IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VINOD GOYAL,	)	
	)	
Plaintiff and Counterclaim-Defendant,	)	
	)	
v.	)	
	)	C.A. No. 2023-0018-SKR
COGNOSANTE, LLC,	)	
	)	
Defendant and Counterclaim-Plaintiff.	)	

Submitted: September 5, 2023
Decided: November 29, 2023

Upon Plaintiff's Motion for Partial Judgment on the Pleadings:

GRANTED IN PART, DENIED IN PART.

Upon Defendant's Motion for Summary Judgment:

GRANTED IN PART, DENIED IN PART.

MEMORANDUM OPINION AND ORDER

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RENNIE, J.

I. INTRODUCTION

Plaintiff brought this suit to recover earnout payments that he contends he is entitled to following the sale of his business to Defendant. Defendant denies Plaintiff's right to any earnout payment. Their disagreement focuses on whether twelve contracts the business entered following its sale meet certain criteria such that a portion of the revenue earned is owed to Plaintiff. Both parties put forth an array of arguments in support of their respective positions.

Plaintiff moved for partial judgment on the pleadings to obtain relief as to eight of the twelve contracts. Defendant countered by moving for summary judgment on the entire dispute. Despite these motions, the Court finds genuine disputes of material fact that preclude judgment at this stage. As detailed herein, much of the applicable language in the parties' purchase agreement is ambiguous and there are several factual issues that merit discovery.

Though ambiguities and factual issues preclude the bulk of the requested relief, some of the issues can be decided now. For one, Plaintiff requests a declaratory judgment as to the meaning of a particular provision contained in the parties' purchase agreement. Defendant only perfunctorily challenges Plaintiff's interpretation without offering a contrary reading. Convinced that Plaintiff's construction is correct, the Court grants the requested declaration. Also, Defendant asks for a declaration that certain payments it made to employees under the purchase

agreement should be set off from any award Plaintiff receives. Plaintiff does not contest that position. In light of Plaintiff's concession, the Court grants Defendant's request. Those narrow issues aside, there is still much to resolve before the more substantive decisions can be made.

So, for the reasons that follow, Plaintiff's Motion for Partial Judgment on the Pleadings is **GRANTED** as to Count III but **DENIED** in all other respects, and Defendant's Motion for Summary Judgment is **GRANTED** as to Counterclaim Count XIV but **DENIED** in all other respects.

II. BACKGROUND[1]

A. The Parties

Plaintiff Vinod Goyal is the founder and former president of Enterprise Information Services, LLC ("EIS").[2] EIS provides information technology ("IT") services to government agencies.[3] In May 2020, Goyal and an affiliated trust sold EIS, with Goyal acting as the "Sellers' Representative."[4] Following the sale, Goyal remained with EIS until his retirement in January 2022.[5]

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[1] The following facts are primarily derived from the allegations in Plaintiff's Complaint and Defendant's Answer and Counterclaim, as well as from documents incorporated into the pleadings by reference. *See* D.I. No. 1 ("Compl."); D.I. No. 10 ("Ans." and "Countercl.").

[2] Compl. ¶¶ 1, 21.

[3] *Id.* ¶ 1.

[4] *Id.* ¶¶ 3, 21.

[5] *Id.* ¶ 4.

Defendant Cognosante, LLC is a Delaware limited liability company headquartered in Virginia that similarly provides IT services to government agencies.[6] It purchased EIS from Goyal, and EIS became Cognosante's wholly owned subsidiary.[7]

B. The Sale of EIS

The sale of EIS culminated following discussions between EIS's investment banker and Cognosante.[8] Cognosante was interested in acquiring EIS "given EIS's status as a prime contractor under Alliant 2."[9] Alliant 2 is a contract vehicle set up by the federal government limited to a fixed group of vendors.[10] Those designated vendors have exclusive access to certain task orders, giving them a competitive advantage over vendors without such access.[11] By acquiring EIS, Cognosante sought "to expand its pool of opportunities to provide IT solutions to federal government agencies."[12]

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[6] Countercl. ¶¶ 3, 16.

[7] Compl. ¶ 3.

[8] *Id*. ¶ 2; Countercl. ¶ 7.

[9] Countercl. ¶ 7.

[10] Compl. ¶¶ 9-10.

[11] *Id*. ¶ 10.

[12] Countercl. ¶ 7.

As part of their negotiations, the parties ultimately agreed to a base purchase price of [redacted] and potential "Earnout Payments" up to [redacted].[13] Those Earnout Payments were designed to compensate Goyal for certain new contracts and business obtained by EIS between the May 15, 2020 Closing Date and December 31, 2021 (the "Earnout Period").[14] They form the core of this controversy.

The details of the Earnout Payments are furnished through several provisions of the parties' Equity Purchase Agreement (the "Purchase Agreement"). Principally, Section 2.7(a) of the Purchase Agreement states,

> Purchaser shall pay to the Seller an aggregate amount equal to the lesser of (i) [redacted] of the Total Contract Value "booked" (i.e., recognized or that would be recognized assuming payments under the applicable contracts were made) by the Company in the period starting on the Closing Date and ending on December 31, 2021 (the "Earnout Period") which originated from (x) new contracts or subcontracts, or (y) add-on work for new business for existing contracts and subcontracts (to the extent additional revenue is recognized or to be recognized as a result of such add-on work and provided such contract action was not already contemplated by such existing contract or subcontract), in each case which are entered into by the Company with a third party in the Earnout Period for the provision of the Company's services, directly or indirectly, to U.S. federal Governmental Bodies, provided that any protests against the additional work described in the foregoing clauses (x) and (y) which are finally and successfully resolved in the Company's favor by March 31, 2022 shall be included ("2020-21

[13] Compl. ¶ 5.

[14] Compl., Ex. 1 ("Purchase Agreement") § 2.7(a).

> Bookings") and (ii) [redacted] (the "Earnout Payments") as consideration for the Acquired Interests, subject to the procedures set forth in the remaining provisions of this Section 2.7.[15]

"Total Contract Value" is then defined in an annex to the Purchase Agreement to mean,

> funded and unfunded contracted scope to be performed directly by the Company or indirectly by the Company through a Company Joint Venture (excluding, for the avoidance of doubt, scope performed by other members of a Company Joint Venture and amount payable by the Company to other members of a Company Joint Venture as a management fee or other similar expense) as defined in the applicable Qualified Government Contract, including all options and option years.[16]

"Qualified Government Contract" is defined as,

> a Government Contract that either (i) based on Purchaser's reasonable forecasts prepared in good faith at the effective time of such Government Contract, is expected, together with all other Government Contracts entered into by the Company during the Earnout Period, to generate an average gross profit (calculated as (x) the amount, if any, by which revenue exceeds direct costs (which shall not include fringe, overhead, or general and administrative expenses as such items are reflected in the Financial Statements) divided by (y) revenue) which is equal to or greater than [redacted] or (ii) is a strategic opportunity for the Company that does not qualify as a Qualified Government Contract pursuant to the foregoing clause (i) and is approved in writing (email being sufficient) by Purchaser (and any such Qualified Government Contract shall be

[15] *Id.*

[16] Purchase Agreement, Annex I at 14.

> excluded from the aggregate gross profit calculation when evaluating other Government Contracts under the foregoing clause (i)); provided, however, that "Qualified Government Contract" shall not include any Government Contract for a healthcare information technology opportunity or any other opportunity consistent with Purchaser's qualifications and experience or that primarily relies upon the assets (including employees and Contracts) of the Purchaser.[17]

And "Government Contract," in turn, is defined as,

> any written Contract between a member of the Company Group, on the one hand, and (i) any Governmental Body, (ii) any prime contractor of a Governmental Body in its capacity as a prime contractor, or (iii) any subcontractor with respect to any contract of a type described in clauses (i) or (ii) above, on the other hand, but specifically excludes Lower-Tier Subcontracts and Teaming Agreements; provided that any task order, delivery order, purchase order or similar order under an indefinite-type Government Contract shall not constitute a separate Government Contract, but will be a part of the Government Contract under which it was issued.[18]

Together, those provisions define Goyal's earnout rights. The parties broadly dispute the contours of that composite definition. Still, the basic structure of the Earnout Payments can be surmised. Goyal was entitled to a portion of the revenue from Qualified Government Contracts, up to a maximum of [redacted]. A Qualified Government Contract—in rough terms—is a contract to which EIS is a party that

[17] *Id*. at 12.

[18] *Id*. at 7.

provides for new work, benefits EIS with specified profits or opportunities, and was distinct from Cognosante's pre-closing capabilities. Each component of that stripped-down description is contested by the parties.

The Purchase Agreement also provides a process for earnout-related dispute resolution.[19] In brief, the process consists of Cognosante providing to Goyal a description of its calculation of the Earnout Payment (the "Draft Booking Calculations").[20] Then, Goyal has thirty days to object to Cognosante's calculation.[21] As part of Goyal's review, he is entitled to the "records and work papers of the Company reasonably necessary" to evaluate Cognosante's determination.[22]

If any such objections are not resolved within thirty days, the parties agreed to "engage [an] Independent Accounting Expert to resolve all amounts and items subject to objection . . . remaining in dispute."[23] At that stage, the parties would put forth their respective calculations accompanied by written explanations, and the Independent Accounting Expert ("IAE") would pick the calculation with which it most agreed.[24] This process too is now the subject of dispute.

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[19] *See* Purchase Agreement §§ 2.7(b)-(c).

[20] *Id*. § 2.7(b).

[21] *Id*.

[22] *Id*.

[23] *Id*. § 2.7(c).

[24] *Id*.

C. The Earnout Dispute

According to Cognosante, instead of expanding post-acquisition, EIS began to shrink.[25] Cognosante calculated the final Earnout Payment to be $0.[26] Goyal, though, believes the payment should be the maximum, [redacted].[27] Their disagreement centers on twelve contracts Goyal contends are Qualified Government Contracts that Cognosante excluded from its calculation for various reasons.[28]

The twelve at-issue contracts, as labeled by the parties, are: (1) DoD GEOINT; (2) DHS JPMO; (3) USPTO PPOS; (4) DHS CWMD; (5) DOL NCC; (6) USPTO PPMS Bridge 2; (7) Navy; (8) BPA Surge; (9) USPS; (10) DHS TSA; (11) USPTO PPMS Mod 7; and (12) DHS CWMD Bridge.[29] Goyal, relying on Cognosante's figures, calculates the Total Contract Value of those contracts to be [redacted].[30] Since [redacted] of that sum exceeds [redacted], Goyal says he is entitled to the maximum Earnout Payment.[31]

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[25] Countercl. ¶¶ 1, 12.

[26] *Id*. ¶ 13.

[27] Compl. ¶ 77.

[28] *Id*. ¶ 76; Countercl. ¶ 14.

[29] Compl. ¶ 76; Countercl. ¶ 14.

[30] Compl. ¶ 77.

[31] *Id*.

Along with its April 29, 2022 Draft Bookings Calculations, Cognosante sent Goyal a letter explaining its reasons for excluding each contract.[32] Goyal, through his representatives, submitted an objection notice on May 27, 2022.[33] He contested each of Cognosante's proffered grounds for exclusion.[34] In supplemental notices sent on May 29 and September 19, 2022, Goyal identified USPTO PPMS Mod 7 and DHS CWMD Bridge as wrongfully excluded Qualified Government Contracts.[35]

Also of note, on May 10, 2022, Goyal had requested documents from Cognosante to aid his review.[36] Some, but not all, of those documents were provided.[37] The production of certain documents was delayed due to illness among Cognosante's management.[38] Other documents were deemed by Cognosante to not be "reasonably necessary" and thus were not turned over.[39]

D. Procedural History

Negotiations between the parties failed to resolve their dispute.[40] Contending that contractual interpretation beyond the IAE's purview is needed, Goyal filed his

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[32] Compl., Ex. 7 ("Draft Booking Calculations Letter").

[33] Compl., Ex. 8 ("Objection Notice").

[34] *Id*. at 2-12.

[35] Compl. ¶¶ 52-53, Ex. 9; Countercl. ¶ 71.

[36] *See* Objection Notice at 11.

[37] Compl. ¶¶ 73-74; Countercl. ¶ 70.

[38] Objection Notice at 12 n.5.

[39] Compl. ¶ 73; Countercl. ¶ 70.

[40] Compl. ¶ 78.

Complaint on January 9, 2023.[41] Cognosante responded with its Answer and Counterclaim on February 27, 2023.[42] On April 24, 2023, Goyal answered the Counterclaim and moved for partial judgment on the pleadings.[43] Cognosante, on June 15, 2023, submitted a response to Goyal's motion combined with its own Motion for Summary Judgment.[44] Following each parties' reply briefing,[45] oral argument was heard on September 5, 2023.

III. PARTIES' CONTENTIONS

A. Plaintiff

Goyal's motion seeks judgment on the pleadings as to eight of the twelve disputed contracts: DoD GEOINT, DHS JPMO, USPTO PPMS Bridge 2, BPA Surge, USPS, DHS TSA, USPTO PPOS, and DHS CWMD.[46] He avers that a favorable judgment on those contracts would entitle him to [redacted] in Earnout Payments.[47] The remaining four contracts are subject to material disputes of fact, according to Goyal.[48]

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[41] *See generally* Compl.

[42] *See generally* Ans.; Countercl.

[43] *See generally* D.I. No. 17 ("Ans. to Countercl."); D.I. No. 19 ("Pl.'s Mot.").

[44] *See generally* D.I. No. 27 ("Def.'s Mot.").

[45] *See generally* D.I. No. 30 ("Pl.s Reply"); D.I. No. 34 ("Def.'s Reply").

[46] Pl.'s Mot. at 4-10.

[47] *Id*. at 9.

[48] *Id*. at 10 n.4.

Goyal's first two arguments both relate to DoD GEOINT and DHS JPMO. He first says the [redacted] "average gross profit" threshold contained in the definition of Qualified Government Contract does not apply to individual contracts.[49] In Goyal's view, because all Government Contracts together had a forecasted average gross profit in excess of [redacted], DoD GEOINT and DHS JPMO can be qualified despite not hitting that number themselves.[50] Also with regard to those two contracts, Goyal says that obtaining them required Alliant 2—an EIS asset—so they are inherently inconsistent with Cognosante's pre-closing qualifications and hence should not be excluded from the definition of Qualified Government Contract.[51]

Goyal's next argument pertains to USPTO PPMS Bridge 2, BPA Surge, USPS, and DHS TSA.[52] These contracts were excluded, in part, because Cognosante claimed it could not prepare "reasonable forecasts" of their expected profit margins since they had indefinite terms.[53] With no forecasts prepared, these contracts lacked the requisite forecasted profitability. Goyal argues forecasting was required for all contracts, so failing to do so was a breach of the Purchase Agreement that cannot prevent Earnout Payments.[54]

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[49] *Id*. at 4-5.

[50] *Id*. at 5.

[51] *Id*. at 5-6.

[52] *Id*. at 6.

[53] Draft Booking Calculations Letter at 2-3; Countercl. ¶ 138.

[54] Pl.'s Mot. at 6-7.

Goyal's next arguments are interrelated—each deals with what "new" means for purposes of Section 2.7(a) of the Purchase Agreement. There are three categories of disputed agreements in this regard: "recompeted" contracts (USPTO PPOS and DHS CWMD), for which EIS was the incumbent vendor but had to submit a new bid to keep; "bridge" contracts (USPTO PPMS Bridge 2, Navy, and DHS CWMD Bridge), which operated as extensions to avoid lapses in service; and "add-on work" (BPA Surge, USPS, and USPTO PPMS Mod 7), which supplemented existing contracts.[55] For each set, Goyal claims they were temporally new and provided for new revenue and are thus "new" as meant in Section 2.7(a), notwithstanding their connections to prior contracts.[56]

Lastly, Goyal claims that the Court is not required to send the parties to an IAE after resolving the legal issues.[57] Instead, Goyal says, the Court itself can determine whether there has been a breach and provide remedies accordingly.[58] He adds that a material breach by Cognosante—such as not preparing required forecasts—would displace his contractual obligation to submit the matter to an IAE.[59]

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[55] *Id*. at 7-8.

[56] *Id*.

[57] *Id*. at 9.

[58] *Id*.

[59] *Id*.

B. Defendant

Cognosante's motion goes further than Goyal's and seeks resolution of the entire controversy.[60] As a preliminary position, Cognosante claims that only an IAE can determine the Earnout Payments owed and accuses Goyal of attempting to "end-run the earnout dispute resolution process he agreed to."[61] Cognosante also asserts that Goyal's declaratory judgments counts, which request interpretations of operative provisions in the Purchase Agreement, amount to requests for advisory opinions because they are not directly tied to disputed contracts.[62] By contrast, Cognosante's Counterclaim seeks twelve separate declaratory judgments independently sanctioning each contract's exclusion, among other relief.[63]

Aside from those procedural arguments, Cognosante takes aim at Goyal's substantive positions. It claims each individual contract, in addition to the aggregate of all Government Contracts, must have a forecasted "average gross profit" of at least [redacted] to be qualified.[64] Relatedly, it argues that the profitability of contracts with indefinite terms cannot be reasonably forecasted and so cannot satisfy the [redacted] threshold.[65] Cognosante further argues that using Alliant 2 to obtain a contract does

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[60] Def.'s Mot. at 4.

[61] *Id*. at 1.

[62] *Id*. at 2.

[63] Countercl. ¶¶ 151-222.

[64] Def.'s Mot. at 37-38.

[65] *Id*. at 50-52.

not mean the contract is inconsistent with Cognosante's qualifications because Alliant 2 is only an asset, not a qualification.[66] Next, Cognosante says the recompetes, bridges, and add-ons are not "new" because they merely continued existing work and extrinsic evidence demonstrates that they were not intended to be part of the Earnout Payment.[67]

Beyond confronting Goyal's motion, Cognosante seeks summary judgment that DoD GEOINT, DHS JPMO, DOL NCC, and DHS TSA were properly excluded as consistent with its own qualifications and experience.[68] Goyal claims that issue is subject to genuine disputes of fact.[69] Cognosante also insists that it is entitled to summary judgment as to whether it provided all the documents "reasonably necessary" for Goyal's review.[70] Moreover, it argues that the September 2022 objection to DHS CWMD Bridge was untimely, warranting summary judgment as to that contract.[71] Goyal retorts that there are factual disputes regarding the sufficiency of Cognosante's document production and says that the delayed objection to DHS CWMD Bridge is excused by Cognosante's belated production.[72]

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[66] *Id*. at 33-34.

[67] *Id*. at 53-63.

[68] *See* Countercl. ¶¶ 153, 159, 165, 207.

[69] Pl.'s Reply at 40-42.

[70] Def.'s Mot. at 64-66.

[71] *Id*. at 63-64.

[72] Pl.'s Reply at 45-48.

Finally, Cognosante argues that until an IAE determines the proper payment, Goyal has no damages and cannot state a claim for breach of contract.[73]

IV. STANDARD OF REVIEW

Rule 12(c) permits a party to move for judgment on the pleadings.[74] A court may grant such a motion where "the movant is entitled to judgment as a matter of law" and there are "no material issues of fact."[75] The Court views the well-pleaded facts and the inferences derived from those facts in the light most favorable to the non-movant.[76] Rule 12(c) motions are "a proper framework for enforcing unambiguous contracts," as those contracts are only susceptible to one reasonable meaning and thus avoid material disputes of fact.[77]

Similarly, summary judgment is warranted under Rule 56 "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits" show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[78] As with Rule 12(c)

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[73] Def.'s Mot. at 67-69.

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

[75] *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 475 (Del. Ch. 2022) (citing *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993)).

[76] *Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965 (Del. Ch. 1989).

[77] *Aizen*, 285 A.3d at 475 (quoting *NBC Universal v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29. 2005)).

[78] Ct. Ch. R. 56(c); *see also ITG Brands, LLC v. Reynolds Am., Inc.*, 2023 WL 6383240, at *5 (Del. Ch. Oct. 2, 2023).

motions, "[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."[79] "Where it seems prudent to make a more thorough inquiry into the facts, summary judgment is inappropriate."[80]

Absent ambiguity, "Delaware courts interpret contract terms according to their plain, ordinary meaning."[81] Such interpretation "should be that which would be understood by an objective, reasonable third party."[82] Courts construing an agreement "must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."[83] For unambiguous terms, "the writing itself is the sole source for gaining an understanding of intent."[84]

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[79] *ITG Brands*, 2023 WL 6383240, at *5 (quoting *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldgs. Co.*, 853 A.2d 124, 126 (Del. Ch. 2004)).

[80] *New Castle Cnty. v. Pike Creek Recreational Servs., LLC*, 82 A.3d 731, 744 (Del. Ch. 2013) (citing *Pathmark Stores, Inc. v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del.Ch.1995)).

[81] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (citing *City Investing Co. Liq. Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993)).

[82] *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) (quoting *Osborne ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

[83] *Alta Berkeley*, 41 A.3d at 386 (quoting *Elliot Assoc., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998)).

[84] *City Investing*, 624 A.2d at 1198 (citing *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992)).

But "[i]f the language of an agreement is ambiguous, then the court 'may consider extrinsic evidence to resolve the ambiguity.'"[85] "Contract language is not ambiguous merely because the parties dispute what it means. To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning."[86] In cases where ambiguity creates factual disputes and requires consideration of extrinsic evidence, "summary judgment is improper."[87]

V. ANALYSIS

A. Goyal's Counts for Declaratory Judgments are Justiciable

A threshold question is whether Goyal's three requests for declaratory judgment are justiciable. Specifically, Goyal asks the Court to adopt its interpretations as to: (1) the meaning of "new" in Section 2.7(a);[88] (2) the application of the [redacted] profitability requirement;[89] and (3) to whom EIS's pre-closing assets are attributable for purposes of calculating Earnout Payments.[90] According to

[85] *ArchKey Intermediate Hldgs. Inc. v. Mona*, 302 A.3d 975, 988 (Del. Ch. 2023) (quoting *Salamone*, 106 A.3d at 374).

[86] *Alta Berkeley*, 41 A.3d at 385 (citations omitted).

[87] *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012).

[88] Compl. ¶¶ 79-84.

[89] *Id*. ¶¶ 85-90.

[90] *Id*. ¶¶ 91-98.

Cognosante, those provisions may only be interpreted as applied to specific disputed contracts lest the interpretation be advisory.[91] Cognosante is mistaken.

"Parties to a contract can seek declaratory judgment to determine 'any question of construction or validity' and can seek a declaration of 'rights, status or other legal relations thereunder.'"[92] A request for declaratory judgment "allow[s] for the construction of a contract before or after a breach has occurred."[93] There are four prerequisites for a declaratory judgment request to be justiciable:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[94]

Those requirements are met here. Notably, Cognosante's Answer explicitly denied each of Goyal's proffered interpretations.[95] And it admitted that "an actual controversy exists" as to the correct interpretation of each relevant provision.[96]

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[91] Def.'s Mot. at 25-26.

[92] *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *6 (Del. Ch. Oct. 11, 2006) (quoting 10 *Del. C.* § 6502).

[93] *Id*. (citing 10 *Del. C.* § 6503).

[94] *Id*. (quoting *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973)).

[95] Ans. ¶¶ 83, 89, 97.

[96] *Id*. ¶¶ 82, 88, 95.

Cognosante does not argue that Goyal's request is unripe; nor could it, considering its Counterclaim essentially seeks resolution of the same issues.[97]

Simply put, there is nothing hypothetical about the questions Goyal wants answered. They are discrete, disputed issues of contract construction that bear directly on the parties' respective rights and obligations. It follows that this Court is empowered to resolve them.

B. EIS's Pre-Closing Assets are Not Attributable to Cognosante for Purposes of the Earnout Determination

Goyal asks the Court to declare that "assets (including employees and Contracts) of EIS prior to the Closing Date are attributable to EIS and not to Cognosante for purposes of determining the 'Earnout Payments.'"[98] Goyal alleges that Cognosante used Alliant 2—an EIS asset pre-closing—to win DoD GEOINT and DHS JPMO and then claimed those contracts "were bid upon and won primarily in reliance on Cognosante's assets."[99] That matters because contracts "that primarily rel[y]" on Cognosante's assets are excluded from the definition of Qualified Government Contract and did not need to be bid through EIS.[100]

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[97] *See, e.g.*, Countercl. ¶¶ 159, 171.

[98] Compl. ¶ 97.

[99] *Id.* ¶ 96.

[100] Purchase Agreement § 2.7(f)(vii), Annex I at 12.

Cognosante averred in the pertinent part of its Answer, "Cognosante admits that an actual controversy exists between Goyal and Cognosant regarding the interpretation of Section 2.7(f)(vii). Cognosante denies that Goyal's interpretation of that provision is correct."[101] But it never offered a contrary interpretation. Instead, it responded that "Cognosante has not claimed that Alliant 2 is its asset for purposes of calculating the Earnout Payments."[102] Indeed, contrary to its pleading, Cognosante's briefing states, "Cognosante is not arguing that EIS's . . . assets are Cognosante's for purposes of the earnout calculation."[103]

Putting aside whether Cognosante's lack of argument constitutes a concession, it is clear there is only one reasonable interpretation of who EIS's pre-closing assets are attributable to for purposes of calculating Earnout Payments. They are attributable to EIS. Were it otherwise, the exception for contracts that "primarily rel[y] upon the assets . . . of [Cognosante]"[104] could cutoff most, if not all, of Goyal's earnout rights. Since that interpretation is unambiguous,[105] there are no factual

[101] Ans. ¶ 95.

[102] Def.'s Mot. at 24-25.

[103] *Id*. at 34 n.23.

[104] Purchase Agreement, Annex I at 12.

[105] *See Aizen*, 285 A.3d at 475-76 ("To be ambiguous, a disputed term must be fairly or reasonably susceptible to more than one meaning." (quoting *Alta Berkeley*, 41 A.3d at 385)).

disputes to resolve on this point.[106] Accordingly, Count III of Goyal's Complaint is granted.

However, Cognosante is correct that this alone does not resolve the larger question of whether these contracts were definitionally excluded from being Qualified Government Contracts.[107] Instead, there is still the issue of whether the contracts at issue were "consistent with [Cognosante]'s qualifications and experience," which is an alternative basis for exclusion.[108] Unlike the interpretation proposed in Count III, that question is not ready for resolution.

C. The Extent to which Contracts are Consistent with Cognosante's Qualifications and Experience is Subject to Genuine Disputes of Material Fact

i. Whether Alliant 2 is a "Qualification" is Ambiguous

If Alliant 2 is considered a qualification as well as an asset, DoD GEOINT and DHS JPMO would not be consistent with Cognosante's "qualifications and experience" and could not be excluded on that basis.[109] But each party offers a reasonable interpretation of the definition of "qualification," so the term is

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[106] *Id*. at 475.

[107] Def.'s Mot. at 25-26.

[108] Purchase Agreement § 2.7(f)(vii), Annex I at 12.

[109] Purchase Agreement, Annex I at 12. Notably, DoD GEOINT and DHS JPMO's status as Qualified Government Contracts would still be dependent on the application of the profitability threshold.

ambiguous. As a result, factual disputes remain and neither parties' motion can be granted on this issue.[110]

The competing definitions are straightforward. As Goyal would have it, "qualification" means a prerequisite an entity must possess in order to do a particular thing—such as the access to task orders provided by Alliant 2.[111] Cognosante treats "qualifications" as the skills necessary to complete a task and says contracts, like Alliant 2, are solely "assets" under the Purchase Agreement.[112] Each party's definition finds support in the dictionary.[113] One definition of "qualification" is "a condition or standard that must be complied with (as for the attainment of a privilege)."[114] An alternative definition is "a quality or skill that fits a person (as for an office)."[115]

Winning the contracts at issue here shares characteristics with attaining a privilege and assuming an office. So, either of those two definitions could fit. With two reasonable interpretations, the term is ambiguous. Extrinsic evidence such as

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[110] *See GMG Cap. Invs.*, 36 A.3d at 783-84.

[111] *See* Pl.'s Mot. at 35-38.

[112] *See* Def.'s Mot. at 34-36.

[113] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").

[114] *Qualification*, Merriam-Webster, https://www.merriam-webster.com/dictionary/qualification (last visited Nov. 29, 2023).

[115] *Id*.

"overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry" will therefore be needed to settle this question.[116] That precludes summary judgment.[117]

ii. Even the Contracts Not Dependent on Alliant 2 Require Further Factual Development

Aside from the Alliant 2 issue, there are other genuine disputes about whether the contracts that Cognosante excluded as "consistent with [its] qualifications and experience" truly were so. The first is a question of the parties' intent in drafting the relevant exclusion. The second is the more directly factual question of how closely Cognosante's qualifications and experiences matched the needs of the relevant contracts. Both questions preclude judgment at this stage.

The pertinent language reads: "'Qualified Government Contract' shall not include any Government Contract for a healthcare information technology opportunity or any other opportunity consistent with [Cognosante]'s qualifications and experience or that primary relies upon the assets (including employees and Contracts) of [Cognosante]."[118] The parties dispute the scope of "consistent with [Cognosante]'s qualifications and experience."

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[116] *ArchKey*, 302 A.3d at 988 (alteration in original) (quoting *Salamone*, 106 A.3d at 374).

[117] *GMG Cap. Invs.*, 36 A.3d at 783-84.

[118] Purchase Agreement, Annex I at 12. Section 2.7(f)(vii) of the Purchase Agreement has an identical carve-out for the contracts that had to be bid through EIS, which is relevant to DOL NCC as that contract was bid through Cognosante itself.

Cognosante construes it to broadly cover general IT applications, explaining "IT support is a cornerstone of the suite of services Cognosante provides to its customers."[119] Goyal contends that the exclusion cannot apply to IT experience in a general sense because IT is the core of EIS's business, so "[t]o credit Cognosante's argument would be to render the earnout provisions a nullity."[120] Goyal says the experience contemplated by this provision must relate to specific fields within IT that Cognosante had worked in previously.[121]

Their disagreement is sufficient to create ambiguity. On the one hand, the language itself is fairly broad, so Cognosante's broad interpretation seems reasonable. On the other, Goyal's point that such an interpretation could defeat the purpose of the earnout provisions is well taken.[122] Cognosante is correct that the disputed language cannot relate solely to healthcare opportunities.[123] That would

[119] Def.'s Mot. at 47.

[120] Pl.'s Reply at 18.

[121] *Id*. at 41-42.

[122] *See ArchKey*, 302 A.3d at 988 ("[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." (alteration in original) (quoting *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985))).

[123] Def.'s Reply at 11.

render the broader language meaningless.[124] But Cognosante does not claim its IT experience is so limited.

According to Cognosante, its "expertise in IT is comprehensive," and it "has experience in, *among other things*, Medicaid, Medicare, military, and Veterans health, the health insurance marketplace, data standards and analytics, and modular system development and integration."[125] Perhaps, within that "comprehensive" expertise are specific, non-healthcare IT experiences that this provision was meant to reference. At the least, "it seems prudent to make a more thorough inquiry into the facts," making summary judgment "inappropriate."[126]

Relatedly, Cognosante's pre-discovery averments about how its qualifications line up with the requirements of the pertinent contracts do not render the issue undisputed. Cognosante points to successful bids that referenced its own experience and that required "labor categories" Cognosante could fulfill.[127] But Goyal suggests that overlap is insufficient because of the unique needs associated with the military

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[124] *FMLS Hldg. Co. v. Integris BioServices, LLC*, 2023 WL 7297238, at *6 (Del. Ch. Oct. 30, 2023) (The Court "will not construe a contract in a way that renders a provision meaningless or illusory").

[125] Countercl. ¶ 3; Ans. ¶ 23 (emphasis added).

[126] *Pike Creek*, 82 A.3d at 744 (citing *Pathmark Stores*, 663 A.2d at 1191).

[127] Def.'s Mot. at 33, 43, 47-48.

and national security contracts at issue here.[128] This dispute too would benefit from fact finding incompatible with summary judgment.

D. The Meaning of the [redacted] Average Gross Profit Threshold is Ambiguous

Another issue pertaining to DoD GEOINT and DHS JPMO is how the [redacted] profitability threshold in the definition of Qualified Government Contract is applied. Those two contracts had forecasted profit margins just below [redacted].[129] Cognosante does not dispute that the average profitability of all forecasted Government Contracts, including DoD GEOINT and DHS JPMO, exceeded [redacted] but says each contract must hit that mark individually.[130] Goyal claims it is enough that the collective average exceeds [redacted].[131] This dispute reveals another ambiguity.

A Government Contract may be "Qualified" if:

> based on [Cognosante]'s reasonable forecasts prepared in good faith at the effective time of such Government Contract, [it] is expected, together with all other Government Contracts entered into by [EIS] during the Earnout Period, to generate an average gross profit (calculated as (x) the amount, if any, by which revenue exceeds direct costs (which shall not include fringe, overhead, or general and administrative expenses as such items are reflected in the Financial Statements) divided by (y) revenue) which is equal to or greater than [redacted].[132]

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[128] Pl.'s Reply at 42-43.

[129] Compl. ¶ 47.

[130] Def.'s Mot. at 38.

[131] Pl.'s Mot. at 29.

[132] Purchase Agreement, Annex I at 12.

The two phrases at the heart of this disagreement are "average gross profit" and "together with all other Government Contracts."

Under Cognosante's interpretation, this provision creates two requirements. First, that the individual contract has an expected "average gross profit" of at least [redacted].[133] And second, that the average of all contracts together hit that threshold.[134] But, as Goyal stresses, the phrase "average gross profit" is inconsistent with measuring an individual contract's gross profit. The term "average" contemplates a set of data, not a single item. Cognosante argues that the plain meaning of "average" is supplanted by the adjacent parenthetical formula.[135] But it is not clear that formula extends to the term "average" instead of merely explaining how "gross profit" is calculated before it is averaged.

Goyal offers a competing, but likewise flawed, interpretation. He says the contracts' profit margins are averaged together and, so long as the average remains above [redacted], they are all qualified.[136] But, to avoid an all-or-none determination that would conflict with an alternative avenue for qualification,[137] Goyal adds a second

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[133] Def.'s Mot. at 37-38.

[134] *Id*. at 38.

[135] *Id*. at 39 n.30

[136] Pl.'s Mot. at 29.

[137] That alternate path applies to a Government Contract that provides "a strategic opportunity for [EIS] that does not qualify as a Qualified Government Contract pursuant to the foregoing clause (i) and is approved in writing (email being sufficient) by [Cognosante] (and any such Qualified Government Contract shall be excluded from the aggregate gross profit calculation when

step. He says, if the average falls below [redacted], the contract that caused the drop becomes disqualified and is removed from the calculation.[138] There are, however, at least two problems with that interpretation.

Most notably, it ignores the phrase "*all* other Government Contracts entered into by [EIS] during the Earnout Period."[139] Under Goyal's construction, the relevant average could consist of only *some* of the Government Contracts entered during the Earnout Period. Second, it operates under the assumption that there will be identifiable contracts that individually cause the average to fall below the threshold. But it is entirely possible that, for example, two contracts could cause the average to fall below [redacted] in conjunction while either would maintain the requisite average without the other. In that circumstance, there would be no defined method to pick which of the two gets excluded. In short, Goyal's proffered interpretation only works because of the specific numbers that came to fruition.

Faced with this enigmatic provision, "neither side has convincingly suggested a reasonable interpretation."[140] Both posited readings are in tension with the text. Provisions with less than one facially reasonable interpretation are treated like those

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evaluating other Government Contracts under the foregoing clause (i))." Purchase Agreement, Annex I at 12.

[138] Pl.'s Mot. at 29.

[139] Purchase Agreement, Annex I at 12 (emphasis added).

[140] *Himawan v. Cephalon, Inc.*, 2018 WL 6822708, at *7 (Del. Ch. Dec. 28, 2018).

with more than one reasonable interpretation.[141] Accordingly, extrinsic evidence is needed to determine how the profitability threshold should apply, so judgment at this stage would be premature.[142]

E. Cognosante was Required to Prepare Reasonable Forecasts for All Government Contracts

One thing is clear with regard to the profitability threshold: It cannot be avoided by simply not forecasting profits at all. The Purchase Agreement tasked Cognosante with generating "reasonable forecasts prepared in good faith."[143] Now, Cognosante argues that language categorically excluded "indefinite" contracts—*i.e.*, those with no fixed scope of work—from earnout calculations because the profitability of those contracts cannot be reasonably forecasted.[144] The Court disagrees.

As mentioned, this Court interprets contracts as they "would be understood by an objective, reasonable third party."[145] Here, the plain meaning of the disputed language defines the quality of forecasts to be prepared. It does not create a condition for when Cognosante's obligation to prepare a forecast arises. It is worth

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[141] *Id.*; *see also U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *15 (Del. Ch. June 6, 1996).

[142] *GMG Cap. Invs.*, 36 A.3d at 783-84.

[143] Purchase Agreement, Annex I at 12.

[144] Def.'s Mot at 52-53.

[145] *Salamone*, 106 A.3d at 367-68 (quoting *Osborne*, 991 A.2d at 1159).

noting that the definition of "Government Contract" expressly contemplates "indefinite-type Government Contract[s]."[146] Had the parties truly intended that such contracts could never be "Qualified," there are several ways they could have said so. Placing the word "reasonable" before "forecasts" is not one of them.

Moreover, Cognosante's suggestion that it is inherently unreasonable to forecast the profitability of indefinite contracts is unpersuasive. A forecast, by its nature, presupposes limited information. So, the forecaster must use the available information, including past experience, to fill in gaps. It might not be possible to do so perfectly, but it can be done reasonably, and that was all the Purchase Agreement required.

Nevertheless, this conclusion does not yet entitle Goyal to relief. The four contracts for which profitability was not forecasted—USPTO PPMS Bridge 2, BPA Surge, USPS, and DHS TSA—are arguably subject to exclusion on other grounds.[147] As explained elsewhere herein, the validity of those other grounds remains to be determined. Thus, the damages resulting from Cognosante's failure to forecast are still in doubt. The Court must await greater clarity before fixing any remedy.

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[146] Purchase Agreement, Annex I at 7.

[147] Compl., Ex. 7 at 2-3. Specifically, those other grounds pertain to the contracts' consistency with Cognosante's qualifications and experience and the meaning of "new" in Section 2.7(a) of the Purchase Agreement. *Id*.

F. The Meaning of "New" as used in Section 2.7(a) of the Purchase Agreement is Ambiguous

A question that pertains to eight of the twelve disputed contracts[148] is how "new" should be interpretated in the context of Section 2.7(a). At base, the parties' disagreement centers on whether contracts signed post-closing need to be substantively distinct from pre-closing contracts in order to be "new."[149] Yet again, the Court finds ambiguity.

The relevant language of Section 2.7(a) limits Earnout Payments to a portion of the revenue

> which originated from (x) new contracts or subcontracts, or (y) add-on work for new business for existing contracts and subcontracts (to the extent additional revenue is recognized or to be recognized as a result of such add-on work and provided such contract action was not already contemplated by such existing contract or subcontract).[150]

The parties dispute "new" both as it pertains to "new contracts or subcontracts" and "new business."

This provision is subject to two reasonable interpretations. Goyal says that any agreement executed post-closing that provides for additional revenue is "new."

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[148] USPTO PPOS, DHS CWMD, USPTO PPMS Bridge 2, Navy, DHS CWMD Bridge, BPA Surge, USPS, and USPTO PPMS Mod 7.

[149] *See* Pl.'s Mot. at 46; Def.'s Mot. at 55.

[150] Purchase Agreement § 2.7(a).

He claims that this is the only reasonable interpretation.[151] Cognosante recognizes that Goyal's reading is "arguably plausible" but says there is another reasonable interpretation.[152] Specifically, it argues "new" as used here "require[s] an expansion of EIS's business through new scope of work or new customers, expanding upon and not just maintaining EIS's revenue."[153] This disagreement arose because several of the disputed contracts essentially operated to have EIS continue performing work it had been doing pre-closing.

The Court finds merit in both parties' constructions. Goyal's aligns with perhaps the most literal reading of the word "new."[154] Cognosante's, though, is also reasonable in that "new" can imply a measure of substantive difference from that which came before.[155] Put differently, "new" can mean either temporally new or qualitatively new. Which definition was intended by the parties is not clear from the text of the Purchase Agreement alone. That lack of facial clarity calls for extrinsic evidence.[156]

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[151] Pl.'s Mot. at 45, 46, 50.

[152] Def.'s Mot. at 55.

[153] *Id*.

[154] *New*, Merriam-Webster, https://www.merriam-webster.com/dictionary/new (last visited Nov. 29, 2023) (providing as one definition, "having recently come into existence").

[155] *Id*. (providing as other definitions, "different from one of the same category that has existed previously" and "of dissimilar origin and usually of superior quality").

[156] *Salamone*, 106 A.3d at 374.

Cognosante submits that extrinsic evidence proves the parties intended the qualitative definition.[157] It points to documents from the parties' negotiations that treat "new business" as opportunities distinct from EIS's pre-closing commitments and listed expected extensions as "existing" business.[158] It also refers to affidavits that suggest the industry custom is to use "new" in this context to describe opportunities that grow the business, as opposed to continuations of existing engagements.[159]

That is certainly the sort of evidence relevant to this determination.[160] But Goyal, through his own affidavit, attests the Earnout Payments were designed, in part, to reward retention of current customers and that the parties did not discuss or require expanding the scope of EIS's business.[161] At this stage in the litigation, "the court will not weigh evidence."[162] Instead, the Court finds it prudent to permit more fulsome discovery before resolving this factual dispute. So, the motions must be denied as to this issue.[163]

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[157] Def.'s Mot. at 59-63.

[158] *Id*. at 60-62.

[159] *Id*. at 62-63.

[160] *See Salamone*, 106 A.3d at 374.

[161] D.I. No. 30 ("Goyal Aff.") ¶ 6.

[162] *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *5 (Del. Ch. Sept. 20, 2021).

[163] *See Pike Creek*, 82 A.3d at 744 (citing *Pathmark Stores*, 663 A.2d at 1191).

G. Cognosante's Timely Provision of Adequate Documents for Goyal's Review is Subject to Genuine Disputes of Material Fact

Turning from the disputed contracts' earnout eligibility, the parties also argue over whether Cognosante fulfilled its procedural obligations after submitting its Draft Bookings Calculation. Specifically, Goyal claims Cognosante did not turn over "those records and work papers of [EIS] reasonably necessary for [Goyal] to review the calculation of the Earnout Payment and Draft Bookings Calculation" as required by Section 2.7(b) of the Purchase Agreement.[164] Cognosante responds that any undelivered documents either could not be located or were not "reasonably necessary" for Goyal's review.[165] This factual disagreement is not suitable for summary judgment.

There are two broad categories of requested documents Cognosante objects to producing: those that deal with actual financial performance of the disputed contracts and those pertaining to contracts Cognosante itself won during the Earnout Period.[166] It claims those are not "reasonably necessary" because they are irrelevant to the contracts EIS won during the Earnout Period and the forecasted profitability thereof.[167] But Goyal claims that he did not have sufficient information to (i) test

[164] Compl. ¶ 104(ix).

[165] Def.'s Mot. at 64-66, 66 n.43.

[166] *Id*. at 65.

[167] *Id*.

the reasonableness of the forecasts Cognosante prepared, (ii) create his own projections for the contracts Cognosante did not forecast, and (iii) determine whether non-EIS contracts were required to be bid through EIS under Section 2.7(f)(vii).[168] Goyal adds that Cognosante's "reasonable search efforts" for unlocated documents must be tested through discovery.[169] The Court agrees with Goyal that genuine disputes exist as to Cognosante's compliance with Section 2.7(b).

Relatedly, Goyal argues that his admittedly late objection to the exclusion of DHS CWMD Bridge was excused by Cognosante's delayed production.[170] Cognosante suggests that Goyal had access to the necessary information because he remained with EIS throughout the Earnout Period.[171] That, though, cannot be enough because it would be true for all contracts and Section 2.7(b) expressly gives Goyal the right to obtain specific information from Cognosante. Cognosante further argues that Goyal failed to explain precisely how the missing documents prevented him from objecting to DHS CWMD Bridge's exclusion.[172] To be sure, such an explanation would put Goyal on stronger footing here. But, at this early stage, the

[168] Pl.'s Reply at 46; Goyal Aff. ¶ 25.

[169] Pl.'s Reply at 46.

[170] *Id*. at 47. In addition to the documents Cognosante refused to provide, other production was delayed ostensibly because of illness among Cognosante management. *See* Objection Notice at 12 n.5.

[171] Def.'s Reply at 27.

[172] *Id*. at 26-27.

Court is not inclined to reject out of hand Goyal's attestation that Cognosante's delay led to his belated objection. Rather, in these circumstances, the Court finds it worthwhile to avail itself of more facts before ruling on such a fact-driven issue. So, Cognosante's motion as to DHS CWMD Bridge and the adequacy of its document production is denied.

H. So Long as Goyal Accepts Cognosante's Mathematical Calculations, an Independent Accounting Expert is Unnecessary

A major contention in Cognosante's various submissions is that Goyal must bring his disputes to an IAE before they can be fully resolved. Indeed, it claims Goyal's breach of contract allegations are bereft of damages unless and until an IAE determines an Earnout Payment.[173] Cognosante does, however, accept this Court's role in interpreting and applying the terms of the Purchase Agreement.[174] So, in Cognosante's view, the Court should apply the terms of the Purchase Agreement to each disputed contract and then send the parties to an IAE to do the final Earnout Payment calculation.[175] While that procedure may become necessary, Goyal's current position avoids it.

Section 2.7(c) of the Purchase Agreement provides in pertinent part:

> If [Cognosante] and [Goyal] do not reach a final resolution of the Earnout Payment . . . then [Cognosante] and [Goyal]

[173] Def.'s Mot. at 67.

[174] *Id*. at 24.

[175] *Id*. at 26-27.

> shall engage the Independent Accounting Expert to resolve all amounts and items subject to objection in the Calculation Objection Notice remaining in dispute. . . . [E]ach of [Cognosante] and [Goyal] shall submit to the Independent Accounting Expert a written brief setting forth its proposed calculation of each disputed item or amount in the Calculation Objection Notice that remains in dispute, and the reasons it believes that calculation is the correct calculation according to the definitions in the Agreement. . . . The Independent Accounting Expert shall resolve each item or amount in dispute by selecting the position of the party with respect to the disputed item or amount that the Independent Accounting Expert determines to be calculated most in accordance with the applicable definitions in the Agreement.[176]

Two important details emerge from that language. First, the IAE's role is to resolve numerical disputes—*i.e.*, disputes subject to "calculation."[177] Second, and critically, the IAE is only needed to resolve calculations "*remaining in dispute*."[178] Put differently, the parties need not engage an IAE merely to rubber stamp calculations the parties agree upon.

Presently, Goyal has indicated a willingness to abide by Cognosante's numbers precisely to avoid such a dispute.[179] So long as that is the case, the Court

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[176] Purchase Agreement § 2.7(c).

[177] This is in accord with the IAE's role "as an expert and not as an arbitrator." *Id*. *See Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2019 WL 366614, at *6 (Del. Ch. Jan. 29, 2019) ("A typical expert determination provision limits the decision maker's authority to deciding a specific factual dispute *within the decision maker's expertise*." (emphasis added)).

[178] Purchase Agreement § 2.7(c) (emphasis added).

[179] Pl.'s Mot., Ex A at 1 n.2; Pl.'s Reply at 30 n.20, 33. Though, Goyal said that he will "continue his dispute of the forecasts" "[f]or any contract for which damages are not awarded on this Motion." Pl.'s Mot., Ex A at 1 n.2.

fails to see what calculations "remaining in dispute" would trigger the need for an IAE. By the terms of Section 2.7(c), Cognosante is precluded from reducing the Total Contract Values and forecasted average gross profits from what it had originally calculated.[180] If the lone necessary calculation becomes determining [redacted] of the applicable Total Contract Value, the Court is confident the parties could agree upon that simple arithmetic without resort to an accounting expert.

Goyal, though, goes further and argues that Cognosante's conduct constituted material breaches that relieve him from adhering to the Purchase Agreement's dispute resolution procedure all together.[181] He pushes both a standard material breach theory[182] and the prevention doctrine.[183] Even assuming—without deciding—that there have been material breaches, the Court is not convinced by this argument.

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[180] Purchase Agreement § 2.7(c).

[181] Pl.'s Mot. at 55-56.

[182] *ITG Brands*, 2023 WL 6383240, at *20 ("A party is excused from performance under a contract if the other party is in material breach thereof." (quoting *In re Mobilactive Media, LLC*, 2013 WL 297950, at *13 (Del. Ch. Jan. 25, 2013))).

[183] *Snow Phipps Grp., LLC v. KCAKE Acq., Inc.*, 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021) ("The prevention doctrine provides that where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." (internal quotation marks and citation omitted)).

One concern is adapted from the analogous context of arbitration. There are important differences between expert determinations and arbitration.[184] Perhaps chief among those differences is that expert determinations are not governed by the Federal Arbitration Act ("FAA").[185] Still, independent experts and arbitrators share a similar role: resolving disputes among contracting parties. Accordingly, some of the well-established principles that pertain to arbitrators provide useful guidance with regard to independent experts.

Relevant here, "[a]rbitration provisions are . . . severable from the remainder of the contract, 'and may therefore be separately enforced and their validity separately determined.'"[186] Though that rule can be traced back to the FAA,[187] it has logical support beyond the statute. At the risk of stating the obvious, dispute resolution provisions—both arbitration and expert determinations—are only implicated by disputes. Many, if not most, of which will involve material breaches

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[184] *See ArchKey*, 302 A.3d at 989-95 (discussing the distinctions between arbitration and expert determinations); *see also Penton Bus. Media Hldgs., LLC v. Informa PLC*, 252 A.3d 445, 454-61 (holding "Delaware decisions distinguish between expert determinations and arbitrations").

[185] *ArchKey*, 302 A.3d at 990.

[186] *Chemours Co. v. DowDuPont Inc.*, 2020 WL 1527783, at *11 (Del. Ch. Mar. 30, 2020) (quoting *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 229 (3d Cir 2012)); *see also Ranginwala v. Citibank, N.A.*, 2020 WL 6817508, at *4 (D.N.J. Nov. 19, 2020) ("Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract." (quoting *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l*, 370 U.S. 254, 262 (1962))).

[187] *Chemours*, 2020 WL 1527783, at *11.

or relevant non-performance. It follows that the application of dispute resolution provisions nullified by those circumstances would be sporadic.

The Court is also guided by Delaware's strong preference for giving effect to the arrangements agreed upon by contracting parties.[188] Though that principle must yield in some circumstances, it can be followed here. Cognosante and Goyal, at the time of contracting, mutually agreed an IAE was the best choice for resolving accounting disputes. And at the conclusion of this litigation, the parties' disagreement will be confined to narrow accounting questions, if not wholly resolved. The Court is not inclined to supplant the parties' agreement and install itself as a *de facto* accounting expert without a compelling reason for doing so. Goyal has not provided such a reason.

Finally, this approach is in line with several Delaware cases that have resolved legal disputes while leaving strictly factual questions to the contractually designated expert.[189] This scenario is particularly reminiscent of that in *AQSR*. There, parties

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[188] *See Restanca, LLC v. House of Lithium, Ltd.*, 2023 WL 4306074, at *26 (Del. Ch. June 30, 2023) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." (quoting *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *60 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (TABLE))).

[189] *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 936 (Del. 2017) (determining which factual arguments could properly be submitted to an expert); *ArchKey*, 302 A.3d at 982 (staying case for expert determinations after setting scope of expert's review); *Ray Beyond*, 2019 WL 366614, at *1 (denying plaintiff's motion to compel an expert determination where case turned on a "primarily legal question"); *Penton*, 252 A.3d at 445 (ruling on several counts and setting scope of expert's review); *AQSR India Private, Ltd. v. Bureau Veritas*

to an asset purchase agreement agreed to a "Referee Procedure" that, like here, called for an expert determination of specific issues following the parties' "Review Process."[190] The buyer failed to fully comply with the Review Process but still sought specific performance of the Referee Procedure.[191] The Court noted that the buyer's breaches may have been material and "pose[d] a practical obstacle" to the expert's determination.[192] Nevertheless, while the Court retained the primary role in sorting out the controversy, it left open the possibility of sending the parties to the Referee "with a basis for making the discrete, expert decisions contemplated by the Asset Purchase Agreement."[193] That example will be followed here.

Therefore, to the extent discrete accounting disputes remain after resolution of the legal issues presented in this litigation, they will be determined by an IAE as outlined in Section 2.7(c) of the Purchase Agreement. However, if no accounting disputes exist—as is the current posture—an IAE is unnecessary.

I. Cognosante is Entitled to Set Off "Earnout Bonus Plan" Payments

Lastly, Cognosante seeks a declaration that it may set off [redacted] in "Earnout Bonus Plan" payments it made to three employees under Section 6.5(b) of

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Hldgs., Inc., 2009 WL 10707910, at *8 (Del. Ch. June 16, 2009) (holding broad issues must be resolved by the Court before narrow, technical issues could be submitted to the expert).

190 *ASQR*, 2009 WL 1707910, at *7.

191 *Id*.

192 *Id*.

193 *Id*. at *7-8.

the Purchase Agreement.[194] Per the terms of Section 6.5(b), that payment was to be funded by the Earnout Payments.[195] So, Cognosante wants to reduce any award granted to Goyal by [redacted].[196] Goyal "does not dispute Cognosante's entitlement" to that setoff.[197] Without objection, Counterclaim Count XIV is granted.[198]

VI. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Judgment on the Pleadings is **GRANTED** as to Count III but **DENIED** in all other respects, and Defendant's Motion for Summary Judgment is **GRANTED** as to Counterclaim Count XIV but **DENIED** in all other respects.

IT IS SO ORDERED.

Sheldon K. Rennie, Judge

[194] Countercl. ¶ 226.

[195] Purchase Agreement § 6.5(b).

[196] Def.'s Mot. at 66-67.

[197] Pl.'s Reply at 49 n.31.

[198] In making this ruling, the Court does not adopt Cognosante's suggestion within Counterclaim Count XIV that an IAE must determine the Earnout Payments.