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Re: Rhodes v. SilkRoad Equity, LLC
C.A. No. 2133-VCN
Date Submitted: March 24, 2009

Dear Counsel:

I. INTRODUCTION

The founder of a company, in substance, sold 80% of his company in exchange for an infusion of much-needed capital. Not long thereafter, he was forced out and his interest was extinguished in accordance with a buy-back provision in the purchase agreement. The price of that buy-back, he asserts, was unfair. This litigation has evolved from that context and now involves a wide range of claims and counterclaims, some more significant than others. In an effort to narrow the issues

for trial, both sides have moved for partial summary judgment. In this letter opinion, the Court addresses those competing motions; although a few issues may be resolved under Court of Chancery Rule 56, most, because of disputes of material fact, must await trial for their resolution.

II. BACKGROUND[1]

InterAct Public Safety Systems ("InterAct" or the "company") is a North Carolina software development corporation founded by Plaintiff William A. Rhodes III ("Rhodes"). Plaintiff Wijnant van de Groep ("van de Groep") is Rhodes's son-in-law, and a former officer and shareholder of InterAct. A contract with BellSouth in 2000 increased the growth prospects for the company and left InterAct in need of increased capital. InterAct initially engaged Frontenac VIII Limited Partnership ("Frontenac") as its equity investor. Two days before the scheduled closing in October 2004, Frontenac backed out of the deal.

Shortly thereafter, Rhodes and van de Groep found a replacement in Defendants Andrew J. Filipowski ("Filipowski") and Matthew G. Roszak ("Roszak"). Defendant SilkRoad Equity, LLC ("SilkRoad"), a Filipowski controlled company,

[1] For a more detailed understanding of how the parties reached their current state of contentiousness, see *Rhodes v. SilkRoad Equity, LLC*, 2007 WL 2058736 (Del. Ch. July 11, 2007).

entered into a stock purchase agreement in December 2004 with Rhodes and Van de Groep, whereby SilkRoad acquired 80% of the outstanding stock of InterAct in exchange for: (i) a $100 payment to Rhodes and Van de Groep; (ii) a $5 million contingent payment to Rhodes; and (iii) a $10 million line of credit to InterAct (the "Stock Purchase Agreement" or "SPA").

The SPA included a provision granting Defendants the option to purchase the Plaintiffs' shares for "fair market value" in the event that they were later removed as directors. Less than a year and a half later, on July 25, 2006, Plaintiffs received notice that Defendants had elected to exercise that option, and to purchase the remaining 20% interest from the Plaintiffs. The purchase price was based on a valuation by Houlihan, Lokey, Howard & Zukin ("Houlihan").

In their complaint, Plaintiffs allege a comprehensive scheme of alleged self-dealing designed to depress the value of the company for the purpose of enabling the purchase of the Plaintiffs' shares at a significant discount.[2] In Count One, Plaintiffs allege that Defendants breached their fiduciary duties by engaging in self-dealing transactions involving four companies under Defendants' control (the "sister

[2] The Court previously granted Defendants' motion to dismiss as to a number of other claims. *Rhodes*, 2007 WL 2058736.

companies"[3]), and by failing timely to pay IRS payroll penalties incurred by InterAct before the SPA. In Count Four, Plaintiffs accuse Defendants of self-dealing in the InterAct acquisition of TrueSentry, another Defendant controlled entity. Defendants counterclaim. In Count One, they accuse Plaintiffs of breach of certain representations and warranties found in the Stock Purchase Agreement.

Defendants have moved for partial summary judgment as to Count One and Four of Plaintiffs' complaint and as to certain aspects of Count One of their counterclaim. Plaintiffs have moved for partial summary judgment as to the whole of Count One of Defendants' counterclaim. This is the Court's analysis of those motions.

III. DISCUSSION[4]

Court of Chancery Rule 56 allows for summary judgment when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] The burden is on the moving party, and

[3] Those companies are OnRamp, MissionMode, Pendulab, and SolidSpace.
[4] Counts Two and Three of the Plaintiffs' complaint are not subject to any summary judgment motion. Neither are Counts Two and Three of Defendants' counterclaims. Counts not subject to a motion for summary judgment are omitted from the Court's discussion. The Court uses the terms defendants instead of counterplaintiffs and plaintiffs rather than counterdefendants to avoid confusion.
[5] Ct. Ch. R. 56(c).

the Court views the evidence in the light most favorable to the nonmoving party.[6] "However, once the moving party has satisfied its initial burden of 'demonstrating the absence of a material factual dispute,' the burden shifts to the nonmovant to present some specific, admissible evidence that there is a genuine issue of fact for a trial."[7] If both sides put forth conflicting evidence such that there is an issue of material fact, summary judgment must be denied.[8]

A. *Defendants' Motion for Summary Judgment as to Count One of the Complaint*

Defendants have moved for summary judgment as to certain aspects of Plaintiffs' breach of fiduciary duty claims alleged in Count One. They are: (1) InterAct's relationship with OnRamp; (2) InterAct's relationship with MissionMode; (3) InterAct's relationship with Pendulab; (4) InterAct's relationship with SolidSpace; and (5) the payroll tax penalties Defendants caused InterAct to incur. These all involve, in one form or another, allegations of self-dealing in which the Defendants allegedly siphoned cash from InterAct and, thereby, depressed its value, enabling them buy out Plaintiffs' interests at a lower price. Each is discussed in turn.

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[6] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008).
[7] *Id.*
[8] *Id.*

For the purposes of this motion only, and as to InterAct's relationships with the sister companies, the Defendants' have conceded the applicability of an entire fairness standard. Entire fairness requires the demonstration of good faith, and "the most scrupulous inherent fairness of the bargain."[9] The two components of entire fairness are fair dealing and fair price. Fair dealing embraces questions of, among others, when the transaction was timed and how it was initiated, structured, negotiated, and disclosed. Fair price assures the transaction was substantively fair by examining the transaction's "economic and financial considerations."[10] These two aspects of entire fairness are not independent. Rather, "the fair dealing prong informs the court as to the fairness of the price obtained through the process."[11]

The Plaintiffs argue that InterAct's transactions with the sister companies demonstrate unfair process and price. In addressing the Defendants' motion for summary judgment, the Court focuses primarily on price because, if the Defendants are unable to show fair price, summary judgment will be denied whether a fair

[9] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).
[10] *Id.*
[11] *Valeant Pharms. Int'l. v. Jerney*, 921 A.2d 732, 746 (Del. Ch. 2007).

process is demonstrated or not.[12] Therefore, summary judgment is proper if undisputed evidence demonstrates that the rates InterAct was charged by each SilkRoad sister company were entirely fair in light of prevailing market rates for the same or similar services.[13]

1. InterAct's relationship with OnRamp

Following SilkRoad's purchase of the Company, InterAct hired OnRamp to provide marketing services. SilkRoad owned 50% of OnRamp. OnRamp allegedly charged InterAct expenses which may be divided into two categories: (i) a monthly flat-fee for its services, which is not the subject of Defendants' summary judgment request, and (ii) expenses incurred by OnRamp on behalf of InterAct from third-party vendors and subsequently charged to InterAct (the "pass-through" payments).[14] The Plaintiffs allege that OnRamp used these pass through arrangements to bill expenses of the sister companies to InterAct.[15]

[12] *Cf. id.*, 921 A.2d at 748 (noting that extraordinarily fair price terms may allow a transaction to pass the entire fairness test despite a relatively unfair process and citing *Oliver v. Boston Univ.*, 2006 WL 1064169, at *25 (Del. Ch. Apr.14, 2006)).
[13] *See Marciano v. Nakash*, 535 A.2d 400 (Del. 1987).
[14] Expenses from OnRamp came either by way of invoices or by way of an American Express card provided to OnRamp's managing member by InterAct. Maxwell Aff. ¶¶ 8-10.
[15] Am. Compl. ¶ 73(b).

Defendants move for summary judgment as to the second category, the pass through expenses. In support of their motion, the Defendants submit a written contract between InterAct and OnRamp which provides that InterAct was required to reimburse OnRamp for expenses "incurred in connection with [OnRamp's] performance of the Services,"[16] along with an affidavit from Red Maxwell, OnRamp's managing member, stating that "I only used my InterAct American Express card to charge expenses incurred while providing marketing services to InterAct."[17]

The Plaintiffs rely upon Mr. Maxwell's June 18, 2008, deposition in which he discussed the purchase of Google AdWords advertising made with his InterAct American Express card for, at least in part, the products of other Silkroad companies.[18] These statements create a fact question of whether the expenses of InterAct were intermingled with the expenses of the sister companies in OnRamp's

[16] Biondi Aff., Ex. 12 ¶ 2.
[17] Maxwell Aff. ¶ 8.
[18] DuPriest Aff., Ex. 40 at 158-61 (Maxwell Dep.) "Q. Did you ever use InterAct's American Express credit card to purchase Google AdWords for any other SilkRoad company? A. No. Well, I mean, actually, let me expand on that. If you mean, by "any other SilkRoad company"—we may do some terms for TrueSentry or TrueLook or MissionMode, but usually it was as a—as an InterAct offering. And those leads would go to InterAct's sales team."

billing, thereby precluding summary judgment. Defendants' motion for summary judgment as to the OnRamp relationship is denied.

2. InterAct's Relationship with MissionMode

The Defendants demonstrate that the prices charged to InterAct by MissionMode were below those which MissionMode would typically charge its customers. However, they fail to demonstrate that the pricing was at or below market pricing. The question asked in the entire fairness inquiry is not whether InterAct paid a fair price *vis-a-vis* other MissionMode customers but whether InterAct paid a fair price *vis-a-vis* all other buyers in the market for similar services, whether MissionMode customers or not. In other words, were the prices charged by MissionMode at or below market instead of merely at or below MissionMode's own rates? The Defendants have presented no evidence in this regard.

Defendants offer two statements in support of their motion.[19] The first, by Defendant Roszak, merely sets forth his purpose for seeking out the sister companies

[19] Despite Plaintiffs' protestations, affidavits (or deposition testimony) from parties affiliated with SilkRoad may create a material factual dispute precluding the grant of summary judgment. *Technicorp Intern. II, Inc. v. Johnston*, 2000 WL 713750, at *2 (Del. Ch. May 31, 2000) does not hold that these affidavits should be disregarded based solely on the parties' relationship with SilkRoad. Here, a legitimate business purpose has been offered for the transactions in question and there is no valid reason to suspect either affiant of giving false testimony. *See id.*

and supports a below MissionMode rate, instead of a below market rate, provision of services:

> I investigated whether MissionMode or Pendulab, both SilkRoad software development companies, could handle InterAct's needs for a below-market price. I was particularly concerned about pricing because even with the cash infusion from SilkRoad's acquisition, the company had very little money and any additional needs would likely come from SilkRoad. I specifically discussed pricing with Ted Collins, the CEO of MissionMode, and he agreed to provide software development services for substantially below what MissionMode would charge any other clients.[20]

The Defendants also offer the Affidavit of Theodore J. Collins, III, President and Chief Executive Officer of InterAct, and the founder of MissionMode. It is equally unhelpful. His entire discussion of InterAct rates is relative to other MissionMode customers rather than the larger market for similar services.[21] While he phrases the comparison in market terms, it is clear the comparison is against MissionMode's typical rates: "the stated billing rates charged by MissionMode to InterAct for the services of the MissionMode Engineers totaled less than 50% of the market rate that any third party would have been charged for comparable services."[22]

[20] Roszak Aff. ¶ 11.
[21] *See* Collins Aff. ¶¶ 5, 7, 9-10.
[22] *Id.* ¶ 10.

The Defendants argue "the fact that MissionMode cut its rate by more than half because InterAct is a sister company is certainly strong evidence that the price was fair to InterAct."[23] They may well be correct. However, the Court may not draw such an inference here. The Defendants present no evidence of how the rates MissionMode charged InterAct compare to the market, and Defendants' motion for summary judgment as to MissionMode must therefore be denied.

3. InterAct's Relationship with Pendulab

The affidavit of Steven F. McDowall, Vice President of Engineering at InterAct, provides sufficient evidence—albeit narrowly—of fair price to shift the burden to the Plaintiffs to demonstrate a material fact issue concerning the fairness of the price InterAct was charged by Pendulab. McDowall states that he was "aware of how the Pendulab billings compared to what it would cost InterAct to perform similar services in-house" and that having Pendulab perform the work provided a company a savings of over 50%.[24] He additionally "considered obtaining similar services from a company in Eastern Europe or India."[25] He decided that a Singapore company would best serve InterAct's needs, considering "comparative actual cost" as well as

[23] Defs.' Reply Br. in Supp. of Their Mot. for Summ. J. at 20.
[24] McDowall Aff. ¶ 9.
[25] *Id.* ¶ 10.

language and culture concerns.[26] He concluded that no other company offered a materially cheaper price when the efficiencies of language and culture were considered.[27] This is evidence of market price.

The Plaintiffs fail to rebut this evidence of fair price. They do, however, present a sufficiently material issue of disputed fact as to the fairness of the InterAct/Pendulab relationship to render summary judgment improper. The Plaintiffs point to evidence, both deposition and paper, which suggests that at least some Pendulab invoices included fees for non-InterAct work.[28] Defendants' motion for summary judgment as to Pendulab must therefore be denied.

4. InterAct's Relationship with SolidSpace

In the affidavit of James Capps III, President and Chief Executive Officer of SolidSpace, the Defendants presents evidence that the price paid for SolidSpace services were fair as compared to the market. He claims "a familiarity with what [SolidSpace's] competitors charge for similar services,"[29] and opines that "InterAct

[26] *Id.*
[27] *Id.*
[28] *See* Biondi Aff., Ex. 24-25; McDowall Dep. at 34-37.
[29] Capps Aff. ¶ 15.

received the best pricing it could have received from any reputable hosting services provider."[30]

The Plaintiffs sponsor facts sufficient to demonstrate a material issue as to the fairness of the pricing InterAct received from SolidSpace. Plaintiffs point to an email chain between a long-time SilkRoad employee, Peter Quintas, and Defendant Roszak in which Quintas compares rates from SolidSpace against those of industry competitors. Quintas found SolidSpace's rates to be above market ("too damn high" to use his words) and provided a comparison of SolidSpace's rates to those of its competitors.[31] The result is conflicting evidence, all of equally sparse detail, as to the fairness of SolidSpace pricing *vis-a-vis* the market. The evidence of the fairness of the SolidSpace transaction is in dispute and Defendants' motion for summary judgment as to SolidSpace must therefore be denied.

5. IRS Penalties

Before Defendants' acquisition of InterAct, the Plaintiffs failed to cause it to pay nearly $1 million in federal payroll taxes.[32] Defendants unsuccessfully appealed the penalties and interest after acquiring the company. Further penalties accrued

[30] *Id.*
[31] Biondi Aff., Ex. 28 ("$140/mbps (Level3, TimeWarner, etc.) vs. $325/mbps SolidSpace").
[32] Fay Aff., Ex. 3 (SPA) Schedule 3.7.

during the appeals process. The Plaintiffs argue that these penalties should not have been included as an expense in the financial statements used by Houlihan to value InterAct for the purposes of purchasing Plaintiffs' shares.[33]

The Defendants present competent evidence that these penalties were not included in the financials submitted to Houlihan.[34] Plaintiffs fail to present evidence to the contrary. Defendants' motion for summary judgment is therefore granted on this issue.

B. *Defendants' Motion for Summary Judgment as to Count Four of the Complaint*

Count Four alleges breach of fiduciary duty against all defendants alleging that InterAct's acquisition of TrueSentry was self-dealing not approved by a majority of disinterested directors.[35] Both parties agree that TrueSentry was never acquired by InterAct.[36] Summary judgment is granted in favor of the Defendants as to this claim.

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[33] The Plaintiffs also argue that the decision to appeal, rather than immediately pay, the payroll tax penalties constituted self-dealing by the Defendants because they chose to direct cash to themselves that should have been paid in order to minimize to the penalties. As a result, the Plaintiffs were injured by the amount of the additional penalties. The Court finds no basis for this claim. The Plaintiffs point the Court to no evidence of such intent. Additionally, the Court finds that as to these additional penalties the interests of the Plaintiffs and Defendants were aligned, as Defendants, by virtue of their ownership share, would bear 80% of the costs of any new penalty while the Plaintiffs bore 20%. In short, they each shared the incentive to avoid increased penalties. Plaintiffs fail to show that Defendants received a benefit to their exclusion.

[34] Martin Aff. ¶¶ 8-9; Supplemental Martin Aff. ¶¶ 4-5.

[35] Am. Compl. ¶¶ 92-93.

[36] Defs.' Br. in Supp. of Mot. for Summ. J. at 18; Pls.' Br. in Opp. at 12.

C. *Counterclaim Count One*

Count One of Defendants' counterclaims alleges breach of the Stock Purchase Agreement by both Plaintiffs regarding their representations and warranties concerning: (1) the balance sheet of InterAct as of September 30, 2003, and September 30, 2004 (the "Financial Statement Misrepresentations"); (2) North Carolina Sales and Use Taxes; (3) products and services provided to InterAct's customers ("Liability for Installed Systems"); and (4) the ownership or licensing of software in InterAct's possession (the "Business Software Alliance Claims.") The Plaintiffs have moved for summary judgment as to all of these claims. Defendants have moved for summary judgment as to claims (2) and (4). Each is addressed in turn.

1. Financial Statement Misrepresentations

In Section 3.6 of the Stock Purchase Agreement, Plaintiffs represented that InterAct's financial statements for 2003 and 2004 fairly presented "the financial position and the results of operations of InterAct . . . ." In Count One subsection A of the counterclaims, Defendants allege that Plaintiffs breached this representation by overstating InterAct's revenue in 2003 and 2004 with respect to contracts with the

Commonwealth of Kentucky ("Kentucky")[37] and BellSouth Mississippi ASP ("ASP").

Defendants allege that in 2003 InterAct improperly booked $3,533,617 in revenue from Kentucky even though it had only invoiced Kentucky $553,628, and that in 2004 InterAct improperly booked $5,900,393 in revenue from Kentucky even though it had only invoiced Kentucky $3,124,852.[38] Defendants allege that InterAct improperly booked $941,179 in revenue from ASP in 2004, although payment was not actually received until 2005.[39]

The debate over the propriety of these revenue recognitions centers, primarily, on whether each was reasonable under the "percentage-of-completion" revenue recognition methodology used by InterAct.[40] Whether these revenue recognitions were reasonable is a fact question for trial, and Defendants' motion for summary judgment as to this claim is denied.

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[37] The parties dispute whether arrangements with Kentucky constituted a contract at the time of the SPA.
[38] Counterclaims ¶ 13.
[39] *Id.*
[40] The parties additionally debate whether a memo from Ed McFarland and Anne Martin to Matt Roszak outlined mere recommendations for revenue recognition procedures or represented the procedure InterAct followed (or purported to follow) during the Plaintiffs' tenure. Cohen Aff., Ex. 21 (McFarland memo).

2. North Carolina Sales and Use Tax

In Section 3.7 of the Stock Purchase Agreement, Plaintiffs represented that InterAct had "paid or withheld and remitted" all taxes due and owing. In February 2005, Defendants were notified by the North Carolina Department of Revenue (the "NCDOR") that it would be conducting an audit of InterAct's tax returns, including returns for sales and use taxes.[41] On September 15, 2005, the NCDOR notified InterAct that its auditor's report indicated InterAct owed the NCDOR $233,596.31 in unpaid sales and use taxes. In Count One subsection B of the counterclaims, Defendants allege that Plaintiffs breached the representations and warranties of the Stock Purchase Agreement surrounding these sales and use taxes.

Defendants seek summary judgment in the amount of $199,683.14, the taxes ultimately paid by InterAct for the relevant period, plus costs.[42] Plaintiffs argue unfulfilled preconditions to indemnification found in the SPA require summary judgment in their favor.

Section 7.5(d) of the SPA states that if InterAct receives "a written notice of deficiency, a notice of reassessment, a proposed adjustment, an assertion of claim or

[41] Fay Aff., Ex. 14.
[42] *Id.* Exs. 22-25.

demand concerning the taxable period covered by such return" it is required to provide Plaintiffs with notice of this communication within thirty business days after receiving it. Plaintiffs claim that Defendants did not comply with this provision. However, this defense is limited by the very language of Section 7.5, which provides that:

> no failure or delay . . . [in providing notice] shall reduce or otherwise affect the obligations or liabilities of [Plaintiffs] pursuant to this Agreement, except to the extent that such failure or delay shall preclude InterAct from defending against any liability or claim for Taxes that Sellers are obligated to pay hereunder.

Thus, by the plain language of the SPA, the failure to provide notice is no bar to indemnification unless the Plaintiffs can point to InterAct's resulting inability to defend itself. Plaintiffs are unable to do so, other than the assertion that "had Plaintiffs been given the required notice, they would have at the very least filed an appeal" on InterAct's behalf.[43] Significantly, they have not shown that an appeal would have altered the eventual outcome or even would have been likely to have done so.

Plaintiffs attempt to create a material factual dispute alleging Defendants failed to attempt to collect unpaid taxes from its customers. This is unpersuasive. The

[43] Pls.' Br. in Supp. of Mot. for Summ. J. at 21.

representation found in Section 3.7 is plain on its face. The State of North Carolina found that InterAct had not paid all applicable taxes. The representation found in Section 3.7 was therefore breached. Summary judgment is granted in favor of Defendants as to this claim.[44]

3. Undisclosed Liability for Installed Systems

Certain customers secured by Plaintiffs before the closing of the Stock Purchase Agreement refused to pay InterAct because they claim to have experienced problems with the systems and software they purchased.[45] In Count One subsection C of the counterclaims, Defendants allege that Plaintiffs breached the representations and warranties set forth in Section 3.27 of the Stock Purchase Agreement. Section 3.27 states that all the products sold and services provided by InterAct were in conformity with all contractual commitments and all accompanying expressed and implied warranties.

Plaintiffs argue that they are entitled to summary judgment on this counterclaim because Defendants present no evidence that these customers' refusal to pay was due to product performance problems. However, Defendants have

[44] The record is insufficient for summary judgment as to the costs and fees associated with this counterclaim.
[45] Counterclaims ¶¶ 18-21.

demonstrated evidence, both paper and deposition, of performance problems with the systems sold to uncollected accounts.[46] Only Plaintiffs have moved for summary judgment, and thus bear the burden of showing that no material fact is in dispute. They have failed to do so, and their motion for summary judgment as to this counterclaim is denied.

4. Business Software Claims

In Count One subsection D of the counterclaims, Defendants allege that Plaintiffs are required to reimburse them for (1) a penalty paid to the Business Software Alliance ("BSA") levied as a result of unlicensed software in InterAct's possession, and (2) for money InterAct expended on software purchases. Defendants claim Plaintiffs breached SPA representations that InterAct owned all of the software it used, found under Sections 3.8 (Undisclosed Liabilities), 3.9 (Compliance with Law), 3.19 (Title to Assets), and Section 3.22 (Intellectual Property).[47]

Defendants seek summary judgment in their favor in the amount of $218,500 paid in settlement to BSA and the $521,832.47 cost of purchasing software licenses for unlicensed software in InterAct's possession—a total amount of $765,332.47.

[46] McFarland Aff.¶ 7 and Ex. 1; Fay Aff., Ex. 16 (Martin Dep.) at 272-73.
[47] Counterclaims ¶¶ 22-24.

Plaintiffs argue that these indemnifications are barred by the Stock Purchase Agreement and have moved for summary judgment in their favor.

a. *The Penalty for Past Use*

Plaintiffs argue that Section 10.4(b) of the SPA provides that Defendants could not consent to a settlement of any third party claim, such as the BSA claim, without the prior written consent of the Plaintiffs. Plaintiffs were not given the opportunity to approve, or even review, the settlement agreement with the BSA prior to its execution by InterAct.[48] Under the unambiguous language of Section 10.4(b), "Indemnitee will not consent to a settlement of, or the entry of any judgment arising from, any Indemnifiable Losses, without the prior written consent of the Indemnifying Party (which consent will not be unreasonably withheld)."

Defendants admit that they breached this "consent-to-settlement" clause. The breach of this clause creates a rebuttable presumption that prejudice to the Plaintiffs arose as a result.[49] The burden therefore shifts to the Defendants to prove a lack of prejudice by competent evidence.[50] The Defendants attempt to show such evidence by arguing the settlement arrived at was necessary and reasonable. Whether or not

[48] Roszak 30(b)(6) Dep. at 110-12.
[49] *Allstate Ins. Co. v. Fie*, 2006 WL 1520088, at *3 (Del. Super. Mar. 6, 2006).
[50] *Id.*

the settlement amount was reasonable is a contested fact question not suitable for summary judgment. Both motions as to this issue are denied.

b. *The Cost of Licensing Going Forward Use*

The BSA gave InterAct the option of either destroying unlicensed software or purchasing licenses and retaining the software. Defendants chose to purchase licenses and retain all of the software. Plaintiffs argue that at least some of the purchased licenses were for software the business had no need for, and thus should have been destroyed. Whether purchasing licenses for all of the software instead of destroying portions was reasonable is a fact question.[51] Both motions for summary judgment as to this claim are denied.

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Defendants and against Plaintiffs (i) as to Plaintiffs' challenge that the IRS penalties were improperly allowed to accrue or were included in the Houlihan valuation process; (ii) as to claims regarding the acquisition of TrueSentry; and (iii) in the amount paid ($199,683.14) by InterAct to North Carolina for use and sales taxes (but

[51] It is an odd argument, and one initially difficult to accept, that the Defendants were unreasonable in purchasing licenses for software that Plaintiffs themselves deemed so necessary to the business that unlicensed acquisition was warranted.

not with respect to any associated fees and costs). Otherwise, the motions for summary judgment are denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K