No. 24-

IN THE

Supreme Court of the United States

ISS AVIATION, INC., WYOMING, AND
ISS AVIATION, INC., GUYANA,

Petitioners,

v.

BELL TEXTRON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court misapply Federal Rules of Civil Procedure 12 and 56 by ruling that no reasonable jury could find that Bell breached its contract with the plaintiff and failed to act in good faith while fulfilling its duty to support the Representative in promoting the sale of Authorized Products and Services in Guyana during the final months of the parties' Independent Representative Agreement? Did the court err in ruling that the plaintiffs are not entitled to recover in *quantum meruit* for the work they performed over six years as Bell's Independent Representative in Guyana—work that led to multi-million-dollar agreements finalized by Bell in 2020 and 2022?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent or publicly held company owning 10% or more of either petitioner's stock.

PARTIES TO THE PROCEEDINGS

Petitioners, ISS Aviation, Incorporated, Wyoming, and ISS Aviation, Incorporated, Guyana, were the plaintiffs in the District Court and the appellants in the Court of Appeals. Respondent, Bell Textron, Incorporated, was the defendant in the District Court and the Appellee in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

ISS Aviation, Incorporated, Wyoming, and ISS Aviation, Incorporated, Guyana, petition this Court for a writ of certiorari to review the decisions of the District Court for the Northern District of Texas and the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The February 5, 2025 Opinion of the Court of Appeals is unpublished and appears at App. A. The January 4, 2024 and May 30, 2023 Opinions of the District Court are unpublished and appear at Appendices B and D.

JURISDICTION

The Court of Appeals decision affirming the orders and judgment of the District Court was entered on February 5, 2025. App. A. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b) provides, "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted . . . "

Federal Rule of Civil Procedure 56 provides, "(a) Motion for Summary Judgment or Partial Summary

Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion."

STATEMENT OF THE CASE

ISS Guyana contends that Bell owes commissions or at least *quantum meruit* damages for sales of Bell helicopters finalized in 2020 and 2022 that were worth at least $55.5 million (Record on Appeal before Court of Appeals "ROA," ROA.585, 1104, 1121; a press release indicated the deal was worth more like $256 million, ROA.1588). ISS Wyoming, which spearheaded lobbying efforts for Bell, (ROA.1564), alleged a separate *quantum meruit* claim in the district court.

Bell manufactures and sells helicopters and related services throughout the world. Bell does so through Independent Representatives, who work under Independent Representative Agreements (IRAs) that prescribe the duties of Bell and the representative in marketing and selling Bell products. Each IR works in a defined region and is required to market only Bell helicopters (Art. 10, ROA.1555).

ISS Guyana served as Bell's IR for French Guiana, Guyana, and Suriname from 2013 until September 30, 2019, via six separate IRAs of one year each. ROA.1838, 696. Articles Five and Six of the final 2018 IRA (ROA.1549)

are at issue in this case. Article Five provides that "Bell agrees to perform the duties defined below:"

> a. Support Representative in its efforts to promote the sale of Authorized Products and Services in the Authorized Territory during the Term of Appointment; . . .
>
> c. Generally render such sales assistance as may be, in Bell's sole judgment, reasonable and appropriate, without assuming any responsibility for Representative's sales efforts or any obligation to render assistance beyond what Bell, in its sole discretion, deems adequate; . . .
>
> f. Compensate the Representative as provided in Article 6 of this Agreement.

Article 6 provides that "Bell will pay commissions to Representative . . . for the sale of Authorized Products and Services to third parties who purchase directly from Bell and the Bell Companies, provided that Representative has actively and substantially participated in the promotion of a particular sale in the Authorized Territory as determined at the reasonable discretion of Bell, and the order is placed with Bell during the Term of Appointment set forth in Article (2)(b) of this Agreement."

ISS Guyana contends that Bell breached the IRA by failing to pay commissions for the 2020 and 2022 sales to the Guyana Defence Force (GDF) that ISS Guyana "actively and substantially participated in the promotion of" through its six years of work as Bell's representative in

Guyana, and Bell did not exercise "reasonable discretion" in determining whether to pay commissions (ROA.1551). Though the orders were not "placed with Bell" during the Term of Appointment as the IRA requires for commissions to be paid, this was because Bell breached its duties to "Support" its representative and provide sales assistance under subsections (a) and (c) of Article Five and did not act in good faith in carrying out its duties. Bell also breached its duty to cooperate, under Texas law, by cutting its IR out of the final stages of communications and negotiations that culminated in the multi-million dollar agreements. ROA.303. Plaintiff charges, "After ISS Guyana and ISS Wyoming performed all of the work procuring a deal with the Guyana Government and the Guyana Defence Force for the purchase of Bell helicopters, products, and services for approximately six years on Bell's behalf, Bell deliberately ousted ISS Guyana and ISS Wyoming from the discussions, negotiations, and ultimate deal transaction . . . with the finish line in sight, Bell decided to get the deal done without ISS Wyoming or ISS Guyana in order to avoid paying them commissions" (ROA.325, 1560).

The District Court's Dismissal of Some of the Plaintiffs' Claims

The District Court granted Bell's Rule 12(b)(6) motion and dismissed ISS Guyana's claims for breach of contract except that premised on the implied duty to cooperate. "Defendant's obligation to '[s]upport [ISS Guyana's] efforts to promote the sale' of Defendant's Authorized Products and Services, as set forth in Article 5(a), is the same as Defendant's obligation to '[g]enerally render . . . sales assistance,' as set forth in Article 5(c)," the court said. ROA.445. "[T]he Court finds that the clear,

unambiguous meaning of the contract is that Article 5(c) is meant to place limits on Defendant's obligations under Article 5(a) . . . the Parties agreed and intended that Defendant would have an obligation to provide sales assistance to ISS Guyana, but that Defendant would only be obligated to provide such assistance as Defendant thought reasonable and appropriate. Therefore, any breach of contract claim based on an alleged failure of Defendant to provide sufficient sales assistance regarding the Guyana Deal fails." ROA.445. ISS Guyana's alternative claim for *quantum meruit* failed on its face as well, the court said, because Texas law precludes such claims where an express contract exists between the parties. ROA.451 (the court retained ISS Wyoming's *quantum meruit* claim, ROA.462).

The District Court's Dismissal of the Plaintiffs' Remaining Claims on Summary Judgment

Regarding ISS Guyana's remaining claim for breach of the implied duty to cooperate, the court acknowledged that, at the motion to dismiss stage, it had held "that the Plaintiffs sufficiently pled facts to state a plausible claim for an implied duty to cooperate." "However," the court said, "given the heightened pleading standard at summary judgment and the benefit of additional evidence, the Court finds that the implied duty Plaintiffs seek to impose on the Defendant was 'clearly [not] within the contemplation of the parties' and thus not applicable under Texas law." ROA.1846. "[T]he 2018 IRA expressly states that Bell's obligations to ISS Guyana are to support it 'in its efforts to promote sales' and '[g]enerally render such sales assistance as may be, in Bell's sole judgment, reasonable and appropriate.' And the 2018 IRA makes clear that Bell

has no obligation to render assistance beyond what Bell, in its sole discretion, deems adequate." *Id.*

Plaintiffs' Appeal

The plaintiffs argued that the District Court misapplied the motion to dismiss and summary judgment standards in dismissing their claims before trial.

The District Court misconstrued Bell's obligations under subsection (a) of Article Five of the parties' IRA, which does not grant Bell "sole discretion" to decide what "Support" to give its representative. Regarding Bell's duty to provide "sales assistance" under subsection (c), the court disregarded that this duty must be considered alongside Bell's duty to cooperate implied under Texas law, and a jury applying Texas law would also consider whether Bell acted in good faith in carrying out its contractual obligations. The District Court committed a reversible error by dismissing ISS Guyana's alternative *quantum meruit* claim as well. The court ruled that this claim failed because there is an "express contract" between the parties, but Texas law provides a "clear exception" to this rule for a party who has partially performed under the contract and alleges that its complete performance was hindered by the other party—as ISS Guyana shows in this case.

These claims are trial worthy, moreover, because a reasonable jury can find in ISS Guyana's favor on the claims. A jury can find that Bell failed to act in good faith in carrying out its contractual duties to its representative and did so for the improper purpose of trying to avoid paying its IR commissions or any compensation for the

six years of work that resulted in Bell's 2020 and 2022 sale agreements.

REASONS FOR GRANTING THE PETITION

A. To clarify and correct the application of the motion to dismiss standard

This Court's precedent provides a very minimal standard for pleaded claims to survive dismissal on a Rule 12(b)(6) motion. The complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is simply plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plausibility requires only a sheer possibility that a defendant has acted unlawfully and is liable to the plaintiff. *Id.* The factual allegations must be enough to raise a right to relief above merely the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The district court misapplied that standard, which the Court should intervene to correct and clarify the governing standard. The IRA is unambiguous (*R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980); *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 458 (5th Cir. 2003)), but the District Court misconstrued the unambiguous language in limiting Bell's duty to "Support Representative" under subsection (a) the "sole judgment" limitation that appears in subsection (c), with regard to Bell's duty to "render" sales assistance. These are separate obligations that Bell had under two independent provisions, which are not even next to each other under Article Five and are among six separately stated duties Bell has to its IR under Article

Five. The "sole discretion" and "as Bell deems reasonable and appropriate" limitations appear only in subsection (c), not in subsection (a) or in any other section, *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 591 (Tex. 1996) ("The failure to include more express language of the parties' intent does not create an ambiguity when only one reasonable interpretation exists.") Under the District Court's construction, the limitation would apply to Bell's other obligations under Article Five as well, such as Bell's duty to "compensate the Representative" under subsection (f). This is not sensible, since the representative's right to compensation is not dependent on Bell's sole discretion. The District Court's dismissal on its face of plaintiff's breach of contract claim premised on subsection (c) was erroneous because Bell's obligation under subsection (c) must be considered alongside Bell's implied duty to cooperate under Texas law, because Bell's "cooperation is necessary for" ISS Guyana's performance of its own duties under the parties' contract, *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452 (5th Cir. 2003).

The district court also violated the plausibility standard under Rule 12(b)(6) by dismissing even ISS Guyana's alternative quantum meruit claim. The court dismissed this claim on the ground that Texas law (which applies to this diversity dispute) precludes quantum meruit recovery where there is an express contract between the parties. But Texas law provides an exception that permits "recovery in *quantum meruit* . . . when a plaintiff has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract"—as ISS Guyana did, *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d

452, 462 (5th Cir. 2003) (noting if "Mothers violated the duty to cooperate implied in the Contract, then LER was unable to recover any potential overcharges on Mothers's behalf because Mothers breached the contract. We must therefore also vacate the district court's grant of summary judgment for Mothers on LER's claim that it is entitled to recover in *quantum meruit* insofar as it relates to LER's implied duty to cooperate claim") (*citing Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988)).

B. To clarify and correct the application of the summary judgment standard

Summary judgment should be denied when the evidence permits a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A district court must view the evidence in the light most favorable to the nonmoving party in assessing a summary judgment motion. *Tolan v. Cotton*, 572 U.S. 650 (2014). If reasonable minds could differ on the import of the evidence, summary judgment is unwarranted. *Beard v. Banks*, 548 U.S. 521 (2006).

The district court misapplied this governing standard as well because a reasonable jury, seeing and hearing the witness testimony and considering the documentary evidence, can find that Bell took actions—in cutting Barker from the communications on the Guyana deal between the beginning of January 2019 and the termination of the IRA in September 2019—that breached its duty to plaintiff and shows that Bell failed to act in good faith in carrying out its duty to "Support Representative in its efforts to promote the sale of Authorized Products and Services in" Guyana.

A jury would also consider whether Bell acted in good faith in carrying out its duty, *L.O.D.C. Grp., Ltd v. Accelerate360, LLC*, 621 F. Supp. 3d 716, 727 (E.D. Tex. 2022) ("the Court will instead consider Lily's allegations of bad faith to be subsumed within its breach of contract claims"). Texas law says there is a duty of good faith "in special relationships," such as those between joint venturers and principal and agent—much like the relationship between Bell and its IR. Bell says that the IRA disclaims creating any "agency, partnership, dealership, distributorship, employment relationship, and/or joint venture between [ISS Guyana] and Bell (Brief at 11), but the duty of good faith springs from the parties' relationship, not from the contractual language, *Eng. v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983) (concurring opinion); *cf. Fitz-Gerald v. Hull*, 150 Tex. 39, 54, 237 S.W.2d 256 (1951) (three parties in joint adventure for oil and gas lease, imposing upon each party duty to perform to further common interest; petitioner violated duty in taking title in own name and seeking to appropriate all profits for itself); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509 (1942) (principal and agent).

The district court distorted the summary judgment standard, this Court should rule by granting Certiorari, by failing to construe the evidence in the light most favorable to the plaintiff and, instead, highlighting proofs that Bell claimed supports the factual conclusions it urges, contravening the Court's governing precedent, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

It is not just Lex Barker's testimony that the district court disregarded but Bell's own witnesses and documents. *All* of Bell's actions occurred while plaintiff was still Bell's IR in Guyana—during the term of the IRA. This is an important fact that a jury would consider in determining whether Bell breached its duty under Article Five and failed to act in good faith in carrying out its duty. Among other evidence, Bell's Ruben Reyes' acknowledges that ISS Aviation was excluded from the "renewed" discussions with Guyana; Barker was "not involved in any of the meetings that the Bell team is having with the GDF for the new LOR." ROA.1118. Bell contacted Guyana and/or the GDF in early August 2019 seeking more information or specifications and requirements of Guyana—without including its IR (ROA.1625-26). Reyes acknowledged that Bell received a Letter of Request from Guyana that Reyes withheld from its IR. ROA.1621. In an August 12, 2019 email regarding a PowerPoint presentation containing a proposal for the Guyana deal, Bell's Nick Peffer states, "If there is reference to [ISS Guyana], please remove." ROA.1628 (redacted from public filing). Bell's Reyes wrote to Guyana's representative without notifying its IR:

> Dear Colonel Bowman,
>
> Hope your day is going well. My name is Ruben Reyes and as the Regional Sales Manager for Bell, my goal is to ensure we meet address all of your needs. Currently, we are working on responding to your attached request. There are some specifications that still need to be clarified, such certain details around the needed helicopter configuration.

> Would it be possible to setup a teleconference with you so that we can continue the dialogue and if needed, I'm happy to travel to Guyana to meet with you in person. My contact information is as shown below and am available at any time. You can best reach me on my cell via WhatsApp as well (817) 964-5602.
>
> Regards,
>
> Ruben S. Reyes Jr
> Regional Sales Manager Latin America / Bell
> [ROA.1625]

Reyes wrote independently to Lieutenant Colonel Byrne as well:

> It was a pleasure speaking with you on Monday and as discussed we are working on the response for the LOR.
>
> Would you please review the attached configuration that is being developed to see if it will meet your needs. I'll call you tomorrow to discuss the subject further. Below you will also find my contact information and I hope to meet you in person soon. [ROA.1625-26]

Bell coordinated a teleconference with the GDF to address its questions and concerns—without telling its IR. ROA.1631.

Reyes visited Guyana in late August 2019 to discuss the Guyana deal without advisement to or involvement of

its IR. Reyes provided an expansive summary of his visit to other participants within Bell—but nothing to Barker. ROA.1635.

When Barker made his presentation to Bell in August 2019, Reyes made "some changes" to it, but Reyes did not tell Barker, even then, that there was an LOR, or that Guyana had renewed and was following up on the 2016 proposal—now advising it wanted more of the same model helicopters that Barker had previously negotiated. Reyes admits,

> Q. And when you received this PowerPoint presentation from Mr. Barker, this 4158, that page, indicates that the Guyana government is wanting two 429s and one 412. See?
>
> A. Okay. Yes ***
>
> Q. So this requirement that was being communicated to you through this presentation that he gave to you, before he gave the presentation, was wrong?
>
> A. Yes.
>
> Q. But you didn't tell Mr. Barker that, did you?
>
> A. I did. I told him to take out the August 2019.
>
> Q. That's all you told him to do. But you didn't tell him to change the 429—you didn't tell him to change the 412 quantity?

"I may have overlooked it," Reyes claimed during his deposition. ROA.1620. A jury can reject this and find that this was reflective of Reyes and Bell's concerted action to cut its IR from the discussions about the agreement that its IR had built for six-plus years.

A jury would consider that Reyes' actions also broke the promises of continued support that Vice-President Ortiz had consistently made to Plaintiff's Lex Barker. "Jay made this oral statement to support" plaintiff and promised that Bell would renew the IRA at least until the Guyana agreement was finalized. ROA.1144. Barker testified, "We're working a live active deal." ROA.1144. "We had a clear feeling and understanding, promise, reassurance that we'll get the support and be involved in the deal with Bell Helicopter as ISS Wyoming and ISS Guyana to close the Guyana deal." ROA.1144. "Bell Helicopter was committed to work with ISS Aviation on the Guyana deal to see it through closing, and we should keep at it, and there's always another time for another deal, just stick at it, keep at it, and we will be not excluded, you know, just be involved. And the commitment from Bell to support ISS Aviation, based on their commitment to not do the Guyana deal without us, I mean, was that reassurance that we got that we did the right thing, that Bell will be committed to doing the Guyana deal with ISS Aviation because of our long-term involvement and bringing the deal to where it was." ROA.1144, ROA.1150. "[W]e got their assurances that Bell is committed to us, so I mean, the promise is there for us to keep at it, we're going to have Bell's involvement to ensure we close the deal that we worked on, we created the program, set up the program," Barker would affirm to a jury at trial. ROA.1151.

Bell's August 2019 emails permit a jury to find that Bell breached its duties to plaintiff and failed to carry out its duties in good faith during the term of the IRA. Bell claimed that it was pleased with plaintiff's work and would approve renewal of the IRA beyond September 2019 (per Ortiz's promises, etc., as noted), then reversed its decision when Reyes concluded he could close the Guyana deal without plaintiff and cut them from its final stages, thereby avoiding payment of any sort to its IR. A jury can find this breached the duty to support its IR and showed a complete lack of good faith in carrying out its contractual duties to its IR because of the following email from Bell's Susan Michaels discussing Bell's sudden decision not to renew the IRA (ROA.1560-61), telling Reyes and Ortiz (among others at Bell),

> I found a problem on ISS Aviation. I forgot that they were put on a temporary extension, under the renewal process, that goes through the end of September, see attached. The option we now have is to do an early termination instead of allowing him to just lapse. If you allow the contract to continue through the end of September wouldn't that give [ISS Guyana] the opportunity to get involved in the FMS case in Guyana? . . . Want to make sure we have all of our ducks in a row because when I reach out to him next week for a list of opportunities he feels he has been actively involved in . . . he will more than likely list the FMS case. . . . Let me know if early termination is the best way to go on this one. [ROA.1560-61]

Bell Vice President Ortiz advised the email participants, "Good Morning All . . . While Lex had no clue about the FMS case he was the individual that created the program a few years ago. That will be his claim and he would be correct." ROA.1560; ROA.1115 (Reyes' testimony re: same). A jury would consider all Bell's internal communications showing discussions among Bell's personnel and a concerted effort, led by Reyes, to hide the renewed, follow up discussions from Barker and cut his company completely from the forthcoming deal to avoid paying plaintiff anything for its part, *e.g.*, ROA.1560 (August 2019 emails among Bell personnel discussing how to cut off ISS Guyana's claim for commissions on forthcoming agreement); ROA.1614 (Reyes testimony acknowledging omission of Barker from follow-up communications about 2016 proposal made on Bell's behalf); ROA.1617 (Reyes acknowledging Barker not advised of meetings "that Bell team [was] having with the GDF [Guyana Defence Force) for the new LOR"); ROA.1620-21 (Reyes acknowledging concealing from Barker, in July 2019, that GDF had renewed interest in consummating purchase); ROA.1625-26 (Reyes communicating with GDF about GDF requests for purchases, omitting Barker); ROA.1631 (communications without Barker/ISS Guyana re: "updated 429 configurations" for agreements, and GDF request for further details, ROA.1633); ROA.724 (April 2019 communications confirming interest from Guyana in finalizing sale for purchase of Bell helicopters); ROA.728 (request from GDF to U.S. Embassy re: same); ROA.820 (April 2019 emails from Bell re: "Guyana 2 x 412 ROM proposal"); ROA.822 (Rough Order Proposal sent by Bell for 2 x 412 sale to GDF); ROA.825 (Bell communications—sans Barker/ISS Guyana—noting continued work toward finalizing pricing requests for Guyana agreement);

ROA.826 (July 2019 email noting LOR from Guyana "for 4 total aircraft: two each Bell 412Epi and 2 each Bell 429"); ROA.829 (June 2019 Letter Request from Guyana for "Offer for the purchase of two Bell 412 EPIs and Two Bell 529 Helicopters"); ROA.832 (August 12, 2019 email re: GDF purchases of same); ROA.834 (September 19, 2019 email from "FMS Contracts Administrator" to U.S. Army re: "Bell's LOA response for the Guyana Defence Force" for same sales, noting, "Should you have any questions or desire a walkthrough of the attached document, please contact myself, Brad Mullins, or David Archer" of Bell); ROA.836 (LOA Response re: proposed purchase agreements with Guyana).

The district court credited Bell's claim that it canceled the plaintiff's IRA not to cut them out of the Guyana agreements but because the plaintiff was "not aware" of the "FMS prospect." However, proper application of Rule 56 shows this is an issue for a jury, not the district court judge, to determine. Bell was withholding the information from its IR in the first place. Barker told Reyes that Bell suddenly deciding not to renew the IRA just as the Guyana deal was coming to fruition was precluding plaintiff sufficient time to close the agreement. ROA.1117.

Bell says that plaintiff has no right to compensation because the 2020 and 2022 agreements were not "placed with Bell" during the term of plaintiff's appointment as Bell's IR in Guyana, as Article 6 of the IRA requires. But a jury can find that Bell breached its duties to plaintiff in the first place, and did not act in good faith in carrying out its support duties; Bell's wrongful actions, first in time, precluded plaintiff from completing its own obligations under the IRA and wrongfully deprived

it of the commissions it otherwise would have earned for its six-plus years of work. "Where one party to the contract, by wrongful means, prevents the other party from performing, as by making it impossible for him or her to perform, such action constitutes a breach of the agreement, the effect of which not only excuses performance by the injured party, but also entitles him to seek to recover for any damage he may have sustained by reason of the breach." *TLC Hosp., LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 765–66 (Tex. App. 2018); *Lam v. Thompson & Knight*, 104 F. App'x 975, 976 (5th Cir. 2004) ("[W]hen a contract has been substantially performed and an attempt to complete performance has been refused, the refusal excuses any further attempt to perform by the party offering performance and entitles that party to recover under the contract").

The district court also credited Bell's claim that the plaintiff was only involved in an "FMS case" that never transpired and that the FMS case was "unrelated" to the 2020 and 2020 agreements. But this again is for a jury, which can reject Bell's claim and find otherwise—that plaintiff did "actively and substantially participate[] in the promotion of" the 2020 and/or 2022 agreements through its six years of service as Bell's IR in Guyana. Bell disregards its own documents acknowledging that the 2019 discussions were renewed, follow-ups from the 2016 proposals that Barker had piloted, ROA.1650, and involved the same 412 and 429 Bell model helicopters, ROA.808, ROA.817 (Guyana request for pricing and availability of 412s and 429s); ROA.808. Reyes himself said that, in 2019, Tropical Aviation Distribution/ Africair, Bell's successor IR in Guyana was following up on the work done by ISS Aviation. ROA.1122.

The December 2020 and June 2022 agreements were preceded by a March 2020 FMS approval from the United States Government that Barker helped procure during his six years as Bell's IR. As Reyes himself affirms, Barker "was the individual that created the program a few years back"—referencing the proposed "FMS case" in 2019 (ROA1118). Vice President Ortiz affirms this as well:

> Q . . . So as you sit here today, Mr. Ortiz, you agree that it was Mr. Barker, by way of ISS Aviation (Guyana), that created the program for the sale of helicopters to the Guyana government?
>
> A. Mr. Barker engaged with the Government of Guyana to sell the aircraft. Given the timing of the FMS case, my argument here is that, if he claimed, he would be correct, if the FMS case had closed.
>
> Q. So you're in agreement that if the FMS case had closed, then Mr. Barker, ISS Aviation, would have been—has substantially participated in that—in facilitating that closing?
>
> A. Not the closing of the FMS case but the fact that we closed the program. Two different things.
>
> Q. Okay. What program are we talking about?
>
> A. The program to the Guyana government.

> Q. Okay. And has the Guyana—has Bell, in fact, sold helicopters to the Guyana government?
>
> A. A couple of years later, yes.
>
> Q. So when you say he created the program, what do you mean?
>
> A. He engaged with the customer in a conversation to pitch the Bell product and create an opportunity for Bell to sell into the country.
>
> Q. Okay. Is it fair to say that there was no program prior to ISS Aviation's involvement with the Government of Guyana?
>
> A. Yes. There was basically no rep. [ROA.1102

A jury can find that even by Bell's characterization of the events, the "FMS case" that plaintiff helped procure was still active when the allegedly separate 2020 sale was finalized—providing further proof that the prior discussions and groundwork laid by Barker and company from 2014 onward resulted in the 2020 agreement reached. Bell's own Frank Ferraro, who worked alongside Barker for years, would tell the jury,

- how Barker worked with Bell to secure financing from 2014 forward (ROA.1639; ROA.1089-90, ROA.1049)

- how Barker worked with past and newly-elected Governments of Guyana, leading to the 2016 proposal (ROA.1080; ROA.1073-78; ROA.1038-47)

• how Barker and his company worked to drive marketing and sales for Bell in the hostile conditions of Guyana despite interference in plaintiff's business operations and even attempts on Mr. Barker's life

• about the work he and Barker did to advance a sale of the 412—the same model in the renewed 2019 discussions and that Bell then sold to Guyana in the 2020 and 2022 agreements (Appellee's Brief at 16; ROA.1588, 775, 789)

• how Barker helped Ferraro visit Guyana to meet with decisionmakers and "help move the deal forward" (ROA.1080-82)

• how, by August 2016, Ferraro and Barker had developed and presented a proposal to the U.S. Embassy and the Canadian High Commission in Guyana toward securing the needed approval for Bell's helicopters sales to Guyana

• how, by 2017, Barker and Ferraro had succeeded in getting the GDF to move beyond their existing helicopters and consider new Bell "replacement helicopters," with Barker simultaneously working on securing the needed "GDF/Government financing" for the purchase (ROA.1029).

Bell's Vice President, Javier Ortiz, would testify that,

• Barker and his company's work had furthered an agreement with Guyana (ROA.1049, 1639, 1089-90; ROA.1598-1611 (noting work done by Barker and companies toward Guyana agreement)

• Ortiz promised continued support for plaintiff towards finalizing an agreement with Guyana (ROA.1665)

• Ortiz assured Barker that it was Bell's expectation that a deal with Guyana would be finalized during the 2018 IRA and Bell would continue working with plaintiff toward the agreement (ROA.1666).

A jury can find that all this evidence (and the other evidence detailed in the summary judgment record) showed that Barker and his company were substantially involved in the deals—having laid the needed groundwork for the agreements that were ultimately reached on the back of what the IR built for Bell and rejecting Bell's claim that its longtime IR had "nothing to do" with the agreements.

Bell contends, "[t]he 2018 IRA did not guarantee ISS Guyana access to all deals in the Guyana region or protection in Guyana." What deals? Bell hadn't had a deal since 1981. Saying that Bell was not required to "include ISS Guyana" in "all potential sales" is absurd in the context of this case, when the only deal being worked on was any deal with Guyana or its GDF as Barker, with his Bell point person Ferraro, had worked towards for six-plus years, a jury can find.

The lower courts' misapplication of the summary judgment standard is reflected most acutely in adopting Bell's characterization of this case as if it involved two discrete sales by a regional representative among hundreds or thousands a company might make of a garden variety product marketed in a friendly country.

This is not such a case. Bell is a manufacturer and seller of helicopters trying to obtain multi-million-dollar sales agreements with a hostile foreign government in a volatile country, riddled with corruption and rampant drug trade, where Bell hadn't had a sale of any sort for decades (since 1981). Such deals take years to grow into financed and government-approved ones—and that's precisely what it took for Bell to obtain the 2020 and 2022 agreements here. A jury would consider these circumstances in deciding whether plaintiff "actively and substantially participated in the promotion of" the 2020 and/or 2022 agreements through its six years of service as Bell's representative in Guyana; whether Bell breached its duty to "Support" its IR and failed to act in good faith in carrying out its duty; and whether Bell exercised "reasonable discretion" in determining whether compensation was owed to plaintiff for the agreements that Bell then obtained by way of damages for breach of contract or, at least, under quantum meruit principles.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: April 29, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 5, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-10063

ISS AVIATION, INCORPORATED WYOMING;
ISS AVIATION, INCORPORATED GUYANA,

Plaintiffs—Appellants,

versus

BELL TEXTRON, INCORPORATED,

Defendant—Appellee.

Filed February 5, 2025

Before HIGGINBOTHAM, WILLETT, and HO, *Circuit Judges.*

PER CURIAM:*

ISS Aviation, Inc. Wyoming (ISS Wyoming) and ISS Aviation, Inc. Guyana (ISS Guyana) worked on behalf of Bell Textron, Inc., a helicopter manufacturer, to sell helicopters in certain South American countries. During their six-plus years as Bell's representatives, ISS Wyoming

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

and ISS Guyana achieved no sales. However, they now seek commissions or restitution for sales that post-date their contract with and representation of Bell, based on their supposed groundwork for the eventual sales and Bell's alleged failure to "support" their sales efforts. The district court granted summary judgment to Bell and dismissed the ISS parties' breach-of-contract, breach-of-implied-duty-to-cooperate, and *quantum meruit* claims. We AFFIRM.

I

Bell Textron, Inc. manufactures and sells helicopters around the world. Bell sells its helicopters through three paths: (1) Foreign Military Sales, through which Bell sells the product to the United States government who then sells the product to the customer; (2) Direct Consumer Sales, in which the customer buys the product directly from Bell; and (3) Canadian Commercial Sales, through which the customer obtains quasi-private financing from Export Development Canada to purchase the product from Bell.

To achieve sales, Bell contracts with Independent Representatives for specified terms. These Representatives work under Independent Representative Agreements, which outline the duties of both Bell and the Representative in marketing and selling Bell products. Included among these duties, each Representative is assigned a defined region and is required to market only Bell products—and none of any competitor.

Appendix A

Via six separate agreements, ISS Guyana was Bell's Representative in French Guiana, Guyana, and Suriname from 2013 to September 30, 2019. As background, Lex Barker—eventual head of ISS Guyana—owned Bell helicopters and a hanger in Guyana and had previously sold preowned helicopters to the Guyanese government. Bell had not sold a helicopter in Guyana since 1981, so Bell and Barker met to discuss doing business as an Independent Representative. Barker formed ISS Guyana soon after and entered into an Agreement in 2013, which was subsequently renewed multiple times for varying term lengths. In 2015, ISS Guyana relocated to Florida (after the Guyanese government allegedly seized ISS Guyana's hangar) and never returned.[1] Barker later formed ISS Wyoming—with Bell's knowledge—to lobby the United States to approve sales to Guyana, given that ISS Guyana, a foreign corporation, could not lobby the U.S. government.

ISS Guyana and ISS Wyoming's relationship with Bell at first seemed promising. In 2014, Barker and the ISS parties worked with Bell to achieve a non-binding indication from Canada, confirming its interest in financing up to three aircrafts for around $25 million. Barker also provided Bell with intelligence about Guyana's politics, corruption, and drug trade. And by 2017, the Guyana Defence Force was considering new Bell models as "replacement helicopters," and Barker confirmed to Bell in February 2017 that "all was in place to close our deal in early 2017."

1. The Agreements required ISS Guyana to maintain an office in the covered territory.

But the ISS parties' initial promise faded. The anticipated 2017 deal was disrupted—due to corruption, say the ISS parties, and according to email records, helicopters were not the Guyana Defence Force's top priority and "the budget [did] not contemplate such a buy." Barker still anticipated moving towards a sales agreement, but Bell was growing increasingly concerned with ISS Guyana's lack of engagement—*i.e.*, failure to generate new leads and to further the potential three-helicopter sale—and failure to maintain a physical presence in the Agreement territory (Guyana).

B

In May 2018, Bell renewed ISS Guyana's Independent-Representative term for one year. However, Bell expressed it "[w]ould like to see more in-country involvement." The 2018 Agreement's term extended from August 15, 2018 to August 14, 2019. By amendment, Bell extended the term to September 30, 2019.

Under Article 4 of the 2018 Agreement, ISS Guyana's duties included: "[e]stablish[ing] and maintain[ing] an official place of business in the Authorized Territory"; "[o]btain[ing] offers from prospective customers to purchase Authorized Products" and "submit[ting] those offers to Bell"; and "[p]ay[ing] all costs and expenses incurred in the promotion and sale by the Representative of the Authorized Products and Services unless otherwise agreed to in writing by the Representative and Bell[.]"

Appendix A

Article 5 of the Agreement spelled out Bell's obligations:

> a. Support Representative in its efforts to promote the sale of Authorized Products and Services in the Authorized Territory during the Term of Appointment; . . .
>
> c. Generally render such sales assistance as may be, in Bell's sole judgment, reasonable and appropriate, without assuming any responsibility for Representative's sales efforts or any obligation to render assistance beyond what Bell, in its sole discretion, deems adequate; . . .
>
> f. Compensate the Representative as provided in Article 6 of this Agreement.

Article 6 governed "Compensation." As relevant here, the Agreement provided that:

> Bell will pay commissions to Representative . . . for the sale of Authorized Products and Services . . . provided that Representative has actively and substantially participated in the promotion of a particular sale in the Authorized Territory as determined at the reasonable discretion of Bell, and the order is placed with Bell during the Term of Appointment[.] . . . Orders received outside of the Term of Appointment . . . will not be eligible to receive a commission, regardless

> of when such order was initiated unless otherwise agreed to by Bell under a separate written agreement.

C

By Spring 2019, Bell received a letter from the Multi-National Aviation Special Project Office (a division of the U.S. Army), on behalf of the Guyanese government, which requested pricing and availability for four helicopters through Foreign Military Sale procedures. Barker and ISS Guyana had no knowledge of the Foreign Military Sale prospect.

In response to the letter, Bell made another proposal to Guyana through its internal government-to-government team and without ISS Guyana. ISS Guyana contends that Bell "fell silent" and worked "behind [the ISS parties'] back to close the deal without ISS Guyana's involvement."

Javier Ortiz, Vice President of Bell, assured Barker that Bell expected a deal with Guyana to be completed during the term of the 2018 Agreement. As a result, Barker, ISS Guyana, and ISS Wyoming pressed ahead with work to further a deal with Guyana.

In August 2019, Bell advised Barker that it would not be renewing the Agreement. Bell did, however, suggest that it may consider granting prorated commissions on future sales if ISS Guyana "actively and substantially participated in the transaction prior to the expiration date of the subject Agreement." Bell repeatedly asked

ISS Guyana to identify any potentially qualifying sales, but ISS Guyana never responded.

ISS Guyana's Agreement then expired on September 30, 2019. And its business never took off: ISS Guyana did not sell a single Bell helicopter during the six-plus-year relationship.

D

In October 2020, after the 2018 Agreement expired, the United States approved the potential Foreign Military Sale of Bell helicopters to Guyana, worth approximately $256 million. However, that Foreign Military Sale never materialized, as the Guyanese government cancelled the sale proposal in January 2021.

Eventually, Guyana purchased two helicopters from Bell. The first sale occurred in December 2020. According to Bell, a year after the 2018 Agreement expired, Bell's new Independent Representative in Guyana learned that the newly-installed Guyanese National Security Advisor—with whom ISS Guyana had no contact during its term as Representative—sought to obtain a used Bell helicopter. A Bell regional sales manager approached the official to discuss the sale of a new Bell helicopter to the Guyana Defence Force, and in December 2020, the sale was completed for $9.5 million. Bell paid its new Representative commission. ISS Guyana sought commission, by email, for this sale in May 2022, and continues to seek commission for this sale now.

The second sale occurred in June 2022—nearly three years after the 2018 Agreement expired—for another $9.5 million. Bell again paid its new Representative commission. ISS Guyana now seeks commission for this sale.

E

In August 2022, ISS Guyana filed suit in state court—which Bell later removed to federal court—and charged that Bell breached the 2018 Agreement by failing to pay commissions for the 2020 and 2022 sales to the Guyana Defence Force. ISS Guyana alleges it "actively and substantially participated in the promotion of" the sales through its six years as Bell's Representative, and Bell did not exercise "reasonable discretion" in determining whether to pay commissions, as required by the Agreement. According to ISS Guyana, it "performed all the work procuring a deal" with Guyana's government and defense force for the purchase of Bell helicopters and services, but Bell "deliberately ousted" them from the negotiations "with the finish line in sight . . . to avoid paying them commissions."

Bell moved to dismiss. The district court found that "any breach of contract claim based on an alleged failure of [Bell] to provide sufficient sales assistance regarding the Guyana Deal fails." *ISS Aviation, Inc. (Wyoming) v. Bell Textron, Inc.*, No. 4:22-CV-00689-O, 2023 U.S. Dist. LEXIS 238873, 2023 WL 11822275, at *5 (N.D. Tex. May 30, 2023). It also found ISS Guyana's alternative claim for *quantum meruit* failed because Texas law precludes

such claims where an express contract exists between the parties. 2023 U.S. Dist. LEXIS 238873, [WL] at *6–7. However, the court retained ISS Guyana's claim for breach of the implied duty to cooperate and ISS Wyoming's *quantum meruit*, promissory estoppel, and unjust enrichment claims. 2023 U.S. Dist. LEXIS 238873, [WL] at *12.

After discovery, Bell moved for summary judgment on the ISS parties' remaining claims. The district court found the implied duty to cooperate was "clearly [not] within the contemplation of the parties" and accordingly was not applicable under Texas law. *ISS Aviation, Inc. v. Bell Textron Inc.*, No. 4:22-CV-00689-O, 2024 U.S. Dist. LEXIS 111061, 2024 WL 3086629, at *4–6 (N.D. Tex. Jan. 4, 2024). As to ISS Wyoming's claims, the district court ruled that the summary-judgment evidence did not "demonstrate that ISS Wyoming performed work or that Bell enjoyed that work" nor did it "demonstrat[e] how ISS Wyoming's lobbying led to any helicopter sales or provided any other benefits to Bell." 2024 U.S. Dist. LEXIS 111061, [WL] at *6.

ISS Guyana appeals its breach-of-contract, breach-of-implied-duty-to-cooperate, and *quantum meruit* claims. ISS Wyoming appeals its *quantum meruit* claim.

II

We begin with ISS Guyana's claims which were dismissed at the motion-to-dismiss stage: (1) breach of contract, and (2) in the alternative, *quantum meruit*.

We review *de novo* a district court's grant of a motion to dismiss. *See Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013).

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of complaints which "fail[] to state a claim upon which relief can be granted." Accordingly, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). So ISS Guyana must plead "factual content that allows [us] to draw the reasonable inference that [Bell] is liable for the misconduct alleged." *Id.* Because the district court had jurisdiction based on diversity, we apply Texas substantive law. *See Smith v. Christus Saint Michaels Health Sys.*, 496 F. App'x 468, 470 (5th Cir. 2012) (per curiam) ("When the district court exercises diversity jurisdiction over a dispute, we apply the substantive law of the forum state, which in this case is Texas." (citation omitted)); *Weaver v. Metro. Life Ins. Co.*, 939 F.3d 618, 626 (5th Cir. 2019) ("As this is a diversity case, [the court] interpret[s] the contract at issue under Texas law." (alterations in original) (citation omitted)).

At the motion-to-dismiss stage, we may consider contracts attached to the motion and central to the complaint. *See New Orleans City v. Ambac Assur. Corp.*, 815 F.3d 196, 200 (5th Cir. 2016). Here, that is the 2018 Agreement.

Appendix A

A

First, ISS Guyana revives its breach-of-contract claim. But its arguments on appeal are unavailing.

We review a district court's interpretation of a contract *de novo. See Franlink Inc. v. BACE Servs., Inc.*, 50 F.4th 432, 438 (5th Cir. 2022). Texas applies the "usual rules of construction" to commission contracts such as the 2018 Agreement. *Perthuis v. Baylor Miraca Genetics Labs., LLC*, 645 S.W.3d 228, 236 (Tex. 2022) (quotation marks and citation omitted). Accordingly, our "primary objective is to ascertain and give effect to the parties' intent as expressed in" the 2018 Agreement. *URI Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018) (citations omitted). We refrain from rewriting or changing the 2018 Agreement under the guise of contract interpretation. *Weaver*, 939 F.3d at 627.

1

Because ISS Guyana seeks commissions, we start with Article 6(b), which governs compensation. Below, the district court found that Bell did not breach Article 6 because ISS Guyana, by its own allegations, sought commissions for sales occurring after the 2018 Agreement's term. We agree.

Article 6(b) only requires commissions for sales in which ISS Guyana

> has actively and substantially participated . . . *and* the order is placed with Bell *during the Term of Appointment . . . Orders received outside of the Term of Appointment . . . will not be eligible to receive a commission, regardless of when such order was initiated unless otherwise agreed to by Bell under a separate written agreement.*

See Art. 6(b) (emphasis added). The 2018 Agreement reiterated this limitation on commissions twice more. *See* Arts. 6(c)(8), 7(b).

The Texas Supreme Court has instructed that when a contract "authorize[s] commissions only on sales that close during the [contractual] relationship," like the 2018 Agreement here, the contracting parties' choice is binding. *Perthuis*, 645 S.W.3d at 237. As such, Bell could "freely provide [its] own rules for paying or withholding commissions" and was free to "deny the payment of commissions from procured sales absent continued employment; authorize commissions only on sales that close during the [contractual] relationship; [or] condition commissions on the money from the sale being received within a particular time frame." *Id.* at 236–37.

The contract here is unambiguous, and "at least in Texas, clear text = controlling text." *Weaver*, 939 F.3d at 627. So we honor Bell's—and ISS Guyana's—choice. The 2018 Agreement expired on September 30, 2019. And the only sales that took place were in December 2020 and June 2022—years after the expiration of ISS

Guyana's Agreement. Bell even gave ISS Guyana an opportunity for potential commissions outside of these limitations by asking the Representative to identify potentially qualifying sales, and ISS Guyana failed to do so. Accordingly, Bell did not breach Article 6(b) of the 2018 Agreement.

2

To evade these contractual requirements for commissions, ISS Guyana argues that Bell breached Article 5(a) of the 2018 Agreement, which requires Bell to "[s]upport [ISS Guyana] in its efforts to promote the sale of Authorized Products and Services in the Authorized Territory during the Term of Appointment."

But Texas courts do not read contractual clauses in isolation; instead, Texas law requires that we interpret contracts as a whole and give effect to each provision. *See, e.g., Matter of Pirani*, 824 F.3d 483, 493 (5th Cir. 2016) (applying Texas law); *Weaver*, 939 F.3d at 626 (same); *In re Serv. Corp. Int'l*, 355 S.W.3d 655, 661 (Tex. 2011) (Courts should "examine and consider the *entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." (emphasis in original) (citation omitted)). And we "must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or *section* of a contract." *Tex. v. Am. Tobacco Co.*, 463 F.3d 399, 408 (5th Cir. 2006) (emphasis added) (citation omitted) (applying Texas law). To that end, we look to Article 5(c) to help us determine whether Bell breached Article 5(a).

Both Articles 5(a) and 5(c) are subsections of the same Agreement section dedicated to Bell's duties. And the text of Article 5(c) refers back to Article 5(a): Although Article 5(a) requires Bell to "[s]upport [ISS Guyana] in its efforts to promote the sale of Authorized Products . . .", Article 5(c) clarifies that Bell will "[g]enerally render *such sales assistance* as may be, in Bell's sole judgment, reasonable and appropriate, without assuming any responsibility for Representative's sales efforts or any obligation to render assistance beyond what Bell, in its sole discretion, deems adequate" (emphasis added). *See, e.g., Slack Techs., LLC v. Pirani*, 598 U.S. 759, 766, 143 S. Ct. 1433, 216 L. Ed. 2d 18 (2023) (commenting "[t]he word 'such' usually refers to something that has already been 'described'" and using at-issue section's context in the statute and surrounding language to define terms); *Escondido Res. II, LLC v. Justapor Ranch Co.*, No. 04-14-00905-CV, 2016 Tex. App. LEXIS 5222, 2016 WL 2936411, at *3 (Tex. App.—San Antonio May 18, 2016, no pet.) (mem. op.) (describing "such" as reference to preceding sentences).

Accordingly, Article 5(c) narrows the scope of Bell's "support" duties to what is "reasonable and appropriate" in "Bell's sole judgment" and limits the assistance to what "Bell, it its sole discretion, deems adequate." *See Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc.*, 663 S.W.3d 569, 587 (Tex. 2023) (reaffirming that "a specific contract provision controls over a general one" (quoting *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 889 (Tex. 2019))). And in Texas, these kinds of sole-judgment or sole-discretion clauses are binding and enforceable. *See, e.g., Culbertson v. Brodsky*,

788 S.W.2d 156, 157 (Tex. App.—Fort Worth 1990, writ denied); *Lewis v. Vitol, S.A.*, No. 01-05-00367-CV, 2006 Tex. App. LEXIS 5645, 2006 WL 1767138, at *5 (Tex. App.—Houston [1st Dist.] June 29, 2006, no pet.) (mem. op.); *Kellermann v. Avaya, Inc.*, 530 F. App'x 384, 389 (5th Cir. 2013) (applying Texas law). Because Bell had "sole discretion" to determine what support to give, Bell did not breach Article 5 of the Agreement. Accordingly, the district court correctly dismissed ISS Guyana's breach-of-contract claim.

B

Second, ISS Guyana argues that the district court misapplied Texas law when it dismissed ISS Guyana's alternative claim for *quantum meruit*. Again, ISS Guyana's argument fails.

To begin, "*quantum meruit* is an equitable remedy which does not arise out of a contract, but is independent of it." *Vortt Expl. Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990). For ISS Guyana to recover under *quantum meruit*, it must prove that "'(1) valuable services were rendered or materials furnished; (2) for the party sought to be charged; (3) which services and materials were accepted by the party sought to be charged, used and enjoyed by him; (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, was expecting to be paid by the person sought to be charged.'" *Matter of KP Eng'g, L.P.*, 63 F.4th 452, 456 (5th Cir. 2023) (quoting *Vortt*, 787 S.W.2d at 944).

In Texas, recovery in *quantum meruit* is unavailable when an "express contract" exists between the parties. *Id.* (quoting *Vortt*, 787 S.W.2d at 944). However, as ISS Guyana emphasizes, such recovery is permissible "when a plaintiff has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract." *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 462 (5th Cir. 2003) (cleaned up) (quoting *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988)).

The district court dismissed ISS Guyana's *quantum meruit* claim because the 2018 Agreement covered "all the services performed by ISS Guyana" and thus barred recovery in *quantum meruit*. *ISS Aviation, Inc. (Wyoming)*, 2023 U.S. Dist. LEXIS 238873, 2023 WL 11822275, at *7. Indeed, an "express contract" undisputedly exists between ISS Guyana and Bell, which outlined their respective duties and responsibilities for the term. So that contract bars ISS Guyana's recovery in *quantum meruit*, unless an exception applies.

But ISS Guyana's partial-performance-exception argument now before us does not rescue their claims. The district court never considered that argument because ISS Guyana never raised it. So we do not consider it either. *See, e.g., Matter of KP Eng'g, L.P.*, 63 F.4th at 457 (finding party "forfeited [an] argument because it was alleged for the first time on appeal"); *Purselley v. Lockheed Martin Corp.*, 322 F. App'x 399, 404 (5th Cir. 2009) (finding that estoppel argument not raised in the district court was waived); *Cox Paving of Tex., Inc. v. H.O.*

Salinas & Sons Paving, Inc., 657 S.W.3d 756, 767 (Tex. App.—El Paso 2022, pet. denied) (discussing waiver of partial-performance exception). Even if this argument was not forfeited, the partial-performance exception does not apply. We already determined that Bell didn't breach the contract, and nothing suggests ISS Guyana was prevented from completing its end of the bargain. *See Leasehold Expense Recovery*, 331 F.3d at 462.

Accordingly, the district court correctly dismissed ISS Guyana's *quantum meruit* claim.

III

We next turn to the claims resolved at the summary judgment stage: ISS Guyana's claim for breach of an implied duty to cooperate and ISS Wyoming's claim for *quantum meruit*. We review grants of summary judgment *de novo*. *See Miller v. Michaels Stores, Inc.*, 98 F.4th 211, 216 (5th Cir. 2024). We affirm "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A "genuine dispute" of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Jones v. New Orleans Reg'l Physician Hosp. Org.*, 981 F.3d 428, 432 (5th Cir. 2020) (citation omitted). We view the evidence in favor of the nonmovant—here, the ISS parties. *Id.* And we may "affirm a summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Diamond Servs. Corp. v. RLB Contracting, Inc.*, 113 F.4th 430, 438 (5th Cir. 2024) (citation omitted).

Appendix A

A

We first address ISS Guyana's claim for breach of the implied duty to cooperate, for which the district court granted summary judgment to Bell.

The implied duty to cooperate "requires that a promisee" does not "hinder, prevent, or interfere with the promisor's ability to perform his duties under an agreement." *Bank One, Tex., N.A. v. Stewart*, 967 S.W.2d 419, 435 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (citing *Bagwell Coatings, Inc. v. Middle S. Energy, Inc.*, 797 F.2d 1298, 1305 n.6 (5th Cir. 1986)). But the implied duty to cooperate is just that—*implied*. And Texas law permits an implied duty, such as that to cooperate, when it rests "on the presumed intention of the parties as gathered from the terms as *actually expressed in the written instrument itself*, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it. . . " *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 748 (Tex. 2003) (emphasis added) (citations omitted).[2] But there "can be no implied covenant as to

2. ISS Guyana also seems to argue that Bell acted in bad faith. Even if ISS Guyana pleaded or appealed a claim for a breach of the implied duty of good faith—which it did not—Bell had no general duty to act in good faith under Texas law. *See, e.g., Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 369-70 n.13 (Tex. 2019) ("Under Texas law . . . contracting parties owe a good-faith duty only if they expressly agree to act in good faith, a statute imposes the duty, or the parties have a 'special relationship' like that between an insurer and insured."); *English*

a matter specifically covered by the written terms of the contract." *Bank One*, 967 S.W.2d at 434–35 (citation omitted).

The district court found that Article 5 of the 2018 Agreement defined Bell's cooperation obligation "to support ISS Guyana," and the court thus declined "to imply an additional duty to cooperate." *ISS Aviation, Inc.*, 2024 U.S. Dist. LEXIS 111061, 2024 WL 3086629, at *5. We agree.

The 2018 Agreement expressly defined Bell's obligations—to "render such sales assistance as may be, in Bell's sole judgment, reasonable and appropriate." And the Agreement explicitly outlined ISS Guyana's obligations, too—to bring potential sales to Bell, and as the district court said, "[n]ot the other way around." *Id.* Indeed, Bell's decision to pursue the Foreign Military Sale proposal on its own—outside of the Direct Consumer Sale process and based on leads which ISS Guyana was unaware of—did not constitute a breach. ISS Guyana even admits as much—conceding that Bell had no obligation to involve it in the Foreign Military Sale proposal. Accordingly, the Agreement defined the extent of "cooperation" required of both parties. *See, e.g., Chapman Children's Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 437 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("Because the parties specifically contracted the extent of their duty to

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v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983) (declining to adopt implied covenant of "good faith and fair dealing"); *Culbertson*, 788 S.W.2d at 157 (rejecting good-faith argument where contract afforded one party sole discretion).

cooperate, . . . we decline to imply additional duties in this instance."); *Estate of Rashti v. Bank of Am. Nat'l Ass'n*, 782 F. App'x 322, 326 (5th Cir. 2019) (applying Texas law). We can imply nothing more or nothing less, and we will not read into the contract additional, heightened duties just to "make the contract fair, wise, or just" in ISS Guyana's view. *Bank One*, 967 S.W.2d at 434; *see also In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003) ("[I]mplied covenants are not favored by law and will not be read into contracts except as legally necessary to effectuate the plain, clear, unmistakable intent of the parties.").

ISS Guyana makes much noise about its groundwork and contributions to Bell's eventual helicopter sales to Guyana. But even if we were to imply a duty to cooperate, Bell's efforts to sell helicopters outside of the Independent-Representative relationship never hindered, prevented, or interfered with ISS Guyana's efforts to perform its obligations. As the district court correctly emphasized, "[t]he 2018 Agreement did not guarantee ISS Guyana access to all deals in the Guyana region or protection in Guyana." *ISS Aviation, Inc.*, 2024 U.S. Dist. LEXIS 111061, 2024 WL 3086629, at *5. It merely required Bell to assist, as "reasonable and appropriate" in Bell's "sole discretion," in the sales that ISS Guyana pursued or obtained.

Finally, even assuming the implied duty to cooperate applied—though it does not—no evidence suggests ISS Guyana was entitled to damages for any alleged breach. First, the Foreign Military Sale for four helicopters never materialized. And even if ISS Guyana was involved in initiating that sale, ISS Guyana was never

entitled to commissions for sales that never occurred. Second, the 2020 sale resulted from a new regime's interest in purchasing a helicopter, a new Independent Representative's lead—with whom ISS Guyana had no prior contact—and Bell's outreach. ISS Guyana points to no evidence that ISS Guyana would have closed that sale, or the 2022 sale, prior to the end of the 2018 Agreement. Because ISS Guyana relies on "mere conclusory allegations" that are "not competent summary judgment evidence," its allegations are "insufficient, therefore, to defeat a motion for summary judgment." *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) (per curiam). As such, the district court properly granted Bell summary judgment on ISS Guyana's implied-duty claims.

B

Finally, we turn to ISS Wyoming's *quantum meruit* claims. Just as the district court found, ISS Wyoming has "failed to . . . establish a fact issue for two elements of this claim: ISS Wyoming's performance of work and enjoyment of work by Bell." *ISS Aviation, Inc.*, 2024 U.S. Dist. LEXIS 111061, 2024 WL 3086629, at *6.

ISS Wyoming's single-paragraph argument fails to provide any "genuine dispute" of material fact to survive summary judgment. FED. R. CIV. P. 56(a). The only thing ISS Wyoming—and the record evidence on which it relies—shows is that Bell was aware of ISS Wyoming. Indeed, in the district court's words, ISS Wyoming has presented no evidence that the "lobbying led to any helicopter sales or provided any other benefits

to Bell." *ISS Aviation*, 2024 U.S. Dist. LEXIS 111061, 2024 WL 3086629, at *6. Critically, even if Bell, as ISS Wyoming argues, "supported ISS Wyoming's formation and lobbying for Bell," Bell did not ask Barker or ISS Guyana to form ISS Wyoming, nor did Bell promise or expect to compensate ISS Wyoming in exchange for any lobbying efforts. *See LTS Grp., Inc. v. Woodcrest Cap., L.L.C.*, 222 S.W.3d 918, 920 (Tex. App.—Dallas 2007, no pet.) ("Quantum meruit is an equitable theory of recovery which is based on *an implied agreement to pay for benefits received*." (emphasis added)). And as Bell emphasizes, "ISS Wyoming supplied services, if at all, to further its own business interests—specifically, to assist ISS Guyana sales-promotion efforts so that ISS Guyana, which ISS Wyoming (and ultimately Barker) owns, might earn commissions." Because ISS Wyoming's efforts were to support a "future business advantage or opportunity"—sales of Bell helicopters, and accordingly, commissions from those sales—there is no basis for "a cause of action in quantum meruit." *Peko Oil USA v. Evans*, 800 S.W.2d 572, 577 (Tex. App.—Dallas 1990, writ denied) ("Quantum meruit relief cannot be obtained where the benefit is conferred officiously or gratuitously or where the services were rendered to gain a business advantage or where the defendant could not have reasonably believed that the plaintiff expected a fee."); *see, e.g., FDIC v. Plato*, 981 F.2d 852, 858 n.14 (5th Cir. 1993) (affirming denial of *quantum meruit* damages where defendant did not ask for and was unaware of benefit conferred); *Blanchard v. Via*, No. 5:20-CV-170-BQ, 2022 U.S. Dist. LEXIS 63398, 2022 WL 1018645, at *5 (N.D. Tex. Apr. 5, 2022) (applying Texas law) (collecting cases applying the rule that expectation

of future business advantage cannot form the basis of *quantum meruit* claim), *aff'd*, No. 22-10458, 2023 U.S. App. LEXIS 11367, 2023 WL 3316326 (5th Cir. May 9, 2023). ISS Wyoming hasn't provided evidence that a fact dispute exists as to whether there were either "services rendered" to or benefits "enjoyed" by Bell sufficient to defeat a motion for summary judgment.

Accordingly, the district court properly granted summary judgment to Bell on ISS Wyoming's *quantum meruit* claim.

* * *

We AFFIRM the district court's grant of summary judgment to Bell and its dismissal of the ISS parties' breach-of-contract, breach-of-implied-duty-to-cooperate, and *quantum meruit* claims.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JANUARY 4, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-CV-00689-O

ISS AVIATION, INC. (WYOMING), *et al.*,

Plaintiffs,

v.

BELL TEXTRON INC,

Defendant.

ORDER

Before the Court are Defendant's Motion for Summary Judgment (ECF No. 49), filed June 26, 2023; Plaintiffs' Response (ECF No. 67), filed July 31, 2023; and Defendant's Reply (ECF No. 72), filed August 14, 2023. For the reasons stated herein, Defendant's Motion is **GRANTED**. Because the Court grants summary judgment on all causes of action, the Courts does not reach the merits of Plaintiffs' entitlement to damages.

Appendix B

I. BACKGROUND[1]

This case arises out of an Independent Representative Agreement ("IRA") between Defendant Bell Textron Inc. ("Defendant" or "Bell") and ISS Aviation, Inc. (Guyana) ("ISS Guyana"). Bell manufactures helicopters and spare helicopter parts. Bell sells its products and services with the assistance of independent representatives who work on commission and obtain the right to market Bell's products and services in defined regions for defined periods of time under an IRA. Bell's independent representatives market and sell products and services based on territories assigned in executed IRAs.[2]

In 2013, Lex Barker ("Barker") formed ISS Guyana to serve as Bell's independent representative in the Guyana region.[3] On or about March 15, 2013, Bell and ISS Guyana entered into an IRA for a one-year term.[4] Each IRA expires at the conclusion of the term, at which time Bell determines whether to renew the relationship by agreeing to a new IRA.[5] Between 2013 and 2018, Bell

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1. The facts referenced herein are taken from Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment (ECF No. 68).

2. *See* Def.'s Br. in Supp. of Summ. J. 3-4, ECF No. 50.

3. Pl.'s App'x 113 (Barker Affidavit), ECF No. 69.

4. *Id.*

5. Def.'s App'x 002 (Reyes Declaration), ECF No. 51-1; Def.'s App'x 506-28 (Ortiz Deposition) 27:1-10, 27:17-24, 182:18-183:7, ECF No. 51-2. For examples of the IRAs, see Def.'s App'x 012-031 (2013 IRA); Def.'s App'x 032-051 (2014 IRA); Def.'s App'x 052-071

renewed the IRA on four occasions. Each renewal was accompanied by the execution of a separate IRA between Bell and ISS Guyana.

Bell renewed the final IRA with ISS Guyana on or about August 15, 2018 ("2018 IRA"), which is the main subject of this dispute. As relevant to this case, the 2018 IRA states that:

- ISS Guyana agreed to establish and maintain an official business in the Guyana region, obtain offers from prospective customers, submit those offers to Bell, and pay all costs and expenses incurred in the promotion and sale by ISS Guyana.[6]

- Bell agreed to support ISS Guyana in its efforts to promote the sale of products and services, render such sales assistance as may be, in Bell's sole judgment, reasonable and appropriate, without assuming responsibility for ISS Guyana's sales efforts or any obligation to render assistance beyond what Bell, in its sole discretion, deems adequate.[7]

- Bell will pay commissions to ISS Guyana provided that it had actively and substantially

(2015-2017 IRA); Def.'s App'x 072-085 (June 2017 IRA); Def.'s App'x 086-099 (Dec. 2017 IRA).

6. Pl.'s App'x. 003 (2018 IRA) ¶¶ 4(a), (d), ECF No. 69.

7. *Id.* at 004 ¶¶ 5(a), (c).

participated in the promotion of a particular sale in the Guyana region as determined at the reasonable discretion of Bell.[8]

- Orders received outside the term of appointment will not be eligible to receive commissions, regardless of when such order was initiated.[9]

During ISS Guyana's term as the independent representative, it marketed Bell's helicopters in the Guyana region, conducted demonstrations, and disseminated product and marketing information. ISS Guyana provided Bell with advice, research, and market intelligence pertaining to the politics and current events taking place in the Guyanese government and the Guyana Defense Force ("GDF"). Additionally, Barker lobbied the United States government to garner support for Bell's dealings in Guyana. As a part of this lobbying, Barker formed ISS Aviation Inc. (Wyoming) ("ISS Wyoming" and, collectively with ISS Guyana, "Plaintiffs").[10] Bell was aware of the formation of ISS Wyoming and its lobbying work.[11] And Bell paid ISS Wyoming a partial commission in June 2019 for a sale that was secured by another independent representative to a customer in the Guyana region.[12]

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8. *Id.* ¶ 6(b)(1).

9. *Id.*

10. Pls.' Appx 114-15 (Barker Affidavit), ECF No. 69.

11. *Id.*

12. *Id.*

ISS Guyana never secured a sale of a new helicopter in the Guyana region during its term as an independent representative.[13] The closest ISS Guyana came to facilitating a sale was in 2014 when ISS Wyoming and ISS Guyana successfully lobbied the Export Development of Canada ("EDC") for $25 million in financing to facilitate a transaction between Bell, Guyana, and the GDF.[14] However, ISS Guyana never secured any helicopter sale that would take advantage of the financing.[15]

By 2015, ISS Guyana was no longer physically operating in Guyana after it relocated to Florida.[16] Because of ISS Guyana's refusal to operate in Guyana and its poor sales record, Bell grew concerned that ISS Guyana lacked the appropriate presence in the region to operate as its independent representative and was disconnected from the Guyana region's helicopter market.[17] Bell's concern increased in April 2019 when it received a letter from the Multi-National Aviation Special Project Office ("MASPO") on behalf of the Guyanese

13. Def.'s App'x 001-011 (Ruben Reyes Declaration), ¶ 14, ECF No. 51-1; Def.'s App'x 551-596 (Barker Deposition), 115:17-25, 116:7-11, 116:15-24, 117:19-118:10, ECF No. 51-2.

14. Pls.' Appx115(Barker Affidavit), ECF No. 69.

15. Def.'s App'x 551-596 (Barker Deposition), 84:4-85:12, 115:17-21, 116:7-24, 117:19-118:10, 306:6-15, ECF No. 51-2.

16. *Id.* at 341 ; Pls.' App'x 118 (Barker Affidavit), ECF No. 69.

17. Def.'s App'x 441-447 (Frank Ferraro Declaration) ¶ 3, ECF No. 51-2; Def.'s App'x 448-470 (Email Dated February 14, 2017), ECF No. 51-2.

government.[18] The letter requested Bell's pricing for a total of four helicopters. This request was the first step in a proposed foreign military sale ("FMS Case") for the Guyanese government. Bell later contacted ISS Guyana about the FMS Case but ISS Guyana did not seem to know that the Guyanese government was interested in purchasing helicopters at that time or that a FMS Case process had begun.[19]

Around this same time, ISS Guyana believed that a deal with Guyana was materializing.[20] Plaintiffs contend that executives from Bell assured Barker that it was Bell's expectation that a deal would get done with the GDF or Guyanese government during the term of the 2018 IRA.[21] And that Bell would assist and include ISS Guyana in any Guyana deals. Plaintiffs assert that ISS Guyana and ISS Wyoming each continued to expend funds and resources in furtherance of a deal because of these representations.[22]

Bell worked the FMS Case without ISS Guyana. For reasons Bell and ISS Guyana dispute, ISS Guyana was

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18. *Id.* at 506-528 (Ortiz Deposition) 246:17-247:2; *id.* at 236-238 (Email Dated April 3, 2019 re: ROM Request for Guyana); *id.* at 239-241 (The P&A Request Dated March 13, 2019).

19. *Id.* at 529-550 (Reyes Deposition) 172:19-173:2; 178:2-4; *id.* at 551-596 (Barker Deposition) 269:1-7, 273:7-9, 282:19-283:5, 292:18-23.

20. Pls.' App'x 119-20 (Barker Affidavit), ECF No. 69.

21. *Id.*

22. *Id.*

not included in phone calls or other meetings surrounding this deal.[23] Bell's sales team met with Guyanese officials directly and made a formal proposal to MASPO on or about September 19, 2019.[24] However, no sale ever materialized from the FMS Case.[25]

Bell contends that ISS Guyana's lack of awareness of the FMS Case was the final and most-prominent reason it declined to renew the IRA.[26] In July 2019, Barker presented at Bell's annual sales meeting in Florida. Leading up to the sales meeting, Barker and Ruben Reyes ("Reyes"), Bell's regional sales manager, exchanged communications about Barker's presentation. In one of those communications, Reyes told Barker to change the closing date for the FMS Case from August 2019 to "unknown."[27] Plaintiffs allege that this change made Barker appear unprepared.[28] Defendants, on the other hand, claim that Barker appeared uninformed about the FMS Case generally because he did not provide the timeline for closing the deal or the specific types of helicopters the GDF requested.[29]

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23. Def.'s Br. in Supp. of Mot. for Sum. J. 10, ECF No. 50.

24. *Id.*

25. *Id.*

26. *Id.*

27. Pls.' App'x. 122 (Barker Affidavit), ECF No. 69.

28. *Id.*

29. Def.'s Br. in Supp. of Mot. for Sum. J. 11-12, ECF No. 50.

Bell notified ISS Guyana on August 19, 2023 that it would not be entering into another IRA.[30] As part of its standard non-renewal procedure, Bell asked ISS Guyana to identify potential sales that it actively participated in from which it could claim a commission.[31] ISS Guyana did not identify any sales that it had actively and substantially participated in prior to the expiration of the 2018 IRA.[32]

Around August 2020, nearly a year after the IRA expired, the Guyanese government experienced a regime change. At this time Bell learned from another company (unrelated to Plaintiffs) that the new Guyana National Security Advisor ("NSA") was searching for a used helicopter.[33] After learning about this prospect, Reyes flew to Florida and pitched the NSA for the sale of a new Bell helicopter.[34] In December 2020, the GDF purchased a helicopter from Bell. Bell later made additional sales to the GDF in 2022.[35]

Plaintiffs filed this case against Bell seeking commissions from the successful 2020 and 2022 Guyana deals and other compensation for work performed under

30. Def.'s App'x 529-550 (Reyes Deposition) 159:14-18, 165:7-166:1, ECF No. 51-2; Def.'s App'x 181-182 (Email Dated August 28, 2019), ECF No. 51-1; *id.* at 183-184 (Formal Notice of Non-renewal).

31. Def.'s; App'x 185-186 (Email Dated September 16, 2019), ECF No. 51-1.

32. *Id.*

33. *Id.* at 191-192 (Email Dated December 1, 2020).

34. Def.'s Br. in Supp. of Mot. for Sum. J. 14, ECF No. 50.

35. *Id.* at 15.

the 2018 IRA.[36] On May 30, 2023, the Court dismissed with prejudice most of Plaintiffs' claims.[37] The remaining claims are (1) ISS Guyana's breach of contract claim regarding an implied duty to cooperate under the 2018 IRA; (2) ISS Wyoming's quantum meruit claim; (3) ISS Wyoming's unjust enrichment claim; (4) ISS Wyoming's promissory estoppel claim; (5) Plaintiffs' fraud/fraudulent inducement claim; and (6) Plaintiffs' fraud by non-disclosure claim.[38] Defendants now seek summary judgment on all remaining claims, which is now ripe for review.[39]

II. LEGAL STANDARD

The Court may grant summary judgment when the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Summary judgment is not "a disfavored procedural shortcut," but rather an "integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation marks omitted).

"[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

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36. Pls.' Complaint, ECF No. 1.

37. May 30, 2023 Order, ECF No. 44.

38. *Id.* at 26-27.

39. Def.'s Mot. for Summ. J.,ECF No.49; Pls.' Resp. to Def.'s Mot. for Summ. J.,ECF No. 67; Def.'s Reply in Supp. of Mot. for Summ. J., ECF No.72.

248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant must inform the court of the basis for its motion and demonstrate from the record that no genuine dispute as to any material fact exists. *Celotex*, 477 U.S. at 323. "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

III. ANALYSIS

A. ISS Guyana's Implied Duty to Cooperate Claim

Plaintiffs assert Defendant breached its duty to cooperate under the 2018 IRA by "exclud[ing] ISS Guyana from the Guyana deal and intentionally preventing consummation of the transaction until after the 2018 IRA expired."[40] Defendant counters that an implied duty to cooperate should not be imposed in the 2018 IRA as the IRA already defines Defendant's obligation to cooperate.[41] Further, Defendant argues that, even if there was an implied duty to cooperate, Defendant did not breach said duty.[42] The Court agrees.

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40. Pl. Br. in Opp. to Def.'s Mot. for Summ. J. 8, ECF No. 68.

41. Def. Br. in Support of Mot. for Summ. J. 17, ECF No. 50.

42. *Id.* at 19.

"The parties' obligations under a contract are, for the most part, limited to those stated within the written agreement." *Miller v. Ret. Sys. Grp., Inc.*, No. H-09-834, 2011 U.S. Dist. LEXIS 166809, 2011 WL 13340637, at *9 (S.D. Tex. Jan. 31, 2011), *report and recommendation adopted sub nom.*, *Miller v. RSGroup Tr. Co.*, No. H-09-834, 2011 U.S. Dist. LEXIS 166801, 2011 WL 13340640 (S.D. Tex. Apr. 26, 2011) (citing *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 747 (Tex. 2003)). However, a court may imply a covenant when necessary to reflect the parties' actual intentions. *Universal Health Servs., Inc.*, 121 S.W.3d at 747. The implied covenant must appear, based on the express terms, "'so clearly within the contemplation of the parties that they deemed it unnecessary to express it.'" *Id.* at 748 (quoting *Danciger Oil & Ref. Co. of Tex. v. Powell*, 137 Tex. 484, 154 S.W.2d 632, 635 (Tex. 1941)). Texas law implies a duty to cooperate "in every contract in which cooperation is necessary for performance of a contract." *Bank One, Tex., N.A. v. Stewart*, 967 S.W.2d 419, 434 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). When applicable, the duty to cooperate prohibits a party to a contract from hindering, preventing, or interfering with the other party's ability to perform his contractual duties. *Id.* at 435.

A court "cannot make contracts for parties" and "can declare implied covenants to exist only when there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties in the contracts made." *Freeport Sulphur Co. v. Am. Sulphur Royalty Co. of Tex.*, 117 Tex. 439, 6 S.W.2d 1039,

1040 (Tex. 1928). "An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it." *Danciger*, 154 S.W.2d at 635. Accordingly, "a covenant will not be implied simply to make a contract fair, wise, or just." *Universal Health Servs., Inc.*, 121 S.W.3d at 748.

Plaintiffs contend that the duty to cooperate should be implied in the 2018 IRA because "Bell's cooperation was imperative in ensuring ISS Guyana's ability to perform as required by the 2018 IRA."[43] By excluding ISS Guyana from the Guyana deals, Plaintiffs argue that Defendants breached this duty. But "'[t]here can be no implied covenant as to a matter specifically covered by the written terms of the contract.'" *Bank One, Texas, N.A.*, 967 S.W.2d at 434-35 (quoting *Texstar N.A., Inc. v. Ladd Petroleum Corp.*, 809 S.W.2d 672, 678 (Tex. App.—Corpus Christi—Edinburg 1991, writ denied)). Here, the 2018 IRA expressly states that Bell's obligations to ISS Guyana are to support it "in its efforts to promote sales" and "[g]enerally render such sales assistance as may be, in Bell's *sole judgment*, reasonable and appropriate.[44] And the 2018 IRA makes clear that Bell has no "obligation to render assistance beyond what Bell, in its sole discretion, deems adequate."[45]

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43. Pls.' Br. in Opp. to Def.'s Mot. for Summ. J. 9, ECF No. 68.

44. Pl.'s App'x 004 (2018 IRA) ¶ 5(a), (c)), ECF No. 69 (emphasis added).

45. *Id.*

The Court is aware that at the motion to dismiss stage, it held that the Plaintiffs sufficiently pled facts to state a *plausible* claim for an implied duty to cooperate.[46] However, given the heightened pleading standard at summary judgment and the benefit of additional evidence, the Court finds that the implied duty Plaintiffs seek to impose on the Defendant was "clearly [not] within the contemplation of the parties." *Danciger*, 154 S.W.2d at 635. The 2018 IRA set up a framework that allowed ISS Guyana to operate as an independent representative for Bell in Guyana. Bell would provide ISS Guyana marketing materials and assistance up to Bell's sole discretion. The 2018 IRA did not guarantee ISS Guyana access to all deals in the Guyana region or protection in Guyana.

Simply put, this implied duty to cooperate would have forced Bell to include ISS Guyana in deals that it did not generate, did not know about, and did not participate in bringing to Bell.[47] But under the 2018 IRA, Bell had no obligation to involve ISS Guyana in the FMS Case or the successful sales that occurred after the 2018 IRA expired. For the first of those sales, Plaintiffs were unaware of the deal[48] and MASPO reached out to Bell directly about the FMS Case, making it reasonable for Bell, in its sole judgment, to exclude ISS Guyana from getting involved in the FMS Case. And both the 2020 and 2022 sales were initiated and occurred after the IRA had expired, meaning

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46. *Id.*

47. Pls.' Br. in Opp. to Def.'s Mot. for Summ. J. 9, ECF No. 68.

48. *Id.* at 20 (stating "Plaintiffs were unaware of the Guyana deal").

Bell had no duties—implied or not—to involve ISS Guyana in those deals.

Given the express language of the 2018 IRA and the parties' own conduct, Plaintiffs ask the Court to imply a duty that would flip the 2018 IRA on its head. Under the 2018 IRA, ISS Guyana was supposed "to obtain offers from prospective customers and submit those offers to Bell." Despite this language, Plaintiffs seem to argue that 2018 IRA requires Bell to support ISS Guyana's presence in Guyana and facilitate sales for ISS Guyana. But nothing in the express terms of the 2018 IRA indicate that this is the parties' intent. In fact, the terms of the 2018 IRA clearly indicate that the parties intended to have ISS Guyana generate sales opportunities for Bell. Not the other way around.

In total, "the parties agreed and intended that Defendant would have an obligation to provide sales assistance to ISS Guyana, but that Defendant would only be obligated to provide such assistance as Defendant thought reasonable and appropriate."[49] Because the parties specifically defined Bell's obligations to support ISS Guyana, the Court declines to imply an additional duty to cooperate. *See Bank One, Texas, N.A.*, 967 S.W.2d at 435; *see also In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003) ("[I]mplied covenants are not favored by law and will not be read into contracts except as legally necessary to effectuate the plain, clear, unmistakable intent of the parties."); *Matlock Place Apartments, L.P. v. Druce*,

49. May 30, 2023 Order 10, ECF No. 44.

369 S.W.3d 355, 379 (Tex. App.—Fort Worth 2012, no pet.) ("An implied covenant is necessary to effectuate the parties' intentions only if the obligation is so clearly within the contemplation of the parties that they deemed it unnecessary to express it." (cleaned up)).

Accordingly, Defendants motion for summary judgment on Plaintiffs' breach of contract claim is **GRANTED**.

B. ISS Wyoming's Quantum Meruit Claim

Plaintiffs next bring a claim for quantum meruit. To succeed on a quantum meruit claim, the claimant must prove:

> (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) those services and materials were accepted by the person sought to be charged, and were used and enjoyed by him; and (4) the person sought to be charged was reasonably notified that the plaintiff performing such services or furnishing such materials was expecting to be paid by the person sought to be charged.

In re BJ Servs., LLC, No. 20-33627, 2023 Bankr. LEXIS 540, 2023 WL 2311986, at *4 (Bankr. S.D. Tex. Mar. 1, 2023) (emphasis omitted) (quoting *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 732-33 (Tex. 2018)). Plaintiffs failed to present evidence to establish a fact

issue for two elements of this claim: ISS Wyoming's performance of work and enjoyment of work by Bell.

Plaintiffs assert that "ISS Wyoming was formed *at Bell's encouragement* to facilitate in conversations with and lobbying of the United States government to garner support for the Guyana transaction."[50] Plaintiffs also state that Bell knew ISS Wyoming was created for the purpose of lobbying. But nowhere in Plaintiffs' response or the record do Plaintiffs show that ISS Wyoming performed work for Bell or that Bell enjoyed that work. Plaintiffs point to excerpts from Barker's Affidavit[51] and Ferraro's Deposition, but those pieces of evidence only indicate that Bell knew about ISS Wyoming and that ISS Wyoming was established for the "purpose of seeking advocacy support for Bell's potential transaction."[52] Plaintiffs additionally point to a series of emails between Susan Michaels ("Michaels") and Barker regarding ISS Wyoming's articles and certificate of incorporation. This evidence certainly demonstrates that Bell was aware of ISS Wyoming, but once again does not demonstrate that ISS Wyoming performed work or that Bell enjoyed that work. Indeed, Plaintiffs have provided no evidence demonstrating how ISS Wyoming's lobbying led to any helicopter sales or provided any other benefits to Bell. Because Plaintiffs have failed to present evidence to

50. Pl. Br. in Opp. to Def.'s Mot. for Summ. J. 12, ECF No. 68.

51. Pl.'s App'x 114 (Barker Affidavit), ECF No. 69 (indicating that Barker made Bell aware of the formation of ISS Wyoming, without providing any evidence of work performed by ISS Wyoming).

52. *Id.* at 095-099 (Ferraro Deposition).

establish a fact issue for at least two elements of their claim, Defendant's motion for summary judgement on Plaintiffs' quantum meriut claim is **GRANTED**.

C. ISS Wyoming's Unjust Enrichment Claim

Plaintiffs also bring a claim for unjust enrichment. "'A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.'" *Elias v. Pilo*, 781 F. App'x 336, 338 (5th Cir. 2019) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). Here, Plaintiffs have not demonstrated what benefit, if any, Bell obtained from ISS Wyoming. Plaintiffs have only provided evidence that demonstrates Bell knew ISS Wyoming was formed to provide advocacy services. Accordingly, Defendant's motion for summary judgment on Plaintiffs' unjust enrichment claims is **GRANTED**.

D. ISS Wyoming's Promissory Estoppel Claim

Plaintiffs also bring a claim for promissory estoppel. "To prevail on a promissory estoppel claim under Texas law, a plaintiff must show: '(1) a promise; (2) foreseeability of reliance thereon by the promisor; and (3) substantial reliance by the promisee to his detriment.'" *Howard v. Bank of N.Y. Mellon*, No. 3:12-CV-1143-O, 2012 WL 13024096, at *2 (N.D. Tex. Nov. 27, 2012) (quoting *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). Plaintiffs allege that Defendant was aware of ISS Wyoming and the efforts taken by ISS Wyoming in furtherance of the Guyana deal.

To support this claim, Plaintiffs once again merely point to communications between Michaels and Barker about documentation for ISS Wyoming and that Defendant encouraged the formation of ISS Wyoming,[53] but none of these communications point to any promises made by Defendant. Plaintiffs fail to sufficiently demonstrate that Bell made a promise or that ISS Wyoming substantially relied on any such promise. Accordingly, Defendant's motion for summary judgment on the promissory estoppel claim is **GRANTED**.

E. Plaintiffs' Fraud/Fraudulent Inducement Claim

Next, Plaintiffs bring a claim for fraud and fraudulent inducement, alleging that ISS Guyana is entitled to commissions for sales occurring within the term of the 2018 IRA. "The essential elements of common law fraud are: '(1) that a false, material representation was made; (2) that was either known to be false when made or was made without knowledge of its truth; (3) that was intended to be acted upon; (4) that was relied upon; and (5) that caused injury.'" *Express Working Cap., LLC v. Starving Students, Inc.*, 28 F. Supp. 3d 660, 672 (N.D. Tex. 2014) (quoting *Hubbard v. Shankle*, 138 S.W.3d 474, 482-83 (Tex. App.—Fort Worth 2004, pet. denied)). "Texas law has long imposed a duty to abstain from inducing another to enter into a contract through the use of fraudulent misrepresentations." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018). "Fraudulent inducement is a

53. Pl. Br. in Opp. to Def.'s Mot. for Summ. J. 13, ECF No. 68.

particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Id.* (cleaned up) (quoting *LeTourneau Techs. Drilling Sys., Inc. v. Nomac Drilling*, LLC, 676 F. Supp. 2d 534, 542 (S.D. Tex. 2009)). Fraud and fraudulent inducement share the same basic elements, but fraudulent inducement requires the existence of a contract as an essential element of proof. *Anderson*, 550 at 614.

Justifiable reliance is an element of each claim. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 654 (Tex. 2018). The plaintiff must show that it actually relied on the defendant's representation and, also, that such reliance was justifiable. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). Justifiable reliance is typically a question of fact, but it can be "negated as a matter of law when circumstances exist under which reliance cannot be justified." *Orca Assets G.P., L.L.C.*, 546 S.W.3d at 648. Texas courts have repeatedly held that reliance upon an oral representation that is directly contradicted by unambiguous terms of a written contract is not reasonable or justified as a matter of law. *Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015); *Orca Assets G.P., L.L.C.*, 546 S.W.3d at 658. In this case, all fraud claims against Defendant fail as a matter of law because Plaintiffs have not demonstrated that ISS Guyana or ISS Wyoming justifiably relied on Bell's alleged representations.

The crux of Plaintiffs' fraud and fraudulent inducement claims center around the allegations that ISS Guyana and ISS Wyoming would not have continued providing

marketing and lobbying services if they knew Defendants would not help Plaintiffs secure a Guyana deal or renew the IRA.[54] Both the fraudulent and fraudulent inducement claims turn on Bell's alleged representations to Plaintiffs that (1) Bell would support Plaintiffs and provide assistance to perform under the 2018 IRA, (2) Plaintiffs had the right be involved in all transactions, (3) the value of the Guyana deal was $24 million, and (4) the Guyana deal would be complete by the expiration of the 2018 IRA.[55] But these alleged representations are all contradicted by the express language of the 2018 IRA.

First, nothing in the IRA requires Bell to aid ISS Guyana. Instead, the 2018 IRA requires Defendant to "render such sales assistance as may be, in Bell's *sole judgment*, reasonable and appropriate.[56] Second, the 2018 IRA did not give ISS Guyana the right to be involved in all transactions, know the value of deals it is not involved in, or consummate a deal while ISS Guyana is the independent representative. Under the 2018 IRA, ISS Guyana was supposed "to obtain offers from prospective customers and submit those offers to Bell." It was ISS Guyana's responsibility to generate sales opportunities for Bell—not the other way around. Finally, the 2018 IRA does not entitle ISS Guyana to commissions or the successful completion of a sale. The 2018 IRA states that

54. Pls.' 2nd Am. Compl. ¶ 58, ECF No. 20; Def's. App'x 551-596 (Lex Barker Deposition) 203:16-24, 244:12-16, ECF No. 51-2.

55. Pls.' 2nd Am. Compl. at 14-15, ECF No. 20.

56. Pl.'s App'x 004 (2018 IRA) ¶¶ 5(a), (c)), ECF No. 69 (emphasis added).

Bell will pay commissions for sales when the independent representative had "actively and substantially participated in the promotion of a particular sale"[57] and that "orders received outside of the term of appointment will not be eligible to receive a commission, regardless or when such orders were initiated."[58] No sales ever materialized during the 2018 IRA's term and Baker failed present Bell with a list of any sales in which he directly participated.[59] Thus, under the explicit terms of the 2018 IRA, ISS Guyana was never guaranteed a sale or any commissions.

Despite this, Barker continued to provide ISS Wyoming's and ISS Guyana's services to Defendant and continued to seek renewal of the IRA. Baker did so while knowing that Bell's decision not to renew ISS Guyana was a possibility subject to Bell's sole discretion and that ISS Guyana was not entitled to a successful sale and commissions solely because it was an independent representative.[60] Accordingly, it was not justified for Plaintiffs to continue providing support through ISS Guyana or ISS Wyoming based on Bell's alleged representations.

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57. *Id.* ¶ 6(b)(1).

58. *Id.*

59. Def.'s App'x 185-187 (Email Dated October 9, 2019), ECF No. 51-1; Def.'s App'x. 551-596 (Lex Barker Deposition) 329:9-330:23, ECF No. 51-2.

60. Def.'s App'x 551-596 (Lex Barker Deposition) 327:18-328:8, ECF No. 51-2.

This decision is consistent with Texas precedent. *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858-59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc)). In *DCR*, the contract granted the plaintiff non-exclusive distribution rights. *Id.* at 856. But the plaintiff claimed that the defendant fraudulently induced it to sign the agreement by promising exclusive distribution rights. *Id.* at 858. The Texas Court of Appeals rejected the claims because "reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *Id.* To hold differently, the court reasoned, "would defeat the ability of written contracts to provide certainty and avoid dispute," and reward parties that seek to enforce conflicting terms of unwritten agreements. *Id.* Here, much like *DRC*, Plaintiffs seek commissions through the enforcement of terms that directly contradict the 2018 IRA. The Court will not reward such tactics.

Because Plaintiffs failed to sufficiently demonstrate that ISS Guyana or ISS Wyoming reasonably relied on Bell's alleged misrepresentations, Defendant's motion for summary judgment for the fraud and fraudulent inducement claims is **GRANTED**.

F. Plaintiffs' Fraud by Non-Disclosure Claim

Lastly, Plaintiffs bring a claim for fraud by non-disclosure. Justifiable reliance is an essential element of fraud by non-disclosure. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (explaining

that reliance is an element of fraud by nondisclosure because this cause of action is a subcategory of fraud); *BP Am. Prod. Co. v. Zaffirini*, 419 S.W.3d 485, 506 (Tex. App.—San Antonio 2013, pet. denied) (stating that, like common-law fraud, fraud by nondisclosure includes the element of justifiable reliance). Because the Court has determined that Plaintiffs' reliance was not justified as a matter of law, Defendants motion for summary judgment on this claim is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment is **GRANTED** in its entirety. Plaintiffs' Objection to Defendant's Summary Judgment Evidence[61] (ECF No. 70), Defendant's Motion to Exclude Testimony (ECF No. 78); and Defendant's Objections to Plaintiffs' Evidence in Response to Exclude Testimony (ECF No. 84) are **DENIED as MOOT**. Defendant's Objections to and Motion to Strike Summary Judgment Evidence (ECF No. 73) is **OVERRULED**. Separate final judgment shall follow.

SO ORDERED this **4th day** of **January, 2024**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

61. Because the Court, in ruling on Defendant's Motion for Judgment, did not rely on Defendant's Exhibits A-9 through A-13, A-19, A-18, or A-28, Plaintiffs' Objection is **MOOT**.

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JANUARY 4, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-CV-00689-O

ISS AVIATION, INC. (WYOMING), *et al.*,

Plaintiffs,

v.

BELL TEXTRON INC,

Defendant.

FINAL JUDGMENT

This Judgment is issued pursuant to Fed. R. Civ. P. 58(a).

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. This case is **DISMISSED with prejudice** to the refiling of the same.

2. This Final Judgment fully and finally resolves all issues between Plaintiffs and Defendant and may be appealed. Any relief not specifically granted in this Judgment is **DENIED** and any parties not otherwise disposed of are **DISMISSED**.

3. The taxable costs of court, as calculated by the clerk of court, shall be borne by the party incurring the same.

SO ORDERED on this **4th day** of **January, 2024**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED MAY 30, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:22-CV-00689-O

ISS AVIATION, INC. (WYOMING), *et al.*,

Plaintiffs,

v.

BELL TEXTRON INC,

Defendant.

ORDER

Before the Court are Defendant Bell Textron, Inc.'s Motion to Dismiss (ECF No. 7), filed September 27, 2022; Plaintiffs ISS Aviation, Inc. (Wyoming) and ISS Aviation, Inc. (Guyana)'s Response (ECF No. 14), filed October 25, 2022; and Defendant's Reply (ECF No. 18). For the reasons contained herein, Defendant's Motion is hereby **GRANTED in part** and **DENIED in part**.

Also before the Court are Plaintiffs' Motion for Leave to File Amended Complaint (ECF No. 17), filed October 25, 2022; Defendant's Response (ECF No. 19),

filed November 8, 2022; and Plaintiffs' Reply (ECF No. 23), filed November 22, 2023. For the reasons contained herein, Plaintiffs' Motion is hereby **GRANTED in part** and **DENIED in part**.

Defendant's Motion to Dismiss

I. Factual Background[1]

Plaintiffs ISS Aviation, Inc. (Wyoming) ("ISS Wyoming") and ISS Aviation, Inc. (Guyana) ("ISS Guyana") bring this lawsuit against Defendant Bell Textron, Inc. Defendant promotes and sells model helicopters, accessories, and spare parts, nationally and internationally.

On or about March 15, 2013, Defendant and ISS Guyana entered into the first Independent Representative Agreement ("IRA"), wherein Defendant and ISS Guyana agreed that ISS Guyana would be Defendant's independent representative on behalf of Defendant within the Authorized Territory of French Guinea, Guyana, and Suriname. ISS Guyana[2] was to establish Defendant

1. Unless otherwise cited, the Court's recitation of the facts is taken from Plaintiffs' Amended Complaint. *See* Am. Compl., ECF No. 4. At this stage, these facts are taken as true and viewed in the light most favorable to the plaintiffs. *See Sonnier v. State Farm Mut. Auto. Ins.*, 509 F.3d 673, 675 (5th Cir. 2007).

2. Throughout the Amended Complaint, Plaintiffs refer to "ISS Aviation," which is confusing as both Plaintiffs are related to ISS Aviation. The Court presumes based on context that "ISS Aviation" as utilized by Plaintiffs in the recitation of the facts in the

as the primary resource for the Government of Guyana for their helicopters, parts, services, and other needs. In return, as part of the Parties' agreement, Defendant promised to support ISS Guyana in its efforts to promote the sale of Authorized Products and Services and timely accept or reject offers to purchase Authorized Products and Services by or obtained by ISS Guyana. Defendant renewed ISS Guyana as its independent representative five times between 2014 and 2018 by signing new IRAs containing similar terms and compensation structure as the initial IRA, and each expiring by their own terms after either one or two years.

Plaintiffs purport that Defendant was aware there were deliberate attempts by various entities and rival companies in Guyana to "financially ruin" ISS Guyana over the course of the Parties' contractual relationship. For example, Plaintiffs contend that some of these companies conspired with certain airport officials of the Government of Guyana to obstruct the business operations of ISS Guyana. Plaintiffs contend Defendant did nothing to assist ISS Guyana with these entities.

In 2017 and 2018, Mr. Jay Ortiz, a representative of Defendant, allegedly made representations to ISS Guyana regarding Defendant's commitment to support ISS Guyana's efforts to secure a profitable deal known

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Amended Complaint refers to ISS Guyana, and, as such, the Court has adopted the use of "ISS Guyana" throughout. Further, looking at the "Factual Background" section of the Amended Complaint, it is never explained who ISS Wyoming is and/or how it fits into this litigation. *See* Am. Compl., ECF No. 4.

as the "Guyana Deal."[3] Specifically, Mr. Ortiz and other members of management of Defendant represented that it would provide full support, including political support, to ISS Guyana to close the Guyana Deal. This support included the careful coordination of all meetings, visits, emails and phone calls to the Government of Guyana to close the transaction. Mr. Ortiz told ISS Guyana to keep pressing ahead with its representation of Defendant.

On August 15, 2018, the Parties entered into their final IRA ("the 2018 IRA"), extending the Parties' contractual relationship for another one-year term.

In early 2019, Plaintiffs discovered Defendant's prior regional sales manager, with whom ISS Guyana worked with for years, was no longer working for Defendant. Months later, an acting regional sales manager contacted ISS Guyana asking for all information regarding the Guyana Deal. The new acting regional sales manager allegedly represented that the value of the Guyana Deal at that time was approximately $24 million. Plaintiffs contend that the new acting regional sales manager, operating under Defendant's direction, proceeded to deal directly with the government of Guyana and the Guyana Defence Force, excluding ISS Guyana from any involvement. On or about August of 2019, Defendant's new acting sales manager contacted ISS Guyana and informed

3. Throughout the Amended Complaint, Plaintiffs refer to the "Guyana Deal" although they fail to immediately define what the Deal is or the background behind the Deal. The Court presumes the "Guyana Deal" refers to the allegedly $256 million deal resulting from two sales to the Government of Guyana and the Guyana Defence Force in 2020.

ISS Guyana that Defendant would not be renewing the IRA at the expiration of the 2018 IRA.

The Guyana Deal commenced "some time in 2020."[4] According to certain news articles, the Guyana Deal constituted at least two purchases made by the Government of Guyana and the Guyana Defence Force, purportedly valued at $256 million. In addition to commission owed on the Guyana Deal, Plaintiffs claim Defendant owes commission in relation to Defendant's sale of helicopter parts and equipment for two helicopters based and operated in Guyana, thought to be helicopters with serial numbers 52138 and 52164.

On August 9, 2022, Plaintiffs filed this lawsuit in the Tarrant County District Court.[5] Defendant removed this case to federal court on August 10, 2022.[6] Plaintiffs filed an amended complaint on August 30, 2022.[7] On September 27, 2022, Defendant filed a motion to dismiss Plaintiffs' amended complaint.[8] Plaintiffs filed their response on October 25, 2022.[9] Defendant filed its reply on November 8, 2022.[10]

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4. Am. Compl. ¶ 67, ECF No. 4.

5. Pl. Orig. Pet., ECF No. 1-3.

6. Not. of Removal, ECF No. 1.

7. Am. Compl., ECF No. 4.

8. Def. Mot., ECF No. 7.

9. Pls. Resp., ECF No. 14.

10. Def. Reply, ECF No. 18.

On October 25, 2022, Plaintiffs filed a motion for leave to file an amended complaint.[11] On November 8, 2022, Defendant filed its response to Plaintiffs' motion.[12] Plaintiffs stated that they filed the motion for leave to file an amended complaint solely as a precaution *should* the Court grant Defendant's motion to dismiss.[13] All motions are now ripe for the Court's review.

II. Legal Standard

Rule 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). If a plaintiff fails to satisfy Rule 8(a), the defendant may file a motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads

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11. Pls. Mot. for Leave, ECF No. 17.

12. Def. Resp., ECF No. 19.

13. *See* Pls. Resp. to Court Order, ECF No. 22.

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (cleaned up) (quoting *Twombly*, 550 U.S. at 557). A court may not accept legal conclusions as true. *Id.* at 678-79. When well-pleaded factual allegations are present, a court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

III. Analysis

Plaintiffs bring claims for breach of contract;[14] quantum meruit;[15] promissory estoppel;[16] unjust enrichment;[17] fraud/fraudulent inducement;[18] and fraud by non-disclosure.[19] Defendant moves to dismiss all of Plaintiffs' claims.[20]

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14. Am. Compl. ¶¶ 73-81, ECF No. 4.

15. *Id.* at ¶¶ 81-84.

16. *Id.* at ¶¶ 85-89.

17. *Id.* at ¶¶ 90-93.

18. *Id.* at ¶¶ 94-103.

19. *Id.* at ¶¶ 104-08.

20. *See generally* Def. Mot., ECF No. 7.

Appendix D

A. Breach of Contract

Plaintiffs first bring a claim for breach of contract, alleging that Defendant and ISS Guyana entered into a valid enforceable contract, which Defendant breached by excluding ISS Guyana from the Guyana Deal and by intentionally preventing the consummation of the deal during the representative period.[21] Plaintiffs further contend Defendant breached the contract by failing to pay ISS Guyana in full for the services it provided on behalf of Defendant pursuant to the IRA.[22] Finally, Plaintiffs allege that ISS Wyoming was an intended third-party beneficiary of the agreement between ISS Guyana and Defendant and suffered damages due to Defendant's breach.[23]

Under Texas law, "[b]reach of contract requires pleading and proof that (1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach." *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019) (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018)). To successfully plead a breach of contract claim, a plaintiff must "identify a specific provision of the contract that was allegedly breached."

21. Am. Compl. ¶¶ 74, 77, ECF No. 4.

22. *Id.* at ¶ 78.

23. *Id.* at ¶ 81.

Appendix D

Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Georgia, Inc., 995 F. Supp. 2d 587, 602 (N.D. Tex. 2014).

1. Article 6 of the 2018 IRA

Defendant first contends that Plaintiffs' breach of contract claim must be dismissed because Plaintiffs are not entitled to commissions for sales that were procured after the expiration date of the 2018 IRA.[24] Defendant highlights Article 6 of the 2018 IRA wherein it states, "[o]rders received outside of the Term of Appointment set forth in Article [sic] 2.b ***will not be eligible to receive a commission*** [or discount], ***regardless of when such order was initiated*** unless otherwise agreed to by [Defendant] under a separate written agreement."[25] Plaintiffs are seeking commission payments for the Guyana Deal that commenced "sometime in 2020."[26] Defendant contends that the 2018 IRA expired on August 14, 2019.[27] Plaintiff provides evidence of an amendment to the 2018 IRA that the Parties entered into wherein the termination date was extended to September 30, 2019.[28] Either way, the 2018 IRA expired, at latest, on September 30, 2019, before the commencement of the Guyana Deal.

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24. Def. Brief 11, ECF No. 8.

25. *Id.* (alterations in original); Def. App. 96, ECF No. 9.

26. Am. Compl. ¶ 67, ECF No. 4.

27. Def. App. 95, ECF No. 9.

28. Pls. App. 5, ECF No. 16.

2. Articles 5(a) and (e) of the 2018 IRA

Regardless, Plaintiffs contend Defendant nevertheless breached the contract by failing to provide support and sales assistance to ISS Guyana and by engaging in actions that Plaintiffs argue ultimately obstructed the completion of the Guyana Deal during the term of the IRA.[29] In terms of what contractual provisions were breached, Plaintiffs loosely allege that Defendant breached Articles 5(a) and 5(e) of the 2018 IRA.[30]

Looking at the 2018 IRA, Article 5 spells out Defendant's duties.[31] Article 5(a) states that Defendant agrees to "[s]upport [ISS Guyana] in its efforts to promote the sale of Authorized Products and Services in the Authorized Territory during the Term of Appointment."[32] Article 5(e) states that Defendant agrees to "[t]imely accept or reject offers to purchase Authorized Products and Services by or obtained by Representative."[33]

Regarding Article 5(e), the Court finds that Plaintiffs do not allege facts to show that Defendant failed to timely

29. Pls. Resp. Brief 7, ECF No. 15.

30. Am. Compl. ¶ 27, ECF No. 4; Pls. Resp. Brief 2, ECF No. 15. In the Amended Complaint, Plaintiffs fail to state which contractual provisions they feel were breached but use language from Articles 5(a) and 5(e).

31. *See* Def. App. 96, ECF No. 9.

32. *Id.*

33. *Id.*

accept or reject offers to purchase Authorized Products and Services during the term of the agreement. Therefore, Plaintiffs fail to sufficiently allege that Defendant breached Article 5(e). Turning to Article 5(a), Defendant highlights that, under Article 5(c) of the IRA, Defendant was only contractually obligated to "[g]enerally render such sales assistance as may be, **in** [Defendant's] **sole judgment, reasonable and appropriate**."[34] Therefore, Defendant contends, the Parties expressly agreed Defendant had the sole right to determine how to perform the sales assistance that Plaintiffs "take umbrage with" in this lawsuit.[35] Plaintiffs counter that Article 5(c) should not be read in conjunction with 5(a) and that, at best, there is an ambiguity in the agreement based on different interpretations.[36] Plaintiffs state that it is for the jury to decide whether 5(a) and 5(c) are discussing the same subject matter, how these provisions should be read together, and whether Article 5(a) was breached.[37]

"The primary concern of a court in construing a written contract is to ascertain the true intentions of the parties as expressed in the instrument." *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (citations omitted). "Contracts are construed in their entirety, and it is the Court's duty 'to consider each part with every other

34. Def. Brief 13, ECF No. 8 (quoting Def. App. 96, ECF No. 9) (emphasis in original).

35. *Id.*

36. Pls. Resp. Brief 3, ECF No. 15.

37. *Id.*

part so that the effect and meaning of one part on any other part may be determined.'" *Id.* at 408 (quoting *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 337 (Tex. 1980)). "[C]ourts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a contract." *Id.* (quoting *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)). "Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered." *Id.* at 407 (quoting *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983)). "If a written contract is worded such that it can be given a definite or certain legal meaning, then it is not ambiguous." *Id.* (citing *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)). "If the contract's meaning is uncertain and doubtful, or it is reasonably susceptible to more than one meaning, it is ambiguous." *Id.* (citing *Coker*, 650 S.W.2d at 393-94).

In this case, the Court finds that the contract language is unambiguous. Defendant's obligation to "[s]upport [ISS Guyana's] efforts to promote the sale" of Defendant's Authorized Products and Services,[38] as set forth in Article 5(a), is the same as Defendant's obligation to "[g]enerally render . . . sales assistance," as set forth in Article 5(c).[39] Reading the two clauses together, Court finds that the clear, unambiguous meaning of the contract is that Article 5(c) is meant to place limits on Defendant's

38. Def. App. 96, ECF No. 9.

39. *Id.*

obligations under Article 5(a). Furthermore, Plaintiffs fail to articulate an alternative interpretation of 5 for how Article 5(a) and (c) should be interpreted in relation to one another.[40] Accordingly, the Court finds that the Parties agreed and intended that Defendant would have an obligation to provide sales assistance to ISS Guyana, but that Defendant would only be obligated to provide such assistance as Defendant thought reasonable and appropriate. Therefore, any breach of contract claim based on an alleged failure of Defendant to provide sufficient sales assistance regarding the Guyana Deal fails.

3. Air Services, Ltd. Transactions

Plaintiffs, in their response, vaguely allege that Defendant breached the 2018 IRA by failing to pay ISS Guyana commissions for transactions involving Air Services, Ltd.[41] Plaintiffs cite to Paragraph 71 of the Amended Complaint, which states that Defendant owes commission in relation to aircraft operated by Air Services, Ltd. in Guyana, which owns, operates, and bought Defendant helicopter parts and equipment for their two helicopters purchased from Defendant.[42] Paragraph 71 is the only mention of Air Services, Ltd. or any transactions with Air Services, Ltd. in the entire Amended Complaint.[43] Plaintiffs fail to state which provisions of the 2018 IRA

40. *See* Pls. Resp. Brief, ECF No. 15.

41. *Id.* at 8.

42. Am. Compl. ¶ 71, ECF No. 4.

43. *See id.*

such transactions violated. Plaintiffs fail to specify when these transactions even occurred. Altogether, the Court finds that any breach of contract claim based on these alleged transactions involving Air Services, Ltd. fails as the Amended Complaint does not contain factual allegations sufficient to support such a claim.

4. Duty to Cooperate

Plaintiffs also assert Defendant breached its duty to cooperate under the 2018 IRA by engaging in actions that prevented ISS Guyana's performance of the IRA.[44] Defendant counters that an implied duty to cooperate should not be imposed in the 2018 IRA as the IRA already defines Defendant's obligation to cooperate.[45] Further, Defendant argues that, even if there was an implied duty to cooperate, Defendant did not breach said duty.[46]

"The parties' obligations under a contract are, for the most part, limited to those stated within the written agreement." *Miller v. Ret. Sys. Grp., Inc.*, No. H-09-834, 2011 WL 13340637, at *9 (S.D. Tex. Jan. 31, 2011), adopting report and recommendation sub nom. *Miller v. RSGroup Tr. Co.*, No. H-09-834, 2011 WL 13340640 (S.D. Tex. Apr. 26, 2011) (citing *Universal Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 121 S.W.3d 742, 747 (Tex. 2003)). However, the court may imply a covenant

44. Pls. Resp. Brief 6-7, ECF No. 15.

45. Def. Reply 4, ECF No. 18.

46. *Id.* at 4-5.

when necessary to reflect the parties' actual intentions. *Universal Health Servs., Inc.*, 121 S.W.3d at 747. The implied covenant must appear, based on the express terms, "so clearly within the contemplation of the parties that they deemed it unnecessary to express it." *Id.* at 748 (quoting *Danciger Oil & Ref. Co. of Tex. v. Powell*, 137 Tex. 484, 154 S.W.2d 632, 635 (Tex. 1941)). Texas implies a duty to cooperate "in every contract in which cooperation is necessary for performance of a contract." *Bank One, Tex., N.A. v. Stewart*, 967 S.W.2d 419, 434 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). When applicable, the duty to cooperate prohibits a party to a contract from hindering, preventing, or interfering with the other party's ability to perform his contractual duties. *Id.* at 435.

In this case, the Court finds that Plaintiffs have sufficiently pled the existence of an implied duty to cooperate on the part of Defendant. The issue therefore is whether Defendant breached the duty.

Defendant contends that it did not breach its duty to cooperate under the 2018 IRA, as Defendant did not prevent ISS Guyana from fulfilling its contractual duties.[47] Specifically, Defendant contends that ISS Guyana was not contractually obligated to secure a sale to the government of Guyana, and that ISS Guyana's only contractual duties concerned how ISS Guyana was to conduct business (e.g., ISS Guyana is obliged to office in Guyana, comply with global anti-corruption laws, conduct reasonable

47. Def. Reply 5, ECF No. 18.

due diligence into prospective customers).[48] ISS Guyana counters that Defendant engaged in actions that prevented its performance of the contract and ultimately obstructed completion of the Guyana Deal.[49] Specifically, ISS Guyana alleges that Defendant took "full control over the deal to the exclusion of ISS Guyana despite ISS Guyana being the sole independent representative"; that during the term of the IRA, [Defendant's] "new acting regional sales manager and [Defendant's] Management conducted various meetings with Guyanese officials and others without telling ISS Guyana despite the fact that ISS Guyana was the representative"; that [Defendant's] unilateral decision to take over the deal discussions without notifying ISS Guyana and its decision to exclude ISS Guyana deliberately and intentionally from the deal discussion runs afoul of the [IRA] and ultimately prevents ISS Guyana from participating and concluding the deal and getting the commissions it earned[.]"[50]

At the motion to dismiss stage, the Court finds that ISS Guyana has sufficiently pleaded facts to support the claim that Defendant prevented ISS Guyana from performing as Defendant's sole independent representative in the region under the 2018 IRA. Defendant's motion to dismiss ISS Guyana's breach of contract claim on this point is **DENIED**.

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48. *Id.*

49. Pls. Resp. Brief 7, ECF No. 15.

50. *Id.* (quoting Am. Compl. ¶¶ 54-55).

5. ISS Wyoming

Plaintiffs lastly allege that ISS Wyoming was an intended third-party beneficiary of the agreement between ISS Guyana and Defendant and suffered damages due to Defendant's breach.[51]

"A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit." *Mokhtar v. Penn-Am. Ins. Co.*, No. 3:16-CV-01168-O, 2016 WL 9527963, at *4 (N.D. Tex. June 22, 2016) (emphasis omitted) (quoting *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)). "In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied." *Id.* (quoting *MCI Telecomm. Corp.*, 995 S.W.2d at 651).

In this case, Plaintiffs fail to provide any evidence that the Parties intended for ISS Wyoming to be a third-party beneficiary to the 2018 IRA. Plaintiffs fail to point to any provision of the contract wherein ISS Wyoming was designated a third-party beneficiary. Plaintiffs fail to cite to any provision in the 2018 IRA, or in the Parties' negotiations before signing the 2018 IRA, where ISS

51. Am. Compl. ¶ 81, ECF No. 4.

Wyoming was mentioned at all. Therefore, the Court finds that ISS Wyoming fails to sufficiently allege a breach of contract claim. ISS Wyoming's breach of contract claim thereby fails.

6. Breach of Contract Conclusion

To conclude, Defendant's motion to dismiss is hereby **GRANTED** as to any breach of contract claim asserted by ISS Wyoming. Also, Defendant's motion to dismiss is hereby **GRANTED** as to any breach of contract claim based on an alleged failure of Defendants to provide sufficient sales assistance under the IRA. Further, Defendant's motion to dismiss is hereby **GRANTED** as to any breach of contract claim based on the alleged transactions involving Air Services, Ltd. However, Defendant's motion to dismiss is **DENIED** as to Defendant's alleged breach of the duty to cooperate. Therefore, the sole surviving argument for breach of contract is ISS Guyana's claim that Defendant breached its implied duty to cooperate under the 2018 IRA.

B. Quantum Meruit

Plaintiffs secondly bring a claim for quantum meruit.[52] To succeed on a quantum meruit claim, the claimant must prove:

> (1) valuable services were rendered or materials furnished; (2) for the person sought to be

52. Am. Compl. ¶¶ 81-84, ECF No. 4.

> charged; (3) those services and materials were accepted by the person sought to be charged, and were used and enjoyed by him; and (4) the person sought to be charged was reasonably notified that the plaintiff performing such services or furnishing such materials was expecting to be paid by the person sought to be charged.

In re BJ Servs., LLC, No. 20-33627, 2023 WL 2311986, at *4 (Bankr. S.D. Tex. Mar. 1, 2023) (emphasis omitted) (quoting *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 732-33 (Tex. 2018)). "[A] party may recover under quantum meruit only when there is no express contract covering the services or materials furnished." *Moncrief v. Tech Pharm. Servs. LLC*, No. 3:22-cv-1654-X, 2023 U.S. Dist. LEXIS 12513, 2023 WL 416549, at *2 (N.D. Tex. Jan. 25, 2023) (quoting *Vortt Exploration Co. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990)).

Defendant contends, and the Court agrees, that the 2018 IRA clearly sets out the contractual obligations of Defendant and ISS Guyana, and all the services performed by ISS Guyana were contemplated by the 2018 IRA.[53] Accordingly, ISS Guyana cannot recover under quantum meruit. Furthermore, the IRA was between ISS Guyana and Defendant, and Plaintiffs fail to plead facts to show that Defendant was ever reasonably notified that ISS Wyoming performed work on Defendant's behalf or that

53. Def. Brief 16-17, ECF No. 8.

ISS Wyoming expected to be paid by Defendant.[54] As such, the Court agrees with Defendant's contention that ISS Wyoming's quantum meruit claim must be dismissed.[55] Therefore, both ISS Guyana's and ISS Wyoming's claims for quantum meruit are **DISMISSED**.

C. Promissory Estoppel

Plaintiffs thirdly bring a claim for promissory estoppel.[56] "To prevail on a promissory estoppel claim under Texas law, a plaintiff must show: '(1) a promise; (2) foreseeability of reliance thereon by the promisor; and (3) substantial reliance by the promisee to his detriment.'" *Howard v. Bank of N.Y. Mellon*, No. 3:12-CV-1143-O, 2012 WL 13024096, at *2 (N.D. Tex. Nov. 27, 2012) (quoting *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). "[I] f a valid contract between the parties covers the alleged promise, a plaintiff may not recover under a promissory estoppel theory." *Id.* (citing *Fertic v. Spencer*, 247 S.W.3d 242, 250 (Tex. App.—El Paso 2007, pet. denied)).

Plaintiffs allege that Defendant promised to respect ISS Guyana's rights as Defendant's independent representative.[57] They further contend Defendant promised that it would support Plaintiffs with the tools and resources necessary to secure the Guyana Deal.[58]

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54. *Id.*

55. *Id.* at 17.

56. Am. Compl. ¶¶ 85-89, ECF No. 4.

57. *Id.* at ¶ 86.

58. *Id.*

They also state that Defendant promised it would pay ISS Guyana commissions for transactions procured by ISS Guyana on Defendant's behalf.[59] Finally, they allege that it was foreseeable Plaintiffs would rely on Defendant's promises, and that Plaintiffs did in fact rely on Defendant's promises to their detriment.[60] Regarding ISS Wyoming, Plaintiffs contend that, as ISS Wyoming was not a party to the 2018 IRA, ISS Wyoming is entitled to seek compensation and damages for the benefit it conferred on Defendant.[61]

The Court finds that the alleged promises by Defendant were covered by the 2018 IRA. Furthermore, pursuant to its own terms, the 2018 IRA "constitutes the entire Agreement of the Parties with respect to the subject matter of [the] Agreement."[62] Therefore, to the extent Defendant made any extra-contractual promises, it was not foreseeable that Plaintiffs would rely on any such promises. Regarding ISS Wyoming specifically, the Court finds that Plaintiffs fail to sufficiently plead that Defendant made any promises to ISS Wyoming or that ISS Wyoming substantially relied on any such promises. Accordingly, Plaintiffs' promissory estoppel claims are **DISMISSED**.

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59. *Id.*

60. *Id.*

61. Pls. Resp. Brief 13, ECF No. 15.

62. Def. App. 103, ECF No. 9.

D. Unjust Enrichment

Plaintiffs next bring a claim for unjust enrichment. "A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Elias v. Pilo*, 781 F. App'x 336, 338 (5th Cir. 2019) (quoting *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)). "In Texas, unjust enrichment is based on quasi-contract and is unavailable when a valid, express contract governing the subject matter of the dispute exists." *JPM Restoration, Inc. v. Ares LLC*, No. 3:20-cv-3160-B, 2021 U.S. Dist. LEXIS 25164, 2021 WL 487696, at *3 (N.D. Tex. Feb. 10, 2021) (quoting *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 454 (5th Cir. 2001)). "[I]n general, unless one party disputes the existence of a contract that governs the parties' relationship, [plaintiffs] cannot maintain an unjust-enrichment counterclaim—even if pleaded in the alternative." *Id.* (cleaned up).

In this case, the Court finds that the 2018 IRA governs the subject matter of Plaintiffs' claims. Also, the Parties have expressly agreed that the 2018 IRA governs the Parties' relationship. Regarding ISS Wyoming, Plaintiffs fail to allege facts to show ISS Wyoming has a viable unjust enrichment claim. Therefore, Plaintiffs' unjust enrichment claims must be **DISMISSED**.

E. Fraud/Fraudulent Inducement

Plaintiffs bring a claim for fraud/fraudulent inducement. The essential elements of a fraud claim are: "(1) that a false, material representation was made; (2) that was either known to be false when made or was made

without knowledge of its truth; (3) that was intended to be acted upon; (4) that was relied upon; and (5) that caused injury." *Express Working Cap., LLC v. Starving Students, Inc.*, 28 F. Supp. 3d 660, 672 (N.D. Tex. 2014) (quoting *Hubbard v. Shankle*, 138 S.W.3d 474, 482-83 (Tex. App.—Fort Worth 2004, pet. denied)). "Fraudulent inducement is a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Id.* (cleaned up) (quoting *LeTourneau Techs. Drilling Sys., Inc. v. Nomac Drilling, LLC*, 676 F. Supp. 2d 534, 542 (S.D. Tex. 2009)). To prove their fraudulent inducement claim, Plaintiffs must establish the elements of fraud as they relate to the 2018 IRA. *Id.*

Rule 9(b) provides, in pertinent part, that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). "The amount of particularity required for pleading fraud differs from case to case." *Flu Shots of Tex., Ltd. v. Lopez*, No. 3:13-cv-144-O, 2014 U.S. Dist. LEXIS 45828, 2014 WL 1327706, at *8 (N.D. Tex. Apr. 3, 2014). "In the Fifth Circuit, the Rule 9(b) standard requires 'specificity as to the statements (or omissions) considered to be fraudulent, the speaker, when and why the statements were made, and an explanation of why they were fraudulent.'" *Id.* (quoting *Plotkin v. IP Axess, Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)). "Essentially, the standard requires the Complaint to allege answers to 'newspaper questions' ('who, what, when, where, and how') of the alleged fraud." *Id.* (citing *Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994)). The pleading standard under Rule 9(b) is more "relaxed" regarding pleadings of intent and state of mind. *Id.* at *10.

Plaintiffs contend that Mr. Ortiz, Defendant's former representative, made several representations in 2017 and 2018 regarding Defendant's commitment to Plaintiff ISS Guyana. Mr. Ortiz allegedly supported ISS Guyana by introducing ISS Aviation to U.S. government programs to help close the Guyana Deal, and by coordinating meetings, visits, emails, and phone calls to ensure there was one comprehensive and carefully executed strategy in working with the Guyana government.[63] Plaintiffs state that Defendant, through Ortiz's statements, "lied" because Defendant "never intended to provide [Plaintiffs] with the support and assistance or tools [they] needed, despite [Defendant's] knowledge that [Plaintiffs] suffered significant attacks to its operations" on Defendant's behalf.[64] Plaintiffs assert that Defendant made the representations with the intent to induce Plaintiffs to act on them, and Plaintiffs relied on the representations when it executed the August 2018 IRA.[65]

Defendants contend that Plaintiffs' fraudulent inducement claim must be dismissed because it relies on terms outside of the 2018 IRA.[66] "Under Texas law, . . . parties challenging contracts as fraudulently induced may rely on evidence of oral promises or agreements to support their claims." *LeTourneau Techs. Drilling Sys., Inc.*, 676 F. Supp. 2d at 542 (citation omitted). However, "[t]o

63. Am. Compl. ¶ ¶ 36-40, ECF No. 4.

64. *Id.* at ¶ 42.

65. *Id.* at ¶¶ 36, 41.

66. Def. Brief 21, ECF No. 8.

establish the 'justifiable reliance' element of a fraud claim, the plaintiff's reliance on the defendant's false statement must have been reasonable." *Id.* (citing *Ortiz v. Collins*, 203 S.W.3d 414, 421 (Tex. App.—Houston [14th Dist.] 2006, no pet.)). "Reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law." *Id.* at 542-43 (citing *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc)). "Thus, while a plaintiff may be able to introduce parol evidence of a defendant's misrepresentations in order to prove a claim of fraudulent inducement, where that parol evidence is directly contradicted by the express terms of the written agreement the plaintiff will fail to prove the element of justifiable reliance." *Id.* at 543.

Defendant contends that Plaintiffs' allegations cannot be reconciled with the merger clause contained within the 2018 IRA,[67] which states that the agreement "constitutes the entire Agreement of the Parties with respect to the subject matter of the subject matter of this Agreement and supersedes all prior Agreements or understandings, written or oral."[68] Plaintiff cites to *Dunbar Medical Systems, Inc. v. Gammex, Inc.* to support its contention that the Fifth Circuit has held that merger clauses do not preclude fraudulent inducement claims.[69] *See* 216 F.3d

67. Def. Brief 22, ECF No. 8.

68. Def. App. 103, ECF No. 9.

69. Pls. Resp. Brief 10, ECF No. 15.

441, 448-49, 451 (5th Cir. 2000). In *Dunbar*, the Fifth Circuit held that, in determining whether a merger clause precludes a fraudulent inducement claim, the court must look at the agreement as a whole to determine whether the agreement "clearly expresses the parties' intent to waive fraudulent inducement claims, or . . . disclaims reliance on representations about specific matters in dispute." *Id.* at 449 (cleaned up).

In this case, after looking at the 2018 IRA as a whole, the Court cannot say that the IRA reflects the "requisite clear and unequivocal expression of intent necessary to disclaim reliance on the [ ] specific representations" by Plaintiffs. *Id.* at 451 (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997)). Therefore, the Court finds that the merger clause does not preclude Plaintiffs' fraud/fraudulent inducement claim.

* * *

Turning to the sufficiency of Plaintiffs' pleadings, Defendant alleges that Plaintiffs fail to plead facts to show that Mr. Ortiz's statements were fraudulent, or false when made.[70] Defendant contends that Plaintiffs fail to sufficiently plead their claims that Defendant had no intention of supporting Plaintiffs.[71] Plaintiffs counters that Defendant's eventual exclusion of ISS Guyana from the Deal discussions and meetings with the government of Guyana were indicators of Defendant's malicious intent

70. Def. Brief 20, ECF No. 8.

71. *Id.* at 21.

not to perform any of the representations and that such representations were false.[72] However, Plaintiffs do not allege that Defendant began meeting with the Guyanese government or otherwise excluding ISS Guyana from the process until the new acting regional sales manager took over in 2019.[73] Mr. Ortiz made the aforementioned statements in 2017 and 2018.[74] Therefore, the Court finds that Plaintiffs have insufficiently pled that Mr. Ortiz's statements were fraudulent *at the time they were made*. Thereby, Plaintiffs' fraud/fraudulent inducement claim is **DISMISSED**.

F. Fraud by Non-Disclosure

Plaintiffs lastly bring a claim for fraud by non-disclosure.[75] "Fraud by non-disclosure, a subcategory of fraud, occurs when a party has a duty to disclose certain information and fails to disclose it." *CBE Grp., Inc. v. Lexington L. Firm*, 993 F.3d 346, 353 (5th Cir. 2021) (quoting *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219 (Tex. 2019)). Under Texas law, a plaintiff establishes fraud by non-disclosure by proving:

> (1) the defendant deliberately failed to disclose material facts; (2) the defendant had a duty

72. Am Compl. ¶¶ 43-49, 98, ECF No. 4.

73. *See id.*

74. *Id.* at ¶ 36.

75. Am. Compl. ¶¶ 104-08, ECF No. 4.

> to disclose such facts to the plaintiff; (3) the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) the defendant intended the plaintiff to act or refrain from acting based on the nondisclosure; and (5) the plaintiff relied on the nondisclosure, which resulted in injury. In general, there is no duty to disclose without evidence of a confidential or fiduciary relationship . . . . [But] [t]here may [ ] be a duty to disclose when the defendant . . . made a partial disclosure that created a false impression . . . .

Id. (quoting *Bombardier Aerospace Corp.*, 572 S.W.3d at 219-20) (alterations in original).

Plaintiffs contend that Defendant had a duty to disclose information, "including but not limited to," its decision to conduct business meetings and deal discussions without Plaintiffs and the value of the deal contemplated by Defendant.[76] Plaintiffs contend that this information was material and that Defendant knew Plaintiffs were ignorant of these facts and had no opportunity to discover them.[77] Defendant contends that Plaintiffs fail to articulate facts sufficient to satisfy the heightened pleading standard under Rule 9(b) as Plaintiffs rely on claims based "upon information and belief" without articulating any factual basis for those beliefs.[78] Furthermore, Defendant contends

76. *Id.* at ¶ 105.

77. *Id.* at ¶ 106.

78. Def. Brief 23, ECF No. 8.

that Plaintiffs fail to sufficiently plead that Defendant had a duty to disclose information to Plaintiffs.[79]

In *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*,[80] relied upon by Plaintiffs, the Supreme Court of Texas states that a fiduciary duty arises "as a matter of law in certain formal relationships, including attorney-client, partnership, and trustee relationships." 572 S.W.3d 12 at 220 (citation omitted). A confidential relationship is one in which the "parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest." *Id.* (citation omitted). "An informal relationship giving rise to a duty may also be formed from "a moral, social, domestic or purely personal relationship of trust and confidence.'" *Id.* The court further stated, "an informal relationship giving rise to a duty may also be created by a 'special relationship of trust and confidence [which] exist[s] prior to, and apart from, the agreement'" *Id.* (quoting *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (per curiam)) (alteration in original). However, a duty to disclose may also arise "when one party makes a representation, which gives rise to the duty to disclose new information that the party is aware makes the earlier representation misleading or untrue[.]" *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 385 (Tex. App. 2007).

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79. Def. Reply 9-10, ECF No. 18.

80. In *Bombardier*, the court did not have to analyze whether the defendant owed a duty of disclosure as the defendant waived the issue during trial. *See* 572 S.W.3d 213, 222 (Tex. 2019).

Plaintiffs state that Defendant, for example in 2017 and 2018 through its representative Mr. Ortiz, told ISS Guyana[81] that it was committed to securing the Deal through ISS Guyana.[82] Then, in 2019, Plaintiffs aver that Defendant began acting to secure the Guyana Deal without ISS Guyana, cutting them out of the Deal.[83] The Court finds that ISS Guyana has thus sufficiently pleaded the existence of a duty to disclose. The Court further finds that ISS Guyana sufficiently pled the remaining elements of their fraud by non-disclosure claim. Therefore, Defendant's motion to dismiss this claim as to ISS Guyana is **DENIED**. Regarding ISS Wyoming, the Court finds that there is not enough information in the Amended Complaint as to ISS Wyoming's identity or role in this exchange. The Court thus finds that Plaintiffs have not pleaded sufficient facts to support any fraud by non-disclosure claim brought by ISS Wyoming. Defendant's motion to dismiss the fraud by non-disclosure claim is **GRANTED** as to ISS Wyoming.

IV. Conclusion

To conclude, the Court **DENIES** Defendant's motion to dismiss as to ISS Guyana's claim that Defendant breached an implied duty to cooperate under the 2018 IRA, but the Court **GRANTS** Defendant's motion to dismiss as to all Plaintiffs' other breach of contract claims. Among the claims being dismissed, all are **DISMISSED with**

81. Again, Plaintiffs write "ISS Aviation," and the Court presumes this means Plaintiff ISS Guyana.

82. Am Compl. ¶ 39, ECF No. 4.

83. *Id.* at ¶¶ 41-55.

prejudice other than the claim regarding the transaction with Air Services, Ltd.

The Court **GRANTS** Defendant's motion to dismiss as to Plaintiffs' claims for quantum meruit, promissory estoppel, and unjust enrichment. As to ISS Guyana, these claims are **DISMISSED with prejudice**. As to ISS Wyoming, they are **DISMISSED without prejudice**.

The Court further **GRANTS** Defendant's motion to dismiss Plaintiffs' claim of fraud/fraudulent inducement. This claim is **DISMISSED without prejudice**.

Finally, the Court further **DENIES** Defendant's motion to dismiss ISS Guyana's fraud by non-disclosure claim and **GRANTS** Defendant's motion to dismiss any fraud by non-disclosure claim brought by ISS Wyoming. ISS Wyoming's fraud by non-disclosure claim is **DISMISSED without prejudice**.

The Court will now assess whether to grant Plaintiffs leave to file an amended complaint to cure their claims the Court dismissed without prejudice.

Motion for Leave to File an Amended Complaint

As mentioned above, Plaintiffs filed a Motion for Leave to File Amended Complaint on October 25, 2022.[84] On November 8, 2022, Defendant filed a response opposing Plaintiff's motion for leave, highlighting that Plaintiffs failed to attach the proposed amended pleading to their

84. *See* Pls. Mot. for Leave, ECF No. 17.

motion as required under Local Rule 15.1(b).[85] However, on November 9, 2022, Plaintiffs filed an Amended Motion to Amend/Correct their prior motion, this time attaching Plaintiffs' proposed Second Amended Complaint, thereby mooting Defendant's objection.[86] Plaintiffs make clear that they filed their motion for leave as an alternative to its response to Defendant's Motion to Dismiss.[87]

I. Legal Standard

Federal Rule of Civil Procedure 15(a)(2) provides that "the court should freely give leave when justice so requires." *See also Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997) ("Rule 15(a) expresses a strong presumption in favor of liberal pleading"); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1987) ("Rule 15(a) counsels a liberal amendment policy"). The decision to allow amendment of a party's pleadings is within the sound discretion of the district court. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) (citation omitted). "Leave to amend is in no way automatic, but the district court must possess a 'substantial reason' to deny a party's request for leave to amend." *Marucci Sports, LLC v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (citation omitted). "However, it is within the district court's discretion to deny a motion

85. Def. Resp. 3, ECF No. 19.

86. Proposed Sec. Am. Compl., ECF No. 20.

87. Pls. Mot. for Leave ¶ 7, ECF No. 17.

for leave to amend pleadings if the amendment would be futile." *Avdeef v. Royal Bank of Scotland*, No. 4:13-cv-967-O, 2014 WL 4055369, at *3 (N.D. Tex. Aug. 15, 2014) (citing *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872-73 (5th Cir. 2000)).

An amendment is futile if it could not survive a Rule 12(b)(6) motion. *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003). Therefore, the Court reviews the Proposed Second Amended Complaint under "the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000) (citation omitted). Thus, a plaintiff's amended complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). And a court should accept all well-pleaded facts and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007).

II. Analysis

A. Breach of Contract

The Court first finds that, regarding Plaintiffs' breach of contract claim involving the transaction with Air Services, Ltd., Plaintiffs' Proposed Second Amended Complaint does not cure the pleading issues from the First Amended Complaint, as found by the Court. Thereby, Plaintiffs' request for leave to file an amended complaint to cure the breach of contract claim is **DENIED**.

B. Quantum Meruit, Promissory Estoppel, and Unjust Enrichment

The Court finds the Proposed Second Amended Complaint provides more information regarding ISS Wyoming's purpose, activity, and how it fit into the business relationship between ISS Guyana and Defendant.[88] Therefore, the Court finds it would not be futile to grant leave to amend to cure ISS Wyoming's quantum meruit, promissory estoppel, and unjust enrichment claims. Therefore, leave file an amended complaint to amend ISS Wyoming's quantum meruit, promissory estoppel, and unjust enrichment claims is **GRANTED**.

C. Fraud/Fraudulent Inducement

In assessing Plaintiffs' Proposed Second Amended Complaint, the Court finds that Plaintiffs added sufficient

88. *See generally* Proposed Sec. Am. Compl., ECF No. 20.

details wherein granting leave to file an amended complaint to cure their fraud/fraudulent inducement claim would not be futile. As such, leave as to this claim is **GRANTED**.

D. Fraud by Non-Disclosure

The Court finds that Plaintiffs in their Proposed Second Amended Complaint added sufficient details wherein granting leave to file an amended complaint to cure ISS Wyoming's fraud by non-disclosure claim would not be futile. As such, leave as to this claim is **GRANTED**.

E. Conclusion

The Court finds that Plaintiffs' Motion for Leave to File Amended Complaint should be, and is, hereby **GRANTED in part** and **DENIED in part**. Therefore, accepting Plaintiffs' Second Amended Complaint, the Court finds that the remaining claims in this lawsuit are as follows:

- ISS Guyana's breach of contract claim regarding an implied duty to cooperate under the 2018 IRA;
- ISS Wyoming's quantum meruit, promissory estoppel, and unjust enrichment claims;
- Plaintiffs' fraud/fraudulent inducement claim; and
- Plaintiffs' fraud by non-disclosure claim.

All other claims are **DISMISSED with prejudice**.

SO ORDERED this **30th day** of **May, 2023**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE