Georgiean -

Thanks for the follow-up email. The definition of an "aired event" is the following and any aired event is excluded from your re-purposing rights: Web-casting, Pod-casting, and Broadcasting.

AstraZeneca's repurposing rights for one year will include DVD private distribution, DVD public distribution, Lunch and Learns as well you can certainly put the program on your web-site via on-demand streaming including entire or partial content.

* * *

(Docket No. 92-5, p. 61).[51]

On May 5, 2009, Janson received the following email from Franklin (Velocity's Sr. VP):

Hi Kurt:

In reviewing Celerity's monthly reporting, it appears that A/Z is no longer a Celerity client. Is that an accurate assumption by me/velocity? *Lost to a competitor* has that connotation - want to clarify if that is the case. There is no activity or ongoing conversations between A/Z and Celerity related to commitments to VELOCITY broadcasts? Or ..."

If VELOCITY and Celerity are no longer the vendors of choice, do you know who A/Z has chosen and the reason(s)? We know that A/Z had a very strong connection and satisfaction with VELOCITY. In fact, remarks were made to that effect during A/Z's most recent broadcast. The collapse of this relationship is of great concern here.

---

[51] Around this time, Velocity quoted a broadcast repurposing fee of $54,000 for a potential client of Celerity for a product called Voltaren Gel. In an email to the client on February 26, 2009, a representative of Celerity indicated that an explanation of the high repurposing fee had been requested from Velocity. (Docket No. 92-51, p. 30). Approximately 5½ months later, Velocity quoted a repurposing fee of $15,000 for 6 months and $5,000 per month thereafter for a Celerity customer for a product called Embryon. In response to the quote, Janson sent an email to Surgil which stated: "It looks like Velocity is getting less expensive as it relates to our clients being able to repurpose their content." (Docket No. 92-5, p. 32).

> I know that I asked you about A/Z by phone a while back, but further clarification is needed here.
>
> Thanks
> Susie

(Docket No. 92-5, p. 65).

Janson responded later that day as follows:

> Susie
>
> I just landed and saw this. In light of the allegations of our cross claim and the third party claim, as well as all of the e-mails exchanged regarding AZ; (sic) I find it amazing that I am receiving such an inquiry. You know as well as I do that Velocity's pricing tactics, inability to finalize intellectual property issues and general intransigence caused AZ to seek other options.

(Docket No. 92-5, p. 64).

In response to Franklin's subsequent inquiry into whether AZ had terminated its relationship with Celerity, Janson directed her to speak with Celerity's counsel. (Docket No. 92-5, p. 64).

<u>Commencement of Litigation</u>

On January 28, 2009, Velocity filed this civil action against Celerity (a) asserting a claim for breach of contract based on Celerity's failure to pay the cancellation fees invoiced for the Effient broadcasts, and (b) seeking a declaratory judgment that Celerity's failure to pay the cancellation fees was a material breach of the second reseller agreement entitling Velocity to terminate the agreement. (Docket No. 1).

Nine days later, Velocity filed Civil Action No. 09-151 against Celerity (a) asserting claims for trademark infringement, unfair competition, breach of contract based on Celerity's alleged violation of Velocity's brand usage guidelines and breach of contract based on Celerity's alleged violation of the non-solicitation provision in the second reseller agreement,[52] and (b) seeking a declaratory judgment that Celerity's violation of Velocity's brand usage guidelines was a material breach of the second reseller agreement entitling Velocity to terminate the agreement. (Civil Action No. 09-151, Docket No. 1).

On March 17, 2009, Celerity filed an answer to Velocity's complaint in this case which included counterclaims against Velocity for breach of contract, breach of the implied duty of good faith and fair dealing and tortious interference with existing and prospective contractual relations. The counterclaim for tortious interference with existing and prospective contractual relations also was asserted against Elias.[53] In addition, Celerity asserted a counterclaim against Velocity in which it sought a declaratory judgment that Velocity

[52] Velocity's claim against Celerity for breach of the second reseller agreement's non-solicitation provision related to Celerity's direct contact with a representative of Morton's. (Civil Action No. 09-151, Docket No. 1, ¶¶ 45-53, 79-85).

[53] Because Elias was not a plaintiff in this case, the Court notes that Celerity should have filed its claim against Elias in a third-party complaint, not as a counterclaim. Nevertheless, the claim will be treated as a third-party claim.

materially breached the second reseller agreement entitling Celerity to terminate the agreement. (Docket No. 12). Six days later, Celerity filed an answer and the same counterclaims and third-party claim against Velocity and Elias in Civil Action No. 09-151. (Civil Action No. 09-151, Docket No. 13).

On April 14, 2009, Velocity and Elias filed a motion to dismiss Counts II through IV of Celerity's counterclaims in this case and in Civil Action No. 09-151 pursuant to Fed.R.Civ.P. 12(b)(6). (Docket No. 14, Civil Action No. 09-151, Docket No. 15). Thereafter, on May 27, 2009, the parties filed a joint motion to consolidate Civil Action No. 09-151 with this case for all purposes. The motion was granted and Civil Action No. 09-151 was closed. (Civil Action No. 09-151, Docket Nos. 18 and 19).

On June 9, 2009, the Court filed a Memorandum Opinion and Order (a) denying without prejudice the motion of Velocity and Elias to dismiss Counts II through IV of Celerity's counterclaims and (b) directing Celerity to file an amended answer and counterclaims.[54]

[54] Two weeks later, Celerity filed the amended answer and counterclaims adding another counterclaim against Velocity for breach of contract relating to the failure of the audience response system during the Enablex broadcast in Blue Bell, Pennsylvania on May 28, 2009. (Docket No. 23).

Velocity's Termination of Second Reseller Agreement

Despite Velocity's pending request for a declaratory judgment that it was entitled to terminate the second reseller agreement based on Celerity's material breaches of the agreement, on September 2, 2009, Velocity's counsel sent the following letter to Celerity's counsel:

> Dear Mr. Harmon:
>
> VELOCITY International, Inc., dba VELOCITY Broadcasting ("VELOCITY") hereby provides notice to Celerity Healthcare Solutions LLC ("Celerity") pursuant to Section VIII of the Reseller Agreement dated October 17, 2007, that said Agreement is terminated effective immediately, for failure to cure the breaches identified in VELOCITY's notices of material breaches dated December 16, 2008 and December 22, 2008. Celerity's authority to resell Velocity services and programming is hereby revoked. Any broadcasts that have been hardbooked pursuant to a signed customer agreement will be honored.
>
> Very truly yours,
> COHEN & GRIGSBY, P.C.
> By: Barbara A. Scheib

(Docket No. 81-7, p. 6).

Upon receiving Velocity's September 2nd termination letter, Celerity sought a clarification. Velocity's counsel responded on September 3rd as follows:

> Dear Mr. Harmon:
>
> This letter responds to your correspondence of September 2, 2009 inquiring as to Velocity Broadcasting's position regarding certain scheduled and proposed broadcasts. The only event hard-booked as of the termination of the Reseller Agreement was the Sanofi Aventis broadcast scheduled for October 14, 2009. It is therefore Velocity's understanding that Sanofi Aventi is

> under contract, and Velocity will honor that broadcast. The remaining proposed broadcasts have not been scheduled or hard-booked, and it is therefore Velocity's understanding that those broadcasts are not under contract. Given those understandings, Celerity does not have authority to sell Velocity's services or bind Velocity to any contractual obligation with respect to any of the remaining proposed events.
>
> Very truly yours,
> COHEN & GRIGSBY, P.C.
> By: Barbara Scheib

(Docket No. 95-1, p. 2).

Also on September 3rd, Elias sent the following letter to Celerity's customers:

> Please be advised that effective (Wednesday, September 2, 2009), VELOCITY Broadcasting has terminated Celerity Healthcare Solutions, LLC, as an authorized VELOCITY reseller.
>
> Therefore, Celerity Healthcare Solutions may no longer sell or represent VELOCITY's suite of private broadcasting and precision marketing services. In addition Celerity may not: sell, market, promote, license or otherwise represent private broadcasts, via satellite, internet, or other similar broadcast media, into restaurant or other hospitality venues until September 2, 2010.
>
> Please do not hesitate to call Susie Franklin, Senior Vice President, Strategic Business Development at VELOCITY Broadcasting (**412.316.6100** or **800.755.9001**) should you have any immediate questions about this change to our authorized reseller network or your business relationship with VELOCITY Broadcasting.
>
> A VELOCITY Broadcasting Account Services Representative will be contacting you soon to discuss our array of services.
>
> Philip Elias
> President and CEO

(Docket No. 76-2, p. 2).[55]

The Sanofi Aventis Broadcast

Following Velocity's termination of the second reseller agreement with Celerity, the parties completed one broadcast that had been sold by Celerity to Sanofi Aventis prior to the termination. As noted previously, the payment terms of Velocity and its hospitality partners, Morton's and Maggiano's, require advance payment of F&B revenue minimums, and, following each broadcast, a final bill is sent for the F&B charges exceeding the minimum. Consistent with this practice, on October 29, 2009, Velocity sent an invoice to Celerity for $54,308.63 in excess F&B charges for the Sanofi Aventis broadcast. Celerity has withheld payment of $50,000 of the invoice amount on the ground that Velocity "left Celerity's name and logo off of the walk-in graphics, credits, poster and all signage" at the Sanofi Aventis broadcast.[56] (Docket No. 90-45, p. 2, 97, ¶¶ 147, 149-52, 154).

III

Under Rule 56(a) of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows

[55] According to Celerity, Elias's September 3, 2009 letter to its clients "was the death knell for Celerity. Not only did it deprive Celerity of its core business (*i.e.*, selling Velocity broadcasts), but it put Celerity out of business altogether by causing its clients to fear the prospect of litigation if they continued to do business with Celerity." (Docket No. 83, p. 22).

[56] Gatzulis maintains that $50,000 is the "minimum cost" or damage incurred by Celerity as a result of the omissions by Velocity. (Docket No. 97, ¶ 155).

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). With respect to contract claims, "where ... a contract is unambiguous, it is appropriate for the court to determine its meaning as a matter of law at the summary judgment stage." LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1073 (3d Cir.1996). See also Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 164-65 (3d Cir.2001)(A court "can grant summary judgment on an issue of contract interpretation if the contractual language being interpreted is subject to only one reasonable interpretation.").

IV

Cancellation Fees for the Effient Broadcasts

Both Velocity and Celerity seek judgment as a matter of law on Velocity's breach of contract claim arising out of Celerity's refusal to pay the cancellation fees invoiced by Velocity for the Effient broadcasts that could not proceed in late 2008 due to the failure of the product to obtain FDA approval. Regarding general principles of contract interpretation under Pennsylvania law, in Krizovensky v. Krizovensky, 624 A.2d 638 (Pa.Super. 1993), the Superior Court of Pennsylvania stated:[57]

[57] There is no dispute that the second reseller agreement is governed by Pennsylvania law. (Docket No. 90-3, p. 5).

* * *

> ... When interpreting a contract, a court must determine the intent of the parties and effect must be given to all provisions in the contract. Dept. of Transp. v. Manor Mines, Inc., 523 Pa. 112, 565 A.2d 428 (1989). It is firmly settled that the intent of the parties to a written contract is contained in the writing itself. Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659 (1982). When the words of a contract are clear and unambiguous, the intent is to be found only in the express language of the agreement. Id. Clear contractual terms that are capable of one reasonable interpretation must be given effect without reference to matters outside the contract. D'Huy, supra. Where the contract terms are ambiguous and susceptible of more than one reasonable interpretation, however, the court is free to receive extrinsic evidence, i.e., parol evidence, to resolve the ambiguity. Id. A contract will be found to be ambiguous:
>
> > if, and only if, it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one and is obscure in meaning through indefiniteness of expression or has a double meaning. A contract is not ambiguous if the court can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends; and a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction.
>
> A & L Lumber Co. of Atlasburg v. Nordquist, 348 Pa.Super. 580, 585-86, 502 A.2d 697, 700 (1985)(citations omitted).
>
> * * *

624 A.2d at 642.

With respect to the issue of Celerity's obligation to pay cancellation fees for the Effient broadcasts, Velocity and Celerity assert that the second reseller agreement is clear and unambiguous and the Court agrees. Accordingly, there is no need for receipt of extrinsic evidence to interpret the second reseller agreement on this issue.[58]

Velocity's breach of contract claim for damages arising out of Celerity's refusal to pay the cancellation fees invoiced for the Effient broadcasts is based on Section III.A. of the second reseller agreement which provides:[59]

---

[58] Although Velocity and Celerity maintain the second reseller agreement is clear and unambiguous, both parties have submitted extensive extrinsic evidence in support of their summary judgment motions on the issue of Celerity's obligation to pay cancellation fees for the Effient broadcasts as noted in the Court's lengthy summary of the undisputed facts. In this connection, the Court notes that its consideration of extrinsic evidence at this stage of the proceedings would be limited to determining whether a latent ambiguity exists, *i.e.*, an ambiguity arising from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language, on its face, appears clear and unambiguous. To establish a claim of latent ambiguity, a party's extrinsic evidence must show that some specific term or terms in the contract are ambiguous. It cannot simply show that the parties intended something different that was not incorporated into the contract. Further, to be capable of establishing a latent ambiguity, the alternative meaning that a party seeks to ascribe to the specific term or terms in the contract must be reasonable. If a party offers extrinsic evidence capable of establishing a latent ambiguity, a decision as to which of the competing interpretations of the contract is the correct one is reserved for the factfinder, which, in this case, would be a jury. See Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79 (3d Cir.2001). Neither Velocity nor Celerity has argued that a latent ambiguity exists in the second reseller agreement and the Court can find none. Thus, there is no basis for the Court to consider the parties' proffered extrinsic evidence concerning Celerity's purported obligation to pay cancellation fees for the Effient broadcasts.

[59] As noted in footnote 9, there is no provision in the second reseller agreement addressing the issue of broadcast cancellations. Rather, terms relating to broadcast cancellations are set forth in a provision of the sample Velocity Broadcasting Agreement attached to the second reseller agreement as Exhibit B. In the event Velocity's breach of contract claim regarding Celerity's failure to pay cancellation fees for the Effient broadcasts was based on the provision in the second reseller agreement designating Velocity as a third-party beneficiary of the broadcast agreements executed by Celerity and its clients, Celerity argued in support of its motion for summary judgment that Velocity cannot be a third-party beneficiary of a broadcast agreement that was never executed by MMEG. (Docket No. 83, pp. 28-29). In response, Velocity clarified the basis of its initial breach of contract claim against Celerity. Specifically, Velocity is not seeking payment of the cancellation fees from Celerity as a third-party beneficiary of a broadcast agreement with MMEG. Rather, it is seeking payment of the

* * *

> A. Fees and Payment: Reseller will pay Velocity the fees set forth in Velocity's then-current Rate Cards for Velocity Services ("Fees") and will use best efforts to do so in accordance with Velocity's standard payment terms as set forth therein for each Broadcast that Reseller **sells** to a Customer.... (emphasis added).

* * *

Velocity and Celerity dispute the meaning of the term "sells" in Section III.A. Celerity asserts that under any reasonable interpretation of the term, a broadcast is not "sold" if its customer has no contractual obligation to buy the broadcast. Because it is undisputed that MMEG never executed a contract for either Effient broadcast (which, as noted in the summary of the undisputed facts, was based on MMEG's objection to the IP provision in the Velocity Broadcasting Agreement), Celerity maintains that Velocity is not entitled to collect cancellation fees for the Effient broadcasts under Section III.A. of the second reseller agreement.

On the other hand, Velocity contends that for a broadcast sold through a reseller (as opposed to a broadcast directly sold to an end customer by Velocity), the reseller's contractual obligation to submit payments to Velocity and/or to pay cancellation fees to Velocity arises under Article III.A. of the second reseller agreement when a broadcast is "firm booked,"

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cancellation fees pursuant to Section III.A. of the second reseller agreement with Celerity. (Docket No. 95, p. 22).

i.e., when the non-refundable deposits to reserve private dining rooms at Morton's or Maggiano's for a broadcast are paid. After consideration, the Court finds Velocity's interpretation of the term "sells" untenable.[60]

The term "firm booked" does not appear in the second reseller agreement between Velocity and Celerity. Rather, it is found in the sample Reservation Confirmation Letter attached to the second reseller agreement as Exhibit C. Specifically, the Reservation Confirmation Letter provides that upon payment of a non-refundable deposit, the reservation of private dining rooms for a proposed Velocity broadcast is "firm booked." However, the Reservation Confirmation Letter also clearly states that Velocity will not commence work on a customer's proposed broadcast until a Velocity Broadcasting Agreement is signed. As a result, "firm booking" private dining rooms for a proposed Velocity broadcast cannot constitute a sale of the broadcast.

The term "sale" is defined in Black's Law Dictionary (9th ed. 2009) as follows: "1. The transfer of property or title for a price. See UCC § 2-106(1). 2. The agreement by which such a

[60] The Court also finds untenable Velocity's assertion that "[t]he fact that Celerity reserved private dining locations and booked Velocity's studio ... **without** having a signed customer agreement in place constitutes a breach of the Reseller Agreement by Celerity, but it is not a defense (sic) Velocity's claim." (Docket No. 95, p. 19, fn.5). Velocity fails to identify the provision of the second reseller agreement that was allegedly breached by Celerity's payment of the non-refundable deposits to reserve private dining rooms for the Effient broadcasts before MMEG had signed broadcast agreements and the Court can find none. In fact, this is the exact procedure contemplated in the section of Velocity's Reservation Confirmation Letter captioned "Next Steps."

transfer takes place. The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised." In the present case, there is no evidence to support the second and fourth elements of a sale. Specifically, due to the unresolved dispute over IP language, MMEG never agreed to the terms of Celerity's contract proposal for the Effient broadcasts and never paid, or promised to pay, the proposed fees for those broadcasts.

In support of its motion for summary judgment on this claim, Velocity asserts that it "treats" a broadcast as "sold" for payment and billing purposes when private dining rooms at Morton's or Maggiano's are "firm booked" by the payment of the non-refundable deposit pursuant to the terms of the Reservation Confirmation Letter. (Docket No. 89, pp. 8-9). Simply put, the manner in which Velocity "treats" a proposed broadcast for its own accounting purposes at the time a non-refundable private dining room deposit is paid is irrelevant. As noted above, in the absence of mutual assent to the terms for producing the Effient broadcasts and a promise to pay, the broadcasts were never sold to MMEG and no obligation arose on the part of Celerity to pay any fees to Velocity under the second reseller agreement.

Based on the foregoing, Celerity's motion for summary judgment on this breach of contract claim will be granted and Velocity's cross-motion for summary judgment will be denied.[61]

Section 43(a) of the Lanham Act

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which precludes the use of another's mark in a manner likely to confuse the public about the origin of goods, provides in relevant part:

> **§ 1125. False designation of origin, false descriptions, and dilution forbidden**
>
> **(a) Civil action**
>
> **(1)** Any person who, on or in connection with any goods or services, ..., uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -
>
> > **(A)** is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, ...
>
> * * *
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.
>
> * * *

[61] In light of the Court's conclusion that the terms of the second reseller agreement did not obligate Celerity to pay cancellation fees for the Effient broadcasts in the absence of MMEG's execution of broadcast agreements, the Court will not address Celerity's alternative argument that the cancellation fees sought by Velocity constitute an unconscionable penalty. (Docket No. 83, pp. 29-31).

15 U.S.C. § 1125(a)(1)(A).

Velocity seeks damages from Celerity under Section 43(a)(1)(A) based on the "Overview" created by Janson in late 2006 or early 2007 to describe for marketing purposes the services offered by Celerity in concert with Velocity. As noted previously, the "Overview" refers to the "Celerity-Velocity HD Suites," the "Celerity-Velocity solution" and a "Celerity-Velocity broadcast." Velocity contends that by placing "Celerity" before "Velocity," the "Overview" falsely implied that Celerity was the originator, rather than a reseller, of Velocity's services and programs.

To establish a claim for false designation of origin or unfair competition under Section 43(a), Velocity must prove, among other things, that Celerity's use of the mark or marks at issue to identify goods or services is likely to create confusion. Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc., 269 F.3d 270, 279 (3d Cir.2001). In Interpace Corp. v. Lapp, Inc., 721 F.2d 460 (3d Cir.1983), the Third Circuit Court of Appeals developed the following nonexhaustive list of factors for district courts to consider in determining whether there is a likelihood of confusion between marks for goods or services:

> (1) the degree of similarity between the owner's mark and the alleged infringing mark;

(2) the strength of the owner's mark;
(3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
(4) the length of time the defendant has used the mark without evidence of actual confusion arising;
(5) the intent of the defendant in adopting the mark;
(6) the evidence of actual confusion;
(7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media;
(8) the extent to which the targets of the parties' sales efforts are the same;
(9) the relationship of the goods in the minds of consumers because of the similarity of function; and
(10) other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market, or that he is likely to expand into that market.

721 F.2d at 463.[62]

Velocity maintains that there is no need to apply the Lapp factors in determining whether Celerity's "Overview" created a likelihood of confusion as to the origin of Velocity's broadcasts because its Section 43(a)(1)(A) claim is based on Celerity's breach of Section II.F of the second reseller agreement which granted a limited license to Celerity to use Velocity's marks for marketing activities. Citing, among other cases, U.S. Structures, Inc. v. J.P. Structures, Inc., 130 F.3d 1185 (6th Cir.1997)(Proof of continued, unauthorized use of original trademark by one whose license to use trademark had

[62] The unfair competition claim under Section 43(a) of the Lanham Act in Lapp involved non-competing goods. In A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198 (3d Cir. 2000), the Third Circuit extended consideration of the Lapp factors to unfair competition claims under Section 43(a) involving competing goods.

been terminated is sufficient to establish "likelihood of confusion," for purpose of trademark infringement action under the Lanham Act), and Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc., 88 F.Supp.2d 914 (C.D.Ill.2000)(Likelihood of confusion existed as a matter of law for purpose of establishing trademark infringement under the Lanham Act where trademark licensee continued to use marks owned by licensor after termination of license), Velocity asserts that likelihood of confusion exists as a matter of law where a licensee continues to use the licensor's marks after termination of the license. (Docket No. 95, pp. 33-35).

After consideration, the Court finds Velocity's argument unpersuasive. First, there is no evidence that Celerity continued to distribute the "Overview" after its license to use Velocity's marks had been terminated, which did not occur until Velocity terminated the second reseller agreement on September 2, 2009.[63] Thus, U.S. Structures and Bunn-O-Matic are distinguishable from this case. Second, assuming Celerity was aware of the content of Velocity's 2008 usage guidelines when the "Overview" was distributed to potential customers for

[63] Any claim by Velocity that Celerity's license to use its marks for marketing purposes was revoked by the cease and desist letter dated December 22, 2008 is meritless. The letter specifically provided for Celerity's continued use of Velocity's marks "in strict accordance with the Guidelines and the Reseller Agreement." (Docket No. 81-6, p. 3). The only distribution of the "Overview" after the December 22, 2008 cease and desist letter occurred on March 10, 2009, six months before Celerity's license to use Velocity's marks was revoked by termination of the second reseller agreement.

Velocity's private broadcasts (as the Court must do in ruling of Celerity's motion for summary judgment on this claim), a review of those guidelines reveals no provision which would put Celerity on notice that the mere placement of its name before Velocity's name in a description of the services they provided in concert was a violation of the guidelines. The 2008 usage guidelines focused on Logo Usage (which logo to use and when), Logo Composition (the fonts, colors and sizes to be used), Logo Positioning (the location of logos on the page or in proximity of other logos or messaging), Type Treatments (for stationery, collateral pieces and printed material), PowerPoint Templates (guide to the use and creation of presentations), and On-Air Use (production guidelines for consistent brand identity). (Docket No. 90-5). Thus, there is no basis for finding that Celerity's "Overview" violated Velocity's 2008 usage guidelines.[64]

Turning to the likelihood of a potential customer for a Velocity private broadcast being confused by the "Overview" created by Celerity, the majority of the Lapp factors are not applicable because this case does not involve the usual situation in which a similar mark is adopted by another company, regardless of whether the other company's goods are competing or

[64] Tellingly, as noted by Celerity, the section of a document created by Velocity on January 7, 2008 to provide, among other things, an overview of Celerity referred to the "Celerity-Velocity solution" (Docket No. 75-8, p. 3), and a power point presentation created by Velocity linked the parties' names together, stating: "The Velocity/Celerity experience informs, engages, excites and motivates audiences like nothing else." (Docket No. 75-2).

non-competing. Celerity was an authorized reseller of Velocity's private broadcasts at the time the allegedly infringing document was prepared and distributed. The Court does note, however, that there is no evidence that Celerity intended to mislead potential customers as to the producer of Velocity's private broadcasts (Lapp factor No. 5) and no evidence that anyone was actually confused by the "Overview" as to the producer of Velocity's private broadcasts (Lapp factor No. 6). Moreover, any possible confusion as to the producer of Velocity's private broadcasts created by Celerity's "Overview" was eliminated by the contract proposals provided by Celerity to its potential customers which stated in relevant part:

* * *

> "We are pleased to have an opportunity to offer private broadcast services, to be provided in conjunction with our partner Velocity Broadcasting, for your consideration through this Broadcast Event Agreement. Velocity produces live television events and broadcasts them over an encrypted satellite system to a network of private dining rooms and clubs around the world. Velocity has been chosen as the exclusive provider of private broadcasts by Morton's, The Steakhouse and Maggiano's, Little Italy.... Celerity Healthcare Solutions, LLC has partnered with Velocity Broadcasting to be the exclusive provider of their proprietary satellite network to the life sciences industry...."

(Docket No. 82-2, p. 2).

Finally, as noted by Celerity, there is no evidence that Celerity profited as a result of the alleged infringement of Velocity's service marks. Velocity was the only entity for which Celerity sold private broadcasts. Therefore, any profits earned by Celerity from distributing the "Overview" resulted in increased profits for Velocity. (Docket No. 83, p. 39). Under the circumstances, judgment will be entered in favor of Celerity as a matter of law on Velocity's claim under Section 43(a)(1)(A) of the Lanham Act.

Section 43(c) of the Lanham Act

Velocity also asserted a claim against Celerity under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), which entitles the owner of a famous mark that is distinctive to an injunction against a person who uses a mark in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence of actual or likely confusion, competition or actual economic injury. Because (1) the remedy provided by Section 43(c) is limited to injunctive relief, (2) Velocity terminated its reseller relationship with Celerity on September 2, 2009, and (3) Celerity has no reason to distribute marketing materials representing a relationship between Celerity and Velocity, any claim under Section 43(c) is moot. Moreover, it appears that Velocity mistakenly cited Section 43(c) as a basis for its second Lanham Act claim against Celerity. Velocity did not allege that it was entitled to an injunction against Celerity to prevent the blurring of its service marks by dilution or tarnishment. Rather, Velocity alleged that it was entitled to injunctive relief under Section 43(c) because "Celerity's continued misuse of Velocity's service marks ... has caused or is likely to cause consumer confusion," which is covered by Section 43(a) of the Lanham Act. Based on the foregoing, Celerity's motion for summary judgment on this claim will be granted.

Celerity "Overview"

Velocity also asserts a breach of contract claim against Celerity based on the three references to "Celerity-Velocity" in the "Overview" which served as the basis for its Lanham Act claims against Celerity. To re-iterate, Velocity asserts that the placement of "Celerity" before "Velocity" violated the limited license granted to Celerity to use Velocity's service marks in Section II.F. of the second reseller agreement. For the reasons set forth above in connection with the identical argument raised in support of Velocity's claim against Celerity under Section 43(a) of the Lanham Act, the Court concludes that the "Overview" created by Celerity did not breach Section II.F. of the second reseller agreement. Accordingly, Celerity's motion for summary judgment on this claim will be granted and Velocity's cross-motion for summary judgment will be denied.

Solicitation of Morton's

In the remaining breach of contract claim asserted against Celerity by Velocity (in Civil Action No. 09-151), it is alleged that Celerity "materially breached its contract with Velocity by soliciting Morton's in a manner detrimental to Velocity." (Civil Action No. 90-151, p. 12, ¶ 82). In opposition to Celerity's motion for summary judgment on this claim, Velocity failed to offer any evidence to support the claim. In fact, Velocity totally failed to address this portion of Celerity's motion for summary judgment. Under the circumstances, judgment will be entered in favor of Celerity and against Velocity on this breach of contract claim.[65]

Velocity's Requests for Declaratory Relief

Finally, with regard to Velocity's requests for declaratory relief in Civil Action Nos. 09-102 and 09-151 which were prospective in nature (and never amended), the Court finds that Velocity's termination of the second reseller agreement on September 2, 2009 moots the requests. Thus, Velocity's requests for declaratory relief will be dismissed.

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[65] In the motion for summary judgment on its breach of contract claims against Celerity arising out of the cancellation fees for the Effient broadcasts and its 2008 brand usage guidelines, Velocity also seeks judgment as a matter of law in connection with the $50,000.00 in excess F&B charges withheld by Celerity for the Sanofi Aventis broadcast which occurred after Velocity's termination of the second reseller agreement. (Docket No. 89, p. 22). Because this breach of contract claim was not included in the complaints filed by Velocity in this case and Civil Action No. 09-151 and Velocity never filed a motion to amend either complaint, the Court declines to address this claim.

V

As noted previously, Velocity and Elias have moved for summary judgment on Celerity's counterclaims and third-party claim. The claims will be addressed seriatim.

Counterclaim I

Celerity asserts a counterclaim against Velocity for breach of the second reseller agreement based on (1) the cancellation fees imposed for the Effient broadcasts that had to be postponed/cancelled due to the failure of the product to receive FDA approval and (2) violations of the non-disclosure and non-solicitation provisions in the second reseller agreement. (Court's Memorandum Opinion, Docket No. 21, p. 13)

Cancellation fees

For the reasons stated in connection with the parties' cross-motions for summary judgment on Velocity's claim for breach of contract based on Celerity's failure to pay the cancellation fees for the Effient broadcasts, there was no basis in the second reseller agreement for Velocity's claim that Celerity was obligated to pay such fees. Thus, Celerity's failure to do so did not constitute a material breach entitling

Velocity to terminate the second reseller agreement.[66] Accordingly, Velocity is not entitled to summary judgment on this aspect of Celerity's first counterclaim.

Non-Disclosure Provision

Section V of the second reseller agreement provided:

> **V. Confidentiality and Non-Disclosure**
>
> Each party to this Agreement may receive Confidential Information ... in connection with the performance of its obligations pursuant to this Agreement. Each party will exercise reasonable care to preserve and protect the confidentiality of the Confidential Information and will at a minimum use the same level of care and security it affords its own confidential information. Neither party will disclose the Confidential Information to third parties or use such Confidential Information for any purposes whatsoever other than as permitted or contemplated under this Agreement....

(Docket No. 74-1, p. 4).

The term "Confidential Information" is defined in the second reseller agreement and specifically includes "information related to Customers and Prospective Customers." (Docket No. 74-1, p. 2).

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[66] With respect to termination, the second reseller agreement provided in relevant part:

> **VIII. Termination**
>
> A party may terminate this Agreement if the other party commits a material breach of this Agreement and fails to cure such material breach within thirty (30) days of receipt of notice from the non-breaching party specifying the nature of the breach....

(Docket No. 74-1, p. 5).

In opposition to Velocity's motion for summary judgment on this counterclaim, Celerity submitted uncontroverted evidence showing that in November 2008, while the second reseller agreement was in effect and Celerity was the exclusive reseller of Velocity broadcasts in the pharma sector, Franklin sent a list of the pharma clients to whom Celerity had sold Velocity broadcasts to O'Malley after he expressed a desire on behalf of Maritz to resell Velocity broadcasts in the pharma sector.[67] Under the circumstances, Velocity is not entitled to summary judgment in its favor on this aspect of Celerity's first counterclaim.

Non-Solicitation Provision

The non-solicitation provision in the second reseller agreement provided in relevant part:

> **VII. No Solicitation**
>
> Each party to this Agreement acknowledges and agrees that the other party ... invest[s] considerable resources to recruit, hire, retain, engage and/or contract with their respective employees, clients and Business Partners, and that the loss of employees, or interference with the relationships between either party ... and its respective clients or Business Partners would have considerable adverse impact on such party.... Therefore, each party agrees that during the Term of this Agreement and for a period of twelve (12) months thereafter, such party shall not, directly or indirectly: ... (2) solicit for business ... any Customer, as applies to the restriction on

[67] It is apparent that Franklin knew the list of pharma clients who had been sold Velocity broadcasts through Celerity was confidential. Franklin specifically stated in her email to O'Malley: "Our exchange is totally confidential at this point - keep close." (Docket No. 92-3, p. 22).

> Velocity, in any way that would be detrimental to the other party ...; or (3) interfere with any contractual or business relationship ... (ii) as applies to the restriction on Velocity, between Reseller and a Reseller Customer.

(Docket No. 74-1, p. 5).

In turn, the second reseller agreement defines a Celerity "Customer" to mean "an end customer who has purchased and is under contract for Velocity services from Reseller or any other entity, such as a Medical Communications Company 'MedCom' that has either contracted or subcontracted with Celerity for services that include Velocity Services." (Docket No. 74-1, p. 2). Celerity has submitted evidence showing that, despite the foregoing provision, Velocity began directly soliciting Celerity's customers while the second reseller agreement was still in effect.

In support of its motion for summary judgment on this claim, Velocity asserts: "The non-solicitation term, by its plain language, applied only to companies who were parties to unexpired, current contracts for Velocity Services. At the time the Reseller Agreement was terminated by Velocity in September 2009, only one company - Sanofi Aventis - fit that description." (Docket No. 87, p. 18). In so arguing, Velocity ignores entirely the second part of the definition of a Celerity "Customer" in the second reseller agreement, *i.e.,* **"or any other entity, such as a Medical Communications Company 'MedCom' that**

has either contracted or subcontracted with Celerity for services that include Velocity Services." As noted by Celerity, Velocity's proposed interpretation of the term "Customer" "makes no sense in the context of the nonsolicitation provision." (Docket No. 93, p. 31-32). There would be absolutely no reason for Velocity to solicit a Celerity customer that had executed a contract for a future Velocity broadcast.

In sum, the Court agrees with Celerity that the only reasonable interpretation of the term "Customer" in the second reseller agreement is one that included any entity that had ever contracted or subcontracted with Celerity for Velocity's broadcast services. Under the circumstances, Velocity is not entitled to summary judgment on this aspect of Celerity's first counterclaim.

Counterclaim II

Celerity also asserts a counterclaim against Velocity for breach of an alleged oral agreement by Elias to extend a 10% discount on network access fees to AZ for any broadcasts in 2008. In its earlier motion to dismiss, Velocity asserted that this counterclaim was barred by Section X.F. of the second reseller agreement which provided: "This Agreement will not be modified or amended in any respect except by a writing duly executed by both parties." (Docket No. 74-1, p. 6). In denying Velocity's motion to dismiss on this ground, the Court noted that "well-established Pennsylvania law provides that despite the existence of 'no oral modification' provisions in a written contract, such modifications may be binding where the words or conduct of the parties show by 'clear, precise and convincing evidence' that the parties' waived that provision."[68] (Court's Memorandum Opinion, Docket No. 21, p. 9).

In support of its motion for summary judgment on this counterclaim, Velocity asserts that (1) the only evidentiary support for this counterclaim is Janson's testimony that he had a 10 to 15 minute discussion with Elias on an unidentified date during which Elias agreed to a 10% discount on AZ's network access fees in 2008, and (2) this evidence is insufficient to meet the applicable "clear, precise and convincing evidence" standard noted above.[69] (Docket No. 87, p. 30).

After consideration, the Court concludes that Velocity is not entitled to summary judgment on this counterclaim. Velocity fails to acknowledge significant evidence which supports this counterclaim. Specifically, upon receipt of the invoice for the first AZ broadcast in 2008, Celerity noted the omission of the 10% discount on AZ's network access fees and promptly brought

[68] See First Nat'l Bank v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 280 (3d Cir.1987).

[69] In support of its motion for summary judgment on this counterclaim, Velocity also notes "it is undisputed that Celerity paid numerous successive invoices without protest that did not contain the alleged discount." (Docket No. 87, p. 30). Velocity fails to mention the evidence submitted by Celerity which shows that upon discovery of this oversight, Celerity contacted Velocity and requested an adjustment.

the omission to Velocity's attention through Senko. After inquiring into the matter, Rhea confirmed that the 10% discount should have been applied and the invoice was revised Senko. Moreover, during his deposition, Elias conceded that the 10% discount for AZ's 2008 network access fees had been approved by Russell Rice, Velocity's President at the time.

Counterclaim III

Next, Celerity asserts a counterclaim against Velocity for breach of the implied duty of good faith and fair dealing based on (1) Velocity's unreasonable refusal to allow modification of the IP provision in its standard broadcast agreement, and (2) Velocity's unreasonable refusal to permit MMEG to reschedule the Effient broadcasts in light of the continued failure of the FDA to approve the drug. (Docket No. 21, p. 13). As noted by Celerity, a review of Velocity's brief in support of summary judgment shows that Velocity did not move for summary judgment on Celerity's bad faith claim on either of these grounds. Accordingly, this counterclaim is preserved for trial. (Docket No. 93, pp. 36-37, fn.14).

Counterclaim IV

The tort of intentional interference with the performance of a contract is set forth in Section 766 of the Restatement (Second) of Torts and has been adopted in Pennsylvania. Walnut

Street Assocs., Inc. v. Brokerage Concepts, Inc., 982 A.2d 94, 97 n.2 (Pa.Super.Ct.2009). Section 766 states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Thus, to prevail on a claim for tortious interference with contractual relations under Pennsylvania law, a plaintiff must prove: (1) the existence of a contractual or prospective contractual or economic relationship between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm the existing relationship or intended to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; (4) legal damage to the plaintiff as a result of the defendant's conduct; and (5) for prospective contracts, a reasonable likelihood that the relationship would have occurred but for the defendant's interference. Acumed LLC v. Advanced Surgical Services, Inc., 561 F.3d 199, 212 (3d Cir.2009).

Celerity contends that Velocity and Elias tortiously interfered with its relationship with AZ by (1) refusing to permit modification of the IP provision in Velocity's standard broadcasting agreement to permit AZ to repurpose the broadcast scheduled for 2009 and the broadcasts proposed for 2009, and (2) increasing network access fees which negatively affected the same existing and prospective contractual relation. (Docket No. 21, p. 15, No. 23, pp. 19-20, ¶¶ 60-69).[70]

The Stranger Rule

In support of its motion for summary judgment on this counterclaim, Velocity initially asserts that because it produces each broadcast and receives payment from Celerity for each broadcast, it is an essential party to Celerity's customer contracts and not a stranger to the economic relationship. Therefore, Velocity cannot be sued for interference with contracts with would-be buyers of its programs and services.[71] (Docket No. 87, p. 24).

In rejecting the identical argument in Kernaghan v. BCI Communications, Inc., 2011 WL 2937430 (E.D.Pa.2011), the district court stated:

[70] To the extent Celerity's fourth counterclaim could be read to include the actions of Velocity and Elias with regard to MMEG and the Effient broadcasts, those actions are the subject of Celerity's counterclaim for breach of the duty of good faith and fair dealing.

[71] In connection with this argument, Velocity notes that it is well established in Pennsylvania that a party cannot be liable for interfering with a contract to which he is a party. (Docket No. 87, p. 24). As noted by Celerity, however, the Pennsylvania case law cited by Velocity in support of this principle is inapposite. See Abel v. American Art Analog, Inc., 838 F.2d 691 (3d Cir.1988); Wells v. Thomas, 569 F.Supp. 426 (E.D.Pa.1983); and DuSesoi v. United Refining Co., 540 F.Supp. 1260 (W.D.Pa.1982). (Docket No. 87, p. 24). These cases involved officers or managerial employees of companies who were alleged to have interfered with contracts between their companies and third parties. The courts held that a claim for intentional interference with contractual relations could not be maintained because a party cannot interfere with its own contracts and a company necessarily acts through its officers and employees. In contrast, Celerity alleges interference by Velocity and Elias, an officer of Velocity, with contractual relationships between Celerity and its customers. (Docket No. 93, p. 24).

* * *

Defendant Clearwire does not dispute that Plaintiffs have alleged the second, third, and fourth elements of a tortious interference claim. However, they argue:

> With respect to the first element - the existence of a contractual relation between the claimant and a third party - courts around the country have uniformly held that a defendant must be a stranger to the underlying contract with which it allegedly interfered. Put another way, the party must tortiously interfere with a contract under which it has no "beneficial" or "economic" interest.

(Doc. No. 9-2 at 5). According to Clearwire, since the Agreement between Plaintiffs and BCI was formed for the benefit of Clearwire, Clearwire had a beneficial interest in the Agreement. Clearwire, therefore, was not a stranger to the Agreement and cannot be held liable for tortiously interfering with it.

In states which apply the "stranger" rule, a plaintiff must establish that the defendant was a "stranger" to the protected business relationship with which it allegedly interfered. Edwards v. Prime, Inc., 602 F.3d 1276, 1302 (11^{th} Cir.2010).

> A defendant is a party in interest to a business or contractual relationship if the defendant has any beneficial or economic interest in, or control over, that relationship.... When the defendant is an essential party to the allegedly injured business relationship, the defendant is a participant in that relationship instead of a stranger to it.
>
> Id.

The parties agree that there is no state court or federal court that has addressed whether the Pennsylvania Supreme Court would adopt and apply the "stranger" rule to a tortious interference claim. In each court decision relied upon by Defendant Clearwire in support of the Motion to Dismiss, the "stranger" rule has been adopted only in that jurisdiction. (footnote omitted).

> As noted, the Supreme Court of Pennsylvania has adopted § 766 of the Restatement as the law in Pennsylvania. Section 766 and the commentary accompanying it do not contain a statement of the "stranger" rule as it has been defined in other jurisdictions. Under Pennsylvania law, a claim for tortious interference will survive only if a defendant is not a party to the contract alleged to have been tortiously interfered with. See, e.g., Daniel Adams Assocs., Inc. v. Rimbach Publi'g, 360 Pa.Super. 72, 519 A.2d 997, 1000-02 (1987)(holding that a tortious interference claim could not be maintained against a corporate officer of a publisher where the underlying agreement was between the publisher and a sales representative because "the corporation and its agent are considered one so that there is no party against whom a claim for contractual interference will lie"); ...
>
> However broad this preclusive test under Section 766 appears to be in Pennsylvania, the Court will not expand the test to include language that a defendant be a "stranger" to the agreement, having no "beneficial or economic interest" in it. Under Pennsylvania law, Plaintiffs need only show the existence of a contract between Plaintiffs and a party other than Clearwire against whom they have brought the tortious interference claim....

Id. at *5-6.

Similarly, this Court declines to apply the stranger rule in this case.

Third-Party Beneficiary Argument

In a related argument, Velocity asserts that it is entitled to summary judgment on this counterclaim because it was a third-party beneficiary of the agreements between Celerity and its customers, and a party to a contract may not tortiously interfere with the contract. See Motise v. Parrish, 297 Fed.Appx. 149, 152 (3d Cir.2008).

A party becomes a third-party beneficiary of a contract only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties and performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Scarpitti v. Weborg, 530 Pa. 366, 370 (1992).

While the second reseller agreement provided that Velocity would be deemed a third-party beneficiary of Celerity's broadcast agreements with its customers (Docket No. 74-1, p. 3), Velocity did not include this language in its standard broadcasting agreement on which Celerity was to model its customer agreements and there is no evidence that such language was included in any of Celerity's executed customer agreements. (Docket No. 90-47). Despite the absence of such language, Velocity asserts that an intent on the part of Celerity and its customers to bestow a benefit upon it is clear from language in Celerity's customer proposals and agreements, noting statements such as Celerity offers "private broadcast services in conjunction with our partner Velocity Broadcasting;" "[s]atellite signal transmission will be provided through

Velocity's designated satellite provider;" the broadcast production package will include a "Velocity HD set" and "Velocity/Morton's script-writing and editing;" and "[t]he services and associated fees for such services to be performed by Celerity and Velocity as part of your broadcasts are outlined in the Statement of Work above." After consideration, the Court rejects Velocity's claim that it was an intended beneficiary of the existing contract and the proposed contracts between Celerity and AZ for broadcasts in 2009. Rather, Velocity was an incidental beneficiary of those contracts.

In this regard, Section 302 of the Restatement (Second) of Contracts provides:

> § 302. **Intended and Incidental Beneficiaries**
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> > (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Comment e to Section 302 and an illustration thereunder states:

> *e. Incidental beneficiaries.* Performance of a contract will often benefit a third person. But unless the

> third person is an intended beneficiary as here defined, no duty to him is created. See § 315.
>
> **Illustrations:**
>
> * * *
>
> 17. B contracts with A to buy a new car manufactured by C. C is an incidental beneficiary, even though the promise can only be performed if money is paid to C.

The foregoing illustration is precisely the situation presented in this case.[72]

Privileged Conduct

Velocity also asserts that the exercise of a contractual right does not constitute "wrongful" or "unprivileged" conduct. Because Velocity retained the right in the second reseller agreement to establish fees for its broadcast services and approve modifications of the provisions in its standard broadcasting agreement requested by Celerity's customers, Velocity contends that application of the increase in network access fees to AZ's 2009 broadcasts and Velocity's refusal to accept the modifications to the IP provision proposed by AZ for the 2009 broadcasts cannot for the basis for Celerity's counterclaim for tortious interference with contractual relations. (Docket No. 87, pp. 26-27). After consideration,

[72] In any event, seven of the eight broadcasts for AZ in 2009 were prospective in nature and no broadcast agreements were executed by Celerity and AZ for those broadcasts. As noted by Celerity, in the absence of such agreements, there is no basis for Velocity to claim the status of a third-party beneficiary. (Docket No. 93, p. 23, fn.6).

the Court concludes that Velocity is not entitled to summary judgment on this ground.

As noted by Celerity, when a party has a contractual right to take an action, that action is privileged and proper only if done in good faith. See Schulman v. J.P. Morgan Investment Mgt., 35 F.3d 799, 810 (3d Cir.1994); Ross v. Canada Life Assurance Co., Civil Action No. 94-5557, 1996 WL 182561, at *12 (E.D.Pa.1996). (Docket No. 93, p. 27). As further noted by Celerity, the cases cited by Velocity in support of this argument do not dictate a different conclusion. In each of the cases, the court considered whether the conduct of the defendant that was alleged to have tortiously interfered with the plaintiff's contractual relationship was proper and, therefore, privileged. Windsor Securities, Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 663-64 (3d Cir.1993); Peoples Mtg. Co., Inc. v. Federal Nat'l Mtg. Assoc., 856 F.Supp. 910, 934 (E.D.Pa.1994); Cloverleaf Dev., Inc. v. Horizon Financial F.A., 500 A.2d 163, 167-68 (Pa.Super.1985). (Docket No. 93, pp. 27-28).

Notwithstanding Elias's self-serving declaration that his challenged actions were taken "purely for business reasons and ... to fulfill his fiduciary duties to the corporation and its shareholders" (Docket No. 87, p. 28), the Court's lengthy summary of undisputed facts shows that Celerity has submitted sufficient evidence to raise a material dispute of fact as to whether Elias's actions were proper and, therefore, privileged or an attempt, as Celerity claims, to deprive Celerity of the exclusivity it had earned in the pharma sector through September 2010 and drive it out of business.[73]

Personal Liability of Elias for Tortious Interference

Velocity and Elias also assert that there is no basis for the imposition of personal liability on Elias for interfering with Celerity's contracts because a corporation acts only through its officers and agents. (Docket No. 87, pp. 28-29). The Court disagrees.

As noted by Celerity, Pennsylvania recognizes the participation theory as a basis for personal tort liability where the corporate officer is an actor who participates in the wrongful acts. Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 621-22 (1983); Mill Run Assocs. v. Locke Property Co., Inc., 282 F.Supp.2d 278, 287-88 (E.D.Pa.2003); Strategic Learning, Inc. v. Wentz, Civil Action No. 05-cv-0467, 2006 WL 3437531, at *7

[73] For example, Velocity and Elias assert that the refusal to modify the IP provision as requested by Celerity's customers was based on a concern that the requested changes "would have a detrimental impact on the value of Velocity's brand and would undermine Velocity's ownership rights to the 'look and feel' of its programming." (Docket No. 87, p. 27). As noted by Celerity, this assertion makes no sense. There is no evidence that Celerity's customers were requesting the right to change the "look and feel" of a Velocity broadcast. They merely wanted to show a recording of the program after the conclusion of the live broadcast. (Docket No. 28). The Court also notes an email from Esswein to Franklin and Elias less than a week after Velocity terminated the second reseller agreement with Celerity in which Esswein states: "We should go through in detail every lead they ever listed on a sales Forecast and call every company direct. **These guys are done in this space.**" (Docket No. 92-10, p. 21).

(M.D.Pa.2006). Accordingly, Elias is not entitled to summary judgment on this counterclaim.

Counterclaim V

Next, Celerity sought a declaratory judgment that it was entitled to terminate the second reseller agreement based on Velocity's material breaches of the agreement. Like the declaratory judgments sought by Velocity in this case and Civil Action No. 09-151, this counterclaim is moot in light of Velocity's termination of the second reseller agreement on September 2, 2009. Accordingly, the request for declaratory relief will be dismissed.

Counterclaim VI

Finally, Celerity asserts a counterclaim against Velocity for breach of an oral agreement to provide Celerity with the connectivity and technical services required to integrate ARS services into broadcasts for Celerity customers on May 28, 2009 and June 16, 2009. (Docket No. 23, p. 30). Velocity asserts that it is entitled to summary judgment on this counterclaim "because Celerity has failed to establish any damages arising from Velocity's alleged breach of its oral agreement. To the contrary, Mr. Gatzulis stopped payment on the check that had been sent to Velocity to pay for those charges." (Docket No. 87, p. 30).

After consideration, Velocity's motion for summary judgment on this ground will be denied. Although Gatzulis stopped payment on the check that had been issued to Velocity to pay for connectivity and technical support for the provision of ARS services during the May 28, 2009 broadcast in Blue Bell, Pennsylvania which failed, it does not follow that Celerity did not suffer any damages. Celerity marked up the fees charged to its customers for these services which could not be collected due to the failure of the ARS system during the May 28, 2009 broadcast and the total absence of ARS services during the June 16, 2009 broadcast.

William L. Standish
William L. Standish
United States District Judge

Date: November 21, 2011