UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WORLDWIDE SERVICES, LTD. and RIDER LIMITED, Plaintiffs, -against- BOMBARDIER AEROSPACE CORPORATION, Defendant.	**REDACTED OPINION AND ORDER** 14 Civ. 7343 (ER)

Ramos, D.J.:

Worldwide Services, Ltd. ("Worldwide") and Rider Limited ("Rider," and collectively "Plaintiffs") assert claims for breach of contract, promissory estoppel, and unjust enrichment against Bombardier Aerospace Corp. ("Bombardier" or "Defendant") arising out of the parties' contract negotiations for the purchase and sale of three private long-range planes. Defendant moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' action in its entirety. For the reasons stated below, Defendant's motion is GRANTED in part and DENIED in part.

I. Factual Background[1]

A. The Parties

Worldwide and Rider, together, own and operate the planes used by the businesses of an individual named Dr. Carlos Bulgheroni. Compl. ¶ 13. Dr. Bulgheroni operates a global

[1] The facts are based on the allegations in the Complaint, Doc. 1, which the Court accepts as true for purposes of the instant motion. *See Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). In addition, the Court considers documents incorporated by reference and any documents that Plaintiffs relied upon in bringing the instant action. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citing *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000)); *see also infra* Section III.B.

business which requires travel between South America, Europe, Asia and other global destinations in as few hours as possible. *Id.* ¶ 25.

Bombardier and its parent company, Bombardier, Inc., manufacture and sell the planes at issue in the instant action. *Id.* ¶ 14.

B. The Marketplace

According to Plaintiffs, preproduction contracts—where parties commit to purchasing airplanes years in advance of production—are common in the marketplace for long-range business planes because they are mutually beneficial to buyers and sellers. *Id.* ¶ 20. Preproduction sales, which require an initial payment of millions of dollars years in advance of delivery, provide manufacturers with working capital to produce new planes, and provide buyers guaranteed reservation prices that are substantially lower than the purchase prices charged by manufacturers once planes are in production. *Id.* ¶¶ 20, 21. In a marketplace where it can allegedly take years to fulfill and deliver orders, preproduction sales also guarantee that buyers will receive one of the first planes available. *Id.* ¶ 21.

Plaintiffs contend that it is more efficient to purchase identical or similar plane models from a single manufacturer because companies that own multiple planes must also employ several full-time pilots that must be trained periodically by the manufacturer of the airplanes they fly. *Id.* ¶ 22. When a company's airplane fleet is made up of the same models produced by the same manufacturer, the company's pilots can be trained more efficiently and are able to fly any plane in the company's fleet. *Id.* Plaintiffs contend that no rational business would be willing to purchase two planes from two different manufacturers and would not view similar planes produced by different manufacturers as substitutes for one another. *Id.* ¶ 23.

C. The Negotiations

In 2009, Defendant was developing a new, long-range model plane, the Global 7000 ("G7000"). *Id.* ¶ 28. Defendant offered Plaintiffs the opportunity to reserve one of the initial G7000 models and forwarded Plaintiffs a proposal letter for consideration. *Id.* ¶¶ 28, 29. Plaintiffs allegedly notified Defendant they would need two, not one, of the planes to address their growing global business but because the G7000 model was not expected to be ready for delivery for several years they would also need to purchase a third interim airplane that would be ready for delivery at an earlier date. *Id.* ¶ 30.

According to Plaintiffs, the parties negotiated a package deal for the sale and purchase of three long-range business planes: one Global XRS Vision (the "XRS") and two G7000s. *Id.* ¶ 2. The XRS was meant to "bridge the gap" until the two G7000s were manufactured and ready for delivery, which was estimated to occur approximately six years later in 2015. *Id.* ¶¶ 2, 33. Plaintiffs allege that Defendant understood that they were not interested in purchasing the XRS without also having a "firm plan" to acquire the two G7000s. *Id.* ¶ 33. Accordingly, the parties simultaneously negotiated a purchase agreement for the XRS and two letters of intent ("LOI") for the purchase of the two G7000s, all of which were executed on December 7, 2009. *Id.* ¶¶ 34, 35. Plaintiffs made two [redacted] deposits required under the LOIs to secure their "reservation slots" for the two G7000s and obtain priority reservation numbers 002 and 006, which allegedly meant that Plaintiffs had the right to secure the second and sixth G7000s available for sale to third party customers. *Id.* ¶¶ 3, 37. The [redacted] deposit also entitled Plaintiffs to purchase the G7000s under the limited time introductory price of [redacted] each, [redacted] to be determined later, stated in the LOIs.[2] *Id.* ¶¶ 36, 37. According to

[2] Plaintiffs note that while the introductory price contemplated by the LOI is [redacted], the parties ultimately agreed to fix the price at [redacted]. *Id.* ¶¶ 42 n.1, 63 n.4.

Plaintiffs, the LOIs anticipated only two scenarios under which Plaintiffs would not be entitled to purchase the two G7000s: (1) if Defendant did not launch the product line, or (2) if the LOIs were not converted into purchase agreements. *Id.* ¶¶ 36, 37. Plaintiffs contend that neither of these situations occurred. *Id.* ¶ 36.[3]

Two identical draft purchase agreements for the two G7000s were circulated in October 2010. *Id.* ¶ 39. In early 2011, however, Defendant experienced delays in manufacturing the XRS and the G7000. *Id.* ¶ 40. Plaintiffs were purportedly concerned that Defendant would be unable to deliver the XRS on time due in part to Defendant's difficulty in obtaining FAA certification for the plane, [redacted]. *Id.* ¶¶ 3, 4, 40. Accordingly, the parties allegedly agreed to change their strategy from simultaneously finalizing the purchase agreements for the two G7000s to finalizing the purchase agreement for the first G7000 first and then finalizing the purchase agreement for the second G7000 when the issues with the XRS were resolved. *Id.* ¶ 40. On April 5, 2011, the parties extended Plaintiffs' rights under the LOI for the second G7000 for an additional two years. *Id.* ¶¶ 4, 41. Three days later, on April 8, 2011, the parties executed the purchase agreement for the first G7000 for [redacted] and Plaintiffs made the first payment of [redacted] required under the purchase agreement. *Id.* ¶¶ 3, 41. Thus, by April 2011 Plaintiffs had purchased two planes from Defendant at a combined price of over [redacted] "in express reliance" on the completion of their three-plane deal. *Id.* ¶¶ 3, 42.

At the end of 2011, the production and delivery problems with the XRS allegedly worsened and in December 2011, Defendant acknowledged that it would not be able to meet the

[3] According to Plaintiffs, the first delivery of any of Defendant's G7000 is estimated to occur in December 2016. *Id.* ¶ 38. If Plaintiffs' alleged contractual right to the sixth G7000 is not honored, Plaintiffs contend that it may not be possible to obtain another G7000 from Defendant until 2018 or later at an increased cost of [redacted] for the reservation slot and [redacted] for the G7000. *Id.*

contract delivery date because FAA certification and United States registration would not occur on time, if at all. *Id.* ¶¶ 43, 44. Plaintiffs agreed to renegotiate rather than terminate the contract and Defendant agreed to substantial concessions. *Id.* ¶ 45. Plaintiffs contend that they made it clear, and that Defendant agreed, that finalizing the purchase agreement for the second G7000 would occur after the issues with the XRS were resolved and that Plaintiffs' accommodations were made with the express understanding that these were necessary steps to ensure the sale of all three planes in the package deal. *Id.* At an unidentified date, the parties executed a "Settlement Agreement" under which Defendant would deliver the XRS by [redacted].[4] *Id.* ¶ 46.

During these negotiations, Defendant allegedly acknowledged that the parties had agreed to the package deal for the sale of the three planes and Plaintiffs' desire for assurance that the XRS would be delivered on time prior to finalizing the purchase agreement for the second G7000. *Id.* ¶ 47. Specifically, on December 15, 2011, Dr. Bulgheroni sent a letter to Steve Ridolfi ("Ridolfi"), the then President of Bombardier Business Aircraft, noting that after the issues with the XRS were resolved he

> hope[d] to receive . . . a Bombardier Team in order to discuss the contract for the Second Global 7000 aircraft. As you can see we have been very confident from the beginning that the plane would be built by Bombardier. We will start buying two units of this aircraft, which will continue to improve our partnership that we started with you many years ago.

Id. ¶ 48. In response, Ridolfi wrote

> [w]e thank you for taking the time to meet with us here in Montreal . . . to 'set the stage' for converting the Letter of Intent for your second Global 7000 aircraft into a firm Purchase Agreement . . . .

[4] The [redacted] delivery date for the XRS was incorporated into the amended purchase agreement for the XRS on December 30, 2011. *Id.* ¶ 49.

> During our conversations, we acknowledge and also understand the broader context of our mutual long-standing relationship, your purchase of three new Global Business Jet Aircraft, and the overall impact associated with the later readiness date for the new [XRS].

Id. On December 19, 2011, Ridolfi sent a letter thanking Dr. Bulgheroni and noting that he "look[s] forward to both the delivery of your new [XRS] and towards further expanding our relationship with your purchase of a 2nd Global 7000." *Id.*

On December 22, 2011, Defendant circulated a new draft of the purchase agreement for the second G7000. *Id.* ¶ 50. In the cover email of the draft purchase agreement, Plaintiffs allege that Defendant's contracts manager, Marilyn Thomas ("Thomas"), stated that from Defendant's perspective, all material terms had been negotiated for the sale of the second G7000. *Id.* Thomas, referring to the April 8, 2011 purchase agreement for the first G7000, noted that "[t]his version reflects the document that was signed (including the last clarification) and, as such, the modifications that appear in the document are the ones that were made to cover specifically the fact that this second Plane will be delivered in the following quarter." *Id.*

On December 30, 2011, the parties amended the purchase agreement for the XRS to account for the delayed delivery date and Defendant's agreement to provide Plaintiffs [redacted]. *Id.* ¶¶ 46, 49.

On January 23, 2012, Wayne Cooper ("Cooper"), Bombardier's Director of Contracts, emailed Plaintiffs' counsel, Nestor Falivene ("Falivene"), regarding the second G7000 stating that "[w]e can make a commitment that your G7000 will be one of the first 6 that are delivered, but we really cannot be sure of the serial number . . . . Thus, we have committed that you will receive one of the first 6 Global 7000 planes that are delivered to third-party customers" and offering to "go ahead and prepare a full document set (including schedules) and prepare them for execution." *Id.* ¶¶ 35, 51. Plaintiffs contend that Cooper's email was a clear and unmistakable

statement that Defendant would ensure Plaintiffs received the benefit of the bargain struck—the sale of two G7000s in accordance with the priority reservation numbers set forth in the LOIs. *Id.* ¶ 52. Plaintiffs further allege that at the time Cooper made this promise, Plaintiffs were in a position to explore opportunities to purchase planes from Defendant's competitors and that Cooper made this promise in order to keep Plaintiffs from exploring these opportunities. *Id.* ¶ 53.

Although the purchase agreement for the second G7000 was allegedly nearly complete, Plaintiffs were unwilling to execute the transaction for the second G7000 until there was a firm delivery date for the XRS. *Id.* ¶ 54. While Defendant allegedly represented that the XRS would be tentatively ready for Plaintiffs' inspection and delivery in March 2012, by mid-March 2012 the FAA had not yet issued its certification. *Id.* ¶ 55. Plaintiffs were concerned about Defendant's ability to deliver on its promises and informed Defendant that they may look elsewhere. *Id.* Moreover, on March 24, 2012, Dr. Bulgheroni wrote to Pierre Beaudoin, the Chairman of Bombardier, Inc., to express his dissatisfaction. *Id.* ¶ 56. Negotiations between the parties intensified, allegedly because of Defendant's efforts to avoid losing the three-plane package deal. *Id.*

The parties ultimately reached an agreement whereby Plaintiffs agreed to accept delivery of the XRS without FAA approval and without U.S. registration, but required FAA approval and U.S. registration to be forthcoming, in exchange for [redacted] concessions from Defendant in connection with the two G7000s, including a firm commitment from Defendant to conclude the purchase agreement for the second G7000. *Id.* ¶¶ 57-59. This agreement was memorialized in two new written agreements: (1) the second amendment to the XRS purchase agreement, and (2) a Memorandum of Understanding ("MOU") executed on March 31, 2012. *Id.* ¶¶ 60, 62. The

amendment to the XRS purchase agreement required Defendant to ensure that [redacted] and, if Defendant failed to comply with this deadline, Defendant was [redacted]. *Id.* ¶ 60. The MOU obligated Defendant to (1) [redacted]; and (2) to "negotiate in good faith with the intent and design to conclude and sign" a purchase agreement for the second G7000. *Id.* ¶¶ 4, 62. The first paragraph of the MOU stated that

> Immediately after the FAA certification is obtained for the [XRS], Buyer and Seller *shall negotiate in good faith and with the intent and design to conclude and sign* (i) the Aircraft Purchase Agreement for the purchase of the second Global 7000 Aircraft . . . . Such negotiations shall be focused on the discussion of the revisions made by Bombardier to Buyer's draft attached to Bombardier's email dated January 23rd 2012. The email with the corresponding drafts under discussion is attached hereto as Exhibit 'A' for identification purposes.

Id. ¶ 62 (emphasis added).[5] Plaintiffs allegedly negotiated the MOU to ensure that they would not be obligated to purchase the second G7000 unless Defendant obtained FAA certification for the XRS, while also incentivizing Defendant to promptly obtain FAA certification for the XRS or risk losing the sale of the second G7000. *Id.* ¶ 65. Under the MOU, the parties agreed that as soon as the XRS received FAA certification, the parties were obligated to resolve the remaining minor issues regarding the second G7000 purchase agreement. *Id.* ¶ 64. Plaintiffs also allege

[5] Plaintiffs allege that the January 23, 2012 email from Cooper to Falivene and attached purchase agreement referenced in the first paragraph of the MOU contained the agreed upon material terms, including price, [redacted], and delivery date, [redacted]. *Id.* ¶ 63. Plaintiffs further allege that neither of these terms changed at any time thereafter. *Id.*

that the MOU affirmatively precluded Defendant from negotiating with anyone other than Plaintiffs regarding the second G7000. *Id.* ¶¶ 7, 64.

On March 31, 2012, Defendant delivered the XRS to Plaintiffs. *Id.* ¶ 66. On April 24, 2012, Defendant notified Plaintiffs that FAA certification for the XRS was received. *Id.* ¶ 67. The letter from Defendant stated that "[t]he receipt of the FAA Certification will enable the terms and conditions of the above-subject Memorandum of Understanding to be fulfilled." *Id.* After FAA certification was received, the parties resumed negotiations regarding the purchase agreement for the second G7000. *Id.* ¶ 69. Negotiations stalled in late 2012, however, allegedly because of confusion on the part of Defendant regarding which party was responsible for circulating the latest revisions to the purchase agreement. *Id.* ¶ 70.

On May 24, 2013, Fabio Rebello, Bombardier's Regional Vice President, asked Plaintiffs to confirm that they would like to continue negotiating the purchase of the second G7000 pursuant to the MOU. *Id.* Plaintiffs confirmed that negotiations should resume and on July 10, 2013, Falivene and Senior Vice President of Sales at Bombardier, Bob Horner ("Horner"), met in New York City to discuss the second G7000. *Id.* ¶¶ 28, 70, 71. At this meeting, Plaintiffs allege that "every single relevant outstanding negotiating point was resolved." *Id.* ¶ 71. After the meeting, Horner allegedly reported to Falivene that he was "working with finance" and would "get back to you shortly." *Id.* On July 17, 2013, Horner wrote to Falivene that it "[l]ooks like we have a deal. I've just spoken with Steve Ridolfi who will request board approval in the coming days. . . ." *Id.* ¶ 72. Plaintiffs contend that at the time of Horner's July 17, 2013 email, the parties had agreed to all material terms for the second G7000 purchase agreement and that any open items were minor and would not require substantive negotiations. *Id.* On July 18, 2013, Horner emailed Plaintiffs that he was "pleased to confirm [that] we have board approval to

proceed in accordance with discussions in NY." *Id.* ¶ 73. Plaintiffs allege that the Board approved the terms of the sale of the second G7000 established at the July 10, 2013 meeting. *Id.* Plaintiffs further alleged that the Board's approval and Horner's written notification of the Board's approval to Plaintiffs gives rise to a fully enforceable agreement for the sale of the second G7000 (the "July 2013 Contract"). *Id.* ¶¶ 6, 73. According to Plaintiffs, because the July 2013 Contract was a definitive agreement, pursuant to the MOU the parties were bound to "conclude and sign" the purchase agreement, which Plaintiffs characterize as the "formal document" memorializing the July 2013 Contract. *Id.* ¶¶ 6, 9. However, the parties were unable to finalize the alleged contract, although Plaintiffs contend it was essentially execution ready, because of life-threatening health issues affecting Dr. Bulgheroni's son. *Id.* ¶ 74.

By December 2013, Dr. Bulgheroni's son's health had stabilized and discussions resumed. *Id.* ¶ 75. Defendant informed Plaintiffs that it was unlikely to meet the delivery date in the purchase agreement for the second G7000. *Id.* Dr. Bulgheroni and Horner met in Washington D.C. to discuss Plaintiffs' remedies if Defendant was unable to deliver the second G7000 on time. *Id.* The parties agreed to an [redacted]. *Id.* Based on this agreement, on December 30, 2013, Horner emailed Dr. Bulgheroni Defendant's [redacted]:

[redacted]

Id. According to Plaintiffs, at no point during the December 2013 meeting or in the months before or after did Defendant indicate that the purchase agreement for the second G7000 needed

to be finalized shortly or that Defendant viewed the transaction for the purchase of the second G7000 as anything other than a "done deal" with only the formality of executing the purchase agreement left to be done. *Id.* ¶ 76.

Plaintiffs revised the purchase agreement to account for Defendant's [redacted] proposal. *Id.* ¶ 77. On February 18, 2014, Falivene emailed Horner that he "revised the purchase agreement to incorporate the latest matters discussed," the [redacted], and attached the purchase agreement (the "2014 Purchase Agreement").[6] *Id.* ¶ 77. According to Plaintiffs, at that time, all substantive points had been negotiated, therefore, the parties were obligated under the MOU "to conclude and sign" the second G7000 purchase agreement. *Id.* ¶¶ 78, 79. On February 19, 2014, Horner acknowledged receipt of Falivene's email and stated he would "review and revert shortly." *Id.* ¶ 80. Plaintiffs also allege that the material terms of the January 2012 purchase agreement annexed to the MOU, the July 2013 Contract, and the 2014 Purchase Agreement did not differ materially from one another. *Id.* ¶ 77.

By March 7, 2014, Defendant had not contacted Plaintiffs and Falivene reached out to Horner to request a status update. *Id.* ¶ 80. On March 15, 2014, Horner wrote "our contracts team have completed their review. I will revert next week." *Id.* Subsequently, in response to Falivene's requests for status updates on March 19 and March 23, 2013, Horner informed him that Defendant's new president, as of January 1, 2014, Eric Martel ("Martel"), needed to approve the sale of the second G7000. *Id.* Plaintiffs contend that neither the MOU, nor the purchase agreement required Defendant's President to sign off on the sale. *Id.* ¶ 82. Moreover, according to Plaintiffs, Defendant's Board of Directors already approved the transaction in July 2013, resulting in the July 2013 Contract and requiring Defendant to execute the purchase agreement.

[6] The delay between Horner's December 30, 2013 email and Falivene circulating a revised purchase agreement in February 2014 was allegedly due to Falivene's personal health issues. *Id.* ¶ 77 n.6.

Id. Plaintiffs contend that requiring Martel's approval was a bad faith delay tactic meant to provide Defendant with a reason to walk away from the parties' alleged contract. *Id.*

Finally, on May 9, 2014, Martel told Dr. Bulgheroni that Defendant would not conclude and sign the 2014 Purchase Agreement for the second G7000 and that Defendant had sold Plaintiffs' reservation slot and the G7000 to a third party. *Id.* ¶ 83. According to Plaintiffs, this was the first time Defendant notified Plaintiffs that they had been negotiating to sell the reservation slot and G7000 to another party. *Id.* ¶ 84. Plaintiffs allege that due to the complexity and timing required to negotiate the sale of a plane like the G7000, it appears that Defendant had been engaged in negotiations with a third party for a substantial period of time. *Id.* Plaintiffs allege, upon information and belief, that Defendant sold the second G7000 and its reservation slot to a third party for substantially more than the [redacted] purchase price stated in the 2014 Purchase Agreement. *Id.* ¶ 7, 84. At the time Defendant allegedly declined to execute the 2014 Purchase Agreement, Plaintiffs contend that the parties had agreed to all material terms and that no good faith differences existed in the remaining open terms that would have prevented the parties from signing the 2014 Purchase Agreement. *Id.* ¶ 85.

On March 26, 2014, Dr. Bulgheroni wrote to Martel expressing his "outrage" at Defendant's "duplicity" and informing him of Plaintiffs' injury resulting from their reliance on Defendant's express promises regarding the second G7000, including foregoing multiple other opportunities to purchase another plane. *Id.* ¶ 86. Martel responded on June 6, 2014, stating that Defendant gave Plaintiffs various "ultimatums" that the sale of the second G7000 be concluded by the end of 2013 "in order not to 'lose the deal'" and that "Bombardier and Worldwide Services Limited had not yet reached a meeting of the minds on the terms and conditions of the purchase agreement for the second Global 7000 aircraft position." *Id.* ¶ 87. Allegedly, Martel's

letter did not mention the MOU, Defendant's Board's approval in July 2013, or specify which terms had not been agreed to. *Id.* Martel's letter also stated that the LOI had expired because the parties were required under the LOI to finalize mutually agreeable terms in a purchase agreement thirty-business days following the launch of the program. *Id.* ¶ 88. Plaintiffs contend that Martel's letter contains only pretextual reasons for Defendant's failure to execute the sale of the G7000. *Id.* ¶¶ 7, 88. The instant suit followed two months later.

D. Requested Relief

Plaintiffs' first cause of action seeks an order of specific performance of the allegedly breached contract,[7] ordering Defendant to sell Plaintiffs the specific G7000 contracted for, or alternatively, if the second G7000 is not available, the next unreserved G7000 at the price and on the terms agreed to by the parties, including the [redacted] provision proposed by Defendant in their December 30, 2013 email. *Id.* ¶ 97. In the alternative, Plaintiffs' third cause of action seeks money damages for the allegedly breached contract, specifically the greater of the difference between the contract price for the second G7000, [redacted], and (1) the market price of the second G7000 and its reservation slot as of the date of Defendant's alleged breach; (2) the price Defendant sold the second G7000 and its reservation slot to a third party for; or (3) the market price of a comparable substitute plane and its reservation slot sold by Defendant's competitors. *Id.* ¶ 113. Plaintiffs also seek incidental and other damages. *Id.*

Plaintiffs' second cause of action seeks an order of specific performance compelling Defendant to perform its obligations under the MOU, specifically requiring Defendant to finalize the "ministerial" components of the 2014 Purchase Agreement and sign the 2014 Purchase

[7] The Complaint does not specify whether Plaintiffs are seeking specific performance under the July 2013 Contract or the 2014 Purchase Agreement. *Id.* ¶¶ 89-97. In Plaintiffs' Opposition to Defendant's Motion to Dismiss, they clarify that they are seeking to enforce the July 2013 Contract. *See* Pls.' Opp'n Mem. at 23-24.

Agreement. *Id.* ¶ 111. In the alternative, Plaintiffs' fourth cause of action seeks money damages—the same amount as requested in count three, *id.* ¶ 113—for the alleged breach of the MOU. *Id.* ¶ 115. Plaintiffs also seek incidental and other damages. *Id.* ¶ 115.

Plaintiffs' fifth cause of action is for promissory estoppel and the sixth cause of action is for unjust enrichment. *Id.* ¶¶ 116-126. Plaintiffs seek monetary damages not less than [redacted] for both the fifth and sixth causes of action. *Id.* ¶¶ 122, 126.

II. Procedural Background

On August 4, 2014, Plaintiffs filed the Complaint under seal in the Supreme Court of the State of New York in New York County. Doc. 1. On September 10, 2014, Defendant filed a notice of removal and removed the action to this Court. *Id.* At a conference held before this Court on October 23, 2014, Defendant was granted leave to file a motion to dismiss the instant action. Defendant filed their motion on November 3, 2014. Doc. 10.

III. Standard of Review

A. Rule 12(b)(6) Motion to Dismiss Standard

When ruling on a motion to dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014); *Koch v. Christie's Intern., PLC*, 699 F.3d 141, 145 (2d Cir. 2012). The court is not required to credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also id.* at 681 (citing *Twombly*, 550 U.S. at 551). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). More specifically, the plaintiff must allege sufficient facts to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 680.

The question in a Rule 12 motion to dismiss "'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 615 (S.D.N.Y. 2012) (quoting *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 278 (2d Cir. 1995)). "[T]he purpose of Federal Rule of Civil Procedure 12(b)(6) 'is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief without resolving a contest regarding its substantive merits,'" and without regard for the weight of the evidence that might be offered in support of Plaintiffs' claims. *Halebian v. Berv*, 644 F.3d 122, 130 (2d Cir. 2011) (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)).

B. Extrinsic Materials

The Court may consider a document that is attached to the complaint, incorporated by reference or integral to the complaint, provided there is no dispute regarding its authenticity, accuracy or relevance. *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citations omitted). "To be incorporated by reference, the [c]omplaint must make a clear, definite and substantial reference to the documents." *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 815 F. Supp. 2d 679, 691 (S.D.N.Y. 2011) (internal quotation marks and citation omitted). Defendant attaches eight documents to its motion to dismiss: (1) the 2009 purchase

agreement for the XRS, Shawn P. Thomas Affirmation in Support of Def.'s Motion to Dismiss ("Thomas Aff."), Ex. 1; (2) the 2011 purchase agreement for the first G7000, *id.* Ex. 2; (3) the 2012 MOU and attached purchase agreement for the second G7000, *id.* Ex. 3; (4) an email from Horner to Falivene dated July 17, 2013, *id.* Ex. 4; (5) an email from Horner to Falivene dated July 18, 2013, *id.* Ex. 5; (6) an email from Horner to Dr. Bulgheroni dated December 30, 2013, *id.* Ex. 6; (7) an email from Falivene to Horner dated February 18, 2014 attaching the 2014 Purchase Agreement, *id.* Ex. 7; and (8) the Complaint, *id.* Ex. 8. These documents are clearly referenced by the Complaint, are highly relevant to the question of the parties' relationship and whether they formed a binding contract for the sale of the second G7000, and are therefore incorporated by reference. *See* Compl. ¶¶ 35, 42, 62, 63, 72, 73, 75, 77. Thus, the Court will consider them in deciding the present motion.

IV. Discussion

A. Breach of Contract

To establish a breach of contract claim under New York Law[8], Plaintiffs must plausibly allege "(1) the existence of a contract between itself and that defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by that defendant; and (4) damages to the plaintiff caused by that defendant's breach." *Gas Natural, Inc. v. Iberdrola, S.A.*, 33 F. Supp. 3d 373, 377-78 (S.D.N.Y. 2014) (quoting *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011)). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Tractebel Energy Mktg. v. AEP Power Mktg., Inc.*,

[8] Both parties rely on New York law in their papers and do not dispute that New York law applies. Moreover, the 2014 Purchase Agreement and the MOU state that New York law applies. *See* Thomas Aff. Ex. 3 ¶ 5; Ex. 7 ¶ 4.4.

487 F.3d 89, 95 (2d Cir. 2007); *see also FCOF UB Sec. LLC v. MorEquity, Inc.*, 663 F. Supp. 2d 224, 227-28 (S.D.N.Y. 2009). "Ordinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract." *Brown v. Cara*, 420 F.3d 148, 153 (2d Cir. 2005) (quoting *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 548 (2d Cir. 1998)). "In some circumstances, however, preliminary agreements can create binding obligations." *Id.*

As noted above, Plaintiffs seek to enforce the July 2013 Contract, which the parties never formally executed, and the MOU, which the parties did execute but which required the parties to continue to negotiate to conclude an agreement. There is thus no *executed* agreement binding Defendant to sell the plane to Plaintiffs on the purportedly agreed upon terms. Plaintiffs allege that their agreements are binding nonetheless. The Second Circuit adopted a framework first articulated by then-District Judge Leval in *Teachers Insurance & Annuity Association of America v. Tribune Company*, 670 F. Supp. 491 (S.D.N.Y. 1987), classifying binding preliminary agreements into two types. *Gas Natural, Inc.*, 33 F. Supp. 3d at 378 (citing *Brown*, 420 F.3d at 153).[9] The first category, Type I agreements, are "fully binding agreements, which are created when the parties agree on all the points that require negotiation (including whether to

[9] The New York Court of Appeals noted in a footnote addressing whether a settlement agreement was binding, that federal courts had divided preliminary agreements into two types and stated that "[w]hile we do not disagree with the reasoning in federal cases, we do not find the rigid classifications into 'Types' useful." *Gas Natural, Inc.*, 33 F. Supp. 3d at 378 n.1 (citing *IDT Corp. v. Tyco Grp.*, 918 N.E.2d 913, 915 n.2, 13 N.Y.3d 209, 215 n.2 (2009)). After the New York Court of Appeal's decision in *IDT*, the Second Circuit and the district courts continued to rely on the Type I/Type II framework. *See SSP Capital Partners, LLP v. Mandala, LLC*, 402 Fed. App'x 572, 573 (2d Cir. 2010) (summary order); *Sawabeh Info. Servs. Co. v. Brody*, No. 11 Civ. 4164 (SAS), 2014 WL 46479, at *10 (S.D.N.Y. Jan. 6, 2014), *rev'd on other grounds*, 598 Fed. App'x 794 (2d Cir. 2015) (affirming the district court's judgment except as to breach of fiduciary duty); *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC*, 861 F. Supp. 2d 344, 356 (S.D.N.Y. 2012). "Accordingly, absent guidance from the Second Circuit or the New York Court of Appeals to the contrary, this Court will continue to rely on the framework." *Gas Natural, Inc.*, 33 F. Supp. 3d at 378 n.1.

be bound) but agree to memorialize their agreement in a more formal document." *Vacold LLC v. Cerami*, 545 F.3d 114, 124 (2d Cir. 2008) (alterations omitted). Type I agreements fully bind the parties that enter them "to carry out the terms of the agreement even if the formal instrument is never executed." *Id.* Alternatively, Type II agreements, are preliminary contracts that are binding on the parties "only to a certain degree because the parties agree on certain major terms, but leave other terms open for further negotiation." *Id.* (alterations omitted). These agreements "do not commit the parties to their ultimate contractual objective," but rather "bind the parties to the obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework." *Id.* (internal citations and alterations omitted). "If the parties fail to reach such a final agreement after making a good faith effort to do so, there is no further obligation." *Id.* "In the analysis of both these types of binding agreements, the Court has found the language of the agreements to be the most important factor in discerning the parties' manifested intent." *Spencer Trask Software and Info. Servs. LLC v. Rpost Intl Lmt.*, 383 F. Supp. 2d 428, 441 (S.D.N.Y. 2003) (citing *Tribune*, 670 F. Supp. at 499).

When determining whether either type of binding preliminary agreement exists, the Court is mindful of the need to balance two competing policy concerns: courts must "avoid trapping parties in surprise contractual obligations that they never intended" while also enforcing and preserving agreements that were intended to be binding, even despite a need for further documentation or further negotiation. *Gas Natural, Inc*, 33 F. Supp. 3d at 379 (citing *Adjustrite Sys., Inc.*, 145 F.3d at 548); *Brown*, 420 F.3d at 157-58. "Otherwise, as Judge Leval explained, 'parties would be obliged to expend enormous sums negotiating every detail of final contract documentation before knowing whether they have an agreement, and if so, on what terms.'" *Gas Natural, Inc*, 33 F. Supp. 3d at 379 (quoting *Tribune*, 670 F. Supp. at 499).

i. Type I Agreement

There are four considerations courts use to help determine whether the parties intended to be bound by a Type I agreement: "(1) whether there is an expressed reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing." *See Winston v. Mediafare Entm't*, 777 F.2d 78, 80 (2d Cir. 1985); *Brown*, 420 F.3d at 154 (*citing Adjustrite*, 145 F.3d at 549); *see also R.G. Grp., Inc. v. The Horn & Hardart Co.*, 751 F.2d 69, 74-77 (2d Cir. 1984). Moreover, these four factors "may be shown by oral testimony or by correspondence or other preliminary or partially complete writings." *Winston*, 777 F.2d at 81 (internal citations omitted).

Defendant contends that based on these four factors, Plaintiffs have failed to plausibly alleged that the 2014 Purchase Agreement is an enforceable Type I preliminary agreement. Def.'s Mem. at 10-14. Plaintiffs, however, explain that they "do not contend that [the 2014 Purchase Agreement] is itself a contract" and "do *not* seek to 'enforce' [it]." Pl.'s Opp'n Mem. at 24 (citing Compl. ¶¶ 73, 91-97, 112-13) (emphasis in original). Instead, Plaintiffs assert that as of July 18, 2013 a "fully formed" contract existed for the sale of the second G7000, or, in the alternative, that as of July 18, 2013 an enforceable Type I preliminary agreement existed. Pl.'s Opp'n Mem. at 23. In any event, for the reasons set forth below, the Court finds that neither the July 2013 Contract, nor the 2014 Purchase Agreement are enforceable Type I preliminary agreements.[10]

[10] Because the Court finds that the July 2013 Contract is not an enforceable preliminary agreement, the Court also finds that the July 2013 Contract cannot be considered a "fully formed" contract, a description Plaintiffs do not explain, for the sale of the second G7000.

a. Express Reservation of Right

"The first factor is 'frequently the most important,' and 'is frequently determined by explicit language of commitment or reservation.'" *Nat'l Gear & Piston, Inc.*, 861 F. Supp. 2d at 356 (quoting *Brown*, 420 F.3d at 154); *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 126 (S.D.N.Y. 2010); *but see R.G. Grp.*, 751 F.2d at 75 ("No single factor is decisive, but each provides significant guidance."). "Indeed, if the language of the agreement is clear that the parties did not intend to be bound, the Court need look no further." *Cohen v. Lehman Bros. Bank, FSB*, 273 F. Supp. 2d 524, 528 (S.D.N.Y. 2003). Moreover, "if either party communicates an intention not to be bound absent a fully executed document, then no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." *Bear Stearns Inv. Prods., Inc. v. Hitachi Auto. Prods. (USA), Inc.*, 401 B.R. 598, 617 (Bankr. S.D.N.Y. 2009); *Kargo, Inc. v. Pegaso PCS, S.A. de C.V.*, No. 05 Civ. 10528 (CSH) (DFE), 2008 WL 4579758, at *10 (S.D.N.Y. Oct. 14, 2008) (granting summary judgment to defendant, where the "undisputed facts—in particular, the correspondence between the parties and the language in the contract—clearly show that the Agreement was not binding until executed").

Plaintiffs allege that the parties entered into an enforceable and binding contract for the sale of the second G7000 in July 2013.[11] *See* Pls.' Opp'n Mem. at 5, 23. Specifically, Plaintiffs contend that Horner's email on July 17, 2013 that it "[l]ooks like we have a deal" and his confirmation one day later that "we have board approval to proceed in accordance with our

[11] The Court does not decide the issue of whether the July 2013 Contract satisfies the requirements of the Statute of Frauds, which requires "a contract for the sale of goods for the price of $500 or more" to be enforceable, to have "some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought[.]" N.Y. U.C.C. § 2-201. Because this Court finds that the July 2013 Contract is not an enforceable preliminary agreement notwithstanding whether the alleged agreement satisfied the Statute of Frauds, the Court does not decide whether a sufficient writing exists to satisfy the Statute of Frauds. *See Brown*, 420 F.3d at 159 n.3 (finding that "[b]ecause we hold that the MOU is not enforceable as a Type I agreement, we need not reach defendants' argument that enforcement of the MOU as a Type I agreement is barred by the New York Statute of Frauds.").

discussions in NY" evidenced that a valid and binding contract had been reached based on the terms allegedly agreed to at the July 10, 2013 meeting. *Id.*; *see also* Compl. ¶¶ 72, 73.

The plaintiff in *Spencer Trask Software and Information Services LLC*, 383 F. Supp. 2d at 443, similarly argued that their oral agreement and handshake on the agreement established the parties' intention to be bound. Such an agreement, however, "can only serve as an indication of the parties' intention to be bound, and cannot . . . conclusively establish that the parties intended to be bound." *Id.* The *Spencer Trask* court explained that the "alleged oral agreement and handshake must be considered with all the other words and deeds of the parties, identifiable from the facts alleged in the Amended Complaint and the incorporated documents, and which would constitute objective signs of their intent to be bound." *Id.* The court ultimately found that although the draft agreements, which laid out the terms allegedly agreed to in the oral contract, did not include an express reservation of the right not to be bound, such a reservation was contained in an earlier offering memorandum. *Id.* at 442. The parties also included statements in the draft agreements referring to the execution of the agreement, including that "[w]e are prepared to move promptly to consummate this transaction following the execution of this letter." *Id.* Accordingly, while the court explained that the "plaintiffs' allegation that the parties reached an agreement on terms must be seen by the Court, in the context of a motion to dismiss, as evidence in support of defendants' intention to be bound," *id.* at 443 n.4, the court ultimately found that the first factor favored the defendants. *Id.* at 445.

Here, like in *Spencer Trask*, the entirety of the facts alleged suggest that the parties intended to execute a purchase agreement for the sale of the second G7000 and be bound by that subsequent, executed agreement. In an email sent on January 23, 2012, Defendant states that "we have committed that you will receive one of the first 6 Global 7000 planes that are delivered

to third-party customers," but offers that they "can go ahead and prepare a full document set (including schedules) and *prepare them for execution*." Compl. ¶ 51 (emphasis added). The MOU, executed two months later in March 2012, also anticipates executing the purchase agreement, directing that the parties shall "negotiate in good faith with the intent and design to conclude *and sign*" the purchase agreement for the second G7000, and attached a draft of the purchase agreement. Compl. ¶ 62 (emphasis added); *see also* Thomas Aff. Ex. 3.

Additional indicia of the parties' intent not to be bound by an unexecuted agreement is found in the 2014 Purchase Agreement, whose material terms Plaintiffs contend "did not differ from the version of the agreement existing at the time of Bombardier's Board approval in July 2013[.]" Compl. ¶ 77. Therefore, any reservation of right not to be bound by an unexecuted agreement in the 2014 Purchase Agreement was also allegedly contained in the version of the agreement that formed the basis of the July 2013 Contract. *Id.*

The 2014 Purchase Agreement provides that it is effective only as of "the date of its acceptance *and* execution." Thomas Aff. Ex. 7 at 1 (emphasis added). In addition, the language above the signature block of the unexecuted 2014 Purchase Agreement states "IN WITNESS HEREOF, the parties hereto have caused this Agreement to be *duly executed* by authorized representatives" and contains a space for the signatures of "Bombardier Aerospace Corporation" and "Rider Limited." *Id.* Ex. 7 (emphasis added). The 2014 Purchase Agreement also contains a merger clause stating [redacted]

[redacted]." *Id.* Ex. 7 ¶ 10.4. These provisions taken together demonstrate the parties' intent to be bound only once a purchase agreement was signed by both parties.[12] *See Nat'l Gear & Piston, Inc.* 861 F. Supp. 2d at 357 (finding the first factor favored defendants where the agreement contained substantially similar language to the language used in the 2014 Purchase Agreement, including provisions that the agreement was effective "upon the date fully executed," similar language above the signature block, and a substantially similar merger clause); *see also Kaczmarcysk v. Dutton,* 414 Fed. App'x 354, 355 (2d Cir. 2011) (summary order) (finding that while the presence of the merger clause is not dispositive, it "is persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement."); *Ciaramella v. Reader's Digest Ass'n,* 131 F.3d 320, 324-25 (2d Cir. 1997) (finding "numerous indications" in the proposed agreement "that the parties did not intend to bind themselves until the [agreement] had been signed," such as statements that the agreement would not become effective until signed by both parties and a merger clause); *R.G. Grp.*, 751 F.2d at 76 (holding that each factor "unequivocally supports" defendant, where the agreement "declared on its face that 'when duly executed' it would set forth the parties' rights and obligations, that there were no other agreements between the parties, and that any modification in the agreement would also have to be in writing and signed"); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261-62 (2d Cir. 1984) (holding that Defendant was not bound by a draft agreement where the drafts and testimony demonstrated that the agreement would be binding "when executed and delivered").

In light of all of the above suggesting the parties did not intend to be bound absent a fully executed agreement, the July 2013 Contract and emails sent and received during and after the

[12] The 2012 Purchase Agreement contains substantially similar provisions as the 2014 Purchase Agreement. *See id.* Ex. 3 at 1, 9, 14.

Defendant's Board's approval of the contract terms are insufficient to show that the parties intended to be bound in the absence of an executed agreement. Statements from Defendant that it "[l]ooks like we have a deal," Compl. ¶ 72; Thomas Aff. Ex. 4, and "confirm[ing] we have board approval to proceed in accordance with our discussions in NY," Compl. ¶ 73, Thomas Aff. Ex 5, are insufficient to negate the language in the MOU and the 2014 Purchase Agreement (which allegedly contain the same language as the version of the agreement in existence when Defendant's Board approved the terms of the sale of the second G7000). *See R.G. Grp.*, 751 F.2d at 76 (holding that the parties' alleged handshake agreement on the deal was not sufficient to show a mutual intent to be bound in light of the reservation of rights found in the parties' other deeds and words); *Ciaramella,* 131 F.3d at 325 (finding the statement "[w]e have a deal" was not an explicit waiver of an express signature requirement); *Davidson Pipe Co. Inc. v. Laventhol and Horwath*, No. 84 Civ. 5192 (LBS), 1986 WL 2201, at *5 (S.D.N.Y. Feb. 11, 1986) (finding the statement "we have a deal" was insufficient to bind the parties where the cover letter attached to the draft agreement referred to the agreement as "the proposed settlement agreement" and the agreement contained a merger clause). Thus, the emails surrounding the July 2013 Contract, particularly when considered in context with the language in the March 2012 MOU and the 2014 Purchase Agreement, suggest that the parties did not intend to be bound by the July 2013 Contract absent a fully executed agreement.

b. Partial Performance

The second factor is whether one party has partially performed and whether that performance has been accepted by the party disclaiming the existence of an agreement. *Ciaramella*, 131 F.3d at 325 (citing *R.G. Grp.*, 751 F.2d at 75). Defendant contends that the purchase agreement for the second G7000 was not partially performed because Plaintiffs did not

fulfill their obligation to deposit [redacted] under the agreement. Def.'s Mem. at 12. Conversely, Plaintiffs explain that the purchase agreement attached to the MOU governs when the deposit is due and explicitly states that it is due [redacted].[13] *See* Pls.' Opp'n Mem. at 21 n.25. To the extent Plaintiffs separately address partial performance, they seem to contend that they partially performed their obligations because they had already purchased two planes from Defendant for over [redacted] pursuant to their three-plane package deal. Moreover, Plaintiffs put down a [redacted] deposit for the second G7000 pursuant to the LOI. Compl. ¶ 37. Even assuming this factor favors Plaintiffs, courts have found the second factor is "not dispositive, and in some cases it is given little weight." *Nat'l Gear & Piston, Inc.*, 861 F. Supp. 2d at 357-58; *see also United States v. U.S. Currency in the Sum of $660,200*, 423 F. Supp. 2d 14, 28 (E.D.N.Y. 2006) ("it is the second factor that appears to have had the least sway with courts").

c. Agreement on All Terms

Plaintiffs contend that the parties had come to an agreement on all material terms for the purchase of the second G7000, which were allegedly approved in July 2013 by Defendant's Board of Directors, and that any changes made thereafter were "minor, technical" drafting points. Compl. ¶¶ 5, 74, 76, 78. The one exception noted by Plaintiffs was the [redacted] provision proposed by Defendant to address the late delivery of the second G7000. *Id.* ¶ 77. However, Plaintiffs contend that the [redacted] provision is not an open term because they accepted the provision as suggested by Defendant. *Id.* ¶¶ 77, 78. Plaintiffs also allege that besides the [redacted] provision in the 2014 Purchase Agreement, the purchase agreement

[13] The 2014 Purchase Agreement contains the identical provision. Thomas Aff. Ex. 7.

attached to the MOU and the terms approved by Defendant's Board in July 2013, were materially the same. *See id.* ¶ 77.

Defendant vehemently disputes these allegations and contends that the parties have not agreed to all terms in the 2014 Purchase Agreement. Def.'s Mem. at 12-13. According to Defendant, if the 2014 Purchase Agreement is incomplete, then the July 2013 Contract, which Defendant characterizes as a "purported oral agreement" that mirrors the 2014 Purchase Agreement, is also incomplete. *See* Def.'s R. Mem. at 1. Defendant points to the February 18, 2014 cover email to the 2014 Purchase Agreement, which stated that the attached agreement was for Defendant's "consideration." Def.'s Mem. at 12-13 (citing Compl. ¶¶ 75, 77), Def.'s R. Mem. at 3; Thomas Aff. Ex. 7. Moreover, the 2014 Purchase Agreement itself was stamped "Rider Draft 02/18/14" on the upper left-hand corner of each page. Def.s' R. Mem. at 3; Thomas Aff. Ex. 7.

Defendant contends that the [redacted] provision in the 2014 Purchase Agreement remains an open term because, while Defendant's proposal stated that the [redacted]," Thomas Aff. Ex. 6, the 2014 Purchase Agreement allowed Plaintiffs [redacted]. Def.'s Mem. at 13; Thomas Aff. Ex. 7 ¶ 14.1 (the 2014 Purchase Agreement provides that "[redacted] . . . .") (emphasis original).

Defendant also alleges that the 2012 and 2014 Purchase Agreements were materially different, pointing out the differences in the agreements' provisions for (i) [redacted], (ii) [redacted], (iii) [redacted], and (iv) [redacted]. Def.'s Opp'n Mem. at 7, 13 n.3. While Plaintiffs concede that "a few changes were made to the [purchase agreement] between January 2012 and February 2014," Plaintiffs plausibly contend that these changes merely show, consistent with the Complaint, that the parties negotiated the terms of the Purchase Agreement at various times before July 2013. Pl.'s Opp'n Mem. at 18-19.

Defendant also attempts, with varying degrees of success, to identify the specific terms left open in the 2014 Purchase Agreement: (1) the amount of a credit to be taken by Plaintiffs against their initial [redacted] deposit, Thomas Aff. Ex. 7 ¶ 2.1; (2) if and when [redacted] may be claimed by Plaintiffs, *id.* ¶ 8.6; and (3) missing schedules including a [redacted] to be provided by Defendant, *id.* ¶¶ 2.1(i), 6.4; Def.'s R. Mem. at 3. However, some, but not all, of these terms were meant to be finalized at some point *after* the agreement's execution. Specifically, the 2014 Purchase Agreement noted that [redacted]. Thomas Aff. Ex. 7 ¶¶ 3.1. Moreover, the 2014 Purchase Agreement states that [redacted]. *Id.* ¶ 2.1. Similarly, the 2014 Purchase Agreement required that the [redacted] be provided "[redacted]." *Id.* ¶ 6.4 (emphasis added). While the amount of credit Plaintiffs may take against their initial [redacted] deposit is left blank, [redacted]. *Id.* ¶ 2.1(i). Lastly, the term left open in the provision regarding [redacted] identified by

Defendant as incomplete, ¶ 8.6, relates to the date upon which the buyer would be entitled to claim [redacted], not the actual amount of [redacted] the buyer would be entitled to.

"Parties are not obliged to negotiate every final detail of a contract before a binding preliminary agreement exists." *FCOF UB Sec. LLC*, 663 F. Supp. 2d at 230 (finding the plaintiffs made a facially plausible claim that the defendant was bound by obligations arising from the preliminary agreement where the agreement "referred to a specific pool of assets, and contains language suggesting the parties intended to be bound by a pricing mechanism defined in the [agreement].") (citing *Vacold LLC*, 545 F.3d at 128). While there is a strong presumption against finding a binding contract where open terms exist, the parties' intent is controlling and legitimately bargained for contract expectations should not be denied. *See Vacold LLC*, 545 F.3d at 128. While the 2014 Purchase Agreement is clearly labeled a draft, as alleged, the agreement contains most if not all material terms that were negotiated for although not signed off on. However, as discussed *infra* at Section IV.A.iii, Plaintiffs plausibly allege that Defendant's failure to execute was in bad faith. Accordingly, this factor favors neither party.

d. Agreement is Usually the Type Committed to Writing

The Second Circuit has "found that the complexity of the underlying agreement is an indication of whether the parties reasonably could have expected to bind themselves orally." *Ciaramella*, 131 F.3d at 326. Here, a purported contract for the purchase of a long-range airplane worth [redacted] of dollars purchased years prior to manufacture and delivery may be assumed to be a complex contract normally committed to writing. However, "the question of whether it is customary to accord binding force to a certain type of preliminary agreement is a question of fact to be determined, in significant part, based on industry custom." *Sawabeh Info.*

Services Co. v. Brody, 832 F. Supp. 2d 280, 308 n.198 (S.D.N.Y. 2011); *FCOF UB Secs. LLC*, 663 F. Supp. 2d at 231.

In sum, the facts as alleged point to the conclusion that the parties did not intend to be bound to the terms of an agreement—whether the July 2013 Contract or the 2014 Purchase Agreement —absent its execution. "While courts are 'often reluctant to rule on the issue of intent to form a binding agreement in a judgment on the pleadings, and must be cautious in making such determinations,'" where "the language of the agreement makes clear that Defendants did not intend to be bound until the Agreement was executed, and Plaintiff has not offered plausible allegations to the contrary," courts have found the plaintiff failed to adequately allege the existence of a Type I agreement. *Nat'l Gear & Piston, Inc.*, 861 F. Supp. 2d at 358 (quoting *Spencer Trask*, 383 F. Supp. 2d at 439); *id.* at 358 n.5 (declining to consider an affidavit from the defendant's vice president attached to the plaintiffs' opposition as evidence to show the party's intent to be bound by a Type I preliminary agreement because it was not incorporated by reference into the complaint, and therefore could not be considered on a motion to dismiss, but noting that "[n]eedless to say, were Plaintiff to allege this in a Second Amended Complaint, it might change the Court's analysis.") (citing *Bitumenes Orinoco, S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485 (LAP), 2007 WL 485617, at *13-15 (S.D.N.Y. Feb. 13, 2007)).

The question for this Court is whether Plaintiffs adequately assert plausible allegations to contradict the evidence that suggests the parties did not intend to be bound by an unexecuted agreement. Taking the allegations in the Complaint as true, as discussed *supra* at Section IV.A.i.a, the Court finds that Plaintiffs' allegations of an intent to be bound does not adequately contradict the emails concerning the purchase agreements or the express written terms of the MOU and the 2014 Purchase Agreement (and earlier purchase agreements) that the parties did

not intend to be bound by an unexecuted agreement. "Further, negotiating 'numerous' contract drafts after reaching a preliminary agreement on some terms has been held by the Second Circuit as strong evidence that the parties intended to remain unbound pending the execution of formal documentation." *Bear Stearns Inv. Products, Inc.*, 401 B.R. at 619. Accordingly, Plaintiffs have not plausibly alleged the existence of a Type I preliminary agreement. Defendant's motion to dismiss counts one and three, which seek relief on the basis of the breach of the July 2013 Contract, is granted.[14]

ii. Type II Agreement

Counts two and four concern the MOU entered into on March 31, 2012, which Plaintiffs allege is an enforceable Type II agreement. The Second Circuit has articulated five factors courts should consider when determining whether an agreement is a Type II agreement that imposes an obligation to negotiate in good faith: "(1) whether the intent to be bound is revealed by the language of the agreement; (2) the context of the negotiations; (3) the existence of open terms; (4) partial performance; and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transactions." *Brown*, 420 F.3d at 157 (citing *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989)). While the considerations for determining the plausible existence of a Type I as compared to a Type II binding agreement overlap significantly, in the context of determining the existence a Type II agreement, courts place more emphasis on the context of the negotiations and less on the existence of unresolved terms. *See Brown*, 420 F.3d at 157; *Tribune*, 670 F. Supp. at 499 (finding that considerations applied to a determination of a Type II agreement are similar to considerations for a Type I agreement, but "must be applied in a different way"); *Spencer Trask Software & Info. Svcs. LLC*,

[14] As discussed, the Court would reach the same conclusion if Plaintiffs were seeking to enforce the 2014 Purchase Agreement.

383 F. Supp. 2d at 441 (finding Type I agreement considerations to be instructive in discerning a Type II agreement but explaining that less of a focus is placed on the existence of unresolved terms in considering a Type II agreement); *see also FCOF UB Sec. LLC*, 663 F. Supp. 2d at 229.

a. Intent to be Bound

As with a Type I agreement, when evaluating the existence of a Type II agreement, "the language of the agreement," is the most important factor. *Madu, Edozie & Madu, P.C.*, 265 F.R.D. at 126 (citing *Tribune*, 670 F. Supp. at 499); *Arcadian Phosphates, Inc.*, 884 F.2d at 72 ("The first factor, the language of agreement, is the most important."). Here, the MOU expressly states the parties' intention: "[i]mmediately after the FAA certification is obtained for the [XRS], Buyer and Seller shall negotiate in good faith with the intent and design to conclude and sign . . . the Aircraft Purchase Agreement for the purchase of the second Global 7000 aircraft." Compl. ¶ 62; Thomas Aff. Ex. 3. There is no dispute that on March 31, 2012 the parties executed the MOU or that shortly thereafter the FAA certification was obtained for the XRS. *See* Compl. ¶¶ 62-64, 67; Thomas Aff. Ex. 3.

In order to avoid the effect of the MOU's explicit language, Defendant argues that the MOU was not in effect in 2014 because the MOU obligated the parties to negotiate a final agreement "immediately" after FAA certification of the XRS was obtained. *See* Def.'s Opp'n Mem. at 16. Defendant notified Plaintiffs on April 24, 2012 that FAA certification was received for the XRS but the parties continued negotiating the purchase agreement for the second G7000 into 2014. Compl. ¶¶ 67, 77. Defendant, however, fails to account for the fact that it was the Vice President of Bombardier Regional that reached out to Plaintiffs to confirm that they "would like to continue negotiating the second G7000 . . . *based on this Memorandum of Understanding*" on May 24, 2013, over one year after FAA certification was obtained. Compl. ¶

70 (emphasis added). Plaintiffs confirmed that negotiations should continue and the parties resumed negotiations starting in June 2013 and continuing through May 9, 2014, when Defendant told Plaintiffs they would not execute the 2014 Purchase Agreement. *See Id.* ¶¶ 70-83. While there were temporal gaps in the parties' negotiations, Plaintiffs have sufficiently explained the reasons for these gaps. *See id.* ¶¶ 74, 77 n.6. Moreover, Defendant reached out to Plaintiffs to resume negotiations a full year after the condition—FAA certification of the XRS—was met, effectively negating any immediacy requirement in the MOU. *Id.* ¶ 70. As alleged, the MOU was in effect throughout the parties' negotiations.

b. Context of Negotiations And Partial Performance

Plaintiffs allege that the purchase and sale of the second G7000 was acknowledged to be part of a package deal that included Plaintiffs' purchase of the XRS and the first G7000. Compl. ¶¶ 2, 44. The parties began negotiations in 2009 and simultaneously negotiated and executed the purchase agreement for the XRS and the LOIs for the two G7000s. *Id.* ¶¶ 28, 29, 33-35. Pursuant to the LOIs, Plaintiffs made two [redacted] deposits to reserve the two G7000s. *Id.* ¶ 37. The parties continued negotiating various issues, including production delays with the XRS, over the next three plus years. *Id.* ¶¶ 39-42, 75. In 2011, the parties extended the LOI for the second G7000 an additional two years and on April 8, 2011, executed the purchase agreement for the first G7000. *Id.* ¶¶ 41, 42. In March 2012, the parties signed the MOU, which was intended to resolve issues surrounding the continued delays in the delivery of the XRS by granting [redacted] concessions to Plaintiffs and requiring the parties to "negotiate in good faith with the intent and design to conclude and sign" the purchase agreement for the second G7000. *Id.* ¶ 62.

The sheer length of these negotiations—the alleged package deal was negotiated on and off from 2009 through 2014, while the purchase agreement for the second G7000 was negotiated on and off from 2012 through 2014—supports a finding that a Type II agreement existed. *See Learning Annex Holdings, LLC v. Whitney Educ. Grp., Inc.*, 765 F. Supp. 2d 403, 415 (S.D.N.Y. 2011) (finding that a document that was "the culmination of several months of discussions and negotiations between the parties" weighed in favor of finding a Type II agreement); *EQT Infrastructure Ltd. v. Smith*, 861 F. Supp. 2d 220, 230 (S.D.N.Y. 2012) ("Here, the LOI contemplated that Plaintiff would 'expend significant time, effort, and expense in connection with the Possible Transaction,' . . . and Plaintiff did so after the LOI was executed, hiring lawyers, accountants, and consultants, at a total cost of $1.5 million so far, to conduct due diligence and draft documents necessary to complete the Possible Transaction. This effort weighs in favor of finding that Plaintiff and Defendants were bound to continue to negotiate in good faith."). The fact that at least three drafts purchase agreements for the second G7000 were exchanged by the parties also supports finding a Type II agreement was plausible alleged. *See Gas Natural, Inc.*, 33 F. Supp. 3d at 382 (finding that the fact the parties exchanged several drafts of the LOI supported the existence of a Type II agreement). Accordingly, this factor favors Plaintiffs.

c. Existence of Open Terms

"While courts have found the existence of open terms to indicate the parties' intention not to be bound to the terms of a preliminary agreement, courts have found that factor to play a less significant role in the determination of whether the parties evinced an intent to be bound to negotiate those open terms in good faith." *Spencer Trask Software and Info. Services LLC*, 383 F. Supp. 2d at 447. Here, the parties agreed to negotiate "with the intent and design to conclude

and sign" the purchase agreement *and* attached a draft purchase agreement which specified *inter alia* the item to be purchased, the price to be paid, and the schedule for delivery. Thomas Aff. Ex. 3. *See, e.g.*, *FCOF UB Sec. LLC*, 663 F. Supp. 2d at 230 ("even if necessary terms to a binding agreement remain unresolved, FCOF has sufficiently alleged that the parties intended to be bound to negotiate in good faith toward an ultimate contractual goal."). Even if the purchase agreement attached to the MOU or the 2014 Purchase Agreement contains some open terms, this is not fatal to finding Plaintiffs adequately allege the existence of a Type II agreement. *See FCOF UB Sec. LLC*, 663 F. Supp. 2d at 230 ("FCOF also alleges that both parties were in the midst of working toward a final agreement, as agreed upon in the Initial Commitment, when MorEquity broke off negotiations. Taken as true, FCOF's allegations support its claim that the Initial Commitment created an enforceable obligation to negotiate toward a final agreement.").

d. Necessity of Putting the Agreement in Final Form

"Type II agreements, by definition, comprehend the necessity of future negotiations and contracts, so that necessity—explicitly contemplated here—does not preclude a finding of a Type II agreement." *See EQT Infrastructure Ltd.*, 861 F. Supp. 2d at 230 (citing *Brown*, 420 F.3d at 158). Accordingly, this factor favors Plaintiffs.

In sum, all factors favor Plaintiffs and they have therefore plausibly alleged the existence of a Type II agreement. Accordingly, Defendant's motion to dismiss counts two and four, which seek relief under the MOU, is denied.

iii. Breach of the MOU

To adequately allege a claim for breach of contract, Plaintiffs must plausible allege not only the existence of a binding contract, but also must allege that the contract was breached. *Gas Natural, Inc.*, 33 F. Supp. 3d at 377-78. Here, Plaintiffs allege that Defendant breached the MOU's obligation to "negotiate in good faith with the intent and design to conclude and sign"

the purchase agreement by (1) asserting a new condition—Defendant's President's approval of the sale—that was not mentioned in the MOU or the 2014 Purchase Agreement, *id.* ¶¶ 81-83; and (2) negotiating with and ultimately selling the plane to a third party in violation the parties' alleged agreement to negotiate exclusively with one another. *Id.* ¶¶ 7, 61, 64, 84. "Courts in this District find bad faith when a party attempts to alter the terms on which the parties have already reached agreement" and "in some instances, the duty of good faith might preclude a seller from soliciting offers from, or otherwise negotiating with, third parties." *Gas Natural, Inc.*, 33 F. Supp. 3d at 383, 384 (finding the plaintiff had not alleged bad faith by defendants for terminating negotiations after receiving a competing offer where "the parties specifically contemplated and rejected an exclusivity clause"). Additionally, whether the duty of good faith was breached "is ordinarily a question of fact to be determined by the jury or other finder of fact." *Id.*; *see also Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 98 (2d Cir. 2007). Accordingly, at this stage, Plaintiffs have adequately alleged Defendant breached the MOU and Defendant's motion to Dismiss counts two and four is denied.[15]

B. Equitable Claims

Defendant also moves to dismiss Plaintiffs' quasi-contractual claims for promissory estoppel and unjust enrichment. "As a preliminary matter, '[a]t the pleading stage, [a party] is not required to guess whether it will be successful on its contract . . . or quasi-contract claims.'" *Growblox Sciences, Inc. v. GCM Admin. Services, LLC*, No. 14 Civ. 2280 (ER), 2015 WL 3504208, at *9 (S.D.N.Y. June 2, 2015) (quoting *St. John's Univ., New York v. Bolton*, 757 F.

[15] Defendant argues that "[t]he Complaint concedes that any breach 'was not the result of the failure of the parties' good faith negotiations." Def.'s Mem. at 18 (citing Compl. ¶ 7). However, the Complaint actually asserts that while the parties initially reached a "definitive agreement" for the sale of the G7000 through good faith negotiations, Defendant "reneged" on that agreement in order to sell the G7000 to a third party, in violation of the MOU and contract that required Defendant "negotiate in good faith and exclusively with plaintiffs while the MOU was in force." Compl. ¶ 7.

Supp. 2d 144, 183 (E.D.N.Y. 2010)). Under the Federal Rules of Civil Procedure parties may "set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones," FED. R. CIV. PRO. 8(d)(2), and "may state as many separate claims or defenses as it has, regardless of consistency." *Id.* at 8(d)(3). "Even where allegations are not specifically denominated as alternative claims '[Rule 8(d)] offers sufficient latitude to construe separate allegations in a complaint as alternative theories, at least when drawing all inferences in favor of the nonmoving party as we must do in reviewing orders granting motions to dismiss.'" *St. John's Univ.*, 757 F. Supp. 2d at 183-84 (quoting *Adler v. Pataki*, 185 F.3d 35, 41 (2d Cir. 1999)) (alternations in original).

i. Promissory Estoppel

"A claim for promissory estoppel requires Plaintiff to show 1) a clear and unambiguous promise; 2) reasonable and foreseeable reliance on that promise; and 3) injury to the relying party as a result of the reliance." *Kaye v. Grossman*, 202 F.3d 611, 615 (2d Cir. 2000); *Gas Natural, Inc.*, 33 F. Supp. 3d at 378. Plaintiffs allege that 1) Defendant made a series of clear and unambiguous promises to Plaintiffs that they would participate in the package deal for the sale of three planes, (2) Plaintiffs relied on these promises by forgoing opportunities with Defendant's competitors and purchasing two of the three planes involved in the alleged package deal from Defendant, and (3) as a result of that reliance, Plaintiffs were injured by purchasing two planes they would not have purchased if they could not also purchase the third. *See* Compl. ¶¶ 116-121. Defendant, however, contends that the merger clauses in the purchase agreements for the XRS and the first G7000 preclude Plaintiffs' reliance on statements from Defendant regarding the package deal made before the agreements were entered and that Plaintiffs cannot logically have relied on statements made after the agreements were entered. Def.'s Mem. at 19-

20. While Plaintiffs concede that they are not arguing that they entered the purchase agreements for the XRS in 2009 or the first G7000 in 2011 in reliance on promises made in 2012 through 2014, Plaintiffs instead contend that they relied on promises allegedly made by Defendant in deciding not to walk away from the package deal by either attempting to terminate the earlier purchase agreements or ending negotiations for the purchase of the second G7000. Pl.'s Opp'n Mem. at 29-30 (citing Compl. ¶¶ 45, 48, 55-57, 120). Accordingly, Plaintiffs adequately plead the three elements of promissory estoppel as an alternative claim and Defendant's motion to dismiss count five is denied.

ii. Unjust Enrichment

"Under New York law, 'a plaintiff seeking an equitable recovery based on unjust enrichment must first show that a benefit was conferred upon the defendant, and then show that as between the two parties, enrichment of the defendant was unjust.'" *Spencer Trask Software and Info. Services LLC*, 383 F. Supp. 2d at 448 (quoting *Reprosystem, B.V.*, 727 F.2d at 263). The alleged benefit Defendant received was its ability to sell the second G7000 to a third party for [redacted] more than the price Defendant would have received from Plaintiffs. Compl. ¶ 124. The issue here, as aptly pointed out by Defendant, is that Defendant's sale of the G7000 to a third party is only unjust if Defendant violated an obligation to negotiate in good faith and/or sell the G7000 to Plaintiffs. Def.'s Mem. at 21-22. This obligation only exists under the MOU or the 2014 Purchase Agreement. Accordingly, as pled, Plaintiffs' unjust enrichment claim on its face is duplicative of their breach of contract claim and thus, must be dismissed. Defendant's motion to dismiss count six is granted.

C. Damages

The parties devote a significant portion of their papers to arguments about whether Plaintiffs' requested relief, specific performance and money damages, including expectation damages, are available remedies for Plaintiffs' claims.[16] This issue, however, is premature at the motion to dismiss stage. *See FCOF UB Sec. LLC*, 663 F. Supp. 2d at 231 n.2 ("Because the Court is not determining whether the Initial Commitment constitutes a binding agreement [as the court has not yet determined as a matter of law that a contract, or what type of contract (Type I or II), exists] it is premature to determine what form of damages might be appropriate. The Court will not address [defendant's] motion to dismiss as to the issue of damages or specific performance."); *Goodstein Const. Corp. v. City of New York*, 111 A.D.2d 49, 52, 498 N.Y.S.2d 175, 177 (1st Dep't 1985) (denying the defendant's motion to dismiss finding "the designation agreements did impose the implied obligations of good faith, cooperation and fair dealing, implicit in any contract. Upon a breach of these obligations, the law does afford a remedy" but explaining that "[f]inal resolution of these issues, however, cannot be made on a motion addressed to the face of the pleading nor on the basis of any speculation as to the extent of resulting damages."), *aff'd*, 494 N.E.2d 99, 100, 67 N.Y.2d 990, 996 (1986) ("Similarly immaterial on a motion addressed to the sufficiency of the pleading is defendant's claim that

[16] As discussed *supra*, Defendant's motion to dismiss counts one and three, which sought specific performance and monetary damages for breach of contract, respectively, was granted. Therefore, Plaintiffs' request for specific performance of the contract ordering Defendant to sell the second G7000 to Plaintiffs has been dismissed.

Defendant's motion to dismiss counts two and four, however, was denied. Therefore, Plaintiffs' request under count two, for specific performance of the MOU ordering Defendant to finalize and sign the 2014 Purchase Agreement, and Plaintiffs' request under count four, for money damages for the alleged breach of the MOU in the form of incidental and expectation damages (the difference between the price of the G7000 in the 2014 Purchase Agreement and either the market price of the G7000, the price the G7000 was sold for to the third party, or the market price of a comparable aircraft) are not dismissed.

plaintiff cannot recover all of the items of damage claimed.");[17] *see also Ace Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 ex rel. HSBC Bank USA, Nat. Ass'n v DB Structured Products, Inc.*, 5 F. Supp. 3d 543, 557 (S.D.N.Y. 2014) ("The Court has already determined that the enforceability of the sole remedy clauses need not be addressed at this stage, and given that courts are generally hesitant in any event to strike remedies before the parties have presented any facts bearing on the suitability of equitable relief, the Court also declines to decide whether the sole remedy clauses bar Plaintiffs rescissory damages claims.").

The Court recognizes that the Second Circuit has explained that although out-of-pocket costs incurred in the course of good faith partial performance are appropriate, lost profits are not available where no agreement is reached. *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 431 (2d Cir. 2011) (citing *Goodstein*, 604 N.E.2d at 1360-61, 80 N.Y.2d at 373-74; *Arcadian Phosphates*, 884 F.2d at 74 n.2). However, whether lost profits may *never* be recovered for a party's failure to negotiate in good faith is unclear. *See Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 429 (8th Cir. 2008) ("We are not as confident as the district court that *Goodstein II* should be read as categorically precluding benefit-of-the-bargain damages for all breaches of binding preliminary agreements to negotiate a final agreement in good faith. This is a difficult, largely unsettled question of remedies.") (applying New York law); *but see Arcadian Phosphates*, 884 F.2d at 74 n.2 ("[defendant's] alleged failure to bargain in good faith is not a but-for cause of [plaintiff's] lost profits, since even with the best faith on both sides the deal might not have been closed . . . . Because attributing [plaintiff's] lost profits to [defendant's] bad faith may be speculative at best, the district court may decide that damages based on . . . out-

[17] The New York Court of Appeals in *Goodstein Const. Corp. v. City of New York*, 604 N.E.2d 1356, 1360-61, 80 N.Y.2d 366, 373-74 (N.Y. 1992), upheld a trial court's determination on summary judgment that lost profits were not available for a breach of the duty to negotiate in good faith.

of-pocket costs are most appropriate."); *Goodstein*, 604 N.E.2d at 1360-61, 80 N.Y.2d at 373-74 (same).

Moreover, here, the MOU imposes an unusual obligation that the parties "shall negotiate in good faith and *with the intent and design to conclude and sign*." Compl. ¶ 62 (emphasis added); *Stanford Hotels Corp. v. Potomac Creek Assocs., L.P.*, 18 A.3d 725, 738 (D.C. 2011) (noting that if "there is not another decided case where a court ordered a party to sign an agreement pursuant to a preliminary Type II agreement of the sort involved here, that is likely because there has not been another case where a party bound itself to sign a subsequent agreement, as [the lower court] found that Potomac Creek—perhaps unusually—did here");[18] *c.f.* *Goodstein*, 604 N.E.2d at 1360, 80 N.Y.2d at 373 (explaining the parties' only obligation under the agreement was to negotiate in good faith and that the defendant "was neither bound to agree to [the final agreement] nor continue the negotiating process."). While Plaintiffs may not ultimately be able to recover their requested relief, at this stage of the proceedings, Plaintiffs have plausibly alleged that it *may* be entitled to its requested relief.

[18] The obligation at issue in *Standford Hotels*, 18 A.3d at 727, required the parties to "negotiate in good faith with a view toward signing" a final agreement. The *Standford Hotels* court found specific performance was an available remedy but noted that "if, however, the parties had not yet come to agreement on the terms of sale and drafted a Definitive Agreement ready for execution, the specific performance Stanford seeks might not be available as a remedy. . . . due to the principle that specific performance is a remedy that compels the performance of the contract in the *precise terms* agreed upon." *Id.* at 737.

V. Conclusion

For the reasons set forth above, Defendant's motion to dismiss is GRANTED in part and DENIED in part. Specifically, Defendant's Motion to Dismiss as to counts one, three, and six is granted while the Motion to Dismiss as to counts two, four, and five is denied. The parties are directed to submit a proposed Discovery Plan and Scheduling Order by October 6, 2015. The Clerk of the Court is respectfully directed to terminate the motion, Doc. 10.

It is SO ORDERED.

Dated: September 22, 2015
New York, New York

Edgardo Ramos, U.S.D.J.