



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POST HOLDINGS, INC. and )  
MICHAEL FOODS OF DELAWARE, )  
INC., )

Plaintiffs, )

v. )

C.A. No. 2017-0772-AGB

NPE SELLER REP LLC, SAFE EGG )  
LLC, AARDEMA PARTNERSHIP, )  
LOST CREEK RANCH, BRIAN )  
BOOMSMA, HOPEWELL )  
VENTURES, L.P., R.W. DUFFY COX, )  
GREGORY M. WEST, CHUCK LEIS, )  
MICHAEL SMITH, JAY BERGLIND, )  
HECTOR LARA, D. WILLIAM )  
TOONE, )

Defendants. )

NPE SELLER REP LLC, )  
Counter-Plaintiff, )

v. )

POST HOLDINGS, INC. and )  
MICHAEL FOODS OF DELAWARE, )  
INC., )

Counter-Defendants. )

**NPE SELLER REP LLC’S MOTION FOR JUDGMENT  
ON THE PLEADINGS ON ITS VERIFIED COUNTERCLAIMS**

Counter-Plaintiff NPE Seller Rep LLC (“NPE Seller Rep”), by and through its undersigned counsel, hereby moves pursuant to Court of Chancery Rule 12(c) for judgment on the pleadings on its Verified Counterclaims against Counter-Defendants Michael Foods of Delaware, Inc. (“MFI”) and Post Holdings, Inc. (“Post,” and together with MFI, “Buyers”). In support of this motion, NPE Seller Rep states as follows:

### INTRODUCTION

1. Pursuant to the Stock Purchase Agreement (the “Agreement”) whereby MFI acquired all outstanding shares of National Pasteurized Eggs, Inc. (“NPE”), if NPE receives tax refunds or insurance proceeds related to certain pre-acquisition events, MFI is obligated to remit those amounts to NPE Seller Rep, which is the Seller Representative<sup>1</sup> of NPE’s Securityholders who sold their shares to MFI (collectively, “Sellers”). Post is the parent company of MFI and unconditionally guaranteed all of MFI’s contractual obligations under the Agreement.

2. Since MFI’s acquisition of NPE, NPE has received more than \$970,000 in tax refunds and insurance proceeds, which MFI has not remitted to Sellers (the

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<sup>1</sup> Unless otherwise indicated, capitalized terms have the same meaning as in the Agreement, attached hereto as Exhibit 1, and which is incorporated by reference into the Verified Counterclaims. *See In re Tex. E. Overseas, Inc.*, 2009 WL 4270799, at \*2 (Del. Ch.) (the Court may “consider the content of documents integral to, and incorporated by reference into” the pleadings on a motion for judgment on the pleadings).

“Remittance Amounts”). MFI does not deny its obligation to remit the Remittance Amounts, but instead asserts a right to withhold and set off the Remittance Amounts against undetermined amounts MFI claims should be paid to it by Sellers relating to MFI’s disputed indemnification claims. However, MFI has no contractual, common law, or equitable basis to assert its purported right of set-off with respect to the Remittance Amounts. To the contrary, in connection with the Agreement, a \$7.5 million escrow was created to satisfy Sellers’ indemnification obligations, to the extent any are subsequently determined to exist.

3. NPE Seller Rep brought the Verified Counterclaims to enforce MFI’s contractual obligation to pay the Remittance Amounts to Sellers, as well as to enforce Post’s unconditional guarantee of MFI’s contractual obligation under the Agreement. There are no material issues of fact for the Court to resolve. MFI admits it has received amounts contractually due to Sellers and MFI admits that it has not remitted those amounts. MFI has no basis to refuse to remit those amounts. Therefore, as a matter of law, NPE Seller Rep is entitled to a judgment and order directing Buyers to remit the Remittance Amounts and to indemnify NPE Seller Rep for its reasonable attorneys’ fees and other expenses incurred in connection with pursuing its Verified Counterclaims.

## BACKGROUND

### A. Relevant Provisions of the Agreement

4. The Agreement imposes obligations on Buyers with regard to certain tax refunds and insurance proceeds that Buyers receive after the October 3, 2016 closing. For example, pursuant to Section 6.7(e), “[i]f [NPE], its Subsidiary, or an Affiliate thereof actually receives a credit with respect to, or refund of, any Tax paid by or on behalf of [NPE] or its Subsidiary with respect to any Pre-Closing Period or Pre-Closing Straddle Period or taken into account in the determination of the Pre-Closing Tax Obligations, the Buyer [MFI] shall pay over to the Seller Representative (to be distributed by the Seller Representative to the Securityholders based upon their respective Allocable Portions) the amount of such refund or credit within fifteen (15) days of receipt or entitlement thereto.” (Ex. 1 at § 6.7(e).)

5. Section 6.8 contains a similar contractual obligation requiring Buyers to remit funds to Sellers relating to insurance proceeds. Under that provision, NPE “shall, reasonably promptly after receipt thereof, pay to the Seller Representative (to be distributed by the Seller Representative to the Securityholders based upon their respective Allocable Portions) any net business interruption insurance proceeds (net

of all direct collection expenses) received by [NPE] after the Closing Date with respect to the matters described on Schedule 3.11(b).”<sup>2</sup> (*Id.* at § 6.8.)

6. In addition to these post-closing remittance obligations, MFI agreed to indemnify Sellers for “any breach, non-fulfillment of or failure by the Buyer or [Post] to perform or observe any covenant or agreement to be performed or observed by the Buyer or [Post] under this Agreement or in any certificate or other closing document delivered pursuant to this Agreement.” (*Id.* at § 8.2(b)(ii).)

7. The parties agreed to an indemnification claims process whereby a party seeking indemnification submits a claim notice. (*Id.* at § 8.2(c)(i).) If a party receiving a claim notice fails to dispute the claim within 60 days of receiving the notice, “the Claim set forth in the Claim Notice shall be conclusively deemed a liability to be indemnified under this Section 8.2, and the Indemnified Party shall be indemnified for the amount of the Losses stated in such Claim Notice on demand.” (*Id.*)

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<sup>2</sup> Schedule 3.11(b) provides that “[NPE] recently experienced a several day power outage at the Lansing Facility. The physical damage to [NPE]’s electrical equipment resulting from such outage is not expected to exceed \$250,000. However, [NPE] may experience losses and mitigation damages in connection with such outage due to spoilage and selling eggs at a loss. [NPE] plans to file a business interruption claim for such outage, but the outage did not result in any failure to deliver customer orders.” The contents and circumstances referenced in Schedule 3.11(b) of the Agreement are referred to herein as the “Business Interruption Claim.”

8. Post, as MFI's parent, agreed to "guarantee[] unconditionally the payment and performance of all of Buyer's obligations and agreements under this Agreement, including, without limitation, any obligation of the Buyer with respect to any claim brought by the Securityholders or the Seller Representative arising out of or related to this Agreement." (*Id.* at § 10.13.)

**B. The Remittance Amounts Due Sellers Under the Agreement**

9. Since April 2017, NPE has received at least six tax refunds covered by Section 6.7 of the Agreement, totaling \$552,395.86. (CC Ans. ¶¶ 29, 30, 45, 55, 59.<sup>3</sup>) NPE has also received insurance proceeds covered by Section 6.8 at least twice, totaling \$422,040.68 net of all direct collection expenses. (*See id.* at ¶¶ 38, 52.) MFI has refused to remit any of these amounts. (*See id.* at ¶¶ 34, 38, 63.)

10. Instead, Buyers claim that they are "owed [separate] indemnification payments by the Securityholders under the...Agreement, the amount of which substantially exceeds" the Remittance Amounts (*see id.* at ¶ 31) and that they are "only obligated to pay the amount of the Refund to Securityholders if it would be net of the amount of any indemnification payment owed by the Securityholders to the Buyer or the Company" (*id.* at ¶¶ 47, 57, 61).

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<sup>3</sup> "CC Ans. ¶ \_\_\_" refers to Plaintiffs' Reply to Defendants' Verified Counterclaims to Plaintiffs' Amended Verified Complaint. (D.I. 28.)

11. Specifically, Buyers allege that they are entitled to indemnification for breaches of certain of NPE's representations in Article 3 of the Agreement. (Compl. ¶¶ 84, 87-92.<sup>4</sup>) However, to the extent Buyers have valid indemnification claims, a \$7.5 million escrow is available to satisfy Sellers' indemnification obligations. (*See id.* at ¶ 8; *see also* Ex. 1 at Ex. A (Form of Escrow Agreement).)

12. In response to Buyers' failure to remit the Remittance Amounts, Sellers submitted claim notices for indemnification. (*See* CC Ans. at ¶¶ 39, 48, 58.) More than 60 days have passed since Sellers submitted each claim notice. (*See, e.g., id.* at ¶¶ 42, 49.) Buyers did not dispute the merits of any of Sellers' claim notices within the 60-day period. Rather, Buyers asserted an alleged right to set off the Remittance Amounts due to Buyers' purported indemnification claims against Sellers. Based on this purported assertion to set-off, neither MFI nor Post has made any payments to Sellers with respect to the Remittance Amounts.

13. Count I of the Verified Counterclaims is for breach of contract, and alleges that Buyers have breached Sections 6.7, 6.8, 8.2, and 10.13 of the Agreement. In Count II, NPE Seller Rep seeks specific performance of Buyers' contractual obligations to pay the Remittance Amounts to Sellers.<sup>5</sup>

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<sup>4</sup> "Compl. ¶ \_\_\_" refers to Plaintiffs' Amended Verified Complaint. (D.I. 18.)

<sup>5</sup> "[T]he Parties agree that, such non-breaching Party shall have the right, in addition to any other rights and remedies existing in its favor at law or in equity, to enforce it[s] rights and the other Party's obligations hereunder not only by an action or actions for damages but also by an action or actions for specific

## ARGUMENT

14. A motion for judgment on the pleadings will be granted when “no material issue of fact exists and the movant is entitled to judgment as a matter of law.” *Aveta Inc. v. Bengoa*, 2008 WL 5255818, at \*2 (Del. Ch.). The Court must view all well-pleaded factual allegations and reasonable inferences in favor of the non-moving party. *Id.* “The court is not, ‘however, required to accept as true conclusory assertions unsupported by specific factual allegations,’ particularly assertions that do not comport with the terms of a clear and unambiguous contract.” *GreenStar IH Rep, LLC v. Tutor Perini Corp.*, 2017 WL 5035567, at \*5 (Del. Ch.) (citations omitted). For these reasons, “[j]udgment on the pleadings is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact.” *Id.* (citations omitted).

15. “Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff.” *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003). Here, MFI and Post all but admit to breaching the Agreement. MFI does not dispute its obligations under Section 6.7 and 6.8 to remit the Remittance Amounts to Sellers or its obligation under Section 8.2 to indemnify Sellers in

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performance, injunctive and/or other equitable relief (without posting of bond or other security.” (Ex. 1 at § 10.12.)



response to Sellers' claim notices. MFI also does not dispute that it has not remitted the Remittance Amounts to Sellers or otherwise indemnified them. And Post does not dispute its unconditional obligation under Section 10.13 to guarantee MFI's payment and performance under the Agreement. Nor does Post dispute that it has not remitted or caused to be remitted the Remittance Amounts or otherwise indemnified Sellers. These undisputed breaches have resulted in damages to Sellers of more than \$970,000.

16. Buyers' only response with respect to their clear obligations to remit to Sellers the Remittance Amounts is an alleged right to set off those amounts against Buyers' pending indemnification claims against Sellers. Because that right does not exist at common law or in equity, and Buyers did not bargain for that right in the Agreement, MFI has no basis to withhold the Remittance Amounts or to refuse to indemnify Sellers pursuant to Sellers' claim notices, and Post has no basis to refuse to guarantee MFI's payment and performance.

**I. MFI Has No Right at Law or in Equity to Set Off Unliquidated Sums Against the Remittance Amounts**

17. The "hornbook principles" of set-off include that "[a] contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off" and that "there is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable." *CanCan Development, LLC v. Manno*, 2011 WL 4379064, at \*5 (Del. Ch.) (quoting 80 *C.J.S. Set-Off and Counterclaim*

§§ 3, 58 (2011)). Applying these principles, the Court has refused to permit a defendant to set off payment of a plaintiff's attorneys' fees against the defendant's potential recovery against that plaintiff in a related action. *See id.*; *see also Brace Indus. Contracting, Inc. v. Peterson Enters, Inc.*, 2017 WL 2628440, at \*4 (Del. Ch.) (“[N]o right to set-off unliquidated sums [exists] at common law or in equity...”). The Court has explained that such a set-off would be “premature” because the claim in the related action was “contingent and unmatured” while the amount of the attorneys' fees was “liquidated, due, and payable....” *CanCan Development*, 2011 WL 4379064, at \*5.

18. MFI has refused to remit the Remittance Amounts because MFI claims it is “owed [separate] indemnification payments by the Securityholders under the...Agreement.” But the Securityholders did not then, and do not now, owe indemnification payments to MFI. To the contrary, the Securityholders dispute that they owe any indemnification payments, and the Securityholders' indemnification obligations are the subject of this litigation. While MFI's purported indemnification claims remain disputed in the litigation, the Securityholders' indemnification obligations are contingent, unmatured, and unliquidated. On the other hand, MFI has not denied its obligation under Sections 6.7 and 6.8 to remit the Remittance Amounts, which are due and payable now (and have been for months).

## **II. MFI Has No Contractual Right to Set Off Unliquidated Sums Against the Remittance Amounts**

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19. Because there is no common law or equitable right to set off unliquidated sums against amounts that are due and payable, Delaware “law encourages parties to contract freely to create those contractual rights as they see fit.” *Brace Indus.*, 2017 WL 2628440, at \*4. When construing contractual rights, “the role of the court is to effectuate the parties’ intent. In doing so, [the court is] constrained by a combination of the parties’ words and the plain meaning of those words.” *See GreenStar IH Rep*, 2017 WL 5035567, at \*6 (citations omitted).

20. With regard to the tax refund portion of the Remittance Amounts, the parties did not agree to any set-off rights for disputed indemnification claims. The Agreement instead provides that “Buyer shall only be required to pay the amount of any such refund net of (A) the amount of any indemnification payment owed by Securityholders to Buyer or to the Company; and (B) any tax detriment (including Taxes owed on such refund) suffered by the Buyer or its Affiliates as a result of such refund.” (Ex. 1 at § 6.7(e)(ii).) The plain meaning of this language demonstrates that netting is inapplicable here.

21. First, as discussed above, the Securityholders do not owe any indemnification payments to MFI. Only if and when Buyers are successful on their purported claims, the Securityholders might owe indemnification payments to MFI. Contrary to Buyers’ position, the Agreement does not permit MFI to remit tax refunds

net of any indemnification payments *claimed* against Securityholders, but rather only net of any indemnification payments *actually owed* by Securityholders. *Compare, e.g., Brace Indus.*, 2017 WL 2628440, at \*3 (set-off provision addressing “claimed amounts”). Second, MFI has not asserted that it or any of its affiliates have suffered a tax detriment in connection with any of the refunds that exceeds the amount of the refunds. Therefore, the netting language in Section 6.7(e)(ii) does not apply to the tax refund portion of the Remittance Amounts.

22. With regard to the insurance proceeds portion of the Remittance Amounts, MFI’s obligation to remit net business interruption insurance proceeds is even more obvious. If NPE receives net business interruption insurance proceeds after the Closing Date with respect to the Business Interruption Claim, NPE “shall, reasonably and promptly after receipt thereof, pay to the Seller Representative” those proceeds. (Ex. 1 at § 6.8.) The Agreement does not permit MFI to “throw up” allegations against Sellers “as a means to avoid” its clear responsibilities to remit the insurance proceeds portion of the Remittance Amounts. *See GreenStar IH Rep*, 2017 WL 5035567, at \*9. MFI cannot, in its own discretion, set off “against the amount owed what it claims to be an unrelated liability running from” Sellers to MFI. *See Brace Indus.*, 2017 WL 2628440, at \*4. Therefore, the insurance proceeds portion of the Remittance Amounts clearly is due and payable now (and has been for months).

## CONCLUSION

23. For these reasons, NPE Seller Rep respectfully requests that the Court grant its motion for judgment on the pleadings on its Verified Counterclaims and enter judgment in its favor and against Buyers awarding NPE Seller Rep \$974,436.54 plus NPE Seller Rep's costs and expenses in pursuing the Verified Counterclaims (including its reasonable attorneys' fees and expenses) as well as pre- and post-judgment interest on all of the foregoing.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of June, 2018, a copy of the within document was served electronically by *File & ServeXpress* on the following counsel of record at the address indicated:

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