UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THULE AB,

Plaintiff,

-against-

ADVANCED ACCESSORY HOLDINGS COPORATION, AAS ACQUISITIONS, LLC, CHAAS ACQUISITIONS, LLC, VALLEY INDUSTRIES, LLC,

Defendants.

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09 Civ. 00091 (PKC)

MEMORANDUM
AND ORDER

P. KEVIN CASTEL, District Judge:

This action arises out of a dispute over certain post-closing adjustments relating to the acquisition of a business by the plaintiff, Thule AB ("Thule"), from the defendants. In a Memorandum and Order dated April 2, 2009, the Court granted the defendants' motion to confirm an arbitration award that ordered defendants to pay Thule more than $4.1 million in post-closing adjustments, and denied Thule's motion to vacate the award. Thule AB v. Advanced Accessory Holding Corp., 2009 WL 928307 (S.D.N.Y. Apr. 2, 2009) ("Thule I"). The original defendants in this action were Advanced Accessory Holdings Corporation, AAS Acquisitions, LLC, CHAAS Acquisitions, LLC ("CHAAS") and Valley Industries, LLC. As will be explained, the claims against all defendants but CHAAS are currently stayed pursuant to 11 U.S.C. § 362(a).

It is undisputed that, despite this Court's confirmation of the arbitration award, defendants have not made payment to Thule. In its Second Amended Complaint (the "SAC"), Thule asserts that CHAAS breached the parties' asset purchase agreement (the "Purchase Agreement"), as well as a related escrow agreement (the "Escrow Agreement"), by refusing to

authorize payment to Thule from an escrow account. CHAAS, as well as certain other defendants against who the claims are stayed, were parties to both the Purchase Agreement and the Escrow Agreement. (SAC Exs. A, B.) Thule seeks equitable relief to compel CHAAS's performance under the Escrow Agreement.

CHAAS moves to dismiss the SAC pursuant to Rule 12(b)(6), Fed. R. Civ. P., and Thule moves for summary judgment on its breach of contract claim pursuant to Rule 56, Fed. R. Civ. P. All parties agree that the motions solely raise issues of contract interpretation that may be determined by the Court as a matter of law. Neither side contends that extrinsic evidence is required – or permitted – to interpret the relevant agreements. For the reasons explained below, the defendants' motion to dismiss is denied. In addition, because Thule has not established its entitlement to relief on its breach of contract claim, Thule's motion for summary judgment against CHAAS also is denied.

THE DEFENDANTS' BANKRUPTCY PROCEEDINGS

Thule filed the SAC on May 22, 2009. (Docket # 47.) All defendants filed a motion to dismiss on June 16, 2009, and Thule filed a motion for summary judgment on that same date. (Docket # 51, 53.) On July 1, 2009, before the motions were fully briefed, defendants notified the Court that they had filed bankruptcy petitions in the Eastern District of Michigan. (Docket # 58.) The bankruptcy proceedings triggered the automatic stay. 11 U.S.C. § 362(a). In a letter dated December 14, 2009, counsel to Thule informed the Court that the bankruptcy stay had been lifted as to defendant CHAAS. (Docket # 60.) Although the motion to dismiss was initially filed on behalf of all defendants, this Memorandum and Order is directed to CHAAS, and CHAAS is the sole defendant whose rights are at issue in

this motion. As explained by CHAAS, "the parties agree that the remaining issue can be litigated to its conclusion without the other Defendants." (Reply Mem. at 1 n.1.) Plaintiff has not taken a different position.

I. The Defendants' Motion to Dismiss is Denied.

A. Background

For the purposes of defendants' motion to dismiss, all nonconclusory factual allegations set forth in the pleadings are accepted as true. S. Cherry St. LLC v. Hennessee Group LLC, 573 F.3d 98, 100 (2d Cir. 2009); see also Iqbal v. Ashcroft, 129 S.Ct. 1937, 1949-50 (2009). As the non-movant, all reasonable inferences are drawn in favor of the plaintiff. See Hayden v. Paterson, 594 F.3d 150, 157 n.4 (2d Cir. 2010).

Thule is a Swedish manufacturer of automotive accessories and specialty car parts. (SAC ¶ 1.) In 2006, it purchased from the defendants an automotive accessories and specialty car parts business (the "Business"). (SAC ¶¶ 1, 20.) The terms of the transaction were memorialized in the Purchase Agreement, which is dated May 17, 2006. (SAC ¶ 21.) In the Purchase Agreement, Thule agreed to pay the defendants $203 million for the Business, with that figure subject to post-closing adjustments. (SAC ¶ 22.) Subsequent to the closing, Thule calculated that the defendants owed Thule a purchase price adjustment of approximately $29 million. (SAC ¶ 23.) Defendants disputed Thule's calculations, and the parties proceeded to arbitration. (SAC ¶¶ 23-26.) On October 9, 2009, the arbitrator issued an award concluding that defendants owed Thule a purchase price adjustment of $4,121,200, plus interest. (SAC ¶ 27.) According to Thule, the defendants have refused to pay the sum. (SAC ¶ 27.)

Thule commenced this action on January 7, 2009. (SAC ¶ 28.) It sought to vacate the arbitration award, and also asserted a breach of contract claim seeking $4,121,200 in damages, plus interest. (SAC ¶ 28.) In a Memorandum and Order, this Court denied a motion by Thule to vacate the award, granted the defendants' motion to confirm the award, and denied Thule's motion for summary judgment on its breach of contract claim. See Thule I, 2009 WL 928307. The Court noted that, "[w]ith the confirmation of the arbitration award, the sum [to Thule] will now be due and owing. If not paid, Thule may pursue all remedies available to it." Id. at *5.

Thule filed the SAC after the Court's decision in Thule I. The SAC asserts a new breach of contract claim, contending that Thule has failed to perform under the terms of both the Purchase Agreement and the Escrow Agreement. According to the SAC, the "[d]efendants do not contest their payment obligation or the amount" now owed to Thule, but instead contend that they lack funds to pay Thule the amounts awarded at the conclusion of arbitration. (SAC ¶ 31.) Thule asserts that at section 8.2, the Purchase Agreement contains "a broad indemnification provision" protecting Thule against defendants' non-performance. (SAC ¶¶ 32, 34.) The SAC excerpts the indemnification language of the Purchase Agreement, which, it contends, requires the defendants to indemnify Thule "from and against any and all Losses that may be . . . suffered or incurred by [Thule] that, directly or indirectly, arise out of, result from, are based upon or related to: . . . (b) any failure by [Defendants] to duly and timely perform or fulfill any of its covenants or agreements required to be performed by [Defendants] under this Agreement . . . ." (SAC ¶ 32, quoting Purchase Agreement § 8.2; emphasis omitted.)

In connection with the acquisition, the parties executed the Escrow Agreement on September 6, 2006 to ensure indemnity payments were made to Thule for losses arising out of "covenants or agreements" set forth in the Purchase Agreement. (SAC ¶ 38.) The escrow account was funded by a letter of credit in the amount of $16 million, which was issued with the purpose of ensuring availability of escrow funds. (SAC ¶ 38.)

According to the SAC, the Escrow Agreement sets forth the procedures by which Thule can assert a claim to payment from the escrow account. (SAC ¶ 39.) As excerpted in the SAC, "[i]f [Thule] delivers a notice to the [Defendants] . . . seeking indemnification from the [Defendants] under Section 8.2 of the Purchase Agreement (a 'Claim Notice'), [Thule] also will deliver to the [Defendants'] Representatives with a copy to the Escrow Agent a certificate . . . ." (SAC ¶ 39, quoting Escrow Agreement § 6(a); alterations in original.) In other words, for Thule to make a claim to escrow funds, it must provide 1.) a claim notice to the defendants (the "Notice of Claim"), and 2.) a claim certificate to the escrow agent (the "Certificate of Claim"). According to the SAC's interpretation of the relevant language, the Escrow Agreement requires that once the Notice of Claim and Certificate of Claim are delivered to the defendants, the escrow claim remains pending and valid until one of the following occurs: the claim is paid from the escrow account, a court adjudicates the amount in dispute, the parties reach an agreement or Thule cancels its claim. (SAC ¶ 40.)

Thule asserts that CHAAS has failed to perform consistent with its obligations under the Purchase Agreement and the Escrow Agreement. According to the SAC, on September 2, 2008, while the parties' arbitration was pending, Thule sent to CHAAS a Notice of Claim and a Certificate of Claim in connection with amounts that defendants owed Thule

for purchase price adjustments. (SAC ¶ 43.) Among other things, the Notice of Claim asserted that Thule was owed indemnification pursuant to section 2.10 of the Purchase Agreement for an aggregate price adjustment that was then in arbitration. (SAC ¶¶ 44-45.) According to Thule, its actions were made in order to "freeze" the assets in escrow, pending resolution of the disputed purchase price adjustment. (SAC ¶ 47.)

These actions by Thule predated the arbitration award and this Court's subsequent confirmation of the award. (SAC ¶¶ 51-52.) Following Thule I (and the entry of a judgment subsequently vacated pursuant to a motion by Thule) Thule delivered to defendants' counsel a "certificate of payment," which, under the Escrow Agreement, is to be jointly delivered by the parties to the escrow agent as a final step prior to payment from the escrow account. (SAC ¶ 54; Escrow Agrmt. § 6(c).) The defendants refused to sign the certificate of payment. (SAC ¶ 55.) According to the Escrow Agreement, the parties "shall" jointly deliver the certificate of payment upon a determination of the amount owed, made by a final, nonappealable order of a court of competent jurisdiction. (Escrow Agreement § 6(c).) Thule seeks specific performance under the Escrow Agreement in the form of an order requiring defendants to sign the certificate of payment. (SAC ¶ 56.) Alternatively, it seeks an order directing the escrow agent to pay the amount of Thule's claim. (SAC ¶ 56.)

B. Motion to Dismiss Standard.

Rule 8(a) (2), Fed. R. Civ. P., requires "'a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (ellipsis in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must provide the

grounds upon which the claims rest, through factual allegations sufficient "'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund. Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S.Ct. at 1949. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." Id. Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action" do not suffice to state a claim, as "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 1949-50.

The Supreme Court has described the motion to dismiss standard as encompassing a "two-pronged approach" that requires a court first to construe a complaint's allegations as true, while not bound to accept the veracity of a legal conclusion couched as a factual allegation. Id. at 1950. Second, a court must then consider whether the complaint "states a plausible claim for relief," which is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Although the Court is limited to facts as stated in the complaint, it may consider exhibits or documents incorporated by reference without converting the motion into one for summary judgment. See Int'l Audiotext Network, Inc. v. AT&T, 62 F.3d 69, 72 (2d Cir. 1995).

C. Discussion.

The defendants' motion to dismiss is premised on two arguments. First, they argue that Thule's Notice of Claim and Certificate of Claim are unenforceable because at the time they were delivered, Thule had not yet incurred a cognizable loss for which it was entitled to indemnification. Second, the defendants argue that, even assuming its timeliness,

the Notice of Claim provided insufficient detail as to Thule's grounds for indemnification, rendering it unenforceable.

The Purchase Agreement provides that it "shall be governed by and construed in accordance with the laws of the State of New York . . . ." (Purchase Agreement § 10.10; emphasis omitted.) The Escrow Agreement contains identical language. (Escrow Agreement § 15.) Under New York law, a successful breach of contract claim must allege the terms of the agreement, the consideration, the plaintiff's performance and the basis of the defendant's alleged breach. Furia v. Furia, 116 A.D.2d 694, 695 (2d Dep't 1986). "[C]ontracts must be read as a whole and all terms of a contract must be harmonized whenever reasonably possible." Madison Hudson Associates LLC v. Neumann, 44 A.D.3d 473, 480 (1st Dep't 2007) (citing Matter of Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358 (2003)). A breach of contract claim premised upon conclusory breach allegations is not entitled to the presumption of truth, and fails to satisfy the pleading thresholds of Iqbal and Twombly. See, e.g., Sedona Corp. v. Ladenburg Thalmann & Co., 2009 WL 1492196, at *10 (S.D.N.Y. May 27, 2009).

1. Thule Timely Delivered Its Notice of Claim and Certificate of Claim.

I begin by reviewing the Escrow Agreement's language concerning the timing of a Certificate of Claim and Notice of Claim asserting entitlement to escrow account funds. At section 6(a), the Escrow Agreement states:

> No Certificate of Claim may be delivered by Purchaser after 5:00 p.m. New York time on the business day immediately preceding (i) the Initial Release Date for any claim made pursuant to any clause of Section 8.2 of the Purchase Agreement other than Section 8.2(e) as it relates to Deal-Related Taxes . . . . For purposes of this Agreement, the "Initial Release Date" is the second anniversary of the date of this Agreement . . . .

The Escrow Agreement is dated September 6, 2006. Therefore, section 6(a) requires that any

Certificate of Claim must be delivered before 5 p.m. on September 6, 2008, with the exception of certain tax-related obligations not implicated in this dispute.

Thule submitted one Certificate of Claim prior to the Escrow Agreement's deadline of September 6, 2008. (SAC ¶¶ 4, 43 & Ex. F.) It was dated September 2, 2008, was executed by Thule's CEO, and stated that it was submitted pursuant to section 6(a) of the Escrow Agreement. (SAC Ex. F.) The Certificate of Claim states that Thule had sent defendants a claim notice in "the amount of $25,341,977," payable "pursuant to Section 8.2 of the Purchase Agreement . . . ." (SAC Ex. F.) It "instructs" the escrow agent to pay Thule the amount owed from the escrow fund. (SAC Ex. F.)

2. Thule's Notice of Claim Asserted a Breach of Contract Theory Rejected by the Arbitrator.

The Notice of Claim, also dated September 2, 2008, is addressed to CHAAS, and asserts that defendants had breached section 2.10(b) of the Purchase Agreement. (SAC Ex. F.) Section 2.10 of the Purchase Agreement is headed, "Closing Balance Sheet," and at subsection (b), provides that within thirty days of delivery of the closing date balance sheet, the defendants "shall deliver to [Thule] a notice setting forth, in reasonable detail, any good faith dispute" concerning the closing date balance sheet, statement of working capital, or statement of indebtedness. According to the Notice of Claim addressed to CHAAS, defendants breached section 2.10(b) of the Purchase Agreement by delivering a dispute notice that contained "general reservations of the right to raise specific objections after receiving further information or after having the opportunity to hold discussions with Thule's independent accountants." (SAC Ex. F.) This broad reservation of rights is the sole breach identified in Thule's Notice of Claim. (SAC Ex. F.) Thule stated in the Notice of Claim that the reservation of rights caused Thule to "incur[] substantial incremental expenses in

connection with the Dispute Process" and has "wrongfully prevented [Thule] from being paid the amounts owed to it pursuant to Section 2.10(e) of the Purchase Agreement." (SAC Ex. F.) It appears to have been Thule's theory in its Notice of Claim that a general reservation of rights was not contemplated by the Purchase Agreement, and that by asserting such reservations, the defendants violated the agreement and caused loss to Thule. The arbitrator rejected Thule's argument that the defendants breached section 2.10(b), and their performance thereunder is not a basis for plaintiff's present breach of contract claim. (SAC Ex. D ¶¶ 22-24.)

3. Defendants Do Not Dispute that, as a General Proposition, Post-Closing Adjustments are Subject to Indemnification.

As previously noted, section 8.2 of the Purchase Agreement states that defendants shall indemnify Thule "from and against any and all Losses that may be asserted against or paid, suffered or incurred by [Thule] that, directly or indirectly, arise out of, result from, are based upon or related to: . . . (b) any failure by [defendants] to duly and timely perform or fulfill any of its covenants or agreements required to be performed by [defendants] under this Agreement . . . ." (Purchase Agreement § 8.2.) The parties do not dispute that section 8.2 of the Purchase Agreement provides for indemnification, and that at section 6(a), the Escrow Agreement allows a drawdown of the escrow account for indemnification payments owed pursuant to section 8.2. Similarly, the SAC alleges, and the defendants do not dispute that, at least in the abstract, the Purchase Agreement provides for payment if the defendants fail to duly perform any covenants or agreements. (Purchase Agreement §§ 2.10(a) & (e), 8.1.) The defendants do, however, dispute that under the facts of this case, Thule delivered an enforceable Notice of Claim and Certificate of Claim for payment under the Escrow Agreement. According to the defendants, the Certificate of Claim and Notice of

Claim prematurely sought payment on price adjustments that were yet to be resolved in a parallel arbitration.

4. The Purchase Agreement Sets Forth a Broad Definition of Indemnifiable "Losses."

The definitional section of the Purchase Agreement establishes an expansive definition of a "Losses" subject to indemnification. Section 8.2 specifies that "after the Closing," the defendants will indemnify Thule "from and against any and all Losses" that arise out of "any failure" by the defendants "to duly and timely perform or fulfill any of its covenants or agreements" required as part of the transaction. (Purchase Agreement § 8.2.) The Purchase Agreement defines "Losses" to mean "any and all damages, fines, fees, penalties, deficiencies, Liabilities, claims, losses, Taxes, demands, judgments, settlements, actions, obligations and costs and expenses . . . ." (Purchase Agreement at 8.) "Liabilities" is, in turn, defined to include "all Indebtedness, liabilities, obligations, responsibilities, commitments and expenses of every kind, whether or not accrued or fixed, known or unknown, absolute or contingent, matured or unmatured, determined or determinable." (Purchase Agreement at 8.)

The Purchase Agreement's definition of "Liabilities" – which is incorporated into its definition of "Losses" and subject to indemnification under section 8.2 – is broad, and includes "all" "contingent," "unknown" or "unmatured" "responsibilities, commitments and expenses of every kind . . . ." (Purchase Agreement at 8.) Read in conjunction with section 8.2(b), which promises indemnification for "Losses" arising from "any failure . . . to duly and timely perform" any covenants or agreements, the Purchase Agreement allows for indemnification claims for yet-to-be-ascertained losses – obligations, responsibilities or commitments that are contingent, unknown or unmatured.

The parties here expressly contracted for indemnification claims as to not-fully-realized, "unmatured" losses. (Purchase Agreement at 8.) As is discussed below, they also distinguished a claim for such indemnification from entitlement to indemnification payment for such a loss.

5. The Purchase Agreement and Escrow Agreement Did Not Require Thule to Identify the Precise Sources of Loss for Which it Claimed Indemnification.

Defendants argue that the Notice of Claim that Thule delivered on September 2, 2008 was inadequate because it identified the defendants as being in breach of section 2.10(b) of the Purchase Agreement, a provision that is no longer in dispute and for which the arbitrator ruled in the defendants' favor. (SAC Ex. D. ¶¶ 22-24.) Section 2.10(b), which governs the parties' obligations in the event of a dispute over the calculation of post-closing adjustments, required defendants to deliver a statement setting forth the grounds of their disagreement with Thule's calculations, "specifying the items and amounts that are dispute and the basis for such dispute . . . ." Thule's Notice of Claim merely asserted that by claiming a general reservation of rights to raise future objections, the defendants breached section 2.10(b). (SAC Ex. F.) The arbitrator rejected Thule's argument that defendants' general reservation of rights breached the Purchase Agreement. (SAC Ex. D ¶¶ 22-24.) Defendants' general reservation of rights is not at issue in the present dispute.

Defendants correctly point out that Thule seeks indemnification for losses that were not incurred at the time the Notice of Claim was delivered. But in the Purchase Agreement, the parties agreed that indemnifiable "Losses" included "Liabilities" of a contingent, unknown and unmatured nature. (Purchase Agreement at 8.) That is, in drafting the Purchase Agreement, all parties expressly agreed that a party could claim indemnification and assert entitlement to escrow payment for "Losses" that were not fully realized – provided

that the Notice of Claim and Certificate of Claim were delivered before 5 p.m. on September 6, 2008. (Purchase Agreement at 8; Escrow Agreement § 6(a).) That an indemnitee could claim entitlement to indemnification for contingent, unknown or unmatured obligations does not necessarily result in payment for such an obligation, because the Escrow Agreement conditions payment on either "an agreement" between Thule and the defendants that the sum "is payable to" an indemnitee, or, alternatively, "a final, nonappealable order of a court of competent jurisdiction" that indemnification is owed.[1] (Escrow Agreement §§ 6(c)(i) & (ii).) In other words, eventual payment of a claim of future loss was conditioned on subsequent events – agreements between the parties or a judicial order – that confirmed the existence and quantum of loss.

Moreover, neither the Purchase Agreement nor the Escrow Agreement requires that a particular form or level of specificity be provided in asserting a Notice of Claim or the grounds for indemnification. Indeed, at section 8.5(a), the Purchase Agreement states in full:

> If an Indemnified Party intends to seek indemnification under this Article VIII, it shall promptly notify the Indemnifying Party in writing of such claim. The failure to provide such notice will not affect any rights hereunder except to the extent the Indemnifying Party is materially prejudiced thereby.

(emphasis added.) If the parties had wished to require greater specificity or formality in asserting entitlement to indemnification, they could have included such requirements in the agreement. As it is, the mechanism for asserting a claim for indemnification is consistent with New York's presumption that an indemnitee need not assert the precise basis for the indemnitor's obligation to pay. "It is well established that unless otherwise specified by contract, no particular form of notice is required under New York law for an indemnitee's

[1] CHAAS has not raised the existence vel non of a final, nonappealable order as part of the motion to dismiss. This issue is discussed in greater detail in the context of Thule's motion for summary judgment.

notice of claim to his indemnitor." Combustion Engineering, Inc. v. Imetal, 235 F. Supp. 2d 265, 273 (S.D.N.Y. 2002) (citing Prescott v. Le Conte, 83 A.D. 482 (1st Dep't 1903)). Applying New York law, Judge Sweet has held that an indemnitee "was not required to provide a detailed description of the nature of the liability nor 'point[ ] to a specific breach' for which it sought indemnification." E*TRADE Financial Corp. v. Deutsche Bank AG, 631 F. Supp. 2d 313, 378 (S.D.N.Y. 2009). Defendants argue that these cases do not apply because they involve past losses, but in this instance, the Purchase Agreement specifically provides for indemnification when there are "contingent," "unknown" or "unmatured" "responsibilities, commitments and expenses of every kind . . . ." (Purchase Agreement at 8.)

6. The SAC Plausibly Alleges Breach of the Purchase Agreement and the Escrow Agreement.

The Purchase Agreement and the Escrow Agreement were negotiated at arm's length by sophisticated entities. The agreements might have included narrower definitions of "Losses" and "Liabilities," and they might have prescribed the form of notice or level of specificity required by an indemnitee. The agreements did neither, instead adopting an expansive definition of "Losses" and a simple procedure for claiming entitlement to indemnification. The SAC sufficiently alleges delivery of the Notice of Claim and Certificate of Claim prior to 5 p.m. on September 6, 2008, and defendant's arguments that the Notice of Claim should be unenforceable for lack of specificity, as well as its assertion of future loss, are unavailing. Based on the foregoing, I conclude that the SAC plausibly alleges a breach of contract claim, and that the defendants' motion to dismiss is denied.

II. Thule's Motion for Summary Judgment is Denied.

A. Background.

The standards governing Thule's Rule 56 summary judgment motion differ from those governing the motion to dismiss pursuant to Rule 12(b)(6). Except where expressly noted, the following facts are either undisputed or taken from the defendants' version of the facts. All reasonable inferences are drawn in favor of the defendants who are, on Thule's motion, the non-movants. See Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

On May 17, 2006, Thule and the defendants entered into the Purchase Agreement for the acquisition of the Business. (56.1 ¶ 1; Def. 56.1 Resp. ¶ 1.) The Purchase Agreement contains an indemnification provision at section 8.2. (56.1 ¶ 2; Def. 56.1 Resp. ¶ 2.) The parties, including CHAAS, also executed the Escrow Agreement. (56.1 ¶ 3; Def. 56.1 Resp. ¶ 3.) The Escrow Agreement was executed to secure payment of indemnification claims. (56.1 ¶ 4; Def. 56.1 Resp. ¶ 4.) After the transaction's closing and Thule's acquisition of the Business, Thule asserted that defendants owed approximately $29 million in post-closing adjustments. (56.1 ¶ 5; Def. 56.1 Resp. ¶ 5.) On January 3, 2007, defendants sent Thule a notice disputing Thule's calculations. (56.1 ¶ 6; Def. 56.1 Resp. ¶ 6.) Subsequently, on September 2, 2008, Thule sent the defendants a Notice of Claim and Certificate of Claim pursuant to the Escrow Agreement, claiming that defendants were obligated to pay a purchase price adjustment pursuant to section 2.10 of the Purchase Agreement. (56.1 ¶ 7; Def. 56.1 Resp. ¶ 7.) Defendants contend that Thule's claims of September 2, 2008 lack legal effect. (Def. 56.1 Resp. ¶ 7.)

On April 14, 2009, after this Court confirmed the arbitration award, Thule delivered a "Certificate of Payment" to CHAAS, asserting its entitlement to payment of moneys set forth in the Certification of Claim. (56.1 ¶ 8; Def. 56.1 Resp. ¶ 8.) The defendants have refused to sign the Certificate of Payment, and have represented as much to the Court. (56.1 ¶¶ 9-10; Def. 56.1 Resp. ¶¶ 9-10.) Thule asserts that CHAAS lacks the resources to pay Thule for purchase price adjustments totaling $4,121,200 plus interest; CHAAS does not dispute this, but asserts that Thule possibly may recover "some portion of the amount owed in bankruptcy proceedings." (56.1 ¶ 11; Def. 56.1 Resp. ¶ 11.) Defendants dispute that the Escrow Agreement requires payment to Thule from the escrowed funds for the purchase price adjustments. (Def. 56.1 Resp. ¶ 12.)

B. Summary Judgment Standard.

Summary judgment "should be rendered 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." Rule 56(c)(2), Fed. R. Civ. P. It is the initial burden of a movant on a summary judgment motion to come forward with evidence on each material element of his claim or defense, demonstrating that he or she is entitled to relief. A fact is material if it "might affect the outcome of the suit under the governing law . . ." Anderson, 477 U.S. at 248. The evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

When the moving party has met this initial burden and has asserted facts to demonstrate that the non-moving party's claim cannot be sustained, the opposing party must "set out specific facts showing a genuine issue for trial," and cannot rest "merely on

allegations or denials" of the facts asserted by the movant. Rule 56(e)(2), Fed. R. Civ. P. In raising a triable issue of fact, the non-movant carries only "a limited burden of production," but nevertheless "must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 84 (2d Cir. 2004) (quoting Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1072 (2d Cir.1993)).

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." Allen v. Coughlin, 64 F.3d 77, 79 (2d Cir.1995) (internal quotations and citations omitted); accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). In reviewing a motion for summary judgment, the court must scrutinize the record, and grant or deny summary judgment as the record warrants. Rule 56(c)(2), Fed. R. Civ. P. In the absence of any disputed material fact, summary judgment is appropriate. Id.

Mere "conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996) (citing Matsushita, 475 U.S. at 587); see also Anderson, 477 U.S. at 249-50 (summary judgment may be granted if the evidence is "merely colorable" or "not significantly probative") (citations omitted). An opposing party's facts "must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences,

conjectural, speculative, nor merely suspicions." Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 n. 14 (2d Cir.1981) (quotation marks omitted).

C. Thule Has Failed to Establish Its Entitlement to Judgment in Its Favor on All Elements of Its Claim.

Thule contends that the Escrow Agreement establishes a three-step process for making a claim against the escrow account when the amount claimed is in dispute. (S.J. Reply at 8-9.) First, Thule must deliver a Notice of Claim and Certificate of Claim. (Escrow Agreement § 6(a).) Second, the defendants must deliver to the escrow agent an objection certificate disputing Thule's entitlement to the escrow payment. (Escrow Agreement § 6(b).) Third, "[u]pon . . . a determination by a final, nonappealable order of a court of competent jurisdiction" that the amount cited in a certificate of claim is "payable" to Thule, Thule and CHAAS are to deliver to the Escrow Agent a certificate of payment stating that the owed amount in the certificate of payment is payable to Thule. (Escrow Agreement § 6(c).) In addition, Thule contends that it has no adequate remedy at law, because the defendants have asserted that they lack funds to satisfy their payment obligations to Thule. (S.J. Mem. at 8-9; 56.1 ¶ 11; 56.1 Resp. ¶ 11.)

In opposition to Thule's motion, the defendants largely reiterate their arguments supporting the motion to dismiss, focusing on the timing and the sufficiency of detail in Thule's Notice of Claim. As discussed in detail above, the Purchase Agreement sets forth a broad definition of "Loss," and neither the Purchase Agreement nor the Escrow Agreement require that the Notice of Loss include any particular content or be made in any specific form. Indeed, the Purchase Agreement, at section 8.5(a), expressly contemplates that a party could assert entitlement to indemnification without even providing written notice, provided that its actions did not materially prejudice the defendants. For the reasons that the

defendants' motion to dismiss is denied, I conclude that their arguments going toward the Purchase Agreement's notice provisions are unavailing in their opposition to summary judgment, and that they have failed to come forward with facts that, if believed, would entitle them to judgment in their favor. Anderson, 477 U.S. at 248.

In addition, the defendants have raised no triable issue of fact as to Thule's entitlement to equitable relief. Except to note that bankruptcy proceedings may result in at least partial payment of the arbitration award by the defendants, the defendants do not dispute Thule's assertion that legal remedies are unavailable to it. (Def. 56.1 Resp. ¶ 11.) Tellingly, the defendants do not contend that either the Purchase Agreement or Escrow Agreement bars equitable relief. See generally Matter of Burke v. Bowen, 40 N.Y.2d 264, 267 (1976) ("The equitable remedy of specific performance is available in the court's discretion generally when the remedy at law, damages, would be inadequate."); S.E.S. Importers, Inc. v. Pappalardo, 53 N.Y.2d 455, 464 (1981) (trial courts should not order specific performance unless parties are capable of performing as directed).

This does not end the inquiry, however. For a court to grant summary judgment, the movant must establish its entitlement to judgment as a matter of law on all elements of its claim. See Vt. Teddy Bear Co., 373 F.3d at 244. "If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then 'summary judgment must be denied even if no opposing evidentiary matter is presented.'" Id. (quoting Amaker v. Foley, 274 F.3d 677, 681 (2d Cir. 2001) (emphasis in original)).

Thule's motion for summary judgment must be denied. Throughout Thule's submissions, it reiterates that the Escrow Agreement conditions payment on either an

agreement between Thule and the defendants that the sum is payable to an indemnitee, or, alternatively, a final, nonappealable order by a court of competent jurisdiction holding that indemnification is owed. (Escrow Agreement §§ 6(c)(i) & (ii); SAC ¶ 42; S.J. Mem. at 5, 7-8; S.J. Reply at 9.) But there is no evidence that the parties have reached an agreement that the sum is payable, and there is no final, nonappealable order stating that indemnification is owed.

On April 14, 2009, the Clerk entered judgment in this action. Less than one month later, and upon Thule's own motion, judgment was vacated. (Docket # 37; Docket Minute Entry 5/8/09.) Thule's Local Rule 56.1 Statement does not assert that a final, non-appealable order has been entered. Elsewhere, Thule strongly implies, but stops short of explicitly asserting, that this Court's decision affirming the arbitration award constituted a final, nonappealable order that required CHAAS to execute the certificate of payment under the Escrow Agreement. (S.J. Mem. at 2 (arguing that CHAAS is "obligated to sign the Certificate of Payment if the dispute over the amount owed is resolved."), 8 & n.2 (discussing the since-vacated judgment of April 14, 2009).)

A judicial decision followed by a subsequently vacated judgment is not a final, nonappealable order. Entry of final judgment is necessary for a party to file a notice of appeal. See Rule 4(a)(1)(A), Fed. R. App. P.; Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009) (discussing federal final judgment rule). Alternatively, no certificate has been issued pursuant to 28 U.S.C. § 1292(b), nor partial summary judgment entered under Rule 54(b), Fed. R. Civ. P, either of which might have resulted in a final, nonappealable order. Just as the parties agreed to a broad definition of "Losses" and an informal procedure for asserting entitlement to indemnification, so too did they negotiate and agree that drawdown on the

escrow account was conditioned upon agreement between the parties or a final, nonappealable order by a court of competent jurisdiction. (Escrow Agreement §§ 6(c)(i) & (ii).)

Had Thule not vacated the judgment in this action, it is possible that the 30 days would have passed without an appeal, rendering Thule I final and nonappealable. Rule 4(a)(1)(A), Fed. R. App. P. (setting 30-day deadline for appeal from district court judgment). Alternatively, the action might have proceeded until all appeals were exhausted. Had CHAAS continued to refuse payment under the escrow account, Thule might then have commenced a separate action, under the theory that a final, nonappealable order triggered payment pursuant to the Escrow Agreement, rendering CHAAS in breach of contract.

As the record currently stands, however, Thule has not established its entitlement to judgment as a matter of law an all elements of its breach of contract claim. Vt. Teddy Bear Co., 373 F.3d at 244. Its motion for summary judgment is denied.

CONCLUSION

The defendants' motion to dismiss is DENIED. (Docket # 51.) The plaintiff's motion for summary judgment is DENIED. (Docket # 53.)

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
May 3, 2010