The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 29, 2024

United States Bankruptcy Judge

United States Bankruptcy Court
Northern District of Texas
Dallas Division

In re:	§	
	§	
GGI Holdings, LLC, et al.,	§	**Case No. 20-31318-swe-11**
	§	
Debtors.	§	

Order Granting Motion to Allow Administrative Expense Claim

In this case, the purchaser of substantially all of the Debtors' assets is asserting claims related to the Debtors' failure to include a significant license agreement in the final disclosure schedules attached to the asset-purchase agreement.

As in many bankruptcy cases, the Debtors ran a competitive sale process in which potential purchasers were required to conduct diligence and submit complex bids on a truncated timeframe. There are several aspects of this case, however, that are quite unusual. For one, about two months after the Debtors filed for bankruptcy, a wholly-owned subsidiary of one of the Debtors—which did not file for bankruptcy itself—executed a long-term license agreement granting nonexclusive rights to some of the Debtors' core intellectual property without notice to parties or approval from the bankruptcy court. Despite being sent a copy of the new agreement after it was signed, the Debtors' outside counsel and financial advisor seem to have been unaware of the existence of this new

license agreement, or at least unaware of its significance. Nevertheless, transactional counsel for the Debtors included the license agreement in the draft of the form disclosure schedules uploaded to the virtual data room that parties were using for diligence before submitting their bids for the Debtors' assets. The license agreement itself was not uploaded to the virtual data room until the day before bids were due when it was uploaded with a batch of 481 other documents. Despite the belated upload of the license agreement, its inclusion in the draft of the form disclosure schedules, and a few hints in diligence that a new license agreement may exist, the ultimate purchaser of substantially all of the Debtors' assets did not know about the license agreement until after the final asset-purchase agreement was signed. Due to a compilation error along the way, though, the license agreement was not disclosed in the final version of the disclosure schedules, which rendered several of the Debtors' representations in the asset-purchase agreement inaccurate.

The representations in the asset-purchase agreement were also warranties, though, so the Debtors warranted that the intellectual property sold to the purchaser was not subject to the license agreement in question. When the purchaser brought this to the Debtors' attention, the Debtors allowed the purchaser to reserve its rights for the breach but did not assist the purchaser in rectifying the situation.

The license agreement presented a serious impediment for the purchaser's business strategy going forward, so the purchaser needed to either terminate or limit the license agreement. But despite the purchaser's significant efforts to negotiate a more limited scope or duration for the license agreement, the licensee—secretly assisted and prodded on by the Debtors' in-house licensing team—wound up suing the purchaser for breach. The purchaser settled with the licensee and now seeks an administrative-expense claim against the Debtors for breach of their representations and warranties under the asset-purchase agreement, as well as for statutory fraud and negligent misrepresentation.

For the reasons explained below, the purchaser is entitled to an administrative-expense claim for the Debtors' breach of its warranties, but not for the purchaser's other claims.

I. Jurisdiction and Venue

This Court has jurisdiction over the parties and claims asserted in this proceeding under 28 U.S.C. § 1334. The claims in this contested matter are core matters under 28 U.S.C. § 157(b)(2)(A) and (B). Venue is proper in this District pursuant to 28 U.S.C. § 1409(a).

II. Factual Background

The Debtors owned and operated an iconic brand in fitness, with approximately 95 company-owned gyms domestically and franchise agreements for more than 600 gyms domestically and internationally.[1] Before the temporary closures caused by the COVID-19 pandemic, the Debtors employed over 4,600 individuals at the corporate offices and company-owned gyms.[2]

A. Bankruptcy Filing and Early Process

The Debtors filed for bankruptcy on May 4, 2020 (the "**Petition Date**"). As would later become relevant to the present dispute, not all of the entities associated with the Debtors' business filed for bankruptcy. Notably, Gold's Gym Licensing, LLC ("**Licensing**") filed for bankruptcy, but its wholly-owned subsidiary, Gold's Gym Alliances, LLC ("**Alliances**"), did not.

In a declaration submitted on the Petition Date (the "**First-Day Declaration**"),[3] Adam Zeitsiff, the Chief Executive Officer of the Debtors, stated that "Gold's Gym Alliances, LLC is actually owned by Gold's Gym Licensing, but has no assets or operations"[4] and that Alliances and other listed non-filing subsidiaries have "not owned assets or operations any time in recent history and, thus, have not sought bankruptcy protection at this time."[5]

TRT Holdings, Inc. (together with its affiliates, "**TRT**") was the majority owner of GGI Holdings, LLC, the parent company in the Debtors'

---

[1] RSG Ex. 13 ¶ 5.

[2] RSG Ex. 13 ¶ 6.

[3] RSG Ex. 13.

[4] RSG Ex. 13 ¶ 14(k) n.7.

[5] RSG Ex. 13 ¶ 14(k); Joint Pretrial Order ¶ 28.

corporate structure,[6] and TRT provided the Debtors with debtor-in-possession financing during these bankruptcy cases. As of the Petition Date, the Debtors expected to file a largely consensual plan within the first week of the bankruptcy cases to effectuate a sale or similar restructuring transaction to TRT.[7] The bankruptcy cases attracted attention, though. By May 20, 2020, RSG Group North America, LP (together with its affiliates, "**RSG**") had contacted the Debtors and obtained access to a data room so that it could begin diligence on a possible transaction.[8] RSG owned and operated high-end fitness centers around the world, including in Europe and the United States. On May 28, 2020, RSG appeared at a hearing where it introduced itself to the Court as "a potential purchaser of the assets" of the Debtors.[9]

B. The Sale Process

In response to interest from potential purchasers, the Debtors were able to convert TRT's equity offer into a stalking-horse bid for purposes of testing the market,[10] and on June 1, 2020, the Debtors filed a motion seeking approval of bidding and sale procedures for a sale of their assets (the "**Bid Procedures**").[11] The Court entered an order approving the Bid Procedures on June 11, 2020 (the "**Bid-Procedures Order**").[12]

1. The Virtual Data Room and Diligence

Under the Bid-Procedures Order, the Debtors were responsible for maintaining a data room with various materials relevant to the sale transaction for prospective bidders to review when conducting due diligence and developing their bids.[13] The Debtors' financial advisor engaged BMC Group, Inc. ("**BMC**") to provide the platform that hosted the virtual data room (the "**VDR**"). While BMC owned and maintained the platform, the Debtors' financial advisor generally uploaded and

---

[6] Joint Pretrial Order ¶ 2.

[7] Joint Pretrial Order ¶ 27; RSG Ex. 86 at 29:8–30:17.

[8] RSG Ex. 88; Trustee Ex. 34; Trustee Ex. 19 ¶¶ 3–4.

[9] Joint Pretrial Order ¶ 31.

[10] Joint Pretrial Order ¶ 36; Docket No. 612 ¶ 2.

[11] Joint Pretrial Order ¶ 33; Docket No. 230.

[12] Joint Pretrial Order ¶ 34; Trustee Ex. 27.

[13] Trustee Ex. 27 at Ex. 1 ¶ 6(c).

organized documents in the VDR on behalf of the Debtors.[14] A total of 3,058 unique documents were uploaded into the VDR.[15]

Pursuant to the Bid-Procedures Order, a form asset-purchase agreement (the "**Form APA**") and form disclosure schedules (the "**Form Disclosure Schedules**") were prepared and uploaded to the VDR for prospective bidders to access as part of their bid consideration and preparation process.[16]

On June 22, 2020, the Debtors filed the *Notice of Cure Costs Associated with Unexpired Leases and Executory Contracts* (the "**Cure Notice**"), which listed the unexpired leases and executory contracts the Debtors anticipated assuming and assigning under the Form APA, and the anticipated cure amounts necessary for assuming each.[17] The table titled "Licenses" in the Cure Notice listed 29 license agreements.[18]

On July 6, 2020, Mark Shapiro, who at the time was the lead for the Debtors' financial advisor, sent RSG an e-mail with a spreadsheet that he characterized as the "complete list of contracts for RSG to accept/reject."[19] In his testimony, Shapiro claims that RSG was trying to avoid differentiating its bid from TRT's bid on the basis of contract rejections and had inquired about which contracts TRT was going to accept or reject.[20] Shapiro testified that he was responding to that inquiry when he sent this e-mail, so what he meant to convey in his e-mail was that the spreadsheet contained a complete list of the contracts that TRT was going to assume and reject.[21]

2. The Bidding Process

Prospective bidders, other than TRT, were required to submit a "Bid Package" by 4:00 p.m. Central Daylight Time on July 9, 2020 (the "**Bid**

---

[14] Joint Pretrial Order VDR Facts ¶ 1.

[15] Joint Pretrial Order VDR Facts ¶ 11.

[16] Joint Pretrial Order ¶ 35; Joint Pretrial Order VDR Facts ¶ 59; Trustee Ex. 81.

[17] Trustee Ex. 106.

[18] Joint Pretrial Order ¶ 39; Trustee Ex. 106 at LTX_106.016.

[19] RSG Ex. 156.

[20] Transcript of Hearing Held 6/2/23 [Docket No. 1273] at 131:1–132:3.

[21] Transcript of Hearing Held 6/2/23 [Docket No. 1273] at 132:4–133:11.

Deadline") to become a "Qualified Bidder."[22] The Bid Package was required to include a number of items, including an asset-purchase agreement based on the Form APA that detailed the key terms of the bidder's proposed offer and a redline comparing the bid asset-purchase agreement to the Form APA.[23]

RSG submitted its Bid Package on July 9, 2020. As part of its Bid Package, RSG submitted a cover letter describing the bid[24] and a draft of RSG's proposed asset-purchase agreement.[25] Then shortly thereafter, RSG's counsel e-mailed the Debtors' counsel RSG's proposed disclosure schedules "applicable to the draft of the Asset Purchase Agreement formally submitted by [RSG] . . . in their bid letter today" so that Debtors' counsel would have them "in the event [that RSG] becomes the successful bidder in the auction" (the "**RSG Original Disclosure Schedules**").[26]

Ultimately, there were two qualifying bids in addition to the stalking-horse bid from TRT,[27] so the Debtors held an auction beginning in the morning of July 13, 2020 (the "**Auction**").[28] The Debtors determined that RSG's bid represented the best value to the Debtors and designated RSG's bid as the "Initial Bid" for the Auction.[29]

3. The Auction

RSG chose to employ an auction strategy that was unconventional in a few ways.[30] For one, RSG created an unusual visual. The Auction was

---

[22] Joint Pretrial Order ¶ 37.

[23] Joint Pretrial Order ¶ 37.

[24] RSG Exs. 73, 337, 349, and 368.

[25] Trustee Ex. 29.

[26] Trustee Ex. 157; Transcript of Hearing Held 5/31/23 [Docket No. 1246] at 52:3–53:2 (Fisher claiming that the RSG Original Disclosure Schedules were not sent as part of the Bid Package but were merely sent after the Bid Package).

[27] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 190:24–191:6.

[28] Joint Pretrial Order ¶ 48.

[29] *See* Trustee Ex. 27 at LTX_027.029; Trustee Ex. 89 at LTX_089.005.

[30] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 190:11–198:10 (visual), 198:11–201:20 (bidding strategy).

held by videoconference,[31] and most participants attended from conference rooms wearing suits.[32] Rainer Schaller, the owner and founder of RSG, attended the Auction—and did RSG's bidding—shirtless, from an outdoor hot tub, and surrounded by the most muscular employees that RSG had.[33] The manner in which RSG chose to bid was also unconventional. The Bid Procedures only required that bidders exceed the prior bid by at least $100,000,[34] but RSG chose to bid in $10 million increments and did so very quickly rather than taking breaks and conferring in a breakout room.[35] RSG's president, Sebastian Schoepe, testified that the strategy was nothing more than showmanship designed to "throw people off" and convince the other bidders that RSG would win the Auction at any cost, which Schoepe maintains was not actually the case.[36] Dr. Mueller-Trimbusch, the CFO of RSG at the time of the transaction, similarly testified that RSG had limited funds with which to bid[37] and that his team had completed a substantial amount of due diligence to determine how much RSG was willing to bid.[38]

Likely as a result of RSG's auction strategy, the price for the Debtors' assets rose quickly. The Initial Bid for the Auction was RSG's bid for just under $72 million.[39] After several rounds of bidding, RSG was named the "Successful Bidder," as defined in the Bid-Procedures Order,[40] with a bid of roughly $100 million.[41] But as a result of RSG's strategy of overbidding in large increments, there was a significant gap between RSG's winning bid and the next highest bid. Venice Strength Owner was named the "Back-Up Bidder," as defined in the Bid-

---

[31] Trustee Ex. 89 at LTX_089.004.

[32] Docket No. 1199 at 29.

[33] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 192:19–193:3.

[34] Trustee Ex. 27 at LTX_027.031.

[35] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 198:11–201:20.

[36] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 191:16–192:14.

[37] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 84:1–20.

[38] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 91:10–92:25, 144:4–147:3.

[39] Trustee Ex. 89 at 17:8–11.

[40] Joint Pretrial Order ¶ 49.

[41] Joint Pretrial Order ¶ 50; Docket No. 374.

Procedures Order, with a bid of $92 million, $8 million less than RSG's winning bid.[42]

4. Execution of the Asset-Purchase Agreement

The Bid Procedures required that the Successful Bidder execute an asset-purchase agreement within twenty-four hours of the Auction. To that end, RSG and the Debtors continued to negotiate and exchange drafts of the asset-purchase agreement and the disclosure schedules after the Auction on July 13 and July 14, 2020.[43]

Shortly before midnight on July 14, 2020, counsel for RSG delivered a signed signature page on behalf of RSG to counsel for Debtors, and the Debtors then delivered a fully-executed asset-purchase agreement (the "**Final APA**") to RSG.[44]

In the Final APA, RSG agreed to pay a purchase price of $91,389,578 (consisting of a previously made $8 million deposit and an $83,389,578 payment) and to pay up to $8,610,422 of assumed liabilities identified as cure amounts on the Cure Notice.[45]

5. Amendment No. 1 to the Final APA

The original version of the Final APA did not provide for the purchase of any of the Sellers' equity,[46] but the parties signed Amendment No. 1 to the Final APA effective as of July 27, 2020[47] so that RSG would acquire the equity of Licensing (a Debtor at the time, a Seller, and the owner of substantially all of Gold's Gym intellectual property, including trademarks) instead of its underlying intellectual-property assets.[48] By

---

[42] Joint Pretrial Order ¶ 50; Docket No. 374.

[43] Joint Pretrial Order ¶ 51; RSG Ex. 178 (disclosure schedules sent from the Debtors to RSG on 7/13/20 at 9:18 pm).

[44] Joint Pretrial Order ¶¶ 52–53; RSG Ex. 76; Trustee Ex. 69.

[45] Final APA § 3.1. The final purchase price wound up being $99,191,977.03 because some of the actual cure amounts were negotiated to lower amounts than originally estimated. Final APA § 3.1(c).

[46] Seller is a defined term in the Final APA.

[47] Joint Pretrial Order ¶¶ 64–65.

[48] Joint Pretrial Order ¶ 66; RSG Ex. 98 ¶ 17.

doing this, RSG also indirectly acquired the equity of non-Debtor Alliances, which was fully owned by Licensing.[49]

The purpose of Amendment No. 1 was to ease RSG's logistical issues concerning Licensing's intellectual-property registrations across the globe, as RSG believed it would be very burdensome for a new owner to re-register intellectual property in many jurisdictions.[50]

In a declaration submitted to the Court on July 28, 2020 in connection with the sale (the "**Early Declaration**"), the Debtors' Chief Administrative Officer, Paul Early, stated that "[i]t is the Debtors' business judgment that such modification does not change the economic value of the Transaction, but will enable for a more practical transition of the intellectual property to the Purchaser."[51] In that same declaration, Early also stated that he had "reviewed the [First-Day Declaration] and he incorporated such testimony as [his] own where relevant to the Debtors' background."[52] As set forth above, the First-Day Declaration represented that "Gold's Gym Alliances, LLC . . . ha[s] not owned assets or operations any time in recent history . . . ."

6. Court Approval of the Sale

The Court held a hearing on July 29, 2020 to consider approval of the sale to RSG and entered an order approving the sale (the "**Sale Order**") on the next day.[53]

C. RSG's Discovery of the Merchandising License Agreement

On August 2, 2020, shortly after entry of the Sale Order but before the parties had closed on the Final APA, RSG learned of the existence of the

---

[49] Joint Pretrial Order ¶ 68.

[50] Joint Pretrial Order ¶ 67.

[51] Joint Pretrial Order ¶ 70 (alteration in original) (internal quotation marks omitted); RSG Ex. 98 ¶ 17.

[52] RSG Ex. 98 ¶ 4.

[53] RSG Ex. 100.

Merchandising License Agreement that sits at the center of the current controversy between the parties (the "**MLA**").[54]

The MLA was a nonexclusive license agreement between Alliances and Evolution Group USA LLC ("**Evolution**"), a South Africa-based company that designs, manufactures, and distributes licensed products, that allowed Evolution to manufacture and sell a wide variety of Gold's Gym products. In the first recital of the MLA, Alliances claims that it "owns or represents the rights" to the licensed property. But according to Schedule 5.5(a) attached to the Final APA, and as supported by evidence at trial, Licensing owned the relevant intellectual property.[55] While there were several theories suggested at trial for how Alliances could have owned or represented the rights to the licensed property, such as the existence of an agreement granting Alliances the right to license intellectual property owned by Licensing (the alleged "**Intercompany Agreement**"), it is still not entirely clear which of those theories were correct.[56]

In any event, the MLA was effective starting January 1, 2020, with a term expiring on December 31, 2026. By its terms, the MLA licensed Gold's Gym trademarks, service marks, and other sources of designation to Evolution for a wide array of product categories and was global in scope, covering markets on every continent except Antarctica. The MLA allowed, among other things, online and "big box" store distribution and sale of branded equipment in the United States and Europe (as well as in a number of other countries and markets), and of apparel in Europe and various other secondary markets. *See* MLA, Appendix "A" ¶¶ 5–7.

---

[54] RSG Ex. 5; Trustee Ex. 80; Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 113:2–114:18.

[55] Trustee Ex. 69 at LTX_069.033, LTX_069.083–116; *see also* Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 26:25–27:10.

[56] *See, e.g.*, RSG Ex. 385 ¶¶ 14–16; Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 27:15–28:4; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 66:19–23, 68:20–69:19; Sherwood Depo. [Docket No. 1264-1] at 27:17–28:3 (Craig Sherwood, the Chief Development Officer who was in charge of licensing for the Debtors, did not know the full extent of the relationship between Alliances and Licensing), 210:12–211:1.

The MLA expressly terminated and replaced three prior agreements between Gold's Gym entities and Evolution (collectively, the "**Novated Agreements**"):

- a license agreement between Alliances and Evolution effective from July 12, 2019 through December 31, 2023, primarily focused on nutritional supplements,[57] with an African territorial reach and with limitations on e-commerce rights (for instance, not including Wal-Mart as an approved retailer) (the "**July 2019 Agreement**");[58]

- a license agreement between Alliances and Evolution effective from March 5, 2019 through December 31, 2025, with an African territorial reach, and a carve-out for distribution rights to corporate and franchise gyms;[59] and

- a license agreement between Gold's Gym Merchandising, LLC (a Debtor) and Evolution effective from March 5, 2020 through December 31, 2025, primarily focused on apparel.[60]

In short, the MLA replaced some prior contracts, but materially expanded the scope, term, and reach of Evolution's license rights beyond the Novated Agreements.[61]

While RSG correctly points out that the MLA was not listed in the Final Disclosure Schedules attached to the Final APA, the history of the MLA presents a slightly more complicated picture.

D. The History of the MLA

The Debtors began their licensing relationship with Evolution in 2019, and the MLA grew out of the progression of that relationship, as seen in

---

[57] Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 9:4–9; 11:5–10.

[58] Trustee Ex. 3; RSG Ex. 28.

[59] RSG Ex. 6. This agreement is identified as being effective March 5, 2019 in both the agreement itself and in the recitals for the MLA, but the signature block for this agreement indicates that it was signed by Alliances on March 6, 2020. Wolfe testified that 2019 was an error and should have been 2020. Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 32:12–20; RSG Ex. 51. This discrepancy does not affect the Court's analysis of the issues presented in this case.

[60] RSG Ex. 7; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 18:8–19:21.

[61] *See* RSG Ex. 51; Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 79:7–80:17.

the Novated Agreements and a term sheet for the MLA that was finalized prior to the Petition Date.[62] The MLA itself, though, along with several other license agreements, was negotiated and actually signed by the Chief Executive Officer of the Debtors during the bankruptcy cases.[63] The Debtors' approval process for the MLA was the subject of discussion between employees who primarily worked on licensing and members of the Debtors' executive team, so the significance of the MLA was no secret within the Debtors' organization.[64] While both the Debtors' financial advisor and the Debtors' transactional counsel seem to have also been notified of these impending agreements prior to their execution,[65] they did not seem to truly be aware of the importance of the MLA.[66]

An investor presentation prepared by the Debtors explaining their post-COVID strategy and business plan (the "**Investor Presentation**") was uploaded to the VDR and circulated internally by RSG as early as June 15, 2020.[67] Page 56 of the Investor Presentation lists the identification and onboarding of new equipment partners as a key initiative for 2020 and discloses the Debtors' intention to execute a new agreement with Evolution for a new global large and small equipment license.[68] Page 57 of the Investor Presentation is titled "Active License Pipeline Includes Large Potential Partnerships for Equipment, Globally," and lists "Evolution Group (Large & Small Equipment)" as a pending deal.[69] The slides that follow also identify Evolution as a new equipment partner and disclose that the Debtors' new partners bring increased territory

---

[62] Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 71:15–72:5; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 25:21–26:7.

[63] *See* RSG Ex. 69; Trustee Ex. 5 at LTX_005.020.

[64] *See* RSG Exs. 151, 153, 154, and 279; Trustee Ex. 159.

[65] *See* RSG Ex. 91.

[66] Transcript of Hearing Held 6/1/23 [Docket No. 1259] at 63:5–66:16.

[67] *See* Trustee Ex. 24.

[68] *See* Trustee Ex. 24 at LTX_024.059.

[69] *See* Trustee Ex. 24 at LTX_024.060.

distribution globally.[70] Mueller-Trimbusch testified that RSG viewed these slides as the Debtors' plans[71] but did not ask questions about them.[72]

Notably, the MLA was not executed until June 25, 2020—after the Petition Date, after the Bid-Procedures Order was entered, and even after the Cure Notice was filed. There was no notice in the bankruptcy cases of the MLA being executed, and the Court did not approve the MLA. Alliances was not technically a Debtor at any point during these cases and was not a "Seller" as defined in the Final APA, but the MLA certainly affected intellectual property owned by the Debtors, and Zeitsiff, who signed the MLA in his capacity as the President and CEO of Alliances,[73] was also the CEO of the Debtors.[74]

Only one of the Novated Agreements, the July 2019 Agreement, was uploaded to the VDR,[75] and it was uploaded to the VDR twice: once on June 16, 2020,[76] before execution of the MLA, and once on July 8, 2020,[77] after execution of the MLA. The MLA, which terminated, replaced, and expanded the July 2019 Agreement, was not uploaded to the VDR for roughly two weeks, but it was disclosed sooner than that in a manner that was fairly subtle given the importance of the new agreement.

On June 29, 2020, Jamie Wolfe, the Senior Director of Licensing and Retail for the Debtors,[78] sent a copy of the MLA to transactional counsel for the Debtors.[79] The MLA was promptly added to the Form Disclosure Schedules in Schedule 5.6(d), which identified, among other things,

---

[70] *See* Trustee Ex. 24 at LTX_024.061–62.

[71] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 167:25–169:4.

[72] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 169:5–173:7.

[73] Joint Pretrial Order ¶ 42.

[74] Joint Pretrial Order ¶ 8.

[75] Joint Pretrial Order VDR Facts ¶ 23.

[76] Joint Pretrial Order VDR Facts ¶ 20.

[77] Joint Pretrial Order VDR Facts ¶ 21.

[78] Joint Pretrial Order ¶ 11; RSG Ex. 155; Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 16:6–11.

[79] Joint Pretrial Order ¶ 44; RSG Ex. 155.

license agreements.[80] The Form Disclosure Schedules were uploaded to the VDR that same day,[81] and RSG actually received the Form Disclosure Schedules in the days that followed both by downloading them from the VDR[82] and through an e-mail sent by counsel for the Debtors to counsel for RSG.[83] But the MLA itself was not uploaded to the VDR at the same time as the Form Disclosure Schedules.[84] Instead, the MLA continued to only circulate internally with the Debtors, and on June 30, 2020, Wolfe sent it to Shapiro, who, at the time, was the lead for the Debtors' financial advisor.[85]

The MLA was not noted in the spreadsheet sent to RSG on July 6, 2020 that Shapiro characterized as the "complete list of contracts for RSG to accept/reject."[86] Schoepe testified that RSG reviewed the list sent by Shapiro rather than the Form Disclosure Schedules because the list had been characterized as complete.[87] Schoepe further testified that rather than relying on the disclosure schedules or the notices of documents being uploaded to the VDR, RSG was relying on the list of cure claims to identify contracts to accept or reject[88] despite the fact that the Cure Notice itself indicates that there may be additional contracts not included therein.[89]

RSG appears not to have known that the MLA was finalized at this point, as evidenced by a presentation prepared by RSG for internal circulation, which copied a portion of the Investor Presentation showing a

---

[80] Joint Pretrial Order VDR Facts ¶¶ 58–59; Trustee Ex. 81 at LTX_081.059; Trustee Ex. 161 ¶¶ 11–13.

[81] Joint Pretrial Order VDR Facts ¶ 58–59.

[82] Joint Pretrial Order VDR Facts ¶ 60.

[83] Trustee Ex. 32.

[84] Joint Pretrial Order VDR Facts ¶ 17.

[85] Joint Pretrial Order ¶¶ 26, 45; RSG Ex. 24.

[86] RSG Ex. 156.

[87] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 152:10–153:6.

[88] Transcript of Hearing Held 5/24/23 [Docket No. 1270] at 27:24–28:21, 39:1–10; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 97:1–12 (Fisher testimony).

[89] Trustee Ex. 106 ¶ 9.

closed apparel deal with Evolution and a pending equipment license agreement with Evolution.[90]

The MLA was only uploaded to the VDR on July 8, 2020—roughly twenty-four hours prior to the Bid Deadline[91]—together with 481 other documents that were uploaded at the same time. Rather than being uploaded into the "Licensing Agreements" folder on the VDR, the MLA was uploaded to the "Vendor Agreements" folder.[92] This was the only time the MLA was uploaded to the VDR.[93] RSG received an e-mail notifying it that a large batch of documents had been uploaded to the VDR,[94] and Schoepe forwarded the notification e-mail to a member of RSG's diligence team with the comment, "Things are happening in the Data Room . . . ."[95] During his testimony, Schoepe explained that RSG was not happy about the large number of documents uploaded to the VDR so close to the Bid Deadline[96] but did not complain to the Debtors essentially because RSG was concerned with keeping a good relationship with the parties who would decide whose bid to accept, and this was a "once in a lifetime opportunity."[97] Mueller-Trimbusch testified that while the mass upload was "kind of annoying," it was not entirely concerning to RSG because they were still basing their understanding of what contracts would be included in the sale on the Cure Notice.[98]

The VDR login credentials provided to representatives of RSG were not used to view, save, print, or otherwise access the MLA within or from the VDR prior to the Bid Deadline.[99] Despite not having seen the MLA prior to submitting its bid, the RSG Original Disclosure Schedules,

---

[90] *See* Trustee Ex. 20 at LTX_020.072; *see also* RSG Ex. 349 at RSG0106016.

[91] Joint Pretrial Order VDR Facts ¶ 17 (Uploaded 4:14 pm Eastern Daylight Time); Joint Pretrial Order ¶ 37 (Bid Deadline 4:00 pm Central Daylight Time).

[92] Bennett Depo. [Docket No. 1264-5] at 137:2–19, 263:24–265:3.

[93] Joint Pretrial Order VDR Facts ¶ 17.

[94] Trustee Ex. 151.

[95] Trustee Ex. 151.

[96] Trustee Ex. 37.

[97] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 66:12–69:5, 164:4–17.

[98] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 129:16–130:1; Transcript of Hearing Held 6/1/23 [Docket No. 1267] at 21:23–22:9.

[99] Joint Pretrial Order VDR Facts ¶ 30.

which had been edited by RSG in several respects,[100] listed the MLA on Schedule 5.6(d) in the same manner as the Form Disclosure Schedules did.[101] The parties were all aware that the Form Disclosure Schedules, as uploaded, were in need of updates and not a final document.[102] In preparing the RSG Original Disclosure Schedules, RSG did not intend to change the content of the Form Disclosure Schedules[103] but did include some reservation language.[104] The RSG Original Disclosure Schedules were also plainly not intended to serve as a final document.[105]

In addition to the signs in the Form Disclosure Schedules and the Investor Presentation, there were other ways RSG could have discovered the MLA sooner if it had been paying closer attention. On July 13, 2020, a few hours before the Auction, a representative of RSG saved the MLA to RSG's server contemporaneously with 497 other documents.[106] In addition, a few hours before the Final APA was executed, the Vice President of Brand Marketing for the Debtors sent an e-mail to RSG with a "[h]igh level" outline of upcoming press releases that the Debtors were working on.[107] Included as a bullet point on that e-mail was "Licensing News – Evo Group / Sakar release."[108] A draft of a press release apparently referring to, in part, the MLA, of which RSG still appears to have been unaware, was attached to the e-mail.[109]

---

[100] *Compare, e.g.*, Trustee Ex. 81 *with* Trustee Ex. 157 at LTX_157.013 (inserting Schedule 5.4). *Compare, e.g.*, Trustee Ex. 81 at LTX_081.006 *with* Trustee Ex. 157 at LTX_157.007 (populating Schedule 3.2). *Compare, e.g.*, Trustee Ex. 81 at LTX_081.049 *with* Trustee Ex. 157 at LTX_049 (inserting footnote 2 for Schedule 5.6(d)). *Compare, e.g.*, Trustee Ex. 81 at LTX_081.064 *with* Trustee Ex. 157 at LTX_157.064 (editing footnote for Schedule 5.11(a)).

[101] Trustee Ex. 81 at LTX_081.059 (Form Disclosure Schedules); Trustee Ex. 157 at LTX_157.059 (RSG Original Disclosure Schedules).

[102] RSG Ex. 95 at RSG0128561; Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 29:3–16.

[103] Trustee Ex. 157 at LTX_157.001.

[104] Trustee Ex. 157 at LTX_157.001.

[105] Trustee Ex. 157 at LTX_157.001, LTX_157.049; RSG Ex. 175.

[106] Joint Pretrial Order VDR Facts ¶¶ 32–37.

[107] Trustee Ex. 91.

[108] Trustee Ex. 91.

[109] Trustee Ex. 91.

As previously noted, the Final APA was executed on July 14, 2020. The Final Disclosure Schedules do not list the MLA, but do list a Merchandising License Agreement between Evolution and Gold's Gym Merchandising, LLC with an expiration date of December 31, 2023, the same expiration date as the July 2019 Agreement.[110] The explanation from the Debtors for why the MLA was not included in the Final Disclosure Schedules is that the execution version of the asset-purchase agreement was inadvertently compiled by the Debtors' counsel with an outdated version of the Schedule 5.6 Table (the license agreements).[111] This compilation error appears to have occurred earlier in the process, though, with an outdated version of the Schedule 5.6 Table circulating even prior to the Auction.[112] The compilation error continued through drafts of the disclosure schedules that were exchanged after the Auction but before execution of the Final APA.[113]

Schoepe testified that between the time RSG sent the RSG Original Disclosure Schedules to the Debtors and RSG's execution of the Final APA, he was not aware of any changes negotiated by the parties that would have affected the inclusion of the MLA in the Final Disclosure Schedules.[114] Arielle Snyder, a transactional attorney who represented the Debtors during the sale, similarly testified that the parties did not discuss or negotiate any changes to the Schedule 5.6 Table at any time prior to the execution of the Final APA or Amendment No. 1.[115]

Nevertheless, the MLA was not included in the Final Disclosure Schedules. The MLA was also not listed on Exhibit B to the Final APA, which identified all "Assigned Contracts" as defined in the Final APA to be transferred and assigned to RSG.[116]

---

[110] Joint Pretrial Order ¶ 54; Trustee Ex. 69 at LTX_069.129.

[111] RSG Exs. 78 at GGI_0000152099 and 105 at GGI_0000151858; Trustee Ex. 161 ¶¶ 22–25.

[112] Trustee Ex. 161 ¶¶ 22–25; RSG Exs. 166 and 170.

[113] RSG Ex. 178 at RSG0076407.

[114] Transcript of Hearing Held 5/24/23 [Docket No. 1270] at 71:20–72:9; Transcript of Hearing Held 5/31/23 [Docket No. 1246] at 62:1–15 (Fisher testifying the same).

[115] Trustee Ex. 161 ¶¶ 27–29.

[116] Final APA § 2.5; Trustee Ex. 69 at LTX_069.027, LTX_069.204–207.

After execution of the Final APA but before the closing of the sale, the Debtors and RSG continued to exchange information and began to work on the upcoming transition. It was during this time period that RSG employees appear to have begun to understand that there was a substantial license agreement that they had not yet seen. On July 16, the Debtors again sent a press release regarding the MLA to serve as "official notification of the partnership for retail buyers to understand the vendors able to sell our product."[117] Schoepe replied asking that the press release not be published before the beginning of August so that RSG could take time to understand the implications of the agreement, "especially term and termination rights as well as economics."[118]

Schoepe acknowledged that it was during this time that RSG tried to "really understand the economics" of each of the agreements RSG assumed because RSG did not have the time to complete its due diligence prior to the Auction.[119]

On July 23, 2020, Schoepe went to the Debtors' offices for a full day of meetings, one of which was with Zeitsiff, Wolfe, and Craig Sherwood, the Chief Development Officer of the Debtors who oversaw the Gold's Gym franchise and licensing business.[120] Schoepe testified that despite this meeting specifically being about licensing, the MLA was not discussed.[121] Rather, Schoepe generally asked the Debtors' team to slow down on licensing and long-term agreements.[122] Both Sherwood and Wolfe had a similar recollection that this was a high-level overview of the Debtors' licensing business in which Schoepe expressed a desire to bring the licensing business in-house, but neither could recall the MLA being discussed.[123]

---

[117] Trustee Ex. 105.

[118] Trustee Ex. 50.

[119] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 245:7–20.

[120] Joint Pretrial Order ¶ 71; RSG Exs. 19 and 35; Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 20:12–19.

[121] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 250:25–252:12.

[122] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 252:13–25.

[123] Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 91:17–96:16; RSG Ex. 35; Sherwood Depo. [Docket No. 1264-1] at 99:25–103:11.

E. Initial Reactions to the MLA

From the evidence presented at trial, it appears that the first time Schoepe, or anyone at RSG, was aware of the MLA was August 2, 2020. On that day, Schoepe sent an e-mail to Zeitsiff saying that RSG would like to "pause all new agreements and contracts, such as licensing . . . for the next eight (8) weeks."[124] Schoepe went on in that e-mail to ask the Debtors to "explore options on how to get out of the Evolution and Sakar agreements" and to send the contracts to RSG so that RSG could "also review for possible termination scenarios."[125]

As requested, Zeitsiff sent a copy of the MLA to Schoepe on August 3, 2020,[126] and Schoepe immediately began looking for ways to terminate the agreement.[127]

On August 7, 2020, Schoepe forwarded the MLA internally at RSG, describing it as one of the agreements he wants to terminate and asking for assistance on finding ways to get out of the MLA.[128] Stephan Pallman, the Director of Brand Partnership for RSG, responded to that e-mail saying that he did not see any withdrawal options in the case of insolvency or change of ownership but that RSG could look for violations under the MLA that would permit termination.[129] Schoepe then replied with the idea that RSG "could 'simply' not approve any of the products, which would result in the licensee not being able to launch a single product with the Gold's Gym Brand."[130]

On August 12, 2020, Schoepe met with Zeitsiff, Sherwood, and Wolfe to discuss licensing. Schoepe testified that he expected Sherwood and Wolfe to present him with options for RSG to exit the existing license agreements, as he had requested they investigate such options in his August 2 e-mail, but instead Sherwood and Wolfe primarily focused on trying to convince Schoepe to keep the existing license agreements in

---

[124] Trustee Ex. 48; RSG Ex. 21.

[125] Trustee Ex. 48; RSG Ex. 21.

[126] Joint Pretrial Order ¶ 72; Trustee Ex. 52; RSG Ex. 52.

[127] Trustee Ex. 52.

[128] Trustee Ex. 52.

[129] Trustee Ex. 52.

[130] Trustee Ex. 52 at LTX_052.003.

place.[131] There is some disagreement as to what was actually said in the meeting regarding the MLA. By Sherwood's and Wolfe's account, Schoepe instructed them to effectively terminate the MLA by not granting any approvals for product or logo use.[132] Sherwood and Wolfe admitted that they did not recall Schoepe actually saying that RSG was going to terminate the MLA, but they felt it was implied.[133] Schoepe testified that he did not instruct anyone to terminate the MLA or revoke approvals under the MLA at that meeting.[134] What is clear is that the meeting ended with Sherwood and Wolfe upset and not in agreement with how RSG wanted to proceed with licensing going forward.[135]

Sherwood appears to have been particularly upset after the meeting with Schoepe. The following day, Sherwood submitted his written resignation to Zeitsiff, effective August 28.[136] Sherwood testified in his deposition that he resigned because he was not comfortable with the conversation on August 12, but it is curious that Sherwood had also received an employment offer from Little Caesars on August 12[137] and that Sherwood's son began working for Evolution in July 2020.[138] In addition to submitting his anticipated resignation on August 13, Sherwood had a call with Marc Ackermann, the CEO of Evolution,[139] on that same day, a call which Zeitsiff and Wolfe also joined. During that call, Sherwood told Ackermann that the Debtors would not provide any further approvals for products and that RSG was intending to terminate the MLA.[140]

---

[131] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 28:7–29:21; Trustee Ex. 48; Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 96:18–100:8.

[132] RSG Ex. 35; Trustee Ex. 87; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 34:15–39:6, 47:13–48:16, 49:2–7, 72:18–74:3, Sherwood Depo. [Docket No. 1264-1] at 116:23–118:6.

[133] Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 98:18–99:6; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 47:13–48:2, 72:18–74:3; Sherwood Depo. [Docket No. 1264-1] at 172:13–174:21.

[134] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 30:7–19.

[135] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 31:22–32:14; RSG Ex. 35.

[136] RSG would eventually move this date forward to August 21. RSG Ex. 35; Sherwood Depo. [Docket No. 1264-1] at 133:25–134:13.

[137] Sherwood Depo. [Docket No. 1264-1] at 134:14–135:5, 286:3–287:5.

[138] Sherwood Depo. [Docket No. 1264-1] at 146:19–147:21.

[139] Ackermann Depo. [Docket No. 1264-9] at 15:7–21.

[140] Sherwood Depo. [Docket No. 1264-1] at 177:23–180:15.

This language of termination stood in contrast to the literal message from Schoepe the day before as well as the e-mail that Wolfe would send to Ackermann the following day merely asking the Evolution team to "pause."[141]

On August 15, Sherwood e-mailed Zeitsiff again, documenting his understanding of Schoepe's instructions, warning Zeitsiff of the consequences of following Schoepe's instructions, and imploring Zeitsiff to reach out to Rainer Schaller, the owner and founder of RSG, "so that the licensees can continue to receive the benefit of the agreement that we granted them."[142] Immediately after sending this e-mail to Zeitsiff, Sherwood forwarded it to his personal e-mail account as well.[143] Sherwood would later send this e-mail to Evolution, which used it in its eventual lawsuit against RSG.[144]

Over the next week, there was a flurry of activity. Everyone was now aware of the existence of the MLA and the fact that it was not included in the Final Disclosure Schedules. The deadline for closing the Final APA was August 21.

The Debtors' professionals generally set about the task of gathering information to understand what happened, communicating with the Debtors and RSG, and trying to think of options for dealing with the MLA.[145] Shapiro acknowledged that despite receiving a copy of the MLA by e-mail on June 30, 2020, he was not aware of the MLA until August.[146] Counsel for the Debtors discussed the matter internally, trying to understand how and why the MLA was executed by Alliances (but affecting Licensing's intellectual property) after the Petition Date.[147]

The Debtors expressed surprise that Alliances was not part of the original bankruptcy filing,[148] but also generally went about the task of

---

[141] RSG Ex. 277.

[142] Trustee Ex. 12.

[143] RSG Ex. 197.

[144] RSG Exs. 201 and 292. *Compare, e.g.*, RSG Ex. 2 ¶¶ 48–49 *with* RSG Ex. 292.

[145] RSG Exs. 99 and 77.

[146] Transcript of Hearing Held 6/1/23 [Docket No. 1267] at 109:14–17.

[147] RSG Ex. 302.

[148] RSG Ex. 15.

gathering information regarding the distributors and products that had already been approved[149] and a general timeline of the Debtors' relationship with Evolution.[150] What strikes the Court most about the communications taking place during this timeframe is that everyone involved seems to have had some bits of information, but none of the Debtors' professionals or employees had a complete enough understanding of the bankruptcy filings and the business operations to prevent the issues that arose with the MLA. *See, e.g.*, RSG Exs. 25, 106, and 186 (Early asking bankruptcy counsel how the MLA was not added to the disclosures and getting an initial answer that still did not appreciate the distinction between the MLA and the Novated Agreements); RSG Exs. 16 and 90 (counsel for the Debtors complaining that he had warned Early not to enter into long-term contracts postpetition).

In addition to researching options for exiting the MLA during this timeframe, RSG was also still gathering information about whether there were any other undisclosed agreements in the name of Alliances, which the Debtors apparently used for licensing "high-risk" products,[151] and trying to understand how many products had been approved so that RSG could assess how harmful the MLA was going to be.[152] At the same time, Schoepe began a dialogue with Ackermann. The first call between Zeitsiff, Schoepe, and Ackermann was on August 19.[153] On that call, Schoepe and Ackermann introduced themselves[154] and discussed licensing and RSG's desire to reduce its number of licensing partners.[155]

Critically, Schoepe's discussions with Ackermann did not begin in a vacuum. As previously noted, Sherwood had already told Ackermann that RSG was intending to terminate the MLA. On the night before Schoepe's first call with Ackermann, Sherwood—who was still working for the

---

[149] RSG Exs. 129 and 130.

[150] RSG Ex. 51.

[151] RSG Ex. 27 at RSG0057640 (internal quotation marks omitted); *see also* Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 18:22–24, 28:8–24 (explaining what was meant by "high-risk"); Sherwood Depo. [Docket No. 1264-1] at 25:4–9, 27:8–28:3, 196:3–12.

[152] RSG Ex. 355.

[153] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 125:19–126:20.

[154] Schoepe Depo. [Docket No. 1252-1] at 270:20–272:8.

[155] Transcript of Hearing Held 5/24/23 [Docket No. 1270] at 200:24–202:5.

Debtors—contacted Ackermann to give him advice on handling the call with Schoepe and to advise him to record the call.[156] During and after the call, Sherwood and Wolfe were in communication, and Wolfe mentioned her idea of documenting her concerns like Sherwood did by writing an e-mail to Zeitsiff, to which Sherwood replied that doing so would help Evolution's case.[157] That same day, Wolfe sent an e-mail to Zeitsiff, copying Sherwood, about her concerns with not approving products under the MLA.[158] Sherwood forwarded Wolfe's e-mail to his personal e-mail account, just as he did with his own e-mail to Zeitsiff.[159] Sherwood then, while still employed by the Debtors, continued to advise Ackermann that if RSG failed to provide product approvals, they would be violating Evolution's rights.[160]

In the months following their initial call in mid-August, Schoepe had several calls with Ackermann to discuss ways to modify the term, territories, and other aspects of the MLA, but Schoepe was not aware that Sherwood and Wolfe were passing information to Ackermann during that same time period or that Ackermann was recording those calls.[161] After his employment with the Debtors concluded, Sherwood told Ackermann to let him know if there was anything he could do to assist and that RSG had "drawn a battle line with the wrong group!"[162]

Unsurprisingly, RSG was not able to renegotiate the MLA before the deadline for closing the sale under the Final APA. Schoepe further testified that even though the Debtors were discussing it internally, no one from the Debtors suggested options for dealing with the MLA to RSG and did not actually assist other than by connecting him with Ackermann.[163]

---

[156] RSG Ex. 384 at CS0066, CS0050.

[157] RSG Ex. 384 at CS0050.

[158] Trustee Ex. 87.

[159] RSG Ex. 284.

[160] RSG Ex. 384 at CS0067.

[161] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 49:3–50:24; Trustee Exs. 56 and 141; RSG Ex. 384.

[162] RSG Ex. 384 at CS0067.

[163] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 270:8–18.

The MLA was a big deal to RSG.[164] At trial, Schoepe discussed RSG's concern with the long-term value of the Gold's Gym brand and the importance of focusing only on higher-quality products and controlling how and when they were introduced to different markets. To execute on its strategy, RSG needed control over product development, design, and marketing. RSG considered backing out of the Final APA because of the MLA but ultimately decided it would be willing to move forward with a reservation of rights.[165]

F. Amendment No. 2 to the Final APA and the Closing of the Sale

On August 20, 2020, bankruptcy counsel for the Debtors sent an e-mail internally letting them know the current state of affairs: "There will be no resolution of the license agreement issue before closing. I told [bankruptcy counsel for RSG] just to reserve his rights, close and give us the cash. He can assert an admin claim that will have to get paid before we can make distributions to the creditors. We dispute his claim and reserve the right to claim more money was due under the APA purchase price."[166] Later that same day, Snyder circulated a draft amendment to the Final APA with a "creative solution to the license agreement situation."[167] The Sellers and RSG negotiated and then formally made the amendment to the Final APA on August 21, 2020 ("**Amendment No. 2**").[168]

Amendment No. 2 amended the deadline for closing the sale from August 21, 2020 to August 25, 2020 and preserved RSG's claims related to two license agreements. Specifically, under Amendment No. 2, the parties agreed that RSG's right to assert causes of action for damages actually suffered, to the extent arising out of a breach of representations and warranties in the Final APA relating to the MLA or a second license

---

[164] RSG Ex. 321; Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 116:22–117:15.

[165] Transcript of Hearing Held 5/25/23 [Docket No. 1271] at 224:25–225:22.

[166] Joint Pretrial Order ¶ 73 (internal quotation marks omitted); RSG Ex. 188.

[167] RSG Ex. 79 at RSG0058012.

[168] Joint Pretrial Order ¶ 74; Trustee Ex. 69 at LTX_069.241–45.

agreement (the "**Sakar Agreement**"), would survive the closing of the sale for an agreed period of time.

With Amendment No. 2 in place, RSG and the Debtors were able to close the sale on August 24, 2020 (the "**Closing**").[169] In connection with the Closing, a full set of documents with the Final APA and the Final Disclosures Schedules was circulated.[170]

Two days later, on August 26, 2020, the Court entered an order (the "**Confirmation Order**")[171] confirming the Debtors' plan of liquidation (the "**Plan**").[172] Paragraph 89 of the Confirmation Order preserved the right of RSG to bring an administrative claim if the claim arose from, was acquired under or was "otherwise involved with" the sale. The Plan also established a Liquidating Trust with a Liquidating Trustee. Shapiro, who was the lead for the Debtors' financial advisor, became the Liquidating Trustee (the "**Trustee**") on September 10, 2020 when the Plan became effective (the "**Effective Date**").[173]

On September 17, 2020, counsel for the Debtors e-mailed counsel for RSG asking them to simply replace the incorrect Schedule 5.6 of the Final Disclosure Schedules with a prior, "proper" version that included the MLA.[174] RSG refused to do so.[175]

G. Continuing to Deal with the MLA

After Closing, there were about 25 license agreements, some disclosed, some not, that RSG was working to mitigate or terminate. Of those, Schoepe testified that 14 ran their natural course until the end of their terms, seven are still active, and four were renegotiated and amended.[176] This appears to have been, at least in part, a deliberate strategy for

---

[169] Joint Pretrial Order ¶ 76.

[170] Trustee Ex. 69.

[171] Docket No. 531.

[172] Docket No. 457.

[173] Joint Pretrial Order ¶¶ 26, 78.

[174] RSG Ex. 105.

[175] Trustee Ex. 161 ¶¶ 35–36.

[176] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 80:7–81:21.

RSG.[177] While RSG rejected some contracts through the sale process, Dan Fisher (transactional counsel for RSG) and Shapiro testified that RSG was basically trying to take whatever contracts TRT was intending to assume in an attempt to avoid differentiating its bid too much.[178] Ultimately, RSG was able to successfully address all of the license agreements other than the MLA.

For the next two months, RSG continued negotiating with Evolution to find an acceptable reduction in the scope and duration of the MLA. In his deposition, Ackermann agreed that during his lengthy conversations with Schoepe, they were exchanging offers and ideas for how to resolve the situation.[179]

While Schoepe was talking to Ackermann, though, Sherwood and Wolfe were both also still in contact with Ackermann.[180] Wolfe's employment with the Debtors was terminated after Closing,[181] but she decided not to sign the separation agreement offered by RSG so that she could be "available for Gold's Gym partners/licensees should RSG choose to terminate their agreement without cause."[182]

Very likely because of the perspective that Sherwood and Wolfe provided to Ackermann, while RSG was trying to find an amicable resolution, in mid-September, Evolution's communications took on a distinctly legal tone.[183] Shortly after that, RSG's approach to the MLA likewise seems to have shifted, and RSG began enforcing what it referred as "contract discipline"[184] and sent Evolution a notice of breach under the MLA for failure to make a minimum guaranteed payment.[185]

---

[177] Trustee Ex. 54 at LTX_54.002.

[178] Transcript of Hearing Held 5/31/23 [Docket No. 1272] at 32:13–33:6; Transcript of Hearing Held 6/2/23 [Docket No. 1273] at 131:1–132:3.

[179] Ackermann Depo. [Docket No. 1264-9] at 214:15–216:4.

[180] Joint Pretrial Order ¶¶ 81–83.

[181] Joint Pretrial Order ¶ 80.

[182] RSG Ex. 290 at RSG0146082.

[183] RSG Ex. 141.

[184] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 26:15–27:3.

[185] RSG Ex. 140.

Internal RSG communications in early October show that it was RSG's opinion that negotiations had failed and it was time to cancel the MLA.[186] Communications between Evolution and RSG continued,[187] but the formal notices picked up as well. On October 27, RSG sent Evolution a notice of audit and a request for information.[188] On November 11, Evolution sent RSG a notice of breach for "attempting to unilaterally alter the term of the contract, unilaterally alter the geographic scope of the contract, revoking approvals of approved Licensed Property, and other actions taken in bad faith with the intentional design to frustrate and prevent Evolution Group's performance under the contract."[189] On November 16, RSG sent Evolution a notice of breach for failure to provide requested documents and information.[190]

H. The Evolution Lawsuit

On November 23, 2020, Evolution sued RSG, Licensing, and Alliances, claiming breach of the MLA and breach of the covenant of good faith and fair dealing (the "**Evolution Lawsuit**").[191] Evolution claimed damages of at least $94.9 million. RSG denied the allegations in the Evolution Lawsuit and asserted counterclaims.

When the Evolution Lawsuit was filed, RSG sent a copy of the petition to the Trustee.[192] RSG tried to engage the Trustee in settlement negotiations with Evolution, but those attempts failed,[193] and RSG was told that because RSG's claim against the Debtors was not liquidated, it was not recoverable, and that RSG should first deal with Evolution.[194] Nevertheless, RSG kept the Trustee informed about progress with the

---

[186] Trustee Ex. 56.

[187] Trustee Exs. 54, 97, and 141; RSG Ex. 126.

[188] RSG Exs. 131 and 132.

[189] RSG Ex. 371.

[190] RSG Ex. 133.

[191] Joint Pretrial Order ¶ 84; RSG Ex. 2.

[192] RSG Ex. 306.

[193] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 163:10–15 (Schoepe Testimony); RSG Ex. 388 [Estes Declaration] ¶ 11; Transcript of Hearing Held 6/1/23 [Docket No. 1260] at 83:5–84:3 (Shapiro Testimony).

[194] RSG Ex. 388 [Estes Declaration] ¶ 11.

Evolution Lawsuit as RSG and the Trustee tried to work through the administrative claim that RSG was asserting against the Debtors.[195]

After several months of activity in the Evolution Lawsuit, including mediation,[196] RSG and Evolution were able to reach a settlement. RSG and Evolution executed an "Interim Binding Term Sheet" with terms for the settlement of the Evolution Lawsuit on March 10, 2021,[197] followed by a confidential settlement agreement on April 15, 2021 (the "**Evolution Settlement**") that required RSG to pay $7,500,000 to Evolution (the "**Evolution Settlement Payment**").[198]

RSG and the other defendants in the Evolution Lawsuit were forced to incur $353,026 in legal fees and an additional $7,465.76 in expenses to defend, litigate, mediate, and ultimately resolve the Evolution Lawsuit (together with the Evolution Settlement Payment, the "**Evolution Litigation Costs**").[199]

Russell F. Nelms, a former bankruptcy judge, provided expert testimony that RSG's settlement with Evolution was reasonable and prudent and an appropriate mitigation of potential losses and expenses for RSG.[200] Nelms further testified as to the reasonableness of the legal fees incurred by RSG in settling the Evolution Lawsuit.[201]

III. Procedural History

On April 16, 2021, RSG filed a timely motion to allow an administrative-expense claim under 11 U.S.C. § 503(b) for (1) breach of the Final APA, (2) statutory fraud under section 27.01 of the Texas Business and

---

[195] RSG Exs. 202, 217, 224, and 229.

[196] Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 155:4–10; Transcript of Hearing Held 5/25/23 [Docket No. 1271] at 29:16–30:19.

[197] RSG Ex. 148.

[198] Joint Pretrial Order ¶ 88; RSG Ex. 149; Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 162:8–11 (disclosing the settlement amount on the record).

[199] RSG Ex. 388 [Estes Declaration] ¶¶ 7–17; Joint Pretrial Order at 7.

[200] RSG Ex. 387 [Nelms Declaration] at 19.

[201] RSG Ex. 387 [Nelms Declaration] at 24. Further testimony regarding the legal fees incurred by RSG and their reasonableness are in the Declaration of Dawn Estes. RSG Ex. 388.

Commerce Code, and (3) negligent misrepresentation.[202] The Trustee initially asserted a counterclaim against RSG for breach of contract, but the parties later filed a stipulation of dismissal with prejudice with regard to that claim.

On May 19, 2023, the Court signed and entered the *Joint Pretrial Order for Contested Matter Between RSG Group USA, Inc. and Liquidating Trustee* [Docket No. 1195] (the "**Joint Pretrial Order**") submitted by the parties.[203] Trial began on May 15, 2023 and concluded on June 27, 2023. Following trial, the parties submitted the *Parties' Joint Submission of Admitted Exhibits for Final Hearing* [Docket No. 1291] documenting the exhibits admitted at trial,[204] as well as post-trial briefing.

IV. Legal Analysis

RSG asserts claims against the Debtors—brought against the Trustee as successor to the Debtors under the Confirmation Order—for (1) breach of the Final APA, (2) statutory fraud under section 27.01 of the Texas Business and Commerce Code, and (3) negligent misrepresentation. RSG further asserts that its claims are entitled to administrative-expense priority pursuant to section 503(b)(1) of the Bankruptcy Code, or, in the alternative, should be allowed as unsecured claims.

A. Breach of Contract

The elements of a breach-of-contract claim under Texas law are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages sustained by the plaintiff as a result of the breach. *Smith Int'l, Inc. v. Egle Grp., LLC*, 490 F.3d 380, 387 (5th Cir. 2007). The parties do not dispute that the Final APA is a valid contract or that RSG performed under the Final APA. They dispute only whether the Debtors breached the Final APA, whether RSG sustained damages as a result of the

---

[202] The motion and the supporting brief were originally filed on April 16, 2021, but the motion was re-filed three days later due to an error with the original filing. *See* Docket Nos. 831 and 837.

[203] The stipulated facts in the Joint Pretrial Order are incorporated herein by reference.

[204] To the extent not done at trial, the Court hereby formally admits the exhibits as described in the parties' joint submission.

breach, and whether the Debtors have any applicable defenses. The Court will address each of those issues in turn.

1. The Debtors made inaccurate representations and breached warranties under the Final APA.

RSG asserts that the Debtors breached sections 5.5(a) and 5.6 of the Final APA[205] by not disclosing (i) the MLA, (ii) the Intercompany Agreement that allegedly gave Alliances authority to execute the MLA, (iii) certain subcontractor authorization forms related to the MLA (the "**Subcontractor Agreements**"), and (iv) several other licenses and sublicenses granting third parties rights to use intellectual property owned by the Debtors. RSG also alleges breaches of the same provisions based on the Debtors' failure to honor the warranties under the Final APA. In closing arguments, RSG confirmed that it is no longer pursuing its claim related to the third-party licenses and sublicenses other than the MLA because RSG successfully handled those contracts with the counterparties and did not present evidence of damages resulting from those contracts not being disclosed.[206]

It is difficult for the Court to analyze nondisclosure of the Intercompany Agreement because it is unclear whether a formal Intercompany Agreement existed, and if it did exist, whether it was written or oral and what its terms were. Wolfe testified that there was some kind of agreement giving Alliances authority to enter into contracts licensing intellectual property owned by Licensing, but Wolfe never actually saw a written version of that agreement and could offer no testimony on the specific terms of such an agreement. While other evidence showed that there was a practice of Alliances entering into license agreements with third parties for the Debtors' intellectual property, the Court is still left to imagine whether the arrangement between Licensing and Alliances was a formal licensing and sublicensing agreement, an agency relationship, or something that the individuals working for those entities just did. More importantly, though, even if there was an Intercompany Agreement that could, and should, have been disclosed, there were no damages resulting from not disclosing it. Because RSG controlled Licensing

---

[205] Although section 2.1 of the Final APA was mentioned in the Joint Pretrial Order, RSG confirmed in its closing brief that it is not asserting a separate breach claim based on that section. Docket No. 1287 at 7 n.3.

[206] Transcript of Hearing Held 6/27/23 [Docket No. 1286] at 12:1–13:1.

and Alliances after the Closing, and those were the only two alleged parties to the Intercompany Agreement, it was entirely within RSG's ability not to act under the Intercompany Agreement, or to dissolve it entirely, so the postclosing existence of the Intercompany Agreement did not by itself harm RSG. The Intercompany Agreement may have facilitated the execution of the MLA, but the damages that RSG complains of flow from the MLA, not from the Intercompany Agreement.

Similarly, the Subcontractor Agreements—which were subcontracts entered into in aid of the MLA and the Novated Agreements—are secondary to the MLA, and any failure to disclose those agreements did not give rise to the damages that RSG now claims. For these reasons, the Court will focus on the MLA and whether the Debtors breached representations and warranties related to the MLA.

Article 5 of the Final APA contains the Sellers' representations and warranties. Under Article 5, except as set forth in the applicable Final APA Disclosure Schedules, the Sellers "represent and warrant" to RSG that the statements contained in Article 5 are true and correct as of the date of the Final APA. There are three key representations and warranties in the Final APA relevant to RSG's present claims—two in section 5.5(a) and one in section 5.6—that the Court will discuss separately.

a. The MLA was an Intellectual Property Agreement that the Debtors should have listed in Schedule 5.5(a).

In section 5.5(a) of the Final APA, the Debtors represented and warranted that "Schedule 5.5(a) lists . . . all Intellectual Property Agreements" with certain exceptions that do not apply here. The MLA was not set forth on Schedule 5.5(a) of the Final Disclosure Schedules or on Schedule 5.6 of the Final Disclosure Schedules, which was incorporated into Schedule 5.5(a) by reference. Section 1.1 of the Final APA defines Intellectual Property Agreements as "all licenses, sublicenses, and other agreements by or through which . . . any Seller grants to any other Person any exclusive or non-exclusive rights or interests in or to any Intellectual Property that is used in connection with the Business." Trademarks are included in the definition of "Intellectual Property," and Licensing's trademarks unquestionably were used in the Debtors' "Business" of operating, franchising, and licensing Gold's Gym fitness centers.

The MLA thus falls squarely within the definition of Intellectual Property Agreement. Even though it was executed by Alliances, the MLA is

an agreement by or through which Licensing (a Seller) granted to Evolution a nonexclusive right or interest in Licensing's trademarks that were used in the Gold's Gym business. It is true that Licensing was not a named party to the MLA, but the overwhelming weight of evidence shows that—whether through an agency relationship with Alliances, through an Intercompany Agreement, or through a course of conduct—Licensing granted Evolution rights in its Intellectual Property by and through the MLA:

- The MLA itself notes that Alliances "owns or represents the rights to the Licensed Property," which includes Licensing's trademarks. MLA, Trustee Ex. 5 (including "Appendix A" Term Sheet attached to the MLA and Exhibit 1 to Appendix A). Alliances does not own the trademarks (Licensing does), so Alliances must have "represent[ed]" the rights to the trademarks that were licensed to Evolution by and through the MLA.

- Wolfe testified that she understood from in-house counsel that Licensing authorized Alliances and Merchandising to enter into license agreements for the Gold's Gym trademarks. Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 68:17–69:19.

- Sherwood signed the subcontractor authorization forms as the Chief Development Officer on behalf of both Licensing as "Owner" and Alliances as "Licensor," and testified that he was authorized to do so. RSG Exs. 8, 9, and 11; Sherwood Depo. [Docket No. 1264-1] at 195:20–196:12, 230:2–232:6.

- The entire executive team of the Sellers (which includes Licensing) reviewed and approved the terms of the MLA before it was executed. RSG Exs. 151–154, and 279; Trustee Ex. 159.

- Zeitsiff, the CEO of Debtors, signed the MLA on behalf of Alliances.

Because the MLA was an Intellectual Property Agreement that did not fall into any of the exceptions listed in section 5.5(a) of the Final APA, the Debtors made an inaccurate representation in section 5.5(a) of the Final APA by not listing the MLA on Schedule 5.5(a) of the Final Disclosure Schedules.

b. The MLA was an Encumbrance that the Debtors should have listed in Schedule 5.5(a).

In section 5.5(a) of the Final APA, the Debtors also represented and warranted that "[e]xcept as set forth on Schedule 5.5(a), to the Knowledge of Sellers, Sellers own or have the right to use, free and clear of all Encumbrances other than Permitted Encumbrances, all Intellectual Property Assets material to the Business . . . ."

The MLA was not set forth on Schedule 5.5(a) of the Final Disclosure Schedules or on Schedule 5.6 of the Final Disclosure Schedules, which was incorporated into Schedule 5.5(a) by reference. The MLA was within the Knowledge of Sellers, as defined in section 1.1 of the Final APA, because both Zeitsiff, who signed the MLA, and Sherwood had actual knowledge of the MLA. The intellectual property licensed to Evolution under the MLA constituted Intellectual Property Assets because it was Intellectual Property owned by a Seller (Licensing) and used in connection with the Business, as those terms are defined in the preamble, recitals, and section 1.1 of the Final APA. The intellectual property licensed to Evolution under the MLA was also clearly material to the Business, as that intellectual property included the iconic Gold's Gym brand and the trademarks underpinning that brand. The remaining questions are whether the MLA was an Encumbrance (preventing the free-and-clear ownership and use of Intellectual Property Assets material to the Business), and if so, whether it was a Permitted Encumbrance.

In addition to the types of things that one might normally think of as encumbrances in the ordinary usage of that term, such as liens and easements, Encumbrance was defined in section 1.1 of the Final APA to include a "restriction of any kind, including any restriction on use . . . receipt of income or exercise of any other attribute of ownership." The MLA fits this definition of an Encumbrance, as it was a restriction on an attribute of ownership—specifically, a restriction on the right to stop Evolution from using certain intellectual property owned by the Debtors to manufacture, distribute, and sell products. Furthermore, section 5.5(a) represents and warrants that the Debtors own or have the right to use all Intellectual Property Assets material to the business free and clear of Encumbrances *except as set forth* on Schedule 5.5(a), which lists all Intellectual Property Agreements. This construction strongly suggests

that the Intellectual Property Agreements were intended to be included in the definition of Encumbrance.

The Trustee argues that the MLA is not an Encumbrance because it is a nonexclusive license agreement that does not restrict the use or further licensing of the licensed intellectual property, or the receipt of income on it, as the MLA allows the sale of branded products by any other entity in any market covered by the MLA. But even a nonexclusive license restricts the exercise of attributes of ownership of intellectual property, such as the right to exclusive use of the intellectual property or the right to grant exclusive licenses to others. *See, e.g.*, *Horizon Meds. LLC v. Apotex Inc.*, No. 22-640, 2022 U.S. Dist. LEXIS 202088, at *11 (D. Del. Nov. 7, 2022) ("[B]ecause 'the owner of a patent cannot transfer an interest greater than that which it possesses' . . . an assignee of a patent takes that patent subject to the patent's legal encumbrances, including any previously-issued licenses." (citation omitted)); *Bangkok Broad. & T.V. Co. v. IPTV Corp.*, 742 F. Supp. 2d 1101, 1111 (C.D. Cal. 2010) ("[I]n granting a non-exclusive license, a copyright owner gives up only one stick from the bundle of rights that comprises copyright ownership."). The right of exclusive use and the ability to exclude others from use are the central attributes of ownership of property, including intellectual property. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing the right to exclude others from use as one of the most essential sticks in the bundle of rights that are commonly characterized as property); *Horizon Meds.*, 2022 U.S. Dist. LEXIS 202088, at *11 ("The grant of a patent merely provides the patentee with the right to exclude others from practicing the invention . . . ."). Not only does a nonexclusive license impose a legal restriction on a trademark owner's right of exclusive use of its trademarks, but it also creates a practical restriction on the owner's ability to use the trademarks to sell products similar to the licensed products in the licensed markets. Schoepe, Wolfe, and Dan Fisher (transactional counsel for RSG) testified that granting licenses to different licensees for the same products in the same markets using the same distribution channels, or selling its own branded

products directly, would create unwanted competition that could dilute the brand in those markets.[207]

The Trustee also argues that the MLA does not fall within the definition of Encumbrance because the term allegedly includes only those types of encumbrances that could threaten the Debtors' ownership of assets (because of, for example, potential foreclosures). According to the Trustee, the MLA creates revenue and does not threaten the Debtors' continued ownership of the intellectual property. The plain language of the Final APA refutes this argument. The term "Encumbrance" mentions nothing about ownership-threatening restrictions, and in any event, the term expressly includes easements and rights of first refusal, which, like the MLA, would restrict the attributes of ownership of the Debtors' assets without threatening its ownership in the same way that a lien would.

The Trustee also argues that the MLA is not an Encumbrance because Pallman, the Director of Brand Partnership for RSG, at one time told Schoepe that the MLA does not actually hurt RSG. *See* Trustee Ex. 52. But Schoepe responded with Schaller's point that the MLA would prevent RSG from controlling the brand. *See id.* The Court does not give a great deal of weight to this statement from Pallman because it was coming from an employee of RSG focused on one portion of the business, but Schoepe testified credibly and extensively at trial about RSG's broader business plans and why the MLA interfered with those plans.

After considering the arguments and evidence, the Court concludes that the MLA was an Encumbrance as defined in section 1.1 of the Final APA, but the Court must still address whether the MLA was a Permitted Encumbrance.

Permitted Encumbrance is defined in section 1.1 of the Final APA to include, in relevant part, "items set forth on Schedule 1.1" and "other imperfections of title or Encumbrances, which are not, individually or in the aggregate, material to the Business or the Assets, and which do not prohibit or interfere in any material respect with the current ownership, use or operations of the Business or the Assets." The MLA was not set forth on Schedule 1.1 of the Final Disclosure Schedules. Based on the

---

[207] Transcript of Hearing Held 5/22/23 [Docket No. 1268] at 120:24–121:19, 122:15–124:14 (Schoepe); Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 44:1–13 (Fisher); Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 75:5–77:7 (Wolfe).

evidence adduced at trial, including the significant term and scope of the MLA, the Debtors' obvious impression that the MLA was significant,[208] and RSG's plans for operation of the Business, the Court finds that the MLA was both material to the Business and would have interfered in material respects with the ownership and use of the Assets and the operations of the Business.

In short, the Debtors did not own or have the right to use Licensing's trademarks—which were Intellectual Property Assets material to the Business—free and clear of the MLA, which was an Encumbrance other than a Permitted Encumbrance. Hence the Debtors made an inaccurate representation in section 5.5(a) of the Final APA by not listing the MLA on Schedule 5.5(a) of the Final Disclosure Schedules.

c. The MLA was not a Franchise Agreement that should have been included on Schedule 5.6.

In section 5.6(d) of the Final APA, the Debtors represented and warranted as follows:

> Schedule 5.6 is a true, correct, and complete list of the following: all of the oral and written franchise agreements, license agreements, subfranchise agreements, sublicense agreements, master franchise agreements, development agreements, area development agreements, business opportunity agreements, and similar agreements (each a "Franchise Agreement" and, collectively, the "Franchise Agreements") which grants or purports to grant to a third party the right to operate, or license others to operate, one or more Gold's Gyms or any similar or related health and fitness businesses or concepts operated, licensed, or franchised by any Seller (each such business is a "Franchise").

While section 5.6(d) specifically includes license agreements in the definition of Franchise Agreements, it restricts the term Franchise Agreements to just those agreements that grant rights related to the operation of a Franchise, as defined in the Final APA. The MLA was a license

---

[208] It was a "huge deal," the largest request for proposal Gold's Gym issued while Wolfe was there. Transcript of Hearing Held 5/30/23 [Docket No. 1261] at 73:25–74:11 (Wolfe testimony); RSG Exs. 153 and 154. Sherwood later estimated that a breach of the MLA would cost tens of millions or even hundreds of millions of dollars. Trustee Ex. 12.

agreement, but it granted rights relating to the production and sale of products, not the operation of a Franchise. For this reason, the Debtors did not make an inaccurate representation in section 5.6(d) of the Final APA by failing to list the MLA on Schedule 5.6 of the Final Disclosure Schedules.

d. The Debtors breached warranties in the Final APA.

The Debtors did not just make two inaccurate representations in the Final APA; the Debtors also warranted to RSG that the statements contained in Article 5 of the Final APA were true and correct. The breach of contract resulting from the inaccurate representations and the breach of contract resulting from the failure to honor the warranty are slightly different.[209] While a representation is an assertion that a fact is true, a warranty is a promise to indemnify if the assertion is false. The Second Circuit Court of Appeals described a warranty as follows:

> A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.

Metro. Coal Co. v. Howard, 155 F.2d 780, 784 (2d Cir. 1946) (L. Hand, J.); *see also* 1 Timothy Murray, Corbin on Contracts § 1.14 (Matthew Bender) (quoting *Metro. Coal Co.*, 155 F.2d at 784); *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 890 (Tex. Civ. App.—San Antonio 1996, pet. denied) ("Generally, a warranty describes the 'character, quality, or title' of that which is being sold and 'by which seller promises

---

[209] For the avoidance of doubt, RSG has pursued its cause of action for breach of the warranties in the Final APA as a breach-of-contract claim, not a breach-of-warranty claim, and the Court has considered it as such. *See Gale v. Carnrite*, No. 05-4092, 2007 U.S. Dist. LEXIS 13278, at *11–16 (S.D. Tex. Feb. 27, 2007) (addressing a breach-of-contract action based on an express warranty in a written agreement and holding that "Texas law has clearly established a distinction between breach of contract and breach of warranty, with each cause of action having its own elements. Texas law has also established that a plaintiff may maintain a cause of action under either or both theories in a lawsuit and courts will analyze each theory using the applicable rule."). For that reason, references to a breach of a warranty, or a breach of the warranties, refer to the warranties in the Final APA.

or undertakes to insure that certain facts are or shall be as he then represents them.'" (quoting BLACK'S LAW DICTIONARY (6th ed. 1990))).

While the mere omission of the MLA from Schedule 5.5(a) of the Final Disclosure Schedules rendered the representations in section 5.5(a) of the Final APA inaccurate, the breach of the warranties in section 5.5(a) of the Final APA stems from the Debtors' failure to insure that the facts were as the Debtors stated and to indemnify RSG for any loss based on the inaccurate statements.

Neither the Debtors nor the Trustee removed the Encumbrance of the MLA or compensated RSG for the cost of removing the Encumbrance. The Debtors were notified of the problem before the Closing of the sale, but the Debtors' solution, as embodied in Amendment No. 2, was for RSG to reserve its rights, close the sale, and give the Debtors the cash. RSG Ex. 188. RSG tried to engage the Trustee in settlement negotiations with Evolution, but those efforts were not fruitful. Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 163:10–15 (Schoepe Testimony); RSG Ex. 388 ¶ 11 (Estes Declaration). In November 2020, over two months after Closing, the Trustee offered some ideas on how RSG could address the MLA, but the Trustee still did not get directly involved with the work of addressing the MLA. RSG Ex. 142. Rather, RSG was directed to first address the MLA directly with Evolution. RSG Ex. 388 ¶ 11 (Estes Declaration).

Because of the Debtors' breach of warranty, RSG was left to deal with the MLA on its own. Through its own efforts and the resulting litigation, RSG eventually succeeded in both removing the Encumbrance of the MLA and liquidating its damages.

2. RSG sustained damages as a result of the Debtors' breach.

When measuring damages in a breach-of-contract action, the general rule is that the complaining party is entitled to recover the amount necessary to put him in as good a position as if the contract had been performed. *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. Civ. App.—Houston [1st. Dist.] 2006, pet. denied) (citing *Smith v. Kinslow*, 598 S.W.2d 910, 912 (Tex. Civ. App.—Dallas 1980, no writ)). In other words, in a breach-of-contract case, the normal measure of damages is "just compensation for the loss or damage actually sustained, commonly referred to as the benefit of the bargain." *Id.* (citing *SAVA Gumarska in Kemijska*

Industria D.D. v. Advanced Polymer Scis., Inc., 128 S.W.3d 304, 325 n.6 (Tex. Civ. App.—Dallas 2004, no pet.)).

RSG asserts that the amount paid by RSG to Evolution pursuant to the Evolution Settlement, plus RSG's attorneys' fees and expenses incurred in connection with the Evolution Lawsuit, represent the damages that RSG suffered as a result of the Debtors' breach of the Final APA. The Trustee generally argues that these costs of litigation are not the appropriate measure of damages for RSG in this case and that even if they were, they are not the types of damages permitted under the Final APA. Under the unusual facts of this case, the Court finds RSG's position more persuasive.

a. The cost of litigating and settling the Evolution Lawsuit is an appropriate measure of damages in this case.

Because the MLA was not listed in Schedule 5.5(a) of the Final Disclosure Schedules, the Debtors represented and warranted that they owned or had the rights to use their intellectual property free and clear of the MLA. If that had been true, RSG would have had the right, after the Closing, to prevent Evolution from using the Debtors' intellectual property to manufacture, distribute, and sell products. This is, in a sense, exactly what RSG wanted to do and is why RSG was exploring contractual options to get out of the MLA.

At the beginning of trial, the Court was suspicious of RSG's "contract discipline" with Evolution and its pause of product approvals, especially when coupled with the unflattering internal RSG e-mails showing that RSG wanted out of the MLA. As the trial progressed, however, the Court began to appreciate a few things: First, RSG was simply exploring its limited options given the mess the Debtors created by warranting the absence of the MLA and then refusing to honor that warranty. Second, RSG did not carry out every option explored in those unflattering e-mails; RSG's external and objectively determinable actions concerning Evolution were more important than its internal musings. And third, Sherwood and Wolfe acknowledged that what RSG did (enforcing contract discipline against Evolution, seeking to renegotiate a contract, and pausing product approvals after closing on a significant transaction to "figure out what's going on") was not prohibited by the MLA and was consistent with what the Debtors had done in the past when they wanted to exit the agreement with Evolution's predecessor. Transcript

of Hearing Held 5/30/23 [Docket No. 1255] at 61:17–63:24 (Wolfe); Sherwood Depo. [Docket 1264-1] at 149:25–150:16, 151:15–18, 171:13–19, 214:16–25.

Although RSG made extensive efforts to resolve the matter amicably with Evolution, those efforts were thwarted—and RSG was then forced to defend Evolution's lawsuit that was prompted—in significant part by Sherwood's and Wolfe's inappropriate (and inaccurate) disclosures of confidential information to Evolution. Sherwood's conduct may have been motivated in part by his son's recent decision to work for Evolution. Sherwood and Wolfe unquestionably were both motivated in part by their indignation that RSG would want to get rid of the global, long-term license agreement they (the licensing team) had worked so long and so hard to negotiate.

What Sherwood and Wolfe failed to appreciate, however, was that the Debtors were in the middle of a Chapter 11 sale process and that the Debtors ***never*** should have approved—even through the use of a non-debtor subsidiary—a significant license agreement that burdened the Debtors' intellectual property without seeking Court permission and without giving bidders red-flag notice that such a significant contract was in the works, or at the very least (even if the Debtors insisted on plowing forward with signatures) that such an agreement had already been signed. It simply was not reasonable for the Debtors to expect that bidders would glean the MLA's existence from a virtual data dump of 482 documents the day before the Auction, from vague and passing references buried in a lengthy Powerpoint investor presentation, or from a draft press release that Schoepe received in the hectic hours before executing the Final APA. Even the Debtors' bankruptcy counsel and financial advisor were unaware of the MLA until after the Final APA was signed, and Shapiro admitted that had he known about the MLA before the Auction, he would have brought it to the bidders' and the Court's attention. Transcript of Hearing Held 6/1/23 [Docket No. 1259] at 86:11–87:2. RSG potentially could have discovered the MLA prior to the Auction and before Final APA execution had it used more attorneys for contract review, but (as explained in greater detail elsewhere in this Order) RSG reasonably limited its due-diligence obligations instead by requiring the Debtors' to make contractual representations and warranties about the Debtors' own assets.

Because the MLA did not have a buy-out provision, because the Debtors' own employees inappropriately thwarted RSG's negotiations with Evolution and prompted the Evolution Lawsuit, and because the Debtors failed to honor their warranties, RSG was left to deal with a factual and legal morass that was mostly the Debtors' own making. Under these highly unusual circumstances, RSG's costs and expenses from litigating and settling the Evolution Lawsuit can fairly be characterized as amounts paid to discharge the Encumbrance (the MLA) on the Debtors' assets.

When a seller breaches a covenant against encumbrances in a contract for the sale of property—which is what section 5.5(a) of the Final APA is, in substance—the purchaser is generally entitled to seek damages for the amounts paid to discharge the encumbrance. *See, e.g.*, *United States v. Lacy*, 234 F.R.D. 140, 147 (S.D. Tex. 2005) (discussing the discharge of an undisclosed lien in a real estate transaction through a settlement); *Wolff v. Com. Standard Ins. Co.*, 345 S.W.2d 565, 568 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.) (holding that once liens were discharged by the purchasers of real property, the purchasers became entitled to reimbursement of the amounts paid to secure the release). The measure of damages for breach of a covenant against encumbrances in a case where the encumbrance can be removed, is the cost of removal of the encumbrance, including attorneys' fees in litigation. *NexBank, SSB v. Soffer*, 102 N.Y.S.3d 566, 567–68 (N.Y. App. Div. 2019) (holding that the proper measure of damages caused by an undisclosed *lis pendens* was the cost to remove the defect, which consisted of attorneys' fees).

Unlike some of the cases the parties have cited, this dispute does not concern real property, and this is not a case in which the purchaser had the right or the ability to simply pay for removal of the Encumbrance. But *Lacy*, *Wolff*, and *NexBank* are still informative. In light of the available precedent and under the specific facts of this case, the Court believes the Evolution Litigation Costs provide the most reasonable and natural measure of damages. As he did with his argument that the MLA was not an Encumbrance, the Trustee complains that RSG did not incur any damages because it was not prevented from selling its own goods, selling its trademarks, or entering into other license agreements. That is not an appropriate measure of damages under these unique facts, however, because it would not accurately capture the damages RSG would have suffered from the continued existence of the MLA. As

Schoepe credibly testified, the broader impact of the MLA on the brand and RSG's business plans would have been significant. The mitigated damages were most reliably liquidated by looking to the cost of freeing the intellectual property of the burden of the MLA.

The Trustee also argues that the cost of litigating and settling the Evolution Lawsuit is not an appropriate method of measuring damages in this case because even if the MLA had been included in Schedule 5.5(a) of the Final Disclosure Schedules, the result would have been the same because there were hints of the existence of the MLA during diligence and RSG was not closely reviewing the Final Disclosure Schedules. That is, even if the MLA had appeared on the Final Disclosure Schedules, RSG still would have paid the same amount for the assets, still would have taken the intellectual property subject to the MLA, still would have closed on the sale, and still would have wanted to exit the MLA and been sued by Evolution. This argument has some support in the evidence with respect to RSG's breach-of-representation claim, but not for RSG's breach-of-warranty claim. The breach-of-warranty claim relates not only to the Debtors' false no-Encumbrance representation, but also to the Debtors' failure to honor the promise to indemnify for that false assertion.

It is true that RSG was an enthusiastic and aggressive bidder. If RSG had looked more closely at the Form Disclosure Schedules or the draft press releases, RSG might have discovered the MLA before signing the Final APA. If RSG had been as focused on license agreements as it was on the brick-and-mortar operations, RSG might have discovered the MLA before signing the Final APA. Given the pace that the parties were moving at when they signed the Final APA, RSG may not have even noticed the difference if the MLA was included on Schedule 5.5(a). And even if RSG had known about the MLA, it is not clear what it could have done to take the intellectual property free and clear. Without belaboring the point, the Court generally agrees that RSG was not damaged solely as a result of the inaccurate representation in the Final Disclosure Schedules regarding the MLA, but it is clear that RSG was damaged by the Debtors' failure to indemnify RSG against the falsity of that representation. Simply put, the result would have been different if the Debtors had not breached their warranties. The need to address RSG's claim delayed Closing, and it was not until Amendment No. 2 was signed, preserving RSG's claim for damages actually suffered by RSG for the

Debtors' breach of its representations and warranties regarding the MLA, that the sale was able to close.

The Trustee also argues that the cost of litigating and settling the Evolution Lawsuit is not an appropriate method of measuring damages in this case because RSG essentially caused its own damages by breaching the MLA and bringing litigation on itself. Specifically, the Trustee complains that RSG refused to consider new product submissions in good faith and thereby frustrated performance under the MLA and caused the Evolution Lawsuit through its own misconduct. RSG responds that it exercised its contractual rights under the MLA but did not breach. The Court has already found and concluded that the Debtors and their employees (including Sherwood and Wolfe) were a significant cause of the Evolution Lawsuit. From the time RSG learned of the existence of the MLA, RSG was clearly exploring a way to get out of it, whether through unilateral termination or a negotiated modification. RSG was, of course, left to do this on its own because the Debtors did not remove the Encumbrance of the MLA themselves and instead left that work to RSG.

The actions that RSG took both before and during the Evolution Lawsuit, which resulted in its costs, fees, and the Evolution Settlement Payment, were an effective and efficient method of removing the Encumbrance and mitigating and liquidating the amount of the damages. In the case of other contracts, such as the Sakar Agreement, RSG was able to accomplish its task without being sued and asserting a cause of action against the Debtors, but this is a testament to the efforts that RSG took to resolve situations as efficiently and amicably as possible. It is not surprising that the MLA was more difficult to resolve than the Sakar Agreement given the MLA's broader scope and longer term. Amicable resolution of the MLA was also made significantly more difficult by the Debtors' employees who fanned the flames by reaching out to Ackermann—before Schoepe could speak with him—to tell him that RSG was intending to terminate the MLA and that the Debtors would not provide any further approvals for products.[210] This way of introducing Ackermann to the situation, along with the ongoing communications from Sherwood, undoubtedly had a negative impact on the likelihood of successful negotiations between RSG and Evolution. The Court is confident, based on

---

[210] Sherwood Depo. [Docket No. 1264-1] at 177:23–180:15.

its review of the record, that RSG would have had a much better chance of negotiating a termination of the MLA without litigation by either side (just as it did with the Sakar Agreement) were it not for the inappropriate (and inaccurate) communications by Sherwood and Wolfe that invited Evolution to sue. The cost of litigating and settling the Evolution Lawsuit is an entirely fair and reasonable method of measuring damages in this case given these unusual circumstances.

The Trustee's argument that RSG caused its own damages also overlaps with its argument that RSG failed to mitigate its damages, but neither argument is availing. It is helpful to recall what was required of RSG and what RSG did. The doctrine of mitigation prevents a party from recovering damages resulting from a breach of contract that could be avoided by reasonable efforts on the part of the plaintiff. *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995). "Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions." *Id.* (quoting *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936)). The Trustee seems to regard performing under the MLA and conforming RSG's business plans for the next seven years to accommodate the MLA to be reasonable exertions. The Court does not agree. A plaintiff is not required to sacrifice a substantial right of his own in attempting to mitigate. *See Bank One, Tex., N.A. v. Taylor*, 970 F.2d 16, 29 (5th Cir. 1992). RSG was not required to surrender its rights and share its intellectual property to mitigate damages. Nevertheless, RSG offered to make concessions regarding some of the rights the Debtors warranted that RSG would have to allow for the sale of Evolution's existing products and to allow Evolution to continue operating in fewer markets and with a shorter term. The concessions that RSG offered clearly satisfied, and probably went well beyond, what would be considered reasonable exertions to reduce its claim against the Debtors. Notably, by quickly pausing the approval of new products, RSG stopped the flow of new product development under the MLA, which would have further exacerbated the damages.

In its briefing, the Trustee also implies that RSG only acquired the MLA as a result of Amendment No. 1, which RSG chose to do to save the time and cost of re-registering intellectual property in many jurisdictions as a new owner. This argument misses the point, though. The damage to

RSG was created by the MLA encumbering the intellectual property that RSG purchased, and that Encumbrance would have existed whether RSG owned Alliances or not.

The Trustee also appears to argue that the MLA did not damage RSG and was, in fact, beneficial because it would have produced licensing revenue, it was nonexclusive, it did not come with cure costs, and Evolution was a good business partner. This argument ignores Schoepe's extensive and credible testimony at trial about RSG's broader business plans and why the MLA interfered with those plans. This argument is also curious in that the Trustee appears to expect a purchaser that paid roughly $100 million dollars for assets to simply accept that it will not have full control over those assets for years to come. If someone bought a house that was supposed to be free and clear of renters, but then discovered that the seller was renting to a housemate, one would not expect the purchaser to simply accept that he has a housemate, collect rent, and be happy.

The Trustee also argues that the amounts RSG paid to settle the Evolution Lawsuit could not be damages without a judicial determination of liability because RSG may not have even been liable to Evolution at all if it had resolved the Evolution Lawsuit in court. The Trustee provides no legal support for this argument. RSG, of course, denied liability in the Evolution Lawsuit and asserted counterclaims, but the Trustee did not provide evidence supporting its theory that RSG could have successfully avoided all liability. If the Trustee believed that to be the case, he should have participated in the Evolution Lawsuit when he was invited to do so by RSG. The Court concludes instead that RSG acted reasonably in electing to settle the Evolution Lawsuit. Furthermore, RSG provided the Court credible evidence supporting the reasonableness of not only the Evolution Settlement Payment but also the fees and expenses that RSG incurred in connection with the Evolution Lawsuit. The Court finds that the Evolution Settlement Payment and the fees and expenses that RSG incurred in connection with the Evolution Lawsuit were reasonable and provide the best method of determining the actual damages suffered by RSG as a result of the Debtors' breach of the Final APA.

Having established what RSG's damages were, the Court must now address whether those damages were permissible under the Final APA.

b. The damages sought by RSG are permitted under the Final APA.

Section 12.5 of the Final APA contained a waiver of damages other than direct damages:

> Notwithstanding anything to the contrary contained herein, no party shall be liable to the other for special, indirect, exemplary, consequential or punitive damages arising out of, associated with, or relating to this agreement (including loss of revenue, diminution in value and any damages based on any type of multiple, however same may be caused) and the parties hereby waive all claims for any such damages.

RSG discovered the Debtors' failure to include the MLA on Schedule 5.5(a) before the closing of the sale. To move matters forward, the parties agreed to amend the Final APA to specifically account for this alleged breach and preserve RSG's rights to pursue its claim against the Debtors after Closing. This agreement was memorialized in Amendment No. 2, which added the following sentence to the end of section 12.1 of the Final APA (the portion of the Final APA that addressed the survival of the Sellers' representations and warranties after the Closing):

> Notwithstanding the foregoing sentence, or any other term or provision of this Agreement, (A) Sellers' representations and warranties contained herein or in any certificated deliveries hereunder relating to [the MLA] . . . and (B) the right of Buyer to bring or assert any Actions for damages actually suffered by Buyer to the extent arising out of any breach of such representations and warranties of Sellers, shall survive the Closing . . . .

RSG argues that the Evolution Litigation Costs are the direct damages of the Debtors' breach of contract allowed for under section 12.5 of the Final APA and preserved by Amendment No. 2. Alternatively, RSG argues that the Evolution Litigation Costs are consequential damages encompassed in the "damages actually suffered" that Amendment No. 2 specifically amended the Final APA to allow. In contrast, the Trustee argues that the Evolution Litigation Costs are not a valid measure of damages at all because they were caused by RSG, but even if they are a valid measure, they are, at best, consequential damages that were not permitted under the Final APA. According to the Trustee, Amendment No. 2 did not amend the waiver of consequential damages in section

12.5; in fact (according to the Trustee), the language in Amendment No. 2 allowing for "damages actually suffered" to survive, actually further narrowed the direct damages available to RSG for the Debtors' breach of representations and warranties.

The Court believes the Evolution Litigation Costs are allowable as damages under the Final APA and Amendment No. 2 because they represent RSG's direct damages that were actually suffered as a result of the Debtors' breach of warranty. Direct damages are those that the breaching party is conclusively presumed to have foreseen as a result of its breach because they are the necessary and usual result of, and flow naturally and necessarily from, that wrongful act. *San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 631 (Tex. 2020). In contrast, consequential damages are those that result naturally, but not necessarily, from the defendant's breach, and are not the usual result of the wrong. *Id.* Consequential damages must be foreseeable and must be directly traceable to the wrongful act and result from it. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997).

The damages that RSG suffered were the necessary and usual result of transferring intellectual property to a purchaser when that intellectual property is encumbered by a license agreement but represented and warranted to be free and clear of such an encumbrance. The fact that RSG could have performed under the MLA and waived the intellectual-property rights that the Debtors represented and warranted they had does not change this result. As in many cases involving an undisclosed lien or encumbrance, the purchaser could technically choose not to do anything about it, but once the purchaser pays to discharge the encumbrance, the purchaser becomes entitled to reimbursement of the amounts paid to secure the release. *Wolff*, 345 S.W.2d at 568. Even if RSG had chosen to concede its rights, not seek to renegotiate, and avoid any risk of litigation, RSG still would have suffered damages; the damages just would have been unliquidated. But RSG tried to renegotiate the MLA since there was no right to terminate the MLA for a penalty or a fee. Unless one or both of the parties to the MLA chose to make voluntary concessions of their rights, the only way for RSG to enjoy its warranted right to prevent others from using its intellectual property would have been to violate the terms of the MLA and suffer the inevitable lawsuit. The Evolution Litigation Costs represented the cost of removing the Encumbrance of the MLA, which RSG implicitly determined was

better for it (*i.e.*, less harmful) than not exercising its warranted rights and performing under the MLA. For these reasons, the damages RSG suffered can be conclusively presumed to have been foreseen as a result of the Debtors' breaches.

This case is unusual in that the damages RSG suffered as a result of the Debtors' breaches also appear to have been actually foreseen by the Debtors. The specific breaches were known to all parties before they delineated in Amendment No. 2 what damage claims would be preserved. The Final APA was executed on July 14, 2020, but Amendment No. 2 was not made until August 21, 2020. In the interim period, the parties discussed what was going on and understood what was planned. As explained below, it is clear from the communications before Amendment No. 2 was made that the Debtors understood that (1) RSG wanted to terminate the MLA, (2) negotiations between RSG and Evolution were not going well, and (3) litigation was likely going to ensue.

Almost immediately after learning of the existence of the MLA, RSG expressed a desire to get out of it. On August 2, Schoepe asked Zeitsiff to have Sherwood and Wolfe explore options for how to get out of the MLA while RSG did its own review of the MLA for possible termination scenarios. RSG Ex. 21. On August 12, Sherwood had a meeting with Schoepe, Zeitsiff, and Wolfe, after which it was Sherwood's (potentially biased) understanding that RSG planned to effectively terminate the MLA by not granting any approvals for product or logo use. RSG Ex. 35. Sherwood then promptly shared this understanding with Evolution. On August 13, Sherwood, Zeitsiff, and Wolfe had a call with Ackermann, the CEO of Evolution, during which Sherwood told Ackermann that RSG was intending to terminate the MLA and that the Debtors would not provide any further approvals for products. Sherwood Depo. [1264-1] at 177:23–180:15. In the days that followed, Schoepe began his discussions with Ackermann to determine what could be done with the MLA. Trustee Ex. 53.

Internal communications before August 21 show that the Debtors, their counsel, and their financial advisor were all well-aware of the fact that RSG did not want the MLA. RSG Exs. 77 and 321. They were also aware that a negotiated solution was not imminent. Especially given the direct communications between the Debtors and Evolution, it is not surprising that on August 19, counsel for the Debtors reported that Schoepe's

discussions with Evolution had not been productive and that RSG was trying to find a buy-out of the MLA. RSG Ex. 191.

On August 15, six days before execution of Amendment No. 2, Sherwood—the Chief Development Officer of the Debtors, who was most directly in charge of overseeing the MLA—sent an e-mail to Zeitsiff, the CEO of the Debtors who signed Amendment No. 2, expressing his assessment that RSG's approach to dealing with the MLA "will most certainly result in a lawsuit against Gold's Gym for breach of contract." Trustee Ex. 12. Sherwood went on to estimate the damages: "We will certainly be on the hook for tens of millions, if not hundreds of millions, of damages given the lifetime value of the agreement." Trustee Ex. 12.

With these views of RSG intentions, the low likelihood of a negotiated solution between RSG and Evolution, and the high likelihood of litigation, the Debtors accepted that there would be no resolution of the license-agreement issue before Closing and told RSG to reserve its rights to assert a claim later so that the sale could close. RSG Ex. 188. In short, the Court need not merely presume that the Evolution Litigation Costs were foreseen when the Debtors entered into Amendment No. 2 because the Evolution Litigation Costs are the exact damages that the Debtors actually predicted would result when they entered into Amendment No. 2 allowing RSG to assert an action for its damages actually suffered.

Even if the Evolution Litigation Costs are for some reason not properly considered direct damages—*see James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 417 (Tex. 2022) ("Indeed, the line between direct and consequential damages often is not a bright one.")—they would still qualify as "damages actually suffered" that were allowable under Amendment No. 2 as consequential damages. *See DaimlerChrysler Motors Co., LLC v. Manuel*, 362 S.W.3d 160, 179 (Tex. Civ. App.—Ft. Worth 2012, no pet.) ("[T]he term 'actual damages' encompasses both 'direct' and 'consequential' damages."). The Evolution Litigation Costs resulted naturally from, and were directly traceable to, the Debtors' breach of warranty, and it was foreseeable (even before execution of the Final APA) that if the Sellers transferred encumbered intellectual property to RSG in breach of that warranty and then did not clear the encumbrance themselves, RSG may attempt to exercise the rights it was promised and suffer damages in litigation.

As consequential damages, the Evolution Litigation Costs would be recoverable under Amendment No. 2. Despite the relatively clear language of Amendment No. 2 allowing RSG to assert a cause of action for damages actually suffered as a result of the Debtors' breaches of representations and warranties, the Trustee argues that several portions of Amendment No. 2 and section 12.5 of the Final APA require a different result. For one, the Trustee notes that Amendment No. 2 does not state that it was creating or expanding RSG's rights—it merely states that RSG's right to pursue damages actually suffered related to the MLA "shall survive" the Closing. Since there was no right to assert actions for the types of damages listed in section 12.5 of the Final APA, such as consequential and indirect damages, prior to Closing, the Trustee argues that no such rights could survive the Closing. The Court is not persuaded. Section 12.5 is a waiver provision. The types of damages addressed in section 12.5 existed but were being waived as part of the Final APA that both section 12.5 and Amendment No. 2 comprised. Under Amendment No. 2, the limited set of damages actually suffered by RSG as a result of Sellers' breach of representations and warranties was not waived under section 12.5 but instead survived. Amendment No. 2 did not create an additional right; it simply preserved RSG's rights so that the parties could proceed with Closing by narrowing the waiver of rights with respect to two specific contracts. The Trustee cites testimony supporting the proposition that when entering into Amendment No. 2, the parties simply meant to preserve RSG's claims, but that is not inconsistent with revoking RSG's waiver of claims in this limited instance and preserving RSG's ability to recover all of its "damages actually suffered."

The Trustee also argues that Amendment No. 2 did not amend section 12.5 because there is no express amendment of section 12.5, and section 3 of Amendment No. 2 states as follows: "Except as and to the extent expressly amended by this Amendment, the APA shall continue in full force and effect in accordance with the terms, provisions and conditions thereof as in effect on the date hereof." The Trustee is stretching this language too far. While it is true that Amendment No. 2 does not specifically address the waiver of damages in section 12.5 and does not expressly amend the language in section 12.5, it does provide that the preservation of RSG's right to pursue damages actually suffered as a result of the Debtors' breaches of representations and warranties shall survive notwithstanding "any other term or provision of this Agreement." This is enough to show that the parties contemplated that

Amendment No. 2 may have an impact on other provisions of the Final APA not specifically identified in Amendment No. 2 and that they intended for Amendment No. 2 to take precedence. The use of the "notwithstanding" clause in Amendment No. 2 is helpful to understand what Amendment No. 2 means, but it also creates a conflict in the Final APA because section 12.5 states that the waiver-of-damages provision is effective "notwithstanding anything to the contrary contained herein . . . ." This conflict must be resolved in favor of Amendment No. 2, though, both because Amendment No. 2 was executed later in time against the backdrop of the existing section 12.5 and because Amendment No. 2 was drafted to address a very specific issue as opposed to the general applicability of section 12.5. *See Breaux v. Halliburton Energy Servs.*, 562 F.3d 358, 366 (5th Cir. 2009) (noting the well-established contract principle that a contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind the inconsistent term in the earlier contract); *see also NuStar Energy, L.P. v. Diamond Offshore Co.*, 402 S.W.3d 461, 466 (Tex. Civ. App.—Houston [14th Dist.] 2013, no pet.) (holding that to the extent of any conflict, specific provisions of a contract control over more general ones); *In re TrueStar Barnett, LLC*, 2008 Bankr. LEXIS 3310, at *9 (Bankr. N.D. Tex. Oct. 3, 2008) ("[C]ontract terms are to be given their plain, ordinary, and generally accepted meanings and the more specific provisions of a contract will control over the general." (citing *Ayres Welding Co., Inc. v. Conoco, Inc.*, 243 S.W.3d 177, 181 (Tex. Civ. App.—Houston [14th Dist.] 2007, rehearing overruled, pet. denied))).

In short, the most natural and logical reading of the contract, consistent with the parties' intent at the time, is that Amendment No. 2 means what it says: Notwithstanding any other term or provision in the Final APA, RSG is allowed to assert a cause of action for damages actually suffered as a result of the Debtors' breaches of representations and warranties related to the MLA.

Stepping back, the Court believes utilizing the Evolution Litigation Costs as a measure of damages and construing Amendment No. 2 to allow for such damages, makes perfect sense under the specific facts and circumstances of this case. Late August 2020 was a critical time during the Debtors' bankruptcy case when (i) the Debtors were scrambling to figure out what happened with the MLA so that they could close on their sale, and (ii) RSG was working hard to gather information and explore

options for dealing with the MLA. It strains credulity to believe that in the midst of this confusion, the parties agreed that RSG would not only limit its claim for the identified breaches to direct damages but to insert language to further limit those direct damages to an alleged subset of damages actually suffered. It makes far more sense that the limitation was supposed to override the previous waivers and limit RSG's claim for specific breaches of contract that were still being explored to the damages that it actually suffered. After all, the Debtors considered Amendment No. 2 to be a creative solution, not just RSG's capitulation. RSG Ex. 79.

3. The defenses presented by the Trustee fail.

Aside from arguing that the elements of a breach-of-contract claim have not been satisfied, the Trustee has also raised several defenses, most of which have already been addressed. As the Court explained, RSG incurred such expenses and made such exertions as were reasonable to mitigate its damages. Indeed, RSG's efforts probably went well beyond what would be considered reasonable exertions to reduce its claim against the Debtors. RSG's right to claim the damages it is seeking was not waived or released by the Final APA or Amendment No. 2. The defense that the Trustee focused on the most, though, was mutual mistake.

The Trustee asserts mutual mistake as an affirmative defense, claiming that (1) RSG included the MLA in the RSG Original Disclosure Schedules, (2) the parties did not intend to remove the MLA from the disclosure schedules between the time of the RSG Original Disclosure Schedules and the Final Disclosure Schedules, (3) by not intending to remove the MLA, the parties intended to include the MLA in the Final Disclosure Schedules, (4) the MLA was left out of the Final Disclosure Schedules only because of a compilation error, and (5) the Court should now enforce the Final APA according to the parties' intended terms, as though the MLA were included in the Final Disclosure Schedules.

Despite the Trustee's characterization of the defense as mutual mistake, the parties dispute what exactly the Trustee is asking for. RSG initially construed the Trustee's defense as seeking avoidance. The Trustee initially relied on authorities addressing reformation, but then disavowed any intent to seek reformation and now characterizes his request as an affirmative defense in which he merely asks the Court to enforce the Final APA according to the parties' intended terms.

Avoidance and rescission operate to invalidate or set aside a contract, but the underlying objective of reformation is to correct a mistake "made in *preparing* a written instrument, so that the instrument truly reflects the *original* agreement of the parties." *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987). While the Trustee's request looks very much like reformation, the Trustee has cited authority for the proposition that "when the facts show the true agreement intended and a mutual mistake . . . in preparing the written policy, the agreement intended will be enforced without going through the formal proceedings of reformation." *See Republic Ins. Co. v. Silverton Elevators, Inc.*, 493 S.W.2d 748, 754 (Tex. 1973). The Fifth Circuit Court of Appeals has also observed that "[r]egardless of the label placed upon that lawsuit, a party asserting mutual mistake seeks relief in the substance, if not necessarily the form, of reformation." *Harbor Ins. Co. v. Urb. Constr. Co.*, 990 F.2d 195, 200 (5th Cir. 1993). The Court will therefore analyze the mutual-mistake defense as an affirmative defense that is, in substance, asking for reformation.

Under Texas law, a court may reform a contract to correct a mutual mistake in reducing the agreement to writing. *See Cherokee Water*, 741 S.W.2d at 379. Reformation requires two elements: (1) an original agreement and (2) a mutual mistake, made after the original agreement, in reducing the agreement to writing. *Id.* The party seeking reformation based on a mutual mistake must present clear, exact, and satisfactory evidence that he is entitled to it. *See Estes v. Republic Nat'l Bank*, 462 S.W.2d 273, 275 (Tex. 1970). Extrinsic evidence is usually required because a substantive mistake and the original agreement between the parties would rarely be readily apparent based on the terms of the contract itself. *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 409 (5th Cir. 2012).

Reformation hinges on an "original agreement." *See Cherokee Water*, 741 S.W.2d at 379. The indispensability of an original agreement arises from the inherent limitation on a court's authority to craft a contract that the parties did not mutually establish. *See id.* The party seeking reformation must prove what the original agreement was. *Estes*, 462 S.W.2d at 275. But proving there was an agreement that is at variance with the writing is not enough. *Id.* The party "must go further and establish the fact that the terms or provisions of the writing which differ from the true agreement made were placed in the instrument by mutual mistake." *Id.*

(citation omitted). Demonstrating that a party "assumed or believed" the contract contained particular terms, *see Champlin Oil & Refin. Co. v. Chastain*, 403 S.W.2d 376, 382 (Tex. 1965), or "that both parties were mistaken about some feature of their bargain," *see Nat'l Resort Cmtys., Inc. v. Cain*, 526 S.W.2d 510, 513 (Tex. 1975), is insufficient. Rather, the parties must have had a "definite and explicit" agreement, *see Champlin Oil & Ref.*, 403 S.W.2d at 382, and the agreement must have been reached before the contract was drafted. *See Cherokee Water*, 741 S.W.2d at 379.

The Trustee falls short of presenting clear, exact, and satisfactory evidence that the Debtors and RSG had a definite and explicit agreement regarding the Form Schedule 5.6 Licensing Agreements Table that differed from the terms in the Final APA. On July 1, 2020, about six days after the MLA was executed, Snyder (transactional counsel for the Debtors) sent Fisher (transactional counsel for the RSG) the Form Disclosure Schedules expressly denoted as a "[d]raft" after an introductory call.[211] The Form Schedule 5.6 Licensing Agreements Table listed the MLA,[212] but the parties did not discuss the MLA during their introductory call.[213] After the introductory call, RSG requested changes to the Debtors' proposed representations and warranties with the intention of prompting the Debtors to furnish further disclosures. RSG sent these requested changes as a revised "draft" to the Debtors before the Bid Deadline.[214] The communications and correspondence during this timeframe do not show that RSG agreed to the Form Schedule 5.6 Licensing Agreement Table. Rather, the communications affirm RSG's intent to induce the Debtors to furnish supplementary disclosures or to take exceptions to the representations and warranties for RSG's ultimate approval:

- Fisher wrote to Snyder and Patrick Ryan (also transactional counsel for the Debtors) on July 8, 2020: "We included some additional language in the representations and warranties . . . . As a result, there may be some numerical changes to the disclosure

---

[211] Trustee Ex. 32.

[212] Trustee Ex. 32 at LTX_032.062. As previously noted, the table of licensing agreements was included in Schedule 5.6, but the disclosures in Schedule 5.6 were also incorporated into Schedule 5.5(a) by reference.

[213] Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 23:15–25.

[214] RSG Ex. 159.

schedules and a few new disclosure schedules - which I assume can be *worked through* following the initial bid qualifications."[215]

- In the same email, Fisher wrote to Snyder and Ryan on July 8, 2020: "Please advise if we need the proposed disclosure schedules attached and *worked out with you* to submit along with the APA."[216]

- Ryan wrote to Fisher on July 8, 2020: "[W]e'll review the preliminary revision that you sent and get back to you today with any thoughts on the cover note issues you raise."[217]

- Fisher wrote to Ryan and Snyder on July 9, 2020: "Do you have a word version of the Assignment and Assumption Agreement and the Assignmnet [sic] and Bill of Sale that were included with your Disclosure Schedules in the data room? *I want to attach these as Exhibits to the APA for our bid*."[218] Fisher did not mention attaching the full disclosure schedules as part of its Bid Package.

- Snyder wrote to Fisher on July 9, 2020: "Full set Disclosure Schedules with each of those form agreements at the Exhibits (toward the end) is attached."[219] These disclosure schedules did not include any attachments, such as a table of licensing agreements.

- Counsel for RSG wrote to Snyder and others on July 9, 2020: "Please see the attached Bid Letter, and as a courtesy, a word copy of our APA (*sans Disclosure Schedules*)[.]"[220] Disclosure schedules were expressly excluded from the Bid Package.

- Fisher wrote to Snyder and Ryan on July 9, 2020, shortly after the deadline to submit bids: "I had a few moments today to compile a *draft* of the disclosure schedules applicable to the *draft* of the Asset Purchase Agreement formally submitted by our clients . . . you will find we have accepted your language (if something

---

[215] RSG Ex. 159 (emphasis added).

[216] RSG Ex. 159; *see also* Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 31:11–32:18 (Fisher explaining that it was unclear whether disclosure schedules were required to be submitted with RSG's bid).

[217] RSG Ex. 81.

[218] RSG Ex. 161 (emphasis added).

[219] RSG Ex. 161.

[220] Trustee Ex. 108 (emphasis added).

does not transmit correctly with the various attachments to the disclosure schedules, meaning it differs from the contents of the form Disclosure Schedules made available for our review by Ariel, that is completely unintentional. For any new information we seek in the APA, I have put language in the disclosure schedules *reserving for all parties the right to supplement and agree* upon the final disclosures."[221] The MLA was listed in the licensing agreements table included in the RSG Original Disclosure Schedules that RSG sent to the Debtors shortly after the Bid Deadline.

- Fisher wrote to Ryan on July 11, 2020: "With RSG's bid designated as the initial high bid, our understanding is that the APA submitted by RSG yesterday (as revised) is the form of agreement that other qualified bidders are now evaluating and bidding against. Given that, my question relates to the disclosure schedules, which are *very close to complete but still require some further disclosures*. Are you currently working on those? Do you need any input from us?"[222] Fisher asked Ryan to "let us know, if time permits, *what your thoughts are on possible completion of the disclosure schedules prior to the auction*."[223]

- Ryan wrote to Fisher on July 11, 2020: "We look forward to Monday and, yes, *we will get the Schedules further updated in advance as best we can*."[224]

- Snyder wrote to Fisher, after RSG was named the successful bidder, on July 13, 2020: "Please find the attached the following: . . . Redline of Disclosure Schedules against draft circulated with Auction invitation Friday (*Note, the attachments to the Disclosure Schedules did not change in substance*)."[225]

- Fisher wrote to Ryan on July 14, 2020: "The Disclosure Schedules are approved."[226]

---

[221] Trustee Ex. 157 (emphasis added).

[222] RSG Ex. 175 (emphasis added).

[223] RSG Ex. 175 (emphasis added).

[224] RSG Ex. 175 (emphasis added).

[225] RSG Ex. 178 (emphasis added).

[226] Trustee Ex. 64.

- Snyder testified that final agreement on the disclosure schedules did not take place until July 14, 2020.[227]

The communications before Fisher's approval on July 14, 2020, do not establish a definite and explicit agreement with respect to the Form Disclosure Schedules, and much less the Form Schedule 5.6 Licensing Agreement Table. Fisher asked the Debtors to provide new information so the parties could then "agree upon the final disclosures." Fisher's communications also signify disclosures were "very close to complete" but not final. Counsel for RSG was not even sure if the disclosure schedules were necessary for RSG's Bid Package. The Bid Procedures state that within one business day after the conclusion of the Auction, "the Successful Bidder shall complete and execute all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which the Successful Bid was made."[228] The RSG Original Disclosure Schedules were sent after the bid submission deadline, and RSG did not communicate an intention for the Debtors to accept the RSG Original Disclosure Schedules because they were referred to as a "draft" and they expressly reserved for all parties the right to agree upon the final disclosures.

The acceptance of the "language" by Fisher on July 9, 2020, was referring to the face of the Form Disclosure Schedules, and not necessarily to the attachments or contents of the Form Disclosure Schedules, including the Form Disclosure Schedule 5.6 Licensing Agreement Table.[229] The RSG Original Disclosure Schedules sent by RSG included footnotes for the Debtors to provide updated information, which can hardly be regarded as evidence that the true agreement was to include the Form Disclosure Schedule 5.6 Licensing Agreement Table in the Final Disclosure Schedules. *See Estes*, 462 S.W.2d at 275.

Even more, Fisher testified that time constraints prevented the Debtors from negotiating the disclosure schedules with every bidder before bid submissions.[230] Notably, the parties did not discuss or negotiate which table—the Form Disclosure Schedule 5.6 Licensing Agreement Table or

---

[227] Transcript of Hearing Held 5/25/23 [Docket No. 1271] at 99:11–24.

[228] Trustee Ex. 27 at LTX_027.032–LTX_027.033.

[229] Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 48:7–23.

[230] Transcript of Hearing Held 5/26/23 [Docket No. 1240] at 35:1–4.

the Execution Disclosure Schedule 5.6 Licensing Agreement Table—would be attached to the Final Disclosure Schedules. Snyder, in her testimony, could not discern which alterations to the attachments of the disclosure schedules were intentional and which were not.[231] Between the Bid Deadline and the Auction, Fisher did not receive any modifications to the attachments to the disclosure schedules, and he confirmed the absence of negotiations or discussions concerning the Form Disclosure Schedule 5.6 Licensing Agreement Table.[232] Snyder likewise testified she was not aware of any negotiations or discussions regarding the Form Disclosure Schedule 5.6 Licensing Agreement Table.[233] After the Auction but before the execution of the Final APA, while the parties negotiated certain provisions of the APA, there was a conspicuous absence of discourse between the parties concerning the Form Disclosure Schedule 5.6 Licensing Agreement Table or the Execution Disclosure Schedule 5.6 Licensing Agreement Table.[234]

There is no evidence that the Form Disclosure Schedule 5.6 Licensing Agreement Table or the Execution Disclosure Schedule 5.6 Licensing Agreement Table were specifically discussed or negotiated leading up to the execution of the Final APA. Absent a definite and explicit agreement—or even any negotiations or discussions regarding an agreement—on the use of the Form Disclosure Schedule 5.6 Licensing Agreement Table, which did include the MLA, rather than the Execution Disclosure Schedule 5.6 Licensing Agreement Table, which did not include the MLA, the Court is without power to reform the writing.[235]

The Texas Supreme Court's decision in *Champlin Oil & Refining Co. v. Chastain*, illustrates why the absence of negotiations or discussions prevents reformation. 403 S.W.2d 376 (Tex. 1965). In *Champlin Oil*, Champlin processed natural gas and extracted certain petroleum derivatives with a method referred to as the "plant formula." *Id.* at 379. Prior to negotiations between Champlin and Chastain, Champlin had

---

[231] Transcript of Hearing Held 5/25/23 [Docket No. 1271] at 159:4–24.

[232] Transcript of Hearing Held 5/31/23 [Docket No. 1246] at 82:15–84:3.

[233] Transcript of Hearing Held 5/25/23 [Docket No. 1271] at 198:1–10.

[234] Transcript of Hearing Held 6/2/23 [Docket No. 1273 at 150:1–6.

[235] For these reasons, the Court need not decide whether the Trustee's mutual-mistake defense, as a potential affirmative claim for reformation, is barred by the Sale Order and Confirmation Order.

prepared a "form of contract" relating to its processing operations. *Id.* at 380. During negotiations, there was little discussion between the parties as to the terms of the formula Champlin would use for Chastain's gas. *Id.* The parties approved the contract after making changes and corrections to the contract. *Id.* However, through oversight or misadventure, the contract between Champlin and Chastain did not embody the "plant formula" and instead embodied an older formula, somewhat similar in form and wording but different in several respects, referred to as the "contract formula." *Id.* Champlin requested reformation because of a mutual mistake, arguing that the parties believed, at the time they signed the contract, that the contract language correctly described the "plant formula" and not the "contract formula." *See id.* at 381–82.

The Texas Supreme Court readily recognized there was a mistake in the technical sense of the term when Champlin prepared its contract and inserted an old, discarded formula. *See id.* at 382. The Texas Supreme Court assumed that both parties intended that the plant formula would accomplish the goal between the parties, and that Chastain assumed or believed that the formula in the contract contained the plant formula because it would be unusual, and potentially problematic, for a processing company to offer a contract based on a formula that differed from the formula the processing company, Champlin, used with every other party. *See id.* Nevertheless, the Texas Supreme Court held reformation was unavailable because the parties did not discuss the applicable formula and there was no evidence that the parties agreed to a formula other than the one in the contract. *See id.* 382–83.

Here, as in *Champlin*, there is no dispute that the parties did not specifically discuss the MLA, or even the Form Disclosure Schedule 5.6 Licensing Agreement Table and the Execution Disclosure Schedule 5.6 Licensing Agreement Table. And, as in *Champlin*, relief by reformation must be denied in the absence of proof of a definite agreement between the parties to include the MLA or even to use one table instead of the other. The mere inclusion by RSG of the Form Disclosure Schedule 5.6 Licensing Agreement Table that included the MLA in the RSG Original Disclosure Schedules, which were expressly referred to as a "draft," submitted to the Debtors does not signify an agreement. *Cf. Cherokee Water*

Co., 741 S.W.2d at 381 (form deed predating the parties' agreement, which was also used with other parties, did not support reformation).[236]

Further, the evidence fails to establish that RSG's intent was to accept the Execution Disclosure Schedule 5.6 Licensing Agreement Table and *all* associated license agreements. Section 5.5(a) of the Final APA expressly provides: "*Except as set forth on* Schedule 5.5(a) . . . Sellers own or have the right to use, free and clear of all Encumbrances other than Permitted Encumbrances, all Intellectual Property Assets material to the Business and the Intellectual Property material to the Business licensed to Sellers under the Intellectual Property Agreements." The language employed, and the contemporaneous actions and communications by RSG to induce the Debtors to furnish supplementary disclosures or to take exceptions to the representations and warranties, does not signify RSG's intention to accept any license agreement that *would or should be* set forth on the Execution Disclosure Schedule 5.6 Licensing Agreement Table. Without an actual agreement that RSG intended to accept the Execution Disclosure Schedule 5.6 Licensing Agreement Table and *all* associated license agreements, reformation is unavailable because reformation requires a mistake "in the drafting of the instrument, not in the making of the contract." *Natixis Funding Corp. v. GenOn Mid-Atl., L.L.C.* (*In re GenOn Mid-Atl. Dev., L.L.C.*), 42 F.4th 523, 547 (5th Cir. 2022) (quoting 27 Williston on Contracts § 70:19 (4th ed. 1993), Westlaw (database updated May 2022)) (internal quotation marks omitted).

Finally, the Trustee's contentions that the MLA was disclosed does not establish a definite and explicit agreement. For example, the Trustee highlights the fact that the MLA was uploaded to the VDR, alluded to in the Investor Presentation, and mentioned in a draft press release. According to the Trustee, the Debtors regarded these other means of transmitting information, such as the VDR, as the critical identification of license agreements rather than the Execution Disclosure Schedule 5.6 Licensing Agreement Table. This may well be true for *the Debtors'* intent, but it says nothing about RSG's intent. *See BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, No. CIV.A. 20456, 2004 WL 1739522, at *6

---

[236] The Supreme Court of Texas has limited reformation to specifically-negotiated writings by recognizing form documents usually cannot be reformed because they are not specifically negotiated. *See Cherokee Water*, 741 S.W.2d at 380.

(Del. Ch. Aug. 3, 2004) ("Moreover, pleading that Lockheed disclosed the CCT Litigation on draft disclosure schedules or that BAE conducted due diligence investigations prior to closing does not make up for the lack of pleading of a specific prior agreement."). Fisher testified that the essential identification of license agreements was not derived from the information in the VDR but rather from the information contained within the four corners of the Final APA. The Court has also found that whether notice was provided or not during the diligence period, RSG (like the Debtors' bankruptcy counsel and financial advisor) was not actually aware of the MLA until after the Final APA was executed.

In sum, the evidence does not show a definite and explicit agreement or any negotiations regarding the Form Disclosure Schedule 5.6 Licensing Agreement Table and the Execution Disclosure Schedule 5.6 Licensing Agreement Table leading up to the execution of the Final APA. Reformation is therefore unavailable because of a lack of evidence that the parties actually agreed to include the MLA on the Execution Disclosure Schedule 5.6 Licensing Agreement Table or even to use the Form Disclosure Schedule 5.6 Licensing Agreement Table instead of the Execution Disclosure Schedule 5.6 Licensing Agreement Table in the Final Disclosure Schedules.

The Trustee's mutual-mistake defense also fails because the mistake made in compiling the Final Disclosure Schedules is not attributable to a mutual mistake but rather to a unilateral mistake on the part of the Debtors, which makes reformation an unavailable remedy. "A mistake by only one party to an agreement, not known to or induced by acts of the other party, is not grounds for finding a mutual mistake." *Laws. Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 857 (5th Cir. 2014) (citation omitted) (internal quotation marks omitted). Here, full responsibility for listing the license agreements rested with the Debtors. The Debtors alone were responsible for preparing the Disclosure Schedule 5.6 Licensing Agreement Table and sending it to bidders and the ultimate purchaser. *See Samson Expl., LLC v. T.S. Reed Properties, Inc.*, 521 S.W.3d 766, 779 (Tex. 2017).[237] The Trustee's argument that the

[237] Shapiro, who, at the time, was the lead for the Debtors' financial advisor, testified that under the Bid Procedures, RSG should have been provided the documents Venice Strength Owner and TRT (which had the incorrect attachments of licensing agreements to the disclosure schedules that did not reflect the MLA) received. Transcript of Hearing Held 6/1/23 [Docket No. 1260] at 17:22–18:2.

mistake was mutual is difficult to reconcile with the facts clearly establishing the Debtors were the party responsible for creating the Final Disclosure Schedules. As Snyder testified, there was a compilation error. Had the Debtors "carefully reviewed the schedules that it produced, the mistake in the schedule should have been discovered before the closing - and before any harm resulted." *Minn. Valley Broad. Co. v. Three Eagles of Lincoln, Inc.*, No. CV 07-4158, 2007 WL 9735995, at *4 (D. Minn. Oct. 24, 2007).

The overarching problem with the Trustee's mutual-mistake defense is that there was no common intent to use the Form Disclosure Schedule 5.6 Licensing Agreement Table or to include the MLA in the Final Disclosure Schedules. Indeed, the mistake concerns a license agreement that RSG did not even know existed when the Final APA was signed. This is not entirely surprising given these were the Debtors' disclosures, not RSG's. Section 6.8 of the Final APA allocated the risk of many facts involved in the transaction to RSG but specifically allocated the risk of inaccurate representations in Article 5 of the Final APA to the Sellers. A "warranty . . . is intended precisely to relieve the promisee of any duty to ascertain the fact for himself . . . ." *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946) (L. Hand, J.). "When the risk of mistake is allocated to the defendant by agreement, the defendant's mutual mistake defense 'fails as a matter of law.'" *Liberty Mut. Ins. Co. v. Servisair, L.L.C.*, 698 F. App'x 770, 773 (5th Cir. 2017) (citing *Cherry v. McCall*, 138 S.W.3d 35, 40 (Tex. Civ. App.—San Antonio 2004, pet. denied)); *see also Transworld Leasing Corp. v. Wells Fargo Auto Fin., LLC*, 2012 WL 4578591, at *6 (Tex. Civ. App.—San Antonio Oct. 3, 2012, pet. denied) ("Because the Agreement contained a warranty that allocated the risk that the lease was not executed by a duly authorized individual to Transworld," the court held Transworld's defense of mutual mistake failed as a matter of law). The Trustee did not prove that before executing the Final APA the parties agreed on a table or on specific license agreements that the Trustee contends should have appeared in the Final Disclosure Schedules. Without evidence of a definite agreement that the Final APA would include a specific table or license agreement, there is nothing for the Court to reform.

4. Expert-Witness Testimony

Three expert witnesses (Russell F. Nelms, Mark Stromberg, and Kevin J. Carey) testified at trial, either live or by declaration. All three experts

are highly-qualified and well-respected individuals, but much of the testimony offered by the experts concerned normal practices and responsibilities in a bankruptcy sale process or legal conclusions regarding reasonableness for which the Court did not need the aid of expert testimony. There are a few specific aspects of the expert testimony that the Court does wish to address, though.

Kevin J. Carey, a former bankruptcy judge, offered his opinions that (1) the Debtors fulfilled their responsibilities in connection with the bankruptcy sale and the related diligence, (2) the Debtors' procedures and processes for providing relevant material information to potential bidders in the bankruptcy sale were sufficient, (3) RSG received timely disclosure of the MLA, (4) it was reasonable for the Debtors to expect bidders to conduct their own due diligence regarding the transaction, and (5) the representations and warranties provided by the Debtors in the Final APA do not save RSG from its casual approach to diligence. Mark Stromberg, an attorney with extensive experience in bankruptcy, offered some countervailing opinions regarding the diligence process. It is apparent from the evidence at trial that RSG's diligence was hurried and more focused on the Debtors' brick-and-mortar operations than on the Debtors' license agreements, but obtaining representations and warranties regarding specific facts is an appropriate way to limit the burden of conducting diligence in a complex transaction. *See Metro. Coal Co.*, 155 F.2d at 784 ("A warranty . . . is intended precisely to relieve the promisee of any duty to ascertain the fact for himself . . . ."). One Delaware Chancery Court described the purpose and usefulness of representations and warranties in mergers and acquisitions:

> Due diligence is expensive and parties to contracts in the mergers and acquisitions arena often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business. In other words, representations like the ones made in the Asset Purchase Agreement serve an important risk allocation function. By obtaining the representations it did, Cobalt placed the risk that WRMF's financial statements were false and that WRMF was operating in an illegal manner on Crystal. Its need then, as a practical business matter, to independently verify those things was lessened because it had the assurance of legal recourse against Crystal in the event the representations turned out to be false.

> Representations about the accuracy of unaudited financial statements of the type involved here are by no means a ubiquitous feature of M & A contracts. But, having given the representations it gave, Crystal cannot now be heard to claim that it need not be held to them because Cobalt's due diligence did not uncover their falsity. This point is, in fact, made clear in the Asset Purchase Agreement itself, which provides that "no inspection or investigation made by or on behalf of [Cobalt] or [Cobalt's] failure to make any inspection or investigation shall affect [Crystal's] representations, warranties, and covenants hereunder or be deemed to constitute a waiver of any of those representations, warranties, or covenants." Having contractually promised Cobalt that it could rely on certain representations, Crystal is in no position to contend that Cobalt was unreasonable in relying on Crystal's own binding words.

Cobalt Operating, LLC v. James Crystal Enters., No. 714-VCS, 2007 Del. Ch. LEXIS 108, at *89–90 (Del. Ch. July 20, 2007) (alterations in original) (footnote omitted).

The Debtors and RSG contractually agreed that RSG would bear the burden of conducting its own diligence with regard to the transaction, except with respect to the specific representations and warranties in Article 5 of the Final APA:

> Buyer has entered into this agreement with the intention of making and relying upon its own investigation of the physical, environmental, economic, and legal condition of the assets of the Business and that Buyer is not relying upon any statements, information, reports, representations, or warranties *other than those specifically set forth in Article 5 of this agreement* . . . .

Final APA § 6.8 (emphasis added).

At least for the purposes of a breach-of-contract action, the Court finds that RSG was not actually aware of the MLA at the time the Final APA was executed and satisfied its diligence obligations in light of all of the circumstances, including the parties' contractual allocation of those obligations.

5. RSG's claim for attorneys' fees.

RSG also seeks attorneys' fees in this action under section 38.001(b) of the Texas Civil Practice and Remedies Code, which allows for recovery of attorneys' fees to prevailing contracting parties. As the prevailing party on a claim based on a written contract, RSG is entitled to its attorneys' fees.[238]

B. Violation of Texas Business and Commerce Code Section 27.01

RSG's second cause of action is statutory fraud. Section 27.01(a)(1) of the Texas Business and Commerce Code provides:

> Fraud in a transaction involving real estate or stock in a corporation or joint stock company consists of a (1) false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing that person to enter into a contract; and (B) relied on by that person in entering into that contract.

RSG has identified several alleged misrepresentations in support of its statutory-fraud claim:

- The statements in the First-Day Declaration that "Gold's Gym Alliances, LLC is actually owned by Gold's Gym Licensing, but has no assets or operations" and that Alliances and other listed non-filing subsidiaries have "not owned assets or operations any time in recent history and, thus, have not sought bankruptcy protection at this time." RSG Ex. 13 ¶ 14(k) and n.7.

- The statement in the Early Declaration that Paul Early, the Debtors' Chief Administrative Officer, had reviewed the First-Day Declaration and incorporated such testimony

---

[238] It is the Court's understanding that the parties only agreed to defer the presentation of evidence regarding the amount of RSG's claim for attorneys' fees in this action until after a liability determination had been made. *See* Transcript of Hearing Held 5/23/23 [Docket No. 1274] at 188:6–12; Docket No. 1073 at 5. If the Court is incorrect and the parties also agreed to defer argument on whether RSG was entitled to fees in this action, the parties should ask the Court to reconsider this ruling within fourteen days of entry of this Order.

as his own where relevant to the Debtors' background. RSG Ex. 98 ¶ 4.

- The statement in the Early Declaration that it was the Debtors' business judgment that Amendment No. 1 to the Final APA would not change the economic value of the transaction. RSG Ex. 98 ¶ 17.

- The statement in the Final APA recitals that "Sellers are engaged in the business of operating, franchising, and licensing one of the largest networks of company-owned and franchised fitness centers in the world, with over 650 locations across six continents each day." Final APA at 1.

- The statement in the Final APA recitals that as of June 15, 2020, the "Sellers own and operate approximately 62 gyms domestically, and as franchisors, are parties to franchise agreements for approximately 600 gyms domestically and internationally and all currently conducted business activities that are ancillary thereto." Final APA at 1.

- The inaccurate representations in section 5.5(a), Article 5 of the Final APA regarding Intellectual Property Agreements and Encumbrances.

There are a few problems with RSG's reliance on representations made outside of Article 5 of the Final APA for this cause of action. RSG did not prove that statements in the First-Day Declaration, the Early Declaration, or the recitals in the Final APA were made by the Debtors to RSG for the purpose of inducing RSG to enter into a contract. Furthermore, in sections 5.17, 6.8, and 8.11 of the Final APA, the Sellers disclaimed any representations made to RSG outside of Article 5 of the Final APA, RSG disclaimed any reliance on any representations made to RSG outside of Article 5 of the Final APA, and RSG covenanted to refrain from suing the Sellers based on any representations made to RSG outside of Article 5 of the Final APA. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997) (holding that a clear contractual disclaimer of reliance may conclusively negate the element of reliance). Thus, the only representations that could form the basis for a statutory-fraud claim are the inaccurate representations in Article 5 of the Final APA regarding Intellectual Property Agreements and Encumbrances (the "**Inaccurate Representations**").

As explained above, the Inaccurate Representations were false representations of an existing material fact. They were also part of the representations in the Final APA made to RSG for the purpose of inducing RSG to enter into a contract. But the reliance element of the statutory-fraud claim is not as clear.

To prevail on a statutory-fraud claim, RSG must show, among other things, that it relied on false representations. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653–54 (Tex. 2018); *see also Bykowicz v. Pulte Home Corp.*, 950 F.2d 1046, 1050 (5th Cir. 1992) (holding that the reliance element for statutory fraud is the same as for Texas common law fraud). The reliance element of a fraud claim "has two requirements: the plaintiff must show that it actually relied on the defendant's representation and, also, that such reliance was justifiable." *JPMorgan Chase Bank*, 546 S.W.3d at 653; *see also Bykowicz*, 950 F.2d at 1050. Justifiable reliance usually presents a question of fact, and the court may consider the plaintiff's knowledge, experience, background, and level of sophistication. *JPMorgan Chase Bank*, 546 S.W.3d at 654; *Bykowicz*, 950 F.2d at 1050.

The Trustee argues that RSG's reliance on representations regarding the MLA was not justifiable because RSG had either actual notice or inquiry notice of the MLA. It is difficult to see how RSG's reliance on any of the representations in Article 5 of the Final APA would not have been justifiable given the contractual provisions, such as section 6.8 of the Final APA, expressly allowing RSG to rely on a very limited set of the Sellers' representations. The Court need not decide whether RSG's reliance on the Inaccurate Representations was justifiable, though, because RSG did not actually rely on them.

The sale process moved very quickly, and the evidence showed that RSG was more focused on areas of the Debtors' business other than licensing. Indeed, some of the same inattention that plagued the Trustee's mutual-mistake defense to RSG's breach-of-contract claim also defeats the reliance element of RSG's statutory-fraud claim. Schoepe testified that rather than relying on the disclosure schedules, RSG was relying on the list of cure claims to identify contracts to accept or reject[239] despite the

---

[239] Transcript of Hearing Held 5/24/23 [Docket No. 1270] at 27:24-28:21, 39:1-10; Transcript of Hearing Held 5/30/23 [Docket No. 1255] at 97:1-12 (Fisher testimony).

fact that the Cure Notice itself indicates that there may be additional contracts not included therein.[240] RSG may have actually relied on some of the representations in the Final APA regarding areas on which RSG was more focused, but RSG did not actually rely on the Inaccurate Representations regarding the MLA in the Final APA. Rather, even if the MLA had appeared on the Final Disclosure Schedules, RSG would not have noticed the difference in the rush to execute the Final APA.

Even if RSG had relied on the Inaccurate Representations, for the reasons stated above, the Court has already found that RSG was not damaged solely as a result of the inaccurate representation in the Final Disclosure Schedules regarding the MLA. Section 27.01(b) Texas Business and Commerce Code only allows for actual damages resulting from fraud.

In summary, RSG's claim for statutory fraud fails because (1) RSG has not shown that the representations in the First-Day Declaration, the Early Declaration, and the recitals in the Final APA were made by the Debtors for the purpose of inducing RSG to enter into a contract and RSG has also disclaimed reliance on such representations, (2) RSG did not prove that it actually relied on the Inaccurate Representations, and (3) RSG did not prove that it suffered actual damages as a result of the Inaccurate Representations.

C. Negligent Misrepresentation

RSG's third cause of action is negligent misrepresentation, which requires a plaintiff to show (1) a representation made by the defendant in the course of its business or in a transaction in which it has a pecuniary interest; (2) the representation conveyed false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation. *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

---

[240] Trustee Ex. 106 ¶ 9.

The alleged misrepresentations that form the basis for RSG's negligent-misrepresentation claim are the same as those RSG identified for its statutory-fraud claim.

As with the statutory-fraud claim, RSG cannot show justifiable reliance on misrepresentations made outside of Article 5 of the Final APA. In sections 5.17, 6.8, and 8.11 of the Final APA, the Sellers disclaimed any representations made to RSG outside of Article 5 of the Final APA, RSG disclaimed any reliance on any representations made to RSG outside of Article 5 of the Final APA, and RSG covenanted to refrain from suing the Sellers based on any representations made to RSG outside of Article 5 of the Final APA. Thus, the only representations that could potentially form the basis for a negligent-misrepresentation claim are the Inaccurate Representations.

RSG's claim for negligent misrepresentation based on the Inaccurate Representations fails because it is barred by the economic-loss doctrine.[241] "Simply stated, under the economic loss rule, a duty in tort does not lie when the only injury claimed is one for economic damages recoverable under a breach of contract claim." *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 796 (Tex. Civ. App.—Houston [1st Dist.] 2007, pet. denied); *accord Reed v. Carecentric Nat'l, LLC (In re Soporex, Inc.)*, 446 B.R. 750, 783 (Bankr. N.D. Tex. 2011) ("Under the economic loss rule, if a plaintiff only seeks to recover for the economic loss or damage to the subject matter of a contract, the plaintiff cannot maintain a tort action—the plaintiff's remedy lies under the contract."); *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) ("If the defendant's conduct . . . would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct . . . would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.").

---

[241]Although the statutory-fraud claim failed for other reasons, it was not barred by the economic-loss rule. *See Bates Energy Oil & Gas v. Complete Oilfield Servs.*, 361 F. Supp. 3d 633, 657 (W.D. Tex. 2019) ("[T]he Fifth Circuit has also held that if a particular duty is defined in both a contract and a statutory provision, and a party violates the duty enumerated in both sources, the economic loss rule does not apply.") (citing *McCaig v. Wells Fargo Bank, N.A.*, 788 F.3d 463, 474 (5th Cir. 2015)).

RSG's negligent-misrepresentation claim is barred unless RSG "can establish that [it] suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim." *Sterling Chems., Inc.*, 259 S.W.3d at 797 (citing *D.S.A. Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 664 (Tex. 1998)). The burden is on RSG to "provide evidence of this independent injury." *Id.* It cannot. RSG has asserted the same damages based on the same facts for the negligent-misrepresentation claim as for its breach-of-contract claim.

Furthermore, even if the economic-loss rule did not apply to RSG's claim for negligent misrepresentation, it would fail because—for the reasons detailed earlier—RSG has not shown actual reliance on, and has not suffered actual damages from, the Inaccurate Representations. *See Prime Income Asset Mgmt. v. One Dallas Ctr. Assocs. L.P.*, 2009 U.S. Dist. LEXIS 149355, at *12 (N.D. Tex. Feb. 18, 2009) (noting that both statutory fraud and negligent misrepresentation "share in common the requirement that the plaintiff must prove justifiable reliance on the representations made by the defendant").

D. Administrative-Expense-Claim Status

RSG asserts that its claims against the Debtors are administrative expenses entitled to priority under section 507(a)(2) of the Bankruptcy Code. Administrative expenses include "the actual, necessary costs and expenses of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A). To qualify as an actual and necessary cost under section 503(b)(1)(A), a claim against the estate (1) must have arisen postpetition (2) as a result of actions taken by the trustee or debtor-in-possession that benefited the estate. *Nabors Offshore Corp. v. Whistler Energy II, L.L.C. (In re Whistler Energy II, L.L.C.)*, 931 F.3d 432, 441 (5th Cir. 2019). As a general matter, if a trustee enters into a contract after the order for relief and subsequently breaches the contract, the other party will have a claim for damages, and the full amount of those damages arising from the trustee's breach—as determined under the contract—will constitute an administrative expense. 4 COLLIER ON BANKRUPTCY ¶ 503.06[6][a] (Richard Levin & Henry J. Sommer eds., 16th ed.); *see also Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001) (observing that section 503(b)(1)(A) claims "generally stem from voluntary transactions with third parties").

The first element required for an administrative-expense claim is satisfied because the breach of the Final APA clearly took place after the Petition Date. Nevertheless, the Trustee argues that RSG's claim cannot be considered an administrative expense because RSG's damages were incurred in the Evolution Lawsuit after the Effective Date of the confirmed Plan. *See In re Barker Med. Co., Inc.*, 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985) ("By definition, the costs [incurred after plan confirmation] cannot be administrative expenses" because they "were incurred by the debtor after discharge and after confirmation at a time when no estate existed."). The Court disagrees. RSG was damaged when the Debtors failed to indemnify RSG against the falsity of their representations, which occurred when the Final APA was executed, or perhaps shortly thereafter when the Debtors chose not to remove the Encumbrance of the MLA and instead leave the problem to RSG. It took slightly longer to mitigate and liquidate the damages, but the damage was done before the Effective Date. And even if the Court is wrong about when the damages were incurred, it is more appropriate to consider when the acts giving rise to the liability occurred. *See Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 818 (6th Cir. 1997) ("Thus, regardless of the substantive law on which the claim is based, the proper standard for determining that claim's administrative priority looks to when the acts giving rise to a liability took place, not when they accrued."); *accord In re Krisu Hosp., LLC*, No. 19-20347, 2021 Bankr. LEXIS 788, at *11–12 (Bankr. N.D. Tex. Mar. 26, 2021). In this case, the acts giving rise to the liability occurred by the time of the Closing, which occurred roughly two weeks before the Effective Date.

The second element required for an administrative-expense claim is satisfied because RSG's damages resulted from the Debtors' breach of a contract for the sale of substantially all of their assets, a contract which greatly benefited the estates. Even in a case where a postpetition contract for the sale of the debtor's assets failed because of the debtor's inability to perform under the contract, a court held that such contract provided a concrete benefit to the estate when the contract was entered into and that the attempted purchaser's claim for attorneys' fees under the contract was an administrative expense. *See In re Emerald Grande, LLC*, No. 17-00021, 2021 Bankr. LEXIS 2799, at *6–12 (Bankr. N.D. W. Va. Oct. 7, 2021). The benefit to the estate in this case is even clearer—

the Debtors actually received substantial sale proceeds that have already been used to make payments to creditors.

The parties also dispute whether RSG's claim qualifies as an administrative expense under an exception created in *Reading Co. v. Brown*, for damages inflicted on innocent third parties through a trustee's operation of the debtor's estate. 391 U.S. 471 (1968). Under the *Reading* exception, the debtor's estate need not have received a benefit. *Id.* at 485. Because the Court finds that the Debtors' estate received a substantial benefit from the Final APA, the Court need not address the applicability of the *Reading* exception. RSG's claim for breach of contract qualifies as an administrative expense under section 503(b)(1)(A) of the Bankruptcy Code.

E. Limitations on the Amount of RSG's Claim

In the Joint Pretrial Order, RSG requested (1) an administrative-expense claim of up to $5 million for the Evolution Litigation Costs, (2) an administrative-expense claim of up to $3 million for actual legal expenses in this litigation, and (3) a general unsecured claim for (i) amounts of the Evolution Litigation Costs in excess of $5 million and (ii) amounts of RSG's actual legal expenses in this litigation in excess of $3 million.[242] The Trustee has objected to RSG's claim for a general unsecured claim for the excess amounts, arguing that the claim was not timely asserted. The Court agrees.

There are a few relevant deadlines to consider. Under paragraph 2 of Amendment No. 2, RSG had a deadline to assert causes of action arising out of a breach of representations and warranties in the Final APA relating to the MLA. Under paragraph 85 of the Confirmation Order, there was a deadline for filing requests for payment of administrative-expense claims. Both deadlines have long since passed, but the parties have extended them by agreement. The most recent extension was documented in the *Seventh Stipulation and Agreed Order for Extension of Deadline*

---

[242] RSG describes its third claim as an "unsecured" claim, but the administrative-expense claims it has asserted are also, technically, unsecured. The Court understands RSG's request for an unsecured claim for the excess amounts from its other claims to be for a general unsecured claim not entitled to priority treatment, as opposed to RSG's administrative-expense claims that are entitled to priority treatment.

to File Claims [Docket No. 826] (the "**Seventh Deadline Extension**"), which extended both deadlines to April 16, 2021.

RSG filed its administrative-expense claim on April 16, 2021, requesting an order allowing its claim for $5 million and for fees in this action.[243] In its original claim, RSG acknowledged that the amount it was seeking was less than the amount of damages that RSG actually suffered. In a reply brief filed two months later, RSG again confirmed that it was only seeking to recover a portion of the damages it suffered. Docket No. 885 ¶ 1.

On December 5, 2022, RSG and the Trustee filed another stipulation regarding additional reserved amounts for RSG's administrative-expense claim. Docket No. 1058. In that stipulation, the parties confirmed that RSG had sought damages "in the amount of $5 million, in addition to certain requested legal fees and expenses" and that the Trustee had established reserves of $5 million. *Id.* ¶¶ 4–5. Under the stipulation, the Trustee agreed to increase the reserves for RSG's administrative-expense claim by $3 million to account for RSG's claimed legal expenses in this action. *Id.* ¶¶ 7–8. There was no mention of any additional claims being asserted by RSG.

In a proposed version of the joint pretrial order that RSG filed on February 8, 2023, RSG—for the first time—added its request for a general unsecured claim for (i) amounts of the Evolution Litigation Costs in excess of $5 million and (ii) amounts of RSG's actual legal expenses in this litigation in excess of $3 million. Docket No. 1085 at 4–5. This request was repeated in the final Joint Pretrial Order.

The deadline for filing general unsecured claims under section 1.23 of the Plan was September 9, 2020. While the Seventh Deadline Stipulation extended certain deadlines in Amendment No. 2 and the Confirmation Order, it only extended those deadlines to April 16, 2021. The only claim that RSG asserted by that deadline was for $5 million plus its fees in this action. This was not a mistake, either. RSG made clear that it

---

[243] The motion and the supporting brief were originally filed on April 16, 2021, but the motion was re-filed three days later due to an error with the original filing. *See* Docket Nos. 831 and 837; *see also* Joint Pretrial Order ¶ 93.

knew it was asserting a claim for less than the full amount of its damages.

V. CONCLUSION

RSG is entitled to an administrative-expense claim against the Debtors for the Debtors' breach of warranties in the Final APA and for attorneys' fees. While the Evolution Litigation Costs total $7,860,491.76, RSG limited the amount of its request for an administrative-expense claim based on the Evolution Litigation Costs to $5 million and is granted an administrative-expense claim in that amount. RSG's request for a general unsecured claim for the excess amount is time barred.

RSG is ordered to submit a declaration regarding its claim for additional attorneys' fees, and the Court will hold a hearing to consider the reasonableness of those fees, if necessary.

For these reasons, the Court **ORDERS**:

1. RSG is granted an administrative-expense claim in the amount of $5,000,000.

2. RSG's request for a general unsecured claim is denied.

3. RSG must submit a declaration detailing the attorneys' fees it is seeking pursuant to section 38.001 of the Texas Civil Practices and Remedies Code within 21 days of the entry of this Order. If the Trustee objects to the amount of RSG's claim for attorneys' fees, the Trustee must file an objection within 14 days of the filing of RSG's declaration, after which RSG may file a reply within 14 days and the Court will either rule on the papers or set the matter for hearing.

END OF ORDER