IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOSEPH A. BONOLA, D.D.S. and OPUS INDUSTRIES, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2025-0102-DG
	)	**UNDER SEAL**[1]
NORTH AMERICAN DENTAL MANAGEMENT, LLC, and PROFESSIONAL DENTAL ALLIANCE OF TEXAS, PLLC,	)	
Defendants.	)	

MAGISTRATE'S REPORT

Date Submitted: July 8, 2025
Date Decided: December 8, 2025

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GIBBS, M.

[1] This report is being issued under seal to protect confidential information that may not have been made public through the hearing on this matter. Under Court of Chancery Rule 5.1, I will unseal this report unless, within five (5) days, either party files a notice stating grounds for any continued restriction and requesting a determination whether good cause exists therefor.

INTRODUCTION

This report evaluates a motion to dismiss under Court of Chancery Rules 12(b)(1) and 12(b)(6). I grant the motion in part, under Rule 12(b)(6), and otherwise deny the motion. This is my report.

FACTUAL BACKGROUND

This is a breach of contract action. At issue are Defendants' obligations under an asset purchase agreement ("APA") entered between Plaintiffs, together with other nonparty entities,[2] and Defendants for the sale of certain dental practice locations and related assets. Plaintiff Joseph Bonola ("Dr. Bonola") is a dentist residing in Tarrant County, Texas, who owned the dental practices.[3] Plaintiff Opus Industries, Inc. ("Opus") is a Texas corporation and the Seller Representative under the APA.[4] Defendant North American Dental Management LLC ("North American") is an Ohio limited liability company[5] and, along with Defendant Professional Dental Alliance of Texas, PLLC ("PDA"), is the acquiror of the dental practices.[6]

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[2] The nonparty entities are (i) NCD Ortho, PA, (ii) NCD Pedo, PA, (iii) NCDSG, PA, and (iv) NCDWK, PA. APA at 1. These entities are defined, together with Opus, as the "Sellers" under the APA. *Id.* Dr. Bonola is the "Sellers' Owner." *Id.*

[3] Verified Compl. ("Compl."), Dkt. 1 ¶¶ 1, 6.

[4] *Id.* ¶ 7.

[5] *Id.* ¶ 8.

[6] *Id.* at 1; *id.* ¶ 9. Under the APA, North American is the "Buyer" of the "Purchased Assets." Compl. Ex. A (cited as "APA") § 2.1.

The parties executed the APA on September 25, 2020.[7] Defendants purchased dental practice assets that included certain "Specified Locations."[8] The "Purchased Assets" include "Clinical Assets" and "Non-Clinical Assets." The former are "clinical assets, properties and rights of every kind and description, tangible and intangible, wherever situated, that are used in connection with or related to the Business[.]"[9] The latter comprises certain receivables, operating assets, interests in leased equipment, books and patient records, and other business-related items.[10] In exchange for the Purchased Assets, Dr. Bonola received $3,700,000.00[11] and became eligible to receive an earnout payment not to exceed $2,000,000.00.[12] The earnout amount, and the APA's procedure for determining and delivering the earnout amount, are central to this action.

[7] *See* APA at 2 ("'Closing Date' is defined in the preamble."); *id.* at 1 (preamble) (stating the APA "is made this 25th day of September, 2020").

[8] The "Specified Locations" acquired by Defendants were two dental practices located in Texas. *Id.* at 9.

[9] *Id.* § 2.1. "Business" is defined as "the practice of Dentistry, including without limitation, developing and implementing the infrastructure related thereto, including the management, administration, financing, billing and coding, as well as any and all related non-clinical services, procedures and techniques as of the Closing Date conducted, Sellers and Sellers' Owner, including at each of the Specified Locations." *Id.* at 2.

[10] For the full list of "Non-Clinical Assets," see *id.* § 2.1.

[11] *See id.* § 2.5.

[12] *Id.* § 2.9.

I. Section 2.9 of the APA: The Earnout Provision

Section 2.9 of the APA contains terms relating to the potential earnout payment. Section 2.9(a) states:

> [I]n the event that the Practice Level EBITDA for the Specified Locations for a twelve (12) consecutive month period after Closing (the 'Earn-Out EBITDA') exceeds the Earn-Out Target during the period of time commencing with the first full calendar month after the Closing Date and ending on the earlier of (the date the Buyer receives the Early Earn-out Notice and the end of the twenty-fourth (24th) month after the Closing (such period of time, the 'Earn-Out Period'), then [North American] shall pay to [Dr. Bonola] an amount equal to the product of (a) the amount by which the Earn-Out EBITDA exceeds the Earn-Out Target multiplied by (B) six (6) ('Earn-Out Amount').[13]

The Closing Date under the APA is its date of execution, September 25, 2020.[14] Accordingly, under Section 2.9(a), the Earn-Out Period began on October 1, 2020 ("the first full calendar month after the Closing Date"),[15] and ended 24 months later, on September 30, 2022.

"No more than forty-five (45) days following the end of the Earn-Out Period," North American must "calculate and deliver to" Opus its "calculation of the Earn-

[13] *Id.* § 2.9(a). "Practice Level EBITDA" is defined as "the practice level net income from operations at the Specified Locations before the payment of or provision for any interest, Taxes, depreciation or amortization." *Id.* at 7–8.

[14] *Id.* at 1.

[15] *Id.* § 2.9(a).

Out Amount."[16] North American's calculations of the Earn-Out Amount are to be reflected in an "Earn-Out Statement."[17] Given the 45-day deadline set in the APA, North American was to deliver the Earn-Out Statement to Opus by November 14, 2022.

Once Opus receives the Earn-Out Statement, it has

> thirty (30) days to either (i) confirm and agree in writing to [North American]'s calculation of such Earn-Out Amount, in which case, [North American] shall pay such Earn-Out Amount to the [Opus] within five (5) Business Days after the confirmation by [Opus] or (ii) contest in writing such Earn-Out Amount, in which case, [North American] and [Opus] shall work in good faith to resolve any dispute existing as it pertains to the appropriate Earn-Out Amount as such is to be calculated as set forth in this Section 2.9 during the thirty (30) day period thereafter.[18]

In the event the 30-day, good-faith resolution process between the parties is unsuccessful, Section 2.9(e) provides a process for obtaining a binding resolution of the Earn-Out Amount due from a neutral expert. It states, in part:

> If the parties have failed to resolve all disputes regarding such Earn-Out Amount after such thirty (30) day period, the parties shall submit to the Neutral Accountant for review and resolution of all such disputes (but only such disputes). [North American] and [Opus] will cooperate with the Neutral Accountant during the term of its engagement. [North American] and [Opus] shall instruct the Neutral Accountant not to assign a value to any item

[16] *Id.* § 2.9(e).

[17] *Id.*

[18] *Id.*

> in dispute greater than the greatest value for such item assigned by [North American], on the one hand, or [Opus] on the other hand, or less than the smallest value for such item assigned by [North American], on the one hand, or [Opus], on the other hand. The Earn-Out Statement for the relevant Earn-Out Amount and the determination of the relevant Earn-Out Amount shall become final and binding on [North American], Sellers and [Opus] on the date the Neutral Accountant delivers its final resolution in writing to the parties[.][19]

The parties agreed that this expert determination mechanism would be the only external avenue for resolving a dispute regarding Dr. Bonola's Earn-Out Amount.[20]

Under Section 2.9(b), North American is to "deliver to [Dr. Bonola] the monthly profit and loss and other internally prepared financial statements of [North American] and PDA as and when made available in the ordinary course *but no later than* the 25th of each month."[21] In addition, during a dispute resolution period, Section 2.9(e) permits Opus "to review [North American]'s books and records as may be reasonably required in connection with its review and analysis of the Earn-Out Statement for the Earn-Out Amount; provided, that such review shall be in a manner that does not interfere with the normal business operations of [North American]."[22]

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[19] *Id.*

[20] *Id.* § 2.9(i) (the "Release Provision").

[21] *Id.* § 2.9(b) (emphasis added).

[22] *Id.* § 2.9(e) (emphasis in original).

II. Defendants Allegedly Fail to Perform.

Plaintiffs allege that "[d]uring the Earn-Out Period, [North American] failed to provide the financial statements to [Dr. Bonola], as required under Section 2.9(b)."[23] Plaintiffs allege that, "[d]espite Dr. Bonola's repeated requests . . . , [North American] delivered only one quarterly statement and no monthly statements."[24] Plaintiffs also allege North American failed to provide to Opus an Earn-Out Statement by the November 14, 2022 deadline.[25] These alleged failures led Plaintiffs to send a demand letter to North American on June 9, 2023, "regarding [North American's] failure to produce the required monthly and quarterly statements as well as [North American's] failure to deliver the Earn-Out Statement as required by the APA."[26] North American allegedly ignored this demand letter.[27]

Accordingly, on October 27, 2023, "Dr. Bonola initiated litigation against Defendants in the District Court for the Judicial District of Tarrant County, Texas[.]"[28] Defendants moved to dismiss the Texas action, allegedly on the basis of

[23] Compl. ¶ 33.

[24] *Id.*

[25] *Id.* ¶ 34.

[26] *Id.* ¶ 37.

[27] *Id.*

[28] *Id.* ¶ 38.

the APA's forum selection provision.[29] In response, "Dr. Bonola moved for an order of Nonsuit without Prejudice, which the Texas court granted and ordered on June 28, 2024."[30]

While conducting the Texas litigation, the parties also attempted to resolve their dispute privately.[31] As part of the private resolution process, North American's counsel produced a "Collections Spreadsheet."[32] The Collections Spreadsheet is a single-page table that purports to provide data about the practices using three financial metrics for the period from October 2020 to September 2022.[33] The three main metrics are (1) "Total Collections," (2) "Total Practice Level Expenses," and (3) "Total Bad Debt Expense."[34] The bottom row of the Collections Spreadsheet purports to state "Cash EBITDA."[35] The Collections Spreadsheet provides little additional information.[36] The bottom of the document purports to show the results

[29] *See* APA § 11.5 (Delaware forum selection provision). It is not clear whether Defendants raised in Texas the release provision they have raised here.

[30] Compl. ¶¶ 39; 40.

[31] *See id.* ¶ 41.

[32] *See id.* ¶ 41; *see also* Compl. Ex. B (cited as "Collections Spreadsheet"). The Collections Spreadsheet was produced on February 6, 2024.

[33] *See* Collections Spreadsheet.

[34] *Id.*

[35] *Id.*

[36] And some of the information that is provided is unhelpful. The bottom of the Collections Spreadsheet appears to contain excerpts of the parties' APA. There is one stray provision, *i.e.*, a section "(ii)," however, that refers to a "Year Five Earn-Out Amount," which does not appear to be used in the parties' APA. *See id.* (below the embedded "Specified

of combining the first three categories and to show that Dr. Bonola is entitled to no Earn-Out Amount.[37]

Plaintiffs argue that the Collections Spreadsheet is not the required Earn-Out Spreadsheet; Defendants contend that it should be deemed the "functional equivalent."[38] Plaintiffs also argue that they have not contested the information on the Collections Spreadsheet in writing and that the parties have not commenced the good-faith resolution process set forth in Section 2.9(e).[39] The parties continue to dispute Defendants' obligations and alleged performance under the APA.

III. Procedural Posture

On January 30, 2025, Plaintiffs filed the Verified Complaint.[40] The complaint asserts a claim for breach of contract, seeking from Defendants specific performance of their alleged obligations under the APA.[41] In the alternative, Plaintiffs seek the full potential earnout amount in money damages.[42] On April 1, Defendants moved

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Locations" language). There are also defined terms that are found only in the stray section (ii), including one whose definition is "Error! Reference source not found." *Id.*

[37] *See id.* ("Earnout Amount" category).

[38] *See* Compl. ¶ 37; OB at 19–21.

[39] *See id.* ¶ 58 ("Plaintiffs are thus entitled to an order specifically enforcing the APA and requiring Defendants to . . . provide an Earn-Out Statement and, to the extent there is a dispute regarding the Earn-Out Statement, engage in good faith in the dispute resolution provision described in Section 2.9(e).").

[40] Dkt. 1.

[41] *See id.* ¶¶ 48–58.

[42] *See id.* ¶¶ 59–66.

to dismiss the complaint under Court of Chancery Rules 12(b)(1) and 12(b)(6)[43] The parties briefed the motion, and they presented oral argument to the Court on July 8.[44] I took Defendants' motion under advisement on that date.

ANALYSIS

Defendants moved to dismiss the complaint under Rules 12(b)(1)[45] and 12(b)(6).[46] I address Defendants' arguments under each Rule, in turn.

I. The Motion to Dismiss Under Rule 12(b)(1)

Defendants argue that the Earn-Out Provision's expert determination process deprives this Court of subject matter jurisdiction.[47] But as explained by this Court in *Gandhi-Kapoor v. Hone Capital LLC*, expert determination provisions in contracts "do[] not 'oust' a court of its subject matter jurisdiction over an action; instead, '[they] raise[] the question of whether a 'court should . . . exercise[] its jurisdiction to . . . give effect to the legitimate expectation of the parties.'"[48] Thus, a motion to dismiss under Rule 12(b)(1), based on such an expert determination

[43] Dkt. 9.

[44] Dkt. 23.

[45] Opening Br. in Supp. of Defs.' Mot. to Dismiss Compl. ("OB"), Dkt. 9 at 1.

[46] *Id.* at 1.

[47] *See id.* at 4 ("[T]he Complaint should be dismissed for lack of subject matter jurisdiction due to the expert determination provision[.]").

[48] 307 A.3d 328, 338–39 (Del. Ch. 2023) (citations omitted).

provision, "will be granted where it appears that 'as a matter of established doctrine' the Court should not exercise its jurisdiction."[49]

Defendants argue that Plaintiffs' claims fall "squarely" within the scope of the expert determination provision.[50] Defendants argue that "[b]oth of Plaintiffs' claims arise out of alleged breaches of provisions in Section 2.9 of the APA that allegedly require Defendants to provide certain documents to determine the Earn-Out Amount, including the Earn-Out Statement."[51] They assert that "[t]he APA . . . makes clear that ***all*** issues regarding the Earn-Out Amount come within the Neutral Accountant's jurisdiction or are otherwise released."[52] These issues, Defendants contend, "include[] whether Defendants provided the documents necessary to determinate the Earn-Out Amount[.]"[53]

Defendants have raised an argument about the scope of the Neutral Accountant's authority under Section 2.9(e). "An expert's authority is generally 'limited to its mandate to use its specialized knowledge to resolve a specified issue

[49] *BuzzFeed Media Enters., Inc. v. Anderson*, 2024 WL 2187054, at *4 (Del. Ch. May 15, 2024).

[50] OB at 14.

[51] *Id.*

[52] *Id.* at 16 (emphasis in original).

[53] *Id.*

of fact."[54] "[P]rovisions calling for expert determinations 'normally have not granted the expert the authority to make binding decisions on general issues of law or legal disputes.'"[55] "[P]rinciples of contract interpretation determine whether a disputed issue falls within [the ADR provision's] scope."[56] "The critical issue for the Court to decide . . . is what the shared intentions of the contracting parties were when they entered the Agreement."[57] In *Terrell v. Kiromic Biopharma, Inc.*, this Court explained:

> There is no general principle . . . that the expert *always* has exclusive jurisdiction to decide the meaning of the terms of the contract, or that the expert *never* has exclusive jurisdiction to do so. ***Rather, in each case it is necessary to examine the contract itself in order to decide what the parties intended should be a matter for the exclusive decision of the expert***. . . . Although Delaware cases have not expressly adopted a default rule for use when the agreement is silent, the logic of the decisions suggests that an expert charged with making a narrow determination will not have authority to interpret the governing agreement ***unless the contract says so***.[58]

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[54] *Terrell v. Kiromic Biopharma, Inc.*, 2022 WL 175858, at *4 (Del. Ch. Jan. 20, 2022) (quoting *Penton Bus. Media Hldgs., LLC v. Informa PLC*, 252 A.3d 445, 464 (Del. Ch. 2018)).

[55] *Id.* at *5 (quoting *Penton Bus. Media Hldgs., LLC v. Informa PLC*, 252 A.3d 445, 466 (Del. Ch. 2018)).

[56] *ArchKey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 997 (Del. Ch. 2023) (citing *Terrell*, 297 A.3d at 617).

[57] *Alliant Techsys., Inc. v. MidOcean Bushnell Hldgs.*, 2015 WL 1897659, at *1 (Del. Ch. Apr. 27, 2025).

[58] 2022 WL 175858, at *6 (quoting *Penton Bus. Media Hldgs., LLC v. Informa PLC*, 252 A.3d 445, 466 (Del. Ch. 2018)) (emphasis in original).

A. The Court, not the Neutral Accountant, Must Decide Plaintiffs' Claims of Breach.

I conclude from the language in the APA that the parties intended the Neutral Accountant to determine only limited matters, germane to its expertise, not to interpret the APA or to determine whether Defendants have failed to satisfy the prerequisites for invoking the dispute resolution process or have otherwise breached the APA.

I first note that Section 2.9(e) does not explicitly empower the Neutral Accountant to interpret the language of the APA. Instead, the APA identifies discrete issues for the expert's determination. Sections 2.9(a) and (c) dictate how the Earn-Out Amount is to be calculated.[59] Before going to the Neutral Accountant, Section 2.9(e) requires the parties to "work in good faith to resolve any dispute existing as it pertains to the appropriate Earn-Out *Amount as such is to be calculated as set forth in this Section 2.9*[.]"[60] If the attempt at good faith resolution is unsuccessful, Section 2.9(e) requires the parties to go to "the Neutral Accountant for review and resolution of all *such* disputes *(but only such disputes)*."[61] I concluded that Section 2.9(e) "signals the parties' intent to limit the scope of the [Neutral] Accountant's authority to discrete factual issues within [the] [Neutral] Accountant's

[59] *See* APA, §§ 2.9(a), (c).

[60] *Id.* § 2.9(e) (emphasis added).

[61] *Id.* (emphasis added).

expertise."[62] Those factual issues are any disputes between the parties regarding the calculation of the Earn-Out Amount pursuant to Sections 2.9(a) and (c).[63]

This interpretation is further supported by the following language in Section 2.9(e): "The Earn-Out Statement for the relevant Earn-Out Amount *and the determination of the relevant Earn-Out Amount* shall become final and binding on" the parties.[64] Here, Section 2.9(e) expressly limits the scope of the Neutral Accountant's binding resolution to the Earn-Out Amount that will be stated on the Earn-Out Statement, and signals that "the determination of the relevant Earn-Out Amount" is the Neutral Accountant's primary focus.[65] Section 2.9(e) does not authorize the Neutral Accountant to determine whether Defendants breached the APA by failing to produce monthly financial materials in accordance with Section 2.9(b) or by failing to timely deliver an Earn-Out Statement to Opus.

By alleging Defendants' failure to provide required information and the insufficiency of Defendants' purported, belated substitute performance, Plaintiffs raise questions of law that fall outside the Neutral Accountant's limited authority.

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[62] *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *6 (Del. Ch. Jan. 29, 2019).

[63] *See id.* § 2.9(e) (limiting the Neutral Accountant to review and resolution of "only such disputes").

[64] *Id.* § 2.9(e).

[65] *See Ray Beyond Corp.*, 2019 WL 366614, at *6 ("A typical expert determination provision limits the decision maker's authority to deciding a specific factual dispute within the decision maker's expertise.").

B. The Release Provision Does Not Bar Plaintiffs' Claims.

Defendants attempted to eliminate the foregoing questions of law from the case by invoking the APA's Release Provision. They argue that "[t]o the extent the Court finds that any issues regarding the Earn-Out Statement are *not* within the Neutral [Accountant]'s jurisdiction, such issues were necessarily released by Plaintiffs under Section 2.9(i) of the APA."[66] The argument is a supplement to Defendants' lack of subject matter jurisdiction defense. They argue that the parties intended to eliminate any possibility of court involvement in an earnout dispute by agreeing on the front end that all potential arguments about the earnout would be either eligible for determination by the Neutral Accountant or released.[67] The overall theory must fail for the reasons stated in the previous section. For the sake of completeness, I address the release-based half of Defendants' argument here.[68]

"[A]n effective release terminates the rights of the party executing and delivering the release and . . . is a bar to recovery on the claim released."[69] "When

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[66] OB at 16 n.5.

[67] *See id.* at 16 ("The APA therefore makes clear that *all* issues regarding the Earn-Out Amount come within the Neutral Accountant's jurisdiction or are otherwise released.") (footnote omitted) (emphasis in original).

[68] Defendants did not explicitly link this argument to Rules 12(b)(1) or 12(b)(6). The analysis I am conducting here is akin to assessing whether a plaintiff has stated a claim for release. *See Geier v. Mozido, LLC*, 2016 WL 5462437, at *2 (Del. Ch. Sept. 29, 2016); *Seven Invs., LLC v. AD Cap., LLC*, 32 A.3d 391, 396 (Del. Ch. 2011).

[69] *Seven Invs., LLC v. AD Cap., LLC*, 32 A.3d 391, 396 (Del. Ch. 2011) (quoting *Hicks v. Soroka*, 188 A.2d 133, 138 (Del. Super. 1963)).

determining whether a release covers a claim, 'the intent of the parties as to its scope and effect are controlling, and the court will attempt to ascertain [the parties'] intent from the overall language of the document."[70] "If the claim falls within the plain language of the release, then the claim should be dismissed."[71] But, "[o]n a motion to dismiss for failure to state a claim, a trial court cannot choose between two differing reasonable interpretations of ambiguous documents. . . . Dismissal is proper only if the defendants' interpretation is the *only* reasonable" interpretation.[72]

The Release Provision states in its entirety:

> Except for the matters dispute resolution mechanism of Section 2.9(e) above, the Sellers and [Dr. Bonola], for and on behalf of themselves and their respective heirs, agents, successors, and assigns, release each of PDA and [North American] from any and all claims in law or in equity, whether asserted or unasserted, whether known or unknown, which they had against PDA and [North American] with any or all of the operation, management or performance of PDA and [North American] after the Closing Date with respect to the Earn-Out Amount and the elements thereof.[73]

[70] *Id.* (quoting *Corporate Prop. Assocs. 6 v. Hallwood Gp., Inc.*, 817 A.2d 777, 779 (Del. 2003)).

[71] *Id.* (citing *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1163–65 (Del. 2010)).

[72] *Vanderbilt Income and Growth Assocs., LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[73] APA § 2.9(i).

Defendants contend that the only reasonable interpretation of the Release Provision is that it "includes whether Defendants provided the documents necessary to determine the Earn-Out Amount[.]"[74] I disagree.

"Elements" is not defined by the APA. Merriam-Webster defines "elements" as "a constituent part: such as . . . 'one of the necessary data or values on which calculations or conclusions are based.'"[75] Applying this definition to the Release Provision, "the Earn-Out Amount and the elements thereof" means the Earn-Out Amount and its underlying calculations. I conclude that the "operation, management or performance of [Defendants] after the Closing Date with respect to the Earn-Out Amount and [its underlying calculations]" does not unambiguously extend to North American's contractual obligation to *produce and deliver* an Earn-Out Statement by November 14, 2022.

A more limited construction of the Release Provision—*i.e.*, that it bars specific claims that Defendants failed to use their commercially reasonable efforts to operate and manage the business and to maintain its performance to ensure a fairly

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[74] OB at 16.

[75] *Elements*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/elements (last visited Nov. 24, 2025). *See also Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *4 (Del. Ch. Mar. 19, 2021) ("'Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract,' as 'dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract.'") (quoting *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).

calculated Earn-Out Amount—is also reasonable. This interpretation comports with Section 2.9(c), which obligates Defendants "to use their commercially reasonable efforts to operate the Business and manage controllable costs to not negatively impact the Practice level EBITDA for purposes of calculating the Earn-Out Amount."[76]

Defendants' interpretation of the Release Provision is not the only reasonable interpretation. Defendants have thus failed to establish that Plaintiffs' claim based on the failure to provide an Earn-Out Statement must be dismissed. I recommend that Defendants' motion to dismiss be denied to the extent that it is based upon Rule 12(b)(1) and the Release Provision.

II. The Motion to Dismiss Under Rule 12(b)(6)

Defendants make multiple arguments under Rule 12(b)(6). First, they argue that the claims of alleged breaches of Section 2.9(b) are time-barred.[77] Second, Defendants argue that Plaintiffs have not provided written notice of a contest to the Collections Spreadsheet and, therefore, Plaintiffs are not yet entitled to production of books and records under Section 2.9(e).[78] Third, Defendants argue that Plaintiffs have alleged only non-material breaches of the APA.[79] Finally, they argue that

[76] APA § 2.9(c).

[77] OB at 18.

[78] *Id.* at 19.

[79] *Id.* at 19–20.

Plaintiffs' claims fail because the complaint fails to adequately allege damages arising from the alleged breaches.[80]

I address each of Defendants' arguments below.

A. Plaintiffs' Claims are Partially Time-Barred.

Defendants assert that the statute of limitations bars Plaintiffs' breach of contract claims based upon Defendants' alleged breach of Section 2.9(b), because the cause of action for such a claim would have accrued after the first failure to produce the monthly materials, *i.e.*, on October 25, 2020.[81] Defendants contend that the statute of limitations barred Plaintiffs' Section 2.9(b) claims as of October 25, 2023.[82]

Plaintiffs disagree, arguing that the alleged breaches of Section 2.9(b) amount to a continuing breach. Plaintiffs contend that Defendant's final alleged breach of Section 2.9(b) "accrued on October 25, 2022, when Defendants failed to deliver the last monthly financials to Plaintiffs."[83] Plaintiffs additionally argue that, if the Court does not find a continuing breach, their Section 2.9(b) claims would only be partially

[80] *See id.* at 21–23.

[81] *Id.* at 18.

[82] *Id.*

[83] Pl.s' Ans. Br. in Opp. to Defs.' Mot. to Dismiss Compl. ("AB"), Dkt. 14 at 19.

time-barred, because their "claims relating to Defendants' failure to deliver monthly financials between February 25, 2022 and October 25, 2022 would be timely."[84]

"Although this is a court of equity, 'equity follows the law, and this court will apply statutes of limitations by analogy.'"[85] The statute of limitations for breach of contract claims is three years.[86] "Absent tolling," a claim falling outside the applicable statute of limitations "is presumptively time-barred."[87]

"The continuing breach doctrine is narrow and typically is applied only in unusual situations."[88] "Continuing breach is an exception to the general rule and arises only when 'there is a continuing injury whose damages cannot be determined until the cessation of the wrong."[89] "[B]reach of a recurring obligation does not necessarily give rise to continuing breach. A series of harms only gives rise to continuing harm where 'the various acts are "so inexorably intertwined that there is

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[84] *Id.* at 21.

[85] *MKE Hldgs. Ltd. v. Schwartz*, 2020 WL 467937, at *12 (Del. Ch. 2020) (quoting *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 812 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. Of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011)).

[86] *Id.* (citing 10 *Del. C.* § 8106; *Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1767529, at *5 (Del. Super. July 10, 2002)).

[87] *Bean v. Fursa Cap. P'rs*, 2013 WL 755792, at *5 (Del. Ch. Feb. 28, 2013) (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998)).

[88] *Vivint Solar, Inc. v. Lundberg*, 2024 WL 2755380, at *27 (Del. Ch. May 30, 2024) (quoting *AM Gen. Hldgs. LLC v. The Renco Gp., Inc.*, 2016 WL 4440476, at *11 (Del. Ch. Aug. 22, 2016)).

[89] *Id.*

but one continuous wrong.""""[90] "In a case for breach of contract, if the aggrieved party could have alleged a *prima facie* case for breach of contract . . . after a single incident, Delaware courts have determined that the continuing breach doctrine does not apply even when confronted with numerous repeated wrongs of similar, if not same, character over an extended period."[91]

The alleged breaches of Section 2.9(b) are not continuous breaches; they are segmented breaches. Each failure to produce monthly financials would constitute an independent breach of the APA.[92] Accordingly, any claim of breach that arose before January 30, 2022—three years before the date of filing—is time-barred and must be dismissed. The remaining Section 2.9(b) claims, encompassing the production due from February 25, 2022, to October 25, 2022, are timely and are not dismissed.[93]

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[90] *Id.* (quoting *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 287 A.3d 1160, 1197 (Del. Ch. 2022)).

[91] *Id.* (cleaned up).

[92] *See Vivint Solar, Inc.*, 2024 WL 2755380, at *27.

[93] *See* Compl. (filed January 30, 2025); *see also* AB at 21 (Plaintiff's explanation of the time-bar period).

B. The Complaint Fails to State a Claim for Breach of Section 2.9(e)'s Books and Records Obligation.

The Complaint requests that the Court order Defendants to produce books and records owed to Plaintiffs under Section 2.9(e)'s good-faith negotiation process.[94] Defendants argue that the obligation to produce books and records during the good-faith resolution period contemplated by Section 2.9(e) has not been triggered because Plaintiffs never initiated the resolution process.[95] This argument is correct. Because the good-faith resolution process has not been triggered by a writing contesting the purported Earn-Out Statement, Plaintiffs are not yet entitled to production of Defendants' books and records under Section 2.9(e). Accordingly, this portion of the Complaint is dismissed.

C. The Complaint States a Claim for Breach of the APA.

Defendants next argue that Plaintiffs' claims should be dismissed because "Plaintiffs have failed to allege a material breach of the APA that would excuse their compliance with the Neutral Accountant ADR procedure."[96] To make this argument, Defendants assert that their purported failure to provide an Earn-Out

[94] *See, e.g.*, Compl. ¶ 58.

[95] OB at 19.

[96] *Id.* at 21.

Statement by November 14, 2022, is a "non-material deviation" from the APA because they provided the Collections Spreadsheet in February 2024.[97]

Defendants' other remaining arguments are similar; they are that the complaint fails to state a claim because it fails to adequately quantify damages and because, in connection with the request for specific performance, "the balance of equities tips in Defendants' favor[.]"[98] This collection of arguments is addressed together because they fail for a similar reason—they exceed the scope of the elements necessary to sufficiently plead a breach of contract claim.

"A complaint should be dismissed if it fails to state a claim on which relief could be granted."[99] "When considering a 12(b)(6) motion: '(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

[97] *Id.* at 20; *see also id.* at 19 ("[T]here was no breach based on 'failing to provide the Earn-Out Statement within forty-five (45) days following the end of the Earn-Out Period.' . . . [T]he Collections Spreadsheet contains all of the information required in the Earn-Out Statement. As such, it should be construed as the Earn-Out Statement or its functional equivalent.") (citations omitted).

[98] *See id.* at 21–23.

[99] *Seven Invs., LLC*, 32 A.3d at 396.

inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible to proof."[100]

"'In alleging a breach of contract, a plaintiff need not plead specific facts to state an actionable claim.'"[101] The elements of a breach of contract are "'(i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a causally related injury that warrants a remedy, such as damages or in an appropriate case, specific performance.'"[102] "Thus, a plaintiff need not plead monetary damages to sustain a breach of contract claim."[103] A plaintiff can plead causally related harm "by pleading a violation of the plaintiff's contractual rights."[104] A court can also "vindicate a breach of contract that does not give rise to monetary damages through an award of nominal damages."[105]

Plaintiffs here have adequately alleged that (i) the APA exists,[106] (ii) Defendants breached the APA by failing to provide monthly production of financial

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[100] *In re Doehler Dry Ingredient Solutions, LLC*, 2022 WL 4281841, at *7 (Del. Ch. Sept. 15, 2022) (quoting *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982)).

[101] *Garfield v. Allen*, 277 A.3d 296, 328 (Del. Ch. 2022) (quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

[102] *Id.* (quoting *AB Stable VIII LLC v. Maps Hotel & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021)).

[103] *Id.*

[104] *Id.*

[105] *Id.* (citing Restatement (Second) of Contracts § 346(2) (Am. L. Inst. 1981)).

[106] *See, e.g.*, Compl. ¶ 14.

documents and a timely Earn-Out Statement,[107] and (iii) Plaintiffs have been injured by Defendants' unexcused breaches.[108] It is not relevant at this stage whether Plaintiffs adequately pleaded a specific and proper form of damages because Plaintiffs have alleged violations of their contractual rights that would warrant a remedy, whether it be money damages (including nominal damages) or specific performance.[109] Defendants' argument to the contrary fails.

Defendants' argument that specific performance is unavailable because the equities favor Defendants[110] is not persuasive at this stage. Plaintiffs allege that Defendants failed to meet their contractual obligation to produce financial materials to Plaintiffs for two years.[111] Plaintiffs also allege that North American failed to deliver an Earn-Out Statement to Plaintiffs by the contractually established deadline of November 14, 2022.[112] Thus, for example, Plaintiffs may be able to prove that

[107] *See, e.g.*, *id.* ¶¶ 31–34, 53.

[108] *See, e.g.*, *id.* ¶¶ 33–36; *see also Garfield*, 277 A.3d at 328 ("In this case, the allegations of the Complaint support an inference of harm. The plaintiff has pled that the members of the Committee committed an unexcused breach of the Performance Share Limitation. That is sufficient.").

[109] *See Garfield*, 277 A.3d at 328 ("Put simply, '[a] breach of contract gives rise to a right of action.' That is because any 'unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury.'") (citations omitted).

[110] *See* OB at 23.

[111] Compl. ¶ 33.

[112] *Id.* ¶ 34.

they have been unable to trigger and participate effectively in the expert resolution process, and Plaintiffs' claims may "support obvious potential remedies" like specific performance.[113] There is no basis for the Court to determine at this stage how a grant of specific performance to Plaintiffs would balance against any harm to Defendants.

Finally, Defendants' argument that Plaintiffs' claims must be dismissed because they allege only non-material breaches is also not persuasive at this stage. To reiterate, at the pleading stage, Plaintiffs must adequately plead "'(i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a causally related injury that warrants a remedy, such as damages or in an appropriate case, specific performance.'"[114] Plaintiffs pleaded those elements here.

Defendants' argument that the complaint must be dismissed because the Collections Spreadsheet is the "functional equivalent" of the Earn-Out Statement[115] fails. Plaintiffs pleaded that the Collections Spreadsheet was produced over a year after Defendants' obligations to produce an Earn-Out Statement were triggered and

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[113] *Garfield*, 277 A.3d at 329; *see also id.* ("The plaintiff has pled facts making it reasonably conceivable that (i) a contract exists, (ii) the members of the Compensation Committee breached the contract . . . , and (iii) the stockholders were harmed by the breach. *That is all that is required*.") (emphasis added).

[114] *Id.* at 328 (quoting *AB Stable VIII LLC v. Maps Hotel & Resorts One LLC*, 2020 WL 7024929, at *47 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021)).

[115] OB at 19.

that the Collections Spreadsheet suffers from substantive and procedural flaws.[116] Based on these facts, it is reasonably conceivable that Plaintiffs may prove that Defendants' production of the Collections Spreadsheet does not satisfy Defendants' obligations under the APA.

Additionally, the question of whether the Collections Spreadsheet constitutes a "non-material deviation" from Defendants' obligation to timely produce and deliver an Earn-Out Statement need not be answered at the pleading stage because Plaintiffs' claim for breach need not ultimately be actionable.[117] Plaintiffs need not satisfy a "fact-intensive" standard, like materiality, to state a claim for breach of contract that satisfies Rule 12(b)(6).[118] To the extent that Defendants raise the issue of materiality to "reject" the argument that Plaintiffs are excused from the expert

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[116] *See, e.g.*, Compl. ¶¶ 34, 41–43.

[117] *Garfield*, 277 A.3d at 328 (quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)); *see also New Enterprise Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 137 (Del. Ch. 2023) ("So long as the complaint alleges that an 'agreement[] ha[s] been breached,' and even if it is not clear that the non-breaching party has 'suffer[ed] immediate quantifiable harm, the equitable powers of this Court afford [it] broad discretion in fashioning appropriate relief.'") (quoting *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579, 583 (Del. Ch. 1997)).

[118] *See SphereCommerce, LLC v. Caulfield*, 2022 WL 325952, at *7 n.65 ("I note that the material breach inquiry typically is implicated when determining whether a party to a contract is excused from performing that contract. It is far less common to see 'material breach' utilized as a standard by which to assess whether other contractual rights have been triggered.") (collecting cases); *id.* ("It is . . . noteworthy that each of the cases cited above *considered the fact-intensive material breach question after a full trial on the merits.*") (emphasis added).

determination process,[119] Defendants are fighting a strawman. Plaintiffs contend that (i) the Earn-Out Statement was never produced,[120] and (ii) the good-faith resolution process was never initiated.[121] They do not contend that they are not required to engage in the expert determination process.[122]

CONCLUSION

Plaintiffs' claims largely survive the motion to dismiss. I recommend that the Court dismiss the claims that are time-barred, namely the claims pertaining to breaches of Section 2.9 of the APA that predate January 30, 2022. I also recommend that the Court dismiss Plaintiffs' request for an order directing Defendants to produce books and records pursuant to Section 2.9(e)'s good-faith resolution process. Otherwise, I recommend that the Court deny Defendants' Motion to Dismiss.

This is a Report, but not a Final Report. Exceptions are stayed pending the issuance of a Final Report.

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[119] *See* OB at 20 ("Plaintiffs do not and cannot allege that these purported breaches were 'material' sufficient to excuse their participation in the ADR process.").

[120] *See* Compl. ¶¶ 37, 41–44, 53.

[121] *See id.* ¶ 58.

[122] In fact, the Complaint specifically requests that the Court order the parties, "to the extent there is a dispute regarding the Earn-Out Statement, [to] engage in good faith in the dispute resolution provision described in Section 2.9(e)[.]" *Id.* at 19.