IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN NOEL, TYLER NOEL,
BETSY BROUGHER and WILLIAM ATKINS,

Plaintiffs,

v.

HCC INSURANCE HOLDINGS, INC.,

Defendant.

OPINION and ORDER

11-cv-379-bbc

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Plaintiffs John Noel, Tyler Noel, Betsy Brougher and William Atkins are the former owners of Multinational Underwriters, LLC, an insurance company that focuses on international medical, travel and group insurance. In 2007 plaintiffs sold the company to defendant HCC Insurance Holdings, Inc., but plaintiffs Brougher and Atkins continued to be employed there. Defendant agreed to make additional payments to plaintiffs for the first three years if Multinational hit certain performance targets.

Plaintiffs are challenging various decisions defendant made during those three years, contending that it violated a provision in the parties' agreement requiring it to "operate in good faith to maximize [Multinational's] growth and performance." Defendant has filed a motion for summary judgment, dkt. #39, which is ready for decision.

Jurisdiction is present under 28 U.S.C. § 1332, which requires complete diversity of citizenship and an amount in controversy greater than $75,000. Plaintiffs are citizens of

Wisconsin or Indiana (where they are domiciled), Dakuras v. Edwards, 312 F.3d 256, 258 (7th Cir. 2002), defendant is a citizen of Delaware (where it is incorporated) and Texas (where its principal place of business is located), Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 741 (7th Cir. 2004), and it is reasonable to infer that more than $75,000 is at stake. Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC, 589 F.3d 881, 886 (7th Cir. 2009).

I am granting defendant's motion for summary judgment. Although the evidence shows that plaintiff Brougher butted heads with defendant on many occasions while she was employed there, plaintiffs have failed to adduce evidence from which a reasonable jury could find that defendant violated its duty to act in good faith to maximize Multinational's growth and performance. If plaintiffs wanted more control over how the company should be run, they should have included those terms in the purchase agreement. They cannot rely on general language in the agreement to second guess every exercise of defendant's business judgment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

In 1998 plaintiffs Betsy Brougher and William Atkins founded Multinational Underwriters, LLC. Multinational's primary line of business was international health insurance, consisting of international medical, travel and group insurance. Multinational was a "managing general underwriter," which means that it sold insurance for other insurance carriers.

In 2002 Brougher and Atkins sold the company to plaintiffs John Noel and Tyler Noel, but remained involved in it. In 2007, plaintiffs began negotiations to sell the company to defendant HCC Insurance Holdings, Inc. Brougher prepared a proposed budget for Multinational in which she projected operating expenses at 16.5% of gross written premium.

A. Purchase Agreement

On December 20, 2007, defendant entered into a purchase agreement with plaintiffs to buy Multinational for $42 million. The agreement set forth two "earnout" provisions under which plaintiffs could receive additional payments under certain conditions. The earnout provisions corresponded with Multinational's two lines of business, the International Health Business and the Amigo Business, which involved short-term, domestic medical insurance. Both earnouts were based on Multinational's gross underwriting profit, which the agreement defined as the gross premium on policies written by Multinational for defendant's affiliates, minus the claims, commissions and premium taxes associated with those policies, plus certain profit commissions on policies that Multinational wrote for non-affiliates of HCC. Gross underwriting profit did not factor in operating expenses.

Under the International Health Business earnout, plaintiffs were eligible to receive up to $4 million for each of the 2008, 2009, and 2010 underwriting years. To realize the full $4 million International Health earnout for a given year, Multinational would have to achieve 100% of the gross underwriting profit target set forth in the agreement for that same year. To receive a pro rata share of the full $4 million International Health earnout for a given year, Multinational to would have to achieve 75% of the gross underwriting profit target for that same year. The targets were $15,964,781 in 2008, $20,754,215 in 2009 and $26,980,480 in 2010.

Under the Amigo Business earnout, plaintiffs were eligible to receive an additional payment between $2 million and $15 million that was determined by the gross underwriting profit for the Amigo Business in 2010. Plaintiffs were guaranteed $2 million pursuant to the Amigo Business earnout, but if Multinational's 2010 gross underwriting profit for its Amigo Business exceeded $2 million in 2010, plaintiffs were entitled to the actual gross underwriting profit for the Amigo Business, up to a maximum of $15 million.

Section 10.4 of the Purchase Agreement addressed the operation of Multinational from 2008 to 2010. It included the following provisions:

> (a) Purchaser shall have complete operational and budgetary control over all of the operations of MNU after the Closing Date;
>
> (b) Brougher will head up MNU's operations, reporting to Craig J. Kelbel, head of HCC's accident and health operations, to his successor or to such other person designated by the CEO of Purchaser.
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> * * *
>
> (d) Purchaser will operate in good faith to maximize MNU's growth and performance during the earnout period. For so long as Brougher shall be an employee of MNU, Owners shall have forty-five (45) days to object to any business decision of HCC having a potential effect on MNU's growth and performance about which Brougher has actual knowledge (and HCC shall have a further thirty (30) day period to cure). If Brougher ceases to be an employee of MNU prior to the

completion of the final Earnout Year, then with respect to any business decision of HCC that is made during the period in which Brougher is not an employee of MNU that has a potential effect on MNU's growth and performance, Owners shall have forty-five (45) days from the date Purchaser gives notice of such decision to the Representative to object to the decision (and HCC shall have a further thirty (30) day period to cure). Absent such objection to such business decision, Owners forever waive their right to claim that such decision breached HCC's obligation to operate in good faith to maximize MNU's growth and performance. For the avoidance of doubt, MNU's objection and Purchaser's decision whether or not to cure (i) will not be determinative of the issue of whether Purchaser has operated in good faith to maximize MNU's growth and performance and (ii) will not otherwise relieve MNU, the Owners or the Noels of any obligation under this Agreement.

(e) MNU will be a direct or indirect wholly-owned subsidiary of HCC. Provided such transaction does not affect the calculation or payment of the Health Earnout Payment or the Amigo Earnout Payment, HCC reserves the right to change the name of MNU, merge the company out of existence or change the structure, organization or operations of MNU in its discretion following the Closing Date, provided that HCC will continue to be obligated to pay any earnout payment to Owners.

Section 14.3 states: "Whenever any party hereto desires or is required to give any notice, demand, or request with respect to this Agreement, each such communication shall be in writing and shall be effective only if it is delivered by personal service or mailed, United States registered or certified mail, return receipt requested, postage prepaid, or sent by prepared overnight courier or confirmed telecopier."

B. Operation of Multinational

Plaintiff Brougher remained the president of Multinational, but she reported to Craig Kelbel. PlaintiffAtkins was the head of marketing and sales.

1. Employees

At the time of the sale, Multinational had between 61 and 64 employees. Immediately after closing the sale, Brougher requested authorization to hire 16 or 17 new employees. Defendant approved 10 new employees, with an agreement to consider additional hires depending on business need. (Plaintiffs say that some of these new positions were not used "for the purpose Ms. Brougher had originally sought those positions," Plts.' PFOF ¶ 266, dkt. #80, but they fail to explain what they mean by that.) At the end of 2008, Multinational had 75 employees. At a meeting on November 11, 2008, Brougher agreed that 75 was an appropriate number of staff.

Plaintiff Brougher asked for 11 new hires in 2009. She told Kelbel, "If we are required to cut expenses, cut commissions and hire no new people to service our business, we will be gone within 6 to 12 months" and she was "not willing to stand by and allow [Kelbel's] decisions to wreck" Multinational. In response, Kelbel wrote:

> There is no way I can approve 11 more employees for 2009 when the premium is increasing by 4 million from the original budget of 2008. I just don't see how you can justify that and even submit it. You need to be far more realistic about looking much harder at your operating expenses, you are eroding the margins more then [sic] when we/I have stressed the need to improve.

Ultimately, defendant approved three new hires for 2009.

2. Problems with Multinational's financial information

On January 7, 2008, Multinational was informed by its bank that it needed to perform certain data security procedures in order to comply with the standards that the payment card industry requires merchants to meet if they wish to be authorized to accept credit cards as a form of payment. The parties call this "PCI compliance." In February 2008 an independent third party determined that Multinational was not in compliance with industry standards. If Multinational did not remedy this problem, it risked losing the ability to accept credit cards as a form of payment over the internet. In addition, the personal financial information of Multinational's customers could be at risk.

Defendant developed a "data warehouse" to assist Multinational in reporting accurate financial data to its customers and to defendant. The data warehouse is a system used to pull financial information and generate reports. During the development of the data warehouse, errors were discovered in Multinational's financial information. Defendant needed to fix these errors so that Multinational could meet its reporting requirements. Brougher agreed that fixing these problems was important.

In order to fix the problems related to the data warehouse and the security procedures, defendant required the assistance of Multinational's IT department as well as staff from defendant's other subsidiaries. Kelbel "and others assisting him" directed Brougher to make these projects top priorities until they were completed. Plts.' PFOF ¶ 247, dkt. #80. When Brougher asked defendant to hire more IT staff, Kelbel told Brougher that some projects "might have to wait," but he also asked her to provide a list of projects she was working on so they could review it and prioritize. (The parties do not say whether Brougher followed through with that request.) In addition, Kelbel asked for input from the head of the IT department, who said that no additional staff was needed. (The parties dispute whether defendant hired additional IT staff at this time. Defendant says it hired two new employees; plaintiffs say it hired no one.)

3. <u>Short-term medical insurance</u>

To sell its short-term medical insurance product, Multinational had to file its policy in each state in which it sought to do business, a process that could take many months. Multinational had reached agreements with major short-term medical distributors, but these distributors would not begin selling the policies until they were filed in at least 20 states. Brougher asked Kelbel to hire an outside service provider that could quickly submit the policies, but Kelbel gave the responsibility to an in-house employee instead. Brougher provided defendant a priority list of states in which to get approval. Within 90 days, defendant applied for approval and received it in all of those priority states. (The parties dispute how many states approved the policies in 90 days and how quickly the policies were filed in the remaining states.)

4. <u>International markets</u>

At an unspecified time, Brougher sought authorization to "explore business opportunities" in China. Brougher Dec. ¶ 81, dkt. #81. Brougher had done no business in China, had limited knowledge of the requirements for selling insurance in China and had not developed a business plan. Kelbel discussed the idea with others at the company but decided that Multinational should develop existing markets before expanding into new ones.

5. New office

In January 2009, Multinational moved from its old office building to a newer, more modern office building. Defendant wanted Multinational to have a space in which it could grow. Defendant gave Brougher seven potential locations from which to choose. As a result of the move, Multinational's rent "nearly doubled." Plts.' PFOF ¶ 304, dkt. #80.

6. Brougher's and Atkins's departure

Sometime after February 1, 2009, defendant hired Mark Carney as vice president of operations of Multinational in conjunction with an investigation into suspected fraud. On May 1, 2009, defendant terminated plaintiff Brougher and replaced her with Mark Carney. (The parties dispute various aspects of Brougher's performance.) Atkins resigned after Kelbel told him that he had 30 days to meet Multinational's premium production targets or be subject to disciplinary action, including possibly termination.

7. Name change

In April 2009, defendant decided to "accelerate" Multinational's name change to HCC Medical Insurance Services, LLC so that the change would be complete by the end of June 2009. Plts.' PFOF ¶ 307, dkt. #80. Before their termination, plaintiffs Atkins and Brougher helped develop the name and approved it. However, Brougher objected to the timing because she believed the name change "should be rolled out gradually" because the "goodwill MNU had built up with its brokers, agents and customers, which was associated with the MNU name, was critical to MNU's business and its efforts to maximize growth." Id. at ¶ 308. In June 2009, defendant changed the name and prepared a schedule of steps to carry out the change.

8. AIG contract

After defendant terminated Brougher, defendant canceled a contract with AIG, which recently had received a government bailout. Defendant was concerned that AIG would not be able to meet its obligations and that Multinational's reputation would suffer if it was associated with AIG. In addition, the premiums Multinational received from AIG were diminishing and Multinational sold products that competed with AIG's products.

9. Plaintiffs' objections after Brougher's termination

On May 20, 2009, counsel for plaintiffs Brougher and Atkins wrote to defendant's general counsel, stating, "Pursuant to Section 10.4 of the Purchase Agreement, Ms. Brougher and Mr. Atkins hereby object to the termination of their employment with MNU, the promotion of Mark Carney to President of MNU, and the abrupt change of the name of the company." In a letter to HCC dated May 14, 2009, counsel representing plaintiff Tyler Noel stated, "Tyler Noel will review the information you provided with your [May 13, 2009] letter and advise HCC as to whether he needs more information or whether he objects, under Section 10.4(d) of the Purchase Agreement, to any of HCC's decisions regarding MNU's growth and performance, including the decisions involving Ms. Brougher and Mr. Atkins."

Tyler Noel did not follow up with notice of any objection.

10. Multinational's financial condition after the acquisition

In 2008 Multinational's gross underwriting profit for internal health business was $13 million, which was approximately 81.3% of its target. In 2009, the gross underwriting profit was $10.3 million, which was approximately 50% of the target. In 2010, the gross underwriting profit was $15.5 million, which was approximately 57% of the target. Generally, Multinational's sales fell below projections.

Multinational's total operating expense for 2008, 2009, and 2010 were $8,125,615, $8,295,145, and $9,542,489, respectively. Its gross written premiums were between $37.3 and $39.3 million for 2008, between $40.9 million and $42.4 million for 2009 and between $48.6 million and $49.1 million for 2010. Its operating expense to gross written premium ratios were between 20.7% and 21.8% for 2008, between 19.6% and 20.3% for 2009 and between 19.4% and 19.6% for 2010. (The parties dispute the precise amount of gross premiums, so I have included both figures.)

In 2008 Multinational's ratio of claims paid to premiums collected, or "loss ratio," was higher than what Brougher budgeted.

In 2008 plaintiffs received $3.3 million in earnout payments. On top of the $3.3 million plaintiffs received for 2008, they also received the guaranteed $2 million payment under the Amigo Business earnout. In 2010, the gross written premium for the Amigo business was between $3.7 and $3.8 million, which yielded an underwriting profit of between $1.3 and $1.4 million.

In an email to Kelbel dated March 6, 2009, one of defendant's employees provided a projection of plaintiffs' 2008 earnout. In addition, the employee wrote: "The projected underwriting profit would need to deteriorate $1,999,619 or reduce the current projected underwriting profit from 36.73% by 5.26% for a[n] adjusted 31.47%. This would result in the projected underwriting profit to be 74.99% of the $15,964,781 2008 Earn out target resulting in no payment." Mark Sanderford, the chief financial officer of another entity owned by defendant, continued to make projections of these figures for the next few months and sent his calculations to Kelbel. (Defendant says it made that calculation to account for the potential earnout on its balance sheet.)

OPINION

A. Waiver

The first question is whether and to what extent plaintiffs waived their claims by failing to follow the procedure in the parties' agreement for objecting to decisions. Under § 10.4(d) of the parties' agreement, plaintiffs had 45 days "to object to any business decision of [defendant] having a potential effect on [Multinational Underwriters]'s growth and performance. . . . Absent such an objection to such business decisions, [plaintiffs] forever waive their right to claim that such decision breached [defendant]'s obligation to operate in good faith to maximize [Multinational Underwriters]'s growth and performance." Under § 14.3, "Whenever any party hereto desires or is required to give any notice, demand, or request with respect to this Agreement, each such communication shall be in writing and shall be effective only if it is delivered by personal service or mailed, United States registered or certified mail, return receipt requested, postage prepaid, or sent by prepared overnight courier or confirmed telecopier."

It is undisputed that plaintiffs were required to follow both § 10.4 and § 14.3 under circumstances in which those provisions would apply. It is also undisputed that plaintiffs Brougher and Atkins followed the procedure in § 14.3 with respect to only three of the decisions they are challenging now: (1) terminating Atkins and Brougher; (2) promoting Mark Carney to president of Multinational; and (3) changing Multinational's name. Plaintiffs John Noel and Tyler Noel did not follow § 14.3 with respect to any of the decisions at issue in this case.

Plaintiffs argue that they complied with § 10.4(d) by objecting to various decisions orally or in emails and that the requirements of § 14.3 do not apply because § 10.4 does not use the words "notice," "demand" or "request." Brougher was the only plaintiff to make these objections, so it is not clear whether plaintiffs are limiting their argument to her. In any event, § 14.3 does not require any particular language to trigger the provision. "Notice," "demand" and "request" are not defined in the agreement and there is no other indication such as quotation marks or bolded font to suggest that the words have special meaning. "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." <u>Alta Berkeley VI C.V. v. Omneon, Inc.</u>, 41 A.3d 381, 385 (Del. Supr. 2012) (The parties agree that Delaware law applies to their dispute under a choice of law provision in the purchase agreement.).

Plaintiffs do not suggest that the ordinary meaning of “notice” would exclude the objection required in § 10.4. How could it? One could not object in any meaningful way under § 10.4 without giving notice of some kind. By requiring plaintiffs to object, § 10.4 is also requiring them to give defendant notice of that objection.

Plaintiffs point out that the words “notice,” “demand” and “request” are used in various other places in the agreement and they rely on the interpretative canon expressio unius est exclusio alteris to argue that § 14.3 is not triggered unless a provision uses one of those three words: “If one subject is specifically named, or if several subjects of a larger class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded.” Arthur L. Corbin, 3 Corbin on Contracts § 552 at 206 (1960), quoted in Plts.’ Br., dkt. #78, at 55. However, this canon does not apply. This is not a situation in which the contract uses words to describe specific kinds of notices and the question is whether other kinds of unnamed notices should be included as well. Rather, the question in this case is whether the word “notice” has a restricted meaning in the context of § 10.4. Simply because the agreement uses the same word in multiple places does not imply a narrower meaning.

Plaintiffs’ restrictive interpretation of the word is belied by their own conduct. If plaintiffs did not interpret § 14.3 as applying to objections, they do not explain why Brougher and Atkins followed § 14.3 when objecting to their terminations. (Or why

Brougher agreed during her deposition that she had to follow § 14.3 "if [she] had any objection to anything that HCC was doing." Brougher Dep., dkt. #42, at 98.)

Plaintiffs say that it is unfair to construe § 14.3 as encompassing § 10.4 if defendant had actual notice of their concerns, but this assumes that making defendant aware of plaintiffs' unhappiness is the sole purpose of § 10.4(d). As defendant points out, that is not necessarily the case. As with any exhaustion requirement, one purpose of § 10.4(d) may be to narrow the issues for litigation. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 537 (7th Cir. 1999); Park v. Howard University, 71 F.3d 904, 907 (D.C. Cir. 1995). By requiring parties to formalize their grievances, this gives notice not only of the problem, but also of the potential for litigation and it prevents parties from turning every disagreement into a lawsuit. Accordingly, I conclude that plaintiffs waived their right to bring any claim, with the exception of plaintiffs Brougher's and Atkins's claims regarding their terminations and replacement and the name change.

B. Good Faith Duty to Maximize Growth and Performance

Even if I assume that plaintiffs did not waive any of their claims, they have failed to show that a reasonable jury could find that defendant breached its agreement with them. They point to § 10.4(d), which required defendant to "operate in good faith to maximize MNU's growth and performance during the earnout period." However, they devote only a few of their brief's 60 pages to explaining how they believe defendant violated this provision.

I understand plaintiffs to be objecting to the following decisions:

- devoting too many resources in the IT department to fixing errors in Multinational's financial information rather using those resources for marketing and sales;

- hiring 10 instead of 16 new employees for Multinational in 2008; hiring three instead of eight new employees in 2009;

- failing to devote more staff to filing the Amigo policy in all 50 states;

- prohibiting Multinational from expanding into new markets;

- moving Multinational to a "Class A" office space;

- limiting the increases in operating expenses;

- terminating plaintiffs Brougher and Atkins and replacing them with Mark Carney;

- canceling a contract with AIG;

- changing Multinational's name.

The parties agree that it is not enough for plaintiffs to show that defendant was negligent or made a poor decision. Rather, if plaintiffs are to prevail on their claims, they must show that defendant acted in bad faith. Plts.' Br., dkt. #78, at 35; Dft.'s Br., dkt. #40, at 8. See also Amirsaleh v. Bd. of Trade of City of New York, Inc., 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009) ("[T]here is no meaningful difference between 'a lack of good faith' and 'bad faith.'); McGowan v. Ferro, 859 A.2d 1012, 1036 (Del. Ch. 2004) ("Bad faith is not simply bad judgment or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.").

From the evidence adduced by plaintiffs, no reasonable jury could find that any of the decisions cited above represent bad faith by defendant in maximizing Multinational's growth and performance. Certainly, plaintiffs have shown that Brougher and Kelbel disagreed about many decisions after defendant bought Multinational, but that is not sufficient to prove to defendant breached the contract. Defendant had no duty under the contract to defer to Brougher's judgment; the agreement gave defendant "complete operational and budgetary control over all of the operations of MNU after the Closing Date." § 10.4(a). Thus, even if defendant overruled every decision of Brougher's, that would not support a breach of contract claim.

Plaintiffs devote many proposed findings of fact to showing that Brougher rarely got her way, but few to showing that defendant's decisions were attempts to stifle Multinational's growth. With respect to Brougher's requests for additional employees, it is undisputed that defendant approved 10 new hires in 2008 and another 3 in 2009. At the end of 2008, Brougher agreed that the 10 additions in 2008 were sufficient. Although plaintiffs have taken a different view now, they do little to explain why more employees were needed, much less showing that additional employees would have created additional growth. With respect to defendant's decision to devote resources in the IT department to fixing errors in Multinational's financial information, plaintiffs admit this was necessary to insure that Multinational maintained its ability to accept credit card payments over the internet and protect the personal financial information of their customers. Plaintiffs say that defendant should have hired more employees in the IT department during this time to help with sales and marketing, but they do not identify any specific marketing or sales initiatives that Brougher was unable to accomplish because she did not have the staff for it.

This is a general problem with plaintiffs' evidence: they have many gripes with defendant's decisions, but little evidence that the decisions were bad ones, much less that they were made in bad faith. Plaintiffs rely primarily on Brougher's affidavit, which in turn relies primarily on vague and conclusory allegations. For example, she says that defendant would not allow Multinational "to expand into any new products or markets" and "made it all but impossible for MNU to move forward with a cohesive plan for accessing the Asian market," Brougher Dec. ¶¶ 83-84, dkt. #81, but she does not explain what she means by this. The only example she gives is that defendant would not allow plaintiff Atkins "to visit Beijing to help define the appropriate products, procedures and channels of distribution." Id. at ¶ 82. However, it is undisputed that Brougher had done no business in China before, had limited knowledge of the requirements to sell insurance in China and had not developed a business plan. Under those facts, no reasonable jury could find that defendant acted in bad faith when it denied plaintiffs' request.

With respect to the decisions to move Multinational's office to a more modern space, canceling the AIG contract and changing Multinational's name, plaintiffs offer nothing but speculation to show that these decisions hindered rather than helped Multinational's potential for growth. E.g., Brougher Dec. ¶ 144, dkt. #81 (stating without any support that cancellation of AIG contract "caused a direct loss of commissions on approximately $750,000 of premium in 2009 and $1.5 million in 2010"). It is the same with respect to defendant's decision to terminate Brougher and give Atkins a 30-day deadline for improvement. Although the parties debate in their briefs and their proposed findings whether Brougher's termination was justified, the question in this case is not whether defendant had good cause to fire her. Because plaintiffs make no showing that replacing Brougher with Carney was an effort by defendant to keep Multinational from growing, it is unnecessary to decide whether defendant's various criticisms of Brougher's performance are accurate.

With respect to defendant's decisions to limit operating expenses, it is undisputed that Multinational's operating expenses increased each year and that the ratio of operating expenses to gross written premium for 2008, 2009, and 2010 was significantly *higher* than what Brougher had projected originally that it should be. Although the increase in operating expenses from 2008 to 2009 was limited, this was because Multinational's performance did not meet expectations in 2008. Plaintiffs' position seems to be that the agreement required defendant to make plaintiffs' earnout payments its first and only priority and that it could not take other factors into account when making business decisions, but that is not a reasonable interpretation of defendant's duty to act in good faith. Of course, defendant could have decided to impose no limitations on Multinational's expenses, but plaintiffs could not argue plausibly that doing so would be a wise business decision or in the best interest of Multinational. Again, this comes down to a disagreement between Brougher and Kelbel and, again, plaintiffs have not shown that Kelbel's decision shows disregard for defendant's contractual obligations. A determination to consider the big picture when making decisions about operating expenses is consistent with a duty to act in good faith to maximize performance and growth. Cf. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.").

Plaintiffs cite as smoking gun evidence emails in which one of defendant's employees calculated the amount of underwriting profit Multinational needed before plaintiffs would be entitled to earnout payments. According to plaintiffs, this shows that defendant was trying to manipulate Multinational's growth so that its underwriting profits came just under the 75% target. If that happened, defendant would come out ahead because plaintiffs would be entitled to nothing rather than the $3 million they would get if Multinational reached that target.

Plaintiffs' conspiracy theory lacks plausibility for several reasons. First, plaintiffs do not deny that it was in all parties' best interests to maximize Multinational's underwriting profits. Although defendant might have been better off if the profits were 74.99% of the target rather than 75%, it is undisputed that all parties would have been better off if Multinational had reached 100% of its target. Thus, plaintiffs are suggesting that defendant's disdain for them was so strong that it was willing to sacrifice the success of its own company in order to punish plaintiffs, but there is no evidence to support that view. Second, it is undisputed that Multinational came nowhere close to meeting the 75% target in 2009 and 2010, obtaining less than 60% of the goal both years. (It exceeded the target in 2008, so plaintiffs received more than $3 million in earnout payments that year.) Thus, *all* sides lost out in 2009 and 2010. If plaintiffs are correct that defendant was trying to manipulate its growth, then it did a very poor job of protecting its own interests. Finally, it is hardly surprising that defendant would want to calculate the figures that would trigger the earnout payments. Regardless of motive, it would be important for defendant's own budgeting purposes to know the circumstances under which the obligation would be triggered.

Plaintiffs cite various other statements in which Kelbel expressed his belief that the agreement between the parties was unfair, that he thought operating expenses should be at 10%-12% and that he did not want to authorize any new hires. However, plaintiffs have failed to demonstrate the relevance of these statements. It is ultimately what defendant *did* that matters rather than what Kelbel said. It is undisputed that operating expenses consistently were much higher than 10-12% and that defendant approved new hires. If anything, these statements support defendant's position because they suggest that defendant was attempting to meets its obligations under the agreement, even though it may have believed that the agreement was unfair.

The closest plaintiffs come to showing that defendant breached the contract is with respect to the decision not to seek additional help in filing short-term medical insurance policies in various states around the country so that Multinational could begin selling them. It is undisputed that Multinational had agreements with distributors and that the distributors were not willing to begin selling the policies until they were filed in at least 20 states. Although the parties dispute how long it took Multinational to get the policies filed, I must accept plaintiff's testimony for the purpose of summary judgment that the policies were not filed in 20 states until "late 2008." However, one problem with this claim is that plaintiffs cite no evidence to show that any delay in filing the policies was caused by a lack of staff or that an outside provider would have been able to file the policies more quickly. In addition, it is undisputed that defendant worked with Brougher to get the policies filed in priority states. In any event, even if I concluded that plaintiffs raised a genuine issue of material fact with respect to this issue, I could not allow plaintiffs to proceed to trial because none of the plaintiffs followed § 14.3 when objecting to this decision.

ORDER

IT IS ORDERED that defendant HCC Insurance Holdings, Inc's motion for summary judgment, dkt. #39, is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 16th day of July, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge