UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYLER MILLER,

Plaintiff,

-against-

BRIGHTSTAR ASIA, LTD.,

Defendant.

REPORT AND RECOMMENDATION

20-CV-4849 (GBD) (JLC)

JAMES L. COTT, United States Magistrate Judge.

To the Honorable George B. Daniels, United States District Judge:

Tyler Miller brought this case against Brightstar Asia, Ltd. ("Brightstar" or "Brightstar Asia"), alleging claims stemming from Brightstar's purchase of the majority shares in his company Harvestar Solutions Limited ("Harvestar"). Following remand from the Second Circuit, Brightstar has moved to dismiss Miller's remaining claim for breach of the implied covenant of good faith and fair dealing pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, the motion should be denied.

I. BACKGROUND

The Court assumes familiarity with the facts alleged in the First Amended Complaint ("FAC" or "complaint"), Dkt. No. 24, and the procedural history set forth in the prior Report and Recommendation ("the Report"), Dkt. No. 39, Judge Daniels' Decision and Order, Dkt. No. 43, and the Second Circuit's opinion, Dkt. No. 47,

issued in this case and incorporates them by reference. The facts relevant to the present dispute are summarized below and are assumed true for purposes of this motion. *See, e.g.*, *Ebomwonyi v. Sea Shipping Line*, 473 F. Supp. 3d 338, 344–45 (S.D.N.Y. 2020), *aff'd,* 2022 WL 274507 (2d Cir. Jan. 31, 2022).

A. Relevant Facts

Miller and his business partner Omar Elmi ("Elmi") co-founded Harvestar, a "very successful" business that refurbishes pre-owned mobile telephones. FAC ¶¶ 9–11. Brightstar, a "significant customer of Harvestar" and "one of the largest distributors of mobile telephones in the world," purchases refurbished mobile devices for resale. *Id.* ¶¶ 11–12. In 2018, representatives from Harvestar and Brightstar negotiated a deal: Brightstar purchased from Miller and Elmi a 51% controlling stock interest in Harvestar, leaving Miller and Elmi each owning a 24.5% minority interest in the company. *Id.* ¶ 15. The parties also agreed to certain "valuable" "put" and "call" rights for Miller and Elmi, which give them "the right to sell [their] remaining minority interest in Harvestar to Brightstar Asia for a defined amount or, alternatively, to repurchase for a defined amount the securities sold to Brightstar Asia." *Id.* ¶ 17.

In connection with the purchase, representatives from Brightstar and Miller and Elmi, on behalf of themselves and Harvestar (collectively, "the parties"), executed several agreements outlining the parties' relationship, including a shareholders agreement dated April 9, 2018 (the "Shareholders Agreement"), which

defined "the rights, duties and obligations of the parties" as well as Miller's and Elmi's put and call rights. *Id.* ¶¶ 16–17 & Ex. 1. In Section 14 of the Shareholders Agreement, the parties agreed:

> that any transactions between [Harvestar] . . . and [another business or investor] . . . will be on terms no less favorable to [Harvestar] than would be obtainable in a comparable arm's-length transaction.

FAC ¶ 18; Shareholders Agreement at 16, Dkt. No. 24-1. In Section 29(a), the parties further agreed:

> To the maximum extent permitted by applicable law, no Shareholder[—*i.e.*, Brightstar, Miller, or Elmi—](solely in its capacity as such), . . . *shall owe any duty (including any fiduciary duty)* to [Harvestar] *or to any other Shareholder* other than a duty to act in accordance with the implied contractual covenant of good faith and fair dealing. The parties hereto acknowledge and agree that any Shareholder *acting in accordance* with this [Shareholders] Agreement *shall* (a) *be deemed to be acting in compliance with such implied contractual covenant*, and (b) not be liable to [Harvestar], to any other Shareholder or to any other Person that is a party to or is otherwise bound by (or is a beneficiary of) this [Shareholders] Agreement for its reliance on the provisions of this [Shareholders] Agreement.

Shareholders Agreement at 19 (emphasis added).

Other agreements that the parties executed as part of the deal included the Master Services Agreement ("MSA"), Dkt. No. 63-1, and Statement of Work #1 ("SOW"), Dkt. No. 63-2 (collectively, with the Shareholders Agreement, "the 2018 Agreements"). FAC ¶ 16. The MSA provides that "[a]ll pricing for Services will be

stated in an applicable SOW," MSA at 2, "[t]he rates, fees and charges to be charged to and paid by Brightstar are set forth in the applicable SOWs," and "there are no other applicable rates or charges." *Id.* at 5. Meanwhile, the SOW provides that "[p]ricing (and the rate card) shall be revised quarterly to meet fair market on material and labor." SOW at 3.

Miller alleges that "[a]lmost immediately upon obtaining majority control of Harvestar, . . . Brightstar Asia mismanaged the company and caused it to engage in conflict[ed] transactions," FAC ¶ 21, thus "using Harvestar to create a profit for itself and its affiliates . . . while at the same time destroying the value of" Miller's put and call rights. *Id.* ¶ 28. According to Miller, Brightstar specifically "us[ed] Harvestar to repair and refurbish up to 8,000 to 10,000 mobile devices per month for its affiliate on terms less favorable to Harvestar than Brightstar Asia could obtain in a comparable arm's-length transaction," and "has caused, and continues to cause, Harvestar to repair handsets for its insurance affiliate at a cost [of] $50 per device less than" it was previously paying a third party. *Id.* ¶ 27.

B. Recent Procedural History

Following appeal of the prior judgment, which had dismissed Miller's complaint in its entirety, the Circuit vacated and remanded solely as to Miller's claim for breach of the implied covenant of good faith and fair dealing. *See Miller v.*

Brightstar Asia, Ltd., 43 F.4th 112, 125–26 (2d Cir. 2022).[1] Thus, on remand, Miller's only remaining cause of action is for breach of the implied covenant of good faith and fair dealing (Count III) (FAC ¶¶ 46–55). On March 17, 2023, Brightstar moved to dismiss Miller's remaining claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Dkt. No. 61, and filed a Memorandum of Law ("Def. Mem."), and the Declaration of Frankie N. Spero dated March 17, 2023 in support of the motion with accompanying exhibits. Dkt. Nos. 62–63. Miller filed an opposition memorandum on March 31, 2023 ("Pl. Opp."), Dkt. No. 64, and Brightstar filed a reply ("Def. Reply") on April 7, 2023. Dkt. No. 65.

II. DISCUSSION

A. Legal Standard

Under Rule 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Williams v. Novoa,* No. 19-CV-11545 (PMH), 2021 WL 431445, at *3 (S.D.N.Y. Feb. 5, 2021) (quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim is plausible on its face 'when the plaintiff pleads factual content

[1] Although the Circuit otherwise affirmed the dismissal of the other claim that Miller appealed, it noted that the dismissal should have been for failure to state a claim rather than for lack of subject matter jurisdiction. *See Miller*, 43 F.4th at 125–26.

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). The Court may consider "not only the assertions made within the four corners of the complaint itself, but also those contained in documents attached to the pleadings or in documents incorporated by reference." *Kraiem v. JonesTrading Institutional Servs. LLC.*, 492 F. Supp. 3d 184, 192 (S.D.N.Y. 2020) (quoting *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001)).

B. The Master Services Agreement and Statement of Work Are Properly Considered on This Motion

As a threshold matter, Brightstar urges the Court to consider the MSA and SOW in addition to the Shareholders Agreement in adjudicating its motion to dismiss. *See* Def. Mem. at 4–6; Def. Reply at 6–7.[2] "[E]xtrinsic documents may be considered as part of the pleadings if they either are (1) attached to the complaint; (2) incorporated into the complaint by reference; or (3) integral to the complaint." *DeLuca v. AccessIT Grp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010). The MSA and SOW are not attached to the first amended complaint.

"To be incorporated by reference, the complaint must make 'a clear, definite and substantial reference to the documents"—"limited quotation of documents not attached to the complaint" is insufficient. *Id.* (cleaned up) (citing cases). The MSA

[2] As Brightstar did not make this argument in its prior motion, the Court did not previously consider it.

and SOW are mentioned explicitly in only one paragraph of the first amended complaint. *See* FAC ¶ 16. Thus, the documents cannot be considered to have been incorporated into the complaint by reference.

However, "a document may be considered 'integral' to the complaint," and thus reviewable by the Court on a motion to dismiss, "where the plaintiff relies heavily on [its] terms and effect in pleading his claims and there is no serious dispute as to [its] authenticity." *U.S. ex rel. Foreman v. AECOM*, 19 F.4th 85, 107 (2d Cir. 2021) ("*Foreman*"). The Second Circuit has emphasized that "a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

Here, Miller specifically alleges that

> the parties executed numerous other documents that outlined the relationship of the parties moving forward. For example, Brightstar . . . and Harvestar . . . executed [the MSA] and [SOW] that together detailed the services Harvestar was to provide to Brightstar.

FAC ¶ 16.

Despite not contesting the documents' authenticity, Miller opposes the Court's consideration of the MSA and SOW. He cites to *Goel v. Bunge, Ltd.*, *see* Pl. Mem. at 10, where the documents at issue were the plaintiff's deposition testimony in a prior state action and an affidavit he submitted in a separate proceeding. 820

F.3d 554, 559 (2d Cir. 2016). The operative complaint in that case referred only to "sworn testimony," *id.*, and to the "proceeding only in passing." *Id.* n.4. There, the Circuit warned that a "complaint that alleges facts related to or gathered during a separate litigation does not open the door to consideration, on a motion to dismiss, of any and all documents filed in connection with that litigation." *Id.* at 560. Miller argues that his singular references to the MSA and SOW are similarly too "isolated" to "render the documents integral to the" complaint. Pl. Mem. at 12.

While it is true that "[m]erely mentioning a document in the complaint will not satisfy this standard; indeed, even offering 'limited quotation[s]' from the document is not enough," *Goel*, 820 F.3d at 559 (quoting *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006)), the "Circuit has [also] cautioned district judges to be mindful of litigants who cherry-pick among relevant documents, and has clarified that district courts may consider relevant documents that are fairly implicated by a plaintiff's claims, irrespective of whether they are part of the pleadings." *Barker v. Bancorp*, Inc., No. 21-CV-869 (KPF), 2022 WL 595954, at *6 (S.D.N.Y. Feb. 25, 2022) (citing *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011); *Glob. Network Commc'ns, Inc.*, 458 F.3d at 156–57; *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991)).

Goel, which involved the consideration of legal testimony, specifically distinguished the kinds of materials at issue in that case from those at issue here, namely, "a contract or other legal document containing obligations upon which the

plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim"—was not attached to the pleadings. *Goel*, 820 F.3d at 559. Indeed, the Circuit has specifically "recognized the applicability of [the 'integral' to the complaint] exception where the documents consisted of emails that were part of a negotiation exchange that the plaintiff identified as the basis for its good faith and fair dealing claim," *Foreman*, 19 F.4th at 107–08 (citing *L-7 Designs, Inc.*, 647 F.3d at 422), "or . . . of contracts referenced in the complaint which were essential to the claims." *Id.* (citing *Chambers*, 282 F.3d at 153 n.4). The MSA and SOW comfortably fit into this category. *See, e.g.*, *DeSouza v. PlusFunds Grp., Inc.*, No. 05-CV-5990 (JCF), 2007 WL 4287745, at *2 (S.D.N.Y. Dec. 7, 2007) ("In an action for breach of contract, these principles allow the court to analyze the contract at issue on a motion to dismiss." (citing cases)).

Illustratively, in *Pearson Capital Partners LLC v. James River Insurance Co.*, the court concluded that the defendant's "commercial general liability policy" in effect at the time of the incidents giving rise to the suit, although not attached to the complaint, was nevertheless "integral" and therefore properly considered on a motion to dismiss, as "the dispute between the parties center[ed] around whether [its] terms . . . provide[d] coverage to Plaintiffs under the circumstances alleged." 151 F. Supp. 3d 392, 402 (S.D.N.Y. 2015) (citing *Chambers*, 282 F.3d at 153). However, an employee handbook proffered by the defendant in *Barker* was not

deemed to be properly considered on a motion to dismiss because it was "by its own terms . . . not 'a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls.'" 2022 WL 595954, at *6 (quoting *Goel*, 820 F.3d at 559).

Here, the MSA and the SOW should be considered because, as alleged, they were "executed" in "connection with the transaction" at the center of this dispute, "outlined the relationship of the parties" and "detailed the services" to be completed, Compl. ¶ 16, and Miller's claim centers on whether there is a gap left to be filled by the parties' agreements related to Brightstar's acquisition of Harvestar.

Relying on language in *Foreman*, Miller also argues that the SOW and MSA must be excluded from consideration because the parties do not agree on their relevance to his claim. *See* Pl. Mem. at 10–11 (citing 19 F.4th at 106 ("[I]t must be clear that 'there exist no material disputed issues of fact regarding the relevance of the document.'")). However, the Court is unable to identify any analogous case where as here, a dispute over the relevancy was not a dispute over validity. *Cf. Robinson v. Dep't of Motor Vehicle*, No. 16-CV-1148 (JCH), 2017 WL 2259767, at *8 (D. Conn. May 23, 2017) (dispute as to relevance of document where complaint "makes clear that" plaintiff "disputes [its] validity"). In this case, there is no dispute that Miller "relies heavily on the [MSA's and SOW's] terms and effect in pleading his claim," or "as to the[ir] authenticity." *Foreman*, 19 F.4th at 107; *see also Carter v. JP Morgan Chasebank, N.A.*, No. 17-CV-4244 (GBD) (SN), 2017 WL

8890262, at *2 n.4 (S.D.N.Y. Dec. 14, 2017) (plaintiff "plainly relied upon his understanding of the documents when crafting his Complaint"), *adopted by* 2018 WL 1083966 (Feb. 26, 2018). Miller's explanation reveals that his dispute is not actually with the "relevance" of the MSA and the SOW, but with their applicability to his legal claims. Regardless of whether "actual volume and price terms are decided elsewhere," he concedes that the documents "provide policies and procedures for discussing, establishing, and communicating volume forecasts and pricing." Pl. Mem. at 12. For these reasons, the MSA and SOW are properly considered in resolving the instant motion.

C. Miller Has Plausibly Alleged a Claim for Breach of the Implied Covenant of Good Faith

As the Circuit held that Miller may bring his claim for breach of the implied covenant of good faith in a direct suit, *see Miller*, 43 F.4th at 125, the sole issue before the Court is whether Miller has adequately pleaded that claim.

Under applicable Delaware law, "[t]o sufficiently plead a breach of the implied covenant of good faith and fair dealing, a complaint must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1117–18 (Del. 2022) (cleaned up); *cf. Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 887 (Del. Ch. 2009) ("[B]ecause plaintiff has failed to articulate a contractual benefit he was denied as a result of defendants' breach of an implied provision of the

contract, the claim for breach of the implied covenant of good faith and fair dealing must be dismissed."). The complaint must also allege that the breach "was motivated by an improper purpose." *Sheehan v. AssuredPartners, Inc.*, No. 2019-CV-333 (AML), 2020 WL 2838575, at *11 (Del. Ch. May 29, 2020). For this requirement, "[g]eneral allegations of bad faith conduct are not sufficient[; r]ather, the plaintiff must allege a specific implied contractual obligation and allege how the violation of that obligation denied the plaintiff the fruits of the contract." *Kuroda*, 971 A.2d at 888.

Miller has met these pleading requirements. First, he alleges a specific implied contractual obligation: "that Brightstar Asia refrain from engaging in, or causing Harvestar to engage in, conflict[ed] transactions to [his] detriment." FAC ¶ 48. Second, he alleges that Brightstar breached that implied obligation by, altogether, causing Harvestar: (a) "to repair devices for Brightstar Asia's insurance affiliate . . . on terms less favorable to Harvestar than Brightstar Asia could obtain in a comparable arm's-length transaction," (b) "not to receive for repair and refurbishment the 40,000 mobile devices per month that had been the basis for the [Shareholders Agreement]," and (c) "to cease the repair of any mobile devices other than the up to 8,000 to 10,000 devices per month that its affiliate . . . provide[d] to Harvestar to refurbish at a below market rate." *Id.* ¶¶ 50–51. Third, he alleges that these actions caused him harm by "damag[ing] the value of [his] 24.5% interest in Harvestar"—thus his put and call rights—"in an amount of more than

$2,450,000." *Id.* ¶ 52. He also specifically alleges that these actions constituted "conflicted and bad faith dealings." *Id.* ¶ 55.

Brightstar challenges only the first prong of Miller's claim—*i.e.*, the existence of the implied covenant in the 2018 agreements.

1. **The Parties' Agreements Contained an Implied Covenant Not to Engage in Conflicted Transactions to the Other Party's Detriment**

"The implied covenant is inherent in all contracts and is used to infer contract terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017) (cleaned up). It "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005). "Thus, parties are liable for breaching the covenant when their conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms." *Id.* (cleaned up).

Reading the implied covenant of good faith and fair dealing into a contract "should be a rare and fact-intensive exercise, governed solely by issues of compelling fairness," and should be done "[o]nly when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter." *Dunlap*, 878 A.2d at 442

(cleaned up). However, at the motion to dismiss stage, the "inquiry focuses on whether . . . the express terms of the agreement can be reasonably read to imply certain other conditions, or" whether the terms "leave a gap, that would prescribe certain conduct, because it is necessary to vindicate the apparent intentions and reasonable expectations of the parties." *Dieckman*, 155 A.3d at 367; *see also Baldwin,* 283 A.3d at 1123 ("[A] fairly pleaded claim of good faith/bad faith raises essentially a question of fact which generally cannot be resolved on the pleadings or without first granting an adequate opportunity for discovery." (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1208 (Del. 1993))).

Miller argues that the implied covenant prohibits Brightstar from "manipulat[ing] the variables in the sale price calculation to render [his] put and call rights . . . worthless." Pl. Mem. at 14. He explains:

> While benign fluctuations in market conditions would correspondingly increase and decrease the price of the put and call shares, only all three acts together—starving Harvestar of operating profits through unfavorable conflict transactions, slashing the Harvestar Volume, and loading Harvestar with intercompany debt—could destroy the value of [his] put and call rights.

Id.

"The test for the implied covenant depends on whether it is 'clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of

the implied covenant of good faith—had they thought to negotiate with respect to that matter.'" *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146 (Del. Ch. 2009) (quoting *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del.Ch. 1986)). The decision in *Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.*, No. Civ.A. 19522, 2004 WL 1949300, at *12 (Del. Ch. Aug. 27, 2004), *amended*, 2005 WL 3488497 (Dec. 8, 2005), is instructive. In that case, an internet company, having fallen victim to the dot com-era boom and bust, brought a breach of the implied covenant claim against the investment banks that had underwritten its initial public offerings ("IPOs"), arguing that they had breached the covenant by "benefiting from [its] underpriced IPO securities, . . . allocating [its] undervalued shares to favored clients, and . . . directly or indirectly requiring and receiving additional compensation therefrom." *Id.* The defendants argued that because the plaintiff "received all the monetary compensation called for in the" contract at issue, it had no claim. *Id.* The court disagreed, and concluded that "whether the Defendants frustrated the overarching purpose of the offering by taking advantage of their position to control how the [parties' a]greement was implemented present[ed] a fact-based inquiry that is not well suited for a motion to dismiss." *Id.* (citation omitted).

Similarly, in *Light Years Ahead, Inc. v. Valve Acquisition, LLC*, the court was presented, on a motion to dismiss, with a claim for breach of the implied covenant based upon allegations that the defendant "undertook purposeful acts that would

damage the business . . . beyond what was negotiated," specifically, by "unreasonably delay[ing] product testing . . . to the point where the prospective business deal fell apart." No. N20C-12-181 (DJB), 2021 WL 6068215, at *10 (Del. Super. Ct. Dec. 22, 2021). Although the parties agreed that "there was no guarantee of success" in the operative contract, the complaint survived the pleading stage because the harm alleged resulted from more than "market fluctuations," but rather "willful mismanagement and unreasonable behavior." *Id.*

The gravamen of Miller's claim is that although Brightstar complied with the express terms of the parties' agreements, it took advantage of its position to harm Harvestar's business and, by proxy, Miller's put and call rights—his "fruits of the bargain." *See* Pl. Mem. at 5. Whether or not Brightstar took advantage of its position to destroy the value of Miller's put and call rights intentionally and in bad faith, as in the cited cases, "presents a fact-based inquiry that is not well suited for a motion to dismiss." *Breakaway*, 2004 WL 1949300, at *12.

2. **Brightstar's Arguments Lack Merit**

Brightstar makes four arguments in opposition, which all essentially boil down to its position that Miller has no claim because Brightstar complied with the express terms of the 2018 agreements. However, "[t]he implied covenant of good faith is the obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form[; i]t requires more than just literal compliance with the policy provisions and statute." *Dunlap*, 878 A.2d at 444

(cleaned up). Taken together, as Brightstar's arguments merely reiterate its position that it complied with the literal agreements of the parties, they do not adequately respond to Miller's argument that "the spirit of the bargain" was that he would benefit from the deal through the value of his put and call rights. Thus, as explained more fully below, each of its arguments misses the mark.

a. **Miller's Claim is Not Prohibited by Section 29(a) of the Shareholders Agreement**

Brightstar first argues that Miller's claim is prohibited by Section 29(a) of the Shareholders Agreement, which again provides:

> To the maximum extent permitted by applicable law, no Shareholder[—*i.e.*, Brightstar, Miller, or Elmi—](solely in its capacity as such) . . . shall owe any duty (including any fiduciary duty) to [Harvestar] or to any other Shareholder other than a duty to act in accordance with the implied contractual covenant of good faith and fair dealing. The parties hereto acknowledge and agree that any Shareholder *acting in accordance* with this [Shareholders] Agreement *shall* (a) *be deemed to be acting in compliance with such implied contractual covenant*, and (b) not be liable to [Harvestar], to any other Shareholder or to any other Person that is a party to or is otherwise bound by (or is a beneficiary of) this [Shareholders] Agreement for its reliance on the provisions of this [Shareholders] Agreement.

Shareholders Agreement at 19 (emphasis added). According to Brightstar, as Miller has no claim for breach of the Shareholders Agreement, Section 29(a) does not permit any claim for breach of the implied covenant.

While Delaware courts have warned against reading the implied covenant to replace explicitly eliminated fiduciary duties, *see, e.g.*, *Lonergan v. EPE Holdings,*

LLC, 5 A.3d 1008, 1019 (Del. Ch. 2010) ("To use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing." (cleaned up)), it is axiomatic that "the implied covenant of good faith and fair dealing . . . cannot be eliminated." *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 580 n.235 (Del. Ch. 2023) (citing *Dunlap*, 878 A.2d at 442–43). In *Dieckman*, for instance, the Delaware Supreme Court was presented with the question of whether the implied covenant could be used to remedy the harms alleged where the applicable partnership agreement "waived fiduciary-based standards of conduct." *Id.* at 366. The court clarified that "[e]ven though the express terms of the agreement govern the relationship when fiduciary duties are waived, . . . the implied covenant of good faith and fair dealing" could be read into other provisions of the contract because it "cannot be eliminated." *Id.* at 367 (citing 6 Del. C. § 17–1101(d)).

Thus, Brightstar's argument that Section 29(a) shields it from implied covenant liability lacks merit, as the implied covenant may not be eliminated by contract. *See*, e.g., *Dunlap*, 878 A.2d at 444 ("[T]he covenant of good faith and fair dealing [is] implied in all contracts[.]").[3]

[3] Brightstar maintains that Section 29(a) nevertheless precludes applicability of the implied covenant because Miller did not specifically allege that it "failed to act in accordance with a provision of the Shareholders Agreement." Def. Reply at 10 n.7. However, in addition to the prohibition on eliminating the implied covenant, Miller alleged that "Brightstar Asia . . . caused Harvestar to repair devices . . . on terms less favorable to Harvestar than Brightstar Asia could obtain in a comparable

b. Miller's Claim Is Not in Conflict with the Express Terms of the Agreements

"The implied covenant 'does not apply when the contract addresses the conduct at issue.'" *Oxbow Carbon & Minerals Hold., Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019). Brightstar argues that the covenant that Miller seeks to imply is contrary to the price and volume obligations explicitly set forth in the MSA and SOW. The MSA provided that Harvestar could "propose pricing updates . . . to adjust for changes in repair volume or device mix," MSA at 5, while the SOW provided for Brightstar to "submit" "supply forecast[s]" to Harvestar at set intervals. As Brightstar contends, neither of those agreements "impose[] any requirement . . . to supply a minimum volume of mobile devices to [Harvestar] for repair or refurbishment." Def. Mem. at 12. While this may be true, it does not defeat Miller's claim.

Miller's claim is not that there is any implied floor or ceiling for supply of devices or fees paid per device, but rather that Brightstar had the obligation to act in good faith to refrain from manipulating price, supply, and volume of devices for repair in a way that would destroy Harvestar's profits and Miller's put and call rights. Thus, the argument that the implied covenant was addressed by specific

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arm's-length transaction," FAC ¶ 50, which is specifically proscribed by Section 14 of the Shareholders Agreement. ("[A]ny transactions . . . will be on terms no less favorable to [Harvestar] than would be obtainable in a comparable arm's-length transaction.").

agreed upon price and volume terms fails. *See, e.g.*, *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, No. 15202, 1996 WL 560190, at *2 (Del. Ch. Sept. 25, 1996) ("[A]lthough that subject is generally addressed [in the agreement at issue], the specific question presented here . . . is not.").

c. The 2018 Agreements Leave a Gap to be Filled by the Implied Covenant Between Brightstar and Miller

Just as no implied covenant may be contrary to the express terms of an agreement, the covenant only applies "when the contract is truly silent concerning the matter at hand." *Oxbow Carbon,* 202 A.3d at 507 (citing cases). Courts refer to such silence as a "contractual gap." *See, e.g.*, *id*. Brightstar maintains that the Shareholders Agreement leaves no gap to be filled because "[i]t is not a services agreement or a statement of work and, thus, does not contain terms detailing services for the repair and refurbishment [of] mobile devices." Def. Mem. at 15. However, this argument merely repackages Brightstar's prior argument that the MSA and SOW are express terms contrary to the covenant that Miller seeks to imply. *See* Def. Mem. at 14 (Miller "seeks to impose obligations under the Shareholders Agreement regarding the pricing to be paid for repair services and the volumes of mobile devices to be supplied for repair"). As explained *supra*, the obligation that Miller seeks to imply is not to specific pricing and volumes for repair, but that Brightstar refrain from acting in bad faith to use multiple levers, including pricing and volume, to destroy Miller's put and call rights. That

particular obligation is written nowhere in any of the 2018 agreements and therefore may be considered, at least at the motion to dismiss stage, as plausibly filling a contractual gap.

d. **The Parties' Agreements Did Not Contemplate the Obligations at the Core of Miller's Claim**

Finally, Brightstar argues that the parties' contracted "minimum volume and pricing obligations" are evidence that the parties "specifically 'contemplated'" the implied covenant "at the time of contracting," and that those obligations were "the 'basis for' and 'an integral part'" of the parties' 2018 agreements. Def. Mem. at 17. "When determining the parties' reasonable expectations, the court analyzes whether the parties would have bargained for a contractual term"—in this case, "conflict[ed] transactions to [Miller's] detriment," FAC ¶ 48—"proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose." *Baldwin*, 283 A.3d at 1118 (cleaned up) (citing cases).

Section 14 of the Shareholders Agreement requires that:

> any transactions between [Harvestar] . . . and an [investor or business] . . . will be on terms no less favorable to [Harvestar] or the Subsidiaries thereof than would be obtainable in a comparable arm's-length transaction.

Shareholders Agreement at 16. Section 14 thus defined—and evidently contemplated—the limits of prices and volumes of devices for repair to "terms no

less favorable . . . than would be obtainable in a comparable arm's-length transaction." *Id.* What Section 14 does *not* do, however, is contemplate those limits vis-à-vis *Miller's* individual put and call rights.

The Second Circuit has already made clear that the "implied covenant" alleged in Miller's complaint "arises between Brightstar Asia and Miller," whereas "Paragraph 14 arises between Brightstar Asia and Harvestar." *Miller*, 43 F.4th at 125. Thus, an implied covenant between Brightstar Asia and Miller to avoid conduct that would unreasonably undermine the value of Miller's put and call rights does not "circumvent" any bargain between Brightstar Asia and Harvestar. *Id.*

Moreover, although the parties agreed to put and call rights and to price and volume terms, the parties understandably did not think to expressly prohibit "engaging in" a concert of "conflict[ed] transactions to the detriment of" the value of Miller's rights. FAC ¶ 48. Thus, viewing the facts as Miller alleges them, Brightstar's actions taken together and in "bad faith" were not contemplated by the parties' agreements. However, given the potential value of the put and call rights and that they were evidently a benefit that Miller was to earn from the deal, "it is clear . . . that the . . . parties would have agreed to proscribe [those actions] . . . had they thought to negotiate with respect to that matter." *Dunlap*, 878 A.2d at 442 (cleaned up).

III. CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

PROCEDURE FOR FILING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections, and any responses to such objections, shall be filed with the Clerk of Court. Any requests for an extension of time for filing objections must be directed to Judge Daniels.

FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).

Dated: September 11, 2023
New York, New York

JAMES L. COTT
United States Magistrate Judge