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Case No. 2023-0380-EMD

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FMLS HOLDING COMPANY, a Delaware corporation, Plaintiff, v. INTEGRIS BIOSERVICES, LLC, d/b/a KCAS BIOANAYLTICAL AND BIOMARKER SERVICES, a Delaware limited liability company, Defendant.	C.A. No.: 2023-0380-EMD

Submitted: August 16, 2023
Decided: October 30, 2023

Upon Defendant Integris BioServices, LLC's Motion to Dismiss the Complaint,
DENIED

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DAVIS, J.[1]

I. INTRODUCTION

Plaintiff FMLS Holding Company ("FMLS") initially filed this civil action in the Court of Chancery on March 30, 2023. On April 10, 2023, the Court of Chancery assigned the action to this Court pursuant to the Supreme Court Order entitled *In re Designation of Actions Filed Pursuant to 8 Del. C. § 111* and entered on February 23, 2023. FMLS seeks relief relating to

[1] Sitting as a Vice Chancellor of the Court of Chancery of the State of Delaware by designation of the Chief Justice of the Supreme Court of Delaware pursuant to *In re Designation of Actions Filed Pursuant to 8 Del. C. § 111* (Del. Feb. 23, 2023) (ORDER).

claims arising out of the Equity Purchase Agreement (the "EPA" or "Agreement") entered into on February 3, 2022. FMLS asserts breach of contract claims against Defendant Integris BioServices LLC ("KCAS") concerning earnout payments (Count I), Adjustment Escrow Amount (Count II), Indemnity Escrow Amount (Count III), seeks specific performance for a release of the Adjustment Escrow Amount and Indemnity Escrow Amount (Count IV), and declaratory judgment (Count V).

Presently before the Court is KCAS's Motion to Dismiss (the "Motion to Dismiss"). The Court held a hearing on August 16, 2023. At the conclusion of the hearing, the Court took the Motion to Dismiss under advisement. For the reasons set forth below, the Motion to Dismiss is **DENIED**.

II. RELEVANT FACTS[2]

A. EQUITY PURCHASE AGREEMENT

FMLS is a Delaware corporation and a party to the EPA.[3] KCAS is a Delaware limited liability company.[4] KCAS is also a party to the EPA.[5] Non-parties FlowMetric, LLC ("FlowMetric US") and FlowMetric Europe, S.p.A ("FlowMetric Europe," and together with FlowMetric US, "FlowMetric" or the "Company") are biotechnology companies that provide flow cytometry services, a specialized cellular analytical platform technology.[6]

On February 3, 2022 (the "Closing Date"), KCAS entered into the EPA with FlowMetric and FMLS for the purchase of FMLS's equity interests in FlowMetric.[7] KCAS agreed to pay

[2] The facts are drawn from the Complaint and the documents it incorporates by reference. At this stage in proceedings, all well-pleaded allegations of the Complaint are assumed to be true, and FMLS receives the benefit of all reasonable inferences. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. 2010).
[3] Complaint ("Compl.") ¶ 15 (D.I. No. 1); *see also* Compl., Ex. A ("EPA") Preamble.
[4] Compl. ¶ 16; *see also* EPA Preamble.
[5] EPA Preamble.
[6] Compl. ¶ 2.
[7] *See* EPA Preamble, Recitals.

$17 million for the acquired interests, and up to $8 million in earnout payments based on the achievement of revenue targets.[8] Renold J. Capocasale is FlowMetric's Founder and CEO, John M. Healey is FlowMetric's Chief Operating Officer, and Julie A. Bick is FlowMetric's Chief Scientific Officer (collectively, the "Executives").[9] The Executives remained with FlowMetric after closing.[10]

1. Earnout Payment Structure

The EPA provided that KCAS was potentially obligated for two types of earnout payments for the period between February 1, 2022 and December 31, 2022 (the "Earnout Period"): (i) periodic payments ("Intermittent Earnout Payments"); and, (ii) a single trailing payment ("Trailing Eleven Month Earnout Payment").[11] EPA Section 1.7.1 required KCAS to make Intermittent Earnout Payments in the amount of $1 million if "Net Revenue" exceeded $3.2 million in months one to five after closing, and another $1 million if it exceeded $2.18 million in months six to eight.[12] For months nine to eleven, EPA Section 1.7.1 directed KCAS to pay $2 million if "Net Revenue" exceeded $2.45 million.[13]

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[8] Compl. ¶ 25; EPA §1.7.1.
[9] Compl. ¶ 21.
[10] *Id.*
[11] Ex. A to EPA; EPA § 1.7.1.
[12] EPA §§ 1.7.1(a) and (b).
[13] *Id.* § 1.7.1(c). Sections 1.7.1 (a)-(c) state in full:

> a) If the Net Revenue is in excess of $3,200,000 (the "Months 1-5 Net Revenue Target") in respect of the Months 1-5 Earnout Period, an amount equal to $1,000,000 (the "Months 1-5 Earnout Payment") in respect of the Months 1-5 Earnout Period. For the avoidance of doubt, if the Net Revenue in respect of the Months 1-5 Earnout Period does not exceed the Months 1-5 Net Revenue Target during the Months 1-5 Earnout Period, then no Months 1-5 Earnout Payment shall be due or payable hereunder.
>
> (b) If the Net Revenue is in excess of $2,180,000 (the "Months 6-8 Net Revenue Target") in respect of the Months 6-8 Earnout Period, an amount equal to $1,000,000 (the "Months 6-8 Earnout Payment") in respect of the Months 6-8 Earnout Period. For the avoidance of doubt, if the Net Revenue in respect of the Months 6-8 Earnout Period does not exceed the Months 6-8 Net Revenue Target during the Months 6-8 Earnout Period, then no Months 6-8 Earnout Payment shall be due or payable hereunder.

Additionally, EPA Section 1.7.2 mandated KCAS to make a Trailing Eleven Month Earnout Payment in the amount of $4 million upon the satisfaction of certain conditions, including "Net Revenue" hitting $7.96 million during the Earnout Period.[14] Altogether, FMLS had the potential to receive $8 million in earnout payments.

2. Earnout Protections

FMLS bargained for certain protections to help ensure FlowMetric's ability to meet the earnout obligations. EPA Sections 1.7.5(a) and (b) memorialize those duties.[15] These provisions applied for the entirety of the Earnout Period.[16] EPA Section 1.7.5(c), in contrast, imposed separate duties that, on an initial basis only, applied in the first five months of the Earnout Period. If certain conditions were then met, the additional duties carried over into the remaining months of the Earnout Period.[17]

> (c) If the Net Revenue is (i) in excess of $2,450,000 (the "Months 9-11 Net Revenue Target") in respect of the Months 9-11 Earnout Period, an amount equal to $2,000,000 (the "Months 9-11 Earnout Payment") in respect of the Months 9-11 Earnout Period. For the avoidance of doubt, if the Net Revenue in respect of the Months 9-11 Earnout Period does not exceed the Months 9-11 Net Revenue Target during the Months 9-11 Earnout Period, then no Months 9-11 Earnout Payment shall be due or payable hereunder.

[14] Those conditions include that:

> (i) the Net Revenue is in excess of $7,960,000 (the "Trailing Eleven Month Net Revenue Target") in respect of the Trailing Eleven Month Earnout Period,
>
> (ii) the Adjusted EBITDA is in excess of $800,000 (the "Trailing Eleven Month Adjusted EBITDA Target") in respect of the Trailing Eleven Month Earnout Period,
>
> (iii) the Earnout Business does not experience a Major Client Loss Event during the Trailing Eleven Month Earnout Period and
>
> (iv) the Earnout Business does not experience a reduction of Contracted Demand by more than 10% due to customer dissatisfaction during the Trailing Eleven Month Earnout Period, as reasonably determined by Buyer in good faith based on written or oral declarations or expressions of dissatisfaction from Existing Clients of the Earnout Business….

EPA §§ 1.7.2(a)(i)-(iv).
[15] *Id.* §§ 1.7.5(a) and (b).
[16] *Id.*
[17] *Id.* § 1.7.5(c).

EPA Section 1.7.5(a) states that KCAS "shall at all times act in good faith with respect to its [earnout] obligations."[18] KCAS's obligation to act in good faith applied during the entire Earnout Period.[19] Similarly, Section 1.7.5(b) provides:

> KCAS "shall have sole discretion with regard to all matters relating to the operation of [FlowMetric]; *provided*, that [it] (A) shall not, directly or indirectly, take any actions or omit to take any actions in bad faith that would have the purpose or effect of avoiding or reducing any Earnout Payment hereunder…"[20]

The Court will collectively refer to the obligations in EPA Section 1.7.5(a) and (b) as the "Good Faith Obligation."

The category of protections that applied in the first five months of the Earnout Period, and potentially longer, is not as straightforward. Under EPA Section 1.7.5(c), KCAS must use certain commercially reasonable efforts in operating, and make certain expenditures for, FlowMetric in months one to five of the Earnout Period.[21] Those obligations then lift for the subsequent three months if there is a reasonable, good faith determination that FlowMetric could not generate certain revenue levels in the preceding months.[22] Section 1.7.5(c) states, in relevant part, that:

> during the Trailing Eleven Month Earnout Period (subject to Section 1.7.5(d) with respect to the Months 6-8 Earnout Period and Section 1.7.5(e) with respect to the Months 9-11 Earnout Period), the Buyer (Y) shall use commercially reasonable efforts to ensure the Earnout Business will have access to funding, personnel, compensation for employees, and support as is reasonably necessary to operate the Earnout Business reasonably consistent with the manner in which the Earnout Business was conducted by Seller immediately prior to the Closing Date;
>
> and (Z) shall make expenditures with respect to the Earnout Business at least as great as set forth in the 2022 Budget attached hereto as Exhibit D (the "2022

[18] *Id.* § 1.7.5(a).
[19] *Id.*
[20] *Id.* § 1.7.5(b).
[21] *Id.* §§ 1.7.5(c)(Y) and (Z).
[22] *Id.* §§ 1.7.5(d) and (e).

> Budget") in respect of the Earnout Period, on terms no less restrictive than those set forth in the 2022 Budget.[23]

This Court refers to 1.7.5(c)(Y) as the "Commercially Reasonable Efforts Obligation" and 1.7.5(c)(Z) as the "Expenditure Obligation."

Sections 1.7.5(d) and (e), referenced in Section 1.7.5(c) above, set out the conditions that lift the Commercially Reasonable Efforts Obligation and Expenditure Obligation for the succeeding months.[24] Sections 1.7.5(d) and (e) provide that:

> (d) If (and only if) Buyer reasonably determines in good faith as of the date which is thirty (30) days following the last day of the Months 1-5 Earnout Period that the Net Revenue in respect of the Months 1-5 Earnout Period could not reasonably exceed 90% of the Months 1-5 Net Revenue Target, then the obligations and covenants described in Section 1.7.5(c) will not apply with respect to the Months 6-8 Earnout Period.
>
> (e) If (and only if) Buyer reasonably determines in good faith as of the date which is thirty (30) days following the last day of the Months 6-8 Earnout Period that the Net Revenue in respect of the Months 6-8 Earnout Period could not reasonably exceed 90% of the Months 6-8 Net Revenue Target, then the obligations and covenants described in Section 1.7.5(c) will not apply with respect to the Months 9-11 Earnout Period.[25]

FlowMetric's performance during months one to five, therefore, determined whether the Commercially Reasonable Efforts Obligation and Expenditure Obligation would continue to apply in months six to eight of the Earnout Period. This is also true as to the Commercially Reasonable Efforts Obligation and Expenditure Obligation for months nine to eleven based on the performance of the Company in months six to eight. The Good Faith Obligation applied throughout the Earnout Period.

[23] *Id.* § 1.7.5(c).
[24] *Id.* §§ 1.7.5(d) and (e).
[25] *Id.*

B. Loss of Scientists at FlowMetric Prior to the Acquisition

Prior to the Closing Date, several FlowMetric scientists left during the third and fourth quarters of 2021.[26] Due to these departures, FMLS alleges that, during pre-acquisition discussions, KCAS officers, John Bucksath and Jeff Goddard, provided assurances that KCAS would give full support to FlowMetric and make recruitment of new scientists a priority after closing.[27] Mr. Bucksath promised that KCAS would promptly hire several full-time recruiters,[28] and KCAS's parent entity, Vitruvian Partners ("Vitruvian"), would provide immediate assistance.[29] FMLS contends that hiring new scientists early was critical to meeting the earnout because the scientists had to undergo a four-month training program before they became profitable to the business.[30]

C. FlowMetric Business during Earnout: Hiring and Additional Allegations

FMLS alleges that KCAS's actions (or lack thereof) after closing showed that hiring new scientists and staff was not a priority to KCAS. KCAS took approximately three weeks after closing before introducing the individual responsible for staffing new scientists to FlowMetric.[31] Although FMLS had on two separate occasions in March introduced to KCAS two recruiters FlowMetric had successfully used in the past, FMLS alleges KCAS refused to engage them.[32] Two months into the Earnout Period KCAS introduced to FlowMetric the recruitment firm that was ultimately used to recruit new scientists.[33] KCAS hired its first post-closing scientist on May 31, 2022—nearly four months into the Earnout Period.[34] KCAS had received the

[26] Compl. ¶ 23.
[27] *Id*. ¶¶ 24-25.
[28] *Id*. ¶¶ 26-27.
[29] *Id*. ¶¶ 8, 27.
[30] *Id*. ¶ 26.
[31] *Id*. ¶ 35.
[32] *Id*. ¶ 39.
[33] *Id*. ¶ 41.
[34] *Id*. ¶ 40.

scientist's CV in the middle of March.[35] On June 2022, KCAS hired its second scientist, and KCAS filled the remaining pre-closing vacancies by July 2022.[36] At that point in time, KCAS was roughly six months into the Earnout Period.

In addition, new vacancies and staffing needs arose during the first few months after closing. Beginning in February 2022, two scientists and a Senior Data Analyst left FlowMetric.[37] A new position also opened for Director of Lab Operations.[38] To FMLS's disappointment, KCAS responded by removing Mr. Healey from any sale or marketing role, and then hired a junior-level associate with no experience in the field of flow cytometry in April 2022.[39] With respect to the FlowMetric Europe business, KCAS delayed in the hiring of president Gianluca Carenzo.[40] FMLS believes KCAS could have hired Mr. Carenzo as early as March 2022.[41]

FMLS makes additional allegations related to the lack of staffing support provided by KCAS, though the timing of these allegations is not entirely clear. FMLS alleges KCAS shifted sales responsibility to existing KCAS salespeople, rather than hire new staff at FlowMetric.[42] On or around July 27, 2022, Dr. Bick also confirmed with KCAS representatives that KCAS was hiring flow cytometry analysts at its Kansas City site and was expected to receive more than a dozen projects.[43] FMLS believes KCAS was diverting flow cytometry business from FlowMetric.[44] During an after-dinner discussion around September 2, 2022, KCAS's Vice

[35] *Id.*
[36] *Id.* ¶ 42.
[37] *Id.* ¶ 44.
[38] *Id.*
[39] *Id.* ¶ 49.
[40] *Id.* ¶¶ 56-58.
[41] *Id.*
[42] *Id.* ¶ 48.
[43] *Id.*
[44] *Id.*

President of Operations, Lawrence Goodwin, told Mr. Capocasale that Mr. Goodwin was prevented from assisting FlowMetric US's lab during the Earnout period "because of the earnout."[45]

FMLS alleges KCAS created a hostile work environment.[46] KCAS did not provide job descriptions to FlowMetric's Executives, went directly to the Executives' direct reports to bypass them, and limited their decision-making authority.[47] KCAS did not include Mr. Healey in operational meetings and removed Mr. Healey from a variety of activities and responsibilities he held prior to closing.[48] FMLS makes similar allegations as to Mr. Capocasale and Dr. Bick. [49] Finally, FMLS makes allegations that KCAS failed to make certain expenditures set out in the 2022 budget and manipulated FlowMetric's financials.[50]

By the end of the first Earnout Period (months one to five), FlowMetric missed the revenue target to make the first Intermittent Earnout Payment.[51] FlowMetric also fell short of the 90% revenue target necessary to maintain the Commercially Reasonable Efforts Obligation and Expenditures Obligation for months six to eight.[52] FlowMetric also did not hit the 90% revenue target in months six to eight.[53]

Despite the decline in revenue in the first half of the Earnout Period, the second half was an entirely different story.[54] Revenue grew by 101% in the second half of the Earnout Period,

[45] *Id*. ¶ 7.
[46] *Id*. ¶¶ 52-55.
[47] *Id*. ¶ 52.
[48] *Id*. ¶ 53.
[49] *Id*. ¶¶ 54-55.
[50] *Id*. ¶¶ 60-62.
[51] Compl., Ex. E.
[52] *Id*.
[53] Compl., Ex. I.
[54] Compl. ¶ 64.

and 143% in the fourth quarter.[55] Overall, FlowMetric's revenue increased by 28% from 2021 to 2022, but was short of the revenue targets required to distribute any earnout payment.[56]

D. PRESENT LITIGATION

On February 23, 2023, after an exchange of correspondence, KCAS provided final notice to FMLS that KCAS would not make any earnout payments under the Agreement.[57] FMLS initiated this action against KCAS by filing a Verified Complaint for Specific Performance and Monetary damages on March 30, 2023. FMLS asserts breach of contract claims concerning earnout payments (Count I), Adjustment Escrow Amount (Count II), Indemnity Escrow Amount (Count III), seeks specific performance for a release of the Adjustment Escrow Amount and Indemnity Escrow Amount (Count IV), and declaratory judgment (Count V). Instead of an answer, KCAS filed the Motion to Dismiss. On June 21, 2023, KCAS filed an opening brief in support of the Motion to Dismiss, arguing lack of subject matter jurisdiction and failure to state a claim as to Counts I and II.[58] FMLS filed its answering brief in opposition to the Motion to Dismiss.[59] KCAS filed its reply brief on July 10, 2023.[60]

The Court held a hearing on August 16, 2023.[61] Defendant's counsel represented that Defendant was no longer moving to dismiss Count II during the hearing.[62] At the end of the hearing, the Court took the Motion to Dismiss under advisement.

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[55] *Id*.
[56] *Id*. ¶ 65; *see also* Compl., Ex. I.
[57] Compl., Ex. I.
[58] Defendant's Opening Brief in Support of its Motion to Dismiss Pursuant to Chancery Court Rules 12(B)(1) and 12(B)(6) ("MTD") (D.I. No. 25).
[59] Answering Brief in Opposition to Defendant's Motion to Dismiss Pursuant to Chancery Court Rule 12(B)(1) and 12(B)(6) ("Opp'n") (D.I. No. 26).
[60] Defendant's Reply Brief in Support of its Motion to Dismiss Pursuant to Chancery Court Rules 12(B)(1) and 12(B)(6) ("Reply") (D.I. No. 29).
[61] D.I. No. 21.
[62] Transcript of Oral Argument on Motion to Dismiss (August 16, 2023) ("OA Tr.") at 4:16-5:21 (D.I. No. 21).

III. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[63] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[64]

In considering a motion to dismiss under Rule 12(b)(6), the court generally may not consider matters outside the complaint.[65] However, documents that are integral to or incorporated by reference in the complaint may be considered.[66] "If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[67]

IV. DISCUSSION

"Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party."[68] The contract will be read as a whole, and each provision and term will be given effect.[69] When the contract is clear and unambiguous, the Court will give effect to the plain meaning of the contract's terms and provisions.[70] It will not construe a contract in a way that renders a provision

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[63] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825353, at *3 (Del. Super. Oct. 27, 2010).
[64] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[65] Super. Ct. Civ. R. 12(b).
[66] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[67] Super. Ct. Civ. R. 12(b).
[68] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[69] *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 2010 WL 779992, at *2 (Del. 2010).
[70] *Osborn ex rel. Osborn*, 991 A.2d at 1159-60.

meaningless or illusory.[71] When interpreting a contract, the Court gives priority to the parties' intentions as reflected within the contract's four corners."[72]

A. FMLS States a Claim that KCAS breached the Commercially Reasonable Efforts Obligation

> During months one to five of the Earnout Period, KCAS:
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> shall use commercially reasonable efforts to ensure the Earnout Business will have access to funding, personnel, compensation for employees, and support as is reasonably necessary to operate the Earnout Business reasonably consistent with the manner in which the Earnout Business was conducted by Seller immediately prior to the Closing Date.[73]

The Court finds that FMLS sufficiently alleges KCAS failed to meet its obligations under EPA Section 1.7.5(c)(Y).

FMLS asserts that FlowMetric did not appear to have a recruitment team in place until approximately two months into the Earnout Period, despite promises it would have a team in place promptly after closing.[74] FMLS sets out that FlowMetric did not fill all pre-closing vacancies until approximately six months into the Earnout Period.[75] FlowMetric purportedly hired the first scientist on May 31, 2022, although it had received that scientist's CV two and a half months earlier.[76] By the time the new scientists were hired, the scientists had to still undergo several months of training before they became profitable to the Company.[77] When vacancies arose during the Earnout Period, KCAS also did not appear to adequately fill those roles or provide additional staff support. KCAS demoted Mr. Healy and hired a junior-level

[71] *See id*. at 1159 (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).
[72] *See B&C Holdings, Inc. v. Temperatsure Holdings, LLC*, 2020 WL 1972855, at *7 (Del. Super. 2020) (citations omitted), *aff'd*, 247 A.3d 686 (Del. 2021).
[73] EPA § 1.7.5(c)(Y).
[74] Compl. ¶¶ 23-25, 41.
[75] *Id*. ¶¶ 40, 42.
[76] *Id*. ¶ 40.
[77] *Id*. ¶ 26.

associate with no experience in the field of cytometry.[78] Instead of hiring additional staff at FlowMetric, KCAS limited the flow of business to FlowMetric by diverting work to KCAS's Kansas labs, where KCAS had hired additional analysts.[79]

The Court finds that these allegations satisfy the applicable legal standards. The allegations raise a reasonable inference that KCAS did not use commercially reasonable efforts to provide the level of support necessary for FlowMetric to meet the earnout payments within the first five months of the Earnout Period.

In opposition, KCAS argues that the minimal level of support it was obligated to give to FlowMetric only needed to be consistent with the level of support it received immediately prior to the Closing Date.[80] KCAS maintains that, because vacancies existed for several months prior to closing, the Commercially Reasonable Efforts Obligation gave KCAS the license to refrain from filling those vacancies for a similar time period after closing.[81] The Court does not, at this stage of the proceedings, agree with KCAS's interpretation of the provision. Rather than treating the provision as a protection in ensuring FlowMetric meets its earnout obligations, KCAS interprets it in a way that allowed KCAS to withhold support. The Court holds that KCAS's interpretation is not aligned with the applicable contract interpretation principles used to

[78] *Id*. ¶¶ 44, 49.
[79] *Id*. ¶ 48.
[80] MTD at 19-23.
[81] *Id*.; OA Tr. at 15:6-12 (Attorney Westhoff: "Under the plain language of Section 1.7.5(c)(Y), KCAS had no obligations to fill vacancies that existed prior to the closing. The provision is clear that KCAS was only required to provide personnel reasonably consistent with the manner in which plaintiff operated FlowMetric immediately prior to the closing.")); *see also id*. at 18:4-9 (Attorney Westhoff: "So, again, even if the manner in which the earnout business was conducted immediately prior to closing means the manner in which plaintiffs were hiring, it cannot mean that KCAS was required to fill positions more quickly than plaintiff had been able to fill the positions immediately prior to closing.").

effectuate the intent of the parties based on the four corners of the contract, as well as avoid rendering provisions meaningless.[82]

KCAS next argues FMLS has failed to allege "a relevant yardstick" showing that KCAS's actions were not commercially reasonable."[83] In support, KCAS relies upon *Neurvana Med., LLC v. Balt USA, LLC*.[84] Like this case, *Neurvana* is an earnout dispute. Unlike this case, however, *Neurvana* concerned a commercially reasonable efforts provision that required the buyer to use "efforts and resources comparable to those" used by a similarly situated entity.[85] There, the Court explained that the agreement imposed "an outward facing definition" that applied "an industry-standard requirement…to define the diligence obligations of the buyer."[86] The Court then found that the complaint failed to allege any reasonably conceivable facts that the buyer breached the commercially reasonable efforts provision because the complaint did not identify a single similarly situated entity nor activities or products expected to be used or developed in such a business [87]

Here, in contrast, the Commercially Reasonable Efforts Obligation is not external-facing, and instead, is based in part on the staffing and hiring practices at FlowMetric. Moreover, a reasonable reading of this provision suggests the purpose of the provision is to prevent KCAS from reversing course and changing the nature of how the business was run pre-closing in a way that would be detrimental to FlowMetric meeting its earnout obligations. If FlowMetric was actively seeking to recruit and hire scientists considering the recent departures before closing, KCAS cannot unreasonably refrain from continuing those efforts when it took control of the

[82] *See Osborn ex rel. Osborn*, 991 A.2d at 1159 (quoting *Sonitrol Holding Co.*, 607 A.2d at 1183); *B&C Holdings, Inc.*, 2020 WL 1972855, at *7.
[83] Reply at 12.
[84] 2020 WL 949917, at *1 (Del. Ch. 2020).
[85] 2020 WL 949917, at *16.
[86] *Id*.
[87] *Id*. at *16-17.

business. Furthermore, unlike facts demonstrating an industry-wide standard, the question of FlowMetric's pre-closing operations and degree of access to funding, personnel, compensation for employees, and support is a fact question not amenable to resolution at the pleading stage.

Finally, KCAS asks the Court to make defendant-friendly inferences that are not suitable on a motion to dismiss.[88] For example, KCAS argues that FlowMetric failed to reach the necessary revenue targets because of the tight labor market.[89] Based on the well-pleaded allegations, at this stage in the proceedings, this Court must credit the failure to meet the earnout to KCAS, not the tight labor market.[90]

B. FMLS STATES A CLAIM THAT KCAS BREACHED THE GOOD FAITH OBLIGATION

The Court also finds that FMLS's allegations raise an inference that KCAS violated the Good Faith Obligation. Under Section 1.7.5(b), KCAS "shall not, directly or indirectly, take any actions or omit to take any actions in bad faith that would have the purpose or effect of avoiding or reducing any Earnout Payment hereunder."[91] KCAS argues that bad faith requires FMLS to plead conduct "so far beyond the bounds of reasonable judgment that it seems essentially

[88] KCAS also makes this argument as to the Good Faith Obligation. MTD at 30-31; Reply at 20.
[89] Reply at 7-8, 13.
[90] FMLS also raises a claim under the Expenditure Obligation. Dismissal of this claim will not result in a dismissal of the entire case. Moreover, this Court has the right to defer a decision of a pleading-stage motion for a later time. *See Cygnus Opportunity Fund, LLC v. Washington Prime Grp., LLC*, 2023 WL 5113279, at *22 (Del. Ch. 2023) (citing Ct. Ch. R. 12(a)(1) & (d); *Harris v. Harris*, 289 A.3d 310, 342 (Del. Ch. 2023); *Spencer v. Malik*, 2021 WL 719862, at *5 (Del. Ch. 2021); *In re Pattern Energy Gp., Inc. S'holders Litig.*, 2021 WL 1812674, at *46, n.612 (Del. Ch. 2021)). Given the closely tied factual basis of the Expenditure Obligation and the Commercially Reasonable Efforts Obligation, the Court elects to exercise that discretion and defer a decision on this claim until later in the action.
[91] EPA § 1.7.5(b).

inexplicable on any ground other than bad faith."[92] KCAS is requiring FMLS plead waste.[93] The Court does not agree that is the applicable standard at this stage in the proceedings.[94]

To allege bad faith, one must allege "facts related to the alleged act taken in bad faith, and a plausible motivation for it."[95] The standard is "minimal," and intended "to give the defendant notice of the claim being made against it."[96] To plead a buyer's intent to avoid an earnout, "intent" can be inferred from well-pleaded allegations in a complaint, with the understanding that allegations of intent "need only be averred generally."[97]

FMLS pleads that KCAS took actions in bad faith with the purpose or effect of reducing or avoiding the earnout payments. KCAS was aware that several scientists left before closing, and promised FMLS that it would promptly hire a recruitment team to fill the vacancies, as well

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[92] MTD at 27 (citing *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 102 (Del. 2013)).

[93] *See IBEW Loc. Union 481 Defined Contribution Plan & Tr. on Behalf of GoDaddy, Inc. v. Winborne*, 2023 WL 5444317, at *16 (Del. Ch. 2023) (citations omitted) (explaining that bad faith may be pled where the "decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith" and that such a pleading "matches the standard for a claim for waste, defined as a decision 'so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests'").

[94] The case relied upon by KCAS, *DV Realty Advisors LLC*, was based on *Brinckerhoff v. Enbridge Energy Co.* ("*Brinckerhoff III*"), 67 A.3d 369, 370 (Del. 2013), *abrogated by Brinckerhoff v. Enbridge Energy Co., Inc.* ("*Brinckerhoff V*"), 159 A.3d 242 (Del. 2017). In *Brinckerhoff III*, plaintiffs challenged a joint venture agreement entered into between a limited partnership and an affiliate. 67 A.3d at 369. Under the limited partnership agreement ("LPA"), self-interested transactions had to be "fair and reasonable to the Partnership." *Id*. at 371. To make that determination, a special committee was formed and instructed to make a recommendation to the board. *Id*. at 370. The LPA also included an exculpatory provision protecting indemnitees from money damages for actions taken in good faith. *Id*. at 372. Good faith was not defined in the LPA. *Id*. On appeal, the Supreme Court stated that to plead a bad faith claim, plaintiffs must show that the challenged actions were "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Id.* at 373. A few months later, in *DV Realty Advisors LLC*, the Supreme Court applied the same standard, explaining that it was adopting a "traditional common law definition of the business judgment rule" to define the good faith requirement. 75 A.3d at 110. In 2017, the Supreme Court in *Brinckerhoff V* reversed, and replaced the "rigorous pleading standard for bad faith" in *Brinckerhoff III* with "the more traditional definition of bad faith utilized in Delaware entity law." 159 A.3d at 247. Under that standard, plaintiff must plead facts supporting an inference that one "did not reasonably believe it was acting in the best interest of the partnership." *Id.* Here, the Good Faith Obligation is in an equity purchase agreement, not a limited partnership agreement, and the relevant pleading standard is notice pleading under Rule 12(b)(6), not the heightened standard under Rule 23.1. Aside from the fact that KCAS applies an overruled standard for pleading bad faith, borrowing from the common law definition of the business judgment rule to define good faith is not appropriate because of the differences in pleading standards to survive dismissal.

[95] *Coca-Cola Beverages Fla. Holdings, LLC v. Goins*, 2019 WL 2366340, at *3 (Del. Ch. 2019) (citing *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *7 (Del. Ch. 2011)).

[96] *Clean Harbors, Inc.*, 2011 WL 6793718, at *7.

[97] *Lyons Ins. Agency, Inc. v. Kirtley*, 2019 WL 1244605, at *4 (Del. Super. 2019).

as give other support.[98] Yet KCAS did not provide the promised support, despite its knowledge of FlowMetric's need for new scientists.[99] KCAS also hired the scientists several months into the Earnout Period, where there is a reasonable basis it could have hired them on an earlier timeline.[100] For example, although KCAS received the CV of the first scientist in March 2022, KCAS took approximately two months to hire the scientist.[101] Or, on two separate occasions in March, KCAS allegedly refused to engage recruiters that FMLS introduced to it.[102] This delay purportedly worked to KCAS's benefit by causing FlowMetric to miss the first revenue target. By missing the revenue target, KCAS was relieved of the affirmative obligations KCAS owed for months six to eight.

Moreover, the alleged corresponding increase in revenue in the second half of the Earnout period once the new scientists had been hired and underwent training indicates that KCAS's delay in the hiring process had the "effect of avoiding or reducing" the earnout payments.[103] Based on these allegations, the Court finds it plausible that KCAS was motivated to extend the hiring process as late into the Earnout Period as possible to avoid paying the earnout payments.

In addition, though intent may be averred generally, FMLS goes further by alleging that KCAS promised to provide support to FlowMetric to hire new scientists and keep the Executives in leadership roles.[104] FMLS also alleges that in an after-dinner discussion that took place

[98] Compl. ¶¶ 8, 23, 26-27.
[99] *Id*. ¶¶ 35-37.
[100] *Id*. ¶¶ 40, 42.
[101] *Id*.
[102] *Id*. ¶ 39.
[103] *Id*. ¶¶ 42, 64; EPA § 1.7.5(b).
[104] Compl. ¶¶ 8, 21, 26-27.

around September 2, 2022, an officer of KCAS communicated to Mr. Capocasale that KCAS did not provide the requested assistance to FlowMetric "because of the earnout."[105]

KCAS contends that the EPA's integration clause bars reliance on these extracontractual statements.[106] That argument may work if FMLS were bringing claims of fraud or fraudulent inducement. FMLS is not making such claims. FMLS instead highlights KCAS's promises of support to show intent on the part of KCAS.[107] The Court finds that these allegations also raise the inference that KCAS intended to withhold support to cause FlowMetric to miss its revenue targets.

In an effort to get FMLS's claim for breach of the Good Faith Obligation dismissed, KCAS relies on the contract principle that specific provisions override more general ones.[108] KCAS maintains that FMLS cannot assert claims under the Good Faith Obligation because the Commercially Reasonable Efforts Obligation directly addresses the challenged conduct.[109] The Court notes, however, that the Good Faith Obligation is a distinct claim that requires a showing of bad faith, whereas the Commercially Reasonable Efforts Obligation does not. Moreover, the Good Faith Obligation applied throughout the Earnout Period, while the latter did not unless certain conditions were met. Therefore, the Court does not find the existence of a conflict

[105] Compl. ¶ 7; *see, e.g.*, *Tchrs.' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006) ("[I]t is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation.").
[106] MTD at 2, 17-18.
[107] *See S'holder Representative Servs. LLC v. Albertsons Companies, Inc.*, 2021 WL 2311455, at *11 (Del. Ch. 2021) ("Plaintiff has appropriately pointed to certain discussions between the negotiators pre-closing as circumstantial evidence that Albertsons knew that certain actions or omissions post-closing would place achievement of the Earnout in jeopardy. As discussed below, that is different from pointing to alleged false future promises from Albertsons, contradicted by or not stated in the integrated contract, as support for a claim that Plated justifiably relied upon those promises as binding such that the failure to perform them constitutes actionable fraud. For reasons stated below, if there is a claim here, it is for breach of contract, not fraud.").
[108] MTD at 28-29. KCAS also relies on caselaw relating to the implied covenant of good faith and fair dealing, but FMLS is not raising a claim under the implied covenant of good faith and fair dealing.
[109] *Id*.

between the provisions. Absent such a conflict, this Court will not override one claim for another.[110]

V. CONCLUSION

FMLS has sufficiently alleged a claim that KCAS fell short of the Commercially Reasonable Efforts Obligation. Moreover, FMLS has separately alleged a violation of the Good Faith Obligation by raising a reasonable inference that KCAS acted in bad faith to avoid the earnout. Accordingly, the Motion to Dismiss is **DENIED**.

Dated: October 30, 2023
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

[110] *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."); *Exit Strategy, LLC v. Festival Retail Fund BH, L.P.*, 2023 WL 4571932, at *16 (Del. Ch. July 17, 2023), *judgment entered*, (Del. Ch. 2023) ("It is true that specific language controls general language. But that canon applies only if the general 'conflicts' with the specific.") (citing *DCV Holdings, Inc.*, 889 A.2d 961)).