 Pa. 454, 866 A.2d 270 (Pa. 2005), the economic loss doctrine does not automatically apply when only economic losses are alleged." Excavation, 2006 WL 1875326, at *1. Given this decision, we will

[33] Excavation addressed a negligent misrepresentation claim brought pursuant to Section 552 of the Restatement (Second) of Torts:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977). McCarthy is an insurance broker who facilitates the placement of insurance policies, and he had a financial interest here because he would receive some compensation from ASU. Therefore, given Comcast's allegation about his representations, the claim against McCarthy may fall within Section 552.

not apply the economic loss doctrine to dismiss the negligent misrepresentation claim against McCarthy.

The gist of the action doctrine "precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims." eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002). "Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals." Id. at 14 (quoting Bash v. Bell Tel. Co., 601 A.2d 825, 829 (Pa. Super. Ct. 1992)). In other words, we must consider if the alleged fraud concerns "the performance of contractual duties." Air Products and Chemicals, Inc. v. Eaton Metal Products Co., 256 F. Supp. 2d 329, 341 (E.D.Pa. 2003) (discussing eToll's analysis). If it does, then the fraud is likely to be collateral to a breach of contract claim, but if it does not, then the fraud, rather than the contractual relationship, is the "gist of the action." Id.

Comcast's allegations against McCarthy are not grounded in contractual duties, as he is not a party to the insurance contracts or any other contract with Comcast. However, as Comcast's insurance broker, he did owe certain duties of care to Comcast. See Consolidated Sun Ray, Inc. v. Lea, 401 F.2d 650, 656 (3d Cir. 1968). Since the alleged fraud does not concern McCarthy's contractual duties, the gist of the action does not bar the misrepresentation claim against him.

We shall therefore deny McCarthy's motion to dismiss Count III.

F. Counts IV and V: Promissory Estoppel/ Detrimental Reliance and Unjust Enrichment

In the alternative to its breach of contract claim, Comcast advances the quasi-contractual claims of promissory estoppel/detrimental reliance and unjust enrichment. The doctrine of promissory estoppel is applied "to avoid injustice by making enforceable a promise made by one party to the other when the promisee relies on the promise and therefore changes his position to his own detriment." Crouse v. Cyclops Industries, 745 A.2d 606, 610 (Pa. 2000).[34] The doctrine of unjust enrichment is similarly addressed to situations where one party received a benefit that would be unconscionable to retain without compensating the provider. See Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987). Promissory estoppel and unjust enrichment may be pled in the alternative to a breach of contract claim, although the finding of a valid contract would prevent a party from recovering for either quasi-contractual theory. See Halstead v. Motorcycle Safety

[34] The promise at issue here was "a promise that [McCarthy, Chubb, ASU, HCC, Lloyd's of London, and ICL] would indemnify and/or reimburse Comcast for paying Pitkanen for any of the bonuses outlined in the Bonus Schedule." Second Am. Compl. ¶ 72. ASU and McCarthy are not insurers, nor does the second amended complaint allege that they promised to indemnify Comcast themselves. For this reason alone, the promissory estoppel claim against them must be dismissed.

Foundation, Inc., 71 F. Supp. 2d 455, 459 (E.D. Pa. 1999). ("[a]lthough plaintiffs are free to pursue the alternative theories of recovery of breach of contract and unjust enrichment, the finding of a valid contract prevents a party from recovering for unjust enrichment"); Iversen Baking Co., Inc. v. Weston Foods, Ltd., 874 F. Supp. 96, 102 (E.D. Pa. 1995) ("breach of contract and promissory estoppel may be pleaded in the alternative, but that if the court finds that a contract exists, the promissory estoppel claim must fall").

Comcast contends that it disputes the contracts' validity -- and not merely their terms as defendants claim -- because the defendants induced Comcast to enter the contracts by misrepresenting its contents and orally agreeing to provide different coverage than they gave. As already discussed, the other parties to the contracts, i.e., the insurers, made no misrepresentations to Comcast, nor did their Producer or Correspondents. Other than Comcast's broker McCarthy, only ASU had direct communications with Comcast, and the second amended complaint does not allege with any particularity any time when ASU orally agreed to provide Comcast coverage on the terms it claims it requested. The only representation that remains in dispute is McCarthy's alleged verbal assurance to Bostic on October 9, 2003 that the policy would be triggered when Pitkanen achieved any bonus. As Comcast's agent, McCarthy's knowledge and actions can bind Comcast, but cannot be imputed to the other

defendants. See Rich Maid Kitchens, Inc. v. Pennsylvania Lumbermens Mut. Ins. Co., 641 F. Supp. 297, 303 (E.D. Pa. 1986).

In the absence of any fraudulent conduct on the part of the contracting parties -- or their Producer or Correspondents -- the insurance contracts are valid. Accordingly, the quasi-contractual claims must be dismissed.

G. Count VI - Rescission/Reformation

"[R]eformation and rescission are equitable remedies that are sparingly granted." H. Prang Trucking Co., Inc. v. Local Union No. 469, 613 F.2d 1235, 1239 (3d Cir. 1980). Most relevant to our purpose here is that such claims presuppose the existence of a contract between the parties. See id. We have already found that ASU and McCarthy are not parties to the disputed contracts, so we shall dismiss this count against them.

III. Conclusion

For the reasons described herein, we dismiss with prejudice all claims against HCC, pursuant to Fed. R. Civ. P. 12(b)(2). We grant the defendants' motion for summary judgment on the issue of agency, and therefore will enter judgment for Chubb, ICL, and Underwriters. We also dismiss with prejudice all claims against ASU and dismiss with prejudice Counts I, II, IV, V, and VI against James McCarthy.

An appropriate order and judgment follow.

BY THE COURT:

/s/ Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMCAST SPECTACOR L.P.	:	CIVIL ACTION
	:	
v.	:	
	:	
CHUBB & SON, INC., et al.	:	NO. 05-1507

JUDGMENT

AND NOW, this 8th day of August, 2006, in accordance with the accompanying Order and Memorandum, JUDGMENT IS ENTERED in favor of defendants Chubb & Son, Inc., ICL, Ltd., and Certain Underwriters at Lloyd's, London and against plaintiff Comcast Spectacor, L.P.

BY THE COURT:

/s/ Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMCAST SPECTACOR L.P.	:	CIVIL ACTION
	:	
v.	:	
	:	
CHUBB & SON, INC., et al.	:	NO. 05-1507

ORDER

AND NOW, this 8th day of August, 2006, upon consideration of defendants' motions for summary judgment on the issue of agency and their motions to dismiss plaintiff's second amended complaint (docket entries # 45, 46, 48, 49, 50, and 51), plaintiff's response thereto, defendants' replies, the parties' supplemental memoranda of law, the motions for leave to file reply by Certain Underwriters at Lloyd's, London, ASU International, Inc., and HCC Insurance Holdings, Inc. (docket entries #69, 70), and plaintiff's response thereto, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. HCC Insurance Holdings, Inc.'s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) is GRANTED and its motion to dismiss under Fed. R. Civ. P. 12(b)(6) is DENIED AS MOOT;

2. The motions for summary judgment of Chubb & Son, Inc., ICL, Ltd., Certain Underwriters at Lloyd's, London, ASU International, Inc., and James J. McCarthy are GRANTED;

3. ASU International, Inc.'s motion to dismiss is GRANTED and all counts are dismissed with prejudice; and

4. James J. McCarthy's motion to dismiss is GRANTED IN PART and DENIED IN PART, and Counts I, II, IV, V, and VI are dismissed with prejudice.

BY THE COURT:

/s/ Stewart Dalzell, J.