IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

KEVIN KELLY and MARK WILKINS Plaintiffs, v. DCC TECHNOLOGY HOLDINGS, INC. and EXERTIS (UK) LIMITED Defendants.	x : : : : : : : : : : : x	Case No. 1:22-cv-00518-WMS

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS OR TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Plaintiffs' Opposition turns the Stock Purchase Agreement, ECF 10-1 ("SPA"), on its head and ignores its plain and unambiguous terms requiring all of Plaintiffs' claims to be submitted to the Independent Accountants for arbitration. The bottom line is that the Motion to Dismiss ("Motion") boils down to the question: whether the dispute resolution provision in Section 1.4 of the SPA ("Earn-out Payments") covers the alleged breaches of the SPA asserted in the Complaint. The answer is unequivocally "yes." Section 1.4(d) states expressly that "all unresolved disputed items shall be promptly referred to the Independent Accountants . . .", and that "the Independent Accountants shall act as an *arbitrator* . . . ." Thus, it is crystal clear that the parties intended the Independent Accountants to have authority over all disputed items, not only those related to the "calculation" of the Earn-out Payments, as Plaintiffs would have the Court believe.

Plaintiffs conjure an outdated and incorrect legal paradigm in order to avoid the effect of the SPA, and selectively cite to a litany of inapposite cases in an effort to confuse the Court. Moreover, Plaintiffs' current arguments are disingenuous given that all disputes related to the Year 1 Earn-out were referred to and decided by the Independent Accountants, including disputed issues outside of pure calculation issues. It is telling that, in connection with the Year 1 Arbitration, Plaintiffs did not object to the findings of the Independent Accountants on the basis that the Independent Accountants lacked the authority to address those non-calculation issues. Now, in clear dissatisfaction with the result of the Year 1 Arbitration, Plaintiffs want a different forum to re-litigate some, if not all, of the same claims. This type of forum shopping is improper.

Thus, before the Court were to rule on the arbitrability point, the Court should dismiss all claims litigated in the Year 1 Arbitration based on the doctrines of collateral estoppel and *res judicata*. And, all remaining claims should be submitted to the Independent Accountants pursuant

to Section 1.4(d) of the SPA. Lastly, however, even if the Court were to exercise jurisdiction over the claims asserted in the Complaint, which in and of itself would run contrary to the Federal Arbitration Act and Delaware law, the Complaint should nevertheless be dismissed because it fails to state a claim under Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. Plaintiffs Ignore The Plain And Unambiguous Language Of The SPA Requiring That "All" Disputed Items Regarding the Earn-out Payments Shall Be Determined By The Independent Accountants.

A. *Plaintiffs Wholly Ignore Language in the SPA Providing that the Independent Accountants Shall Act as Arbitrator.*

Plaintiffs inexplicably fail to mention that the SPA provides expressly that (1) "all unresolved disputed items shall be promptly referred to the Independent Accountants;" and (2) the Independent Accountants "shall act as an arbitrator" in making determinations relating to the Earn-out Payments. SPA § 1.4(d). The entire basis of Plaintiffs' Opposition to Defendants' Motion to Dismiss, ECF 16 ("Opp."), falls apart for this reason.

Plaintiffs seek to avoid this clear and unmistakable language by foisting the fiction that the Independent Accountants' authority under the SPA extends only to "the calculation of the Earn-out Payments." Opp. at 11. This inappropriate parsing runs directly counter to the express terms and structure of the SPA. Indeed, the SPA permits Buyer to object to the Earn-out Statement provided by Seller, and to include in an Earn-out Notice "*any* such objections." SPA § 1.4(d) (emphasis added). Such "broad and unqualified language . . . means what it says and encompasses "any"— or at a minimum, virtually "any dispute." *Alstom v. Gen. Elec. Co.*, 228 F. Supp. 3d 244, 251 (S.D.N.Y. 2017). Similarly, if Buyer and Seller cannot agree to resolve their disputes within 20 days, the SPA directs that the parties "*shall*" promptly refer "*all* unresolved disputed items" to the Independent Accountants. *Id.* (Emphasis added). The plain language of the SPA thus

demonstrates that it was designed to encompass *any* dispute related to the Earn-out; it is simply inaccurate for Plaintiffs to call such language "narrow."[1] Opp. at 1, 5, 7. Moreover, the SPA grants the Independent Accountants authority to decide the "resolution of the dispute *and* the calculation of the Earn-out Payments," *id*. (emphasis added), demonstrating that the resolution of the dispute and the calculation are not one in the same.

The SPA's structure offers yet further support belying Plaintiffs misconstruction of the SPA. *Both* sections 1.4(d) and 1.4(f) are *subparts* of Section 1.4 – covering all aspects of the Earn-out Payments and all disputes concerning them. The parties unambiguously intended the Earn-out Payments dispute resolution provisions in that overarching section. Notably, Section 1.3 contains a separate and substantially different dispute resolution provision with respect to the Closing Payment which submits to the Independent Accountants only "*amounts* remaining in dispute," specifically defined as "Disputed Amounts" by the SPA. The parties' choice to include *two* separate dispute resolution provisions, and to refer to the arbitrator "all unresolved disputed items" in Section 1.4(d) rather than just "Disputed Amounts" must be given meaning. *See Sapp v. Industrial Action Services, LLC*, CA No. 19-912-RGA, 2020 U.S. Dist. LEXIS 94066, *8 (D. Del. May 29, 2020) (finding that decision not to capitalize "notice of disagreement" in one section where it was capitalized in another indicated that the parties did not intend the former reference to be limited in terms of the disputes the notice could raise).

B. *Delaware Law Decides Issues In Favor of Arbitration.*

Plaintiffs ignore ample precedent of the United States Supreme Court which has repeatedly held that "state contract law regarding the scope of agreements" applies in cases governed by the

[1] Defendants' contention that the Court cannot consider the award in deciding the Motion is incorrect. *See Charles Schwab & Co. v Retrophin, Inc.*, No. 14 Civ. 4294 (ER), 2015 US Dist. LEXIS 133535, at *18-19 (S.D.N.Y. Sep. 30, 2015).

Federal Arbitration Act. *See, e.g., Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Here, the parties selected Delaware law to govern interpretation of the SPA (*see* SPA § 9.9(a)), and accordingly, none of the cases cited by Plaintiffs from outside Delaware are controlling. *See also Fr 8 Sing. PTE, Ltd. v. Albacore Mar., Inc.*, 794 F. Supp. 2d 449, 456 (S.D.N.Y. 2011) (setting aside plaintiffs' string cite about the "federal law of arbitrability" following *Arthur Anderson* and enforcing choice of law clause as to whether non-signatory was bound); *Advantage Sales & Mktg. LLC v. USG Cos.,* Civ. No. 15-1225-RGA, 2016 U.S. Dist. LEXIS 59019, *3 (D. Del. May 4, 2016) (noting that based on Delaware choice of law clause, "the court finds most helpful those cases decided under Delaware law where the FAA applied.").

In interpreting the scope of arbitration agreements related to Earn-out disputes, Delaware courts have consistently held that conduct-related allegations of wrongdoing which impact the Earn-out are within the scope of arbitration provisions similar to that in the SPA. *See* Mot. at 13. Plaintiffs' argument that *Sapp*, 2020 U.S. Dist. LEXIS 94066 somehow "misconstrued" the law (Opp. at 12 n.3), ignores that *Sapp* is spot on. In *Sapp*, the court held that allegations concerning the impact of defendants' allegedly wrongful conduct to lower EBITDA to avoid paying any Earn-out were subject to arbitration under a provision nearly identical to that contained in SPA § 1.4(d). *Id*. at *2. Nor is *Sapp* an outlier by any means. *See CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, No. CV 2018-0783-PRW, 2021 WL 2588905 (Del. Ch. June 14, 2021) (holding that arbitrator – and not the court – must consider breach of contract claim based on diversion of revenue allegations); *HBMA Holdings, LLC v. LSF9 Stardust Holdings LLC*, No. 12806-VCMR, 2017 Del. Ch. LEXIS 841, at *6, n.15 (Del. Ch. Dec. 8, 2017) (finding all "Unresolved Objections"

including ones based on alleged violation of a covenant to operate the company in the ordinary course consistent with past practice were within the arbitration agreement).[2]

Even if Plaintiffs' cited caselaw were to have any relevance, the outcome would be the same for two reasons. First, myriad federal cases outside of Delaware also support finding that allegations of the sort concocted by Plaintiffs fall within the scope of the SPA's arbitration provision. *See, e.g.*, *PureWorks, Inc. v. Unique Software Sols., Inc.*, 554 F. App'x 376 (6th Cir. 2014) (operational disagreements including allegations that PureWorks had failed to comply with the earn-out covenants were arbitrable); *Duafala v. Globecomm Sys. Inc.*, 91 F. Supp. 3d 330 (E.D.N.Y. 2015) (breach of contract cause of action based on shifting and reassigning business and contracts were within the scope of arbitration clause before independent accountant).[3]

Second, even under the most narrow arbitration clauses, if non-arbitrable matters are "inextricably tied up with the merits of the underlying dispute" they may still be arbitrated. *See SOHC, Inc. v Zentis Sweet Ovations Holding LLC*, No. 14-CV-2270 2014 U.S. Dist. LEXIS

[2] *Sheth v. Harland Financial Solutions, Inc.*, C.A. No. N14C-01-222 WCC CCLD, 2014 WL 4783017 (Del. Super. Ct. Aug. 28, 2014), the sole Delaware case cited by Plaintiffs, is inapplicable here because the dispute resolution provision in *Sheth* did not vest the accountants with the authority of an arbitrator. *Id*. at *9. *Sheth* also contained an arbitration provision explicitly limiting the accountant's review to "what extent, if any, the 2011 Earn-Out Revenue and 2011 Earn-Out Payment . . . requires adjustment," *id*. at *4, which is a far cry from the expansive authority given to the arbitrator in the SPA where they are empowered to decide "all unresolved disputed items." *See* SPA § 1.4(d). Indeed, similar language was pivotal to the decision in *Alstom*. 228 F. Supp. 3d at 246. The court found all claims were to be submitted to the accountant under a clause empowering accountants to decide "any matters identified in [the] Dispute Notice that remain in dispute" and further found that language was in "sharp contrast" to the language in *XL Capital*, a case cited by Plaintiffs. *Id*. Plaintiffs' allegation that the SPA refers only to "the calculation of the Earn-out Payments," Opp. at 11, ignores that such language relates to the proper purposes for which Plaintiffs may inspect the Earn-out Group's books and records, not the authority of the arbitrator. *See* SPA at 12.

[3] At most, therefore, the Court is faced with two possible interpretations of how to interpret SPA § 1.4(d). Against the backdrop of these competing interpretations of the SPA's arbitration clause, it is well settled that the Court must resolve any doubts in favor of arbitrability. *See, e.g., John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001) ("Even if we were to accept [appellants'] interpretation . . . at best it would raise an ambiguity . . . . In the face of such an ambiguity, we would be compelled to construe the provision in favor of arbitration.").

156008, at *12 (S.D.N.Y. Nov. 4, 2014). As demonstrated in the Motion, there is substantial overlap between the claims in this case, those that have been submitted to the Independent Accountants in the Year 1 Arbitration, and those which are included in the Earn-out Notice for resolution currently. *See* Mot. at 5, 10-11. That overlap demonstrates that any non-arbitrable matters would be "inextricably tied up" with the arbitrable matters,[4] and therefore subject to arbitration even if the Court were to accept the factually incorrect assumption that the arbitration clause is somehow narrow.[5]

II. All Claims That Were, Or Could Have Been, Litigated In The Year 1 Arbitration Should Be Dismissed Based On Collateral Estoppel and *Res Judicata*.

Res judicata bars any claim already decided in the Year 1 Arbitration, of which the Court is permitted to take judicial notice, including the Independent Accountants' determination that all accounting practices must comply with GAAP, and any claims which could have been brought during the Year 1 Arbitration including claims related to diversion of the JAM acquisition. Mot. at 8-11.[6] Plaintiffs' argument that none of their claims in this case are impacted by the Year 1

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[4] Consider, for instance, that if the Court were to accept Plaintiffs' preposterous theory that Defendants breached the SPA by forcing them to return a COVID loan, expectation damages could only be determined by calculating the impact on the Earn-out, which is indisputably left to the arbitrator. The issues are "inextricably tied up."

[5] Plaintiffs have also failed to justify a stay of the arbitration, citing only cases that are widely dissimilar, involving no-fault collection arbitrations, which require arbitration under statute rather than private contract and involved dozens of arbitrations at a time. *See Convergen Energy LLC v. Brooks*, No. 20-CV-3746 (LJL), 2020 WL 4500184, at *7 (S.D.N.Y. Aug. 5, 2020), *reconsideration denied*, No. 20-CV-3746 (LJL), 2020 WL 5549039 (S.D.N.Y. Sept. 16, 2020). Plaintiffs' conclusory statement that DCC will not suffer any adverse effects by staying the arbitration (Opp. at 16) ignores that the parties explicitly bargained for an expedited dispute resolution mechanism. *See MMPC Sub, Inc. v. Midmark Corp.*, No. 13 C 3950, 2014 WL 562019, at *4 (N.D. Ill. Feb. 13, 2014) (granting motion to stay action pending arbitration because "[a]n interpretation of the APA that would permit [plaintiff] to engage in protracted litigation in federal court [over an earn-out] would be inconsistent with such a process").

[6] The fact that conduct is allegedly ongoing does not itself prevent a prior claim from having *res judicata* effect. *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 501 (2d Cir. 2014) ("claim preclusion may apply where some of the facts on which a subsequent action is based post-date the first action but do not amount to a new claim.") (citation and quotation omitted).

Arbitration Decision is belied by the Complaint itself, which alleges misconduct based on DCC's alleged accounting practices already determined proper by the Independent Accountants in the Year 1 Arbitration. *See* Compl. ¶¶ 53, 61, 67; Mot. at 10. Plaintiffs have offered no explanation for why the allegations in Sections C and H of the Complaint, challenging DCC's accounting practices, are not entirely precluded by the Arbitrator's Decision. Mot. at 10.

III. Plaintiffs' Conclusory Allegations In Contravention Of The Plain Terms Of The SPA Fail To State A Claim.[7]

Plaintiffs are wrong that asserting allegations of intent to avoid an Earn-out are categorically sufficient to survive a motion to dismiss. Opp. at 16. The cases Plaintiffs rely on deal with contractual terms precluding the buyer from taking any action with the "intent" of reducing, decreasing, and/or avoiding an Earn-out. *See S'holder Representative Servs. LLC v. Albertsons Cos., Inc.*, No. CV 2020-0710-JRS, 2021 WL 2311455, at *4 (Del. Ch. June 7, 2021); *Windy City Invs. Holdings, LLC v. Tchrs. Ins. & Annuity Ass'n of Am.*, No. CV 2018-0419-MTZ, 2019 WL 2339932, at *3 (Del. Ch. May 31, 2019). These decisions rely on the holding that "[t]o plead a buyer's intent to avoid an earnout, the goal of avoiding the earnout need not be the buyers sole intent; rather, a plaintiff may well-plead that the buyer's actions were motivated at least in part by that intention." *Albertsons*, 2021 WL 2311455, at *6 (internal quotations and citation omitted). But that cannot be the case here, because the SPA provides that DCC cannot take actions that have the "*sole* purpose of avoiding or minimizing the Earn-out," evidencing the parties' intent

[7] Plaintiffs also fail to state a claim against Exertis. Plaintiffs' sole support for their argument that they did not need to provide notice is a single case decided nearly forty years ago discussing absolute guarantors. Opp. at 25 (citing *Gaylords, Inc. v. Tollin*, Civ.A. 80C-JN-23, 1984 WL 547850, at *3 (Del. Super. Ct. Jan. 31, 1984)). But Delaware courts have suggested that the distinction between conditional and absolute guarantors is antiquated. *Falco v. Alpha Affiliates, Inc.*, C.A. No. 97-494 MMS, 2000 U.S. Dist. LEXIS 7480 (D. Del. Feb. 9, 2000). Moreover, the notice here was required as a matter of *contract* (SPA § 9.13(a)) – it is not a question of whether to impose a notice requirement by operation of law, in contrast to *Gaylords,* where the contract said nothing about notice. *Id*. at *3. The filing of the complaint cannot constitute "notice" as required by the SPA.

to further limit the grounds for an alleged breach beyond the language cited in *Albertsons* or *Windy City*. The Court cannot construe the words "sole purpose" in a manner contrary to its plain meaning – "being the only one" or "having no sharer." *See* "sole," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/sole (last accessed 4 October 2022). Plaintiffs' allegations are inconsistent with their claim that Defendants took action with the "sole purpose of avoiding or minimizing the Earn-out." Mot. at 16. And the few places where Plaintiffs allege that DCC acted with the "sole purpose" of reducing the Earn-out, their claims are entirely conclusory and contrary to logic. *See AJ Energy LLC v Woori Bank*, No. 18-CV-3735 (JMF), 2019 US Dist. LEXIS 164961, at *13-14 (S.D.N.Y. Sep. 25, 2019) ("Although the Court is required to assume the truth of the allegations in the [complaint], it is not required to discard its common sense . . . . Nor is the Court required to sustain claims that are "implausible in light of factual allegations *in the pleading itself*") (citation and quotation omitted). It is implausible that DCC would conspire to damage the company it spent $70 million to acquire while continuing to provide it with debt financing. *See* Mot. at 17-18. *See also Albertsons*, 2021 WL 2311455, at *7 ("The reasonable inference allowed by these allegations is *not* that Albertsons sabotaged a company it just paid $175 million for . . . ") (emphasis added). Plaintiffs' Opp. is likewise completely devoid of authority which would support a reformation claim based on the COVID pandemic, and that claim must therefore be dismissed for the reasons stated in the Motion.

Plaintiffs' remaining contractual causes of action (Counts I and II) fare no better. *See* Mot. at 16-19. Acquisitions were contracted for in a separate provision of the SPA which generally excluded acquisitions in excess of $1 million unless otherwise agreed from the calculation of Adjusted EBITA, and made no reference to "revenue opportunities." *See* Mot. at 17; SPA § 1.4(g). Despite Plaintiffs' conclusory allegations that the referenced acquisitions are "revenue

opportunities," (Opp. at 17), the existence of separate provisions in the SPA suggests a clear intention of the parties to treat acquisitions differently from "revenue opportunities" and to limit acquisitions included in Adjusted EBITA to those acquired by the Earn-out Group. Because Plaintiffs concede that the relevant acquisitions were not made through the Earn-out Group, (*see* Opp. at 18), they cannot be included in Adjusted EBITA under the SPA.

Likewise, Plaintiffs ignore clear authority finding that Plaintiffs cannot breach an oral agreement where the oral agreement is contradicted by a written agreement. *See* Mot. at 18-19. Plaintiffs cite to cases finding provisions deeming oral modifications unenforceable can be waived orally or by course of conduct. Opp. at 23.[8] But the Court cannot just ignore the provisions in the SPA. Non-waiver provisions "give a contracting party some assurance that its failure to require the other party's strict adherence to a contract term . . . will not result in a complete and unintended loss of its contract rights if it later decides that strict performance is desirable." *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008) (citation and quotation omitted). Courts will not find waiver based on a course of conduct where the parties have previously executed written amendments. *AgroFresh Inc. v. MirTech, Inc.*, 257 F. Supp. 3d 643, 660 (D. Del. 2017). The Complaint must also specifically allege waiver of the requirement of a writing – an implied waiver is insufficient. *See MDNet, Inc. v. Pharmacia Corp.*, 147 F. App'x 239, 243-44 (3d Cir. 2005). Here, Plaintiffs acknowledge that the MOU was a modification to the SPA which was reduced to writing. Compl. ¶¶ 101, 104. While Plaintiffs claim that writing is unenforceable,[9]

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[8] There is no argument that Defendants somehow waived their right to respond to Plaintiffs' claim that enforcing the MOU breached the SPA – Defendants stated that they would address that claim when responding to the cause of action seeking declaratory judgment. *See* Mot. at 14 n.9. *Myun-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018) has absolutely no bearing on these circumstances. To be clear, there can be no breach where an agreement permitted the conduct at issue. *Am. Homepatient, Inc. v. Collier*, C.A. No. 274-N, 2006 Del. Ch. LEXIS 79, at *11 (Del. Ch. Apr. 19, 2006).

[9] While it will do no good to rehash all the arguments made in the Motion for why the MOU is enforceable, Plaintiffs have cited no authority for their argument that partial performance is somehow negated because DCC

there is no dispute that when the parties sought to modify the SPA with respect to the Furrion contract, they did so in writing. Plaintiffs have also made no allegations that DCC intended to waive the requirement of a writing. Accordingly, Plaintiffs' claim (Count III) cannot survive.

The non-contractual claims fare no better under the SPA. First, the very cases cited by Plaintiffs conclusively demonstrate that Plaintiffs cannot maintain their breach of implied duty of good faith claim. *See Sheth*, 2014 WL 4783017, at *5 (noting that there was no "gap" to be filled by the implied covenant where agreement provided protections for plaintiffs in the event defendant acted with the "sole purpose" of preventing the Earn-out); *Albertsons*, 2021 WL 2311455, at *9 ("[T]he court will not override those bargained for provisions by giving the implied covenant independent force to bolster earnout protections for the seller."). The sole case that Plaintiffs cite to the contrary, *Renco Group Inc. v. MacAndrews AMG Holdings LLC*, C.A. No. 7668-VCN, 2015 WL 394011, at *6 (Del. Ch. Jan. 29, 2015), has been subsequently criticized as "inconsistent with other Delaware cases." *3M Co. v. Neology, Inc.*, C.A. No. N18C-07-089 AML CCLD, 2019 WL 2714832, at *11 (Del. Super. Ct. June 28, 2019). With respect to Counts IV and V, Plaintiffs have not addressed any of the law cited in the Motion,[10] nor the argument that an unjust enrichment claim cannot allege intangible benefits; in any event, Plaintiffs' reliance on written waiver caselaw is unavailing for the reasons discussed *supra* at 9; *see also AgroFresh*, 257 F. Supp. 3d at 661.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant the Motion.

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spent less than anticipated, but still spent millions more than the *zero dollars* they would have spent otherwise. *See* Opp. at 21. Nor do Plaintiffs offer any support for merely pleading the existence of missing essential terms where the signed agreement does not reflect the existence of such terms. If the parties thought there were missing terms, they would have found a way to acknowledge that in the MOU itself. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

[10] *J.C. Trading Ltd. v. Wal-Mart Stores, Inc.*, 947 F. Supp. 2d 449, 457-58 (D. Del. 2013), for example, explicitly distinguished *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003). Opp. at 24.

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