IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SPECIALTY DX HOLDINGS, LLC, PAS OUTREACH TECHNICAL LABORATORY, LLC, CYCTOLOGY OUTREACH, P.C., and PATHOLOGY OUTREACH P.C.	)	
Plaintiffs,	)	
v.	)	C.A. No. N19C-06-054 EMD CCLD
LABORATORY CORPORATION OF AMERICA HOLDINGS,	)	
Defendant.	)	

Submitted: September 22, 2021
Decided: December 16, 2021

Upon Plaintiffs' Motion for Summary Judgment as to Counts I and IV of the Verified Amended Complaint,
GRANTED IN PART, DENIED IN PART

Upon Defendant's Motion for Summary Judgment as to Count I of the Verified Amended Complaint,
DENIED

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DAVIS, J.

I. INTRODUCTION

This a breach of contract action assigned to the Complex Commercial Litigation Division of this Court. Plaintiffs Specialty Dx Holdings, LLC ("Specialty Dx"), PAS Outreach Technical Laboratory, LLC ("POTL"), Cytology Outreach PLLC ("COP") and Pathology Outreach, P.C.

("POP")[1] initially filed the civil action in the Court of Chancery on January 15, 2018. On June 4, 2019, the Court of Chancery entered an order transferring the action to this Court pursuant to 10 *Del. C.* § 1902.

Plaintiffs seek relief relating to claims arise out of an Asset Purchase Agreement ("APA") entered into on August 4, 2016. Plaintiffs assert these claims against Defendant Laboratory Corporation of America Holdings ("LabCorp"). Plaintiffs filed the Verified Amended Complaint on January 25, 2019,[2] setting out claims for: Declaratory Judgment (Count I); Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II); Breach of Contract (in the Alternative)—Section 3.3(g) of the APA (Count III); Breach of the APA (in the Alternative)—Section 3.3(c) of the APA (Count IV); and Breach of the APA—Section 3.3(e) of the APA (Count V). The Court stayed proceedings on Counts II–IV on July 27, 2020,[3] and Plaintiffs stipulated to the dismissal of Count V on June 1, 2021.[4]

Before the Court are Plaintiffs' motion for summary judgment on Counts I and IV[5] and LabCorp's motion for summary judgment on Count I.[6] The main issue in the cross-motions is whether LabCorp's delay in proposing a revised Adjustment Amount constituted a waiver of its right to seek a revised Adjustment Amount in its favor. The Court previously denied Plaintiffs' motion for judgment on the pleadings on Count I because too many facts were in dispute.[7]

For the reasons below, the Plaintiffs' motion is **GRANTED** as to Count I and **DENIED** as to Count IV. LabCorp's cross-motion is **DENIED**.

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[1] The Court will collectively refer to Specialty Dx, POTL, POP and COP as "Plaintiffs."
[2] D.I. No. 1.
[3] D.I. No. 37; *Specialty Dx Holdings, LLC v. Laboratory Corp. of America Holdings*, 2020 WL 4581007, at *4–5 (Del. Super. July 27, 2020).
[4] D.I. No. 93.
[5] D.I. No. 105.
[6] D.I. No. 100–104.
[7] D.I. No. 17; *Specialty Dx Holdings, LLC v. Laboratory Corp. of America Holdings*, 2020 WL 5088077, at *9–10 (Del. Super. Jan. 31, 2020).

II. BACKGROUND

A. THE PARTIES

Specialty Dx is a Delaware limited liability corporation.[8] POTL is a New York limited liability company that previously operated a clinical laboratory business.[9] Specialty Dx is the sole member of POTL.[10] COP is a New York professional limited liability company that previously provided professional laboratory diagnostic services.[11] POP is a New York professional corporation that previously provided professional laboratory diagnostic services.[12] The APA[13] defines Specialty Dx as the "Parent" and POTL, COP, and POP as "Sellers."[14]

LabCorp is a Delaware corporation with its principal place of business in Burlington, North Carolina.[15] LabCorp is a life sciences company that operates clinical laboratory networks and related businesses. The APA defines LabCorp as the "Purchaser."[16]

B. THE APA

LabCorp and Plaintiffs executed the APA on August 4, 2016.[17] Through the APA, LabCorp acquired assets of laboratories that Plaintiffs formerly owned and operated in New York.[18] The consideration that LabCorp agreed to pay was two-fold. First, LabCorp agreed to pay $20,116,154.40 at closing.[19] Second, LabCorp agreed to provide potential earnout payments

[8] Verified Am. Compl. at ¶¶ 20–23.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] The APA is Exhibit A of both the Amended Complaint and Plaintiff's Motion for Summary Judgment. The Court will cite it simply as the "APA."
[14] Verified Am. Compl. at ¶¶ 20, 24.
[15] *Id.* at ¶ 25.
[16] APA at 2.
[17] Answer at ¶ 26 (D.I. No. 25).
[18] *Id.*
[19] APA § 3.1; Answer at ¶ 27.

based on revenue generated by the sold assets in the first and second years after the closing.[20] The APA closed on October 3, 2016.[21]

Section 3.3 of the APA describes how to calculate the first potential earnout payment (the "First Earnout Payment"). First, LabCorp was to calculate the Net Billed Revenue from the assets it acquired from Plaintiffs during the First Earnout Year.[22] Second, LabCorp was to compare the Net Billed Revenue with the First Earnout Year Net Billed Revenue Target.[23] Plaintiffs would receive the First Earnout Payment only if Net Billed Revenue equaled at least 92.5% of the Net Billed Revenue Target.[24] The value of the First Earnout Payment ultimately depended on measuring Net Billed Revenue against certain pre-defined benchmarks.[25]

The APA defines the First Earnout Year Net Billed Revenue Target as "$13,548,644, plus the Adjustment Amount."[26] In turn, the APA defines the Adjustment Amount as:

> a dollar amount agreed upon by Purchaser, the Sellers and Parent in writing within thirty (30) days following the date hereof, which represents revenue from Shared Customers, and shall be documented by a certificate signed by Purchaser, the Sellers and Parent. Such Adjustment Amount shall be revised promptly after the expiration of one hundred and twenty (120) days after the Closing Date to take into account any Prospects that have become Earnout Customers, and shall be documented by a certificate signed by Purchaser, the Sellers and Parent.[27]

Section 3.3 of the APA defines several relevant terms, including the following:

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[20] APA § 3.1; Answer at ¶ 27.
[21] Answer at ¶ 38.
[22] *See* APA § 3.3(c) ("Following the end of the First Earnout Year, Purchaser shall calculate the Net Billed Revenue associated with services rendered during the First Earnout Year and determine the percentage of the First Earnout Year Net Billed Revenue Target achieved for the First Earnout Year."). Additionally, the APA defined the First Earnout Year as "the period beginning on the first Business Day of the next calendar month after the Closing Date and ending on the last Business Day of the calendar month twelve (12) consecutive months thereafter"—*i.e.*, October 31, 2017. *Id.*, § 3.3(a)(vii).
[23] *See id.*, § 3.3(c).
[24] *See id.*, § 3.3(d).
[25] *See id.*, §§ 3.3(c)–(d).
[26] *Id.*, § 3.3(a)(viii).
[27] *Id.*, § 3.3(a)(i).

> "Earnout Customer List" means Schedule 3.3(a)(ii), which includes, as of the date of this Agreement and updated as of the Closing Date, (x) a list of customers of the Business from January 1, 2014 to date, and (y) a list of Prospects.[28]
>
> "Earnout Customers" means (x) the customers listed on the Earnout Customer List, (y) all prospects that send specimens to Purchaser or any Affiliate of Purchaser for testing on or before one hundred twenty (120) days after the Closing Date, and (z) all Excellus customers.[29]
>
> "Prospect" means a prospective customer of the Business with whom any sales representative of a Seller had contact prior to the Closing Date and who is listed as a Prospect on the Earnout Customer List.[30]
>
> "Shared Customers" means any customer or Prospect on the Earnout Customer List that also is, or has been within the past 12 months prior to the Closing Date, a customer of Purchaser or any Affiliate of Purchaser.[31]

The APA specifies when LabCorp was required to provide the First Earnout Payment if one became due. "Within sixty (60) calendar days after the end of the First Earnout Year"—*i.e.*, by December 30, 2017—"Purchaser shall deliver to Sellers a statement setting forth in reasonable detail the Net Billed Revenue as of the date of the end of the First Earnout Year together with, in immediately available funds, the First Earnout Payment payable, if any."[32]

The APA provides a dispute resolution procedure (the "Resolution Process").[33] The Sellers were to serve a Dispute Notice within sixty days of receiving the Earnout Statement if the Sellers disputed the First Earnout Statement calculation.[34] An Independent Accounting Firm was then to: (i) address the Disputed Items raised by the Seller; (ii) address any "other manifest errors" the Independent Accounting Firm identified; (iii) re-calculate the First and Second Earnout Statements; and (iv) "determine if Purchaser complied with the covenants contained [in

[28] *Id.*, § 3.3(a)(ii) (emphasis in original).
[29] *Id.*, § 3.3(a)(iii) (emphasis in original).
[30] *Id.*, § 3.3(a)(x) (emphasis in original).
[31] *Id.*, § 3.3(a)(xiv) (emphasis in original).
[32] *Id.*, § 3.3(c).
[33] *Id.*, § 3.3(g).
[34] *Id.*

the APA]."[35] The Independent Accounting Firm's determination was to be "final and binding on the parties."[36]

C. POST-CLOSING EVENTS & COMMUNICATIONS

On October 3, 2016, the day of closing, the parties executed an Adjustment Amount Certificate.[37] The Certificate stated that "Purchaser, Sellers and Parent agree that the Adjustment Amount is $22,138,810."[38] The Certificate also stated that "this amount shall be revised to take into account any Prospects that have become Earnout Customers, and such amount shall be documented in a certificate signed by Purchaser, Sellers and Parent 120 days after the Closing Date"[39]—*i.e.*, January 31, 2017.[40] The deadline passed without the parties agreeing to or documenting a revised Adjustment Amount.

On February 28, 2017, John Hennegan, a representative of Plaintiffs, e-mailed LabCorp's Greg Klenke and Anil Asnani.[41] Mr. Hennegan requested an "earn-out tracker" for the First Amount Year.[42] Mr. Hennegan sent an additional e-mail on April 4, 2017[43] and a letter on April 5, 2017.[44] In the April 4, 2017 e-mail, Mr. Hennegan noted that LabCorp had not responded to the previous email, that LabCorp was "months past the deadline," and that Mr. Henngan had "zero clarity for [his] investors/partners."[45] And in the April 5, 2017 letter, Mr. Hennegan, in part, stated:

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[35] *Id.*
[36] *Id.*
[37] Answer at ¶ 38; Pl.'s Mot. for S.J., Ex. F (Adjustment Amount Certificate).
[38] Answer at ¶ 38; Pl.'s Mot. for S.J., Ex. F.
[39] Answer at ¶ 39; Pl.'s Mot. for S.J., Ex. F.
[40] Answer at ¶ 40.
[41] Answer at ¶ 43; Pl.'s Mot. for S.J., Ex. G (Hennegan Emails).
[42] Answer at ¶ 43; Pl.'s Mot. for S.J., Ex. G.
[43] Answer at ¶ 43; Pl.'s Mot. for S.J., Ex. G.
[44] Def.'s Cross-Mot. for S.J., Decl. of Gregory A. Klenke ("Klenke Decl.") at ¶ 24; *id.*, Ex. 5. (April 5, 2017 Letter).
[45] Pl.'s Mot. for S.J., Ex. G.

> Pursuant to the Purchase Agreement, Purchaser covenanted and agreed to take certain actions following the Closing. Without limiting anything contained in the Purchase Agreement, the Sellers note the following:
>
> 1. Pursuant to Section 3.3(i) of the Purchase Agreement, Purchaser agreed to provide the first Earnout Report to the Sellers on or prior to January 29, 2017.
>
> 2. Pursuant to Section 3.3(i) of the Purchase Agreement, Purchaser agreed to provide the second Earnout Report to the Sellers on or prior to March 30, 2017.
>
> 3. Pursuant to Section 3.3(a) of the Purchase Agreement, Purchaser agreed to revise the Adjustment Amount to take into account any Prospects that have become Earnout Customers on or prior to January 31, 2017.
>
> Purchaser has not provided the Earnout Reports referenced in items 1 and 2 above to the Sellers. In addition, Purchaser has not revised the Adjustment Amount as referenced in item 3 above. The Sellers request that Purchaser deliver the Earnout Reports and revise the Adjustment Amount as soon as possible.[46]

On April 17, 2017, Mr. Klenke e-mailed an interim earnout report to Mr. Hennegan.[47] The interim report showed a revised Adjustment Amount of $31,095,076.[48] LabCorp later admitted that this Adjustment Amount was the product of "errors" and "inaccuracies."[49] LabCorp never presented Plaintiffs a proposed revised Adjustment Amount Certificate reflecting that amount.[50]

In April 2017, Plaintiffs and LabCorp representatives participated in two phone calls.[51] LabCorp states that during these calls it "confirmed its understanding that the Adjustment amount 'shall be revised.'"[52] LabCorp also states that Plaintiffs "did not assert during these phone calls that LabCorp waived the Parties' agreement that the Adjustment Amount 'shall be

[46] Klenke Decl. at ¶ 24; *id.*, Ex. 5.
[47] *Id.* at ¶ 25; *id.*, Ex. 6 (First Interim Earnout Report).
[48] *Id.* at ¶ 25; *id.*, Ex. 6.
[49] Pl.'s Mot. for S.J., Ex. E at 69:7–70:24; 72:19–73:10 (Deposition of Gregory A. Klenke).
[50] *Id.*, Ex. E at 62:7–15.
[51] Klenke Decl. at ¶ 26.
[52] *Id.*

revised.'"[53] LabCorp states that Plaintiffs did not complain about the Adjustment Amount in the six months that followed.[54]

On February 2, 2018, Plaintiffs sent a letter to LabCorp.[55] The letter contended that LabCorp "willfully and repeatedly fail[ed] to meet its obligations under the Purchase Agreement"[56] and "demand[ed]" that LabCorp deliver certain documents, "revise the Adjustment Amount immediately, and pay the First Earnout Payment that was due in December 2017."[57] On February 7, 2018, LabCorp delivered the First Earnout Statement to Plaintiffs.[58] In the First Earnout Statement, LabCorp represented that no First Earnout Payment was due.[59] LabCorp's calculation did not use the Adjustment Amount reflected in the October 3, 2016 Certificate (*i.e.*, $22,138,810).[60] Instead, it used an Adjustment Amount of $25,906,672.[61] On April 6, 2018, Plaintiff replied with a Dispute Notice concerning the calculation in the First Earnout Statement.[62] Plaintiffs believed that using the Adjustment Amount reflected in the October 3, 2016 Certificate resulted in an earnout payment being due.[63]

On April 20, 2018, LabCorp sent to Plaintiffs a proposed revised Adjustment Amount Certificate.[64] The Adjustment Amount reflected therein was $25,611,358.[65] The parties did not agree upon this Adjustment Amount, and the parties did not document this Adjustment Amount in a certificate signed by all the parties.[66]

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[53] *Id.*
[54] *Id.* at ¶¶ 26–27.
[55] Pl.'s Mot. for S.J., Ex. P (February 2, 2018 Letter); *see also* Klenke Decl. at ¶ 28; *id.*, Ex. 8.
[56] Pl.'s Mot. for S.J., Ex. P at 1.
[57] *Id.*, Ex. P at 3.
[58] Answer at ¶ 52; Pl.'s Mot. for S.J., Ex. J (First Earnout Statement).
[59] Answer at ¶ 52; Pl.'s Mot. for S.J., Ex. J.
[60] Answer at ¶ 53; Pl.'s Mot. for S.J., Ex. J.
[61] Answer at ¶ 54; Pl.'s Mot. for S.J., Ex. J.
[62] Answer at ¶ 56; Pl.'s Mot. for S.J., Ex. C (Dispute Notice).
[63] Answer at ¶ 56; Pl.'s Mot. for S.J., Ex. C.
[64] Answer at ¶¶ 44, 57; Pl.'s Mot. for S.J., Ex. K (April 2018 Proposed Revised Certificate).
[65] Answer at ¶¶ 44, 57; Pl.'s Mot. for S.J., Ex. K.
[66] Answer at ¶ 46.

D. THE PARTIES ENGAGE AN INDEPENDENT ACCOUNTING FIRM

On October 12, 2018, the parties engaged Frazier & Deeter, LLC ("FD") to act as the Independent Accounting Firm in the Resolution Process.[67] Plaintiffs contended that the Adjustment Amount in the October 3, 2016 Certificate was the correct one for calculating the earnout payments.[68] LabCorp claimed that revising the Adjustment Amount would still be timely.[69] FD informed the parties that questions of how and when they could revise the Adjustment Amount were legal issues outside of its expertise and mandate under the APA.[70] FD requested additional information from LabCorp in November 2018 but terminated the review process after not receiving it.[71]

In April 2020, the parties re-engaged FD to complete the review process. FD provided the parties with its Statement of Work in June 2020, which detailed the procedures that it needed to complete and the data it would require from LabCorp.[72] Later, FD stated that LabCorp did not provide access to all the data and systems FD required.[73] FD advised the parties that it could not determine "whether [LabCorp's earnout calculation was] in accordance with the Agreement" and that it could not re-calculate the earnout statements.[74] Instead, FD could only provide whether it had become "aware of any material modifications" that should be made to LabCorp's earnout

[67] Pl.'s Mot. for S.J., Ex. L (FD Letter).
[68] *Id.*, Ex. M (Plaintiffs' Submissions to FD).
[69] *Id.*, Ex. N (LabCorp's Submissions to FD).
[70] *Id.*, Ex. O (FD Communications).
[71] D.I. No. 17 at 4.
[72] Pl.'s Mot. for S.J, Ex. Q (FD Statement of Work).
[73] *Id.*, Declaration of John E. Schreiber at ¶ 3.
[74] *Id.*, Ex. R (Review Report).

calculations.[75] Plaintiffs did not accept FD's proposal, and FD resigned without issuing a report on October 29, 2020.[76]

E. THE PARTIES ENGAGE A SECOND INDEPENDENT ACCOUNTING FIRM

Litigation between the parties began in November 2018. But in January 2021, the parties agreed to make another attempt at the Resolution Process and engage another Independent Accounting Firm.[77] The new firm, Asterion, issued its report on February 13, 2021.[78] It concluded that: (1) LabCorp's calculation of revenue for purposes of the earnout "was not consistent with the definition of Net Billed Revenue contained in the APA;" (2) LabCorp's purported "revision to the Adjustment Amount contains increases for accounts that are not Prospects," which was also inconsistent with the APA; and (3) that "Sellers should have received a First Year Earnout payment."[79] Asterion calculated the First Earnout Payment under two scenarios—Scenario 1 and Scenario 2.

Scenario 1 contemplates that Plaintiffs prevail on Count I of the Verified Amended Complaint. In Scenario 1, the Adjustment Amount certified by the parties at closing remains operative for the earnout calculations. Asterion concluded that "Sellers should have received a First Year Earnout payment of $725,000" under this scenario.[80] Scenario 2 contemplates that LabCorp prevails on Count I. For Scenario 2, Asterion determined the revised Adjustment Amount that "would have been agreed to among the parties based upon the information available

[75] *Id.*
[76] *Id.*, Ex. S (Notice of Resignation).
[77] *Id.*, Ex. V (Asterion Letter)
[78] *Id.*, Ex. B (Asterion Report).
[79] *See id.*, Ex. B at 10–11.
[80] *Id.*, Ex. B at 10–11.

at the 120-day period."[81] Asterion concluded that Scenario 2 results in an Earnout Payment of $563,000.[82] As detailed below, LabCorp has since challenged Asterion's determinations.

F. PROCEDURAL BACKGROUND

On November 15, 2018, Plaintiffs filed the complaint in the Court of Chancery. They sought a declaration that the Adjustment Amount in the October 3, 2016 Certificate remains operative for purposes of the earnout calculations under the APA. Plaintiffs filed the Verified Amended Complaint on January 25, 2019, which added Counts II–V.[83] Count II and III assert claims for breach of contract and breach of the implied covenant of good faith and fair dealing relating to LabCorp's alleged failure to engage in the Independent Accounting Firm process in good faith. Count IV asserts a claim for breach of the APA based on LabCorp's alleged failure to properly calculate and make the First Earnout Payment. Count V asserted a claim for breach of the APA based on LabCorp's failure to properly calculate and make the Second Earnout Payment.

On February 12, 2019, LabCorp moved to dismiss Count V.[84] After LabCorp answered the remaining counts, Plaintiffs moved for judgment on the pleadings on Count I.[85] The Court of Chancery entered an order transferring to this Court pursuant to 10 *Del. C.* § 1902 on June 4, 2019.[86] On January 31, 2020, the Court denied Plaintiffs' motion because the record had not sufficiently developed for a determination under Rule 12(c).[87] The Court stayed Count V,[88] but Plaintiffs later voluntarily dismissed it.[89]

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[81] *Id.*, Ex. B at 11.
[82] *Id.*, Ex. B at 11–13.
[83] Verified Am. Compl. (D.I. No. 1).
[84] Def.'s Mot. to Dismiss (D.I. No. 1).
[85] Pl.'s M.J.O.P (D.I. No. 1).
[86] Transfer Order (D.I. No. 1.)
[87] D.I. No. 17.
[88] *Id.*
[89] D.I. No. 92.

On March 24, 2020, LabCorp moved to dismiss Counts I–IV on the grounds that the Court lacked subject matter jurisdiction.[90] The Court denied the motion on July 27, 2020.[91] Plaintiffs agreed to stay Counts II–IV pending completion of the Independent Accounting Firm process, which was ongoing at that time.[92]

After Asterion issued its report, LabCorp filed a complaint in the Court of Chancery seeking to vacate or modify Asterion's determination.[93] The complaint was subsequently assigned to this Court.[94] According to Plaintiffs, the parties agree that the Court will be required to address LabCorp's challenges to the Asterion report only if LabCorp prevails on Count I.[95]

The parties filed cross-motions for summary judgment on June 22, 2021.[96] The Court heard arguments on September 22, 2021 and took the matter under advisement.[97]

III. PARTIES' CONTENTIONS

A. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTS I & IV

Plaintiffs seek summary judgment on Count I. Count I requests a declaration that the Adjustment Amount in the October 3, 2016 Certificate remains operative for calculating the First Earnout Payment and that "the parties to the APA waived their right to revise [that] Adjustment Amount."[98] Plaintiffs present the undisputed facts relevant to the resolution of Count I as follows:

> (1) At Closing, the parties agreed to an Adjustment Amount of $22,138,810 and jointly executed an Adjustment Amount Certificate dated October 3, 2016;

[90] D.I. No. 24.
[91] D.I. No. 37.
[92] *Id.*
[93] *Laboratory Corp. of America Holdings v. Specialty Dx Holdings, LLC, et al.*, C.A. No. 2021-0425-KSJM.
[94] *Id.*; *see also* D.I. No. 97.
[95] Pl.'s Opening Br. in Supp. of Mot. for S.J. at 5–6, 21.
[96] D.I. No. 100–05.
[97] D.I. No. 134.
[98] Verified Am. Compl. at ¶¶ 90–95.

(2) The APA provided that any revision to this Adjustment Amount was to be made "*promptly* after the expiration of one hundred (120) days after the Closing Date" and was likewise required to be agreed upon and documented in a certificate signed by all parties;

(3) The parties never agreed upon, let alone executed, a certificate reflecting a revised Adjustment Amount; and

(4) LabCorp, whose obligation it was to provide a revised Adjustment Amount certificate in the event one was warranted (as Plaintiffs no longer had access to the relevant information), did not do so until late April 2018 – nearly 15 months after the 120-day post-closing period had expired and nearly four months after LabCorp should have made the First Earnout Payment.[99]

Plaintiffs argue that, on these undisputed facts, the Adjustment Amount in the October 3, 2016 Certificate remains operative because the parties never revised it.[100] Plaintiffs add that "LabCorp's own dilatory conduct precluded the parties from considering, agreeing upon and documenting any such revision 'promptly' after January 31, 2017, as required by the APA."[101] Accordingly, Plaintiffs request that the Court enter judgment in their favor on Count I.

Plaintiffs also seek summary judgment on Count IV, which alleges that LabCorp "breached the APA by failing to properly calculate the First Earnout Year Net Billed Revenue Target and timely pay the First Year Earnout owed pursuant to Section 3.3(c)."[102] The Court previously stayed Count IV pending resolution of the Resolution Process.[103] Since then, Asterion concluded that LabCorp's earnout calculation was not consistent with the APA and that Plaintiffs should have received a First Year Earnout Payment. Plaintiffs therefore argue that the Court should lift the stay on Count IV and enter judgment in their favor.[104]

B. LABCORP'S CROSS-MOTION FOR SUMMARY JUDGMENT

[99] Pl.'s Answering Brief in Opp. to Def.'s Cross-Motion for S.J. at 1; *see also* Pl.'s Opening Br. in Supp. of Mot. for S.J. at 23–29.
[100] *Id.* at 23–24.
[101] *See id.* at 25–29.
[102] Verified Am. Compl. at ¶ 111.
[103] D.I. No. 37.
[104] Pl.'s Opening Br. in Supp. of Mot. for S.J. at 22–23.

LabCorp makes three arguments for summary judgment in its favor on Count I. First, LabCorp contends that the language in the APA that the Adjustment Amount "shall" be revised requires the denial of Plaintiffs' claims in Count I. LabCorp claims that this "plain and mandatory" language precludes a finding of waiver.[105] LabCorp adds that a finding of waiver would essentially rewrite the APA to provide Plaintiffs a benefit that was not a part of the bargain between the parties.[106] LabCorp concludes by arguing that this would result in an unwarranted and inequitable windfall to Plaintiffs.[107]

Second, LabCorp argues that the undisputed facts demonstrate that Plaintiffs, not LabCorp, are subject to waiver. LabCorp identifies the following facts as showing it did not waive the parties' obligation to revise the Adjustment Amount:

(1) LabCorp did not expressly waive the agreement to revise the Adjustment Amount;

(2) "LabCorp consistently provided a revised Adjustment Amount including with the Interim First Year Earnout Report and in numerous other communications with Plaintiffs. LabCorp did so consistently including in at least eight reports confirming a revised Adjustment Amount;" and

(3) LabCorp provided Plaintiffs with a revised Adjustment Amount Certificate, reflecting LabCorp's calculation of a revised Adjustment Amount.[108]

And LabCorp identifies the following facts as showing that Plaintiffs "expressly waived their claims of untimeliness:"

(1) On April 5, 2017, Plaintiffs sent LabCorp a letter urging LabCorp to "revise the Adjustment Amount as soon as possible;"

(2) On February 2, 2018, Plaintiffs sent a letter to LabCorp urging LabCorp to "revise the Adjustment Amount immediately;" and

[105] *See* LabCorp's Opening Br. in Supp. of Mot. for S.J. at 21–24.
[106] *See id.* at 23–24.
[107] *See id.* at 24.
[108] *See id.* at 25–27.

(3) Plaintiffs never objected to the revised Adjustment Amount included in multiple interim Earnout Reports and the Earnout Statements provided by LabCorp.[109]

Third, LabCorp argues that Plaintiffs have not pled any harm or damages relating to Count I.[110] LabCorp insists that Plaintiff's declaratory judgment claim is a disguised breach of contract claim, which requires damage. LabCorp contends that Plaintiffs have not been damaged because "the historical data from October 2015 through September 2016 remains materially the same whether LabCorp acted in Spring 2017 or thereafter."[111] LabCorp adds that even if it did breach the APA, its breach was immaterial.[112]

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[113] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[114] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[115] The moving party bears

[109] *See id.* at 27–29.
[110] *See id.* at 29–35.
[111] *See id.* at 29.
[112] *See id.* at 30–31.
[113] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[114] *Id.*
[115] *See Ebersole v. Lownegrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

the initial burden of demonstrating that the undisputed facts support his claims or defenses.[116] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[117]

"These well-established standards and rules equally apply [to the extent] the parties have filed cross-motions for summary judgment."[118] Where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[119] But where cross-motions for summary judgment are filed and an issue of material fact exists, summary judgment is not appropriate.[120] To determine whether there is a genuine issue of material fact, the Court evaluates each motion independently.[121] The Court will deny summary judgment if the Court determines that it is prudent to make a more thorough inquiry into the facts.[122]

V. DISCUSSION

Plaintiffs and LabCorp have moved for summary judgment on Count I. Count I requests a declaration that LabCorp "waived [its] right to revise the Adjustment Amount specified in the October 3, 2016 Certificate."[123] As discussed below, the Court finds that Plaintiffs are entitled

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[116] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[117] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[118] *IDT Corp.*, 2019 WL 413692, at *5 (citations omitted); *see Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. May 31, 2013) (citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)).
[119] Del. Super. Civ. R. 56(h).
[120] *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *5 (Del. Super. June 19, 2017), *aff'd sub nom., Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018); *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008); s*ee also Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 738 (Del. Ch. 2001) ("[T]he presence of cross-motions 'does not act per se as a concession that there is an absence of factual issues.'") (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[121] *Motors Liquidation*, 2017 WL 2495417, at *5; *see Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 167 (Del. Ch. 2003).
[122] *Ebersole*, 180 A.2d at 470-72; Pathmark Stores, 663 A.2d at 1191.
[123] Verified Am. Compl. at ¶ 94.

judgment as a matter of law on Count I. Accordingly, the Court grants Plaintiff's motion as to Count I and denies Defendant's cross-motion. The Court denies Plaintiff's motion as to Count IV because the Court finds that granting summary judgment would be premature.

A. APPLICABLE LEGAL STANDARD

Delaware's standard for contract interpretation is well-settled. A court generally gives priority to the parties' intentions contained in the four corners of the contract.[124] "In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein."[125] "When construing a contract, and unless a contrary intent appears, [courts] will give words their ordinary meaning."[126]

Where the language of the contract is plain and unambiguous, the contract must be enforced as written.[127] "If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent."[128] The parole evidence rule bars the admission of evidence outside the contract's four corners to vary or contradict the unambiguous language.[129] However, "where reasonable minds could differ as to the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence.[130]

B. STANDARD FOR WAIVER

The Court notes that waiver is a central issue as to Count I. "It is well settled in Delaware that contractual requirements or conditions may be waived."[131] However, the

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[124] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).
[125] *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (1985).
[126] *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992).
[127] *Lorillard Tobacco Co. v. Am. Legacy Found*, 903 A.2d 728, 740 (Del. 2006).
[128] *City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993).
[129] *GMG Capital*, 36 A.3d 776 at 783.
[130] *Id.*
[131] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus.*, Inc., 871 A.2d 428, 444 (Del. 2005) (citing *Pepsi-Cola Bottling Co. v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972)).

standards for proving waiver under Delaware law are "quite exacting."[132] "Waiver is the voluntary and intentional relinquishment of a known right."[133] "It implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights."[134]

Three elements must be satisfied before a conclusion of waiver may reached: (i) there is a requirement or condition to be waived, (ii) the waiving party must know of the requirement or condition, and (iii) the waiving party must intend to waive that requirement or condition.[135] "A waiver may express or implied, but either way, it must be unequivocal."[136] "An express waiver exists where it is clear from the language used that the party is intentionally renouncing a right that it is aware of."[137] An implied waiver is possible only if there is a "clear, unequivocal, and decisive act of the party demonstrating relinquishment of the right."[138] The Court will not imply waiver based on ambiguous acts.[139]

"The question of waiver is normally a jury question, unless the facts are undisputed and give rise to only one reasonable inference."[140] "Where the inference of ultimate fact to be

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[132] *Id.* (quoting *Am. Fam. Mortg. Corp. v. Acierno*, 640 A.2d 655 (Del. 1994)).
[133] *Id.* (quoting *Realty Growth Invs. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982)).
[134] *Id.* (quoting *Realty Growth Invs.*, 453 A.2d at 456).
[135] *Id.*
[136] *Bouchard v. Braidy Indus., Inc.*, 2020 WL 2036601, at *8 (Del. Ch. Apr. 28, 2020) (quoting *Dirienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944 (Del. Ch. Dec. 8, 2009)).
[137] *Id.*
[138] *Id.*; *see also Se. Chester Cty. Refuse Auth. v. BFI Waste Servs. of Pennsylvania, LLC*, 2015 WL 3528260 (Del. Super. June 1, 2015); *Rsrvs. Dev. Corp. v. Esham*, 2009 WL 3765497 (Del. Super. Nov. 10, 2009).
[139] *Dirienzo*, 2009 WL 4652944, at *5 (citing 28 Am Jur.2d Estoppel and Waiver § 209 (2009)).
[140] *Mergenthaler v. Hollingsworth Oil Co. Inc.*, 1995 WL 108883, at *2 (Del. Super. Feb. 22, 1995); *see also Topspin Partners, L.P. v. RockSolid Sys., Inc.*, 2009 WL 154387, at *2 (Del. Ch. Jan. 21, 2009) (deferring waiver as a question of fact for the jury to decide); *AeroGlobal*, 871 A.2d at 444–45 (reversing grant of summary judgment; jury must determine whether under circumstances there was a waiver of a contract's timing requirements based on course of conduct); *George v. Frank A. Robino, Inc.*, 334 A.2d 223 (Del. 1975) ("It is for the jury to say whether plaintiff's conduct under the circumstances of this case evidenced an intentional, conscious and voluntary abandonment of his claim or right.").

established concerns intent or other subjective reaction, summary judgment is ordinarily inappropriate."[141]

C. COUNT I – DECLARATORY JUDGMENT CLAIM

i. The relevant APA provisions are unambiguous.

Several provisions of the APA are relevant to Count I. The Court does not find any of these provisions to be ambiguous.

First, the APA describes how the initial Adjustment Amount was to be set. Section 3.3(a)(i) requires that the parties "agree[]" to an Adjustment Amount "in writing within thirty days (30) days following the date hereof," which was to be "documented by a certificate signed by Purchaser, the Sellers and Parent."[142] The parties, consistent with the APA, agreed upon and documented an initial Adjustment Amount of $22,138,810 on October 3, 2016.

Second, the APA describes how to revise the initial Adjustment Amount. Section 3.3(a)(i) states that "[s]uch Adjustment Amount shall be revised promptly after the expiration of one hundred and twenty (120) days after the Closing Date to take into account any Prospects that have become Earnout Customers."[143] The language of this provision makes it clear that the parties were not required to revise the Adjustment Amount no matter what. Instead, the parties were required to revise the Adjustment Amount only "to take into account any Prospects that have become Earnout Customers" during the 120-day period.

LabCorp contends that the APA's use of the word "shall" denotes a requirement that the Adjustment Amount.[144] The Court finds that is an unreasonable interpretation of the APA's text.

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[141] *AeroGlobal*, 871 A.2d at 444.
[142] APA § 3.3(a)(i).
[143] *Id.*
[144] Def.'s Opening Br. in Supp. of Cross-Mot. for S.J. at 22 (quoting Section 3.3(a)(i)).

It is true that "shall" is mandatory language.[145] However, the plain language indicates that revision is mandatory only if any Prospects have become Earnout Customers. The Court notes that it would not be reasonable to interpret the APA as requiring a revision to the Adjustment Amount even when there is nothing to revise.[146]

Third, the APA places the burden on LabCorp to propose any revised Adjustment Amount. LabCorp appears to recognize this in its cross-motion for summary judgment, despite denying it in its Answer.[147] The APA is clear on its terms. Only LabCorp could know whether any Prospect became Earnout Customers after closing. LabCorp is in control of operations. Plaintiffs lacked access to the information to make that determination after selling the relevant assets to LabCorp.

Fourth, the APA requires that any revision to the Adjustment Amount occur "promptly" after January 31, 2017. The APA does not define "promptly," requiring the Court to consult dictionaries.[148] Merriam-Webster defines "promptly" as "in a prompt manner: without delay: very quickly or immediately."[149] The APA therefore required the parties to revise the Adjustment Amount, if necessary, without delay after January 31, 2017. This, contractually, makes sense. The Adjustment Amount was necessary to calculate the First Earnout Year Net

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[145] *See Nardo v. Bd. of Plumbing Exam'rs*, 2001 WL 845663, at *3 (Del. Super. Apr. 17, 2001), *aff'd* 787 A.2d 101 (Del. 2001).

[146] *See, e.g., Council of the Dorset Condo. Apartments v.* Gordon, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.").

[147] *Compare* Def.'s Opening Br. in Supp. of Cross-Mot. for S.J. at 6 ("The APA does not provide a specific date by which the Parties are required to agree upon the revised Adjustment Amount. *Nor does it provide a specific date by which LabCorp is to communicate a proposed revised calculation to Plaintiffs*.") (emphasis added), *with* Answer at ¶ 42 (denying that "the onus was on LabCorp in the first instance to propose a revised Adjustment Amount within the contractually-required timeframe").

[148] *See 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.").

[149] *Promptly*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/promptly (accessed Sept. 15, 2021).

Billed Revenue Target,[150] which determined whether Plaintiffs would receive the First Earnout Payment.[151] LabCorp was required to pay any First Earnout Payment by December 30, 2017. The APA logically requires that the Adjustment Amount be revised before that date at the latest.

Fifth, the APA describes how to revise the Adjustment Amount. The APA required that the revised Adjustment Amount "shall be documented by a certificate signed by Purchaser, the Sellers and Parent." [152] The APA describes no other way. Plainly, the original Adjustment Amount must remain in effect unless and until a revised Adjustment Amount is documented in a signed certificate.

In short, the language of the APA is clear and unambiguous as to the rights and obligations of the parties. But that is not the end of Court's inquiry. The ultimate question under Count I is whether either of the parties waived its rights under the APA.

ii. Plaintiffs are entitled to summary judgment on Count I.

Plaintiffs seek a declaration that LabCorp waived its right to seek a revised Adjustment Amount in its favor. Plaintiffs must therefore show that LabCorp's conduct "evidenced an intentional, conscious and voluntary abandonment of [its] claim or right."[153] To succeed on summary judgment, the facts must be "undisputed and give rise to only one reasonable inference."[154] This is a heavy burden. Indeed, "summary judgment is ordinarily inappropriate" on the issue of waiver.[155]

Here, the undisputed facts show that LabCorp engaged in a prolonged and unreasonable pattern of delay with respect to its duties under the APA. As described above, the APA required

[150] APA, § 3.3(a)(viii).
[151] *Id.*, § 3.3(c).
[152] *Id.*, § 3.3(a)(i).
[153] *AeroGlobal*, 871 A.2d at 446.
[154] *Mergenthaler*, 1995 WL 108883, at *2.
[155] *See AeroGlobal*, 871 A.2d at 446.

LabCorp to propose any revised Adjustment Amount without delay after January 31, 2017. But Plaintiffs heard nothing from LabCorp when that date came. Plaintiffs then contacted LabCorp by e-mail on February 28, 2017.[156] LabCorp remained silent.

Plaintiffs pressed LabCorp to fulfill its post-closing obligations. In the April 4, 2017 e-mail, Plaintiffs complained that LabCorp's lawyers "keep deflecting" Plaintiffs' questions, that LabCorp was "months past the deadline" and that Plaintiffs had "zero clarity" on the situation.[157] In the April 5, 2017 letter, Plaintiffs again reminded LabCorp of its unfulfilled obligations to provide Earnout Reports and a proposed revised Adjustment Amount Certificate.[158] In response, LabCorp finally provided an interim earnout report on April 17, 2017. However, LabCorp later admitted that the Adjustment Amount therein was the product of "errors" and "inaccuracies,"[159] and never presented a proposed revised Adjustment Amount Certificate reflecting that amount. Indeed, LabCorp did not propose any such Certificate for the rest of 2017, even when its deadline to provide the First Earnout Statement arrived at the end of December.

Plaintiffs addressed LabCorp's non-performance in early 2018. On February 2, 2018, Plaintiffs sent another letter questioning LabCorp's good faith and demanding that LabCorp revise the Adjustment Amount and provide the Earnout Payment.[160] Even then, LabCorp did not provide a revised Adjustment Amount Certificate. Instead, on February 7, 2018, LabCorp provided an entirely new Adjustment Amount in the First Earnout Statement.[161] Plaintiffs correctly pointed out that the APA did not allow LabCorp to unilaterally decide upon a revised Adjustment Amount, but instead required any revision to the Adjustment Amount to be

[156] Pl.'s Mot. for S.J., Ex. G.
[157] *Id.*, Ex. G.
[158] Klenke Decl., Ex. 5.
[159] Pl.'s Mot. for S.J., Ex. E at 69:7–70:24; 72:19–73:10.
[160] *Id.*, Ex. P.
[161] *Id.*, Ex. J.

documented in a Certificate signed by all the parties.[162] Only then, on April 20, 2018, did LabCorp propose a revised Adjustment Amount Certificate.[163]

The APA required that any revision to the Adjustment Amount occur "promptly" after January 31, 2017. The Court finds that the undisputed facts show that LabCorp did not even propose a revised Adjustment Amount Certificate until nearly 15 months after January 31, 2017. Moreover, the Court notes this was also nearly four months after the First Earnout Statement had become due. LabCorp's delay prohibited the parties from revising the Adjustment Amount under the schedule that the APA required. LabCorp's delay was particularly unreasonable because Plaintiffs repeatedly reminded LabCorp of its obligations and requested that LabCorp perform its obligations. Every time, LabCorp's response was either silence or a futile half-measure. Under these undisputed facts, the Court holds that Plaintiffs have demonstrated that, as a matter of law, LabCorp's conduct "evidenced an intentional, conscious and voluntary abandonment [its] claim or right" [164] to seek a revised Adjustment Amount in its favor. These facts give rise to no other "reasonable inference,"[165] given the length of LabCorp's delay and LabCorp's evasiveness when Plaintiffs repeatedly demanded performance.

The Court is persuaded not only by the undisputed facts, but is guided by the reasoning in *Schillinger Genetics, Inc. v. Benson Hill Seeds, Inc*.[166] There, a buyer purchased the seller's assets under an asset purchase agreement. Funds were placed in an escrow account to be distributed in accordance with the agreement's post-closing purchase price adjustment process. The buyer was required to deliver to the seller a closing statement setting forth the buyer's

[162] *Id.*, Ex. C.
[163] *Id.*, Ex. K.
[164] *AeroGlobal*, 871 A.2d at 446.
[165] *Mergenthaler*, 1995 WL 108883, at *2.
[166] *Schillinger Genetics, Inc. v. Benson Hill Seeds, Inc.*, 2021 WL 320723 (Del. Ch. Feb. 1, 2021).

calculated purchase price adjustment within ninety days of closing. Instead, the buyer submitted the closing statement nearly two months late. The seller moved for summary judgment on its declaratory judgment claim, which sought a declaration that the buyer had "waived its right to a post-Closing adjustment."[167] The court determined that "[b]y submitting a Closing Statement too late, Defendants forfeited its right to a post-Closing adjustment and determination of the Final Adjustment Amount."[168] The court explained that the funds were placed in escrow "as security for an Adjustment that benefitted Buyer; otherwise, they would go to Seller."[169] And because "Buyer frustrated the determination of the Final Adjustment Amount by breaching its obligation to timely deliver the Closing Statement, the proper award of expectancy damages is to provide Seller with the baseline consideration to which the Seller was entitled."[170]

Like the buyer in *Schillinger Genetics*, LabCorp failed in its duty to provide information necessary for post-closing purchase price adjustments within the contractual period. LabCorp's delay had the effect of frustrating the revision to the Adjustment Amount that the APA required. Additionally, LabCorp's delay frustrated the APA's deadline for the delivery of the First Earnout Statement. Thus, as in *Schillinger Genetics*, the Court finds that (i) LabCorp waived its right to seek a revised Adjustment Amount in its favor, and (ii) the Adjustment Amount in the October 3, 2016 Certificate remains operative for calculating the First Earnout Payment.

Plaintiff's motion for summary judgment on Count I is granted.

iii. LabCorp is not entitled to summary judgment on Count I.

For the reasons set forth above, the Court will deny LabCorp's cross-motion for summary judgment. However, the Court will consider LabCorp's arguments for summary judgment

[167] *Id.* at *17.
[168] *Id.*
[169] *Id.* at *18.
[170] *Id.*

because they serve as counterarguments to the Plaintiffs' motion. LabCorp contends that it is entitled to summary judgment on Count I for three reasons: (i) the language of the APA precludes a finding of waiver; (ii) the undisputed facts show Plaintiffs are subject to waiver, not LabCorp; and (iii) Plaintiffs have not alleged any harm or damages.[171] The Court is not persuaded by these arguments.

First, LabCorp contends that the APA requires that the Adjustment Amount "shall be revised." LabCorp contends that this mandatory language requires the Adjustment Amount to be revised no matter what and no matter when, effectively precluding a finding of waiver.[172] In LabCorp's view, a finding of waiver would impermissibly rewrite the APA to favor Plaintiffs.[173]

The Court finds this to be an unreasonable interpretation of the APA. The APA required any revision to the Adjustment Amount to occur "promptly" after January 31, 2017. And the revised Adjustment Amount was necessary for the First Earnout Report, which LabCorp was required to provide by December 30, 2017. The Court notes that LabCorp's interpretation would frustrate other portions of the APA by permitting a revision to the Adjustment Amount at any time whatsoever. Instead, the APA required revision without delay after January 31, 2017, with December 30, 2017 effectively serving as a hard deadline. In arguing otherwise, LabCorp ignores the plain language of the APA. Furthermore, LabCorp's argument is incorrect as a

[171] *See* Def.'s Opening Br. in Supp. of Cross-Mot. for S.J. at 21–35.
[172] *See id.* at 5 (The "position that LabCorp waived the APA's requirement that the Adjustment Amount 'shall be revised' . . . is contrary to the plain language of the APA in which the Parties agreed that the Adjustment Amount 'shall be revised.'"); *see also id.* at 6 ("The APA does not provide a specific date by which the Parties are required to agree upon the revised Adjustment Amount. Nor does it provide a specific date by which LabCorp is to communicate a proposed revised calculation to Plaintiffs.").
[173] *See id.* at 23–24.

matter of law. Delaware courts have held that parties can waive their contractual rights even when the contract describes those rights using mandatory language.[174]

Second, LabCorp argues that it did not waive its rights under the APA; rather, Plaintiffs did. LabCorp argues that Plaintiffs expressly waived their claim of untimeliness through the letters they sent in April 2017 and February 2018, both of which urged LabCorp to revise the Adjustment Amount. LabCorp adds that Plaintiffs never objected to the revised Adjustment Amounts included in its interim Earnout Reports and the Earnout Statements.

"An express waiver exists where it is clear from the language used that the party is intentionally renouncing a right that it is aware of;" as usual, the facts supporting waiver must be "unequivocal."[175] The letters that Plaintiffs sent do not demonstrate that Plaintiffs intentionally renounced their claims of untimeliness. Plaintiffs' communications consistently protested LabCorp's failure to provide the information and urged LabCorp meet its obligations under the APA. Additionally, LabCorp admitted that Plaintiff's February 2018 letter concerned the inaccuracies in LabCorp's April 2017 interim report and requested that LabCorp revert to the initial Adjustment Amount.[176] Therefore, Plaintiffs' letters did not constitute an express waiver.[177]

Finally, LabCorp argues that the declaratory judgment claim in Count I is truly a breach of contract claim alleging that LabCorp did not act "promptly" under Section 3.3(a).[178] Claims

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[174] *See, e.g., Schillinger Genetics*, 2021 WL 320723, at *2, 17 (finding waiver despite the APA's use of the word "shall"); *J&J Produce, Inc. v. Benson Hill Fresh, LLC*, 2020 WL 1188052 (Del. Ch. Mar. 11, 2020) (conducting a similar analysis).
[175] *Bouchard v. Braidy Indus., Inc.*, 2020 WL 2036601, at *8 (Del. Ch. Apr. 28, 2020) (quoting *Dirienzo v. Steel Partners Holdings L.P.*, 2009 WL 4652944 (Del. Ch. Dec. 8, 2009)).
[176] *See* Pl.'s Answering Br. in Opp. to Def.'s Cross-Motion for S.J. at 14 (citing Pl.'s Mot. for S.J, Deposition of John Hennegan at 183:34–185:13 & *id.*, Deposition of Greg Klenke at 70:13–24).
[177] The court in *Schillinger Genetics* refused to find waiver in similar circumstances. *See Schillinger Genetics*, 2021 WL 320723, at *14–15 (holding that plaintiffs did not waive a deadline after defendants missed it by notifying defendants of the missed deadline and requesting performance).
[178] Def.'s Opening Br. in Supp. of Cross-Mot. for S.J. at 29–35.

for breach of contract require damages, but LabCorp argues that Plaintiffs have not suffered any damages. Therefore, LabCorp contends that Count I fails as a matter of law.

LabCorp's argument is not persuasive because LabCorp does not explain why the Court should recognize Count I as a breach of contract claim. LabCorp instead cites *Donald M. Durking Contracting, Inc. v. City of Newark*[179] with no analysis. In that case, the plaintiff filed a declaratory judgment action alleging breach of contract by the City of Newark. The plaintiff requested a declaration that (i) the City is and was obligated to cooperate with plaintiff pursuant to their previous settlement agreement and (ii) the City materially breached the settlement agreement in the past, for which the plaintiff requested damages. The court treated the claim as one for breach of contract for statute of limitations purposes because "Plaintiff's action [was] based on an alleged promise in a contract, Plaintiff request[ed] interpretation of the terms of that contract, and Plaintiff [sought] to pursue damages for a breach of that contract."[180]

Presumably, LabCorp's position is that the Court should treat Count I as a breach of contract claim for the same reasons as those stated in *Donald M. Durking Contracting*. The Court does not find this case helpful here. The controversy in Count I is not whether LabCorp breached the APA. The declaration sought is whether the original Adjustment Amount remains in effect and whether the parties waived their rights to revise it. These appear to be separate questions, and LabCorp has offered no reason for finding otherwise.

In any case, Plaintiffs pled harm. The APA contemplated that the parties would revise the Adjustment Amount by mutual agreement promptly after January 31, 2017. This agreement would provide clarity for Plaintiffs on whether they would ultimately receive the First Earnout Payment on December 30, 2017, because the Adjustment Amount is a vital part of the equation

[179] *Donald M. Durking Contracting, Inc. v. City of Newark*, 2020 WL 2991778, at *8 (Del. Super. June 4, 2020).
[180] *Id.*

in the APA. LabCorp's failure to propose a revised Adjustment Amount in a timely manner deprived Plaintiffs of this part of their bargain. The court in *Schillinger Genetics* reached a similar conclusion. There, the buyer delivered its final adjustment calculation to the seller nearly two months after the contractual deadline. The buyer argued that sellers "suffered no prejudice from any delay as they were and are able to review . . . and object to the calculation."[181] The court rejected this argument, explaining:

> [The parties] bargained for that ninety-day window with the expectation that they would know of their final financial positions under the APA shortly after Closing. Defendant's tardiness breached Plaintiffs' bargained-for right, especially in the face of Plaintiffs' numerous communications alerting Defendants that the [final adjustment amount calculation] was overdue in violation of the APA.[182]

The same rationale appears here. LabCorp is not entitled to summary judgment based on Plaintiffs' alleged lack of injury.

D. COUNT IV – BREACH OF CONTRACT CLAIM

Plaintiffs also move for summary judgment on Count IV, which alleges that LabCorp breached the APA by failing to calculate and make the First Earnout Payment. The Court stayed Count IV upon agreement of the parties on July 27, 2020, pending resolution of the Resolution Process. Asterion issued its report on February 13, 2021, which concluded that Plaintiffs should have received a First Earnout Payment. Plaintiffs move for summary judgment on that basis alone.[183]

The Court finds that summary judgment on Count IV would be premature. As LabCorp points out, there has been no discovery or briefing on Count IV due to the stay.[184] Moreover,

[181] *Schillinger Genetics*, 2021 WL 320723, at *18 n.177.
[182] *Id.*
[183] Pl.'s Opening Br. in Supp. of Mot. for S.J. at 22–23.
[184] Def.'s Answering Br. in Opp. to Pl.'s Mot. for S.J. at 33–34.

Plaintiffs' argument for summary judgment is limited to one short paragraph.[185] The Court therefore finds that summary judgment would not be advisable at this time.[186]

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is **GRANTED** as to Count I and **DENIED** at to Count IV. LabCorp's cross-motion for summary judgment on Count I is **DENIED**.

IT IS SO ORDERED

Dated: December 16, 2021
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeExpress

[185] Pl.'s Opening Br. in Supp. of Mot. for S.J.
[186] *Annestella v. GEICO Gen. Ins. Co.*, 2014 WL 4229999, at *3 (Del. Super. Aug. 18, 2014) ("Summary judgment may be denied without prejudice if 'discovery is in its nascent stage' and summary judgment would be premature.") (internal citations omitted).