IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FORTIS ADVISORS LLC, solely in its capacity as Stockholders' Representative,	)	
Plaintiff,	)	
v.	)	C.A. No. 2023-1055-MAA
MEDTRONIC MINIMED, INC.,	)	
Defendant.	)	

Submitted: April 29, 2024
Decided: July 29, 2024

MEMORANDUM OPINION

***Defendants' Motion to Dismiss Plaintiff's Verified Complaint* - GRANTED.**

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Adams, J.[1]

[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 In re: DESIGNATION OF THE HONORABLE MEGHAN A. ADAMS under Del. Const. art. IV § 13(2) dated March 16, 2023.

INTRODUCTION

Plaintiff Fortis Advisors LLC ("Fortis"), in its capacity as Stockholders' Representative for the former stockholders of Companion Medical, Inc. ("Companion"), filed this suit against Defendant Medtronic Minimed, Inc. ("Medtronic"). Medtronic, Companion, Fortis, and Takeoff Sub, Inc. entered into an Agreement and Plan of Merger dated July 24, 2020 (the "Merger Agreement"). Medtronic acquired Companion through the Merger Agreement. Fortis now alleges that Medtronic breached the Merger Agreement by acting with the primary purpose of defeating a contingent payment and by failing to authorize the release of certain funds held in escrow.

Medtronic has moved to dismiss Fortis's Second Amended Complaint (the "SAC") under Court of Chancery Rule 12(b)(6). In brief, Medtronic maintains Fortis failed to plead facts that raise a reasonable inference of a breach with respect to the contingent payment. Medtronic continues that Fortis's current claim to the escrow funds rests upon a misinterpretation of the relevant contractual provisions. This is the Court's decision on Medtronic's Motion. For the reasons stated herein, Medtronic's Motion is GRANTED in part, and DENIED in part.

FACTS[2]

I. THE PARTIES

Fortis is a Delaware limited liability company with its principal place of business in California.[3] Fortis brings this case in its capacity as the representative of Companion's former stockholders.[4]

Medtronic is a Delaware corporation with its principal place of business in California.[5]

II. THE MERGER AGREEMENT

Medtronic is a company that, in part, operates its parent's "Diabetes Unit" in the United States.[6] Companion is a company that, prior to the at-issue merger, developed "smart insulin pen" products called "InPen" and "InCap."[7]

InPen and InCap allow users to better manage their insulin doses.[8] InPen delivers "short-acting insulin" while InCap delivers "long-acting insulin."[9] Fortis claims InPen has several advantages over "traditional insulin pens and insulin

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[2] The following facts are derived from the allegations contained in the SAC and the documents integral thereto. *See* D.I. No. 24 (hereinafter "SAC"). These allegations are accepted as true solely for purposes of this decision.
[3] SAC ¶ 11.
[4] *Id.* ¶ 1.
[5] *Id.* ¶ 12.
[6] *Id.* ¶ 4.
[7] *Id.* ¶ 2.
[8] *Id.* ¶¶ 2–3.
[9] *Id.* ¶ 2.

pumps."[10] Fortis continues that "Companion achieved significant growth in the number of InPens it sold" in the approximately two years leading up to the at-issue merger.[11]

Medtronic expressed interest in acquiring Companion.[12] In the summer of 2020, Medtronic allegedly represented that it "intended to integrate the InPen with a forthcoming Medtronic continuous glucose monitor ('CGM'), referred to as Simplera (formerly Synergy), which [Medtronic's representatives] anticipated obtaining FDA clearance on soon."[13]

On July 24, 2020, Medtronic, Companion, Fortis, and non-party Takeoff Sub, Inc. executed the Merger Agreement.[14] Through the Merger Agreement, Medtronic acquired Companion for "Closing Consideration" that exceeded $300 million.[15] The Merger Agreement closed on September 10, 2020.[16] Certain of Medtronic's obligations thereunder now form the core of this dispute.

A. The First Milestone Provisions

Fortis's primary contention in this litigation is that Medtronic wrongfully deprived Companion's former stockholders of a $100 million contingent milestone

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[10] *Id.* ¶ 3.
[11] *Id.* ¶¶ 16–19. Specifically, Fortis alleges that InPen sales grew from 676 units in the third quarter of 2018 to 9,959 units in the first quarter of 2020. *Id.*
[12] *Id.* ¶ 22.
[13] *Id.*
[14] *Id.* ¶ 1; *see also* SAC, Ex. A (hereinafter "Merger Agreement").
[15] SAC ¶ 23, 26.
[16] *Id.* ¶ 25.

payment (the "First Milestone"). Merger Agreement Section 1.01—the "Definitions" section of the Merger Agreement—defines the "First Milestone" as: "the occurrence of both of the following during a single First Milestone Measurement Period: (a) Unit Sales exceed 85,000 units and (b) Average Net Revenue of at least 85,000 units sold during such First Milestone Measurement Period is greater than $400.00."[17]

Unpacking that definition requires a tour through Merger Agreement Section 1.01's cross-referencing definitions. The bottom line is that to hit the First Milestone, Medtronic had to sell at least 85,000 smart insulin pens for an average price of at least $400 each during any four consecutive quarters during the first eight "full Buyer Fiscal Quarters" following closing[18]—*i.e.*, November 1, 2020 through October 28, 2022 (the "Milestone Period").[19] If Medtronic hit the First Milestone, Companion's former stockholders would receive a one-time payment of $100 million (the "First Milestone Consideration").[20]

Medtronic's obligations with respect to achieving the contingent milestone payments[21] are contained in Merger Agreement Section 2.11(f). That provision

[17] Merger Agreement § 1.01.
[18] *Id.*; *see also* SAC ¶¶ 31–39.
[19] SAC ¶ 36.
[20] Merger Agreement § 2.11(a).
[21] In addition to the First Milestone that is at issue here, the Merger Agreement provided for a Second Milestone worth $75 million. *See id.* § 2.11(b). Medtronic achieved the Second Milestone, benefitting Companion's former stockholders. SAC 42–44.

indicates that Medtronic's obligations were limited. The beginning of Section 2.11(f) states:

> The parties hereto acknowledge that, following the Closing, it is the intention of the parties that the development, marketing, commercial exploitation and sale of the Milestone Products shall be exercised by Buyer, the Surviving Corporation or their Affiliates and transferees *in accordance with its or their own business judgment and in its or their sole and absolute discretion, which may have an impact on the payment of the Milestone Consideration*. The parties hereto further acknowledge and agree that achievement of the Milestones is uncertain. Neither Buyer nor the Surviving Corporation makes any representation or warranty, express or implied, whatsoever, with respect to the achievability of the Milestones, and the Company, on behalf of itself and the Former Holders, acknowledges that there can be no assurances that the Milestones are achievable.[22]

Section 2.11(f) continues:

> Except as provided in this Section 2.11, and notwithstanding any conversations, correspondence or other writings in which the parties or any Former Holders may have engaged before signing this Agreement (including with respect to the intentions, capabilities and/or practices of the parties, or forecasts as to future events), *neither Buyer nor any of its Affiliates shall have any liability whatsoever to any Former Holder or any other Person for any claim, loss or damage of any nature that arises out of or relates in any way to any decisions or actions affecting whether or not or the extent to which the Milestone Consideration becomes payable* in accordance with this Section 2.11.[23]

Importantly to this litigation, the next sentence of Section 2.11(f) qualifies that language, saying: "Notwithstanding the foregoing, until the end of the Milestone Period, *Buyer shall not take any action intended for the primary purpose of*

[22] Merger Agreement § 2.11(f) (emphasis added).
[23] *Id.* (emphasis added).

frustrating the payment of Milestone Consideration hereunder."[24] Section 2.11(f) concludes:

> For clarity, other than the Ancillary Agreements, the parties hereto agree that this Agreement is intended to define the full extent of the legally enforceable undertakings of the parties hereto, and that no promise or representation, written or oral, which is not set forth explicitly in this Agreement or such Ancillary Agreement is intended by any party to be legally binding. The Company and the Former Holders acknowledge that in deciding to enter into or adopt this Agreement and to consummate the Merger none of them has relied upon any statements or representations, written or oral, other than those explicitly set forth herein.

At bottom, and as Fortis acknowledges,[25] Section 2.11(f) immunizes Medtronic from any milestone-related claims aside from a claim that Medtronic acted "for the primary purpose of frustrating the payment of Milestone Consideration."[26]

B. The Escrow Provisions

Separately, the Merger Agreement called for a $35 million "Indemnity Escrow Amount" to be used to satisfy Companion's former stockholders' indemnity obligations.[27] Exhibit A to the Merger Agreement contains the form escrow agreement that would govern the escrow account.[28] On September 10, 2020, Fortis, Medtronic, and PNC Bank, N.A. ("PNC") executed the contemplated escrow

[24] *Id.* (emphasis added).
[25] *See* SAC ¶ 51.
[26] Merger Agreement § 2.11(f).
[27] *Id.* §§ 1.01, 10.06.
[28] *Id.*, Ex. A; SAC, Ex. B (hereinafter "Escrow Agreement").

agreement (the "Escrow Agreement") pursuant to the Merger Agreement.[29] The parties now dispute the meaning of the respective release provisions contained in the Merger Agreement and Escrow Agreement.

Merger Agreement Section 10.11 provides in pertinent part:

> On the fifth (5th) Business Day following the three (3)-year anniversary of the Closing Date, the remainder of the funds remaining in the Indemnity Escrow Fund as of such date that are not subject to a then-pending Indemnity Claim shall be released to the Former Holders in accordance with the terms of the Escrow Agreement.[30]

Escrow Agreement Section 1.3(d) similarly—but not identically—provides:

> Within five Business Days after the three-year anniversary of the Closing Date, Buyer and the Stockholders' Representative shall issue a Joint Written Direction directing the Escrow Agent to disburse to (1) the Paying Agent, for further distribution to the Former Holders (other than Former Holders in respect of Employee Options) and (2) to the Surviving Corporation, for further distribution to the Former Holders in respect of Employee Options, an amount equal to the remainder of the funds remaining in the Indemnity Escrow Account as of such date that are not subject to a then-pending Indemnity Claim, subject to the terms and conditions set forth in the Merger Agreement and in accordance with the allocation schedule.[31]

III. THE ALLEGED BREACHES OF THE MERGER AGREEMENT

A. The Alleged First Milestone-Related Breach

Fortis dedicates eight paragraphs of its 141-paragraph SAC to the allegations that purportedly raise a reasonable inference that Medtronic acted with the primary

[29] *See* Escrow Agreement.
[30] Merger Agreement § 10.11.
[31] Escrow Agreement § 1.3(d).

purpose of defeating the First Milestone.[32] Those eight paragraphs allege five circumstance that Fortis argues support its claim.

First, the SAC alleges that regulatory approval of Medtronic's CGM took longer than expected.[33] The unpled implication appears to be that Medtronic could not generate enough revenue to justify the First Milestone Consideration without also selling Medtronic's CGM.[34]

The other four circumstances are the actions Medtronic allegedly took—or, more commonly, failed to take—with the primary purpose of defeating the First Milestone. For one, Fortis alleges that Medtronic required the legacy Companion salespeople to sign non-compete agreements that temporarily precluded subsequent employment in "the diabetes field."[35] Fortis alleges that, prior to closing, Medtronic stated such agreements would be limited in scope to "the field of smart insulin pens."[36] According to Fortis, the broader scope of the actual non-compete agreements led to an exodus of Companion's top salespeople.[37]

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[32] SAC ¶¶ 52–59.
[33] *Id.* ¶ 53.
[34] *See* D.I. No. 40 (hereinafter "Pl.'s Opp'n") at 23 ("At the time, Medtronic faced the prospect of having to pay the First Milestone Consideration without FDA clearance for its new CGM, which is a plausible motivation for taking actions intended for the primary purpose to frustrate the payment of the First Milestone Consideration.").
[35] SAC ¶ 54.
[36] *Id.* ¶ 52.
[37] *Id.* ¶¶ 55–56.

Fortis also claims Medtronic failed to effectively replace the legacy Companion salespeople who resigned.[38] Specifically, Fortis claims that Medtronic did not incentivize its own salespeople to sell InPens until spring 2021, even though the Milestone Period began in November 2020.[39] Fortis adds that even once Medtronic incentivized Medtronic's sales team to sell InPens, Medtronic did not offer powerful enough incentives and the Medtronic salespeople did not have enough experience with InPens.[40]

Next, Fortis alleges Medtronic "deferred the commencement of a $12 million marketing program that would have supported sales of the InPen during the Milestone Period."[41] Fortis claims that Medtronic instead instituted the marketing program in November 2022, "the month after the Milestone Period expired."[42]

Last, Fortis alleges Medtronic "refused to pursue InCap clearance and sales" "[u]nder the guise of" Medtronic's belief that insurers would not cover InCaps often enough to make pursuing InCap sales worthwhile.[43] In Fortis's view, "[i]t is reasonable to have assumed, however, that the InCap product would have been covered more than 50% of the time."[44] Fortis cites Companion's pre-closing ability

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[38] *Id.* ¶ 57.
[39] *Id.*
[40] *Id.*
[41] *Id.* ¶ 58.
[42] *Id.*
[43] *Id.* ¶ 59.
[44] *Id.*

to obtain coverage for InCaps and suggests that Medtronic could have done the same.[45]

B. The Alleged Escrow-Related Breach

The facts surrounding the alleged breach of Escrow Agreement Section 1.3(d) and Merger Agreement Section 10.11 are uncomplex. On September 10, 2023—the third anniversary of the Merger Agreement's closing date—the relevant escrow account held $17.5 million (the "Escrow Fund").[46] On September 12, 2023, Fortis contacted Medtronic to execute Joint Written Directions authorizing the release of the Escrow Fund.[47] On September 15, 2023,[48] Medtronic submitted an indemnity claim and refused to authorize release of the Escrow Fund.[49] The parties have since disputed whether Medtronic's submission was timely such that Medtronic's refusal to authorize disbursement of the Escrow Fund is allowed.[50]

PROCEDURAL HISTORY

Fortis instituted this action with its initial Complaint in October 2023.[51] Fortis filed a First Amended Complaint in December 2023.[52] Medtronic moved to dismiss

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[45] *Id.*
[46] *Id.* ¶ 79.
[47] *Id.* ¶ 91.
[48] Medtronic sent the notice on the evening of September 14, 2023, but the notice is deemed to have been delivered the next business day by operation of the Merger Agreement's notice provision. *Id.* ¶ 93; Merger Agreement § 12.01(c).
[49] SAC ¶¶ 93–95.
[50] *See, e.g.*, *id.* ¶¶ 95–98.
[51] *See* D.I. No. 1.
[52] *See* D.I. No. 11.

the First Amended Complaint in January 2024.[53] With Medtronic's consent and the Court's permission, Fortis filed the SAC on February 9, 2024.[54]

The SAC contains six causes of action pertaining to the two alleged breaches: declaratory judgment regarding the First Milestone (Count I);[55] specific performance regarding the First Milestone (Count II);[56] breach of contract regarding the First Milestone (Count III);[57] declaratory judgment regarding the Escrow Fund (Count IV);[58] specific performance regarding the Escrow Fund (Count V);[59] and breach of contract regarding the Escrow Fund (Count VI).[60] Fortis moved for partial summary judgment on February 13, 2024, but the Court stayed that motion until resolution of Medtronic's motion to dismiss.[61]

Medtronic moved to dismiss the SAC on March 1, 2024.[62] Fortis opposed Medtronic's Motion on March 19, 2024.[63] Medtronic replied to Fortis's opposition on April 9, 2024.[64] Fortis sought leave to file a sur-reply on April 15, 2024, but the

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53 *See* D.I. No. 15.
54 *See* SAC.
55 *Id.* ¶¶ 100–05.
56 *Id.* ¶¶ 106–15.
57 *Id.* ¶¶ 116–21.
58 *Id.* ¶¶ 122–27.
59 *Id.* ¶¶ 128–36.
60 *Id.* ¶¶ 137–41.
61 *See* D.I. Nos. 26, 37.
62 *See* D.I. No. 34 (hereinafter "Def.'s Mot.").
63 *See* Pl.'s Opp'n.
64 *See* D.I. No. 43 (hereinafter "Def.'s Reply").

Court denied that request.[65] The Court heard argument on Medtronic's Motion on April 29, 2024.[66] The matter is now ripe for decision.

STANDARD OF REVIEW[67]

Under the well-establish standard of review applicable to a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6):

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[68]

"A trial court is not, however, required to accept as true conclusory allegations without specific supporting factual allegations."[69]

ANALYSIS

Three elements comprise a breach of contract claim: "(1) the existence of a contractual obligation, (2) a breach of that obligation, and (3) damages as a result."[70] The damage element, however, can be satisfied by nominal damages in the absence

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[65] *See* D.I. Nos. 46, 52.
[66] *See* D.I. No. 55 (hereinafter "OA Tr.").
[67] Applicable Court of Chancery Rules were amended on June 14, 2024; however, the Court applies the Rules in effect when Fortis filed this action. *See Bricklayers Pension Fund of W. Pa. v. Brinkley*, 2024 WL 3384823, at *12 n.143 (Del Ch. July 12, 2024) (citations omitted).
[68] *Ramco Asset Mgmt., LLC v. USA Rare Earth, LLC*, 2024 WL 1716399, at *4 (Del. Ch. Apr. 22, 2024) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).
[69] *Id.* (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006)).
[70] *Levy Fam. Invs., LLC v. Oars + Alps LLC*, 2022 WL 245543, at *8 (Del. Ch. Jan. 27, 2022) (quoting *Deluxe Ent. Servs. v. DLX Acq. Corp.*, 2021 WL 1169905, at *3 (Del. Ch. Mar. 29, 2021)).

of other cognizable damages.[71] "When interpreting a contract for purposes of a motion to dismiss, this court is guided by our Supreme Court's instruction that '[d]ismissal is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law.'"[72]

Though pled as six Counts, Fortis essentially brings two breach-of-contract claims.[73] The Court analyzes the two claims separately.

I. FORTIS HAS NOT ALLEGED FACTS RAISING A REASONABLE INFERENCE THAT MEDTRONIC BREACHED MERGER AGREEMENT SECTION 2.11(f).

The bulk of Fortis's requested relief flows from the proposition that Medtronic breached the Merger Agreement by acting with the primary purpose of defeating the First Milestone. Thus, a threshold inquiry is whether Fortis's SAC raises a reasonable inference of that pivotal fact. The Court finds the SAC does not.

The Court first notes the unusually heavy burden that Fortis contractually imposed on itself. This is not a case where Medtronic covenanted to use "best efforts," "commercially reasonable efforts," or even "good faith efforts" to achieve the First Milestone.[74] To the contrary, in an arm's-length transaction, Medtronic

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[71] *Cygnus Opportunity Fund, LLC v. Wash. Prime Grp., LLC*, 302 A.3d 430, 456 (Del. Ch. 2023) (citing *In re P3 Health Grp. Hldgs., LLC*, 2022 WL 16548567, at *9, *30 (Del. Ch. Oct. 31, 2022)).

[72] *Levy Fam. Invs.*, 2022 WL 245543, at *4 (alteration and emphasis in original) (quoting *Vanderbuilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996)).

[73] *See infra* Section III.

[74] *See Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *86–87 (Del. Ch. Oct. 1, 2018) (discussing various iterations of "efforts" clauses and the respective burdens they impose). The Court recognizes the general rule stated in *Akorn* that "[g]ood faith efforts are implied as a matter

secured for itself sole discretion to take actions that Medtronic knew would frustrate the First Milestone, so long as the action had some other primary purpose.[75] Fortis freely assented to that arrangement. The Court is not aware of any Delaware precedent applying such a buyer-friendly contingent payment scheme,[76] and the parties cite to none.

Thus, while Fortis is correct that Delaware law imposes a "'minimal' and 'plaintiff-friendly' standard" at the pleading stage,[77] Fortis must contend with a voluntarily undertaken contractual standard that is far from plaintiff-friendly. To meet that standard, Fortis cannot simply raise an inference that Medtronic acted in a way that had the purpose or effect of defeating the First Milestone,[78] Fortis must

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of law." *Id.* (citations omitted). But implied terms are used to fill unanticipated gaps in a contract. *See Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (citations omitted). Implied terms are therefore necessarily "[s]ubject to the express terms of the agreement." *Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 919 (Del. 2021). And "[p]arties have a right to enter into good and bad contracts, the law enforces both." *Nemec*, 991 A.2d at 1126. Here, in light of Merger Agreement Section 2.11(f)'s express terms, Medtronic effectively replaced the generally applicable good-faith obligation with the lesser obligation of refraining from acting with the "primary purpose" of defeating the milestones. In other words, Section 2.11(f) allows Medtronic to take actions motivated, in part, by defeating a milestone payment so long as some other purpose is more central to the decision.

[75] Merger Agreement § 2.11(f).

[76] An analogous "primary purpose" clause is referenced in *Dolce v. WTS Int'l, LLC*, but the court stayed that case without consideration of the merits. 2024 WL 714128, at *2 n.32 (Del. Ch. Feb. 20, 2024).

[77] Pl.'s Opp'n at 29 (quoting *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2022 WL 36488, at *11 (Del. Ch. Jan. 4, 2022)).

[78] *Cf. FMLS Hldg. Co. v. Integris BioServices, LLC*, 2023 WL 7297238, at *8–9 (Del. Ch. Oct. 30, 2023).

plead facts that raise an inference that Medtronic acted with the *primary* purpose of defeating the First Milestone. Fortis fails to raise the latter inference.

Three of the four actions Medtronic allegedly took with the primary purpose of frustrating the First Milestone are, in fact, artfully worded omissions. Specifically, Fortis alleges that Medtronic "deferred the introduction of new salespeople," "deferred the commencement of a $12 million marketing program," and "refused to pursue InCap clearance and sales."[79] Deferring action and refusing action are functional opposites of "tak[ing]" action. If Medtronic had covenanted to use reasonable efforts to achieve the First Milestone, those omissions might be telling. But the at-issue language of Section 2.11(f) only expressly proscribes affirmative acts, so the relevance of Medtronic's omissions is, at best, questionable.[80]

Even assuming that deferring or refusing action could fall under the language "take any action," the SAC's most important deficiency is what the SAC does not allege. Specifically, the SAC fails to plead any facts that directly relate to Medtronic's purpose in taking the four at-issue actions. That failure takes on outsized importance in light of the atypical deference Section 2.11(f) gives to Medtronic. The Court acknowledges many plaintiffs will not be able to allege direct

[79] SAC ¶¶ 57–59.

[80] *Cf. FMLS Hldg.*, 2023 WL 7297238, at *3 (discussing an earnout-related "Good Faith Obligation" that stated in part the defendant "shall not, directly or indirectly, take any actions *or omit to take any actions* in bad faith" (emphasis added)).

evidence of purpose like the plaintiff in *FMLS* did.[81] The Court does not impose such a burden on Fortis. But there is circumstantial evidence of an action's purpose aside from conjecture based only upon the action itself. Fortis could not muster any such support for its claim.

By way of example, Medtronic's alleged actions—such as requiring non-compete agreements and not providing compelling sales incentives—might be more suspect if Fortis could plead that Medtronic's policies were unique to the legacy Companion business. That would tend to suggest that Medtronic's actions had more to do with frustrating the First Milestone than another business purpose. But the SAC's allegations offer no basis to infer that Medtronic treated the legacy Companion products differently than any other Medtronic assets.

Likewise, the timing of Medtronic's actions could help raise an inference of a primarily improper purpose. That is, if Medtronic abruptly forced non-competes upon the legacy Companion employees or reduced sales incentives for InPens only when Medtronic got close to achieving the First Milestone, that might suggest a primary purpose of defeating the First Milestone. Fortis does not allege that happened. Instead, Fortis's allegations reflect that Medtronic largely maintained the status quo throughout the Milestone Period—with the exception of the request for non-compete agreements, which Medtronic made within sixty days of acquiring

[81] *See id.* at *9.

Companion and before the Milestone Period commenced.[82] The only mid-Milestone Period change Fortis alleges is that Medtronic *started* incentivizing the sale of InPens about one-quarter of the way through the Milestone Period.[83]

Along those lines, the Court agrees with Fortis that the November 2022 investment into a marketing program suggests Medtronic was content to let the First Milestone go unmet. The Court reiterates, though, that Medtronic had *no* contractual duty to make *any* effort to achieve the First Milestone. Medtronic's only obligation was to refrain from actions primarily aimed at "frustrating" the First Milestone.[84] Fortis could have negotiated for required marketing investments during the Milestone Period.[85] Fortis did not do so. Fortis cannot now proceed against Medtronic as if Fortis had obtained such a term.[86]

The Court does not mean to suggest that either of the circumstances mentioned above is necessary to plead purpose in this context. The Court offers those examples only to demonstrate that there is occupiable ground between Fortis's conclusory allegations of purpose in this case and the direct evidence of bad faith provided in

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[82] SAC ¶¶ 53–54.
[83] *Id.* ¶ 57.
[84] Merger Agreement § 2.11(f).
[85] *Cf. FMLS Hldg.*, 2023 WL 7297238, at *3 (discussing a contractually imposed "Expenditure Obligation" during an earnout period).
[86] *Nemec*, 991 A.2d at 1126 (Delaware courts "must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." (citing *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1234 (Del. Ch. 2000))).

FMLS. The circumstances potentially suggestive of purpose are as varied as the idiosyncratic relationships parties create for themselves. Fortis pled none.[87]

In sum, the exceptionally buyer-friendly milestone structure in this case imposed a burden that Fortis could not carry; but the Court is obliged to enforce the parties' contract as written.[88] Moreover, for the reasons explained, it is not as if Section 2.11(f)'s requirements made it impossible to sufficiently plead a breach of Section 2.11(f) absent direct evidence of Medtronic's purpose. Fortis simply did not do so. Accordingly, the Counts I through III of the SAC are dismissed.

In a footnote at the end of Fortis's opposition brief, Fortis requested leave to amend its pleading yet again.[89] There are several problems with this request. First, this Court is generally unwelcoming of substantive arguments hidden in

[87] Fortis may point to its allegation regarding the delayed approval of Medtronic's CGM to contest this conclusion. *See* Pl.'s Opp'n at 23. But the single sentence regarding the CGM contained in Paragraph 53 of the SAC does not provide enough information to support a reasonable inference regarding Medtronic's primary purpose. The SAC does not suggest how long the delay lasted, when the parties initially expected to receive the approval, when or if the CGM received approval, the estimated impact of the delay on Medtronic's revenues, whether promoting CGM sales was a purpose behind the First Milestone, or anything else that might help bridge the logical gap between this allegation and the conclusion that Medtronic acted with the primary purpose of defeating the First Milestone. Indeed, Fortis only explicitly suggested that the delay motivated Medtronic's alleged breach of Section 2.11(f) in Fortis's opposition brief. *See Brex Inc. v. Su*, 2024 WL 2956861, at *1 n.7 (Del. Ch. June 12, 2024) (noting a party "cannot amend its pleading through its brief" (citation omitted)). What is more, the Second Milestone—worth $75 million—was the development of a smart insulin pen that integrated Medtronic's CGM at any point during the Milestone Period, which seems to belie the implication that Medtronic expected to benefit from approval of the CGM throughout the Milestone Period. *See* Merger Agreement §§ 1.01, 2.11(b).

[88] *Nemec*, 991 A.2d at 1126.

[89] Pl.'s Opp'n at 59 n.19.

footnotes[90]—Medtronic's failure to reply to this request helps to explain why. Second, the version of Court of Chancery Rule 15(aaa) applicable here[91] requires plaintiffs facing a motion to dismiss to request leave to amend their pleading before filing an answering brief.[92] Third, Fortis has already amended its pleading twice, which weighs against giving Fortis a fourth attempt to state a claim.[93] And most importantly, Fortis makes no attempt to show the "good cause" necessary to circumvent Rule 15(aaa) or explain what a fourth version of the complaint might do differently.[94] Fortis has had ample opportunity to state a claim for breach of Section 2.11(f), if such a breach occurred. The Court will not permit Fortis to try again.

II. MEDTRONIC'S INTERPRETATION OF THE PROVISIONS GOVERNING RELEASE OF THE ESCROW FUND IS NOT THE ONLY REASONABLE INTERPRETATION.

Fortis's escrow-related claim turns on the narrow issue of whether the last day to properly submit a claim to the Escrow Fund was September 10, 2023 or September 15, 2023. The answer to that question depends on an interpretation of Merger Agreement Section 10.11 and Escrow Agreement Section 1.3(d). Because

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[90] *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc.*, 2023 WL 9053173, at *11 (Del. Ch. Dec. 29, 2023) (quoting *In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293, at *20 (Del. Ch. Mar. 28, 2018)).

[91] *See supra* note 67.

[92] *See Karpoff v. Atl. Concrete Co., Inc.*, 2023 WL 5529695, at *2 (Del. Ch. Aug. 25, 2023) (discussing Ct. Ch. R. 15(aaa)).

[93] *See Lima USA, Inc. v. Mahfouz*, 2021 WL 5774394, at *10 (Del. Super. Aug. 31, 2021) (noting that under Superior Court Civil Rule 15(a)'s liberal standard for granting leave to amend, a "repeated failure to cure deficiencies" is a reason to deny leave to amend (quoting *Parker v. State*, 2003 WL 24011961, at *3 (Del. Super. Oct. 14, 2003))).

[94] *See Karpoff*, 2023 WL 5529695, at *2.

Medtronic has failed to demonstrate that Fortis's interpretation is unreasonable as a matter of law, dismissal of Fortis's escrow-related claim is not appropriate.

The Court may address "the proper interpretation of language in a contract" at the pleading stage if "the language of [the] contract is plain and unambiguous."[95] "Contract language is ambiguous 'only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'"[96] "Dismissal is appropriate when the defendant's interpretation is the only reasonable construction as a matter of law and that construction reveals that the plaintiff cannot sustain an actionable claim."[97] Stated differently, a defendant must "preclude" the plaintiff's interpretation to achieve a pleading-stage dismissal.[98]

Medtronic has not precluded the reasonableness of Fortis's interpretation of the relevant provisions. The core of the dispute is whether "such date" as used in Merger Agreement Section 10.11 and Escrow Agreement Section 1.3(d) refers to: (1) the three-year anniversary of the September 10, 2020 closing date, which is Fortis's interpretation of both Agreements;[99] (2) the fifth business day after the three-

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[95] *CHS/ Cmty. Health Sys., Inc. v. Steward Health Care Sys. LLC*, 2020 WL 4917597, at *3 (Del. Ch. Aug. 21, 2020) (alteration in original) (quoting *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006)).
[96] *Id.* (quoting *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008)).
[97] *Id.* (citations omitted).
[98] *See Johnson Revocable Living Tr. v. Davies US, LLC*, 2022 WL 17347775, at *6 (Del. Super. Nov. 18, 2022).
[99] Pl.'s Opp'n at 48–52.

year anniversary, which is Medtronic's interpretation of the Merger Agreement;[100] or (3) whichever of the five business days following the three-year anniversary on which the parties issue a Joint Written Direction, which is Medtronic's interpretation of the Escrow Agreement.[101] Medtronic argues the Court should accept the second interpretation listed above because the Merger Agreement's terms have "priority" over the Escrow Agreement.[102]

Medtronic criticizes Fortis's interpretation for being "ungrammatical."[103] Medtronic then discusses nuanced grammar rules that, in Medtronic's view, makes Medtronic's interpretation the only reasonable one.[104] Medtronic's analysis ranges from the effect of subordinate modifiers within a prepositional phrase to the proper use of "a deictic or 'pointing word.'"[105]

Notwithstanding Medtronic's sophisticated grammar argument, more ordinary interpretative principles guide the Court's analysis. First, the integration clause contained in Merger Agreement Section 12.05 confirms that the Merger Agreement "*together with* the other Ancillary Agreements . . . constitutes the entire agreement among the parties[.]"[106] Merger Agreement Section 1.01 expressly

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[100] Def.'s Mot. at 31.
[101] *Id.* at 35.
[102] *Id.* at 34.
[103] *Id.* at 30.
[104] *Id.* at 31–36.
[105] *Id.* (first citing Antonin Scalia & Bryan A. Garner, *Reading Law* 126–27 (2012); and then citing Bryan A. Garner, *Modern English Usage* 1052 (5th ed. 2022)).
[106] Merger Agreement § 12.05 (emphasis added).

defines "Ancillary Agreements" to include "the Escrow Agreement."[107] Thus, the Merger Agreement and Escrow Agreement "should be read together as a unitary contractual scheme."[108] That implicates "the principle of contract interpretation that requires this court to interpret the various provisions of a contract harmoniously."[109]

Medtronic's interpretation does not read the integrated Merger Agreement and Escrow Agreement harmoniously. Rather, Medtronic's reasoning leads to inconsistency between the Escrow Agreement and the Merger Agreement that Medtronic says should be resolved in favor of the Merger Agreement.[110] Fortis's interpretation, in contrast, causes Merger Agreement Section 10.11 and Escrow Agreement Section 1.3(d) to have the same substantive meaning despite containing slightly different language. And Medtronic does not accuse Fortis's interpretation of producing an "absurd result"[111]—Medtronic only argues that Fortis's construction would offend strict grammarians.

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[107] *Id.* § 1.01.

[108] *See Fla. Chem. Co., LLC v. Flotek Indus., Inc.*, 262 A.3d 1066, 1082 (Del. Ch. 2021).

[109] *Menn v. ConMed Corp.*, 2022 WL 2387802, at *38 (Del. Ch. June 30, 2022) (citing *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *6 (Del. Ch. June 21, 2012)).

[110] Medtronic argues that "there is no inconsistency" under Medtronic's theory because "such date" in both Merger Agreement Section 10.11 and Escrow Agreement Section 1.3(d) refers to the "Release Date." Def.'s Reply at 26. Medtronic omits, however, that the "Release Date" is different under Medtronic's interpretation of the Merger Agreement and Escrow Agreement—under the Merger Agreement it would be September 15, 2023, whereas under the Escrow Agreement it would be the date on which the parties issue a Joint Written Direction. Def.'s Mot. at 30, 35.

[111] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract." (citations omitted)).

The Court does not presently have occasion to decide whether Medtronic's interpretation is reasonable. For now, it is enough that the Court does not view the only harmonious interpretation of the Merger Agreement and Escrow Agreement as unreasonable as a matter of law.[112] Fortis's escrow-related claim therefore withstands Medtronic's Motion.

III. COUNTS IV AND V ARE DUPLICATIVE OF COUNT VI.

Fortis's claim to the Escrow Fund is reasonably conceivable. Fortis, however, does not need three separate counts to pursue that claim. A single breach-of-contract count will suffice.[113] At oral argument, Fortis indicated that it would accept dismissal of Counts IV and V—declaratory judgment and specific performance, respectively—so long as doing so would not substantively affect Fortis's case.[114] Accordingly, the Court dismisses Counts IV and V. The issue of what remedy Fortis is entitled to, if any, will proceed under Count VI.

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[112] *See Johnson Revocable Living Tr.*, 2022 WL 17347775, at *6.

[113] *See Blue Cube Spinco LLC v. Dow Chem. Co.*, 2021 WL 4453460, at *16 (Del. Super. Sept. 29, 2021) ("[W]here a claimant merely has repackaged in the language of a declaration an adequately-pleaded affirmative count, the 'declaration' is duplicative and not viable." (collecting authority)); *Thompson St. Cap. Partners, IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 2024 WL 1251150, at *5 (Del. Ch. Mar. 25, 2024) ("[S]pecific performance is a remedy, and not a standalone claim[.]" (citing *Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014))).

[114] OA Tr. at 54:16–55:13.

CONCLUSION

In conclusion, Defendants' Motion to Dismiss is **GRANTED** as to Counts I through V, and **DENIED** as to Count VI.

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge