

Microstrategy Inc. v. Acacia Research Corp.

Court of Chancery of Delaware

September 24, 2010, Submitted; December 30, 2010, Decided

Civil Action No. 5735-VCP

**Reporter**

2010 Del. Ch. LEXIS 254 \*; 2010 WL 5550455

MICROSTRATEGY INC, Plaintiff, v. ACACIA RESEARCH CORP. and DATABASE APPLICATION SOLUTIONS, LLC, Defendants.

**Notice:** THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

**Core Terms**

Patent, Licensed, parties, effective date, allegations, fraud claim, infringement, assurances, settlement agreement, present plan, warranty, breached, motion to dismiss, Affiliates, releases, argues, subsidiary, contends, acquire, particularity, Mediation, infer, state of mind, alter ego, Defendants', documents, asserts, patent infringement, induced, Counts

**Case Summary**

**Procedural Posture**

Plaintiff software provider sued defendants, a patent licensor and its subsidiary, for (1) breach of contract, (2) declaratory judgment as to the proper construction of a contract, (3) breach of representation and warranty, and (4) fraud in the inducement. Defendants moved to dismiss the complaint.

**Overview**

The provider said the licensor's threat to sue for patent infringement breached a settlement. Breach of contract and declaratory judgment claims failed because the provider unreasonably construed the settlement to release it from infringement of the patents at issue and any patent infringement claims, making the first release mere surplusage. The breach of warranty and representation claim survived dismissal because it (1) alleged defendants, despite stating otherwise, planned to sue the provider when agreeing to the

settlement, (2) relied on a clause that did not make other provisions meaningless, and (3) alleged the licensor controlled a patent on which it later threatened to sue, as well as reliance on the licensor's statement. Fraud in the inducement was adequately alleged because (1) an integration clause did not bar a claim of justifiable reliance on the licensor's executive's statements, and (2) the provider met Del. Ch. Ct. R. 9(b)'s particularity standard. A fraud claim alleging the licensor's intent to enforce a patent it controlled against the provider when agreeing to the settlement did not bootstrap a contract claim because it was arguably outside a contract clause.

**Outcome**

The motion was granted as to the provider's breach of contract and declaratory judgment claims and as to the fraudulent inducement claim to the extent it alleged the licensor promised never to sue the provider. The motion was otherwise denied.

**LexisNexis® Headnotes**

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

**HNI** When considering a motion to dismiss under Del. Ch. Ct. R. 12(b)(6), a court must assume the truthfulness of the well pled allegations in the complaint and afford the party opposing the motion the benefit of all reasonable inferences. But, the court need not accept inferences or factual conclusions unsupported by specific allegations of fact. Consequently, to survive a Rule 12(b)(6) motion, a complaint must contain allegations of facts supporting an inference of actionable conduct, not simply a conclusion to that effect. The court must determine whether the complaint offers sufficient

facts plausibly to suggest that the plaintiff ultimately will be entitled to the relief he or she seeks. If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be granted.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN2 [img alt="down arrow icon"] In considering a motion to dismiss for failure to state a claim, a court generally may not consider matters beyond the complaint. If it does so, the motion must be treated as one for summary judgment under Del. Ch. Ct. R. 56 and the court must give the parties a reasonable opportunity to take discovery and present all material relevant to a summary judgment motion. In certain limited circumstances, however, the court may consider documents, including Securities and Exchange Commission (SEC) filings, beyond the complaint without being required to convert a motion to dismiss into one for summary judgment. For example, a court may take judicial notice of the contents of an SEC filing, but only to the extent that the facts contained in them are not subject to reasonable dispute. In addition, a court may consider a document beyond the complaint on a motion to dismiss if the proponent establishes that such document is either (1) integral to, and incorporated within, the plaintiff's complaint; or (2) not being relied upon for the truth of its contents. Indeed, a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Intent

HN3 [img alt="down arrow icon"] Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss. When interpreting a contract, a court strives to determine the parties' shared intent, looking first at the relevant document, read as a whole, in order to divine that intent. As part of that review, the court interprets the words using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise.

Additionally, when interpreting a contractual provision, a court attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term. In doing so, courts apply the well settled principle that contracts must be interpreted in a manner that does not render any provision illusory or meaningless.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Intent

HN4 [img alt="down arrow icon"] If contractual language is clear and unambiguous, the ordinary meaning of the language generally will establish the parties' intent. A contract is ambiguous, however, when the language in controversy is reasonably or fairly susceptible of different interpretations or may have two or more different meanings. On a motion to dismiss, a trial court cannot choose between two different reasonable interpretations of an ambiguous document. Where ambiguity exists, dismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law.

Contracts Law > Contract Interpretation > General Overview

HN5 [img alt="down arrow icon"] It is a long-settled principle of contract interpretation that a court must read a contract as a whole and give each provision and term effect, so as not to render any part of the contract mere surplusage.

Contracts Law > Contract Interpretation > General Overview

HN6 [img alt="down arrow icon"] Grammar and punctuation are of secondary importance to a court in interpreting a contract where such grammar and punctuation reasonably would frustrate the parties' clear intent as evinced from the language used in the contract. Indeed, a court should not allow the imprecise placement of adverbs and commas to alter the otherwise plain meaning of a contractual provision or to frustrate the overall plan or scheme memorialized in the parties' contract.

Patent Law > ... > Defenses > Estoppel & Laches > General Overview

Patent Law > Infringement Actions > Defenses > Statute of Limitations

[HN7](#) The fact that a patent may be characterized as a wasting asset does not mean that a patent holder who suspects its patent is being infringed would never wait six months or more before confronting the suspected infringer. Indeed, [35 U.S.C.S. § 286](#) permits a patent holder to recover damages for infringement committed up to six years prior to the filing of a complaint.

Patent Law > Infringement Actions > Defenses > Statute of Limitations

[HN8](#) See [35 U.S.C.S. § 286](#).

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Warranty

[HN9](#) Under Delaware law, a plaintiff must establish reliance as a prerequisite for a breach of warranty claim.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Inadequate Capitalization

[HN10](#) Specific facts a court may consider when being asked to disregard the corporate form include: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant shareholder. A decision to disregard the corporate entity generally results not from a single factor, but rather some combination of them, and an overall element of injustice or unfairness must always be present, as well. Most importantly, because Delaware public policy does not lightly disregard the separate legal existence of corporations, a plaintiff must do more than plead that one corporation is the alter ego of another in conclusory fashion in order for a court to disregard their separate legal existence.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

[HN11](#) To state a claim for common law fraud, a plaintiff must allege: (1) that a defendant made a false representation, usually one of fact; (2) with the knowledge or belief that the representation was false, or with reckless indifference to the truth; (3) with an intent to induce the plaintiff to act or refrain from acting; (4) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of his or her reliance on the representation. Additionally, per Del. Ch. Ct. R. 9(b), in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. That is, to satisfy Rule 9(b), a complaint must allege: (1) the time, place, and contents of the false representation; (2) the identity of the person making the representation; and (3) what the person intended to gain by making the representations. State of mind, however, may be averred generally. Essentially, this particularity requirement obligates plaintiffs to allege the circumstances of the fraud with detail sufficient to apprise the defendant of the basis for the claim.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

[HN12](#) Delaware law holds that the parol evidence rule bars the admission of preliminary negotiations, conversations and verbal agreements when the parties' written contract represents the entire contract between the parties.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

[HN13](#) The presence of an integration clause is not conclusive as to the admission of prior statements because the intent of the parties always controls. Moreover, integration clauses will not be given effect to bar allegations of fraudulent inducement based on extra-contractual statements made before the effectuation of the contract unless such clauses contain an explicit anti-reliance representation.

Business & Corporate Compliance > ... > Formation of  
Contracts > Consideration > Detrimental Reliance

Contracts Law > Defenses > Fraud &  
Misrepresentation > General Overview

[HN14](#) It is unreasonable to rely on oral representations when they are expressly contradicted by the parties' written agreement. Fraudulent inducement is not available as a defense when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation.

Civil Procedure > ... > Pleadings > Heightened Pleading  
Requirements > Fraud Claims

Contracts Law > Defenses > Fraud &  
Misrepresentation > General Overview

[HN15](#) Generally, prior oral promises or statements of future intent do not constitute false representations of fact that satisfy the first element of fraudulent misrepresentation. Indeed, a viable claim of fraud concerning a contract must allege misrepresentations of present facts (rather than merely of future intent) that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract. As such, prior oral promises or statements of future intent can be "fraudulent misrepresentations" sufficient to form the basis of a fraudulent inducement claim only where a complaint alleges particularized facts that allow a court to infer that, at the time the promise was made, the speaker had no intention of keeping it. Indeed, statements of intention which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent. This knowing misrepresentation of one's intention or state of mind is a misrepresentation of an existing fact. Determining whether such statements are fraudulent or actionable misrepresentations, therefore, requires a subjective examination of the speaker's intent and state of mind.

Civil Procedure > ... > Pleadings > Complaints > Requirements  
for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading  
Requirements > Fraud Claims

[HN16](#) In general, while Delaware law requires a plaintiff to plead the circumstances of alleged fraud with particularity, the defendant's state of mind and knowledge may be averred generally. Even so, when a plaintiff pleads a claim of fraud that charges that the defendants knew something, it must allege sufficient facts from which a court reasonably could infer that this "something" was knowable and that the

defendants were in a position to know it. Moreover, when a plaintiff pleads a claim of promissory fraud, in that the alleged false representations are promises or predictive statements of future intent rather than past or present facts, the plaintiff must meet an even higher threshold. In this situation, the plaintiff must plead specific facts that lead to a reasonable inference that the promisor had no intention of performing at the time the promise was made.

Civil Procedure > ... > Pleadings > Complaints > General  
Overview

Contracts Law > Breach > General Overview

Torts > ... > Fraud & Misrepresentation > Actual  
Fraud > Defenses

[HN17](#) Delaware law holds that a plaintiff cannot "bootstrap" a claim of breach of contract into a claim of fraud merely by alleging that a contracting party never intended to perform its obligations. In other words, a plaintiff cannot state a claim for fraud simply by adding the term "fraudulently induced" to a complaint or alleging that the defendant never intended to comply with the agreement at issue at the time the parties entered into it.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Civil Procedure > Judicial Officers > Judges > Discretionary  
Powers

[HN18](#) The doctrine of unclean hands states that when a party who seeks relief in the Delaware Court of Chancery has violated conscience or good faith or other equitable principles in his conduct, then the doors of a court of equity should be shut against him. The Delaware Supreme Court generally affords the Court broad discretion in determining whether to apply the doctrine of unclean hands.

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**Judges:** PARSONS, Vice Chancellor.

**Opinion by:** PARSONS

## Opinion

### PARSONS, Vice Chancellor.

In late 2009, Plaintiff, MicroStrategy Inc. ("MSI"), entered into an agreement with Defendant Acacia Research Corp ("ARC") which had the effect of settling a number of patent infringement claims brought by one of ARC's subsidiaries against MSI in federal court. Approximately six months later, however, another of ARC's subsidiaries, Defendant Database Application Solutions, LLC ("DAS" or collectively with ARC, "Defendants"), delivered a letter to MSI advising [\*2] it that DAS planned to assert an infringement claim against MSI based on a patent that was not in issue in the prior litigation. Based on its construction of the terms of the settlement agreement and its alleged reliance on certain oral assurances from one of ARC's executives at a mediation in the prior litigation that led to that agreement, MSI asserts it obtained a broader release than ARC contends and greater protection against certain future claims ARC might assert against it, including the claim discussed in DAS's letter.

Almost two months after receiving the DAS letter, MSI brought suit in this Court alleging, among other things, that ARC and DAS breached provisions of the agreement, breached certain representations and warranties in the agreement, and fraudulently induced MSI to enter into the agreement. ARC and DAS deny these allegations and have moved to dismiss MSI's claims. As explained in detail below, I grant their motions to dismiss in part and deny them in part. In particular, I dismiss MSI's breach of contract claim, decline to dismiss its breach of representation and warranty claim, and allow this litigation to proceed as to only a limited portion of MSI's fraudulent [\*3] inducement claim.

## I. BACKGROUND

### A. The Parties

MSI is a Delaware corporation and a global leader in business intelligence technology.<sup>1</sup> It provides integrated reporting,

analysis, and monitoring software, including the Business Intelligence software platform, that enable organizations to design, deploy, and issue business intelligence output to various users.<sup>2</sup>

ARC is a Delaware corporation in the business of forming subsidiaries that partner with inventors and patent owners to license their patents to corporate users and share the resulting revenue.<sup>3</sup> In particular, ARC helps individual inventors and patent holders by providing them with the expertise and resources to manage, license, and monetize their inventions, as well as to defend their patents from infringement.<sup>4</sup> ARC sells no products and provides no services other than the licensing of certain patents that it has acquired from others.<sup>5</sup> DAS is a Virginia limited liability corporation formed as a wholly-owned subsidiary of ARC to acquire and license U.S. Patent No. 5,444,842 (the "842 Patent" or "Patent").<sup>6</sup>

### B. Facts<sup>7</sup>

#### 1. The settlement of the DSC Litigation

Before December 14, 2009, ARC and MSI were adversaries in litigation (the "DSC Litigation") in which Diagnostic Systems Corporation ("DSC"), a wholly-owned subsidiary of ARC, asserted patent infringement claims against MSI regarding U.S. Patent Nos. 5,537,590, 5,701,400, and 5,293,615 (collectively, the "DSC Patents").<sup>8</sup> On December 9, 2009, the parties participated in a court-ordered mediation (the "Mediation") before a former federal judge. During the Mediation, ARC Senior Vice President, Matt Vella, and MSI's Vice President of Risk Management and Corporate Counsel, Richard N. Wiedis, met privately to discuss the prospects of settling the litigation. MSI alleges that it was favorably disposed to a settlement because, among other things, it wanted to avoid the enormous costs associated with defending

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* ¶ 4.

<sup>4</sup> Def. ARC's Op. Br. ("ARC OB") 2. Similarly, I refer to ARC's reply [\*4] brief and DAS's opening and reply briefs as ARC RB, DAS OB, and DAS RB, respectively. I refer to MSI's combined answering brief as PAB.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* ¶ 6; DAS OB Ex. C.

<sup>7</sup> Unless otherwise specified, this summary of the facts is drawn from the allegations in the Complaint, which I must accept as true for purposes of a motion to dismiss.

<sup>8</sup> DAS OB Ex. B.

<sup>1</sup> Pl.'s Ver. Compl. (the "Complaint") ¶ 3.

against possible [\*5] future lawsuits brought by ARC subsidiaries against MSI.<sup>9</sup> MSI avers that ARC viewed the proposed settlement as favorable because, among other things, it sought to avoid a decision by the court that DSC was an alter ego of ARC.<sup>10</sup> Such a finding, according to MSI, would threaten ARC's business model and its ability to enforce its patents.

During their meeting, Vella assured Wiedis that ARC "wanted to avoid future litigation with [MSI], and that there was no real chance that [ARC] would come after [MSI] [\*6] again," and later told Wiedis that "there was no way that [ARC] would again pursue [MSI] in litigation."<sup>11</sup> Relying, at least in part, on these assurances, MSI agreed to settle the DSC Litigation.

## 2. The Settlement Agreement

On December 14, 2009, MSI and ARC entered into a formal Settlement Agreement (the "Settlement Agreement" or "Agreement"). As ARC's motion to dismiss largely turns on the provisions of that Agreement, I detail certain relevant provisions below.

While the parties fervently dispute its scope, § 2.2 contains the language of the release ARC granted to MSI (the "Release"). In pertinent part, it states:

[ARC], [its] parent companies, Subsidiaries and Affiliates . . . hereby releases, acquits, and forever discharges [MSI] and its distributors and customers, together with any and all of their related companies, Affiliates, and Subsidiaries . . . from any claim or counterclaim they asserted or could have asserted in the Lawsuit regarding the DSC/[ARC] Alter Ego Claim, as well as from any and all known or unknown claims or any other liability for infringement, or alleged infringement of the Licensed Patents, through the making, using, selling, offering for sale or [\*7] importation into the United States of any [MSI]

<sup>9</sup>The Complaint alleges that MSI's motives to settle included its belief that ARC, which uses the business model of a nonpracticing entity ("NPE"), had a massive portfolio of patents and sought to acquire additional patents to derive significant revenue from judgments obtained by its wholly-owned subsidiaries through the prosecution of patent infringement lawsuits. MSI considers this business model especially threatening to operating companies, such as MSI, because ARC and its subsidiaries produce no products and sell no services, making them generally invulnerable to the threat of counter-assertion of a patent infringement claim.

<sup>10</sup>See DAS OB Ex. A, Settlement Agreement, § C.

<sup>11</sup>Compl. ¶ 7.

product any where [sic] in the world prior to the Effective Date.<sup>12</sup>

The Agreement defines the "Effective Date" as December 14, 2009,<sup>13</sup> and "Affiliate(s)" as "any entity which either party, now or hereafter, directly or indirectly, owns or controls, is owned or controlled by, or is under the common control with, as the case may be."<sup>14</sup> "Licensed Patents" is defined as the three DSC Patents, as well as any additional patents obtained at any time by DSC, the Acacia Entities, or any of their Affiliates . . . and all other patents obtained anywhere in the world issuing therefrom or claiming priority to any of the foregoing."<sup>15</sup>

In addition to granting the Release noted above, ARC also made certain representations and warranties regarding the likelihood of future litigation against MSI. Section 5.2 of the Agreement states, in relevant part:

The Acacia Entities, on behalf of themselves and their Affiliates, represents and warrants that . . . (ii) the Acacia Entities and its Affiliates have no present plan or intent to enforce against [MSI], or a [MSI] Affiliate or [\*8] Subsidiary, any patent owned, licensed, or controlled by the Acacia Entities, or any of its Affiliates as of the Effective Date."<sup>16</sup>

Finally, the parties agreed to a dispute resolution mechanism for future patent infringement disputes that potentially could arise between them. For example, § 4.1 provides that before ARC may file an infringement suit against MSI it must comply with certain notice requirements to give the parties an opportunity to resolve any dispute amicably and wait ninety days.<sup>17</sup> Notably, § 4.2 provides that during this ninety-day period MSI is prohibited from:

(b) bring[ing] a claim for declaratory judgment regarding any such patent, or (c) bring[ing] any additional suits or

<sup>12</sup>Settlement Agreement § 2.2.

<sup>13</sup>*Id.* at the Introduction.

<sup>14</sup>*Id.* § 1.2.

<sup>15</sup>*Id.* § 1.3.

<sup>16</sup>*Id.* § 5.2.

<sup>17</sup>*Id.* § 4.1. On day one, ARC must provide MSI with a written statement setting forth its allegations with "sufficient particularity for [MSI] to prepare a non-infringement defense." *Id.* MSI must respond in writing no later than day sixty, after which the parties are to participate in good faith negotiations [\*9] to resolve the dispute between days sixty and ninety. *Id.*

proceedings regarding any such patent.<sup>18</sup>

Once the ninety-day period expires, however, the parties are free to file suit against each other for infringement or related matters.<sup>19</sup>

### 3. The '842 Patent

The Complaint alleges, upon information and belief, that ARC was in the process of acquiring the '842 Patent for the purpose of enforcing it against MSI as of the Effective Date.<sup>20</sup> In particular, MSI avers that ARC formed DAS shortly after the execution of the Agreement for the purpose of acquiring the '842 Patent and pursuing MSI for infringement of it. The Patent formally was assigned to DAS on June 25, 2010. On June 29, DAS sent written notice to MSI (the "June 29 Letter")<sup>21</sup> that it believed MS was infringing the '842 Patent. MSI then filed this action claiming that, among other things, the June 29 Letter and DAS's stated intention to sue MSI for infringement of the '842 Patent constitute a breach of the Settlement Agreement.

### C. Procedural History

On August 17, 2010, MSI filed its Complaint, alleging six counts against ARC and DAS for: (I) breach of contract by Defendants with respect [\*10] to § 2.2 of the Agreement; (II) declaratory judgment as to the proper construction of § 2.2; (III) breach of representation and warranty by Defendants with respect to § 5.2 of the Agreement; (IV) tortious interference with contract by DAS for allegedly causing the breach of §§ 2.2 and 5.2; (V) injunctive relief against Defendants; and (VI) fraud in the inducement against ARC. On August 31, both Defendants moved to dismiss all six counts of the Complaint, and the parties subsequently briefed those motions.<sup>22</sup> Importantly, in its answering brief, MSI effectively withdrew Counts IV and V.<sup>23</sup> I heard argument on Defendants' motions on September 24, 2010. This Opinion

<sup>18</sup> Settlement Agreement § 4.2(b)-(c).

<sup>19</sup> *Id.*

<sup>20</sup> MSI further alleges that had it been aware of ARC's intentions with regard to the '842 Patent, it would not have entered into the Settlement Agreement.

<sup>21</sup> DAS OB Ex. E, the June 29 Letter.

<sup>22</sup> Defendants each submitted an opening brief and a reply brief. Plaintiff submitted a single, combined answering brief. On September 23, MSI filed a sur-reply letter with four exhibits. Docket Item ("D.I.") 46. Later that day, counsel for ARC submitted a letter in reply to MSI's sur-reply. D.I. 47.

<sup>23</sup> PAB 11 n.7.

constitutes my ruling on those motions to dismiss Counts I-III and VI of the Complaint.

### D. Parties' Contentions

Defendants argue that MSI has failed to state a claim with regard to Counts I-III and VI. In particular, they [\*11] contend that MSI failed to allege facts which plausibly suggest Defendants breached §§ 2.2 or 5.2 of the Settlement Agreement by threatening to sue MS for infringing the '842 Patent. In addition, Defendants assert that MS has not stated a claim for fraudulent inducement because the Complaint does not plead fraud with the particularity required by Rule 9(b) or allege that MSI justifiably relied upon the oral statements ARC purportedly made at the Mediation. For its part, MSI disagrees with Defendants' characterizations of the Complaint and contends that it has sufficiently stated a claim for each of the four counts challenged by Defendants' motions.

## II. ANALYSIS

### A. Standard for a Motion to Dismiss

HNI [7] When considering a motion to dismiss under *Rule 12(b)(6)*, a court must assume the truthfulness of the well pleaded allegations in the complaint and afford the party opposing the motion "the benefit of all reasonable inferences."<sup>24</sup> But, the court need not accept inferences or factual conclusions unsupported by specific allegations of fact.<sup>25</sup> Consequently, to survive a Rule 12(b)(6) motion, a complaint must contain allegations of facts supporting an inference of actionable conduct, not simply [\*12] a conclusion to that effect.<sup>26</sup> In line with the standard articulated by the United States Supreme Court in *Bell Atlantic v. Twombly*,<sup>27</sup> the court must determine whether the complaint offers sufficient facts plausibly to suggest that the plaintiff ultimately will be entitled to the relief she seeks.<sup>28</sup> "If a complaint fails to do that and instead asserts mere conclusions, a Rule 12(b)(6) motion to dismiss must be

<sup>24</sup> *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Comme'us Corp.*, 672 A.2d 35, 38 (Del. 1996)).


<sup>25</sup> *Ruffalo v. Transtech Serv. P'rs Inc.*, 2010 Del. Ch. LEXIS 183, 2010 WL 3307487, at \*10 (Del. Ch. Aug. 23, 2010).

<sup>26</sup> *Desimone v. Barrows*, 924 A.2d 908, 928-29 (Del. Ch. 2007).

<sup>27</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

<sup>28</sup> *Desimone*, 924 A.2d at 928-29.

granted." <sup>29</sup>

HN2[] In considering a motion to dismiss for failure to state a claim, a court generally may not consider matters beyond the complaint. <sup>30</sup> If it does so, the motion must be treated as one for summary judgment under *Rule 56* and the court must give the parties a reasonable opportunity to take discovery and present all material relevant [\*13] to a summary judgment motion. <sup>31</sup> In certain limited circumstances, however, the court may consider documents, including SEC filings, beyond the complaint without being required to convert a motion to dismiss into one for summary judgment. <sup>32</sup> For example, a court may take judicial notice of the contents of an SEC filing, but only to the extent that the facts contained in them are not subject to reasonable dispute. <sup>33</sup> In addition, a court may consider a document beyond the complaint on a motion to dismiss if the proponent establishes that such document is either "[1] integral to, and incorporated within, the plaintiff's complaint; or . . . [2] not being relied upon for the truth of [its] contents."<sup>34</sup> Indeed, "a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations."<sup>35</sup>

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<sup>29</sup> Ruffalo, 2010 Del. Ch. LEXIS 183, 2010 WL 3307487, at \*10 (citing *Desimone, 924 A.2d at 929*).

<sup>30</sup> See *Robotti & Co. v. Liddell, 2010 Del. Ch. LEXIS 4, 2010 WL 157474, at \*5 (Del. Ch. Jan. 14, 2010)*.

<sup>31</sup> See, e.g., *Liddell, 2010 Del. Ch. LEXIS 4, 2010 WL 157474, at \*5; Kessler v. Copeland, 2005 Del. Ch. LEXIS 24, 2005 WL 396358, at \*4 (Del. Ch. Feb. 10, 2005)* (when a Rule 12(b)(6) motion is converted to a Rule 56 motion due to consideration of extrinsic matters, [\*14] the parties must be permitted to take discovery).

<sup>32</sup> In re Gen. Motors (Hughes) S'holder Litig., 897 A.2d 162, 170 (Del. 2006) ("This Court has recognized that, in acting on a Rule 12(b)(6) motion to dismiss, trial courts may consider hearsay in SEC filings 'to ascertain facts appropriate for judicial notice under [Delaware Rule of Evidence] 201.'").

<sup>33</sup> See *Fleischman v. Huang, 2007 Del. Ch. LEXIS 124, 2007 WL 2410386, at \*3 (Del. Ch. Aug. 22, 2007)*. Under Rule 201, a fact is not subject to reasonable dispute if it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *D.R.E. 201*.

<sup>34</sup> See, e.g., *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc., 691 A.2d 609, 613 (Del. 1996); Liddell, 2010 Del. Ch. LEXIS 4, 2010 WL 157474, at \*5; Adly v. Piedmonte, 2009 Del. Ch. LEXIS 38, 2009 WL 707641, at \*6 (Del. Ch. Mar. 18, 2009)*.

## B. Judicial Notice of Documents Outside of the Complaint

The parties have submitted along with their briefs and supplemental letters a number of items arguably beyond the Complaint. <sup>36</sup> Preliminarily, I note [\*15] that I properly may consider copies of the Settlement Agreement and the June 29 Letter in adjudicating Defendants' motions to dismiss because they are integral to and incorporated in the Complaint. This action centers on, among other things, alleged breaches of contract and related fraudulent conduct pertaining to actions taken in the wake of the settlement of the DSC Litigation. I also take judicial notice of (1) the title pages of the DSC Patents and the '842 Patent, (2) the DAS corporate information form from the Virginia Corporation Commission, and (3) the publicly filed assignment form for the '842 Patent. These documents all contain facts that are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to "sources whose accuracy cannot reasonably be questioned," *i.e.*, government databases.

I have not considered, however any of the other documents submitted by the parties because they do not satisfy any exception to the rule that the Court generally should not consider documents beyond the Complaint in evaluating a motion to dismiss. <sup>37</sup> None of these documents is integral to

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<sup>35</sup> *Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318, 327 (Del. Ch. 2003)*.

<sup>36</sup> In no particular order, these documents include: (1) the Settlement Agreement (DAS OB Ex. A); (2) ARC Form 10-K for fiscal year 2008 (DAS OB Ex. D); (3) the June 29 Letter (DAS OB Ex. E); (4) the title pages of the DSC Patents and the '842 Patent (DAS OB Exs. B and C); (5) a YouTube video about "patent trolls" (Compl. ¶ 1 n.1; PAB 6 n.5); (6) [\*16] a streamingmedia.com article regarding ARC's business model (PAB 9 n.6); (7) a copy of a Commonwealth of Virginia Corporation Commission form containing information about DAS (ARC RB 3 and Aff. of Tye C. Bell ("Bell Aff.") Ex. A); (8) MSI Form 10-K for fiscal year 2009 (DAS RB Ex. A); (9) a Letter dated May 13, 2009 from Paul Ryan, Chairman and CEO of ARC, to the Federal Trade Commission (Letter from MSI dated Sept. 23, 2010 ("Sept. 23 Letter") Ex. A); (10) a publicly filed assignment form for the '842 Patent (Sept. 23 Letter Ex. B); (11) ARC Form 10-K for fiscal year 2009 (Sept. 23 Letter Ex. C); (12) documents related to a patent litigation between Document Generation Corporation and Allmeds in the Eastern District of Texas (Sept. 23 Letter Ex. D); and (13) a link to an ARC client agreement (Sept. 23 Letter at 2).

<sup>37</sup> *Albert v. Alex. Brown Mgmt. Servs., Inc., 2005 Del. Ch. LEXIS 100, 2005 WL 1594085, at \*12 (Del. Ch. June 29, 2005)* ("Our Supreme Court has cautioned trial courts to be sparing in our resort to documents outside the pleadings.").



and incorporated in the Complaint.<sup>38</sup> Moreover, I may not take judicial notice of any [\*17] of these documents because the facts contained in them are subject to reasonable dispute in this case.

As is discussed *infra*, for example, the parties hotly contest whether Defendants "owned, licensed, or controlled" the '842 patent at or before the Effective Date. Nevertheless, MSI offers for the Court's consideration a letter from Paul Ryan and a copy of ARC's Form 10-K for fiscal year 2009 for the proposition that ARC did have control over the '842 Patent by the Effective Date.<sup>39</sup> Similarly, as discussed *infra*, the parties strenuously dispute whether § 2.2 of the Agreement is a blanket release of all claims by ARC against MSI as of the Effective Date or a release essentially confined to the specific Licensed Patents at [\*18] issue in the DSC Litigation. Yet, DAS offers ARC's Form 10-K for fiscal year 2008 and MSI's Form 10-K for fiscal year 2009 for the proposition that § 2.2 applied only to release the Licensed Patents and that this construction is reasonable because ARC has a large portfolio of patents and it would be unlikely to grant as sweeping a release as MSI argues.<sup>40</sup> Finally, as discussed *infra*, the parties dispute whether Defendants had a "present plan or intent" to enforce the '842 Patent against MSI at or before the Effective Date. To buttress its allegations to that effect, MSI submitted multiple documents to show that ARC's internal policies require a robust and time-consuming due diligence process before it acquires a patent to support an inference that ARC knew about the '842 Patent and was considering enforcing it against MSI by December 2009.<sup>41</sup> Like the

<sup>38</sup> In addition, each of the documents in question were offered for the truth of the matter asserted in them. Thus, they cannot be admitted for consideration on the Defendants' motions under the rubric that they were not offered for that purpose. *See supra* note 36.

<sup>39</sup> *See* Sept. 23 Letter at 1, Exs. A and C.

<sup>40</sup> *See* DAS RB 5; DAS OB 5. Similarly, MSI apparently offered a YouTube video regarding so-called "patent trolls" to support its suggestion that that pejorative term aptly describes ARC. Compl. ¶ 1; PAB 6 n.5. Because the parties dispute the nature and scope of ARC's business model with respect to enforcing patents through litigation and its effect on accused infringers, it would not be appropriate to take judicial notice of the proffered video.

<sup>41</sup> MSI offered, for example, a streamingmedia.com article and a copy of an ARC client agreement to demonstrate ARC's commitment to a significant period of due diligence before acquiring each patent to which it purchases rights. *See* PAB 9 n.6; Sept. 23 Letter at 2. In addition, MSI submitted papers from a patent infringement suit prosecuted by another ARC subsidiary in a federal district court for the proposition that ARC might wait at least six months to bring an infringement suit against an alleged infringer, even though ARC

documents concerning Defendants' purported "control" over the '842 Patent and the intended scope of § 2.2 of the Agreement, these documents constitute extrinsic evidence about hotly contested matters at the heart of the parties' present dispute. As such, and because they represent matters directly in dispute in this action, I conclude [\*19] it would be inappropriate to consider them on the pending motions to dismiss.<sup>42</sup>

This does not mean, however, that the allegations in MSI's Complaint are not sufficient to support a reasonable inference that ARC plausibly knew in early December 2009 that it had acquired or might acquire the '842 Patent and would enforce it against MSI. I discuss this possibility in the next section.

### C. Counts I and II: breach of the Settlement Agreement and declaratory relief

#### 1. Applicable principles of contract interpretation

HN3 [T] Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss.<sup>43</sup> When interpreting a contract, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."<sup>44</sup> As part of that review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."<sup>45</sup> Additionally, when interpreting a contractual [\*21] provision, a court attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term.<sup>46</sup> In doing so, courts apply the well

argues a patent is a wasting asset. *See* Sept. 23 Letter at 2 and Ex. D. MSI argues that these documents [\*20] make it more likely that ARC owned, licensed, or controlled the '842 Patent by December 2009 and intended to enforce it against MSI. *See, e.g.*, Sept. 23 Letter at 2.

<sup>42</sup> *See Addy v. Piedmonte*, 2009 Del. Ch. LEXIS 38, 2009 WL 707641, at \*12 (Del. Ch. Mar. 18, 2009).

<sup>43</sup> *See, e.g., Schuss v. Penfield P'rs, L.P.*, 2008 Del. Ch. LEXIS 73, 2008 WL 2433842, at \*6 (Del. Ch. June 13, 2008); *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

<sup>44</sup> *Schuss*, 2008 Del. Ch. LEXIS 73, 2008 WL 2433842, at \*6.

<sup>45</sup> *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 Del. Ch. LEXIS 71, 2005 WL 1252399, at \*1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.*, 2005 Del. Ch. LEXIS 56, 2005 WL 1038997, at \*9 (Del. Ch. Apr. 29, 2005)).

<sup>46</sup> *Schuss*, 2008 Del. Ch. LEXIS 73, 2008 WL 2433842, at \*6.

settled principle that "contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'" <sup>47</sup>

HNS [¶] If the contractual language is "clear and unambiguous," the ordinary meaning of the language generally will establish the parties' intent. <sup>48</sup> A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings." <sup>49</sup> On a motion to dismiss, a trial court cannot choose between two different reasonable interpretations of an ambiguous document. <sup>50</sup> [\*22] Where ambiguity exists, "[d]ismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law." <sup>51</sup> Thus, to succeed on their motions, Defendants must demonstrate that their construction of the Settlement Agreement is the only reasonable interpretation.

## 2. Application to Counts I and II<sup>52</sup>

Defendants argue that Counts I and II should be dismissed because a patent infringement claim against MSI based on the '842 Patent unambiguously falls outside the scope of the release ARC granted to MSI under § 2.2 of the Agreement. Specifically, they argue that the plain language of § 2.2 demonstrates that it is not a general release. Rather, § 2.2 is a litigation-specific claim release provision in which ARC releases MSI from two classes of claims: (1) "from any claim or counterclaim [ARC] asserted or could have asserted in the

<sup>47</sup> *Id.*

<sup>48</sup> Brandywine River Props., Inc. v. Maffett, 2007 Del. Ch. LEXIS 173, 2007 WL 4327780, at \*3 (Del. Ch. Dec. 5, 2007).

<sup>49</sup> Pharmathene, Inc. v. Siga Techs., Inc., 2008 Del. Ch. LEXIS 9, 2008 WL 151855, at \*11 (Del. Ch. Jan. 16, 2008). Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. United Rentals, Inc. v. Ram Hldgs., Inc., 937 A.2d 810, 2007 WL 4496338, at \*15 (Del. Ch. 2007).

<sup>50</sup> See Appriva S'holder Litig. Co. v. EF3, Inc., 937 A.2d 1275, 1289 (Del. 2007).

<sup>51</sup> *Id.* (quoting Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc., 691 A.2d 609, 613 (Del. 1996)).

<sup>52</sup> MSI contends that Counts I and II raise distinct inquiries. PAB 12 n.8. I disagree and evaluate them together because whether Defendants breached § 2.2 by issuing the June 29 Letter and whether MSI is entitled to a declaration that Defendants have released MSI from the claims raised in the June 29 Letter [\*23] turn on the same question of the proper construction of § 2.2.

Lawsuit regarding the DSC/[ARC] Alter Ego Claim" and (2) "as well as from any and all known or unknown claims or any other liability for infringement, or alleged infringement of the Licensed Patents." <sup>53</sup> According to Defendants, the second class of released claims is limited to claims related to the Licensed Patents, *i.e.*, the family of patents associated with the three DSC Patents. That group of Licensed Patents is defined in § 1.3 and does not include the '842 Patent. Defendants argue further that this reading is consistent with the overall purpose of the Agreement: to settle any and all claims [\*24] related to the DSC Litigation and nothing more. <sup>54</sup>

MSI, for its part, reads § 2.2 to include three distinct releases that, taken together, release all claims against MSI that ARC or its Affiliates may have had as of the Effective Date of the Agreement. That is, MSI argues that § 2.2 is not limited to alter ego or Licensed Patent claims, but instead releases MSI from: (1) "any claim or counterclaim [ARC] asserted or could have asserted in the Lawsuit regarding the [Alter Ego Claim]"; "any and all known or unknown claims or any other liability for infringement"; and "alleged infringement of the Licensed Patents." <sup>55</sup> It contends that this reading of § 2.2 is reasonable and correct because the second and third purported releases are set off by a comma, thereby making the Licensed Patent limitation applicable only to the third purported release and not to the much broader second purported release. <sup>56</sup> Thus, per MSI, the second release prevents ARC from asserting [\*25] a claim against MSI regarding the '842 Patent, even if such a claim has no relation to the Licensed Patents. <sup>57</sup>

Turning first to the plain language of § 2.2 itself, I find MSI's construction unreasonable in a number of respects. First, it violates HNS [¶] the long-settled principle of contract interpretation that the Court must "read a contract as a whole

<sup>53</sup> See DAS RB 9-13. ARC also subscribes to DAS's arguments concerning Counts I and II. ARC OB 5. Where the parties have asserted arguments on an individual basis, I have endeavored to specify the Defendant involved by name.

<sup>54</sup> DAS OB 11.

<sup>55</sup> PAB 13.

<sup>56</sup> *Id.*

<sup>57</sup> At the Argument, MSI implied that ARC's '842 Patent claim also might be barred by the alter ego release in § 2.2. Transcript of Argument dated Sept. 24, 2010 ("Tr.") at 93. Because MSI did not present this argument in its brief and mentioned it only in passing at the Argument, I need not address it here. See Emerald P'rs v. Berlin, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage." <sup>58</sup> Even assuming that the comma separating the phrase "as well as from any and all known or unknown claims or any other liability for infringement" from "or alleged infringement of the Licensed Patents" in § 2.2 is interpreted to mean that these phrases represent two distinct releases, the monumental breadth of the [\*26] second purported release easily would swallow the full scope of the third release and, perhaps, the first as well. If, as MSI contends, the second purported release exempts MSI from "any and all known or unknown claims or any other liability," there would be no reason to include an additional release that precludes liability on MSI's part for "alleged[ly] infring[ing] . . . the Licensed Patents." Thus, MSI's construction would render meaningless the third purported release.

In addition, MSI's construction unreasonably rests on a single, potentially errant comma in an imperfectly drafted contract. MSI contends that the phrase in the release section "as well as from any and all known or unknown claims or any other liability for infringement, or alleged infringement of the Licensed Patents" contains two distinct releases, one limited to the Licensed Patents and the other not so limited, based on the comma separating "infringement" from "or alleged infringement." This reading, however, ignores the clear intent of the parties to include only one release in this quoted language as demonstrated by the language [\*27] they used in § 2.2. <sup>59</sup> First, § 2.2 uses the word "from" only twice. That is, ARC releases MSI *from* the applicable alter ego claims as well as *from* "any and all known or unknown claims or any other liability for infringement, or alleged infringement of the Licensed Patents." <sup>60</sup> Notably, there is no "from" preceding the phrase "or alleged infringement of the Licensed Patents" despite MSI's argument that this clause is a separate and distinct third release. In addition, the parties used the conjunction "as well as" to separate the two clauses that begin with the word "from." That the parties did not also insert a similar conjunction between MSI's second and third purported releases further suggests they did not intend those phrases to be separate and distinct releases. Therefore, I am convinced that the comma at issue here is, at worst, a drafting error that should be disregarded. <sup>61</sup>

<sup>58</sup> *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010).

<sup>59</sup> See *Schuss v. Penfield P'ts, L.P.*, 2008 Del. Ch. LEXIS 73, 2008 WL 2433842, at \*6 (Del. Ch. June 13, 2008) (noting that a Court should endeavor to divine the parties' intent from the language they used in drafting the contract).

<sup>60</sup> Settlement Agreement § 2.2.

In reaching that conclusion, I am mindful that *HN6* grammar and punctuation are of secondary importance to a court in interpreting a contract where such grammar and punctuation reasonably would frustrate the parties' clear intent as evinced from the language used in the contract. <sup>62</sup> Indeed, a court should "not allow the imprecise placement [\*29] of adverbs and commas to alter the otherwise plain meaning of a contractual provision or to frustrate the overall plan or scheme memorialized in the parties' contract." <sup>63</sup>

Thus, properly read, § 2.2 unambiguously contains two distinct releases: one relating to the DSC Litigation's alter ego claims and one relating to claims of infringement with regard to the Licensed Patents at issue in the DSC Litigation. It is undisputed that the '842 Patent is not within the definition of the Licensed Patents in § 1.3. Nor has MSI presented any other argument, beyond the three-part-release argument that I have rejected, that DAS's claim for infringement of the '842

<sup>61</sup> Cf. *In re Trust U.D. Asbury*, 2003 Del. Ch. LEXIS 154, 2003 WL 22232599, at \*4 n.1 (Del. Ch. Sept. 12, 2003) [\*28] ("The settlor's niece, Elizabeth Meehan, argues that the language of Article FIRST (C)(3) is not ambiguous. She points out that the comma separating the clauses "the settlor's nieces and nephews" and "the children of deceased nieces and nephews" is grammatically unnecessary to the construction of the sentence, and therefore should be interpreted to act as an indicator that the "per capita" language was meant to modify only the last clause, that referring to children of deceased nieces and nephews. This strikes me as unpersuasive. The drafting of the residuary clause of the trust is, to put it charitably, sloppy. While the placement of the comma may represent the intention which Ms. Meehan has expressed, it strains credulity to believe that a punctuation mark in such an otherwise carelessly drafted clause was carefully placed to demonstrate that intent.").

<sup>62</sup> See, e.g., *Segovia v. Equities First Hldgs., LLC*, 2008 Del. Super. LEXIS 197, 2008 WL 2251218, at \*9 (Del. Super. May 30, 2008) ("Delaware courts will not allow 'sloppy grammatical arrangement of the clauses or mistakes in punctuation to vitiate the manifest intent of the parties as gathered from the language of the contract.'") (internal citations omitted); *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 555 (Del. Super. 2005), *aff'd*, 886 A.2d 1278 (Del. 2005); see also *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 Del. Ch. LEXIS 43, 2007 WL 1207107, at \*17 (Del. Ch. Apr. 2, 2007) (citing cases from New York for the proposition that "punctuation and grammatical construction are reliable signposts in the search" for contractual intent but "punctuation is a most fallible standard by which to interpret a writing. . . . The court will take the contract by its four corners, and having ascertained . . . what its meaning is, will construe it accordingly, without regard to punctuation marks, or the want of them. . . . [T]he words control the punctuation marks, [\*30] and not the punctuation marks the words.") (internal citations and bold text omitted).

<sup>63</sup> *Interim Healthcare*, 884 A.2d at 555-56.