

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

SHELDON K. RENNIE
JUDGE

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RE: *Fraser v. Digital Sub, LLC*, (C.A. No. N25C-06-260 SKR)

Dear Counsel:

This letter decision resolves Defendant Digital Sub’s¹ Motion to Dismiss (the “Motion”).² For the reasons explained below, the Motion is **GRANTED**.

I. BACKGROUND

The Court assumes familiarity with the facts of this matter and only briefly recites them here.³ In 2020, Fraser sold RepZio LLC to Digital Sub pursuant to a Membership Interest Purchase Agreement (the “MIPA”).⁴ As part of the conditions

¹ All capitalized terms have the same meaning as in the Court’s prior Memorandum Opinion and Order unless otherwise defined. *See* D.I. 18 (hereinafter “Opinion”).

² D.I. 25 (“Mot.”).

³ The Court’s prior opinion contains a more fulsome recitation of the facts of this case. *See* Opinion at 3–5.

⁴ D.I. 19 (hereinafter “Am. Compl.”) at ¶ 2; Am. Compl., Ex. A (hereinafter “MIPA”).

of the sale, Fraser was entitled to an Upside Participation Payment (the “UPP”) should RepZio meet certain goals.⁵ Fraser was also hired to serve as a Senior Vice President of IMC, an affiliate of Digital Sub.⁶

Fraser’s employment with IMC ended,⁷ and in September 2023 he signed an expansive Release waiving any claims that arose before that point.⁸ In a previous opinion, the Court found that the Release barred Fraser’s claims as pled, but granted him limited leave to amend based on a theory first expressed at oral argument.⁹ Specifically, the Court conditioned amendment on “alleg[ing] facts consistent with the theory articulated in the hearing: namely, that Digital Sub took actions after the Release but before the MIPA’s conclusion, ‘the primary purpose of which [was] to minimize the Upside Participation Payment.’”¹⁰

Fraser attempted to amend his complaint in a manner consistent with the Court’s direction.¹¹ He expounded on events that took place prior to his termination,¹² and noted that Digital Sub publicly announced that it would be

⁵ Am. Compl. at ¶ 3.

⁶ *Id.* at ¶ 4.

⁷ *Id.* at ¶ 7.

⁸ *See* Opinion at 6–9.

⁹ *Id.* at 9–10.

¹⁰ *Id.* at 10 (quoting D.I. 1, Ex. A at Ex. B, § 3(a)) (internal footnote omitted).

¹¹ *See* Am. Compl.

¹² *Id.* at ¶¶ 8–10.

revamping RepZio shortly after his departure.¹³ Fraser also added allegations that Digital Sub failed to provide certain UPP-related information.¹⁴

Digital Sub moved for dismissal under Rule 12(b)(6) on the ground that Fraser failed to plead any actions taken by Digital Sub with the primary purpose of minimizing the UPP in the post-Release period.¹⁵ Fraser opposed the motion,¹⁶ and Digital Sub filed a reply.¹⁷ The Court heard oral argument on May 29, 2026.¹⁸

II. STANDARD OF REVIEW

Superior Court Civil Rule 12(b)(6) is a familiar, plaintiff-friendly standard.¹⁹ In a standard breach of contract action, Fraser would simply need to plead facts supporting a plausible contract, breach of that contract, and damages, with the Court taking all reasonable inferences in his favor.²⁰

In this instance, however, Fraser has voluntarily contracted for a far from plaintiff-friendly standard.²¹ Under the terms of the MIPA, Digital Sub is granted

¹³ *Id.* at ¶¶ 13–15.

¹⁴ *Id.* at ¶¶ 11–12; 30–32.

¹⁵ Mot. at 2.

¹⁶ D.I. 29.

¹⁷ D.I. 30.

¹⁸ *See* D.I. 31.

¹⁹ When considering a motion under Rule 12(b)(6), the Court “(i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.” *SARN Energy LLC v. Tatra Def. Vehicle as*, 2018 WL 5794599, at *3 (Del. Super. Nov. 5, 2018).

²⁰ *See Fortis Advisors LLC v. Medtronic Minimed, Inc.*, 2024 WL 3580827, at *5 (Del. Ch. Jul. 29, 2024).

²¹ *See* MIPA, Ex. B at § 3(a).

broad discretion on its handling of RepZio, promising only that it would not take any actions with the *primary purpose* of minimizing the UPP.²² Hence, to plead his case, Fraser must plead facts that raise an inference that Digital Sub *acted* with the *primary purpose* of defeating the UPP.²³ Further complicating Fraser’s ability to plead his case is his waiver of any claims based on Digital Sub’s actions prior to the Release.²⁴

III. ANALYSIS

The combination of the “primary purpose” language and the Release create a substantial pleading problem for Fraser. As expressed at oral argument, Fraser’s theory of the case is that Digital Sub shelved the project for the primary purpose of minimizing the UPP, only to later resurrect it once the UPP term expired.

Considering only the post-Release actions by Digital Sub which—to be actionable—must be taken for the primary purpose of minimizing the UPP,²⁵ the Court finds no basis for a claim. The first problem is that the action of shelving RepZio occurred prior to the Release and is therefore waived.²⁶ The next action in the chain of events was Digital Sub taking RepZio off the shelf and publicly announcing that it was being revamped. This cannot constitute an action taken for

²² *Id.*

²³ *See Fortis*, 2024 WL 3580827, at *6 (Del. Ch. Jul. 29, 2024).

²⁴ *See Opinion* at 6–9.

²⁵ MIPA, Ex. B at § 3(a).

²⁶ Am. Compl. at ¶ 5.

the primary purpose of minimizing the UPP, as any revenue realized between the revamp and the end of the UPP term would have inured to Fraser's benefit.

Fraser also argues that Digital Sub's failure to provide contractually required records was done for the primary purpose of minimizing the UPP.²⁷ Although this does implicate post-Release conduct, the failure to provide records—where Fraser was already clearly aware that the requirements of the UPP were not met²⁸ and does not contend they were—is not an action taken for the primary purpose of minimizing the UPP.

Finally, at oral argument, Fraser again requested leave to amend. Having already provided Fraser with an opportunity to amend after full briefing and argument on a motion for judgment on the pleadings, the Court finds that the interests of justice do not demand another amendment and denies this request.

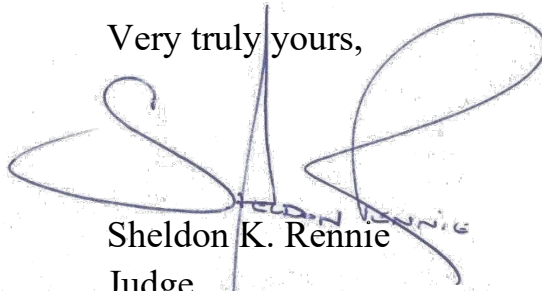
²⁷ When asked at oral argument if this theory was being raised under separate language in the Earnout requiring the provision of certain records, Fraser's counsel responded, "not really" and proceeded to discuss how it applied to the primary purpose argument.

²⁸ Am. Compl. at ¶¶ 5–6, 8–9, and 29.

For the foregoing reasons, Digital Sub's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'SKR', with a large loop on the right side.

Sheldon K. Rennie

Judge

SKR/ars

Original to Prothonotary