SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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SL GLOBETROTTER, L.P., GLOBAL BLUE GROUP HOLDING AG,

Plaintiffs,

-against-

SUVRETTA CAPITAL MANAGEMENT, LLC, TOMS CAPITAL INVESTMENT MANAGEMENT LP,

Defendants.

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INDEX No.: 652769/2020

MOT. DATE: 10/13/2020

MOT. SEQ. No.: 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 48 were read on this motion to/for DISMISSAL

Defendants Suvretta Capital Management, LLC ("Suvretta") and TOMS Capital Investment Management LP ("TOMS") move to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). For the following reasons, defendants' motion is denied.

I. BACKGROUND

Beginning in July 2018, plaintiffs SL Globetrotter, L.P. and Global Blue Group Holding AG ("New Global Blue" or, the "Company") and other Global Blue Group AG ("Global Blue") seller parties engaged with Far Point Acquisition Corporation ("FPAC") toward consummation of a business combination regarding Global Blue, a provider of tax-free shopping and currency processing services (Compl. ¶¶ 1, 12-13 [Doc. No. 10]). On January 16, 2020, the various seller parties and FPAC entered into an Agreement and Plan of Merger (the "Merger Agreement") providing for a series of transactions whereby New Global Blue would become a new public company owned by existing FPAC and Global Blue shareholders as well as other equity investors, including defendants (the "Transaction") (*id.* ¶ 1). FPAC endeavored to raise funding in support of the Transaction through various channels, including offering investment opportunities, known as private investments in public equity or "PIPEs," to sophisticated investors such as defendants (*id.* ¶ 14). It is common for special purpose acquisition vehicles

such as FPAC to offer PIPE opportunities privately to select sophisticated investors looking to secure a meaningful stake in public companies in exchange for an upfront commitment to the seller to provide funding when a given merger closes (*id.* ¶ 15). In December 2019 and January 2020, certain PIPE investors including defendants were provided with an Investor Presentation which included a summary of the Transaction, an overview of Global Blue's business model and historical financial performance, and highlights of the investment opportunity on offer (*id.* ¶ 16). The Investor Presentation expressly disclaimed any guarantees of performance, with the "Disclaimer" and "Ley risks relating to Global Blue" slides making clear that "There can be no assurance that the future developments affecting FPAC, Global Blue or any successor entity of the Transaction will be those that we have anticipated" and that "no representation, express or implied, is or will be given by FPAC, Global Blue or their respective affiliates and advisors as to the accuracy or completeness of the information contained herein" (*id.* ¶ 17). The Investor Presentation warned that any forward-looking statements involved numerous risks, uncertainties, or other assumptions that could create a difference in results from those expressed or implied by the Investor Presentation, further disclaiming any obligation to update or revise such statements with new information (*id.* ¶ 18).

On January 16, 2020, FPAC entered into the Merger Agreement with parties including plaintiffs, providing for New Global Blue to become a new public company owned by the existing shareholders of FPAC and Global Blue, as well as by defendants and other PIPE investors (*id.* ¶ 19). Under the Merger Agreement, Globetrotter and other existing shareholders of Global Blue will sell, exchange and contribute their shares of Global Blue for cash consideration and shares of New Global Blue, and FPAC shares will be converted into the right to receive New Global Blue shares (*id.*). The Merger Agreement provided a deadline of August 31, 2020 (subject to extension by certain parties) to satisfy certain closing conditions and consummate the Transaction, with the parties agreeing to take actions reasonably necessary to do so by that date (*id.* ¶ 20). Concurrently with the execution and delivery of the Merger Agreement, New Global Blue, FPAC, and defendants entered into the Agreements, pursuant to which defendants collectively committed to purchase five million New Global Blue Shares for $10 per share, an aggregate purchase price equal to $50 million (*id.* ¶ 21). Along with other PIPE investors committing to purchase an additional $75 million of New Global Blue Shares at the same price, New Global Blue would use the combined $125 million Primary PIPE Investment

amount to purchase a portion of the issued and outstanding Global Blue shares held by Globetrotter and other Global Blue shareholders (*id.*). In the Agreements, defendants expressly acknowledged the possibility of an immediate loss in their investment's value, even during the interim period leading up to the transaction (*id.* ¶ 22).

On June 19, 2020, FPAC filed with the Securities and Exchange Commission a revised Preliminary Proxy Statement (the "Preliminary Proxy Statement") which reported that the COVID-19 pandemic had a negative impact on Global Blue's financial performance to date (*id.* ¶ 23). On June 22, 2020, defendants sent plaintiffs a Repudiation Letter in which defendants announced they would refuse to "perform any action contemplated to be performed by [them] in connection with the Closing, including funding the Purchase Price," unequivocally expressing intent not to perform under the Agreements (*id.* ¶ 24). To excuse their nonperformance, defendants invoked New Global Blue's representation and warranty in Section 5(f) of the Agreements, claiming that because the COVID-19 pandemic had a negative impact on Global Blue's financial performance subsequent to the time of the Investor Presentation, the Presentation was materially inconsistent with the proxy statement provided to the SEC (*id.* ¶ 25). Interpreting the Repudiation Letter as an unequivocal expression of defendants' intent to not perform, plaintiffs now bring suit alleging four causes of action, breach of contract and declaratory judgment separately against defendants Suvretta and TOMS(*id.* ¶ 34).

II. ARGUMENTS

A. Defendants' Memorandum in Support

Defendants begin by arguing the complaint should be dismissed because the conditions precedent to defendants' obligations to purchase Global Blue Shares were not and cannot be satisfied (Def. Br. at 16 [Doc. No. 7]). "A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Express conditions "must be literally performed" (*id.*). Where a defendant's performance under a contract is subject to conditions precedent, a claim for breach of contract must be dismissed unless all conditions have been satisfied (*see e.g. Seaport Park Condo. v Greater N.Y. Mut. Ins. Co.*, 39 AD3d 51, 54 [1st Dept 2007]; *Carver Fed. Sav. Bank v Word Aflame Cmty. Church Inc.*, 2012 WL 882797, *4 [Sup Ct Kings County 2012]). The interpretation of an unambiguous contract is a question of law for the court and provisions of a

contract addressing the rights of the parties will prevail over a complaint's allegations (*Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004]).

Defendants argue that, under Section 3(a) of the Subscription Agreements, their obligation to purchase Global Blue shares was subject to the express condition precedent that all representations and warranties of Global Blue contained in the agreements were true and correct in all material respects as of the closing date (Def. Br. at 17; Subscriber Agreements, § 3 [Doc. Nos. 14-16] [hereinafter "Subscriber Agreements"]). In Section 5(f) of the Agreements, Global Blue represented that the description of business and financial information in the Proxy Statement would not be materially inconsistent with the information included in the Investor Presentation (Subscriber Agreements, § 5(f)). First, defendants argue, the Investor Presentation included financial projections for Global Blue for the financial years ending March 31, 2020 and March 31, 2021 and touted that Global Blue expected a "3-6% compounded annual revenue growth rate," generating ">200bps Adjusted EBITDA margin expansion" and "high single digit adjusted net income . . . growth" (Investor Presentation at 20-21 [Doc. No. 13] [hereinafter "Investor Presentation"). By contrast, defendants argue, the Definitive Proxy Statement (released on August 4, 2020) includes no financial projections for Global Blue whatsoever and advises shareholders that Global Blue's previously provided financial projections for the 2020 and 2021 years should no longer be relied on (Def. Br. at 12; Ex. 2 at 128 [Doc. No. 11] [hereinafter "Definitive Proxy"]). The Proxy Statement further discloses that as of April 2020, Global Blue "could not" provide any forecast regarding the Company's business, results of operations, and cash flows for the year ending March 31, 2021 (*id.* at 126, 128). Defendants argue the Investor Presentation's inclusion financial projections juxtaposed with the Proxy Statement disclaiming the ability to provide any financial projections constitutes a material inconsistency (Def. Br. at 18). Defendants argue that plaintiffs cannot contend that the financial information included in the Investor Presentation was only "historical financial information" as Global Blue previously provided the same financial projections under the heading "Certain Projected Financial Information" in the February 2020 preliminary proxy (*id.*; Ex. 8 at 112-15 [Doc. No. 17]). Defendants further argue that the plain meaning of "financial information" encompasses both historical and forward-looking financial information (*see e.g. Chalom Liparelli*, 236 AD2d 354, 356 [2d Dept 1997]; *Guandong Enters. (N. Am.) Fur Holdings Ltd. v Hennessy*, 2002 WL 1000953, *2 [SD NY 2002]; *Federated Strategic Income Fund v Mechala Grp. Jamaica Ltd.*,

1999 WL 993648, *2 [SD NY 1999]). Defendants further argue Global Blue admitted in its original preliminary proxy filing that financial projections are still "financial information" even if they are subject to change (Ex. 8 at 112-15).

Second, defendants argue that even if "financial information" were limited to historical financial information, the information in the Investor Presentation is also materially inconsistent with the historical financial information in the Definitive Proxy Statement (Def. Br. at 19). The Definitive Proxy discloses that "Global Blue has restated its historical audited consolidated financial statements for its financial year ended March 31, 2020 . . . to correct certain errors included in the financial statements included in earlier filed preliminary proxy statements/prospectuses" (Definitive Proxy at 129). Defendants argue that, although the restatement covered a single period, FPAC management could not assure investors that no additional restatements could be required, that Global Blue "has fully identified the impact of the material weaknesses," or that "there are not control issues beyond those identified" (*id.*). Defendants argue the restated financial information includes some of the same historical financial information provided to defendants in the Investor Presentation (*see* Investor Presentation at 18, 47-48). Consequently, defendants argue the information in the Investor Presentation is materially inconsistent with the historical financial information in the Definitive Proxy as well (Def. Br. at 19; Compl. ¶ 30 ["If the proxy statement . . . revised the overall historical financial information therein in a materially adverse way, defendants might have had a justification to raise Section 5(f)"]).

Third, defendants argue the description of Global Blue's business in the Investor Presentation is materially inconsistent with the description of the business in the Definitive Proxy (Def. Br. at 20). Defendants note the Investor Presentation describes Global Blue as a business that has exhibited "strong macro driven historical growth" that is "expected to continue" whereas the Definitive Proxy describes a business in financial free fall, stating "Global Blue's revenues for April, May and June of 2020 declined to approximately 5%, 4%, and 14% of the revenues for the same months of 2019" (Definitive Proxy at 126). Defendants argue, consequently, that the positive outlook for Global Blue's business described in the Investor Presentation is materially inconsistent with the Definitive Proxy's "bleak view" (Def. Br. at 20).

Defendants next argue that, under Section 3(b) of the Agreements, defendants' obligations to purchase Global Blue shares are subject to the condition that "[t]here shall not

have been enacted or promulgated any governmental order, law, statute, rule or regulation enjoining or prohibiting the consummation of the Transaction" (Subscriber Agreements, § 3(b)). Defendants argue that, under the Supplemental Agreements, FPAC agreed it would not object to waiver of a "Specified Condition," which, under the Merger Agreement, is a regulatory approval for the proposed merger (*see* Definitive Proxy at A-22, A-74-75 [Merger Agreement, §§ 2.08, 10.01(a)]). Defendants argue that just because the parties to the Merger Agreement have agreed to waive a regulatory approval for the proposed merger does not modify the closing conditions set forth in the Subscription Agreements (Def. Br. at 21). Defendants argue they negotiated an independent condition to their obligations under the Subscription Agreements in Section 3(b), and that condition is waivable only with their consent, regardless of any agreements between the parties to the Merger Agreement (*id.*).

Defendants next argue that, under Section 3(c) of the Subscription Agreements, defendants' obligations to purchase Global Blue shares are subject to the condition precedent that "all conditions precedent to the closing of the Transaction pursuant to the [Merger] Agreement . . . shall have been satisfied or waived . . . by August 31, 2020, provided that no material amendment to or waiver of any provision of the [Merger] Agreement shall have been made that materially adversely affects Purchaser as a stockholder of the Company in a manner materially disproportionate to all stockholders" (Subscriber Agreements, § 3(c)). Defendants argue the Supplemental Agreements with Third Point constitute material amendments of the Merger Agreement that materially, disproportionately affect defendants (Def. Br. at 21). Under the Supplemental Agreements, Globetrotter and FPAC have agreed not to enforce any rights or claims under various agreements with Third Point if Third Point purchases at least $61 million of shares under a forward purchase agreement (*id.*; Ex. 13 [Doc. No. 22]). Defendants argue that before the Supplemental Agreements, Third Point was required to fund up to approximately $390 million pursuant to the forward purchase agreement (*see* Definitive Proxy at F-103). Defendants argue no other shareholder of FPAC was afforded identical or similar relief under their agreements with FPAC and Global Blue (Def. Br. at 22). Defendants further argue the Supplemental Agreements waive the condition in the Merger Agreement that Global Blue shares have been approved for listing on the New York Stock Exchange, which materially disproportionately affects defendants (*id.*; Ex. 13 at 5). Defendants argue SL Globetrotter and its affiliates will control the post-merger environment and thus have long-term interests with less

need for a listing on the NYSE to trade their shares, whereas defendants would be minority shareholders in a post-merger company with no direct access to management requiring ready access to the liquidity provided by a NYSE listing as a result (Def. Br. at 22). Defendants argue the Investor Presentation soliciting PIPE investments represented that the post-merger company would be listed in the NYSE (Investor Presentation at 4). Defendants further argue the Subscription Agreements similarly stated that "upon consummation of the Transaction, the Company will continue as a publicly traded corporation" (Subscriber Agreements at 1). Defendants argue that by waiving the condition in the Merger Agreement that Global Blue shares would be listed on the NYSE, the Supplemental Agreement disproportionately affect minority shareholders like defendants who invested in reliance on the representation that shares of the post-merger company would be listed and would be traded on the NYSE (Def. Br. at 22). Defendants argue that all conditions precedent in Sections 3(a), (b), and (c) of the Subscription Agreements must be satisfied before defendants' obligations to purchase Global Blue shares arise and, as none of these conditions precedent have been met, plaintiffs' claims must be dismissed (*id.* at 23).

Defendants further argue there are multiple additional grounds for dismissal. First, the failure of multiple conditions precedent to defendants' obligation to purchase Global Blue shares makes it impossible for plaintiffs to allege they suffered any damages as a result of any alleged "repudiation and breach of [defendants'] obligations under the Agreements" (*id.*; Compl. ¶¶ 40, 47, 54, 61; *see Ross Bicycles, Inc. v Citibank, N.A.*, 200 AD2d 379, 380 [1st Dept 1994]). Second, even accepting plaintiffs' allegation that defendants' June 22, 2020 letter constituted a repudiation of the Agreements, it was timely and effectively retracted in a subsequent July 28, 2020 letter (*see Turner Const. Co. v US Framing, Inc.*, 2015 WL 6991217, *5 [Sup Ct Albany County 2015]; Ex. 11 at 1-2; Ex. 15). Third, plaintiffs' claims for declaratory judgment must be dismissed as duplicative of their breach of contract claims (*see Wells Fargo Bank, Nat. Ass'n. v GRSE II, Ltd.*, 92 AD3d 535 [1st Dept 2012]; *Singer Asset Fin. Co., LLC v Meivin*, 33 AD3d 355, 358 [1st Dept 2006]; *Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1144 [4th Dept 2009]). Finally, by seeking damages plaintiffs admit they have an adequate remedy at law and are therefore not entitled to specific performance of defendants' purchase obligations "[w]hen the closing of the [Merger] Transaction occurs" (Def. Br. at 24; Compl. ¶¶ 48, 62; *see 11 Duke St., Ltd. v Ryman*, 280 AD2d 429, 429 [1st Dept 2011]; *T.F. Demilo Corp. v E.K. Const.*

Co., 207 AD2d 480, 481 [2d Dept 1994]). If plaintiffs wanted specific performance, they should have sought expedited relief (Def. Br. at 25).

B. Plaintiffs' Memorandum in Opposition

Plaintiffs begin by arguing defendants' justifications for breaching their obligations are meritless (Pl. Br. at 11 [Doc. No. 46]). First, the Section 3(a) condition precedent has been satisfied because all representations and warranties of New Global Blue were true and correct as of closing as was required by the Agreements (Subscriber Agreements, § 3(a)). The financial information in the Presentation and the Definitive Proxy for the same period is consistent in all material respects (Pl. Br. at 11). The Presentation described "financial information" as "the historic financial information respecting Global Blue contained in this Presentation [which] has been taken from or prepared based on the historical audited financial statements of Global Blue" (Investor Presentation at 2). The Presentation included financial information based on Global Blue's audited financial statements for the fiscal years ending March 31, 2017, 2018, and 2019 (*id.* at 13). Defendants cannot claim any material inconsistency regarding any specific historical financial information (Pl. Br. at 11). Defendants' assertion that Section 5(f) is untrue because Global Blue's statement for its fiscal year ended March 31, 2020 was restated to reflect correction of certain errors, is implausible as the January 2020 Presentation did not contain the results of the March 2020 financial statements which had not been issued yet and would not be issued for another five months (*id.* at 12; Def. Br. at 19; Definitive Proxy at F-14). Plaintiffs argue the Definitive Proxy on which defendants rely explains that the restatement "did not have an effect on the preceding periods" (Definitive Proxy at 324). Plaintiffs consequently argue it is impossible for the restatement to trigger Section 5(f) as there was no audited financial information for the 2020 fiscal year in the Presentation with which the restatement could be inconsistent (Pl. Br. at 12). Plaintiffs further argue defendants cannot rely on its assertion that the Proxy is inconsistent with the Presentation because it discloses that Global Blue identified certain weaknesses in its internal controls, as Section 5(f) makes no representation respecting Global Blue's internal controls (Definitive Proxy § 5(f)).

Plaintiffs next argue that defendants' interpretation of Section 5(f), allowing defendants to abandon their commitments under the Agreement because financial projections in the Presentation are inconsistent with the Definitive Proxy, is meritless (Pl. Br. at 12-13). This interpretation ignores not only that defendants expressly accepted the risk that materialized based

on a Presentation that disclaimed guarantees of forward-looking statements, but also that fundamental principles of law prohibit such a construction of agreements (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010] ["A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties"]). As an initial matter, defendants' interpretation of Section 5(f) would render the Subscription Agreements valueless as the bargain of a PIPE investment is for the SPAC to secure an upfront funding commitment to reinforce the closing of the merger in exchange for the investor locking in a share purchase price and, here, Section 5(f) reflects the parties' understanding that the historical financial information of Global Blue included in the Presentation is materially accurate (Pl. Br. at 13; Compl. ¶¶ 15; Definitive Proxy § 5(f)). The parties never intended, and no reasonable PIPE investor could expect, as defendants argue, a guarantee of future forecasts (Compl. ¶ 29). Further, plaintiffs argue that defendants' attempt to conflate historical information and projections contradicts how those terms are explicitly presented in the Presentation. Section 5(f) only applies to "financial information" in the Presentation, explicitly distinguishing between "financial information" and "forward-looking statements" (Subscriber Agreements, § 5(f)). As to the forward-looking statements in particular, plaintiffs argue it makes no sense to assert that future performance was inconsistent with the Presentation given that the Presentation expressly disclaims any guarantees of future performance (Pl. Br. at 13-14; Investor Presentation at 2; *Georgia Malone & Co., Inc. v E & M Assocs.*, 163 AD3d 176, 186 [1st Dept 2018]).

Plaintiffs further argue defendants' reading of Section 5(f) would render their own contractual representations to plaintiffs meaningless as each defendant represented and warranted that it was "able at this time and in the foreseeable future to bear the economic risk of a total loss" and "acknowledge[d] specifically that a possibility of total loss exists" (Subscriber Agreements, § 6(h)). Further, defendants represented that they were aware of "substantial risks" to their investment, "including those set forth in the Disclosure Package" which included the Presentation (*id.* § 6(g)). If Section5(f) were interpreted to relieve defendants of their obligations following any material negative change in Global Blue's performance, as defendants now argue, defendants would bear no economic risk at all and the possibility of "total loss" would be illusory, something no PIPE investor could reasonably expect (Pl. Br. at 14). Plaintiffs argue defendants cannot rely on their cited cases that use the term "financial information" in the same

sentence as the term "forecasts" or "projections" as none of those cases interpret the meaning of "financial information" as it is used in any contract and none conclude as a matter of law that "financial information" includes forward-looking statements (*id.* at 14-15). "It is well established that when reviewing a contract, particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties manifested thereby" (*Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). Plaintiffs further argue defendants erroneously reference "Certain Projected Financial Information" in FPAC's post-contract Preliminary Proxy as that section was not purporting to apply the term "financial information" in Section 5(f), not could that post-contract reference change the meaning of the term as fixed by the parties at the time of contracting (Pl. Br. at 15).

Plaintiffs next argue the Presentation disclaimed any guarantees of future performance and any duty to update any forward-looking statements (*id.* at 16; Presentation at 2). The fact Global Blue once made projections, and subsequently did not do so amidst the uncertainty of the global pandemic, is a function of the same uncertainty that Global Blue had warned would be present in any projections. Plaintiffs argue the Presentation did not provide any representation that Global Blue would always make projections, instead warning that even the projections that were made could not be relied upon (Presentation at 2). Consequently, failure to update the Presentation's projections does not create a material inconsistency as defendants argue. Defendants' assertion that the description of Global Blue's business in the Presentation as one exhibiting "strong macro driven historical growth . . . expected to continue" is materially inconsistent with the "bleak view" of the Definitive Proxy, must similarly fail as the Presentation explains that the terms referenced by defendants—"expect" and "continue"—signal a forward-looking statement, not a guarantee of future performance (Presentation at 2).

Plaintiffs next argue that Section 10(o) unambiguously contradicts defendants' arguments, providing: "no investor subscribing to purchase Shares for cash directly from the Company in private transactions in connection with the closing of the Transaction will be sold shares at a price per are lower than the Purchase Price per share provided for herein to the Purchaser. For the avoidance of doubt, the foregoing shall not apply to the terms of the Forward Purchase Contract described in FPAC's SEC filings or arrangements with employees" (Pl. Br. at 17; Subscriber Agreements § 10(o)). Plaintiffs argue that defendants confuse the different transaction contemplated by the January 2020 Subscriber Agreements and the May 2018

Forward Purchase Contract; the Subscriber Agreements are agreements "to purchase [New Global Blue] Shares for cash directly from [New Global Blue]" whereas the Forward Purchase Agreement is an agreement by Third Point to purchase FPAC shares directly from FPAC (Subscriber Agreements § 10(o)). Plaintiffs argue Section 10(o) expressly distinguishes the Forward Purchase Contract from its sweep, refuting defendants' argument that the Section 3(a) condition must fail because compliance with Section 10(o) cannot be certified (*id.*; Def. Br. at 20 n3).

Plaintiffs next turn to Section 3(b), arguing the condition precedent has been satisfied as no law enjoins or prohibits the Transaction (Subscriber Agreements § 3(b)). Plaintiffs argue the Transaction Agreement permitted the sellers to waive the closing condition that the Bank of Italy approve any change in control in Global Blue as a result of the merger (the "Specific Condition") (Pl. Br. at 18; Definitive Proxy at 460). In the Letter Agreements, plaintiffs argue, FPAC agreed it would not object to the waiver of this Specific Condition. Defendants cannot now conclude, without citing relevant authority, that the Transaction was prohibited under Italian Law. First, defendants do not cite the substance of any Italian law to be applied, nor do they provide this court with sufficient information to enable it to take judicial notice of any Italian law at issue (CPLR §§ 3016(e), 4511(b)). Second, even if the Italian change-of-control law applied, it would not have "prohibited" or "enjoined" the consummation of the Transaction as any authoritative legal opinions from Italian counsel would confirm that the sanction, if any, would have consisted of temporary limitations on the new controlling shareholders pending post-closing approval but the closing itself would not have been barred (Pl. Br. at 18).

Plaintiffs next address Section 3(c), arguing the condition precedent has been satisfied because defendants have not suffered a material, adverse, disproportionate impact as shareholders from a waiver or amendment to the Transaction Agreement. Plaintiffs first argue that defendants' assertion, that the August 15 Letter Agreements "constitute material amendments of the Merger Agreement that materially disproportionately affect" them in violation of Section 3(c), is false as defendants fail to argue how each of the required elements of 3(c)—adverse effect, materiality, and disproportionate impact—has been triggered (Pl. Br. at 19; Subscription Agreements § 3(c)). Plaintiffs argue defendants' payment terms, the number of shares to be acquired, and ownership percentage in New Global Blue post-closing were entirely unaffected by the Letter Agreements, as were their voting and other stockholder rights

(Supplemental Proxy Statement). Next, plaintiffs argue that defendants' argument, that the Letter Agreements allowed Third Point to reduce its "backstop" obligation to purchase FPAC shares under the Forward Purchase Contract from approximately $390 million to $61 million and no other shareholder of FPAC was afforded similar relief, again improperly conflates New Global Blue and FPAC because Section 3(c) unambiguously concerns defendants as New Global Blue shareholders and whether the Letter Agreements impact FPAC shareholders is irrelevant (Subscription Agreements § 3(c)). Defendants suffered no diminution in their post-closing stake in New Global Blue due to the Letter Agreements (Pl. Br. at 20). The waiver of the NYSE listing condition under the Transaction Agreement does not disproportionately impact defendants as minority shareholders as New Global Blue is currently trading on the NYSE under the stock symbol GB (*see* NYSE Listing Directory, https://www.nyse.com/listings_directory/stock). Plaintiffs finally argue that defendants' assertion, that they were disadvantaged as supposed shareholders of FPAC because of redemption benefits and equity incentive awards granted to certain FPAC shareholders, must fail because any redemptions of FPAC shares by FPAC have no bearing on Section 3(c) which unambiguously concerns defendant as a stockholder of New Global Blue (Subscription Agreements § 3(c)). Further, if defendants held any FPAC shares, the Subscription Agreements provided that they too had the right to redeem those FPAC shares prior to the Transaction's consummation (*id.* § 9).

Plaintiffs finally argue that defendants' other grounds for dismissal are also meritless. First, defendants' argument, that plaintiffs cannot recover damages, is dependent on defendants' arguments that the conditions precedent to the defendants' funding obligations were not satisfied which, plaintiffs argue, has been proved meritless (Pl. Br. at 21; Def. Br. at 23). Second, defendants' repudiation was unequivocal and damaging, and that defendants ultimately did not fund, this no retraction ever occurred (Pl. Br. at 21; Def. Br. at 23; *SPI Commc'n v WTZA-TV Assocs.*, 229 AD2d 644, 645 [3d Dept 1996]). Third, plaintiffs do not oppose dismissal of their declaratory judgment claims because defendants have now completed their breaches (Pl. Br. at 21; Def. Br. at 24). Fourth, the parties explicitly contracted that specific performance would be available for a breach of the Agreements in addition to damages and the question of whether specific performance or instead money damages is the appropriate remedy is "a matter to be resolved at a later stage, not on a motion to dismiss" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). Finally, the stipulated extension of defendants' time to respond to the

complaint until August 24, 2020 was given because defendants asked for one and, regardless, specific performance remains a viable remedy for plaintiffs (Pl. Br. at 22; Def. Br. at 25).

III. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Subscription Agreements [Doc. Nos. 14-16], the Definitive Proxy [Doc. No. 11], and the Investor Presentation [Doc. No. 13].

Defendants' motion to dismiss pursuant to CPLR 3211(a)(1) must fail as the documentary evidence offered here does not utterly refute plaintiffs' factual allegations. Much of defendants' argument come down to defendants' interpretation of Section 5(f) of the Subscription Agreement which states that the "description of the business and financial information of the Target to be included in the proxy statement/prospectus to be provided to the stockholders of FPAC in connection with the Transaction shall not be materially inconsistent

with the information included in the Investor Presentation included in the Disclosure Package" (Subscription Agreements § 5(f)). First, plaintiffs' correctly note that the Investor Presentation included a disclaimer which, among other things, noted that the financial information in the presentation was "historical financial information . . . based on the historical audited financial statements of Global Blue" (Investor Presentation at 2). The Presentation further warned that it would contain "forward-looking statements" for which there could be no assurance that the future developments impacting the parties will be those that were anticipated (*id.*). Finally, the disclaimer explicitly states that FPAC and Global Blue undertook no obligation to update or revise any forward-looking statements in the Presentation (*id.*). The Subscription Agreements further state that defendants, as Purchasers, acknowledged substantial risks incident to the purchase and ownership of Acquired Shares, including those set forth in the Disclosure Package (Subscription Agreements § 6(g). The Agreements further state that Purchasers "acknowledge[] specifically that a possibility of total loss exists" (*id.* at § 6(h). Given the totality of these disclaimers and warranties and further considering that, when reviewing a contract, words should be considered in light of the obligation as a whole and the intention of the parties , it would be improper to now allow defendants to disclaim their contractual obligations by arguing that the exclusion of forward-looking statements or the inclusion of corrected financial information in the Definitive Proxy are material inconsistencies in violation of Sections 3(a) and 5(f).

Defendants' argument as to Section 3(b) of the Agreements, which states that there "shall not have been enacted or promulgated any governmental order, law, statute, rule or regulation enjoining or prohibiting the consummation of the Transaction," must also fail as defendants have not identified any law or precedent that the Transaction's consummation violates. Finally, defendants' argument as to Section 3(c) of the Agreements must also fail as defendants do not adequately demonstrate that the amendments contained in the Supplemental Agreements with Third Point materially and disproportionately affects defendants, let alone all stockholders. Further, plaintiffs' correctly note that the Letter Agreements impact FPAC shareholders and Section 3(c) concerns New Global Blue shareholders. Consequently, defendants' motion to dismiss pursuant to CPLR 3211(a)(1) shall be denied.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46

NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The motion to dismiss pursuant to CPLR 3211(a)(7) must also fail. Defendants' initial argument against the breach of contract claim relies on the success of their CPLR 3211(a)(1) argument that multiple conditions precedent has not been met. As the court has rejected this argument, similarly defendants' argument fails here. Further, defendants' argument that they effectively retracted their repudiation of the Agreements also fails as the Closing Date has now passed without defendants' funding, suggesting that defendants have ultimately breached the contract at issue. Consequently, defendants' motion to dismiss the breach of contract claim must be denied.

Pursuant to plaintiffs' withdrawal of their declaratory judgment claims, counts two and four of plaintiffs' complaint shall be dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is DENIED; and it is further

ORDERED that the second and fourth causes of action for declaratory judgment are hereby DISMISSED.

2/25/2021
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION			
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART		[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER			
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE	