IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

VELOCITY EXPRESS, INC.,	:	
	:	**C.A. No: 07C-05-012 (RBY)**
Plaintiff,	:	
v.	:	
	:	
OFFICE DEPOT, INC.,	:	
	:	
Defendant.	:	

Submitted: July 15, 2009
Decided: August 7, 2009

Noel E. Primos, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware, for Plaintiff.

Michael M. Rosenbaum, Esquire, Budd Larner, P.C., Short Hills, New Jersey, for Plaintiff.

Arthur G. Connolly, III, Esquire, and Josiah R. Wolcott, Esquire, Connolly, Bove, Lodge & Hutz, Wilmington, Delaware for Defendant.

Marcie R. Ziegler, Esquire, Paul T. Hourihan, Esquire, and Ana Reyes, Esquire, Williams & Connolly, LLP, Washington, DC 20005 for Defendant.

Upon Consideration of Defendant's
Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART

OPINION AND ORDER

Young, J.

Velocity Express, Inc., v. Office Depot, Inc.
C.A. No: 07C-05-012 (RBY)
August 7, 2009

This is Defendant Office Depot's motion for summary judgment against Plaintiff Velocity Express. For the respective reasons stated as follows, the Motion is **GRANTED IN PART and DENIED IN PART.**

I: FACTS[1]

Office Depot is a Delaware corporation with a principal place of business in Florida. Velocity is a Delaware corporation with a principal place of business in Connecticut. On October 27, 2003, the parties entered into a contract for shipping. Velocity became the Carrier under the contract, with the obligation to deliver Office Depot's products to Office Depot's customers. The contract, referred to as the Master Transportation Agreement (MTA), outlined the arrangement between the parties. Included in the MTA was a merger clause highlighting the completeness of the contract's integration. Under the merger clause the agreement was believed by the parties to have been complete. The clause did, however, allow the parties to amend if necessary. The MTA also named Florida law as the applicable substantive law governing disputes between the parties.

The contract provided for Velocity to deliver products for Office Depot. The contract required certain benchmarks, called Service Level Ratings (SLR), to be met by Velocity's performance. The SLR allowed bonuses for certain targets, and provided an opportunity to cure when the ratings showed deficiencies. Also in the

[1] These facts are interpreted in a light most favorable to Velocity. *Matas v. Green*, 171 A.2d 916, 918 (Del. Super. Ct. 1961).

contract were damage limitations, notice requirements, and offset provisions for amounts paid but unearned, as well as the Florida choice of law provision.

A principal aspect of the arrangement was the termination clause. The MTA explicitly provided for an automatic renewal of the contract for a one year term. This renewal would occur if Office Depot failed to give the requisite 90 day notice of its intention not to renew the contract. Office Depot did not provide 90 days of notice. By its items, the MTA automatically renewed itself for one year on October 23, 2006. The MTA also allowed termination of the contract if Office Depot provided 30 days of notice of its intention to terminate for cause. If Office Depot availed itself of this opportunity, it had to allow Velocity an opportunity to cure whatever defects Office Depot believed to be sufficient cause for termination. Whether Velocity effectively cured was in Office Depot's discretion.

The parties amended the contract to incorporate Schedule A arrangements for the individual markets Velocity serviced for Office Depot. The Schedule As included a new arrangement allowing Office Depot to terminate the contract without cause if 60 days notice was afforded to the other party. The Schedule As were consistent in describing this 60 day notice requirement. The Schedule As differed, however, from one location to another with respect to each market's pricing structure. These market locations included metropolitan Philadelphia, Detroit, and Las Vegas, among others. On some of the Schedule As, computing the guaranteed minimums required comparing two or three different price equations. Velocity was paid the highest result of the different equations.

Equation A was the actual amount earned. This amount was calculated by

multiplying the number of packages delivered at a set rate for each package. Equation B required multiplying the total number of specific stops, called nine digit stops referring to specific nine digit zip codes, and a dollar amount, regularly $10.[2] Equation C, used only select markets, was a flat amount.[3] After calculating these equations, Office Depot determined the highest result of the equations, included it in an invoice that included all the relevant delivery information, and sent the invoice to Velocity along with payment. This information was sent via email, in the form of a spreadsheet containing the invoice information in labeled rows.

Another critical amendment to the parties' arrangement was the procedure for payment. On October 15, 2004, the parties amended the contract to allow Office Depot to produce invoices for Velocity, generating the necessary payment information itself. This amendment included a seven day provision, in which Velocity was required to inform Office Depot of any discrepancy in the invoicing within seven days, or any claim to any discrepancy would be waived. This amendment was signed by Velocity Vice President David Nitzel and Office Depot Vice President of Transportation Mark Cartwright.

The relationship between the parties was rocky from the start. Office Depot notes numerous customer complaints, citing events from delivery persons dragging mud through customers' offices, to the use of an "ugly truck," though that term is not

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[2] The parties dispute the meaning of this equation. Its interpretation, however, is not ambiguous, and will be explained in conjunction with Count II of Office Depot's argument.

[3] For instance, Las Vegas's Schedule A used a $31,000 weekly total as a base minimum.

explained. In any event, these customer complaints became more numerous as the relationship between the parties evolved.[4]

The relationship became more unsteady as the three year term of the contract neared its conclusion. In early 2006, Office Depot learned that Velocity was performing delivery services for Staples, Office Depot's arch rival. This discovery set off a barrage of internal emails at Office Depot's office discussing the confidentiality of Office Depot's relationship with Velocity. Office Depot was concerned about Velocity's relationship with Staples.

After receiving complaints and unfavorable reviews of Velocity's service and operations, when considered with Velocity's business difficulties and other items, Office Depot sent a notice of termination pursuant to paragraphs 13 and 22 of the MTA to Velocity on October 23, 2006. This notice was effective after the appropriate 30 day "for cause" termination period. Office Depot did not give Velocity an opportunity to cure any deficiencies. Velocity then brought this action, alleging Office Depot's breach of contract for failure to provide adequate notice of termination and failure to perform under the new one year agreement.

In an order dated February 4, 2009, this Court granted Office Depot's motion to dismiss regarding any damages exceeding $5,000,000 per the explicit language of the MTA. The Court denied Office Depot's motion to dismiss concerning Velocity's

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[4] Velocity urges that, on a motion for summary judgment, the Court must not consider inadmissible evidence. These customer complaints are hearsay and multiple hearsay, and as such, should not be relied on by the Court. At this juncture, such an objection is not persuasive. The parties may well be called as witnesses, the indication may be in business records, and so forth. In any event, admissibility appears more likely than not.

waiver of its right to seek unpaid invoices after the close of the seven day window, as well as Office Depot's motion concerning the MTA's exclusion of suit for lost profits. The Court reasoned in its denial that without the lost earnings Velocity sought, Velocity would have no effective right of recourse if Office Depot were in breach. The Court's Order was addressed merely to the adequacy of the pleadings under a Superior Court Civil Rule 12 analysis. Additional facts specific to the individual counts are included in the following analysis.

II: LEGAL STANDARD

When considering a motion for summary judgment, the Court must determine if there are any genuine issues of material fact.[5] If there are none, and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.[6] If, when considering the facts in a light most favorable to Velocity, the Court determines that no reasonable trier of fact would find in favor of Velocity, summary judgment is also appropriate.[7]

In addition, it is the Court's responsibility to determine if there are any ambiguities in the contract.[8] Generally, ambiguities come in two forms, latent, and

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[5] Super. Ct. Civ. R. 56(c).

[6] *Id.*

[7] *Matas*, 171 A.2d at 918.

[8] *Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So. 2d 564, 565 (Fla. Dist. Ct. App. 2000), (quoting *Bivens Gardens Office Bldg. Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 905 (11th Cir. 1998) (applying Florida law)).

patent. First, patent ambiguities exist when the ambiguity appears on the face of the document.[9] If a patent ambiguity arises, the parties may not use extrinsic evidence to clear the confusion.[10] Latent ambiguities exist when the different interpretations are realized during the application or enforcement of the contract.[11] Extrinsic evidence may be used to clarify latent ambiguities.[12] Florida law requires the trial court to construe any such ambiguous provisions in accord with their ordinary meanings.[13]

III: ANALYSIS

Office Depot raises three primary arguments in its motion for summary judgment, addressed as follows.

A) Count I: Velocity claim for certain amounts from CD&L Invoicing

Office Depot's first contention in its motion for summary judgment is that Count I of Velocity's complaint fails. Count I of the complaint alleges that Office Depot owes Velocity $221,329.30 from unpaid, successor liability debts. Office

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[9] *Emergency Associates of Tampa P.A. v. Sassano*, 664 So. 2d 1000, 1002 (Fla. Dist. Ct. App. 1995).

[10] *Id*.

[11] *Id*.

[12] *Id*. at 1002-03.

[13] *Id*. at 1003.

Depot makes two arguments. First, that Velocity has not presented sufficient evidence to establish that any amounts are owed. Second, Office Depot argues that it is entitled to set-off overcharged amounts against any amounts it may owe for the CD&L invoicing.

1) Velocity's claim under the Allied/CD&L arrangement.

Office Depot purchased some of the assets of Allied, a company involved in contracts with CD&L. CD&L was acquired by Velocity. Velocity now argues that any amounts owed by Allied to CD&L are the responsibility of Office Depot, and, hence, Velocity is entitled to recovery of those unpaid amounts.

Office Depot argues that, first, Velocity must present evidence that such amounts are in fact due. Office Depot's contention rests on various theories. First, the only evidence produced in Velocity's answers to interrogatories concerning these damages was an internal balance sheet. Office Depot cites various cases holding that an internal balance sheet is insufficient to prove damages owed on a contract. These cases, however, are not instructive. Office Depot cites an Eleventh Circuit opinion interpreting Florida law that held "a balance sheet is not an invoice and does not constitute proof that [defendant] owed [plaintiff] anything on the invoices it had submitted for work performed."[14] Office Depot's reliance on the *Johnson Entertainment* case is misplaced. In that very same case, the Eleventh Circuit noted

[14] *Johnson Ent. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1327 n. 84 (11th Cir. 1998).

as an initial matter that sufficiency of the evidence was a procedural issue.[15] Being a procedural issue, the evidence was considered under the federal rules of procedure, not Florida State law.[16] Using this guidance from the federal court, consideration of whether Velocity's balance sheet submission was sufficient to establish damages will be undertaken pursuant Delaware law.

The Delaware Superior Court has held that a balance sheet was sufficient evidence.[17] In *Interim Healthcare*, the Superior Court determined that a balance sheet was the appropriate source to measure a disputed issue.[18] In the most basic sense, therefore, the dispute is whether Velocity's spreadsheet is sufficient to survive summary judgment regarding whether it is owed the money. The *Interim Healthcare* Court's holding supports its sufficiency at this stage.

The internal balance sheet being attacked by Office Depot is actually a spreadsheet of invoices. It appears that, rather than submitting well over 50 individual invoices outlining amounts unpaid by Allied to CD&L, Velocity relied on this internally generated list to show the amounts. The spreadsheet includes labeled columns designated for customer identification numbers, invoice numbers, account date, due date, amount, notes, and others. These columns indicate the relevant information necessary for Office Depot to determine what is owed on the past due

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[15] *Id.* at 1308 n. 44.

[16] *Id.*

[17] *Interim Healthcare Inc. v. Spherion Corp.*, 884 A.2d 513, 572 (Del. Super. Ct. 2005).

[18] *Id.*

invoices. Office Depot does not dispute that it had the appropriate information. Since the spreadsheet potentially suffices as a summary or business record and contains the relevant information, Velocity's claim will not be dismissed at the summary judgment stage.

Office Depot attacks the legitimacy of the document itself. The use of this list as proof may be attacked by Office Depot in the future on admissibility bases. Office Depot also asserts that the list in question was sent to Linda Wight. Office Depot contends that it has never had anyone named Linda Wight in charge of billing. Office Depot presents an affidavit from Michael Manis, Office Depot's Vice President of Global Technology Shared Services to support this contention. While Office Depot may have never employed a Linda Wight, it is possible, for instance, that this was the contact given to Velocity. In any event, the document appears sufficient to create a genuine issue of material fact. The parties' dispute is appropriate for a determination by the trier of fact, rather than on a motion for summary judgment.

Office Depot also claims that Velocity presents no evidence that the liabilities Office Depot purchased in its partial acquisition of Allied included the liabilities of Allied to pay CD&L for the invoices in question. Under the theory of successor liability with respect to asset purchases, Office Depot's contention may well be correct.[19] This contention, however, is the subject of a genuine issue of material fact. It remains to be seen whether Allied's liability to CD&L was such a liability

[19] *See Krogen Exp. Yachts, LLC v. Nobili*, 947 So. 2d 581, 583 (Fla. Dist. Ct. App. 2007).

purchased by Office Depot. If so, Velocity's claim for damages on the unpaid invoices may have merit. Because this issue is a genuine issue of material fact, summary judgment is not proper.

2) Office Depot entitlement to set-off any overcharged amounts.

Office Depot also seeks summary judgment with respect to the CD&L invoices of Count I of the Complaint by way of an offset of amounts overcharged by CD&L. Office Depot argues that any amounts included in Velocity's claim for $221,329.30 that are the result of overcharging should be offset. Office Depot claims that $169,691.75 was overcharged by CD&L and paid by Allied. Office Depot now seeks to use that amount as a set-off to any amount that Office Depot owes Velocity as a result of the Allied/CD&L relationship.

Velocity argues against this set-off, claiming that the defense of a set-off is an affirmative defense not raised in the pleadings and therefore untimely raised. Office Depot, however, in paragraph 46 of its answer, explicitly defended on the ground that it was entitled to such a set-off. Therefore, Velocity's argument that Office Depot's defense was filed untimely is without merit. The parties also argue about the amount of such set-off. Because of the factual dispute concerning the final amount to be set-off, summary judgment on an amount is inappropriate. The amount available to be set off must be determined at trial. Office Depot's entitlement to a set-off is appropriate as a legal proposition; the amount of which is to be determined at trial.

B) Count II: Velocity's claim for alleged "Guaranteed Minimums."

Office Depot's second main contention in its motion for summary judgment involves the parties' disputes over contract interpretation.

1) The guaranteed weekly minimums are misinterpreted by Velocity.

As an initial matter, when dealing with this portion of Office Depot's motion and Velocity's complaint, it is critical to understand the guaranteed minimum payment that Velocity seeks. Velocity claims in Count II of the complaint that it is entitled to $9,750,539.37. The Court's opinion on the $5,000,000 damage limitation still applies, rendering any amount over $5,000,000 unobtainable.[20] Additionally, Velocity claims that it is owed this amount because Office Depot's payments under the agreement were insufficient. Velocity argues that the Schedule As entitled it to receive a minimum of $10 per stop per zip code over the course of the parties' relationship. This is incorrect.

It is in the Court's purview to determine if a contract actually is ambiguous.[21] As such, the Court determines that it is unambiguous in the Schedule As that Velocity's earnings for its delivery services would be the greater of two (sometimes three) separate equations. The equation in question with this motion is the weekly minimum equation, Equation B. Equation B on every Schedule A states that it "is the weekly 9 digit stop equation and is included **to provide the carrier an average minimum revenue per stop over the course of a week.**" (emphasis added) Equation

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[20] *Velocity Exp., Inc. v. Office Depot, Inc.*, 2009 WL 406807, at *4-5 (Del. Super.).

[21] *See Centennial*, 772 So. 2d at 565.

B then gives this formula: "The total number of 9 digit stop in a given week x the minimum stop rate listed above." The minimum stop rate frequently was $10.

Velocity interprets this equation to mean that on EVERY stop it made, it was entitled to no less than $10. That is not at all how the equation reads to the reasonable interpretation. Velocity argues that if under Equation A (the actual fee earned) a stop generated $2.50, the $10 minimum clause entitled it to an additional $7.50 on its weekly invoice. Therefore, in Velocity's eyes, each stop in the markets affected by the Schedule As was entitled to no less than $10.

This interpretation, however, is incorrect on a variety of fronts. First, were that correct, the inclusion of the base prices in such a manner would be superfluous, when the course of dealing between Office Depot and its carriers did not always top $10 per stop. Second, and more importantly, the only indication that such a $10 minimum was appropriate is the phrase "guaranteed minimum" that was qualified by an asterisk. This asterisk explains the minimums, and cannot be ignored. Under the actual working equation, the minimum was set up to provide Velocity with an **average** per week of no less than $10 per stop. If Velocity performed 100 stops in a given zip code per week, it would earn at least $1,000. That much is clear.

Under Velocity's mistaken interpretation, if it performed 50 stops in a given zip code per week that earned $20 each for a total of $1,000, and another 50 stops that only earned $100 ($2 per stop), it was entitled to an additional $8 per stop on the second 50 stops. This would bring its weekly total to $1,500 on the 100 stops, for an average of $15 per stop, instead of the actual average of $11 per stop. Under Equation B, Velocity's weekly stops would be 100, multiplied by the $10 minimum

for $1,000. Velocity's earnings in the secondary scenario directly above, however, with 50 stops at $20 per stop and 50 stops at $2 per stop result in an actual weekly earnings of $1,100. Under the Schedule A, Velocity gets the larger of the two formulas, $1,100. Velocity's theory that it is entitled to a minimum of $10 per stop is incorrect. The formula indicates unambiguously that it is expected to be an AVERAGE.

2) Velocity's interpretation regarding situations where Equation B prevailed.

Velocity makes the clarification in its brief that only $7,430,605.03 of the $9,750,539.37 is the result of the misapplication of the $10 minimums discussed above. Velocity asserts that Office Depot also failed to pay $2,319,934.43 from Equation C of the Schedule As. Mentioned above, only a select number of markets had a third equation on the guarantee. Velocity claims that, in those markets affected by Equation C, Office Depot failed to supply the weekly minimum where appropriate. Office Depot does not address this portion of the claim in any of its motion papers. Velocity, however, fails to produce evidence showing Office Depot's failure to pay these floor rates. A trial issue regarding this exists.

3) Office Depot's position that Velocity <u>waived</u> any entitlement to these guaranteed minimums, has merit.

Office Depot's main argument with respect to Velocity's claim for the guaranteed minimums is that Velocity WAIVED its entitlement to such guaranteed minimums. On October 15, 2004, the parties executed Amendment No. 1 to the

MTA. This amendment complied with the original MTA's provisions for amending the contract.

Amendment No. 1 switched the role of the parties in invoicing under the MTA. That amendment placed the obligation of producing the invoices on Office Depot. According to the amendment, Office Depot was responsible for generating weekly invoices, which included the requisite delivery details, and sending them to Velocity. The weekly submissions included such information as location, rates and amounts of furniture cartons, rates and amounts of stationary cartons, amounts due, and time periods. These submissions were detailed and included all the relevant elements to the equations used in the Schedule As. After receipt of the submissions, Velocity then had seven days to respond to any discrepancies between the invoice and the actual amount owed. The amendment conspicuously states at the bottom: "[i]f the original invoice is not disputed by Carrier within the initial seven day time period, then it will stand "as is" and there will be no further protests or adjustments after that time."

The amendment, while changing the obligations of the parties, is enforceable. It is unambiguous, expressly placing the responsibility of verification on Velocity. Velocity never responded to Office Depot about any discrepancies. Instead, Velocity waited until Office Depot terminated the contract, and included these claimed discrepancies in its suit.

Velocity argues that it never had the necessary information to determine whether the invoices were deficient. This contention, however, appears to be incorrect. Each of the self-generated invoices provided by Office Depot to Velocity

contained information about what was delivered and where it was delivered. Office Depot Exhibit 16 contains an example of the email sent from Office Depot to Velocity regarding the invoices. Based on a reasonable interpretation of Equations A, B, and C of the Schedule As, the self generated invoices seem to have contained all the necessary and relevant information to determine how much was owed. Velocity's argument that it did not have the relevant and necessary information appears to be without merit. Therefore, it is not a genuine issue.

Velocity also argues that the parties orally agreed to waive the seven day requirement. The Court must rule on the basis of the unambiguous contract. Within the MTA are two critical paragraphs. First, paragraph 30 states that the MTA is the full and complete agreement between the parties. Second, paragraph 31 states that any amendments must be entered into in writing. Amendment No. 1 satisfies both of these unambiguous requirements. Further, Amendment No. 1 clearly states that the amendment is incorporated into the MTA, and all of the MTA's clauses still apply. This includes the clause concerning integration.

Integration is important for two reasons. One, it defeats Velocity's claim that an oral agreement to waive the seven day requirement was enforceable against Office Depot. The MTA was integrated completely. Secondly, no amendments could be made to the MTA without a signed writing.

Florida law, however, seems to be emerging to implement a looser interpretation of the theory of complete integration.[22] Florida courts have stated an

[22] *Centennial*, 772 So. 2d at 565.

interest in following the modern trend of parol evidence.[23] This trend would allow parol evidence, even when contracts are integrated completely for purposes of clarifying any ambiguities.[24]

This modern trend does not affect Velocity's situation. Amendment No. 1 is not ambiguous. In fact, it unambiguously states that invoices will be paid for "as is" if a claim is not made concerning any discrepancy within seven days. Because such language is unambiguous, Velocity's attempt to introduce parol evidence that the seven day period was waived is unpersuasive.

Also possibly dispositive of Velocity's contention is the statute of frauds. The statute of frauds requires, in short, contracts taking over a year to perform to be in a signed writing.[25] Velocity's waiver argument arguably does not satisfy that statute of frauds requirement. First, Velocity contends that the oral agreement occurred in the "summer of 2005." The MTA was set to expire in October, 2006. This is more than one year after the alleged oral agreement. For the agreement to be enforceable in this Court, it needed to have been reduced to writing, because it would have occurred over at least the next 14 months. While not necessary to this decision, the statute of frauds issue may be fatal to this claim of Velocity's. In either event, the oral modification to the seven day requirement fails.

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[23] *Id.*

[24] *Id.*

[25] *See Campo v. Tafur*, 704 So. 2d 730, 733 (Fla. Dist. Ct. App. 1998). *Campo* generally explains the existence and enforcement of the Statute of Frauds in Florida law.

There is no evidence to support a showing that Velocity complied with the seven day adjustment procedure. Without such evidence, Velocity does not establish a genuine issue of material fact, showing its entitlement to any discrepancy on any unpaid minimums. Summary judgment is appropriate. Therefore, Office Depot's motion with respect to the guaranteed minimums is **GRANTED**.

C) Count III: Office Depot did breach the contract, but any recovery must be limited to the amount of notice that Velocity was entitled to receive.

Office Depot offers two reasons in support of its contention that it did not breach the contract by terminating it. First, Office Depot claims it had the right to terminate the contract without cause and without offering an opportunity to cure. Second, even if Velocity were afforded an opportunity to cure, it would not have been able to cure its defective performance in a sufficient manner. Office Depot also contends that even if the contract were breached by Office Depot through termination, Velocity has not produced requisite proof of damages.

1) Office Depot had the right to terminate WITH cause upon 30 days notice, or otherwise with 60 days notice.

Office Depot argues that it was entitled to terminate the contract without cause and without providing Velocity an opportunity to cure. Under the terms of the Schedule As, effective as written amendments to the MTA, Office Depot could

terminate the contract FOR CAUSE, if it provided 30 days notice to Velocity. This "for cause" termination had a condition, however, that if Velocity cured the defect cited as the cause within a 30 day period, Office Depot could not effectuate the intended termination. According to subsequent amendments by way of the Schedule As, Office Depot could terminate the contract without cause upon 60 days notice. Also, the contract automatically renewed for one year if Office Depot failed to provide notice of its intention not to renew at least 90 days prior to the contract's expiration. Therefore, unless Office Depot provided notice of its intention not to renew by July 29, 2006, the contract would renew automatically for one year. Because of these explicit restrictions on Office Depot's ability to terminate the contract, Office Depot's first argument fails.

2) The existence of a genuine issue of material fact as to whether, with a sufficient opportunity, Velocity could have cured its deficiencies.

Office Depot also argues that the opportunity to cure is not sufficient to establish a claim for Velocity, as any cure was judged in Office Depot's discretion. Further, according to Office Depot, it was not possible for Velocity to cure all the defects in the allotted 30 day period.

In support of this contention, Office Depot urges Restatement (Second) of Contracts § 254(1) (1981). Section 254 discharges a party's obligation to pay damages for its breach, if the injured party would have failed to perform its return promise. Under this language, if Velocity could not have fulfilled its promise, specifically the promise to cure within 30 days, Office Depot is absolved from

liability resulting from its breach.

Office Depot offers numerous individual incidents, beginning in 2004, to support its claim that Velocity was committing fatal errors. These include customer complaints, untimely deliveries, and aggressive drivers. In the end, all of these alleged events were considered harmful to Office Depot's business and reputation. Office Depot's argument that these defects were incurable, however, is another story. It is premature to say that the service failures relied on in the termination letter necessarily were incurable, even if Office Depot was the sole judge as to whether the failures were cured. At this point, whether Velocity could have cured these defects adequately is a factual determination not appropriate for adjudication on summary judgment.

It appears from the MTA that the only objective measure of Velocity's performance with respect to terminable defects was in the form of its Service Level Ratings. The MTA provided that any monthly SLR below 97% must be resolved by attaining above 97% for the immediate three months beyond the deficient month. According to the exhibits presented by both parties, Velocity did not have the three month opportunity to cure its defects. General contract principles require discretion to be exercised in good faith.[26] Therefore, Office Depot's argument that cure was impossible or infeasible does not, at this stage, defeat the genuine issue of material fact that Velocity could have cured if given a good faith opportunity to do so. On this

[26] *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So. 2d 696, 697 (Fla. Dist. Ct. App. 1988) ("[E]very contract includes an implied covenant that the parties will perform in good faith.").

point, Office Depot's second contention fails.

3) The sufficiency and extent of claims for damages.

As an initial matter, Office Depot argues that Velocity's showing of a spreadsheet summary of damages is insufficient. This has been addressed previously in the motion. The threshold is whether Velocity could produce the full documents that comprise the summaries.[27] At this stage of the proceedings, the Court is not going to foreclose Velocity from its reliance on the summaries. This is a motion for summary judgment, where the Court is testing the sufficiency of Velocity's evidence and claims. Velocity has made a sufficient showing based on its summaries to survive summary judgment.

Office Depot also challenges Velocity's claim for damages stemming from the breach of the contract. Office Depot contends that the only proof offered by Velocity relating to the lost profits/expectation damages claim is the testimony of its CEO, Vincent Wasik. Office Depot argues that such testimony is mere conjecture and speculation, and therefore unreliable for survival of summary judgment.

In support of its arguments, Office Depot cites *Paul Gottlieb & Co. v. Alps S. Corp.*[28] and *Fisher v. Professional Advertising Directors Co.*[29] (which relied on *Gottlieb*). The *Gottlieb* court declared that a final award of lost profits had to be

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[27] D.R.E. 1006.

[28] *Paul Gottlieb & Co. v. Alps S. Corp.*, 985 So. 2d 1 (Fla. Dist. Ct. App. 2007).

[29] *Fisher v. Prof'l Adver. Dir. Co.*, 955 So. 2d 78 (Fla. Dist. Ct. App. 2007).

established by a reasonable certainty.[30] In making such a declaration, the court reversed the trial verdict's damage award.[31] The court noted that a determination of damages must rely on more than mere speculation,[32] which is consistent with Florida law.[33]

Awards from a trial verdict have been overturned because, at trial, the damages calculations were not supported by actual evidence, such as a yardstick accounting measure.[34] Office Depot intends for that result to be implemented in its motion for summary judgment. However, this present motion is brought only during the summary stage of the proceedings. Therefore, the standard at this point favors sufficiency, if justified. At the same time, the purpose of this motion is to test the evidence presented by Velocity. Hence, the Court cannot accept any evidence that seems no more than mere speculation.

Velocity's evidence concerning its lost profits largely consists of the testimony

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[30] *Gottlieb*, 985 So. 2d at 9.

[31] *Id*.

[32] *Id*.

[33] *See W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350 (Fla. 1989) (citing *Twyman v. Roell*, 166 So. 215, 217-18 (Fla. 1936); *Schonfeld v. Alpert, Alpert & Sons, Ltd.*, 427 So. 2d 1035, 1036 (Fla. Dist. Ct. App. 1983); *Sampley Enterprises v. Laurilla*, 404 So. 2d 841, 842 (Fla. Dist. Ct. App. 1981); *Adams v. Dreyfus Interstate Dev. Corp.*, 352 So. 2d 76, 78 (Fla. Dist. Ct. App. 1977); *HGI Assocs., Inc. v. Wetmore Printing Co.*, 236 Fed. Appx. 563, 564 (11th. Cir. 2007).

[34] *Hammer Const. Corp. v. George Phillips & Assocs., Inc.*, 994 So. 2d 1135, 1138 (Fla. Dist. Ct. App. 2008) (citing *W.W. Gay*, 545 So. 2d at 1350).

of CEO Vincent Wasik. During Mr. Wasik's deposition, he repeatedly stated that the figure being used to represent the lost profits/expectation damages was the amount of income that Velocity would have earned on the Office Depot contract. Mr. Wasik analyzed how much revenue was expected and subtracted from that the costs associated with earning that revenue.

Office Depot attacks this figure, claiming that Velocity must subtract a portion of fixed costs from its estimate. Though Office Depot's assertion has certain accounting validity, Velocity provided an accurate picture to the amount it expected to earn as profits from the Office Depot contract. Arguably, any fixed costs that Velocity would have incurred from servicing the Office Depot contract were deduced from Mr. Wasik's figure.

Even though Office Depot paints Velocity's damage claim as mere speculation by challenging Mr. Wasik's ability to provide such information, it is sufficient for purposes of showing what Velocity was entitled to recover. Mr. Wasik's forecasting of Velocity's revenues and discounting the costs involved to establish what the company would have earned under a fully performed contract, at least at this stage, meets the requirements for the claim.[35] Mr. Wasik's figure was not limited to variable or fixed costs. The end result was a figure that took into consideration all the operating expenses. That figure represented how much Velocity's bottom line would

[35] *See Sampley*, 404 So. 2d at 842, (The Court allowed approximations of damages when damages would have been earned but for the breach.) This is similar to Velocity's forecast of what it would have earned. Velocity's CEO Vincent Wasik was deposed sufficiently about how he calculated the lost earnings Velocity suffered.

have improved from the Office Depot contract. Therefore, it is more than mere conjecture, and survives summary judgment.

In support of its contention regarding a full year of available damages, Velocity, argues the application of *Reiver v. Murdoch & Walsh, P.A.*[36] Velocity claims that the *Reiver* case stands for the premise that notice of termination for cause cannot be relied upon also to assert notice of termination without cause. Velocity argues that because Office Depot's termination letter listed reasons why Office Depot was attempting to terminate for cause, requiring 30 days of notice, and did not state explicitly that it would also stand for 60 days notice of without cause termination, it was insufficient for the latter variation of termination. Velocity and Office Depot argued at length about the applicability and holding of *Reiver*.

In *Reiver*, the plaintiff argued against the application of the "without cause" termination clause of her employment contract when she was terminated for cause.[37] The *Reiver* court explained that the plaintiff's interpretation was "incorrect . . . because no plausible explanation for such a limitation is provided[.]"[38] The court disagreed with the plaintiff's argument that her interpretation was sufficient to survive summary judgment, because the contract did not exclude her interpretation expressly.[39] The court concluded that the determination of whether the initial, "for

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[36] *Reiver v. Murdoch & Walsh, P.A.*, 625 F. Supp. 998 (D. Del. 1985).

[37] *Id*. at 1009.

[38] *Id*.

[39] *Id*.

cause", notice was sufficient to trigger the without cause notice was a jury question.[40] The court declined to rule on that sufficiency at the summary judgment stage.[41]

Because this dispute is set for resolution at a bench trial, comment is appropriate on whether the notice was sufficient for "without cause" termination. The termination notice was a lengthy and detailed recollection of the alleged failures of Velocity in performing its end of the contract. The letter cited several provisions of the MTA with which Velocity failed to comply. The letter also stated that the defects were egregious and incurable. Regardless of the details, one thing was clear from the letter. The relationship between the parties was over. Office Depot did not intend to give Velocity an opportunity to right its alleged wrongs. Therefore, the Court finds that with or without cause, the letter was sufficient to end the relationship in no more than 60 days.

"[A]s a matter of law, . . . a . . . notice provision in a termination clause limits the terminated party's damages to the benefits he is entitled to receive under the contract during the notice period."[42] Applying the 60 day "without cause" notice provision, therefore, limits Velocity's expectation of damages claim to what it would have earned during the 60 day period.

Velocity's entitlement to a full year of damages fails. Velocity's argument about the automatic renewal of the MTA for one year is irrelevant. Office Depot

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[40] *Id*.

[41] *Id*.

[42] *Id*. at 1010 (internal citations omitted).

retained the ability to terminate the agreement without cause upon giving 60 days of notice. At the very least, the termination letter written on October 23, 2006 was sufficient for the 60 day notice period to begin. Therefore, Velocity is entitled only to recover damages it can prove for the 60 days immediately following its receipt of Office Depot's termination letter. The 30 day notice period is not pertinent here, because with the 30 day notice comes the opportunity to cure, which is an evidentiary issue, as discussed. With respect to limiting damages to 60 days however, Office Depot's motion for summary judgment is **GRANTED**.

IV: CONCLUSION

Based on the evidence presented, inferences compelled, and the applicable law, the Motion is **GRANTED IN PART AND DENIED IN PART.**

With respect to Count I of Office Depot's motion, the motion to the extent that Office Depot claims Velocity is not entitled to amounts from the CD&L contract with Allied is **DENIED**. The portion of the motion concerning the Count I request of a set-off of overpaid amounts is **GRANTED.**

Count II of Office Depot's motion, the Court is **GRANTED,** because Velocity (1) is not entitled to its interpretation of the unambiguous contract, and (2) did not complain of any discrepancies until after the seven day adjustment period had lapsed.

Count III of Office Depot's motion is **DENIED** as to the portion of the motion seeking to declare that Office Depot was not in breach and that Velocity's damages claim was insufficient to survive summary judgment. The motion addressed to the

portion of Count III that limits any recovery to the 60 day period after Velocity received notice of Office Depot's termination is **GRANTED.**

SO ORDERED.

/s/ Robert B. Young
J.

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