

Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

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James S. Green, Esq.
Seitz, Van Ogtrop & Green, P.A.
222 Delaware Avenue, Suite 1500
P.O. Box 68
Wilmington, DE 19899

Richard L. Horwitz, Esq.
Potter, Anderson & Corroon
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899

**RE: Charge Injection Technologies, Inc.
v. E. I. DuPont de Nemours and Company
C.A. No. 07C-12-134-JRJ
*Upon E.I DuPont de Nemours and Company's Motion for Summary
Judgment That Article 13 of Flash Spinning JDA Survives
Termination -GRANTED***

Dear Counsel:

Before the Court is DuPont's Motion for Summary Judgment. DuPont argues that Article 13 of the Flash Spinning JDA (the "JDA") survives termination of the JDA. The parties agree that: (1) the JDA is unambiguous; (2) the JDA is "the result of an arms length negotiation between sophisticated parties;"¹ (3) because the terms of the JDA are "clear on their face," "they should be given the

¹ Hr'g Tr. 2, July 14, 2009, Docket Item ("D.I.") 59.

meaning that would be ascribed to them by a reasonable third-party;”² (4) “the JDA must be read as a whole and to give life and meaning to every provision in the contract;”³ and (5) the contract provisions cannot be reduced to mere surplusage.⁴ What the parties do not agree on is whether Article 13 of the JDA survives the termination of the JDA.

The starting point in the Court’s analysis is Article 16.(17) of the JDA which states:

“[t]he Parties’ legal obligations under this Agreement shall be determined from the precise and literal language of this Agreement.”⁵

Article 15.(4) entitled “Survival” states in pertinent part:

Termination of this Agreement through any means for any reason shall not relieve either Party of any obligation accrued prior to such termination,...and **the provisions of Articles 5, 6, 7(2)-7(4), 8, 10, 11, 12, 13 and 14 shall survive termination or expiration of this Agreement to the extent provided in such Articles.**⁶

Article 13 states:

1. **Limitations of Liabilities**

a) NEITHER DUPONT NOR CIC SHALL UNDER ANY CIRCUMSTANCES BE LIABLE TO EACH OTHER FOR INDIRECT, INCIDENTAL, SPECIAL

² D.I. 59 at 3.

³ *Id.*

⁴ *Id.*

⁵ Flash Spinning JDA Amendment by Agreement dated Mar. 13, 2002, D.I. 53 (Exhibit B to DuPont’s Motion for Summary Judgment).

⁶ JDA, D.I. 53 (Exhibit A to DuPont’s Summary Judgment Motion) at 15-16.

OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, REVENUE, OR BUSINESS) RESULTING FROM OR IN ANY WAY RELATED TO THIS AGREEMENT, OR THE TERMINATION OF THIS AGREEMENT, OR ARISING OUT OF OR ALLEGED TO HAVE ARISEN OUT OF (i) BREACH OF THIS AGREEMENT, (ii) THE FAILURE BY EITHER PARTY TO DEVELOP ANY PRODUCTS OR PROCESSES IN ACCORDANCE WITH THE JOINT DEVELOPMENT PROGRAM, (iii) THE FAILURE BY EITHER PARTY TO DEVOTE THE RESOURCES SPECIFIED IN THE JOINT DEVELOPMENT PROGRAM, (iv) THE FAILURE BY EITHER PARTY TO COMPLY WITH THE EXPRESS CONDITIONS SPECIFIED IN THE JOINT DEVELOPMENT PROGRAM, OR (v) ANY EVENT RELATED TO THE CONDUCT OF THE JOINT DEVELOPMENT PROGRAM. This limitation applies regardless of whether such damages are sought based on breach of contract, negligence, or any other legal theory.

b) NEITHER DUPONT NOR CIC SHALL UNDER ANY CIRCUMSTANCES BE LIABLE TO EACH OTHER FOR DIRECT DAMAGES OF ANY KIND, RESULTING FROM OR IN ANY WAY RELATED TO THE FAILURE BY EITHER PARTY TO DEVELOP ANY PRODUCTS OR PROCESSES MEETING THE GOALS OF THE JOINT DEVELOPMENT PROGRAM. This limitation applies regardless of whether such damages are sought based on breach of contract, negligence, or any other legal theory.

Only three of the Articles specified in Article 15.(4) expressly or implicitly contemplate survival.⁷ Article 10 expressly limits the survival of that provision to

⁷ *Id.* at 8, 10, 13.

“five (5) years following termination of this Agreement by either Party.”⁸ No other Article contains such a limiting provision. Article 7(3) implicitly contemplates survival. That provision provides for notification “prior to either Party filing any patent application during or after the term of this Agreement.”⁹ Similarly, Article 13.(1)(a) limits liability “resulting from or in any way related to this Agreement, or the termination of this Agreement.”¹⁰

The Court can interpret the Article 15.(4) language “to the extent provided in such Articles” in only one way, or else run the risk of rendering the provision a “mere surplusage.”¹¹ The express language of Article 15.(4) dictates that all of the provisions listed in Article 15.(4) survive termination. The “to the extent provided” language simply allows the parties to limit the duration of that survival if they so desire. This application of the Article 15.(4) language is illustrated in Article 10, which explicitly limits survival of that provision to five years after termination.¹² Interpreting Article 15.(4) any other way would render it moot in relation to the majority of the Articles to which Article 15.(4) expressly applies.

Applying JDA section 16.(17) and the rules of contract interpretation,¹³ the

⁸ *Id.* at 10.

⁹ *Id.* at 8 (emphasis added).

¹⁰ *Id.* at 13 (emphasis added).

¹¹ *Elliot Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. Supr. 1998).

¹² JDA, *supra* note 6, at 10.

¹³ “If the terms of [an] agreement are clear on their face, the court will give them the meaning that would be ascribed by a reasonable third party.” *Nutzz.com, LLC v. Vertrue Inc.*, No. 1231-N/1719-N, 2006 WL 2220971, at *5 (Del. Ch. July 25, 2006).

Court finds that Article 13 survives termination.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge