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Case No. 2019-0878-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EVAN M. STONE, as Sellers' Representative, on behalf of himself and Rick W. Skogg,	)	
Plaintiff and Counterclaim-Defendant,	)	
v.	)	C.A. No. 2019-0878-KSJM
NATIONSTAR MORTGAGE LLC,	)	
Defendant and Counterclaim-Plaintiff.	)	

MEMORANDUM OPINION

Date Submitted: April 7, 2020
Date Decided: July 6, 2020

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McCORMICK, V.C.

The owners of a mortgage services company sold their interests to the defendant pursuant to a unit purchase agreement. The agreement required an initial closing payment to be calculated using contractually-specified accounting methodologies. In the event of disagreement concerning the calculations, the parties agreed to submit their dispute to an independent accounting firm for resolution. Disputes over the initial closing payment arose. The defendant refused to submit them to the accounting firm on the belief that the firm harbors a conflict of interest. The plaintiff filed this litigation on behalf of the sellers to enforce the dispute resolution provisions. The defendant responded with counterclaims alleging that the sellers misapplied the accounting methodologies governing the initial closing payment and seeking to disqualify the accounting firm.

This decision resolves the parties' cross-motions for judgment on the pleadings, holding that the accounting methodology disputes are delegated to the contractually-specified alternative dispute resolution process. The plaintiff is therefore entitled to judgment on the pleadings on the claim to enforce that process and on the counterclaims for breach of the accounting methodology provisions. This decision declines to enter judgment on the pleadings as a matter of law regarding the defendant's counterclaims to disqualify the accounting firm because the contractual provisions governing that issue are ambiguous.

I. FACTUAL BACKGROUND

The background is drawn from facts not disputed by the parties and the documents referenced in the parties' pleadings.[1]

A. The Purchase Agreement

Pacific Union Financial, LLC (the "Company") provides mortgage services. Under a Unit Purchase Agreement dated November 5, 2018 (the "Purchase Agreement"),[2] Defendant Nationstar Mortgage LLC ("Nationstar") purchased all of the equity interests in the Company from Rick W. Skogg and Evan M. Stone (together, the "Sellers").[3] The Purchase Agreement, which is governed by Delaware law,[4] includes two sets of provisions relevant to this decision: the "Closing Payment Provisions" and the "Dispute Resolution Provisions."

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[1] This decision cites to the Verified Complaint, the Answer, the Verified Counterclaims, the Reply to Verified Counterclaims, and the exhibits thereto. C.A. No. 2019-0878-KSJM, Docket ("Dkt.") 1, Verified Compl. ("Compl."); Dkt. 7, Def. Nationstar Mortgage LLC's Answer to Pl.'s Verified Compl., Affirmative Defenses and Verified Countercls. at 1–52 ("Answer"); *id.* at 53–79 ("Countercl."); Dkt. 12, Reply to Verified Countercls. ("Countercl. Answer").

[2] Compl. Ex. 1.

[3] Compl. ¶ 13; Answer ¶ 13.

[4] Purchase Agreement § 10.10.

1. The Closing Payment Provisions

The consideration payable by Nationstar under the Purchase Agreement comprised an initial "Closing Payment Amount" and potential post-closing earn-out payments. Only the Closing Payment Amount is disputed in this litigation.

The Purchase Agreement required that the Closing Payment Amount be calculated pursuant to a formula that depended on the value of the "Closing Date Members' Equity."[5] The Closing Date Members' Equity is defined as "the members' equity of the Company as of immediately prior to the Closing determined in accordance with the accounting practices, policies[,] and methodologies" set forth in an exhibit to the Purchase Agreement.[6] That exhibit, titled "Accounting Principles," sets forth "transaction accounting principles" to be used in valuing assets relevant to the Closing Date Members' Equity, including the Company's mortgage servicing rights.[7]

The Purchase Agreement further required that the Company prepare and deliver, five days before the closing date, a "Closing Statement" setting forth the Company's "good faith" estimate of the Closing Payment Amount and its supporting calculations, including the Closing Date Members' Equity (the "Estimated Closing

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[5] *Id.* § 1.1.

[6] *Id.*

[7] *Id.* Ex. A.

Payment Amount").[8] At closing, the Purchase Agreement required that Nationstar pay the Estimated Closing Payment Amount set forth in the Closing Statement.[9]

The Purchase Agreement required that Nationstar prepare and deliver, within sixty days after the closing date, an "Adjustment Statement" setting forth the Company's balance sheet "as of immediately prior to the Closing," Nationstar's own calculations of the Closing Payment Amount, and its supporting calculations, including the calculation of the Closing Date Members' Equity.[10]

2. The Dispute Resolution Provisions

The Purchase Agreement establishes a dispute resolution process in the event the Sellers "disagree[] with any item set forth in the Adjustment Statement."[11] Upon such disagreement, and within thirty days of the Adjustment Statement's delivery, the Sellers must serve a "Notice of Adjustment Disagreement."[12] The Notice of Adjustment Disagreement must set forth "in reasonable detail, on a line item by item basis," the "Disputed Items," alternative amounts for each Disputed Item, and

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[8] Purchase Agreement § 2.3(a). Section 2.3(a) also requires that the Company deliver a "good faith" estimate of what the Purchase Agreement defines as the "Members' Equity Adjustment Amount." *Id.*

[9] *Id.* § 2.2(c).

[10] *Id.* § 2.3(b).

[11] *Id.* § 2.3(c).

[12] *Id.*

proposed calculations for the Closing Payment Amount and its supporting calculations, including the Closing Date Members' Equity, based on the Disputed Items.[13]

In the thirty days following delivery of the Notice of Adjustment Disagreement, Section 2.3(d) of the Purchase Agreement requires that the parties "seek in good faith to resolve any disagreement that they may have with respect to the matters specified in the Notice of Adjustment Disagreement."[14] In the event the parties are unable to come to an agreement during those thirty days, Section 2.3(d) requires that unresolved disputes be submitted to a third-party for resolution:

> The Disputed Items that the Sellers' Representative and [Nationstar] have not resolved by written agreement within such 30 day period shall be referred to and resolved by Richey May & Co. LLP (the "Independent Accountant"); provided that in the event that Richey May & Co. LLP refuses or is otherwise unable to act as the Independent Accountant, the Sellers' Representative and [Nationstar] shall cooperate in good faith to appoint an independent registered public accounting firm in the United States of national recognition mutually agreeable to the Sellers' Representative and [Nationstar] that has not been engaged by, or otherwise performed any services for, any Party or its Affiliates within the past three years . . . , in which event "Independent Accountant" shall mean such firm.[15]

[13] *Id.*

[14] *Id.* § 2.3(d).

[15] *Id.*

Section 2.3(d) describes the proceedings to take place before the Independent Accountant. The parties initiate those proceedings by submitting to the Independent Accountant a statement "setting forth the Disputed Items that have not been resolved" in an "Independent Accountant Dispute Notice."[16] Thereafter, the Independent Accountant is to make a "final written determination" as to the "Final Closing Payment Amount," which shall "be binding on the Sellers' Representative, each Seller and Buyer, as if a final, non-appealable arbitral decision or award, of the appropriate amount of each Disputed Item as to which there is disagreement as specified in the Independent Accountant Dispute Notice."[17] The Independent Accountant's determination is to be "based on the relevant definitions and other applicable provisions" of the Purchase Agreement.[18]

B. The Closing

Five days before the February 1, 2019 closing date, the Company provided Nationstar with a written statement setting forth an Estimated Closing Payment Amount and its supporting calculations.[19] Hours before the closing, Nationstar took the position that the Company's calculation of the Closing Date Members' Equity

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Compl. ¶ 26; Answer ¶ 26; Countercl. ¶ 23; Countercl. Answer ¶ 23.

was deficient in that it was neither prepared in "good faith" nor "determined in accordance with the accounting practices, policies and methodologies specified" in the Accounting Principles.[20] In a letter to the Sellers, Nationstar stated that "the Company ha[d] not delivered a Closing Statement that m[et] the requirements of [the Purchase Agreement]."[21] Nationstar attached what it called a "revised Closing Statement" to the letter,[22] which included its own Estimated Closing Payment Amount.[23]

The Sellers agreed to close based on Nationstar's Estimated Closing Payment Amount.[24] The parties agreed that Nationstar would place a "hold back" amount in escrow.[25] On the closing date, Nationstar confirmed to the Sellers that it had placed the agreed-upon amount in a separate bank account maintained by Nationstar.[26]

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[20] Dkt. 24, Transmittal Aff. of Seth R. Tangman in Supp. of Pl.'s Opening Br. in Supp. of Pl.'s Mot. for J. on the Pleadings ("Tangman Aff.") Ex. B, at 2–3. The Court can consider this document for the purposes of this motion because the Complaint incorporates it by reference. *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. 2006) (explaining that on a Rule 12(c) motion, the Court "may consider the unambiguous terms of exhibits attached to the pleadings, including those incorporated by reference"); *see* Compl. ¶ 27; *see also* Answer ¶ 27; Countercl. ¶ 28; Countercl. Answer ¶ 28.

[21] Tangman Aff. Ex. B, at 4.

[22] *Id.*

[23] *Id.* at 5.

[24] Compl. ¶ 28; Answer ¶ 28.

[25] Compl. ¶ 29; Answer ¶ 29.

[26] Compl. ¶ 31; Answer ¶ 31. As of the date this action was filed, the parties had not yet finalized their escrow arrangement. Compl. ¶ 32; Answer ¶ 32.

C. The Post-Closing Events

Post-closing, the parties continued to dispute the Closing Payment Amount, thereby implicating the Dispute Resolution Provisions.

1. Nationstar Delivers an Adjustment Statement.

In April 2019, Nationstar delivered an Adjustment Statement to the Sellers. The Adjustment Statement set forth Nationstar's calculation of the Closing Payment Amount, as well as supporting calculations of the Closing Date Members' Equity and the Company's mortgage servicing rights. These calculations differed from those of the Company, and Nationstar expressly noted that on the closing date, Nationstar and the Sellers "acknowledged a methodology difference in the calculation of the valuation of mortgage servicing rights."[27] Nationstar asserted that the Closing Payment Amount should be lower than that suggested by the Sellers.

2. The Sellers Deliver a Notice of Adjustment Disagreement.

In May 2019, the Sellers delivered a Notice of Adjustment Disagreement to Nationstar disputing several particular line items set forth in Nationstar's Adjustment Statement.[28] The Sellers asserted that Nationstar:

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[27] Tangman Aff. Ex. C, at 2. The Court can consider this document for the purposes of this motion because the Complaint incorporates it by reference. *OSI Sys.*, 892 A.2d at 1090; *see* Compl. ¶ 33.

[28] Tangman Aff. Ex. D. The Court can consider this document for the purposes of this motion because the Complaint incorporates it by reference. *OSI Sys.*, 892 A.2d at 1090; *see* Compl. ¶ 39; *see also* Answer ¶ 39; Countercl. ¶ 32.

- Misstated the value of the Closing Date Members' Equity and related items by using the wrong closing date as an input;
- Misstated the value of the Company's mortgage servicing rights by using the wrong reference date and by generally using a "methodology . . . to prepare the Adjustment Statement [that] was different than the one required under the Purchase Agreement" and the Accounting Principles;[29] and
- Erroneously adjusted the Closing Date Members' Equity downward by excluding from that amount certain transaction expenses.

Based on these calculations, the Sellers determined that the Closing Payment Amount should be higher than that suggested by Nationstar in its Adjustment Statement.

3. The Parties Discuss the Engagement of the Independent Accountant.

Nationstar acknowledged the Sellers' Notice of Adjustment Disagreement in a letter dated May 31, 2019, and stated that the disagreements "are required to be resolved by the Independent Accountant."[30] Noting that more than thirty days had passed without written agreement between the parties, Nationstar notified the Sellers that it "expect[ed] send an Independent Accountant Dispute Notice to the Independent Accountant on or about July 1, 2019."[31] Nationstar further stated that

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[29] Tangman Aff. Ex. D, at 3; *see id.* at 3–4.

[30] Tangman Aff. Ex. E, at 1. The Court can consider this document for the purposes of this motion because the Complaint incorporates it by reference. *OSI Sys.*, 892 A.2d at 1090; *see* Compl. ¶ 43.

[31] Tangman Aff. Ex. E, at 2.

the Independent Accountant "w[ould] then be required to resolve the dispute in accordance with the terms of Section 2.3(d) of the [Purchase] Agreement."[32] Throughout August 2019, the Parties discussed and exchanged drafts of an engagement letter for the firm identified in the Purchase Agreement, Richey May & Co. LLP ("Richey May").[33] The parties also discussed the related engagement of a Delaware law firm as counsel for Richey May.

4. Nationstar Objects to Richey May Serving as the Independent Accountant, but Richey May Declines to Withdraw.

In October 2019, Nationstar wrote to the Seller stating that it had uncovered several facts regarding Richey May that were not disclosed during the negotiation of the Purchase Agreement. Nationstar learned that, in September 2018, Stone asked Richey May "to evaluate [his] tax liability arising from the sale of substantially all of his assets in a single transaction—*i.e.*, the sale of [the Company] to [Nationstar],"[34] and Richey May followed up with Stone in early 2019 asking for a meeting.[35] Based on this, Nationstar concluded that Richey May was "unable to act

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[32] *Id.*

[33] Compl. ¶ 45; Answer ¶ 45; Countercl. ¶ 34; Countercl. Answer ¶ 34.

[34] Countercl. Ex. 1, at 1. The Court can consider this document for the purposes of this motion because it is attached as an exhibit to the Counterclaims. *OSI Sys.*, 892 A.2d at 1090; *see* Countercl. ¶ 45; *see also* Compl. ¶ 53.

[35] Countercl. Ex. 1, at 1.

as the Independent Accountant" within the meaning of Section 2.3(d) and that Richey May "should decline to perform any services" under the Purchase Agreement.[36] Nationstar also took the position that Richey May was required to withdraw in accordance with the Code of Professional Conduct applicable to Certified Public Accountants.

In November 2019, Richey May indicated that it did not intend to withdraw as Independent Accountant and that it did not believe that the engagement posed a professional conflict of interest.

D. This Litigation

Plaintiff Stone, in his capacity as Sellers' Representative, filed the Verified Complaint (the "Complaint") on November 1, 2019, asserting four Counts against Nationstar. One is relevant to this decision. In Count III, Plaintiff seeks a declaration that "Richey May is the appropriate arbitrator for the parties' accounting dispute" and an order of specific performance directing Nationstar to proceed with arbitration before Richey May.[37]

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[36] *Id.* at 2.

[37] Compl. ¶¶ 73–80.

On November 27, 2019, Nationstar answered the Complaint and asserted seven Counterclaims.[38] Six are relevant to this decision.[39] In Counterclaims I, II, and III, Nationstar seeks an order of specific performance directing the Sellers to comply with the accounting methodologies set forth in the Purchase Agreement and submit revised calculations:

- Counterclaim I alleges that the Sellers "prepared and submitted to Nationstar an Estimated Closing Payment Amount in which Sellers refused to apply the objective formula specified in . . . the Accounting Principles for calculating the value" of the Company's mortgage servicing rights;

- Counterclaim II alleges that the Sellers used the wrong closing date in calculating the Closing Date Members' Equity; and

- Counterclaim III alleges that the Sellers improperly increased the Closing Date Members' Equity by purporting to include certain transaction costs in that amount that should have been excluded.

In Counterclaims IV and V, Nationstar seeks a declaration that Richey May is "unable" to serve as the Independent Accountant due to its "material conflict of interest," as well as an order of specific performance requiring the Sellers to cooperate in finding a replacement.[40]

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[38] In its pleadings, Nationstar styles its Counterclaims as "Counts." For clarity, this decision refers to those Counts as "Counterclaims."

[39] Counterclaim VII, through which Nationstar seeks attorneys' fees, is not currently before the Court. Countercl. ¶¶ 108–12.

[40] *Id*. ¶¶ 89–102.

In Counterclaim VI, Nationstar seeks a declaration that "this Court is the exclusive forum for adjudicating Nationstar's specific performance claims and all other claims requiring a construction of the Purchase Agreement."[41]

On December 17, 2019, Plaintiff filed his Reply to Verified Counterclaims. On January 24, 2020, Plaintiff moved for judgment on the pleadings on Count III and Counterclaims I, II, III, IV, V, and VI.[42] On February 20, 2020, Nationstar cross-moved for judgment on the pleadings on Count III and Counterclaims IV, V, and VI.[43] The parties fully briefed the cross-motions by April 1, 2020,[44] and the Court held oral argument on April 7, 2020.[45]

II. LEGAL ANALYSIS

The parties have moved for judgment on the pleadings pursuant to Court of Chancery Rule 12(c).[46] "A motion for judgment on the pleadings may be granted

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[41] *Id.* ¶¶ 103–07.

[42] Dkt. 22, Pl.'s Mot. for J. on the Pleadings.

[43] Dkt. 29, Nationstar Mortgage LLC's Cross-Mot. for J. on the Pleadings.

[44] Dkt. 23, Opening Br. in Supp. of Pl.'s Mot. for J. on the Pleadings; Dkt. 30, Def./Countercl. Pl.'s Opening Br. in Supp. of its Mot. for J. on the Pleadings and Answering Br. in Opp'n to Pl.'s Mot. for J. on the Pleadings ("Brief No. 2"); Dkt. 34, Pl.'s Reply Br. in Supp. of Pl.'s Mot. for J. on the Pleadings and Answering Br. in Opp'n to Def.'s Cross-Mot. for J. on the Pleadings; Dkt. 38, Def./Countercl. Pl.'s Reply Br. in Supp. of its Mot. for J. on the Pleadings ("Brief No. 4").

[45] Dkt. 50, Telephonic Oral Arg. on Cross-Mots. for J. on the Pleadings.

[46] Ct. Ch. R. 12(c).

only when no material issue of fact exists and the movant is entitled to judgment as a matter of law."[47] "[T]he proper interpretation of language in a contract, while analytically a question of fact, is treated as a question of law, and judgment on the pleadings is a proper framework for enforcing unambiguous contracts."[48] "When there are cross-motions for judgment on the pleadings, the court must accept as true all of the non-moving party's well-pleaded factual allegations and draw all reasonable inferences in favor of the non-moving party."[49] "The court may also consider the unambiguous terms of exhibits attached to the pleadings, including those incorporated by reference."[50]

The parties' cross-motions join issue on two main points. The first is whether this Court or the Independent Accountant has the authority to resolve the disputes set forth in Counterclaims I, II, and III.[51] The second is whether Richey May is subject to the independence criteria found in Section 2.3(d) of the Purchase Agreement and thus potentially unable to serve as Independent Accountant.[52]

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[47] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

[48] *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *10 (Del. Ch. Dec. 19, 2017).

[49] *OSI Sys.*, 892 A.2d at 1090.

[50] *Id.*

[51] This issue concerns Counterclaims I, II, III and VI.

[52] This issue concerns Count III of the Complaint and Counterclaims IV and V.

A. The Accounting Methodology Disputes Must Be Referred to the Independent Accountant for Resolution.

The parties dispute whether the Independent Accountant has the authority to resolve the accounting methodology disputes set forth in Counterclaims I, II, and III. Plaintiff argues that the issues raised by Counterclaims I, II, and III are "Disputed Items" expressly delegated to the Independent Accountant under the Section 2.3(d). Nationstar responds that the Independent Accountant's authority is limited by the plain text of Section 2.3(d) and case law and that the issues raised by Counterclaims I, II, and III are beyond the scope of that authority.

The analysis starts with Section 2.3(d) of the Purchase Agreement, which delegates to the Independent Accountant the authority to make a determination concerning "the appropriate amount of each Disputed Item as to which there is disagreement." [53] The defined term "Disputed Items" first appears in Section 2.3(c).[54] That section provides that if the Sellers "disagree[] with any item set forth in the Adjustment Statement,"[55] then they shall submit a "Notice of Adjustment Disagreement" that "shall set forth in reasonable detail, on a line item by line item basis, . . . the disputed items (the "Disputed Items") and the basis of any

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[53] Purchase Agreement § 2.3(d)

[54] *Id.*

[55] *Id.* § 2.3(c).

disagreement asserted."[56] Read together with the phrase that immediately precedes it, "Disputed Items" refers to "any item set forth in the Adjustment Statement" with which the Sellers disagree.[57] Thus, Section 2.3(d) confers upon the Independent Accountant the authority to determine the amount of any item set forth in the Adjustment Statement with which the Sellers disagree.

A comparison of the Counterclaims and the Notice of Adjustment Disagreement reveals that, under the definition of "Disputed Items," the accounting methodology disputes raised in Counterclaims I, II, and III are within the scope of authority delegated to the Independent Accountant.

In Counterclaim I, Nationstar alleges that the Sellers "prepared and submitted to Nationstar an Estimated Closing Payment Amount in which Sellers refused to apply the objective formula specified in . . . the Accounting Principles for calculating the value" of the Company's mortgage servicing rights.[58] In the Notice of Adjustment Disagreement, the Sellers take the position that Nationstar misstated in its Adjustment Statement the value of the Company's mortgage servicing rights as an input to the Closing Payment Amount by generally using a "methodology . . . to

[56] *Id.*

[57] *Id.*

[58] Countercl. ¶¶ 60–69.

prepare the Adjustment Statement [that] was different than the one required under the Purchase Agreement" and the Accounting Principles.[59]

In Counterclaim II, Nationstar alleges that the Sellers used the wrong closing date in calculating the Closing Date Members' Equity.[60] In their Notice of Adjustment Disagreement, the Sellers take the position that Nationstar misstated in its Adjustment Statement the value of the Closing Date Members' Equity and related items by using the wrong closing date as an input.[61]

In Counterclaim III, Nationstar alleges that the Sellers improperly increased the Closing Date Members' Equity by purporting to include in that amount certain transaction costs that should have been excluded.[62] In their Notice of Adjustment Disagreement, the Sellers take the position that Nationstar erroneously adjusted the Closing Date Members' Equity downward by excluding from that amount certain transaction expenses.[63]

Each of the relevant Counterclaims, therefore, mirrors disputes raised by the Sellers in the Notice of Adjustment Disagreement. It does not matter that the Counterclaims allege that the Sellers and not Nationstar committed the error. The

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[59] Tangman Aff. Ex. D, at 3; *see id.* at 3–4.

[60] Countercl. ¶¶ 70–77.

[61] Tangman Aff. Ex. D, at 2.

[62] Countercl. ¶¶ 79–88.

[63] Tangman Aff. Ex. D, at 4–5.

core disputes are the same. Because the Closing Payment Amount and the Closing Date Members' Equity were items set forth in the Adjustment Statement with which the Sellers disagreed, they are Disputed Items within the meaning of the Purchase Agreement.

Also, each of these disputes involves critical inputs to the core determination that the Independent Accountant must make—the "amount" of any Disputed Item.[64] The valuation of the Company's mortgage servicing rights, the closing date used to calculate the Closing Date Members' Equity, and the allocation of transaction costs or expenses are inputs that bear directly on the ultimate value of the Closing Date Members' Equity and the Closing Payment Amount. The inputs that Nationstar used in its Adjustment Statement resulted in a lower Closing Date Members' Equity amount and a lower Closing Payment Amount than those suggested by the Sellers.[65] And the inputs that the Sellers used in their Notice of Adjustment Disagreement resulted in a higher Closing Date Members' Equity amount and a higher Closing Payment Amount than those suggested by Nationstar.[66] In other words, the disputes described in the Counterclaims and the Notice of Adjustment Disagreement speak

[64] Purchase Agreement § 2.3(d)

[65] Tangman Aff. Ex. C, at 2.

[66] Tangman Aff. Ex. D, at 2.

directly to the "amount" of the Disputed Items—the Closing Date Members' Equity and the Closing Payment Amount.

In search of a more restrictive interpretation of the Independent Accountant's authority, Nationstar invokes a line of cases that emphasizes the distinction between an expert and an arbitrator.[67] Nationstar then argues that the Independent Accountant is an expert lacking the authority to decide questions of law or grant equitable relief. Specifically, Nationstar asserts that Counterclaims I, II, and III raise legal issues requiring the application of contract interpretation principles and that they are therefore beyond the scope of the Independent Accountant's expertise.

It is true that, under Delaware law, an expert's scope of authority 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."[68]

It is also true that the Independent Accountant is an expert and not an arbitrator, although the language of the Purchase Agreement does not expressly state

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[67] Brief No. 2 at 16–25 (citing *Chi. Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912 (Del. 2017); *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *6 (Del. Ch. Jan. 29, 2019); *Penton Bus. Media Hldgs., LLC v. Informa PLC*, 2018 WL 3343495 (Del. Ch. July 9, 2018); *AQSR India Private, Ltd. v. Bureau Veritas Hldgs., Inc.*, 2009 WL 1707910, at *7 (Del. Ch. June 16, 2009)).

[68] New York City Bar Committee on International Commercial Disputes, *Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems and Suggested Improvements* 4 (2013); *accord Ray Beyond*, 2019 WL 366614, at *6.

this. The Dispute Resolution Provisions do not bear the hallmarks of an arbitration provision; they do not include procedural rules mimicking the judicial process, broadly encompass all legal disputes, or speak to issues typically resolved by legal professionals.[69] Thus, it is safe to conclude that a contractually-designated accountant is intended to serve as an expert, not an arbitrator.

It is further true that, as drafted, Counterclaims I, II, and III appear to raise legal issues and seek equitable relief beyond the scope of the Independent Accountant's authority. Each Counterclaim is styled as a request for an order of specific performance for various provisions of the Purchase Agreement "directing Sellers to prepare and submit a corrected Notice of Adjustment Disagreement."[70] And each Counterclaim purports to raise an issue of contract interpretation.

Although all of the premises of Nationstar's argument are true, the result Nationstar seeks does not follow. At bottom, Nationstar's argument elevates form

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[69] *Compare* Purchase Agreement § 2.3(d), *with, e.g.*, *Ray Beyond*, 2019 WL 366614, at *7–8 (explaining that arbitration provisions "typically include procedural rules affording each party the opportunity to present its case" and "broadly encompass the entire legal and factual dispute between the parties" and that "[a]rbitration of legal issues arising in post-closing price disputes is typically conducted by legal professionals"), *and Agiliance, Inc. v. Resolver SOAR, LLC*, 2019 WL 343668, at *3 (Del. Ch. Jan. 25, 2019) (finding that a dispute resolution provision required arbitration before an independent accounting firm where the agreement was replete with references to arbitration, including that the independent accounting firm would "arbitrate the dispute and submit a written statement of its adjudication" and that "the determination of the Accounting Firm shall constitute an arbitral award").

[70] Countercl. ¶¶ 69, 78, 88.

over substance. In substance, Counterclaims I, II, and III raise issues necessary to determine the amount of any Disputed Items, an issue contractually delegated to the Independent Accountant for resolution. They all involve accounting methodology issues that fall squarely within an accounting firm's expertise.[71] That Nationstar and the Sellers disagreed concerning the application of contractually called-for accounting principles in the first instance does not strip the Independent Accountant of the authority to resolve their disputes. Nationstar's attempts to plead around this reality is unsuccessful. Delaware courts have rejected contractual parties' efforts to plead around the scope of a third-party decision-maker's authority by couching delegable disputes in questions of law.[72] So too does the Court here.

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[71] *See* A. Vincent Biemans & Gerald M. Hansen, *M&A Disputes: A Professional Guide to Accounting Arbitrations* 19 (2017) (explaining that the types of purchase price adjustment disputes typically delegated to accounting firms for resolution involve "proposed adjustments that are significant in dollar amount, involve real or perceived departures from the company's historical accounting practices, require significant judgment under [Generally Accepted Accounting Principles ("GAAP")], and/or involve real or perceived departures from provisions of the purchase agreement such as transaction-specific non-GAAP adjustments").

[72] *See, e.g.*, *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) ("In the case at bar, we do not believe there is any doubt of the parties' intention to agree to arbitrate all disputed matters in California. If we were to hold otherwise, arbitration clauses in existing LLC agreements could be rendered meaningless."); *id.* at 295–96 (rejecting the plaintiff's attempt to invoke the Court of Chancery's "special" jurisdiction over claims concerning the election or removal of an LLC manager despite an arbitration clause in the LLC agreement and stating: "By resorting to the alleged 'special' jurisdiction of the Court of Chancery, future plaintiffs could avoid their own arbitration agreements simply by couching their claims as derivative."); *United Eng'rs & Constructors, Inc. v. Babcock & Wilcox Co.*, 1993 WL 50309, at *3 (Del. Ch. Feb. 11, 1993) ("These assertions by [the plaintiff] are apparently merely an ill-conceived effort by it to be relieved of its agreed

Further, Nationstar's interpretation of the Purchase Agreement would render the dispute resolution mechanism in Section 2.3(d) meaningless. If a party to the Purchase Agreement were permitted to cry breach of contract and seek specific performance when confronted with the very category of disputes contractually delegated to the Independent Accountant, the Independent Accountant's role would be rendered illusory at best.[73] It would be as though Section 2.3(d) were read out of the Purchase Agreement entirely.[74]

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obligation to arbitrate. There is therefore no reason to delay the arbitration on this basis and to do so would make the agreement to arbitrate meaningless.").

[73] *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (explaining that the relevant contract must "be read as a whole, giving meaning to each term and avoiding an interpretation that would render any term 'mere surplusage'" (quoting *Estate of Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159–60 (Del. 2010))).

[74] Nationstar's argument that Section 10.8 of the Purchase Agreement controls is unpersuasive. Brief No. 2 at 25–26. Section 10.8, captioned "Specific Performance," provides that each party to the Purchase Agreement is "entitled to specific performance . . . to enforce specifically the terms and provisions hereof." Purchase Agreement § 10.8. Nationstar argues that Plaintiff's interpretation of the Purchase Agreement would render "the 'specific performance' guarantee . . . a nullity in closing price disputes, notwithstanding its unqualified language." Brief No. 2 at 26. But if the Court were to allow parties to seek resolution of Disputed Items in this Court directly pursuant to Section 10.8 of the Purchase Agreement, the dispute resolution mechanism in Section 2.3(d) would become a nullity. And the parties to the Purchase Agreement remain entitled to seek the remedy of specific performance in the event of disputes not delegated to the Independent Accountant for resolution. In any event, Nationstar's interpretation "contradicts the basic principle that specific language controls over general language in a contract." *TMIP Participants LLC v. DSW Gp. Hldgs. LLC*, 2016 WL 490257, at *12 (Del. Ch. Feb. 4, 2016); *see, e.g.*, *id.* (holding that a "clear and specific arbitration provision" delineating "a specific procedure to challenge and arbitrate certain calculations" trumped a general forum selection clause in the same contract). Because the general entitlement to specific performance set forth in Section 10.8 must yield to the "clear and specific" dispute

Because Counterclaims I, II and III speak to the amount of any Disputed Item, which are subject to resolution by the Independent Accountant, Plaintiff's motion for judgment on the pleadings is granted as to Counterclaims I, II, III, and VI. Nationstar's motion for judgment on the pleadings is denied as to Counterclaim VI.

B. The Issue of Whether Richey May Can Serve as the Independent Accountant Cannot Be Resolved as a Matter of Law.

The cross-motions seek resolution of the question of contractual interpretation concerning Section 2.3(d) of the Purchase Agreement. Section 2.3(d) sets forth certain independence criteria, requiring that an "Independent Accountant" selected by the parties "has not been engaged by, or otherwise performed any services for, any Party or its Affiliates within the past three years and is not in discussions to, or otherwise anticipated to be engaged to, perform any services for any Party or its Affiliates within the next 12 months."[75] Nationstar alleges that this independence criteria applies to Richey May and that because Richey May does not satisfy the criteria, disqualification is appropriate.

Plaintiff responds that the independence criteria does not apply to Richey May in view of the structure of Section 2.3(d), which provides more fully:

> The Disputed Items that the Sellers' Representative and Buyer have not resolved by written agreement within such 30-day period shall be referred to and resolved by Richey

resolution mechanism set forth in Section 2.3(d), Nationstar's argument fails.

[75] Purchase Agreement § 2.3(d).

> May & Co. LLP (the "Independent Accountant"); provided that in the event that Richey May & Co. LLP refuses or is otherwise unable to act as the Independent Accountant, the Sellers' Representative and Buyer shall cooperate in good faith to appoint an independent registered public accounting firm in the United States of national recognition mutually agreeable to the Sellers' Representative and Buyer that has not been engaged by, or otherwise performed any services for, any Party or its Affiliates within the past three years and is not in discussions to, or otherwise anticipated to be engaged to, perform any services for any Party or its Affiliates within the next 12 months, in which Event "Independent Accountant" shall mean such firm.[76]

Plaintiff interprets Section 2.3(d) as identifying Richey May as the Independent Accountant to whom the dispute "shall be referred" and as establishing independence criteria *only* "in the event that Richey May . . . refuses or is otherwise unavailable to act as Independent Accountant."[77]

Nationstar responds by pointing to the language "unable to act as Independent Accountant," arguing that the independence criteria should inform that determination.[78] Nationstar further responds that by repeating the term "Independent Accountant" in the last clause of Section 2.3(d), the provision redefines the term for the purpose of is prior usage earlier in the provision.

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[76] *Id.*

[77] *Id.*

[78] *Id.*

Each side's interpretation of Section 2.3(d) is reasonable. Because Section 2.3(d) is susceptible to differing reasonable interpretations on this point, the Court cannot resolve it on cross-motions for judgment on the pleadings and further development of the factual record is warranted.[79] For that reason, both cross-motions for judgment on the pleadings are denied as to Count III of the Complaint and Counterclaims IV and V.[80]

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for judgment on the pleadings is GRANTED as to Counterclaims I, II, III, and VI. Nationstar's motion for judgment on the pleadings is DENIED as to Counterclaim VI. Both parties' motions for judgment on the pleadings are DENIED as to Count III of the Complaint and Counterclaims IV and V.

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[79] *See Fiat N. Am. LLC v. UAQ Retiree Med. Benefits Tr.*, 2013 WL 3963684, at *19 (Del. Ch. July 30, 2013) (denying motion for judgment on the pleadings where contractual provision was "susceptible to at least two reasonable interpretations" and stating that "the parties should be allowed to develop evidence regarding the intended meaning of that term through discovery and expert witnesses, if appropriate").

[80] Nationstar argues that Richey May's ethical obligations bar it from serving as the Independent Accountant and that Nationstar has an independent right to a fair and impartial decision-maker. Brief No. 2 at 35–40; Brief No. 4 at 29–33. As to the former argument, the applicability of various ethical codes that form the basis for Nationstar's position was not adequately developed in briefing. And as to both arguments, further factual development concerning Richey May's relationship with the Sellers or the Company is needed, and judgment on the pleadings is foreclosed.