UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KEVIN KELLY and MARK WILKINS,

Plaintiffs,

v.

1:22-cv-00518-WMS

DCC TECHNOLOGY HOLDINGS, INC. and
EXERTIS (UK) LIMITED,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
OR TO COMPEL ARBITRATION
AND CROSS-MOTION TO STAY

Respectfully submitted,

PHILLIPS LYTLE LLP
Attorneys for Plaintiffs
Kevin Kelly and Mark Wilkins
One Canalside
125 Main Street
Buffalo, New York 14203
(716) 847-8400

David J. McNamara
Joshua Glasgow
– Of Counsel –

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

BACKGROUND 2

ARGUMENT 5

POINT I PLAINTIFFS' CLAIMS ARE NOT BASED ON ACCOUNTING DISPUTES AND THUS CANNOT BE DECIDED BY THE INDEPENDENT ACCOUNTANTS 5

A. This Court decides the question of arbitrability under federal law 5

B. Plaintiffs' claims do not fall within the scope of the Accountant Clause 7

C. The Year One accounting dispute has no impact on the present claims 13

D. The Court should stay any action by the Independent Accountants 15

POINT II PLAINTIFFS HAVE STATED VALID CLAIMS 16

A. Plaintiffs have pled a valid claim for breach of the SPA 16

B. The MOU is unenforceable by its own terms 18

C. DCC breached the implied covenant of good faith and fair dealing 21

D. DCC breached a separate promise to waive an inventory reserve 23

E. Plaintiffs have pled valid alternative claims regarding the inventory reserve 24

F. Plaintiffs have stated a valid claim for reformation under Delaware law 24

G. The Complaint provides the notice to Exertis required under the SPA 25

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Advantage Sales & Mktg. LLC v. USG Companies, Inc.,
2016 WL 2588163 (D. Del. May 4, 2016) 11

Allstate Ins. Co. v. Elzanaty,
929 F. Supp. 2d 199 (E.D.N.Y. 2013) 16

In re Am. Exp. Fin. Advisors Sec. Litig.,
672 F.3d 113 (2d Cir. 2011) 15

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..16

AT & T Techs., Inc. v. Commc'ns Workers of Am.,
475 U.S. 643 (1986).. 6

BBCM, Inc. v. Health Sys. Int'l, LLC,
2010 WL 4607917 (N.D. Iowa Nov. 4, 2010), *report and recommendation adopted*, 2010 WL 5418892 (N.D. Iowa Dec. 23, 2010)..............................9, 10

BBS Norwalk One, Inc. v. Raccolta, Inc.,
117 F.3d 674 (2d Cir. 1997) 14

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..16

Blutt v. Integrated Health Servs., Inc.,
1996 WL 389292 (S.D.N.Y. July 11, 1996) 11

CAE Indus. Ltd. v. Aerospace Holdings Co.,
741 F. Supp. 388 (S.D.N.Y. 1989) 7

Catamaran Acquisition Corp. v. Spherion Corp.,
2001 WL 755387 (Del. Super. Ct. May 31, 2001) 24

Certainteed Corp. v. Celotex Corp.,
2005 WL 217032 (Del. Ch. Jan. 24, 2005)..19

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2d Cir. 2002) 14, 15

Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.,
822 A.2d 1024 (Del. 2003)..24

Chrysler Corp. v. Quimby,
144 A.2d 123, 132, *adhered to on reh;g*, 144 A.2d 885 (1958)....................................18, 24

Conopco, Inc. v. Roll Int'l,
231 F.3d 82 (2d Cir. 2000)...13

Cont'l Ins. Co. v. Rutledge & Co.,
750 A.2d 1219 (Del. Ch. 2000) 23

CPC Mikawaya Holdings, LLC v. MyMo Intermediate, Inc.,
2022 WL 2348080 (Del. Ch. June 29, 2022)..23

DDK Hotels, LLC v. Williams-Sonoma, Inc.,
6 F.4th 308 (2d Cir. 2021).. 6

Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.,
624 A.2d 1199 (Del. 1993)...21

Doctor's Assocs., Inc. v. Alemayehu,
934 F.3d 245 (2d Cir. 2019) 6

Dunlap v. State Farm Fire & Cas. Co.,
878 A.2d 434 (Del. 2005)...21

Emigrant Bank v. UBS Real Est. Sec., Inc.,
49 A.D.3d 382 (1st Dep't 2008) 20

First Options of Chi., Inc. v. Kaplan,
514 U.S. 938 (1995).. 6

Fit Tech, Inc. v. Bally Total Fitness Holding Corp.,
374 F.3d 1 (1st Cir. 2004) 9, 13

Gaylords, Inc. v. Tollin,
1984 WL 547850 (Del. Super. Ct. Jan. 31, 1984)...25

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 13

Gloucester Holding Corp. v. U.S. Tape & Sticky Prod., LLC,
832 A.2d 116 (Del. Ch. 2003) 22

Goldstein v. Pataki,
516 F.3d 50 (2d Cir. 2008)...16

Gov't Emps. Ins. Co. v. Cean,
2019 WL 6253804 (E.D.N.Y. Nov. 22, 2019) 16

Hebbronville Lone Star Rentals, LLC v. Sunbelt Rentals Indus. Servs.,
2017 WL 1026019, at *8 (W.D. Tex. Mar. 15, 2017), *report and recommendation adopted,* 2017 WL 3634190 (W.D. Tex. June 27, 2017)........................10

Intellisource Grp., Inc. v. Williams,
1999 WL 615114 (D. Del. Aug. 11, 1999)..20

JCM Innovation Corp. v. FL Acquisition Holdings, Inc.,
2016 WL 5793192 (Del. Super. Ct. Sept. 30, 2016)..22

JPD, Inc. v. Chronimed Holdings, Inc.,
539 F.3d 388 (6th Cir. 2008)..11

Leeds v. First Allied Connecticut Corp.,
521 A.2d 1095 (Del. Ch. 1986)..19

Liberty Mut. Ins. Co. v. Excel Imaging, P.C.,
879 F. Supp. 2d 243 (E.D.N.Y. 2012)..15

Life Plans, Inc. v. Sec. Life of Denver Ins. Co.,
800 F.3d 343 (7th Cir. 2015)..23

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.,
252 F.3d 218 (2d Cir. 2001).. 7

LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC,
2018 WL 1559936 (Del. Ch. Mar. 28, 2018)..24

McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.,
858 F.2d 825 (2d Cir. 1988).. 7

Medspan Shipping Serv., Ltd. v. Prudential Lines, Inc.,
541 F. Supp. 1076 (E.D. Pa. 1982)...25

Merrill v. Crothall-Am., Inc.,
606 A.2d 96 (Del. 1992)...23

Monahan v. N.Y.C. Dep't of Corr.,
214 F.3d 275 (2d Cir. 2000)..13

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983)... 6

Myun-Uk Choi v. Tower Rsch. Cap. LLC,
890 F.3d 60 (2d Cir. 2018)..17

O'Tool v. Genmar Holdings, Inc.,
387 F.3d 1188 (10th Cir. 2004)..23

ODP Corp. v. Allen,
277 A.3d 296, 341 (Del. Ch. 2022) 24

Orrico v. Alliant Foodservice, Inc.,
119 F. App'x 899 (9th Cir. 2004) 9

PaineWebber Inc. v. Bybyk,
81 F.3d 1193 (2d Cir. 1996) 6

Pantzer v. Shields Dev. Co.,
660 F. Supp. 56 (D. Del. 1986) 19, 21

Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.,
297 A.2d 28 (Del. 1972) 23

Postlewaite v. McGraw-Hill,
333 F.3d 42 (2d Cir. 2003) 14

Powderly v. MetraByte Corp.,
866 F. Supp. 39 (D. Mass. 1994) 10

Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.,
23 AD3d 213 (1st Dep't 2005) 20

Renco Grp., Inc. v. MacAndrews AMG Holdings LLC,
2015 WL 394011 (Del. Ch. Jan. 29, 2015), DCC 23

Rochdale Village, Inc. v. Public Service Employees Union,
605 F.2d 1290 (2d Cir. 1979) 7

S'holder Representative Servs. LLC v. Albertsons Companies, Inc.,
2021 WL 2311455 (Del. Ch. June 7, 2021) 16

Sapp v. Indus. Action Servs., LLC,
2020 WL 2813176 (D. Del. May 29, 2020) 12

Sheth v. Harland Fin. Sols., Inc.,
2014 WL 4783017 (Del. Super. Ct. Aug. 28, 2014) 12

SIGA Techs., Inc. v. Pharmathene, Inc.,
67 A.3d 330 (Del. 2013) 20

Smith v. Altisource Sols.,
726 F. App'x 384 (6th Cir. 2018) 9, 13

Stern v. Leucadia Nat. Corp.,
844 F.2d 997 (2d Cir. 1988) 18

Sussex Equip. Co. v. Burke Equip. Co.,
860 A.2d 812 (Del. 2004)....................20

Symbiont.io, Inc. v. Ipreo Holdings, LLC,
2021 WL 3575709 (Del. Ch. Aug. 13, 2021)....................24

T.R. McClure & Co. Liquidating Tr. v. TMG Acquisition Co.,
1999 WL 692683 (E.D. Pa. Sept. 7, 1999)....................10

TMIP Participants LLC v. DSW Grp. Holdings LLC,
2016 WL 490257 (Del. Ch. Feb. 4, 2016)....................11

United Steelworkers of America v. Warrior and Gulf Navigation Co.,
363 U.S. 574 (1960).................... 6

USG Companies, Inc. v. Advantage Sales & Mktg. LLC,
2018 WL 3117545 (D. Del. June 25, 2018).................... 11, 12

Viacom Int'l, Inc. v. Winshall,
72 A.3d 78 (Del. 2013).................... 11, 12

Viking Pump, Inc. v. Liberty Mut. Ins. Co.,
2007 WL 1207107 (Del. Ch. Apr. 2, 2007)....................24

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,
489 U.S. 468 (1989).................... 6

In re Westinghouse Elec. Co. LLC,
588 B.R. 347 (Bankr. S.D.N.Y. 2018)....................20

Windy City Invs. Holdings, LLC v. Tchrs. Ins. & Annuity Ass'n of Am.,
2019 WL 2339932, at *10 (Del. Ch. May 31, 2019)....................17

XL Cap., Ltd. v. Kronenberg,
145 F. App'x 384 (2d Cir. 2005)....................8, 12

Statutes

9 U.S.C. § 1.................... 6

9 U.S.C. § 2.................... 6

Other Authorities

Fed. R. Civ. P. 9(b)....................18

PRELIMINARY STATEMENT

Kevin Kelly and Mark Wilkins submit this response to the motion to dismiss filed by DCC Technology Holdings, Inc. ("DCC") and Exertis (UK) Limited ("Exertis"), and cross-motion to stay the initiation of proceedings before the Independent Accountants.

Having breached their obligations to Plaintiffs, Defendants seek to evade judicial review. Plaintiffs agreed to sell a group of companies, collectively referred to as "Stampede," to DCC pursuant to a Stock Purchase Agreement ("SPA"). To induce that sale, DCC agreed to a number of covenants. It promised to act in good faith to maximize Stampede's profits and to avoid taking actions to minimize payments due to Plaintiffs. It promised not to act with the purpose of adversely affecting the business of Stampede. And it promised that it would refer—and not divert—certain revenue opportunities to Stampede. These covenants were critical because a substantial portion of the purchase price, the "Earn-out Payments," would be determined by Stampede's post-closing performance.

DCC breached the foregoing covenants but hopes to escape liability by stretching a narrow accounting clause beyond its breaking point. Under SPA § 1.4(d) (the "Accountant Clause"), disputes concerning "the calculation of the Earn-out Payments" may be referred to "Independent Accountants." DCC asserts this narrow clause is an expansive arbitration provision governing all aspects of the parties' relationship. As a matter of plain text and common sense, DCC's argument fails. Numerous federal courts including the Second Circuit have held this type of clause is limited to disputes regarding accounting techniques.

Because Plaintiffs' claims are not subject to the Accountant Clause, DCC's motion to dismiss should be denied. For the same reason, DCC's preclusion arguments fail. A prior decision by the Independent Accountants has no bearing on the non-accounting claims

advanced here because Plaintiffs' claims could not have been presented to the Independent Accountants. And the present claims are based on acts that occurred after that proceeding. Further, because DCC will use any proceedings before the Independent Accountants to attempt to restrict Plaintiffs' rights in this case, any such proceeding should be stayed.

DCC's scattershot approach to the merits of Plaintiffs' claims fares no better. The Complaint provides detailed factual allegations supporting each cause of action. DCC breached covenants in the SPA by failing to refer and diverting revenue opportunities, attempting to enforce a non-binding memorandum, and forcing Stampede to return COVID relief funds while refusing to address the impact of the pandemic. DCC also breached a separate promise to forgo an inventory reserve if Plaintiffs liquidated aged inventory. Plaintiffs have pled a valid claim for reformation due to the unanticipated effects of the business quarter impacted by COVID. And they have advanced a valid claim for breach of guarantee against Exertis. Defendant's motion should be denied in its entirety.

BACKGROUND

After years spent building a local Professional Audio Visual ("Pro AV") distribution business into a global leader, Plaintiffs sold a group of companies known as Stampede to DCC. (Compl. ¶¶ 10-15, 27). A substantial portion of the purchase price was comprised of "Earn-out Payments," which were funds to be paid after closing based on Stampede's performance over a three-year "Earn-out Period." (*Id.* ¶¶ 29-31). Because post-closing business decisions would have a significant impact on those payments, Plaintiffs required specific covenants from DCC regarding the operation of Stampede. (*Id.* ¶ 34).

DCC promised to "act in good faith in continuing to operate the Earn-out Group in the ordinary course consistent with past practice (but subject to the DCC Conduct of

Business guidelines) with the goal of maximizing profits consistent with the medium-term development of Stampede and "not to "take any actions that have the sole purpose of avoiding or minimizing the Earn-out Payments." (*Id.* ¶ 35 (quoting SPA § 1.4(f)(i)). It agreed not to "take any action with the purpose of materially and adversely affecting the business of the Earn-Out Group or its relationship with vendors and customers." (*Id.* ¶ 36 (quoting SPA § 1.4(f)(iv)). And DCC agreed to "refer to the Earn-out Group all revenue opportunities in North America within the scope of the Restricted Business stemming from their businesses outside of North America" and "not take any action intended to divert revenue in North America within the scope of the Restricted Business away from the Earn-Out Group to any other Affiliate of Buyer." (*Id.* ¶ 37 (quoting SPA § 1.4(f)(v)).

DCC breached these covenants in several respects. First, although the intent of the parties was to have one of the Stampede entities serve as the "Pro AV platform company" in North America, DCC acquired and operated three companies engaged in Pro AV business through other DCC affiliates. (*Id.* ¶¶ 76-83). DCC also used an internal division to provide Pro AV distribution services in North America, and failed to refer business from other affiliates who sell Pro AV products. (*Id.* ¶ 84-85). DCC thus diverted hundreds of millions of dollars in revenue away from Stampede in violation of SPA § 1.4(f)(v). (*Id.* ¶¶ 79, 82).

Second, DCC breached the SPA by seeking to enforce a non-binding memorandum. During the Earn-out Period, one of the Stampede companies entered into an agreement to serve as the exclusive distributor for Furrion Limited. (*Id.* ¶ 94). Just before that deal was completed, DCC interfered by demanding Plaintiffs sign a memorandum (the "MOU") setting forth certain "proposed terms" for an amendment to the SPA. (*Id.* ¶¶ 98, 101). The MOU specifically states that it is "SUBJECT TO CONTRACT" and would be "put into

legal form and executed by the parties." (*Id.* ¶¶ 100, 103). Despite extensive negotiations that continued through the end of the Earn-out Period, the parties were not able to reach an agreement on an amendment to the SPA. (*Id.* ¶¶ 104, 111-12). Although no contract was ever formed, (*Id.* ¶¶ 100, 104), DCC has attempted to enforce the MOU by withholding approximately $3 million due to Plaintiffs in violation of the SPA. (*Id.* ¶¶ 120-23).

Third, DCC forced Stampede to return $2.4 million in funding obtained through the Paycheck Protection Act ("PPP") and to refuse an additional $2.4 million in available funding. (*Id.* ¶¶ 128-31). DCC did so in an effort to drive down the amount of Earn-out Payments due to Plaintiffs. (*Id.* ¶ 132). Without those funds, the fourth quarter of the Year Two Earn-out Period (the "COVID Quarter") had a disproportionate effect on the overall amount due to Plaintiffs. (*Id.* ¶ 133). The Year Two Earn-out Payment dropped 78% and, according to DCC, Plaintiffs became ineligible for an increased multiplier. (*Id.* ¶¶ 135, 139).

In addition to its violations of the SPA, DCC also breached a separate agreement it made with Plaintiffs regarding liquidation of inventory. DCC promised that it would waive its right to a 3% inventory reserve for Year Three of the Earn-out Period if Plaintiffs agreed to precipitously liquidate certain inventory at a loss. (*Id.* ¶¶ 142-43). Plaintiffs did so, but DCC refused to keep its promise and waive the inventory reserve. (*Id.* ¶¶ 146-48).

Plaintiffs filed this action advancing claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, declaratory judgment, and reformation. (*Id.* ¶¶ 161-206). Plaintiffs also filed a claim for breach of guarantee against Exertis, DCC's parent guarantor. (*Id.* ¶¶ 207-212). In response, Defendants assert that this court lacks the authority to consider all of Plaintiffs' claims, and that they must instead be submitted to an accountant.

Defendants rely on the Accountant Clause, a narrow provision titled "Earn-Out Payment Calculations." (SPA § 1.4(d)). It requires DCC to prepare an "Earn-out Statement" containing its "calculation of the Earn-out Payments" each year. (*Id.*) Plaintiffs may then identify "disputed items" in an "Earn-out Notice." (*Id.*). DCC must provide Plaintiffs access to records "relating to the calculation of the Earn-out Payments." (*Id.*). The "unresolved disputed items" may be referred to "Independent Accountants" who can "resolve only those disputed items set forth in the Earn-out Notice that remain unresolved." (*Id.*). "[T]he calculation of the Earn-out Payments by the Independent Accountants that is subject to the disputed Earn-out Statement shall be final and binding." (*Id.*).

Plaintiffs' claims in this action do not concern disputed accounting issues. The Complaint includes background allegations identifying DCC's efforts to artificially lower the Earn-out Payments, noting that certain accounting issues were submitted to the Independent Accountants regarding Year One and could be subject to the same process for Yeas Two and Three. (*Id.* ¶ 64). But the Complaint specifically explains that the claims advanced "are not based on disputed accounting items." (*Id.* ¶ 66). Instead, as described above, the claims are based on DCC's misconduct unrelated to accounting techniques.

ARGUMENT

POINT I

PLAINTIFFS' CLAIMS ARE NOT BASED ON ACCOUNTING DISPUTES AND THUS CANNOT BE DECIDED BY THE INDEPENDENT ACCOUNTANTS

A. This Court decides the question of arbitrability under federal law

Although Defendants cite both Delaware and federal law on arbitration, federal law controls. The Federal Arbitration Act ("FAA") applies to any "contract evidencing a transaction involving commerce," with the term "commerce" defined to include "commerce

among the several States or with foreign nations." 9 U.S.C. §§ 1, 2. The FAA thus "creates a 'body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act,'" including "[a]ny arbitration agreement affecting interstate commerce." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996) (*quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The SPA is a transaction between New York and Florida residents as sellers, a Delaware corporation as buyer, and an English company as guarantor. (Compl. ¶¶ 2-5). The FAA governs.

It is well-settled that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

The Second Circuit recognizes "that 'threshold questions of arbitrability,' such as whether the arbitration agreement applies to a particular dispute, 'presumptively should be resolved by the court and not referred to the arbitrator.'" *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 317 (2d Cir. 2021) (quoting *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 250-51 (2d Cir. 2019)). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (alterations in original) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Defendants fail to identify any provision of the SPA suggesting that the threshold question of arbitrability was delegated to the Independent Accountants. Accordingly, this Court decides arbitrability.

In determining whether a specific dispute is subject to arbitration, the Second Circuit has directed that courts should first "classify the particular clause as either broad or narrow." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001). Arbitration clauses are "broad" if they "purport to refer all disputes arising out of a contract to arbitration" and "narrow" if they "limit arbitration to specific types of disputes." *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). The Accountant Clause at issue in this case is plainly narrow. It applies only to "the calculation of the Earn-out Payments." (SPA § 1.4(d)); *see CAE Indus. Ltd. v. Aerospace Holdings Co.*, 741 F. Supp. 388, 392 (S.D.N.Y. 1989) (holding an arbitration clause requiring "'any objections Buyer may have to any of the matters set forth' in the Closing Date Balance Sheet 'be submitted to an independent accounting firm' is narrow in scope").

Because the clause is narrow, "the court must determine whether the dispute is over an issue that 'is on its face within the purview of the clause.'" *Louis Dreyfus Negoce S.A.*, 252 F.3d at 224 (quoting *Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979)). "Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview." *Id.*

B. Plaintiffs' claims do not fall within the scope of the Accountant Clause

Plaintiffs are not challenging the *calculation* of any Earn-out Payment. Instead, Plaintiffs have pled damages caused by DCC's breach of the covenants contained in SPA §§ 1.4(f)(i), (iv), and (v). (Compl. ¶ 165). Specifically, DCC failed to refer and diverted revenue opportunities. (Compl. ¶¶ 80, 83, 87, 89). It sought to enforce a non-binding MOU. (Compl. ¶¶ 121-23). And it required Plaintiffs to return PPP funds. (Compl. ¶¶ 130-

32). None of these breaches are based on an improper *calculation* or a challenge to any accounting technique. They require legal rulings from this Court, not an accountant.

Nor are Plaintiffs' other claims rooted in calculation errors. Plaintiffs allege that DCC breached the covenant of good faith and fair dealing by exercising its discretion to deprive sellers the benefit of their bargain, (*Id.* ¶ 172), that DCC breached a separate promise regarding the liquidation of aged inventory, (*Id.* ¶¶ 177, 182, 187), and that Exertis is liable for damages as guarantor. (*Id.* ¶ 211). Plaintiffs also seek a declaratory judgment regarding the MOU and reformation of the SPA to account for the COVID Quarter. (*Id.* ¶¶ 198, 206). DCC attempts to manufacture an arbitrable dispute by pointing to background information regarding the course of the parties dealings, but the Complaint expressly states that Plaintiffs are not pursuing any claims based on those calculation issues. (Compl. ¶¶ 64-66).

Numerous Courts of Appeal, including the Second Circuit, have held that similar clauses relate only to accounting disputes and do not extend generally to breach of contract claims. In *XL Cap., Ltd. v. Kronenberg*, 145 F. App'x 384 (2d Cir. 2005), the Second Circuit considered a provision much broader than that contained in the SPA, referring to an accounting firm "all questions, issues or disputes arising under this Agreement with respect to the calculations of the . . . Earned Payout Amount." *Id.* at 385 (ellipses in original). The court nonetheless held the clause applied only to "pure accounting issues." *Id.* It explained "the fact that the chosen arbitrator is an accounting firm verifies the import of the plain language: that the scope of the clause is limited to those issues closely related to accounting." *Id.* Breach of contract claims were not arbitrable because "the operative acts giving rise to the claimed cause of action are not the calculation errors themselves." *Id.*

In *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004), the court considered another purchase agreement that set forth a procedure similar to that found in the SPA. *Id.* at 8. The First Circuit explained:

> In context, it therefore makes most sense to read "any disagreements" as referring to disagreements about *accounting* issues arising in the calculations that underpin the schedules.
>
> Conversely, it makes no sense to assume that accountants would be entrusted with evaluating disputes about the operation of the business in question. Yes, operational misconduct may well affect the level of earnings and therefore the schedules, but the misconduct itself would not be a breach of proper accounting standards. Nor would one expect accountants to have special competence in deciding whether business misconduct unrelated to accounting conventions was a breach of contract or any implied duty of fair dealing.

Id. (emphasis in original).

The Sixth Circuit reached the same conclusion in *Smith v. Altisource Sols.*, 726 F. App'x 384 (6th Cir. 2018), holding that "a plain reading of the [agreement] shows that the parties agreed to arbitrate only disputes over the *calculation* of the Earn-out Payments; they did not agree to arbitrate *all* disputes between the parties that might somehow affect [seller]'s entitlement to Earn-out Payments." *Id.* at 391-92. The Ninth Circuit has also held that a similar "Section 1.4(d)" did not extend to breach of contract claims because "[t]here is no evidence that the parties intended for Section 1.4(d) to govern disputes concerning damages resulting from a breach of contract. Instead this section of the Agreement only governs one limited situation" concerning "calculation of the proposed earnout amount." *Orrico v. Alliant Foodservice, Inc.*, 119 F. App'x 899, 902 (9th Cir. 2004).

Perhaps the case most factually analogous to this action is *BBCM, Inc. v. Health Sys. Int'l, LLC*, 2010 WL 4607917 (N.D. Iowa Nov. 4, 2010), *report and recommendation adopted*, 2010 WL 5418892 (N.D. Iowa Dec. 23, 2010). It also concerned a purchase agreement that

included a procedure by which disputes concerning the "EBITDA calculation for a given year will be resolved by accountants." *Id.* at *2. The seller alleged the buyer breached the purchase agreement by "imposing changes to the business resulting in lost revenue, entering into financially disadvantageous contracts, and diverting business revenues to another company controlled by [buyer]." *Id.* at *4. The court rejected a motion to compel arbitration, explaining that it "ignores the fact that [seller] is not contesting the 'calculation' of the earnout amount. Rather, [seller] specifically asserts in its complaint that [buyer] has breached those covenants and agreements found" elsewhere in the contract. *Id.* at *6.

The *BBCM* decision relied on a long line of cases endorsing the common-sense proposition that clauses referring calculation disputes to independent accountants are most naturally read as applying only to disputes regarding accounting techniques. *Id.* (collecting cases); *see also Powderly v. MetraByte Corp.*, 866 F. Supp. 39, 43 (D. Mass. 1994) (when "allegations challenge the defendants' business practices regarding [the target company], and not the integrity of the accounting techniques used to calculate the Net Operating Profit, the defendants' motion to compel arbitration will be denied"); *T.R. McClure & Co. Liquidating Tr. v. TMG Acquisition Co.*, 1999 WL 692683, at *5 (E.D. Pa. Sept. 7, 1999) (clause "specifies that only objections pertaining to 'the determination of the amount' (and not the conduct that underlies the mathematical determination) of the earn-out payments are subject to arbitration"); *Hebbronville Lone Star Rentals, LLC v. Sunbelt Rentals Indus. Servs.*, 2017 WL 1026019, at *8 (W.D. Tex. Mar. 15, 2017), *report and recommendation adopted,* 2017 WL 3634190 (W.D. Tex. June 27, 2017) ("[T]he fact that they contracted for an accountant to be the arbitrator is consistent with [seller]'s position that the only issues reserved for

arbitration were accounting issues, not legal ones. Numerous courts have relied on this very same aspect of an arbitration agreement to reach the same conclusion.").[1]

DCC cites a handful of outlier decisions, which are both inapposite and unpersuasive. In *USG Companies, Inc. v. Advantage Sales & Mktg. LLC*, 2018 WL 3117545 (D. Del. June 25, 2018), the clause at issues applied to "any disagreement with respect to the calculation of Revenue for the Measurement Period," which it described as "broad and inclusive language." *Id.* at *8. Notably, the court relied on cases with even broader clauses. *Id.* (citing *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 391 (6th Cir. 2008) (clause "covers not only disputes over [buyer]'s EBITDA calculation, but also 'all issues having a bearing on such dispute'")).[2] DCC mischaracterizes the Accountant Clause as applying to "any dispute over the Year 2 or 3 Earn-out Payments," (Dkt. 9 at 12), but the SPA contains no such language. It refers only to "the calculation of the Earn-out Payments." (SPA § 1.4(d)). The Accountant Clause contains no broadening language such as "with respect to."

Other cases cited by DCC are even further afield. In *TMIP Participants LLC v. DSW Grp. Holdings LLC*, 2016 WL 490257 (Del. Ch. Feb. 4, 2016), there was no dispute that the plaintiff's claim "concern[ed] a substantive accounting issue." *Id.* at *11. The parties merely disagreed as to whether participants had "observed the necessary time limits to dispute the calculations," which was an issue for the arbitrator. *Id.* In *Viacom Int'l, Inc. v.*

---

[1] The plain language reading of the Accountant Clause is further supported by the process set forth in the SPA. It states that the Independent Accountants may consider only the parties' "work papers, schedules and other documents and information relating to the unresolved disputed items set forth in the Earn-out Statement and the Earn-out Notice." (SPA § 1.4(d)). Such a clause "supports the conclusion that the parties intended the arbitrators to resolve statistical disputes, since work papers and trial balances could hardly provide a basis for a determination regarding the reasonableness of [buyer]'s decisions about the entities through which it would conduct its business." *Blutt v. Integrated Health Servs., Inc.*, 1996 WL 389292, at *3 (S.D.N.Y. July 11, 1996).

[2] The same clause was at issue in another case cited by DCC, *Advantage Sales & Mktg. LLC v. USG Companies, Inc.*, 2016 WL 2588163, at *1 (D. Del. May 4, 2016).

Winshall, 72 A.3d 78 (Del. 2013), the issue was whether an arbitrator should have "include[d] an inventory write-down to reflect the diminished value of unsold goods," which is plainly an accounting question. *Id.* at 81. The arbitrator did not address that issue because it was not listed in an Earn-Out Statement, and the court held that "was an issue of procedural arbitrability, properly decided by the arbitrator." *Id.* at 83. DCC quotes a sentence from that decision out of context. When the court referred to "issues as to what financial or other information should be considered," it was discussing "questions about how the subject of the arbitration should be decided." *Id.* at 83-84.[3] The court considered whether an arbitrator correctly decided an accounting question under the procedures set forth in a contract, not whether non-accounting questions were subject to arbitration.

Plaintiffs allege breach of specific covenants of the SPA, the duty of good faith and fair dealing, and a separate promise regarding the sale of certain inventory, resulting in damages. When faced with similar claims, Delaware Courts have followed the well-settled precedent described above. As the court explained in *Sheth v. Harland Fin. Sols., Inc.*, 2014 WL 4783017 (Del. Super. Ct. Aug. 28, 2014), "Plaintiffs do not now nor have they ever disputed the calculations or items set forth in the Earn-Out statement. This litigation is a dispute over the alleged conduct of Defendant to purposely avoid making the Earn-Out payments. That dispute is correctly before the Court, not an accountant." *Id.* at *4.

The same is true here. The Accountant Clause does not apply because "the operative acts giving rise to the claimed cause of action are not the calculation errors themselves." *XL Cap., Ltd.*, 145 F. App'x at 385. Even if "operational misconduct may well

---

[3] This sentence appears to have been misconstrued by the court in *Sapp v. Indus. Action Servs., LLC*, 2020 WL 2813176, at *4 (D. Del. May 29, 2020). The *Sapp* decision also relied on the decisions in *Advantage Sales* and *USG* without noting the broadening language contained in the clause at issue in those cases.

affect the level of earnings . . . the misconduct itself would not be a breach of proper accounting standards." *Fit Tech, Inc.*, 374 F.3d at 8. The parties in this case "did not agree to arbitrate *all* disputes between the parties that might somehow affect [seller]'s entitlement to Earn-out Payments." *Smith*, 726 F. App'x at 391-92. DCC's efforts to evade responsibility for its misconduct should not be countenanced.

C. The Year One accounting dispute has no impact on the present claims

Because the claims advanced in this action are not, and were not, arbitrable, the Year One accounting dispute has no preclusive effect under either of DCC's creative theories. Dismissal on the basis of claim preclusion is permissible only if "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir. 2000). The party asserting claim preclusion must show that "the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000).

The claims advanced in the Complaint were not raised, and could not have been raised, in the Year One proceedings before the Independent Accountants. As described above, none of the claims in this case concern accounting disputes. Indeed, DCC concedes that the claim preclusion can apply only if claims "involve the *calculation* of the Year 1 Earn-out and could have been raised in the Arbitration." (Dkt. 9, at 9 (emphasis added)). As the Supreme court explained in the same context: "Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). Plaintiffs

did not agree to arbitrate non-accounting disputes, and thus the Independent Accountants could not have resolved the claims advanced in the Complaint.

Further, all of Plaintiffs' claims involve misconduct that post-dates the Year One Earn-out Period.[4] DCC's diversion of revenue opportunities continued throughout the Year Two and Year Three Earn-out Periods. (Compl. ¶¶ 78-89). The MOU is dated November 15, 2019 and negotiations regarding a binding agreement continued through June 2021. (Compl. ¶ 111; Dkt. 10-5, at 2). DCC's unreasonable actions regarding PPP funds and treatment of the COVID Quarter occurred in 2020. (Compl. ¶¶ 127, 130, 141). And DCC's promise regarding liquidation of inventory occurred in January 2021. (Compl. ¶ 145).

DCC's issue preclusion argument is even less sound. Issue preclusion applies only to "an issue that was raised, litigated, and actually decided." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 48 (2d Cir. 2003) "'[T]he party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment,' and '[i]ssue preclusion will apply only if it is quite clear that this requirement has been met.'" *Id.* at 49 (quoting *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997)).

This case does not involve any issues that were decided by the Independent Accountants. The Independent Accountants were tasked with deciding a limited universe of accounting disputes contained in the Year One Earn-out Statement and the Year One Earn-out Notice. (*See* Dkt. 10-4, at 1-2).[5] Plaintiffs are not challenging those determinations, as they expressly state in the Complaint. (Compl. ¶¶ 64, 66).

---

[4] The Year One Earn-out Period ended on June 30, 2019. (SPA, at 9).

[5] In considering a motion to dismiss, the Court may not consider a document outside the Complaint unless it is referenced in and "integral" to the Complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Although the SPA and MOU qualify under this standard, none of the remaining documents submitted with the motion to dismiss may be considered because they are not integral to the Complaint. "[A] plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's

D. The Court should stay any action by the Independent Accountants

DCC asserts that all of Plaintiffs' claims must be submitted to arbitration and that the Independent Accountants' prior decision has preclusive effect. These assertions demonstrate that DCC intends to use any proceeding before the Independent Accountants as a means of usurping this Court's authority to decide non-arbitrable claims. Should proceedings before the Independent Accountants be initiated, DCC will undoubtedly use that forum to improperly encroach upon this Court's jurisdiction.

When parties "have not consented to arbitrate a claim, the district court [i]s not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right." *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 141 (2d Cir. 2011). Federal courts thus possess the "authority to order the cessation of an arbitration by parties within its jurisdiction where such authority appears necessary in order for a court to enforce the terms of the parties' own agreement." *Id.*

Because the claims advanced in the Complaint are not accounting disputes, DCC should be prohibited from attempting to arbitrate them. Further, because DCC will use the Independent Accountants to impinge upon Plaintiffs' rights, DCC should be barred from initiating any such proceedings. Allowing "claims to proceed to arbitration while [a legal claim] remains pending in this court puts the plaintiffs at significant risk of multiple judgments that may be inconsistent with the ultimate decision in this case." *Liberty Mut. Ins. Co. v. Excel Imaging, P.C.*, 879 F. Supp. 2d 243, 264 (E.D.N.Y. 2012).

---

consideration of the document on a dismissal motion; mere notice or possession is not enough." *Id.* Plaintiffs did not rely on any of the documents related to the Year One Independent Accountants proceeding in drafting the Complaint. Accordingly, Dkt. 10-2, 10-3, and 10-4 are not properly considered at this stage of the litigation. To the extent that the Court does consider them, however, Plaintiffs note that they do not provide any support for issue or claim preclusion.

"There is no doubt that staying all pending and future arbitrations is the most economic result." *Allstate Ins. Co. v. Elzanaty*, 929 F. Supp. 2d 199, 217 (E.D.N.Y. 2013); *see also Gov't Emps. Ins. Co. v. Cean*, 2019 WL 6253804, at *4 (E.D.N.Y. Nov. 22, 2019). And the threat of "irreparable harm is not solely the existence of a piecemeal resolution" but "wasting time and resources in an arbitration with awards that might eventually be, at best, inconsistent with this Court's ruling, and at worst, essentially ineffective." *Elzanaty*, 929 F. Supp. 2d at 222. DCC will not suffer any adverse effects through an orderly disposition of this case prior to resolution of accounting disputes before the Independent Accountants. Plaintiffs thus request that any proceedings before the Independent Accountants be stayed.

POINT II

PLAINTIFFS HAVE STATED VALID CLAIMS

A complaint need only provide allegations sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court is required to liberally construe the Complaint, accepting as true all factual allegations and drawing all reasonable inferences in the plaintiffs' favor. *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

A. Plaintiffs have pled a valid claim for breach of the SPA

DCC's arguments regarding Plaintiffs' breach of SPA claim simply urge this Court to reject the Complaint's well-pled factual allegations in contravention of the federal law. Delaware courts frequently reject motions to dismiss under similar circumstances. *See, e.g.*, *S'holder Representative Servs. LLC v. Albertsons Companies, Inc.*, 2021 WL 2311455, at *8 (Del. Ch. June 7, 2021) (denying motion to dismiss "[b]ecause Plaintiff's well-pled allegations make it at least reasonably conceivable that [defendant] acted with the intent to avoid or

reduce the Earnout"); *Windy City Invs. Holdings, LLC v. Tchrs. Ins. & Annuity Ass'n of Am.*, 2019 WL 2339932, at *10 (Del. Ch. May 31, 2019) (denying motion to dismiss because "[t]he Complaint pled that [defendant] conceivably took each of the actions at issue in Count IV with an intent to depress the Earn-Out amount").

First, DCC fails to advance any argument regarding Plaintiffs' claim that DCC breached the SPA by attempting to enforce the MOU. (*See* Compl. ¶¶ 120-23). Accordingly, any such argument is waived. *See Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 69 (2d Cir. 2018). In any event, Plaintiffs have properly alleged that DCC's efforts to enforce the non-binding MOU is a violation of the SPA. (Compl. ¶¶ 120-23). And as described in greater detail in Section II.B, *infra*, the MOU is not enforceable.

Second, the Complaint alleges that DCC breached SPA § 1.4(f)(v) by failing to refer and diverting revenue opportunities. (Compl. ¶¶ 74-90). The Complaint identifies specific instances of such misconduct, including the acquisition and operation of three companies, (*id.* ¶¶ 76, 80, 83), provision of distribution services for Pro AV business through a DCC division, (*id.* ¶¶ 84-87), and use of other affiliates to sell Pro AV products in North America, (*id.* ¶¶ 89-90). DCC's sole substantive argument regarding the diversion claim concerns SPA § 1.4(g), which does not apply. That clause governs the treatment of debt and revenues for an "entity or business acquired by the Earn-Out Group." (SPA § 1.4(g)).[6] It states that an acquisition "by the Earn-Out Group" will be excluded from certain calculations if it exceeds $1 million and occurs "without the prior consent of the Seller Representative." (*Id.*). Nothing in Plaintiffs' diversion claim concerns any acquisition "by the Earn-Out

---

[6] The "Earn-Out Group" is a defined term in the SPA referring to four specific Stampede entities. (Compl. ¶ 31, n.2 (citing SPA at 7, 66)).

Group." (*Id.*). The Complaint specifically states that the acquisitions occurred "through entities that are not members of the Earn-Out Group." (*Id.* ¶¶ 80, 83). The plain text of SPA § 1.4(g) demonstrates that it is irrelevant. DCC's remaining arguments simply ignore the Complaint's allegations that DCC violated SPA § 1.4(f)(v). (Compl. ¶¶ 80, 83, 88, 90).

Third, the Complaint alleges that DCC violated SPA §§ 1.4(f)(i) and (iv) by insisting Stampede return PPP funds and refusing to address the COVID Quarter's impact on the Earn-out Payment. (Compl. ¶¶ 124-41). DCC makes no argument regarding the latter breach. As to the former, DCC simply asserts that the allegations in the Complaint should be rejected, which is of course impermissible. The Complaint alleges that DCC forced Stampede to return the funds for the purpose of reducing the Earn-out Payments. (Compl. ¶ 132). The federal rules permit state of mind to be pleaded generally. *See Stern v. Leucadia Nat. Corp.*, 844 F.2d 997, 1004 (2d Cir. 1988) (citing Fed. R. Civ. P. 9(b)). Further without the PPP funds, the COVID Quarter had a disproportionate effect on total payments, providing a motive for DCC's misconduct. (*Id.* ¶ 133).[7]

B. The MOU is unenforceable by its own terms

Whether a document is a binding contract "is a question of intention to be inferred from the evidence. Where the evidence is conflicting and two inferences are possible, as here, the question is for the jury." *Chrysler Corp. v. Quimby*, 144 A.2d 123, 132, *adhered to on reh;g*, 144 A.2d 885 (1958). "[C]ourts look to all of the surrounding circumstances, including the course and substance of the negotiations, prior dealings between the parties, customary practices in the trade or business involved and the formality and completeness of

[7] DCC is correct that Plaintiffs do not allege a breach "[b]ased on [a]ccounting [m]ethodolgy" or "in calculating the Earn-out Payments." (Dkt. 9, at 15). As explained above, the claims alleged in the Complaint do not involve accounting methods or calculations. DCC's extensive efforts to blur the distinction between arbitrable accounting disputes and non-arbitrable breach of contract claims, should be rejected.

the document (if there is a document) that is asserted as culminating and concluding the negotiations." *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1102 (Del. Ch. 1986). "Agreements made along the way to a completed negotiation, even when reduced to writing, must necessarily be treated as provisional and tentative. Negotiation of complex, multi-faceted commercial transactions could hardly proceed in any other way." *Id.* Delaware law "prevents the enforcement of the term sheet as a contract if it is subject to future negotiations because it is, by definition, a mere agreement to agree." *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *14 (Del. Ch. Jan. 24, 2005).

The MOU sets forth a set of "*proposed* terms" rather than a list of binding commitments. (Compl. ¶ 101 (emphasis added)). It expressly states that it is "SUBJECT TO CONTRACT" and would, after additional negotiations, be "put into legal form and executed by the parties." (*Id.* ¶¶ 100, 103). The parties continued to negotiate a proposed amendment to the SPA through June 2021. (*Id.* ¶ 111). However, "the parties were not able to reach mutually acceptable terms regarding the Furrion transaction and never amended the SPA accordingly." (*Id.* ¶ 104). Numerous essential terms of the proposed amendment remained in dispute, including "a 3% reserve for aged inventory, the treatment of goods received but not invoiced in financial statements, a late payment clause, specific treatment for different forms of termination of the Furrion contract, and treatment of any withholding if a new Furrion contract were formed." (*Id.* ¶ 105).

These facts establish that the MOU was never intended to be a binding contract. When a document "anticipate[s] a subsequent formal agreement," and "was expressly 'subject to the Buyer and Seller entering into a mutually acceptable lease,'" no contract is formed. *Pantzer v. Shields Dev. Co.*, 660 F. Supp. 56, 59-60 (D. Del. 1986). As the Delaware

Supreme Court has explained, language that "[t]his is an agreement in principle, subject to final negotiations" is sufficient to "clearly indicate[] that the document was not intended to be a contract." *Sussex Equip. Co. v. Burke Equip. Co.*, 860 A.2d 812 (Del. 2004) (table).

Although it acknowledges that Delaware law applies, DCC cites a New York case in which the court held that a document including "subject to" language "did not conclusively contradict the pleading, and it was thus premature to dismiss the contract claim." *Emigrant Bank v. UBS Real Est. Sec., Inc.*, 49 A.D.3d 382, 383 (1st Dep't 2008). This case clearly does not suggest "subject to" language requires dismissal. And even if *Emigrant Bank* were not contrary to Delaware case law, a subsequent New York case explained, "there is an extremely long line of decisions in both the state courts and the Federal courts that have relied on such 'subject to' language as clearly indicating that parties have reserved a right not to be bound in the absence of a fully negotiated and executed written contract." *In re Westinghouse Elec. Co. LLC*, 588 B.R. 347, 367 (Bankr. S.D.N.Y. 2018) (collecting cases).[8]

DCC also asserts that the MOU is a "Type I agreement" under New York law, in which "the parties agree on all the points that require negotiation." (Dkt 9, at 22 (quoting *SIGA Techs., Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 349 n.82 (Del. 2013)). This assertion is flatly inconsistent with the Complaint's factual allegations. The parties continued to negotiate long after the date of the MOU and were unable to reach an agreement on a number of essential terms identified in the Complaint. (Compl. ¶¶ 104-05, 111). "[T]here can be no contract when an essential term is missing." *Intellisource Grp., Inc. v. Williams*,

[8] The *Emigrant Bank* court also expressly distinguished another decision finding no contract where "the intent of the parties not to be bound was further manifest from references to a 'proposed' commitment and a 'proposed' transaction." *Id.* (quoting *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213, 213 (1st Dep't 2005)). The very same "proposed" language appears prominently in the MOU. (Compl. ¶ 101).

1999 WL 615114, at *4 (D. Del. Aug. 11, 1999). "The question of what is an essential term is often a question of fact involving a determination of each party's intent to be bound, and thus must frequently be decided by a jury." *Pantzer*, 660 F. Supp. at 59-60. The MOU did not include all essential terms, but merely "proposed terms." (Compl. ¶ 101).

DCC also contends that there was partial performance but this is incorrect. At the time of the MOU, the parties forecasted that the Furrion product line would require the ongoing use of more than $50 million in working capital. (Compl. ¶ 119). That investment level never materialized. Instead, less than $15 million in working capital was required, a substantially different investment level than the one anticipated in the MOU. (*Id.*). Neither party performed the transaction contemplated in the MOU. Finally, despite DCC's attempts to minimize the underlying transaction, the MOU concerned a deal that resulted in more than $237 million in revenue and for which DCC is attempting to wrongfully withhold approximately $3 million. (Compl. ¶¶ 116, 120-21). That is hardly the type of transaction that would normally be consummated in a one-page memorandum setting forth "proposed terms" and expressly made "SUBJECT TO CONTRACT." (Compl. ¶¶ 100-01).

C. DCC breached the implied covenant of good faith and fair dealing

The implied covenant of good faith and fair dealing prohibits a party from "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). Accordingly, when a contract grants one party discretion, that party "is obliged to exercise that discretion in a *reasonable* manner." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993). "Reasonableness is a question of fact to be determined by the finder of fact." *Id.*

DCC wrongly contends that it is excused from its obligation to act in good faith by the SPA's indemnification provisions. Under the SPA, Plaintiffs may recover "any and all Losses" that are "based upon, arising out of, with respect to or by reason of . . . any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Buyer pursuant to this Agreement." (SPA § 8.4(b)). DCC points to a separate clause stating that the parties "may not avoid such limitation on liability by . . . seeking damages for breach of contract, tort or pursuant to any other theory of liability." (SPA § 8.12). But Delaware courts have held that a similar clause "is sufficiently broad to cover a contractual claim for a breach of the implied duty of good faith and fair dealing." *Gloucester Holding Corp. v. U.S. Tape & Sticky Prod., LLC*, 832 A.2d 116, 129 (Del. Ch. 2003).

As the court explained in *Gloucester*, "[a]lthough sometimes couched as a duty, this obligation is actually contractual in nature." *Id.* at 128. A claim for breach of the implied covenant is accordingly one seeking recovery for losses from the breach of a "covenant, agreement or obligation to be performed by" DCC. (SPA § 8.4). The single case cited by DCC, *JCM Innovation Corp. v. FL Acquisition Holdings, Inc.*, 2016 WL 5793192 (Del. Super. Ct. Sept. 30, 2016), contains no analysis indicating whether such recovery was permitted.[9]

DCC had discretion in operational decisions with regard to Stampede, but the SPA required it to "act in good faith in continuing to operate the Earn-out Group in the ordinary course consistent with past practice (but subject to the DCC Conduct of Business guidelines) with the goal of maximizing profits consistent with the medium-term development of

[9] DCC makes a conclusory argument, in a footnote, that other claims should also be dismissed based on the indemnification provisions. As explained in Section II.E, *infra*, the claims regarding the inventory reserve are pled in the alternative. Accordingly, DCC's own authorities hold that the indemnification provisions do no bar these claims. *See JCM Innovation Corp.*, 2016 WL 5793192, at *7 ("Logically, the Court cannot, at this stage in the proceedings, use a provision of the Agreement to dismiss [plaintiff]'s unjust enrichment claim that must rely on the theory there is no valid Agreement.").

Stampede." (Compl. ¶ 35 (quoting SPA § 1.4(f)(i)). DCC breached the implied covenant by making operational decisions that were intended to benefit DCC and its executives at the expense of Plaintiffs. (*See, e.g.*, *Id.* ¶¶ 57, 60, 69, 76-78, 85, 89, 109-10, 113-15, 132, 139-40, 149, 151-53). Finally, Delaware law permits an implied covenant claim to proceed "notwithstanding contractual language on point, [if] the defendant failed to uphold the plaintiff's reasonable expectations under that provision." *Renco Grp., Inc. v. MacAndrews AMG Holdings LLC*, 2015 WL 394011, at *6 (Del. Ch. Jan. 29, 2015).[10]

D. DCC breached a separate promise to waive an inventory reserve

The Complaint explains that DCC promised to waive its right to a 3% inventory reserve if Plaintiffs would liquidate certain aged inventory. (Compl. ¶¶ 142-43, 145-47). Plaintiffs performed their end of the bargain, resulting in a $4.2 million loss. (*Id.* ¶ 147). DCC then refused to meet its obligations. (*Id.* ¶ 148). To excuse this breach, DCC points to SPA § 9.8, which requires waivers of SPA rights to be in writing. But "it is settled law that contract provisions deeming oral modifications unenforceable can be waived orally or by a course of conduct just like any other contractual provision." *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1229 (Del. Ch. 2000); *see also Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972). This type of "waiver is a fact-intensive inquiry and Delaware courts have been reluctant to decide waiver on the pleadings." *CPC Mikawaya Holdings, LLC v. MyMo Intermediate, Inc.*, 2022 WL 2348080, at *13 (Del. Ch. June 29, 2022).

---

[10] DCC also asserts that an implied covenant claim requires an allegation of fraud, deceit or misrepresentation, citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 101 (Del. 1992). That standard applies only in the employment context, not "to a breach of implied covenant claim arising in the context of a commercial contract dispute." *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1202 (10th Cir. 2004) (applying Delaware law); *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 356 (7th Cir. 2015) (same).

E. Plaintiffs have pled valid alternative claims regarding the inventory reserve

Claims for unjust enrichment and promissory estoppel may be pled in the alternative to a contract claim. *See Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1031 (Del. 2003) (promissory estoppel); *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2018 WL 1559936, at *17 (Del. Ch. Mar. 28, 2018) (unjust enrichment). The Complaint alleges that DCC made a promise to forgo its right to impose an inventory reserve if Plaintiffs liquidated aged inventory, and that Plaintiffs relied on that promise to DCC's benefit and suffered an attendant loss. (Compl. ¶¶ 182-85, 188-93). If DCC's promise were not an enforceable contract, these allegations satisfy the elements of promissory estoppel and unjust enrichment. *See Chrysler Corp. (Delaware)*, 822 A.2d at 1032 (promissory estoppel); *Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 341 (Del. Ch. 2022) (unjust enrichment).

These claims are not barred by the SPA. "[C]ontracts governing other aspects of the business relationship are of no consequence" when the promise at issue was "in addition to the existing relationship." *Chrysler Corp. (Delaware)*, 822 A.2d at 1034 (Del. 2003). Nor does the written waiver provision apply because "such agreements do not have the unfettered power in all circumstances to supersede the doctrines of waiver and estoppel." *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *28 (Del. Ch. Apr. 2, 2007); *see also Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 WL 3575709, at *52 (Del. Ch. Aug. 13, 2021).

F. Plaintiffs have stated a valid claim for reformation under Delaware law

DCC cites New York cases for the proposition that mutually mistaken expectations are insufficient to support a reformation claim. But Delaware law recognizes that reformation "amends or rewrites the instrument in accordance with its interpretation of the parties' expectations at the time the contract was made." *Catamaran Acquisition Corp. v.*

Spherion Corp., 2001 WL 755387, at *5 (Del. Super. Ct. May 31, 2001). The Complaint alleges that Plaintiffs and DCC had the mutual understanding that Earn-out Payments would be based on twelve business quarters as a basic assumption of the SPA, and that Plaintiffs were denied the benefit of the bargain by receiving in effect fewer than twelve quarters. (Compl. ¶¶ 200-02). Because of this mutual mistake, the SPA led to absurd results, including negative figures under which Plaintiffs would be paying DCC to buy their company. (Compl. ¶¶ 136, 203). To avoid this absurdity, reformation is warranted.

G. The Complaint provides the notice to Exertis required under the SPA

Exertis contends that the Complaint is insufficient notice under SPA § 9.13(a). The sole case cited by Exertis did not involve notice to a guarantor, but a notice of default in an agreement that included a cure period. *See Medspan Shipping Serv., Ltd. v. Prudential Lines, Inc.*, 541 F. Supp. 1076, 1079 (E.D. Pa. 1982). The SPA provides for no such cure period. Instead, the SPA provides for an "absolute guarantee," and states that Plaintiffs may "enforce the obligations of Parent Guarantor" without having to first "institute suit or exhaust its remedies against Buyer." (SPA § 9.13(a)). In any event, lack of notice to even a conditional guarantor does not excuse performance; it merely permits the gurantor to argue for a reduction of liability if it can prove prejudice. *Gaylords, Inc. v. Tollin*, 1984 WL 547850, at *3 (Del. Super. Ct. Jan. 31, 1984).[11] There is no prejudice here.

CONCLUSION

Plaintiffs request that Defendants' motion to dismiss be denied. Plaintiffs further request that any action by the Independent Accountants be stayed.

[11] Exertis also asserts that it is not liable on its guarantee because the underlying claims against DCC are insufficiently pled. That assertion fails for the reasons set forth above.

Dated: Buffalo, New York
September 30, 2022

PHILLIPS LYTLE LLP

By: /s/ Joshua Glasgow
David J. McNamara
Joshua Glasgow
Attorneys for Plaintiffs
Kevin Kelly and Mark Wilkins
One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No. (716) 847-8400
dmcnamara@phillipslytle.com
jglasgow@phillipslytle.com

Doc #10662155