NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

February 7, 2022

Rebecca Saitta
WILEY REIN LLP
2050 M Street, NW
Washington, D.C. 20036

Matthew J. MacLean
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036-3006

Re: *Eisiminger, et al. v. Perspecta, Inc.*, CL 2021-3525

Dear Ms. Saitta and Mr. MacLean:

This matter was before the court on Defendant's motion to compel. On December 17, 2021, the court denied the motion, without prejudice, except as to production of Plaintiffs' personal tax returns; on that issue, the court requested supplemental memoranda, which the parties timely filed.

BACKGROUND

On July 19, 2019, the parties entered into an agreement -- the *Equity Purchase Agreement ("Agreement")* -- for the sale by Plaintiffs of the equity in Knight Point Systems, LLC to Defendant Prospecta, Inc. Plaintiffs now contend that Defendant breached the *Agreement* by not paying Plaintiffs the sum of $3,046,632, the "purchase price increase to be paid to Sellers based on a formula in the Agreement." *Complaint* at 1.

The referenced formula is found in Section 10.7(b) of the *Agreement*, which provides in pertinent part:

> Within ten (10) calendar days after the Parties have agreed to the Final Incremental Section 338 Liability (or such amount has been determined in accordance with the procedures outlined below), Buyer shall pay to the Sellers, or the Sellers shall pay to Buyer, as

OPINION LETTER

> applicable, the difference between (i) the amount of the Incremental Section 338 Liability based upon the final Allocations (the "*Final Incremental Section 338 Liability*"), and (ii) the estimated amount previously paid to the Sellers by Buyer pursuant to this Section 10.7(b) and Section 1.2(c)(vi). . . . The Parties have agreed to use the methodologies and principles reflected in Exhibit G for purposes of calculating both the estimated Incremental Section 338 Liability and the Final Incremental Section 338 Liability.

Plaintiffs claim that Defendant has not paid them "the difference between" the "*Final Incremental Section 338 Liability*" and "the estimated amount previously paid to" Plaintiffs.

In defending Plaintiffs' claim, Defendant is requesting Plaintiffs' personal tax returns, arguing that Plaintiffs' personal tax information is relevant to determining the validity of Plaintiffs' claim: "This is a complicated tax dispute that places Sellers' income tax returns directly at issue." *Defendant's Supplemental Brief* 1. While Defendant acknowledges that its "request is grounded in the text of the Agreement itself" (*Id.* at 2), Defendant also asserts that "the calculations of Incremental and Final Incremental Section 338 Liability expressly require that taxes be taken into account . . . ." *Id.* at 4. Defendant further contends that Plaintiffs should be required to provide "proof that they incurred actual tax liability as a result of the Election." *Id.*[1]

While Plaintiffs initially responded that their personal tax returns are subject to a qualified privilege, Plaintiffs now argue also that their personal tax returns are not relevant, and thus not subject to discovery, because their personal tax information is not relevant to determining Defendant's liability under Section 10.7(b) of the *Agreement*.

For the reasons set forth below, the court finds that, as a matter of law, Plaintiffs' personal tax returns are not relevant, and thus not subject to discovery. Further, because Plaintiffs' personal tax returns are not relevant, the court does not need to address whether Plaintiffs' personal tax returns are subject to a qualified privilege.

ANALYSIS

The parties agree, correctly, that the text of the *Agreement* controls. As noted above, the text of the Agreement sets forth the agreed-upon "methodologies and principles" to be used "for purposes of calculating . . . the Final Incremental Section 338 Liability." Those "methodologies and principles" are "reflected in Exhibit G . . . ." Further, according to the *Declaration of Brian L. Enverso, CPA* (submitted by Plaintiffs), who computed the Final Incremental Section 338 Liability:

> For the calculation of the Final Incremental Section 338 Liability,

---

[1] Defendant also notes that, "solely as a result of the Election, Sellers may have applied stranded or suspended passive tax losses or used other potential tax attributes resulting from the Election to offset income or capital gains for a tax benefit" and that Sellers are "most assuredly not entitled to a windfall of millions of dollars from Perspecta." *Defendant's Supplemental Brief* 4, n.3. Defendant offers no argument grounded in the *Agreement* or any statute to support this assertion.

> I did not rely on the tax returns of any of the Sellers, and no tax return information or data from the Sellers was necessary to perform the calculation reflected in the schedule I prepared reflecting this calculation.

Declaration of Brian L. Enverso, CPA at ¶ 9.

Defendant offers nothing to the contrary, arguing only that Mr. Enverso "merely performed a calculation in a vacuum" because he "cit[ed] only the 'illustrative' Exhibit G." *Defendant's Supplemental Brief* 8. The *Agreement*, however, provides that, to perform the calculation of the Final Incremental Section 338 Liability, the parties are "to use the methodologies and principles reflected in Exhibit G . . . ." Thus, "citing only the 'illustrative' Exhibit G" was not "perform[ing] a calculation in a vacuum," but rather was adherence to the *Agreement*. The court accepts Mr. Enverso's explanation of his methodology.

Defendant also asserts that "the intent of the Election-related provisions in the Agreement was only to make Sellers whole <u>if</u> they incurred additional tax liability, not to provide a windfall to Sellers beyond actual tax liability." *Defendant's Supplemental Brief* 9 (citing *Declaration of Jonathan S. Bruss*). Mr. Bruss' *Declaration* purports to establish the "intent" of Exhibit G, *i.e.*, Defendant relies on parol evidence to support its interpretation of the *Agreement*. The court rejects Defendant's use of parol evidence.

It is well-established that, "[w]hen an agreement is plain and unambiguous on its face, the Court will not look for meaning beyond the instrument itself" but, "when a contract is ambiguous, the Court will look to parol evidence in order to determine the intent of the parties." *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 632 (2002). Moreover, contract language "is ambiguous when 'it may be understood in more than one way or when it refers to two or more things at the same time' (citation omitted)," but "'is not ambiguous merely because the parties disagree as to the meaning of the terms used.' (citation omitted)." *Id.*

Defendant argues that Exhibit G to the *Agreement* is ambiguous, and thus parol evidence may be considered, because it is "subject to multiple interpretations on how seller-level tax benefits are to be treated." *Defendant's Supplemental Brief* 9. But, other than making this bald assertion, Defendant provides no argument showing what those multiple interpretations might be. Indeed, because Defendant asserts that the multiple interpretations are multiple interpretations of "how seller-level tax benefits are to be treated" and Mr. Enverso concluded that Plaintiffs' tax returns -- and thus their tax benefits -- are not relevant to the Exhibit G calculation, the supposed multiple interpretations are not even present in interpreting Exhibit G. Accordingly, while Exhibit G to the *Agreement* may be complex and require the services of an accountant to apply, it is not ambiguous. It follows that parol evidence may not be considered.[2]

---

[2] The court notes that, even if parol evidence was considered, it supports Plaintiffs in that the parties did not include language "which would have required the calculation of a Final Incremental Section 338 Liability 'for each Seller' using 'such Seller's actual effective tax rate . . . .'" *Declaration of Craig E. Chason* at ¶ 5. The *Declaration of Jonathan S. Bruss* offers nothing which supports his conclusory statements concerning the intent of Section 10.7(b) of the *Agreement* or of Exhibit G.

In sum, because the Plaintiffs' personal tax returns are not relevant to Section 10.7(b) of the *Agreement* or to Exhibit G, Plaintiffs' personal tax returns are thus not subject to discovery, and Defendant's motion to compel production of Plaintiffs' personal tax returns is DENIED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ROBERT EISIMINGER, *et al.*	)	
	)	
Plaintiffs	)	
	)	
v.	)	CL 2021-3525
	)	
PERSPECTA, INC.	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Defendant's motion to compel production of Plaintiffs' individual tax returns, and the court, having reviewed the Complaint, Defendant's motion, the opposition thereto, and the parties' supplemental briefs, hereby

ORDERS that, for the reasons set forth in this court's opinion letter of today's date, Defendant's motion to compel production of Plaintiffs' individual tax returns is DENIED.

ENTERED this 7th day of February, 2022.

[redacted]

Richard E. Gardiner
Judge

Copies to:

Rebecca Saitta
Counsel for Defendant

Matthew J. MacLean
Counsel for Plaintiffs

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA