

I. INTRODUCTION

This dispute involves the buyer and sellers of an online food ordering management company, centering on the release of approximately [REDACTED] held in escrow to cover potential indemnification claims related to the purchase of the company.

The sellers sued, alleging that the buyer is wrongfully withholding the escrowed funds and has no valid right to indemnification under the purchase agreement. The sellers claim that this withholding constitutes a breach of the purchase agreement and seek declaratory judgment affirming that the buyer has no right to indemnification.

The buyer has counterclaimed, asserting that the sellers intentionally misrepresented their compliance with a settlement agreement involving a non-party search engine company, which the buyer alleges constitutes both breach of contract and fraud. The buyer also seeks declaratory judgment affirming its right to indemnification.

Both parties have filed motions for summary judgment on their respective claims and against the claims of the opposing party.

II. FACTUAL AND PROCEDURAL BACKGROUND

In January 2022, Plaintiffs KBranch, Leon Chen, and Tina Chen¹ (collectively “Sellers”) sold Kydia Inc., now known as “BeyondMenu” to Defendant BSI3 Menu Buyer, Inc. (“Buyer”).² An Equity Purchase Agreement (“Purchase Agreement”) governed this transaction.³ As part of the Purchase Agreement, Buyer and Sellers agreed to escrow ██████████ to cover certain indemnity claims that Buyer may have against Sellers (“Escrow Agreement”).⁴

In a letter dated July 17, 2023, Buyer’s counsel sent Sellers a notice of indemnity claim (the “Notice”) informing Sellers that Buyer would be withholding the escrow funds to cover Buyer’s claims against Sellers.⁵ The claims Buyer asserted in the Notice largely fall into two categories.

¹ Because Leon Chen and Tina Chen share a surname (as husband and wife), the Court will refer to them both by their first names only to avoid confusion. No disrespect or familiarity is intended.

² D.I. 210 (hereinafter “Pls.’ Op. Br.”) at 1-2; D.I. 193 (hereinafter “Def.’s Op. Br.”) at 16; D.I. 1 (hereinafter “Compl.”) Ex. 1. The Court will refer to the pre-transaction company under Sellers’ management as “Kydia” and the post-transaction company under Buyer’s management as “BeyondMenu.” This is the case even though the company changed its name from Kydia to BeyondMenu shortly before the transaction. *See* Compl. ¶¶ 2-3.

³ Compl. Ex. 1 (hereinafter “Purchase Agreement”).

⁴ Purchase Agreement at § 2.4(c); *see* Compl. Ex 2.

⁵ Compl. Ex. 3.

First, the “Google Claims,” regarding Sellers’ alleged noncompliance with a settlement agreement (the “Settlement Agreement”) between Google and Kydia.⁶ The lawsuit that culminated with the execution of the Settlement Agreement concerned Google’s allegations that Kydia falsely represented an affiliation with Google to deceive business owners and convince them to give Kydia unauthorized control over their Google Business Profiles (“GBP”).⁷

A GBP is a sort of virtual business card that appears when a Google user searches for a business.⁸ It contains key information about a business, such as its hours, location, reviews, and links to its website and menu.⁹ GBPs can be managed by businesses directly, or businesses can outsource management of their GBPs to third parties, like Kydia.¹⁰ Companies like Kydia can use a tool called GBP API to manage multiple business listings.¹¹

⁶ Compl. Ex. 4 (hereinafter “Settlement Agreement”).

⁷ Complaint, *Google LLC v. Kydia Inc.*, No. 5:18-cv-03047-NC (N.D. Cal), Dkt. No. 1 (May 22, 2018). At the time of the lawsuit, the Google Business Profile product was referred to as “Google My Business.” The Settlement Agreement refers to the same. The Court refers to the product as Google Business Profile because that is what the product is called today, and that is how both parties refer to it in briefing.

⁸ Compl. ¶ 40; Def.’s Op. Br. 5.

⁹ Compl. ¶ 40; Def.’s Op. Br. 5.

¹⁰ See generally Def.’s Op. Br. Ex. 5.

¹¹ See generally Def.’s Op. Br. Ex. 6.

As part of the Settlement Agreement, Kydia agreed to [REDACTED]

[REDACTED]¹² These include the GBP API terms of service¹³ and the GBP third-party policies (collectively, the “Terms of Service” or “GBP TOS”).¹⁴ Buyer alleges that Kydia failed to comply, and that its failure constituted Sellers’ breach of the Purchase Agreement.¹⁵ This breach caused extensive losses, in part because Google suspended Buyer’s access to the GBP API because of Sellers’ conduct.¹⁶

In the Purchase Agreement, Sellers warranted that Kydia was not “in material violation, breach, or default of any [] Material Contract.”¹⁷ The Purchase Agreement defined a Material Contract in relevant part as “any Contract relating to the settlement of any litigation . . . with outstanding nonmonetary obligations of [Kydia].”¹⁸ Both Buyer and Sellers agree that the Settlement Agreement is a Material Contract as defined by the Purchase Agreement.¹⁹

¹² Settlement Agreement § 4(b).

¹³ Def.’s Op. Br., Ex. 6.

¹⁴ Def.’s Op. Br., Ex. 5.

¹⁵ Def.’s Op. Br. 10-14; *Id.* 21-31.

¹⁶ Def.’s Op. Br. 2; *Id.* 18-20; *Id.* 35-37.

¹⁷ Purchase Agreement § 4.13(b)(iii).

¹⁸ Purchase Agreement § 4.13(a)(xiii).

¹⁹ Pls.’ Op. Br. 31 (“The Settlement Agreement is a Material Contract within Schedule 4.13(a)(xiii)”; Def.’s Op. Br. 22 (“Kydia was in material breach of the Settlement Agreement—a “Material Contract.”)).

Second, the “Tax Claims,” regarding Sellers’ alleged nonpayment of Illinois state taxes.²⁰ The Tax Claims relate to certain pre-transaction tax obligations Kydia owed to the State of Illinois. Sellers note the State of Illinois has offered a settlement to BeyondMenu regarding these liabilities, and Sellers have agreed to pay their proportionate share ██████████.²¹

Sellers sued Buyer seeking a release of the escrowed funds, arguing that Buyer’s indemnification claims are without merit.²² Specifically, Sellers brings one count of breach of contract for breaching the Escrow Agreement by refusing to release the escrowed funds.²³ Sellers also seeks declaratory judgment that Buyer has no right to indemnification and that Sellers are entitled to the escrowed funds.²⁴

Buyer counterclaimed, alleging that Sellers breached the Purchase Agreement by misrepresenting that Sellers were in compliance with the Settlement Agreement.²⁵ It also seeks a declaratory judgment that Buyer is entitled to indemnification.²⁶ Finally, it brings an action for fraud, claiming that Sellers knew of their non-

²⁰ Compl. Ex. 3.

²¹ Pls.’ Op. Br. 41; Pls.’ Op. Br. Ex. 55.

²² See generally Compl.

²³ Compl. ¶¶ 71-77.

²⁴ Compl. ¶¶ 78-82.

²⁵ D.I. 11 (hereinafter “Ans. and Counterclaims”) ¶¶ 65-71.

²⁶ Ans. and Counterclaims ¶¶ 72-74.

compliance with the Settlement Agreement and induced Buyer to pay an inflated price to acquire BeyondMenu.²⁷

III. STANDARD OF REVIEW

Summary judgment is appropriate “when the [record] show[s] that there is no genuine issue as to any material fact, and [] the moving party is entitled to a judgment as a matter of law.”²⁸ The moving party bears the burden of demonstrating the undisputed facts entitle it to judgment as a matter of law.²⁹ “When the moving party sustains the initial burden of showing the nonexistence of any material issues of fact, the burden shifts to the non-moving party to substantiate its adverse claim by showing that there are material issues of fact in dispute.”³⁰ “If the facts permit reasonable persons to draw from them but one inference, the question is ripe for summary judgment.”³¹ Summary judgment will not be granted, however, “if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances.”³²

²⁷ Ans. and Counterclaims ¶¶ 75-79.

²⁸ Super. Ct. Civ. R. 56(c).

²⁹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

³⁰ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Moore*, 405 A.2d 679, 680).

³¹ *Brzoska*, 668 A.2d at 1364 (citing *Wootten v. Kiger*, 226 A.2d 238 (Del. Super. 1967)).

³² *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

When the parties have filed cross-motions for summary judgment, as is the case for some of the claims here, “the standard for summary judgment is not altered.”³³ If “neither party argues the existence of a genuine issue of material fact, ‘the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the[m].’”³⁴ However, even where cross-motions are filed, if “an issue of material fact exists, summary judgment is not appropriate.”³⁵

IV. ANALYSIS

A. BUYER IS ENTITLED TO SUMMARY JUDGMENT AS TO ONLY THE TAX CLAIMS. SELLERS ARE ENTITLED TO SUMMARY JUDGMENT AS TO ONLY THE DUPLICATE LISTING ALLEGATION. OTHERWISE, NEITHER BUYER NOR SELLERS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNTS I AND II OF BUYER’S COUNTERCLAIMS AND COUNTS I AND II OF SELLERS CLAIMS.

As previously mentioned, there are two sets of indemnity claims—the Tax Claims and Google Claims. Because Sellers have agreed to pay their proportionate share of the Illinois tax liabilities, Sellers contend the Tax Claims are moot.³⁶ While

³³ *Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. May 31, 2013) (quoting *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)) (internal quotation marks omitted).

³⁴ *Radulski v. Liberty Mut. Fire Ins. Co.*, 2020 WL 8676027, at *4 (Del. Super. Oct. 28, 2020) (quoting Del. Super. Ct. Civ. R. 56(h)).

³⁵ *Motors Liquid. Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *5 (Del. Super. June 8, 2017) (citing *Comet Sys., Inc. S’holders’ Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. Oct. 22, 2008)).

³⁶ Pls.’ Op. Br. 41.

Buyer appeared to have dropped the Tax Claims—omitting them from its brief in support of summary judgment and its reply brief—Buyer clarified at oral argument that Leon has not yet satisfied the claim.³⁷ Counsel for Sellers, however, stated that payment for the Tax Claims “will come out of the escrow funds. There’s no disagreement as to that. And that should hopefully happen promptly.”³⁸ To the extent they remain unsatisfied, Buyer is entitled to summary judgment as to the Tax Claims.

Turning to the Google Claims, Buyer alleges Sellers breached the Purchase Agreement in six main ways: (1) engaging in prohibited “farming” practices; (2) operating an automated script to prevent business owners from changing their GBP; (3) causing GBP menu and reservation links to point to a third-party ordering page without the consent of the business owner; (4) failing to implement a code of conduct; (5) maintaining a source code which violated a Google policy to retain API data for no more than 30 days; and (6) improperly creating duplicate listings.³⁹ Buyer only moved for summary judgment on the first two alleged violations—

³⁷ D.I. 263 5:1-13.

³⁸ *Id.* 42:1-21.

³⁹ As an aside, Buyer had also argued an additional way that Sellers had violated the Settlement Agreement, which is by failing to retain certain acknowledgements before obtaining control of clients’ GBPs. However, this allegation was withdrawn. *See* D.I. 51 and 52.

related to the farming practices and automated script.⁴⁰ Sellers moved for summary judgment regarding all violations arguing Buyer fails to support each alleged violation with any admissible evidence. After a careful review of the factual issues, record evidence, and conclusions that can be drawn from the evidence, summary judgment is granted only as to the Duplicate Listing Allegation.

1. THE FARMING ALLEGATIONS

The parties do not dispute the details of Google’s GBP verification process to determine whether a GBP user is, in fact, the owner of the business associated with that profile.⁴¹ When someone seeks to control or edit a GBP, Google will send a postcard containing a numeric code to the business’s address.⁴² If the user is indeed

⁴⁰ D.I. 230 (hereinafter “Def.’s Reply Br.”) n.68.

⁴¹ *Compare* Pls.’ Op. Br. 55 (“Kydia’s primary method of obtaining control of GBP listings . . . was to go through the PIN verification process. Under this process, Kydia would request control of the GBP, and eventually Google would mail a secret PIN to the restaurant’s physical address. Kydia could not obtain control of the GBP unless someone from the restaurant provided Kydia with that PIN”) *with* Def.’s Op. Br. 5-6; *Id.* 10 (“Google requires that a restaurant undergo verification to claim/change its GBP account. One method of verification is for Google to send a PIN code on a postcard to the physical restaurant address that the restaurant can enter onto Google’s website” and “Kydia took advantage of this method to ‘farm’ or ‘hijack’ restaurants’ GBP so that Kydia could link Kydia’s website to the GBP[.]”).

⁴² Def.’s Op. Br. 5-6 (citing <https://support.google.com/business/answer/7107242>).

the business owner, they will receive the postcard and enter the code on Google's website.⁴³ If the code is correct, the user will gain access to the GBP.⁴⁴

Farming is alleged to be the practice of gaining control over a business's GBP by: (1) soliciting the post-card from Google to be sent to the business's address; (2) calling the business owner and asking them to read the code over the phone; and then (3) entering the code to take control of their GBP.⁴⁵ Google requires third-party GBP managers "to be transparent with information that affects" the decision to grant management status to a third party and to "claim and manage a Business Profile only if [they] obtained the business owner's express consent as required by the applicable law[.]"⁴⁶ Further, Google prohibits third-party managers from making false and misleading claims in seeking to gain control of a business's GBP, including "[m]isrepresent[ing] as Google."⁴⁷

Buyer alleges that Sellers were not transparent in conducting their farming operations. For example, Buyer contends that Kydia sales agents called restaurant owners and read a script which referred to Kydia's supposed Google promotion and

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See generally* Def.'s Op. Br. 10-13.

⁴⁶ Def.'s Op. Br. Ex. 5.

⁴⁷ *Id.*

encouraged the owner to give Kydia the PIN code to activate the promotion.⁴⁸ The script appears in Skype conversations between Daisy Lao, a sales agent at Kydia, and Leon.⁴⁹

Sellers respond that there is no evidence the script was actually used, and that there is evidence suggesting the script was not created at Leon's direction, and cite to another thread of Skype messages sent by Lao that suggest Kydia customer service representatives used a different script provided by a call center supervisor.⁵⁰ They also point to the fact that in the Skype threads between Lao and Leon containing the script, Leon made no reference to the script and did not acknowledge it.⁵¹

As further evidence of Kydia's alleged improper farming practices Buyer points to several sources, many of which Sellers argue are inadmissible hearsay. Besides the evidence of the alleged script, these include: (1) an affidavit from Lao;⁵² (2) summary reports of "PIN tasks" sheets;⁵³ (3) Skype messages regarding customer

⁴⁸ Def.'s Op. Br. 11.

⁴⁹ Def.'s Op. Br. Ex. 13.

⁵⁰ Pls.' Op. Br. 55-56; Pls.' Op. Br. Ex. 67.

⁵¹ Pls.' Op. Br. 55-56.

⁵² Def.'s Op. Br. Ex. 12. Sellers argue this is inadmissible hearsay because Buyer did not make Lao available for a deposition, and she will not testify at trial. *See* D.I. 239 (hereinafter "Pls.' Reply Br.") at 12-13.

⁵³ Def.'s Reply Br. Exs. 4-7. Sellers argue that this is inadmissible hearsay because none of Buyer's witnesses have firsthand knowledge about the sheets. *See* Pls.' Reply Br. 13.

complaints about Kydia/BeyondMenu sending PINs;⁵⁴ (4) testimony from Kydia customer service lead Grace Lee regarding the complaints;⁵⁵ (5) emails from Google regarding Google shutting down BeyondMenu's access to the GBP API;⁵⁶ (6) a BeyondMenu board meeting summary that mentions Leon describing Kydia's lack of proper controls to comply with Google policies and the Settlement Agreement;⁵⁷ and (7) Buyer's witnesses' understandings of Buyer's internal investigation.⁵⁸

While the Court may not consider inadmissible evidence in ruling on a motion for summary judgment,⁵⁹ the primary purpose of a motion for summary judgment is not to analyze the admissibility of evidence parties submit before trial. Indeed, our

⁵⁴ Def.'s Op. Br. Exs. 14-17. Sellers argue this is inadmissible hearsay within hearsay and that none of Buyer's witnesses have firsthand knowledge of the complaints. *See* Pls.' Reply Br. 14.

⁵⁵ Def.'s Op. Br. Ex. 10. Sellers argue this is inadmissible hearsay because Lee lacks firsthand knowledge about the complaints. *See* Pls.' Reply Br. 14.

⁵⁶ Def.'s Op. Br. Exs. 27 and 34. Sellers argue that these emails do not satisfy the business records exception and that their reliability and relevance is in question because the API suspension occurred after the transaction. *See* Pls.' Reply Br. 15-17.

⁵⁷ Def.'s Op. Br. Ex. 30. Sellers argue this is not admissible as a business record or adopted admission because Buyer offered no evidence to satisfy the elements for records of a regularly conducted activity and that the notes were circulated two months after the meeting. *See* Pls.' Reply Br. 17.

⁵⁸ Def.'s Reply Br. 11-13. Sellers argue this is not admissible because the witnesses do not have personal understandings of the investigation and lack firsthand knowledge. *See* Pls.' Reply Br. 17-18.

⁵⁹ *See Deutsche Bank Tr. Co. Americas v. Royal Surplus Lines Ins. Co.*, 2012 WL 2898478, at *10 (Del. Super. July 12, 2012).

Supreme Court demands that on a motion for summary judgment, “a trial court shall not weigh the evidence or resolve conflicts presented by pretrial discovery.”⁶⁰ The Court can determine whether a genuine issue of material fact exists regarding this allegation without weighing in on the admissibility of the disputed evidence.

This is because Buyer proffers undisputedly admissible evidence of Kydia’s improper farming which creates a genuine issue of material fact. First, although Seller’s contend that the deposition testimony of former Kydia Chief Technology Officer Fan Li does not support the Buyer’s contentions, they do not challenge its admissibility.⁶¹ In his deposition, Li testified that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁶² Buyer contends that completing “pin tasks” is how Kydia referred to farming internally.⁶³ Sellers

⁶⁰ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

⁶¹ *See* Pls.’ Reply Br. 18.

⁶² Def.’s Op. Br. Ex. 9 160:18-23.

⁶³ Def.’s Op. Br. 10-11 (citing the Li deposition testimony and writing that completing pin tasks “mean[s] that a Kydia employee would request for Google [to] send a GBP PIN code to the restaurant. Then, a Kydia sales agent would call the restaurant and read a script— written at Mr. Chen’s direction—that was designed to convince the restaurant to provide the PIN code.”).

acknowledge Kydia's practice of requesting PINs from restaurants, but deny that this process violated the Terms of Service.⁶⁴

Second, BeyondMenu's Head of Finance, Ryan Cunningham testified that BeyondMenu's internal investigation uncovered Kydia's farming process:

Beyond Menu would send out physical postcards with the pin codes necessary to gain access to Google Business Profile to thousands of restaurants and upon receipt of those postcards, there was specific sales and support agents on the Beyond Menu team that would then call these restaurants . . . to reach out to them and say, Hey, did you receive this code from Beyond Menu? And then they would use false and misleading scripts to allude to things like, We are partnered with Google to get you a special discount or we can bring you more orders if you sign up, we'll help you rank better on Google if you just give me this pin code.⁶⁵

Third, Kevin Wilson, a current BeyondMenu employee and former Google employee, testified to his knowledge of Kydia, and now-BeyondMenu's practice of requesting ownership of GBP listings without permission from the restaurants.⁶⁶

Finally, Buyer argues Leon's Skype records confirm that Chen directed the sales

⁶⁴ Pls.' Op. Br. 49-50.

⁶⁵ Def.'s Op. Br., Ex. 3 at 86:1-17. It is unclear to the Court how involved Cunningham was in the internal investigation. He testifies that he "was not the lead, but [that he] was aware of the actions that were going on." Buyer's Reply Br. Ex. 2, 16:15-16. However, on several occasions, he also referred to the internal investigation committee's activity in the first person. Seller's Op. Br. Ex 3, 114-115. The extent to which Cunningham can credibly testify as to the investigation committee's conduct is an issue of his credibility. "If the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

⁶⁶ Def.'s Reply Br., Ex. 3 at 65:5-16.

team, when farming, not to seek permission from restaurant owners “for Chinese restaurants.”⁶⁷

Accordingly, there is evidence in the record from which a rational trier of fact could find that Kydia engaged in improper farming.⁶⁸ Because these facts are disputed, however, summary judgment is denied as to this allegation.

2. THE AUTOMATED SCRIPT ALLEGATIONS

The next way in which Buyer contends Sellers violated the Settlement Agreement is through operating an automated script to prevent business owners from changing their GBP.⁶⁹ The crux of this allegation is that Kydia maintained a script of code that would automatically detect changes made to GBP website links, and revert any changes made. Kydia does not dispute that its GBP API code had a script that would “check to see if the website links were no longer set to Kydia websites

⁶⁷ Def.’s Op. Br., Ex. 13 at 4.

⁶⁸ Further, there is a genuine dispute of material fact as to whether Kydia violated the Terms of Service by causing Google to send the PIN before contacting the restaurant when Kydia had previously controlled that restaurant’s GBP. Sellers contend that in these instances, “the restaurant previously provided Kydia permission to control the restaurant’s GBP [and] the TOS do not explicitly state that a third-party must obtain “express consent” twice[.] Pls.’ Reply Br. at 51. At oral argument, Sellers also argued they had express consent because “they had the written consents required under the settlement agreement.” D.I. 263 54:7-14. Buyer, on the other hand, contests that Sellers are effectively arguing that they had implied consent, and insist “[t]he TOS require express (not implied) consent.” Def.’s Reply Br. 18-21.

⁶⁹ Def.’s Op. Br. 14.

for the given restaurant and change them if applicable.”⁷⁰ The parties dispute whether the Terms of Service prohibit third-party GBP managers from reverting changes made by Google, rather than the business owner.⁷¹

Google’s GBP third-party policies prohibit the “[a]uto-reverting of *Google* updates and suggested edits.”⁷² It goes on to explain that “[t]o ensure that the most accurate information is published for merchants and users, *Google* uses many different sources of data, including user-generated content and other third-party data.”⁷³ The GBP API terms of service also prohibit “automatically revert[ing] changes made by *Google*.”⁷⁴ Drawing all reasonable inferences in Buyer’s favor, there is a possibility that Sellers breached the Settlement Agreement because there is a genuine of material fact regarding whether there is a prohibition on third-party GBP managers reverting changes made by Google, rather than the business owner.

Sellers also argue that Buyer acquiesced to the script, and that it was in existence post-transaction.⁷⁵ A party complaining of an act acquiesces to the act when it “(1) has full knowledge of [its] rights and all material facts and (2) remains

⁷⁰ Pls.’ Op. Br. 63.

⁷¹ *Compare* Pls.’ Op. Br. 63-64 with Def.’s Reply. Br. 21-27.

⁷² Def.’s Op. Br. Ex. 5 (emphasis added).

⁷³ *Id* (emphasis added).

⁷⁴ Def.’s Op. Br. Ex. 6 (emphasis added).

⁷⁵ Pls.’ Op. Br. 66-67.

inactive for a considerable time, or freely gives recognition to the act, or conducts [itself] in a manner inconsistent with any subsequent repudiation of the act, thereby leading the other party to believe that the act has been approved.”⁷⁶ Even assuming that Buyer did in fact have knowledge of its rights and all material facts regarding the script, there is insufficient evidence at this stage to conclude that Buyer conducted itself in a manner inconsistent with subsequent repudiation, remained inactive for a “considerable” time, or gave recognition to the script. Therefore, neither party is entitled to summary judgment as to this alleged violation.

3. THE THIRD-PARTY ORDERING PAGE ALLEGATION

The next way in which Buyer argues Sellers violated the Settlement Agreement is by causing GBP menu and reservation links to point to a third-party ordering page. Buyer has clarified that its contention is not simply that Sellers caused the GBP links to point to a third-party page, but rather that Sellers did this without the consent of the business owner.⁷⁷ This practice is prohibited by the Terms of Service.⁷⁸

⁷⁶ *Tenneco Automotive Inc. v. El Paso Corp.*, 2004 WL 3217795, *12 (Del. Ch. Aug. 26, 2004).

⁷⁷ Ans. and Counterclaims ¶¶ 46-47; Def.’s Reply Br. 40-41.

⁷⁸ Buyer cites to <https://support.google.com/business/answer/3038177?hl=en#zippy=%2Cmenu>, which states that “[t]hird parties that manage Business Profiles on behalf of clients must notify and have the consent of the business owner to submit a menu URL for a business.”

As evidence of Sellers engaging in this practice Buyer points back to the evidence of farming and the automated script.⁷⁹ Sellers argue that, accordingly, the menu link claims “are subsumed within the API-related claim.”⁸⁰ Buyer responds by asserting that “even if the reason that Sellers were in violation of the GBP [Terms of Service] is because of farming and the automated script, that does not absolve Sellers of their separate and distinct obligations to avoid improperly inserting links without the restaurant owners’ permission.”⁸¹

As previously explained, there is a genuine issue of material fact concerning Sellers’ alleged improper farming practices. Further, while it is undisputed that Sellers caused GBP links to point to a third-party page, it is disputed that Sellers did so without business owners’ consent.⁸² Because there is a genuine dispute of material fact as to this allegation summary judgment on this alleged violation is denied.

⁷⁹ See Buyer’s Reply Br. 40-42.

⁸⁰ Pls.’ Op. Br. 46.

⁸¹ Def.’s Reply Br. 41-42.

⁸² Pls.’ Reply Br. 22.

4. THE CODE OF CONDUCT ALLEGATION

The next alleged violation is that Sellers failed to comply with the Settlement Agreement's requirement [REDACTED]

[REDACTED] The Google Settlement Agreement provides in relevant part that:

[REDACTED]

Buyer alleges that Sellers failed to implement such a code of conduct. Sellers maintain they did in fact implement the code of conduct and cite to two copies of the code of conduct signed by customer service agent Grace Anne Gancino and Lao.⁸⁴ In turn, Buyer cites to the testimony of several employees who Buyer argues managed GBP listings and who have testified to not signing any code of conduct.⁸⁵ Sellers insist these employees did not manage GBP listings.⁸⁶ Accordingly, there is a genuine dispute of material fact regarding whether Sellers complied with the

⁸³ Settlement Agreement § 6.

⁸⁴ Pls.' Op. Br. Ex. 13.

⁸⁵ Def.'s Reply Br. 43 (citing Def.'s Reply Br. Ex. 15 at 284:10-16; *Id.* 289:7-21; Def.'s Reply Br. Ex. 16 at 77:19-20).

⁸⁶ Pls.' Reply Br. 22-23.

Settlement Agreement’s requirement that “[REDACTED]”⁸⁷ sign a code of conduct. Sellers are not entitled to summary judgment as to this alleged violation.

5. THE DATA RETENTION ALLEGATION

The next alleged violation of the Settlement Agreement is that Kydia maintained a source code which violated a Google policy to retain API data for no more than 30 days. Sellers argue that “Buyer points only to forthcoming testimony of its expert,”⁸⁸ and that accordingly, they are entitled to summary judgment as to this allegation. In reply, Buyer submits an expert report prepared by Isaac J. Pflaum, which states that the Kydia “system was architecturally designed for permanent retention of [GBP] data” and that its “codebase contained no mechanisms for automated purging, compliance verification, or age-based data management, and included no age-based compliance checks to ensure data usage remained within the allowable retention period.”⁸⁹ Because there is a genuine dispute of material fact as to whether Kydia’s source code violated Google’s terms of service, Sellers are not entitled to summary judgment on this alleged violation.

⁸⁷ Settlement Agreement § 6.

⁸⁸ Pls.’ Reply Br. 23.

⁸⁹ Def.’s Reply Br. Ex. 17 at 5.

6. THE DUPLICATE LISTINGS ALLEGATION

The final alleged violation is that Kydia created improper duplicate GBP listings. Neither party discusses this alleged violation in much detail, and the origin of the alleged violation seems to be a September 2023 email from Google.⁹⁰ Google sent the email in response to BeyondMenu's request for additional information into the reason for the API suspension as part of an internal investigation BeyondMenu was conducting.⁹¹ The email notes that one of the "three main concerns . . . that led to [the] suspension [was that Kydia] was using the GBP APIs to create duplicate listings, claiming to be on behalf of the merchants but the merchants did not consent to create a new listing while their current verified profile exists."⁹²

Sellers argue that this email is inadmissible hearsay.⁹³ They also contend that, besides this email, Buyer has no evidence any duplicate listings were ever created.⁹⁴ Additionally, Sellers cite to Tadepalli's deposition, in which Sellers assert Tadepalli contends that "the alleged duplicate listing process is not possible."⁹⁵ But this is not an accurate summary of what Tadepalli says. Tadepalli was asked if he "know[s]

⁹⁰ Def.'s Op. Br. Ex. 29. Not to be confused with the September 2022 email from Google on a similar topic, Ex. 27.

⁹¹ Def.'s Op. Br. 18.

⁹² Def.'s Op. Br. Ex. 29.

⁹³ Pls.' Reply Br. 23-24.

⁹⁴ *Id.*

⁹⁵ Pls.' Op. Br. 48.

anything about *merging . . . the listings, once they're duplicated*, into one?”⁹⁶ Tadepalli responds by saying “I’ve not heard about that, I honestly don’t think that’s possible.”⁹⁷

Because the only evidence for the “duplicate listings” allegation is the Google email, whether summary judgment should be granted on this alleged violation depends on whether the email is inadmissible hearsay. If the email is admissible, there is a genuine dispute of material fact regarding duplicate listings. If it is not, there is no genuine dispute of material fact, and Sellers should be entitled to summary judgment.

The Court finds that this email may not be used to prove that Kydia created improper duplicate listings because it is inadmissible hearsay. Delaware Rule of Evidence 801(c) defines hearsay as “a statement that [a non-party] declarant does not make while testifying at the current trial or hearing; and [] a party offers in evidence to prove the truth of the matter asserted in the statement.” Here, the Google email is an out-of-court statement made by a non-party being offered for the truth of the matter asserted.

Buyer contends that the Court could consider this evidence for non-truth purposes, arguing that “Buyer additionally offers the emails with Google as non-

⁹⁶ Pls.’ Op. Br. Ex. 4, 349:16-18 (emphasis added).

⁹⁷ Pls.’ Op. Br. Ex. 4, 349:19-20.

hearsay for the fact that Google provided . . . notice of its belief that BeyondMenu was in violation of the GBP TOS[.]”⁹⁸ However, this argument makes little sense in the context of Buyer’s claims. The email Buyer is referring to concerns a Google employee’s explanation to *Buyer* about why Google had shut down the company’s GBP API access.⁹⁹ A statement providing *Buyer* “notice” of what Google thought justified an API suspension necessarily cannot be offered to show *Sellers* were on notice of Google’s belief that the company was in violation of the Terms of Service. Buyer itself insists that this email was “received in the ordinary course of *Buyer*’s business,”¹⁰⁰ as discussed below, so it is not clear what “notice” Buyer contends *Sellers* were on as a result of this email.

Buyer further contends that the business record exemption applies because the email was “received in the ordinary course of Buyer’s business.”¹⁰¹ The business records exception to the hearsay rule is found in Delaware Rule of Evidence 803(6). To be admissible as a business record, the record must have been (1) made at or near the time of the act or event recorded; (2) made by or from information transmitted by a person with knowledge; (3) prepared and maintained in the ordinary course of

⁹⁸ Def.’s Reply Br. n.37.

⁹⁹ See Def.’s Op. Br., Ex. 29. All emails sent by BeyondMenu were sent post-closing, after Buyer had assumed control of the company.

¹⁰⁰ Def.’s Reply Br. n.37 (emphasis added).

¹⁰¹ *Id.*

regularly conducted business activity; (4) in the regular practice of the organization; (5) authenticated by a custodian or another qualified witness; and (6) not under circumstances of preparation that indicate a lack of untrustworthiness.¹⁰²

Here, there is nothing suggesting the email, sent by a Google employee, in response to questions about an API suspension is a record sent in the ordinary course of business as a regular practice of Google. That the email was “received in the ordinary course of Buyer’s business” (even if true) is not relevant, because the focus of the business records exception is on whether the records were *created* in the ordinary course of business by the *declarant*.¹⁰³

Additionally, the email was sent over a year after Google suspended BeyondMenu’s API access, so the email was not made at or near the time of the event at issue. This also goes to the lack of trustworthiness and reliability this email presents. Therefore, the Google email does not satisfy the business records exception.

The only other potentially relevant exception to the rule against hearsay is the residual or “catch-all” exception. This exception is applicable to statements that are not otherwise admissible under any other exception, but which have “equivalent

¹⁰² D.R.E. 803(6).

¹⁰³ *Id.*; *See generally* D.R.E. 803 (noting that communications covered by 803(6) and every other communication covered by rule 803 are not excluded regardless of whether the *declarant* is available as a witness) (emphasis added).

circumstantial guarantees of trustworthiness” to statements covered by other exceptions.¹⁰⁴ “To be admitted under this exception, the statement must satisfy three conditions: (1) the statement [must be] offered as evidence of a material fact, (2) the proponent could not find more probative evidence of that fact by reasonable efforts, and (3) admission of the statement serves the purposes of the Rules.”¹⁰⁵

Even assuming that the statement is offered as evidence of a material fact and admission of the statement would serve the purposes of the Rules of Evidence, Buyer could have found more probative evidence of the fact asserted with reasonable efforts. As Sellers highlight, Buyer could have deposed the email sender or a 30(b)(6) witness from Google.¹⁰⁶ Accordingly, there is no dispute of material fact as to this alleged violation, because Buyer has not alleged any admissible evidence regarding duplicate listings.¹⁰⁷ Summary judgment is granted to Sellers on this alleged violation.

¹⁰⁴ D.R.E. 807(a)(1).

¹⁰⁵ *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 242 (Del. 2001) (internal quotations omitted).

¹⁰⁶ Pls.’ Reply Br. 16.

¹⁰⁷ There are several exhibits in the record supplied between the parties and several depositions were taken. If there is admissible evidence in the record to show improper duplicate listings, Buyer has the burden to substantiate its claim by demonstrating that there are material issues of fact in dispute. *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citation omitted). The Court will not comb through the voluminous record for Buyer; inferences in favor the nonmovant party must be

B. THERE IS A GENUINE DISPUTE OF MATERIAL FACT AS TO THE LOSSES BUYER SUFFERED, IF ANY.

A threshold question Sellers raise is whether Buyer has suffered a “Loss” under the Purchase Agreement for indemnification purposes. Sellers contend that Buyer could not have possibly suffered a loss as it pertains to the Settlement Agreement, because Google has not imposed any sort of penalty upon BeyondMenu for breaching the Settlement Agreement.¹⁰⁸ In other words, Sellers’ argument is that for a breach of the Settlement Agreement to constitute a loss entitling Buyer to indemnification, Google must have imposed financial liabilities against Buyer. Sellers cite to several Delaware cases establishing that as a general proposition, the party seeking indemnification must have suffered out-of-pocket losses to be indemnified, rather than speculative and currently unknown liabilities.¹⁰⁹

Buyer argues that Sellers’ caselaw is inapposite because the cases Sellers cite involve different contractual language regarding losses, liabilities, and indemnification.¹¹⁰ Buyer insists that Sellers are attempting to rewrite the scope of

reasonable. *JanCo FS 2, LLC v. ISS Facility Services, Inc.*, 2024 WL 4002825, at *23 (Del. Super. Aug. 30, 2024) (citations omitted).

¹⁰⁸ Pls.’ Op. Br. 32.

¹⁰⁹ See Pls.’ Op. Br. 28-29 (citing *NSI-MI Holdings, LLC v. AMETEK, Inc.*, 2023 WL 7482590 (Del. Super. Nov. 13, 2023); *Clean Harbors, Inc. v. Union Pac. Corp.*, 2017 WL 1175664 (Del. Super. Mar. 28, 2017)).

¹¹⁰ Def.’s Reply Br. 35-37.

the Purchase Agreement’s indemnification provision, which in relevant part provides that Sellers will indemnify Buyer for:

“[A]ny and all Losses suffered, sustained, or incurred by any Buyer Indemnified Party, resulting from, arising in connection with or related to . . . any breach or inaccuracy of any of the representations set forth in . . . Article IV[.]”¹¹¹

“Losses” is defined to include “any Liabilities,”¹¹² and the definition of “Liabilities” includes:

“[A]ny and all claims, losses, damages, deficiencies, assessments, penalties, debts, liabilities, commitments, or obligations, whether contingent, fixed or absolute, direct or indirect, accrued or unaccrued, asserted or unasserted, matured or unmatured, liquidated or unliquidated, known or unknown, due or to become due, or determined or determinable[.]”¹¹³

Buyer’s argument, in sum and substance, is that the Settlement Agreement was a Material Contract which Sellers represented they had complied with in Article IV of the agreement. Sellers agreed to indemnify Buyer for “Losses” sustained in connection with any breach or inaccuracy of any of Seller’s Article IV representations. “Losses” was defined to specifically include “Liabilities,” as defined by the agreement. And “Liabilities” was defined in an incredibly broad

¹¹¹ Purchase Agreement § 7.2. The relevant representation set forth in Article IV is that Sellers were in compliance with “any Contract relating to the settlement of any litigation . . . with outstanding nonmonetary obligations of [Kydia].” *See* Purchase Agreement § 4.13(a)(xiii).

¹¹² Purchase Agreement § 1.1.

¹¹³ Purchase Agreement § 1.1.

manner, contemplating all manner of claims, including those that were “unknown” “unasserted,” or “unliquidated.” Accordingly, Buyer argues that if Sellers breached, Buyer is entitled to some amount in indemnity.

The question then turns to whether Buyer has suffered a liability or an expense. Buyer’s primary theory of loss is that Kydia operated in violation of the Settlement Agreement and Terms of Service in ways that artificially inflated its profitability.¹¹⁴ Buyer relied on the Sellers’ representation that they were in compliance with those agreements when valuing the business.¹¹⁵ In other words, Buyer believed it was purchasing a company whose profits reflected compliant operations—as Sellers had warranted—but that was not the case. Once Buyer brought the company into compliance, operations became more expensive and profits dropped, revealing that Buyer had overpaid.¹¹⁶

If this is indeed the case, Buyer incurred a loss at the time of the transaction, measured by the difference between the price it paid and the actual value of the company. Adam Fuller, a partner at the private equity company that controls Buyer, stated in a sworn affidavit attached to Buyer’s Motion that “Buyer would not have purchased BeyondMenu if it had known about Kydia’s noncompliant activities” and

¹¹⁴ Def.’s Op. Br. 1; Def.’s Reply Br. 35.

¹¹⁵ Def.’s Op. Br. 33-37.

¹¹⁶ Def.’s Op. Br. 34-37; Def.’s Reply Br. 37-39.

further that “[i]n calculating a fair purchase price for BeyondMenu, Buyer would not have considered any non-compliantly earned revenue.”¹¹⁷ This is a theory of damages Delaware courts have previously recognized.¹¹⁸

Buyer also argues that it has suffered losses in other ways to be proven at trial, such as costs incurred in remediating noncompliance and the “intangible (but quantifiable) harm associated with BeyondMenu’s reduced standing with Google.”¹¹⁹ Sellers argue that Buyer’s financial reporting data cuts against these claims. Sellers say that *prior* to the API suspension, Buyer’s data showed “declines in revenue, EBITDA, order count, and active restaurants” and that there is no mention of the API suspension in BeyondMenu’s quarterly reporting data.¹²⁰ These are disputed issues of fact. Accordingly, just as whether Sellers’ breach is in genuine dispute, so is whether Buyer suffered indemnifiable losses. Summary judgment is denied on this issue.

¹¹⁷ Def.’s Op. Br. Ex. 36.

¹¹⁸ See *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926 (Del. Ch. July 20, 2007); *Phoenix Oil Co. v. Mackenzie Oil Co.*, 154 A. 894 (Del. 1930); *Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245 (Del. Ch. Jan. 31, 2013).

¹¹⁹ Def.’s Op. Br. 38.

¹²⁰ Pls.’ Reply Br. 9.

C. BUYER IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS FRAUD CLAIM.

As noted, Buyer has claimed that Sellers' misrepresentations were made knowingly. For a plaintiff to prevail on a fraudulent misrepresentation claim, she must show that "(1) defendant made a false representation, usually one of fact; (2) the defendant knew or believed that the representation was false, or made it with reckless indifference to the truth; (3) the defendant's false representation was intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction was taken in justifiable reliance upon the representation; and (5) the plaintiff was damaged by such reliance."¹²¹

The key allegedly false representation at issue is that Sellers represented they were in compliance with the Settlement Agreement.¹²² The ways in which Buyer alleges Sellers were not in compliance have been detailed above, in the context of the indemnity/breach claims. That analysis is incorporated here by reference. As discussed above, whether Sellers actually were in compliance with the Settlement Agreement is in genuine dispute. The analysis could stop here, as a plaintiff must prove each element of fraudulent misrepresentation. Nevertheless, the Court will analyze the next four factors as well.

¹²¹ *Oglesby v. Conover*, 2011 WL 3568276, at *3 (Del. Super. May 16, 2011).

¹²² Def.'s Op. Br. 37-38; *Id.* 27-30; Purchase Agreement § 4.13(b)(iii).

this element.¹²⁸ Buyer contends that Sellers had the motive and opportunity to conceal their lack of compliance with the Settlement Agreement in order to inflate the purchase price.

To satisfy the element of justifiable reliance, Buyer argues that it relied on the representations when it signed the Purchase Agreement, that such reliance was reasonable because Buyer had a right to rely on Seller's representations in the agreement, and that the representations were an essential part of the transaction.¹²⁹ And to satisfy damages, Buyer points back to the overpayment issue (described *supra*) and the intangible losses it suffered because of the deterioration of the Google-BeyondMenu relationship.¹³⁰

Sellers counter by pointing to Leon's testimony that at the time of closing, he did not believe that Sellers were making any misrepresentations or false statements in the Purchase Agreement.¹³¹ Of course, they also dispute that any misrepresentations were made at all.¹³²

¹²⁸ *Surf's Up Legacy Partners, LLC v. Virgin Fest, LLC*, 2024 WL 1596021, at *17 (Del. Super. Apr. 12, 2024).

¹²⁹ Def.'s Op. Br. 33-35.

¹³⁰ Def.'s Op. Br. 35-37.

¹³¹ Pls.' Op. Br. Ex. 2. 84:5-24; 98:23-99:1.

¹³² *See generally* Pls.' Op. Br. and Pls.' Reply Br.

It is well established that “when an ultimate fact to be determined is one of motive, intention or other subjective matter, summary judgment is ordinarily inappropriate.”¹³³ Here, at the very least Sellers’ intent is at issue, and there is a genuine dispute as to whether or not any of the Sellers intended to defraud Buyer. Buyer is not entitled to summary judgment on this claim.

¹³³ *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 2021 WL 4344172, at *21 (Del. Super. Sept. 23, 2021) (quoting *LVI Gp. Invs., LLC v. NCM Gp. Hldgs., LLC*, 2019 WL 7369198, at *22 (Del. Ch. Dec. 31, 2019)).

V. CONCLUSION

For the above-mentioned reasons, there is a genuine issue of material fact regarding whether Sellers misrepresented their compliance the Settlement Agreement. However, there is no genuine issue of material fact that Sellers must pay the outstanding tax liability to the State of Illinois. Accordingly, Sellers' Motion for Summary Judgment as to the narrow issue of the Tax Claims is **GRANTED**. Otherwise, Seller's Motion for Summary Judgment as to Counts I (Breach of Contract) and II (Declaratory Judgment) is **DENIED**, except as to the "duplicate listings" allegation. Buyer's Motion for Summary Judgment as to Counts I (Breach of Contract) and II (Declaratory Judgment) is similarly **DENIED**. Finally, because a genuine issue of material fact exists, Buyer's Motion for Summary Judgment as to Count III (Fraud) is **DENIED**.

IT IS SO ORDERED.

/s/ Patricia A. Winston
Patricia A. Winston, Judge