Needham & Co., LLC v UpHealth Holdings, Inc.
2023 NY Slip Op 33210(U)
September 14, 2023
Supreme Court, New York County
Docket Number: Index No. 655331/2021
Judge: Margaret A. Chan

PSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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NEEDHAM & COMPANY, LLC,

Plaintiff,

- v -

UPHEALTH HOLDINGS, INC. and UPHEALTH SERVICES, INC.,

Defendants.

INDEX NO. 655331/2021

MOTION DATE 04/03/2023, 04/26/2023

MOTION SEQ. NO. (MS) 005, 006

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 312, 313, 314, 315, 316, 465

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 006) 206, 310, 311, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 466, 467, 468, 469, 470

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOINDER).

Plaintiff-counterclaim defendant Needham & Company, LLC (Needham) brings this action against defendants-counterclaim plaintiffs UpHealth Holdings, Inc. (Holdings) and UpHealth Services, Inc. (Services, and together with Holdings, defendants) asserting a claim for breach of contract arising out of defendants' alleged failure to pay Needham a transaction fee of $31,345,000 in connection with services rendered under an engagement agreement originally entered into between Needham and Services (NYSCEF # 2 – Compl). Defendants, in turn, counterclaim for a declaration that, under the parties' engagement agreement, Needham is only entitled to transaction fee of $4,733,750, if any (NYSCEF # 8 – Counterclaim). In MS 005, Needham moves for summary judgment pursuant to CPLR 3213 for an

order granting summary judgment in favor of both its breach of contract claim and defendants' counterclaim (NYSCEF # 88), and in MS 006, defendants move for summary judgment for an order granting summary judgment in favor of their counterclaim (NYSCEF # 206). Both motions are opposed. For the following reasons, Needham's motion is granted and defendants' motion is denied.

Background

The following facts are drawn from the parties' Rule 19-a statements (19-a) and accompanying affidavits and exhibits. They are undisputed unless otherwise noted.

Services Need for Capital and Initial Approach to Needham

Services was an Illinois S corporation incorporated on November 5, 2019 (NYSCEF # 201 – Pltf 19-a ¶ 1; NYSCEF # 310 – Defs 19-a ¶ 1). Services had four shareholders: Dr. Chirinjeev Kathuria, Executive Chairman & Founder (Kathuria); Dr. Mariya Pylypiv, Vice Chairwoman & Founder (Pylypiv); Al Gatmaitan, Chief Executive Officer (Gatmaitan); and Martin Beck, Chief Financial Officer (Beck) (Pltf 19-a ¶¶ 2-3; Defs 19-a ¶ 2; NYSCEF # 223 at UPHEALTH0007985-86). Needham is an investment bank and asset management firm specializing in advisory services and financings for growth companies (Pltf 19-a ¶ 3).

Services aimed to create a global telemedicine company and sought to acquire several specialized healthcare companies to do so (Defs 19-a ¶¶ 5-6). As Services began the process of entering into term sheets with those companies, it recognized that it needed capital to close those term sheets (*see id.* ¶¶ 6-7, 9). Therefore, in late 2019, Services corresponded with Needham about raising capital by way of a dual track process in which Needham would simultaneously pursue financing for Services through private placement and/or a special purpose acquisition company (a SPAC) (Pltf 19-a ¶¶ 4-5, Defs 19-a ¶ 11; NYSCEF # 98 tr at 24:6-25, 31:6-22; 43:21-46:7; NYSCEF # 229 at Needham_0078440). As discussions progressed, Needham proposed a timeline for Services' capital raise and identified potential investors and SPAC acquirers (NYSCEF # 107 at Needham_00079500, -502-04, -517). By July 2020, Services agreed to term sheets with seven companies: Thrasys Inc.; Transformations Drug and Alcohol Treatment Center; S-Square Systems, Inc.; Glocal Health Care Systems Pvt. Ltd.; MedQuest Pharmacy Inc.; Umedex, Inc.; and Behavioral Health Services, LLC (collectively, the Target Companies) (Defs19-a ¶ 7; Pltf 19-a ¶ 12).[1]

The Engagement Agreement

Eventually, on March 15, 2020, Needham and Services entered into an engagement agreement (the Engagement Agreement) (NYSCEF # 109). Pursuant to

[1] The term sheets included binding exclusivity provisions (NYSCEF # 464, Response No. 7).

the Engagement Agreement, Services (defined therein as the Company) agreed that it would engage Needham as "exclusive Placement Agent to the Company in connection with the proposed private placement of securities of the Company," and the parties set forth various financial services that Needham would provide to Services (*id.* ¶¶ 1-2). Services agreed to pay a percentage-based fee for a successful private placement (*id.* ¶ 3(a); Defs 19-a ¶ 22). That fee was based on a calculation of 2.5% of the aggregate purchase price paid in the Transaction (NYSCEF # 109 ¶ 15(a)).

The Engagement Agreement further provided that Needham was "engaged as exclusive financial advisor to the Company in connection with a possible Transaction involving the Company and another party or parties (each, an 'Other Party')" (NYSCEF # 109 ¶ 15). The Engagement Agreement, in turn, defined "Transaction" as, among other things, "any merger, consolidation, reorganization, or other business combination pursuant to which the business of the Company is combined with that of the Other Party (*id.*). Pylypiv circulated an executed copy to Needham on March 16, 2020, and, in doing so, asked if "Needham could prepare an accelerated timeline to complete the private equity raise and SPAC transaction" (NYSCEF # 237 at Needham_00000026).

Needham Proceeds with the Dual Track Capital Raise Efforts

On March 18, 2020, Services indicated to Needham that it wanted to accelerate the "PE and SPAC Process" (Pltf 19-a ¶ 8; NYSCEF # 110 at Needham_00079744). That same day, the parties held a kick-off meeting, and subsequently Needham began working on its dual track capital raise efforts, including investor outreach (*see* Pltf 19-a ¶¶ 9-10; Defs 19-a ¶ 28).

One of the many investors identified by Needham was Dr. Avi Katz, founder of the SPAC GigCapital2 (GigCapital2) (Pltf 19-a ¶ 11; NYSCEF # 126 at Needham_0091007). On June 12, 2020, Needham sent an email to Katz, which provided information about Services and attached an NDA for Katz's review (Pltf 19-a ¶ 11; Defs 19-a ¶ 29; NYSCEF # 125 at Needham_00093405).[2] Although Needham's email indicated that Services could be "of interest to GigCapital3," rather than GigCapital2 (NYSCEF # 312 at Response No. 11; NYSCEF # 125 at Needham_00093405), Needham employee Robert Steinkrauss testified that the "reason [Needham] went to [GigCapital]3 [was] that it had a longer time horizon so we assumed that they were already in discussions with GigCapital 2" and that Needham "reached out to [Katz] directly based on [] relationships throughout the firm that dealt with [Katz] in the past' (NYSCEF # 463 at 186:19-25). Soon after, on June 30, 2020, Needham circulated a valuation analysis showing how a combination between Services and GigCapital2 could trade in the public markets (Pltf 19-a ¶ 11).

[2] As explained below, the parties largely dispute whether Needham's outreach to Katz is what caused GigCapital2 to pursue a deal with defendants (NYSCEF # 312 at Response Nos. 11, 18, 20).

The Amended Engagement Agreement and the LOI with GigCapital2

Despite its outreach efforts, Needham had not yet secured any investment by the end of June 2020 (Defs 19-a ¶¶ 33-34). On July 10, 2023, Pylypiv requested that Needham attend a call to "brainstorm" ways to "close some of the key companies via debt financing and structured debt" (NYSCEF # 247 at Needham_00007840). After that call, on July 12, 2020, Needham Principal Matthew Stavris wrote to Needham CEO, Jack Iacovone, providing a summary of Services' plans and an update on Needham's progress with the "dual path growth equity/SPAC process" (NYSCEF # 248 at Needham_00100084). In addition to explaining where Needham and Services were in the "Growth Equity Raise" process, Stavris indicated that Needham advised Services that "[f]olding in [a]dditional [p]latforms" to "substantially increase the size of the raise" made "more sense" in a "SPAC context" (*id.* at Needham_00100085). Stavris also observed that the parties should "revise" the Engagement Agreement because it "doesn't really cover a debt raise," which Needham subsequently did (*id.*; Defs 19-a ¶¶ 36-38).

On July 23, 2020, Needham circulated the amended Engagement Agreement, dated July 22, 2020 (the Amended Agreement) to Services (NYSCEF # 250 at Needham_00008853). The cover email noted that the "original letter contemplated only a pure equity offering for the private placement," and that "our team has made edits to the SPAC merger section that aim to address the mechanics of how a transaction may take place" (*id.*).

The Amended Agreement reflected several key changes to the Engagement Agreement. For example, Paragraph 1 now stated that Services had engaged Needham with a proposed private placement of securities and

> in connection with the acquisition by the Company of one of [sic] more target companies with which the Company has negotiated and come to agreement on a detailed acquisition term sheet with each such target [i.e., the Target Companies] . . . as listed in Attachment I, which list shall be promptly updated as Target Companies are added or eliminated for acquisition

(Defs 19-a ¶ 44; NYSCEF # 250 at Needham_00008854, -8867). Meanwhile, Paragraph 15 was amended to add in the following provision:

> If any portion of the Transaction involves the purchase of a Target Company directly by the Other Party, rather than by the Company, for purposes of calculating the Transaction Fee, aggregate purchase price paid in the transaction shall be calculated to include the aggregate purchase price paid with respect to any such Target Company

(Defs 19-a ¶ 48; NYSCEF # 250 at Needham_00008860, -8873). The Amended Agreement now also included Attachment I, which listed out the seven Target Companies with which Services had entered term sheets (NYSCEF # 250 at Needham_00008866). Upon receipt of the Amended Agreement, Services returned a signed copy to Needham without comment (Pltf 19-a ¶ 14; NYSCEF # 89 – Stavris Aff. ¶ 5). Needham, in turn, continued to pursue the dual track strategy of private placement and merger with a SPAC (Pltf 19-a ¶ 16; Stavris Aff. ¶ 8).

Although capital-raising efforts following the Amended Agreement initially struggled (*see* Pltf 19-a ¶ 17; Defs 19-a ¶¶ 52-53), GigCapital2 eventually agreed to enter into a business combination with Services (Pltf 19-a ¶ 19; Defs 19-a ¶ 57). The parties vigorously dispute who convinced Katz to agree to this business combination (*compare* Pltf 19-a ¶¶ 18, 20 *with* Defs 19-a ¶¶ 55-57).[3] But it is undisputed that, on or around September 29, 2020, GigCapital2 entered a letter of intent (LOI) with Services regarding an anticipated business combination (NYSCEF # 138 at UPHEALTH0027290-94). Pursuant to the LOI, Services and GigCapital2 outlined the "general terms and conditions of a potential business combination involving [Services]" (including any "current and future subsidiaries and its-to-be-formed Delaware corporation parent," which were collectively defined by the parties as "the 'Company'") (*see id.* at UPHEALTH0027290). The parties contemplated a transaction that would involve "[a] business combination between the Company (through its to-be-formed Delaware corporation parent) and SPAC pursuant to which the SPAC will acquire 100% of the outstanding equity and equity equivalents of the Company" (NYSCEF # 138 at UPHEALTH0027296).

After sending a copy of the LOI to Katz, Pylypiv sent a copy to Needham for any "suggest[ed] redlines and edits as you see fit" (NYSCEF # 135 at UPHEALTH 0001321). Needham, in turn, provided comments on a draft press release announcing the deal, which announced that "UpHealth Services" (defined as UpHealth) entered the LOI and identified Needham as "serv[ing] as financial advisor to UpHealth" (NYSCEF # 140 at Needham_00014595, -4597).[4] Even though the parties dispute the extent that Needham advised on the business combination contemplated by the LOI, there is no dispute that, after the LOI's execution, Needham provided various services such as updated financial models and valuation

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[3] For example, Needham and Katz corresponded about a potential transaction between August 2020 and September 2020 (*see* NSYCEF #'s 132, 134). Katz also testified that "having Needham behind [the potential transaction] gave [him] some comfort that [Kathuria] is dealing with a serious banker," and that he relied on information received from Needham (NYSCEF # 97 tr at 224:16-225:2, 231:4-20). Defendants, however, claim that Katz learned about the transaction from "a cold call from Chirinjeev Kathuria that was trying to interest me on a couple of these deals, including UpHealth Services" and that he did not believe he "took any interest in [a transaction] until Kathuria call[ed] me" (NYSCEF # 220 tr at 210:23-12).

[4] This draft removed the term "and acted as placement agent on the private offering" from the press release (NYSCEF # 140 at Needham_00014597).

analyses, as well as various presentations to related to the upcoming business combination (Pltf 19-a ¶¶ 22, 24; *see also* Defs 19-a ¶¶ 61, 63).

The Formation of Holdings and Its Intended Purpose

The parties dispute whether it was originally Services who would complete this business combination or whether it was always the plan to have the business combination occur between Holdings and GigCapital2 (*compare* Pltf 19-a ¶¶ 19, 26, 28 *and* Defs 19-a ¶¶ 57, 71 *with* NYSCEF # 312 at Response No. 28). The parties also largely disagree whether Needham had known that Services planned to create Holdings at the time of their engagement (*compare* Defs 19-a ¶¶ 72-73 *with* NYSCEF # 464 at Response No. 72).

To support its position that the business combination was originally going to be carried out by Service, Needham points to the testimony of: (1) Beck, who testified that the "original plan was to do a business combination between UpHealth Services, Inc., and GigCapital 2" (NYSCEF # 96 tr at 74:5-15); (2) Pylypiv, who testified that "there was a decision . . . that instead of UpHealth Services, Inc. acquiring the target companies and entering the business combination agreement . . . instead Holdings would be formed" (NYSCEF # 95 tr at 115:9-116:16); and (3) Katz, who testified that the LOI "was signed indeed with UpHealth Services with the knowledge that it's going to be incorporated in Delaware" for, among other reasons, "the tax associated with the transaction" and allow Services to "carry on" (NYSCEF # 97 tr at 11:3-14:18).

Conversely, defendants point to a January 1, 2020, offer of employment that indicated that "[y]our first day of employment with [Services] will be January 1, 2020 and your employment shall continue until the formation of a holding company (NYSCEF #224). Defendants further note that Services, as an Illinois S corporation, could never have acquired at least one of the Target Companies because it was owned by foreign shareholders (NYSCEF # 302). Defendants, in turn, point to the testimony of: (1) Pylypiv, who testified that "issues [were] raised about [Services] being an Illinois entity" and "there was a suggestion that there should be created a different entity" to "acquire the target companies (NYSCEF # 210 tr at 98:22-99:11); (2) Beck, who testified that Services' corporate form "was not a particularly useful corporate form to use" and that discussions of forming Holding had occurred prior to October 26, 2020 (NYSCEF # 209 tr at 73:23-74:4, 104:21-105:9); and (3) Katz, who testified that "UpHealth Service was put together . . . to go and scout and look for a few companies that could be rolled into a digital healthcare technology company" and that they then "decided to reincorporate it in Delaware" and that GigCapital2 requested "the incorporation of an UpHealth Holding" (NYSCEF # 220 tr at 11:7-17, 84:10-84:18).

Regardless of the original intent regarding Services' involvement in a potential business combination, the record establishes that, at least around late

September 2020 (prior to the execution of the LOI), Services began taking steps to transition to Holdings. Specifically, on September 21, 2020, GigCapital2's transaction counsel circulated a summary of a call "regarding the SPAC business combination" (NYSCEF # 156 at UPHEALTH0027059). In addition to outlining the SPAC transaction process, counsel noted its understanding that "for tax reason [] UpHealth is contemplating creating an LLC which will own the existing UpHealth, Inc., which would then acquire the four target companies" (*id.* at UPHEALTH 0027060). The proposed business combination outlined in the email indicated that, although "UpHealth, LLC, a Delaware limited liability company" (i.e., Holdings) would control "UpHealth, Inc., an Illinois corporation" (i.e., Services) it was Services that would ultimately acquire the Target Companies (*id.*).

The next month, on October 26, 2020, Holdings incorporated in Delaware as a C corporation (Pltf 19-a ¶ 27; Defs 19-a ¶ 69). That same day, Kathuria, Pylypiv, Gatmaitan, and Beck entered Stock Contribution, Exchange and Subscription Agreements (CEAs) with Holdings, whereby each shareholder contributed their shares of Services in exchange for stock in Holdings (Pltf 19-a ¶ 30; Defs 19-a ¶¶ 70, 74; NYSCEF # 158). The parties dispute whether, pursuant to the CEAs, the Services' shareholders acquired more than 54.1% of Holdings' shares, or if Services' shareholders acquired 100% of the issued and outstanding stock of Holdings (*compare* Pltf 19-a ¶¶ 29, 34 *and* NYSCEF # 464 at Response No. 75 *with* Defs 19-a ¶ 75 and NYSCEF # 312 at Response Nos. 29, 34). But a review of Holdings' Stockholder Agreement indicates that "the Initial Stockholders [Kathuria, Pylypiv, Gatmaitan, and Beck] own all of the issued and outstanding shares of Common Stock" (NYSCEF # 278 at UPHEALTH0058505). And as Gatmaitan testified, Holdings' ownership stayed the same as Services' ownership "[a]t the formation of Uphealth Holdings" (NYSCEF # 94 tr at 32:18-24).

UpHealth Inc.'s Form 10-Q and S-1 described the transaction between Holdings and Services' shareholders as a "reorganization" and "merger" (Pltf 19-a ¶ 36; NYSCEF # 15 at 9, 18, 41; NYSCEF # 14 at 73, 91, 116). Notably, upon its formation, Holdings shared the same management, employees, and physical location (if not also ownership) as Services, and it used Services' address at least through February 2021 (Pltf 19-a ¶ 34). In fact, during his deposition, Gatmaitan agreed that Holdings, upon its formation, carried on Services' business (NYSCEF # 94 tr at 16:10-24), while Stavris testified that interactions with Holdings' shareholders (previously Services' shareholders) continued as normal following the Holdings-Services transaction (NYSCEF # 200 tr at 185:7-14, 236:6-238:13).[5] The

[5] Defendants state that Services continued on as a separate, wholly owned subsidiary of Holdings (Defs 19-a ¶ 78), and they cite, among other things, an excerpt to Amendment No. 2 to UpHealth Inc.'s Form S-1, dated September 27, 2021, which indicates the same (NYSCEF # 302). As Needham notes, however, other portions of that same filing state that (1) Services "was established on November 5, 2019 [and] operations effectively began January 1, 2020 and continued through the merger with [Holdings]" and (2) Holdings "entered into a merger agreement with [Services] whereby [Holdings] was deemed the surviving entity (NYSCEF # 331).

record indicates that Holdings also satisfied various liabilities that Services owed to its employees and vendors, and its accounting records showed that Holdings carried liabilities, including to Needham, incurred by Services (*id.* ¶ 35; *see also* NYSCEF # 164 at UPHEALTH0054964 ["Prof Fees" spreadsheet]; NYSCEF # 165 at UPHEALTH0054966; NYSCEF # 97 tr at 27:24-28:2). And as further explained below, it was ultimately Holdings who acquired the Target Companies (Defs 19-a ¶ 79). By April 8, 2022, Services was involuntarily dissolved (Pl 19-a ¶ 33; *see also* NYSCEF # 96 tr at 141:23-142:2), but as Beck testified, upon execution of the CEAs, Services "had no assets" and "no operations" (NYSCEF # 96 tr at 141:4-12).

The Addition of Cloudbreak to the Target Companies List

In addition to the Target Companies, Services explored a business partnership with Cloudbreak Health, LLC (Cloudbreak) (Defs 19-a ¶ 64). Services, in turn, requested Needham to provide advice concerning the impact that an acquisition of Cloudbreak would have on Services' financials (Pltf 19-a ¶ 24). In its replying email, dated October 2, 2020, Needham acknowledged the "strategic benefits" of including Cloudbreak but outlined five "material implications for the broader SPAC transaction" (NYSCEF # 152 at UPHEALTH001464). On October 15, 2020, prior to the incorporation of Holdings, Services and Cloudbreak agreed to a Term Sheet with Cloudbreak (Pltf 19-a ¶ 23; Defs 19-a ¶ 65). The next month, on November 30, 2020, Needham sent Services an updated Attachment I to the Amended Agreement, which now added Cloudbreak to the list of Target Companies (Pltf 19-a ¶ 25; NYSCEF # 155 at Needham_0030211). Services did not object or otherwise respond to the updated Attachment (Pltf 19-a ¶ 25; NYSCEF # 312 at Response No. 25; NYSCEF # 212 tr at 246:17; NYSCEF # 217 tr at 208:20-22).

The GigCapital2 Business Combination

During October and November 2020, Holdings entered into definitive agreements (the Definitive Agreements) with the following Target Companies: Glocal Healthcare Systems Pvt. Ltd., LLC; Behavior Health Services, LLC; Innovations Group, Inc., d/b/a MedQuest Pharmacy; TCC (as successor to Transformations Drug and Alcohol Treatment Center); and Thrasys Inc. (Pltf 19-a ¶ 38; Defs 19-a ¶ 79). There is no dispute that Holdings did not execute any term sheets with the Target Companies and that the term sheets were not amended to permit Holdings to acquire them (Pltf 19-a ¶ 37). Rather, as Beck testified, Holdings exercised Services' rights to acquire the Target Companies, even if those rights were not "formally transferred" (NYSCEF # 96 tr at 142:11-143:7).

The Definitive Agreements required, as a condition for closing, that the business combination between GigCapital2 and Holdings close under terms substantially similar to those set forth in the LOI with Services (Pltf 19-a ¶ 39; *see, e.g.* NYSCEF # 167 at UPHEALTH0029109, -291540; NYSCEF # 168 at UPHEALTH0029268). Eventually, Holdings and GigCapital2 entered into the

Business Combination Agreement, dated November 20, 2020 (the Holdings BCA) pursuant to the LOI (Pltf 19-a ¶ 40; Defs 19-a¶ 80; NYSCEF # 279).[6] This anticipated business combination, in turn, was to provide the financing to acquire the Target Companies (Pltf 19-a ¶ 39). Meanwhile, concurrently with the Holdings BCA, Cloudbreak executed its own business combination agreement whereby Cloudbreak merged with GigCapital2 (the Cloudbreak BCA) (Defs 19-a ¶ 80; Pltf 19-a ¶ 42; NYSCEF # 280).[7]

The GigCapital2-Holdings and GigCapital2-Cloudbreak business combinations (together, the Business Combination) were announced via a press release, dated November 23, 2020, which identified Needham as "exclusive financial advisor" (NYSCEF # 173 at Needham_0028757; *see also* NYSCEF # 181 at UPHEALTH0060781 [FINRA questionnaire listing Needham as "exclusive financial advisor to UpHealth Holdings, Inc."]). The Business Combination then simultaneously closed on June 9, 2021, and, following the Business Combination, GigCapital2 became a publicly traded company called UpHealth Inc. (Defs 19-a ¶¶ 81-82).[8] The enterprise value for the combined entity was $1.325 billion, and the value of the stock issued to owners of Holdings and Cloudbreak was $1.1 billion, which provided the necessary capital to acquire the Target Companies (Pltf 19-a ¶ 43; NYSCEF # 174 at Needham_00039735).

The Fee Dispute

On January 21, 2021, Needham sent Kathuria its fee calculation of $31,345,000 Transaction Fee (NYSCEF # 174 at Needham_00039726). This fee represented 2.5% of the aggregate purchase price paid as part of the Business Combination, which Needham identified as $1.254 billion[9] (Pltf 19-a ¶¶ 49-50). Thereafter, following the closing of the Business Combination, Needham circulated an invoice for its transaction fee and expenses on June 3, 2021, and again on June 10, 2021 (Pltf 19-a ¶ 53). Defendants have yet to pay Needham any fee (Pltf 19-a ¶ 54; Defs 19-a ¶ 92; NYSCEF # 220 at tr 135:2-21; NYSCEF # 213 at 221:6-16).

Defendants contend that the Business Combination does not constitute the relevant "Transaction" for purposes of the Amended Agreement (*see* NYSCEF # 312

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[6] The Holdings BCA stated that "[e]xcept for Needham & Co., no broker, finder or investment banker [was] entitled to any brokerage, finder's or other fee or commission in connection with the Transaction" (NYSCEF # 279 at UPHEALTH0052803).

[7] Cloudbreak negotiated its own deal for a separate business combination with GigCapital2 for various strategic reasons (*see* NYSCEF # 220 tr at 238:3-25, 241:8-244:13; NYSCEF # 217 tr at 117:12-118:9). The parties disagree whether Cloudbreak withdrew from its term sheet with Services, but there is no dispute that it was directly acquired by GigCapital2 (Pl 19-a ¶ 42).

[8] The parties seemingly dispute whether the Business Combination constituted a single transaction or separate transactions (*compare* Defs 19-a ¶ 80 *with* NYSCEF # 464 at Response No. 80).

[9] Specifically, to reach this number, Needham combined the "Rollover Equity" amount of $1.1 billion, the "Repayment of Debt" in the amount of $67.6 million, and "Cash Consideration in the amount of $86.2 million" (Pl 19-a ¶ 50; NYSCEF # 174 at Needham_00039735).

at Response Nos. 50-51). Defendants suggest, and Needham strongly disputes (*see e.g.* NYSCEF # 464 at Response No. 77), that the "aggregate purchase price" to which the transaction fee of 2.5% applies is only tied to the value and consideration paid to Services and its shareholders in connection with Holdings' acquisition of Services by Holdings and Holdings' corresponding purchase of the Target Companies (*see* Defs 19-a ¶ 77). By defendants' calculations, which Needham again disputes as speculative and unsupported by record (*see* NYSCEF # 464 at Response No. 76), the aggregate value of the rolled-up entity, after it acquired the Target Companies, was only $350 million (Defs 19-a ¶ 76 citing NYSCEF # 227 at Needham_00078479; NYSCEF # 239 at Needham_00000237). Needham, however, points out that the same slide indicating a $350 million valuation also suggested a market value "as much as $1.5B to $2.5 B" (NYSCEF # 227 at Needham_00078479).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing is made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party *(see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]). Although summary judgment is "considered a drastic remedy," "when there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). In this regard, the court's task at this juncture "is issue finding, not issue determination" (*Lebedev v Blavatnik*, 193 AD3d 175, 184 [1st Dept 2021]).

Needham commenced this action on September 3, 2021, asserting a claim for breach of contract related to defendants' alleged failure to pay Needham the Transaction Fee due and owing under the Amended Agreement (Compl ¶¶ 66-71).[10] Needham alleges that it is due a Transaction Fee of $31,345,000, which is 2.5% of the Business Combination's aggregate purchase price of $1,254,000,000 (*id.*). In response, defendants counterclaim for a declaration that the relevant "Transaction" under the Amended Agreement occurred when it acquired Services upon execution of the CEAs, and Holdings, in turn, acquired the Target Companies (Counterclaim ¶¶ 63-73). In defendants' view, the relevant Transaction Fee is no more than 2.5% of Services' security-holders alleged 54.1% interest in Holdings' aggregate purchase price of $350,000,000, or $4,733,750 (*id.*). Both parties now move for summary judgment.

[10] Needham's complaint included two causes of action, but by Decision and Order, dated February 28, 2022, this court granted defendants' motion to dismiss Needham's second cause of action (NYSCEF # 38).

The central issue underlying the parties' motions is whether defendants breached the Amended Agreement by failing to pay the Transaction Fee as calculated by Needham (*see* NYSCEF # 202 - Pltf Mot 21-23; NYSCEF # 311 - Defs Mot 15-18). This issue turns on what constitutes the relevant "Transaction" under the Amended Agreement. For its part, Needham argues that under the plain, unambiguous terms of the Amended Agreement, the Business Combination (including the GigCapital2-Cloudbreak business combination) is the relevant "Transaction" for determining Needham's fee (Pltf Mot 21-23; NYSCEF # 466 – Pltf Opp 16-18). Needham posits that defendants' position, besides being unsupported by the record, is nothing more than a litigation position adopted to shirk their payment obligations to Needham (Pltf Mot 22-23; Pltf Opp 18-23).

By contrast, defendants contend that the unambiguous terms of the Amended Agreement establish that the only "Transaction" contemplated by the parties is Holdings' acquisition of Services through the CEAs and Holdings' subsequent acquisition of the Target Companies (the Rollup) (Defs Mot 15-18; NYSCEF # 313 – Defs Opp 4-6). As defendants put it, its interpretation of the Amended Agreement is consistent with the parties' intent because (a) the term "Company" refers to Services, not Holdings, (b) the term Other Party necessarily refers to another entity besides Services, i.e., Holdings, (c) for purposes of ascertaining the relevant "Transaction," the only "business combination" involving Services was the Rollup, and (d) their interpretation comports with the reason Services retained Needham (Defs Mot 15-17).

Below, the court first addresses the parties' interpretation of the Amended Agreement. It then considers whether Holdings can be deemed liable for Services' obligations under the Amended Agreement, and, if so, whether the Business Combination is the relevant "Transaction" for purposes of calculating Needham's Transaction Fee.

I. Interpreting the Amended Agreement

When interpreting a contract, the "best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Accordingly, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). To this end, "words should be accorded their 'fair and reasonable meaning,' and 'the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations'" (*Dreisinger v Teglasi*, 130 AD3d 524, 527 [1st Dept 2015]).

Here, under the Amended Agreement, the parties contemplated Needham would act as both (1) "exclusive Placement Agent" in connection with "the acquisition by the Company of one of more" Target Companies, and (2) "exclusive

financial advisor to the Company in connection with a possible Transaction involving the Company and another party or parties," i.e., an "Other Party" (NYSCEF # 130 at UPHEALTH0056946). The "Transaction" contemplated by the parties was "*any* merger, consolidation, reorganization, or other business combination pursuant to which the business of the Company is combined with that of the Other Party" (*id.*). For services rendered by Needham, Services agreed to pay in connection with such a Transaction a fee of 2.5% percent of the "aggregate purchase price," which is defined, in part, as "the sum of [] the aggregate value of any securities issued, any other non-cash consideration delivered and any cash consideration paid to the Company or its securityholders in connection with the Transaction" (*id.* at UPHEALTH0056948). And in calculating this fee for the Transaction, the parties expressly contemplated situations where a "portion of the Transaction involves the purchase of a Target Company directly by the other Party, rather than by the Company" (*id.* at UPHEALTH0056947).

Pointing to these provisions, defendants posit that the only possible "Transaction" permitted by the Amended Agreement is the Rollup (Defs Mot 15-17; NYSCEF # 470 – Defs Reply 2-4). But this position too narrowly limits the construction of the Amended Agreement. Rather, as drafted, the Amended Agreement reveals that the parties intended for *any* business combination involving the business "the Company" and an Other Party to which Needham served as "exclusive financial advisor" to be considered as the relevant "Transaction" when calculating Needham's fee (NYSCEF # 130 at UPHEALTH0056946). Thus, while the Services-Holdings combination could constitute the relevant Transaction if Needham, in fact, was acting as the exclusive financial advisor for that transaction, so too could another business combination that involved Services (including, if applicable, any successor entities) insofar as Needham provided financial advisory services. This analysis therefore depends on a straightforward application of the Amended Agreement to the factual record (*see 153 Hudson Dev., LLC v Dinunno*, 2003 WL 25520440, at *1 [Sup Ct, NY County, May 13, 2003], *affd* 8 AD3d 77 [1st Dept 2004] ["The application of an unambiguous contract to the facts is a question of law for the court"]).

On this point, Needham makes a prima facie showing that the Business Combination (i.e., GigCapital2's combination with Holdings and Cloudbreak) is the relevant Transaction for purposes of the Amended Agreement, and defendants fail to adduce meaningful evidence through its submissions to rebut that showing.[11] As will be explained, the undisputed facts support a conclusion that Holdings is Services' successor for purposes of its contractual obligations, including the Amended Agreement, and that Needham's work was related to the Business Combination, even if ultimately consummated by Holdings.

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[11] For the same reasons, defendants fail to make a prima facie showing of their entitlement to summary judgment on its counterclaim.

II. Whether Holdings is the Successor to Services for Purposes of the Amended Agreement's Contractual Obligations

Before addressing what constitutes the relevant "Transaction" under the Amended Agreement, the court first considers the threshold question of whether Holdings can be deemed liable for Services' obligations under the Amended Agreement. On this point, as defendants note, the term "Company" is defined under the Amended Agreement as "UpHealth Services Inc." (NYSCEF # 130 at UPHEALTH0056941). Needham argues, notwithstanding this definition, that Holdings can be liable for Services' obligations under the Amended Agreement as its successor (Pltf Mot 12-19; Pltf Opp 11-16). Specifically, Needham contends that Holdings became liable for Services' obligations because (1) Holdings is a "mere continuation" of Services, (2) Holdings *de facto* merged with Services, and/or (3) Holdings impliedly assumed liability under the Amended Agreement (Pltf Mot 12-19; Pltf Opp 11-16). Defendants respond that Needham's invocation of successor liability is an attempt to re-write the Amended Agreement (Defs Opp 6-10; Defs Reply 4-7).

The general rule in New York is that a company "that acquires another [company's] assets is not liable for its predecessor's contract liabilities" (*Eastern Concrete Materials, Inc. v DeRosa Tennis Contractors, Inc.*, 139 AD3d 510, 512 [1st Dept 2016], citing *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). Courts will nonetheless impose liability on a successor company in certain circumstances, namely if (1) the company is a "mere continuation" of the predecessor, (2) the transaction between the predecessor and successor is a "*de facto* merger," and/or (3) the successor expressly or impliedly assumed the predecessor's obligations (*see Schumacher*, 59 NY2d at 245; *Flecha v Seybold Mach. Co.*, 146 AD2d 515, 516 [1st Dept 1989]). As explained below, Needham has made a prima facie showing that Holdings is Services' successor as to its contract liabilities, and defendants fail to rebut this showing.

The court starts with the "mere continuation" doctrine, which refers to "corporate reorganizations . . . where only one corporation survives the transaction" (*Highland Crusader Offshore Partners, L.P. v Celtic Pharma Phinco B.V.*, 205 AD3d 520, 523 [1st Dept 2022]). The lynchpin of this analysis is whether the predecessor has been "effectively extinguished," with the successor company continuing the predecessor's operations (*see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176 [1st Dept 2013]). To assist with this determination, courts will assess, among other things, whether the surviving company "acquired [the predecessor's] 'business location, employees, and good will" (*see NTL Cap., LLC v Right Track Recording, LLC*, 73 AD3d 410, 411 [1st Dept 2010]; *Tap Holdings*, 109 AD3d at 176). Here, a review of the undisputed facts reveals that Holdings, upon its formation and acquisition of Services' shares, retained the same shareholders, shared the same physical location as services, used the same management team, and maintained the employment of all of Services' key employees (*see* Pltf 19-a ¶ 34). Further, the

Holdings transaction was described as a "reorganization" and "merger" in various public filings with the SEC (*see* Pltf 19-a ¶ 36). To that end, as certain Holdings/ Services stakeholders explained, Holdings was "continu[ing] the business of" Services, and Holdings was satisfying at least certain of Services' liabilities (*see* NYSCEF # 94 tr at 16:10-24; NYSCEF # 96 tr at 51:8-13). Meanwhile, although Services did not involuntarily dissolve until April 8, 2022, testimony in the record indicates that upon entering into the CEAs, Services had "no assets" and "no operations" (NYSCEF # 96 tr at 140:19-24, 141:4-12). These factors, among others (to the extent undisputed), indicate that Holdings was essentially operating as Services' surviving entity, with Services effectively extinguished (*see Snowbridge Advisors LLC v ESO Cap. Partners UK LLP*, 589 F Supp 3d 401, 418-420 [SD NY 2022] ["mere continuation" exception sufficiently alleged where company merged with defendant and took on role as fund manager, retaining the substantially same management team and business, and left behind minimal assets]).

These same factors also support a finding that Holdings' acquisition of Services was a "de facto merger." The "*de facto* merger" exception applies when "the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation" (*Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573, 575 [1st Dept 2001]). Similar to the "mere continuation" exception, the hallmarks of a *de facto* merger "include a continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation" (*Highland Crusader*, 184 AD3d at 126). Notably, "[n]ot all of these elements are necessary to find a de facto merger" (*Fitzgerald*, 286 AD2d at 574-575).

Here, many of "hallmarks" of a "de facto" merger are present in Holdings' acquisition of Services. Indeed, as discussed in the context of the "mere continuation" doctrine, there was largely a continuity of ownership between Services and Holdings (even if the exact extent is disputed), Services and Holdings relied on the same directors, management, key personnel, and physical location after execution of the CEAs, Services effectively ceased its operations, and Holdings assumed at least some of Services' liabilities (*see* Pltf 19-a ¶¶ 29, 34-36; NYSCEF # 158 at UPHEALTH0059827). The undisputed record therefore supports a conclusion that a "*de facto* merger' has occurred (*see, e.g. Dart Direct, Inc. v Urban Exp./NJ LLC*, 2016 NY Slip Op 30847[U], at *2 [Sup Ct, NY County, Apr. 22, 2016] [plaintiff alleged de facto merger where (i) predecessor and successor shared corporate officers, directors and shareholders, (ii) successor employed majority of predecessor former employees, (iii) predecessor ceased conducting all ordinary business and successor operated out of same office location, and (iv) and successor assumed liabilities necessary to continue operations]).

Finally, Needham has made a prima facie showing that Holdings impliedly assumed Services' liabilities. "While no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller" (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643, 675 [Sup Ct, NY County, 2013], quoting *Ladjevardian v Laidlaw-Coggeshall, Inc.*, 431 F Supp 834, 839 [SD NY 1974]; *accord Oorah, Inc. v Covista Comm'cns, Inc.*, 2014 WL 4787289, at *5 [Sup Ct, NY County, Sept. 25, 2014], *affd* 139 AD3d 444 [1st Dept 2016]). Courts will consider factors such as the effect of the transfer upon creditors of the predecessor corporation, as well as admissions of liability on the part of the officers or other spokesmen of the successor corporation (*see Ladjevardian*, 431 F Supp at 839-840). Here, in addition to the above discussed factors, testimony available in the record indicates an understanding among Holdings' stakeholders that Holdings would be responsible for Successors "commitment," which seemingly included Needham's financial advisory services" and other liabilities incurred by Services (NYSCEF # 97 tr at 56:6-22; NYSCEF # 96 tr at 236:4-17; NYSCEF # 164 at UPHEALTH0054964; NYSCEF # 165 at UPHEALTH0054966). These undisputed facts proffered by Needham support a conclusion that Holdings intended to pay Services' obligations to other entities.

By contrast, defendants largely fail to adduce any evidence to rebut Needham's prima facie showing (*see* Defs Opp at 6-10; Defs Reply at 5-7). Rather, defendants focus the bulk of their briefing on arguing that Needham's successor-liability arguments effectively amount to an improper attempt to modify the Amended Agreement (*id.*). But none of the cases defendants cited in support of this proposition supports such a conclusion. For example, defendants cite to *Ladenburg v Tim's Amusement, Inc.* (275 AD2d 243 [1st Dept 2000]) to argue that "unless an agreement to vary the terms of the underlying contract . . . the contract cannot be rewritten o swap the related company for the company identified in the contract (Defs Opp at 8). The court in *Ladenburg*, however, confronted two separate issues in connection with an engagement agreement entered between plaintiff and defendant. The first issue pertained to whether the parties' alleged oral agreement that plaintiff would receive a fee for its services to defendant was sufficient to overcome General Obligation Law § 5-701(a)(10)'s prohibition against "contract[s] to pay compensation for services rendered in negotiating . . . the purchase . . . of a business opportunity" (275 AD2d at 246-247). As defendants correctly note, the court agreed that plaintiff's allegations were sufficient to withstand dismissal because the oral agreement, as reflected in a subsequent letter between the parties, "manifest[ed] an agreement that [plaintiff] would be compensated on the same terms to which [defendant] had agreed" (*id.* at 247). But this issue is not germane to the present dispute as it had nothing to do with successor liability. The second issue addressed by the *Ladenburg* court, by contrast, pertained to whether a company related to defendant "succeeded [defendant's obligations] under" the parties' engagement agreement (*id.*at 247-248). On this issue, the court concluded that

plaintiff's claim premised on successor liability could proceed. Specifically, the court concluded that plaintiff alleged sufficient hallmarks of a *de facto* merger—including rechanneled funds, common ownership, leadership, and headquarters, and the stripping of assets from the predecessor—to establish a question of fact as to whether defendant's related entity was "devised as a way to avoid [defendant's] obligations (*id.* at 278). The *Ladenburg* court's analysis on this second issue thus plainly supports a conclusion that successor liability can bind a successor to contractual terms to which its predecessor agreed.

Defendants' reliance on *Iconoclast Advisers LLC v Petro-Suisse Ltd.* is similarly misplaced (27 Misc 3d 1230[A] [Sup Ct, NY County, May 14, 2010]). In *Iconoclast*, after the parties had entered into an engagement agreement, plaintiff alleged that it was later frozen out of the parties' contemplated transaction. The transaction was then subsequently closed by different entities (*id.* at *3-4). Upon the parties' motions for summary judgment, the court dismissed plaintiff's complaint, noting that the engagement agreement contemplated a specific transaction between specific parties under which plaintiff would be entitled to fees, and it did not provide for any affiliates to be included in that definition (*id.* at *5-6). Notably, however, plaintiff in *Iconoclast*, unlike here, was not advancing a claim under a theory of successor liability (*see id.* at *5-7). Hence the court's analysis in *Iconoclast* has no meaningful bearing on whether Holdings can be liable for Services contractual obligations under a theory of successor liability.

At bottom, Needham has met its prima facie burden of establishing Holdings' successor liability to Services' contractual obligations, and defendants fail to rebut that showing or otherwise create a triable issue of fact. This includes, as relevant to the parties' motions, Needham's showing that Holdings is liable for Services' contractual obligations as the defined "Company" under the Amended Agreement. This conclusion, however, does not end the analysis. The court therefore turns to the question of whether the Business Combination is the relevant "Transaction" under the Amended Agreement for purposes of calculating the "Transaction Fee."

III. Whether the Business Combination is the Relevant Transaction

Having concluded that Holdings is a successor to Services, and therefore could be considered "the Company" under the Amended Agreement, the court now turns to whether the Business Combination constitutes that relevant "Transaction." As explained above, while the Amended Agreement is unambiguous, the term "Transaction" and it use of the term "any" necessarily requires an assessment of the record to determine the "merger, consolidation, reorganization, or other business combination" to which Needham served as "exclusive financial advisor" (NYSCEF # 130 at UPHEALTH0056941).

To support its position, Needham contends that the Business Combination is the only transaction for which defendants requested financial advisory services; and

Needham provided it (Pltf Mot 22-23). Needham further avers that Services' reorganization into Holdings was merely a corporate formality that facilitated the Business Combination, and that it was not asked to provide any financial advice or services in connection with Services transition to Holdings (*id.*). For this reason, Needham argues, the undisputed evidence establishes that the Business Combination is the relevant Transaction under the Amended Agreement (*id.* at 19). The court agrees.

As the record establishes, when Services initially engaged Needham, the parties contemplated, and Needham subsequently pursued, a dual track process wherein Services attempt to raise funds through private placement or going public through a merger with a SPAC (*see* Pltf 19-a ¶¶ 5, 8-10; *see also* Defs 19-a ¶ 28; Stavris Aff. ¶¶ 6, 9, 13). Needham's efforts were entirely consistent with this dual track process reflected in both the Engagement Agreement and the Amended Agreement (*see* NYSCEF # 109; NYSCEF # 130). Pursuant to that "dual track" strategy, Needham identified, and reached out to various SPAC entities, including Katz's entities, about a potential combination with Services, although there is some dispute regarding Needham's influence over Katz's decision to have GigCapital2 pursue a business combination (Pltf 19-a ¶ 11; Defs 19-a ¶ 29).

Then, by the time the parties executed the Amended Agreement and Services subsequently executed the LOI with GigCapital2, Needham provided various advisory and due diligence services in connection with the Business Combination, which seemingly continued even after the formation of Holdings (*see* Pltf 19-a ¶¶ 22, 24, 32; *see also* Defs 19-a ¶ 57; NYSCEF # 123 at Needham_00000588-89; NYSCEF # 150 at UPHEALTH0028619; NYSCEF # 144 at Needham_00021425-28; NYSCEF # 97 at tr 56:16-22). And this included GigCapital2's direct acquisition of Cloudbreak, which is consistent with the Amended Agreement's specifying that a "portion" of the Transaction could involve the purchase of a "Target Company" acquired directly by an Other Party (*see* NYSCEF # 130 at UPHEALTH0056947). Conversely, as affirmed by Stavris and testified to by Steinkrauss, Needham did not provide financial advisory services in connection with the formation of Holdings or the CEAs (regardless of when it became aware of Holdings' creation) (*see* Pltf 19-a ¶ 31; Stavris Aff. ¶ 10; NYSCEF # 99 tr at 245:4-11). Taken together, these facts adduced by Needham support a prima facie showing that the Business Combination is the relevant Transaction for which it provided financial advisory services under the Amended Agreement.

Defendants fail to raise a triable issue of fact or otherwise establish their own prima facie showing that the Rollup constitutes that "Transaction." Defendants' primary position is that Needham's engagement was only related to raising capital needed to close Services' term sheets with the Target Companies (Defs 19-a ¶¶ 17, 19; NYSCEF # 312 at Response No. 5). But not only is this position belied by the plain terms of both the Engagement Agreement and Amended Agreement (*see* NYSCEF # 109 at Needham_00000057; NYSCEF # 130 at UPHEALTH0056946), it

is also inconsistent with services that defendants sought and received from Needham over the course of the engagement (*see e.g.* NYSCEF # 110 at Needham_00079744; NYSCEF # 113 at Needham_00000895; NYSCEF # 142 at Needham_001111720-724; NYSCEF # 135 at UPHEALTH0001321; NYSCEF # 139 at UPHEALTH0060844-847; NYSCEF # 145 at Needham_00074963-969; NYSCEF # 269 at UPHEALTH0027332). Moreover, although defendants adduce testimony from various Needham employees acknowledging that Needham was engaged to "execute the term sheets" (NYSCEF # 212 tr at 29:25-31:11; NYSCEF # 312 at Response No. 5), testimony from defendants' stakeholders reveal an understanding that Needham acted as exclusive financial advisor to Services, and thereafter Holdings, in connection with the Business Combination (NYSCEF # 97 tr at 56:16-22; NYSCEF # 94 tr at 57:18-58:12, 71:2-14). This conclusion is buttressed by the fact that, as defendants concede, the capital raise contemplated by the Amended Agreement was accomplished through the Business Combination (*see* Defs Opp at 9-10; *see also* Pltf 19-a ¶ 39).

Similarly unavailing is defendants' attempt to argue that the GigCapital2-Cloudbreak business combination is not part of the relevant "Transaction." The crux of defendants' argument is that the Amended Agreement was never formally amended to add Cloudbreak as a "Target Company," and, as a result, Cloudbreak is not encompassed by that definition (Defs Opp 11-15). The record adduced by the parties, however, supports the opposite conclusion. Specifically, on November 30, 2020, after Services entered into a term sheet with Cloudbreak and after the BCAs were executed, Cloudbreak was added to Attachment I, consistent with the terms of the Amended Agreement (Pltf 19-a ¶ 25). And although defendants maintain that a formal amendment or modification agreed to and signed by both parties was required to add Cloudbreak (Defs Opp 11, 13; *see* NYSCEF # 130 at UPHEALTH0056946), that contention is squarely foreclosed by the Amended Agreement's plain terms. Specifically, as set forth in the Amended Agreement, Attachment I "shall," i.e., *must*, "be promptly updated as Target Companies are added or eliminated for acquisition" (NYSCEF # 130 at UPHEALTH0056941).[12] Accepting defendants' position would effectively render the mandatory obligations under the Amended Agreement as "meaningless or without force or effect" (*see Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [internal citation and quotations omitted] [reiterating contract-interpretation principle that "a contract

[12] Defendants aver that Cloudbreak subsequently "withdrew" from its term sheet with Services (*see* Defs 19-a ¶ 66). But the testimony cited by defendants merely establishes that Cloudbreak eventually entered into a business combination with GigCapital2 subsequent to agreeing to a term sheet with Services (*see, e.g.* NYSCEF # 212 at Tr 1146-9; NYSCEF # 209 at Tr 63:14-64:14). Nothing in the record indicates that Cloudbreak was ever "eliminated for acquisition" for purposes of Attachment I (*see* NYSCEF # 130 at UPHEALTH0056941). In any event, there were also other "Target Companies" listed in Attachment I that were not ultimately acquired by Holdings but still remained on Attachment I.

must be construed in a manner which gives effect to each and every part, so as not to render any provision 'meaningless or without force or effect'").[13]

Finally, defendants contend that Section 15(a) of the Amended Agreement contemplated the acquisition of *all* Target Companies by Holdings, and, for this reason, it must have been the Rollup that the parties contemplated would constitute the relevant "Transaction" for purposes of calculating Needham's fee (*see* Defs Mot 16-17; Defs Opp 5-6). This interpretation is at odds with the plain terms of the Amended Agreement. Section 15(a) specifically contemplates that the "purchase of *a* Target Company" could account for a "*portion* of the Transaction" when calculating the aggregate purchase price paid with respect to "any such Target Company" (NYSCEF # 130 at UPHEALTH0056947). And when this provision is read in conjunction with the Amended Agreement as a whole, it logically suggests that the parties contemplated that the Other Party may potentially acquire a Target Company, not *all* Target Companies (as defendants suggest). For example, the Amended Agreement repeatedly references a singular "Target Company," rather than multiple Target Companies (*cf. id.* at UPHEALTH0056941 [delineating between "Target Company" and "Target Companies"; *id.* at UPHEALTH0056947 [noting that the Company could assign "any or all of its rights to acquire "*any* Target Company"] [emphasis added]). Furthermore, it includes qualifying language "portion," meaning "an often limited part of a whole" (*see* Merrian-Webster.com Dictionary, portion [https://www.merriam-webster.com/dictionary/portion]), or "[a] share or allotted part" (Black's Law Dictionary [11th ed 2019], portion). Stated succinctly, a fair reading of Section 15(a)'s plain language does not rebut Needham's prima facie showing.

In short, for foregoing reasons, the Business Combination (i.e., the GigCapital2-Holdings and GigCapital-Cloudbreak business combinations) is the relevant "Transaction" under the Amended Agreement.

IV. Considering Needham's Transaction Fee under the Amended Agreement

Having concluded that Needham met its prima facie burden of establishing that the Business Combination is the relevant "Transaction" under the Amended Agreement, which defendants fail to rebut, the court now determines whether Needham has made a prima facie showing of the applicable "Transaction Fee" under the Amended Agreement for purposes of assessing damages under its breach of contract claim.

Needham argues that the "aggregate purchase price" of the Business Combination was $1.254 billion, and that it is entitled to 2.5% of that amount, i.e., $31,345,000 (Pltf Mot 19-24). Needham calculated this amount by accounting for (a) rollover equity in the amount of $1.1 billion, which is the aggregate value of

[13] Accordingly, defendants' reliance on *TrueNorth Cap. Partners LLC v Hitachi Metals, Ltd.* is entirely unpersuasive (723 Fed Appx 22, 24 [2d Cir 2018]).

securities issued to Holdings and Cloudbreak in connection the Business Combination, (b) repayment of debt in the amount of $67.6 million, and (c) cash consideration in the amount of $86.2 million (Pltf 19-a ¶¶ 49-50; NYSCEF # 174 at Needham_00039726). Defendants do not seriously dispute either the total purchase price paid as part of the Business Combination or the accuracy of Needham's calculations (*see* NYSCEF # 312 at Response Nos. 49-50; *see also* Pltf 19-a ¶ 51). And the only other calculation submitted by defendants is directly tied to their own interpretation of what is the relevant Transaction under the Amended Agreement (*see* Defs 19-a ¶¶ 60-61, 75-76). Accordingly, Needham has established, and defendants fail to rebut, its entitlement to a Transaction Fee of $31,345,000.[14]

Conclusion

In light of the foregoing, it is

ORDERED that plaintiff-counterclaim defendant Needham & Company LLC's motion for summary judgment in its favor on its breach of contract cause of action and defendants-counterclaim plaintiffs UpHealth Holdings, Inc. and UpHealth Services, Inc.'s counterclaim is granted; and it is further

ORDERED that defendants-counterclaims plaintiff UpHealth Holdings, Inc. and UpHealth Services, Inc.'s motion for summary judgment in favor of its counterclaim is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff-counterclaim defendant Needham & Company LLC and against defendants-counterclaim plaintiffs UpHealth Holdings, Inc. and UpHealth Services, Inc. in the amount of $31,345,000 plus prejudgment interest at 9%, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

09/14/2023
DATE

MARGARET A. CHAN, J.S.C.

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

[14] Contrary to defendants' assertions, this amount does not constitute a "windfall" (Defs Opp at 15-16). Rather, as Needham aptly notes, this amount is consistent with a fee formula duly negotiated between the parties (*see* NYSCEF # 130 at UPHEALTH0056948).