

**John Wiley & Sons, Inc. v Savvas Learning Co. LLC**

2024 NY Slip Op 31841(U)

May 17, 2024

Supreme Court, New York County

Docket Number: Index No. 655049/2023

Judge: Andrew Borrok

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

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JOHN WILEY & SONS, INC.	<b>INDEX NO.</b>	<u>655049/2023</u>
Plaintiff,	<b>MOTION DATE</b>	<u>01/10/2024</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>001</u>
SAVVAS LEARNING COMPANY LLC,		
Defendant.	<b>DECISION + ORDER ON MOTION</b>	

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20  
were read on this motion to/for DISMISS.

**Borrok, J.**

This case involves John Wiley & Sons, Inc. (**Wiley**)’s attempt to have Savvas Learning Company LLC (**Savvas**) pay potentially twice for the same licenses sold by Savvas based on a coding error that Savvas discovered and brought to Wiley’s attention but which Wiley refused to acknowledge and credit towards a final invoice by now in its complaint in this case seizing on a provision of the parties’ Agreement (hereinafter defined) requiring Savvas to hire an independent accountant notwithstanding documentation provided to Wiley which purports to fully explain the basis for certain prior overpayments based on the code error (which Wiley does not appear to dispute).

Reference is made to an API Partner Agreement (the **Agreement**), dated October 16, 2015, between Knewton and Pearson Education, Inc., as amended. Wiley is Knewton’s successor.

Savvas is Pearson Education, Inc.'s successor. Pursuant to the terms of the Agreement, Savvas sold licenses for online learning products owned by Wiley and agreed to pay Wiley based on invoices produced by Wiley subject to the terms of the Agreement.

Pursuant to Section 2.12 of the Agreement, Savvas agreed within 30 days after the end of each quarter to produce a Sales Report indicating, among other things, the number of Licenses distributed or sold and a calculation of Product Fees owed to Wiley, and Savvas agreed to pay applicable invoices upon receipt from Wiley for each license sold:

**2.1.1. Product Fees.** In consideration of the Knewton Platform Services provided in connection with each Online Learning Product, Partner shall pay Knewton the fees set forth in the applicable Product Proposal with respect to each Online Learning Product (the “**Product Fees**”). For clarity, the Parties may agree to implement different Product Fees in a Product Proposal from those set forth on **Appendix A** which sets only guidelines, and in such cases, the Product Fees set forth in such Product Proposal shall be controlling. Partner shall pay such Product Fees on a quarterly basis (i) within thirty (30) days after the end of each calendar quarter of each year in which Product Fees accrue based on Licenses or (ii) within thirty (30) days after receipt of an invoice from Knewton accompanied by a Registration Report for such calendar quarter of each year in which Product Fees accrue based on Registrations. Notwithstanding the foregoing, Partner shall make the first payment for Product Fees owed pursuant to Product Proposal #1 in accordance with the schedule set forth in Section 4 of Product Proposal #1.

(NYSCEF Doc. No. 11, § 2.1.1).<sup>1</sup>

Pursuant to Section 2.6 of the Agreement, the parties agreed that in the event of error in the Sales Reports or invoices, adjustment would be made as to any payment made by Savvas. To facilitate any such adjustment and to ensure that the veracity of the information provided in support of any

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<sup>1</sup> To wit, nothing in Section 2.1.1 permits Wiley to be paid twice for the same sold licenses and as discussed below, this appears to be exactly what they seek in this lawsuit.

claimed adjustment, the Agreement provides that each party could have an independent accountant selected by such party inspect the relevant records maintained by that party of any Sales Report or invoice provided under the Agreement for the purpose of verifying the accuracy of such Sales Report or invoice. In the event of an underpayment, Savvas was required to pay the amount of an underpayment. In the event of an overpayment, Savvas was to receive a credit on its next invoice. The Court notes that the Agreement however does not address what occurs in the event of an overpayment on the final invoice (*i.e.*, if Savvas had made the full payment that Wiley said it was owed on the final invoice notwithstanding the dispute as to prior invoices based on a coding error of Savvas):

**2.6. Records; Audit.** During the Term and thereafter until one (1) year after the end of the Wind-Down Period, (i) Partner will keep complete, accurate and detailed records as is reasonably necessary to show and support the Product Fees payable to Knewton under this Agreement; (ii) Knewton will keep complete, accurate, and detail records as is reasonably necessary to show and support the Integration Fees, Professional Services and, if applicable, Product Fees based on Registrations, payable to Knewton under this Agreement, and (iii) ***each Party may, by giving written notice of not less than 14 days*** (but not more frequently than once per calendar year) ***have independent accountants*** selected by such Party ***inspect***, during regular business hours, the relevant records maintained by that Party and its affiliates with respect to any Sales Report provided by Partner or ***any invoice provided by Knewton under the Agreement***, for the purposes of verifying the accuracy of such Sales Report or invoice. Partner and Knewton may require the auditors to sign appropriate nondisclosure agreements and to comply with reasonable security requirements at such Party's facilities.

***A Party's right to audit any particular Sales Report, Registration report or invoice will be limited to the two (2) year period following the issuance of the Sales Report, Registration report, or invoice.*** The auditing Party agrees to keep confidential all non-public information relating to the business affairs of the applicable Party that may be learned in the course of such audit and to impose on its accountants and agents a similar obligation. ***If any such audit identifies an underpayment or overpayment of Product Fees, Integration Fees, or Professional Services Fees Partner will pay Knewton the amount of such underpayment or Knewton will credit the amount of such overpayment on the next invoice, as applicable within thirty (30) days after the date the audit report is delivered.*** The auditing Party will pay the fees charged by its accounting firm for any such audit; provided, however, that if audit uncovers an underpayment or overpayment of fees by either Party during any twelve (12) month period that exceeds five percent (5%)

of the total fees paid for such period, then the fees of such accounting firm will be paid Partner in the case of an underpayment and Knewton in the case of an overpayment.

(NYSCEF Doc. No. 11, § 2.6 [emphasis added]). The Agreement expired on June 1, 2022

(NYSCEF Doc. No. 2, ¶ 21).

According to Wiley, by letter dated March 16, 2022 (the **March 16 Letter**), two months before the expiration of the Agreement, Savvas indicated that it had made a coding error that resulted in \$841,297 of overpayments and included certain documentation which purported to explain the basis for overpayment calculation, demanded a credit in the same amount pursuant to Section 2.6 of the Agreement, but did not otherwise give notice of its intention to invoke its rights under Section 2.6 to appoint an independent accountant (*id.* ¶¶ 22-27).<sup>2</sup> Wiley then alleges that it declined to give the credit and instead sent invoices for Q1 2022 and Q2 2022. Apparently correspondence between the parties ensued (although almost none of it is in the record), and subsequently (in October) Wiley explained that it had declined to give the credit because the Agreement “does not provide a mechanism for adjustment to be made in this manner” (*id.*, ¶ 28).

**Wiley does not allege that it disputed that the credit Savvas indicated it was entitled to was in fact correct.** Nor does Wiley allege that Wiley indicated that Savvas needed to hire an independent accountant per the terms of the Agreement to verify the accuracy of the information it was provided. In fact, Wiley concedes that Savvas paid the invoices it received but deducted the \$841,297 of purported prior overpayment. Wiley then declared breach and brought this lawsuit based on Savvas withholding amounts from the disputed prior invoices. **Wiley does not**

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<sup>2</sup> According to Wiley, a portion of the \$841,297 related to periods prior to the two years which Savvas was permitted to audit under Section 2.6 and is thus not recoverable. Wiley does not indicate in its papers what portion of the \$841,297 falls outside of the two-year period set forth in Section 2.6 of the Agreement.

**allege that Savvas sold licenses that it did not pay for in the complaint.** Wiley also argues that after the final invoice was issued by Wiley, Savvas has no remedy as to any previous overpayments because Section 2.6 only entitles them to a credit against future invoices. After the final invoice is issued, according to Wiley, Savvas can not receive any credit and has no remedy at all as to prior overpayments even if such overpayments occurred during the two year period provided in Section 2.6 (*id.*, ¶¶ 31-34). The damages they seek are the amount of overpayment they do not dispute Savvas alleges occurred and which they allege Savvas improperly credited itself as to the final invoices it issued.

Savvas filed an answer asserting affirmative defenses sounding in failure to state a claim (first affirmative defense), performance under the Agreement (second affirmative defense), lack of damages on the part of Wiley (third affirmative defense), unjust enrichment (fourth affirmative defense), breach of the implied covenant of good faith and fair dealing (fifth affirmative defense), unclean hands, estoppel, waiver, or laches (fifth affirmative defense), failure to mitigate damages (seventh affirmative defense), and setoff (eighth affirmative defense), and counter-claim for declaratory judgment due to a material mistake of fact that Wiley was not entitled to an overpayment. For its part, Savvas alleges:

1. Plaintiff, Wiley, is a New York corporation with its principal place of business located in Hoboken, New Jersey.
2. Defendant, Savvas, is a Delaware limited liability company with its principal place of business located in Paramus, New Jersey.
3. This Court has jurisdiction over Plaintiff under CPLR §§ 301 and 302 because, among other things, Plaintiff, upon information and belief, transacts business in the State of New York and has consented to the personal jurisdiction of this Court pursuant to Section 9.9 of the API Partner Agreement entered into by Knewton, Inc. (“Knewton”) and Pearson Education, Inc. (“Pearson”) dated October 16, 2015 (“Agreement”). As discussed below, Wiley and Savvas are successors-in-interest to the Agreement.

4. Venue is proper in New York County under CPLR § 501 because the parties agreed to venue in New York County pursuant to Section 9.9 of the Agreement.
5. On or about October 16, 2015, Knewton and Pearson entered into the Agreement in connection with providing Pearson the right to integrate the Knewton Platform Services with its online learning content and other educational materials that Pearson sold to its customers.
6. Pursuant to Amendment No. 3 to the Agreement, dated May 6, 2019, Pearson K12 Learning, LLC became the successor-in-interest to Pearson under the Agreement. Pearson K12 Learning, LLC later changed its name to Savvas.
7. Pursuant to Amendment No. 4 to the Agreement, dated January 8, 2020, Wiley represented that it acquired certain assets of Knewton, including the Agreement, and became the successor-in-interest to Knewton under the Agreement, including “assum[ing] all of the legal obligations and responsibilities of Knewton, Inc. arising under the Agreement.”
8. On or about March 16, 2022, Savvas discovered an error in its calculation of Product Fee payments for the time period Q1 of 2017 through Q4 of 2021. Specifically, due to a coding error, there was a double counting of the number of Licenses distributed or sold to depositories in certain states, and therefore, the applicable Product Fees payable was overstated and overpaid in the amount of \$841,297.
9. Savvas raised this error with Wiley by letter dated March 16, 2022, which provided Wiley with evidentiary data and support for Savvas’s calculation of the overpayments. To date, Wiley has not disputed Savvas’s calculation of the overpayment.
10. Because Wiley was not entitled to the overpaid amount, which had only been paid due to a mistake in calculating the Product Fees, Savvas requested a credit in the amount of \$841,297.
11. In fact, Wiley has been paid in full by Savvas for each License sold or distributed to an Online Learning Product during the Term of the Agreement.
12. Wiley refused to provide a credit for the overpaid amount. Instead, Wiley demanded full payment, including for Licenses that had not sold or distributed pursuant to the Agreement.
13. Accordingly, on or about August 17, 2022, Savvas paid Wiley on all invoices due, but withheld a credit in the amount of \$841,297.
14. Thereafter, despite good faith efforts, the parties have been unsuccessful in resolving this dispute.

(NYSCEF Doc. No. 7, ¶¶ 1-14).

More specifically as to the counterclaim, Savvas indicates:

15. Savvas repeats and realleges each of the allegations made in the foregoing paragraphs as though fully set forth herein.
16. There is an actual case in controversy between Savvas and Wiley regarding \$841,297 that Savvas overpaid Wiley, and which, as a result, Savvas retained as a credit.
17. Savvas overpaid Wiley in the amount of \$841,297 due to a mistake of material fact. In particular, due to a coding error, Savvas double counted the number of Licenses distributed or sold to depositories in certain states, and therefore, the applicable Product Fees payable was overstated and overpaid.
18. Accordingly, Wiley was not entitled to the overpaid amount, and on or about August 17, 2022, Savvas applied and retained a credit in the amount of \$841,297.
19. Wiley retaining the overpaid amount would have constituted unjust enrichment and/or a breach of the implied covenant of good faith and fair dealing under the Agreement.
20. Therefore, Savvas requests judgment, pursuant to CPLR § 3001, declaring that it was proper for Savvas to apply and retain a credit in the amount of \$841,297.
21. Savvas has no adequate remedy at law.

(*Id.*, ¶¶ 15-21).

Wiley has moved to dismiss the unjust enrichment (fourth), breach of implied covenant of good faith and fair dealing (fifth) and set-off (eighth) affirmative defenses and the declaratory judgment counterclaim based on the factual assertion that Savvas did not strictly comply with Section 2.6 set forth above.

In support of its motion to dismiss Wiley adduces a letter (the **September 23 Letter**), dated September 23, 2022 (NYSCEF Doc. No. 12) from Savvas to Wiley which purports to respond to

a letter, dated September 1, 2022 (the **September 1 Letter**) from Wiley to Savvas (which September 1 Letter is not in the record), indicating that Savvas provided adequate documentation for the credit it took and that it has in fact paid everything it was required to pay under the Agreement – *i.e.*, it paid for every single license (which, if true, would mean that Wiley has no actual damages):

Dear Ms. Thomas:

This letter is in response to your letter dated September 1, 2022 in connection with the API Partner Agreement entered into by and between John Wiley & Sons, Inc., successor-in-interest to Knewton, Inc. (“Wiley”) and Savvas Learning Company LLC (“Savvas”) dated October 16, 2015 (the “Agreement”) alleging breach of clause 2.2 by Savvas.

Savvas disagrees with Wiley’s claim that Savvas has breached Clause 2.2 of the Agreement in connection with the payments made by Savvas for invoices for Q1/2022 and Q2/2022 sent to Savvas by Wiley on June 28, 2022 and July 20, 2022, respectively. Further, Savvas disagrees with Wiley’s determination that the Agreement does not provide a mechanism for adjustments to be made through credits applied to subsequent invoices. In fact, Section 2.6 contemplates that the parties may find overpayments and/or underpayments were made and that when such overpayments or underpayments are properly documented, the appropriate credit or adjustment would be made to the next invoice(s) issued by Wiley. Savvas does not dispute that the prior overpayments were made based on Sales Reports provided by Savvas, but Savvas disputes Wiley’s contention that adjustments are not supported by the terms of the agreement or that Wiley should be paid twice for the same Licenses, when clearly, the terms of the Agreement provide that Product Fees are due to Wiley for each License sold or distributed to an Online Learning Product. In fact, Wiley has been paid in full by Savvas for each License sold or distributed to an Online Learning Product during the Term within the thirty (30) day payment period in accordance with Clause 2.2 of the Agreement.

Included with the letter sent to Wiley, dated March 16, 2022, Savvas provided clear, detailed documentation evidencing prior overpayments of Product Fees made by Savvas to Wiley. Wiley did not dispute such overpayment amounts or request any further documentation evidencing the overpayment of Product Fees. Nor is there any reasonable argument that Wiley should be paid twice for the same Licenses. Upon receipt of the documentation provided, Wiley had an obligation to credit such overpayment of Product Fees against the next invoices (respectively the invoices issued by Wiley for Q1/2022 and Q2/2022). When the overpayment credits were not issued by Wiley, to make timely and complete payment to Wiley for the Q1/2022 and Q2/2022 invoices pursuant to Clause 2.2, and avoid making any further overpayments to Wiley, Savvas credited such overpayment amounts to the sums invoiced by Wiley per the Q1/2022 and Q2/2022 invoices. Savvas then paid both invoices within the thirty (30) day period in accordance

with Clause 2.2 of the Agreement. Wiley accepted these payments from Savvas on August 17, 2022. Therefore, Savvas did not breach Clause 2.2 of the Agreement.

Pursuant to the terms of Exhibit C of the Agreement and the Product Proposals issued by Wiley, Product Fees are due to Wiley for each sale or distribution of a License to an Online Learning Product. With the payments made by Savvas pursuant to the Q1/2022 and Q2/2022 invoices, Savvas has now paid Wiley in full for each License sold or distributed to an Online Learning Product during the Term of the Agreement. Savvas reiterates that it disagrees with the contention that the Agreement does not support payment adjustments, or that Wiley should be paid twice for the same Licenses where, as here, (i) there were overpayments made due to a coding error backed up by clear and undisputed evidence; (ii) the overpayment of Product Fees can be readily remedied by applying the appropriate credits for such overpayments to subsequent invoices pursuant to the terms of Clause 2.6 of the Agreement; and (iii) the retention of such overpayments would, otherwise, result in unjust enrichment on the part of Wiley.

Further, Savvas has provided substantial documentation and explanation as to the overpayment of Product Fees, there is no dispute as to the prior overpayment of Product Fees made by Savvas nor the amount of such overpayment amounts, and the Agreement explicitly contemplates that Wiley, upon receipt of adequate documentation, would issue a credit for such overpayment of Product Fees within thirty (30) days of receipt of such documentation. Savvas has paid the correct final invoice amounts due for each license sold or distributed to an Online Learning Product with the final payments made by Savvas pursuant to the invoices issued by Wiley for Q1/2022 and Q2/2022 within thirty (30) days from receipt. Wiley received the final payments from Savvas on August 17, 2022. Therefore, we conclude Savvas has not breached Clause 2.2 of the Agreement; and rather, has paid all Product Fees rightfully due to Wiley for each License sold or distributed to an Online Learning Product during the Term of the Agreement.

Lastly, we would like to note that Savvas has found this partnership with Wiley over the past seven years rewarding and welcomes the opportunity to collaborate in the future should the opportunity arise.

While we expect this letter fully settles this matter, the foregoing response is not a full statement of the facts and nothing herein constitutes, an admission or any waiver by Savvas of any rights, remedies, claims or defenses it may have, all of which are reserved.

Please do not hesitate to contact me if you have any questions regarding this response or the supporting documentation.

Sincerely,  
Paula Massenaro

(NYSCEF Doc. No. 12).

To be clear, the September 23 Letter indicates that Wiley did not dispute and otherwise acknowledged the coding error in its September 1 Letter and indicates that perhaps Wiley breached the Agreement by indicating that the Agreement does not provide for adjustment (which it does) instead of indicating to Savvas (if it had questions about the documents it had been provided) that Savvas needed to hire an independent accountant to verify the information.

As discussed above, Savvas communicated its suspected overpayment—with corroborating evidence—to Wiley in March 2022. In its complaint, Wiley is largely silent as to how it responded to the March 16 Letter, stating only that “[s]hortly after issuing the Q2 2022 invoice, Wiley explained to Savvas that it would not issue a credit because ‘the Agreement does not provide a mechanism for adjustments to be made in this manner’” (NYSCEF Doc. No. 2, ¶ 29). In fact, according to Wiley, some seven months later, in October 2022, Wiley indicated that Savvas would be unable to obtain a credit *even if* an overpayment were discovered pursuant to a review by the independent accountant because the term of the Agreement had expired and there were no future invoices to which a credit could be applied:<sup>3</sup>

31. On September 1, 2022, Wiley sent Savvas notice of its breach of Sec. 2.2 of the Agreement, for failure to pay the full amount owed under the Invoices. Wiley demanded full payment within thirty days of the notice.
32. Savvas responded on September 23, 2022, advising Wiley for the first time that it sought to rely on Sec. 2.6 to award itself a credit for its own overpayments.

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<sup>3</sup> Although not in the record, the parties indicated at oral argument (*tr.* 5.17.24) that there was significant contemporaneous correspondence about this overpayment (including the September 1 Letter). Those correspondence and the positions taken as a factual matter give context to Wiley’s litigation position that hiring an independent accountant was required. Significantly, as discussed above, Wiley does not allege that they indicated that an independent account was required and in its complaint only alleges that they indicated that the Agreement does not provide for adjustment which is not so.

33. Wiley responded on October 24, 2022, noting that Savvas did not follow the procedures outlined in Sec. 2.6 to obtain a credit for an overpayment. It did not provide notice of intent to appoint an independent accountant, it did not retain or otherwise rely upon an independent accountant, and it did not limit the period of time it seeks to recover overpayments to two years.
34. Savvas was free to invoke Sec. 2.6 at any time prior to the expiration of the Agreement but failed to do so. ***Sec. 2.6 provides that any credit awarded thereunder can only be applied to the next invoice. Because the Agreement expired on June 1, 2022, there are no further invoices to which such a credit can be applied. As such, Savvas forfeited its ability to recover any overpayments to Wiley.***

(NYSCEF Doc. No. 2, ¶¶ 31-34 [emphasis added]).

Wiley has now moved to dismiss the unjust enrichment (fourth) affirmative defense, breach of the covenant of good faith and fair dealing (fifth) affirmative defense, set-off (eighth) affirmative defense and declaratory judgment (counterclaim).

## DISCUSSION

On a motion to dismiss, the pleading is to be afforded a liberal construction, and the court is to accept the facts as alleged as true, accord the non-moving party the benefit of every favorable inference, and determine only whether the facts alleged fit any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]).

### ***1. Unjust Enrichment (Fourth Affirmative Defense)***

The Agreement is silent as to how an adjustment for an overpayment by Savvas can be recovered after the last invoice has been issued. This ambiguity suggests that if Savvas is in fact correct that an overpayment occurred and Wiley is correct that there is no mechanism for credit after the final invoice is issued, Wiley would be unjustly enriched by receiving double payments for

licenses sold and paid for by Savvas. Thus, the enrichment claim is not dismissed (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]; *Frio Energy Partners, LLC v Fin. Tech. Leverage, LLC*, 680 F Supp 3d 322, 338 [SDNY 2023] [“Where the contract does not clearly address the subject of the dispute, its existence will not bar a claim in quasi-contract”]).

In addition, as discussed above, given the significant correspondence between the parties as to this purported overpayment which is not in the record, it may be that Wiley previously substantively responded to Savvas in a manner that waived adherence of the requirement of an independent accountant audit given the documentation which Savvas provided to Wiley such that requiring payment would result in Wiley’s unjust enrichment. As discussed above, this is factual and can not be resolved at this stage particularly where significant discussions and correspondence took place, none of which are in the record.

The voluntary payment doctrine also does not bar Savvas’s unjust enrichment defense.

“[M]oney paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake” (*Banque Worms v BankAmerica Intern.*, 77 NY2d 362, 366-67 [1991]; *see also Manufacturers Hanover Tr. Co. v Chem. Bank*, 160 AD2d 113, 117 [1st Dept 1990]). The coding error at issue here is mistake of fact akin to a clerical error, and thus the voluntary payment doctrine does not apply (*Mut. Life Ins. Co. of N.Y. v William B. Kessler, Inc.*, 25 Misc 2d 242 [Sup Ct 1960]). The coding error at issue here appears to be mere negligence.

## ***2. Breach of the Covenant of Good Faith and Fair Dealing (Fifth Affirmative Defense)***

The covenant of good faith and fair dealing is breached when one party to the contract acts in a manner that, although not expressly forbidden by the contract, would deprive the other party of its right to receive the benefits of the agreement (*Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22 [1st Dept 1996]). The proponent of such a claim must allege facts tending to show the other party sought to prevent performance of the contract or to withhold its benefits (*id.*).

The complaint filed by Wiley in this case introduces facts which sufficiently establish this defense at this stage of the litigation. Wiley does not allege that Savvas is wrong about the credit due and, according to Wiley, it waited for seven months and until after the final invoice was issued (for which according to Wiley there could no longer be a credit) before responding to Savvas' March 16 Letter. The intention of parties in Section 2.6 is to make sure that Wiley gets paid every dollar it is owed for every license sold and to the extent of an error by either side to provide a way to resolve the dispute. The point of the provision is not to provide a manner in which Savvas can avoid paying for licenses that it sold or for Wiley through gamesmanship to get paid twice for the same licenses. Inasmuch as this is what Wiley appears to be doing, this more than establishes a cause of action sounding in breach of the implied covenant of good faith and fair dealing. Therefore, the breach of implied covenant and fair dealing defense is not dismissed.

### ***3. Set-off (Eighth Affirmative Defense)***

As discussed further below in regard to Savvas' counterclaim for a declaratory judgment, there is an actual and justiciable controversy as to whether Savvas is entitled to a credit for all or some portion of the alleged \$841,297 overpayment – *i.e.*, to avoid having to pay for the same licenses

twice. Thus, Savvas may maintain its eighth affirmative defense for a set-off as to any such amount.

#### ***4. Declaratory Judgment Cause of Action***

There is an actual and justiciable controversy as to whether Savvas is entitled to a credit for all or some portion of the alleged \$841,297 overpayment towards the final invoice, and Savvas has properly invoked this Court's jurisdiction to issue a declaratory judgment (CPLR 3001; *850 Third Ave. Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498, 499 [1st Dept 2022]). Thus, the declaratory judgment cause of action is not dismissed at this stage of the litigation. It does not matter that Wiley indicates now as part of its litigation position that factually Savvas did not hire an independent accountant when it claimed that it had made substantial overpayments based on a coding error.

Savvas seeks a declaratory judgment stating that it is entitled to a credit for its alleged \$841,297 overpayment to Wiley. The basis for Wiley's motion to dismiss is that Savvas is not entitled to a credit because it did not follow the procedures of Section 2.6. However, as discussed above, Section 2.6 does not provide a mechanism for recovering an overpayment after the last invoice is issued and, as a factual matter, it is not clear whether Wiley waived the requirements of Section 2.6 to the extent they apply. Thus, an actual and justiciable controversy exists as to whether Savvas is entitled to a credit for all or some portion of the alleged \$841,297 overpayment, and Savvas has properly invoked this Court's jurisdiction to issue a declaratory judgment (CPLR 3001; *850 Third Ave. Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498, 499 [1st Dept 2022]).

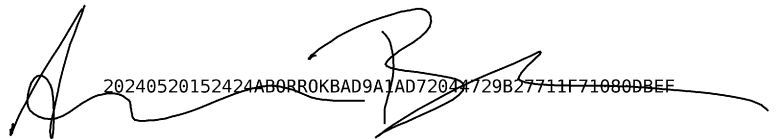
The Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is hereby

ORDERED that Wiley's motion is denied.

5/17/2024

DATE

  
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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE