COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2084CV01189-BLS1

HIGHFIELDS CAPITAL I LP, HIGHFIELDS CAPITAL II LP, and HIGHFIELDS CAPITAL III, LP

vs.

PERRIGO COMPANY, PLC, JOSEPH PAPA, and JUDY BROWN

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Highfields Capital I LP, Highfields Capital II LP, and Highfields Capital III LP (collectively, "Highfields"), owned $700 million shares of Perrigo Company, PLC ("Perrigo"). Highfields alleges that the defendants, Perrigo, Joseph Papa ("Papa"), and Judy Brown ("Brown") (collectively, "Defendants"), made material, false representations to Highfields, omitted material information in their communications with Highfields, and engaged in unfair and deceptive conduct, in its campaign to fend off a hostile takeover of Perrigo by Mylan, N.V. ("Mylan").

Highfields' Amended Complaint asserts five claims: (1) violation of G.L. c. 93A, § 11; (2) tortious interference with prospective economic advantage; (3) common law fraud; (4) negligent misrepresentation; and (5) unjust enrichment. The matter is now before me on the Defendants' Motion to Dismiss. For the reasons that follow, the motion is **DENIED**, except to the limited extent specified below.

BACKGROUND[1]

Highfields Capital I and Highfields Capital II are limited partnerships organized under the laws of Delaware and Highfields Capital III is an exempted limited partnership organized under the laws of the Cayman Islands. The assets of the three plaintiffs are managed by Highfields Capital Management LP, which is a registered investment advisor and fund manager, with its headquarters and principal place of business in Boston, Massachusetts.

Between February 27, 2015 and April 26, 2016, Highfields acquired $700 million in shares of Perrigo's common stock. Highfields believed that Perrigo was a good investment, in part, because Perrigo was "considered a prime candidate for a potential acquisition that would further strengthen its footprint in the industry while maximizing value to its shareholders." Amended Complaint, ¶ 18.

On April 8, 2015, Mylan announced an unsolicited bid to purchase Perrigo for cash and stock worth $205 per share, more than 25% above the price at which Perrigo shares had closed the prior trading day and substantially above any price at which Perrigo shares had ever traded. Even though the general consensus among analysts was that the combination of Perrigo and Mylan would maximize value to their respective shareholders, on April 21, 2015, Perrigo rejected Mylan's bid. Perrigo falsely represented to its shareholders that Mylan's $205 per share bid "substantially undervalues the Company and its growth prospects" and "does not take into account the full benefits of the Omega Pharma acquisition." Amended Complaint, ¶ 23.

On April 24, 2015, Mylan increased its bid to $60 cash plus 2.2 Mylan shares for each Perrigo share tendered. At Mylan's closing price that day of $76.06, this bid was worth over $227 per share. Perrigo rejected this offer and encouraged its shareholders to reject it as well.

[1] I discuss other pertinent allegations in the respective sections of the Discussion.

On April 29, 2015, Mylan increased its bid to $75 cash plus 2.3 Mylan shares for each Perrigo share tendered. At Mylan's closing price that day of $74.50, this bid was worth over $246 per share. Perrigo rejected this offer and encouraged its shareholders to reject it as well.

On September 14, 2015, Mylan formally tendered its offer to purchase Perrigo's shares at the $246 per share offer. At least 50% of Perrigo's shares had to be tendered by November 13, 2015 for the deal to go through. Less than 50% of shareholders tendered their shares by the deadline.

Highfields alleges that, between April 8, 2015 and November 13, 2015, Perrigo made numerous unfair and deceptive statements and material misrepresentations, and omitted material information, in their communications in an effort to defeat Mylan's offer. Specifically, Highfields alleges that Defendants "falsely represented substantially in the Commonwealth of Massachusetts -- where Highfields Capital's harm was directly felt -- and elsewhere," that:

> (i) Perrigo maintained historic organic growth of 5%-10% per annum, which commanded a higher premium than Mylan's tender offer. In reality, Perrigo's historic organic growth was only 0%-1% per annum in the last several quarters leading up to the Mylan bid;
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> (ii) [T]he integration of Perrigo's largest acquisition, Omega Pharma N.V. ('Omega'), had been smooth and seamless, providing strong geographic diversification and substantial, immediate revenue growth to Perrigo's bottom line, which Mylan's offer failed to consider or take into account. In truth, not only was Omega substantially underperforming, but its integration with Perrigo had badly stalled in 2015, rendering the claimed synergies and growth opportunities as represented by the Perrigo Defendants nothing more than smoke and mirrors. The Omega acquisition resulted in a write-off of more than $2 billion – nearly half the total purchase price for Omega;
>
> (iii) Perrigo's largest financial asset – the Tysabri royalty stream – was worth $5.8 billion and was increasingly accretive to the earnings power at Perrigo, and that Mylan's offer did not even come close to adequately valuing this asset. In truth, the fair value of the Tysabri royalty stream was far below $5.8 billion; it was sold for only $2.2 billion in February 2017….;

> (iv) [T]he Perrigo Defendants were engaged in a process of active communications with a number of purported 'white knights,' including Novartis and Johnson & Johnson, that were offering to acquire Perrigo on far better terms than Mylan. It was not until after the Mylan deal was rejected that Papa revealed … that 'Perrigo never ran a process' to engage other potential buyers at all; and
>
> (v) … [T]he Perrigo Defendants also knowingly or recklessly issued inflated, completely unrealistic profit forecasts … in 2015, which were sharply reduced immediately after the Mylan deal was rejected. All told, Perrigo's stock declined more than 62% during the period at issue, from 2015 to 2017.

Amended Complaint, ¶ 3; see also ¶ 101.

Highfields further alleges that Perrigo concealed "the true state" of its business through at least May 2017 and caused Highfields to suffer $185 million in damages. Amended Complaint, ¶ 27.

DISCUSSION

In deciding the motion to dismiss, the court accepts as true the factual allegations of the complaint and the reasonable inferences that can be drawn from those facts in the plaintiffs' favor. *Foster* v. *Commissioner of Correction (No. 2)*, 484 Mass. 1059, 1059 (2020), citing *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 625 n.7 (2008). The court considers whether the allegations, if true, plausibly suggest an entitlement to any relief against the defendants. *Foster*, 484 Mass. at 1060, citing *Iannacchino*, 451 Mass. at 635-636.

I. Statute of Limitations

Defendants argue that all of Highfields' claims, which were filed on June 4, 2020 and allege misrepresentations and omissions between April 8, 2015 and November 13, 2015, are time-barred. See G.L. c. 260, § 2A (tort claims have three-year statute of limitations); G.L. c. 260, § 5A (93A claims have four-year statute of limitations).

Highfields responds that its claims are timely under the so-called "savings statute," G.L. c. 260, § 32 ("Section 32"), the statutory discovery rule, G.L. c. 260, § 12 ("Section 12"), and the common law discovery rule.

Section 32, in relevant part, provides: "If an action duly commenced within the time limited in this chapter is dismissed ... for any matter of form … the plaintiff ... may commence a new action for the same cause within one year after the dismissal or other determination of the original action …." G.L. c. 260, § 32. The statute's purpose is "to relieve a person who, in the exercise of due diligence, within the time limited by the general statute of limitations, has attempted to enforce a claim by suit, and has failed in such attempt by reason of some matter of form, which can be remedied in a new proceeding, and which does not affect the merits of his case." *Cannonball Fund, Ltd.* v. *Dutchess Capital Mgmt., LLC*, 84 Mass. App. Ct. 75, 84-85 (2013).

Relying on Section 32, Highfields argues that its claims are timely because it previously filed the same claims less than one year earlier. Specifically, on February 14, 2019, Highfields filed an eight-count complaint in the U.S. District Court for the District of Massachusetts. Counts I, V, VI, VII, and VIII of that complaint asserted the same claims brought here. Counts I, II, and III alleged violations of the Exchange Act. See *Highfields Capital I LP, et al.* v. *Perrigo Company, plc et al.*, 19-CV-10285-GAO. On March 20, 2020, over Highfields' opposition, the U.S. District Court for the District of Massachusetts transferred the case to the District of New Jersey, *Highfields Capital I LP, et al.* v. *Perrigo Company, plc et al.*, 2:20-cv-02596-MCA-LDW, which was overseeing coordinated discovery in a class action against Perrigo, *Roofer's Pension Fund* v. *Papa, et al.*, 2:16-cv-2085-MCA-LDW, and seventeen individual actions.

Thereafter, Perrigo informed Highfields that it intended to request the New Jersey District Court "coordinate" its action with the eighteen other actions. Highfields opposed "coordination" because it was concerned about the New Jersey District Court's jurisdiction over Highfields' claims under the Securities Litigation Uniform Standards Act ("SLUSA"). Believing that the New Jersey District Court would "coordinate" the case regardless of its objections, however, Highfields stipulated to it. Because the stipulation rendered Highfields' action "a covered class action" under SLUSA, on April 6, 2020, Highfields agreed to dismiss its state claims (Counts I, V, VI, VII, and VIII) for lack of jurisdiction. Then, on June 4, 2020, Highfields voluntarily dismissed Counts II, III and IV in that action and filed this action.

The question presented is whether dismissal of the New Jersey District Court action was "for any matter of form." G.L. c. 260, § 32. I conclude that it was. Highfields dismissed its state causes of action for lack of jurisdiction on April 6, 2020. A dismissal for want of jurisdiction is a "matter of form." Cf. *Abrahamson* v. *Estate of LeBold*, 89 Mass. App. Ct. 223, 224 n.2 (2016), citing *Cannonball Fund, Ltd., LLC*, 84 Mass. App. Ct. at 89 (concluding such for personal jurisdiction). Defendants argue that because Highfields did not dismiss its federal claims until June 4, 2020, and the voluntary dismissal of those claims was "for reasons known only to it," Highfields' "action" was not dismissed "as a matter of form."[2] However, I do not interpret Section 32 so narrowly, particularly given that Highfields has not asserted the federal claims that it had dismissed, "for reasons known only to it," in this action. Compare *Cannonball Fund, Ltd., LLC*, 84 Mass. App. Ct. at 91-92 (concluding that claims against certain defendants were not entitled to protection of savings statute because record was silent as to plaintiffs' reason for dismissing their claims against those defendants).

[2] See Reply Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint, at p. 1.

Further, "[t]he provisions of [Section 32] are to be construed liberally, in the interest of determining the parties' rights on the merits." *Boutiette* v. *Dickinson*, 54 Mass. App. Ct. 817, 818 (2002); see *Cumming* v. *Jacobs*, 130 Mass. 419, 421 (1881) ("The statute is remedial, and its words are not to be construed unfavorably to the plaintiff."). "[A] touchstone for what constitutes dismissal for reasons of matter of form is whether, within the original statute of limitations period, the defendant had actual notice that a court action had been initiated." *Liberace* v. *Conway*, 31 Mass. App. Ct. 40, 45 (1991); Cf. *Krasnow* v. *Allen*, 29 Mass. App. Ct. 562, 566 (1990) ("Failure to provide a defendant with any notice within the applicable limitations period that a claim is being made against him in court has been regarded, for these purposes, as a matter of substance rather than form."). Defendants were placed on notice of Highfields' claims against them within the applicable limitation periods. Also, dismissal of the New Jersey action was not because Highfields "was defeated by some matter" affecting the merits of its claims. See *Cannonball Fund, Ltd.*, 84 Mass. App. Ct. at 75 (quotations and citations omitted) (considering whether plaintiff has been "defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process"). Finally, there is no indication that Highfields is attempting for dilatory purposes to prolong the limitations period by relying on the savings statute. See *Boutiette*, 54 Mass. App. Ct. at 819.

Thus, the relevant date for determining whether the claims are time-barred, in light of Section 32, is February 14, 2019. This means that for the tort claims to be timely, the underlying conduct must have occurred after February 14, 2016, and for the c. 93A claims to be timely, the conduct must have occurred after February 14, 2015. Highfields alleges that the conduct giving rise to its claims occurred between April 8, 2015 and November 13, 2015, when Mylan's tender

offer was defeated. Therefore, under Section 32, the c. 93A claim (but not the tort claims) was timely filed.

Highfields, however, alleges fraudulent concealment by Defendants. For example, Highfields alleges that Defendants fraudulently concealed information about the Omega acquisition, and it was not until February 18, 2016, when Perrigo took a $185 million impairment charge, that Defendants disclosed for the first time that there were problems with the Omega acquisition. Amended Complaint, ¶ 115. It further alleges that Defendants fraudulently concealed information about Tysabri until February 27, 2017, when it disclosed that it would sell the Tysabri royalty stream for less than half of its $5.8 billion valuation. Amended Complaint, ¶ 114. Highfields contends that because the true extent of Defendants' conduct and the resulting harm were not known or knowable until May of 2016 at the earliest, Section 12 and the common law discovery rule tolled the statute of limitations otherwise applicable to its tort claims.[3]

Ordinarily, a tort action accrues at the time the plaintiff is injured. *Phinney v. Morgan*, 39 Mass. App. Ct. 202, 204 (1995). Section 12 provides, however, that, "[i]f a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action." G.L. c. 260, § 12. Under Section 12, where a defendant conceals a cause of action through some affirmative act done with intent to deceive, the limitations period is tolled unless the plaintiff has actual knowledge of the claim. *Magliacane* v. *Gardner*, 483 Mass. 842, 852 (2020). In addition, under the common-law discovery rule, the statute of limitations is tolled until a plaintiff

[3] See Plaintiffs' Opposition to Defendants' Motion to Dismiss, at p. 29.

discovers, or reasonably should have discovered, that it has been harmed or may have been harmed by the defendant's conduct. *Phinney*, 39 Mass. App. Ct. at 204.

I conclude that Highfields has sufficiently alleged fraudulent concealment at this stage, see *Koe* v. *Mercer*, 450 Mass. 97, 101 (2007) ("Generally, an issue concerning what the plaintiff knew or should have known is a factual question that is appropriate for the trier of fact"), and I will not dismiss Highfields' claims on the basis that they were not filed within the relevant statutory periods of limitation except in one respect. I agree with Defendants that, to the extent Highfields' tort claims are based on alleged misrepresentations that Perrigo was involved in a bidding process with other companies and there were several "white knights" on the horizon ('White Knight Representations"), they are time-barred. Highfields alleges that Perrigo's Investor Relations team disclosed to its shareholders in late November 2015 that Perrigo "never ran a process." Amended Complaint, ¶ 84. I infer from this allegation that Highfields knew, or was at least on notice, of the alleged falsity of the White Knight Representations as of that time. Thus, Highfields cannot rely on the discovery rule to toll the three-year limitations period applicable to its tort claims, to the extent that they are based on the White Knight Representations, after that date.

II. Count I—Unfair Business Methods (G.L. c. 93A, § 11)

A. Center of Gravity

Chapter 93A permits relief for unfair or deceptive actions that primarily and substantially occur within Massachusetts. G.L. c. 93A, § 11.[4] To satisfy this locality requirement, "the center

[4] In relevant part, G.L. c. 93A, § 11 states:

> No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth. For the purposes of this paragraph, the burden of proof shall be upon the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth.

of gravity of the circumstances that gave rise to the claim" must be primarily and substantially within the Commonwealth. *Kuwaiti Danish Computer Co.* v. *Digital Equip. Corp.*, 438 Mass. 459, 473 (2003). As the Supreme Judicial Court has observed, section 11 appears to contemplate that such an assessment would occur following, and based upon, findings of fact made by a judge. *Id*. at 472-473 (locality inquiry is necessarily "fact intensive and unique to each case"). This is because the defendants bear the burden of demonstrating that the center of gravity of the circumstances that gave rise to the claim was not primarily and substantially within the Commonwealth. See G.L. c. 93A, § 11; *Skyhook Wireless, Inc.* v. *Google Inc.*, 86 Mass. App. Ct. 611, 622 (2014), citing *Kuwaiti Danish Computer Co.*, 438 Mass. at 470, 473; see also *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 194 (1st Cir. 2009) (affirming District Court's finding on summary judgment that defendant's conduct occurred "primarily and substantially in Massachusetts," especially given that burden of proof on issue rested with defendant).

In accordance with *Kuwaiti*, courts commonly decline to dismiss § 11 claims on center of gravity grounds on a motion to dismiss. Cf. *Resolute Management Inc.* v. *Transatlantic Reinsurance Co.*, 87 Mass. App. Ct. 296, 300 (2015) (court could find no Massachusetts state appellate case in which center of gravity of § 11 claim was determined adversely to plaintiff upon motion to dismiss (as compared to motion for summary judgment or after trial)). But see *Acacia Communs., Inc.* v. *ViaSat, Inc.*, 2018 Mass. Super. LEXIS 46 *18-19 (2018) (Kaplan, J.) (noting that although "[i]t is peculiar to dismiss a case for failure to plead a fact that the defendant must prove to avoid liability, which generally involves an affirmative defense … the statutory language provides that no action may be 'brought' unless this geographic nexus exists … [and t]herefore, a plaintiff may be expected to plead facts sufficient to suggest that the center

of gravity of the offending conduct occurred primarily and substantially in Massachusetts, even having pled them, the plaintiff does not have a burden of proving them").

Defendants argue that I should dismiss Count I because Highfields has not pleaded facts sufficient to suggest that the center of the gravity of the offending conduct occurred primarily and substantially in Massachusetts, notwithstanding Highfields' allegation that the resulting harm occurred there. Defendants, however, acknowledge that nine of the thirty-four alleged misstatements were made in Massachusetts. See Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint, citing Amended Complaint, ¶¶ 38, 42, 44, 55, 57, 74, 80, 81. I find this sufficient at this stage to plead the locality requirement. Compare *Acacia Communs., Inc.*, 2018 Mass. Super. LEXIS 46 *18 (dismissing c. 93A claim where only allegation concerning nexus between claim asserted and Massachusetts was that plaintiff had its corporate headquarters in Massachusetts). I will not engage in a fact-intensive inquiry on a motion to dismiss where at least some of the statements, which supposedly led to Highfields' loss in Massachusetts, allegedly were made in Massachusetts. See *Resolute Management Inc.*, 87 Mass. App. Ct. 300-301 ("In light of the multiple factors to be applied, and the nuanced and flexible approach to assessing them," court found "it difficult to imagine how such an assessment might be made on the basis of the allegations of the complaint alone — at least [in part] where … the loss occurred in Massachusetts."); *Berklee Coll of Music, Inc.* v. *Music Indus. Educators, Inc.*, 733 F. Supp. 2d 204, 213 (D. Mass. 2010) (due to factfinding process necessarily involved in evaluating [center of gravity issue], absent extraordinary concession by plaintiff in complaint, issue cannot be resolved on Rule 12 motion).[5]

[5] Addressing Defendants' arguments regarding the nexus between the challenged statements and Massachusetts, the significance of the statements, and whether the statements were actually deceptive, would require me to engage in the type of fact-intensive, comparative analysis discouraged by Massachusetts appellate courts at the motion to dismiss stage. See *Kuwaiti Danish Computer Co.*, 438 Mass. at 473 ("On the one hand, a single instance of

B. Selling Securities

Defendants contend that I should dismiss Count I "to the extent [it is] based on Defendants' public statements," for the additional reason that statements made to the general public are not made in the "trade or commerce" of selling securities and, thus, cannot give rise to a c. 93A claim. Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint, at p. 10, citing G.L. c. 93A, § 1(b) (defining "trade" and "commerce" to include "the advertising, the offering for sale, … the sale, … or distribution of … any security"). The sole case Defendants cite to support their argument is a twenty-six-year-old U.S. District Court case. See *Salkind* v. *Wang*, 1995 U.S. Dist. LEXIS 4327 *31 (D. Mass. 1995) (company's public dissemination of statements reflecting confidence in company's future "simply do not constitute 'trade or commerce' as defined under 93A when stock is purchased by investors through open markets"). Even if the *Salkind* case had precedential value here, Highfields has alleged more than public dissemination of statements reflecting confidence in Perrigo's future; it has alleged that Defendants made statements directly to Highfields that misrepresented the then-current state of Perrigo to defeat Mylan's tender offer. Compare *Salkind*, 1995 U.S. Dist. LEXIS 4327 *31 (denying motion to dismiss as to defendant who allegedly made statement directly to plaintiff encouraging him to continue investing in company by retention and purchase of securities).

III. Tortious Interference with Prospective Economic Advantage

The tort of intentional interference with advantageous relations "protects a plaintiff's present and future economic interests from wrongful interference." *Blackstone* v. *Cashman*, 448 Mass. 255, 259 (2007). To state a claim for intentional interference with advantageous relations,

misconduct in one jurisdiction may have greater significance for a case as a whole than a multiplicity of instances of misconduct in another jurisdiction. On the other hand, the sheer number of instances of misconduct in one jurisdiction may produce the heft needed to resolve the question.").

a plaintiff must allege that: "(1) [it] had an advantageous relationship with a third party (*e.g.*, a present or *prospective* contract or business relationship); (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *Id.* at 260 (italics added); see also *Comey* v. *Hill*, 387 Mass. 11, 19 (1982) (plaintiff must show business relationship or contemplated contract of economic benefit).

Defendants contend that Highfields has not adequately pleaded the first and third elements, an actionable business relationship and an improper purpose or means. I disagree.

As to the first element, an actionable business relationship, Highfields alleges that it had "the reasonable expectation of economic advantage by participation in the Mylan tender offer – an offer which was legally binding upon Mylan so long as 50% of Perrigo shareholders tendered their shares before the November 13, 2015 deadline" and that Defendants "unlawfully interfered with these prospective relationships by making misrepresentations to their shareholders … to overvalue Perrigo's shares during the pendency of the Mylan tender offer, and encourage shareholders to reject the Mylan tender offer." Amended Complaint, ¶¶ 127, 128. Highfields further alleges that as a result of Defendants' unlawful conduct, a majority of Perrigo shareholders rejected the Mylan tender offer, depriving Highfields of the prospective economic advantage of the offer. Amended Complaint, ¶ 130.

To recover for interference with advantageous business relations, it is enough for a plaintiff to prove "an existing or even a probable future business relationship from which there is a reasonable expectancy of financial benefit." *Owen* v. *Williams*, 322 Mass. 356, 361-362 (1948); see also *Blackstone*, 448 Mass. at 260 (claim for intentional interference with advantageous business relations requires proof that plaintiff had advantageous business

relationship with third party); *Karmaloop, Inc.* v. *Sneider*, 2013 Mass. Super. LEXIS 123 *27-28 (2013) (Kaplan, J.) (advantageous business relationship suggests probable future development of business relationship that will foster some financial advantage).[6]

Highfields has alleged a probable future business relationship from which it had reasonable expectancy of financial benefit. Specifically, Highfields had a business opportunity in the form of Mylan's tender offer to acquire Highfields' Perrigo shares at a significant premium if a sufficient number of shareholders tendered their shares.

Defendants argue that this is not the type of future business opportunity that gives rise to a tortious interference claim. See Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint, at p. 12.[7] In support of their argument, Defendants cite to *Sindi* v. *El-Moslimany*, 896 F.3d 1 (1st Cir. 2018), where the First Circuit stated that "[m]ere speculation regarding potential future business opportunities is insufficient to prove this element…. Rather, there must be competent evidence of a specific business relationship, the consummation of which was reasonably likely." *Sindi*, 896 F.3d at 25, citing *Singh* v. *Blue Cross/Blue Shield of Mass.*, 308 F.3d 25, 48 (1st Cir. 2002). Highfields has alleged, however, that the Mylan tender offer would have been successful if not for the tortious interference of Defendants, *i.e.*, that consummation of the tender offer was not speculative. See *American Private Line Servs., Inc.* v.

[6] "Where a corporate official acting within the scope of his corporate responsibilities is sued for intentional interference with prospective economic advantage, it is not enough for the plaintiff to show interference by improper motive or means; instead, he must show that the corporate official acted with actual malice, meaning 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest.'" *Stonewood Capital Mgmt. v. Giner*, 2013 U.S. Dist. LEXIS 785 *5 (D. Mass. Jan. 3, 2013), quoting *Blackstone*, 448 Mass. at 261. There is a question whether Highfields has sufficiently pleaded facts to support its conclusory allegations of malice as to Papa and Brown. However, Defendants do not distinguish in their briefs between the interference claim against Perrigo and those against the individual defendants and do not argue that Highfields bears a heightened pleading burden as to its claims against the individual defendants. See Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint, at p. 13-14.

[7] There may be a question whether Highfields can recover against Perrigo on a theory that Perrigo tortiously interfered with its own prospective advantageous relationship, cf. *Blackstone*, 448 Mass. at 259 n.8 (party to contract cannot be held liable for intentional interference with that contract), but defendants have not made that argument and I, therefore, do not consider the question.

E. Microwave, Inc., 980 F.2d 33, 36 (1st Cir. 1992) (holding that plaintiff may prevail by showing that she was engaged in promising contract negotiations that were knowingly disrupted by defendant's tortious interference). Compare *Sindi*, 896 F.3d at 25 (plaintiff testified that certain potential business partners ceased communicating with her after alleged interference but failed to introduce any competent evidence concerning content of negotiations with these third parties, details of any potential arrangement, or likelihood that (absent tortious interference) such relationship would come to pass).

A tortious interference claim also requires proof that the inducement to breach was either done with improper motive or committed through improper means. See *United Truck Leasing Corp.* v. *Geltman*, 406 Mass. 811, 816 (1990). A plaintiff need only allege either improper motive or improper means. See *Draghetti* v. *Chmielewski*, 416 Mass. 808, 816 n.11 (1994). It is well-established that a misrepresentation is an improper means of interference. See *id*. at 816; *Cavicchi* v. *Koski*, 67 Mass. App. Ct. 654, 658 (2006) ("Improper means include violation of a statute or common-law precept, *e.g.*, by means of threats, misrepresentation, or defamation."). As discussed below, Highfields has adequately alleged its fraud and misrepresentation claims. Whether the alleged conduct is "truly inappropriate behavior for which there should be a remedy" or "normal competitive behavior permissible in the marketplace," *Pembroke Country Club, Inc.* v. *Regency Sav. Bank, F.S.B.*, 62 Mass. App. Ct. 34, 38 (2004), cannot be resolved at the motion to dismiss stage.

IV. Fraud and Negligent Misrepresentation

To state a claim for fraud and/or misrepresentation, the plaintiff must allege a false statement of a material fact made to induce the plaintiff to act, together with reliance on the false statement by the plaintiff to the plaintiff's detriment. *Zimmerman* v. *Kent*, 31 Mass. App. Ct. 72,

77 (1991). A claim for fraud also requires a showing that the defendant knew that the statements were false or intended to deceive the plaintiff. Cf. *Cumis Insurance Society, Inc.* v. *BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471 (2009) ("Unlike fraud, negligent misrepresentation does not require an intent to deceive or actual knowledge that a statement is false.").

Defendants first argue that Highfields had not adequately pleaded that any challenged statement of Perrigo was false. Even a cursory review of the Amended Complaint shows otherwise.[8] For example, Highfields alleges that "[i]n their zealous effort to defeat Mylan's tender offer … Defendants … represented … that Perrigo was continuing to experience its historic organic growth of 5%-10% per annum … and that Mylan's bid significantly undervalued that organic growth to shareholders." Amended Complaint, ¶ 30. Further, "despite the Perrigo Defendants' flooding the marketplace with misstatements about Perrigo's purportedly robust 5-10% organic growth[,] the Perrigo Defendants were well aware that Perrigo's organic growth had completely stalled at 0%-1% during the six quarters prior to" Mylan's bid in April 2015. Amended Complaint, ¶ 46.

With respect to Omega, one of the largest over-the-counter healthcare companies in Europe, which Perrigo acquired for $4.5 billion on March 30, 2015, Highfields alleges that Defendants represented that the acquisition was "immediately accretive" to Perrigo shareholders and that Perrigo's integration of Omega into Perrigo was "working smoothly." Amended Complaint, ¶ ¶ 54, 55, 68. "[W]hile the Perrigo Defendants were hyping Omega's 'immediate' accretive value …, [however,] Perrigo's internal reports showed … that Omega was substantially

[8] Indeed, Defendants spend most of this section in their memorandum trying to prove Highfields' allegations wrong. This is not appropriate on a motion to dismiss where the court considers whether Highfields' allegations, if true, plausibly suggest an entitlement to relief against Defendants. See *Gibbs Ford, Inc.* v. *United Truck Leasing Corp.*, 399 Mass. 8, 13 (1987) ("Doubt as to whether a particular claim is provable is not a proper basis to dismiss a plaintiff's complaint under rule 12(b)(6)."). Defendants' fact-based arguments are better suited for summary judgment or trial, not a motion to dismiss.

underperforming throughout 2015." Amended Complaint, ¶ 69 ; see also ¶ 70 (Defendants knew of "material problems with the Omega acquisition and integration and performance, [but] they continued to point shareholders to Omega's 'value' as a key basis for rejecting the Mylan deal"). And shortly after the Mylan bid was defeated, Perrigo "disclosed for the first time [on February 18, 2016,] that various Omega assets required restructuring, and Perrigo took a $185 million impairment charge." Amended Complaint, ¶ 60. By 2016's year-end, "the concealed issues with Omega were so profound that Perrigo had accrued over $2 billion in impairment charges." Amended Complaint, ¶ 62 (emphasis in original). Defendants "were aware of the issues that led to the impairment charges during the time they were opposing the Mylan takeover bid." Amended Complaint, ¶ 63.

In addition, "the Perrigo Defendants repeatedly claimed that the Tysabri royalty stream was worth $5.8 billion with imminent huge 'upside' given the stage of its clinical trials" and that the Mylan tender offer "completely undervalued" the Tysabri asset. Amended Complaint, ¶¶ 73, 74. In late February 2017, Perrigo sold the Tysabri royalty stream for $2.2 billion. Amended Complaint, ¶ 77. Highfields alleges that Defendants knew the Tysabri royalty stream was "actually deteriorating in value" while Defendants were "tout[ing]" it as a reason shareholders should reject the Mylan tender offer. Amended Complaint, ¶ 77.

Accepting as true the factual allegations of the Amended Complaint and the reasonable inferences that can be drawn from those facts in Highfields' favor, as I must, Highfields has plausibly alleged that statements made by Perrigo were false.

Additionally, Defendants argue that certain of its statements are not actionable as a matter of law because they are puffery and/or forward-looking statements of opinion. As a general proposition, "only statements of fact are actionable; statements of opinion cannot give rise to a

deceit action." *Cummings* v. *HPG Int'l, Inc.*, 244 F.3d 16, 21 (1st Cir. 2001); see *Yerid* v. *Mason*, 341 Mass. 527, 530 (1960) ("[F]alse statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable."); *von Schönau-Riedweg* v. *Rothschild Bank AG*, 95 Mass. App. Ct. 471, 497 (2019) (statement on which liability for misrepresentation may be based must be one of fact, not of expectation, estimate, opinion, or judgment); *NPS, LLC* v. *Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 171 (D. Mass. 2010) (general, rosy affirmations are puffery and "cannot have been material to any reasonable analysis of the company's prospects").

Statements of opinion and belief, however, may be actionable if the "opinion is inconsistent with facts known" at the time the statement is made. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 57 n.24 (2004). Further, a "statement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion." *Briggs* v. *Carol Cars, Inc.*, 407 Mass. 391, 396 (1990); see also *McEneaney* v. *Chestnut Hill Realty Corp.*, 38 Mass. App. Ct. 573, 575 (1995) ("[A] statement that in form is one of opinion may constitute a statement of fact if it may reasonably be understood by the recipient as implying that there are facts to justify the opinion or at least that there are no facts that are incompatible with it."). Finally, statements about future events concerning the conduct of a business may be actionable as misrepresentations when "the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentation relate." *Zimmerman*, 31 Mass. App. Ct. at 80.

Highfields alleges that despite Defendants' representations to the contrary, and as Defendants well knew or recklessly disregarded, Perrigo "had not been achieving, and was not

able to achieve the organic growth rate it touted; was unsuccessful in integrating its largest acquisition, Omega; had covered up the substantial diminution in value of its largest asset, the Tysabri royalty stream; … and had knowingly or recklessly provided inflated and unrealistic earnings forecasts." Amended Complaint, ¶ 5. Highfields further alleges that Defendants made these misrepresentations to mislead its investors into rejecting Mylan's tender offer. This is enough to survive a motion to dismiss. See *Marram*, 442 Mass. at 62 (whether statements by defendant "are unactionable 'mere puffery'" cannot be resolved on pleadings); *McEneaney*, 38 Mass. App. Ct. at 575 (distinction between statement of fact and statement of opinion is "often a difficult one to draw"); *NPS, LLC*, 706 F. Supp. 2d at 172 (courts vary in their conclusions of where line between misrepresentation and puffery lies, and often determination is highly fact-specific).

Defendants next contend that Highfields has not adequately pleaded that it relied on any of the allegedly false statements. Reliance normally is a question for a jury. *Marram*, 442 Mass. at 59, citing *Golber* v. *BayBank Valley Trust Co.*, 46 Mass. App. Ct. 256, 257 (1999). Highfields alleges that it first invested in Perrigo in February 2015 and "[o]ver time, Perrigo became a very sizeable investment at Highfields Capital, [which] acquir[ed] a $700 million position in [Perrigo] by [purchasing] common stock through the period of February 27, 2015 through April 26, 2016." Amended Complaint, ¶ 19; see also ¶ 105. Further, Highfields alleges that it relied upon Defendants' misrepresentations and omissions "in its decision to continue to purchase Perrigo shares both in advance of the Mylan tender offer and after the bid was rejected." Amended Complaint, ¶ 136. These allegations are sufficient at this stage. See *Bryan Corp.* v. *ChemWerth, Inc.*, 911 F. Supp. 2d 103, 110 (D. Mass. 2012) (denying motion to dismiss where plaintiff

alleged that it expended significant funds and purchased significant amounts of pharmaceutical ingredient in reliance on defendant's representations).[9]

Finally, Defendants argue that Highfields has failed to plead adequately in its fraud claim that Defendants knew their statements were false. I disagree. Under Mass. R. Civ. P. 9(b), knowledge and other condition of mind of a person may be averred generally. In addition, "fraudulent intent may be shown by proof that a party knowingly made a false statement and that the subject of that statement was susceptible of actual knowledge. No further proof of actual intent to deceive is required." *Fisch* v. *Board of Registration in Medicine*, 437 Mass. 128, 139 (2002). As discussed above, Highfields alleges that Defendants made false statements, knowing that those statements were false, and the subject of the statements was susceptible of knowledge by Defendants. For example, Highfields claims "despite the Perrigo Defendants' flooding the marketplace with misstatements about Perrigo's purportedly robust 5-10% organic growth[,] the Perrigo Defendants were well aware that Perrigo's organic growth had completely stalled at 0%-1% during the six quarters prior to" Mylan's bid in April 2015. Amended Complaint, ¶ 46. In addition, Highfields alleges that Defendants "were fully aware of the material problems they were having with Omega at the time they were falsely touting its success, in order to defeat the Mylan tender offer." Amended Complaint, ¶ 65; see also ¶¶ 69, 70. Finally, Highfields claims that "even as the clinical trials [for Tysabri] were failing, the Perrigo Defendants were falsely representing precisely the opposite in an effort to defeat the Mylan deal." Amended Complaint, ¶ 76.

[9] To the extent that Highfields is bringing a "fraud on the market" claim, it cannot stand. No Massachusetts appellate court has held that common law applies the fraud-on-the-market doctrine to fraud or negligent misrepresentation claims. See *Young* v. *Deloitte & Touche, LLP*, 2004 Mass. Super. LEXIS 359 *15 (2004) (van Gestel J.).

V. Unjust Enrichment

Defendants argue that I should dismiss the unjust enrichment claim because Highfields has an adequate remedy at law and Highfields pleaded this claim in the alternative. To dismiss the claim because it is pleaded in the alternative, however, is premature. See *Boston* v. *Purdue Pharma, LP*, 2020 Mass. Super. LEXIS 2 *30-31 (2020) (Sanders, J.), citing *Aetna Cas. Sur. Co.* v. *P&B Autobody*, 43 F.3d 1546, 1555 (1st Cir. 1994) (parties "may be allowed to maintain alternative contentions at least until the evidence is closed").

ORDER

For the reasons stated, it is hereby **ORDERED** that Defendants' Motion to Dismiss is **DENIED**, except that Counts II through IV are **DISMISSED** to the extent that they are based on the White Knight Representations.

/s/ Karen F. Green
Karen F. Green
Superior Court Judge

Dated: November 29, 2021