NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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June 9, 2022

Matthew MacLean, Esquire
Michael A. Warley, Esquire
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036-3006
Matthew.MacLean@pillsburylaw.com
Counsel for Plaintiffs Robert Eisiminger, *et. al.*

Attison L. Barnes, III, Esquire
Rebecca Saitta, Esquire
WILEY REIN, LLP
2050 M Street, NW
Washington, DC 20036
ABarnes@wiley.law
Counsel for Defendant Perspecta, Inc.

Re: *Robert Eisiminger, et al. v. Perspecta, Inc.*
Case No. CL–2021–3525

Dear Counsel:

The key issue before the Court is the proper interpretation of the parties' contract, including an ambiguity determination. The Court holds it premature to assess whether the contract is ambiguous or not and defers judgment on the matter until trial.

This dispute is a complex tax matter arising from an equity purchase agreement. Plaintiffs Eisiminger, *et. al.* ("Seller Eisiminger" or "Seller") sold membership interests of Knight Point Systems, LLC ("KPS") to Defendant Perspecta ("Buyer Perspecta" or "Buyer"). Seller Eisiminger sued Buyer Perspecta to recover a huge tax liability it incurred in connection with the deal. Buyer Perspecta had paid $4,276,704 just after the deal closing as an estimated payment

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toward that liability. Seller Eisiminger claims Buyer Perspecta owes $3,046,632. Buyer Perspecta countersues alleging that it already overpaid and is due a refund.

I. OVERVIEW.

Seller Eisiminger agreed to sell membership interests of KPS to Buyer Perspecta via an Equity Purchase Agreement ("Agreement"). The Agreement contained a tax election under 26 U.S.C. § 338 to treat the sale of equity as a sale of assets. This created a huge tax liability for the Seller and a benefit for the Buyer.

To compensate the Seller, the Agreement provided for a purchase price increase equal to the total increased liability resulting from the § 338 election. The Agreement refers to this as the "Final Incremental Section 338 Liability." However, not all financial inputs were available at the time of closing to determine Seller's increased liability. So, Buyer Perspecta paid Seller Eisiminger $4,276,704 one day after closing as an estimate of the Seller's tax liability. The Agreement refers to this as the "Incremental Section 338 Liability."

Calculations for both the Final Liability and the Incremental Liability were set forth in ¶ 10.7 of the Agreement, which referred to an illustration in Exhibit G. Broadly, if the Estimated Liability was greater than the Final Liability—meaning Buyer Perspecta overpaid Seller Eisiminger, then the Seller would refund the difference. If the Final Liability was greater than the Estimated Liability—meaning the Buyer underpaid the Seller, then the Buyer would pay the difference.

Seller Eisiminger ultimately calculated a $3,046,632 underpayment difference based on what they believe are the final, missing financial inputs for the Exhibit G methodologies. Buyer Perspecta alleges that Seller improperly calculated Final Liability and refuses to pay the difference, seeking an overpayment refund.

The parties have been litigating this matter as part of the Court's general docket and, as a result, at least four judges have had substantive involvement in key parts of the case. On February 23, 2022, the Chief Judge assigned the case to the undersigned judge for all purposes to avoid inconsistent rulings. The Court invited Buyer Perspecta to file a Motion to Clarify Prior Rulings, which it did. Both parties briefed and argued the matter.

Specifically, the Court is making a first ruling on Seller Eisiminger's Demurrer to Buyer Perspecta's counterclaim. It is also reconsidering Buyer Perspecta's Demurrer to Seller Eisiminger's Complaint[1]; reconsidering Buyer Perspecta's Motion to Compel Seller Eisiminger's

[1] Order and Opinion Letter of July 21, 2021 (Smith, J.).

production of tax returns[2]; and reconsidering Buyer Perspecta's Motion to Strike Seller Eisiminger's Plea in Bar.[3]

II. INTERPRETATION OF THE OPERATIVE AGREEMENT.

Seller Eisiminger wants the Court to interpret the Agreement as an unambiguous contract that is essentially a simple algorithm. Buyer Perspecta argues that the Agreement is ambiguous and, alternatively, that it is too early in the litigation process for the Court to rule on ambiguity. As to Buyer Perspecta's alternative argument, the Court agrees. The Agreement is not facially intuitive. It is a complex contract with a technical illustration. The Court believes it understands the deal in principle and can certainly read and interpret ¶ 10.7. The Court understood counsel's respective arguments and attempts to explain Exhibit G. It also considered the hearsay declarations filed in this case. However, the Court is not fully confident it understands Exhibit G and how it relates to ¶ 10.7. A detailed explanation will benefit the Court at trial.

The Court's inability to fully understand the Agreement and Exhibit G at this stage of the trial does not mean it is ambiguous, however. Contract language "is not ambiguous simply because the parties ... disagree about how to understand the language." *Bartolomucci v. Fed. Ins. Co.,* 289 Va. 361, 370 (2015) (internal citation and quotation marks omitted). Thus, logically flowing from this, language is not ambiguous simply because *the Court* does not understand the language. *Doswell Ltd. P'ship v. Va. Elec. & Power Co.,* 251 Va. 215, 223 (1996) ("an agreement is not rendered ambiguous merely because it deals with a technical subject that may be considered complex to the uninformed lay person who is not familiar with the topic"). By analogy, if a contract between two Latin professors was drafted entirely in Latin, and if the Court could not read Latin, the Court could not simply declare the contract ambiguous as a matter of law. Rather, it would wait for a translation at trial. That is what the Court wishes to do in this instance. *See Video Zone, Inc. v. KF&F Properties, L.C.*, 267 Va. 621, 627 (2004) ("Generally, the parties' interpretation and dealings with regard to contract terms are entitled to great weight and will be followed unless doing so would violate other legal principles.")

Since the matter of contractual ambiguity is reserved for trial, the Court will treat the contract as ambiguous, without prejudice, for the purposes of pretrial practice. In this way, the parties can develop the case and be prepared to present explanations and extrinsic evidence in the event the Court, after fully understanding the technical aspects of Exhibit G, finds a latent ambiguity. *See Galloway Corp., v. S.B. Ballard Const., Co.*, 250 Va. 493, 502 (1995).

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[2] Order and Opinion Letter of February 7, 2022 (Gardiner, J).
[3] Opinion Letter of December 13, 2021, revising and extending the Court's rational for its December 3, 2021, Order (Tran, J).

III. SELLER EISIMINGER'S DEMURRER TO BUYER PERSPECTA'S COUNTERCLAIM IS OVERRULED.

Seller Eisiminger raises a Demurrer to all four counts of Buyer Perspecta's Counterclaim. The Court overrules the Demurrer.

On demurrer, the court does not evaluate the claim's merits, but only whether the factual allegations in the pleading are sufficient to state a cause of action. *See* Va. Code Ann. § 8.01–273(A); *Riverview Farm Assocs. Va. Gen. P'ship v. Bd. of Supervisors of Charles Cnty.*, 259 Va. 419, 427 (2000). A pleading need only inform the opposing party of the nature and character of the claim. *See Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). Additionally, a pleading need only be made with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440 (1967) (internal quotation marks and citations omitted). A demurrer does not involve an analysis of the strength of proof for the facts alleged. *See Assurance Data, Inc.*, 286 Va. at 143.

A. Count I: Breach of Contract.

The familiar elements of breach of contract are: (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; (3) and injury or damage to plaintiff caused by the breach of obligation. *Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 344 (2016). Buyer Perspecta properly pled all three elements in its counterclaim. Buyer Perspecta claims there was a valid contract, that Seller Eisiminger violated the contract by not refunding an overpayment, and that Buyer Perspecta was damaged by this breach. (Def. CC ¶¶ 23-31.)

Despite Seller Eisiminger's argument to the contrary, the Demurrer stage is not the time for the factfinder to determine if the Exhibit G methodologies were properly used. That is a trial matter. The Demurrer to this count is overruled.

B. Count II: Unjust Enrichment.

The elements of unjust enrichment are: (1) a benefit conferred on the defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value. *See Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116 (2008). Buyer Perspecta properly pled these elements. (Def CC ¶ 13-21, 32-34.) Seller Eisiminger argues that an express contract precludes an unjust enrichment claim. However, the Supreme Court of Virginia recently held that that is a "plainly erroneous" statement. *Compare CGI Fed., Inc. v. FCi Fed, Inc*, 295 Va. 506, 519 (2018) *with James G. Davis Constr. Corp. v. FTJ, Inc.*, 298 Va. 582, 592-93 (2020). The merits of Perspecta's claims are for another day—at trial. The Demurrer to this count is overruled.

C. Count III: Indemnification.

The relevant language of the Agreement reads: "Each Seller . . . shall, indemnify defend and hold harmless the Buyer Indemnified Parties from and against any Damages arising out of, resulting from or relating to any of the following . . . any breach by such Seller of any covenant, agreement or obligation applicable to such Seller under this Agreement . . ." (Agreement ¶ 9.2(b).) Thus, the parties agreed to indemnify Buyer Perspecta in situations such as the present one.

D. Count IV: Specific Performance.

Specific performance is an equitable remedy which may be considered by the trial court where a remedy at law is inadequate, and that the nature of the contract is such that specific performance of it will not result in great practical difficulties. *Chattin v. Chattin*, 245 Va. 302, 306 (1993). Buyer Perspecta properly pleads in this count that it has a right to the tax documents to ensure the Agreement is properly enforced. The Agreement states that the parties are entitled to equitable relief to enforce the Agreement. (Agreement ¶ ¶ 11.14 and 10.7.) There is a legitimate question of whether specific performance is necessary or if it would be granted at trial. At this stage, however, the Demurrer to this count is overruled.

IV. RECONSIDERATION OF BUYER PERSPECTA'S DEMURRER TO SELLER EISIMINGER'S COMPLAINT.

The Court issued an Opinion Letter and Order July 21, 2021, overruling Buyer Perspecta's Demurrer to Count I, breach of contract. On reconsideration the Court avouches the Order. However, consistent with the Court's position on the interpretation of the contract at this stage of the litigation, it disavows the part of the Opinion Letter interpreting the parties' Agreement concerning whether the contract contained a condition precedent—the actual payment of the tax liability.

"A party seeking to recover on a contract right must allege and prove performance of any express conditions precedent upon which his right of recovery depends." *Lerner v. Gudelsky, Co.*, 230 Va. 124, 132 (1985). However, typically, cases that involve the analysis of conditions precedent on demurrer often revolve around both parties agreeing that a condition precedent exists or there is a clear statutory condition precedent that applies to the contract. *See Squire v. Va. Housing Dev. Auth.*, 287 Va. 507; *TC MidAtlantic Dev., Inc. v. Commonwealth, Gen. Servs.*, 280 Va. 204, 209 (2010); *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 227 (2001); *Sauer v. Monroe*, 171 Va. 421, 423-24 (1938). Here, the parties do not agree that a condition precedent exists, and a condition precedent is not required by statute. The Court may be able to break the tie, but only after it better understands how the Agreement, especially Exhibit G, works. It needs the parties to decipher Exhibit G, if they can. So, at this phase of the litigation, the Court is not able to determine whether an express condition precedent exists. Thus, this issue is best reserved for trial.

Because the Court cannot say at this point whether there was a condition precedent or not, Perspecta's Demurrer, on reconsideration, is overruled—albeit for different reasons than set forth in the Court's July 21, 2021, Opinion Letter.

V. RECONSIDERATION OF BUYER PERSPECTA'S MOTION TO COMPEL SELLER EISIMINGER'S PRODUCTION OF TAX RETURNS.

The Court issued an Opinion Letter and Order February 7, 2022, denying Buyer Perspecta's Motion to Compel Seller Eisiminger's tax returns. On reconsideration the Court grants the motion to compel.

This entire case involves the assignment of tax liability. It is undisputed that the calculation of the liability is governed by ¶ 10.7 of the Agreement and Exhibit G. Seller Eisiminger argue that, under their theory of the interpretation of the contract, the tax returns are not relevant. However, the Court cannot agree at this stage of the litigation. The actual tax paid could be relevant in determining how the Exhibit G methodologies are understood or applied under ¶ 10.7 of the Agreement. They may also support a mutual mistake defense that Buyer Perspecta thinks is in play.

The Court on February 7, 2022, improvidently ruled that the complex Agreement and technical illustration was unambiguous without a full understanding of it. Incongruently, it relied on parol Declarations by an expert witness and others to reach this conclusion without the opportunity to have the Declaration tested with cross examination and rebuttal. If the contract was unambiguous as the Court had held, and as Seller Eisiminger claim, then parol evidence should not have been necessary to understand the contract anyway. In any event, these rulings were premature and have served to improperly short-circuit a *bona fide* evidentiary hearing.

Discovery is a broad tool. Virginia permits the discovery of information that is relevant or "reasonably calculated to lead to the discovery of admissible evidence." Va. Sup. Ct. R. 4:1(b)(1).

The Court recognizes that financial information contained within income tax returns are subject to qualified privilege. *See Mejia-Arevalo v. INOVA Health Care Services*, 77 Va. Cir. 43, *5 (2008). The party moving for the privileged information must prove the information's relevance. *See Continental Fed. Sav. Bank v. Cooper*, 17 Va. Cir. 355, *1 (1989). The opposing party may provide alternative sources from which the information may be obtained. *Id.* In this case the parties agree that there are no alternative sources of the data Buyer Perspecta wants. At this stage of the Court's interpretation of the Agreement it must conclude it is relevant. Therefore, it vacates the February 7, 2022, Order and Opinion Letter entirely and grants the Motion to Compel.

However, the Court sees no need for five years of tax returns, as Buyer Perspecta requested. It will require production of only the 2019 returns, which should provide the relevant data Buyer Perspecta seeks. The tax returns may be produced under the existing Protective

Order, or a new one if the existing Order is insufficient. Until further order of the Court, the tax returns shall be strictly confidential and subject to "attorney's-eyes-only" and to current and prospective experts chosen by the lawyers. Seller Eisiminger must produce the tax returns within fourteen days of this Opinion Letter.

VI. RECONSIDERATION OF BUYER PERSPECTA'S MOTION TO STRIKE SELLER EISIMINGER'S PLEA IN BAR.

The parties did not expect the Court to reconsider the Court's December 13, 2021, Opinion Letter amplifying the Court's reasons for granting Buyer Perspecta's Motion to Strike Seller Eisiminger's Plea in Bar on December 3, 2021. Nonetheless, the Court reviewed it and avouches that Opinion and Order, without prejudice.

VII. BUYER PERSPECTA'S MOTION TO COMPEL.

The Court requested the parties to reconsider their positions on discovery considering the Court's rulings on the present motion. Now that the Court has ruled, it asks the parties to meet and confer on outstanding discovery disputes understanding Virginia's broad discovery rules. In the event the parties remain at an impasse, either party may re-notice the Motion to Compel for a hearing.

VIII. CONCLUSION.

The Court must feel comfortable that it fully understands the parties' Agreement—especially the technical Exhibit G—before interpreting it as a matter of law. The Court has seen and understood many complex matters in other cases in the past and will understand this one, too, once it has the aid of experts and continued instruction by counsel.[4] However, at this point in the case, it cannot assess whether the contract is ambiguous or not and defers judgment on the matter until trial.

Attison Barnes, counsel for Buyer Perspecta, will please prepare a sketch order consistent with this Opinion Letter, endorse it with any desired objections, circulate it to Matthew MacLean, counsel for Seller Eisiminger, for endorsement and any objections, and submit it to the Court in seven days, care of Amelia May, the Court's law clerk.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

[4] In the unlikely event the parties cannot adequately explain Exhibit G, the Court can always resort to burdens of proof to resolve the matter.