

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

ROBERT FIREMAN & ANN RAIDER,                    )  
    Plaintiffs,                                        )  
                                                          ) C.A. No. 05-11740-MLW  
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                                                          )  
                                                          )  
NEWS AMERICA MARKETING IN-STORE,            )  
INC.                                                    )  
    Defendant.                                        )

MEMORANDUM AND ORDER

WOLF, D.J.

September 26, 2009

I. SUMMARY

This case arises out of a business dispute between plaintiffs Robert Fireman and Ann Raider and defendant News American Marketing In-Store, Inc. ("NAM"). During the 1990s, plaintiffs owned Credit Card Marketing International ("CCMI"), a company that developed the "loyalty card" program for retail businesses. In 1999, plaintiffs sold CCMI to NAM. NAM agreed to pay CCMI \$2,800,000 in cash, to employ Fireman and Raider at the CCMI division of NAM, and to pay Fireman and Raider a salary as well as additional amounts of money over the following five years based on earnings targets, the so-called earn-outs.

Plaintiffs assert three claims: breach of contract, based on a violation of the implied covenant of good faith and fair dealing; a violation of the Massachusetts Consumer Protection Statute, M.G.L. Chapter 93A ("Chapter 93A"); and a request for declaratory judgment. Each of the claims arises out of the same general set of

facts. Plaintiffs essentially argue that NAM did not operate CCMI in good faith, that it failed to commit the resources necessary to ensure CCMI's success, and that it siphoned off key resources from CCMI, resulting in relatively low earn-out payments to Fireman and Raider. NAM responds that it had the discretion to run CCMI however it wished, that it ran CCMI in good faith in any event, and that plaintiffs' claims are barred by the parties' contract.

NAM has moved for summary judgment. Plaintiffs oppose the motion. A hearing on the motion for summary judgment has been held.

For the reasons described in detail in this Memorandum, the court concludes that NAM is entitled to summary judgment. The court finds that: (1) the facts viewed in the light most favorable to the plaintiffs would not permit a rational factfinder to find that NAM failed to act in good faith in its management of CCMI; (2) plaintiffs' Chapter 93A claim is barred by the intra-enterprise-dispute doctrine; and (3) the declaratory judgment claim should have been addressed to an arbitrator.

## II. THE SUMMARY JUDGMENT STANDARD

The court's discretion to grant summary judgment is governed by Federal Rule of Civil Procedure 56. Rule 56 provides, in pertinent part, that the court may grant summary judgment only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c). In addition, the facts are to be viewed in the light most favorable to the non-moving party. See, e.g., Chadwick v. WellPoint, Inc., 561 F.3d 38, 41 (1st Cir. 2009). "When a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact... and the moving party is entitled to judgment as a matter of law." Smith v. Stratus Computers, Inc., 40 F.3d 11, 12 (1st Cir. 1994).

In determining the merits of a motion for summary judgment, the court must undertake two inquiries: (1) whether the factual disputes are genuine, and (2) whether any fact genuinely in dispute is material. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. To determine if the dispute about a material fact is "genuine," the court must decide whether "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." Id.; see also Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7-8 (1st Cir. 1990).

### III. FACTS

Many of the following facts are disputed. Except where

otherwise noted, these disputes are for present purposes resolved in favor of the plaintiffs because they are the non-moving party.

#### A. Background

Fireman and Raider founded CCMI in 1991. Compl. ¶4. The company developed and implemented consumer loyalty programs, such as identification cards and key tags, for retail stores. Id. Retailers were able to track individual customers' purchases and develop targeted marketing and programs as a result. Id. Over the next eight years, CCMI grew to be an industry leader with a national reputation in the loyalty marketing industry. Id. ¶5. Around 1999, CCMI was looking to expand its sales force by aligning with a larger company that had an existing sales force. Id. At approximately the same time, NAM was looking to expand into the loyalty marketing industry. NAM approached CCMI regarding a purchase in 1999. See Raider Dep. at 123; Lellouche Dep. at 26.

CCMI, of which Fireman and Raider were the principal shareholders, was paid \$2,800,000 up front. See Stock Purchase Agreement ("Agreement") §2.1. Fireman and Raider each also entered into five-year employment agreements with NAM with a base salary and the possibility of bonuses as specified in the Stock Purchase Agreement. The foregoing facts are essentially undisputed.

#### B. The Stock Purchase Agreement

Several provisions of the Agreement are relevant here. First, Section 2.3 provides for the earn-outs:

(a) Earn-Out Amount. The Purchase Price shall be increased by an amount equal to [certain specified percentages] of the Gross Margin of the Company [CCMI] . . . in respect of each of the first, second, third, fourth and fifth twelve-month periods, respectively, commencing on October 1, 1999. . . . In addition, the Purchase Price shall be increased [by certain bonus amounts if the Gross Margin exceeds certain benchmarks].

Agreement, §2.3(a). That section also provided for dispute resolution:

In the event that the Principal Sellers [the Plaintiffs] desire to dispute any Buyer's Calculation [concerning the earn-out payments], the Principal Sellers shall, within twenty (20) Business Days following receipt of such Buyer's Calculation, deliver to Buyer written notice setting forth, in detail, their objections to such Buyer's Calculation (the "Objection Notice"), which dispute shall be resolved in accordance with the procedure outlined in Section 2.2(b) [providing for accountant-run arbitration].

Agreement, §2.3(c).

The Agreement also includes Section 6.8, entitled, "Conduct of the Business":

Conduct of the Business. It is Buyer's [NAM's] current intention to provide support to the business of the Company by, among other things, (i) utilizing Buyer's sales force in order to promote the sale of the Company's products, (ii) assisting the Company in the creation of long-term relationships with retailers, and (iii) investing in software and hardware as needed to expand the Company's business. Notwithstanding the foregoing, Buyer shall be free to operate the Company and its affiliates in its sole and unfettered judgment and Sellers shall have no claim against Buyer in connection therewith as a result of the preceding sentence.

Id. §6.8 (emphasis added).

Finally, the agreement includes a provision relating to the choice of governing law:

Governing Law; Jurisdictions. This agreement shall be governed by, and construed and enforced in accordance with the laws of the State of New York. The parties hereto irrevocably consent to the jurisdiction of the courts of the State of New York and any Federal court located in such State in connection with any action or proceeding arising out of or relating to this Agreement, or the transaction contemplated hereby.

Id. §8.2.<sup>1</sup>

Plaintiffs do not dispute these contract terms. It is also undisputed that plaintiffs were represented by the law firm Goodwin Procter LLP during negotiations, that they were assisted by a business consultant, that Fireman was (and is) a practicing attorney, and that he and Raider were each sophisticated businesspeople.

C. The Five Years After CCMI's Acquisition

It is undisputed that Fireman and Raider were paid a total of \$771,985 during the five-year earn-out period, that they used the dispute resolution process in Section 2.3(c) frequently, and that plaintiffs never took any grievance to accountant-run arbitration. However, plaintiffs deny defendant's assertion that they "worked out any issues with NAM management and accepted without reservation" the payments they received. Compare Def.'s 56.1 Stmt. ¶25 with Pls.' 56.1 Resp. at 4, ¶25. Viewed most favorably to the plaintiffs, the facts support their contention that, while they accepted earn-out payments, "they consistently raised their issues

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<sup>1</sup> The court notes that the Agreement did not provide for New York to have exclusive jurisdiction.

on the operation of CCMI by NAM after the acquisition and how it was affecting Plaintiff's [sic] ability to achieve their revenue targets." Pls.' 56.1 Resp. at 4, ¶26. Memoranda from Fireman and Raider to NAM management show that they regularly raised questions regarding the earn-outs. See Roumeliotis Aff. Ex. M, N, O, P, Q.

The undisputed facts show that NAM took a series of steps with regard to the CCMI business. These include re-branding CCMI as "Smart Source Direct" ("SSD"); making SSD part of "iGroup," a new operational unit within NAM headed by senior NAM executives; investing over \$1,000,000 in new computer technology for SSD; hiring additional sales personnel to sell SSD's retail products and direct marketing contracts; and instructing its existing sales force to be alert to cross-selling opportunities of SSD's products. See Lellouche Dep. at 124-25 (re-branding), Mixson Dep. at 63 (iGroup), Fireman Dep. at 230-31 (technology), Mixson Dep. at 23-26 (sales personnel), Mixson Dep. at 38, 42 (cross-selling).

Plaintiffs do not dispute that these actions were taken. However, they instead characterize them as hurting, not helping, CCMI. They argue that the re-branding destroyed eight years of brand equity; that becoming part of SSD removed or marginalized all of the expertise and talent which CCMI brought into the company; that the new technology was implemented only because NAM would not support the software that CCMI was using at the time; that hiring new personnel broke apart CCMI's core team; and that NAM refused to use its sales force to promote CCMI's products with manufacturers.

See Raider Dep. at 140 (brand equity), Fireman Answers to Interrogs. at 13-14 (software), Raider Dep. at 257-59 (core members), Fireman Answers to Interrogs. at 10-11 (sales force).

Similarly the parties do not dispute that NAM added a new fourth area of business to the SSD portfolio, the supply and processing of e-gift cards. See Lellouche Aff. ¶¶3, 5. The parties dispute why this business component was added. For the purposes of summary judgment, the court accepts plaintiffs' characterization that the gift cards were an extension of CCMI's loyalty card program. See Raider Dep. at 196-200.

The undisputed facts also show that NAM implemented a stored value card project for Toshiba. This project generated about \$4,000,000 in revenue for SSD between 1999 and 2003. See Mixson Dep. at 104, Raider Dep. at 273; Katz Aff., Ex. 7 (Revenue Spreadsheets).

The parties agree that CCMI's loyalty card revenue declined over time. NAM asserts that this was because of market forces. See, e.g., Lellouche Dep. at 153-54. Plaintiffs counter that the decline was caused by misguided business decisions that NAM made, not by the market. See Fireman Answers to Interrogs. at 8-15, Raider Dep. at 201-02. For the purposes of this analysis, the court accepts plaintiffs' characterization that the decline was caused by NAM's business decisions.

The undisputed facts show that SSD's direct mail portion of the business grew after the acquisition, that NAM experimented with

putting kiosks in stores, and that NAM supported Fireman's ideas regarding an electronic money transfer card. See Lellouche Dep. at 31-33 (direct mail), id. at 67 (kiosks), Fireman Dep. at 306 (card). Plaintiffs stated at their depositions that these initiatives would have been more successful had NAM made certain other business decisions. See Raider Dep. at 201-02, Fireman Dep. at 306. Viewed most favorably to the plaintiffs, the facts suggest that CCMI would have experienced faster growth if NAM had taken certain other actions.

The undisputed facts show that Fireman and Raider were awarded discretionary salary increases and bonuses over the years, all of which they accepted without invoking the accountant arbitration procedure described in Section 2.3(c) of the Stock Purchase Agreement. However, the facts also show that plaintiffs repeatedly objected to the earn-out calculations. See Roumeliotis Aff., Ex. M, N, O, P, Q.

Raider stated in her deposition that she believed NAM's overall goal was to maximize profit. Raider Dep. at 87. Fireman similarly stated that when CCMI did well, NAM did well. Fireman Dep. at 212-213. Nonetheless, plaintiffs note a variety of ways in which NAM did not support CCMI. First, they claim that NAM removed or marginalized expertise and talent within the CCMI division. The facts, viewed most favorably to the plaintiffs, show that Fireman's and Raider's responsibilities were assigned to other NAM employees over the years they worked there. See Fireman Dep. at 147, 245-47;

Raider Dep. at 82-83. The parties do not dispute that the employees who replaced Fireman and Raider had significantly less experience in the loyalty marketing field. See, e.g., Lellouche Dep. at 104, 108, 145-46.

Plaintiffs emphasize the transfer of Bill Adam as an example of how NAM shifted resources away from CCMI. See, e.g., Pls.' 56.1 Resp. at 14, ¶¶19-22 (discussing the transfer of Bill Adam). However, Adam's undisputed affidavit shows that he worked at CCMI prior to its acquisition but intended to resign thereafter. Adam Aff. ¶¶ 2-3. Henri Lellouche, Senior Vice President of the Smart Source iGroup, asked Adam to "consider moving to NAM's office in Norwalk, Connecticut" instead of resigning. Id. ¶4. Adam accepted that offer, moved to Connecticut, and continued to perform computer related work for SSD. Id. If Adam was not given the opportunity to move to Connecticut, he would have terminated his employment with CCMI. See id. ¶5.

Plaintiffs also claim that NAM refused to use its sales force to promote CCMI, the NAM sales force was never trained to market CCMI's business, and CCMI was not allowed to exhibit at trade shows. See Devoe Dep. at 123; Roumeliotis Aff. Ex. K (e-mail from Raider to Lellouche); Fireman Answers to Interrog. at 10. Raider and Fireman believed "that exhibit at trade shows was critical for building business." Pls.' 56.1 Resp. at 15 ¶26. However, "Lellouche believed that such shows were irrelevant, in direct contradiction to Raider and Fireman's belief that trade shows were

critical to developing CCMI's business . . . [Lellouche also] refused to even attempt to seek advertising in trade publications." Id. at 15, ¶27 (citing Lellouche Dep. at 180-81).

With regard to these strategic disputes, the undisputed facts show that plaintiffs repeatedly raised issues with NAM executives. See Roumeliotis Aff. Ex. M, N, O, P, Q (copies of memos (discussing CCMI's growth, business opportunities, and Fireman and Raider's expertise)).

### III. ANALYSIS

#### A. Contract Claims

The contract claim is governed by New York law. See Agreement, §8.2. In New York, "[a]s a general matter, the objective of contract interpretation is to give effect to the expressed intentions of the parties." Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017, 1019 (2d Cir. 1985). Particularly in the business context:

absent a clear violation of public policy[,] it is important to preserve the freedom of parties to contract. It is not for a fact-finder to second-guess the wisdom of their choices. Both parties elected to sign the [contract] despite the risks, and [one party] cannot now be heard to seek to avoid its contract because of regrets on its side about a strategic business decision.

Teachers Ins. & Annuity Ass'n of Am. v. Coaxial Communications of Central Ohio, Inc., 799 F. Supp. 16, 18 (S.D.N.Y. 1992).

NAM argues that it is entitled to summary judgment on the contract claim for four reasons: (1) the agreement contains a covenant not to sue; (2) the plaintiffs' acceptance of earn-out

payments waived any claim; (3) the implied covenant of good faith and fair dealing does not apply; and (4) NAM's conduct did not violate the covenant even if it does apply.

The parties dispute facts pertaining to each of the four steps of the analysis. As described below, the court assumes, without finding, that the disputes regarding the first three elements are genuine and would preclude the entry of summary judgment if they were material. However, even when viewed most favorably to the plaintiffs, the evidence is not sufficient to permit a rational fact finder to conclude that NAM violated the implied covenant of good faith and fair dealing. Thus, NAM is entitled to summary judgment on the contract claim.

1. There Is a Genuine Dispute as to Whether the Contract Contains "Explicit, Unmistakable, and Unequivocal" Language That Would Bar Plaintiffs' Claims

The threshold question is whether plaintiffs may bring this suit at all. New York law recognizes that covenants not to sue can be valid and enforceable. See Golden Pac. Bancorp v. F.D.I.C., 273 F.3d 509, 515 (2d Cir. 2001); Joao v. Cenuco, Inc., 376 F. Supp. 2d 380, 382 (S.D.N.Y. 2005) (citation omitted). This rule is not absolute: "[a] release will not be given effect unless it contains an explicit, unequivocal statement of a present promise to release [a party] from liability." Golden Pac., 273 F.3d 515 (alteration in original and internal quotation marks omitted) (emphasis added). The validity of a covenant not to sue is an issue that can be

determined by the court. See Schneider v. Revici, 817 F.2d 987, 993-94 (2d Cir. 1987).

In this case, Section 6.8 states that NAM's then-current intention was "to provide support to the business of the Company [i.e., CCMI] by [taking a variety of steps] as needed to expand the Company's business." Agreement §6.8. The next sentence contains the purported covenant not to sue. It states, "Notwithstanding the foregoing, Buyer shall be free to operate the Company and its affiliates in its sole and unfettered judgment and Sellers shall have no claim against Buyer in connection therewith as a result of the preceding sentence." Id.

The parties discuss Section 6.8 in the context of covenants not to sue. However, the court is not convinced that Section 6.8 actually contains a covenant not to sue. The agreement states that plaintiffs "shall have no claim" against NAM. See Agreement §6.8. At most, this is a limited covenant not to sue. It does not with sufficient specificity waive plaintiffs' right to sue on an alleged violation of the implied covenant of good faith and fair dealing. The language does not purport to bar all lawsuits. It only states that if Fireman and Raider sued "as a result of the preceding sentence," they would not have a viable claim.

The parties dispute the meaning of Section 6.8, which in turn implicates factual disputes regarding NAM's support of CCMI. However, because the issue is not dispositive, the court assumes, without finding, that plaintiffs' claims are not barred by any

purported covenant not to sue.

2. There is a Genuine Dispute as to Whether Plaintiffs' Claims Are Estopped By Their Acceptance of Earn-Out Payments

Defendant argues that plaintiffs are estopped from asserting their claims because they "accepted and enjoyed without any simultaneous 'reservation of right' all earn-out payments that NAM issued to them." Def.'s Mem. at 26. This arguments appears to include two distinct defenses, estoppel and waiver. "A waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it . . . An estoppel, on the other hand, may be imposed by law in the interest of fairness where one party, justifiably relying upon the word or conduct of another, changes its position to its detriment." England v. Nettessheim, 634 N.Y.S.2d 797, 798-99 (N.Y. App. Div. 1995) (citations and internal quotation marks omitted).

Although defendant cites several cases in which courts held that a party's claim was barred because it accepted benefits without protest, these cases do not dispose of the issue here. In Savasta v. 470 Newport Assocs., 579 N.Y.S.2d 167, 169 (N.Y. App. Div. 1992), aff'd 82 N.Y.2d 763 (1993), a triggering event occurred that might have allowed the plaintiffs to dissolve a partnership and receive twenty percent of the proceeds. Instead of asserting their right immediately, the plaintiffs continued to receive payments from the partnership, and only later attempted to exercise

their claimed right. Id. The court held that, because the plaintiffs enjoyed the benefits of the partnership after the triggering event, they were estopped from exercising their right to dissolve the partnership. Id.

Similarly, in Banque Nationale de Paris v. 1567 Broadway Ownership Associates, 625 N.Y.S.2d 152, 154 (N.Y. App. Div. 1995), the court held that under the doctrines of estoppel, waiver, and ratification, the defendants could not deny the validity of a loan from which they had benefitted.

Finally, in El Reda v. Love Taxi, Inc., 608 N.Y.S.2d 656 (N.Y. App. Div. 1994), a suit over fees which plaintiff taxi operators alleged were wrongfully deducted from taxi fare vouchers, the court held that the plaintiffs were estopped from asserting their claims because they waited fifteen years after the deductions first occurred. The court emphasized that the plaintiffs had full knowledge of the deductions, and that the deductions resulted from an "undisputed and uniform custom and usage" in the industry. Id. at 658. Although the court used the term "estoppel," the court's holding fits more comfortably under England's description of waiver.

Thus, estoppel applies where a party obtains a benefit based on fulfillment of a condition precedent, and then attempts to claim that the condition precedent never in fact occurred. Waiver applies where a party accepts a benefit without complaint as to its adequacy and waits an unreasonable amount of time to protest.

Here, defendant argues that plaintiffs' acceptance of earn-out payments waives plaintiffs' claims because there was no "reservation of rights" when the payments were accepted. See Def.'s Mem. at 26. Plaintiffs argue that they "did not have all of the facts . . . in front of" them that they would need to properly object to defendant's actions. Pls.' Opp'n at 21 n.4. Applying England's framework, the issue is one of waiver rather than estoppel. Estoppel would require that defendant in some way relied on plaintiffs' silence, a fact defendants fail to allege or provide evidence to support. However, waiver may be applicable because, like the taxi drivers in El Reda, plaintiffs may have accepted their earn-outs without protest and with full knowledge of their rights.

There is a genuine dispute as to whether and to what extent Fireman and Raider had material information that would give rise to waiver, as well as to whether plaintiffs' contemporaneous objections were sufficient to reserve their right to file a future lawsuit. Moreover, even if there was a waiver, there is a genuine dispute as to what contract rights were waived. A waiver of plaintiffs' right to challenge the amount of the earn-outs does not necessarily waive their right to challenge NAM's good faith during the parties' course of conduct. Because the issue is not dispositive, the court assumes, without finding, that the defendant's waiver argument for summary judgment is not meritorious.

3. The Implied Covenant of Good Faith and Fair Dealing  
Can Coexist With a Contractual Term Giving Discretion to  
One Party

The next issue is whether the implied covenant of good faith and fair dealing applies despite contractual language giving unfettered discretion to NAM. "Even when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith." Travellers Int'l, A.G. v. Trans World Airlines, 41 F.3d 1570, 1575 (2d Cir. 1994) (citing Carvel Corp. v. Diversified Mgmt. Group, Inc., 930 F.2d 228, 231 (2d Cir. 1991)).

Thus, in general, an implied covenant of good faith coexists with an express contractual provision giving discretion to one party. New York courts have adopted a "purely contractual rule that even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement." Richbell Info. Servs., Inc. v. Jupiter Partners, L.P., 765 N.Y.S.2d 575, 587 (N.Y. App. Div. 2003). See also TIG Ins. Co. v. Newmont Mining Corp., 413 F. Supp. 2d 273, 281 (S.D.N.Y. 2005) ("One party's discretion cannot go so far as to enable the party to eviscerate a term of the contract and frustrate a fundamental purpose underlying the agreement.") (internal quotation marks and citations omitted); Hirsch v. Food Res., Inc., 808 N.Y.S.2d 618, 621-22 (N.Y. App. Div. 2005) ("The exercise of an apparently unfettered discretionary contract right

breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits."); Keene Corp. v. Bogan, No. 88 CIV. 0217, 1990 WL 1864, at \*14 (S.D.N.Y. Jan. 11, 1990) ("[The covenant of good faith] is violated when a party promises commissions or profits and then does not act in good faith to permit such commissions or profits to be earned, thereby depriving the other party of the 'benefit of the bargain.'").

However, the implied covenant can be bargained away. In VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969), defendant Goodyear acquired plaintiff's tire business. As part of the deal, the plaintiff was to be paid commissions calculated in accordance with defendant's future tire sales. The agreement between the parties stated that defendant Goodyear "may make decisions solely in the light of [defendant's] own interest and without liability or obligation of any kind to [plaintiff] in connection therewith, except to pay commissions as above provided . . . ." Id. at 776. Plaintiff later sued, alleging a violation of the implied covenant of good faith and fair dealing. VTR claimed that, after the purchase, Goodyear "wilfully caused the business to deteriorate," depriving VTR of part of the consideration it was to receive. Id. at 776.

The court rejected the claim and granted Goodyear summary judgment, holding that parties "may, by express provisions of the contract, grant the right to engage in the very acts and conduct

which would otherwise have been forbidden by an implied covenant of good faith and fair dealing." Id. at 777. Further:

[a]s to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.

Id. at 778.

Conversely, in Zilg v. Prentice-Hall, Inc., 515 F. Supp. 716 (S.D.N.Y. 1981), a publisher contracted to publish a certain book. The contract gave the publisher the rights to publish and market the book in the style, manner, and means it thought best. Plaintiff sued, claiming that Prentice-Hall did not market the book properly. The court held that the publisher was required to exercise its discretion in good faith, id. at 718-19, reasoning that "[r]equiring the publisher to exercise its discretion in good faith would not deprive it of any bargained for benefits under the contract." Id. at 718.

Thus, "there is clearly some tension between, on the one hand, the imposition of a good faith limitation on the exercise of a contract right and, on the other, the avoidance of using the implied covenant of good faith to create new duties that negate explicit rights under a contract." Richbell, 765 N.Y.S.2d at 587.

NAM claims that plaintiffs bargained away the covenant here by agreeing to a provision that gave NAM "sole and unfettered" discretion as to its operation of CCMI. Plaintiffs complain that

NAM rebranded CCMI, transferred away employees, did not develop certain software, and refused to participate in trade shows, among other things. None of these is specifically mentioned in §6.8. These actions were not "authorized by the express provisions of the contract." VTR, 303 F. Supp. at 778. See also Zilg, 515 F. Supp. at 718 (noting express terms giving publisher control). However, the general "sole and unfettered" language is not as explicit as the language in VTR or Zilg. There is, therefore, a genuine dispute as to whether §6.8 is broad enough to encompass the actions plaintiffs now complain of. Once more, because the issue is not dispositive, the court assumes, without finding, that §6.8 does not relieve defendant of its duties under the implied covenant of good faith and fair dealing.

4. The Undisputed Material Facts Do Not Permit a Rational Inference that NAM Violated the Implied Covenant of Good Faith and Fair Dealing

Assuming that the covenant does apply, the last issue is what the covenant requires and whether a reasonable factfinder could conclude that NAM's conduct violated those requirements. The implied covenant "cannot be used to add wholly new terms to the contract." Keene, 1990 WL 1864, at \*14. Additionally, "[n]o obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship." Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 304 (1983).

Defendants cite Keene in support of its argument that no

covenant of good faith and fair dealing can be implied here. In Keene, Bogan, plaintiff-in-counterclaim, sued Keene based on an Asset Purchase Agreement ("APA") executed when Keene bought Bogan's business. First, Bogan argued that Keene violated an oral agreement and fraudulently induced him into entering the APA. Further, and relevant here, he argued that Keene violated the covenant of good faith and fair dealing implied in that contract. 1990 WL 1864, at \*1.

The district court rejected the argument that Keene violated the covenant "when it willfully destroyed the value of [Bogan's] earn-out payments by reducing his authority and otherwise ruining [SRS]." Id. at \*14. Likewise, the court held that Bogan's claims that Keene shipped defective parts, maintained irregular shipment schedules, and implemented misguided pricing programs were insufficient to survive a motion for summary judgment. Finally, the court concluded that Bogan's claims failed because he could not show that Keene intentionally or recklessly lost money:

without a showing that Keene adopted these policies with the purpose of or with reckless disregard for losing money, the mere failure to adopt the opinions of veteran employees does not prompt a rational inference that Keene intended to deprive Bogan of the fruits of the contract  
. . . .

That Keene's policies were misguided or ignorant or even merely negligent does not show a breach of the implied covenant of good faith.

Id. at \*15-\*16. Therefore, the court entered summary judgment for Keene.

The case is nearly identical. Plaintiffs attempt to distinguish Keene, arguing that material factual disputes exist as to NAM "marginalizing . . . the business." Pls.' Opp'n at 19. However, these are the same type of disputes that existed between Keene and Bogan - disputes concerning strategy between sophisticated business people.

As in Keene, cf. 1990 WL 1864, at \*15, plaintiffs give no reasons why NAM would want CCMI/SSD to lose money, and none of the evidence suggests that they would. Plaintiffs claim that NAM sought to siphon CCMI resources to benefit NAM's other divisions. The primary example cited in this context is the transfer of Bill Adam. See, e.g., Pls.' Opp'n at 19. However, the evidence does not suggest that Adam was transferred in order to harm CCMI's business. Adam's undisputed affidavit indicates that he wished to leave NAM and would have resigned if he had not been relocated. See Adam Aff. ¶3. Even after he was relocated, Adam continued to work for SSD, id. ¶4, the division whose revenues counted toward plaintiffs' earn-outs.

Similarly, plaintiffs admit that the Toshiba stored value card project was one of the most substantial SSD revenue items during the relevant period. Plaintiffs consider this project an extension of CCMI's pre-existing loyalty card services. NAM characterizes it as a new program that NAM was not obligated to count toward SSD's revenue. Compare Def.'s 56.1 Stmt., ¶¶36-37 with Pls.' 56.1 Resp. at 7, ¶¶36-37. Regardless of how the project is characterized, it

is undisputed that it made money for CCMI.

The parties dispute a series of other facts pertaining to NAM's course of conduct during the relevant time period. However, these disputes do not defeat NAM's motion for summary judgment because they are not material. As explained earlier, "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248 (emphasis added). The substantive law, as reflected in Keene and other cases discussed below, indicates that the merit of plaintiffs' claim depends on whether NAM intentionally or recklessly caused CCMI to lose money. See Keene, 1990 WL 1864, at \*15-16. Viewed most favorably to plaintiffs, the disputed facts would not permit a rational factfinder to conclude that NAM did so. At most, they show strategic disputes between sophisticated businesspeople as to how CCMI should have been run. Even if NAM's actions were misguided, ignorant, or negligent, the evidence would not reasonably permit the inference that NAM intentionally or recklessly caused CCMI to lose money, sought to withhold benefits from NAM, exercised its rights malevolently, or acted without a legitimate business purpose.

For example, NAM provides evidence that it took a variety of steps to improve CCMI's profits. These include re-branding CCMI as "Smart Source Direct" ("SSD"); making SSD part of "iGroup," a new

operational unit within NAM; investing over \$1,000,000 in new computer technology for SSD; hiring additional sales personnel to sell SSD's retail products and direct marketing contracts; and instructing its existing sales force to be alert to cross-selling opportunities of SSD's products.

Plaintiffs dispute each of these characterizations. They assert that the re-branding destroyed eight years of brand equity; that becoming part of SSD removed or marginalized all of the expertise and talent which CCMI brought to the company; that the new technology was only as a result of a decision by NAM that it would not support CCMI's software; that hiring new personnel broke apart CCMI's core team; and that NAM refused to use its sales force to promote CCMI's products with manufacturers. However, these different characterizations of the effect of the exercise of NAM's business judgment are not sufficient to support a reasonable inference of a violation of the implied covenant.

The other factual disputes plaintiffs identify are similar. The implementation of new technology, the failure of the data management business, new software, decline of the loyalty card business, and initiatives such as kiosks and money transfer programs are all subject to differing characterizations depending on whose business judgment controls. The fact that plaintiffs might have made different decisions is not sufficient to permit an inference that NAM's decisions were arrived at in bad faith. Plaintiffs "cannot now be heard to seek to avoid [their] contract

because of regrets on [their] side about a strategic business decision." Teachers Ins., 799 F. Supp. at 18.

For example, plaintiffs claim "that exhibit at trade shows was critical for building business." Pls.' 56.1 Resp. at 15, ¶26. Plaintiffs admit that "[Henri] Lellouche believed that trade shows were irrelevant, in direct contradiction to Raider and Fireman's belief that trade shows were critical to developing CCMI's business in the marketplace," and as a result, he "refused to even attempt to seek advertising in trade publications." Id. at 15, ¶27. However, "the mere failure to adopt the opinions of veteran employees does not prompt a rational inference that [NAM] intended to deprive [plaintiffs] of the fruits of the contract." Keene, 1990 WL 1846, at \*15.

In their memoranda, and again at the hearing on the motion for summary judgment, plaintiffs argued, "if NAM's formulation of its rights under the Agreement is credited, then NAM would have been within its rights to shut CCMI down the day after it purchased the company." Pls.' Opp'n at 12. If NAM had done so, then a reasonable factfinder could have concluded NAM intentionally caused CCMI to lose money. However, NAM did not shut CCMI down. It added certain components, changed others, and took steps that it believed would inure to CCMI's benefit. Compare Keene, 1990 WL 1864, at \*15 ("Keene argues that all the evidence which Bogan claims betrays Keene's bad faith reveals instead its attempt to turn SRS around.") with Def.'s 56.1 Stmt. ¶32 (outlining steps taken "[w]ith the goal

of building CCMI revenue and improving CCMI profits").

There are cases in addition to Keene that indicate that NAM is entitled to summary judgment on plaintiffs' claimed violation of the covenant of good faith and fair dealing. They generally hold that a defendant violates the covenant of good faith and fair dealing only when he acts with some improper motive. See, e.g., TIG, 413 F. Supp. 2d at 281 ("To prove breach of the implied covenant . . . , the plaintiff must establish that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff.") (internal quotation marks and citation omitted); Richbell, 765 N.Y.S.2d at 587 (finding defendant liable in a fiduciary duty case because the evidence showed that the defendant acted "malevolently . . . as part of a purposeful scheme designed to deprive plaintiffs of [their] benefits . . . [involving] bad-faith targeted malevolence in the guise of business dealings."); Zilg, 515 F. Supp. at 719 (no breach "if the relevant decisions... were guided by any legitimate business purpose," but a violation if defendant "provided less than reasonable efforts . . . and did so in order to deprive the plaintiff of the benefits he would otherwise have received under the contract") (citations omitted).

In Zilg, supra, the district court entered judgment for plaintiff following a bench trial. This judgment was reversed on appeal. However, the Second Circuit recognized that, in deciding how to promote the book at issue, "all that is required [of the

publisher] is a good faith business judgment." Zilg v. Prentice-Hall, Inc., 717 F.2d 671, 680 (2d Cir. 1983).

Here, it may be that if NAM had taken certain other actions, plaintiffs would have met or exceeded the earn-out targets. However, to defeat NAM's motion for summary judgment, plaintiffs must offer evidence sufficient to prove more than that. Plaintiffs do not point to any evidence that reasonably suggests that NAM's actions were not guided by a legitimate business purposes. Cf. Zilg, 515 F. Supp. at 719. NAM's actions are "not [now] subject to second guessing by a trier of fact as to whether [they were] sound or valid." Zilg, 717 F.2d at 680.

Other cases involving earn out rights or commissions are consistent with this conclusion. See, e.g., Tagare v. Nynex Network Sys. Co., 994 F. Supp. 149, 161 (S.D.N.Y. 1997) (holding that plaintiff must "provide evidence from which a reasonable trier of fact could conclude that [defendant] violated the implied covenant of good faith and faith [sic] dealing by intentionally or arbitrarily interfering with his marketing and sales efforts."); Liu v. Beth Israel Med. Ctr., 2003 WL 21488081, at \*3-\*4 (S.D.N.Y. June 26, 2003) (covenant of good faith and fair dealing does not require use of "best efforts" unless such a provision is explicit in the contract).

At the hearing on the motion for summary judgment, plaintiffs' counsel argued that a reasonable factfinder could infer an improper motive for NAM's actions because NAM marginalized Fireman and

Raider, refused to follow through on the intentions of David Devoe (who negotiated the agreement for NAM but was later replaced by Henri Lellouche), and reduced the size of the sales force. Such claims have been rejected elsewhere. For example, in Tagare, plaintiff claimed that the company that hired him failed to provide him with sufficient staff, in terms of quality and quantity, to earn his bonus. See 994 F. Supp. at 159-160. He also claimed that his authority was diminished after a new executive was named to his division and that the defendant company did not provide him with sufficient information to develop his sales leads. See id. at 160.

The court granted defendants' motion for summary judgment. It held that Tagare had provided no evidence from which a factfinder could infer that defendant intentionally and purposely prevented him from achieving his bonuses or that it arbitrarily and irrationally exercised its discretion. Id. Tagare claimed that the defendant did not understand the industry, have the right people in place, implement proper training programs, or have contacts in the industry. See id. Similarly, plaintiffs here claim that they did not have adequate staffing, that their authority was diminished, and that NAM did not understand the loyalty marketing industry. However, without more, plaintiffs have not "provide[d] evidence from which a reasonable trier of fact could conclude that [NAM] violated the implied covenant . . . ." Id. at 161.

Finally, plaintiffs' argument that the earn-outs were part of

the "purchase price" for CCMI and, therefore, part of the "anticipated consideration for the CCMI acquisition" is not persuasive. See Pls.' Opp'n at 13-14 n.2. "[I]f the parties had agreed to and bargained for a guaranteed earn-out, such a term would have been specified in an express provision in" the Agreement. Keene, 1990 WL 1864, at \*15.

The evidence does not create any dispute concerning a fact that is material and would permit a rational factfinder to conclude that NAM intentionally, recklessly, irrationally, arbitrarily, malevolently, or in bad faith sought to injure CCMI. Cf. Keene (intentionally, recklessly), Tagare (irrationally, arbitrarily), Richbell (malevolently, bad faith). Therefore, NAM is entitled to summary judgment on plaintiffs' breach of contract claim.

B. The Intra-Enterprise Dispute Doctrine Bars Plaintiffs' Chapter 93A Claim

Plaintiffs have also sued under the Massachusetts Consumer Protection Statute, M.G.L. Chapter 93A. However, this claim is unmeritorious.

The threshold inquiry is whether Massachusetts law applies. The parties dispute whether the contract's selection of New York law bars the 93A claim. There is a difference between forum selection clauses that say that the agreement is governed by another state's law, see Worldwide Commodities, Inc. v. J. Amicone Co., Inc., 36 Mass. App. Ct. 304, 305 (1994), and those that say the rights of parties are governed by foreign law, see Northeast

Data Sys., Inc. v. McDonnell Douglas Computer Sys. Co., 986 F.2d 607, 609 (1st Cir. 1993). Chapter 93A claims might be viable in the former case but not the latter. The Massachusetts Supreme Judicial Court has noted this distinction but not decided the question. See Jacobson v. Mailboxes, Etc. U.S.A., Inc., 419 Mass. 572, 580 n.9 (1995).<sup>2</sup>

However, in this case it is not necessary to decide whether Massachusetts law applies because, even if it does, plaintiff's Chapter 93A claim fails. First, a mere breach of contract is not sufficient to establish a Chapter 93A violation. See, e.g., Framingham Auto Sales, Inc. v. Workers' Credit Union, 41 Mass. App. Ct. 416, 418 (1996); Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd., 217 F.3d 33, 40 (1st Cir. 2000). A breach of the covenant of good faith and fair dealing "may" be sufficient to establish a Chapter 93A violation. Mass. Employers Ins. Exchange v. Propac-Mass, Inc., 420 Mass. 39, 43 (1995). However, additional evidence of egregious conduct is generally required. See PH Group Ltd. v. Birch, 985 F.2d 649, 652 (1st Cir. 1993). As the First

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<sup>2</sup> At the hearing, plaintiffs' counsel relied on Stagecoach Transportation, Inc. v. Shuttle, Inc., 50 Mass. App. Ct. 812 (2001). There, the court held that "because the choice of law clause does not purport to declare that the rights of the parties [were] to be governed by New York law, the application of G.L. c. 93A to the parties' dealings is not barred." Id. at 819. However, in Stagecoach, the plaintiff's "claim did not arise under the contract." Id. Here, plaintiffs' Chapter 93A claim relates solely to the good faith and fair dealing claim and, therefore, does "arise under the contract," making Stagecoach inapposite.

Circuit has explained, "violations of ch. 93A must meet a higher standard of liability than do breaches of an implied covenant of good faith and fair dealing." Id. Because, as explained earlier, the evidence is insufficient to prove a violation of the covenant of good faith and fair dealing, it is also insufficient to permit a finding that NAM violated Chapter 93A.

Plaintiffs' claim is also defeated by the intra-enterprise dispute doctrine. "It is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A." Szalla v. Locke, 421 Mass. 448, 451 (1995) (citing examples, such as joint ventures, stockholders' claims pertaining to internal governance, employer-employee claims, and claims among members of a partnership); see also Saint Louis v. Baystate Med. Ctr., Inc., 30 Mass. App. Ct. 393, 404 (1991). In Baystate, the court held that a dispute between an anesthesiology group and its members against a hospital and a rival anesthesiology group could not involve a violation of Chapter 93A because the dispute was "intra-enterprise." Id.

Here, the claim is between two former employees of NAM and their former employer, concerning conduct that took place while plaintiffs were employees of NAM. This dispute is not between two discrete, independent business entities. Although NAM and CCMI were two separate entities before the Agreement was executed, and disputes between the two before NAM's acquisition of CCMI might have formed the basis for a Chapter 93A claim not barred by the

intra-enterprise doctrine, the actions challenged in this lawsuit all took place after the purchase. This is not a claim for pre-contractual wrongs, cf. Jacobson, 419 Mass. at 579, or for "tort-like" contract claims such as fraudulent misrepresentation, cf. Northeast, 986 F.2d at 610-11. It is a dispute based on intra-enterprise conduct that took place during the course of an employer-employee relationship. Therefore, it is not actionable under Chapter 93A.

Plaintiffs argue that characterizing this case as involving an intra-enterprise dispute "simply misunderstands the claims." Pls.' Opp'n at 23. However, they cite no authority in support of their position. The intra-enterprise doctrine has been applied to a variety of contexts and is not limited to employer-employee or joint venture cases. See Szalla, 421 Mass. at 451-52 (citing cases); Baystate, 30 Mass. App. Ct. at 404. Because this case is properly viewed as involving an intra-enterprise dispute, it does not implicate "trade or commerce" and is not within the ambit of Chapter 93A. See Szalla, 421 Mass. at 451-52. See also Manning v. Zuckerman, 388 Mass. 8, 14 (1983). Cf. M.G.L. ch. 93A, §2.

Therefore, NAM is entitled to summary judgment on the Chapter 93A claim.

D. The Declaratory Judgment Claim Should Have Been Presented to an Arbitrator

Plaintiffs seek a declaratory judgment concerning what revenues should have been counted in calculating their earn-out. The Declaratory Judgment Act, 28 U.S.C. §2201, gives a federal court the power, "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201(a).

This court has jurisdiction over plaintiffs' claims and, therefore, could decide the declaratory judgment claim. However, "declaratory relief, both by its very nature and under the plain language of 28 U.S.C. §2201, is discretionary." El Dia, Inc. v. Hernandez-Colon, 963 F.2d 488, 493 (1st Cir. 1992). See also Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 320 (1st Cir. 1992) (court's duty to exercise jurisdiction relaxed in declaratory judgment actions).

When a contract has an arbitration clause, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006); see also New York City Transit Auth. v. Transp. Workers' Union of Am., 6 N.Y.3d 332, 336 (2005) (holding that the "arbitrator is charged with the interpretation and application of the agreement").

Plaintiffs acknowledge that the Agreement contained a section providing for certain earn-out payments, and an accountant-run

arbitration process to resolve any disputes. See Pls.' 56.1 Resp. at 2-3, ¶¶8 (earn-outs), 18 (dispute process). See also Agreement, §2.3(c) (providing for accountant-run arbitration in the event of disputes over earn-outs). Plaintiffs do not challenge the enforceability of §2.3(c), or of §2.2(b), which details the procedure that the accountants are to use. Plaintiffs argue that the declaratory judgment claim:

does not implicate the arbitration provision of the Agreement because rather than debating the details of earn-out calculations, it seeks a more general declaration that the Agreement contemplated the "Company" and its successors to include the companies using CCMI's assets.

Pls.' Opp'n at 24.

However, disputes over what constitutes the "company" are governed by §2.3(c). That section begins, "In the event that [plaintiffs] desire to dispute any Buyer's Calculation, . . . ." Agreement §2.3(c). The section applies to disputes regarding "any" earn-out calculation by NAM, not just "details of . . . calculations," as plaintiffs contend. These calculations require an assessment of what divisions of NAM count toward the gross margin and, therefore, the payments to which plaintiffs were entitled. Nothing in the Agreement limits the scope of arbitration clause to technical disputes over, for example, CCMI's revenue or other mathematical matters. Even if there were ambiguity in the terms of the arbitration clause, or if the scope of the clause were in tension with state contract law, "the federal policy favoring

arbitration trumps the state contract law tenet." Kristian v. Comcast Corp., 446 F.3d 25, 35 (1st Cir. 2006).

Plaintiffs seek a declaratory judgment "as to which company's Gross Margin Fireman and Raider's earn-out payments must be measured against." Compl. at 8, ¶31. This dispute should have been first presented to an arbitrator. Therefore, NAM is entitled to summary judgment on the declaratory judgment claim.

#### IV. ORDER

For the foregoing reasons, it is hereby ORDERED that NAM's Motion for Summary Judgment (Docket No. 50) is ALLOWED.

/s/ Mark L. Wolf  
UNITED STATES DISTRICT JUDGE