

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

SSC MANAGER, LLC, d/b/a SeventySix Capital <p style="text-align:center">v.</p> VENEZIA FC 1907 LP, VENEZIA FC 1907 GP, and VENEZIA F.C. S.R.L.D.	CIVIL ACTION NO. 17-1042
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Baylson, J.

July 27, 2017

MEMORANDUM RE: MOTION TO DISMISS

In this action for declaratory judgment, Plaintiff SSC Manager, LLC (“SSC”) seeks an order stating that it neither entered into an agreement with, nor has any obligations to, Defendants Venezia FC 1907 LP, Venezia FC 1907 GP, and Venezia F.C. S.R.L.D. (collectively, “Venezia”) arising out of a series of discussions between the parties regarding SSC’s possible investment in Venezia. Venezia has filed a counterclaim against SSC, and a third party complaint against three partners at SSC—Wayne Kimmel, Ryan Howard and Jon Powell (collectively, with SSC, “SSC Defendants”)—asserting claims arising out of the same chain of events. At issue before the Court are two motions to dismiss the counterclaims and third party complaint, one filed by SSC and Kimmel, and the other filed by Howard and Powell.

Before diving into a discussion of the case, we pause to briefly discuss the strategic choices made by counsel in this multi-million dollar lawsuit. SSC, obviously recognizing that a business dispute had developed with Venezia and cognizant of the likelihood of litigation, chose to file suit in this Court rather than wait to be sued by Venezia in a court of its choosing.

Whether this strategic move was designed to ensure federal jurisdiction in this District, or for

some other reason, is not known; however, the filing of the claim here has established the jurisdictional requisites for the case to proceed. Venezia, for its part, has also made strategic choices. For one, it chose not to file a motion to dismiss the declaratory judgment complaint and instead to file an answer and counterclaim. By doing so, Venezia consented to jurisdiction in this Court, agreed that venue was proper, and, for better or worse, permitted the case to proceed towards a judgment. Venezia also chose not to assert a breach of contract claim, notwithstanding its averments that sufficiently definite promises were made and relied upon as to form the basis for claims of fraud, promissory estoppel, and negligent representation.

As the reader of the declaratory judgment complaint and the answer and counterclaim will recognize, there are serious disputes as to credibility. However, underlying these disputes, there is apparently no question that the parties had a number of meetings at which multi-million dollar investments in Venezia were discussed, but no document was signed expressing a lack of legal obligation until or unless such discussions were reduced to writing. As any first law year student would know, if this was a real estate transaction, then the verbal discussions would amount to naught. However, the law is generous in allowing claims to proceed based on oral statements, assuming that the requisite words have been used. For that reason, and because the only matter before the Court is the legal sufficiency of the motion to dismiss the answer and counterclaim, much of this case will proceed into discovery and the ultimate conclusion may rest upon a jury's consideration of the credibility of the various principals.

I. Factual Background

The following facts are taken as true from Venezia's counterclaim and third party complaint. In October 2016, Venezia, an Italian football club based in Venice, began seeking \$10 million via a Series B round of financing which valued the company at between \$30 million

and \$35 million. (ECF 10, Answer, Counterclaim and Third Party Complaint (“ACC”) ¶¶ 74-75.) Venezia’s outreach to potential investors quickly led it to SSC, a venture capital firm based in Radnor, Pennsylvania that primarily invests in and raises money for investments in start-up companies. (Id. ¶ 76.) Kimmel is SSC’s managing partner and a long-time family friend of one of the members of the Venezia FC Board of Directors, John Tapinis. (Id.) The first discussion of any possible investment by SSC in Venezia occurred at a meeting between the parties in Radnor on November 22, 2016 at which Kimmel, Powell, Howard and another individual named Chad Stender were present on behalf of SSC, and Joe Tacopina, Tapinis, and John Goldman were present on behalf of Venezia. (Id. ¶ 77.) Following that initial meeting, the SSC Defendants began conducting due diligence of Venezia and, in December 2016, Venezia provided them with various documents. (Id. ¶¶ 77-78.) Venezia believed SSC to be “enthusiastic about the opportunity to invest,” based on statements such as one made by Kimmel in January 2017 that he was “disappointed” to learn that Venezia had already sold \$1 million of Series B shares to someone else. (Id. ¶ 79.)

The next meeting between the parties occurred in New York City on January 6, 2017, with Kimmel, Stender, Tacopina, Tapinis, and Goldman present, and spirits high regarding the likelihood of the investment taking place. (Id. ¶ 81.) At that meeting, Venezia communicated that it immediately needed cash in order to continue operations and Kimmel and Stender acknowledged Venezia’s cash position, stated they understood, and agreed to plan a trip for various SSC employees to visit Venice, “attend a game and feel the passion around the project in Venice.” (Id.) Kimmel and Stender went to Venice for three nights beginning January 27, 2017, during which time they toured Venezia’s facilities, attended a game, and met with Venezia’s management to discuss the team and the possible investment. (Id. ¶ 83.) At dinner in Venice on

January 29, 2017, “Kimmel represented to [Venezia] that the SSC Defendants would promptly invest at least \$6.5 million in [Venezia],” stating that “we’re in, absolutely, 100%.” (Id. ¶ 85.) Kimmel further stated that the SSC Defendants would “take down the rest of the round,” referring to the \$6.5 million remaining in the \$10 million Series B round, that the SSC Defendants could invest that sum without raising any money from third parties, and “assured [Venezia] that [they] would fund by February 10, 2017.” (Id.) Following the dinner, Kimmel called Powell and Howard to tell them that he had committed SSC to investing \$6.5 million in Venezia, a statement to which Powell and Howard responded enthusiastically. (Id. ¶ 86.)

Kimmel’s representation that SSC was able to invest the \$6.5 million by February 10th without needing financial help from outside investors “was critical to [Venezia]” due to Venezia’s need for immediate capital to meet its financial obligations and its inability to “wait for the SSC Defendants . . . to first raise capital from third parties.” (Id. ¶ 87.) Venezia’s representatives confirmed with Kimmel “repeatedly” that the SSC Defendants were capable of funding by February 10th and that they did not need any further information in order to complete their due diligence. (Id. ¶ 89.) In addition to the statements made in Venice, Kimmel also “insisted that [Venezia] cease all other efforts to obtain other Series B investors or otherwise seek alternative financing.” (Id. ¶¶ 90-91.)

Venezia did not doubt the veracity of Kimmel’s representations due to Tapinis’ longstanding friendship with Kimmel, as well as because Kimmel “brands himself” on his website as “ethical” and touts his many investments in well-known, large companies. (Id. ¶¶ 88, 92.) On account of Kimmel’s statements, Venezia “ceased its efforts to pursue other potential investors and/or financing.” (Id. ¶ 93.) Following the Italy trip, Kimmel made several more assurances to Venezia that SSC was committed to investing; specifically, on February 1, 2017,

he emailed unidentified Venezia representatives that “he was headed to Houston for the Super Bowl where he was going to have ‘a number of meetings that will be helpful to [Venezia],’” and on February 7, 2017, he confirmed to Tapinis the SSC Defendants’ commitment to completing the Series B round. (Id. ¶¶ 94-96.) In the February 7th conversation, Kimmel also represented to Tapinis that the SSC Defendants would fund \$1 million by the following week because he understood that Venezia needed capital to satisfy certain immediate obligations. (Id. ¶¶ 97-98.) That investment never took place. (Id. ¶ 99.)

A couple of weeks later, the SSC Defendants told Venezia that they planned to invest \$3.5 million of their own money and that the remaining \$3 million would be raised from their friends and family, in contrast to earlier representations that the SSC Defendants would be personally investing the entire \$6.5 million. (Id. ¶ 100.) They reassured Venezia that if they were unable to raise the additional \$3 million, they could fund it themselves, and that regardless, they would fund their \$3.5 million before raising the other \$3 million so that Venezia could meet its financial obligations. (Id. ¶ 101.) The terms then changed again—Kimmel stated that SSC would now be investing \$3 million rather than \$3.5 million, and their friends and family would invest the remainder. (Id. ¶ 103.) Throughout this back and forth, Kimmel maintained that SSC “had \$1 million ‘ready to go’ to assist [Venezia] [in] meet[ing] its immediate financial needs.” (Id. ¶ 105.)

On February 16, 2017, Venezia sent Kimmel the investment documents, sought reassurance that the investment was still on track, and requested the promised first \$1 million. (Id. ¶¶ 106-107.) Kimmel responded that “he needed additional financial information from [Venezia] before he could invest even a single dollar.” (Id. ¶ 108.) One of the documents sent was a term sheet dated January 17, 2017 (“Term Sheet”), which details “the Series B Equity

Interests being offered for limited partnership interest in [Venezia].” (ECF 9, Amended Cmplt., Ex. B at 1.) The Term Sheet includes the following disclaimer: “No prospective investor will have legally binding obligations until we have negotiated and signed definitive written agreements with such prospective investor.” (Id.) The document contains signature lines for Tacopina, as authorized signatory of Venezia FC 1907 LP, and “Purchaser,” but both lines are unsigned and undated. (Id. at 2.)

Over the next several days Tacopina and Kimmel exchanged a series of emails in which Tacopina stated that Kimmel had represented at the dinner in Venice that SSC would invest \$6.5 million in Venezia by February 10th, that Venezia needed the money urgently, and that Venezia had not pursued other sources of capital because it had expected to obtain the \$6.5 million from SSC. (ACC ¶¶ 109-115.) Kimmel did not dispute any of Tacopina’s characterizations but rather responded stating that SSC needed an updated cash flow statement in order to move forward. (Id. ¶ 116.) Venezia was taken aback by this request because Venezia had already provided its financial statements through December 31, 2016 and projected cash flows through 2017, and this “was the first time that Kimmel (or any of the SSC Defendants) had ever asked for financial information beyond December 31, 2016.” (Id. ¶ 117.)

The parties participated in a teleconference on February 22, 2017, during the course of which Kimmel stated that “the SSC Defendants would not invest anything until they were sure they could raise the full \$6.5 million,” that “it would be difficult to ‘find’ \$1 million to invest in [Venezia] quickly,” and that he recognized he was making a “radical” about-face from the SSC Defendants’ previous representations. (Id. ¶¶ 120-123.) The next day, Kimmel advised Venezia that the SSC Defendants “would not be investing in [Venezia] under any circumstances and regardless of the consequences.” (Id. ¶ 124.) At this point, in late February 2017, Venezia was

in dire straits, having depended on receiving at least the \$1 million promised by the SSC Defendants. (Id. ¶¶ 125-126.) It ultimately found a replacement investor who, partially based on the company’s poor financial condition, “insisted upon more favorable terms than what had been offered other Series B investors (including the SSC Defendants).” (Id. ¶ 127.) The investor demanded that “his \$4 million investment be structured as a loan (bearing an interest rate of 15%) and further demanded that [Venezia’s] shares that had been set aside for the SSC Defendants (that is, approximately 22% of the common stock) now be conveyed to him instead.” (Id. ¶ 128.) These terms were “far worse” than those to which the SSC Defendants had committed, “resulting in millions of dollars in damages to [Venezia].” (Id. ¶ 130.)

Shortly after the business relationship fell apart, Venezia discovered that the SSC Defendants had never intended to fund the full \$6.5 million themselves but rather “had been marketing the Series B round to third parties – not just to friends and family, as they had told [Venezia] – and were seeking to raise \$10 million (not just \$6.5 million) from their investors and clients.” (Id. ¶¶ 132-133.) SSC represented in its marketing materials that it would be investing 15% of the total invested capital, that it was charging a fee based on the capital raised from investors, and that it would serve as “an advisor to the President” of Venezia. (Id. ¶ 134.) Venezia alleges that, had it known that the SSC Defendants could not fund the \$6.5 million themselves and instead were planning to rely on third parties to do so, it would have pursued two potential investors with whom they had been speaking but who they did not pursue at the SSC Defendants’ insistence. (Id. ¶ 136.) Finally, Venezia avers that the SSC Defendants had always intended to raise the money from third parties because doing so would allow the SSC Defendants to earn fees from the investors, but that the SSC Defendants had purposely neglected to tell Venezia because they knew if they did, then Venezia would have sought alternate sources of

funding. (Id. ¶¶ 137-138.)

II. Procedural Background

SSC filed suit against Venezia on March 8, 2017 (ECF 1). It then filed an amended complaint on May 11, 2017 (ECF 9), to which Venezia answered and asserted a counterclaim and third party complaint on May 15, 2017 (ECF 10). On June 16, 2017, Howard and Powell filed a motion to dismiss Count IV of the ACC (ECF 22), and SSC and Kimmel filed a motion to dismiss the entire ACC (ECF 23). Venezia responded to both on July 14, 2017 (ECF 28, 29). On July 18, 2017, SSC, Kimmel, Howard, and Powell submitted a joint reply (ECF 30).

III. Discussion

A. Legal Standard

In considering a motion to dismiss under Rule 12(b)(6), “we accept all factual allegations as true [and] construe the complaint in the light most favorable to the plaintiff. Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 84 (3d Cir. 2011) (internal quotation marks and citations omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

The Court in Iqbal explained that, although a court must accept as true all of the factual allegations contained in a complaint, that requirement does not apply to legal conclusions; therefore, pleadings must include factual allegations to support the legal claims asserted. Id. at 678, 684. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. at 678 (citing Twombly, 550 U.S. at 555); see also Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008) (“We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she

provide not only ‘fair notice,’ but also the ‘grounds’ on which the claim rests.”) (citing Twombly, 550 U.S. at 556 n.3). Accordingly, to survive a motion to dismiss, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

B. Analysis

i. Fraud (Count I)

Under Rule 9(b) and Pennsylvania law, a party pleading fraud must allege with particularity: “(1) [a] representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.” Plouffe v. Bayview Loan Servicing, LLC, No. 15-5699, 2016 WL 6442075, at *8 (E.D. Pa. Oct. 31, 2016) (citing Youndt v. First Nat’l Bank of Port Allegany, 868 A.2d 539, 545 (Pa. Super. Ct. 2005)).

The heightened pleading standard of Rule 9(b) is intended to provide defendants with “notice of the claims against them, provide[] an increased measure of protection for their reputations, and reduce[] the number of frivolous suits brought solely to extract settlements.” In re Suprema Specialties, Inc. Sec. Litig., 438 F.3d 256, 270 (3d Cir. 2006) (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997)). A plaintiff meets the standard by alleging “the ‘date, place or time’ of the fraud, or through ‘alternative means of injecting precision and some measure of substantiation into [his] allegations of fraud.’” Lum v. Bank of Am., 361 F.3d 217, 224 (3d Cir. 2004) (quoting Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984)). The Third Circuit has cautioned that “focusing exclusively on [Rule 9(b)’s] ‘particularity’ language ‘is too narrow an approach and

fails to take account of the general simplicity and flexibility contemplated by the rules.’”
Seville, 742 F.2d at 791 (3d Cir. 1984) (quoting Christidis v. First Pa. Mortg. Trust, 717 F.2d 96, 100 (3d Cir. 1983)) (internal quotations omitted).

Under Pennsylvania law, a cause of action for fraud must allege misrepresentation of a past or present material fact; it cannot be based on a failure to perform an action in the future. Nissenbaum v. Farley, 380 Pa. 257, 264, 110 A.2d 230, 233 (1955) (stating that “promises to do something . . . do not in themselves constitute fraud, though they are not subsequently complied with”); Singh v. Wal-Mart Stores, Inc., No. 98-1613, 1999 WL 374184, at *9 (E.D. Pa. June 10, 1999) (“A claim for fraudulent misrepresentation may not be based on a promise to take action in the future.”). However, a statement of present intention which is known to be false when uttered can give rise to a fraudulent misrepresentation claim. Coll. Watercolor Grp., Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 115, 360 A.2d 200, 206 (1976) (“Statements of intention . . . which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent.”); see also Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Invs., 951 F.2d 1399, 1410-11 (3d Cir. 1991) (noting that “[a] statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact,” but adding that “[s]tatements of intention made at the time of contracting are not fraudulent simply because of a later change of mind”) (quoting Brentwater Homes, Inc. v. Weibley, 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977)) (citations and internal quotations omitted).

The third and fifth elements of the fraud framework are the only ones in dispute here: whether Kimmel or any individual speaking on behalf of SSC knowingly or recklessly made false representations, and whether Venezia justifiably relied on any statements made.

1. Falsity

First, we tackle the question of whether Venezia has adequately pleaded that any of the allegedly fraudulent statements were false when made. There are four representations at issue:

1. That SSC was committed to funding the remainder of the Series B round;
2. That SSC had the ability to fund the full remaining amount of the Series B round without raising any funds from investors or third parties;
3. That SSC would fund by February 10, 2017; and
4. That SSC would fund \$1 million by the week of February 13, 2017. (ACC ¶ 142.)

SSC and Kimmel devote much of their motion to the argument that these were “statement[s] of intent to do something in the future and therefore not actionable as fraud.” (ECF 23, SSC & Kimmel Motion to Dismiss (“SSC Mot.”) at 22.) However, as stated above, a statement of purported present intention that is false when made can form the basis of a fraud claim. Therefore, the crux of this analysis is whether Venezia has adequately pleaded facts showing that, at the time these statements were made, the speaker had no intention of following through on them. Also critical is whether Venezia has pleaded with the requisite particularity. We will analyze each allegedly fraudulent statement.

As to any statements that SSC was committed to funding the remainder of the Series B round, we find that Venezia has pleaded with particularity facts showing that these statements may have been contrary to the speakers’ present intentions. Although it seems that the SSC Defendants in fact intended that SSC would invest \$6.5 million in Venezia, it is plausible from the facts alleged that SSC’s interest in investing was conditioned on the company’s ability to raise outside funding and/or on its receipt of certain due diligence documents, two critical facts which were not disclosed to Venezia. This is sufficient to support an allegation of fraud. Coleman v. Sears, Roebuck & Co., 319 F. Supp. 2d 544, 550 (W.D. Pa. 2003) (“Any alleged

false information may be communicated directly, or indirectly, by the non-disclosure of material facts.") (emphasis added); see Liebholz v. Harriri, No. 05-5148, 2006 WL 2023186, at *8 (D.N.J. July 12, 2006) (where promisor's intention to perform is "dependent upon contingencies known only to [him]," that indicates an intent not to perform which can support an allegation of fraud). SSC and Kimmel point to Venezia's averment that "[t]he SSC Defendants reneged on their commitment to fund [Venezia] because, . . . they learned that they would be unable to raise sufficient funds from their clients and investors" as evidence that "SSC did actually intend to invest" in Venezia. (ACC ¶ 65; SSC Mot. at 22.) We agree, but see a critical difference between Kimmel's representation that SSC was committed to investing \$6.5 million, and his allegedly true intention that SSC would only invest that amount if it was able to find investors. The alleged failure to inform Venezia of the conditionality of the promise is key and supports a claim of fraud.

Venezia next avers that SSC and Kimmel fraudulently misrepresented SSC's ability to fund the \$6.5 million without the help of any third parties. As to this allegation, we find that Venezia's claim fails due to the lack of facts regarding the falsity of any such statements. Specifically, Venezia does not make any allegations regarding SSC's inability to fund the \$6.5 million such as that "SSC was underfunded, or even that SSC did not have the requisite financial resources to make the investment." (SSC Mot. at 23.) Venezia conflates the question of whether SSC intended to fund the \$6.5 million itself with the question of SSC's ability to do so. There are insufficient facts supporting a fraud claim as to the falsity of any statements made by the SSC Defendants that SSC was able to fund the \$6.5 million itself.

Venezia next alleges that on January 29, 2017, Kimmel fraudulently promised Venezia that SSC would fund the \$6.5 million by February 10, 2017. SSC and Kimmel point to

inconsistencies in Venezia's allegations, such as that Tacopina had described Kimmel as having said that Kimmel "expected to be ready to fund by 2/10" rather than that he "would fund by 2/10." (SSC Mot. at 23; ACC ¶ 109.) But, Venezia also alleges that Kimmel represented that SSC "would fund by February 10, 2017, after they had returned from the Super Bowl." (ACC ¶ 85.) At this preliminary stage, we construe all facts in the light most favorable to Venezia, and find Venezia sufficiently alleged a promise to fund.

SSC and Kimmel also assert that Venezia has not averred that any such statements were false when made. (SSC Mot. at 23-24.) Venezia counters by arguing that these were misrepresentations because "SSC and its principals were busy secretly seeking funding from third-parties and were contemporaneously advising those third-parties that they had until March to fund their investment." (ECF 29,¹ Venezia Opp'n at 18.) Although SSC's attempts to raise money from investors at the same time it was promising to fund Venezia's Series B round does not necessarily mean that it did not intend to fund the \$6.5 million itself, it could be indicia of such an intention. Similarly, if SSC was advising outsiders that they had until March to participate in the investment, that could point to a contradiction between Kimmel's statement and his true state of mind. We conclude that both the definitiveness with which Kimmel stated SSC would fund by February 10, 2017, as well as the honesty with which he made that statement are questions of fact incapable of resolution at this juncture. See Giordano v. Claudio, 714 F. Supp. 2d 508, 514 (E.D. Pa. 2010) (where counterclaim alleged that plaintiff made a future promise without the present intention to abide it, it stated a claim for fraud because "[t]he determination of whether [the plaintiff] honestly intended to [fulfill his promise] . . . or planned to deceive [the defendant] entails questions of fact").

¹ Venezia's motions in opposition to dismissal, ECF 28 and 29, are identical. We cite to ECF 29 because that is the one filed in opposition to the motion of SSC and Kimmel.

Finally, we turn to the allegedly fraudulent representation Kimmel made to Tapinis on February 7, 2017 that SSC would fund \$1 million the following week, which representation he confirmed some days thereafter when he allegedly stated that “the SSC Defendants had \$1 million ‘ready to go’ to assist [Venezia][in] meet[ing] its immediate financial needs.” (ACC ¶¶ 96-98, 105.) SSC and Kimmel allege that Venezia has put forth no facts showing that the statements were false when made, but in so doing they ignore Venezia’s averment that two weeks after the initial representation, on February 22, 2017, Kimmel stated that “it would be difficult to ‘find’ \$1 million to invest in [Venezia] quickly.” (SSC Mot. at 24; ACC ¶ 122.) Venezia has pleaded sufficient facts to survive dismissal on its claim that these representations may have been fraudulent when made.

2. Justifiable Reliance

SSC and Kimmel argue that Venezia has failed to allege justifiable reliance as a matter of law based on certain language in the Term Sheet sent from Venezia to SSC on February 16, 2017 stating that SSC would have no obligation to Venezia until a written agreement was negotiated and signed. (SSC Mot. at 15; ECF 30, Reply at 1, 3-5.) Venezia disputes the appropriateness of our consideration of the Term Sheet “because [Venezia] neither attached the Unsigned Term Sheet to the ACC nor relied upon it in . . . asserting any of its claims.” (Venezia Opp’n at 20.) SSC and Kimmel counter that the document is properly before the Court because: (1) it was discussed in, and attached as an exhibit to, SSC’s Amended Complaint; (2) Venezia admitted in its Answer that the exhibit was the Term Sheet Venezia sent to SSC; and (3) in the ACC, Venezia references the Term Sheet. (Reply at 2.)

Venezia cites Third Circuit precedent for the proposition that, under Rule 12(b), the district court may only consider, in addition to the pleadings, “certain narrowly defined types of

material without converting the motion to dismiss [into a motion for summary judgment].” In re Rockefeller Ctr. Props., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). Among the documents a court can examine are those “integral to or explicitly relied upon in the complaint,” and ones attached to a motion to dismiss “if the plaintiff’s claims are based on the document[s].” Id. (quoting Burlington Coat Factory, 114 F.3d at 1426 and PBGC v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)).

Although Venezia accurately states the law, it neglects to acknowledge that the Term Sheet was attached as an exhibit to SSC’s Amended Complaint and therefore is a part of the record of this case. Therefore, in order for it to be considered on these motions, it neither needs to have been relied on in the ACC nor the basis for any of Venezia’s claims. Rather, it falls under the core group of items properly before the Court on a motion to dismiss: “matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case.” Pension Trust Fund for Operating Engr’s v. Mortg. Asset Securitization Trans., Inc., 730 F.3d 263, 271 (3d Cir. 2013) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994)) (emphasis added); see also 5A Wright & Miller, Federal Practice and Procedure: Civil 2d, § 1357. Because the Term Sheet was Exhibit B to SSC’s Amended Complaint, it “appear[s] in the record of the case,” and is properly considered by the Court on this motion. (ECF 9-2.)

That said, the document is not dispositive of the issue of Venezia’s justifiable reliance, contrary to SSC’s and Kimmel’s contentions. They cite to Bennett v. Itochu Int’l, Inc., Nos. 09-1819, 09-4123, 2012 WL 3627404 (E.D. Pa. Aug. 23, 2012) for the proposition that Venezia’s reliance on any statements made by the SSC Defendants was unreasonable as a matter of law due to the language in the Term Sheet, but Bennett is distinguishable. In Bennett, the parties

engaged in extensive negotiations regarding the defendant's possible purchase of the plaintiff's company, during the course of which four expressly non-binding documents were signed: three letters of intent and one term sheet. Id. at *1-2. The court, considering the plaintiff's claim for promissory estoppel to enforce the defendant's oral promise to purchase shares in the plaintiff's company, held that it was unreasonable as a matter of law for the plaintiff to have relied on the defendant's promise "as this statement contradicted several signed written documents under which such a transaction required the execution of a final, binding, *written* contract." Id. at *21 (emphasis in original).

These facts stand in contrast to the instant matter. Here, the Term Sheet was signed by neither party and was exchanged almost three weeks after the first alleged misrepresentation, whereas in Bennett, the parties were bound by written agreements signed prior to the alleged oral promises which expressly disclaimed any legal obligations between the parties until a final agreement was reached. The fact that the Term Sheet was circulated after a majority of the alleged misrepresentations had been made belies a finding that, from late January to mid-February 2017, the parties were both operating under the assumption that all discussions were purely hypothetical and that Venezia should not rely on any of SSC's statements. In addition, the failure of either party to sign the Term Sheet underscores that the document was not a binding contract representing the mutual agreement of both SSC and Venezia to not be bound to each other until a final agreement was reached and executed; rather, it can better be conceived of as a proposal which was never assented to. Perhaps most importantly, Bennett was disposed of on summary judgment after full discovery, while here this case has only just begun.

MDNet, Inc. v. Pharmacia Corp., 147 F. App'x 239 (3d Cir. 2005) provides further support for our conclusion that the Term Sheet does not render Venezia's reliance on the SSC

Defendants' statements unreasonable as a matter of law. In that case, the plaintiff and the defendant engaged in negotiations in which the defendant allegedly agreed to provide \$2 million to support expansion of a venture in which the plaintiff was involved. Id. at 241. Though both parties proposed written contracts to formalize the agreement, the deal fell apart before any contract was signed. Id. The district court dismissed the plaintiff's promissory estoppel claim due to the lack of reasonable reliance, which holding was affirmed on appeal by the Third Circuit. Id. at 244 (stating that "[the plaintiff] could not have reasonably relied on the oral promises made by [the defendants] because their prior agreement required a writing for a further binding agreement"). Although a similar contract is at issue here—the Term Sheet states that a final agreement was required before any legal obligations could arise between the parties—critically, the Term Sheet was not signed. The lack of clear assent to the terms of the Term Sheet on the part of both parties is, we find, a key difference between MDNet and the instant case and one that renders SSC's and Kimmel's argument regarding the dispositive nature of the Term Sheet to the reasonableness inquiry, unpersuasive.

The rest of SSC's and Kimmel's contentions as to Venezia's failure to allege reasonable reliance are similarly unavailing. They refer to the email from Venezia dated February 16, 2017 that attached the Term Sheet, which stated that it sent the document "to move the process forward," as evidence that "Venezia acknowledged that the 'process' for the investment was not complete." (SSC Mot. at 16.) But, again, SSC and Kimmel cite Bennett and MDNet for that conclusion, and as explained above, those cases do not control due to their reliance on signed written agreements in place prior to the alleged misrepresentations. Perhaps most importantly, we note that significant precedent exists for the proposition that "the issue of whether reliance on a representation is reasonable (or justifiable) is generally a question of fact that should be

presented to the jury.” Tran v. Metro. Life Ins. Co., 408 F.3d 130, 139 (3d Cir. 2005); Angrisani v. Capital Access Network, Inc., 175 F. App’x 554, 557 (3d Cir. 2006) (reversing summary judgment on fraudulent misrepresentation claim where district court had concluded that the plaintiff “was an intelligent and sophisticated businessman and should have more fully investigated the claims of [the defendant’s] agents,” because “the question of whether [the plaintiff’s] investigation and reliance was reasonable presents a factual issue that is more properly left to the judgment of the jury”); Silverman v. Bell Sav. & Loan Ass’n, 367 Pa. Super. 464, 474, 533 A.2d 110, 115 (1987) (“The right to rely upon a representation is generally held to be a question of fact.”).²

In sum, the ACC pleads several specific instances in which the SSC Defendants represented that SSC (1) was committed to funding the remainder of the Series B round; (2) would fund by February 10, 2017; and (3) would fund the initial tranche of \$1 million the week of February 13, 2017. (ACC ¶¶ 85, 89, 91.) The ACC further pleads facts showing that these representations were made at a time when SSC in fact intended only to move forward with the investment if SSC was able to obtain outside funding and/or further financial documentation, two conditions allegedly unbeknownst to Venezia. (Id. ¶¶ 108, 116, 133, 134.) Venezia supports its reliance on these representations by reference to: (1) Kimmel’s longstanding personal relationship with Tapinis, (2) its knowledge about the substantial personal wealth of Howard,

² SSC and Kimmel dispute that reliance is typically for the fact finder to decide, citing to Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247 (3d Cir. 2007), in which the court affirmed dismissal of a promissory estoppel claim because the plaintiff’s reliance was unreasonable as a matter of law. Id. at 251. But, in Fletcher-Harlee, the alleged promise at issue was a subcontractor’s written bid to a subcontractor which specifically stated that “its price quotation was for informational purposes only, did not constitute a ‘firm offer,’ and should not be relied on.” Id. at 249. Because there were no facts “undercut[ting] the force of [the subcontractor’s] disclaimer,” the court concluded that any reliance on the terms of the submission was unreasonable as a matter of law. Id. at 251. Here, in contrast, the fact that the alleged promises were made prior to the submission of the Term Sheet, the Term Sheet being unsigned, and the longstanding relationship between Kimmel and Tapinis, all are “facts to undercut the force of [the Term Sheet’s] disclaimer,” and do not permit a finding at this preliminary stage that Venezia’s reliance was legally unreasonable. Id.

and (3) various statements on SSC's website describing Kimmel's business acumen and investments in major companies. (Id. ¶¶ 76, 88.) Venezia also alleges that it took action in reliance on these representations by foregoing other investment opportunities on the express direction of Kimmel that Venezia "cease all other efforts to obtain other Series B investors or otherwise seek alternative financing." (Id. ¶¶ 90-91.) Finally, Venezia avers that, as a result, it was harmed insofar as it was forced to find a replacement investor at the eleventh hour, who demanded far more onerous terms than had been offered by other possible Series B investors. (Id. ¶¶ 127-129.)

Venezia has sufficiently pled fraud as to three of the four representations allegedly made.

ii. Negligent Misrepresentation (Count II)

In Pennsylvania, a claim of negligent misrepresentation requires proof of: "(1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation." Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 466, 866 A.2d 270, 277 (2005) (quoting Bortz v. Noon, 556 Pa. 489, 500, 729 A.2d 555, 561 (1999)). Negligent misrepresentation differs from fraudulent 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." Bennett, 682 F. Supp. 2d at 481.

Venezia cites the same four representations that form the basis of its fraud claim for its negligent misrepresentation claim:

1. That SSC was committed to funding the remainder of the Series B round;

2. That SSC had the ability to fund the full remaining amount of the Series B round without raising any funds from investors or third parties;
3. That SSC would fund by February 10, 2017; and
4. That SSC would fund \$1 million by the week of February 13, 2017. (ACC ¶ 150.)

Venezia claims that “SSC and Kimmel should have known that . . . their representations were false and misleading when made because neither SSC nor Kimmel ever intended to fund (i) the full \$6.5 million without raising funds from outside parties, (ii) the first tranche of \$1 million, and/or (iii) by any of the dates promised.” (*Id.* ¶ 151.) SSC and Kimmel argue for dismissal of this claim because Venezia has failed to allege reasonable reliance on any representations made, and because the representations at issue are merely “unfulfilled promises to do acts in the future, which are not actionable.” (SSC Mot. at 25.) We dispense with the first argument for the reasons discussed in Section III(B)(i)(2) above. As for the second, SSC and Kimmel cite two cases from this District for the proposition that one cannot be negligent as to his future intentions, a rule which would prove fatal to Venezia’s negligent misrepresentation claims, which are each based on statements relating to SSC’s future actions.³ (SSC Mot. at 25-26.)

In Bennett, discussed above, the court held that although a statement of one’s future intention can be the basis for a fraud claim if the plaintiff shows the statement was false when made, such a statement cannot support a negligent misrepresentation claim because “[a]t the time that a statement is made regarding what the speaker intends to do in the future, the speaker either intends at the moment to take the action he is promising or not.” Bennett, 682 F. Supp. 2d at 480. The court reasoned that it is impossible to be negligent as to one’s own future intentions.

³ Venezia argues that “whether SSC was ‘100%’ committed to investing, required additional due diligence to make an investment, or intended to invest its own money are all statements of present facts” rather than of future intentions. (Venezia Opp’n at 19.) We disagree. At base, those are representations going to the SSC Defendants’ state of mind regarding their future plans to invest in Venezia.

Id. at 480-81. Based on that analysis and in light of the plaintiffs’ averments that the defendants had “made affirmative representations . . . regarding their intentions to enter certain future agreements,” the court found that “[t]hese statements were either true at the time they were made or they were not,” and therefore the negligent misrepresentation claim had to be dismissed. Id. at 481.

Similarly, in Arsenal, Inc. v. Ammons, No. 14-1289, 2014 WL 6771673 (E.D. Pa. Dec. 2, 2014), Judge Brody dismissed a negligent misrepresentation claim on these grounds. The case concerned representations made by several defendants as to “the future possibility or imminence” that they would sign a lease with the plaintiffs, which the plaintiffs argued were negligently made because the defendants “‘ought to have known’ that they would change their mind and refuse to ultimately sign a lease.” Id. at *3 (emphasis omitted). The claim was dismissed for the same reasons relied on in Bennett—to misrepresent one’s state of mind, “a defendant must say one thing while planning to do another; . . . however, this reasoning collapses when the defendant’s intention concerns his or her future plans.” Id. (reasoning that one cannot be negligent as to one’s future intentions).

We agree with the analysis in these cases. Just as in Bennett and Arsenal, either the SSC Defendants meant what they said regarding their plans to fund Venezia’s Series B round and the timing by which they would do so, or they did not, in which case their statements may have been fraudulent when made. Under this theory, SSC and Kimmel made no factual misrepresentations; therefore, we dismiss Venezia’s negligent misrepresentation claim.

iii. Promissory Estoppel (Count III)

In order to state a claim for promissory estoppel under Pennsylvania law, the plaintiff must show that: “(1) the promisor made a promise that he should have reasonably expected to

induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise.” Crouse v. Cyclops Indus., 560 Pa. 394, 403, 745 A.2d 606, 610 (2000). The promise alleged must be express; “a broad and vague implied promise” cannot sustain a promissory estoppel claim. C & K Petroleum Prods., Inc. v. Equibank, 839 F.2d 188, 192 (3d Cir. 1988).

SSC and Kimmel advance two arguments in support of dismissing this claim: first, that the representations allegedly made were insufficient to qualify as promises, and second that Venezia’s reliance thereon was unreasonable. (SSC Mot. at 17-19.) We dispense with the latter argument for the reasons discussed in Section III(B)(i)(2) above.

In regard to whether Venezia has sufficiently alleged that a promise was made, we turn to the averments at issue. Venezia alleged that on January 29, 2017, Kimmel represented to certain unnamed employees of Venezia “that the SSC Defendants would promptly invest at least \$6.5 million in [Venezia].” (ACC ¶ 85.) Kimmel also allegedly stated that “we’re in, absolutely, 100%,” that the SSC Defendants would “take down the rest of the round,” without needing to raise any additional capital from outsiders, and finally that they would fund by February 10, 2017. (Id.) SSC and Kimmel characterize these statements as lacking in the certainty needed to qualify as a promise for purposes of promissory estoppel, largely relying on Burton Imaging Group v. Toys “R” Us, Inc., 502 F. Supp. 2d 434 (E.D. Pa. 2007) for support. (SSC Mot. at 17-18.) In that case, Burton was a digital graphics firm that engaged in negotiations with Toys “R” Us (“TRU”) regarding Burton’s provision of certain graphics services for a largescale electronic display that TRU would use for the façade of one of its stores. Id. at 436. During the course of these negotiations, one of TRU’s employees stated that the store was “going to move ahead with

you as long as everything that you're doing passes" a certain test. Id. at 437. Burton took and passed the test, but TRU declined to retain Burton for the graphics contract, leading Burton to sue TRU under a theory of promissory estoppel. On summary judgment, the court found that the employee's statement was insufficient to qualify as a promise "because it does not express the intent of the parties with reasonable certainty." Id. at 439. Specifically, the statement failed to include "key terms such as payment to Burton or duration of the . . . contract." Id.

SSC and Kimmel argue that the instant situation is similar insofar as the alleged misrepresentations did not address "numerous material terms of the potential [investment] . . . , as demonstrated by the terms set forth in the Term Sheet, and the Term Sheet's recognition that the terms of the investment needed to be negotiated." (SSC Mot. at 18.) Contrary to these assertions, we find the TRU employee's statement far vaguer than the ones allegedly made by the SSC Defendants. Whereas a promise "to move ahead with you" contains no detail regarding the compensation owed or duration of the contract, Kimmel's alleged statements included the amount of the investment and the specific date by which it would be completed. In addition, in Burton there was just the one statement at issue, while here the circumstances leading up to the January 29, 2017 representations also must be considered as indicia that Kimmel's statements in Venice were sufficiently definite to be promises. See Burton, 502 F. Supp. 2d at 439 (noting that "Burton predicated its right to recover for [promissory estoppel solely] upon the statement made").

For these reasons, we find SSC's and Kimmel's arguments regarding the specificity of the promise unavailing, and turn to their final contention supporting dismissal of this claim—that Venezia has not alleged any basis for bringing a claim against Kimmel in his individual capacity. (SSC Mot. at 18-19.) SSC and Kimmel argue that Venezia's allegations against Kimmel for

promissory estoppel all center on promises Kimmel made in his capacity as a corporate officer of SSC rather than in his individual capacity, and that a claim for promissory estoppel cannot be brought for a promise made “by a representative of the corporation acting in his official capacity.” Inoff v. Caftex Mills, Inc., No. 06-3675, 2007 WL 4355385, at *15 (E.D. Pa. Dec. 11, 2007). They further argue against application of the “participation theory,” which would hold Kimmel, as a corporate officer, liable for his “individual participation in a wrongful act.” Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 621 A.2d 86, 89-90 (1983).

Under the participation doctrine, “[a] corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort.” Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978). In order to state a claim for participation liability the plaintiff must do more than “mere[ly] aver[] that a corporate officer should have known the consequences of the liability-creating corporate act[;]” he must show that the officer “specifically directed the particular act to be done or participated, or cooperated therein.” Moore v. Johnson & Johnson, 907 F. Supp. 2d 646, 663 (E.D. Pa. 2012); Wicks, 503 Pa. at 622. Of particular importance here, this doctrine “applies only in tort, not contract.” Accurso v. Infra-Red Servs., Inc., 23 F. Supp. 3d 494, 506 (E.D. Pa. 2014) (emphasis omitted); Bala Corp. v. McGlenn, 295 Pa. 74, 79, 144 A. 823, 824 (1929) (“Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members.”); A & F Corp. v. Brown, No. 94-4709, 1996 WL 466909, at *5 (E.D. Pa. Aug. 15, 1996) (“Unless the corporate officer extends promises in his individual capacity, the participation theory does not apply in the context of an action for breach of contract.”).

In Accurso, Judge Pratter considered on summary judgment breach of contract and breach of partnership agreement claims brought by an employee against two officers of the employer corporation and held that the plaintiff could not avail himself of the participation theory due to the contractual nature of the claims at issue. Accurso, 23 F. Supp. 3d at 498, 507-08. The court cited Walsh v. Alarm Security Group, Inc., 95 F. App'x 399 (3d Cir. 2004) for the proposition that “[u]nless the corporate officer extends promises in his individual capacity, the participation theory does not apply in the context of an action for breach of contract.” Accurso, 23 F. Supp. 3d at 507 (quoting Walsh, 95 F. App'x at 402). We find Judge Pratter’s reasoning persuasive. To apply the participation theory to an individual who, acting in his corporate capacity, entered into a contract on behalf of the corporation, would “gut the concept of the corporate form by making corporate officers personally liable anytime they acted on the corporation’s behalf, because, of course, ‘a corporation acts only through its agents and officers.’” Id. at 508 (quoting Nix v. Temple Univ., 408 Pa. Super. 369, 379, 596 A.2d 1132, 1137 (1991)).⁴

Therefore, if promissory estoppel is properly considered a contractual claim, then Venezia cannot maintain its cause of action against Kimmel on Count III. Kimmel cites Seltzer v. Dunkin’ Donuts, Inc., No. 09-5484, 2011 WL 1532398 (E.D. Pa. Apr. 21, 2011) in support of its assertion that promissory estoppel sounds in contract law. Id. at *6 n.17. In Seltzer, the court held that certain third-party beneficiary claims, including promissory estoppel, were contract

⁴ The following excerpt from an article by Richard Posner further illuminates the inappropriateness of applying the participation doctrine to contractual claims:

“A contract gives one a right only against the other party to the contract. A tort right, like a property right—which tort rights frequently serve to enforce—is a right against the whole world, enabling one to obtain damages from (for example) a trespasser on one's property with whom one had no previous agreement limiting his right to enter the property. It would be infeasible to make a contract with every potential trespasser to protect oneself against trespass.”

Richard A. Posner, Economic Analysis of Law 175 (8th ed. 2011).

claims, citing the Pennsylvania Supreme Court case of Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606 (2000). Seltzer, 2011 WL 1532398, at *6. Crouse required the court to decide whether promissory estoppel was governed by the four-year limitations period articulated in 42 Pa.C.S. § 5525, which is operative on several types of contract actions, or whether the catchall provision of § 5527 governed, with its six year limitations' period. Crouse, 560 Pa. at 402. The court examined “the nature of the doctrine” of promissory estoppel and held that, because it “makes otherwise unenforceable agreements binding, [it] sounds in contract law.” Id. at 402-03. The Pennsylvania Supreme Court has not ruled on this issue since; therefore, we hold that promissory estoppel is a contract claim and Venezia cannot rely on the participation theory to assert such a claim against Kimmel. We dismiss Count III as to Kimmel.

iv. Aiding and Abetting Fraud (Count IV)

Finally, we turn to Venezia's sole claim against Howard and Powell, for aiding and abetting fraud. Howard and Powell moved to dismiss on the grounds that there is no such cause of action in Pennsylvania, and because there is insufficient evidence of their alleged participation in any fraudulent activity. (ECF 22, Howard & Powell Mot. (“Howard Mot.”) at 6-10.) Venezia counters that aiding and abetting fraud is a tort recognized under Pennsylvania law, and that Venezia has adequately alleged such a claim. (Venezia Opp'n at 26-31.)

1. Viable Cause of Action in Pennsylvania

At the outset, we note that the Pennsylvania Supreme Court has yet to address whether aiding and abetting fraud is a recognized tort in Pennsylvania. Therefore, we must attempt to predict how that court would decide the issue. Pac. Emp'rs Ins. Co. v. Global Reinsurance Corp. of America, 693 F.3d 417, 433 (3d Cir. 2012). In so doing, we are beholden to “give due regard, but not conclusive effect, to the decisional law of lower state courts,” and not to disregard the

opinions of the superior courts unless we are “convinced by other persuasive data that the highest court of the state would decide otherwise.” Id. (quoting Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000)). Bearing these rules in mind, we turn to the case law.

Each court to hold that a cause of action for aiding and abetting fraud does exist in Pennsylvania has relied on Skipworth by Williams v. Lead Industries Association, Inc., 547 Pa. 224, 690 A.2d 169 (1997), which endorsed section 876(a) of the Second Restatement of Torts’ concert of action theory. Id. at 236. Section 876(a) states that:

“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”

Skipworth was the basis for several subsequent decisions of Pennsylvania courts accepting claims for aiding and abetting tortious conduct. See e.g., Grimm v. Grimm, 149 A.3d 77, 88 (Pa. Super. 2016) (recognizing Skipworth’s conclusion that concerted tortious conduct is a viable cause of action); Koken v. Steinberg, 825 A.2d 723, 731-32 (Pa. Commw. Ct. 2003) (holding that cause of action exists in Pennsylvania for aiding and abetting a breach of fiduciary duty); Sovereign Bank v. Valentino, 914 A.2d 415, 421-22 (Pa. Super. Ct. 2006). A number of federal courts in this Circuit have also relied on Skipworth to hold that such claims would be viable under Pennsylvania law. See e.g., Panthera Rail Car LLC v. Kasgro Rail Corp., No. 13-679, 2013 WL 4500468, at *8 (W.D. Pa. Aug. 21, 2013) (discussing evolution in the caselaw since Skipworth and finding that “[r]ecent developments indicate that Pennsylvania law now

recognizes a civil claim for aiding and abetting fraud”); In re Le-Nature's Inc., No. 08-1518, 2009 WL 3571331, at *15, *15 n.16 (W.D. Pa. Sept. 16, 2009) (finding “no persuasive data” evidencing the Pennsylvania Supreme Court’s unwillingness to recognize this tort); Chicago Title Ins. Co. v. Lexington & Concord Search & Abstract, LLC, 513 F. Supp. 2d 304, 318 (E.D. Pa. 2007); Gilliland v. Hergert, No. 05-1059, 2007 WL 4105223, at *7-8 (W.D. Pa. Nov. 15, 2007).

Howard and Powell argue that to the extent this precedent exists, it is inapposite to the instant inquiry because “neither Skipworth nor either of the cases upon which the Supreme Court relied therein involved allegations of aiding and abetting fraud.” (Howard Mot. at 7; Reply at 9.) Rather, each case involved either personal injury or product liability actions. See Skipworth, 547 Pa. at 228-29; Kline v. Ball, 306 Pa. Super. 284, 286 (1982); Burnside v. Abbott Labs., 351 Pa. Super. 264, 283-84 (1985). Be that as it may, Howard and Powell fail to persuade the Court to follow the scarce post-Skipworth precedent concluding that no cause of action for aiding and abetting fraud exists in Pennsylvania. See Zafarana v. Pfizer, Inc., 724 F. Supp. 2d 545 (E.D. Pa. 2010), Amato v. KPMG LLP, 433 F. Supp. 2d 460 (M.D. Pa. 2006), WM High Yield Fund v. O’Hanlon, No. 04-3423, 2005 WL 6788446 (E.D. Pa. May 13, 2005), and Waslow v. Grant Thornton LLP (In re Jack Greenberg, Inc.), 240 B.R. 486 (Bankr. E.D. Pa. 1999).

Each of the cited cases has reasoning that the Court finds unpersuasive, largely because none “seem to fully appreciate Skipworth’s import.” Panthera, 2013 WL 4500468, at *9. In Zafarana, the court disposed of the plaintiff’s claim for aiding and abetting fraud in one sentence, simply citing to WM High Yield Fund. Zafarana, 724 F. Supp. 2d at 560. WM High Yield Fund, in turn, cites entirely to pre-Skipworth cases in dismissing an aiding and abetting fraud claim and, as with Amato, neither references Skipworth in the context of this issue, nor Section

876 at all. WM High Yield Fund, 2005 WL 6788446, at *15; Amato, 433 F. Supp. 2d at 473-74. Finally, Waslow, similarly fails to engage with Skipworth or to cite any cases decided after it. Waslow, 240 B.R. at 523-24. We decline to read Skipworth as “merely recogniz [ing] a claim for concert of action in personal injury cases,” as advocated by Howard and Powell; rather, the case expressly adopts Section 876(a), which subjects persons who “act in concert” with a tortfeasor “[f]or harm resulting to a third person” from that tortious conduct. (Reply at 9); Skipworth, 547 Pa. at 236; Restatement (Second) of Torts § 876(a).

Being that fraud is a tort, and for the reasons discussed above, we agree that there are reasonable arguments in support of a finding that the Pennsylvania Supreme Court would likely recognize a cause of action for aiding and abetting fraud. That said, the Court reserves final judgment on this issue until or unless such time that Venezia has adequately pleaded facts supporting such an allegation. Count IV will not be dismissed on the grounds that a claim for aiding and abetting fraud is not legally cognizable in Pennsylvania.

2. Sufficiency of Facts Alleged

Having concluded that the claim may be legally cognizable, we must determine whether Venezia has alleged sufficient facts to survive dismissal. To state a claim for aiding and abetting, the plaintiff must allege: “(1) the commission of a wrongful act; (2) knowledge of the act by the alleged aider-abettor; and (3) the aider-abettor knowingly and substantially participating in the wrongdoing.” Impala Platinum Holdings Ltd. v. A-1 Specialized Servs. & Supplies, Inc., No. 16-1343, 2016 WL 8256412, at *23 (E.D. Pa. Sept. 16, 2016) (quoting Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 415 (3d Cir. 2003)). We have already established that Venezia made out a claim for fraud with regard to three of the four misrepresentations alleged.

The key dispute on this claim is whether Venezia has adequately alleged prongs two and three of the above test; that is, did Howard and Powell know of the allegedly fraudulent misrepresentations and, if so, did they knowingly and substantially participate in the wrongdoing. We find that Venezia falls short here. The only facts averred that concern Howard and/or Powell are that the two men were part of the initial meeting between SSC and Venezia in November 2016, and that they received a FaceTime call from Kimmel on January 29, 2017 in which Kimmel “explained that he had committed SSC to the \$6.5 million investment.” (ACC ¶¶ 77, 85, 86.) Venezia further states that Howard and Powell “were ecstatic about investing in Venezia” and neither “expressed any reservation” regarding it. (*Id.* ¶ 86.)

These facts simply do not support “a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). First, there are no allegations that Howard and/or Powell knew that the statements made by Kimmel in Venice were untrue; in fact, their excited reaction belies that conclusion. Second, there is no averment that they participated in any way in SSC’s or Kimmel’s alleged efforts to defraud Venezia. We conclude that the two interactions Howard and Powell had with the Venezia investment opportunity, neither of which evidenced any knowledge of or participation in a scheme to defraud, are insufficient to support a claim of aiding and abetting.

IV. Conclusion

For the reasons stated above, we grant SSC’s and Kimmel’s Motion to Dismiss Count I as to the representation that SSC had the ability to fund the full remaining amount of the Series B round without raising any funds from investors or third parties, Count II in its entirety, Count III only as to Kimmel, and Count IV in its entirety. An appropriate order follows.

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

SSC MANAGER, LLC, d/b/a SeventySix Capital <p style="text-align:center">v.</p> VENEZIA FC 1907 LP, VENEZIA FC 1907 GP, and VENEZIA F.C. S.R.L.D.	CIVIL ACTION NO. 17-1042
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**ORDER RE: MOTION TO DISMISS ANSWER, COUNTERCLAIM, AND THIRD PARTY
COMPLAINT**

AND NOW, this 27th day of July, 2017, having considered the Motions to Dismiss the Answer, Counterclaim, and Third Party Complaint (“ACC”) (ECF 10) of Defendants Ryan Howard, Jon Powell, SSC Manager, LLC (“SSC”), and Wayne Kimmel (ECF 22, 23), and all responses and replies thereto, and for the reasons explained in the foregoing memorandum, it is hereby ORDERED that:

1. Count I of the ACC is DISMISSED only as to the representation that SSC had the ability to fund the full remaining amount of the Series B round without raising any funds from investors or third parties, with leave to amend, but the Motion is otherwise DENIED as to Count I;
2. Count II of the ACC is DISMISSED, with prejudice;
3. Count III of the ACC is DISMISSED, only as to Kimmel, with prejudice, but the Motion is otherwise DENIED as to Count III;
4. Count IV of the ACC is DISMISSED, with leave to amend.
5. Any amendments must be made within fourteen (14) days.

BY THE COURT:

/s/ Wendy Beetlestone FOR:

Michael M. Baylson, U.S.D.J.