IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Textron, Inc.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 10C-07-103-JRJ CCLD
	:	
Acument Global Technologies, Inc.,	:	
	:	
Defendant.	:	

Date Submitted: March 9, 2011
Date Decided: April 6, 2011

Upon Plaintiff's Motion for Judgment on the Pleadings: **DENIED**

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JURDEN, J.

I. Introduction

Before the Court is Plaintiff Textron Inc.'s ("Textron") Motion for Judgment on the Pleadings. Textron filed suit against Acument Global Technologies, Inc. ("Acument") asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and a request for declaratory judgment.[1] Acument asserts counterclaims which mirror Textron's claims.[2] Textron claims that because "the language of the agreements is clear," and "there are no material disputes between the parties with respect to the pertinent agreements that govern their obligations," the Court should enter judgment on the pleadings in Textron's favor.[3]

II. Background

A. Textron

Textron, a Delaware corporation, employs approximately 32,000 people in 25 countries worldwide.[4] Textron operates in many different industries, ranging from the manufacture and sale of various products to provision of financial services.[5]

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[1] Complaint, ¶¶ 25-45 [Trans. ID. 32084937].
[2] Answer, Defenses and Counterclaims at pg. 9-19, ¶¶ 30-58 [Trans. ID. 33236887].
[3] Pltf.'s Op. Br. at pg. 3 [Trans. ID. 35394923].
[4] TFS maintains facilities in 17 countries (on six different continents): Australia, Austria, Brazil, Canada, China, France, Germany, Italy, Japan, Korea, Malaysia, Mexico, Singapore, Spain, Taiwan, the United Kingdom and the United States. *Id* at pg. 3.
[5] *Id*.

Historically, Textron manufactured and sold fastening systems, a business segment that was referred to as Textron Fastening Systems or "TFS."[6] TFS manufactured and sold a full range of fastening systems to customers around the globe, frequently for use in the manufacturing of other components or end products.[7]

B. Sale of TFS Business

In December 2005, Textron's board of directors resolved to sell the TFS business.[8] The sales process for the TFS business eventually resulted in the negotiation and entry into an agreement to sell the business to a subsidiary formed by Platinum Equity, LLC ("Platinum Equity").[9] Platinum Equity is a large private equity firm that purchases, operates and, in some cases, then divests portfolio companies in various industries.[10] Since 1995, Platinum Equity claims to have acquired over 100 businesses that it claims take in over $27.5 billion in annual revenue.[11]

1. The Purchase Agreement

The parties' agreement with respect to the sale of the TFS business is memorialized in a Purchase Agreement between Textron Inc. (as parent) and TFS

[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*. at pg. 3-4.
[10] *Id*. at pg. 4.
[11] *Id*.

Acquisition Corporation (as Purchaser), dated May 31, 2006 (the "Purchase Agreement").[12] Under the Purchase Agreement, TFS Acquisition Corporation (a wholly-owned acquisition subsidiary of Platinum Equity) agreed to purchase all of the ownership interests of the entities comprising the global TFS business for $630 million, subject to certain adjustments.[13] Platinum Equity's acquisition of the TFS business closed in August of 2006.[14] The TFS business was renamed "Acument Global Technologies, Inc.," which remains a portfolio company of Platinum Equity.[15] Acument has continued to operate the TFS business globally, maintaining facilities in various jurisdictions around the world.[16]

Pursuant to the Purchase Agreement, Textron agreed to indemnify the Purchaser for certain Losses incurred.[17] The Purchase Agreement further provided that Textron was entitled to certain reductions of any indemnity payments by Textron pursuant to the Purchase Agreement, including a reduction in the amount of any Tax Benefit attributable to the indemnified loss:

> The obligations and liabilities of Parent and Purchaser under Sections 6.1(b) and (c), respectively, shall be subject to the following additional limitations:…(iii) Each Loss…shall be reduced by (A) the amount of any insurance proceeds received by the Indemnified Party,

[12] Ex. A to Pltf.'s Op. Br. (hereinafter "Purchase Agreement"); Complaint ¶ 8; Answer, Defenses and Counterclaims at pg. 2, ¶ 8.
[13] *See* Pltf.'s Op. Br. at pg. 4; Purchase Agreement, §§ 1.1, 1.3.
[14] Textron alleges it closed on August 31, but Acument alleges it closed on August 11, 2006. *See id*. at pg. 4; Answer, Defenses and Counterclaims at pg. 9, ¶ 4.
[15] Pltf.'s Op. Br. at pg. 4.
[16] *Id.*
[17] *See* Purchase Agreement ¶ 6.1(b).

> (B) any indemnification, contribution or other similar payment paid to the Indemnified Party by any third party with respect to such Loss and (C) *any Tax Benefit of the Indemnified Party or any of its Affiliates attributable to such Loss.*[18]

The term "Tax Benefit" is defined under the Purchase Agreement as:

> the present value of any refund, credit or reduction in otherwise required Tax payment, including any interest payable thereon, which present value shall be computed as of the Closing Date or the first date on which the right to the refund, credit or other Tax reduction arises or otherwise becomes available to be utilized, whichever is later, (i) using the Tax rate applicable to the highest level of income with respect to such Tax, (ii) using the interest rate on such date imposed on corporate deficiencies paid within thirty (30) days of notice of proposed deficiency under the Code, and (iii) assuming that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party.)[19]

2. The Letter Agreement and the Open Issues Summary

Following the closing under the Purchase Agreement, the parties had some disputes regarding their respective rights and obligations under that agreement, including the proper application of the tax benefit offset.[20] Consequently, on October 24, 2007, the parties entered into a letter agreement (the "Letter Agreement"), a binding enforceable agreement memorializing their resolution of

[18] Purchase Agreement § 6.1(d)(iii) (emphasis added); Complaint at ¶ 10.
[19] Purchase Agreement at pg. 89.
[20] Complaint, ¶ 12; Answer, Defenses and Counterclaims at pg. 11, ¶ 12; Answers To Counterclaims, ¶¶ 11-12.

certain disputed issues.[21] The Letter Agreement references a document entitled "Andrew's Open Issues Summary," dated October 9, 2007 (the "Open Issues Summary"), which the parties agreed was "the base line" for their discussions.[22] The Open Issues Summary discusses, *inter alia*, the disputed hypothetical tax benefit rates for Brazil and France, the application of the tax benefit offset, and the process for making indemnity payments.[23]

Specifically, the Letter Agreement confirmed the hypothetical nature of the "Tax Benefit" provided for under the Purchase Agreement, and further set forth the parties' agreement that this hypothetical tax benefit would be applied to reduce indemnity payments made by Textron:

> The hypothetical tax benefit rate will be applied as an offset to Loss Payments for which Textron is obligated to indemnify Acument including, without limitation, deductible non income tax, labor/employment, civil and environmental indemnity obligations {"Indemnification Obligations"} per the terms of the P&S Agreement.[24]

With respect to Textron's non-environmental indemnification obligations, the parties agreed that Textron would pay Acument the amount due, less any applicable hypothetical tax benefit, as follows:

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[21] Complaint, ¶ 12; Answer, Defenses and Counterclaims at pg. 11, ¶ 12; Pltf.'s Op. Br. at pg. 6.
[22] Ex. B to Pltf.'s Op. Br. (hereinafter "Letter Agreement") ("We believed it will be to our mutual benefit to state our agreement in writing. Using Andrew's Open Issues Summary, dated October 9, 2007, as the baseline, we agreed on the following….").
[23] *Id*.
[24] Letter Agreement, ¶ 2.

> With the exception of environmental Loss Payments discussed in paragraph 9, for any Loss Payments which exceed US $100,000, Textron will make the payment to Acument (through an Acument entity(ies) directed by Acument) less the offset for the applicable hypothetical tax benefit prior to the date on which such settlement, payment, etc. is due to the third party and Acument will then remit payment to such third party. For those payments below US $100,000, Acument will make the Payment to such third party and invoice Textron less the offset for the hypothetical tax benefit.[25]

With respect to Textron's environmental indemnification obligations, the parties agreed that Textron would make payment directly to the applicable third party for the amount due, less any applicable hypothetical tax benefit, as follows:

> For environmental Loss Payments, Textron shall make the Payment directly to the applicable third party regardless of the amount and invoice Acument for its share of the Payment attributable to the applicable hypothetical tax benefit rate.[26]

Up until about May 2008, Acument accepted the application of the hypothetical tax benefit provided for in the Purchase Agreement and Letter Agreement to all claims indemnified by Textron by either reimbursing Textron for the hypothetical tax benefit attributable to such claims or accepting indemnity payments from Textron net of the hypothetical tax benefit.[27]

[25] Letter Agreement, ¶ 5.
[26] Letter Agreement, ¶ 9.
[27] Complaint, ¶ 16.

Beginning around June 2008, however, Acument disputed the application of the hypothetical tax benefit to indemnity payments made by Textron for claims arising in the United States.[28]

Since that time, Acument has refused to pay amounts Textron claims it is entitled to under the Purchase Agreement and Letter Agreement for hypothetical tax benefits attributable to claims indemnified by Textron in the United States.[29] In addition, Acument has sought reimbursement from Textron in the amount of $251,937 for hypothetical tax benefits that were previously applied as an offset to claims indemnified by Textron in the Untied States.[30]

On January 16, 2010, Textron sent Acument a letter demanding that Acument fulfill its contractual obligations under the Purchase Agreement and Letter Agreement by remitting to Textron all amounts owed for hypothetical tax benefits attributable to claims indemnified by Textron.[31] Acument has refused this demand.[32]

[28] *Id.*, ¶ 17; *See* Pltf.'s Op. Br. at pg. 11-2.
[29] Complaint, ¶ 18; *See* Pltf.'s Op. Br. at pg. 12.
[30] Complaint, ¶ 19; Pltf.'s Op. Br. at pg. 12.
[31] Complaint, ¶ 23.
[32] *Id*., ¶ 24.

III. The Parties' Contentions

A. Textron's Contentions

Textron contends that pursuant to the terms of the Purchase Agreement, as amended by the Letter Agreement,[33] (and the Open Issues Summary it allegedly incorporates by reference),[34] the "hypothetical tax benefit" offset applies universally to all indemnification payments, including those in the United States. For each such claim, the amount of the indemnification payment is multiplied by an estimate of the applicable tax rate for the pertinent jurisdiction, to arrive at the amount of the hypothetical tax benefit offset owed to Textron.[35] Further, according to Textron, the Letter Agreement shows that the parties had reached a comprehensive agreement on the general application of the hypothetical tax benefit to Textron's indemnity payments. And the Open Issues Summary shows that the parties understood and agreed before they signed the Letter Agreement that the

[33] While the parties agree the Letter Agreement is a valid binding agreement, they disagree on whether it modified or amended the terms relating to the Tax Benefit offset in the Purchase Agreement. Textron maintains that the Letter Agreement is a "valid amendment to the Purchase Agreement," while Acument claims the Letter Agreement "cannot change the terms of the Purchase Agreement, because it expressly states it does not change Purchase Agreement provisions, but rather "clarifies those provisions relative to the matters discussed herein." *See* Pltf's Reply Br. at pg. 6-7 [36268959]; Def.'s Ans. Br. at pg. 5, 8. [Trans. ID. 35995361].

[34] While Textron claims that the Letter Agreement "incorporates by reference" the Open Issues Summary, the Letter Agreement contains no such express language. *See* Letter Agreement; *See* Def.'s Ans. Br. at pg. 8, n.9 ("the Letter Agreement does not state an intention to incorporate the Open Issues Summary or any of its provisions by reference") (citations omitted).

[35] Pltf.'s Op. Br. at pg. 8.

hypothetical tax benefit offset would apply universally.[36] In support of this argument, Textron points to on Paragraph 2 of the Letter Agreement:

> The hypothetical tax benefit rate will be applied as an offset to Loss Payments for which Textron is obligated to indemnify Acument including, without limitation, deductible non income tax, labor/employment, civil and environmental indemnity obligations {"Indemnification Obligations"} per the terms of the P&S Agreement.

According to Textron, the Letter Agreement reflects that the parties agreed on hypothetical tax benefit rates for Brazil and France, and the Open Issues Summary reflects that the parties had previously agreed to "the tax rates for all other countries."[37] Textron points out that although Acument paid approximately $100,000 in reimbursements in connection with United States indemnity payments, now Acument denies the hypothetical tax benefit applies to United States payments.[38] Textron claims that because the plain language in the parties' agreements is clear, and Textron's right to the tax benefit offset was never contingent on Acument's receipt of any actual tax benefit, Textron is entitled to judgment on the pleadings.[39]

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[36] *Id*.
[37] Ex. C to Pltfs's Op. Br.
[38] Pltf.'s Op. Br. at pg. 8, 10; Pltf.'s Reply Br. at pg. 9.
[39] Pltf.'s Op. Br. at pg. 1, *See* Complaint, ¶ 28 ("The plain language of the Purchase Agreement does not require that Acument actually realize a net tax benefit in order for Textron to be entitled to a reduction of indemnity payments made under the Purchase Agreement.").

B. Acument's Contentions

Acument contends that what it and Textron referred to as the "hypothetical tax benefit" offset was intended to apply only in connection with a dispute over the applicable tax rates for deductible losses in Brazil and France.[40] According to Acument, Textron's interpretation of the agreements would give Textron a "double-offset," first in the amount of the deduction, and then in the amount of the reduction of the indemnification obligation, "while leaving Acument with the entire loss and only partial indemnification – in other words, less than whole."[41] Acument contends that the Purchase Agreement and subsequent Letter Agreement expressly require that Acument be entitled to a tax benefit or other offset before Textron is entitled to a reduction in its indemnification obligation.[42] Acument alleges that the Letter Agreement does not, as Textron argues, change the Purchase Agreement's requirement for a right to the deduction.[43] The Letter Agreement expressly states that it "clarifies those provisions relative to the matters discussed herein."[44] It does not say it "incorporates by reference" all the provisions of the Open Issues Summary."[45] Acument contends that the purpose of the Letter Agreement was to resolve pre-existing disputes arising from matters that the

[40] Def.'s Ans. Br. at pg. 9.
[41] *Id.* at pg. 1.
[42] In other words, in order for Textron's indemnification obligation to be reduced, Acument must be entitled to an actual net tax benefit attributable to the indemnified loss. *See id*.
[43] Def.'s Ans. Br. at pg. 5.
[44] Letter Agreement at pg. 2.
[45] *Id*.

Purchase Agreement did not address or left unclear.[46] According to Acument, nothing in the Letter Agreement purports to establish a "hypothetical tax benefit rate" for the United States. Acument alleges Textron is wrong to suggest that paragraph 2 of the Letter Agreement changed the Purchase Agreement's requirement that for Textron's indemnification obligation to be reduced, Acument must possess a right to a deduction.[47] According to Acument, it is clear that paragraph 2 of the Letter Agreement does not apply to the losses at issue in this case – non-deductible environmental losses in the United States, for three reasons: first, the only definition of "hypothetical tax benefit rate" appears in paragraph 1 and applies only to Brazil and France;[48] second, the examples of items to which the hypothetical tax benefit rates apply are all designated as "deductible;"[49] and third, "any doubt that paragraph 2 maintains the deductibility requirement of the Purchase Agreement is dispelled by the provision at the very end of the paragraph, stating that any offsets to Loss Payments must be 'per the terms of the [Purchase] Agreement.'"[50] And those terms, according to Acument, permit offsets only where Acument is entitled to a deduction.[51] With respect to the Open Issues Summary,

[46] Def.'s Ans. Br. at pg. 5.
[47] *Id*. at pg. 6.
[48] There was no need to address tax rates applicable in the U.S. in the Letter Agreement because there had been no dispute on that issue. *See* Def.'s Ans. Br. at pg. 7, 9 n.10.
[49] Acument argues that if the parties had truly intended to apply a tax rate to a loss that was not deductible, there would have been no reason to include the word "deductible" before the list of examples. *Id*. at pg. 7-8.
[50] *Id*. at pg. 8; *See* Letter Agreement ¶ 2.
[51] Def.'s Ans. Br. at pg. 8.

Acument argues it is not an agreement between the parties and the "Letter Agreement does not state an intention to incorporate…[it] or any of its provisions by reference."[52] Further, if the Open Issues Summary truly reflected the agreement of the parties, then there would have been no need for the Letter Agreement.[53]

As for the approximately $100,000 in reimbursements for the hypothetical tax benefits in connection with the United States indemnity payments, Acument acknowledges that after the date of the Letter Agreement it made payments (or allowed Textron to withhold payments) that reduced Textron's indemnification obligation for three non-environmental losses in the United States.[54] However, it says this happened because Acument "was under the mistaken impression that it had a right to deduct the losses on its tax returns."[55] Acument subsequently learned it did not have a right to deduct the losses on its tax return.[56] Under these circumstances, claims Acument, it did not intentionally, voluntarily and knowingly waive its rights under the Purchase Agreement at least as to any other losses, including the more than $2 million in losses that are the subject of this litigation.[57] As for its alleged breach of the implied covenant of good faith and fair dealing, Acument argues that the covenant applies only when a contract is silent as to the

[52] *Id.* at pg. 8, n.9.
[53] *Id*. at pg. 9.
[54] *Id.* at pg. 10.
[55] *Id*. at pg. 10-11.
[56] Acument learned it was Textron that had a right to the deduction and Textron who had been taking the deduction. Def.'s Ans. Br. at pg. 11.
[57] *Id*.

issue in dispute, and the agreements at issue here are not silent on the issue of Textron's entitlement to a reduction of indemnification payments.[58]

IV. DISCUSSON

Under Delaware law, contract interpretation is a question of law.[59] Consequently, a motion for judgment on the pleadings is a "proper framework" for enforcing contracts because there is no need to resolve material issues.[60] The standard for granting a motion for judgment on the pleadings is stringent.[61] The Court must deny such a motion unless viewing the pleaded facts and all reasonable inferences that may be drawn from them in the light most favorable to the non-moving party, it is clear that the movant is entitled to judgment as a matter of law.[62] The parties agree the agreements are unambiguous.[63] They do not agree, however, on the interpretation of those agreements. If the Court finds both parties' interpretations reasonable, then the Court cannot grant judgment on the pleadings.[64]

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[58] *Id*. at pg. 12-3.
[59] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).
[60] *OSI Sys., Inc. v. Instrumentation Corp*., 892 A.2d 1086, 1090 (Del. Ch. 2006); *see Boyce Thompson Inst. V. MedImmune, Inc.*, 2009 WL 1482237, at *5 (Del. Super. May 19, 2009) ("The case law is legion that motions to dismiss are appropriate vehicles by which to engage the Court in the construction of written contracts.").
[61] *O'Leary v. Telecom. Res. Serv., LLC*, 2001 Del. Super. LEXIS 36, at *9 (January 14, 2011); *Artisan's Bank v. Seaford IR, LLC*, 2010 Del. Super. LEXIS 354, at *5 (June 21, 2010).
[62] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1205 (Del. 1993).
[63] *See* Complaint, ¶¶ 28, 33, 42; Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings Hearing Transcript at pg. 28 (Mar. 9, 2011).
[64] *Cf. Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (In the context of a 12(b)(6) motion, "[d]ismissal is proper only if the defendants' interpretation is the only reasonable construction as a matter of law."). *See Atlantic Millwork Corp. v.*

The business (that became Acument) sold under the Purchase Agreement had operating facilities in seventeen different countries on six continents.[65] A reasonable interpretation of the agreements is that the parties agreed to a "Tax Benefit" offset that does not attempt to determine the amount, if any, of actual beneficial net change in tax position under a specific jurisdiction's tax laws Acument will receive. Instead, "Tax Benefits" may be deemed to exist even if, under a particular jurisdiction's tax laws, Acument may not legally be entitled to receive any actual beneficial change in tax position.[66] The parties agree that they entered into the Letter Agreement because a dispute arose as to how the Tax Benefit offset should apply.[67] A reasonable interpretation of the Letter Agreement is that it did, in fact, amend the Purchase Agreement,[68] and that the parties agreed

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Harrington, 2002 WL 31045223, at *1 (Del. Super. Sept. 12, 2002) ("A motion for judgment on the pleadings has been viewed as in the general nature of a motion to dismiss because it admits, for the purpose of the motion, the allegations of the plaintiff's pleadings but contends that they are insufficient at law.").

[65] Pltf.'s Op. Br. at pg. 3-4.

[66] *Id*. at pg. 16. ("They agreed on a definition of Tax Benefit that does not look to tax benefits that are actually received or payable to the indemnified party…[r]ather, the definition of Tax Benefit requires the parties to make certain mandatory assumptions that may deem a Tax Benefit offset to be present when none may in fact exist, and that may increase the size of any extant tax benefit.").

[67] *See* Pltf.'s Op. Br. at pg. 6 ("Following the closing under the Purchase Agreement, the parties came to have various disputes regarding their respective rights and obligations thereunder, including the proper application of the tax benefit offset."); Answer, Defenses and Counterclaims at pg, 2 ¶ 12 ("…the Letter Agreement was intended to memorialize agreements between the parties respecting several post-closing matters concerning the Purchase Agreement and several other disputes."); *see also*, Answer, Defenses and Counterclaims pg. 10, ¶ 11 ("After the Transaction, the parties negotiated the resolution of several post-closing issues, as well as several unanticipated disputes regarding the interpretation and/or application of the Purchase Agreement.").

[68] Textron points to the use of the word "other" as support for its claim that the Letter Agreement was intended to modify the Purchase Agreement. ("It is…clear that the parties did intend to 'alter or modify' some provisions of the Purchase Agreement (*i.e*., those provisions 'relative' to the Tax Benefit offset) to clarify the performances required going forward, but not 'other,' unrelated provisions.") Pltf.'s Reply Br.

to apply what they later came to call a "hypothetical tax benefit" offset to all of Textron's indemnification obligations, without exceptions or limitations.[69] Supporting Textron's interpretation is the Open Issues Summary, referenced by the parties in the Letter Agreement and used as the "baseline" for their understanding. For example, the Open Issues Summary states that Acument has agreed "that for *any Textron indemnification obligations*, Acument pays first, and then invoices Textron less any offset for the "hypothetical tax benefit." There are no exceptions listed.[70] The Open Issues Summary goes on to show how the hypothetical tax benefit applied to every indemnification payment (again, with no exceptions noted) that Textron previously made.[71] Also supportive of Textron's interpretation is Acument's agreement in paragraph 3 of the Letter Agreement to pay nearly $100,000 in "hypothetical tax benefit" offsets in connection with United States claims.[72] Textron correctly notes that there are no carveouts or limitations in the Letter Agreement with respect to application of the hypothetical tax benefit offset.[73]

Acument's interpretation is also reasonable. It is correct that the Letter Agreement itself references an agreement on the tax rates for offsets in France and

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at pg. 7; *see also* Pltf.'s Op. Br. at pg. 22-3. (The inclusion of "other" shows that "the parties did intend to 'alter or modify' some terms and conditions of the Purchase Agreement, but not 'others.'").

[69] As Textron notes, "[t]here are no carve outs or limitations to the application of the hypothetical tax benefit offset" in the agreements. Pltf.'s Op. Br. at pg. 17.

[70] Ex. C to Def.'s Ans. Br. (emphasis added)

[71] *Id*.

[72] Letter Agreement; *see* Pltf.'s Op. Br. at pg. 16-17.

[73] Letter Agreement; *see* Pltf.'s Op. Br. at pg. 17.

Brazil, not all the other countries, and applies the hypothetical tax benefit offset to only one Brazilian tax deduction. Acument correctly points out that the Letter Agreement does not state that the Open Issues Summary is "incorporated by reference," rather, it expressly states, "[t]his Letter Agreement does not alter or modify any other terms and conditions set forth in the Purchase and Sale Agreement."[74] And, "[i]f the Open Issues

Summary had reflected the agreement of the parties, there would have been no need for the subsequent Letter Agreement."[75]

Acument is correct that "[n]owhere does the Purchase Agreement suggest that Textron's indemnification obligation shall be reduced if Acument does not have a right to a deduction…,"[76] and "[n]owhere does the [Purchase] Agreement suggest that the right to a deduction may be assumed."[77] Acument points to section 6.1(d)(iii) of the Purchase Agreement in support of its interpretation. That section states that each Loss "shall be reduced buy…any Tax Benefit…attributable to such Loss." Acument's interpretation of this provision as requiring an actual Tax Benefit, in other words, a right to a refund credit or tax reduction, to Acument

[74] Letter Agreement at ¶ 11. The parties agree that the Open Issues Summary, standing alone, is not a binding agreement between the parties. Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings Hearing Transcript at pg. 15 (Mar. 9, 2011).
[75] Def.'s Ans. Br. at pg. 9.
[76] *Id.* at pg. 4.
[77] *Id*. at pg. 4-5.

before Textron's indemnification can be reduced[78] is not unreasonable. Acument's contention that the Letter Agreement in no way modified the Purchase Agreement, but rather, merely clarified some of the provisions and resolved some pre-existing disputes, is also reasonable.[79] The reasonableness of Acument's interpretation is supported by the provision at the very end of paragraph 2 of the Letter Agreement which states that any offsets to Loss Payments must be "per the terms of the [Purchase] Agreement."[80] The fact that Acument made payment, or allowed Textron to withhold payment, that reduced Textron's indemnification for the three environmental losses in the United States is not inconsistent with its interpretation of the parties' agreements given its explanation.[81] And, at this stage, the Court does not find a waiver.[82] A contract is ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations.[83] Here, in addition to the provisions in controversy being reasonably and fairly susceptible to different interpretations, there is a material issue of fact as to whether the parties intended the Letter Agreement to amend or modify terms in the Purchase

[78] *See* Purchase Agreement, §§ 6.1(d)(iii) and definition of "Tax Benefit" at pg. 89.
[79] *See* Def.'s Ans. Br. at pg. 5-8.
[80] Letter Agreement; *See* Def.'s Ans. Br. at pg. 8.
[81] *See* Def.'s Ans. Br. at pg. 10-1.
[82] "Waiver is the voluntary and intentional relinquishment of a known right." Waiver "implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights." *See Aeroglobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 444 (Del. 2005).
[83] *Lorrilard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) (citing *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195-96 (Del. 1992)); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982).

Agreement, and whether the parties intended to incorporate by reference some or all of the provisions in the Open Issues Summary. Given this, this matter is not appropriate for judgment on the pleadings and, therefore, Textron's motion is **DENIED**.[84]

IT IS SO ORDERED.

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Jan R. Jurden, Judge

[84] The Covenant of Good Faith and Fair Dealing is not implicated here. The agreements at issue are not silent as to the issue in dispute. *See AQSR India Private, Ltd. v. Bereau Vertas Holdings, Inc*., 2009 WL 1707910, at *n.40 (Del. Ch. June 16, 2009) (citing *In re IAC/InterActive Corp*., 948 A.2d 471, 506 (Del. Ch. 2008)). "[I]mplied covenant analysis will only be applied when the contract is truly silent with respect to the matter at hand, and only when the Court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them."(citation omitted).