

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VERA BRADLEY HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2025-0974-PAF
	)	
PROJECT ASTER ACQUISITION,	)	
LLC,	)	
	)	
Defendant.	)	

**ORDER ADDRESSING
CROSS MOTIONS FOR SUMMARY JUDGMENT**

WHEREAS¹:

A. In March 2025, Plaintiff Vera Bradley Holdings, LLC (“Vera Bradley” or “Seller”) sold a wholly owned subsidiary, Creative Genius, LLC (“Creative Genius” or the “Company”), to Defendant Project Aster Acquisition, LLC (“Project Aster” or “Buyer”). Creative Genius, known in the market by its trade name “Pura Vida,” designs and distributes bracelets, jewelry, and other accessories.² The terms of the agreement are contained in a March 11, 2025, Interest Purchase Agreement (the “IPA”) among Buyer, Seller, and Creative Genius.³

¹ References to the docket are cited as “Dkt.” Defendant’s Answer and Affirmative Defenses to Verified Complaint at Dkt. 21 is cited as “Answer.” Citations to the parties’ briefs are to summary judgment briefs at Dkts. 24 (“Pl.’s Opening Br.”), 26 (“Def.’s Opening/Answering Br.”), 28 (“Pl.’s Reply Br.”), and 30 (“Def.’s Reply Br.”).

² Dkt. 1 (“Compl.”) ¶ 13; Answer ¶ 13; Def.’s Opening/Answering Br. 5.

³ Compl. Ex. 1 (the “IPA”).

B. In the IPA, Project Aster acquired all the membership interests in Creative Genius for a \$1,000,000 base purchase price, plus payments equal to 5% of net sales for 24 months after closing.⁴ Inventory was the largest asset on Creative Genius’s balance sheet at signing.⁵ Seller valued its gross inventory at \$24.9 million.⁶ Shortly before signing, Creative Genius made a \$2.5 million upward adjustment to its inventory reserve, increasing the reserve to approximately \$6.95 million.⁷ The purchase price was then reduced from \$8.0 million to a base purchase price of \$1,000,000, plus contingent consideration.

C. Vera Bradley made certain representations and warranties in the IPA, which include:

Section 5.6 Financial Statements.

(a) Section 5.6(a) of the Company Disclosure Schedule sets forth the following financial statements (the “Financial Statements”): (i) the unaudited combined balance sheet of the Company and its Subsidiaries as of February 3, 2024 and January 29, 2023 and the related statements of income for the fiscal years then ended (the “Most Recent Annual Financial Statements”[)], and (ii) the unaudited interim balance sheet of the Company and its Subsidiaries as of November 30, 2024 (the “Balance Sheet Date”), and the related unaudited statements of income, for the period ended on such date (the “Interim Financial Statements”).

⁴ *Id.* § 3.2(a), 3.5(a); *see id.* § 1.1 (defining “Post-Closing Payment” and “Post-Closing Payment Period”).

⁵ *See id.*, Disclosure Schedule, Schedule 5.6(a).

⁶ Compl. ¶ 23; IPA Ex. A.

⁷ Dkt. 26 Aff. of M. Martinez ¶ 13; *see* IPA Ex. A.

(b) The Financial Statements have been prepared from the Company's and Seller's Business Records in accordance with GAAP applied on a consistent basis throughout the period involved and fairly present in all material respects the financial condition and results of operations of the Company and its Subsidiaries as of their respective dates and for the applicable periods then ended, subject to the absence of footnote disclosure and, in the case of the Interim Financial Statements, the absence of year-end adjustments.⁸

...

Section 5.26 Accounts Receivable; Inventory.

...

(b) All of the inventories set forth on the Interim Balance Sheet or acquired after the Balance Sheet Date (i) consist solely of materials and goods of a quality and quantity which are usable or saleable in the ordinary course of business carried on by the Company and its Subsidiaries as presently conducted, net of any reserve for excessive or obsolete inventories reflected on the Interim Balance Sheet, (ii) were acquired in the ordinary course of business, (iii) are owned free and clear of any Liens (other than Permitted Liens), and (iv) have been valued in a manner consistent with the Company's historical practices (including, without limitation, the method of computing overhead and other indirect expenses applied to inventory), and in accordance with GAAP.⁹

D. The IPA afforded Buyer limited rights to pursue claims against Seller for breaches of the Company's or Seller's representations and warranties. Section 9.1 of the IPA specifies that all of Seller's and the Company's representations and

⁸ IPA § 5.6 (the "Financial Representation and Warranty").

⁹ *Id.* § 5.26 (the "Inventory Representation and Warranty").

warranties expire at Closing.¹⁰ After Closing, “no claim may be made against Seller or the Company with respect to . . . any breach of or inaccuracy in any such representation or warranty, other than in the case of Fraud.”¹¹

E. Section 9.3, titled “Limitations on Liability,” or what Seller calls a “Liability Bar,” emphasizes that, absent Fraud, Buyer’s sole recourse for breach of any Seller or Company representation and warranty is to assert a claim under a representation and warranty insurance policy. The pertinent language is as follows:

Buyer . . . acknowledges and agrees that (i) the sole and exclusive remedy of Buyer and its Affiliates with respect to any breach of or inaccuracy in any representation or warranty contained in, or arising out of, this Agreement (or any certificate or other documents delivered in connection herewith) shall be claims under the R&W Insurance Policy.¹²

F. As is typical in M&A transactions, the purchase price was subject to a post-closing working capital adjustment or “True Up.”¹³ Within three business days of closing, Seller was required to deliver to Buyer a good faith estimate of Closing Date Working Capital.¹⁴ Within 60 days of Closing, Buyer was required to deliver

¹⁰ *Id.* § 9.1.

¹¹ *Id.* “Fraud” is defined as common law fraud under Delaware law. *Id.* § 1.1.

¹² *Id.* § 9.3(b).

¹³ Compl. ¶¶ 32–33; *see* IPA § 3.3. The True Up provision closely follows the standardized steps outlined in *ArchKey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 991 (Del. Ch. 2023).

¹⁴ IPA § 3.2(b) (“Not fewer than three (3) Business Days prior to the Closing, Seller shall deliver to the Buyer a written statement setting forth Seller’s good faith estimate of Closing

its own calculation of Closing Date Working Capital, and Closing Date Working Capital Deficit Amount, among other required calculations (the “Purchase Price Adjustment Statement,” collectively with the Closing Date Statement, the “Closing Statements”).¹⁵ Seller then had 30 days to deliver notice of any good faith dispute. If the parties were unable to resolve the dispute, then either side could refer any remaining dispute to a designated accounting firm, acting as an expert. The expert’s determination is binding upon the parties.¹⁶

G. “Closing Date Working Capital” is defined as:

(a) the sum of the Current Assets of the Company as of 11:59 P.M. on the date immediately prior to the Closing Date, minus (b) the sum of the Current Liabilities of the Company as of 11:59 P.M. on the date immediately prior to the Closing Date, calculated as set forth in Exhibit A [to the IPA]. . . .¹⁷

Each of Current Assets and Current Liabilities are those current assets or liabilities, respectively, of “the Company that are set forth on Exhibit A and included in the calculation of Closing Date Working Capital, determined in accordance with GAAP.”¹⁸ The IPA defines GAAP as “U.S. generally accepted accounting

Date Cash, Closing Date Indebtedness, Closing Date Working Capital, and Closing Date Company Transaction Expenses, as well as the Estimated Closing Date Working Capital Deficit Amount, if any.” (citation modified)).

¹⁵ *Id.* § 3.3(a).

¹⁶ *Id.* § 3.3(b), (c).

¹⁷ *Id.* § 1.1.

¹⁸ *Id.*

principles, as in effect from time to time.”¹⁹ Exhibit A provides an “illustrative” calculation as of March 1, 2025.

H. In accordance with the IPA, Project Aster sent Vera Bradley a purchase price adjustment statement.²⁰ The most significant item identified a \$5,377,249.71 working capital adjustment based upon an inventory reserve calculation (the “Inventory Reserve Adjustment”), which was the driving factor for Project Aster asserting a Net Working Capital Deficit of approximately \$4,925,000.²¹ Project Aster said it made this adjustment because certain inventory was not usable or salable under GAAP. As a result, Project Aster claimed that Vera Bradley owed Project Aster \$4,589,696.82, which accounted for the entire purchase price adjustment.²² On July 15, 2025, Vera Bradley provided Project Aster with the Final Purchase Price Dispute Notice asserting that Project Aster’s Inventory Reserve Adjustment of \$5,377,249.71 was without basis.²³ Vera Bradley maintained that “[t]he Company’s Inventory Reserve was calculated pursuant to GAAP, consistent with its longstanding reserve policies and sales practices.”²⁴

¹⁹ *Id.*

²⁰ The parties agreed on an extension for Buyer to provide the purchase price adjustment. Compl. Ex. 2 at 1.

²¹ Compl. Ex. 2; *see* Compl. Ex. 3.

²² Compl. Ex. 2.

²³ Compl. Ex. 3 at 4.

²⁴ *Id.*

I. Vera Bradley’s complaint contains two counts. Count I is a claim for breach of contract seeking declaratory and injunctive relief that Buyer may not pursue the “inventory valuation claim” with the expert. Count II is a claim for specific performance to require Buyer to consummate the transaction without the Inventory Valuation Adjustment. Project Aster answered the complaint, and the parties have filed cross-motions for summary judgment on both counts.

NOW, THEREFORE, the court having carefully considered Seller and Buyer’s motions for summary judgment, IT IS HEREBY ORDERED, this 30th day of September, 2026, as follows:

1. Summary judgment is granted only if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Ct. Ch. R. 56(a). “[T]he facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact.” *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Hldg. Co., LLC*, 853 A.2d 124, 126 (Del. Ch. 2004).

2. When interpreting a contract, a Delaware court “will give priority to the parties’ intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions.” *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (quoting *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014)). The court must “interpret clear and unambiguous terms according

to their ordinary meaning.” *Riverbend Cmty., LLC v. Green Stone Eng’g, LLC*, 55 A.3d 330, 335 (Del. 2012) (citation modified). “A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

3. The parties agree that the True Up provision specifies an expert determination rather than arbitration. They disagree over the nature of their dispute (an accounting or contracting dispute) and the extent to which any of it is for an expert to decide. *See, e.g., ArchKey*, 302 A.3d at 997–98 (“A court need not construe every word in a provision calling for an expert determination before the expert can do its work. . . . Unless it is clear that the expert has no jurisdiction to decide a disputed point of interpretation, the expert will normally reach his own decision on the point” (citation modified)); *id.* (holding that accounting experts are not plenary adjudicators of covenant breaches or equitable remedies, but may interpret terms closely tied to their calculation task); *Georgia Sec. Sols., LLC v. NewCBN, LLC*, 2026 WL 2241016, at *8 n.57 (Del. Ch. Aug. 3, 2026) (collecting cases). When a true-up process “contemplates a process other than a legal arbitration,

principles of contract interpretation determine whether a disputed issue[] falls within its scope.” *ArchKey*, 302 A.3d at 997.

4. The IPA authorizes the expert to decide “Disputed Amounts”²⁵ that Buyer and Seller have been unable to resolve “based solely on presentations and supporting materials provided by Buyer and Seller, and not pursuant to any independent review.”²⁶ In deciding any matter or item in dispute, the expert is bound by Section 3.3(c) and “shall not assign a value to any particular item greater than the greatest value for such item claimed by either Buyer or Seller, or less than the lowest value for such item claimed by either Seller or Buyer.”²⁷ Although “Delaware cases have not expressly adopted a default rule . . . the logic of the decisions suggests that an expert charged with making a narrow determination will not have authority to interpret the governing agreement unless the contract says so.” *Penton Bus. Media Hldgs., LLC v. Informa PLC*, 252 A.3d 445, 466 (Del. Ch. 2018). Like the dispute resolution provision at issue in *Penton*, nothing in the IPA “suggests that the parties intended for the [expert] to decide legal disputes as part of the dispute resolution

²⁵ “Disputed Amounts” include any dispute contained in the “Purchase Price Dispute Notice” from Seller to Buyer which arises from Seller’s disagreement with Buyer’s calculations of (i) Closing Date Working Capital, (ii) the Closing Date Working Capital Deficit Amount, if any, (iii) Closing Date Cash, (iv) Closing Date Indebtedness, (v) Company Transaction Expenses or (vii) a calculation of any Adjustment Shortfall or Adjustment Surplus. See IPA § 3.3(a), (b).

²⁶ *Id.* § 3.3(c).

²⁷ *Id.*

process.” *Penton*, 252 A.3d at 466. Whether the Inventory Reserve Adjustment is an indirect challenge to the Inventory Representation and Warranty is a legal question arising from the IPA and is decided by the court.

5. The Inventory Representation and Warranty is broad and represents that inventory on the Balance Sheet as of November 30, 2024, and *all inventories acquired after that date through closing* (i) are usable and saleable and (ii) have been valued in a manner consistent with historical practices and with GAAP.²⁸ It is not surprising that Buyer would require such a representation, given that Creative Genius’s inventory accounted for a large amount of its value.²⁹

6. Buyer asserts that the Inventory Reserve Adjustment must be calculated to “add[] to the reserve all SKUs in inventory specifically identified to Charity and all SKUs removed from the website for both US and UK entities.”³⁰ Buyer reasons that this calculation is necessary due to certain operational changes between signing

²⁸ See IPA §§ 1.1, 5.26(b).

²⁹ See Def.’s Opening/Answering Br. 9 (“[I]nventory represented the largest account balance on [Creative Genius]’s balance sheet and constituted the primary asset in [Closing Date Working Capital].”); Pl.’s Opening Br. 5 (“The magnitude of this bargain is underscored by the Company’s financial schedules attached to the IPA. For its \$1 million Base Purchase Price, Buyer acquired a business with Gross Inventory valued at over \$24.9 million. Even after accounting for an Inventory Reserve of approximately \$6.95 million, the Company’s Net Inventories still totaled nearly \$18 million.”); see also A. Vincent Biemans & Gerald M. Hansen, *M&A Disputes: A Professional Guide to Accounting Arbitrations* 221 (2017) (hereinafter “M&A Disputes”) (“Inventory is not only a commonly disputed item, it is also often a significant disputed item in terms of the dollar amount at stake.”).

³⁰ Compl. Ex. 2 at 4.

and closing that were not disclosed to Buyer, specifically, “to discontinue the Charity sales operation of the Company as well as the removal of slow moving SKUs from the website which were deemed to be ‘brand damaging,’” making the Inventory no longer usable or saleable.³¹ Buyer’s recalculation resulted in the Inventory Reserve increasing from Seller’s reported \$6,908,000 to \$12,285,000—a \$5,377,000 difference.³²

7. Fundamentally, Buyer’s recalculation challenges the salability and usability of the Inventory held at Closing. Buyer maintains that it may challenge whether the Inventory has been properly accounted for and whether it is usable and saleable under GAAP.³³ Although the True Up provision is intended to address changes between signing and closing, allowing Buyer to assert those changes to the usability and salability of the inventory in the True-Up process would permit Buyer

³¹ *Id.* The parties dispute whether the events Buyer references took place between signing and closing. *See* Def.’s Opening/Answering Br. 29–32; Pl.’s Opening Br. 15–18. This factual dispute is not material to the court’s decision and does not prevent awarding summary judgment to Seller. *See* Del. Ch. R. 56(a). Additionally, while Buyer asserted a variety of affirmative defenses in the Answer, the parties agree that those defenses do not provide a basis to avoid a ruling on summary judgment. Def.’s Opening/Answering Br. 32; Pl.’s Opening Br. 24–29; Pl.’s Reply Br. 20; *see* Answer at 24–28.

³² Compl. Ex. 2 at 4.

³³ Def.’s Opening/Answering Br. 30 (“Specifically, the removal of clearance items from the Company’s website shortly before Closing, the discontinuation of the charitable product lines, and the diminished marketability of inventory in the U.K. and E.U. channels are precisely the types of operational and market developments that GAAP requires to be considered in determining net realizable value, assessing obsolescence, and evaluating the adequacy of reserves at period-end.”).

to indirectly challenge the Inventory Representation and Warranty and circumvent the Liability Bar. This is not permitted under the unambiguous terms of the IPA. *See Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co., LLC*, 166 A.3d 912, 932 (Del. 2017); *see also N. Data AG v. Riot Platforms, Inc.*, 2025 WL 1661855, at *14 (Del. Ch. June 2, 2025) (citing *Chi. Bridge*, 166 A.3d at 932) (holding that only disputes which involve changes in the business between signing and closing are properly before the expert). “[W]here the contract expressly provides that the representations and warranties terminate upon closing . . . the parties have made clear their intent that they can provide no basis for a post-closing suit seeking a remedy for an alleged misrepresentation. That is, when the representations and warranties terminate, so does any right to sue on them.” *Chi. Bridge*, 166 A.3d at 932–33 (citation modified). Also like in *Chicago Bridge*, “[u]nder the plain terms of the [IPA], if [Buyer] disagreed with the accounting methodology that [Seller] historically used [to value inventory reserves], it could refuse to close.”³⁴ *Id.* at 933. After Closing, Buyer could make a claim against the representation and warranty insurance if it thinks that the Inventory Representation and Warranty has been breached.

³⁴ *See* IPA §§ 10.1, 10.4.

8. The parties also dispute whether Closing Date Working Capital must be calculated in accordance with GAAP based on the Company’s historical accounting practices or as consistently applied. Seller contends that GAAP is impliedly “consistently applied.”³⁵ Buyer disagrees, contending that parties did not bargain for a GAAP “consistently applied” framework; rather, the amount of Closing Date Working Capital must be calculated under accounting principles that comply with GAAP and any dispute must be decided by the expert.³⁶

9. Both Seller and Buyer assert that their view is supported by the unambiguous terms of the IPA. Seller primarily relies on three cases—*Chicago Bridge, OSI Systems, Inc. v. Instrumentarium Corp.*, 892 A.2d 1086 (Del. Ch. 2006), and *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352 (N.Y. 2003). Those decisions do not support Seller’s reading of the agreement.

10. The court agrees that the terms of the IPA are unambiguous when read as a whole and situated in the commercial context between the parties. *See Chi. Bridge*, 166 A.3d at 926–27. In *Chicago Bridge*, the Court emphasized that:

the Closing Payment Statement and Closing Statement, of which the Net Working Capital estimates and Westinghouse’s disputed items are a part, must be ‘prepared and determined from the books and records of [the subsidiary] and its Subsidiaries and in accordance with [GAAP] *applied on a consistent basis throughout the periods indicated* and with the Agreed Principles.’ And, the Agreed Principles require that

³⁵ Pl.’s Opening Br. 20–22; Pl.’s Reply Br. 4–9.

³⁶ Def.’s Opening/Answering Br. 22–27.

Working Capital calculations be ‘determined in a manner consistent with GAAP, *consistently applied by Seller Parent in preparation of the financial statements* of the Business, as in effect on the Closing Date’ and ‘*based on the past practices and accounting principles, methodologies and policies*’ used by [the subsidiary].

166 A.3d at 928–29. The Court concluded that the closing payment statement and closing statement must “comply with two conditions: i) they must be prepared from [the subsidiary]’s books and records; and ii) they must use the same accounting approach as had been used in the past.” *Id.* at 929.

11. The True Up at issue here contains neither of the conditions present in *Chicago Bridge*. The Closing Statements were each to be prepared using certain predesignated input categories, each calculated in accordance with GAAP. The parties did not tie these calculations to Seller’s books and records or other financial statements, nor require that GAAP be consistently applied or applied in accordance with certain accounting principles in the IPA. The only requirements were that the Closing Statements be completed (i) in accordance with GAAP and, (ii) for Closing Date Working Capital, using the inputs from Exhibit A, but not the methodology for calculating the inputs, as none was provided in Exhibit A.³⁷

³⁷ Seller contends that the numerical inputs in Exhibit A bind the parties to use the same historical practices used to create the example financials contained in Exhibit A. Pl.’s Reply Br. 8. That is not supported by the plain meaning of the IPA. The IPA provides that Closing Date Working Capital will be calculated as the sum of Current Assets minus the sum of Current Liabilities, calculated as set forth in Exhibit A. IPA § 1.1. This reference to Exhibit A refers to the categorical inputs needed to calculate Current Assets and Current

12. Seller’s reliance on *OSI* and *Westmoreland Coal* fare no better in supporting an implied “consistently applied” modifier to GAAP. The agreement in *OSI* included accounting principles in which the parties agreed that the financial statements prepared in connection with the transaction would be U.S. GAAP compliant, “*provided, however, that: (i) with respect to any matter as to which there is more than one principle of U.S. GAAP, Transaction Accounting Principles means the principles of U.S. GAAP applied in the preparation of the Financial Statements.*” 892 A.2d at 1091.

13. In *Westmoreland Coal*, the purchase price adjustment provisions required preparation of the closing date certificate “on a basis *consistent* with the preparation of the Interim Financial Statements” and that the principles for calculating the closing date certificate required the accounting to be “*applied on a consistent basis with past practices.*” 100 N.Y.2d at 358 (citation modified). The parties’ emphasis on consistency across financial statements was dispositive to the court’s analysis in *Westmoreland Coal*. Other courts in New York have limited *Westmoreland Coal* to its facts. *See Severstal U.S. Hldgs., LLC v. RG Steel, LLC*, 865 F. Supp. 2d 430, 440–41 (S.D.N.Y. 2012) (noting “the *Westmoreland [Coal]* court’s concern and emphasis on consistent treatment is less salient in the instant

Liabilities. That Exhibit A contains numerical inputs for those categorical inputs does not change the plain language.

case because here, the matter involves appropriate adjustment, not comparison”); *Violin Entm’t Acq. Co., Inc. v. Virgin Entm’t Hldgs., Inc.*, 59 A.D.3d 171, 172 (N.Y. App. Div. 2009) (*Westmoreland Coal* “does not compel a different result, as the Court of Appeals there merely construed the agreement before it and did not prohibit sophisticated business parties from agreeing to varying means of resolving disputes over adjustments to purchase price.” (citation modified)). By contrast, the terms of the IPA do not reflect an intent to require the application of GAAP consistently applied with past practice in the True Up process.

14. Seller argues that the True Up process should be a “simple comparative exercise, not an open-ended invitation for Buyer to apply new accounting theories post-closing.”³⁸ But the parties knew that GAAP allows for a variety of treatments as well as the contractual language that Delaware courts have found sufficient to ensure that GAAP be “consistently applied” in a true up process. *See Golden Rule Fin. Corp. v. S’holder Rep. Servs. LLC*, 267 A.3d 382, 382 (Del. 2021) (ORDER) (recognizing that GAAP may “allow[] for a variety of treatments” and using GAAP consistently applied prevents a party from “opportunistically picking and choosing different treatments under GAAP rather than applying the agreed upon GAAP provisions” (citation modified)).

³⁸ Pl.’s Opening Br. 20.

15. The parties did not include any modifiers in the True Up to require GAAP be applied consistent with historical practice, nor the definitions applicable to the True Up. The parties were aware of how to do so and did so in other sections of the IPA.³⁹ The plain language, coupled with the implications of the language being known to the market, leads to the conclusion that “GAAP” does not mean “GAAP, as consistently applied” with historical practice. The True Up provision does not generally require reading GAAP as “consistently applied” or applied “in accordance with past practices.” The proper reading is that the True Up was meant to allow the parties to test the GAAP compliance of the Closing Statements, to the extent that a representation and warranty does not bar that testing function.

16. The IPA requires Closing Date Working Capital to be calculated in accordance with GAAP, but does not require GAAP to be applied consistently based on historical accounting practices.⁴⁰ A dispute as to whether the Closing Date Working Capital calculation is compliant with GAAP is not a claim against Seller

³⁹ The parties included a consistency modifier in the Financial Representation and Warranty and the Inventory Representation and Warranty but not in the definition of GAAP or the True Up provision. This indicates that the parties knowingly and purposefully omitted the consistency language elsewhere in the contract. *See Torrent Pharma, Inc. v. Priority Healthcare Distrib., Inc.*, 2022 WL 3272421, at *9 (Del. Super. Aug. 11, 2022) (“Where one contract section omits a term present in another, the omission is presumed intentional.”). So, the parties did not bargain for consistency.

⁴⁰ *See* M&A Disputes at 245 (“Unless appropriate under the terms of the purchase agreement, the arbitrator should resist the temptation to rely on better or preferred GAAP instead of GAAP compliant past practices.”).

for breach of the Financial Representation and Warranty. A dispute over the usability or salability of the Inventory is a claim against the Seller for breach of the Inventory Representation and Warranty, which is governed exclusively by IPA Sections 9.1 and 9.2 and is not subject to the True-Up process.

17. Summary judgment on Count I is granted in part to Seller and in part to Buyer. Buyer's claim regarding the historical inventory reserve of Creative Genius is a legal claim and not a matter for the accounting expert in the True Up process. To the extent that Buyer's claim does not challenge the historical inventory reserve of Creative Genius, the determination of Closing Date Working Capital in accordance with GAAP does not require consistency with the Company's past practices. Both motions are denied as to Count II because questions remain for the expert.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor