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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KIER CONSTRUCTION, LTD., Plaintiff, v. RAYTHEON COMPANY and RAYTHEON ENGINEERS & CONSTRUCTORS INTERNATIONAL, INC., Defendants.	)	Civil Action No. 19526

MEMORANDUM OPINION

Submitted: November 30, 2004
Decided: March 10, 2005
Cover Page Revised: March 14, 2005

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PARSONS, Vice Chancellor.

This action stems from a 1998 construction subcontract (the "Kier Subcontract") between plaintiff, Kier Construction, Ltd. ("Kier"), and a non-party, Raytheon Engineers & Constructors, UK Ltd. ("REC UK"). Kier claims it is owed over $ 12 million for work performed under the subcontract. Kier contends that the contract with REC UK was transferred to defendants, Raytheon Company ("Raytheon") and Raytheon Engineers & Constructors International, Inc. ("RECI" and collectively, the "Raytheon Defendants"), in 2000 as part of transaction in which the Raytheon Defendants sold REC UK and other subsidiaries to Morrison Knudsen Corporation ("MK"). Kier contends that the Raytheon Defendants, as REC UK's assignees, are directly liable to Kier for the work it performed under the Kier Subcontract.

The parties have filed cross motions for summary judgment. Each side contends that the disputed provisions of the agreements at issue are unambiguous. For the reasons explained in this Memorandum Opinion, the Court grants the Raytheon Defendants' motion for summary judgment and denies Kier's motion for summary judgment. The Court finds the agreements at issue to be unambiguous and that Kier has not carried its burden to show that the Raytheon Defendants accepted an assignment of the rights under, or assumed the obligations of, the Kier Subcontract. Therefore, the Raytheon Defendants are not liable to Kier under the Kier Subcontract.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Background[1]

REC UK, which is not a party to this action, acted as general contractor for a project in Hull, England to construct a 1200-megawatt cogeneration plant (the "Saltend Project"). Kier is a company organized under the laws of England and engaged in the construction business. On June 22, 1998, Kier executed the Kier Subcontract with REC UK to perform construction services related to the Saltend Project. At that time, REC UK was a wholly owned subsidiary of defendant RECI. RECI is a Delaware company based in Waltham, Massachusetts, which, in turn, is a subsidiary of defendant Raytheon. Raytheon is a Delaware corporation also headquartered in Waltham, Massachusetts. Neither Raytheon nor RECI were parties to the Kier Subcontract at execution.

In 1999, MK entered into negotiations with the Raytheon Defendants to purchase RECI's engineering and construction business through a stock purchase transaction. Through the due diligence process, four international construction projects were identified as "high risk" projects (the "Indemnified Projects"). These projects were forecasted to lose money and posed significant financial risks. The Saltend Project was one of the Indemnified Projects.

On April 14, 2000, MK and the Raytheon Defendants entered into a Stock Purchase Agreement (the "SPA"). MK, unwilling to take on the risks associated with the Indemnified Projects, sought to remove them from the deal. To achieve this exclusion,

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[1] Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Stipulated Facts of the Joint Pretrial Order filed on December 13, 2004.

the SPA anticipated that the upstream contracts between RECI's subsidiaries and the project owners (the "Prime Contracts") would be transferred to RECI before closing. Then, in conjunction with the closing, the relevant RECI subsidiaries, including REC UK, were to enter into subcontracts with the Raytheon Defendants with terms largely tracking the respective Prime Contracts. The SPA included as exhibits term sheets for these anticipated subcontracts.[2] Under these agreements (the "Contemplated Subcontracts"), the former RECI subsidiaries would perform, on a cost-reimbursed basis, all of the Raytheon Defendants' obligations under the Prime Contracts.[3] The intended effect of these planned transactions was to allow MK to purchase RECI's engineering and construction business in its entirety, without acquiring the Indemnified Projects or their associated liabilities.

By the time the parties were ready to close on the SPA, they had not obtained the consents or novations required to transfer the Prime Contracts. As a result, MK and the Raytheon Defendants could not enter into the Contemplated Subcontracts because RECI subsidiaries, and not the Raytheon Defendants, remained the parties to the Prime Contracts. MK and the Raytheon Defendants chose not to amend the SPA. Instead, on the SPA's closing date of July 7, 2000, they entered into Project Completion Agreements ("PCAs") with respect to each of the Indemnified Projects. The intent of the PCAs was to implement the contractual relationships, as closely as practicable, that were to have

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2 SPA Ex. E-1 to E-4. The SPA is attached to the Complaint at Ex. 2.

3 *See, e.g.*, SPA Ex. E-3 at 1–2. Exhibit E-3 is the term sheet for the Contemplated Subcontract for the Saltend Project.

been created by the Contemplated Subcontracts.[4] The Kier Subcontract falls within the class of agreements addressed by the PCA.

On May 14, 2001, WGI (f/k/a Morrison Knudsen) filed a petition seeking relief under Chapter 11 of the U.S. Bankruptcy Code.[5] Various WGI subsidiaries, including WILLC (f/k/a REC UK), filed petitions at the same time. Kier subsequently filed a proof of claim in the Chapter 11 proceeding as an unsecured creditor, asserting that WILLC (f/k/a REC UK) owed it over $12 million under the Kier Subcontract.[6] WGI and its subsidiaries emerged from bankruptcy pursuant to an approved plan on December 21, 2001.[7] Kier settled its claim against REC UK and its successor in the Chapter 11 proceeding for an amount less than full value.[8]

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4 PCA at 1 (page 1 of the PCA contains several recitals and is herein referred to as the "Preamble"). The PCA is attached to the Complaint at Ex. 3.

5 After the transaction with the Raytheon Defendants, MK changed its name to Washington Group International ("WGI"). Except for this paragraph describing the bankruptcy proceeding, the Court will use "MK" to refer to both MK and WGI.

As Kier acknowledged at argument, there is no evidence that the contracting parties anticipated MK filing for bankruptcy protection when negotiating and entering into the Agreements. Tr. at 41.

6 The Raytheon Defendants' Opening Brief ("ROB") App. at Tab 7. The Raytheon Defendants' answering brief or memorandum in opposition to Kier's motion and reply paper in support of their own motion are referred to as RAB and RRB, respectively. Similarly, Kier's opening, answering and reply papers are cited as KOB, KAB and KRB.

7 *Id.*

8 *Id.* at Tab 9.

B. The Indemnified Projects and the SPA

The parties drafted the SPA to protect MK from the Indemnified Projects in three ways. First, § 1.4, entitled "Excluded RECI Assets," sets forth certain assets of the engineering and construction business that were to be excluded from the transaction, including all assets and liabilities of the Indemnified Projects.

> 1.4. Excluded RECI Assets. Notwithstanding the foregoing, RECI is not selling and the Buyer is not purchasing pursuant to this Agreement, and the term "Acquired RECI Assets" shall not include, any right, title or interest of RECI in, to or under any of the following rights, properties or assets (collectively, the "Excluded RECI Assets"):
>
> * * *
>
> (l) Distributed Assets. . . . [E]xcept as otherwise provided in the Indemnified Project Subcontracts referred to in Section 4.2(f), all assets and liabilities related to the Indemnified Projects (as defined in Section 4.2(f); and the other assets identified on Schedule 1.4(l); if any of the foregoing is not owned by RECI as of the date of this Agreement it will be transferred by the applicable RECI Subsidiary to RECI prior to the Closing (collectively, the "Distributed Assets").

Second, § 13.1 of the SPA includes provisions that require the Raytheon Defendants to indemnify MK against "Specified Seller Liabilities." These liabilities are defined in Article 14 to include, among others, liabilities associated with the four Indemnified Projects.

Third, the SPA anticipated that the parties would enter into an arrangement in which the relevant RECI subsidiaries would transfer the Prime Contracts of the Indemnified Projects to the Raytheon Defendants and then continue to operate the

projects as contractors for the Raytheon Defendants. The Saltend Contemplated Subcontract stated, however, that

> [i]f any such consent or novations is not received by Closing, the parties will enter into arrangements comparable to those described in the Section 8.3 of the Stock Purchase Agreement, with the intent of implementing, as closely as practicable, the contractual relationships between Prime Contractor [the Raytheon Defendants] and Subcontractor [REC UK] contemplated by this Exhibit.[9]

The SPA contemplated, but did not require, transfer of many of the assets and liabilities relating to the Indemnified Projects in conjunction with the transfer of the Prime Contracts. With respect to the "downstream" contracts, or those between REC UK and third parties, the term sheet for the Saltend Contemplated Subcontract states:

> The parties may also choose not to transfer certain subcontracts or other ancillary agreements (whether because of consents, requirements for contractors, engineers or other licenses, tax planning or other reasons) and will enter into alternative arrangements that achieve to the maximum extent possible the economic intent of the parties.[10]

At the time the parties entered into the SPA on April 14, 2000, they had not transferred the Prime Contracts or the assets related to the projects, nor had they drafted the actual subcontracts anticipated by the term sheets. The parties to this action also agree that the SPA did not effect such a transfer.

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[9] SPA Ex. E-3 at 6. Section 8.3 and other relevant provisions are discussed in the analysis section below.

[10] *Id.* at 7.

C. The Saltend PCA

The stated purpose of the Saltend PCA is to effect the intent of the Contemplated Subcontract. Kier and the Raytheon Defendants disagree about the nature of the relationships intended to be created by the Contemplated Subcontracts and about the method by which the PCAs attempt to implement those relationships.

The Saltend PCA states that its purpose is "to provide all the benefits and burdens of the Project Agreements to the Sellers," i.e., the Raytheon Defendants.[11] Both parties heavily rely on PCA § 2.2, entitled "Benefits and Burdens," to explain the PCA's method for implementing that goal. Section 2.2, in its entirety, reads:

> The Contractor [REC UK] hereby appoints the Sellers [Raytheon and RECI] as the exclusive agents of the Contractor under the Project Agreements for purposes of affording the Sellers the benefits and burdens of such agreements. In consideration of this appointment, the power of attorney granted pursuant to Section 2.4 hereof and the other rights and benefits granted to Sellers under this Agreement, the Sellers agree to pay the Contractor as set forth in Article 3 hereof, indemnify the contractor as set forth in Article 4 hereof and provide the Contractor with the other rights and benefits granted to the Contractor under this Agreement. Each of the parties to this Agreement acknowledges that, although the contractor or another RECI Subsidiary is the party to the Project Agreements, as between the Buyer [MK] and the RECI Subsidiaries on the one hand and the Sellers on the other hand, the Sellers (and not the Contractor or any other RECI Subsidiary) are the real parties in interest under the Project Agreements and, accordingly, the Contractor is performing its obligations under the Project

[11] PCA § 2.2. "Project Agreements" are defined to include "the Prime Contracts and all other contracts, subcontracts, purchase orders, labor agreements, and other agreements for the provision of [the purchased businesses] in connection with the Saltend Project." PCA Art. 1.

> Agreements for the benefit and the account of the Sellers. The parties to this Agreement further acknowledge that they are entering into this Agreement to provide all the benefits and burdens of the Project Agreements to the Sellers.

Kier argues that § 2.2 is "the specific assignment provision" of the PCA.[12] The Raytheon Defendants contend that § 2.2 does not purport to effect a transfer or assignment of the Project Agreements, but rather simply "describes the overall effect of all the provisions of the PCA that follow Section 2.2 . . . ."[13]

In addition to transferring the risk of the projects to the Raytheon Defendants, the PCA provides a number of safeguards. For example:

> Section 2.3(b) grants the Raytheon Defendants the right to control change orders and claims against suppliers, subcontractors, and others;
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> Section 2.3(c) bars REC UK from amending the Project Agreements;
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> Section 2.4 grants the Raytheon Defendants a limited power of attorney to act on behalf of REC UK in matters involving the Project Agreements; and
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> Section 2.6 grants the Raytheon Defendants the power to approve staffing decisions regarding key personnel at REC UK.

The PCA also contains both an "Entire Agreement" or integration provision, § 5.4, and an assignment provision, § 5.7. Section 5.7, labeled "Assigns," bars assignment of the PCA or any rights or obligations under it without the prior written consent of the parties.

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[12] KOB at 10.

[13] DAB at 11.

D. The Dispute and Relief Requested

The parties filed cross motions for summary judgment. The primary issue presented by both motions is whether the PCA effected an assignment and assumption of the Kier Subcontract by the Raytheon Defendants. Kier contends that the SPA and PCA are properly read together. According to Kier, the SPA unambiguously expresses the Raytheon Defendants' intention to assume the obligations under the Indemnified Projects and the PCA effected the intended assumption. Kier argues that § 2.2 of the PCA effects the assumption by stating that its purpose is to provide the Raytheon Defendants "all benefits and burdens" of the Project Agreements.

The Raytheon Defendants argue that the two agreements, although interrelated, are properly read separately. They focus on the effects of the contracting parties' not having obtained consents or novations relating to the Prime Contract for the Saltend Project, among other things. The Raytheon Defendants posit that because transfer of the Prime Contracts was no longer possible by the SPA's closing date, the PCA accomplished the next best thing by transferring the *economic* benefits and burdens of the Saltend Project to them as the Sellers. Thus, the Raytheon Defendants argue that neither the SPA nor the PCA altered the pre-existing contractual relationship between Kier and REC UK.

Both parties agree that the relevant agreements are unambiguous. Therefore, they also agree that no extrinsic evidence is necessary to aid the interpretation of those

agreements.[14] Moreover, neither party has argued that the SPA should be considered extrinsic to the PCA for purposes of interpreting the PCA.

Plaintiff Kier seeks equitable relief in the form of orders declaring: (1) the Raytheon Defendants are assignees of the Kier Subcontract; (2) the Raytheon Defendants are directly liable to Kier for the work it performed on the Saltend Project; and (3) the Raytheon Defendants are obligated to arbitrate the amount of Kier's construction claim pursuant to the terms of the Kier Subcontract. The Raytheon Defendants seek a declaratory judgment that Raytheon and RECI did not assume the Kier Subcontract and have no liability to Kier.

II. ANALYSIS

A. Legal Standard[15]

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[16] The fact that the

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[14] In connection with alternative arguments meant to address the situation if the relevant contractual language were found to be ambiguous, however, the parties did, present extrinsic evidence in the form of affidavits, bankruptcy transcripts and public filings to support their respective positions. Because I have found that the disputed provisions are unambiguous, I have not considered such extrinsic evidence in deciding the pending motions, except as indicated in the analysis that follows.

[15] New York law applies to the substantive issues in this case; however, Delaware law governs the procedural aspects, including the standard for summary judgment. *Int'l Bus. Mach. Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *29 n.9 (Del. Super. 1991).

[16] Ch. Ct. Rule 56(c).

parties have filed cross motions for summary judgment does not alter the standard.[17]

B. Contract Interpretation

When interpreting a contract, it is axiomatic that the court must give effect to the intent of the parties as manifested by the language of the contract.[18] The intent of the parties is not necessarily their actual intent, but the intent expressed or apparent in the writing.[19] Contract interpretation that gives reasonable and effective meaning to all the terms of the contract is generally preferred to one that leaves a term without any reasonable meaning or renders it of no effect.[20]

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[17] *See Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1227 (Del. Ch. 2000). Effective March 1, 2005, however, Chancery Court Rule 56 was amended to add a new subsection (h) that reads:

> (h) *Cross Motions.* Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

As cross motions for summary judgment, the pending motions arguably are subject to the new rule. In a telephone conference with counsel on December 22, 2004, the Court invited the parties to stipulate to submission of this matter for decision on the merits based on the record submitted with their motions. By letter dated December 29, 2004, the parties declined that invitation. Based on that history and the pendency of these motions for some time before March 1, 2005, the Court has decided not to subject them to the new Rule 56(h) or deem the cross motions the equivalent of a stipulation for decision of the merits based on the existing record.

[18] *Health-Chem Corp. v. Baker*, 737 F. Supp. 770, 773 (S.D.N.Y. 1990).

[19] *Goldstein v. Frances Emblems, Inc.*, 55 N.Y.S.2d 740, 742 (App. Div. 1945).

[20] *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985).

"As long as the terms of the contract are unambiguous, extrinsic evidence will be precluded."[21] Contract language is unambiguous when it "has a definite and precise meaning" and when "there is no reasonable basis for a difference of opinion."[22] Finally, whether contract language is ambiguous is a question of law.[23]

The long held rule that extrinsic evidence cannot change the plain meaning of a writing does not preclude the court from examining the writing to be construed within "the context of the circumstances."[24] Thus, when determining the meaning or ambiguity of a contract, the court will consider "relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties."[25]

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21 *Torres v. Costich*, 935 F. Supp. 232 (W.D.N.Y. 1996) (citing *Investors Ins. Co. of America v. Dorinco Reins. Co.*, 917 F.2d 100, 104 (2d Cir. 1990)).

22 *Breed v. Ins. Co. of North Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978).

23 *Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 263 (2d Cir. 1987).

24 *Bensons Plaza v. Great Atl. & Pac. Tea Co.*, 377 N.E.2d 477, 478 (N.Y. 1978); *see also Nat'l City Bank v. Goess*, 130 F.2d 376, 380 (2d Cir. 1942) ("[a]fter interpretation has called to its help all those facts which make up the setting in which the words are used, the words themselves remain the most important evidence of intention").

25 Restatement (Second) of Contracts § 212 cmt. b (Tent. Draft No. 5 followed by the New York Court of Appeals in *Bensons Plaza*, 377 N.E.2d at 478 ("[t]he disputed lease term may, of course, be viewed in the context of surrounding circumstances"); *see also Hotel Credit Card Corp. v. American Exp. Co.*, 214 N.Y.S.2d 921, 925 (App. Div. 1961) ("[e]vidence of the surrounding circumstances, including the preliminary negotiations and contemporaneous statements of the parties, may thus be considered in seeking the true shape of obligations undertaken, without doing violence to the parol evidence rule").

C. Applicability of the SPA

The parties agree that the SPA does not itself effect an assignment of the Project Agreements.[26] They also agree that the SPA reflects the Raytheon Defendants' intention, at the time of signing, to take an assignment and assumption of the Prime Contracts. The parties disagree, however, about the intentions of MK and the Raytheon Defendants regarding the downstream contracts. Kier contends that the SPA expresses the contracting parties' intent to transfer *all* contracts. The Raytheon Defendants argue that there was no agreement as to whether the downstream contracts would be transferred. In their view the SPA contemplated future negotiation regarding the structure of the proposed subcontract, including what, if any, specific assets and liabilities relating to the Saltend Project would be transferred to the Raytheon Defendants at closing.

Kier finds the SPA important for a number of reasons. First, Kier contends that the SPA "excluded" obligations and liabilities related to the Saltend Project Agreements from the assets transferred to MK. Second, Kier argues that "the SPA unambiguously reflects the Raytheon Defendants' intention to take an assignment of the Saltend Project Agreements."[27] Third, the SPA specifies that obligations related to the Saltend Project are "specified liabilities" of the Raytheon Defendants. Kier urges the Court to consider the SPA and PCA together to determine whether the contracting parties intended to effect an assignment of the Project Agreements.

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[26] *See, e.g.*, KOB at 11; ROB at 8.

[27] KOB at 11.

Generally, agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and read together as one.[28] I do not find, however, the SPA and PCA to constitute contemporaneous writings because of the significantly different circumstances known to the parties when each agreement was signed. The parties executed the PCA nearly three months after the SPA.[29] During this time period, they did not obtain the consents or novations necessary to transfer the Prime Contracts as contemplated. As a result, the parties could not complete the transaction in the manner described in the SPA; instead, the Raytheon Defendants and MK entered into the PCAs. Therefore, I do not consider it appropriate to read the two agreements together as if both agreements were entered into under a common set of circumstances.[30] The PCA is the operative agreement for purposes of this case.

At the same time, however, I find that the specific terms of the SPA and the language regarding its purpose are relevant to understanding the context in which the PCA was entered into and the usage of the parties. Consequently, I have considered the

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[28] *Guardsman Lease Plan, Inc. v. Gibraltar Transmission Corp.*, 494 N.Y.S.2d 59, 63 (Sup. Ct. 1985).

[29] The SPA was executed on April 14, 2000; the PCA was executed on July 7, 2000.

[30] The parties could have expressly caused the agreements to be treated as contemporaneous writings. Although the PCA does acknowledge both the existence and intent of the SPA, it employs no language manifesting an intent to incorporate the SPA either in whole or in part. Moreover, the PCA contains an Entire Agreement provision, § 5.4, restricting the parties' understanding to the PCA and its annexes. The PCA does not discuss integrating the SPA or annexing it as an exhibit.

SPA and the Contemplated Subcontract to the Saltend Project in interpreting the PCA, and do not view those documents as proscribed extrinsic evidence.

D. The PCA

For the Raytheon Defendants to be directly liable to Kier for the work it performed on the Saltend project, the PCA must have effected both an assignment and assumption of the Kier Subcontract. Both parties agree that the relevant PCA language is unambiguous, although predictably their interpretations differ.

To effect an assignment the parties must manifest an intent to assign by either act or declaration.[31] Although "an assignment need not utilize any particular phraseology or form,"[32] there must be "a completed transfer of the entire interest of the assignor in the particular subject of assignment."[33]

New York law draws a distinction between the assignment of a contract right and the assumption of a contract obligation. Under New York law, "the assignee of rights under a bilateral contract is not bound to perform the assignor's duties under the contract unless he expressly assumes to do so."[34] Thus, in the absence of an affirmative assumption, an assignment does not create a new liability on the part of the assignee to

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31 *Property Asset Mgmt., Inc. v. Chi. Title Ins. Co.*, 173 F.3d 84, 87 (2d Cir. 1999).

32 *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 557 (2d Cir. 1976).

33 *Id.* at 558 (quoting *Coastal Comm'l Corp. v. Samuel Kosoff & Sons, Inc.*, 199 N.Y.S.2d 852, 855 (App. Div. 1960)).

34 *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8, 10 (2d Cir. 1985).

either the assignor or the other party to the assigned contract.[35] Where an assignee does assume the obligations of a contract, the assignor is not released from its obligations under the contract.[36] Instead, the assignor remains secondarily liable as a surety.[37]

Kier contends that § 2.2 of the PCA, entitled "Benefits and Burdens," specifically effects an assignment of the Kier Subcontract. Kier concentrates on two portions of section 2.2. The first provides that "[t]he parties to this Agreement further acknowledge that they are entering into this Agreement to provide *all benefits and burdens* of the Project Agreements to the Sellers."[38] Kier contends that § 2.2 effected both an assignment and assumption of the Project Agreements by providing "*all* benefits and burdens" of them to the Raytheon Defendants. The Raytheon Defendants, on the other hand, argue that § 2.2 only allocates the benefits and burdens of the Project Agreements between the parties to the PCA (MK, REC UK and the Raytheon Defendants) and does not affect relationships with third parties.

The other portion of § 2.2 Kier relies upon states:

> [A]lthough the Contractor [REC UK] or another RECI Subsidiary is the party to the Project Agreements, as between

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35 *Hudson Eng'g Assocs. v. Ames Dev. Corp.*, 643 N.Y.S.2d 677, 678 (App. Div. 1996). Covenants that run with land are an exception.

36 *Davidson v. Madison Corp.*, 177 N.E. 393, 395 (N.Y. 1931).

37 *See Tarolli v. Syracuse Inv. Corp.*, 271 N.Y.S. 871, 875 (App. Div. 1934) (assumption of the obligations under a mortgage did not release obligations of the mortgagor; instead, the mortgagor took the position of a surety); *500 Fifth Ave., Inc. v. Nielsen*, 288 N.Y.S.2d 970, 975 (City Civ. Ct. 1968) (lessee's assignment of lease with landlord's consent and assumption by assignee made assignor a surety).

38 PCA § 2.2 (emphasis added).

> the Buyer [MK] and the RECI Subsidiaries on the one hand and the Sellers on the other hand, the Sellers (and the Contractor or any other RECI Subsidiary) are the real parties in interest under the Project Agreements and, accordingly, the Contractor is performing its obligations under the Project Agreements for the benefit and the account of the Sellers.

Kier argues that § 2.2's declaration that the Sellers are "the real parties in interest" under the Project Agreements confirms the PCA's intent to transfer the Agreements.[39] The Raytheon Defendants, however, rely on the same language for the opposite conclusion. They emphasize that § 2.2 expressly states that REC UK is *the* party to the Project Agreements and that REC UK is to perform *its* obligations under the Agreements.

Based on a careful review of the PCA in the context of the earlier SPA, I find that Kier has not met its burden to show an affirmative assumption of the Kier Subcontract as required by New York law. In my opinion, the contracting parties to the PCA did not intend to effectuate an assumption of the Project Agreements by the Raytheon Defendants. Kier has not identified any portion of the PCA that indicates that the

[39] Kier also argues that the PCA divested REC UK so completely of control over the Saltend Project as to substantively effectuate an assignment. Under New York law, any act or words are sufficient to show an intention to transfer, where the assignor divests itself of all right, title, and control. *Miller*, 640 F.2d at 558. Although the PCA grants the Raytheon Defendants a measure of control over the Saltend Project, it does not completely divest REC UK of "all right, title, and control" with respect to the Project. The PCA's plain language explains that REC UK remained "the party to the Project Agreements" and that REC UK was to perform its obligations under the Project Agreements. Moreover, the elements of control provided to the Raytheon Defendants by the PCA are strong evidence that REC UK had not divested itself of "all right, title, and control," because if it had done so, these provisions would have been unnecessary.

Raytheon Defendants intended to become directly liable to third parties such as Kier or that MK sought by way of the PCA to create such new obligations.

Both parties agree that the SPA anticipated the transfer of the Prime Contracts to the Raytheon Defendants. The Contemplated Subcontracts, however, indicate that the transfer of the downstream contracts, which included the Kier Subcontract, was not essential. The Saltend Contemplated Subcontract explains that, although the parties anticipated transfer of all contracts and working capital related to the project,

> the parties may also choose not to transfer certain subcontracts or other ancillary agreements (whether because of consents, requirements for contractors, engineers or other licenses, tax planning or other reasons) and will enter into alternative arrangements that achieve to the maximum extent possible the economic intent of the parties.[40]

This provision reflects a certain ambivalence on the part of MK and the Raytheon Defendants as to whether subcontracts like the Kier Subcontract were transferred at all.[41] Instead, the parties to the SPA emphasized the importance of a achieving their "economic intent" under the SPA.

When the SPA closed, the consents or novations that would have transferred the Prime Contracts had not been received and the parties agreed upon another arrangement to address the Indemnified Projects. The solution was the PCA, which provides (1)

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[40] SPA Ex. E-3 at 6.

[41] The term sheet for the Saltend Contemplated Subcontract stated that: "the parties will work to obtain prior to Closing all consents or novations required to implement the Subcontract." It explicitly recognized, however, that such consents or novations might not be received. *Id.*

indemnity for REC UK, (2) certain measures of control for the Raytheon Defendants, and (3) the opportunity for the Raytheon Defendants to capture any upside from the Indemnified Projects.[42] Kier contends that § 2.2 shows that the Raytheon Defendants assumed the Project Agreements in toto.

I have concluded, however, that the PCA cannot reasonably be read to effectuate an assumption of either the Prime Contracts or the downstream contracts by the Raytheon Defendants. Preliminarily, I note that the parties to the PCA are all sophisticated business entities which had the benefit of experienced legal counsel.[43] Those parties appear in § 2.2 to have used the language emphasized below advisedly:

> The Contractor [REC UK] hereby appoints the Sellers [Raytheon and RECI] as the exclusive agents of the Contractor under the Project Agreements for purposes of *affording the Sellers the benefits and burdens of such agreements*. . . . The parties to this Agreement further acknowledge that they are entering into this Agreement to *provide all the benefits and burdens of the Project Agreements to the Sellers*.

Notably, MK and the Raytheon Defendants consistently referred to "benefits and burdens," rather than "rights and obligations," the more traditional objects of an

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[42] *See* PCA §§ 2.2–.8, 3.1, 4.2. Kier argues that the Raytheon Defendants' characterization of the PCA reduces it to an indemnity agreement that is superfluous in light of the SPA's own indemnity provisions. The PCA, however, includes more than mere indemnity; for example, it provides protections and upside potential to the Raytheon Defendants. In addition, SPA § 13.1, "Indemnity by the Sellers," offers protection to MK but not to the purchased RECI Subsidiaries, such as REC UK.

[43] Jones, Day, Reavis & Pogue represented MK and Bingham Dana LLP represented the Raytheon Defendants. *See* PCA at 10–11.

assignment and assumption. Similarly, § 2.2 refers to "affording" and "provid[ing]" the benefits and burdens of the Project Agreements rather than language more indicative of an assignment or assumption. Moreover, the PCA unambiguously states that "the Contractor [REC UK] or another respective RECI Subsidiary is *the* party to the Project Agreements" and was to perform "its obligations" under the Agreements. The import is unmistakable: REC UK remained the only party on its side of the Saltend Project Agreement and no assignment or assumption was intended. This construction gives effect to all of the PCA's provisions and recognizes the PCA's creation of a relationship between the contracting parties, MK and the Raytheon Defendants, that approximates the results the parties intended to achieve under the SPA and Contemplated Subcontracts.

E. Kier's Arguments

In reaching this conclusion, the Court considered and rejected each of numerous contrary arguments advanced by Kier. The primary counterarguments are discussed below.

1. Does the SPA provide a basis for construing the PCA to effect an assumption of the Kier subcontract?

Kier argues that the parties to the PCA did not intend to change the previously agreed upon allocation of liabilities relating to the Saltend Project, and instead intended to implement the agreements described in the SPA and the Saltend Contemplated Subcontract. Kier contends that the SPA expressly excluded all agreements, obligations and liabilities related to the Saltend Project from what was to be transferred to MK and anticipated transfer of all such contracts to the Raytheon Defendants before closing.

Section 1.4(l) of the SPA, according to Kier, shows that the Raytheon Defendants "retained" the Project Agreements. Section 1.4 states that "RECI is not selling and the Buyer is not purchasing" any right, title or interest of RECI in assets and liabilities related to the Saltend Project. Further, § 1.4(l) explains that any assets and liabilities not owned by RECI as of the date of the SPA "will be transferred by the applicable RECI Subsidiary to RECI prior to the Closing."

Kier further contends that SPA Article 2 requires the Raytheon Defendants to assume "Specified Seller Liabilities" that include "all obligations and liabilities (including liabilities to non-contract parties) associated with the Indemnified Projects."[44] Based on such language and the statement in the Preamble to the PCA that the parties entered into that agreement "to transfer the benefits and burdens of the Project Agreements . . . to the Sellers, to make the Sellers the real parties in interest with respect to those agreements for the Saltend Project and to otherwise effect the intent of the Contemplated Subcontract," Kier argues that the PCA necessarily effected an assignment and assumption of the Kier Subcontract, among others.

Kier fails to acknowledge, however, the different circumstances confronting the parties at the time they signed the PCA, as opposed to the SPA. As discussed above, the SPA reflects the expectations of the parties that the Prime Contracts would be, and the downstream contracts might be, transferred or assigned before closing. After the parties failed to obtain the consents or novations necessary to implement the Contemplated

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[44] *See* SPA Article 14 (defining "Specified Seller Liabilities").

Subcontracts, they entered into the PCA and chose not to amend the SPA to reflect the changed circumstances. Thus, with respect to the Saltend Project, the PCA established a different relationship between MK and the Raytheon Defendants, and effectively superseded the SPA in that respect.[45] Therefore, provisions in the SPA regarding the expected relationship between MK and the Raytheon Defendants, such as § 1.4(l) and Article 2, are neither dispositive nor sufficient to make Kier's proffered construction reasonable.

Second, specifically with respect to § 1.4(l), I disagree with Kier's contention that it excludes the downstream contracts from the assets to be transferred to the Buyer under the SPA. Kier refers to § 1.4(l)'s treatment of all assets and liabilities related to the Saltend Project, but fails to note that the definition of the Saltend Project Distributed Assets in § 1.4(l) contains the limitation, "except as otherwise provided in the Indemnified Project Subcontracts referred to in Section 4.2(f) [the Contemplated Subcontracts]." Yet, the Saltend Contemplated Subcontract provides that "the parties may also choose not to transfer certain subcontracts or other ancillary agreements." Therefore, § 1.4(l) and the Contemplated Subcontract acknowledge that some or all of the

[45] In terms of the relationship between MK (and REC UK) and the Raytheon Defendants, the Court's interpretation of the PCA as not effecting an assumption of the obligations of the Kier subcontract does not conflict with the intent of the SPA to protect MK from loss based on that subcontract.

downstream contracts may not be assigned or transferred to RECI before closing and, therefore, would not be part of the "Excluded Assets."[46]

2. The significance of the use of "All Benefits and Burdens"

Kier argues that the PCA's transfer of *all* benefits and burdens is not limited to transfer of "financial" or "economic" benefits and burdens, and thus effected the assignment and assumption of the Project Agreements. Kier draws support for its argument from preliminary negotiations of the PCA. During those negotiations, MK specifically rejected the Raytheon Defendants' attempt to limit the benefits and burdens being assigned to "financial" benefits and burdens.[47]

The Raytheon Defendants contend that § 2.2's allocation of benefits and burdens in the case of the Saltend Project is only as between the Raytheon Defendants on the one hand and MK and REC UK on the other. More broadly, the Raytheon Defendants argue that § 2.2 does not purport to effect a transfer or assignment of the Project Agreements, but instead merely describes the overall effect of the PCA.

The Court finds the Raytheon Defendants' interpretation to be the only reasonable one in the circumstances. I do not consider the change from "financial" to "all" benefits

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[46] The SPA's anticipated treatment is further evidenced by note 2 to the Saltend Contemplated Subcontract, which explains: "[t]he parties will structure this subcontract in a manner that minimizes tiering of costs and preserves to the extent possible the existing relationships." SPA Ex. E-3 at 1 n.2.

[47] A June 26, 2000 draft of the PCA stated the purpose of the PCA was to transfer the "financial benefits and burdens" to the Raytheon Defendants. A June 28, 2000 draft proposed by MK's counsel struck the word "financial." The executed PCA says "all benefits and burdens." KAB at 18.

and burdens during the negotiation of the PCA to reflect an intent to effect an assignment or assumption of the Saltend Project Agreements. From the context of the PCA and the language of § 2.2, it is reasonable to infer from that change that MK simply wanted to make it clear that, as between the parties to the PCA, the Raytheon Defendants would be afforded all benefits and burdens of the Project Agreements. Nothing in the record regarding the deletion of the adjective "financial" suggests that it was intended to make the Raytheon Defendants liable to the other parties to the Project Agreements.

Furthermore, § 2.2 of the PCA specifically avoids using "rights and obligations," the traditional language of assumption, in favor of "benefits and burdens." Kier argues that this is a distinction without a difference; that the two sets of terms are interchangeable. Keir's interpretation, however, does not give effect to the different ways in which the contracting parties used these terms in the SPA and the PCA. The PCA only employs the terms "benefits and burdens" when discussing its *own* effect, while both the SPA and PCA appear to refer to "obligations" in many other instances.[48] Moreover, the Preamble to the PCA explains that the SPA contemplated "that the Prime Contracts on the Saltend Project would be transferred to RECI" and that REC UK would "perform, on a cost-reimbursed basis, all of the Seller's obligations under the Prime

[48] *See, e.g.*, SPA Art. 2 ("Assumption of Certain RECI Obligations"); SPA § 5.1 ("to perform its obligations hereunder and thereunder"); SPA § 5.8(f) ("any guarantee by a RECI Company of the obligations of another RECI Company"); SPA § 16.6 Assigns ("[n]either this Agreement nor the rights or obligations of any party hereunder shall be assigned or delegated"); PCA § 5.7 Assigns.

Contracts."[49] In contrast, as the Preamble also explains, the parties entered into the PCA "in order to transfer the benefits and burdens of the Project Agreements." Thus, the PCA Preamble draws a distinction between transferring the contracts along with their obligations and merely transferring the "benefits and burdens" of the contracts.

Section 8.3 of the SPA further supports the conclusion that MK and the Raytheon Defendants did not use "benefits and burdens" interchangeably with "rights and obligations." Entitled "Nonassignable Contracts," § 8.3 addresses the situation in which a contract that was to be assigned under the SPA could not be because a required consent was not obtained prior to closing.[50] Referring to contracts the SPA anticipated being transferred from RECI to MK, § 8.3(b) provides that RECI will not be obligated to transfer to MK "any of its *rights and obligations* in, to or under any of the contracts" for which consents or novations were not obtained and MK "will not be *obligated to assume*

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49 PCA Preamble (internal references removed).

50 The relevant portion of § 8.3 deals specifically with contracts to be included in the Acquired RECI Assets, not Specified Seller Liabilities. The Contemplated Subcontract for the Saltend Project, however, makes § 8.3 relevant to the dispute regarding the Kier Subcontract. The Assignment provision of the term sheet for the Contemplated Subcontract states:

> The parties will work to obtain prior to Closing all consents or novations required to implement the Subcontract. If any such consent or novations is not received by Closing, the parties will enter into arrangements comparable to those described in the Section 8.3 of the Stock Purchase Agreement, with the intent of implementing, as closely as practicable, the contractual relationships between Prime Contractor [the Raytheon Defendants] and Subcontractor [REC UK] contemplated by this Exhibit.

any obligations under any such contract . . . unless and until all consents, approvals and waivers necessary for such *transfer and assumption* shall have been obtained."[51] Moreover, § 8.3(c) states:

> In the event that any consent, approval or waiver *necessary to assign* to the Buyer any such contract, governmental license or permit is not obtained by RECI prior to the Closing, then the Sellers and the Buyer will each use its commercially reasonable efforts, each at its own expense, to (i) *provide to the Buyer the benefits and burdens* of any such contract, governmental license or permit, (ii) cooperate in any reasonable and lawful arrangement designed *to provide such benefits and burdens* to the Buyer in accordance with this Agreement, *without incurring any additional obligation to any other person or entity*, including without limitation the appointment of the Buyer as RECI's agent for purposes of such contract, governmental license or permit and (iii) enforce, at the request of the Buyer for the account of the Buyer *any rights* of RECI arising from any such contract, governmental license or permit (including without limitation *the right* to elect to terminate such contract in accordance with the terms thereof upon the advice of the Buyer).[52]

The language of § 8.3 closely describes what MK and the Raytheon Defendants did when they entered into the PCA. More importantly, it demonstrates that those parties drew a clear distinction between references to "rights and obligations" as opposed to "benefits and burdens." MK and the Raytheon Defendants used benefits and burdens when referring to a contract that had *not* been assigned.

In addition, the PCA does not completely eschew the use of "rights and obligations." Illustrating this point is the PCA's anti-assignment provision. It bars

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[51] SPA § 8.3(b) (emphasis added).

[52] SPA § 8.3(c) (emphasis added).

assignment of the PCA or the "rights or obligations of any party" thereunder.[53] Thus, when explicitly referring to assignment, the PCA uses "rights and obligations," not "benefits and burdens."

Finally, section 2.2 also explicitly limits the allocation of benefits and burdens "as between [MK] and [REC UK] on the one hand and the [Raytheon Defendants] on the other." This language plainly limits the effect of the transfer of "all benefits and burdens." The express language in the PCA limiting the effect to the contracting parties implies an intent not to affect contractual relationships with third parties. It also contravenes Kier's contention that the agreement created new obligations on the part of the Raytheon Defendants to all of the other parties to the Project Agreements.

In sum, I view the PCA's stated effect of providing the benefits and burdens of the Project Agreements not to include actual assignment and assumption. On the contrary, in revising the relationships intended by the Contemplated Subcontracts, the PCA provides all of the benefits and burdens to the Raytheon Defendants and insulates MK and REC UK from financial loss or other burdens without effecting an assignment or altering third party relationships.

3. The PCA reference to the Raytheon defendants being the real parties in interest under the Project Agreements

Section 2.2 provides that as between the contracting parties to the PCA, the Raytheon Defendants, and not MK, are the "real parties in interest" under the Project Agreements. Kier contends this indicates that the Raytheon Defendants assumed the

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[53] PCA § 5.7.

Project Agreements. The Raytheon Defendants respond that the PCA expressly confirms that REC UK remained "the party to the Project Agreements" as to the Saltend Project and REC UK would be "performing its obligations under the Project Agreements for the benefit and account of the Sellers." For the following reasons, I find the Raytheon Defendants' explanation persuasive. I also conclude that the description of the Raytheon Defendants as the real parties in interest is not inconsistent with my decision that they did not assume REC UK's obligations under the Kier Subcontract.

First, § 2.2 expressly confirms that REC UK "is *the* party to the Project Agreements."[54] Notably, the PCA does not say that REC UK is *a* party to the Project Agreements. Moreover, § 2.2 explains that REC UK "is performing *its* obligations under the Project Agreements for the benefit and the account of the Sellers."[55] Thus not only is REC UK still obligated under the Project Agreements, it is to perform under the Project Agreements and not under a subcontract or the PCA. According to Kier, this language of § 2.2 supports its interpretation, because absent a novation, REC UK would have remained obligated by the Project Agreements.

Kier's argument is only partially correct. Following an assumption, REC UK would have remained obligated to the other original contracting party, but only as a surety.[56] Further, after an assumption, REC UK's obligations to perform vis à vis the

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54 PCA § 2.2 (emphasis added).

55 *Id.* (emphasis added).

56 *See Tarolli*, 271 N.Y.S. at 875.

Raytheon Defendants, if any, would come under the PCA or some other subcontract and not under the Project Agreements.[57] Therefore, it is significant that § 2.2 refers to REC UK's obligations to perform under the Project Agreements and not under the PCA itself. Kier's interpretation of the PCA fails to give effect to this distinction.

Second, in concentrating on the portion of § 2.2 stating that the Raytheon Defendants are the real parties in interest under the Project Agreements, Kier consistently ignores the preceding limiting language. Read in context, it is clear that § 2.2 provides only that the Raytheon Defendants were to be the real parties in interest as between MK, REC UK, and themselves. A reasonable inference from that limitation is that the parties intended that with respect to all other parties, MK and REC UK would remain the real parties in interest to the Project Agreements.

Kier also points out that the Raytheon Defendants provided no authority for the proposition that a party may be the "real party in interest" as to only some entities and not others.[58] Kier, however, has provided no support for its contrary argument. More importantly, whether or not the Raytheon Defendants may be considered real parties in interest as to only some parties to a contract is immaterial, in my opinion, in the context

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[57] In fact, the SPA anticipated such a relationship between REC UK and the Raytheon Defendants. The PCA explains that the SPA anticipated that, after transferring the Prime Contracts to the Raytheon Defendants, RECI subsidiaries would "perform, on a cost-reimbursed basis, all of the *[Raytheon Defendants'] obligations* under the Prime Contracts." PCA Preamble (emphasis added).

[58] New York law applies to this issue because the legal concept of the real party in interest now is considered part of New York's substantive law. *Carvel Farms Corp. v. Bartomeo*, 272 N.Y.S.2d 507, 510 (App. Div. 1965).

of this case. Generally, the issue of whether a party is a "real party in interest" is raised by the defendant to a contract action brought by someone not a party to the contract. A contract claim generally must be maintained by a party who has legal title to the claim; that party is known as a "real party in interest."[59] Thus, being named "the real parties in interest" may facilitate the ability of the Raytheon Defendants to bring claims under the Project Agreements in their own name. In that sense, § 2.2 includes a control provision similar to others in the PCA. Moreover, whether or not the Raytheon Defendants are "the real parties in interest" under the Project Agreements bears little upon whether an assignment and assumption has occurred, because a party that has only a beneficial, as opposed to a legal, interest may be considered "a real party in interest" under New York law.[60]

Third, section 2.2 appoints the Raytheon Defendants "as the exclusive agents" of REC UK under the Project Agreements. The Raytheon Defendants argue that this clause undermines Kier's interpretation because it would have been unnecessary if an assumption had occurred. Kier contends that the appointment of the Raytheon Defendants as agents of REC UK was necessary because, even after assumption, REC

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59 *American Banana Co. v. Venezolana Int'l de Aviacion*, 411 N.Y.S.2d 889, 894–95 (App. Div. 1979).

60 *See Airlines Reporting Corp. v. Pro Travel, Inc.*, 657 N.Y.S.2d 654, 655 (App. Div. 1997) (plaintiff, a clearinghouse for the airlines, was a real party in interest and could bring action against travel agencies for breach of a contract with the airlines because plaintiff had a beneficial interest in the business).

UK would have remained a party to the Project Agreements.[61] Thus, Kier argues that appointment of the Raytheon Defendants as REC UK's exclusive agents was necessary to ensure that Defendants controlled the project.

The Court finds that appointment of the Raytheon Defendants as agents of REC UK would have been unnecessary if the Project Agreements had been assigned. To be valid under New York law, an assignment must "constitute a divestment of all right, title and control" by the assignor.[62] Kier conflates liability with "control." Although an assignor remains liable to the other party of the original contract, it by definition cannot remain in "control." Thus, had the PCA effected an assumption of the Project Agreements, REC UK would have to have been completely divested of control over the Agreements. Instead, because REC UK remained the party to, and in control of, the Project Agreements, the Raytheon Defendants needed the right to act as agents of REC UK for their own security. Corroborating this view, the Contemplated Subcontracts provided for in the earlier SPA did not contain a comparable provision. This is consistent with the Court's interpretation. The Contemplated Subcontract anticipated an environment in which the Prime Contracts would have been assumed and there would have been no need to appoint the Raytheon Defendants as agents of REC UK.

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61 KAB at 9.

62 *Miller*, 540 F.2d at 558.

In sum, I conclude that the PCA is susceptible to only one reasonable interpretation and thus unambiguous.[63] As section 2.2 makes clear, the parties to the PCA did not intend the Raytheon Defendants to assume the Kier Subcontract, and there is no reasonable basis to conclude that they did.

III. CONCLUSION

The relevant language of the PCA is unambiguous. Section 2.2 does not manifest the Raytheon Defendants' intent either to be assigned or to assume the Project Agreements. Thus, the Raytheon Defendants are not directly liable to Kier under the Kier Subcontract. Therefore, the Court grants the Raytheon Defendants' motion for summary judgment and denies Kier's motion for summary judgment.

IT IS SO ORDERED.

[63] Having found the PCA to be unambiguous as a matter of law, the Court has confined its analysis to relevant intrinsic evidence.