IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MESO SCALE DIAGNOSTICS, LLC	:	
Plaintiff,	:	
	:	Case No. 421796-V
vs.	:	
CRESCENDO BIOSCIENCES, INC.,	:	
Defendants	:	

MEMORANDUM AND ORDER

The defendant in this case, Crescendo Biosciences, Inc. ("Crescendo"), is a venture capital-funded biosciences start-up, which was bought in 2014 by a publicly traded molecular diagnostic company, Myriad Genetics, Inc., for $270 million. Crescendo claims it did not understand, and that the court should not enforce, a post-termination materials requirements provision in the Purchase Agreement, dated April 2, 2012 (the "Purchase Agreement"), it signed with the plaintiff, Meso Scale Diagnostics, LLC ("MSD"). The court denied the parties cross-motions for summary judgment, concluding that the contract provision in question, Section 10.1, was under the applicable principles of Delaware, ambiguous. The court then held a three-day bench trial to determine the parties' intent. The court has concluded that the parties intended their relationship to continue after an event of termination, and that Crescendo has post-termination obligations to MSD under the Purchase Agreement. The parties' obligations under Section 10.1 are not terminable at will and the contract is neither illusory nor unenforceable for lack of mutuality of obligation or consideration. The reasons for this decision are set out below.

The court has carefully considered the evidence presented at the trial, including the credibility of the parties and their witnesses, and has considered all post-trial submissions. "The

trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced."[1] "The finder of fact properly may assign no weight and no credibility to a particular witness's testimony."[2] "The trial court is not only the judge of a witness's credibility, but is also the judge of the weight to be attached to the evidence."[3] The court may disbelieve a witness if it is unpersuaded by the witnesses' testimony (or the evidence advanced to support a factual proposition).[4]

Background

On May 23, 2016, the plaintiff filed a three-count complaint in this court, arising out of what it viewed as the defendant's breach of the Purchase Agreement. Count one of MSD's complaint alleged that Crescendo prematurely terminated the agreement, which it viewed as an anticipatory repudiation of the contract. MSD also alleged in this count that Crescendo breached the Purchase Agreement when it failed to negotiate, in good faith, over the prices applicable after the expiration of the Initial Term. Count two alleged that Crescendo failed to abide by certain post-termination exclusivity obligations under section 10.1, which was the subject of the bench trial. Count three seeks a declaratory judgment, consistent with MSD's contentions in counts one and two.

On August 23, 2016, Crescendo filed an answer and a counterclaim. Count one of the counterclaim alleges that MSD breached the Purchase Agreement by failing to negotiate in good

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[1] *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725 (1977); *see Walker v. Grow*, 170 Md. App. 255, 275 (2006).

[2] *Bereano v. State Ethics Comm.*, 403 Md. 716, 747 (2008).

[3] *Ryan v. Thurston*, 276 Md. 390, 392 (1975).

[4] *Yonga v. State*, 221 Md. App. 45, 96 (2015), *aff'd*, 446 Md. 183 (2016).

faith to determine a reasonable pricing structure for purchases made after the Initial Term. Count two of the counterclaim was for promissory estoppel. Count three sought a declaratory judgment that Crescendo properly terminated the Purchase Agreement and that Crescendo is no longer required to purchase all of its supplies for Vectra DA from MSD.

On January 23, 2017, this Court ruled on cross-motion's for partial summary judgment following a hearing on January 13, 2017.[5] This Court held that Crescendo properly terminated the Purchase Agreement, and that Crescendo did not breach the contract by sending the termination notice.[6] This Court did not rule on the post-termination exclusivity issue, preferring a fuller exploration of the facts germane to execution of the Purchase Agreement.[7] As regards the defendant's counterclaim, this court dismissed count one with leave to amend, but retained the portion of count one that alleged an oral agreement existed between the parties.[8] Further, the court dismissed count two, a claim for promissory estoppel, without leave to amend, because quasi-remedies are not available under Delaware law where there is an express contract, the subject matter of the dispute is covered by that contract, and any harm may be addressed by reference to the law of contract damages.[9]

On April 10, 2017, Crescendo filed an amended counter claim arguing in count one that MSD failed to adhere to an oral modification of the contract, and in count two, requesting declaratory judgement that: (i) Crescendo's notice to terminate the Purchase Agreement as of

[5] DE# 61, 62, 63, "Mem. and Order."

[6] Mem. and Order

[7] Mem. and Order, at 8.

[8] Mem. and Order, at 10-11.

[9] Mem. and Order, at 11.

April 30, 2018 is a valid and enforceable exercise of its termination rights under the Purchase Agreement; (ii) MSD has breached the Purchase Agreement by refusing to negotiate with Crescendo in good faith with regard to the pricing for Supplies after the Initial Term and Crescendo was relieved of any obligation to purchase Supplies from MSD exclusively; (iii) even if MSD did not breach the Purchase Agreement, Crescendo has negotiated with MSD in good faith with regard to the pricing for Supplies after the Initial Term and because the parties cannot agree on material pricing terms for the purchase of Supplies, Crescendo is therefore immediately relieved of its obligation to purchase Supplies from MSD exclusively; (iv) as of April 30, 2018, the Purchase Agreement is terminated and Crescendo is not required to purchase any Supplies from MSD after April 30, 2018; (v) MSD had an obligation to adjust the diluent and Read Buffer supply requirements under the Purchase Agreement, agreed to amend the Purchase Agreement to reduce Crescendo's minimum purchase requirements for diluents and Read Buffer for 2016, and then reneged on that promise and in the process breached the Purchase Agreement.[10]

On September 8, 2017, Crescendo filed a motion for partial summary judgment requesting summary judgment in its favor on counts one and two of the complaint and on count two of Crescendo's counterclaim.[11] On September 26, 2017, Meso Scale filed its opposition to Crescendo's motion as well as a motion for partial summary judgment as to liability on Meso Scale's claim under count three and the meaning of the Purchase Agreement under count three and rejecting all of Crescendo's counterclaims.[12]

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[10] DE# 70 at 27-28.

[11] DE# 91 at 1.

[12] DE# 100 at 1; DE # 101.

On October 10, 2017, the court issued its second summary judgment ruling. In that decision, the court concluded that Section 10.1 of the Purchase Agreement was susceptible to more than one reasonable interpretation and that a trial on that issue was necessary to determine the intent of the parties. The court went on to reject MSD's contention that Crescendo anticipatorily repudiated the Purchase Agreement with respect to any post-termination purchase obligations. This Court also denied Crescendo's motion for summary judgment contending that the Purchase Agreement had been orally modified.

The principle contention at trial was whether the Purchase Agreement obligated Crescendo to purchase supplies for the Vectra DA test post-termination. The court concludes that it does.

Legal Standard

The Purchase Agreement provides that Delaware law governs the parties' disputes.[13] Delaware observes objective rules of contract interpretation when the terms of an instrument are disputed, giving effect to the words as written. A contract must be construed in its entirety so that no meaningful portion is disregarded during the course of judicial construction.[14] If a contract is unambiguous, the analysis generally ends, and extrinsic evidence is not admissible to show the subjective intent of the parties. However, "where reasonable minds could differ as to

[13] Joint Trial Ex., Purchase Agreement at §11.6.

[14] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). In that case, Chief Justice Steele reiterated: "We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage." Id. at 1159, quoting *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (2010).

the contract's meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence."[15]

The court earlier determined that the Purchase Agreement was ambiguous, at least with respect to the parties' post-termination obligations under Section 10.1. In Delaware, when a contract is negotiated between parties on an equal footing (as opposed to a take-it or leave-it contract, such as a stock subscription agreement), the court is to consider the parties' subjective expressions that were shared during the negotiations.[16] "In a perfect world, integrated contracts would always reflect plainly and accurately the compromises and allocation of risk the parties intended. The reality is that the contractual language defining rights and obligations of the parties is sometimes ambiguous. It is the court's duty to preserve to the extent feasible the expectations that form the basis of the contractual relationship."[17] In considering extrinsic evidence, the court is mindful that such evidence must speak to the intent of all of the parties to the contract, and the court cannot consider any unexpressed intentions.[18]

Findings of Fact

The plaintiff, MSD is a Delaware limited liability company, with its headquarters in Rockville, Maryland. MSD develops and manufactures assays and instruments for measuring protein molecules in biological samples.

The defendant, Crescendo, is incorporated in Delaware, with its headquarters in San Francisco, California. Crescendo was formed in February 2007 by William A. Hagstrom to

[15] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012)(footnote omitted).

[16] *SI Management L.P. v. Wininger*, 707 A.2d 37, 43 (1998).

[17] *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997).

[18] *SI Management L.P. v. Wininger*, 707 A.2d at 43.

commercialize Vectra DA. This product is a novel diagnostic test for rheumatoid arthritis that had been developed in the laboratory by Dr. Mike Centola of the Oklahoma Medical Research Foundation. Hagstrom obtained initial venture capital funding from Mohr Davidow Ventures. Subsequently, Crescendo raised additional funds from other Silicon Valley firms, including Kleiner Perkins Caufield & Beyers. In February 2014, Crescendo's investors cashed out, and the company was purchased by Myriad Genetics, Inc., for $270 million.[19] Myriad bought Crescendo because it viewed Vectra DA as representing "a $3.0 billion global market opportunity."[20]

The executed Purchase Agreement was sent by Hagstrom to Jim Wilbur, MSD's General Manager, via e-mail on March 20, 2012.[21] Section 10.1 of the Purchase Agreement defines the term of the contract. The first clause provides that it is "in effect for five (5) years ("Initial Term"). The second clause provides that the "Agreement will renew automatically for subsequent two (2)-year periods." The third clause provides that after "the Initial Term, either party may terminate this Agreement for any reason by providing written notice to the other party setting forth a termination date not less than two (2) years from the date of the notice."[22]

The fourth clause, which is the one in dispute, says, as follows:

> Notwithstanding the foregoing or any expiration or termination of this Agreement, Crescendo's obligations under this Agreement, including but not limited to, Section 3.1(a), *shall continue indefinitely with respect to Crescendo's requirements for the measurement of proteins with (a)*

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[19] Hagstrom received an after-tax payout of $3 million pursuant to a change of control provision in his employment agreement with Crescendo.

[20] Plaintiff's Trial Ex. 1.

[21] Joint Trial Ex. 28.

[22] In the first summary judgment decision, the court ruled that Crescendo had not anticipatorily breached the Purchase Agreement by sending such a written notice.

> *Crescendo Products and Services* involving (i) any of the Analytes, (ii) any subset or combination of any of the Analytes, (iii) any Analytes or subset or combination with other analytes or (b) any products and services for which development was initiates by the parties during the Initial Term. (emphasis added)

Crescendo contended at trial that it only bargained for a transaction from which it could exit and that it never intended to bind itself to deal with MSD after the contract terminated. Hagstrom had deleted section 10.1 in its entirety in the draft he sent to Wilbur on February 14, 2012.[23] Wilbur, the court finds, put this clause back in a revised draft he sent to Hagstrom, which Hagstrom signed.

The Purchase Agreement between MSD and Crescendo is governed by Delaware law.[24] By letter dated April 21, 2016, Crescendo notified MSD that it intended to exercise its right to terminate the Purchase Agreement. According to Crescendo's letter, the termination date was April 30, 2018.

The parties' relationship began shortly after Crescendo was formed. In 2008, Crescendo was looking for an instrument platform to use for the commercialization if its medical test for rheumatoid arthritis. After a series of feasibility studies, Crescendo centered on the platform technology of three companies, and ultimately selected MSD's platform. According to Hagstrom, MSD was selected because its platform was highly reliable, offered multiplexing, and MSD "expressed an eagerness to work with companies like ours to further build their long-term book of business."[25]

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[23] Joint Trial Ex. 24.

[24] Purchase Agreement at § 11.6. MSD originally had proposed that Maryland supply the governing law. The parties compromised on Delaware.

[25] Deposition of William A. Hagstrom, June 8, 2017, 45:6-8.

On February 27, 2009, MSD made a formal development proposal to Crescendo to develop reagents for analytes (proteins) related to rheumatoid arthritis. The proposal identified twenty-one potential proteins as candidates for the Vectra DA test, the test being developed by Crescendo. Crescendo accepted the proposal on March 2, 2009.[26]

After the development phase, both parties began negotiating for a long-term supply agreement. Crescendo was concerned about having a stable supply at fixed prices. MSD was concerned about spending time and resources on a start-up company. MSD did not want to be dropped as Crescendo's supplier if and when Vectra DA became commercially successful, and MSD wanted to share in any upside. On November 8, 2010, MSD sent Crescendo an initial draft supply agreement.[27]

Crescendo fell behind in its payment obligations to MSD, and at one point owed MSD over $2.25 million.[28] By mid-2011, MSD insisted on being paid for its overdue invoices before it would continue work on Vectra DA or further discuss a supply agreement.[29] Fortunately, in the fall of 2011, Crescendo received $31 million in a second round of venture capital funding, as well as a $25 million loan from Myriad.[30] Crescendo then paid its outstanding obligations to MSD.

Hagstrom, Wilbur and Jacob Wohlstadter, MSD's President, met in September 2011 to discuss the parties' relationship. Hagstrom wanted to move forward and secure a long-term

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[26] Joint Trial Ex. 1.

[27] Joint Trial Ex. 2.

[28] Joint Trial Ex. 3.

[29] Joint Trial Ex. 4.

[30] Joint Trial Ex. 5.

supply agreement from MSD. MSD was concerned about exclusivity and ways to share in the success of Vectra DA, such as a board seat or an equity position in Crescendo.[31] Crescendo was well aware internally that MSD wanted to share in the long-term success of Vectra DA.[32]

These fundamental business concepts were discussed in-person in September 2011, when the parties met at Tysons Corner, Virginia to discuss the parameters of a long-term supply agreement. Wohlstadter told Hagstrom at the Tysons's Corner meeting that he was not interested in committing to Crescendo unless their relationship extended well beyond the development period and that MSD must be able to participate in Vectra DA's success. Hagstrom understood this, but did not want to give MSD equity or a board seat, given Crescendo's commitments to its venture capital investors. At this meeting, the parties agreed that Wilbur and Hagstrom should try and negotiate a supply agreement.

Thereafter, Wilbur and Hagstrom negotiated for another eighteen months. In October 2011, Wilbur pressed Hagstrom about MSD receiving an equity position or a royalty arrangement.[33] Hagstrom, the court finds, understood that MSD would not move forward without some means of sharing in any upside.[34] Hagstrom, Wilbur and Wohlstadter spoke on January 3, 2012, and MSD agreed to send another draft of the supply agreement.[35] When the

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[31] Joint Trial Ex.s 6 & 7.

[32] Joint Trial Ex. 8.

[33] Joint Trial Ex. 10.

[34] Joint Trial Ex. 11.

[35] Joint Trial Ex. 19.

next draft came, Hagstrom recognized that it contained section 10.1 and he did not like it.[36] Wilbur sent Hagstrom another draft on January 19, 2012.[37]

On February 8, 2012, Wilbur sent Hagstrom yet another draft, which contained section 10.1.[38] The court finds, Wilbur explained its meaning in detail to Hagstrom. Hagstrom claimed at trial that Wilbur did not explain this provision to him. The court disbelieves Hagstrom in this regard.

On February 14, 2012, Hagstrom sent Wilbur a revised draft, in which Section 10.1 was struck in its entirety.[39] However, at Wohlstadter's instance, Wilbur re-inserted the language into the next draft and told Hagstrom that MSD would not sign the agreement without Section 10.1. The court credits Wilbur's testimony regarding the content of the negotiations that led up to the signing of the Purchase Agreement, and the inclusion of Section 10.1. The court also credits Wilbur's testimony that he told Hagstrom what Section 10.1. meant and, that without this provision, MSD would not sign the agreement. The court disbelieves Hagstrom's testimony that he, Hagstrom, did not understand section 10.1 to mean that Crescendo was obligated to purchase proteins from MSD post-termination.

Hagstrom is a seasoned biotech entrepreneur with more than three decades of executive and board-level experience. He raised $100 million for Crescendo from Silicon Valley venture capital firms and regularly worked with investment bankers.[40] The Purchase Agreement was

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[36] Joint Trial Ex. 20.

[37] Joint Trial Ex. 21.

[38] Joint Trial Ex. 22.

[39] Joint Trial Ex. 24.

[40] Joint Trial Ex. 23 at 000552.

reviewed for Crescendo by lawyers at K & L Gates, a global law firm.[41] Crescendo's contentions that Hagstrom did not understand Section 10.1, and that Wilbur somehow failed to discuss it with him in sufficient detail, strain credulity.[42]

The parties finally signed the Purchase Agreement on April 2, 2012. The court disbelieves Hagstrom's testimony that he, Hagstrom, did not understand that section 10.1 obligated Crescendo to purchase proteins from MSD post-termination. The court finds that Hagstrom knew quite well what this clause meant and why MSD insisted that it be in the Purchase Agreement. Notably, Crescendo's own Vice President of Laboratory Operations, Dr. William Manning understood that post-termination, Crescendo was still obligated to use MSD as the supplier of proteins for Vectra DA. The court finds that although Hagstrom did not like Section 10.1, he made the business decision to bind Crescendo to its terms rather than to begin a search for a new platform and new supplier. Hagstrom could have walked away but, the court finds, he elected not to do so, knowing full well of the consequences of signing the Purchase Agreement with Section 10.1 intact. The court finds that the final version of Section 10.1 represents a business compromise by the parties. The December 23, 2011 draft of the contract reflected broader and indefinite exclusivity.[43] This was narrowed considerably in the final agreement that was signed by the parties.[44]

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[41] Joint Trial Ex. 27.

[42] In May 2015, after it was purchased by Myriad, Crescendo considered budgeting nearly $4 million to "legally break MSD contract [and] Move to Luminex by 2019." Plaintiff's Trial Ex. 3. Luminex is an alternative biochemical testing platform. This document belies Crescendo's contention that it did not believe it had post-termination obligations to MSD.

[43] Joint Trial Ex. 16, at § 3.1.

[44] Joint Trial Ex. 28, at §3.1 &§ 10.1.

Crescendo contends that the law disfavors contracts of "indefinite duration" and that if Section 10.1 is considered to be such a contract it is nonetheless terminable at will. For this proposition, Crescendo relies heavily on cases from states other than Delaware, such as *Jespersen v. Minnesota Mining & Manufacturi*ng Co., a decision of the Supreme Court of Illinois.[45] The court rejects Crescendo's argument, for several reasons.

First, the court finds that Hagstrom knew full well that Section 10.1 required Crescendo to continue purchasing proteins from MSD even after the contracts had expired or had been terminated. He testified at trial that he was "confused" by this provision, but the court does not credit this testimony. The Purchase Agreement was heavily negotiated and Hagstrom is a very experienced business person. The court finds that Hagstrom knew that this clause was in the contract and that he knew what it meant at the time he signed the contract.[46] The Purchase Agreement, the court finds, was designed to ensure that Crescendo had a reliable source of supply so that it could successfully launch and then market Vectra DA over the long term. It also was designed to ensure that MSD would participate in any upside if Vectra DA were commercially successful, and not be kicked to the curb once the product had gained traction in the marketplace. The post-termination requirements portion of Section 10.1, the court finds, was a central element of the bargained for exchange and a material part of the overall agreement. It is a cardinal principle of construction that a contract should be read to give effect to all of its

[45] 700 N.E.2d 1014 (Ill. 1998).

[46] Because the Purchase Agreement was heavily negotiated by sophisticated parties, it would not be proper to construe it against the drafter, as Crescendo has requested. *See Besco Inc. v. Alpha Portland Cement Co.*, 619 F.2d 447, 449 (5th Cir. 1980) ("a contract of indefinite duration is to be avoided unless compelled by the unequivocal language.")

provisions and not to render any part of it ineffective.[47] To read the Purchase Agreement in the manner suggested by Crescendo, would render the fourth clause of Section 10.1, and a central tenant of the parties' bargain, largely meaningless.

Second, Section 10.1 of the Purchase Agreement is not actually a true contract of indefinite duration, which some courts have said are disfavored.[48] Although the fourth clause does contain the language "shall continue indefinitely," that phrase is modified by the language "*with respect to Crescendo's requirements for the measurement of proteins*." This contractual language limits the duration of Crescendo's promise to purchase proteins, making it not one of indefinite duration. Both portions of the sentence must be read together; "otherwise it is a waste of ink and paper."[49] In other words, under Section 10.1, if Crescendo no longer has requirements for the measurement of proteins because it is no longer selling Vectra DA, it no longer has any obligation to purchase products from MSD. This is clearly a limit that makes the

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[47] Restatement (Second) of Contracts § 203(a) (1981). Comment b provides: "Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous." Comment b also states: "Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation is very strongly negated if it would render some provision superfluous."

[48] *See Guyer v. Haveg Corp.*, 205 A.2d 176, 182 (Del. Super. 1964)("Contracts of indefinite duration are looked upon with disfavor by the courts, especially when they are oral."), *aff'd on other grounds*, 211 A.2d 910 (Del. 1965). Notably, the Superior Court in *Guyer* rejected the contention that all indefinite contracts are terminable at will. The Delaware trial court observed: "When the record is complete, defendants' contention on this point may prove to be decisive *but all requirements contracts are not in and of themselves invalid or terminable at will.*" 205 A.2d at 182. (emphasis added). On this point. the Delaware Supreme Court held only that awaiting a trial on the merits to determine the question was a proper exercise of discretion. 211 A.2d at 914.

[49] *Baldwin Piano, Inc. v. Deutche Wutlitzer GMBH,* 392 F. 3d 881, 883 (7th Cir. 2004).

contract a valid requirements contract under Delaware law, and not one of "indefinite duration."[50]

Cases such as *Jesperson*, therefore, are readily distinguishable. In those instances, the "parties have failed to agree on a contract's duration. . . ."[51] In this case, by contrast, the parties agreed that Crescendo's purchase obligation would continue as long as it had requirements for the Vectra DA proteins. This is, the court finds, what the parties, in fact, intended. This intent expressed with sufficient clarity in the text of the instrument and the court finds this to have been the intent of the parties at the time of contract formation. Hagstrom's trial testimony that he found the language of section 10.1 to be "unnecessary or "confusing," is not persuasive. The court finds that Hagstrom knew exactly what Section 10.1 obligated Crescendo to do, post-termination, when he signed the contract. What we have in this case is simply buyer's remorse and a post-execution attempt by one sophisticated party to get a court to relieve it of its contractual promises; promises that it freely made and knew that it made at the time of contract formation. In this case a specific event, Crescendo's ceasing to have requirements for proteins is the event on which the contract terminates and prevents the contract from being terminable at will.[52] Under Section 2-309 of the Uniform Commercial Code as adopted in Delaware a contract

[50] *See American Original Corp. v. Legend, Inc.*, 652 F. Supp. 962, 996 (D. Del. 1986)("Contracts which measure quantity by referring to the output of the seller or requirements of the buyer are valid in Delaware. . . .Such contracts are considered to be for the actual output or requirements that occur, and are thus not void for want of mutuality or specificity."); *u.*, 689 F. Supp. 372, 378 (D. Del. 1988)("The court declines the plaintiff's invitation to reconsider its ruling that the agreement is a valid output contract in light of the evidence presented at trial.")

[51] *Jespersen*, 700 N.E.2d at 1017.

[52] UCC § 2-306 (a) & (b).

that seems to be of infinite duration will not be terminable at will if the parties "have otherwise agreed."[53] In this case, the court finds that they parties have done so, in writing.

In summary, the court finds that the parties intended Crescendo to continue to purchase from MSD supplies for the measurement of proteins for Vectra DA, and for any test developed by Crescendo which uses any of the Analytes that was developed by Crescendo during the Initial Term of the Purchase Agreement. This obligation is a classic requirements contract, meaning that Crescendo has the obligation to meet its requirements from MSD as long as it has those requirements.

The court also rejects Crescendo's contention that there is no enforceable contract because no price term was specified for post-termination purchases in the Purchase Agreement. Under UCC § 2-305(a), the parties "if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . . [n]othing is said as to price."[54] In this case, the Purchase Agreement is silent as to the price for Analytes post-termination. The court finds that the parties intended to have contractual rights and obligations, post-termination. The post-termination requirements portion of Section 10.1 was a specifically bargained for term, and expressly within the contemplation of the parties at the time of contract formation. A contract is not invariably indefinite simply because a price term is not stated.[55] This notion is codified in the Uniform Commercial Code.

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[53] UCC § 2-309(2).

[54] Uniform Commercial Code ("UCC") § 2-305(1), "(1) The parties if they so intend can conclude a contract for sale even though the price is not settled." Delaware has accepted UCC 2-305 fully. 6 Del.C. § 2-305.

[55] *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989) ("Passing from the general to the particular, a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula. Where at the time of agreement the parties have manifested their

Under UCC 2-305(1): "The parties if they so intend can conclude a contract for sale even though the price is not settled."[56] The court finds that the parties in this case so intended.[57]

Finally, Crescendo contends that any post-termination obligations are unenforceable because MSD had the right to reject unilaterally any of its purchase orders. According to Crescendo, this makes the contract illusory or unenforceable for want of mutuality of obligation. The court disagrees.

Section 3 of the Purchase Agreement, when read in in its entirety, does not confer on MSD the unilateral right to reject a purchase order. Both Wilbur and Hagstrom testified that once a binding order was placed under Section 3.2 of the Purchase Agreement, it was binding on both MSD and Crescendo.[58] Neither Hagstrom nor Wilbur testified that they believed that one side or the other was not so bound under the Purchase Agreement.

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intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage. . .. A price 'so arrived at would have been the end product of agreement between the parties themselves.'"); *see D.R. Curtis, Co. v. Mathews*, Idaho App.1982 ("In sale of goods, contract will not fail on grounds of indefiniteness when price term is left open, so long as agreement is entered with mutual intent of parties to make binding contract.").

[56] UCC § 2-305(1).

[57] *See Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 328 S.E.2d 426, 430 (Ga.App.1985) ("Agreement between buyer and seller of cottonseed, pursuant to which seller was to sell to buyer whole cottonseed in an amount sufficient to meet all reasonable requirements of buyer, at a price to be mutually determined from time to time by the parties, did not constitute an open price term contract, since, when sellers fixed reasonable price at $267 per ton of cottonseed, buyer rejected it.").

[58] Under a requirements contract governed by the Uniform Commercial Code, a buyer "may reduce its requirements to any amount, including zero, so long as it does so in good faith." *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 364-65 (4th Cir. 1994). The common law rule is in accord. *HML Corp. v. General Foods Corp.*, 365 F.2d 77, 81 (3d Cir. 1966). Crescendo did not advance the contention that it could self-provision, and the court's decision in

The modern trend is to enforce contracts where it is evident that the parties intended to be bound and to perform their express promises.[59] In other words, the courts today do not use the escape hatch of lack of mutuality of consideration or promise when it is plain that the parties intended to be bound. It is plain in this case, the court finds, that the parties intended to be bound.[60]

Conclusion

Section 10.1 of the Purchase agreement is enforceable, and Crescendo is obligation to perform according to its terms. Counsel shall submit an implementing order within the days. It is So Ordered this 29th day of November 2017.

Ronald B. Rubin, Judge

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this case does not address this possibility. *See XO Communications, LLC v. Level 3 Communications, Inc.*, 948 A.2d 1111, 1119-1123 (Del. Ch. 2007).

[59] *See Hodgkins v. New England Tel.*, 82 F.3d 1226, 1230-32 (1st Cir. 1996); *Texas Gas Utilities v. Barrett*, 460 S.W. 2d 409, 412-13 (Tex. 1970).

[60] *See* UCC § 2-306(2); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (NY 1917).