IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RELAX LIMITED,	)	
	)	
Plaintiff,	)	
	)	
V.	)	C.A. No. N10C-06-032 JRS
	)	
ANIP ACQUISITION COMPANY, d/b/a ANI PHARMACEUTICALS, INC.,	)	
	)	
	)	
Defendant.	)	

Date Submitted: March 25, 2011
Date Decided: May 26, 2011

MEMORANDUM OPINION

Upon Consideration of Plaintiff's Motion for Summary Judgment.
GRANTED IN PART and **DENIED IN PART.**

John E. James, Esquire and John A. Sensing, Esquire, POTTER ANDERSON & CORROON, LLP, Wilmington, Delaware. William Choslovsky, Esquire and Eric Y. Choi, Esquire, NEAL GERBER & EISENBERG, LLP, Chicago, Illinois. Attorneys for Plaintiff.

Francis G.X. Pileggi, Esquire and Carl D. Neff, Esquire, FOX ROTHSCHILD, LLP, Wilmington, Delaware. Michael J. Halaiko, Esquire and Matthew P. Phelps, Esquire, MILES & STOCKBRIDGE, PC, Baltimore, Maryland.

SLIGHTS, J.

I.

In this opinion, the Court considers whether plaintiff, Relax Limited ("Relax"), is entitled to summary judgment on its breach of contract claims against defendant, ANIP Acquisition Company d/b/a ANI Pharmaceuticals, Inc. ("ANI"), and on ANI's counterclaims. Relax alleges that ANI has breached a supply contract by not paying for goods (raw lactulose product) that Relax delivered to ANI in accordance with the contract. Relax terminated the contract after ANI refused to tender payment for the delivered lactulose. ANI acknowledges that it received the raw lactulose and that the product met the specifications called for in the contract. It also acknowledges that it has not paid for certain shipments of raw lactulose. Nevertheless, ANI alleges that its refusal to pay for product was justified because Relax has refused to refund past overpayments it has made to Relax based on Relax's incorrect interpretation of the profit sharing provisions of the parties' contract. ANI has brought counterclaims against Relax for these alleged overpayments and for lost profits and other damages caused by Relax's alleged improper termination of the contract.

After carefully reviewing the undisputed record and the parties' submissions, the Court is satisfied that Relax is entitled to summary judgment on its breach of contract claim. Relax has delivered product and ANI has not paid for it. Relax has consented (for purposes of this motion only) to reduce its recovery of breach damages

by the amount of the profit sharing overpayments to which ANI alleges it is entitled. As discussed below, however, the Court cannot accept this concession at this time given the post-judgment issues that would be implicated by refunding ANI its alleged overpayment. The Court has determined that the balance of ANI's counterclaim is not viable because the contract unambiguously precludes the parties from pursuing consequential damages.

Relax seeks prevailing-party counsel fees under the so-called "English rule" which it contends is implicated by the parties' agreed upon choice of English law. While the Court agrees that the English rule applies, it is unable to apply the rule without further guidance from the parties.

Relax's motion for summary judgment on its breach of contract claim and on the consequential damages portion of ANI's counterclaim is **GRANTED.** Its motion is **DENIED** to the extent it seeks a final adjudication of ANI's "overpayment" counterclaim and its own claim for counsel fees.

II.

The parties entered into their Supply Agreement on December 13, 2005 ("the Agreement"), the terms of which set forth the parties' rights and obligations with respect to the purchase, supply, manufacture, marketing and sale of lactulose. ANI used the lactulose in its manufacture and distribution of generic laxative products to

retailers throughout the United States.

The following provisions of the Agreement are particularly relevant to this dispute: (1) Section 10.3 requires ANI to pay relax within sixty (60) days of delivery of lactulose (ANI was charged at cost) and provides that late payments would be subject to a specified late fee; (2) Sections 10.1 and 10.2 provide that the parties were to share profits generated from the sale of refined liquid lactulose on a 50/50 basis and refined powder lactulose on a 65/35 basis; (3) Section 12.1 provides that "[e]ither party may terminate the Agreement immediately by giving written notice to the other" in the event the other party commits a "material breach" of the Agreement and fails to cure the breach within sixty (60) days of receiving notice of the breach; (4) Section 7.4 provides that "neither party shall be liable to the other, in contract, tort or otherwise for any special or indirect or consequential losses whether or not such losses were within the contemplation of the parties at the date of this Agreement;" and (5) Section 15.0 provides that the Agreement "shall be governed by English law."

From July 21, 2009 through September 14, 2009, Relax delivered six shipments of lactulose to ANI valued at $419,865.60. Of this amount ANI paid only $35,491.20, leaving a balance due of $384,374.40. Relax sent written notice of the breach to ANI on February 17, 2010, after efforts to resolve the matter failed.

In the meantime, during November, 2009, a dispute arose between the parties

regarding the calculation of "costs" for purposes of implementing the Agreement's profit sharing provision. Pursuant to Section 10.1B of the Agreement, profits were to be determined in accordance with a detailed formula set forth in the Agreement which, *inter alia*, was based upon a calculation of "costs of goods." ANI contended that Relax's improper calculation of its costs resulted in a larger profit pool which, in turn, resulted in ANI overpaying Relax for shared profits in the amount of $37,272.67. Relax disagreed with ANI's position on the profit sharing dispute and refused to credit ANI's account for the alleged overpayment.

Having received no further payments from ANI, Relax terminated the Agreement by letter dated April 22, 2010. ANI alleges that as a result of Relax's refusal to ship lactulose, ANI was unable to fulfill commitments under third party contracts resulting in lost profits of $225,000 per year, which will continue for at least five years, totaling $1,125,000. In addition, ANI alleges that it has lost business, market share and a $50,000 capital investment it made in reliance upon the continued shipment of lactulose from Relax.

III.

Relax contends that this case presents a straightforward breach of contract dispute: it has shipped conforming goods to ANI under the Agreement and ANI has failed to pay for those goods. In this regard, Relax notes that ANI has acknowledged

that the Agreement is valid, that is has received the lactulose and that it has not paid for it. According to Relax, ANI's effort to manufacture defenses to its claims of breach find no support in the record or in the applicable English law. Nevertheless, in order to allow the Court to enter a final judgment in its favor, Relax is willing to allow a $37,272.67 offset to its breach damages in order to resolve the only aspect of ANI's counterclaims (the profit sharing overpayment) that is potentially viable under the clear and unambiguous terms of the Agreement. As to the balance of ANI's counterclaims, Relax contends that they amount to claims for consequential damages and that the Agreement is clear in its provision that neither party may pursue consequential damages against the other.

ANI counters that it has substantially performed under the Agreement and that Relax's termination of the Agreement was premature and unjustified. As a result of Relax's improper termination of the Agreement, ANI contends that it has sustained substantial non-consequential damages that are neither limited nor excluded under the Agreement. Alternatively, ANI alleges that the contractual limitation on consequential damages is not enforceable under English law.

IV.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material

fact remain for trial.[1] Summary judgment will be granted only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[2] In this regard, "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[3] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment must be denied.[4]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[5] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded.[6] When reviewing the record, the Court must view the evidence in the light most favorable to the non-moving party.[7]

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[1] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[2] *Id.*

[3] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[6] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[7] *Id.*

V.

A. ANI Materially Breached The Agreement

ANI does not dispute that Relax sent six shipments of contract-conforming lactulose from July through September 2009 at a cost of $419,865.60. ANI also does not dispute that it is required to pay Relax for these shipments under the Agreement and that it has paid only $35,491.20, leaving a balance due of $384,374.40. Nevertheless, ANI contends that it has not materially breached the Agreement because it attempted to cure the breach within the sixty days permitted by Section 12.1 by making an offer to make periodic payments until the balance was paid in full.[8] Relax responds that even if such an offer was communicated by ANI, Relax was under no contractual or legal obligation to accept it. ANI owed $384,374.40 for product already received. Relax argues that it was entitled to demand payment in full within the time frame specified in the Agreement.

The parties agree that English law applies to the question of whether ANI's non-payment amounts to a "material breach" of the Agreement as the term is used in Section 12.1. While the term is undefined in the Agreement, this alone will not render the term ambiguous nor create an issue of fact, as ANI contends.[9] When terms

[8]According to ANI, it offered to pay $50,000 per month towards the balance. *See* Def. Ans. Br., Ex. B at ¶ 19.

[9]*See Inntreprener Pub. Co. v. East Crown Ltd.*, [2000] 2 Lloyd's Rep. 611.

of a contract are undefined the Court may assume that the parties intended to give the terms their ordinary and customary meaning.[10] To ascertain such meaning, the Court may refer to a recognized dictionary definition of the term.[11] Black's Law Dictionary defines a material breach as a "significant" or "essential" breach.[12] This definition comports with general notions of "material breach" as recognized in English law.[13]

To accept ANI's position with respect to this issue, the Court would have to conclude that its failure to pay for six shipments of lactulose with a value in excess of $350,000 was not a "material" (or "significant" or "essential") breach of the Agreement. Aside from arguing that Relax rebuffed its efforts to negotiate a "work out" of the debt, ANI has not pointed to a single fact in the record to support its argument that its serial failure to pay for shipped product was not "material." And,

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[10] *Kellogg Brown & Root, Inc. v. Concordia Mar. AG*, [2006] EWHC (Comm) 3358. (interpreting the term "original plate thickness," undefined in the contract, in accordance with the customary and ordinary meaning of the terms).

[11] *Oleochem (Scotland) Ltd v. Revenue and Customs Comm'rs*, [2009] S.T.I. 513 [2009] S.T.C. (S.C.D.) 205 (referring to the dictionary definition of "crew" to determine that the use of "member of the crew" in the operative contract did not restrict "crew" to those involved in the navigation of a ship or vessel, nor did "crew" always mean the whole crew); *Heronslea (Mill Hill) Ltd. v. Kwik-Fit Properties Ltd.*, [2009] EWHC (Q.B.) 295 (holding that it was appropriate to derive assistance from dictionary definitions when construing the meaning of language in a lease agreement, particularly when words are in dispute).

[12] BLACK'S LAW DICTIONARY (9th Ed. 2009).

[13] *Crosstown Music Co. 1 LLC v. Rive Droite Music Ltd.*, [2009] EWHC (Ch) 600 (holding that "material breach" connotes the concept of significance).

of course, it has not cited to a single case that would support its position as a matter of law.

The Agreement, at its essence, is a supply contract. Relax was to supply product and ANI was to pay for that product. Relax performed its end of the bargain by supplying contract-conforming lactulose to ANI. ANI did not pay for that product - - and its failure to pay was not limited to one shipment but extended to six successive shipments with a contract value in excess of $380,000. This failure constitutes a material breach. The fact that Relax might have refused to accept less than it was owed, or to extend the payment terms beyond those called for in the Agreement, does not somehow convert a material breach into an insignificant breach.

Upon ANI materially breaching the Agreement, Relax was required to allow ANI sixty (60) days to "remedy" the breach before terminating the Agreement. The undisputed facts of record reveal that it did just that. When ANI failed to pay the substantial balance due within the sixty (60) days allowed by the Agreement, Relax appropriately terminated the Agreement by proper written notice.[14] Accordingly, Relax is entitled to a judgment for the amount still due under the Agreement - - $384,374.40, plus prejudgment interest.

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[14]The Court rejects ANI's argument that its profit sharing dispute with Relax somehow justified its failure to pay for delivered product. Here again, ANI has cited no legal authority in support of this proposition, and the Court could find none in Delaware or English law.

B. ANI's Counterclaim For Consequential Damages Fails Under The Agreement

The Court has determined that Relax properly terminated the Agreement after ANI failed to cure its material breach within the time allotted by the Agreement. Given that Relax's termination of the Agreement was proper, ANI cannot be heard to argue that Relax is somehow responsible under the Agreement for any consequences of the termination that may have been suffered by ANI. No provision of the Agreement would support this result.

Even assuming *arguendo* that Relax did improperly terminate the Agreement, it is clear from the unambiguous provisions of the Agreement and English law that ANI may not recover its consequential damages from Relax.[15] ANI's counterclaim seeks damages for lost profits, penalties, loss of market share and lost business opportunities flowing from Relax's alleged improper termination of the Agreement. These elements of damages all relate to either third-party contracts (including "penalties" arising therefrom), lost business or lost profits. As such, under both English and American law, these damages fit squarely within the definition of

[15]Section 7.4 provides, in pertinent part: "[N]either party shall be liable to the other, in contract, tort [], or otherwise for any special or indirect or consequential losses (including, without limitation, any loss of profits) whether or not such losses were within the contemplation of the parties at the date of this Agreement."

"consequential damages."[16]

Apparently recognizing that some if not all of its alleged damages are consequential and, therefore, barred by the Agreement's clear exclusion of consequential damages, ANI seeks to invoke an English statute - - the Unfair Contract Terms Act of 1977 (the "UCTA") - - to argue that Section 7.4 is invalid as a matter of law. According to ANI, the UCTA works as a statutory bar to contractual provisions that purport to allow a party to "disclaim liability for its own breach" unless the parties could have contemplated the circumstances leading up to the breach at the time they entered into the contract.[17] Notwithstanding ANI's argument to the contrary, the Court is satisfied that a detailed analysis of the UCTA is not necessary because it is clear on the face of the statute that it does not apply here.

First, according to §27 of the UCTA, the statute does not apply to situations where the parties' contract invokes English law solely by virtue of a choice of law provision. This is precisely what the parties did here. Relax's principal place of

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[16] *British Sugar Plc v. NEI Power Projects, Ltd*, 1997 W.L. 1104071 (appeal taken from Q.B.) ("'[C]onsequential loss is that loss which is special to the circumstances of the particular plaintiff' . . .[T]he word 'consequential' does not cover any loss which directly and naturally results in the ordinary course of events from late delivery . . . .") (citation omitted); U.C.C. §2-715 (amended 2003) ("consequential damages resulting from the seller's breach include . . . any loss resulting from general or particular requirements and needs . . . and . . . injury to person or property proximately resulting from any breach of warranty.").

[17] Def. Ans. Br. at 7 (citing UCTA, §§3, 7).

business is in Malta; ANI's principal place of business is Minnesota; and the goods supplied under the Agreement traveled from South Africa to Minnesota. The only connection to English law, therefore, is the parties' election to include a choice of English law provision in their Agreement.

Second, §26 of the UCTA makes clear that the statute does not apply to "a contract of sale of goods ... made by parties whose places of business ... are in territories of different states."[18] As stated, Relax is in Malta and ANI is in Minnesota. Accordingly, the UCTA does not apply.

Third, and most importantly, the UCTA is a consumer protection statute meant to protect consumers from the "unfair contract terms" set forth in a business' "standard" form contract.[19] Clearly, ANI and Relax are both businesses and the record reveals that both negotiated at arms length to arrive at the terms of the Agreement.[20] As stated, the UCTA does not apply here.

C. The Court Will Defer Addressing The Bona Fides Of ANI's Counterclaim Relating To The Profit Sharing Provisions Of The Agreement

ANI seeks a credit of $37,272.67, reflecting the amount it allegedly overpaid

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[18]UCTA, §26(3).

[19]*Id.* at §3.

[20]Pl. Rep. Br., Ex. 1 at ¶ 6.

to Relax pursuant to the profit sharing provisions of the Agreement. Relax disputes that an overpayment occurred but, for the sole purpose of bringing a final resolution to this dispute, it has consented to a reduction of its claim for damages by the amount of the alleged overpayment.

At first glance, Relax's concession would appear to offer a clear path to a final resolution of this dispute. But the matter is confounded by two issues, both of which arise from the fact that ANI has raised the overpayment as a basis for its counterclaim. First, as a practical matter, Relax's agreement to an offset of its damages amounts to a concession to allow judgment to be entered against it on this portion of ANI's counterclaim.[21] The judgment, in turn, arguably would trigger prejudgment interest.[22] Relax's concession has not extended this far. Moreover, judgment on the counterclaim would raise the issue of ANI's entitlement to counsel fees. As discussed below, Relax seeks prevailing-party counsel fees on its breach of contract claim under the English rule. The Court has determined that such fees might be recoverable in this case. "What's good for the goose [may well be] good for the gander." If Relax is entitled to counsel fees for prevailing on its direct claim, then, arguably, ANI would be entitled to at least some portion of its counsel fees for

[21]Pl. Reply Br. at 6.

[22]*See generally*, *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del. 1966).

prevailing on one of its counterclaims. These issues have not been addressed by the parties in the submissions *sub judice*, nor did the Court think to address them with counsel at oral argument. Resolution of the issues will have to await another day.[23]

D. Relax May Avail Itself Of The "English Rule" Regarding Counsel Fees

Relax has requested the Court to award it prevailing-party counsel fees under the English rule as codified in English Civil Procedure Rule 44.3.[24] In this regard,

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[23]Counsel are directed to meet and confer to discuss an appropriate means by which to address these issues. Within thirty (30) days of this Opinion and Order, counsel shall submit a joint status report to the Court to make either a joint proposal (through stipulation) or separate proposals (through proposed forms of order) with respect to the process by which the Court should dispose of this issue.

[24]C.P.R. 44.3. ("(1) The Court has discretion as to – (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. (2) If the Court decides to make an order about costs – (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order. (3) The general rule does not apply to the following proceedings – (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings. (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including – (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply. (5) The conduct of the parties includes – (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed [the Practice Direction (Pre-Action Conduct) or] any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. (6) The orders which the court may make under this include an order that a party must pay – (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs (continued...)

Relax contends that the English rule represents a substantive rather than a procedural right and that, under Delaware choice of law doctrine, the Court must defer to the substantive law of the jurisdiction whose law otherwise applies to the controversy - - in this case English law - - when addressing the counsel fees issue. ANI counters that the issue of whether to award counsel fees presents a purely procedural question and, therefore, the Court should apply Delaware law to resolve this question. Delaware follows the so-called "American rule" which would not allow prevailing-party counsel fees in the absence of, *inter alia*, bad faith, a statute authorizing fees or a contractual provision expressly authorizing such fees.[25] According to ANI, none of the exceptions to the American rule apply here and Relax does not appear to argue otherwise. To resolve the counsel fee question, therefore, the Court must address two issues: (1) is the right to counsel fees procedural or substantive; and (2) if substantive, is Relax entitled to counsel fees under the English rule?

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[24](...continued)
relating only to a distinct part of the proceedings and (g) interest on costs from or until a certain date, including a date before judgment.(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c). (8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed. (9) Where a party entitled to costs is also liable to pay costs the court may assess the costs which that party is liable to pay and either – (a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or (b) delay the issue of a certificate for the costs to which the party is entitled until he has paid the amount which he is liable to pay.").

[25]*See Haywood v. Ambase Corp.*, 2005 WL 2130614, *8 (Del. Ch. Aug. 22, 2005).

The Restatement (Second) of Conflict Of Laws identifies four factors a court might consider in determining whether an issue is procedural or substantive:

> First, whether the parties shaped their actions with reference to the local law of a certain jurisdiction; second, whether the issue is one whose resolution would be likely to affect the ultimate result of the case; third, whether the precedents have tended consistently to classify the issue as procedural or substantive for conflict of law purposes; and fourth, whether an effort to apply the rules of judicial administration of another jurisdiction would impose an undue burden on the forum.[26]

Upon application of these factors, the Court holds that whether to award counsel fees in this case presents a substantive issue for conflict of law purposes. As to the first factor, the Court notes that §15.0 of the parties' contract provides that the Agreement "shall be governed by English law." At least one Delaware court has found that a choice of law provision in a contract invoking the law of a jurisdiction that allows prevailing-party counsel fees suggests that the parties "shaped their actions" in a manner that would point to the law of the selected jurisdiction when resolving counsel fee disputes.[27] In so holding, the court in *El Paso* relied upon Restatement (Second) of Conflict of Laws, §187(1), which provides:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the

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[26] *Atchison Casting Corp. v. Dofasco, Inc.*, 1995 WL 655183, *8 (D. Kan. Oct. 24, 1995) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §122, cmt. a.).

[27] *See El Paso Nat. Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816, *5 (Del. Ch. Dec. 16, 1994).

> parties could have resolved by an explicit provision in the agreement directed to that issue.[28]

The *El Paso* court noted that the parties could have resolved the counsel fee issue by including a provision in their contract that invoked the law of a jurisdiction other than the law invoked in the general choice of law provision. For whatever reason, they chose not to do so. Accordingly, the court held that the general choice of law provision would "fill in [the] gap" and would direct the court to apply the law selected in the choice of law provision to the counsel fee issue.[29]

The Court acknowledges that Chancellor Allen's decision in *El Paso* has not yet been tested in our Supreme Court. Nevertheless, the Court is persuaded that the Chancellor's analysis is sound and well grounded. *El Paso* will be followed here. Accordingly, the first factor of the §122 analysis tips the scale in favor of Relax's position that the English rule should apply here because the parties' "shaped their actions" according to English law.

Turning to the next step of the §122 analysis, it is clear that resolution of the counsel fee issue will not affect the ultimate result of the case. Indeed, the opposite is true - - it is the result of the case that triggers the need to consider the counsel fee

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[28] *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(1)).

[29] *Id. But see Atchison Casting Corp.*, 1995 WL 655183, at *6 (expressly rejecting *El Paso* and holding that the general choice of law provision in a contract has no bearing on the question of whether counsel fees are procedural or substantive).

issue. In this sense, the counsel fee issue can be considered a post-verdict issue that would favor the application of the forum law. Thus, this second factor of the §122 analysis would tip the scale in ANI's direction.

As to the third factor, it can safely be said that the "precedents" addressing this issue in Delaware are anything but consistent. As stated, *El Paso* considered the award of counsel fees as a substantive issue. Since *El Paso*, this court likewise has found the award of counsel fees to be substantive, not procedural.[30] Other Delaware decisions, however, have concluded that the right to counsel fees presented a procedural question governed by the law of the forum.[31] The Court shares the view expressed in *El Paso* that the Delaware decisions which have determined that the award of counsel fees is procedural are distinguishable because they have considered the question in the context of various Delaware statutory schemes that allow for counsel fees.[32] Nevertheless, the fact remains that the question of whether the award of counsel fees presents a procedural or substantive issue is not settled in Delaware.

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[30] *See Immedient Corp. v. Health Trio, Inc.*, 2007 WL 656901, *2 (Del. Super. March 5, 2007) (applying the parties' contractual choice of law to the counsel fee issue).

[31] *See Chester v. Assiniboia Corp.*, 335 A.2d 880, 882-83 (Del. 1976) (addressing right to counsel fees under a Delaware statute); *Chrysler Corp. v. Viglino*, 260 A.2d 160, 161-62 (Del. 1969) (same). It should be noted that *El Paso* distinguished these cases on the ground that "none of the[se] cases involve the arguable creation of substantive contractual rights by reason of designating as governing the law of a state that included ... a statutory right to attorney's fees." *El Paso,* 1994 WL 728816, at *5.

[32] *Id.*

This factor weighs equally on both sides of the scale.

The fourth factor has little significance here. Neither the English rule nor the American rule, in application, would be unduly burdensome to the Court.

After weighing all of the §122 factors, the Court is satisfied, in this case, that the award of counsel fees upon either party proving a breach of the Agreement presents a substantive question, and that the parties' choice of English law should control the resolution of that question. In this regard, the Court reiterates that it finds *El Paso* (and *Immedient Corp.*) to be persuasive on this issue.[33]

Having determined that the counsel fee issue is substantive, the Court next turns to the question of whether counsel fees are appropriate in this instance under the English rule. As discussed below, the Court requires further submissions from the parties before it can answer this question.

Relax seeks counsel fees under the English Civil Procedure Rules. Pursuant to C.P.R. 44.3(2), "[i]f the court decides to make an order about costs ... the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party." Even under the English rule, however, the award of fees is discretionary.[34]

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[33] *See also Maale v. Kirchgessner*, 2011 WL 1549058, *4-5 (S.D. Fla. Apr. 22, 2011) (holding that contract's choice of Turks and Caicos law invoked the English rule with respect to the award of prevailing-party counsel fees).

[34] Senior Courts Act, 1981, c. 54, § 51 (Eng.) (granting the court "full power to determine by (continued...)

How and when the court should exercise this discretion has not been addressed by the parties.[35] Nor have the parties addressed the proper procedure by which the English rule should be implemented.[36] Further submissions are required to address this issue.[37]

VI.

Based on the foregoing, Relax's motion for summary judgment on its breach of contract claim and on ANI's counterclaim for consequential damages is **GRANTED.** The parties shall submit a stipulation or separate proposals with respect to the further handling of ANI's counterclaim arising from the profit sharing provisions of the Agreement and Relax's claim for counsel fees. As to these aspects of Relax's motion for summary judgment, the motion is **DENIED** without prejudice.

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[34](...continued)
and who and to what extent the costs are to be paid.").

[35]For instance, the parties have not addressed to what extent the Court should consider the scope of the controversy, the counterclaim(s) or any regularly-applied discounts which may have become features of the English courts' jurisprudence on this issue.

[36]The Court takes some if not all of the responsibility for this gap in the submissions. The parties offered to address counsel fees at the oral argument on Relax's motion. The Court responded that oral argument on this issue was not necessary. With the benefit of further reflection, the Court must confess that "[t]he matter does not appear to me now as it appears to have appeared to me then." *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Justice Jackson concurring, quoting Baron Bramwell).

[37]The parties shall discuss the timing and format of these submissions when discussing the appropriate means by which to address ANI's profit sharing counterclaim.

IT IS SO ORDERED.

Judge Joseph R. Slights, III