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

FREEDOM MEDICAL, INC.	:	
	:	CIVIL ACTION
V.	:	
	:	
ROYAL BANK OF CANADA,	:	NO. 04-CV-5626
RBC HOLDINGS (USA), INC.,	:	
RBC DAIN RAUSCHER CORP.,	:	
JON A. TIETBOHL	:	

SURRICK, J. **DECEMBER 30, 2005**

MEMORANDUM & ORDER

Presently before the Court are Defendants RBC Dain Rauscher Inc.,[1] Royal Bank of Canada, and RBC Holdings (USA), Inc.'s Motion For Partial Dismissal Of Plaintiff's Amended Complaint And To Dismiss And Strike Plaintiff's Requests For Punitive Damages, Costs, and Attorneys' Fees (Doc. No. 7), and Defendant Jon A. Tietbohl's Motion For Dismissal Of Plaintiff's Amended Complaint (Doc. No. 12). For the following reasons, Defendants' Motions will be granted in part and denied in part.

I. BACKGROUND

Plaintiff is a privately held corporation formed in 1997 that leases, sells and services biomedical equipment. (Am. Compl., Doc. No. 6 ¶ 7.) In the spring of 2002, Plaintiff sought investment banking advice because it was considering recapitalizing its financial structure and obtaining working capital through a private placement of equity and/or debt securities. (*Id.* ¶ 8.)

[1] Defendant RBC Dain Rauscher, Inc. indicates that it is incorrectly identified in the Amended Complaint as RBC Dain Rauscher Corp. (Doc. No. 7 at 1.)

Defendants RBC Dain Rauscher Inc., Royal Bank of Canada, and RBC Holdings (USA) will together be referred to as "Defendants RBC."

Plaintiff gathered information and recommendations from its accountants and others as to which investment banking firms it should retain. After interviewing three candidates, Plaintiff ultimately selected Defendant RBC Capital Markets, represented by Defendant Tietbohl, to be its financial advisor and investment banker. (Doc. No. 7 at 2; Doc. No. 6 ¶ 10.) Plaintiff asserts that Tietbohl was the principal representative of RBC Capital Markets and that he provided extensive information about his experience, capabilities, and commitment to serve as Plaintiff's investment banker. (Doc. No. 6 ¶ 10.) In March 2002, Defendants presented a Recapitalization Model proposing a midpoint valuation of approximately $55 million for Plaintiff, and projecting a recapitalization transaction in which approximately $20 million would be provided to the existing shareholders, and the remaining $15 million from the offering would be retained as additional working capital for Plaintiff. (*Id*. ¶ 11.) Defendants' proposed Recapitalization Model was far more attractive than proposals from the other candidates. The others projected a transaction of approximately $20 million with approximately $5 million returned to the existing shareholders. (*Id.* ¶ 12.) Plaintiff alleges that Tietbohl "made numerous strongly encouraging statements about the likely high level of interest of various specific prospective investors with which he had relationships as well as about the prospects for completing a recapitalization transaction in the range proposed by RBC Capital Markets." (*Id*. ¶ 13.) According to Plaintiff, Tietbohl's contacts and advocacy skills were a significant factor in the decision to retain RBC. (*Id*. ¶ 14.)

On April 16, 2002, Plaintiff and Defendant RBC Dain Rauscher entered into a letter agreement (the "Agreement"). (*Id.* ¶ 15.) The Agreement sets forth the terms of the engagement by Plaintiff of Defendant to act as a placement agent and/or financial advisor to Plaintiff. (Doc. No. 6 at Ex. A.) In August 2002, after talking with Tietbohl, Wachovia Bank, N.A., met with Plaintiff's

officers and offered Plaintiff a $20 million line of credit. (Doc. No. 6 ¶ 20.) The Loan Agreement, dated September 9, 2002, provided that the line of credit would be repaid upon the earlier of the closing of a Private Placement transaction of at least $30 million or May 30, 2003. (*Id.*) Plaintiff alleges that it was "startled" when shortly after the execution of the Wachovia Loan Agreement, Tietbohl contacted Plaintiff and demanded payment of a Private Placement Fee of one percent of the maximum amount available under the new credit facility of Wachovia Bank, or $200,000. (*Id.* ¶ 22.) Plaintiff accepted Tietbohl's statements that Defendant was entitled to the payment under the agreement and paid Defendant RBC Dain Rauscher the sum of $200,000. (*Id.* ¶ 23.)

At the end of October 2002, Defendants finalized a Private Placement Memorandum to potential investors. Shortly thereafter, in December 2002, Defendant terminated the services of investment banker Tom Collins, Plaintiff's primary contact with Defendant. (*Id.* ¶ 25.) In February 2003, a new Private Placement Memorandum was prepared. (*Id.* ¶ 26.) This second Private Placement Memorandum proposed a reduced offering of $20 million of subordinated debt and equity securities, and called for $5 million to be returned to Plaintiff's existing shareholders. (*Id*.)

Plaintiff noted that during the winter and spring of 2003, Tietbohl's conduct became increasingly erratic. In June 2003, he ceased his involvement with Plaintiff completely. (*Id.* ¶ 27.) Plaintiff learned that Defendant had terminated Tietbohl. (*Id.*) Plaintiff later learned that Tietbohl had used "mind-altering and potentially addictive illegal drugs; had inappropriate relationships with female RBC employees and engaged over an extended period of time in other conduct inconsistent with his professional responsibilities to RBC Capital Markets and its clients." (*Id*. ¶ 28.)

In August 2003, Defendants prepared a Third Private Placement Memorandum that proposed a $14 million offering of subordinated debt and equity securities and distributed it to potential investors. (*Id.* ¶ 29.) Plaintiffs paid Defendants RBC over $310,000 from the date of the signing of the Agreement through the end of 2003. However, Plaintiff contends that no reasonable transaction as contemplated by the Agreement was presented to Plaintiff for final approval. (*Id.* ¶ 30.) Wachovia Bank extended its loan in May 2003 when no Private Placement had been completed and increased the credit facility by $3 million. (*Id.* at 10-11.) Plaintiff alleges that in late 2003 it was forced to restructure because of the Wachovia loan financial obligations, the changes to its business strategy, the engagement related fees and costs, the delay in completing a transaction, and the diversion of its management to the process of pursuing the recapitalization. (*Id*. ¶ 31.) Plaintiff claims that during 2003, it incurred $1,241,000 of non-recurring expenses involved with implementing the restructuring plan. Plaintiff terminated its Agreement with Defendants in January 2004. (*Id*.)

Plaintiff brings the following claims: Breach of Contract (Count I), Breach of the Covenant of Good Faith and Fair Dealing (Count II), Common Law Fraud (Count III), and Common Law Conversion (Count IV). (Doc. No. 6 ¶¶ 32-56.) Plaintiff seeks an award of compensatory damages in an amount in excess of $1 million, punitive damages, and an injunction against the enforcement of the indemnification clause in the Agreement.[2] (*Id.* at 16.)

[2] In its Amended Complaint, Plaintiff sought costs and attorneys' fees (Doc. No. 6 at 16). Plaintiff dropped this request in the Response to Defendants' Motion to Dismiss (Doc. No. 11), stating that "the request for attorney's fees should be stricken as it was included in the original complaint based on a count alleging violation of state statutes permitting the award of attorney's fees; however, when those counts were removed from the Amended Complaint, the request for attorney's fees [] inadvertently remained." (Doc. No. 11 at 22.)

Defendants RBC file the instant Motion arguing that Plaintiff's breach of covenant of good faith and fair dealings and tort claims are barred. Defendants RBC also assert that Royal Bank of Canada and RBC Holdings (USA) should be dismissed from the action as they were not parties to the Agreement. Defendant Tietbohl submits a Motion to Dismiss asserting the same arguments as Defendants RBC Dain Rauscher Inc., Royal Bank of Canada, and RBC Holdings (USA) and asserting that he cannot be found personally liable for a corporate contract.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim. The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *NWJ Property Mgmt, LLC v. BACC Builders, Inc.*, No. 04-1943, 2004 WL 2095446, at *1 (E.D. Pa., Sept. 17, 2004); *Tracinda Corp. v. Daimlerchrysler AG*, 197 F. Supp. 2d 42, 53 (D. Del. 2002). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. City of Phila.*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Res. Sys., Inc.*, 883 F.2d at 247.

III. DISCUSSION[3]

A. Count II: Breach of Covenant of Good Faith and Fair Dealing

Defendants argue that Plaintiff's Claim for breach of the implied covenant of good faith and fair dealing (Count II) should be dismissed. (Doc. No. 7 at 8.) Defendants argue that these allegations involve subjects covered expressly by the terms of the Agreement, precluding a separate claim for breach of the covenant of good faith and fair dealing. Defendants cite to *Dave Greytak Enterprises, Inc. v. Mazda Motors of America, Inc.*, 622 A.2d 14 (Del. Ch. 1992), for the proposition that, "where the subject at issue is expressly covered by the contract . . . the implied duty to perform in good faith does not come into play." *Id.* at 22. Plaintiff responds that none of the conduct described in Count II was embodied in an express provision of the Agreement. (Doc. No. 11 at 21.) Plaintiff cites *Danby v. Osteopathic Hospital Ass'n of Delaware*, 101 A.2d 308 (Del. Ch. 1953), for the proposition that Defendants had a duty to exercise their discretion in a reasonable manner in order to carry out the purpose for which the contract was made, and to refrain from doing anything that would destroy or injure its right to receive the benefit of the contract. (Doc. No. 11 at 21.)

"Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract." *Chamison v. Healthtrust, Inc.*, 735 A.2d 912, 920 (Del. Ch. 1999). However, as Defendants accurately suggest, where the subject at issue in the breach of good faith claim is expressly covered in the terms of the contract or where it is clear that the contract was intentionally silent on the subject, courts must rely solely on the contract itself and cannot entertain claims based

[3] Both parties agree that Plaintiff's contract claims are governed by Delaware law while its tort claims are governed by Pennsylvania law. (Doc. No. 7 at 5; Doc. No. 11 at 2 n.4.)

on an implied duty to perform in good faith. *Dave Greytak*, 622 A.2d at 23. The implied duty "is a judicial convention designed to protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Chamison*, 735 A.2d at 920.

In order to determine whether Plaintiff can maintain a claim for breach of covenant of good faith and fair dealing, we must examine the conduct alleged in the claim and the express terms of the Agreement. In its Amended Complaint, Plaintiff alleges that Defendants breached the implied covenant of good faith and fair dealing through the following conduct and omissions: (1) failing to disclose Defendant Tietbohl's personal problems that interfered with his ability to perform his responsibilities, (2) designating, retaining, and discharging employees for the engagement without consulting with Freedom Medical, (3) collecting a $200,000 Private Placement Fee that Plaintiffs assert Defendants were not entitled to under the Agreement, (4) failing to disclose conflicts between Defendant Tietbohl's interests and the duties of RBC Dain Rauscher to Freedom Medical, and (5) failing to disclose that the original recapitalization model was unreasonable. (Doc. No. 6 ¶ 36.) The Agreement sets forth RBC Dain Rauscher Inc.'s obligations to Freedom Medical as follows: RBC would (1) familiarize itself with Freedom Medical's business and financial performance, (2) formulate a strategy for consummating a transaction, (3) assist Freedom Medical in preparing its offering memorandum, (4) approach and coordinate interested parties, (5) assist the company in evaluating proposals, and (6) formulate strategies for negotiations with interested parties. (Doc. No. 6 at Ex A. ¶ 4.)

We find that Plaintiff's allegations in Count II are not expressly covered by the Agreement. Freedom Medical alleges breaches of good faith by Defendants in the form of conduct or omissions

that are not mentioned in the terms of the Agreement. While it remains to be determined whether such conduct actually constitutes a breach of the covenant of good faith and fair dealing, at the dismissal stage we must permit this claim to stand. Under the circumstances, it is by no means certain at this juncture that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Res. Sys., Inc.*, 883 F.2d at 247 (citing *Hishon* 467 U.S. at 73). Accordingly, we will deny Defendants' Motion with regard to Count II.

B. Count III: Common Law Fraud

In Count III, Plaintiff alleges common law fraud both in the inducement to contract and in the performance of the contract. Because Defendants challenge these two types of fraud claims under different legal analyses, we will first address Plaintiff's claim of fraud in the inducement and then consider the claim of fraud in the performance of the contract.

1. *Fraud in the Inducement*

Defendants argue that Plaintiff's fraud in the inducement claim must be dismissed because under the parol evidence rule, such a claim is barred where the parties' contract contains an integration clause.[4] Defendants cite numerous cases in which a contract's integration clause barred the court from considering a claim of fraud in the inducement. *See e.g. HCB Contractors v. Liberty Place Hotel Assocs*., 652 A.2d 1278, 1279-80 (Pa. 1995); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996); *Coram*, 94 F. Supp. 2d at 595. Plaintiff, citing *Coram*, responds that the

[4] The parties agree that contract interpretation is governed by Delaware law in this matter. They do not discuss whether the existence and interpretation of an integration clause, as it may impact on the tort claim contained in Count III, should be governed by Delaware law or Pennsylvania law. Since this is essentially a tort claim, we will apply Pennsylvania law. *See Coram Health Care Corp. v. Aetna U.S. Healthcare, Inc*., 94 F. Supp. 2d 589, 593-94 (E.D. Pa. 1999) (discussing the application of Pennsylvania law in a similar situation).

parol evidence rule does not apply because the Agreement is neither fully integrated nor unambiguous. *Coram*, 94 F. Supp. 2d at 595 ("For the Pennsylvania parol evidence rule to bar a claim for fraudulent inducement, the contract must be written, unambiguous, and fully integrated."). Moreover, Plaintiff argues that the integration clause that is present in its agreement with Defendants does not explicitly mention pre-contract negotiations and oral representations and so cannot preclude a claim that it relied upon the allegedly fraudulent pre-contract representations in its decision to enter into the agreement.

The integration clause on which Defendants rely provides: "[T]his agreement incorporates the entire understanding of the parties with respect to the subject matter of this Agreement." (Doc. No. 1 at Ex. A ¶ 14.) While it is true that a number of the cases to which Defendants cite involve more extensive integration clauses,[5] Defendants also point to *Heritage Surveyors & Engineers Inc. v. National Penn Bank*, 801 A.2d 1248 (Pa. Super. Ct. 2002), in which the court precluded a fraud in the inducement claim based on an integration clause that greatly resembles the one at issue in this case. In *Heritage*, the integration clause stated: "The terms and conditions of this Note together with the terms and conditions of the Loan Agreement and the Related Documentation, which are incorporated herein by reference as if set forth in full, contain the entire understanding of the [parties.]" *Id.* at 1252. The *Heritage* court concluded that because Heritage "merely averred that

[5] In addition to the standard language, the integration clause in *Dayhoff* also stated: "All previous documents, undertakings and agreements with respect to this subject matter, whether verbal, written, or otherwise, between the parties are hereby cancelled and shall not affect or modify any terms or obligations set forth in this Agreement except by written agreement between the parties." *Dayhoff*, 86 F.3d at 1299. The integration clause in *HCB Contractors* stated: "This Contract represents the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, or agreements, whether written or oral." *HCB Contractors*, 652 A.2d at 1280.

the alleged misrepresentations were fraudulent, without averring that the misrepresentations were fraudulently or by accident or mistake omitted from the promissory note, Heritage could not maintain a cause of action for fraudulent inducement." *Id.* The same is true here. Plaintiff alleges that Defendants made fraudulent statements on which it relied in signing the Agreement. However, Plaintiff does not allege that these misrepresentations were omitted from the contract. In addition, Plaintiff acknowledges that the contract contains an integration clause stating that the agreement represents the full understanding of the parties. As the court in *LeDonne v. Kessler*, 389 A.2d 1123 (Pa. Super. Ct. 1978), noted, the most basic protection against fraud is to read the contract and insist on the "deletion of offending provisions or the insertion of desired guarantees." *Id.* at 1131. The court in *Bardwell v. The Willis Co.*, 100 A.2d 102 (Pa. 1953), similarly stated: "If plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract or lease, they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely." *Id.* at 105 (*cited in LeDonne*, 389 A.2d at 1131). Thus, because Pennsylvania's parol evidence rule bars claims for fraudulent inducement where the contract contains a valid integration clause, we conclude that Plaintiff's claim of common law fraud in the inducement cannot stand and will grant Defendants' Motion to dismiss this aspect of Count III.

2. *Fraud During the Engagement and the Gist of the Action Doctrine*

Plaintiff's Complaint alleges a number of grounds for its claim of common law fraud during the engagement including: (1) Defendants' failure to disclose Tietbohl's drug use and other problems during the course of the engagement, (2) Defendants' representation that it was owed a $200,000 private placement fee under the terms of the contract, and (3) Defendants' failure to

disclose RBC's reorganization and its effect on Freedom Medical. (Doc. No. 6 ¶ 38.) Defendants contend that these claims of fraud in the performance of the contract are merely restatements of Plaintiff's breach of contract claims which include: (1) failure to formulate a reasonable strategy for consummating a transaction, (2) failure to act reasonably in the preparation of private placement memoranda, (3) failure to reasonably adhere to the time-line proposed, (4) collection of the $200,000 private placement fee, and (5) presentation of unreasonable potential investors. (Doc. No. 6 ¶ 33.)

Under Pennsylvania law, "the 'gist of the action doctrine' bars claims for allegedly tortious conduct where the gist of the conduct alleged sounds in contract rather than tort."[6] *Cortez v. Keystone Bank, Inc.*, No. Civ. A. 98-2457, 2000 WL 536666, at *8 (E.D. Pa. May 2, 2000). The conceptual difference between a breach of contract claim and a tort claim have been described as follows:

> Although they derive from common origin, distinct differences between civil actions for tort and contractual breach have been developed at common law. 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.

Hospicomm, Inc. v. Fleet Bank, 338 F. Supp. 2d 578, 583 (E.D. Pa. 2004). The gist of the action rule therefore precludes "plaintiffs from bringing a tort claim that merely replicates a claim for breach of an underlying contract." *Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d 394, 402 (E.D. Pa. 2002) (quoting *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 n.8

[6] While the Pennsylvania Supreme Court has not adopted the gist of the action doctrine, the Pennsylvania Superior Court has repeatedly endorsed it and both parties concede that it is the law in Pennsylvania. *See, e.g. eToll, Inc. v. Elias/Savion Advertising, Inc.*, 811 A.2d 10 (Pa. Super. Ct. 2002); *Bash v. Bell Tel. Co.*, 601 A.2d 825 (Pa. Super. Ct. 1992).

(3d Cir. 2002)); *see also Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc*., 247 F.3d 79, 104 (3d Cir. 2001) ("a claim should be limited to a contract claim when 'the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied in the law of torts'") (quoting *Bash,* A.2d at 830). As the Superior Court of Pennsylvania observed after reviewing the case law in the Third Circuit on this subject:

> [T]he cases seem to turn on the question of whether the fraud concerned the performance of contractual duties. If so, then the alleged fraud is generally held to be merely collateral to a contract claim for breach of those duties. If not, then the gist of the action would be the fraud, rather than any contractual relationship between the parties.

eToll, 811 A.2d at 19.

Plaintiff contends that the "gist of the action doctrine" does not bar its fraud claims because none of the fraud allegations specifically relates to express provisions of the Agreement. In support of this argument, Plaintiff relies on *Owen J. Roberts School District v. HTE, Inc.*, No. Civ. A. 02-7830, 2003 WL 735098 (E.D. Pa. Feb. 28, 2003), in which the court declined to dismiss the common law fraud claim on a 12(b)(6) motion because it concluded that the question was too "fact-intensive" to decide before discovery. *Id.* at *6. However, *Owen J. Roberts* is clearly distinguishable from the case at hand. In *Owen J. Roberts*, the fact-intensive question before the court was whether the defendant made fraudulent promises during the term of the engagement about its ability to fulfill its contractual obligations or whether the defendant breached the contract and then made fraudulent misrepresentations about the breach. *Id.* Under the former scenario, the fraud claim would be intertwined with the breach of contract claim and therefore prohibited while under the latter, the fraudulent conduct could support a separate tort claim. *Id.* In the instant case,

however, there is no question that the alleged fraudulent conduct occurred during the term of the engagement and did not occur after Defendants had breached the contract.

In fact, upon considering the fraud allegations and the breach of contract claims, it is clear that Plaintiff's fraud claims are merely allegations of specific conduct that is part and parcel of its broader breach of contract claims. *See eToll*, 811 A.2d at 19 (gist of the action doctrine bars tort claims "where the tort claim 'essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract.'" (quoting *Polymer Dynamics, Inc. v. Bayer Corp.*, 2000 U.S. Dist. LEXIS 11493, at *19 (E.D. Pa. Aug. 14, 2000)). For example, Plaintiff alleges that Defendants breached the contract by failing to formulate a reasonable strategy for consummating the Transaction" and by "failing to act reasonably in the preparation of the private placement memorandum." (Doc. No. 6 ¶ 33.) Plaintiff's fraud in the performance claims involve the failure to disclose Tietbohl's personal problems and the failure to disclose RBC's re-organization. Both of these allegations are simply ways in which Plaintiff alleges Defendants failed to formulate a reasonable strategy and failed to act reasonably in preparing the private placement memorandum or, in other words, ways in which Plaintiff claims Defendants breached their primary obligations under the contract. In addition, Plaintiff's assertion that Defendants' misrepresentation of their entitlement to a $200,000 private placement fee supports a tortious claim of fraud in the performance is belied by the fact that this claim arises out of differing interpretations of a contractual provision. The Agreement specifically covers the subject of a private placement fee (Doc. No. 6 at Ex. A ¶ 6), and despite Plaintiff's attempt to construe its claim as arising under common law fraud, the claim would not exist at all if not for the contractual provision. Thus, it is clear that Plaintiff's fraud in the performance claim is barred by the gist of the action doctrine. *See*

eToll, 811 A.2d at 21 (fraud claims barred by gist of action doctrine where "the fraud claims are inextricably intertwined with the contract claims"); *see also Galdieri v. Monsanto Co.,* 245 F. Supp. 2d 636, 650 (E.D. Pa. 2002) (fraud claims barred because they were "intertwined" with breach of contract claims). Accordingly, because Pennsylvania's parol evidence rule bars claims for fraudulent inducement where the contract contains a valid integration clause and because Pennsylvania's "gist of the action doctrine" bars the fraud in the performance claim here, we will grant Defendants' Motion to dismiss Count III in its entirety.[7]

C. Count IV: Conversion Claim

Defendants assert that Plaintiff's conversion claim in Count IV is also barred by the gist of the action doctrine, that the Amended Complaint fails to set forth the elements of a conversion claim, and that the conversion claim is time-barred. (Doc. No. 7 at 16.) In Count IV, Plaintiff alleges that it paid Defendants the sum of $200,000 as a Private Placement Fee upon the demand of Tietbohl (Doc. No. 6 ¶ 53), that it realized in 2004 that, under the Agreement, RBC was not entitled to such a fee, and that Plaintiff therefore demanded that the payment be returned. (*Id.* ¶ 54.) Plaintiff asserts that Defendants' refusal to return the fee constitutes unlawful conversion. (*Id.* ¶ 55.) Paragraph Six of the Agreement provides:

[7] Defendants argue that this claim of common law fraud should be dismissed as to all of the defendants. Plaintiff contends that even if the Court dismisses these claims under integration clause and gist of the action theories, these claims should be maintained as to Royal Bank of Canada, RBC Holdings (USA) Inc., and Tietbohl because these defendants were not signatories to the contract and thus contractual theories cannot bar tortious claims against them. (Doc. No. 10 at 11.) However, "the gist of the action doctrine bars tort claims against an individual defendant where the contract between the plaintiff and the officer's company created the duties that the individual allegedly breached." *Williams v. Hilton Group PLC,* 93 Fed. App'x 384, 387 (3d Cir. 2004). Therefore, we will dismiss the common law fraud claims as to all Defendants.

> If the Company completes a Private Placement, the Company hereby agrees to pay RBC a fee totaling the sum of (I) 1.0% of the gross proceeds raised in the form of senior debt (including lines of credit and the total facility extended) as of the date of closing, but excluding financing provided under the Company's existing credit facilities . . .

(Doc. No. 6 at Ex. A ¶ 6.) Plaintiff asserts that no Private Placement was ever made. Defendant contends that it was entitled to the $200,000 under the terms of the contract and, as a result, Plaintiff may sue for breach of contract to recover the private placement fee but may not maintain a claim for conversion. (Doc. No 13 at 7 n.6.)

Conversion is defined as "'the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification.'" *Leonard A. Feinberg, Inc. v. Cent. Asia Capital Corp*., 974 F. Supp. 822, 844-45 (E.D. Pa. 1997) (citation omitted). "The mere existence of a contract between the parties does not automatically foreclose the parties from raising a tort action. However . . . a party cannot prevail on its action of conversion when the pleadings reveal merely a damage claim for breach of contract." *Neyer, Tiseo & Hindo, Ltd. v. Russell*, No. Civ. 92-2983, 1993 WL 53579, at *4 (E.D. Pa. Mar. 2, 1993) (internal citations omitted).

The Superior Court of Pennsylvania addressed the question of when the gist of action doctrine precludes a claim for tortious conversion in *Pittsburgh Construction Co. v. Griffith*, 834 A.2d 572 (Pa. Super. Ct. 2003). In *Pittsburgh Construction,* homeowners contracted with a construction company to build a home and placed funds in an escrow account to be distributed incrementally to the construction company according to a draw schedule. *Id.* at 583. The homeowners moved into the completed home but withheld the final two payments, believing the construction company had breached the contract and that the cost of repairing the resulting defects

would exceed the amount of the final two payments. *Id.* While the construction company claimed tortious conversion on the basis of these facts, the court held that the "tort and breach of contract claims [were] inextricably intertwined [and that] the success of the conversion claim depend[ed] entirely on the obligations as defined by the contract." *Id.* at 584. As a result, the "gist of the action doctrine" barred the claim for conversion. *Id.*

Similarly, in *Neyer, Tiseo & Hindo*, the court found that the plaintiffs could not maintain their conversion claim when entitlement to the funds at issue was predicated solely on the agreement entered into by the parties. *Neyer, Tiseo & Hindo*, 1993 WL 53579, at *4. In that case, the conversion claim was based on the defendant's failure to buy back stock as called for in the stock purchase agreement. *Id.* We came to the same conclusion in *Joyce v. Alti America, Inc.*, No. Civ. A. 00-5420, 2001 WL 1251489 (E.D. Pa. Sept. 27, 2001), finding that with regard to a portion of a stock purchase price that remained unpaid, "in order to enforce [plaintiff's] claim to this property, [he] must pursue a breach of contract claim and not a claim for conversion of property." *Id.* at *6.

In the instant case, Freedom Medical's conversion claim is based on Defendants' demand and receipt of a $200,000 private placement fee to which they claim they were entitled under the Agreement. The facts here are slightly different than the facts in the above cases. Here, rather than simply claiming it is owed money by Defendants, Plaintiff actually paid a sum of money and then concluded it was not required to do so under the contract. This distinction, however, does not alter the conclusion. The right to the $200,000 is predicated on a provision of the Agreement. Whether Plaintiff erred in making the payment or whether Defendant improperly demanded the money must be decided as part of a breach of contract claim and not a conversion claim. Accordingly, we will

grant Defendants' motion to dismiss Count IV. Since we decide the issue based on the gist of the action doctrine, we need not discuss Defendants' other two arguments.

D. Punitive Damages

Defendants contend that Plaintiff's demand for punitive damages must be dismissed because punitive damages are not available in breach of contract claims and because all of Plaintiff's tort claims must be dismissed. We agree. Both Pennsylvania and Delaware law preclude recovery of punitive damages for breach of contract. *See Reliance Universal, Inc. of Ohio v. Ernest Rends Contracting Co.*, 454 A.2d 39, 44 (Pa. Super. Ct. 1982) ("Indeed the law is clear that punitive damages are not recoverable in contract actions."); *see also Pack & Process, Inc. v. Global Paper & Plastics*, No. Civ. A. 95-318, 1996 WL 490264, at *10 (D. Del. Aug. 19, 1996) (punitive damages are unavailable as a matter of law in breach of contract claims). We have dismissed all of Plaintiff's tort claims. The remaining claims are for breach of covenant of good faith and breach of contract for which punitive damages are not available.[8] Accordingly, we will strike Plaintiff's request for punitive damages.

E. Defendants Royal Bank of Canada and RBC Holdings (USA), Inc.

While we have already dismissed the tort claims against all Defendants, *see supra* note 7, Royal Bank of Canada and RBC Holdings (USA), Inc. maintain that the breach of contract and breach of covenant of good faith and fair dealing claims should be dismissed as to them as well, because neither was a party to the Agreement. (Doc. No. 7 at 2 n.1.) Plaintiff contends that, as

[8] Breach of covenant of good faith and fair dealing is a contractual claim. *See Rambo v. Greene*, No. 03894, 2005 WL 579943, at *2 (Pa. Ct. Com. Pl. Feb. 28, 2005) ("There can be no claim for a breach of good faith and fair dealing when there is no contract to which such an obligation can attach.")

stated in its Amended Complaint, Defendant RBC Dain Rauscher Corporation is a wholly owned subsidiary of RBC Holdings and RBC Holdings is a wholly owned subsidiary of Royal Bank of Canada. (Doc. No. 6 ¶¶ 3-5). Plaintiff asserts that because of this relationship, Royal Bank of Canada and RBC Holdings are "affiliated parties" who can be "deemed liable for the contract breaches even though only [RBC Dain Rauscher Corp.] executed the Agreement." (Doc. No. 11 at 2 n.2.) Defendants argue that the corporate relationship among the defendants is not a sufficient basis for finding liability on the part of Royal Bank of Canada and RBC Holdings (USA), Inc. for breach of the Agreement. We agree. "As a general rule, a parent corporation, like any stockholder, is not normally liable for the wrongful acts or contractual obligations of a subsidiary even if or simply because the parent wholly owns the subsidiary." *Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co.*, 2 F. Supp. 2d 688, 691 (E.D. Pa. 1998).

The exception to the general rule that parent corporations are not liable for the contractual obligations of their subsidiaries arises when the "parent so dominates the activities of a corporation that it is necessary to treat the dominated corporation as an agent or 'alter ego' of the principal." *Id.* In order to claim that Royal Bank of Canada and RBC Holdings (USA), Inc. are liable for the contractual obligations of their subsidiary, RBC Dain Rauscher Corp., Plaintiff must make factual averments to suggest that the corporate "veil" should be pierced. *Jean Anderson,* 2 F. Supp. 2d at 692 (dismissing complaint against defendants where no factual averments made to suggest parent corporation was alter ego and thus liable). Relevant factors to consider in determining whether to pierce the corporate veil include:

> Failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of

> corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. . . . Gross undercapitalization is also a factor.

Id. at 691-92 (citations omitted). In this case, however, Plaintiff makes no such factual averments. Accordingly, we will dismiss the breach of contract and breach of covenant of good faith and fair dealing claims as to Defendants Royal Bank of Canada and RBC Holdings (USA), Inc.[9]

F. Defendant Jon A. Tietbohl

Defendant Tietbohl files a separate Motion asserting the same arguments as Defendants, already addressed in this Memorandum, and asserting that he should not personally be brought into this lawsuit. (Doc. No. 12.) As discussed above, we will dismiss the tort claims as to Defendant Tietbohl. *See supra* note 7. We now address the breach of contract claims as to him. While Defendant Tietbohl signed the Agreement, he signed as Managing Director of RBC Dain Rauscher Corp., and not in his personal capacity. (Doc. No. 6 at Ex. A.) "Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually." *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999). Accordingly, we will dismiss the breach of contract and breach of covenant of good faith and fair dealing claims as to Defendant Tietbohl.

IV. CONCLUSION

For the foregoing reasons, Defendants RBC Dain Rauscher Inc., Royal Bank of Canada, and RBC Holdings (USA), Inc.'s Motion For Partial Dismissal (Doc. No. 7) will be denied as to Count

[9] Plaintiff has filed a Supplemental Brief (Doc. No. 22) to which it attaches an Affidavit by Defendant Jon A. Tietbohl, filed in connection with his divorce and stating that his primary employer was "Royal Bank of Canada." While we assume that Plaintiff has referenced this affidavit in an effort to suggest that the corporate veil should be pierced, it is wholly insufficient for that purpose.

II and will be granted as to Counts III and IV and the claims for punitive damages and attorneys' fees and costs. Defendant Jon A. Tietbohl's Motion For Dismissal (Doc. No. 12) will be granted as to all counts.

An appropriate Order follows.

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

FREEDOM MEDICAL, INC.	:	
	:	CIVIL ACTION
V.	:	
	:	
ROYAL BANK OF CANADA,	:	NO. 04-CV-5626
RBC HOLDINGS (USA), INC.,	:	
RBC DAIN RAUSCHER CORP.,	:	
JON A. TIETBOHL		

ORDER

AND NOW, this 30th day of December, 2005, upon consideration of Defendants RBC Dain Rauscher Inc., Royal Bank of Canada, and RBC Holdings (USA), Inc.'s Motion For Partial Dismissal of Plaintiff's Amended Complaint And To Dismiss And Strike Plaintiff's Requests For Punitive Damages, Costs, and Attorneys' Fees (Doc. No. 7), Defendant Jon A. Tietbohl's Motion For Dismissal of Plaintiff's Amended Complaint (Doc. No. 12, 04-CV-5626) and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Defendants' Motions are GRANTED in part and DENIED in part, consistent with the attached Memorandum.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge