

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES PAUL DAVIS and)	
THOMAS WILLIAMS,)	
)	
Plaintiffs/Counterclaim-)	
Defendants,)	
)	
v.)	C.A. No. N23C-03-161 PRW
)	CCLD
TRISTAR CLAIMS MANAGEMENT)	
SERVICES, INC.,)	
)	
Defendant/Counterclaim-)	
Plaintiff.)	

Submitted: February 6, 2024

Decided: February 29, 2024

Upon Plaintiffs' Motion for Judgment on the Pleadings,
DENIED.

Upon Defendant's Motion for Judgment on the Pleadings,
GRANTED.

MEMORANDUM OPINION AND ORDER

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WALLACE, J.

Plaintiffs sold the assets of their insurance business in exchange for five-year employment contracts and performance payments. Throughout that five-year span, though revenues increased (entitling Plaintiffs to some revenue-based performance payments), the business did not produce any profits until the last (fifth) year. In dispute now is whether one certain type of performance payment was triggered for that final year.

Plaintiffs contend it was. In their view, there was “Operating Profit Growth,” *i.e.*, a “percentage increase in Operating Profit” for the fifth year. They say that even though there were absolutely no profits in the prior (fourth) year. Defendant counters that Plaintiffs are entitled to no additional payments because there can be no recognizable percentage increase in profit in a given year where there was no profit at all in the preceding year.

Because the contract explicitly compares *profits* from one year to the *profits* in the next, any entitlement to a payment based on the contract-defined Operating Profit Growth presupposes that the business indeed posted profits in *each* of those years. Because the business didn’t record any profits in the fourth year, Plaintiffs aren’t entitled to additional profit-based payments for the fifth.

What’s more, because the sought-after payments do not constitute “wages due,” Plaintiffs fail to state a claim under the Delaware Wage Payment and Collection Act.

I. RELEVANT FACTS¹

In 2017, James Davis and Thomas Williams (each “Principal,” or collectively, “Sellers”) sold their claims administration, subrogation, compliance, and loss adjusting business (“PCS” or “PCS Operations”) to Matrix Absence Management, Inc. (“Matrix” or the “Company”).² Through an Asset Purchase Agreement (the “APA”), Sellers received cash consideration of \$10,000, and signed five-year employment contracts with Matrix (the “Employment Contracts”).³ The Employment Contracts provided for salary, benefits, bonuses, and certain performance payments.⁴ The Employment Contracts’ Section 2.4 provides that:

the Principal shall be eligible to receive a Performance Payment as calculated herein, based on Revenue Growth and Operating Profit Growth (each as defined herein) during the course of the five (5) year period from and after the Effective Date (collectively, the “Performance Payments”, and individually, an “Performance Payment”).⁵

The Performance Payments are to be made in five installments, covering five periods defined as the “Performance Periods.”⁶ The Performance Payments are

¹ Facts are drawn from the pleadings, which include the Complaint (“Compl.”), Answer and Counterclaims (“Counterclaims”) (D.I. 7), and the documents incorporated therein.

² Compl. ¶ 1.

³ *Id.* ¶ 2; *id.* Ex. A (“APA”) Recitals; Compl. Ex. B (“Employment Contracts”).

⁴ *See* Employment Contracts Art. 2.

⁵ *Id.* § 2.4.

⁶ *Id.* § 2.4(a).

based on Revenue Growth and Operating Profit Growth.⁷ Each must exceed 8% in order to be calculated in the Performance Payment.⁸ This decision focuses on the Operating Profit Growth trigger.

Operating Profit Growth means:

the percentage interest in Operating Profit during a Performance Period as compared to the immediately preceding Performance Period; provided Operating Profit from the 2018 Performance Period shall be compared to Operating Profits from July 1, 2016 to July 1, 2017.⁹

Operating Profit means, in relevant part:

the operating profit from PCS Operations as reasonably determined by the Company and Principal based on a separate general ledger reflecting the financial performance of the PCS Operations including a profit and loss statement and balance sheet¹⁰

There is no dispute that for the first four years, Operating Profit Growth did not exceed 8%.¹¹ Sellers, therefore, received no Performance Payments based on Operating Profit Growth; they only received payments based on Revenue Growth for one of the four years.¹²

In 2021, Tristar Claims Management Services, Inc. (“Tristar” or “Defendant”)

⁷ *Id.* § 2.4(b)(i).

⁸ *Id.*

⁹ *Id.* § 2.4(c)(ii).

¹⁰ *Id.* § 2.4(c)(iv).

¹¹ Compl. ¶ 21.

¹² *Id.*

acquired Matrix, assuming Matrix's obligations towards Sellers under the APA.¹³ On July 31, 2022, for the fifth year, Tristar made a Performance Payment to each Seller for \$233,638.86.¹⁴ These payments were based on Revenue Growth alone.¹⁵ But Sellers insist they are also entitled to \$3,195,896 based on the Operating Profit Growth figures for that fifth year.¹⁶ Tristar disagrees that the difference between (\$116,487) in 2021 and \$473,013 in 2022 results in any Operating Profit Growth, and thus believes they owe no additional payments.¹⁷

So Sellers initiated this action by filing a three-count complaint against Tristar, alleging: (1) breach of contract; (2) violation of the Delaware Wage Payment and Collection Act; and, (3) a right to attorney's fees and costs. Tristar answered and counterclaimed, seeking opposing declarations and claims for attorney's fees and costs. Sellers answered, and the parties filed cross-motions for judgment on the pleadings on all claims.

¹³ *Id.* ¶ 23.

¹⁴ *Id.* ¶ 26.

¹⁵ *Id.*

¹⁶ *Id.* ¶ 44.

¹⁷ Counterclaims ¶ 50.

II. STANDARD OF REVIEW

Judgment on the pleadings is permitted under this Court's Civil Rule 12(c).¹⁸ Rule 12(c) review requires the Court to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party.¹⁹ When there are cross-motions for judgment on the pleadings, the Court must accept as true all of each opponent's well-pleaded factual allegations and draw all reasonable inferences in favor of each.²⁰ In that respect, cross-motions for judgment on the pleadings function just as do cross-motions for summary judgment.²¹

Now, the Court may grant a motion for judgment on the pleadings only when no material issue of fact exists and the movant is entitled to judgment as a matter of law.²² And, a Rule 12(c) motion can be "a proper framework for enforcing unambiguous contracts," which have only one reasonable meaning and therefore do not create material disputes of fact.²³

¹⁸ Super. Ct. Civ. R. 12(c).

¹⁹ *Almah LLC v. Lexington Insurance Company*, 2016 WL 369576, at *4 (Del. Super. Ct. Jan. 27, 2016) (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993)).

²⁰ *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

²¹ *Silver Lake Off. Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, *6 (Del. Super. Ct. Jan. 17, 2014) (internal citations omitted); *Indian Harbor Ins. Co. v. SharkNinja Operating LLC*, 2020 WL 6795965, at *3 (Del. Super. Ct. Nov. 19, 2020).

²² *Desert Equities, Inc.*, 624 A.2d at 1205; *Guaranteed Rate, Inc. v. Ace American Ins. Co.*, 2021 WL 3662269, at *1 (Del. Super. Ct. Aug. 18, 2021).

²³ *Bay Point Cap. Partners L.P. v. Fitness Recovery Holdings, LLC*, 2021 WL 5578705, at *4 (Del. Super. Ct. Nov. 30, 2021) (citations omitted).

III. DISCUSSION

Under Delaware law, “a contract’s construction should be that which would be understood by an objective, reasonable third party.”²⁴ Language in a contract is ambiguous if the language is susceptible to reasonable, conflicting interpretations.²⁵ A suggested interpretation is not reasonable, though, if it produces “an absurd result or one that no reasonable person would have accepted when entering the contract.”²⁶ And whenever a contract’s language is clear and unambiguous, the Court will give effect to that language’s ordinary and usual meaning.²⁷

A. SELLERS ARE NOT ENTITLED TO PROFIT-BASED PERFORMANCE PAYMENTS UNDER THE PLAIN AND ORDINARY MEANING OF THE CONTRACT.

The plain and ordinary meaning of the Employment Contracts resolves the parties’ dispute as to the calculation of the Performance Payments based on Operating Profit Growth. The Employment Contracts entitle Sellers to additional Performance Payments if PCS Operations meets certain profit thresholds.²⁸ If “Operating Profit Growth” exceeds 8%, Sellers shall receive a payment based on a specific formula.²⁹

²⁴ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

²⁵ *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1131 (Del. 2020) (citation omitted).

²⁶ *Osborn ex rel. Osborn*, 991 A.2d at 1160 (citations omitted).

²⁷ *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

²⁸ Employment Contracts § 2.4.

²⁹ *Id.* § 2.4(b)(i).

First, Operating Profit is what its plain and contractually defined meaning indicates, *profit*, that is, net positive value. The Employment Contracts define Operating Profit as the “operating profit from PCS Operations . . . based on a separate general ledger reflecting the financial performance of the PCS Operations including a profit and loss statement and balance sheet.”³⁰ Nowhere does the contractual language suggest the possibility of negative profit, nor will the Court interpret unambiguous language in a way that is contrary to its plain and ordinary meaning.

Second, the definition of Operating Profit Growth makes an explicit reference to *operating profit* made in one year in relation to the *operating profit* made in the next. In the key phrase here, Operating Profit Growth means “the percentage increase in Operating Profit during a Performance Period as compared to the immediately preceding Performance Period.”³¹

The contractual language thus presupposes that PCS Operations records profits in both years. If there is no such profit made in the prior year, by the plain terms of the contract, there can be no Operating Profit Growth, and thus no

³⁰ *Id.* § 2.4(c)(iv).

³¹ *Id.* § 2.4(c)(ii). That phrase goes on to explain that the “*Operating Profit* from the 2018 Performance Period shall be compared to *Operating Profits* from July 1, 2016 to July 1, 2017.” *Id.* (emphasis added). This latter language clarifies the earlier clause in the sentence by more explicitly referencing what is being compared year-to-year—“Operating Profit”—a net positive value.

entitlement to an additional Performance Payment. Given that PCS Operations made no Operating Profits in year four, Sellers are not entitled to payments based on Operating Profit Growth in year five.³²

B. TOO, SELLERS ARE NOT ENTITLED TO PROFIT-BASED PERFORMANCE PAYMENTS WHEN USING THE ACCEPTED METHOD OF CALCULATING PERCENTAGE INCREASE.

The Court reaches the same conclusion by taking judicial notice of the commonly accepted method of calculating percentage increase.

D.R.E 201 provides that the court “may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”³³ For a word that has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning.³⁴

Tristar asks the Court to take judicial notice of the “basic, well-settled point

³² Sellers’ approach would also appear to disincentivize overall profitability by creating alternating non-profitable and profitable years in order to maximize the Performance Payments, and therefore is not a reasonable interpretation of the contractual provisions.

³³ D.R.E. 201; *Lebanon Cnty. Employees’ Ret. Fund v. Collis*, 2023 WL 8710107, at *15 (Del. Dec. 18, 2023) (“Our rules of evidence distinguish judicial notice of adjudicative facts from judicial notice of law. D.R.E. 201 governs judicial notice of adjudicative facts”); *see, e.g., Menacker v. Overture, L.L.C.*, 2020 WL 4463438, at *17 (Del. Ch. Aug. 4, 2020) (comparing buying power of money in different years); *Shaev v. Adkerson*, 2015 WL 5882942, at *11 (Del. Ch. Oct. 5, 2015) (finding that financial accounting standard are public documents subject to judicial notice); *Fiat N. Am. LLC v. UAW Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *15 (Del. Ch. July 30, 2013) (taking judicial notice of GAAP and IFRS rules); *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (taking judicial notice of publicly available facts through SEC filings to ascertain facts on motion to dismiss stage).

³⁴ *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *13 (Del. Ch. Apr. 2, 2007).

of accounting” that:

$$\text{percentage increase} = ((X_2 - X_1) / X_1) \times 100$$

where X_2 is the Operating Profit in year 5, and X_1 is Operating Profit in year 4.³⁵

Tristar inputs the figures below to arrive at -506%, or 0, if one inputs 0 for X_1 , because there was no profit in year four:

$$-506\% = ((\$473,013 - (-\$116,487)) / (-\$116,487)) \times 100$$

or

$$0\% = ((\$473,013 - (0)) / (0)) \times 100$$

Sellers, on the other hand, cite to what appears to be a reddit-style online forum where a contributor suggests a formula using absolute values.³⁶ Sellers characterize their method as “the accepted convention for calculating a percentage increase,” despite the fact that they have failed to point to any treatise, or scholarly work supporting its method.³⁷ Under Sellers’ proffered method, because a “move from a ‘loss’ to a profit will always involve a move from less to more, the calculation

³⁵ See Defendant/Counterclaim-Plaintiff Tristar Claims Management Services, Inc.’s Combined Reply Brief in Further Support of Tristar’s Motion for Judgment on the Pleadings and Opposition Brief to Plaintiffs’ Cross-Motion for Judgment on the Pleadings (“Def.’s Ans. Br.”) at 3, n.3 (D.I. 38) (citing Bharat Kolluri et al., Introduction to Quantitative Methods in Business, Appendix 1.A.8.2 (“Finding Percentage Increase or Percentage Decrease”) (Wiley 2016)); *Percentage Change Definition and Formula*, Investopedia, <https://www.investopedia.com/terms/p/percentage-change.asp>)).

³⁶ Plaintiffs’ Memorandum In Opposition to Tristar’s Motion for Judgment on the Pleadings (“Pls.’ Ans. Br.”) at 18-21 (D.I. 41).

³⁷ *Id.* at 19.

likewise always will reveal an increase, rather than a decrease.”³⁸ Sellers’ result is a 506% increase in Operating Growth Profit, entitling Sellers to a Performance Payment of \$3,663,263.72.³⁹

Sellers’ primary objection to Tristar’s argument that the Court take judicial notice of Tristar’s proffered method of percentage increase is that “alternative formulae for ‘percentage increase’ exist.”⁴⁰ Seller’s argument, however, is belied by the paucity of so-called alternative formulae it cites in support. Seller only provides a citation to an online thread whose genesis is a question posed by an online user named “master of puppets” on March 18, 2014, regarding “how to calculate the percentage of increase/decrease with negative numbers?”⁴¹ The apparent answer materializes seven years later, on January 15, 2021, in a post by an online user named “ismael.”⁴²

Sellers do not credibly dispute the accuracy of the sources cited by Tristar, and therefore the Court takes judicial notice that the commonly accepted method of calculating percentage increase is the formula provided by Tristar. Furthermore, to

³⁸ *Id* at 19, 20.

³⁹ *Id.* at 22-23.

⁴⁰ *Id.* at 18-19 (citing <https://math.stackexchange.com/questions/716767/how-to-calculate-thepercentage-of-increase-decrease-with-negative-numbers> (last visited Dec. 14, 2023)).

⁴¹ *See* <https://math.stackexchange.com/questions/716767/how-to-calculate-thepercentage-of-increase-decrease-with-negative-numbers> (last visited Feb. 28, 2024).

⁴² *Id.*

the extent Sellers argue that the common meaning of calculating percentage increase requires the use of an absolute value formula, the Court takes percentage increase as a term of art whose technical meaning takes priority.

C. SELLERS' CLAIMS FOR WAGES

Sellers raise claims under Delaware's Wage Payment and Collection Act. Nineteen *Del. C.* Section 1102(a) has always mandated that "[e]very employer shall pay all wages due to the employer's employees on regular paydays designated in advance by the employer" ⁴³ Section 1102(b) of Title 19 requires that "every employer [] pay all wages due within 7 days from the close of the pay period in which the wages were earned." ⁴⁴ The statute defines a "wage" as "compensation

⁴³ DEL. CODE ANN. tit. 19, § 1102(a) (2023). The definition of "employee" is found in Section 1101. The parties agree that the version of Section 1101 of Delaware's Wage Payment and Collection Act extant from its promulgation in 1965 to its revision in October 2022 is applicable here. Thereunder, an "employee" was defined as "any person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein." DEL. CODE ANN. tit. 19, § 1101(a)(3) (1995). Neither Mr. Davis nor Mr. Williams would fit that definition.

⁴⁴ DEL. CODE ANN. tit. 19, § 1102(b) (2023). Sellers also cite 19 *Del. C.* § 1107, which provides:

Withholding of wages.

No employer may withhold or divert any portion of an employee's wages unless:

- (1) The employer is required or empowered to do so by state or federal law; or
- (2) The deductions are for medical, surgical or hospital care or service, without financial benefit to the employer, and are openly, clearly and in due course recorded in the employers' books; or
- (3) The employer has a signed authorization by the employee for deductions for a lawful purpose accruing to the benefit of the employee, except that the Department, upon finding that it is acting in the public interest, may, by regulation, prohibit such withholding or diverting for such purpose. If the Department abuses its discretion and acts arbitrarily and without any reasonable

due to an employee by reason of the employee’s employment”⁴⁵ And the purpose of the statute is “to provide a remedy for employees to recover regular direct recurrent wages unreasonably withheld by the employer.”⁴⁶

The Performance Payments are more akin to earn-out payments than recurrent wages. They are post-sale contingent payments based on the revenue and profits of PCS Operations. Though they fall under Article 2 (which is titled “Compensation”) in the Employment Contracts, they are not paid “on regular paydays designated in advance by the employer,” or directly tied to the individual performance of the Sellers.⁴⁷ Indeed, the parties bargained for bonuses and a base salary in separate provisions of the Employment Contracts.⁴⁸

Even if they are considered wages, a claim under the Delaware Wage Payment and Collection Act must be for wages “due.”⁴⁹ Thus, any claim must derive from an

ground, any aggrieved person may institute a civil action in the Superior Court to have such regulation declared null and void. The Department, in such action, shall not be liable for costs or fees of any nature.

⁴⁵ See DEL. CODE ANN. tit. 19, § 1101(a)(8) (2023). From 1965 to the October 2022 revision, “wages” was defined as “compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis.” DEL. CODE ANN. tit. 19, § 1101(a)(2) (1965) (later enumerated as § 1102(a)(5), and now § 1101(a)(8)). Under either iteration, the Performance Payments would likely not be considered recurrent wages.

⁴⁶ *Gallagher v. E.I. DuPont De Nemours & Co.*, 2010 WL 1854131, at *6 (Del. Super. Ct. Apr. 30, 2010); see also DEL. CODE ANN. tit. 19, § 1102(a) (2023).

⁴⁷ See Employment Contracts Art. 2; DEL. CODE ANN. tit. 19, § 1102(a) (2023).

⁴⁸ See Employment Contracts §§ 2.1 and 2.3.

⁴⁹ See DEL. CODE ANN. tit. 19, § 1102(a) and (b) (2023).

entitlement to wages. As explained earlier, Sellers aren't entitled to Performance Payments because the necessary Operating Profit Growth trigger wasn't tripped. Ans so, this statutory claim is rendered moot.

D. ATTORNEY'S FEES

Sellers and Tristar bring cross-claims for attorney's fees and costs under the Employment Contracts' fee-shifting provision. Delaware follows the American Rule, which dictates that a prevailing party is normally responsible for the payment of his own litigation costs.⁵⁰ One exception to the rule is if there is a fee-shifting provision in an enforceable contract.⁵¹ In this case, the parties agreed to the following, which, as described, contains a fee-shifting provision:

This Agreement and all questions relating to its validity, interpretation, performance and enforcement shall be governed by and construed in accordance with the laws of the State of Delaware. Any dispute arising under or in connection with this Agreement or related to any matter that is the subject of this Agreement shall be subject to the exclusive jurisdiction of the state courts located in New Castle County, Delaware. *In the event of any such litigation, the prevailing party shall be entitled to recover from the other party all of its attorney fees and other expenses incurred in connection with such litigation and any appeal therefrom or in connection with any bankruptcy action.*⁵²

The parties do not dispute the enforceability of the contracts. Tristar has

⁵⁰ *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998).

⁵¹ *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 2020 WL 4596838, at *4 (Del. Ch. Aug. 11, 2020), *judgment entered*, (Del. Ch. 2020), *aff'd*, 261 A.3d 1199 (Del. 2021).

⁵² Employment Contracts § 7.8 (italics added for emphasis). The APA has a similarly worded fee-shifting provision. *See* APA § 9.13.

prevailed in this action and is receiving declaratory relief in its favor. It is therefore entitled to its reasonable attorney's fees and costs incurred in bringing its declaratory claims. Tristar shall submit an affidavit outlining its reasonable fees and costs, to which the Sellers can respond before the amount of fees to be awarded is set.

V. CONCLUSION

For the reasons set forth above, Tristar's Motion for Judgment on the Pleadings is **GRANTED**. Sellers' Motion for Judgment on the Pleadings is **DENIED**.

IT IS SO ORDERED.



Paul R. Wallace, Judge