Extended Chha Acquisition, LLC v Mahoney
2021 NY Slip Op 32550(U)
December 3, 2021
Supreme Court, New York County
Docket Number: Index No. 652755/2021
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART 53**

Justice

----------X

EXTENDED CHHA ACQUISITION, LLC,

Plaintiff,

- v -

LENORE MAHONEY, CLAUDIA TAGLICH, VINCENT ACHILARRE, EXTENDED NURSING PERSONNEL CHHA, LLC,

Defendants.

----------X

INDEX NO. 652755/2021

MOTION DATE

MOTION SEQ. NO. 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 129

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 131

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Extended CHHA Acquisition, LLC (the **Buyer**)'s motion for summary judgment and specific performance must be granted and the request for a stay of this decision and order is denied. This is not a close call. Simply put, the record unequivocally establishes that Michael Taglich, Claudia Taglich, Lenore Mahoney, and Vincent Achilarre, motivated by dissatisfaction with the business deal that the Seller (hereinafter defined) cut and fueled by unabashed insidious antisemitism, actively prevented the Buyer from closing and breached the Purchase Agreement.

To be clear, not only did the Seller breach the Purchase Agreement (hereinafter defined) Sections 3.9 (Absence of Undisclosed Liabilities), 3.18 (Compliance with Applicable Laws), 6.2 (Further Assurances), 6.5 (Reasonable Access; Confidentiality) and breach and otherwise fail to satisfy its

Section 8.2 (Conditions Precedent to Obligations of the Buyer) in bad faith, but also the Seller's principals and their agent-representative Michael Taglich actively took glee in frustrating the Buyer's ability to close and in being gratuitously abusive and disrespectful of the Buyer's principals and their religious observance. The degree to which Michael Taglich, Claudia Taglich, Lenore Mahoney, and Vincent Achilarre taunted the Buyer's principals to their face and mocked them behind their back because they are Jewish is horrifying and cannot be overstated. Their bigotry is disgusting and shameful, representing the worst and most depraved behavior that has no place in civilized society:

> Michael Taglich: Question: should a Jewish person know how to spell Semitism…Asking for a friend…**They are too stupid to be Jews…God doesn't make Jews that dumb**
>
> (Exhibit I, NYSCEF Doc. No. 104 [emphasis added]).

> Michael Taglich: Ladies and Gentleman, The Shemias: Not religious enough to know when Passover is, but religious enough to not want to close during Passover…They are dysfunctional, not professional and not very smart. Actually really stupid…They are used to bullying people around and making them jump for a dollar bill…you don't know the half of being on the phone with these yahoos…My thoughts exactly, but I am an anti Senite [sic]…Maybe ai [sic] should advise them they need not work on the sabbath…It's Saturday, so as a goyem I can still work
>
> (Exhibit J, NYSCEF Doc. No. 105).

> Michael Taglich: Jeff Shemia just called me from an unmarked number. I told him I do t [sic] do business on Sunday and slammed him
>
> Claudia Taglich: Yay!…He is an anti-Christian
>
> Vincent Achilarre: I have ignored his calls and Max's calls as well. We will talk tomorrow morning on responding when the nonsense starts again. Enjoy our Christian Sabbath – Palm Sunday

Michael Taglich: Laughed at 'He is an anti-Christian'

(Exhibit K, NYSCEF Doc. No. 106).

There are no material issues of fact that the Purchase Agreement was a valid contract which the Seller breached, that the Buyer was ready, willing, and able to perform under the Purchase Agreement, and that the balance of the equities weighs in the Buyer's favor. Indeed the only factual issues are what post-closing adjustments based on the Seller's March 26, 2021 estimated closing price need to be made in accordance with the Purchase Agreement, the $9m Rebate (hereinafter defined), the Third Party Liability (hereinafter defined), accounting for activity that occurred after the March 29, 2021 closing date (i.e., as the closing adjustments and estimated purchase price was computed by the Seller as of that date) including without limitation any credit due to the Buyer for any post March 29, 2021 profits, any damages that the Buyer suffered based on the Seller's breach of the covenant of good faith and fair dealing including any potential loss of goodwill or employees, and any damages attendant from any file destruction or other damage caused to the Company (hereinafter defined) by the Seller or its principals and its agent, Michael Taglich.

Among other breaches more specifically described below, the Seller failed to deliver the server necessary to operate the Company before the Closing Date as it was required to do under the Purchase Agreement, and tried to shake down the Buyer (i) for additional compensation not expressly negotiated for in the Purchase Agreement and (ii) by demanding that such additional compensation be distributed to them outright before the audit was completed pursuant to Section 2.2 of the Purchase Agreement – *i.e.,* the $9m Rebate is not specifically addressed in the

Purchase Agreement and the Third Party Liability would result in an adjustment to the Purchase Price. Putting aside that the Third Party Liability rendered the schedules inaccurate and a breach of the representations and warranties of the Purchase Agreement, demanding that such amounts be distributed and not held back until after the Section 2.2 post-closing adjustment procedure that the parties bargained for was a breach of the Purchase Agreement because the Third Party Liability is a known, not unknown, liability. Refusing to speak to the Buyer (which the record firmly establishes) about their demanded $18 million increase in the purchase price (the $9m Rebate of which they saw as an outright windfall [NYSCEF Doc. No. 104]) irrefutably establishes a breach of the covenant of good faith and fair dealing:

> Michael Taglich: Jeff Shemia just called. I did not pick up the call
>
> Claudia Taglich: Good! Did he leave a vm?
>
> …
>
> Lenore Mahoney: Don't Answer!!!!!...Run!!!...Don't call back whatever you do!!
>
> …
>
> Vincent Achilarre's wife messaged to say that he forgot his phone.
>
> Claudia Taglich: I'm so sorry Vince had such a terrible week. You should hide his phone for the rest of the weekend!
>
> Michael Taglich: Suzanne, you would be doing him a favor. By the way, Jeff [Shemia] called me 3x…I'm ignoring him
>
> Lenore Mahoney: Keep going mike!
>
> …
>
> Michael Taglich: You pretty ladies are used to blowing guys off. ***I will admit it's kind of fun***
>
> (NYSCEF Doc. No. 105 [emphasis added]).

> Michael Taglich: They just sent us a draft of the 4th amendment
>
> …
>
> Lenore Mahoney: Run!! Michael just say no!!
>
> Michael Taglich: I am not responding
>
> Lenore Mahoney: ***Great. Don't respond…Seriously don't say a word…Not even F off*** (*id.* [emphasis added]).
>
> Michael Taglich: Jeff Shemia just called me from an unmarked number. I told him I do t [sic] do business on Sunday and slammed him
> …
>
> Mr. Achilarre: I have ignored his calls and Max's calls as well
>
> (NYSCEF Doc. No. 106).

Failing to provide the necessary closing documents as they were required to do further breached the Purchase Agreement. Therefore, the Seller shall **immediately** deliver its closing deliverables, including the server necessary to operate the Company, no later than Wednesday, December 8, 2021, and the Buyer shall deliver to the escrow agent no later than Friday, December 10, 2021, the estimated purchase price set forth in the Seller's March 26, 2021 schedules. For the avoidance of doubt, inasmuch as the $9m Rebate has now been received by the Seller, $9 million need not be funded towards the estimated purchase price at this time. Should the audit result in a closing adjustment in Seller's favor in the amount of the $9m Rebate, the Buyer shall fund the $9m Rebate net of any other adjustments determined by the auditor at that time. Having prevented the closing from happening, the Seller cannot benefit from the $9m Rebate it would not have received by March 29, 2021 because such $9m Rebate was not to be

received until after the closing occurred. Stated differently, the expectation at the closing was that the Buyer would have received the $9m Rebate after the closing occurred and if the audit resulted in a determination that it was due Seller, the Buyer would have had to fund that amount post-closing. The same result is required now. The amount of the Third Party Liability which the parties indicated at oral argument (11.29.21) is currently assessed at $28 million must be held in escrow pending resolution of the audit contemplated by Section 2.2 of the Purchase Agreement to determine if any amount less than the $28 million should be accrued as of the March 29, 2019 closing date. The fund for third party liabilities is for unknown liabilities. The Third Party Liability, however, is known. Finally, the parties indicated that the post-March 29, 2021 profit is estimated to be approximately $4m. This decidedly belongs to the Buyer as it relates to profit accrued during what should have been the Buyer's ownership. Inasmuch as the precise amount must be determined by the auditor, this amount must also be held in escrow. It would however be inappropriate for the Buyer to hold this amount back from its obligation to fund the Purchase Price.[1] Again, this is exactly what the parties bargained for and that to which they are entitled.

For the avoidance of doubt, Lenore Mahoney, Claudia Taglich, Vincent Achilarre, and Extended Nursing Personnel CHHA, LLC's motion to dismiss pursuant to CPLR 3211 is frivolous and must be denied in its entirety. Leave is granted to the Buyer to bring an order to show cause seeking attorneys' fees in defending that motion or other appropriate sanction in having to defend that motion.

[1] In other words, there may be an approximately $30 million downward adjustment to the Purchase Price in respect of the Third Party Liability which is currently assessed at $28 million [subject to potential negotiation] and the estimated post-March 29, 2021 profits which are estimated to be approximately $4 million. These amounts must be held in escrow pending audit adjustment as set forth in Section 2.2 of the Purchase Agreement.

The Relevant Facts and Circumstances

Reference is made to (i) a certain Membership Interest Purchase Agreement (the **Original Agreement**, NYSCEF Doc. No. 81), dated September 25, 2019, as amended by a First Amendment to Membership Interest Purchase Agreement (the **First Amendment**, NYSCEF Doc. No. 82), dated October 11, 2019, as further amended by a Second Amendment to Membership Interest Purchase Agreement (the **Second Amendment**, NYSCEF Doc. No. 83), dated December 24, 2019, as further amended by a Third Amendment to Membership Interest Purchase Agreement (the **Third Amendment**, NYSCEF Doc. No. 84**;** the Original Agreement, together with the First Amendment, the Second Amendment and the Third Amendment, hereinafter, collectively, the **Purchase Agreement**), dated March 25, 2019, each by and between Extended Nursing Personnel CHHA, LLC (the **Company**), the equity holders of the Company (the Company together with the equity holders of the Company, hereinafter, collectively, the **Seller**), Lenore Mahoney and Claudia Taglich, acting jointly as the Seller's Representative, and the Buyer, (ii) a letter, dated March 22, 2021 (the **Seller's Initial Termination Notice**, NYSCEF Doc. No. 87), sent by the Seller to the Buyer pursuant to Section 12.1(h) of the Purchase Agreement, purporting to terminate the Purchase Agreement and demanding the Deposit, (iii) a letter, dated March 25, 2021 (**Seller's Recission of the Termination Notice**, NYSCEF Doc. No. 88), from the Seller to the Buyer conditionally rescinding Seller's Initial Termination Notice, provided that the Buyer initiate the wire transfers to effectuate the closing by 5 pm on March 29, 2021, (iv) a certain unexecuted Fourth Amendment to Membership Interest Purchase Agreement (the **Seller's Demanded Fourth Amendment**, NYSCEF Doc. No. 1-51), dated March 29, 2021, pursuant to which the Seller requested that the Buyer agree that a certain Minimum Wage

Adjustment to the CHHA Episodic Rates for the period January 1, 2018 through December 31, 2020 of approximately $9 million (the **$9m Rebate**) that was to be paid after Closing be accrued at Closing and be included in the Seller's Tax Return for the taxable period ending on the Closing Date, and (v) a letter (**Buyer's Termination Notice**, NYSCEF Doc. No. 89), dated April 5, 2021, from the Buyer to the Seller indicating that as of that date the Buyer elected to terminate the Purchase Agreement pursuant to Section 12.1(c) of the Purchase Agreement because (a) the Seller failed to deliver proper estimates, necessary three days prior to the closing pursuant to Section 2.2(a)(ii), of Estimated TTM Operating Working Capital and Estimated Closing Date Operating Working Capital, because Seller failed to account for the $9m Rebate and a Third Party Liability arising out of an OMIG Audit dated March 16, 2021 (the **Third Party Liability**), both of which were to be addressed in the Seller's Demanded Fourth Amendment, (b) the Seller's unreasonable unwillingness to treat a portion of the Purchase Price as a holdback related to the Third Party Liability which would have resulted in adjustment to the purchase price and the Seller's refusal to negotiate with the Buyer as to the Seller's Demanded Fourth Amendment sent to the Buyer on March 26, 2021 with the Seller returning comments on March 27, 2021 (i.e., the very next day and two days prior to the closing), which the Buyer alleges violated Section 6.2 of the Purchase Agreement and frustrated the Buyer's ability to calculate the Estimated Purchase Agreement, (c) the Seller's alleged failure to provide the Buyer with access to its books and records or deliver to the Buyer the required server and IT infrastructure that the Buyer needed to operate the Company by March 28, 2021 (one day prior to the closing) in violation of Sections 6.2 and 6.5 of the Purchase Agreement, (d) alleged breaches of representations and warranties in the Purchase Agreement which made it impossible for the Seller to deliver the certificates required pursuant to Section 8.2(c) including the OMIG Audit dated March 16, 2021 which

violates the representations and warranties in Sections 3.9 and 3.18 of the Purchase Agreement, and (e) the demand that the Seller would only close upon delivery of $58 million without delivery of the server, Seller's Demanded Fourth Amendment, or any signature pages to the ancillary closing documents and would not engage "in any further discussions, negotiations or extensions regarding this transaction" in violation of Section 6.2 of the Purchase Agreement. For the avoidance of doubt, capitalized terms used but not defined herein shall have the meaning ascribed thereto in the Purchase Agreement.

Buyer's Motion for Summary Judgment is Granted (Mtn. Seq. No. 010)

The Buyer's motion for summary judgment (Mtn. Seq. No. 10) must be granted and the Seller must immediately transfer their interests in the Company. On a motion for summary judgment pursuant to CPLR 3212, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

The parties agree that the Purchase Agreement is governed by Delaware law. Under Delaware law, a party "must prove by clear and convincing evidence that he or she is entitled to specific performance and that he or she has no adequate legal remedy" (*Osborn ex rel. Osborn v Kemp*, 991 A2d 1153, 1158 [Del 2010]). The party seeking specific performance "must establish that (1) a valid contract exists, (2) he is ready, willing, and able to perform, and (3) that the balance

of the equities tips in favor of the party seeking performance (*id.*). A valid contract exists "when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration (*id.*). In determining whether a party is ready, willing, and able to perform, Delaware law provides that "[u]nless the contract provides that time is of the essence, [the court] will permit the parties a reasonable time to obtain financing and conclude the transaction" (*id.*, at 1161). In balancing the equities, the court "must be convinced that specific performance of a validly formed contract would not cause even greater harm than it would prevent" (*id.* [internal quotation marks omitted]). However, "[w]hen the contract is clear and unambiguous, [the court] will give effect to the plain-meaning of the contract's terms and provisions" (*id.*, at 1159-1160).

The parties do not dispute that the Purchase Agreement was a valid contract. Nor can it be disputed that the Buyer was ready, willing, and able to perform. The Seller provided notices, dated January 13, 2021, and February 24, 2021 (Joint Exhibits 14 and 18, NYSCEF Doc. Nos. 1-26 and 1-30), that the conditions precedent "have been satisfied and continue to be satisfied…" For completeness, previously, the Seller had argued to this court that the Buyer did not have the money to close. Following discovery and at oral argument (11.29.21), the Seller conceded that the Buyer did in fact have sufficient funds. Pursuant to Section 14.7 of the Purchase Agreement, the parties expressly agreed that specific performance was an appropriate remedy because no adequate remedy of law would compensate the Buyer in the event of a Seller breach and that, pursuant to Section 12(C) of the Purchase Agreement, such provision survived termination of the Purchase Agreement. It is undisputed that the parties agreed to extend the Closing Date until

March 29, 2021.[2] The date was not time is of the essence and the Purchase Agreement was not terminated because the Seller voluntarily agreed to extend the Closing Date. Having done this, they could not actively frustrate and prevent the Buyer from closing by breaching their Section 8.2 and other obligations under the Purchase Agreement and by avoiding the Buyer and cancelling the transfer of the server that they were required to transfer (NYSCEF Doc. No. 106). This, however, as discussed above, is what the record firmly and unequivocally establishes the Seller and its agent, Michael Taglich, did.

The record also establishes that the Seller worked in bad faith to prevent the closing on March 29, 2021. On March 26, 2021, ***three days prior to the closing,*** Mr. Taglich informed Ms. Mahoney, Ms. Taglich, and Mr. Achilarre that Mr. Shemia called to ask to close on Tuesday, March 30, 2021, rather than March 29, 2021, due to Passover (NYSCEF Doc. No. 104). In the internal communication, Mr. Achilarre refused and decided to effectuate a Seller breach of the Purchase Agreement, saying "[w]e have pulled everything back for now**. It's over…"** and told the others **"[w]e can build this bigger and better and sell for a lot more in a couple of years"** (*id.* [emphasis added]).[3]

In other words, three days before the closing was scheduled, Mr. Achilarre decided to breach the Purchase Agreement so that they could sell the Company for more money. When Ms. Mahoney asked whether they would get to keep the Deposit, Mr. Achilarre responded "[w]e will go after

[2] Although the Seller did subsequently serve the Seller's Initial Termination Notice, the Seller's Rescission of Termination Notice provided that the Seller's Initial Termination Notice would be rescinded if the Buyer initiated the wire transfers necessary to effectuate the closing by 5 pm on March 29, 2021.
[3] This is particularly troubling given that the purchase price was an estimate and was necessarily subject to post-closing audit adjustment pursuant to Section 2.2 of the Purchase Agreement.

the deposit" (*id.*). The next day, March 27, 2021, two days prior to the scheduled closing, Mr. Taglich told Ms. Mahoney, Ms. Taglich, and Mr. Achilarre that Mr. Shemia had called again. When Ms. Taglich asked whether it was possible to close on March 29, 2021 as planned, Mr. Taglich responded that the Seller could not close on that date because of the server (NYSCEF Doc. No. 105). In other words, it was the Seller who breached the contract because based on the Seller's actions it would not or could not provide the Buyer with the server by the Closing Date. It is beyond cavil that this breached Sections 6.2 and 6.5 of the Purchase Agreement, which required the Seller to provide the Buyer with the server necessary to run the Company. Ms. Mahoney, Ms. Taglich, and Mr. Taglich also urged that they continue to ignore calls from Mr. Shemia and "blow off" the Buyer (*id.*).

On March 29, 2021, the day the closing was supposed to take place, Barry Freeman sent an email to Mr. Achilarre and Mr. Taglich, among others, indicated that the Buyer was ready to close and wire the money (Exhibit M, NYSCEF Doc. No. 108). Mr. Achilarre replied, saying that they did not expect the Buyer to wire the funds because the closing documents were not signed, the calculation of the amount to wire in the absence of the closing documents had not been calculated, and "we have not delivered the server and our CHHA employees have been instructed that they will remain in our employ" (*id.*). Mr. Achilarre also instructed Mr. Freeman not to respond (*id.*).

Put another way, the Seller breached both Sections 6.2 and 6.5 of the Purchase Agreement when the Seller failed to deliver the closing deliverables, including the server necessary to operate the Company before the Closing Date as required by the Purchase Agreement and by unilaterally (i)

demanding an $18 million premium over the agreed upon Purchase Price, (ii) insisting on the Seller's Demanded Fourth Amendment which the Buyer had no obligation to agree to, and (iii) refusing to allow a holdback of the amount allocable to the Third Party Liability which, per the terms of the Purchase Agreement, required adjustment to the Purchase Price. Article 13 of the Purchase Agreement required the Seller to use their "good faith best efforts that a reasonably prudent Person desirous of achieving a result would use in similar circumstances to ensure that such result is achieved as reasonable expeditiously as possible." This is the opposite of what the Seller did. It does not matter, and it was not a repudiation of the Purchase Agreement, that the Buyer indicated that it would not go forward and close based on the Seller's new and not-agreed-to terms because the Seller frustrated their ability to go forward when they refused to close. The Seller having made these demands cannot then claim repudiation or breach when the Buyer did not agree. There wasn't an agreement as to these terms that could be repudiated.[4] The Seller's simultaneous conduct was unquestionably a breach of multiple sections of the Purchase Agreement.

Additionally, the Buyer may move by order to show for summary judgment that the Seller breached the covenant of good faith and fair dealing. This is also firmly established by the record. It is of no moment that the Seller previously extended the Closing Date. The fact remains that when the $9m Rebate came to the Seller's attention, they demanded that the $9m Rebate should be allocated to them. They had not negotiated for an adjustment to the Purchase Price based on a change in the Minimum Wage Adjustment in the Purchase Agreement. Perhaps

[4] The parties did not come to an agreement regarding Seller's Demanded Fourth Amendment. Although the Buyer commented on Seller's Demanded Fourth Amendment, the Seller ignored their comments and Seller's Demanded Fourth Amendment was never executed.

they should have. But they did not. They could not demand that the Buyer agree to an amendment to the Purchase Agreement reflecting the same with a distribution of such amount requiring the Buyer to chase them in the event that the post-closing adjustment audit indicated that such amount was not properly allocated to Seller. It matters not that the Buyer may have made a good deal. Nor was the Seller entitled to more money because, as a result of any adjustment or change in market conditions, the principals of the Seller and their agent valued the Company more, and they certainly could not frustrate the deal because they changed their minds and no longer wanted to sell. Therefore, the Buyer is entitled to the express remedy that the parties agreed to – specific performance. The Seller shall tender the server and other closing deliverables by Wednesday, December 8, 2021 and the Buyer shall tender into escrow the amount set forth in the Seller's estimated purchase price based on the March 26, 2021 schedule. As discussed above, to the extent of the Third Party Liability and the post March 29, 2021 profit which is estimated to be approximately $4 million (any such profit would accrue to the benefit of the Buyer), these amounts shall be held by the escrow agent pending resolution of the post-closing adjustment audit provided for in Section 2.2 of the Purchase Agreement. Lastly, as indicated above, inasmuch as the $9m Rebate has now been received by the Seller, $9 million need not be funded in respect of the estimated purchase price set forth in Seller's March 26, 2021 estimated purchase price. For the avoidance of doubt, should the Seller or its principals or its agent cause any damage to the files or the server or the Company in any manner whatsoever including any goodwill, the Buyer may seek appropriate damages in addition to any damages that the Buyer may have as of the date of this decision and order.

Seller's Motion to Dismiss is Denied (Mtn. Seq. No. 009)

On a motion to dismiss, "the pleading is to be afforded a liberal construction" and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]). CPLR 3211(a)(1) provides for dismissal on the ground that "a defense is founding upon documentary evidence." "The documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law" (*Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007]). CPLR 3211(a)(7) provides for dismissal on the ground that "the pleading party fails to state a cause of action."

Pursuant to the Purchase Agreement, the parties agreed to a March 29, 2021 closing (the **Closing Date**). As discussed above, the Closing Date was not "time is of the essence." This is confirmed by the fact that none of the documents in the record, including an email, dated March 24, 2021, from Jennifer McLellan of Arnold and Porter to David Stark of Hodgson Russ LLP, indicated "[i]t is our understanding that closing is ***anticipated*** on Monday, March 29th, with deliverables to be exchanged on Friday" (NYSCEF Doc. No. 1-51 [emphasis added]), or the course of conduct during this prolonged contract negotiation suggests otherwise. It does not matter that the Seller issued Seller's Initial Termination Notice purporting to terminate the Purchase Agreement and then sent Seller's Recission of the Termination Notice conditioning rescission of Seller's Initial Termination Notice on the Buyer's closing by the Closing Date or such recission was void,

because the well plead complaint alleges that the Buyer's ability to close the transaction by the agreed upon Closing Date was frustrated and prevented by the Seller's unreasonable conduct. The parties expressly agreed in Section 14.17 of the Purchase Agreement (discussed more completely below) that the Buyer's right to specific performance survived termination of the Purchase Agreement on account of the Seller's breach pursuant to Section 12(c) of the Purchase Agreement.

For completeness, and as discussed above, the Seller's alleged conduct includes, among other things, (i) demanding $58 million to close or refusing to close when the Purchase Price was only approximately $40 million, (ii) refusing a holdback in respect of the Third Party Liability which, under the terms of the Purchase Agreement, required adjustment to the Purchase Price, (iii) demanding the execution of Seller's Demanded Fourth Amendment, which the Seller refused to negotiate, to allocate the $9m Rebate to the Seller, (iv) breaching certain representations and warranties set forth in the Purchase Agreement, and (v) failing to provide access to the books and records and the server to the Company so that the Buyer could operate the Company. The Seller is not entitled to dismissal of the claim for specific performance. The parties agreed pursuant to Section 14.17 of the Purchase Agreement that specific performance was an appropriate remedy because money damages would not adequately compensate the Buyer in the event of a Seller breach.

As discussed above, the Seller's argument that the Buyer repudiated the Purchase Agreement prior to the Closing Date is disingenuous and fails. The only evidence the Seller cites in support of its argument that the Buyer repudiated the Purchase Agreement prior to closing is certain

communications regarding the Buyer's request to move the Closing Date from March 29, 2021 to March 30, 2021 so that they would not have to close on the second day of Passover discussed above (Joint Exhibit 42, NYSCEF Doc. No. 1-54; Joint Exhibit 43, NYSCEF Doc. No. 1-55). None of these communications amount to a repudiation of the Purchase Agreement. They merely represent exasperation at the flat refusal to permit a single day adjournment of the Closing Date in respect of the Jewish holiday.

Indeed, it is apparent from the Seller's conduct that they did not treat these communications as a repudiation of the Purchase Agreement either. In fact, after these communications, the Seller actively avoided the Buyer in an effort to frustrate the Buyer's ability to close and celebrated when the Buyer could not wire because of the Seller's multiple breaches by 5 pm on March 29, 2021 and then treated the contract as having expired at that point. To wit, as discussed above, ***three days prior to the closing,*** when the Buyer inquired as to whether they could close the day after Passover and not on the second day of Passover (NYSCEF Doc. No. 104), the Seller decided to actively frustrate the deal by "pull[ing] everything back," and to not take the steps necessary to transfer the server on the scheduled Closing Date of March 29, 2021 so that they could "sell for a lot more in a couple of years" (*id.*), "go after the deposit" (*id.*) and continue to avoid the Buyer when the Buyer called to effectuate the closing (NYSCEF Doc. No. 105). On March 26, 2021, Mr. Achilarre messaged internally "[w]e can build this bigger and better and sell for a lot more in a couple of years," to which Ms. Mahoney replied "[w]e will have more appealing buyers in a few years" (NYSCEF Doc. No. 104). Mr. Achilarre later wrote "[w]e will create more value and in the long run they have done us a favor. ***Plus we have a nice $9 million windfall to work with***" (*id.* [emphasis added]). On March 27, 2021, Mr. Taglich

wrote "I am happy we are done with them. Let's grow the business and staff it for the next generation of leaders, and let the dividends keep rolling" (NYSCEF Doc. No. 105). Finally, on March 29, 2021, the Closing Date, after having frustrated the Buyer's ability to close, Mr. Taglich wrote in the Seller's internal communication "I believe we have passed all wire cutoffs as of 5pm" (Exhibit L, NYSCEF Doc. No. 107). Mr. Achilarre responded "[n]o wires received and no proof of issuance of any wires received by 5 PM. We are done – MIPA has expired" (*id.*). **Significantly, by their own communications, the Seller demonstrated that they considered the Purchase Agreement to be valid and enforceable until 5 PM on March 29, 2021.** They cannot now argue that the Purchase Agreement was repudiated by the Buyer on March 26, 2021.

Additionally, the Seller is not entitled to dismissal of the Buyer's cause of action for breach of the covenant of good faith and fair dealing. The Seller's refusal to close unless the Buyer agreed to an additional $18 million (i.e., an approximately 40% increase in the price) in consideration beyond that contemplated by the Purchase Agreement states a claim for breach of the covenant of good faith and fair dealing. Although the parties negotiated for post-closing adjustments to the Purchase Price, any adjustments based on the circumstances pursuant to which the $9m Rebate was to be received was known and not specifically provided for in the Purchase Agreement. It is irrelevant that the $9m Rebate may reflect adjustments to rates in respect of the time attributable to the Seller's anticipated ownership. The Seller could have expressly provided for this type of adjustment in the Purchase Agreement but did not. The Seller could not then demand that the Buyer agree to an amendment to the Purchase Agreement granting such adjustments without holdback and prior to the audit determination as to whether the post-closing

adjustment was appropriate. This certainly makes out a claim for breach of the covenant of good faith.

Additionally, the Buyer alleges that the Seller breached the covenant of good faith and fair dealing by not permitting an appropriate holdback of the amount of money allocated to the Third Party Liability because, as alleged, this required a potentially significant adjustment of the Purchase Price pursuant to the Purchase Agreement. Inasmuch as this was a known liability, this also states a claim for breach of the covenant of good faith and fair dealing.

Finally, and equally significant, the evidence of the insidious antisemitism fueling the breach by the Sellers also makes out a claim for breach of the covenant of good faith and fair dealing.

Thus, the motion to dismiss must be denied as frivolous and the Buyer is given leave to bring an order to show cause seeking appropriate sanctions including attorneys' fees for having to defend this motion.

It is accordingly hereby ORDERED that the Seller's motion to dismiss is denied; and it is further

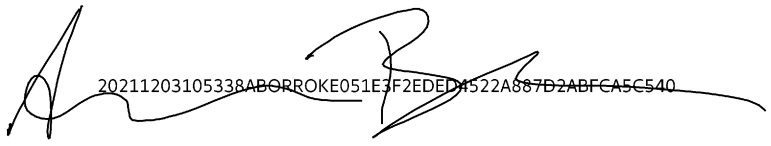
ORDERED that the Buyer's motion for summary judgment is granted; and it is further

ORDERED that the Seller shall tender the server and other closing deliverables by Wednesday, December 8, 2021 and otherwise comply with the terms of the Purchase Agreement; and it is further

ORDERED that the Buyer shall tender the estimated purchase price set forth in the March 26, 2021 Seller's notice of the estimated purchase price less the $9m Rebate into escrow where the amounts in respect of the Third Party Liability and the $4m estimated profit during the period post-dating March 29, 2021 shall remain in escrow pending a post-closing audit performed in accordance with Section 2.2 of the Purchase Agreement; and it is further

ORDERED that the parties are directed to within sixty days engage Ernst & Young (or if Ernst & Young is unavailable to serve on a timely basis, such other nationally recognized accounting firm as shall be mutually agreed between the parties) to the perform the post-closing adjustment audit pursuant to Section 2.2(b) of the Purchase Agreement; and it is further

ORDERED that the parties shall appear for a status conference on February 28, 2022 at 11:30 AM to discuss potential damages.



12/3/2021
DATE

ANDREW BORROK, JSC

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