IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MPEG LA, L.L.C., Plaintiff, v. DELL GLOBAL B.V. and DELL PRODUCTS, L.P., Defendants. DELL GLOBAL B.V. and DELL PRODUCTS, L.P., Counterclaim Plaintiffs, v. MPEG LA, L.L.C., Counterclaim Defendant.	C.A. No. 7016-VCP

MEMORANDUM OPINION

Submitted: November 9, 2012
Decided: March 6, 2013

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PARSONS, Vice Chancellor.

This action is before me on a motion to recognize and apply New York Civil Practice Law and Rules ("N.Y. C.P.L.R.") 3219 as substantive New York law. The plaintiff and the defendants have asserted claims based on a contract whereby the plaintiff granted the defendants licenses to a portfolio of patents. The contract provided that the defendants would maintain records and pay royalties based on a specified formula. Ultimately, a dispute arose between the parties as to whether the defendants had complied with the contract and the amount of royalties they owed under the contract.

The defendants have moved under Court of Chancery Rule 7(b) for an order recognizing and providing for the application of N.Y. C.P.L.R. 3219 as substantive law in this case. Rule 3219 provides a mechanism whereby a litigant may tender an amount to the clerk of the court that the opposing litigant may accept within a ten-day period. The claimant may withdraw the deposited money within ten days if the claimant files a statement that the withdrawal is in satisfaction of the claim. If the amount is not withdrawn and the claimant fails to obtain a more favorable judgment, the claimant is not entitled to recover interest or costs from the time of the offer.

The defendants argue that the parties to the contract selected New York substantive law as their choice of law and that conflicts-of-law principles and Delaware law, therefore, compel the application of the substantive law selected by the parties. The defendants further contend that N.Y. C.P.L.R. 3219 is substantive in nature, and that it should therefore be recognized and applied in this case. The plaintiff, on the other hand, disputes the defendants' characterization of Rule 3219, and contends that it is primarily

procedural in nature. As such, the plaintiff avers that this Court should not apply N.Y. C.P.L.R. 3219.

For the reasons that follow, I find that Rule 3219 is procedural in nature. Therefore, I decline to apply N.Y. C.P.L.R. 3219 in this action.

I. BACKGROUND

A. The Parties

Plaintiff and counterclaim defendant, MPEG LA, L.L.C. ("MPEG"), is a Delaware limited liability company that administers sublicenses granting rights under patents to manufacture and sell products.

Defendants Dell Global B.V. ("Dell Global"), a Netherlands corporation, and Dell Products, L.P ("Dell Products"), a Texas corporation, are companies that manufacture and sell consumer and other devices (collectively, "Dell").

B. Facts

MPEG offers the MPEG-2[1] Patent Portfolio License, a comprehensive and standardized license comprising 800 MPEG-2 essential patents, to companies wishing to manufacture, sell, or otherwise distribute products incorporating MPEG-2 technology to end users.

On or about December 31, 2009, MPEG and Dell Global entered into a contract (the "Contract") whereby MPEG licensed Dell Global to incorporate the patented

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[1] MPEG-2 is a standard for the "generic coding of moving pictures and associated audio information." *See* ISO/IEC 13818-1:2000, International Organization for Standardization, *available at* http://www.iso.org/iso/catalogue_detail?csnumber=31537.

MPEG-2 technology into its consumer and other devices, such as personal computers with DVD or other MPEG-2 playback capacity. In exchange, Dell agreed to pay MPEG royalties for all "MPEG-2 Royalty Products" made or sold in a country that issued one or more existing MPEG-2 patents. The Contract provided that any payment received by MPEG after becoming due shall be deemed late and "bear interest, compounded monthly, at the lesser of 10% per annum or the highest rate permitted" by law.[2] The Contract also required, among other things, that Dell keep and maintain records and that an audit procedure be established to verify the royalty amounts due.

MPEG alleges that Dell failed to keep and maintain accurate records and provide the designated auditor with necessary information. Plaintiff also avers that, in mid-2010, Dell Global asserted that it may have overpaid certain royalties and was entitled to a credit. A dispute between Dell Global and MPEG then ensued over whether Dell Global owed royalties to MPEG.

C. Relevant Contract Provisions

The Contract contains a choice of law provision that states:

> **7.18 Choice of Law.** The validity, construction and performance of this Agreement shall be governed by the substantive law of the State of New York, United States of America, without regard to the conflict of law rules in the

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[2] Compl. ¶ 20. Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Amended Complaint as supplemented by the Verified Supplemental Complaint filed November 5, 2012 (collectively, the "Complaint").

> jurisdiction where a claim arising from this Agreement is brought.[3]

Section 3.7 provides for the payment of interest in the event a royalty payment is made late. The full text of that provision states:

> **3.7 Late Payments.** Any payment required hereunder that is received by the Licensing Administrator after the date it is due pursuant to the terms of Article 3 . . . shall bear interest compounded monthly, at the lesser of 10% per annum or the highest interest rate permitted to be charged by the Licensing Administrator under applicable law.[4]

D. Procedural History

MPEG commenced this case on November 4, 2011 seeking to recover, among other relief, late royalty payments and contractual interest allegedly due from Dell under the Contract. MPEG amended its complaint and filed an Amended Verified Complaint on July 17, 2012. On November 8, 2012, MPEG filed a Verified Supplemental Complaint to add allegations reflecting Dell's continuing refusal to pay royalties as they became due.

On September 7, 2012, Defendants filed a motion to recognize and apply N.Y. C.P.L.R. 3219 as substantive New York law. Rule 3219 provides a mechanism whereby a litigant may tender an amount to the clerk of the court, which the other party to the litigation may accept within a ten-day period. If it is accepted, the litigation is concluded. If the tender is not accepted, the tendering party may reclaim the funds and, in certain

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[3] Compl. Ex. A, Contract, § 7.18.

[4] *Id.* § 3.7.

circumstances, any claim for interest or costs that accrued after the date of tender may be barred. After full briefing, I heard argument on Defendants' motion on November 9, 2012. This Memorandum Opinion constitutes my ruling on that motion.

E. Parties' Contentions

Defendants argue that substantive New York law governs any dispute arising under the Contract, that N.Y. C.P.L.R. 3219 is a substantive New York law, and, therefore, that Rule 3219 must be applied in this case. Plaintiff, on the other hand, argues that N.Y. C.P.L.R. 3219 is a procedural device that has no application outside New York. Specifically, MPEG argues that it is entitled to contractual interest under all circumstances. MPEG also avers that, because Rule 3219 is procedural, and not substantive, it is not covered by the choice-of-law provision in the Contract. Finally, Plaintiff contends that Section 3219 cannot be applied without alterations that this Court lacks the authority to make.

II. ANALYSIS

A. Standard

In a case that involves issues of contract, the choice of law is determined consistent with principles articulated in the Restatement (Second) of Conflict of Laws ("Restatement (Second)").[5] Issues in contract are determined by the law chosen by the parties in accordance with Restatement (Second) Section 187, entitled Law of the State

[5] *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1990 WL 9496, at *1 (Del. Super. Jan. 19, 1990); *see also Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *8 (Del. Ch. Jan. 29, 2010) ("When examining conflicts of law issues, Delaware courts adhere to the Restatement (Second).").

Chosen by the Parties.[6] That Section provides that "[t]he 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 parties could have resolved by an explicit provision in their agreement directed to that issue."[7]

"[A]s a general rule in Delaware, when the law of a foreign state is applied to substantive issues, the law of Delaware is usually applied to procedural issues."[8] The only exception to this occurs when the procedural law of the foreign state is "so inseparably interwoven with substantive rights as to render a modification of the foregoing rule necessary, lest a party be thereby deprived of his legal rights."[9] In such a case, the procedural law of the foreign state will control.[10] The Restatement (Second) also provides that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."[11] The rationale behind that practice is that the "[t]he

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6 *Monsanto Co.*, 1990 WL 9496, at *1.

7 Restatement (Second) § 187 (1971). Issues that the parties could not have resolved by an explicit provision in their agreement include issues of capacity, formalities, and substantial validity. *Id.* cmt. d. For example, parties cannot create a contract that would contravene a local state's express statutory provision. *Id.*

8 *See Monsanto Co.*, 1994 WL 317557, at *4 (citing *Connell v. Del. Aircraft Indus.*, 55 A.2d 637, 640 (Del. Super. 1947)).

9 *Id.*

10 *Id.*

11 Restatement (Second) § 122.

forum is more concerned with how its judicial machinery functions and how its court processes are administered than is any other state."[12] Moreover, "it would often be disruptive or difficult for the forum to apply the local law [procedural] rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state's local law is designed to promote."[13]

B. Is N.Y. C.P.L.R. 3219 Substantive or Procedural?

Here, the parties agreed that the Contract shall be "governed by the *substantive* law of the State of New York."[14] Under both the Contract and Delaware's conflict of law rules, therefore, this Court should apply to this dispute the substantive law of New York and any New York procedural law that is inseparably interwoven with a party's substantive rights. Consequently, the primary question before this Court is whether N.Y. C.P.L.R. 3219 is substantive or procedural.

N.Y. C.P.L.R. 3219 provides, in its entirety:

> **Section 3219.** Tender. At any time not later than ten days before trial, any party against whom a cause of action based upon contract, expressed or implied, is asserted, and against whom a separate judgment may be taken, may, without court order, deposit with the clerk of the court for safekeeping, an amount deemed by him to be sufficient to satisfy the claim asserted against him, and serve upon the claimant a written tender of payment to satisfy such claim. A copy of the written tender shall be filed with the clerk when the money is so deposited. The clerk shall place money so received in the

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12 *Id.* cmt. a.

13 *Id.*

14 Contract § 7.18 (emphasis added).

> safe or vault of the court to be provided for the safekeeping thereof, there to be kept by him until withdrawal by claimant or return to the depositor or payment thereof to the county treasurer or commissioner of finance of the city of New York, as hereinafter provided. Within ten days after such deposit the claimant may withdraw the amount deposited upon filing a duly acknowledged statement that the withdrawal is in satisfaction of the claim. The clerk shall thereupon enter judgment dismissing the pleading setting forth the claim, without costs.
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> Where there is no withdrawal within such ten-day period, the amount deposited shall, upon request be repaid to the party who deposited it. *If the tender is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover interest or costs from the time of the offer*, but shall pay costs for defending against the claim from that time. A tender shall not be made known to the jury.
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> Money received by the clerk of the court for safekeeping as hereinabove provided and later withdrawn by claimant or repaid to the depositor pursuant to the provisions hereof shall not be deemed paid into court. If the deposit is neither withdrawn by claimant nor returned to the depositor upon his request at the expiration of the ten-day period, the amount of such deposit shall be deemed paid into court as of the day following the expiration of the ten-day period and the clerk shall pay the amount of the deposit to the county treasurer or commissioner of finance of the city of New York, in accordance with section twenty-six hundred one of the civil practice law and rules. Withdrawal of such amount thereafter shall be in accordance with the provisions of rule twenty-six hundred seven. Fees for services rendered therein by a county treasurer or the commissioner of finance of the city of New York are set forth in section eight thousand ten.[15]

Dell contends that N.Y. C.P.L.R. 3219 is substantive because it concerns the availability of prejudgment interest and costs to a plaintiff, issues that Delaware courts

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[15] N.Y. C.P.L.R. 3219 (emphasis added).

and the Restatement (Second) treat as substantive.[16] Dell also argues that because Rule 3219 codified New York common law on tender, it should be considered substantive law.

MPEG, on the other hand, notes that these authorities discuss the question of whether statutes dealing with prejudgment interest generally are substantive, but not whether a tender rule is substantive. While prejudgment interest statutes seek to compensate the claimant for the loss of use of its capital during the pendency of litigation and cause the disgorgement of the benefit the defendant has enjoyed during the same period,[17] tender rules serve a different purpose (*i.e.*, encouraging litigants to settle). Recognizing the importance of that distinction, the Minnesota Court of Appeals held that an offer–counteroffer provision, which is similar to a tender rule, was more procedural than substantive because of its purpose to promote settlement.[18] Finally, MPEG argues that the four factors set forth in the comments to Restatement's Section 122 weigh against applying N.Y. C.P.L.R. 3219 in this case.

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16 *See, e.g.*, *Certain Underwriters at Lloyd's London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *21 (Del. Ch. Dec. 21, 2007) ("[T]he application of prejudgment interest is generally an issue of substantive law."); *MCI Worldcom Network Servs., Inc. v. Pelcrete Constr., Inc.*, 2006 WL 1388490, at *3 (S.D.N.Y. May 8, 2006) ("The award of prejudgment interest is a substantive issue governed by [N.Y. C.P.L.R.] 5001."); Restatement (Second) § 207 cmt. e ("The local law of the state selected by application of the rule of this Section determines whether plaintiff can recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.").

17 *Gentile v. Rossette*, 2010 WL 3582453, at *1 (Del. Ch. Sept. 10, 2010).

18 *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548–51 (Minn. Ct. App. 1990); *see also Paine Webber Jackson & Curtis, Inc. v. Winters*, 579 A.2d 545, 553 (Conn. App. Ct. 1990).

As a preliminary matter, I note that Rule 3219 is neither an offer-of-judgment rule nor a prejudgment-interest rule. New York has an offer-of-judgment rule, N.Y. C.P.L.R. 3221, and it is materially different from Rule 3219. For example, N.Y. C.P.L.R. 3221 does not require the tendering of any cash and does not address interest. On the other hand, under both Delaware and New York, a claimant who proves a claim for damages for a breach of contract generally is entitled to prejudgment interest.[19]

Many of the cases cited by MPEG and Dell, however, involve offer-of-judgment rules or prejudgment interest.[20] As a result, those cases are not dispositive on the question of whether N.Y. C.P.L.R. 3219 is procedural or substantive. The decision from Minnesota in *Zaretsky v. Molecular Biosystems, Inc.* is more analogous in that it determined that an offer–counteroffer statute was "more procedural than substantive in nature" because the statute's purpose, like that of Rule 3219, was to "encourage settlements."[21] Nevertheless, *Zaretsky* is arguably distinguishable because that court

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19 *See* N.Y. C.P.L.R. 5001; *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482 (Del. 2011).

20 For example, in *Paine Webber Jackson & Curtis, Inc.*, the Appellate Court of Connecticut held that Connecticut's offer-of-judgment rule "is a procedural rule not involving substantive issues." *Paine Webber Jackson & Curtis, Inc.*, 579 A.2d 545, 552 (Conn. App. Ct. 1990). This case, however, is not controlling because, as previously mentioned, offer-of-judgment rules differ from tender rules in that offer-of-judgment rules generally do not require the tendering of cash.

21 464 N.W.2d 546, 550 (Minn. Ct. App. 1990).

declined to adopt the view that prejudgment interest is a matter of substantive law, which is espoused by the Restatement (Second), Delaware, and the majority of states.[22]

Delaware courts and the Restatement Second have concluded that a party's entitlement to prejudgment interest is an issue of substantive law.[23] Nonetheless, the cases and treatises cited by MPEG are not binding in the context of this case because they rely on the foundation that prejudgment interest involves the issue of damages. For example, in *Cooper v. Ross & Roberts, Inc.*,[24] the Delaware Superior Court concluded that prejudgment interest was substantive on the basis that "the substantive law selected by choice of law principles also determines the amount of damages."[25] Similarly, Section 207 of the Restatement (Second) states that "[t]he measure of *recovery* for a breach of contract is determined by the local law of the state selected by application of the rules of

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22 *Zaretsky*, 464 N.W.2d at 549.

23 *See Tisch Family Found., Inc. v. Texas Nat'l Petroleum Co.*, 336 F. Supp. 441, 443 (D. Del. 1972) ("In Delaware, the recovery of moratory [*i.e.*, prejudgment] interest is a matter of substantive law, and since this suit involves the issue of performance of contractual obligations, the availability of moratory interest must be determined under the law of the place of performance."); *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. 1986) ("The recovery of prejudgment interest in Delaware is a matter of substantive law."); Restatement (Second) § 207 cmt. e ("The local law of the state selected by application of the rule of this Section determines whether plaintiff can recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.").

24 505 A.2d 1305 (Del. Super. 1986).

25 *See id.* at 1307; *see also Tisch Family Found., Inc.*, 336 F. Supp. at 443 ("Under Delaware conflict of law rules, the case, including the measure of damages, must be decided in accordance with the state law of the place of performance.").

§§ 187-188" regarding the law of the state chosen by the parties and the law governing in the absence of effective choice by the parties.[26] Comment e to Section 207 further provides:

> e. *Interest.* The local law of the state selected by application of the rule of this Section determines whether plaintiff can recover interest, and, if so, the rate, upon *damages awarded* him for the period between the breach of contract and the rendition of judgment. This law also determines the validity of an express contractual provision for the payment of a stipulated rate of interest.[27]

In sum, under the relevant case law in Delaware and under the Restatement (Second), prejudgment interest is substantive because prejudgment interest is a key element in the calculation of damages or the measure of recovery. The statute at issue here, however, is distinguishable from prejudgment interest because N.Y. C.P.L.R. 3219 does not seek to compensate the aggrieved party for damages, but rather to encourage the settlement of disputes.

Because no Delaware court has considered the specific issue of whether a tender rule is substantive or procedural, I rely on the four factors identified in Section 122 of the Restatement (Second) to determine that issue.[28] According to Section 122:

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[26] Restatement (Second) § 207 (emphasis added).

[27] *Id.* cmt. e (second emphasis added).

[28] *See Relax Ltd. v. ANIP Acq. Co.*, 2011 WL 2162915 (Del. Super. May 26, 2011) (applying Section 122's four factors to determine whether to apply English rule or Delaware rule regarding the award of counsel fees); *El Paso Natural Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816 (Del. Ch. Dec. 16, 1994) (applying Section

> [1] One factor is whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction. If they probably shaped their actions with reference to the local law of a certain state, this is a weighty reason for applying that law rather than the local law of the forum the plaintiff has chanced to select. [2] Another factor is whether the issue is one whose resolution would be likely to affect the ultimate result of the case. If so, the otherwise applicable law should be applied unless application of the local law of the forum is required by the dominant interest of the forum state in the decision of the particular issue. [3] A third factor is whether the precedents have tended consistently to classify the issue as "procedural" or "substantive" for choice-of-law purposes. If so, the settled classification should not be discarded without good reason. [4] Lastly, there is the question whether an effort to apply the rules of the judicial administration of another state would impose an undue burden upon the forum. If so, this is a further reason why the local law of the forum should be applied.[29]

Having considered each of these factors, I hold that N.Y. C.P.L.R. 3219 is a procedural rule for conflict-of-law purposes.[30]

As to the first factor, the parties are not "likely to have given thought" to N.Y. C.P.L.R. 3219, and, therefore, did not likely shape their actions with reference to that law. Unlike provisions dealing with fee-shifting or contractual rates of interest, which commercial parties often include in their contracts, this Court does not recall seeing a

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122 to determine whether to apply Texas rule or Delaware rule regarding the award of attorneys' fees).

[29] Restatement (Second) § 122 cmt. a.

[30] In that regard, I note that none of Restatement (Second) Section 122's four factors discuss whether the statute derived from common law. Consequently, I do not find persuasive Dell's argument, unsupported by any caselaw, that because Rule 3219 reportedly codifies common law, it therefore is substantive.

contractual provision dealing with tender rules or even offer-of-judgment rules. Nor has Dell directed the Court's attention to any contracts with such provisions. Moreover, in the Contract at issue in this case, the parties specified that "contractual interest accrues at 10%."[31] That provision suggests that the parties intended interest to accrue so as to compensate MPEG for its loss and deter Dell from withholding payments. The first factor, therefore, weighs in MPEG's favor.

Turning to the second factor, the resolution of the tender rule issue will not affect the ultimate result of this case.[32] "Indeed, the opposite is true—it is the result of the case that triggers the need to consider" the tender rule issue.[33] Under Rule 3219, whether the plaintiff is entitled to interest from the time of the offer reflected by the tender turns on whether or not the plaintiff obtains a more favorable judgment after a full trial. In this sense, the tender issue can be considered a post-trial or post-decision issue that would favor the application of the forum law.[34] Accordingly, this factor also favors MPEG's position.

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31 Contract § 3.7.

32 *Relax Ltd. v. ANIP Acq. Co.*, 2011 WL 2162915, at *7.

33 *Id.*

34 *See Atchison Casting Corp. v. Dofasco, Inc.*, 1995 WL 655183, at *8 (D. Kan. Oct. 24, 1995) ("As to the second factor, the resolution of this issue will not affect the ultimate result of the case. As [defendant] repeatedly notes, this is a post trial issue. In that limited sense, the second factor favors forum law.").

The third factor is "whether the precedents have tended consistently to classify the issue as 'procedural' or 'substantive' for choice-of-law purposes."[35] Defendants characterize the tender rule as a prejudgment interest rule and emphasize that such rules fairly consistently have been classified as involving substantive law. Plaintiff, on the other hand, contends that N.Y. C.P.L.R. 3219 is an example of offer-of-judgment rules, which non-Delaware courts have held are procedural rather than substantive. Neither party, however, has presented Delaware caselaw on the specific question of whether tender rules are procedural or substantive.[36] The third factor, therefore, does not weigh in favor of either party.

Finally, the fourth factor weighs heavily against applying N.Y. C.P.L.R. 3219 in this case because it would impose an undue burden on Delaware.[37] Rule 3219 requires that

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35 Restatement (Second) § 122 cmt. a.

36 *See supra* notes 19–26 and accompanying text.

37 The Restatement (Second) provides:

> Enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs. Furthermore, the burdens the court spares itself would have been wasted effort in most instances, because usually the decision in the case would not be altered by applying the other state's rules of judicial administration. Even if the outcome would be altered, however, the forum will usually apply its own rule if the issue primarily concerns

> [i]f the deposit is neither withdrawn by claimant nor returned to the depositor upon his request at the expiration of the ten-day period, the amount of such deposit shall be deemed paid into court as of the day following the expiration of the ten-day period and the clerk shall pay the amount of the deposit to the county treasurer or commissioner of finance of the city of New York, in accordance with section twenty-six hundred one of the civil practice law and rules. Withdrawal of such amount thereafter shall be in accordance with the provisions of rule twenty-six hundred seven. Fees for services rendered therein by a county treasurer or the commissioner of finance of the city of New York are set forth in section eight thousand ten.[38]

Delaware does not have (1) equivalent entities that are prepared to handle without undue burden the deposit of the funds that would be tendered under Rule 3219 or (2) statutes analogous to the three cited statutes from New York. Dell purports to avoid this problem by "represent[ing] that it will request repayment of the deposited amount after expiration of the ten-day period if MPEG LA does not accept the tender offer" and that, therefore, "[t]he only official who need be involved is the 'clerk of the court.'"[39] If this Court were to find Rule 3219 applicable in this proceeding, that and comparable tender rules from other jurisdictions probably also would be held to be applicable in future proceedings. Thus, the application of N.Y. C.P.L.R. 3219 here would impose an undue burden on

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> judicial administration. The statute of limitations is a striking example of such an issue.

Restatement (Second) § 122 cmt. a.

38 N.Y. C.P.L.R. 3219.

39 Reply in Supp. of Mot. to Recognize & Apply N.Y. C.P.L.R. 3219 as Substantive New York Law & for Other Relief 9.

Delaware by creating a significant risk that those making tenders in future cases would not withdraw their money and require the adoption of an administrative framework comparable to that specified in New York, which framework currently does not exist in Delaware. Hence, it would be difficult, if not impossible, to apply Rule 3219 without significant modifications to the statute. The fourth factor, therefore, also weighs heavily against the application of Rule 3219 in this case.

After weighing all of the Section 122 factors, I conclude that the question of whether this Court should apply N.Y. C.P.L.R. 3219 in the circumstances of this case is procedural. The law of Delaware, as the forum state, usually is applied to procedural issues.[40] The only exception to that rule is where the procedural law of the foreign state is inseparably interwoven with substantive rights.[41] That is not the case here because, as previously discussed, Rule 3219 does not involve the substantive issue of damages.

For these reasons, I hold that the parties' choice of New York substantive law does not include Rule 3219.[42]

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40 *See supra* note 8 and accompanying text.

41 *See supra* note 9 and accompanying text.

42 Having concluded that N.Y. C.P.L.R. 3219 should not apply in this case, I need not address MPEG's additional argument that the contractually specified interest rate of 10% takes precedence over and cannot be cut off by Rule 3219.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Dell's motion to recognize and apply N.Y. C.P.L.R. 3219 as substantive New York law.

IT IS SO ORDERED.