IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VERITION PARTNERS MASTER FUND, LTD. and VERITION MULTI-STRATEGY MASTER FUND, LTD., Plaintiffs, v. W. BRADFORD CORNELL, SAN MARINO BUSINESS PARTNERS, LLC, and COHERENT ECONOMICS, LLC, Defendants.	C.A. No. 1:19-cv-00377-CFC

PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS W. BRADFORD CORNELL AND SAN MARINO BUSINESS PARTNERS' RULE 12(b)(6) MOTION TO DISMISS

SMITH KATZENSTEIN JENKINS, LLP
David A. Jenkins (Bar No. 932)
1000 West Street, Suite 1501
Wilmington, DE 19801
(302) 652-8400
daj@skjlaw.com

Counsel for Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Fund, Ltd.

Of Counsel

Erik S. Groothuis (*pro hac vice)*
Vera M. Kachnowski (*pro hac vice)*
SCHLAM STONE & DOLAN, LLP
26 Broadway
New York, NY 10004
(212) 344-5400
egroothuis@schlamstone.com

Dated: April 15, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

NATURE AND STAGE OF THE PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 3

STATEMENT OF FACTS 4

Cornell fails to disclose his bias when switching sides in the underlying appraisal action 4

The Court of Chancery Rejects Cornell's Analysis 6

In response to Verition's demand letter, the movants rush to file in Illinois 7

ARGUMENT 8

I. Standard for Relief 8

II. The Motion Improperly Relies on Fact-Based Causation Arguments that are not Appropriate for Resolution at the Pleading Stage 8

III. Verition's Tort Claims Are Not Barred by the Economic Loss Doctrine and Are Distinct From Its Contract Claim 11

IV. The Professional Malpractice Claim was Adequately Pled 14

V. The Prior Pending Action Doctrine Does Not Bar This Suit 16

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Ashcroft v. Iqbal,
556 U.S. 662 (2009) ... 8

Aviation West Charters, LLC v. Freer,
No. N14C–09–271 WCC CCLD, 2015 WL 5138285 (Del. Super. Ct. July 2, 2015) ... 13

Barker v. Huang,
610 A.2d 1341 (Del. 1992) ... 16

Brasby v. Morris,
No. C.A. 05C-10-022-RFS, 2007 WL 949485 (Del. Super. Ct. Mar. 29, 2007) ... 12

Collins & Aikman Corp. v. Stockman,
No. 07–265–SLR–LPS, 2010 WL 184074 (D. Del. Jan. 19, 2010) ... 9

Commonwealth Const. Co. v. Endecon, Inc.,
No. 08C-01-266 RRC, 2009 WL 609426 (Del. Super. Ct. Mar. 9, 2009) ... 12

Conard v. Pennsylvania State Police,
902 F.3d 178 (3d Cir. 2018) ... 9

CrowdStrike, Inc. v. NSS Labs, Inc.,
No. 17-146 (MN), 2018 WL 6716094 (D. Del. Dec. 21, 2018) ... 8

Data Management Internationale, Inc. v. Saraga,
No. 05C-05-108, 2007 WL 2142848 (Del. Super. Ct. July 25, 2007) ... 11

Empire Financial Services, Inc. v. Bank of New York (Delaware),
900 A.2d 92 (Del. 2006) ... 13

Fowler v. UPMC Shadyside,
578 F.3d 203 (3d Cir. 2009) ... 8

Gunn v. McKenna,
No: K14M–11–010 RBY, 2014 WL 7466521, at *3 (Del. Super. Ct. Dec. 23, 2014) ... 15

Hoover v. Van Stone,
540 F. Supp. 1118 (D. Del. 1982) ... 16

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) ... 8

Khushaim v. Tullow Inc.,
No. N15C–11–212–PRW, 2016 WL 3594752 (Del. Super. Ct. Mar. 7, 2019) ... 11

Kuhn Constr. Co. v. Ocean & Coastal Consultants, Inc.,
844 F. Supp. 2d 519 (D. Del. 2012) ... 12, 13

Marrogi v. Howard,
805 So.2d 1118 (La. 2002) 15

Murphy v. A.A. Mathews,
841 S.W.2d 671 (Mo. 1992) 15

Pollock v. Panjabi,
781 A.2d 518 (Ct. Super. Ct. 2000) 15

Scheuer v. Rhodes,
416 U.S. 232 (1974) 8

Werwinski v. Ford Motor Co.,
286 F.3d 661 (3d Cir. 2002) 12

Statutes

28 U.S.C. § 1404(a) 2

28 U.S.C § 2201 7

Rules

Federal Rule of Civil Procedure 12(b)(6) 1

Other Authorities

Restatement (Second) of Torts § 552 16

Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Master Fund, Ltd. (together, "Verition") submit this answering brief in opposition to the Federal Rule of Civil Procedure 12(b)(6) motion to dismiss by Defendants W. Bradford Cornell ("Cornell") and San Marino Business Partners, LLC ("San Marino"). (*See* D.I. 24).[1]

NATURE AND STAGE OF THE PROCEEDINGS

After retaining Defendants to provide what was supposed to be "independent" expert consulting and testifying services for an appraisal litigation in the Delaware Court of Chancery, Verition was blindsided shortly before the trial in that action when it learned from its litigation adversary that Defendant Cornell harbored a hostile view of Verition's case prior to his retention, had previously disclosed that view to Verition's adversary when he tried but failed to be retained by that adversary, and as a result of being passed over by the adversary in favor of another expert, developed an admitted "grudge" (his word, not ours) that led him to switch sides and seek work from Verition out of spite. Neither Verition nor its counsel knew these facts when engaging the Defendants, but its litigation opponent certainly did, and used them to torpedo Verition's case.

The exposure of Cornell's pre-retention communications completely undermined his credibility at trial, ending in disaster for Cornell, and thus for Verition. While Cornell had opined that the fair value of Verition's shares was $68.98 per share (compared to the deal price in the underlying transaction of $50 per share), the Court of Chancery came up with a fair value of $48.70 per share, which resulted in a loss to Verition of $25 million (plus interest) when compared to what Verition would have recovered had the Court of Chancery credited Cornell's opinion.

[1] Defendant Coherent Economics, LLC ("Coherent") moved to dismiss the complaint by separate motion. (*See* D.I. 25). Verition's opposition to the Coherent motion is being filed today by separate answering brief.

In December 2018, Verition, in a good-faith attempt to resolve this dispute before resorting to litigation in Delaware, sent Cornell and Coherent demand letters outlining Verition's claims and offering to pursue settlement negotiations. Instead of responding to that overture in kind, Defendants rushed to court in the Northern District of Illinois to file anticipatory declaratory judgment actions seeking a declaration that certain billing-related correspondence that Coherent had submitted to Verition's counsel in the appraisal action (correspondence that did not mention the purported releasor, Verition, nor two of the purported releasees, Defendants Cornell and San Marino) caused a release of all potential claims by Verition against the Defendants. (*See Coherent Economic, LLC v. Verition Partners Master Fund, Ltd., et al.,* No. 18-CV-8376 (N.D. Ill.), and *W. Bradford Cornell v. Verition Partners Master Fund, Ltd., et al.,* No. 18-CV-8377 (N.D. Ill.).

The following month, Verition filed its complaint against Defendants in the Superior Court of Delaware as planned. (*See Verition Partners Master Fund, Ltd. et al. v. W. Bradford Cornell, et al.,* No. N19C-01-302 AML CCLD.) Verition's complaint (the "Complaint") asserts causes of action for fraudulent inducement, fraudulent concealment, breach of contract, aiding and abetting fraud, and professional malpractice. On February 25, 2019, Defendants removed the case to this Court. (*See* D.I. 1-1 (Complaint).)

On February 27, 2019, Defendants moved to transfer venue to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). On March 1, 2019, Defendants filed another motion, this time to stay further proceedings in this Court pending resolution of their transfer motion. Verition opposed both motions on March 13, 2019 (*see* D.I. 11), and the motions were fully submitted on March 20, 2019. (*See* D.I. 15).

On March 25, 2019, Defendants moved to dismiss this action. (*See* D.I. 24 – Cornell/San Marino motion; D.I. 25 – Coherent motion). Cornell and San Marino argue principally that

Verition has not alleged an adequate causal link between Cornell's admitted bias and the fact that the Court of Chancery rejected virtually every aspect of his opinion in reaching a fair value determination that was ***$20.28 per share lower*** than Cornell's valuation (and just $3.85 per share above the opposing expert's opinion of fair value). By arguing that no fact finder could ever conclude that Verition would have achieved even a dollar more of value had Cornell's credibility not imploded, Defendants' motion blinds itself to the dynamics of appraisal actions, in which the entire litigation hinges on the result of a proverbial "battle of the experts." In these circumstances, it cannot be said that the public exposure of Cornell's grudge and bias had no effect on the outcome Verition would have otherwise achieved—whether via court decision or settlement—as a matter of law.

SUMMARY OF THE ARGUMENT

1. The Court should reject the movants' attempt to have this Court resolve clear factual disputes about causation in their favor on a motion to dismiss. Their arguments about the supposed lack of "plausibility" of Verition's causation allegations are no more than self-serving assessments that Plaintiffs' claim purportedly has a low likelihood of success at trial. But at this stage of the proceeding, the Court need only consider whether Plaintiffs claims were adequately pleaded. They were.

2. The Court should also reject the movants' argument that Verition's fraud claims must be dismissed because they overlap with the contract claims. The claims for fraudulent inducement and concealment do not amount to unactionable promises to perform a contract; they refer specifically to conduct that occurred ***prior*** to the contract being formed, which induced Verition to enter into the agreement, and therefore are distinct from movants' obligations under the contract.

3. Nor are Verition's claims barred by the economic loss doctrine, which is not a blanket prohibition on the recovery of monetary damages for tort claims in the absence of a personal injury, as movants suggest. The doctrine does not apply where, as here, Defendants caused damages as a result of their breach of duties outside the contract. Further, as movants themselves recognize, the economic loss rule specifically excepts fraud claims of this nature from the doctrine.

4. Verition has sufficiently pleaded the elements of a malpractice claim. The fact that movants have been unable to locate an analogous fact pattern in Delaware where a financial expert was sued for malpractice based on undisclosed conflicts does not require dismissal of the claim. Nor is the professional malpractice claim barred by the absolute litigation privilege, which immunizes certain public statements made about a litigation adversary in the context of pending judicial proceedings. Cornell's statements, by contrast, were made in private *for the benefit of* a litigation adversary, and at Verition's expense. The privilege does not apply in these circumstances.

5. To the extent movants seek to dismiss this case because of the prior pending action doctrine, that argument should be rejected because their anticipatory filing in another forum is not entitled to first-filed deference.

STATEMENT OF FACTS

Cornell fails to disclose his bias when switching sides in the underlying appraisal action

In connection with an appraisal action in the Delaware Court of Chancery styled *In re Appraisal of AOL, Inc.,* No. 11204-VCG (the "Appraisal Action") in which Verition was a petitioner, Verition's counsel retained Defendants to provide independent expert consulting services. (*See* D.I. 1-1 – Complaint ¶¶ 1-2, 13.)

Unbeknownst to Verition or its counsel, however, Defendant Cornell had actively and repeatedly solicited Verition's litigation opponent, Verizon Communications Inc., prior to being retained on Verition's behalf. Among other things, while trying to get retained by Verizon, Cornell had told Verizon that he believed Verition's case was "shitty" and Verizon had "the better side of the case." (*Id.* ¶ 16.)

When Cornell was rejected by Verizon, he expressed to a colleague, Daniel Fischel (who became Verizon's expert in the Appraisal Action), that he held a "grudge" against Verizon as a result and would try to punish Verizon by working for its litigation opponent, Verition. Nevertheless, Defendants falsely represented to Verition that Cornell had no conflicts and would provide "independent" expert analysis in the Appraisal Action despite Cornell's debilitating conflict due to his undisclosed bias and grudge. (*Id.* ¶¶ 25-26).

These pre-engagement communications and biases were never revealed to Verition until Verition's litigation opponent, Verizon, used them to cross examine Cornell (first at his pretrial deposition, and again—with devastating effect—at trial). By then, it was too late in the case for Verition to change its expert (the time for naming experts had long since passed). During the trial, the court ruled that Verizon's cross examination questions highlighting Cornell's incapacitating bias were a proper subject of inquiry, holding that such questions did "make a difference with Professor Cornell because the argument is going to be that it goes to his motive here." This enabled Verizon's counsel to expose what it called Cornell's "unvarnished contemporaneous view" of Verition's case, which was "more revealing than anything Cornell wrote in his expert reports." (*Id.* ¶ 33). With its own expert incapacitated, and to maintain credibility with the court in the Appraisal Action, Verition's counsel was forced to argue that the opposing expert's model for valuing the shares should be used.

The Court of Chancery Rejects Cornell's Analysis

The Court of Chancery conducted a discounted cash flow analysis, which it described as "only as reliable as the inputs relied upon and the assumptions underlying those inputs." (Opinion at 26 (citation omitted).) That court further observed that "DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps." (*Id.* (citation omitted).)

The Court of Chancery was charitable to Cornell by refraining from publicly exposing his embarrassing pre-retention communications. (*See id.* ("For reasons not necessary to detail . . . the Respondent questioned Dr. Cornell's impartiality in this matter, and the Petitioner's seem content to use the DCF model presented by the Respondent's expert as a starting point for my analysis.").) But of the four key items in dispute between Cornell and Fischel, the Court of Chancery sided with Fischel over Cornell, in whole or in part, on each one.[2] Significantly, the Court of Chancery sided with Fischel on what it acknowledged was the "most important input necessary for performing a proper DCF," namely a projection of AOL's cash flows. (*Id.* at 27.) The court chose Fischel's cash flow projections and rejected two other sets of projections relied upon by Cornell (*id.* at 28), admitting that rejecting one of those sets of projections was a "close call" for the court (*id.* at 33).

The foregoing resulted in a fair value determination that was $3.85 per share away from Fischel's opinion and $20.28 away from Cornell's. In large part, this was because the Court of Chancery started with Fischel's DCF valuation of $44.85 and added a couple of minor items to

[2] On the four issues, the Court of Chancery: (1) adopted Fischel's cash flow assumptions and disregarded the two sets of assumptions on which Cornell relied; (2) added only one of the three potential deals that Cornell urged should be incorporated into the court's determination of fair value (*id.* at 35-44); (3) rejected Cornell's use of a three-stage DCF model as "particularly brazen," and went instead with Fischel's two-stage model (*id.* at 47); and (4) agreed with Fischel's determination to withhold $150 million of working capital from the DCF model, rejecting Cornell's suggestion to include it (*id.* at 50).

that figure instead of starting from Cornell's far higher DCF valuation of $68.98. (*Id.* at 50.) The judge ultimately set a valuation for Verition's shares that was $25 million less than Cornell's valuation (before interest). In addition to this difference, Verition wasted significant time, effort, and resources in preparing Cornell for trial and pursuing the Appraisal Action. (Cplt. ¶¶ 27, 31, 37-38.)

In response to Verition's demand letter, the movants rush to file in Illinois

On December 11, 2018, Verition's counsel submitted demand letters to Cornell and Coherent, labeled "Confidential – for Settlement Purposes" in which it attempted to resolve its issue with these Defendants in good faith. The demand letters advised Cornell and Coherent that if a settlement could not be reached, Verition intended to file a complaint for breach of contract, fraudulent inducement and concealment, aiding and abetting fraud, and professional malpractice in light of the above facts and outlined the standards for such claims under Delaware law. The letters cautioned that "[i]f we do not hear from you within 10 days, we have been instructed to commence legal action." (*Id.* ¶ 41.)

Cornell and Coherent did respond within 10 days, but their response was not to pursue any settlement negotiations or to write back denying liability. Instead, on December 20, 2018, they filed declaratory judgment actions pursuant to 28 U.S.C § 2201, seeking a judgment that all claims by Verition were barred based on two documents Coherent sent related to a billing dispute between Coherent and Verition's counsel in the Appraisal Action. (*Id.* ¶¶ 42-46). Subsequently, on January 28, 2019, Verition filed its planned complaint in the Superior Court of Delaware against Defendants, as they had been advised. (*Id.*).

ARGUMENT

I. Standard for Relief

In reviewing a motion to dismiss a court must disregard any legal conclusions, but "accept all of the complaint's well-pleaded facts as true." *CrowdStrike, Inc. v. NSS Labs, Inc.*, No. 17-146 (MN), 2018 WL 6716094, at *2 (D. Del. Dec. 21, 2018) (citing *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009)). The Court then determines "whether the facts alleged in the complaint are sufficient to show a 'plausible claim for relief.'" *Fowler,* 578 F.3d at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A motion to dismiss may only be granted if, after "accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to plaintiff, [the] plaintiff is not entitled to relief." *Id.*

II. The Motion Improperly Relies on Fact-Based Causation Arguments that are not Appropriate for Resolution at the Pleading Stage

In the teeth of these standards, Cornell and San Marino spend most of their motion arguing that, in their view, it is implausible that Verition will prove causation at trial, and thus the case should be dismissed on the pleadings. To that end, they contend that Verition's "speculative theory" about its experts' impact on the Appraisal Action finds "no support in the Court of Chancery's 51-page opinion [] that exhaustively laid out its reasoning." (Mot. at 1-2; 10-13). But, in the context of a motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig*., 114 F.3d at 1420.

Indeed, while movants argue that Verition's theory of causation is untenable, they concede that "causation questions can involve factual issues not resolvable on a motion to dismiss." (Mot. at 2). Here, how much of an effect the startling disclosure of Cornell's conflict had on the disastrous result in the Appraisal Action is a deeply fact-bound question that cannot be resolved on a motion to dismiss. Of course, at the motion to dismiss phase, a court must "draw reasonable inferences regarding causation in a [plaintiff's] favor." *Conard v. Pennsylvania State Police*, 902 F.3d 178, 184 (3d Cir. 2018); *see also Collins & Aikman Corp. v. Stockman,* No. 07–265–SLR–LPS, 2010 WL 184074, at *10 (D. Del. Jan. 19, 2010) (plaintiff not required to prove proximate causation at motion to dismiss stage, and allegations of causation sufficiently pled to survive motion).

The Complaint more than sufficiently alleges that Cornell's undisclosed bias caused Verition to realize a lower valuation for its shares than it would have otherwise achieved. As evidenced by the opinion in the Appraisal Action, that court performed a nuanced analysis that delved deeply into the question of which expert's underlying assumptions and projections – that is, the inputs to the DCF model – were more reliable. Those inputs were the critical underpinnings to the court's determination of fair value, and even minor variances in the inputs yielded massive differences in valuation outputs. The court acknowledged that choosing between the competing experts on one of those inputs was "a close call." (Opinion at 33.) Yet, on virtually *every key difference*, the court used Fischel's inputs instead of Cornell's. Under those circumstances, the complete loss of credibility of one expert could easily have made a difference in the outcome reached.

The movants' suggestion that all of Cornell's reports, analysis, and testimony had nothing to do with the final result in the Appraisal Action begs the question why the Defendants were paid,

and accepted, the millions of dollars they received for their work in the Appraisal Action. Verition retained what they believed to be a highly-credentialed independent expert for a good reason: the work of the experts was critical to the success of the case. The court carefully considered both experts' opinions—it so indicated in the opinion. We also know that the court considered Cornell's undisclosed conflict and bias to be relevant because it permitted questioning on that subject at trial. Although the court indicated in its opinion that it was not discussing the conflict, for reasons "not necessary to detail," the obvious implication is that the court was trying to be courteous and avoid embarrassing Cornell in a public opinion. That the court elected not expose Cornell's misconduct for the world to see was an attempt to be charitable toward him as a professional, a gesture that Cornell and San Marino now try to turn to their advantage by claiming it proves as a matter of law that the conflict had nothing to do with the result.

Moreover, Verition does not have to prove that the court would have accepted *all* of Cornell's opinions in order to recover *any* damages. Even if the Court of Chancery would have accepted only one of Cornell's inputs that ultimately was rejected had his credibility not evaporated, causation would be demonstrated, and the case could proceed. Thus, Cornell's and San Marino's argument that Cornell's bias and Verition's determination to rely on Fishel's model to save face had no impact on the ultimate result as a matter of law is an overreach. (Mot. at 12-13). Contrary to their suggestion that "no fact finder could find otherwise," a reasonable factfinder could easily determine that the court in the Appraisal Action would have reached a higher valuation in the absence of a conflict. Or a factfinder could easily conclude that Verition would have achieved a better result in the absence of Cornell's conflict by negotiating a consensual resolution of its claims with its adversary in the Appraisal Action, since the vast majority of civil cases end in settlement.

While Cornell and San Marino are free to argue otherwise to a jury, these disputes can only be resolved at trial. If the movants' view that claims they find implausible must be dismissed were accepted, then every defendant's professed skepticism about the viability of a complaint would be sufficient to warrant dismissal, and every case would be dismissed on the pleadings. That is not the law, and Verition should be permitted to prove its causation allegations.

III. Verition's Tort Claims Are Not Barred by the Economic Loss Doctrine and Are Distinct From Its Contract Claim

Cornell and San Marino also seek to dismiss the fraudulent inducement, fraudulent concealment, and professional malpractice claims (Counts I, II, and V) on several theories: (a) that the fraudulent concealment and professional malpractice claims seek only economic losses and therefore cannot co-exist with the contract claim (Mot. at 15-16); (b) that the fraudulent inducement and fraudulent concealment claims "are based entirely on Defendants' obligations under the contractual agreement," and do not involve the violation of a duty arising apart from the contract (Mot. at 16); and (c) that these claims plead damages materially identical to the breach of contract claim, and thus the fraud claims should be dismissed because they simply rehash the contract damages claim. (Mot. at 17-18). Each of these contentions fails.

First, while the economic loss doctrine bars tort claims that are "based entirely on the parties' contractual rights and obligations," separate tort and contract claims may be brought when "the defendant breached a duty that is independent of the duties imposed by the contract." *Khushaim v. Tullow Inc.,* No. N15C–11–212–PRW, 2016 WL 3594752, at *5 (Del. Super. Ct. Mar. 7, 2019); *see also Data Management Internationale, Inc. v. Saraga*, No. 05C-05-108, 2007 WL 2142848, at *7 (Del. Super. Ct. July 25, 2007) ("the same circumstances may give rise to both breach of contract and tort claims if the plaintiff asserts that the alleged contractual breach was accompanied by the breach of an independent duty imposed by law"). Here, the duties Defendants

are alleged to have breached are indeed independent of their contractual duties—namely, a professional obligation pursuant to the standards in their field to disclose even the appearance of a conflict of interest.

Moreover, as movants themselves recognize, a well-known exception to the economic loss rule exists for fraud claims that exist independently of the underlying contract and are not adequately remedied by the underlying contract. (*See* Mot. at 15 (citing *Werwinski v. Ford Motor Co.,* 286 F.3d 661 (3d Cir. 2002)); *see also Brasby v. Morris*, No. C.A. 05C-10-022-RFS, 2007 WL 949485, at *7 (Del. Super. Ct. Mar. 29, 2007) ("Claims of fraud, even where purely economic losses are asserted, are not always prohibited by the economic loss rule" where defendant breached a duty independent of the contract duties).) In particular, "[a]llegations of fraud that go directly to the inducement of the contract, rather than its performance, would present a viable claim." *Brasby*, 2007 WL 949485, at *7; *see also Commonwealth Const. Co. v. Endecon, Inc.,* No. 08C-01-266 RRC, 2009 WL 609426, at *5 (Del. Super. Ct. Mar. 9, 2009) ("this Court has declined to apply the economic loss doctrine to bar the tort of fraudulent inducement"; noting a trend among jurisdictions to exclude from the rule intentional torts including fraudulent inducement to contract and fraudulent misrepresentation) While movants assert that "any concealment or negligence that damaged Verition after the formation of the contract occurred in the performance of that contract, and not as a result of any separate tort duty" (Mot. at 16), they are mistaken. In fact, Verition's fraud claims are premised on the misstatements and omissions Cornell made ***prior*** to the formation of the contract, which induced Verition to retain the movants. (*See* Cplt. ¶¶ 3, 18, 27-28).[3]

[3] Movants' own cases address another exception to the economic loss doctrine applicable here. Delaware has adopted the Restatement (Second) of Torts § 552, which renders a defendant liable where: (1) the defendant supplied false information to plaintiff for use in a transaction with a third party; and (2) the defendant's business is to supply information. *See Kuhn Constr. Co. v. Ocean & Coastal Consultants, Inc.,* 844 F. Supp. 2d 519, 527 (D. Del. 2012). Here, Defendants are

For the same reason, the suggestion that Verition has not alleged a misrepresentation separate from the contract, but simply bootstrapped its contract claim into a fraud claim, also fails. The fraud allegations here are not that the Defendants promised but never intended to perform their independent analysis duties under the contract, but rather about Cornell's material pre-contractual conversations and biases that Defendants concealed from Verition. (*See id.*). These fraudulent statements and omissions, which induced Verition into contracting with Defendants, are separate from the work Defendants did once the contract was formed (all of which ultimately turned out to be useless because of Cornell's conflict). Where, as here, "[a]llegations [] are focused on inducement to contract[, they] are not barred by the bootstrapping doctrine." *Aviation West Charters, LLC v. Freer*, No. N14C–09–271 WCC CCLD, 2015 WL 5138285, at *6 (Del. Super. Ct. July 2, 2015) (citations omitted). As a result, Verition's fraudulent inducement and fraudulent concealment claims can proceed in parallel with its contract claims. *See id.* (claim for fraudulent inducement not barred by bootstrapping doctrine where any alleged fraud occurred before the parties entered into contract).

Last, it is not at all clear, at this early stage, whether the damages Verition may recover on its fraud causes of action will wholly duplicate the relief it may recover on its contract claims. They are not always the same. *See, e.g., Empire Financial Services, Inc. v. Bank of New York (Delaware)*, 900 A.2d 92, 93 (Del. 2006) (trial court erred in limiting award to a contract measure of damages; "The tort measure of damages, which should have been applied, allows recovery for lost profits resulting from the bank's wrongful conduct."). Ultimately, expert testimony may be required to quantify the amount of Verition's damages on its various claims. But even now, some

---

alleged to have given Verition false information about their ability to serve as experts in the Appraisal Action, and they are in the business of supplying information. This exception to the economic loss doctrine applies independently of the fraud exception discussed in the text.

differences are already apparent. For example, Defendant Coherent's contract, on which the contract claims against Cornell and San Marino are based, annexes a set of "Standard Commercial Terms" that include certain provisions purporting to limit Coherent's liability. (*See* D.I. 27-1 at 3 (provision purporting to limit claims for incidental, special or punitive damages, and to limit Coherent's responsibility for direct compensatory damages to the fees received).) Verition believes Defendants' attempts to limit their contractual liability should fail, but Defendants contend otherwise. To the extent those limitation of liability provisions will prove to be enforceable, in whole or in part, Verition's contract-based damages may be limited; but the damages available on Verition's fraud claims based on the inducement of that agreement will not be impacted.

In sum, there are myriad forms of potential damages Verition may seek, from the benefit of its bargain with Defendants, to Verition's out-of-pocket expenses, to being put back in the position it would have been in had Cornell disclosed his conflict as he was required to do. It cannot be conclusively determined at this stage that Verition's fraud claims must be dismissed because the potential damages available on such claims is coextensive with the potential damages available on its breach of contract claims.

IV. The Professional Malpractice Claim was Adequately Pled

The movants also seek dismissal of Verition's professional malpractice claim (Count V).[4] First, they say they have not found any Delaware case in which an expert witness was sued for professional negligence "on the basis of a failure to disclose an alleged conflict of interest." (Mot. at 18). Whether Defendants have been able to locate a case involving the precise, bizarre fact pattern at issue here is, of course, beside the point, and has no bearing on whether Verition may

[4] Cornell and San Marino refer to this cause of action as one for professional negligence and mistakenly refer to it as Count IV. (Mot. at 18-19).

bring a malpractice claim. What matters, and what is not in dispute, is that Defendants are professionals who owed duties to Verition to make required disclosures in accordance with the standards of their field. *See, e.g., Gunn v. McKenna,* No: K14M–11–010 RBY, 2014 WL 7466521, at *3 (Del. Super. Ct. Dec. 23, 2014) ("In suits for professional malpractice [] Plaintiff need show merely that the Defendant did not conduct himself according to a standard of care required of professionals in the field."). As alleged in the Complaint, Defendants plainly failed to make the disclosures required of professionals in their field.

Next, movants claim that Cornell's statements are protected by the "absolute litigation privilege." They are mistaken. The purpose of the absolute litigation privilege is to permit legitimate communications about judicial proceedings, so that parties may comment on pending litigation claims in public without fear of retribution from a litigation adversary. The privilege does not immunize an expert from deceiving his client by falsely representing he had no conflicts when in truth he was hopelessly conflicted.

Unlike in the cases on which the movants rely (Mot. at 19), the causes of action against Cornell and San Marino do not allege that Verition was defamed based on privileged statements Defendants made about Verition in a pending court proceeding. To the contrary, Verition's malpractice claim stems from the Defendants' failure to disclose critical information about Cornell's pre-retention communications with its *opponent*. While that peculiar fact pattern may have never been litigated in Delaware, other courts have declined to apply witness immunity privileges in circumstances where experts were alleged to have been negligent. *See, e.g., Marrogi v. Howard*, 805 So.2d 1118, 1133 (La. 2002) (holding that witness immunity does not bar a claim against a retained expert witness for negligent performance of his duty); *Pollock v. Panjabi*, 781 A.2d 518, 529 (Ct. Super. Ct. 2000) (witness immunity did not prevent a suit against expert for

breach of contract, negligence, and unfair trade); *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 680 (Mo. 1992) (witness immunity was not meant to nor should "apply to bar a suit against a privately retained professional who negligently provides litigation support services"). As a result, the litigation privilege does not bar Verition's professional malpractice claims.

Last, contrary to Cornell and San Marino's characterization, the court in *Hoover v. Van Stone*, 540 F. Supp. 1118, 1124 (D. Del. 1982), did not extend the absolute privilege to cover all tort claims besides defamation. Rather, in that case, additional claims for tortious interference, abuse of process, and barratry were deemed to have stemmed from the same conduct as the defamation claim – namely discussion of matters occurring in a judicial proceeding – and thus similarly prohibited by the absolute privilege. *Id.; see also Barker v. Huang*, 610 A.2d 1341, 1349 (Del. 1992) (claims for defamation, intentional infliction of emotional distress, and invasion of privacy all stemmed from allegation that defendant made derogatorily false statements in a judicial proceeding).

V. The Prior Pending Action Doctrine Does Not Bar This Suit

Cornell and San Marino also urge this Court to dismiss the Complaint pursuant to the prior pending action doctrine in the event that the Defendants' Motions to Stay and to Transfer are not granted. (Mot. at 20). As set forth in Verition's opposition to those motions, however, the other related actions filed by Defendants were anticipatory filings that are not entitled to first-deference. (*See* D.I. 11). Accordingly, this action should not be dismissed in favor of the anticipatory actions Defendants commenced on learning of this forthcoming lawsuit.

CONCLUSION

For the foregoing reasons, Verition requests that the Court deny Coherent's motion to dismiss the complaint.

Dated: April 15, 2019

SMITH KATZENSTEIN JENKINS, LLP

/s/ David A. Jenkins

David A. Jenkins (Bar No. 932)
1000 West Street, Suite 1501
Wilmington, DE 19801
(302) 652-8400
daj@skjlaw.com

Counsel for Plaintiffs Verition Partners Master Fund, Ltd. and Verition Multi-Strategy Fund, Ltd.

Of Counsel

Erik S. Groothuis (*pro hac vice)*
Vera M. Kachnowski (*pro hac vice)*
SCHLAM STONE & DOLAN, LLP
26 Broadway
New York, NY 10004
(212) 344-5400
egroothuis@schlamstone.com