

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:)	Chapter 11
AUTO PLUS AUTO SALES LLC,)	Case No. 23-90055 (CML)
Wind-Down Debtor.)	(Formerly Jointly Administered under Lead Case IEH Auto Parts Holding, LLC, Case No. 23-90054)
IEH AUTO PARTS HOLDING LLC, <i>et al.</i> ,)	
Plaintiffs,)	
v.)	Adv. Proc. No. 24-03040
ELLIOTT AUTO SUPPLY CO., INC. D/B/A FMP,)	
Defendant.)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S
COUNTER-MOTION FOR SUMMARY JUDGMENT**

Plaintiff IEH Auto Parts Holding LLC, et al. (“Plaintiff” or “IEH”) files this Response to Defendant Elliot Auto Supply Co., Inc.’s (“Defendant” or “FMP”) Counter-Motion for Summary Judgment (“Motion”).

I. Preliminary Statement

Defendant is putting the cart before the horse. Defendant seeks a decision on which party’s inventory amount is more accurate *before* it is determined whether the parties followed the agreed-upon accounting methodology in calculating that inventory amount. It is undisputed that each party was supposed to follow the Inventory Methodology, as defined in the parties’ contract (the APA), in calculating the inventory amount. Therefore, someone—either this Court or the Independent Accountant—must first determine whether the Inventory Methodology was followed before it can be determined whose inventory amount to adopt.



Defendant incorrectly argues it is for this Court to determine whether the parties followed the Inventory Methodology. The APA and Delaware law, which applies pursuant to the APA, require the Independent Accountant to determine whether the parties followed the Inventory Methodology as part of his responsibility to analyze each party's Inventory Closing Amount Statement and resolve all Disputed Amounts.

Defendant argues that Inventory Methodology is not relevant to the parties' purchase price adjustment dispute because that term is not found in Section 3.2(c)(ii) of the APA. However, Delaware courts have addressed contractual language nearly identical to Section 3.2(c)(ii) of the APA and have held that such language requires the independent accountant to resolve whether the parties followed their agreed-upon accounting methodology as part of the accountant's role of determining which party's disputed amount should be selected. Moreover, Section 3.2(c)(ii) of the APA must be read in context with the defined terms, related sub-sections, and other agreed procedures in the APA, which also make clear that the Independent Accountant must determine whether the parties followed the Inventory Methodology.

In short, the Court should find that the Independent Account is required to evaluate whether each party followed the Inventory Methodology in reaching a decision on which party's inventory amount to adopt. Defendant has delayed long enough. Plaintiff seeks a timely resolution to this issue so that the proceeds of the bankruptcy estate can be distributed to Plaintiff's creditors.

II. Arguments and Authorities

A. The Independent Accountant, not this Court, must decide accounting methodology questions.

Defendant agrees that someone must determine whether the parties followed the Inventory Methodology in preparing their inventory valuations. Motion ¶ 18. However, Defendant incorrectly contends that this Court, rather than the Independent Accountant, must make that

determination. *Id.* ¶ 3. Defendant claims that if the accountant makes that determination he will “assume the role of judge and jury with regard to ruling on whether Defendant complied with, or breached the APA.” *Id.* at ¶ 18. Defendant is wrong.

Delaware courts¹ have routinely held that it is the role of an independent accountant acting as an expert, not the court, to resolve disputes over whether the proper accounting methodologies have been followed. *ArchKey Intermediate Holdings Inc. v. Mona*, 302 A.3d 975, 997-98 (Del. Ch. Ct. 2023) (holding that an accountant must determine whether the parties’ accounting methods complied with past practice); *Stone v. Nationstar Mortgage LLC*, No. 2019-0878-KSJM, 2020 WL 4037337, at *9 (Del. Ch. Ct. July 6, 2020) (holding that the parties’ disagreement “concerning the application of contractually called-for accounting principles in the first instance does not strip the Independent Accountant of the authority to resolve their disputes”); *Alliant Techsystems, Inc. v. MidOcean Bushnell Holdings, L.P.*, No. 9813-CB, 2015 WL 1897659, at *10. (Del. Ch. Ct. Apr. 24, 2015) (explaining that independent accountants “resolve the [purchase price adjustment] dispute as accountants do—by examining the corporate books and applying normal accounting principles plus any special definitions the parties have adopted”). So too here, the Independent Accountant, not this Court, must determine whether the parties followed the Inventory Methodology.

B. The APA and Delaware law require a determination of whether each party followed the Inventory Methodology.

Defendant argues that because Section 3.2(c)(ii) of the APA “never makes any reference” to “Inventory Methodology,” the APA does not require the Independent Accountant to determine whether the parties followed the Inventory Methodology in calculating their Disputed Amounts.

¹ Delaware law governs the APA. APA § 9.5

Motion ¶¶ 22–23. That argument is contrary to the plain language of Section 3.2(c)(ii) of the APA and Delaware law. The APA provides:

If Sellers and Buyer fail to reach an agreement with respect to all of the matters set forth in the Statement of Objections . . . then any amounts remaining in dispute (‘Disputed Amounts’) shall be promptly submitted for resolution [to the Independent Accountant] . . . and the [Independent Accountant] shall resolve the Disputed Amounts only and make any adjustments to the Inventory Adjustment, as the case may be, and the Closing Inventory Amount...”

APA § 3.2(c)(ii). Delaware courts interpreting nearly identical “Disputed Amounts” language have held that the independent accountant must necessarily determine whether the parties followed their agreed-upon accounting methodologies before it can determine which party’s disputed amount to adopt.

In *Stone v. Nationstar* the agreement required sellers to provide an objection notice that “set forth . . . the disputed items (the ‘Disputed Items’) and the basis of any disagreement asserted” and the accountant was required to make a determination of “the appropriate amount of each Disputed Item as to which there is a disagreement.” 2020 WL 4037337, at *6. Based on that language, buyer argued that the accountant could not consider whether the parties followed their agreed-upon accounting methodologies in making a determination of the Disputed Items. *Id.* The court squarely rejected buyer’s argument. *Id.* The court held that because the objection notice raised accounting methodology issues, those accounting methodology issues are “Disputed Items within the meaning of the Purchase Agreement.” *Id.* at *7. The court further held that whether the accounting methodologies were followed “involves critical inputs to the core determination that the Independent Accountant must make—the ‘amount’ of any Disputed Item.”² *Id.*

² The *Stone* defendant attempted to evade the accountant’s authority by arguing that the plaintiff sought to require the accountant to determine “legal issues.” *Id.* at *7. But the court rejected that argument. The court found that the parties’

Stone is squarely on point here. As in *Stone*, the APA provides that if the parties cannot reach agreement with respect to “all of the matters set forth in the Statement of Objections . . . then the amounts remaining in dispute (‘Disputed Amounts’...)” shall be submitted to the Independent Accountant. APA § 3.2(c)(ii). As in *Stone*, Plaintiff provided Defendant with its objection notice objecting that Defendant failed to follow the Inventory Methodology in making its inventory valuation. (Plaintiff’s MSJ, Dkt. 8, Exs. A-4 & A-5). Because Plaintiff raised the Inventory Methodology issue in its objection notice and because whether the Inventory Methodology was followed is a “critical input[] to the core determination that the Independent Accountant must make—the ‘amount’ of any Disputed [Amount],” the APA requires the Independent Accountant here to determine whether each party followed the Inventory Methodology before he can determine which party’s Disputed Amount to adopt. *Stone*, 2020 WL 4037337, at *7–8.

Alliant Techsystems v. MidOcean Bushnell Holdings, L.P. is also instructive. 2015 WL 1897659, at *3. There, the parties’ agreement required them to submit any “Disputed Items” to an independent accounting firm. *Id.* The agreement provided that the accounting firm could “only issue determinations with respect to Disputed Items.” *Id.* One party argued that the accountant could only consider questions of “pure mathematics.” *Id.* at *10. The other party argued that the accountant’s role was not so limited, and that it could resolve issues over compliance with GAAP. *Id.* at *9. The court held that the definition of “Disputed Items,” which referred to “items or amounts,” was “sufficiently broad in [its] view to encompass accounting methodology.” *Id.* at *10. The court also noted that the parties’ selection of an expert accounting firm “supports the notion

disputes “all involve accounting methodology issues that fall squarely within an accounting firm’s expertise.” *Id.* at *8. The court reasoned that the parties’ disagreement “concerning the application of contractually called-for accounting principles in the first instance does not strip the Independent Accountant of the authority to resolve their disputes.” *Id.* So too in this case, the issue of whether the Inventory Methodology was followed is an accounting issue for the Independent Accountant to resolve.

that they intended the expert to consider each side's position and to apply genuine expertise to resolve purchase price adjustment disputes promptly," and that "[w]hen it comes to deciding questions of GAAP in that context, accounting firms are particularly well-positioned to do so." *Id.* at 11. So too here, the APA's requirement that the Independent Accountant resolve the "Disputed Amounts" requires it to evaluate whether each party followed the Inventory Methodology.

In short, Delaware courts are clear that language nearly identical to that included in the APA requires an Independent Accountant to determine whether the parties followed the relevant accounting methodology. This Court should find the same.

C. Defendant's Contractual Arguments Are Wrong.

Defendant's argument that the Independent Accountant must not evaluate Inventory Methodology misconstrues the APA.

1. Plaintiff Is Seeking a Determination of "Only" the Disputed Amounts.

Defendant's argument that Section 3.2(c)(ii) of the APA allows the Independent Accountant to "only" select one party's Disputed Amount without evaluating the Inventory Methodology misconstrues the APA. Section 3.2(c)(ii) of the APA defines the terms "Disputed Amounts" and "Undisputed Amounts," and then provides that the Independent Accountant must "resolve the Disputed Amounts only." The sensible meaning of the word "only" in this context is that the Independent Accountant may not make determinations with respect to "Undisputed Amounts"—"only" the Disputed Amounts. Here, Plaintiff only seeks a determination with respect to Disputed Amounts.

2. The APA Terms "Amount" and "Item" Encompass Accounting Methodologies.

Defendant contends that the terms "amount" and "item" in Section 3.2(c)(ii) of the APA must refer to only a numerical value, and cannot include a "concept" such as the determination of whether the Inventory Methodology was followed. Motion ¶¶ 24–27. But, as discussed, *Stone*

rejected that very argument, holding that the accountant’s authority to resolve “disputed items” necessarily required the accountant to evaluate accounting methodologies. 2020 WL 4037337, at *7–8. Similarly, in *Alliant*, the Delaware Court of Chancery held that “the phrase ‘items or amounts’...is sufficiently broad in [the court’s] view to encompass accounting methodology.” 2015 WL 1897659, at *10 (citing *Matria Healthcare*, 2007 WL 763303, at *2, *6–8 (finding that settlement accountant could consider accounting methodology in resolving adjustments or disputes over “amounts or items”); *HBC Solutions Inc. v. Harris Corp.*, 2014 WL 6982921, at *2–3, *7–9 (S.D.N.Y. Dec. 10, 2014) (finding use of purchase price adjustment before an accountant to be proper where dispute notice set forth “each disputed item or amount”); *Severstal U.S. Hldgs., LLC v. RG Steel, LLC* 865 F. Supp. 2d 430, 434–36, 444 (S.D.N.Y. 2012) (allowing settlement accountant to consider accounting methodology to resolve disputes over “any items” in protest notice)).

Moreover, Defendant ignores that the Independent Accountant is not limited to deciding “amounts” and “items.” Section 3.2(c)(ii) of the APA requires the Independent Accountant to resolve “any amounts remaining in dispute” “with respect to all of the *matters* set forth in the Statement of Objections.” APA § 3.2(c)(ii) (emphasis added). One such “matter” is Plaintiff’s objection in its Statement of Objections that Defendant failed to follow the Inventory Methodology. *See Stone*, at *7 (holding that because the objection notice raised the accounting methodology issues, those accounting methodology issues are “‘Disputed Items’ within the meaning of the Purchase Agreement.”).

3. The APA Must Be Read as a Whole.

Defendant argues “Plaintiff’s reliance on the phrase ‘Inventory Methodology’ comes from Section 3.2(b)(ii) of the APA, which is not even the relevant dispute resolution subsection”

because Section 3.2(c)(ii) of the APA must be read in isolation. Motion ¶¶ 22-23. That argument is doubly wrong: (1) the APA must be read as a whole, (2) but, as discussed, even read in isolation Section 3.2(c)(ii) of the APA requires the Independent Accountant to evaluate Inventory Methodology. *See* Section B, *supra*.

“In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein.” *ArchKey*, 302 A.3d at 988. “The meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement’s overall scheme or plan.” *Id.* “A court interpreting any contractual provision...must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument.” *Id.*

The parties’ “Closing Inventory Amounts” and Defendant’s “Closing Inventory Amount Statement,” in particular, must be prepared “*in accordance with the Inventory Methodology.*” *Id.* § 3.2(b)(ii) (emphasis added); *id.* § 1.1 (““Closing Inventory Amount” means the dollar value of Inventory determined in accordance with the Inventory Methodology as 12:00.01 A.M. Eastern Time on the applicable Closing Date.”). Section 3.2(c)(ii) of the APA allows the Independent Accountant to make “adjustments to [Defendant’s] Closing Inventory Amount Statement.” Because the APA requires Defendant’s Closing Inventory Amount Statement to be prepared by following the Inventory Methodology, the Independent Accountant must necessarily determine whether that methodology was followed in deciding whether to make any adjustments to that inventory statement. *Alliant Techsystems, Inc.*, 2015 WL 1897659, at *1; *Stone*, 2020 WL 4037337, at *7–9.

In short, when Section 3.2(c)(ii) of the APA is read either in isolation or in combination with all of the other provisions of the APA, the result is clear. To “resolve the Disputed Amounts

only and make any adjustments to the Inventory Adjustment, as the case may be, and the Closing Inventory Amount Statement,” the Independent Accountant must evaluate the methodology each party used in arriving at their respective Closing Inventory Amount. APA § 3.2(c)(ii). Any other interpretation of the APA “would render the dispute resolution mechanism in Section [3.2(c)(ii)] meaningless.” *See Stone*, 2020 WL 4037337, at *8. Disagreements over the proper accounting methodology are standard, even quintessential, elements of purchase price adjustment disputes. If Defendant were permitted to discard the contractual dispute resolution process and seek a determination from the Court rather than the Independent Accountant concerning whether each party followed the agreed-upon Inventory Methodology, “the Independent Accountant’s role would be rendered illusory at best.” *Id.* at *9.

D. Conclusion

For the foregoing reasons, Plaintiff requests that the Court grant their Motion for Summary Judgment and deny Defendant’s Counter-Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Plaintiff's Motion for Summary Judgment has been delivered to all counsel of record listed below pursuant to the Federal Rules of Civil Procedure on August 12, 2024 via ECF.

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