IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES E. CONLON and ELITE CORPORATION Plaintiffs/Counterclaim- Defendants, v. CGI MANUFACTURING BUYER LLC, and CGI MANUFACTURING HOLDINGS LLC, Defendants/Counterclaim- Plaintiffs.	))))))))))))))	C.A. No.: N23C-11-151 EMD CCLD

Submitted: March 13, 2026
Decided: June 15, 2026

Upon Defendant/Counterclaim Plaintiffs' Motion for Summary Judgment
DENIED

Upon Plaintiff/Counterclaim Defendants' Cross-Motion for Summary Judgment
GRANTED in part and DENIED in part

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DAVIS, P.J.

I. INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. Plaintiffs James Conlon and Elite Corporation ("Elite" or "Seller" and, together with Mr. Conlon, "Plaintiffs") filed their Complaint in November 2023.[1] Plaintiffs allege that Defendants CGI Manufacturing Buyer LLC ("Buyer") and CGI Manufacturing Holdings LLC ("Holdings" and, together with Buyer, "Defendants" or "Cadrex"), breached the earnout provisions of the Equity Purchase Agreement ("EPA") governing the sale of Elite Manufacturing Technologies LLC, now d/b/a Cadrex-Bloomingdale.[2]

Defendants moved to dismiss (the "Motion to Dismiss") the Complaint in January 2024.[3] On April 2, 2024, the parties stipulated to a dismissal of Count III of the Complaint without prejudice.[4] The Court then held a hearing on the Motion to Dismiss on May 6, 2024.[5] At the conclusion of the hearing, the Court: (i) denied the Motion to Dismiss (or to stay) as to Count I; and (ii) otherwise took the Motion to Dismiss under advisement.[6] On August 8, 2024, the Court granted the Motion to Dismiss as to Count II.[7] The remaining claim is Plaintiffs' Court I: Breach of the Purchase Agreement.[8]

Defendants filed their Answer, Affirmative Defenses, and Counterclaims after the partial dismissal.[9] Defendants assert two counterclaims: (i) fraud (Counterclaim I) and (ii) breach of

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[1] Hereinafter "Compl." (D.I. No. 1).
[2] Answer and Countercl. ¶ 6 (D.I. No. 41).
[3] Defs.' Mot. to Dismiss the Compl. or, in the Alternative, to Stay (D.I. No. 3).
[4] D.I. No. 21.
[5] D.I. No. 34.
[6] *See id*.
[7] *Conlon v. CGI Manufacturing Buyer, LLC.*, 2024 WL 3738715, at *11 (Del. Super. Aug. 8, 2024); Opinion at 19 (D.I. No. 39).
[8] *See* Compl. at 18.
[9] Hereinafter "Answer" or "Countercl."

contract, indemnification (Counterclaim II) against all Plaintiffs.[10] Plaintiffs answered in September 2024.[11]

Defendants then moved for summary judgment.[12] Defendants seek summary judgment on Counterclaim II and Plaintiffs' Count I.[13] In response, Plaintiffs filed their own cross-motion for summary judgment.[14] Plaintiffs pursue summary judgment on Defendants' Counterclaim I.[15] Defendants replied on November 24, 2025.[16] Finally, Plaintiffs filed their reply in support of their cross-motion for summary judgment.[17]

The Court heard oral argument on the motions on January 7, 2026, and took the matter under advisement.[18] The parties then filed supplemental briefing addressing the Delaware Supreme Court decisions in *Johnson & Johnson v. Fortis Advisors LLC*, 2026 WL 89452 (Del. Jan. 12, 2026) ("*J&J*") and *Fortis Advisors, LLC v. Stillfront Midco AB*, 2026 WL 406073 (Del. Feb. 13, 2026) ("*Stillfront*").[19]

Presently before the Court is Defendants' Motion for Summary Judgment (the "Cadrex Motion") and Plaintiffs' Cross-Motion for Summary Judgment (the "Elite Motion"). For the reasons set forth below, the Court **DENIES** the Cadrex Motion. And the Court **DENIES in part and GRANTS in part** the Elite Motion.

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[10] Countercl. at 41, 43.
[11] D.I. No. 46.
[12] Hereinafter "Defs.' MSJ" (D.I. No. 116).
[13] Defs.' MSJ.
[14] Hereinafter Pls.' Br. (D.I. No. 119).
[15] *See generally* Pls.' Br.
[16] Hereinafter Defs.' Reply (D.I. No. 121).
[17] Hereinafer Pls.' Reply (D.I. No. 125).
[18] D.I. No. 131.
[19] D.I. Nos. 139, 140, 147, 150.

II. BACKGROUND[20]

A. Parties

Mr. Conlon is a citizen of Illinois and resides in St. Charles, Illinois.[21] Mr. Conlon founded Elite around 1995.[22] Elite is an Illinois corporation with its principal place of business in Bloomingdale, Illinois.[23] Elite was a global supplier of innovative precision metal sheet components and assemblies, primarily for the electronic gaming market.[24]

Buyer and Holdings are Delaware limited liability companies.[25] Buyer and Holdings fall under Cadrex.[26] Cadrex is an integrated platform of companies with manufacturing capabilities that complimented Elite's.[27]

A. Nature of the Dispute

1. Lead-up to the Equity Purchase Agreement ("EPA")

Cadrex is owned by CORE Industrial Partners ("CORE").[28] CORE is a private equity firm.[29] In 2021, Cadrex began executing a business strategy to acquire a platform of manufacturing companies specializing in metal fabrication and mechanical solutions, serving various end markets.[30] CORE believed that Elite would be a strategic and complementary fit

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[20] The Court draws the following background from the undisputed facts in the pleadings and the Parties' submitted exhibits. Plaintiffs' summary judgment exhibits are identified by letters (e.g., Ex. A) and Defendants' summary judgment exhibits are identified by numbers (e.g., Ex. 1). D.I. Nos. 117–19, 121, 125. The Court also cites to citations of the Compl. by Defendants in their Undisputed Facts section. *See Jiggy Puzzles, LLC v. Steelhead Acquisition EE, Inc.*, 2026 WL 465112, at *4 (Del. Super. Feb. 18, 2026) (recognizing that, at summary judgment, the Court accepts the parties' factual stipulations as true).
[21] Answer to Countercl. ¶ 9 (D.I. No. 46).
[22] Ex. A at 19–21.
[23] Defs.'/Countercl. Pls.' Op. Br. in Supp. of their Mot. for Summ. J. [hereinafter "Defs.' MSJ Br."] at 7 (D.I. No. 116); Answer ¶ 6.
[24] Ex. 4 at CORE-0025638, CORE0025640–41; Answer to Countercl. ¶ 18.
[25] Answer ¶ 4; Answer to Countercl. ¶¶ 7, 8.
[26] *Id*. ¶ 5.
[27] *Id*.
[28] Defs.' MSJ Br. at 7 (citing Compl. ¶ 8).
[29] *Id*.
[30] *Id*.

with Cadrex.[31] Mr. Conlon considered CORE and Cadrex to be attractive buyers because of Cadrex's willingness to allow Mr. Conlon to continue managing Elite after Closing.[32] Moreover, Cadrex seemed committed to providing Elite with additional resources and support.[33]

Shortly before the Parties' talks started, Elite secured Banilla Games ("Banilla") as a customer.[34] On December 10, 2021—one month before negotiations began—Banilla placed a $40 million order for Nitro cabinets.[35] One week after this order, Elite implemented a design change to remove welding from the core of the Nitro cabinets and replace the welding with rivets.[36] Mr. Conlon implemented this modification without completing standard quality control, testing, and customer approval processes.[37] In April 2022, Banilla voiced its dissatisfaction with Elite's Nitro cabinets.[38]

On January 17, 2022, Elite customer Prominent Games ("Prominent") requested that Elite halve the number of gaming cabinets in its order.[39] Elite refused to honor the request and later missed the first shipment deadline on February 26, 2022.[40] In May 2022, Prominent complained about several quality issues and shipping delays and, ultimately, attempted to cancel its $1.8 million order with Elite.[41]

The Parties conducted due diligence before consummating the EPA.[42]

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[31] Ex. 4 at CORE-0025634; Answer ¶ 8.
[32] Ex. A at 21:10–22:7, 23:17–25:24; Compl. Ex. B [hereinafter "EPA"] § 2.8.
[33] *Id*.
[34] Ex. 4 at CORE-0025645.
[35] *Id*.
[36] Ex. 33 at CGI-0111084, CGI-0111087.
[37] Ex. 43 at CGI-0090458–59; Ex. 54 at 331:14–17, 331:22– 332:2; Ex. ZZZ ¶ 12; Ex. 57 at 34:8–36:8.
[38] Ex. 37 at CGI-0093764; Ex. 39 at CGI-0093526.
[39] Ex. 34 at Prominent000021.
[40] Ex. 49 at CORE-0025403.
[41] Ex. AAAA ¶¶ 7–9, 11.
[42] Pls.' Br. at 6.

2. The EPA

On May 20, 2022, the Parties executed the EPA.[43] The EPA is a valid, binding, and enforceable contract.[44] Before Closing, Elite converted from an Illinois corporation to a limited liability company and, after Closing, became a wholly owned subsidiary of Buyer.[45] Cadrex acquired Elite for approximately $92 million.[46]

3. Earnout Provision

EPA Section 2.8 provided for a possible Earnout Payment to Mr. Conlon if Elite achieved certain financial milestones during the Earnout Period.[47] The EPA calculates the potential Earnout Payment by (1) averaging the 2022 and 2023 EBITDA of Elite; (2) multiplying that number by 6 (if the 2023 EBITDA was less than 110% of the 2022 EBITDA) or 6.5 (if the 2023 EBITDA was more than 110% of the 2022 EBITDA); and (3) subtracting $127,825,000.[48] The EPA also includes a requirement that the Parties attempt to resolve any item or calculation disputes in the Earnout Statement between themselves before engaging the Valuation Firm.[49]

EPA Section 2.8(e) gave Cadrex broad—but not unlimited—discretion in running Elite after Closing:

> The Seller Parties acknowledge and agree that the Board of Managers (or any similar governing body) of Holdings and/or any of their respective Affiliates may make from time to time such business decisions and take such actions as it deems reasonably appropriate in the conduct of the business of Holdings and/or any of their respective Affiliates following the Closing. Notwithstanding the foregoing, Holdings and the Buyer agree that they shall act in good faith and shall not take (and shall cause their controlled Affiliates not to take) any action or engage in any conduct with the purpose of circumventing the achievement of any Earnout Payment, artificially decreasing the 2022 EBITDA or 2023 EBITDA, or otherwise

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[43] Defs.' MSJ Br. at 8 (citing Compl. ¶ 14); Answer ¶ 13.
[44] Answer to Countercl. ¶ 65.
[45] Answer to Countercl. ¶ 44.
[46] Defs.' MSJ Br. at 8 (citing Compl. ¶ 14).
[47] EPA § 2.8.
[48] EPA § 2.8(d).
[49] *See* EPA § 2.8(b).

> hindering or diminishing the Seller's ability to earn or receive the Earnout Payment.[50]

4. Representations

The EPA also contains several representations by Elite. EPA Section 3.4(a) represents that Elite's Financial Statements are "true, accurate and complete in all material respects, [do] not omit to state any fact necessary to make the statements contained therein in light of the circumstances in which they were made, not misleading, and [were] prepared in accordance with GAAP applied on a consistent basis throughout the periods indicated . . . ."[51] Elite represented, in EPA Section 3.4(b), that it did not have certain liabilities pre-Closing:

> Except as set forth on Schedule 3.4(b), the Company has no liabilities (contingent or otherwise) and there is no existing condition, fact or set of circumstances that could reasonably be expected to result in any liabilities (including as a result of COVID-19 and COVID-19 Measures), except for: (i) performance obligations under Contracts described on Schedule 3.9(a) (or under Contracts entered into in the Ordinary Course of Business which, because of the dollar thresholds set forth in Section 3.9(a), are not required to be described on Schedule 3.9(a), none of which involves non-performance or a breach), (ii) liabilities reflected (and adequately reserved for) on the face of the Latest Balance Sheet and (iii) liabilities of the type set forth on the face of the Latest Balance Sheet which have arisen after the date of the Latest Balance Sheet in the Ordinary Course of Business (none of which is a liability for breach of Contract or involves a tort, infringement, claim, lawsuit, warranty or environmental, health or safety matter).[52]

Lastly, EPA Section 3.5(c) represents that "Since December 31, 2021, the Company: (i) has operated its business in the Ordinary Course of Business and used its reasonable best efforts to . . . preserve its relationships with its customers . . . in such a manner that its goodwill and ongoing business has not been impaired in any material respect."[53]

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[50] EPA § 2.8(e).
[51] EPA § 3.4(a).
[52] EPA § 3.4(b).
[53] EPA § 3.4(b).

5. Mr. Conlon's Post-Closing Employment and Termination

As part of Closing, Mr. Conlon and Elite signed an Employment Agreement.[54] Under the Employment Agreement, Mr. Conlon continued in his role as President of Elite.[55] Cadrex appears to have ignored and blocked Mr. Conlon's efforts to run Elite as was contemplated under the Employment Agreement.[56] Two months after Closing, Cadrex obtained Tenere, Inc. ("Tenere"), another metal products manufacturer.[57] Tenere did not design or sell its own branded products.[58] Tenere's CEO (Brian Steel) and CFO (Mike Fuller) became the CEO and CFO of Cadrex.[59] Mr. Steel then asked Mr. Conlon to step down as President to become Vice President and assured him that this was a change in name only.[60] However, Cadrex seems to have denied Mr. Conlon the normal duties and responsibilities of a president.[61] Mr. Steel initiated a wave of layoffs at Elite—despite Mr. Conlon's objections.[62] Eventually, Mr. Steel told Mr. Conlon that Mr. Conlon could no longer participate in Elite's management.[63] After a discussion with CORE senior partner T.J. Chung, Mr. Conlon was terminated.[64]

6. Elite's Earnout Period Performance

In 2022, Elite performed well, achieving revenue of $30 million.[65] But in 2023, the electronic gaming industry experienced a drop in demand.[66] Additionally, Elite's largest customer, Banilla, halted all shipments from Elite based on a latent defect in the gaming cabinets

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[54] Compl. Ex. C; Answer ¶¶ 16–17, 20.
[55] *Id*.
[56] *Id*. at 8.
[57] Ex. C at 125:6–11; Ex. D at 11:15–20; Ex. E at 62:2–9; Answer ¶ 27.
[58] *Id*.
[59] Ex. D at 74:8–10; Ex. D at 39:20–40:6, 40:17–41:3; Answer ¶ 28.
[60] Ex. A at 54:23–56:4; *see* Answer ¶ 29.
[61] Ex. A at 62:7–64:5.
[62] *Id*. at 8–9.
[63] Ex. A at 87:9–88:21; Ex. D at 263:4–10; 268:7–17; Ex. G; Answer ¶ 45.
[64] *Id*. at 9–10.
[65] Ex. 18 at CGI-0117328.
[66] Ex. 23 at 44:7–9.

Elite implemented pre-Closing.[67] Post-Closing, Mr. Conlon was unable to drive Elite's business into other channels and sectors, as he had during the COVID-19 pandemic.[68] Instead, due to the shipping and gaming industry issues, Cadrex decided to idle capacity at Elite's facilities to help fulfill orders for other Cadrex business units.[69] Elite did not pursue or fulfill a $5 million order Mr. Conlon negotiated for Elite's top-five customer, Konami.[70]

On August 1, 2023, Cadrex's Chief Operating Advisor, Rodney Gayle, in an email with the subject line "Earnout and 'Clean' Bloomingdale books," told Mr. Steel: "I'd like to get a sense (for all of us) the degree to which the earnout is 'in play.' If you share the agreement (or that part of it), I can assess and determine what gymnastics we need."[71] Around that same time—and before the Earnout Period closed—Cadrex lacked sufficient funds to pay Mr. Conlon any earnout.[72] In early 2024, Cadrex effectuated an intercompany policy that wiped out approximately $1.32 million in gross profits from Elite's books.[73]

Mr. Conlon filed this action before the Earnout Period ended on November 16, 2023.[74] In 2024, Defendants furnished the Earnout Statement, reflecting Elite's Average EBITDA[75] during the Earnout Period of $20,660,000 and an Earnout Payment of $0.[76] The financials included an expense representing an allocation of Cadrex corporate overhead, based on Elite's

[67] Ex. 19 at CONLON_000253–54.
[68] Ex. C at 126:10–121; Ex. L; Ex. M; Ex. ZZZ at ¶ 4.
[69] Ex. 22 at 121:2–11; Ex. 9 at CGI-0018347; Ex. 21 at CGI-0114577; Ex. ZZZ at ¶ 5; Ex. N; Ex. O; Ex. P; Ex. Q; Ex. R; Ex. S.
[70] Ex. A at 138:8–140:9; Ex. Z at 143:10–144:1; Ex. V at 24–25.
[71] Ex. PP at CGI-0007558.
[72] Ex. KK at CORE-0024679.
[73] Ex. V at 22; Ex. 55 at 111:22–112:16; Ex. 56 at 112:14–24; Ex. 58 at 16:24–17:9.
[74] Defs.' MSJ Br. at 14; *see* Compl.
[75] EBITDA is an acronym for earnings before interest, taxes, depreciation, and amortization.
[76] *Id*. at 15.

proportionate share of 2023 revenues.[77] On May 20, 2024, Cadrex informed Mr. Conlon that he was not entitled to the Earnout Payment.[78]

III. PARTIES' CONTENTIONS

A. DEFENDANTS'/COUNTERCLAIM PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants contend that they are entitled to summary judgment on Mr. Conlon's breach of the Earnout Provision claim.[79] Defendants suggest that the Earnout Provision is unambiguous and intentionally buyer-friendly.[80] As a result, Defendants argue that the Earnout Provision imposes a subjective good-faith standard on Cadrex, and this governs the intent, not effect, of Cadrex's business decisions.[81] Defendants rely on *STX Bus. Sols., LLC v. Fin.-Info.-Techs.*, 2024 WL 4645104 (Del. Ch. Oct. 31, 2024) and *Paperless Sols. Grp. V. MIB Grp.*, 2025 WL 1466603 (Del. Super. May 21, 2025).[82] Defendants argue that there is no evidence that Defendants acted in bad faith to circumvent the Earnout Payment.[83] Moreover, Defendants maintain that Mr. Conlon's challenges to Cadrex's accounting policies and entries are subject to the contractually required Valuation Firm process.[84]

Defendants also argue that they are entitled to summary judgment on their counterclaim against Mr. Conlon for failure to repay the pre-closing tax liability, as required by EPA Section 5.2(a).[85] Defendants aver that, even if Mr. Conlon's breach-of-contract claim survives summary judgment, he is not entitled to a "set-off" as the defense does not arise out of an independent

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[77] Ex. V at 22–23.
[78] Ex. NN.
[79] Defs.' MSJ Br. at 17.
[80] *Id*. at 17–20.
[81] *Id*. at 20–23.
[82] *Id*. at 18–20.
[83] *Id*. at 23–30.
[84] *Id*. at 30–32.
[85] *Id*. at 32.

transaction.[86] For this point, Defendants rely on *Finger Lakes Cap. Partners v. Honeoye Lake Acquisition*, 151 A.3d 450 (Del. 2016).[87]

B. Plaintiffs' Brief in Support of Their Cross-Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment

Plaintiffs assert that disputed issues of material fact preclude summary judgment on Mr. Conlon's breach-of-contract claim.[88] Plaintiffs maintain that the EPA does not provide a subjective good-faith compliance basis for Cadrex.[89] As well, Plaintiffs differentiate this case from Defendants' supportive caselaw.[90] Plaintiffs also highlight several disputed material facts that prevent summary judgment.[91]

Additionally, Plaintiffs insist that they are not challenging the Valuation Firm's valuation calculation.[92] Instead, Plaintiffs are arguing that Defendants breached their contractual obligations and thus violated EPA Section 2.8(e).[93]

Lastly, in opposition, Plaintiffs contend that Defendants are not entitled to summary judgment on the tax indemnity provision in that Plaintiffs do not have to pay now and are due a set-off.[94] Plaintiffs do not address the *Finger Lakes* decision.[95]

As to their motion for summary judgment, Plaintiffs contend that the evidence does not demonstrate the elements of fraud.[96] Specifically, Plaintiffs attest that there was no misrepresentation in EPA Section 3.4.[97] Plaintiffs also note that there is no evidence that they

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[86] *Id*. at 33.
[87] *Id*.
[88] Pls.' Br. at 15.
[89] *Id*. at 15–19.
[90] *Id*. at 16–18.
[91] *Id*. at 19–26.
[92] *Id*. at 26.
[93] *Id*.
[94] *Id*. at 27–28.
[95] *See id*. at 27–28.
[96] *Id*. at 45–53.
[97] *Id*. at 45–50.

failed to use reasonable efforts to preserve Elite's relationships with any customers.[98] So there was no misrepresentation.[99]

C. Defendants'/Counterclaim Plaintiffs' Reply in Support of Their Motion for Summary Judgment and Answering Brief in Opposition to Plaintiffs/Counterclaim Defendants' Motion for Summary Judgment

Defendants answer, in support of their fraud counterclaim, that there is ample evidence that Plaintiffs' customer relationship representation was false.[100] Defendants highlight that Plaintiffs, after complaints from Banilla, implemented a cost-cutting design modification without following quality control and testing protocols.[101] Additionally, Defendants argue that Plaintiffs knew this before Closing because Plaintiffs removed weldments with rivets before Closing.[102] At minimum, Defendants claim that there is sufficient evidence to create a factual dispute that precludes summary judgment.[103]

Defendants also maintain that there is evidence showing Mr. Conlon's knowledge that the customer relationship representations were false.[104] Defendants point to the same facts as in their actual falsity argument.[105] Lastly, Defendants contend that the evidence shows that the liabilities and financial statement EPA representations were false.[106]

D. Plaintiffs' Brief in Further Support of Their Cross-Motion for Summary Judgment

On Defendants' fraud counterclaim, Plaintiffs maintain that there is no evidence that any of the challenged statements were false when made.[107] First, Plaintiffs provide that there is no

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98 *Id*. at 50–53.
99 *Id*. at 53.
100 Defs.' Reply at 33.
101 *Id*. at 33–34.
102 *Id*. at 34.
103 *Id*. at 34–36.
104 *Id*. at 36.
105 *Id*. at 37.
106 *Id*. at 38–42.
107 *See generally* Pls.' Reply.

evidence that the customer relationship representation was false when made, because Cadrex cannot show that either Elite or Banilla knew about the "base issue" until a year after closing.[108] Plaintiffs also insist that Cadrex has no evidence that Elite's relationship with any other customer was impaired before Closing.[109]

Second, Plaintiffs claim that Cadrex has no evidence that the liabilities representation was false when made. Plaintiffs note that Mr. Conlon could not have known that the Nitro cabinet design modification would result in liabilities.[110]

Finally, Plaintiffs conclude that there is no evidence that the financial statement representation was false when made, seeing that Prominent did not actually cancel any orders before Closing.[111] Plaintiffs contend that Defendants waived any GAAP argument on the financial statement representation because Defendants did not raise it until summary judgment.[112]

E. J&J **BRIEFING**

Plaintiffs argue that the *J&J* decision buttresses their claim that Defendants breached the implied covenant relating to the earnout provision because that decision held that a reasonableness standard applies when a contractual provision grants a party discretion.[113] Defendants counter that the EPA's earnout contains more buyer protections than the earnout provision efforts clause in *J&J*.[114]

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[108] *Id*. at 2.
[109] *Id*. at 7.
[110] *Id*. at 11.
[111] *Id*. at 13.
[112] *Id*. at 14–16.
[113] *See generally* Pls.' Supplemental Br. in Further Supp. of Their Mot. for Summ. J. and in Further Opp'n to Defs.' Mot. for Summ. J. (D.I. No. 139).
[114] *See generally* Def./Countercl. Pls.' Supplemental Br. in Further Supp. of Their Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. (D.I. No. 140).

F. Stillfront Briefing

Defendants claim that—under the *Stillfront* decision—the EPA's arbitration provision bars Plaintiffs' breach-of-contract claim.[115] Plaintiffs respond that the EPA merely contains an expert determination clause that does not bar their claim.[116]

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled.[117] The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[118] The Court will grant summary judgment, after viewing the record in a light most favorable to a nonmoving party, if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law.[119] But if the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, summary judgment will not be granted.[120] The moving party shoulders the initial burden of demonstrating that the undisputed facts support its claims or defenses.[121] If the motion is properly supported, then the burden shifts to the nonmoving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[122] Although summary judgment is encouraged, there is no "right" to summary judgment.[123]

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[115] *See generally* Defs.'/Countercl. Pls.' Second Supplemental Br. in Further Supp. of Their Mot. for Summ. J. (D.I. No. 147).
[116] *See generally* Pls.' Supplemental Br. in Further Opp'n to Defs.' Mot. for Summ. J. (D.I. No. 150).
[117] *Diner v. Plume Design, Inc.*, 354 A.3d 968, 979 (Del. Super. 2026).
[118] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99–100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[119] *Id.*
[120] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[121] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[122] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[123] *US Dominion, Inc. v. Fox News Network, LLC*, 293 A.3d 1002, 1034 (Del. Super. 2023) (quoting *Telxon Corp. v.*

V. DISCUSSION

Plaintiffs' breach-of-contract claim survives summary judgment. As a threshold matter, the EPA only has an expert determination clause. So, the binding arbitration provision does not bar the claim. Moreover, the Court finds that there is evidence that allows a reasonable inference that Cadrex took actions intended to circumvent the Earnout Payment, which the EPA prohibits. The Court also finds that genuinely disputed material facts exist regarding Cadrex's intent in taking certain actions. Moreover, given the trial status of this claim, Plaintiffs can use recoupment as a defense to Defendants' indemnification counterclaim.

Turning to Defendants' fraud counterclaim, the Court finds that the counterclaim, based on the Customer Relationship Representation and Liabilities Representation, presents genuine issues of material fact regarding the falsity of these representations and knowledge of their falsity. The Court will, however, grant summary judgment on the Financial Statement Representation counterclaim. The Court notes that there were no canceled orders that would have made the representation false. Moreover, Defendants waived any GAAP-related argument, for it was not raised in their counterclaim.

A. THE BREACH OF EPA § 2.8(E) CAUSE OF ACTION SHOULD SURVIVE SUMMARY JUDGMENT SINCE THERE IS EVIDENCE OF ACTS TAKEN WITH THE INTENT TO AVOID THE EARNOUT PAYMENT.

To prevail on a breach of contract claim, the plaintiff must show: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages.[124] A court generally gives priority to the parties' intentions in the four corners of the contract.[125] "In upholding the

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Meyerson, 802 A.2d 257, 262 (Del. 2002) (internal quotation marks and citation omitted)); *see also Diner*, 354 A.3d at 987 ("The Court has discretion to deny summary judgment as a prudential matter" and "the Court is not obligated to grant a summary judgment.").

[124] *See VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

[125] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein."[126] "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan."[127] "Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[128] "When construing a contract, and unless a contrary intent appears, [courts] will give words their ordinary meaning."[129]

Where the language of the contract is plain and unambiguous, the contract must be enforced as written.[130] "If a writing is plain and clear on its face, i.e. its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent."[131]

1. EPA Section 2.8(b) only calls for an expert determination and does not bar Plaintiffs' breach-of-contract claim.

Defendants argue that EPA Section 2.8(b) contains a binding arbitration provision that bars Plaintiffs' breach-of-contract claim. This misses the mark because that Section provides only for an expert determination, not arbitration.

In *Stillfront*, the Supreme Court upheld the Court of Chancery's dismissal of breach-of-contract and implied-covenant claims where the contract at issue contained a binding arbitration provision.[132] That agreement required the parties to submit claims about the earnout calculation

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[126] *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985).
[127] *Riverbend Community, LLC v. Green Stone Engr., LLC*, 55 A.3d 330, 334 (Del. 2012) (citation omitted).
[128] *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 256 (Del. 2017), *as revised* (Mar. 28, 2017) (quoting *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005)).
[129] *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992).
[130] *Lorillard Tobacco Co. v. Am. Legacy Found*, 903 A.2d 728, 740 (Del. 2006).
[131] *City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[132] *Stillfront* at *12.

to an *arbitrator*.[133] The Court recognized that the provision did not call for an expert determination, which typically has a limited scope.[134]

Delaware recognizes a distinction between experts and arbitrators.[135] When a contract does not explicitly provide for expert determination or arbitration, the Court decides whether the contract calls for binding arbitration or an expert determination.[136] "The primary factor is the scope of the decision-maker's authority and whether it more closely resembles the broad authority conferred on a legal arbitrator, who can decide the entirety of the controversy and award final relief, or whether the grant is narrower and involves more fact-like determinations."[137] "In the case of a typical expert determination, the authority granted to the expert is limited to deciding a specific factual dispute concerning a matter within the special expertise of the decision maker, usually concerning an issue of valuation."[138] Arbitration provisions typically include procedural rules affording each party the opportunity to present its case, while expert proceedings are typically marked by a high degree of informality, and experts are not bound to the strict judicial investigation.[139]

EPA Section 2.8(b) granted the Valuation Firm specific authority relating to earnout calculation disputes and outlined how the Parties were to resolve Earnout Calculation disputes:

> If the Seller timely disputes any items or calculation set forth in the Earnout Statement, Buyer and the Seller shall, for a period of thirty (30) calendar days thereafter, use commercially reasonable and good faith efforts to attempt to resolve

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[133] *Id*. at *2–3 (emphasis added) (noting that the contract contained language explicitly referring to an arbitrator, not an expert determination).
[134] *Id*. at *6.
[135] *Blackstone Power & Nat. Res. Holdco L.P. v. Nextera Energy Transmission Investments, LLC*, 2026 WL 1079875, at *6 (Del. Super. Apr. 21, 2026).
[136] *See id*. (recognizing that, when the purchase agreement does not specify for an expert determination or arbitration, courts are "often left to wrestle with whether the parties agreed to an expert or arbitrator").
[137] *ArchKey Intermediate Holdings Inc. v. Mona*, 302 A.3d 975, 995 (Del. Ch. 2023).
[138] *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *6 n.70 (Del. Ch. Jan. 29, 2019); *see also PPG Holdco, LLC v. RAC PPG Buyer LLC*, 2026 WL 1210271, at *7–8 (Del. Ch. Apr. 23, 2026) (noting that when the parties have entrusted a discrete decision to an expert, courts apply contract interpretation principles to determine the scope).
[139] *Terrell v. Kiromic Biopharma, Inc.*, 2022 WL 175858, at *4 (Del. Ch. Jan. 20, 2022) (cleaned up).

> their differences in respect thereof; provided, that at any time after such thirty (30) day period, either Buyer or the Seller may elect to have the Valuation Firm resolve any such items that remain in dispute, in which event Buyer and the Seller will instruct the Valuation Firm to deliver within forty-five (45) calendar days . . . a written statement setting forth its determination, which statement shall be final, conclusive and binding on the Parties, absent manifest error, and shall be enforceable as an arbitration award in any court of competent jurisdiction under the Federal Arbitration Act or its state law equivalents. . . . The Valuation Firm shall determine only those items submitted to the Valuation Firm and its determination will be based upon and consistent with the terms and conditions of this Agreement. The determination by the Valuation Firm will be based solely on presentations with respect to such disputed items by Buyer and the Seller to the Valuation Firm and not on the Valuation Firm's independent review. Buyer and the Seller shall use their commercially reasonable efforts to make their respective presentations as promptly as practicable following submission to the Valuation Firm of the disputed items (but in no event later than fifteen (15) days after engagement of the Valuation Firm), and each of Buyer and the Seller will be entitled, as part of its presentation, to respond to the presentation of the other and any questions and requests of the Valuation Firm. In deciding any matter, the Valuation Firm (i) will be bound by the provisions of this Section 2.8 and (ii) absent manifest error, may not assign a value to any disputed item greater than the greatest value for such item claimed by either Buyer or the Seller or less than the smallest value for such item claimed by Buyer or the Seller . . . .

EPA Section 2.8(b) bears the hallmarks of an expert determination. Granted, the provision states that the decision is enforceable as an arbitration award. But beyond that, EPA Section 2.8(b) reads as a clause that calls for an expert determination. The provision limits authority to items and calculations, provides no independent review, contains no procedural rules of evidence, and requires no hearing. As such, EPA Section 2.8(b) seeks an expert determination.

"[W]here an ADR provision contemplates a process other than arbitration, such as when the parties have entrusted a discrete decision to an expert, thus earning the label 'expert determination,' the court applies contract interpretation principles to determine the ADR

provision's scope."[140] The expert's authority is confined to disputed items and calculations relating to the earnout calculation. In addition, the expert has no authority over: (i) Defendants' decisions leading up to the earnout calculation; or (ii) whether Defendants acted with the intent to avoid an earnout. Accordingly, EPA Section 2.8(b) does not bar Plaintiffs' breach-of-contract claim.

2. *Section 2.8(e) required Cadrex to act in good faith and not take actions with the intent of obviating an Earnout Payment.*

There are two recent and instructive Delaware cases on interpreting similar earnout provisions. First is the Court of Chancery decision in *STX Business Solutions, LLC v. Financial-Information-Technologies, LLC*.[141] There, the Court confronted an earnout provision at the motion-to-dismiss stage.[142] That provision closely resembled the one in the EPA:

> Seller and each Seller Party acknowledges that Buyer is entitled, after the Closing, to use the Purchased Assets and operate the Business in a manner that is in the best interests of Buyer or its Affiliates and shall have the right to take any and all actions regardless of any impact whatsoever that such actions or inactions have on the earn-out contemplated by this Section 2.7; provided, that, prior to the Earn-Out Measurement Date, Buyer shall not take any action in bad faith with respect to Seller's ability to earn the Earn-Out Consideration or with the specific intention of causing a reduction in the amount thereof.[143]

The Court determined that the provision did not obligate the buyer to use best, reasonable, or even good-faith efforts to achieve the earnout.[144] Instead, the buyer only had to refrain from actions in bad faith with respect to the Seller's receipt of the Earn-Out Consideration or actions with a specific intent to reduce the amount.[145] The Court opined that the plain language

[140] *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 617 (Del. 2023) (quoting *Terrell v. Kiromic Biopharma, Inc.*, 2022 WL 175858, at *6 (Del. Ch. Jan. 20, 2022)); *PPG Holdco, LLC*, 2026 WL 1210271, at *7 (Del. Ch. Apr. 23, 2026).
[141] 2024 WL 4645104 (Del. Ch. Oct. 31, 2024).
[142] *Id*. at *1.
[143] *Id*.
[144] *Id*.
[145] *Id*.

authorized the buyer to operate the acquired business as it deemed fit, even if that would interfere with the seller's ability to earn the Earnout, so long as the buyer did not act in bad faith or with the specific intention of causing an earnout reduction.[146] Consequently, the Court dismissed the breach-of-contract claim after ruling that there was no reasonable inference that the defendant acted in bad faith.[147] The Court noted that "[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party."[148]

Paperless Solutions Group, Inc. v. MIB Group, Inc.[149] addressed a similar provision in the Superior Court, also at the motion-to-dismiss stage.[150] There, the provision gave the buyer broad discretion:

> [o]f course, Buyer cannot predict the future and needs the ability to adjust as market conditions dictate. Nothing contained herein shall require the Buyer to operate the business in a manner that would have the effect of maintaining or increasing any Earn-Out Payment hereunder, it being understood that the Buyer shall operate the business in such manner as it deems necessary or desirable in its sole and absolute discretion. Without limiting the foregoing, the Buyer shall maintain full discretion with respect to all operations . . . . The Buyer will at all times in good faith perform and observe its obligations hereunder.[151]

The plaintiff alleged that the defendant breached this provision by "failing to grow Paperless after the acquisition."[152] The Court held that the plaintiff's breach-of-contract claim failed since the provision gave the Buyer "absolute discretion" to determine whether to grow Paperless after the acquisition.[153] The Court observed the provision's broad language and found this to be

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[146] *Id*. at *3.
[147] *Id*. at *4.
[148] *Id*. at *4 (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010)).
[149] 2025 WL 1466603 (Del. Super. May 21, 2025).
[150] *Id*.
[151] *Id*. at *1.
[152] *Id*. at *4.
[153] *Id*.

dispositive.[154] On the bad faith language, the Court similarly noted that "[a] party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits the advantages to another party."[155]

Here, Defendants claim that there is no breach of EPA Section 2.8(e) because of the Section's plain language.[156] Plaintiffs disagree with Defendants' interpretation.[157] EPA Section 2.8(e) restricts Cadrex's discretion in two respects:

> The Seller Parties acknowledge and agree that the Board of Managers (or any similar governing body) of Holdings and/or any of their respective Affiliates may make from time to time such business decisions and take such actions as it deems reasonably appropriate in the conduct of the business of Holdings and/or any of their respective Affiliates following the Closing. Notwithstanding the foregoing, Holdings and the Buyer agree that they shall act in good faith and shall not take (and shall cause their controlled Affiliates not to take) any action or engage in any conduct with the purpose of circumventing the achievement of any Earnout Payment, artificially decreasing the 2022 EBITDA or 2023 EBITDA, or otherwise hindering or diminishing the Seller's ability to earn or receive the Earnout Payment.[158]

Like the provision in *STX*, EPA Section 2.8(e) requires Cadrex to: (1) act in good faith; and (2) refrain from actions with the purpose of averting any Earnout Payment. As a result, to survive summary judgment, there must be some evidence of bad faith or intentional actions to elude an earnout.

And *J&J* does not change this analysis. *J&J* dealt with a post-closing earnout dispute.[159] There, the provision required J&J to use commercially reasonable efforts to achieve regulatory milestones and defined what commercially reasonable meant.[160] The Supreme Court applied

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[154] *Id*.
[155] *Id*. (quoting *Nemec*, 991 A.2d at 1128).
[156] Defs.' MSJ Br. at 17–23.
[157] Pls.' Br. at 15–19.
[158] EPA § 2.8(e).
[159] *J&J* at *1.
[160] *Id*. at *6.

Delaware contract interpretation principles to determine J&J's requirements as to the earnout.[161] The parties believe the Supreme Court created a new subjective/objective analysis for earnout disputes. Not so. The Supreme Court applied Delaware's contract interpretation principles and enforced the provision as written. Moreover, the provision in *J&J* is distinguishable from EPA Section 2.8(e). So, the Supreme Court's analysis, aside from affirming the well-known Delaware rule that courts enforce contracts as written between sophisticated parties, does not impact what the EPA requires of Defendants.[162]

True, EPA Section 2.8(e) says that Defendants "*may* make from time to time such business decisions and take such actions as it deems reasonably appropriate in the conduct of the business." However, the section also provides that: "*[n]otwithstanding the foregoing* . . . [Defendants] agree that they shall act in good faith and shall not take (and shall cause their controlled Affiliates not to take) any action or engage in any conduct with the purpose of circumventing the achievement of any Earnout Payment."[163] Although Defendants were allowed to make business decisions they believed were in the business's best interests, they could not act in bad faith or with the specific aim of avoiding the earnout. Here, Plaintiffs have provided evidence from which a reasonable factfinder could conclude that Defendants took actions to evade the earnout payment, which the EPA prohibits.

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[161] *Id*. at *23–27.

[162] *See id*. at *6:

Section 2.07(e)(ii) provides that "'commercially reasonable efforts'" means:

> the expenditure of efforts and resources in connection with research and development and obtaining and furnishing of information to and communications with applicable Governmental Entities in connection with obtaining the applicable 510(k) premarket notification with respect to the applicable Robotics Products consistent with the usual practice of [J&J] and its Affiliates with respect to priority medical device products of similar commercial potential at a similar stage in product lifecycle to the applicable Robotics Products . . . .

[163] EPA § 2.8(e).

3. *Cadrex could have diverted Elite resources and implemented accounting policies to avoid paying the earnout.*

Plaintiffs assert that Cadrex breached the provision by "(a) diverting Elite's facilities, equipment and personnel to perform work for other companies and their customers, rather than for Elite's customers, which actions had no economic benefit to Elite, negatively impacted Elite's revenue, artificially decreased what would otherwise have been Elite's EBITDA and hindered Plaintiffs' ability to earn or receive the Earnout Payment; and (b) fracturing Elite's management team in a fashion that prevented Elite from servicing, maintaining and growing its customer base and orders or exercising oversight over purchasing expenses and decisions."[164]

At this stage of the proceedings, Plaintiffs present evidence supporting an inference of intentional acts to eschew paying an earnout. First, Cadrex admitted, before the Earnout Period closed, that it lacked sufficient funds to pay Mr. Conlon his earnout.[165] Second, Cadrex treated Mr. Conlon in a manner inconsistent with the Employment Agreement to keep him out of the business.[166] Third, Cadrex diverted Elite resources to fill intercompany work.[167] Fourth, Cadrex's Chief Operating Advisor, Rodney Gayle, emailed Mr. Steel with the subject line "Earnout and 'Clean' Bloomingdale books," and said, "I'd like to get a sense (for all of us) the degree to which the earnout is 'in play.' If you share the agreement (or that part of it), I can assess and determine ***what gymnastics we need***."[168] And finally, a retroactively applied Cadrex March 2024 intercompany policy that wiped out approximately $1.32 million in gross profits from Elite's 2023 books.[169]

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[164] Compl. ¶ 54.
[165] Pls.' Br. at 20.
[166] *Id*. at 20–21.
[167] *Id*. at 21–22.
[168] *Id*. at 23 (emphasis in original).
[169] *Id*.

Cadrex contends that evidence as to the intercompany policy issue is inapplicable because it is an accounting matter subject to EPA Section 2.8(b)—the contractually required Valuation Firm dispute-resolution process.[170] Mr. Conlon counters that he is not disputing the calculation.[171] Instead, he argues that Cadrex breached its good-faith obligations.[172] EPA Section 2.8(b) mandated the Parties to submit certain disputes to the Valuation Firm:

> The Seller shall have sixty (60) calendar days following receipt of the Buyer's Earnout Statement to dispute any item or calculation set forth in the Earnout Statement, after which time any undisputed items shall be final, conclusive and binding on the Parties. . . . [the parties] may elect to have the Valuation Firm resolve any such items that remain in dispute.[173]

EPA Section 2.8(b) does not bar Plaintiffs' assertion that a policy was put in place to hamper Elite's profits. This provision covers items and calculations in the actual Earnout Statement. This is different from arguing that a policy was put into place before the calculation, intending to curtail profits to avoid a payout. The Court will not disregard the evidence because it is somehow precluded by EPA Section 2.8(b).

The Court is not holding that Cadrex breached the EPA when using Elite's resources to assist its affiliates' shipments in 2023. The Court notes that the EPA permits Cadrex to make reasonable decisions. This is so even if it significantly hindered Elite's profits. The question is…did Cadrex do it in bad faith or to evade the Earnout Payment. Moreover, this fact does not exist in a vacuum. The Court notes there is other evidence in the record.

So, looking at Plaintiffs' evidence favorably, the Court finds it is possible that Cadrex took actions to avoid the Earnout Payment. Cadrex lacked the funds to pay the Earnout Payment and used Elite to fund other entities, reducing Elite's profits and causing Elite to miss out on

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[170] Defs.' Reply at 15.
[171] Pls.' Br. at 26.
[172] *Id.*
[173] EPA § 2.8(b).

shipment deals. Cadrex had email discussions that could be interpreted as attempts to avoid the Earnout Payment. Moreover, Cadex implemented a retroactive policy that reduced Elite's profits on its books. Cadrex could have done this to elude the Earnout, as Cadrex lacked funds, which would be a breach, even though Cadrex had broad discretion to run Elite as it wanted. Questions of knowledge or intent are fact-intensive, and courts ordinarily should not resolve these questions on a motion for summary judgment.[174] Summary judgment "will not be granted if there is a material fact in dispute"[175] or if "it seems desirable to inquire thoroughly into [the facts] to clarify the application of the law to the circumstances."[176] The parties contest whether the accounting policy was administered for reasonable tax reasons or to avoid the earnout.[177] The Court, however, cannot weigh evidence at summary judgment:

> [i]t is not permissible for the trial judge . . . to weigh the evidence or to resolve conflicts arising from pretrial documents, affidavits, depositions or other evidence. That is the job of the trier of fact (whether it is to be a bench trial or a jury trial) after hearing *all* the evidence, including live witness testimony that, as here, may be in conflict. This is an axiom of the judicial process and applies unless the parties have stipulated that the paper record shall constitute the trial record.[178]

The Parties have not stipulated that the paper record constitutes the trial record. And it is not the Court's job to determine which party's evidence is more credible or persuasive at this point.

The EPA undoubtedly gives Cadrex broad discretion to run Elite as it wishes; however, the EPA limits Cadrex from taking actions with the specific intent to bypass the Earnout Payment. The Court finds that the record allows for a reasonable inference that Cadrex acted with the intent of decreasing Elite's profits to evade the Earnout Payment it could not afford to

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[174] *Columbus Life Ins., Co. v. Wilmington Tr. Co.*, 2023 WL 1956868, at *8 (Del. Super. Feb. 13, 2023).
[175] *Radulski v. Liberty Mut. Fire Ins. Co.*, 2020 WL 8676027, at *3 (Del. Super. Oct. 28, 2020); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").
[176] *Ebersole v. Lowengrub*, 180 A.2d 467, 468–69 (Del. 1962).
[177] Pls.' Brief at 23; Defs.' Reply at 15.
[178] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002) (citations omitted).

pay. Accordingly, given applicable the legal standard, the Cadrex Motion is **DENIED** on Plaintiffs' breach-of-contract claim (Plaintiffs' Count I).

B. ALTHOUGH SET-OFF IS INAPPLICABLE, PLAINTIFFS HAVE ASSERTED A RECOUPMENT DEFENSE THAT PREVENTS SUMMARY JUDGMENT ON DEFENDANTS' INDEMNIFICATION COUNTERCLAIM.

Defendants also seek summary judgment on their second counterclaim, which asserts that Mr. Conlon breached EPA Section 5.2 by failing to reimburse Cadrex for a pre-Closing tax debt that Cadrex paid on Mr. Conlon's behalf.[179] Plaintiffs agree that Mr. Conlon must indemnify Cadrex.[180] But Mr. Conlon maintains that he does not have to pay now since he is subject to a set-off stemming from his breach-of-contract claim against Cadrex.[181] Defendants disagree that Mr. Conlon is entitled to any set-off and rely on *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition*.[182] Defendants claim that this case holds that "[t]he defense of set-off arises out of an independent transaction," not "the same contract."[183] Plaintiffs do not respond to this caselaw or adduce any opposing case, rule, or statute.

EPA Section 5.2(a) requires Mr. Conlon to reimburse Cadrex for certain tax losses:

> [Counterclaim-Defendants], on a joint and several basis, shall indemnify [Counterclaim-Plaintiffs] and save and hold each of them harmless from and against and pay on behalf of or reimburse such Buyer Indemnified Parties for any and all Losses which any such Buyer Indemnified Party suffers, sustains or becomes subject to based upon, arising out of, with respect to, related to or by reason of . . . any Buyer Tax Losses.[184]

In *Finger Lakes*, our Supreme Court explained that "[s]et-off is a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a defense of his own

[179] Defs.' Reply at 20.
[180] Pls.' Br. at 27–28.
[181] *Id*.
[182] 151 A.3d 450, 453 (Del. 2016); Defs.' Br. at 32–33.
[183] Defs.' Reply at 20.
[184] *Id*. at 32; EPA § 5.2(a).

against the plaintiff, to counterbalance it either in whole or in part."[185] Then, the Supreme Court contrasted this doctrine with the recoupment defense, and stated that recoupment:

> is a species of defense somewhat analogous to set-off in its character, the chief distinction, however, being that the defense of set-off arises out of an independent transaction, but the defense of recoupment goes to the reduction of the plaintiff's damages for the reason that he, himself, has not complied with the cross obligations arising under the same contract.[186]

In their answer, Plaintiffs' Fourth Affirmative Defense is "[t]o the extent Counterclaim-Plaintiffs are entitled to any recovery on any of their claims, Counterclaim-Defendants are entitled to a setoff in the amount of damages suffered by Counterclaim-Defendants in connection with the matters and claims alleged in their Complaint."[187] But Plaintiffs' set-off claim arises from the same transaction. Plaintiffs' claim is for breach of the EPA, and Defendants' claim is for misrepresentations in the representations of the EPA. A set-off claim is "[a] defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim."[188] Seeing as Plaintiffs' set-off defense arises from the same transaction, the defense is inapplicable.

And "[s]et-off is a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a defense of his own against the plaintiff," and is "properly taken only as to judgments, not claims. A pre-existing judgment may be offset against a new

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[185] *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450, 453 (Del. 2016) (quoting 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 492 (1906)).

[186] *Id*. (quoting 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 503 (1906)).

[187] Answer at 21.

[188] *Trader v. Wilson*, 2002 WL 499888, at *4 n.7 (Del. Super. Feb. 1, 2002), *aff'd,* 804 A.2d 1067 (Del. 2002) (citing *Black's Law Dictionary* 1376 (7th ed.1999)); *see also Household Fin. Corp. v. Hobbs*, 387 A.2d 198, 199 (Del. Super. 1978) (recognizing that "a setoff which, by definition, must arise out of a separate transaction."); *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011) ("A set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action." (quoting 80 C.J.S. *Set–Off and Counterclaim* § 3 (2011)).

judgment to reduce the amount that a party is to pay."[189] "A contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off."[190] Here, Plaintiff's breach-of-contract claim is just that—a claim—not a judgment. And if the amount due is genuinely in controversy, the demand is unliquidated.[191] As a result, set-off is inapplicable because there is no enforceable judgment to set off.[192]

The correct defense in this case is recoupment. Notably, the recoupment defense "goes to the reduction of the plaintiff's damages for the reason that he, himself, has not complied with the cross obligations arising under the same contract."[193] Plaintiffs have not corrected this misstatement in their answer or in any of their summary judgment papers. Still, Plaintiffs' alleged set-off affirmative defense put Defendants on notice that Plaintiffs intended to use their own claims to reduce what they owed Defendants under the EPA. Therefore, there is no prejudice to Defendants. As such, Plaintiffs may assert recoupment as a defense.[194] Therefore, the Court **DENIES** the Cadrex Motion on the indemnification counterclaim (Counterclaim Count II).[195]

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[189] *IronRock Energy Corp. v. Pointe LNG, LLC*, 2021 WL 3503807, at *8 (Del. Super. July 19, 2021) (quoting *Seibold v. Camulos Partners LP*, 2012 WL 4076182, at *24 n.233 (Del. Ch. Sept. 17, 2012)).
[190] *Id*. (quoting *CanCan Dev., LLC*, 2011 WL 4379064, at *5).
[191] *Id*.
[192] *See CanCan Dev., LLC*, 2011 WL 4379064, at *5 (holding that an attempt to set-off a claim with a contingent and unmatured claim was premature).
[193] *Finger Lakes Capital Partners*, 151 A.3d at 453 (quoting 1 Victor B. Woolley, *Practice in Civil Actions And Proceedings in the Law Courts of the State of Delaware* § 503 (1906)).
[194] *See LG Elecs. Inc. v. Invention Inv. Fund I, L.P.*, ---A.3d---, 2026 WL 935618, at *13–14 (Del. Apr. 7, 2026) (applying the federal rule that, even if an affirmative defense is not pled in initial answer, the defense is not waived if there is no prejudice to the opposing party).
[195] *See Calloway v. E. Coast Resorts, Inc.*, 1986 WL 13992, at *3 (Del. Super. Nov. 28, 1986) (denying summary judgment when an opposing claim amounted to a recoupment that contained material issues of fact).

C. THE FRAUD COUNTERCLAIM SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE THERE ARE FACTS UNDERPINNING A FINDING THAT PLAINTIFFS MADE FALSE REPRESENTATIONS IN THE EPA.

Plaintiffs move for summary judgment on Defendants' fraud counterclaim. In Delaware, the elements of fraud are: (i) a false representation, usually one of fact; (ii) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (iii) an intent to induce the plaintiff to act or to refrain from acting; (iv) the plaintiff's action or inaction taken in justifiable reliance on the representation; and (v) damage to the plaintiff as a result of such reliance.[196]

There are three types of fraud: "(1) false statements represented as truth; (2) active concealment of facts which prevents the other party from discovering them; and (3) silence in the face of a duty to speak."[197] Normally, optimistic statements extolling one's own skills, experience, and resources are mere puffery that cannot form the basis of fraud.[198]

By arguing that there is no evidence that Elite made any misrepresentation or that the representations were false, Plaintiffs target the first element of fraud.[199] Defendants point to three false representations within the EPA to make their fraud counterclaim.[200] These are the Customer Relationship Representation, the Liabilities Representation, and the Financial Statement Representation.[201]

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[196] *Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584, 586 (Del. 2008) (quoting *Gaffin v. Teledyne, Inc.,* 611 A.2d 467, 472 (Del.1992)).
[197] *DRR, L.L.C. v. Sears, Roebuck & Co.*, 949 F. Supp. 1132, 1137 (D. Del. 1996).
[198] *Priveterra Capital, Mgmt., LLC v. Pixium Vision, LLC*, 2026 WL 940227, at *7 (Del. Super. Apr. 7, 2026).
[199] *See* Pls.' Br. at 45–53.
[200] *See* Defs.' Reply at 33–42.
[201] *See id*.

1. *There is evidence that the Customer Relationship Representation was false, and that Mr. Conlon knew it was false.*

The first alleged misrepresentation is the Customer Relationship Representation. The EPA says that "Since December 31, 2021, the Company: (i) has operated its business in the Ordinary Course of Business and used its reasonable best efforts to . . . preserve its relationships with its customers . . . in such a manner that its goodwill and ongoing business has not been impaired in any material respect."[202] Defendants contend that this statement was a false misrepresentation because Mr. Conlon implemented the new cabinet design without following standard quality-control and testing protocols, which he knew would weaken the Banilla cabinets' structural integrity.[203] Defendants also highlight other customer complaints before Closing to show that this statement was false.[204] Plaintiffs respond that there is no evidence that the representation was false when made, nor that any customer relationship was impaired before Closing.[205] The Court finds that Defendants have presented evidence showing both.

Shortly after Banilla placed one of the largest orders in Elite's history, Mr. Conlon began negotiating with Cadrex.[206] Also, shortly after Mr. Conlon and Cadrex's relationship began, Banilla complained about Elite's quality and deliveries.[207] Around this time, Mr. Conlon implemented a cost-cutting design modification without following standard quality-control and testing protocols, knowing it would weaken the structural integrity of the Banilla cabinets.[208] Thirteen days before Closing, Jim O'Keefe told Mr. Conlon that due to "quality issues" with at least four major customers, "[t]he confidence level with our customers is now in question."[209]

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202 EPA § 3.5(c) [hereinafter "Customer Relationship Representation"].
203 Defs.' Reply at 34.
204 *Id*. at 36.
205 Pls.' Reply at 1–11.
206 Defs.' Reply at 33.
207 *Id*.
208 *Id*.
209 *Id*. at 36.

The Court, viewing this evidence in a light most favorable to Defendants, finds that it is reasonable to conclude that Mr. Conlon and Elite did not use reasonable best efforts concerning the cabinets and knew of several issues with customers before Closing. Mr. Conlon pushed the modification through before Closing and skipped the proper protocols. This modification could have been to cut costs at the expense of customer goodwill. And an employee told Mr. Conlon about customer issues before Closing. This informed Mr. Conlon of the potential harm to ongoing business with existing customers. As such, a reasonable factfinder could conclude that the Customer Relationship Representation was false, and Mr. Conlon knew that the representation was false.

Plaintiffs point out that the Customer Relationship Representation is not a guarantee that nothing would occur in the future that could impact Elite's goodwill and ongoing business after Closing.[210] But Plaintiffs incorrectly claim that it is impossible for Mr. Conlon to have known that the cabinet issue would have impaired the Banilla relationship, as the issue was discovered a year after Closing.[211]

The Customer Relationship Representation represents that: (1) Elite operated its business in the Ordinary Course of Business; (2) used reasonable best efforts to preserve customer relationships; (3) in such a manner that its goodwill *and ongoing business* had not been impaired in any material respect. Indeed, Mr. Conlon could have known that the cabinet modification could negatively impact *ongoing business* with Banilla and did so anyway to save costs in favor of preserving the customer relationship. This is bolstered by Mr. Conlon implementing the change without going through protocols. Mr. Conlon could have skipped these steps to get the faulty-cabinet revamp done, knowing it was not a reasonable decision in the long term.

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[210] Pls.' Reply at 2.
[211] *Id.*

Accordingly, the Customer Relationship Representation is a knowing misrepresentation sufficient to validate Defendants' fraud counterclaim.

2. There is evidence that Mr. Conlon knew that the Liabilities Representation was false.

Plaintiffs represented in the EPA that "there is no existing condition, fact or set of circumstances that could reasonably be expected to result in any liabilities . . . ."[212] Again, Plaintiffs argue that there is no evidence that they could have known that this representation was false.[213] The Court finds Defendants have submitted enough evidence that Mr. Conlon knew this was untrue.

Before signing the EPA, Mr. Conlon knew that Elite had effectuated a design modification that could result in a structural failure of the Nitro Cabinets.[214] This design modification resulted in liabilities.[215] Mr. Conlon also knew of several complaints lodged by important customers.[216] Elite employees characterized the failures underlying the customer complaints as "a disaster," "MAJOR," and "disturbing."[217]

These facts corroborate an inference that Mr. Conlon knew that the Liabilities Representation was false. Mr. Conlon knew of the complaints and played a crucial role in enacting the new cabinet design. There are also Elite employees describing the complaints as major problems. A reasonable factfinder can infer that Mr. Conlon knew that these problems could result in legal action and liabilities.

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[212] EPA § 3.4(b) [hereinafter "Liabilities Representation"].
[213] *See* Pls.' Reply at 11–13.
[214] Defs.' Reply at 38.
[215] *Id*.
[216] *Id*.
[217] *Id*. (citing Ex. 39 at CGI-0093524; Ex. 36 at CGI-0102276; Ex. MMM at CGI-0090721).

Plaintiffs' response attacks this proof's veracity, which is an issue for trial, not summary judgment. Plaintiffs contend that Mr. Conlon lacked a motive to misrepresent this fact, as he was incentivized to reap the Earnout Payment.[218] Plaintiffs also highlight that some issues did not ultimately result in any liability, so the statement was true.[219] But Mr. Conlon could have done this to cut costs before the sale for various reasons. Also, *experiencing* actual liabilities is different from *expecting* liabilities to result—the EPA only says expecting liabilities. Mr. Conlon could have expected liabilities even if there never were actual liabilities. There is thus evidence that Mr. Conlon knew that these problems could lead to liabilities.

3. There is no evidence that the Financial Statement Representation was false.

EPA Section 3.4(a) provides "[e]ach financial statement [is] true, accurate and complete in all material respects [and] does not omit to state any fact necessary to make the statements contained therein in light of the circumstances in which they were made, not misleading . . . ."[220] Plaintiffs contend that no evidence suggests that this provision was false.[221] Defendants' proof on this issue shows only that Prominent sought to cancel its orders but did not actually do so.

By January 2022, Elite knew that Prominent wanted to halve its cabinet purchase order.[222] Elite denied this request and missed the first shipment deadline under the purchase order.[223] Elite eventually filled the shipment over two months later, and Prominent noted: "technical problems that were not resolved until sometime in June 2022."[224] Again, Prominent

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[218] Pls.' Reply at 11–12.
[219] *Id*. at 12.
[220] EPA § 3.4(a) [hereinafter "Financial Statement Representation"].
[221] *See* Pls.' Reply at 13–19.
[222] Defs.' Reply at 39.
[223] *Id*.
[224] *Id*.

attempted to cancel its order.[225] After all this, Elite continued to include receivables purportedly expected under the Prominent purchase order, rendering the financial statements inaccurate.[226]

Plaintiffs argue that the financial statements were accurate since Prominent did not cancel its order.[227] Defendants counter, contending that "[t]he inclusion of cancelled orders on Elite's Financial Statements renders the statements inaccurate."[228] Prominent, however, did not cancel its order. As such, the Financial Statement Representation was not false for obfuscating a cancellation that never happened.

4. Defendants waived the GAAP compliance argument.

To circumvent the result above, Defendants submit—for the first time—that the statements were not prepared in compliance with GAAP since GAAP might require the inclusion of potential cancellations.[229] Plaintiffs urge the Court to disregard Defendants' GAAP argument because the argument was raised for the first time in Defendants' summary judgment brief.[230] Plaintiffs note that Defendants' pleadings, discovery responses, and expert report do not suggest that the Plaintiffs transgressed GAAP.[231] As well, Plaintiffs maintain that invoking GAAP does not create a genuine dispute of material fact.[232]

In their Counterclaim, Defendants did not cite EPA Section 3.4(a)'s GAAP language. Instead, Defendants cite EPA Section 3.4(a) to the extent that "[e]ach Financial Statement: (A) is true, accurate and complete in all material respects, does not omit to state any fact necessary to make the statements contained therein in light of the circumstances in which they were made, not

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[225] *Id.*
[226] *Id.*
[227] Pls.' Br. at 46.
[228] Defs.' Reply at 39.
[229] *Id.* at 40.
[230] Pls.' Reply at 14–16.
[231] *Id.* at 14.
[232] *Id.* at 16–19.

misleading. . . ."[233] Defendants do not mention GAAP anywhere in their counterclaim. Instead, Defendants averred that Plaintiffs committed fraud under this representation by asserting that "[i]nstead of accurately reflecting these cancellations in its financial statements, Counterclaim-Defendants left the orders open, recorded the inventory as 'backlog' (despite knowing that the customers would refuse the orders), and fraudulently altered the order and delivery dates to cover up the cancellations."[234]

Defendants also alleged that "Counterclaim-Defendants knew that the financial statements reflected backlogs and customer orders that customers would not accept and were therefore inaccurate and misleading."[235] As well, Defendants said, "Counterclaim-Plaintiffs further learned that certain customer orders reflected in Elite's financial statements, including orders purportedly placed by Prominent Games, had in fact been cancelled prior to Closing."[236] Finally, Defendants stated, "Counterclaim-Defendants intentionally recorded canceled orders as a backlog and altered dates for those orders to boost Elite's financial statements and inflate the value of the Company."[237] Defendants have not moved to amend their counterclaim.

The counterclaim lacks GAAP-related allegations or the theory that the Financial Statements were false because, as allegedly required by GAAP, Plaintiffs had to include *potential* cancellations, as well as actual order cancellations. "Under Superior Court Civil Rule 9(b), when pleading fraud claims, '[t]he circumstances constituting fraud . . . shall be stated with particularity,' although '[m]alice, intent, knowledge and other condition of mind of a person may be averred generally.'"[238] Not only was this fraud line of argument not pled with particularity,

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[233] Countercl. ¶¶ 36, 57.
[234] *Id.* ¶ 32.
[235] *Id.* ¶ 37.
[236] *Id.* ¶ 49.
[237] *Id.* ¶ 58.
[238] *KnighTek, LLC v. Jive Commc'ns, Inc.*, 225 A.3d 343, 351 (Del. 2020) (quoting Super. Ct. Civ. R. 9(b)).

the argument is absent from the Counterclaim. The Court has previously rejected entirely new theories of negligence—which also must be pled with particularity under Rule 9(b)[239]—after discovery and dispositive motion practice had closed.[240] Therefore, as there was no mention of this argument until summary judgment and no amendment, the Court finds that Defendants waived this argument.[241]

In addition, allowing Defendants to raise this GAAP-compliance argument now would prejudice Plaintiffs. Defendants did not mention this theory until summary judgment. If it had, Plaintiffs may have retained an accounting expert to assess whether a GAAP violation occurred. Now they cannot.[242] Thus, allowing Defendants to raise this new argument at this stage would unfairly prejudice Plaintiffs.[243]

Accordingly, the Court **GRANTS** the Elite Motion for the fraud claim on this line of argument. That said, the Court **DENIES** the on the Liabilities Representation and Customer Relationship Representation.

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[239] Super Ct. Civ. R. 9(b).

[240] *Wilson v. Urquhart*, 2010 WL 2683031, at *11 (Del. Super. July 6, 2010), *aff'd sub nom. Wilson v. Brown*, 19 A.3d 302 (Del. 2011).

[241] *See Emerald Partners v. Berlin*, 1995 WL 600881, at *3 (Del. Ch. Sept. 22, 1995), *aff'd in part, rev'd in part on other grounds,* 726 A.2d 1215 (Del. 1999) (disallowing plaintiff to expand theories of allegations in complaint because the complaint did not provide a basis for new theories at summary judgment).

[242] *See* Third Amended Case Order (D.I. No. 115) (ordering that expert discovery be completed by February 20, 2026); *see also* Third Amended Case Management Order Ex. A (D.I. No. 113) (requiring the Parties to designate all expert witnesses September 5, 2025).

[243] *See Urquhart*, 2010 WL 2683031, at *11 ("While an amendment to the Complaint might have offered an appropriate resolution to Plaintiffs' failure to plead at an earlier point in the litigation, Plaintiffs cannot inject entirely new theories of negligence into the case after discovery and dispositive motion practice have closed without an opportunity for the Browns to develop a defense.").

VI. CONCLUSION

For the above reasons, the Court **DENIES** the Cadrex Motion. And the Court **DENIES in part** the Elite Motion on the Liabilities Representation and Customer Relationship Representation and **GRANTS in part** on the Financial Statement Representation.

June 16, 2026
Wilmington, Delaware

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

cc: File&ServeXpress