IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DREYMOOR FERTILIZERS OVERSEAS PTE. LTD. a Singapore entity,

Plaintiff,

vs.

ANNA MIKHAILOVA n/k/a a/k/a ANNA ADAMS,

Defendants.

Case No. 20-CV-1115-EFM-GEB

MEMORANDUM AND ORDER

Plaintiff Dreymoor Fertilizers Overseas Pte. Ltd ("Dreymoor") filed this Complaint against Defendant Anna Mikhailova asserting seven claims and a request for punitive damages. The claims arise from a transaction, involving approximately 27,000 metric tons of liquid fertilizer, that resulted in an arbitration between Dreymoor and Mikhailova's companies. Dreymoor contends that Mikhailova, the sole owner of AVAgro LLC, which is the sole owner of UAB AVAgro, committed numerous offenses, including fraud, tortious interference with business relations, and breach of a contract guaranty. Mikhailova has filed a Motion to Dismiss (Doc. 8) and requests dismissal of all claims for failure to state a claim. For the reasons stated in more detail below, the Court grants in part and denies in part the motion.

I. Factual and Procedural Background[1]

Plaintiff Dreymoor is a company registered, and with its principal place of business, in Singapore. It is engaged in the business of trading fertilizer products. Defendant Mikhailova is a resident of Kansas. She is the sole owner of, managing member, and chief executive officer of two entities: AVAgro LLC ("LLC"), a Kansas limited liability company with its principal place of business in Kansas, and UAB AVAgro ("UAB"), a Lithuanian corporation (collectively "AVAgro"). UAB is wholly owned by LLC. LLC is wholly owned by Mikhailova. Mikhailova and these entities are engaged in the business of trading fertilizer products.

In October 2018, UAB won a tender from the Belarusian fertilizer producer OAO Grodno Azot ("Grodno") for the purchase of Urea-Ammonium Nitrate Solution ("UAN"), a liquid fertilizer product, for delivery to UAB at Joint Stock Klaipeda Stevedoring Company ("Klasco") in Klaipeda, Lithuania. UAB required short-term funding, approximately one month, for this shipment. Dreymoor agreed to provide this funding by purchasing the UAN with UAB having an obligation to buy it back if it could not be sold to a third party within such period.

On October 22, 2018, UAB and Dreymoor entered into a Sales Contract to document this agreement. Dreymoor paid UAB the amount it needed to pay Grodno and simultaneously bought the UAN from UAB. The parties agreed to sell the UAN to third-party buyers and share the profits.

Mikhailova negotiated the Sales Contract with Dreymoor. When the Sales Contract was finalized, it stated: "As per our various discussions [] LLC is pleased to confirm the sale of UAN . . . ." even though UAB was ostensibly the corporate entity that was the party to the Sales Contract. The Sales Contract concerned a quantity of 25,000 metric tons +/- 10% of UAN which was to be

[1] The facts are taken from Plaintiff's Complaint and construed in the light most favorable to Plaintiff.

purchased from Grodno and resold by UAB. The ultimate quantity of UAN purchased by UAB was 27,464.55 metric tons with a total purchase price of €5,742,000.

On October 22, 2018, Dreymoor paid UAB €5,742,000 pursuant to the Sales Contract. No UAN was delivered by UAB at that time, and the full amount was not delivered until several months later.

On October 26, 2018, UAB and Dreymoor entered into Amendment #1 to the Sales Contract, which contained UAB's buy-back obligation. Specifically, Amendment #1 provided that if the UAN could not be resold to a third party by November 26, 2018, UAB would repurchase it from Dreymoor at a price €3 per metric ton higher than Dreymoor had paid, plus Dreymoor's borrowing costs for the funds paid to UAB. This repayment was referred to by the parties as the "Buy-Back." Amendment #1 also entitled Dreymoor to a late charge penalty of .02% of the unpaid amount each day, but not to exceed 10% of the UAN's value, if there was any delay in payment by UAB.

Dreymoor used credit facilities it maintained with Unicredit Bank AG to obtain the funds which it paid to UAB under the Sales Contract. Mikhailova was aware of Dreymoor's relationship with Unicredit from her extensive prior transactions with Dreymoor, starting in 2016. Unicredit provided much of Dreymoor's overall trade financing. Mikhailova was also aware that Dreymoor was borrowing the funds which it was providing to UAB for this specific transaction from Unicredit, and it was memorialized in Amendment #1.

Mikhailova made repeated representations that payment would be forthcoming from her other funds knowing, but not disclosing to Dreymoor, that in fact this payment was not going to occur as she used those funds to pay for new business transactions she had undertaken through her companies while Dreymoor's debt went unpaid. Throughout all negotiations and discussions with

Dreymoor regarding the UAN and associated contracts, Mikhailova referred to herself, UAB, and LLC, collectively, as one and the same.

UAB was unable to arrange a sale of the UAN by November 26, 2018. Dreymoor demanded that UAB honor its Buy-Back obligation. On November 26, Dreymoor issued a "Buy-Back" invoice to UAB, pursuant to Amendment #1 for €5,835,625.13, due on November 29, 2018.

Subsequent to the Buy-Back invoice, and at Mikhailova's request, the due date for payment to Dreymoor was revised several times in reliance on Mikhailova's representations and promises to Dreymoor that payment was forthcoming from other sources. Dreymoor went out of its way to attempt to cooperate with Mikhailova and provide her additional time to pay the amount due under the Buy-Back.

After repeated representations from Mikhailova that payment would be forthcoming in the following days, on November 29, 2018, Dreymoor issued a "Revised Buy-Back" invoice to UAB, in the same amount as the previous Buy-Back invoice and with a due date of December 4, 2018. UAB did not pay the Buy-Back invoice, the "Revised Buy-Back" invoice, or any subsequent invoice issued by Dreymoor.

On December 3, 2018, Mr. Shimonavich of Dreymoor emailed Mikhailova, thanking her for agreeing to pay Dreymoor by December 5, 2018. Mikhailova did not contradict Shimonavich.

After UAB defaulted on its payment obligations to Dreymoor, Mikhailova confirmed, verbally and in writing, that all details with respect to sales of any materials sold by UAB to third parties would be provided to Dreymoor and sales proceeds would be assigned to Dreymoor to be applied against the amount due under the Buy-Back wherever it was not possible for Dreymoor to receive the funds directly from UAB's buyers. Specifically, Mikhailova promised that UAB would provide Dreymoor with full disclosure of the details of any sale of the UAN, including bills of

lading, that any unsold portion of UAN would be stored in the United States in storage controlled by LLC for further sales at market prices, that all proceeds of those sales would be directed to an account specified by Dreymoor until all amounts were repaid in full, and that Dreymoor would not lose any money on the transaction with the pledge of further, unrelated LLC products as a guarantee in that regard.

From December 2018 through April 2019, in personal meetings and other communications with Dreymoor, Mikhailova repeatedly represented and warranted that she and AVAgro would be receiving substantial funds from earlier sales and that Dreymoor would be repaid from the funds AVAgro had and was receiving from those sales, and not solely from the funds received from the sale of the UAN that Dreymoor had financed. Mikhailova personally obligated herself and assured Dreymoor that funds collected by her or AVAgro from other transactions would be disclosed to Dreymoor and used to repay Dreymoor.

Despite these representations, Mikhailova knew, by November 30, 2018, that the funds that she represented would be paid to Dreymoor were going to be used by her in December 2018 to secretly prepay for AVAgro's 2019 purchases from a company affiliated with the storage company holding the UAN. Mikhailova knew that she was defaulting on her agreements with Dreymoor and that her prior representations regarding forthcoming payments were knowingly false and misleading. Mikhailova admitted in sworn testimony, during the arbitration hearing, that she directed funds and proceeds to other uses, instead of repaying Dreymoor. Mikhailova's actions exposed Dreymoor to substantial financial risks with its own bank creditors, as well as cash flow problems and lost business opportunities.

Mikhailova did not share financial documents, give proof of Quarter 1 purchases, provide any sales contracts with buyers, or update Dreymoor with Quarter 1 tonnage loading and buyer

payments, on December 12, 2018, as she agreed to do. After failing multiple times to pay Dreymoor the amount due pursuant to Sales Contract and Amendment #1, Mikhailova proposed to shift the Buy-Back responsibilities to LLC, pledge LLC assets as security, and obligate herself personally to guaranty to repay the debt owing to Dreymoor. On or about December 18, 2018, at a meeting in Nashville, Tennessee, between Mikhailova and Dreymoor representatives, Mikhailova verbally committed to personally guaranteeing payment to Dreymoor the obligations owed by AVAgro relative to the UAN. This agreement is substantiated by emails sent by Mikhailova following the in-person meeting.

In multiple emails, dated December 19, 2018, Mikhailova made representations that she would personally be responsible for the debt owed to Dreymoor. Specifically, in an email to Shimanovich, Mikhailova stated, "I defaulted on repaying Dreymoor on time as we missed good sales opportunities and I mismanaged AVAgro's finances by asking Dreymoor for help with payment for Grodno's tender. To keep my promise to Dreymoor I am willing to loose [sic] quite a bit as per the action plan below, but I am not willing to lose everything else, as discussed yesterday." She also stated, "I am willing to do whatever possible to survive the current situation personally and professionally."

In another email, Mikhailova stated, "now I will guarantee LLC performance under the buyback instead of UAB." In yet another email, Mikhailova thanked Dreymoor for its support, stating she would be "completely destroyed personally and professionally, as I am sole owner of [] LLC and pledging my personal assets via personal guarantee." She also stated in this email, "as I promised from the beginning that Dreymoor would not lose any money by helping [] UAB to pay for Grodno product, I will pledge 2,500-3000 ST (current market value of $765,000) of []

LLC's inventory at Kinder Morgan terminal towards any losses on this transaction plus the interest."

In an email, dated December 20, 2018, Mikhailova stated to Dreymoor, "As discussed, during my visit to Dreymoor's office yesterday, the responsibility ultimately rests with [] LLC and my personal guarantee." In a December 21, 2018 email, Mikhailova stated, "The balance after it's known will be covered by my personal guarantee . . . ."

Also, on December 21, Mikhailova sent Dreymoor signed contracts designated as "Agreement on Repayment and Pledge" and "Amendment #2" to the Sales Contract, which Dreymoor countersigned.[2] The Agreement on Repayment and Pledge required full payment to be made to Dreymoor on or before January 31, 2019. Dreymoor alleges that its consent to the additional time to make repayment was in reliance on Mikhailova's personal guaranty, which she agreed to verbally and in writing.

Throughout December 2018, Mikhailova made various representations concerning the timing of full payment and requested extensions of time to make payment from Dreymoor. In allowing Mikhailova and AVAgro additional time to pay, Dreymoor relied on Mikhailova's statements and promises of personal guaranty with the expectation that it would be paid in full.

The amount owed under the Sales Contract, Amendment #1, Amendment #2, and Agreement on Repayment and Pledge (collectively the "Contracts") was never paid to Dreymoor.[3] UAB initiated an arbitration action against Dreymoor in 2019 seeking various declarations regarding the obligations of the parties under the Contracts, entitled *UAB AVAgro v. Dreymoor*,

[2] At least one of these agreements appears to be backdated to November 26, 2018.

[3] UAB made a payment to Dreymoor of €60,865.20 on January 31, 2019, and €68,729.10 on April 23, 2019.

International Centre for Dispute Resolution International Arbitration Rules and Procedures, Case No. 01-19-0000-3381. In response, Dreymoor filed a counterclaim against UAB and LLC seeking payment of the debt owed under the Contracts. After an arbitration hearing, the arbitrator awarded Dreymoor €6,211,091.06 and $339,761.42, jointly and severally, against both UAB and LLC.

Petitions to enforce that award were filed in Kansas and Lithuania. On March 3, 2020, Dreymoor initiated Case No. 20-105, a miscellaneous case, in the District of Kansas. Dreymoor sought an order confirming the arbitration award.[4]

On April 28, 2020, Dreymoor also filed this Complaint, asserting numerous causes of action against Mikhailova. The claims asserted against Mikhailova include: (1) intentional misrepresentation and fraud, (2) negligent misrepresentation and fraud, (3) intentional or negligent interference with business relations, (4) fraudulent conveyance, (5) piercing the corporate veil, (6) breach of contract guaranty, (7) promissory estoppel, and (8) punitive damages. With regard to the UAN, which is in liquid form and requires specialized storage facilities at the Port of Klaipeda, Lithuania, as of April 2020, it had been stored at Klasco for more than 15 months without payment. Klasco was seeking more than €2 million before it would release the UAN. The UAN has also declined in value, and the storage charges may exceed the value of the UAN.

On May 5, 2020, in Case No. 20-105, Dreymoor filed a Motion for Judgment, entitled as an "Emergency Application for Order for Post Judgment Remedies." After a hearing, this Court granted Dreymoor's motion to enforce the arbitration award and denied in part and granted in part the Motion for Judgment. Proceedings are ongoing in that case.

[4] The arbitration award was attached to the Complaint.

In this case, Mikhailova has filed a motion to Dismiss for Failure to State a Claim seeking dismissal of all claims against her.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move for dismissal of any claim for which the plaintiff has failed to state a claim upon which relief can be granted.[5] Upon such motion, the court must decide "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.' "[6] A claim is facially plausible if the plaintiff pleads facts sufficient for the court to reasonably infer that the defendant is liable for the alleged misconduct.[7] The plausibility standard reflects the requirement in Rule 8 that pleadings provide defendants with fair notice of the nature of claims as well the grounds on which each claim rests.[8] Under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint, but need not afford such a presumption to legal conclusions.[9] Viewing the complaint in this manner, the court must decide whether the plaintiff's allegations give rise to more than speculative possibilities.[10] If the allegations in the complaint are "so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' "[11] In

[5] Fed. R. Civ. P. 12(b)(6).

[6] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[7] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[8] *See Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (citations omitted); *see also* Fed. R. Civ. P. 8(a)(2).

[9] *Iqbal*, 556 U.S. at 678–79.

[10] *See id.* at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully.") (citation omitted).

[11] *Robbins*, 519 F.3d at 1247 (quoting *Twombly*, 550 U.S. at 570).

addition, although the court generally does not consider documents outside the complaint when deciding a motion to dismiss, a court "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity."[12] Furthermore, the court may take judicial notice of documents on a motion to dismiss, but only "for the existence of the opinion" and "not for the truth of the facts recited therein."[13]

III. Analysis

Mikhailova asserts that the Court should dismiss each claim asserted against her. Dreymoor disagrees. The Court will consider each claim in turn.

A. Count I – Intentional Misrepresentation & Fraud

Dreymoor alleges that Mikhailova made misrepresentations to Dreymoor, relative to the Contracts and UAN, in which she had a pecuniary interest, for the guidance of Dreymoor in its business transactions and decisions. It alleges, as an example of Mikhailova's fraud and intentional misrepresentation, that Mikhailova represented that substantial funds generated from her other business operations existed and would be used to pay Dreymoor. Dreymoor also alleges that Mikhailova promised Dreymoor that she would personally guaranty payment to Dreymoor. Dreymoor contends that these statements induced it to extend the time for Mikhailova or her companies to pay the Buy-Back. Furthermore, Dreymoor alleges that Mikhailova's fraudulent misrepresentations caused Dreymoor to withhold taking action to seize and sell the product (UAN) before the product's value declined and the storage costs increased.

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[12] *Smith v. United States,* 561 F.3d 1090, 1098 (10th Cir. 2009) (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)).

[13] *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1111 (10th Cir. 2016) (quotation marks and citation omitted).

Mikhailova asserts numerous reasons why this claim fails. The Court will only briefly address these arguments. First, she asserts that the alleged statements were made on behalf of AVAgro (the entities she represented—both LLC and UAB) and thus if her conduct was tortious, it would have created liability for both her and the entities. Mikhailova asserts that the arbitration award between Dreymoor, LLC and UAB precludes the fraud claim, and Dreymoor should have brought the claim against her in the arbitration. Dreymoor asserts that its claims here are separate and distinct from the claims asserted in arbitration and that Mikhailova was not a signatory nor a party to the Arbitration Award.

At this stage of the litigation, the Court considers the Complaint and the factual allegations in it. As noted above, Dreymoor alleges that Mikhailova made statements to Dreymoor (both orally and written) that she would personally guarantee the debt owed by AVAgro or that she would cover any balance owing to Dreymoor. This allegation appears to relate to Mikhailova personally and not in her capacity as an agent of AVAgro. Ultimately, there may be a determination that Mikhailova only made those statements in her capacity as the agent of LLC and UAB, and thus only LLC and UAB are responsible for the debt, but the Court cannot resolve this issue on Mikhailova's motion to dismiss.

Mikhailova also asserts that Dreymoor is really alleging a breach of contract claim and cannot do so.[14] Here, Dreymoor alleges that Mikhailova made fraudulent or intentional misrepresentations for the purpose of Dreymoor extending its Buy Back Agreements (with AVAgro) or for the purpose of Dreymoor entering into an agreement with Mikhailova to satisfy AVAgro's debts or to independently be responsible for the debts/balance. In Kansas, "a party may

[14] The Court notes that Dreymoor brings a separate breach of contract guaranty claim against Mikhailova.

be liable in tort for breaching an independent duty toward another, even where the relationship creating such a duty originates in the parties' contract."[15] One independent duty "is the duty to avoid misrepresenting preexisting or present facts."[16] In addition, a plaintiff "may assert a misrepresentation claim based on a 'promise to do something in the future, if the promisor has no intention at the time the promise was made to carry it out [because the promisor has committed] deceit, and if the promisor obtained anything of value by reason thereof, there is actionable fraud.'"[17] In Kansas, "when the alleged fraud relates to promises or statements concerning future events, the gravamen of such a claim is not the breach of the agreement to perform, but the fraudulent misrepresentation concerning a present, existing intention to perform, when no such intention existed."[18] In addition, Kansas "has allowed litigants to assert contract and tort claims based on the same set of facts."[19]

Again, at this stage of the litigation, the Court must construe the Complaint in the light most favorable to Plaintiff. Dreymoor adequately alleges that Mikhailova made false representations, either oral or written, that she had sufficient existing funds to pay the debt owed to Dreymoor on behalf of either herself of AVAgro. Thus, the Court concludes that Dreymoor adequately alleges a tort claim for fraudulent misrepresentation.

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[15] *N. Ala. Fabricating Co., Inc. v. Bedeschi Mid-West Conveyor Co*., 2017 WL 1836973, at *7 (D. Kan. 2017) (quoting *Universal Premium Acceptance Corp. v. Oxford Bank & Tr*., 277 F. Supp. 2d 1120, 1129-30 (D. Kan. 2003)).

[16] *Id.* (citation omitted).

[17] *Id*. (quoting *Gerhardt v. Harris*, 261 Kan. 1007, 934 P.2d 976, 981 (Kan. 1997)) (alteration in original).

[18] *Id.* (quoting *Gerhardt*, 934 P.2d at 981).

[19] *Id.* at *8 (citations omitted).

Mikhailova also asserts that the fraud claim lacks specificity. Federal Rule of Civil Procedure 9(b) requires that a party allege fraud with particularity. A fraud claim must "set forth the time, place and contents of the false representation, the identity of the party making the false statements[,] and the consequences thereof."[20] Mikhailova contends that Dreymoor simply gives two "examples." The Court finds that these examples of fraud were pleaded with particularity. Specifically, Dreymoor alleges the identity of the party making the false statement–Mikhailova; the time—both orally and in emails in the middle of December; the contents of the false representation—that she had substantial funds from other business operations and she would personally guarantee the financial obligations of AVAgro with regard to the Buy Back Agreement to repay Dreymoor or she would personally pay Dreymoor the balance; and the consequences—Dreymoor relied on these statements to its detriment to extend the Buy Back Agreement and/or did not seize or sell the UAN earlier. Thus, these allegations are sufficient to give notice to Mikhailova of Dreymoor's fraud claim.

Mikhailova also argues that Dreymoor fails to show any reliance giving rise to injury. Although Mikhailova asserts that Dreymoor's allegations of reliance are not plausible, Mikhailova appears to ask the Court to weigh the evidence because she claims that Dreymoor's reliance was not *reasonable* based on the surrounding facts. As noted above, Dreymoor alleges reliance to its detriment on Mikhailova's statements, including that it did not act earlier to seize the UAN. Thus, the Court finds that Dreymoor adequately alleges reliance.

[20] *Schwartz v. Celestial Seasonings, Inc*., 124 F.3d 1246, 1252 (10th Cir. 1997) (quotation marks and citation omitted).

Finally, Mikhailova asserts that Dreymoor cannot allege a fraudulent misrepresentation claim because the statute of frauds requires a written contract for agreements in which a party promises to answer for the debt of another. K.S.A. § 33-106 requires an agreement "to answer for the debt, default or miscarriage of another person" to "be in writing and signed by the party." However, Kansas sometimes recognize an exception to the statute of frauds requirement on equitable considerations. "[O]ral agreements are enforceable in Kansas when a party relies 'upon the agreement to his or her detriment and a gross injustice would result if the oral agreement was not enforced.'"[21] Dreymoor alleges that its relied upon Mikhailova's statements to its detriment.

In addition, "Kansas clearly recognizes a cause of action for fraud based on a promise of future action made with the present intent not to perform."[22] This type of claim "does not depend upon proof of an oral contract, but rather depends on proof of the elements of fraud."[23] These elements "include an untrue statement of fact known to be untrue by the party making it made with the intent to deceive or with reckless disregard for the truth upon which another party justifiably relies and acts to his or her detriment."[24] Here, Dreymoor sufficiently alleges these elements. Accordingly, the Court declines to dismiss this claim.

B. Count II – Negligent Misrepresentation & Fraud

Dreymoor's second claim is similar to its first except that it alleges Mikhailova negligently made false representations to Dreymoor. "The elements of negligent misrepresentation are similar

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[21] *N. Alabama Fabricating Co.*, 2017 WL 1836973, at *12 (citing *Bank of Alton v. Tanaka*, 247 Kan. 443, 799 P.2d 1029, 1035 (Kan. 1990)).

[22] *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 746 F. Supp. 1051, 1058 (D. Kan. 1990) (citation omitted).

[23] *Id.*

[24] *Kipp v. Myers*, 753 F. Supp. 2d 1102, 1109 (D. Kan. 2010) (citing *Alires v. McGehee*, 277 Kan. 398, 85 P.3d 1191, 1195 (2004)).

to those of a claim for fraud, except that a negligent misrepresentation claim does not require proof that the defendant knew the statement was untrue or was reckless as to whether the statement was true or false."[25] However, "[a] negligent misrepresentation claim may only be based on a 'misrepresentation of pre-existing or present fact.'"[26] "It may not be based on an intention to perform an agreement."[27] And "it is well settled that a negligent misrepresentation claim cannot be based on a future event."[28]

Mikhailova contends that Dreymoor's claim fails because Dreymoor's allegations relate to future intentions rather than present intent. The misrepresentations at issue here are that Mikhailova told Dreymoor that she had substantial funds from other business operations to personally pay Dreymoor and she would personally guarantee the financial obligations of AVAgro with regard to the Buy Back Agreement to repay Dreymoor or would personally pay Dreymoor the balance. One misrepresentation relates to a present fact, i.e., Mikhailova had the existing funds to pay Dreymoor. The other misrepresentation relates to her intention in the future, i.e., Mikhailova would personally pay Dreymoor the money. To the extent that Dreymoor's claim is based on the present fact that she had existing funds, the claim remains. To the extent that Dreymoor's claim rests on Mikhailova's promise to pay Dreymoor in the future, the claim fails. Thus, the Court dismisses in part Dreymoor's misrepresentation claim.

C. Count III – Intentional or Negligent Interference with Business Relations

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[25] *Indy Lube Investments, L.L.C. v. Wal-Mart Stores, Inc.*, 199 F. Supp. 2d 1114, 1122 (D. Kan. 2002) (quotation marks and citations omitted).

[26] *Id.* at 1123 (citing *Graphic Techs., Inc. v. Pitney Bowes, Inc.*, 998 F. Supp. 1174, 1179 (D. Kan. 1998)).

[27] *Id.* (citing *Wilkinson v. Shoney's, Inc*., 269 Kan. 194, 4 P.3d 1149, 1167 (2000)).

[28] *Id.* (citation omitted).

Mikhailova contends that Dreymoor fails to state a claim against her for negligent or tortious interference with business relations. Under Kansas law, the elements of a tortious interference with business relations claim include "(1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) a reasonable certainty that, except for the conduct of the defendant, plaintiff would have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) incurrence of damages by plaintiff as a direct or proximate result of defendant's misconduct."[29]

Here, Dreymoor asserts that a business relationship exists between itself and various banks through which it obtains funding for its business, including a relationship with Unicredit. It contends that Mikhailova knew of this relationship, and her misrepresentations benefitted her at the expense of Dreymoor's commercial relationships. Dreymoor alleges that in making those misrepresentations, Mikhailova either intentionally interfered or disrupted Plaintiff's banking relationships, or she should have reasonably known that her actions would do so.

These allegations fail to adequately allege a tortious interference claim. Specifically, Dreymoor fails to allege two of the five elements. First, Dreymoor does not allege that it was reasonably certain to continue its relationship with Unicredit, or any bank, but for the conduct of Mikhailova. Instead, Dreymoor asserts that Mikhailova's conduct *threatened* to damage the relationship. In addition, Dreymoor does not allege any damages as a result of Mikhailova's conduct. Indeed, Dreymoor does not allege that its business relationship with Unicredit, or any

[29] *Cohen v. Battaglia*, 296 Kan. 542, 293 P.3d 752, 755 (2013) (citation omitted).

bank, was harmed in any way. Thus, Dreymoor fails to state a tortious interference with business relations claim,[30] and the Court grants Mikhailova's motion to dismiss Count III.

D. Count IV – Fraudulent Conveyance

Dreymoor alleges a fraudulent conveyance in violation of K.S.A. § 33-204. Mikhailova asserts that Dreymoor fails to assert a claim because it does not meet the particularity requirement for fraud claims. In addition, even if the heightened standard is inapplicable, Mikhailova contends that Dreymoor does not adequately state a claim.

Generally, "[t]he elements for a fraudulent conveyance claim in Kansas are that (1) the grantor intended to hinder, delay, or defraud his or her creditors, and (2) the grantee participated in or had constructive or actual knowledge of the fraudulent scheme."[31] At least two judges in the District of Kansas have concluded that the heightened pleading standard under Fed. R. Civ. P. 9(b) applies to fraudulent transfer claims.[32] Rule 9(b) requires allegations of fraud to be pled "with particularity." Thus, the Complaint must contain facts stating the "who, what, when and where of the alleged fraudulent conveyance" to satisfy Rule 9(b).[33]

Here, Dreymoor alleges that, in December 2019, Mikhailova conspired with unidentified third parties to transfer the proceeds of the sale of products to various third parties to shield those

[30] It appears that Dreymoor attempts to circumvent the intentional misconduct requirement of this tort by also asserting that Mikhailova negligently interfered with its business relationships. Dreymoor asserts that Mikhailova should have reasonably known that her actions/misrepresentations would have disrupted or interfered with Plaintiff's various banking relationships. Dreymoor provides no support or case law to the Court providing for such a claim, and the Court is unable to locate the authority for such a claim.

[31] *Jersey Realty and Inv. Co. v. Emco Mfg. Co., Inc*., 187 F.R.D. 649, 650 (D. Kan. 1999) (citations omitted).

[32] *Kansas Penn Gaming, LLC v. HV Properties of Kan. LLC*, 2012 WL 2359417, at *3 (D. Kan. 2012) (citing *Jersey Realty*, 187 F.R.D. 649).

[33] *Id.* at *3.

funds from Dreymoor and other creditors. Dreymoor alleges that the transfer was made without adequate compensation and with the intent to hinder, delay, and defraud Dreymoor and the creditors of LLC.

Mikhailova asserts that these allegations are lacking in detail because they do not identify with particularity what property was transferred, to whom it was transferred, how many transfers were made, where the transfers were made, or what value the property had. The Court, however, concludes that Dreymoor adequately alleges a claim. Dreymoor identifies the who – Mikhailova and third parties; the what – proceeds of a sale of LLC's product; and the when/where – from a storage facility in Virginia in December 2019. These allegations are particular enough to give Mikhailova notice of the fraudulent transfer claim against her. Thus, the Court declines to dismiss this claim.

E. Count V – Piercing the Corporate Veil

Dreymoor alleges that Mikhailova operated the corporate entities LLC and UAB as a sham, without following proper corporate formalities, and without proper capitalization. It also alleges that Mikhailova conspired with third parties to shield the assets of LLC and UAB. Dreymoor claims that because LLC and UAB failed to comply with the Contracts and are in breach of the obligations to repay Dreymoor, it is entitled to a judgment against Mikhailova for all the damages due and owing to Dreymoor.

Mikhailova contends that Dreymoor fails to state a claim because there is no separate cause of action for piercing the corporate veil. She is correct. Generally, "an action to pierce the

corporate veil is not a separate and independent cause of action, but rather is merely a procedure to enforce an underlying judgment."[34] As noted in Fletcher Cyclopedia Corporations:

> A claim based on the alter ego theory is not in itself a claim for substantive relief, but rather is procedural. A finding of fact of alter ego, standing alone, creates no cause of action. It merely furnishes a means for a complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation. An attempt to pierce the corporate veil is a means of imposing liability on an underlying cause of action such as a tort or breach of contract.[35]

Thus, Dreymoor cannot bring a claim for piercing the corporate veil.

F. Count VI – Breach of Contract Guaranty

In Count VI, Dreymoor alleges that Mikhailova made a personal guaranty to it regarding payment to Dreymoor on all obligations due from AVAgro. It contends that Mikhailova breached this contractual guaranty by failing to pay Dreymoor. Multiple documents, including several emails and contracts, were attached to Dreymoor's Complaint.

K.S.A. § 33-106 provides that "[n]o action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . . ." "For a guaranty to be sufficient under the statute of frauds, it must be complete in itself, leaving nothing to rest in parol."[36]

Mikhailova asserts that the written emails for which Dreymoor alleges constitute the guaranty are insufficient to satisfy the statute of frauds because they are incomplete. Dreymoor

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[34] *Powers v. Emcon Assocs., Inc*., 2017 WL 4102752, at *1 (D. Colo. 2017) (quotation marks and citations omitted).

[35] 1 Fletcher Cyc. Corp., § 41.10 (Sept. 2020 Update) (citations omitted).

[36] *Kenby Oil Co. v. Lange*, 30 Kan. App. 2d 439, 42 P.3d 201, 202 (2002).

disagrees and contends that the agreements of the parties were sufficiently pled to establish a meeting of the minds. In addition, Dreymoor argues that the statute of frauds is inapplicable because there is a question of fact whether the debt at issue is a debt of another or a debt Mikhailova assumed for herself.

Here, there are numerous issues based on the allegations in the Complaint which make this claim not subject to dismissal. First, it is unclear, at this stage of the proceedings, whether Mikhailova's oral statements were made in her personal capacity or as a representative of AVAgro. To the extent that Dreymoor alleges that Mikhailova agreed to personally guarantee AVAgro's debts and/or obligations (either LLC's and/or UAB's), the statute of frauds would appear to be applicable. It is unclear to the Court, however, which emails Dreymoor alleges Mikhailova breached because the documents attached to the Complaint include a confusing string of email chains. This claim is not amenable to dismissal at this stage of the proceedings. Dreymoor has adequately alleged a claim against Mikhailova for breach of contract guaranty. Thus, the Court declines to dismiss this claim.

G. Count VII – Promissory Estoppel

Dreymoor alleges a promissory estoppel claim and asserts that Mikhailova made promises and representations to Dreymoor, verbally and in writing, that she would personally guaranty payment to Dreymoor under the Contracts. Dreymoor contends that these promises induced it to, among other things, allow more time for repayment under Amendment #2 and the Agreement on Repayment and Pledge.

Mikhailova seeks dismissal by arguing that the statute of frauds applies to any promise to answer for the debt of another.[37] As noted above with regard to the breach of contract guarantee claim, Dreymoor argues that the statute of frauds is inapplicable because there is a question of fact whether the debt at issue is a debt of another or a debt Mikhailova assumed for herself. Taking the facts as true in the Complaint, Dreymoor states a claim for promissory estoppel against Mikhailova. The Court declines to dismiss this claim.

H. Count VIII – Punitive Damages

Dreymoor seeks punitive damages asserting that Mikhailova knew or should have known her misrepresentations and statements were false, reckless, and misleading. Mikhailova asserts that Dreymoor cannot bring a claim for punitive damages because Dreymoor fails to assert any valid underlying tort claims. The Court notes that "a claim for punitive damages exists only incidental and subject to a cause of action for actual damages."[38] To the extent that Dreymoor attempts to assert a stand-alone punitive damages claim, it cannot do so. To the extent, however, that Dreymoor's claim for punitive damages relates to its remaining underlying tort claims,[39] the Court declines to dismiss its request for punitive damages at this time.

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[37] The Court notes that Mikhailova cites to Tennessee law asserting that the oral conversation occurred in Tennessee. Dreymoor takes issue with Mikhailova's reliance on Tennessee law. The parties do not adequately brief the issue as to this choice of law issue. The Court also notes that this claim is the only one for which Mikhailova references Tennessee law. The parties relied on Kansas law for all other claims, including when discussing the statute of frauds.

[38] *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985, 993 (1993) (citation omitted).

[39] A claim for punitive damages cannot be related to a breach of contract claim. *See Zurn Constructors, Inc.,* 746 F. Supp. at 1057 ("It is undisputed that, under Kansas law, punitive damages may not be recovered under a breach of contract claim, even if the breach is intentional, unless the plaintiff pleads and proves an independent tortious act causing additional injury.")

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (Doc. 8) is **DENIED IN PART** and **GRANTED IN PART**. Counts III and V are dismissed. Count II is dismissed in part. Counts I, II (in part), IV, VI, and VII remain. Count VIII remains as a request for punitive damages incidental to Dreymoor's remaining tort claims.

IT IS SO ORDERED.

Dated this 14th day of April, 2021.

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE