SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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KEVIN M. TROMER, AS SELLERS' REPRESENTATIVE FOR THE SELLERS OF TEAM FOCUS INSURANCE GROUP, LLC,

Plaintiff,

- v -

PEAK6 INSURTECH HOLDINGS LLC,DOUGLAS W. BULLINGTON, THE DOUGLAS WARREN BULLINGTON 2020 IRREVOCABLE TRUST, DATED DECEMBER 28, 2020, THE KEVIN M. TROMER REVOCABLE TRUST AGREEMENT, DATED DECEMBER 5, 2013, THE KEVIN M. TROMER 2020 IRREVOCABLE TRUST, DATED DECEMBER 21, 2020,

Defendant.

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INDEX NO. 653530/2023

MOTION DATE 08/30/2023, 10/13/2023

MOTION SEQ. NO. 002 004

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 51, 68

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 69, 70, 72, 74, 75, 76, 77

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

Upon the foregoing documents, Defendant and Counterclaim-Plaintiff PEAK6 Insurtech Holdings LLC's motion for summary judgment on its first counterclaim (Mtn. Seq. 004) is denied without prejudice. Defendant and Counterclaim-Plaintiff's motion for a stay pending resolution of its summary judgment motion (Mtn. Seq. 002) is denied as moot.

On motion for summary judgment, the movant bears the burden of demonstrating that there is no triable issue of material fact such that the movant is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). PEAK6 contends that the $3.1 million

Earnout allegedly owed to it by Sellers is final and binding on the parties as a matter of law because, under the terms of § 2.6 of the Amended and Restated Unit Purchase Agreement (the **UPA**; NYSCEF Doc. No. 28), Plaintiff failed to properly object to the Earnout Statement. The argument fails.

PEAK6 argues that Plaintiff Counsel's June 19, 2023 letter did not "specify in reasonable detail" Plaintiff's objections to the Earnout Statement, nor give "the basis therefor" as required by UPA § 2.6(b) (NYSCEF Doc. No. 28 § 2.6[b]). But Plaintiff's letter was clear and specific: Plaintiff objected to every number in the Earnout Statement because Plaintiff believed that the values were improperly calculated and based on specific covenant violations including UPA § 2.5(d) (NYSCEF Doc. No. 62). Plaintiff set forth in great detail the basis upon which Sellers objected to the Earnout Statement, citing the specific provisions of the UPA Plaintiff believed PEAK6 had violated and the corresponding violative conduct, including supporting exhibits (*Id.*). Plaintiff also specifically indicated its belief that certain amounts in the Earnout Statement were incorrect, such that the calculation must have been done improperly (*Id.*). Plaintiff's letter was also unquestionably timely, as it was sent 31 days after the receipt of the email containing the Earnout calculation, and just 21 days after PEAK6 confirmed this email was intended as the Earnout Statement, well within the 45-day objection period specified by UPA § 2.6(b) (NYSCEF Doc. Nos. 60, 61).

Thus, PEAK6 is not entitled to summary judgment because the record shows Plaintiff timely and in significant detail objected to PEAK6's Earnout Statement, indicating breaches of the UPA that would unquestionably affect the inputs to the Earnout calculation. To the extent that PEAK6

indicates that more detail is required, that amounts to little more than leaning too heavily on the "reasonable detail" language of UPA § 2.6(b).

Requiring the Earnout calculation to be determined prior to the resolution of Plaintiff's breach of contract claims would put the cart before the horse. The approach suggested by the text of the UPA, and endorsed by the Second Circuit, is to first resolve the contractual disputes and only then submit those determinations to the accountant arbitrator for proper calculation, if appropriate (*XL Capital, Ltd. v Kronenberg*, 145 Fed Appx 384, 385 [2d Cir 2005]). If there are any such issues of calculation remaining after the resolution of Plaintiff's breach of contract claims, Plaintiff is not precluded from raising such concerns before the accountant at that time, pursuant to the terms of UPA § 2.6.

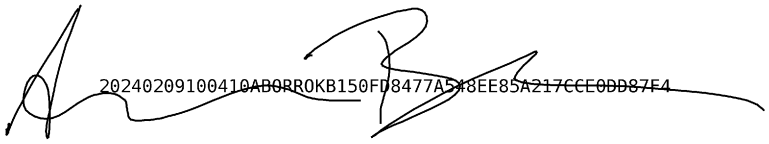
Given the above, PEAK6's motion for a stay pending the resolution of its summary judgment motion must be denied. PEAK6 argues that this motion must be stayed because the Earnout amount must first be determined according to the accountant resolution process provided for in UPA § 2.6. As the above discussion of the text of the UPA and the implications of *XL Capital* makes clear, this is incorrect and the motion must be denied.

The Court has considered PEAK6's remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Defendant and Counterclaim-Plaintiff PEAK6's motion for partial summary judgment on its counterclaims (Mtn. Seq. No. 004) is denied; and it is further

ORDERED that Defendant and Counterclaim-Plaintiff PEAK6's motion for a stay pending resolution of its summary judgment motion (Mtn. Seq. No. 002) is denied.



2/8/2024
DATE

ANDREW BORROK, J.S.C.

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