IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID L. BARNETT and JAMES R. WORKMAN, JR.,	)	Civil Action No. 2:16-cv-1668
Plaintiffs,	)	Magistrate Judge Lisa Pupo Lenihan
v.	)	ECF No. 20
PLATINUM EQUITY CAPITAL PARTNERS II, L.P. t/d/b/a STEELERS HOLDING CORP., *et al.*,	)	
Defendants.	)	

OPINION ON PLAINTIFFS' MOTION TO DISMISS
<u>DEFENDANTS' AMENDED COUNTERCLAIM</u>

LENIHAN, *Magistrate Judge*

Currently pending before the Court is Plaintiffs' Motion to Dismiss Defendants' Amended Counterclaim (ECF No. 20). In this ERISA action, Plaintiffs seek payment of deferred bonuses allegedly due them under two phantom stock plans with their former employer. Defendants[1] have brought a counterclaim against Plaintiffs seeking a declaratory judgment which asks the Court to interpret the agreements between the parties and find that Plaintiffs failed to satisfy an express condition precedent, thereby forfeiting their bonuses. Plaintiffs have moved to dismiss the counterclaim because they submit that the issues raised in the counterclaim are subsumed by the original

[1] The Counterclaim Plaintiffs include all of the Defendants named in the Amended Complaint except for the Co-Investment Plan. (Am. Ctrclm., ¶¶ 8-11, ECF No. 18 at 30.)

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pleadings. For the reasons set forth below, the Court will grant Plaintiffs' Motion to Dismiss the Amended Counterclaim.

I. RELEVANT FACTS

Plaintiffs/Counterclaim Defendants, David L. Barnett and James R. Workman, Jr., were employees of Maxim Crane Works ("Maxim"), the successor by merger to Defendant/Counterclaim Plaintiff, Steelers Holding Corporation ("Steelers"). (Am. Compl., ¶ 14, ECF No. 9; Am. Ctrclm., ¶ 10 (ECF No. 18).) Barnett was employed by Maxim from before 2008 through and including April 4, 2014. (Am. Ctrclm., ¶ 12.) Workman was employed by Maxim from before 2008 through and including December 31, 2012. (*Id.* at ¶ 13.)

Also named as Defendants and Counterclaim Plaintiffs are Platinum Equity Capital Partners II, L.P. ("Platinum Capital") and Platinum Equity Advisors, LLC ("Platinum Advisors") (together the "Platinum Defendants), and the Steelers Holding Corporation 2008 Management Participation Plan (the "Management Plan"). (Am. Compl., ¶¶ 6-7, 10; Am. Ctrclm., ¶¶ 8-9, 11.) The Management Plan is an incentive compensation benefit plan. (Am. Ctrclm., ¶ 11.)

In July of 2008, Barnett and Workman each executed an Employment Agreement which provided, among other things, that "[each] shall be entitled to participate in [the 2008 Management] Participation Plan at a level to be agreed upon and appropriate to his office and on terms and conditions no less favorable to [them] than other senior executive officers participating in such Participation Plan." Barnett Empl. Agrmt., ¶3(f),

Tab A to Defs.' Am. Ctrclm. (ECF No. 18-1 at 4); Workman Empl. Agrmt., ¶ 3(f), Tab B to Defs.' Am. Ctrclm. (ECF No. 18-1 at 15).[2] The Employment Agreement provides that:

> This Agreement, together with any other written agreements between Executive and [Maxim] or one or more of its affiliates of even date herewith (that are being entered into in anticipation of the Merger), . . . and the terms of the Participation Plan referred to in Section 3(f) embody the complete agreement and understanding between Executive, one the one hand, and [Maxim, Steelers] and their respective affiliates, on the other hand, and supersede and preempt any prior understandings, agreements, written or oral, which may have related to Executive's employment by [Maxim]or any of its affiliates in any way, including, without limitation, any prior employment agreement with [Maxim] or any of its Affiliates to which Executive may have been a party."

Barnett Empl. Agrmt., ¶ 14. Counterclaim Plaintiffs refer to the Employment Agreements and the other agreements referenced in paragraph 14 above as the "Complete Agreements" between the parties. (Am. Ctrclm., ¶ 1.)

The Management Plan states that its purpose "is to provide incentive compensation to key employees of Steelers . . . and its subsidiaries[, and] . . . shall be based upon the award of Performance Units, the value of which is related to the appreciation in the value of [Steelers]." (Mgmt. Plan, ¶ 1, Ex. 1 to Am. Compl. (ECF No. 9-1 at 1).) The Management Plan further provides that incentive compensation "shall be payable to participants upon the occurrence of certain Qualifying Events." *Id.* It is undisputed that a Qualifying Event, as defined in the Management Plan, occurred here:

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[2] The Barnett and Workman Employment Agreements contain almost identical language. Where the language in a particular provision is identical, for ease of reference, the Court will cite only to the Barnett Employment Agreement.

On July 29, 2016, a notice was sent to former Maxim employees possessing Performance Units in the Management Plan indicating that a qualifying event—the merger by Maxim, Steelers, and Platinum Advisors—had occurred. (Am. Compl., ¶¶ 60-61 (citing 7/29/16 Notice to Former Maxim Employees , Ex. 8 attached to Am. Compl. (ECF No. 9-8)).

However, the Management Plan sets forth several circumstances in which an executive's Performance Units, whether or not fully matured, will be forfeited. (Mgmt. Plan, ¶ 6.2.) Relevant to this case is the requirement set forth in Section 6.2.2 of the Management Plan, which states that all Performance Units will be discontinued and forfeited if "[t]he Participant engages in competition with [Maxim] or violates any agreement with [Maxim] regarding the assignment of rights to [Maxim] or the confidentiality of [Maxim] information." (Am. Ctrclm., ¶ 17; Mgmt. Plan, § 6.2.2.) Counterclaim Plaintiffs submit that this requirement is a condition precedent to Barnett and Workman receiving the value of their Performance Units in the Management Plan. (Am. Ctrclm., ¶ 17.)

In July of 2008, Barnett and Workman each received a grant of Management Plan Performance Units. (*Id.*, ¶¶ 19-20.) However, in 2015, both Barnett and Workman accepted employment with direct competitors of Maxim, prior to the occurrence of the Qualifying Event. (*Id.* at ¶¶ 21-26.) As such, and based on the clear and unambiguous terms of the Complete Agreements, Counterclaim Plaintiffs contend that Barnett and

Workman failed to satisfy a condition precedent, and therefore, forfeited their Performance Units in the Management Plan. (*Id.* at ¶¶ 27-29.)

For relief, Counterclaim Plaintiffs seek a declaratory judgment declaring that none of them[3] had a contractual duty to pay Barnett and Workman the value of their Management Plan Performance Units at the time of the later Qualifying Event, because neither Barnett nor Workman can satisfy a material and enforceable condition precedent—refraining from engaging in competition with [Maxim]—contained in the Complete Agreements. (*Id.* at ¶¶ 30, 33, 36; Ctrclm. Cts. I & II, Ad Damnum cl., part F.)[4]

II. LEGAL STANDARD – MOTION TO DISMISS COUNTERCLAIM

For purposes of deciding a motion to dismiss under Rule 12(b)(6), claims and counterclaims are treated the same, and therefore, subject to the same standard of review. *Red Bend Hunting & Fishing Club v. Range Resources – Appalachia, LLC*, Case No. 4:16-CV-00864, 2016 WL 7034686, *3 n. 35 (M.D.Pa. Dec. 2, 2016) (citing *Universal Underwriters Co. v. J. Murray Motor Co., Inc.*, Civ. A. No. 4:11-CV-1851, 2012 WL 12870228, at *1 n. 2 (M.D. Pa. Sept. 12, 2012)). In deciding a motion to dismiss under Rule 12(b)(6), the Courts apply the following standard, as recently reiterated by the

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[3] The Court notes that all of the Counterclaim Plaintiffs request declaratory relief in their favor yet both counts of the Amended Counterclaim are brought only by the Management Plan. Moreover, the Platinum Defendants seek declaratory relief only to the extent they are deemed to be the alter egos of Steelers, since they allegedly were not parties to any contract with Barnett or Workman. (Am. Ctrclm., ¶¶ 33 & 36.)

[4] Counterclaim Plaintiffs also list five other declarations which they ask the Court to enter, but as explained below, none of them are the proper subject for declaratory judgment.

Court of Appeals:

> A complaint may be dismissed under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted". . . . "To survive a motion to dismiss, a complaint must contain sufficient *factual matter, accepted as true*, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (citation and internal quotation marks omitted) (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n. 27 (3d Cir.2010). Although the plausibility standard "does not impose a probability requirement," *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955, it does require a pleading to show "more than a sheer possibility that a defendant has acted unlawfully," *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. A complaint that pleads facts "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." Id. (citation and internal quotation marks omitted). The plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937.

Connelly v. Lane Constr. Corp., 809 F.3d 780, 786-87 (3d Cir. 2016).

In determining whether a counterclaim has been adequately pled, the court must accept as true the factual allegations of the counterclaim and draw all reasonable inferences in the light most favorable to the defendant (counterclaim plaintiff). *Assurity Life Ins. Co. v. Nicholas*, Civ. A. No. 14-6522, 2015 WL 5737397, *2, E.D.Pa. Oct. 1, 2015) (citing *GE Capital Mortg. Servs., Inc. v. Pinnacle Mortg. Inv. Corp.*, 897 F. Supp. 854, 860 (E.D.Pa. 1995)). The Court may also rely on facts pled in the complaint, but only to the extent that they have been admitted in defendant's answer. *See Red Bend Hunting &*

Fishing Club, 2016 WL 7034686, at *1 n. 10. In addition, the Court may consider any exhibits attached to the complaint (or, in this case, to the counterclaim), and matters of public record, in deciding motions to dismiss. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citations omitted). Factual allegations within documents described or identified in the complaint (or, as here, the counterclaims) may also be considered if the claims (or counterclaims) are based upon those documents. *Id*. A district court may consider these documents without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

III. DISCUSSION

Plaintiffs have moved to dismiss the Amended Counterclaim on the basis that the claims and issues raised therein and in Defendants' Answer and Affirmative Defenses are identical to claims and issues before the Court in the Amended Complaint. As such, Plaintiffs submit that a resolution of Plaintiffs' Amended Complaint and Defendants' defenses to same will resolve the issue of whether Plaintiffs are entitled to any further compensation for their performance units. Therefore, Plaintiffs argue, a determination on the merits of Plaintiffs' Amended Complaint will render the Amended Counterclaim moot. In support, Plaintiffs cite a number of district court cases for the proposition that it is well-settled that counterclaims requesting declaratory judgment should be dismissed when they are redundant with the original claim and

answer.[5] Because Counterclaim Plaintiffs seek a declaration that Plaintiffs are not entitled to any additional compensation because they forfeited any rights to compensation under the Management Plan when they competed against Steelers, Plaintiffs submit that this is the exact issue raised in paragraphs 64 and 66 of Defendants' Answer and in their Fourth, Fifth, Sixth, and Seventh Affirmative Defenses, and therefore, the Amended Counterclaim is redundant and should be dismissed as moot.

In response, the Counterclaim Plaintiffs acknowledge the general rule that courts possess the discretion to dismiss counterclaims requesting declaratory relief where they are redundant with the original claim. However, Counterclaim Plaintiffs submit that the general rule is disfavored by the courts, and cite to several district court cases which refused to dismiss a counterclaim, particularly where the declaratory relief sought was based on contract interpretation, even where the counterclaim was a near "mirror image" of the complaint.[6] According to Counterclaim Plaintiffs, the rationale that these

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[5] For example, Plaintiffs rely on the following cases: *Lilac Dev. Group., LLC v. Hess Corp.*, Civ. No. 15-7547, 2016 WL 3267325, at *3 (D.N.J. June 7, 2016); *Keybank Nat'l Ass'n v. Voyager Group, LP,* Civ. A. No. 09-1238, 2010 WL 441464, at *12 (W.D.Pa. Feb. 4, 2010) (citing *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 64 F. Supp. 2d 562, 566 (D. Del. 2009)); *ProCentury Ins. Co. v. Harbor House Club Condo Ass'n, Inc.*, 652 F. Supp 2d 552, 556 (D.N.J. 2009); 6 Wright, Miller, & Kane, FED. PRAC. & PROC. § 1406, pp 30-31 (3d ed. 2010).

[6]Counterclaim Plaintiffs cite the following cases in support: *ProCentury,* 652 F. Supp. 2d at 556-57; *Iron Mtn. Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158 (E.D.Pa. 1978); *Assurity Life Ins. Co.,* 2015 WL 5737397, at *5-6; *MedMarc Cas. Ins. Co. v. Pineiro & Byrd PLLC*, 783 F. Supp. 2d 1214, 1217 (S.D. Fla. 2011); *Lilac Dev. Group,* 2016 WL 3267325, at *4 (quoting Wright, §1406); *Univ. Patents, Inc. v. Ligman*, Civ. A. Nos. 89-

courts employed for denying the motion to dismiss is that a ruling on the merits of a plaintiff's action might not establish that the defendant's interpretation of the contract was a correct one. In that situation, the courts have held that the safer course is to deny the motion to dismiss the counterclaim seeking declaratory relief until the facts have been sufficiently developed to enable the court to determine whether the counterclaim is truly redundant. Thus, Counterclaim Plaintiffs maintain that because they present issues separate from Plaintiffs' claim and present a different interpretation of the contract, the Court should deny Plaintiffs' Motion to Dismiss the Amended Counterclaim.

The United States Court of Appeals for the Third Circuit has held that a counterclaim for declaratory judgment may be dismissed as redundant where it is clear that "complete identity of factual and legal issues [exists] between the complaint and the counterclaim." *Aldens, Inc. v. Packel*, 524 F.2d 38, 51-52 (3d Cir. 1975) (citing 6 C. Wright & A. Miller, FED. PRACT. & PROC. § 1406 (1971)). "Dismissal is justified in such cases on the theory that the counterclaim will become moot upon disposition of the complaint." *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, 674 F.Supp. 2d 562, 566 (D. Del. 2009) (citing *Aldens, Inc.*, 524 F.2d at 51-52); *see also Assurity Life Ins. Co. v. Nicholas*, Civ. A. No. 14-6522, 2015 WL 5737397, *5 (E.D.Pa. Oct. 1, 2015) (citing *Aldens,*

3525 & 90-0422, 1991 WL 165071, *1 (E.D.Pa. Aug. 23, 1991). For the most part, these cases are distinguishable because the courts based their denials of the motions to dismiss the counterclaims on their findings that either the counterclaims raised separate issues from those asserted in the complaints or it could not be determined at the pleadings stage whether the counterclaims were redundant. As explained below, that is not the situation here.

Inc., *supra*). However, if there is any doubt as to whether the counterclaim is redundant, the better course is to deny the motion to dismiss without prejudice until the facts have been developed, either at the summary judgment stage or after trial. *See Principal Life,* 674 F. Supp. 2d at 566 & n. 25; 6 C. Wright, A. Miller, & M. Kane, FED. PRAC. & PROC. § 1406, at 35 (3d ed. 2010). *See also Keybank Nat'l Ass'n*, 2010 WL 441464, at *12 (holding dismissal of declaratory counterclaim was inappropriate before development of the facts because it was unclear whether resolution of the breach of contract claim would moot the counterclaim as the counterclaim appeared to raise a separate issue from that raised in the breach of contract claim).

In addition, where a declaratory judgment counterclaim involves the interpretation of a contract, some courts are reluctant to dismiss such counterclaims as redundant, even though the counterclaims are a "mirror image" of the complaint. *Red Bend Hunting & Fishing Club*, 2016 WL 7034686, at *6 (citing *ProCentury Ins.Co.,* 652 F. Supp. 2d at 556 (citing *Univ. Patents, Inc.,* 1991 WL 165071, at *1). The reason for this reluctance is that:

> A ruling adverse to plaintiff on plaintiff's claim would merely result in a judgment that plaintiff was not entitled to the relief requested; although it might logically follow from that judgment that defendants' interpretation of the contract was the correct one, defendants would not be entitled to a judgment to that effect unless they specifically requested one.

Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc., 457 F. Supp. 1158 (E.D.Pa. 1978), *superseded by rule on other grounds as stated in Keefer v. Keefer*, 741 A.2d 808 (Pa.

Super. Ct. 1999). Nonetheless, several district courts have dismissed such counterclaims as redundant where it was clear that a ruling on the merits of plaintiff's claims would render the declaratory counterclaim moot. *See, e.g.*, *Principal Life,* 674 F. Supp. 2d at 566-67 (finding a counterclaim seeking a declaration that an insurable interest existed at the inception of the insurance policy presented no unique issues of fact or law, as an adverse ruling on plaintiff's request for declaratory relief that policy lacked an insurable interest at its inception, would grant the counterclaim's requested relief); *Lilac Dev. Group, LLC v. Hess Corp.*, Civ. No. 15-7547, 2016 WL 3267325, * (D. N.J. June 7, 2016) (finding that the concerns about dismissing declaratory counterclaims as redundant where contract interpretation is involved "are only relevant in an action where the counterclaim presents issues that are separate from the main claim.")

The Court notes that while the district court in *Principal Life* dismissed one of the requests for declaratory relief in the counterclaim as redundant, it found that three other declarations requested by the defendant implicated new facts and principles of agency law that would not necessarily be raised in adjudicating the plaintiff's claim.[7] 674 F. Supp. 2d at 567. Thus, because it could not state with certainty that complete identity of factual or legal issues existed between the complaint and that portion of the counterclaim, the court denied the motion to dismiss as to the other three requests for declaratory relief. *Id.*

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[7] The counterclaim sought additional declarations that (1) the principal was bound by the conduct of its agent; (2) the fraudulent statements or misrepresentations by the agent could be imputed to the principal; and (3) the principal could be held liable for damages caused by the agent's fraud or misrepresentation. 674 F. Supp. 2d at 567.

Here Counterclaim Plaintiffs request that the Court enter six declarations with regard to the Management Plan. In particular, Counterclaim Plaintiffs seek a declaration that:

A. One purpose of the Management Plan was to incentivize employees to conduct themselves in a manner that contributed to appreciation in the value of the Company from the time when it was acquired in 2008 until when it ultimately was sold in 2016.

B. Any payment pursuant to the terms of the Management Plan upon the occurrence of the 2016 sale (e.g., the Qualifying Event) was to be based upon appreciation in the value of the Company that had occurred.

C. Because competitive employment would undermine, as opposed to contribute to, appreciation over time of the value of the Company, an express condition precedent to receipt of payment under the Management Plan was that a participant, at any time prior to the occurrence of a Qualifying Event, could not engage in any competitive employment.

D. The express condition precedent that the participant, prior to the Qualifying Event, not engage in any competitive employment, was not limited in duration, scope or area, nor was there any reason for it to be so limited as it was not a restrictive covenant upon which the employer could sue in a court of equity to enjoin the competitive employment.

E. Lastly, while the Employment Agreement contained discrete (limited in duration, scope and area) non-compete and non-solicitation covenants, the employer could enforce those affirmative restrictions in the form of specific performance by suing in equity, and those restrictive covenants were independent of, and

did not limit, the express condition precedent set forth in the terms of the Management Plan.

F. None of the Counterclaim Plaintiffs had a duty to pay [Plaintiffs] any compensation for the value of [their] Management Plan Performance Units upon the occurrence of a Qualifying Event in July 2016, as [Plaintiffs] could not satisfy the express condition precedent.

See Am. Ctrclm., Counts I & II, Ad damnum cl., parts A, B, C. D, E & F (ECF No. 18 at 34-36). The Court will address the declaratory relief sought in paragraph F first, as that was the sole declaratory relief sought in the original Counterclaim[8] and essentially subsumes the remaining requests for declaratory relief.

Here it is clear that Counterclaim Plaintiffs do not raise any unique issues of fact or law from those pled in the Amended Complaint with regard to the declaratory relief sought in paragraph F. To the extent that Counterclaim Plaintiffs seek a declaration that none of them owed a duty to pay Barnett or Workman any compensation for the value of their Management Plan Performance Units upon the occurrence of a Qualifying Event in July 2016 because they could not satisfy the express condition precedent, such

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[8] Counterclaim Plaintiffs have added five new requests for declaratory relief to their Amended Counterclaim, which are set forth in paragraphs A through E of the ad damnum clauses in counts I and II, *see* ECF No. 18 at 34-36, in an attempt to persuade the Court that the Amended Counterclaim raises different facts or legal issues than those presented in Plaintiff's Amended Complaint. However, as explained below, the proposed declarations added by the Counterclaim Plaintiffs raise facts and/or legal issues that will necessarily be decided in resolving Plaintiffs' breach of contract claims, as will the declaratory relief requested in paragraph F.

relief would be subsumed by a ruling contrary to Plaintiffs on their breach of contract claims.

In their Amended Complaint, Plaintiffs set forth the terms and conditions of the Management Plan relevant to their claims. *See* Am. Compl., ¶¶ 19-33. Specifically, Plaintiffs allege that the Management Plan Performance Units could be forfeited if a plan participant engaged in competition; that the Management Plan does not define what is meant by "engages in competition," and does not provide and geographic scope, time period, or any other details as to what the term meant; the Management Plan provides for the award of compensation for performance units upon the occurrence of a Qualifying Event; and what constitutes a Qualifying Event under the Management Plan. (*Id.* at ¶¶ 26-33.) Plaintiffs also allege that they: do not believe that they received any compensation for their Management Plan Performance Units (*id.* at ¶¶ 64 & 66); and performed under the Management Plan and acted in reliance on same (*id.* at ¶¶ 77 & 126). Plaintiffs also allege that pursuant to a change in control that occurred in July 2016, the Corporate Defendants[9] were obligated to pay Plaintiffs for their Management Plan Performance Units. (*Id.* at ¶¶ 78-79, 127-28.)

In their Answer to the Amended Complaint, Defendants admitted that Plaintiffs did not receive payment pursuant to the Management Plan because they forfeited any performance units when they engaged in competition with Steelers by accepting employment with crane industry competitors. (Ans. ¶¶ 64, 66, ECF No. 18.) The

[9] Plaintiffs use the term "Corporate Defendants" in their Amended Complaint to collectively refer to the Platinum Defendants and Steelers. Am. Compl., ¶ 12.

Management Plan answered in response to Plaintiffs' ERISA claims in counts III and VII that it does not know what Plaintiffs mean when they state that they "performed" under the Management Plan, and affirmatively asserted that Plaintiffs forfeited their performance units by working for competitors. (Ans., ¶¶ 98 & 147). In addition, Defendants assert in their Fourth, Fifth, Sixth and Seventh Affirmative Defenses that Plaintiffs are not entitled to, or forfeited any contractual right to, benefits and/or payment under the Management Plan because they engaged in competition with Maxim when they began working for a crane industry competitor. (ECF No. 18 at 27-28.)

In their Amended Counterclaim, Counterclaim Plaintiffs assert that because neither of the Plaintiffs can satisfy a material and enforceable condition precedent contained in the Complete Agreement, which includes the terms of the Management Plan, as a result of their engagement in competitive employment prior to the Qualifying Event in July 2016, Counterclaim Plaintiffs are entitled to a declaration that none of them owed a duty to pay Plaintiffs the value of their Management Plan Performance Units at the time of the later Qualifying Event. (Am. Ctrclm., ¶¶ 30, 33 & 36.) The request for declaratory relief associated with paragraphs 30, 33 and 36 is set forth in paragraph F of the ad damnum clauses in counts I and II of the Amended Counterclaim.

In essence, Plaintiffs' claims, Defendants Answer and Affirmative Defenses, and the Amended Counterclaim all put at issue whether Defendants owed Plaintiffs any

compensation for their performance units under the Management Plan on the date of the Qualifying Event, which necessarily involves a determination of whether Plaintiffs' forfeited their performance units by working for competitors of Maxim—a defense specifically raised by Defendants. Thus, the Court finds that the same facts and issues of law will be at issue in resolving the breach of contract claims in the Amended Complaint and the Amended Counterclaim, and particularly the declaratory relief sought in paragraph F of the Amended Counterclaim. As such, the Court concludes that the Amended Counterclaim, including the declaratory relief sought in paragraph F, is clearly redundant and is subsumed by Plaintiffs' breach of contract claims. Therefore, the Court will grant Plaintiffs' Motion to Dismiss the Amended Counterclaim, and specifically, as to the declaratory relief sought in paragraph F.

With regard to the proposed declarations in paragraphs A through E, Counterclaim Plaintiffs argue that declaratory relief is necessary because it will address separate issues from the breach of contract claims. Specifically, the Counterclaim Plaintiffs contend that declaratory relief will clarify that: (1) the Management Plan is part of a Complete Agreement that also includes the Employment Agreements; (2) the Management Plan is a means to incentivize senior management employees to conduct themselves in a manner that contributes to appreciation in value of the Company; (3) the term "competition with the Company" is clear and unambiguous; and (4) the clear and unambiguous condition precedent is tied to competitive employment and not limited in duration, scope or geographic area. Defs.' Resp. in Opp'n to Pls.' Mot. to

Dismiss Am. Ctrclm. at 7-8 (ECF No. 22). However, after close examination, the Court finds that these "separate issues" are really components of Plaintiffs' breach of contract claims. These "separate issues," which are the subject of the declaratory relief requested in paragraphs A through E, have been pled and placed at issue by Plaintiffs in their Amended Complaint (*see* Am. Compl., ¶¶ 26-33), and therefore, are subsumed by Plaintiffs' breach of contract claims. *See Gibson v. Liberty Mut. Group, Inc.*, 778 F. Supp. 2d 75, 79 (D. D.C. 2011). Moreover, the piecemeal litigation that would result if the motion to dismiss was denied is not favored in declaratory judgment actions because a declaration on individual terms of a contract will not completely resolve the dispute. *Gibson*, 778 F. Supp. 2d at 80. Accordingly, the Court finds that the declaratory relief sought in paragraphs A through E is rendered moot by the Amended Complaint.

In addition, the relief sought in the proposed declarations is not appropriate under the under the Declaratory Judgment Act ("DJA"). The DJA provides that "in a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such a declaration...." 28 U.S.C. § 2201(a). The district court in *Delaware State University Student Housing Foundation* has aptly summarized when declaratory relief is appropriate under the DJA:

> Whether to grant relief pursuant to section 2201 is vested in the court's discretion. "Although the threat of legal action may present a real controversy . . . the remedy of a declaratory judgment is discretionary even where a justiciable controversy exists." *Gruntal & Co., Inc. v. Steinberg*,

> 837 F. Supp. 85, 89 (D. N.J. 1993) (quoting *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1170 (3d Cir. 1987)). A court should not grant declaratory relief "if it finds that a declaratory judgment action will not serve a useful purpose or is otherwise undesirable." *Id.* (quoting *United Sweetener USA, Inc. v. Nutrasweet Co.,* 766 F. Supp. 212, 216 (D.Del. 1991)). . . . Declaratory judgment permits parties to avoid the "accrual of avoidable damages to one not certain of his rights" and "would . . . strongly affect present behavior, have present consequences and resolve a present dispute." *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 666 F. 2d 819, 823 (3d Cir. 1981) (citations omitted). "A declaratory judgment is inappropriate solely to adjudicate past conduct." *Gruntal*, 837 F. Supp. at 89 (citing *Crown Cork & Seal Co., Inc. v. Borden, Inc.*, 779 F. Supp. 33, 35 (E.D.Pa. 1991)); *see also Alpine Group, Inc. v. Johnson,* No. 01 Civ. 5532(NRB), 2002 WL 10495, at *4 (S.D.N.Y. Jan. 3, 2001).

Del. State Univ. Student Housing Fdn., 556 F. Supp. 2d at 373-74 (internal quotation marks omitted). *See also Gross v. Fox*, 496 F.2d 1153, 1155 (3d Cir. 1974) (a frequently articulated purpose of the DJA is to determine the rights of the parties before damages accrue; however, this purpose cannot be achieved where the damage has already been fully realized) (citations omitted).

In *Lilac Development*, the parties did not dispute that defendants terminated the agreement and the current status of the contract was not disputed. Plaintiffs sought only damages, did not request either specific performance, or argue that the contract was still in effect. As plaintiffs had "already filed suit, the alleged damages ha[d] already accrued, and a declaratory judgment in addition to a ruling on the breach of contract claim [would] not 'strongly affect present behavior, have present consequences, [or] resolve a present dispute[,]'" the court found that defendants'

declaratory counterclaim would be subsumed by the original breach of contract claim, and thus, declined to exercise it discretion to hear the counterclaim. 2016 WL 3267325, at *4 (quoting *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 666 F. 2d 819, 823 (3d Cir. 1981)).

In a case involving a motion to dismiss a declaratory counterclaim under Rule 12(b)(6), our sister court in the District of Delaware noted that although declaratory judgment may be sought for the interpretation of a written contract, declaratory relief is appropriate where it could affect the then-present behavior of the contracting parties, i.e., where the primary question is whether a contract termination has occurred. *Del. State Univ. Student Housing Fdn.,* 556 F. Supp. 2d at 374 (citing *Burger King Corp. v. Family Dining, Inc.*, 426 F. Supp. 485, 487 (E.D. Pa. 1977), *aff'd without op.* 566 F. 2d 1168 (3d Cir. 1977)). In that case, the contracts at issue had been terminated prior to seeking declaratory relief, *id.*, similar to the case at bar. Because there was no present behavior to affect the contracts between the parties, due to the fact that the contracts had been terminated, the court declined to exercise its discretion to grant declaratory relief. *Id.* at 375. Significantly, the court noted that the defendant would not be deprived of the ultimate remedy sought in its request for declaratory judgment as that question would be resolved with the disposition of the breach of contract claim. *Id.*

Similar to *Lilac Development* and *Delaware State University Student Housing Foundation,* here Plaintiffs have already filed suit, seek only damages which have already accrued under the Management Plan, and because Plaintiffs are no longer employed by Maxim, there can be no present or future consequence or dispute with

regard to payment for performance units under the Management Plan. As such, the requested declaratory relief would not serve a useful purpose, and therefore, further supports the Court's decision to grant the motion to dismiss the Amended Counterclaim.

Finally, the proposed declarations set forth in paragraphs A through E appear to seek, at least in part, declarations of fact. However, requests for declaratory relief that seek declarations of fact are not appropriate for declaratory relief, but are best left to fact finder. *See Gibson,* 778 F. Supp. 2d at 79 (citing *Newton v. State Farm Fire & Cas. Co.,* 138 F.R.D. 76, 78 (E.D.Va. 1991)) (holding where the questions raised in declaratory judgment action are purely factual ones regarding proper compliance with an insurance policy, the method used to calculate losses, and the ultimate value of the losses, they are not appropriate for declaratory relief, but are best reserved for the finder of fact). Thus, to the extent the proposed declarations in paragraphs A through E seek declarations of fact, the Court finds that they are not the proper subject of declaratory relief.

Accordingly, the Court exercises its discretion and will dismiss the Amended Counterclaim and, specificially, paragraphs A through E of the ad damnum clauses.

IV. CONCLUSION

For the reasons set forth above, the Court will grant Plaintiffs' Motion to Dismiss the Amended Counterclaim (ECF No. 20).

A separate order will follow.

Dated: July 27, 2017

BY THE COURT:

s/Lisa Pupo Lenihan
LISA PUPO LENIHAN
United States Magistrate Judge

cc: All Counsel of Record
Via Electronic Mail