IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

M&G POLYMERS USA, LLC, a a Delaware Limited Liability Company,	)	
Plaintiff,	)	
	)	C.A. No. 07C-11-242 PLA
v.	)	
CARESTREAM HEALTH, INC., a Delaware Corporation,	)	
Defendant.	)	

Submitted: May 4, 2009
Decided Under Seal: June 3, 2009
Public Version: October 23, 2009

UPON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
DENIED
UPON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTED in part; DENIED in part

Steven J. Margolin, Esquire, and Andrew D. Cordo, Esquire, ASHBY & GEDDES, Wilmington, Delaware, Attorneys for Plaintiff.

Somers S. Price, Jr., Esquire, and James M. Kron, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

Before the Court are cross-motions for summary judgment filed by Defendant Carestream Health, Inc. ("Carestream") and Plaintiff M & G Polymers USA, LLC ("M & G") in a contract dispute involving a requirements supply agreement for terephthalate (PET) resin pellets. Carestream seeks summary judgment on the basis that it did not breach the parties' supply agreement by eliminating its requirements for PET pellets, because M & G's PET products did not conform to contractual specifications. M & G's Motion for Partial Summary Judgment requests a ruling that Carestream was obligated under the parties' agreement to purchase PET pellets from M & G and that Carestream did not seek a price adjustment under the meet-competition clause.

For reasons set forth more fully hereafter, the Court concludes that genuine issues of material fact exist as to whether M & G's PET pellets constituted conforming goods, and thus whether Carestream was under an obligation to purchase. Carestream agrees that it never invoked the supply agreement's meet-competition clause during the course of the litigated events in 2007. Accordingly, Carestream's Motion for Summary Judgment is denied, and M & G's Motion for Summary Judgment is granted in part and denied in part.

II. Factual Background

Eastman Kodak Co. ("Kodak"), predecessor in interest to Carestream, entered into a written requirements contract to purchase PET resin pellets from M & G for use in its Windsor, Colorado facility ("the Windsor facility"). The contract ("the Supply Agreement") was effective for four years, beginning January 1, 2007. Kodak assigned the contract to Carestream on May 1, 2007.

Carestream uses PET resin in the manufacture of medical imaging film. Prior to its agreement with M & G, Carestream employed PET resin in powder form in its production process. In connection with its new arrangement with M & G, however, Carestream apparently planned to convert the Windsor facility to the use of PET pellets in 2007. This conversion required Carestream to install grinders to process the PET pellets. M & G apparently provided a $600,000.00 price reduction to offset the expense of installing the grinders.

Under the Supply Agreement, Carestream was required to purchase, and M & G to supply, PET resin pellets meeting certain specifications, defined in the contract as "Product."[1] The Supply Agreement obligated Carestream to obtain "an amount of Product for its plant located in Windsor,

[1] Supply Agreement, App. A.

Colorado . . . equal to at least the greater of 100% of the . . . total demand" for the Windsor facility, up to a certain volume of demand per year, or "90% of the [Windsor facility's] total demand for PET pellets."[2] The Supply Agreement included a limitation of liability clause that provided, in relevant part, as follows:

> Except for each party's indemnification obligations as expressly set forth in this agreement, neither party shall be responsible or liable to the other for lost profits, or lost business opportunities or for indirect, special, punitive or consequential damages arising out of or in connection with supply of goods provided for under this agreement or for termination of this agreement as provided for herein.[3]

The Supply Agreement did not prohibit Carestream from purchasing PET resin from other suppliers.[4] Under a meet-competition provision contained in § 13.2 of the Supply Agreement, Carestream could also present a competitive offer to M & G and seek a price adjustment if it became possible to purchase "products of comparable quality, (including the Specifications), in volumes equal to or greater than those specified in [the] Agreement."[5] By its terms, the meet-competition provision could not be

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[2] *Id.*, App. B.

[3] *Id.* § 23.0.

[4] *Id.* § 3.3.

[5] *Id.* § 13.2.

invoked until January 1, 2008.[6] The Supply Agreement denied either party the ability to "take unilateral action regarding price."[7]

Although both parties recount that several trials of the M & G-supplied PET pellets occurred at the Windsor facility in the spring and summer of 2007, they dispute the nature and outcome of those trials. Carestream asserts that a planned trial from May 29 through May 30 ended prematurely because of apparent processing problems. Carestream's manufacturing process involves melting PET resin and feeding the melted resin through extruders that form the material into sheets. According to Carestream, when M & G's PET pellets were processed on its machinery, instabilities arose in the plasticators, which caused unacceptable instability in the output flow of melted PET. This plasticator instability resulted in a defective final product. Carestream allegedly experienced plasticator instability again when it conducted another trial using M & G's PET pellets in June.

In June 2007, Carestream notified M & G of concerns regarding the PET pellets. M & G sent a team of their personnel and an outside consultant to the Windsor facility in late July of 2007 to participate in a joint effort to

[6] *Id.*

[7] *Id.* § 5.2.

resolve the plasticator instability. The parties planned to deliberately induce the instability in order to identify its source and solution. M & G claims that after this joint trial ran to completion, Carestream personnel reported that M & G's PET pellets could be used successfully on its machinery. According to M & G, Carestream's grinders became operational on July 12, 2007, prior to the joint trial, and were capable of processing all of Carestream's PET resin requirements in pellet form as of that time.[8] Carestream, however, contends that the two-day joint test never revealed the root cause of the plasticator instability, and that M & G's own consultant indicated that additional extended trials would be required.

Approximately one week after this trial run, Carestream notified M & G that it would not purchase PET pellets from M & G in 2007, and would use a different PET material instead. Carestream stated that it would use M & G's PET pellets in 2008 if M & G would guarantee that its PET pellets would work in Carestream's Windsor facility process and agreed to match the price of PET resin powder available from Eastman Chemical Company ("ECC"). According to Carestream, M & G refused to participate in further trials, which Carestream considered necessary to qualify its PET pellets for

[8] Docket 27 (Pl.'s Mot. for Partial Summ. J.), at 2.

use at the Windsor facility. Carestream asserts that M & G thereby abandoned the Supply Agreement.

M & G claims that although it did not learn of Carestream's plans to resume purchases of PET powder from ECC until August 2007, Carestream had been negotiating with ECC for several months prior. M & G alleges that Carestream raised false quality complaints regarding its PET pellets as a bad-faith attempt to either force M & G into a price concession or avoid the Supply Agreement and pursue a less expensive contract for PET powder from ECC. In support of its argument, M & G points to internal Carestream communications suggesting that Carestream was searching for "any hint of trouble" with the M & G-supplied PET pellets[9] and had set a July target date so that Carestream could "exit our commitment contract from [M & G]" in order to "get more favorable pricing from [ECC] sooner."[10]

M & G informed Carestream on August 13, 2007, that it considered Carestream to be in breach of the Supply Agreement. After failed attempts to resolve the dispute through informal negotiation and mediation, M & G provided written notice to Carestream in November 2007 that it intended to pursue litigation. On November 30, 2007, M & G filed suit in this Court,

[9] Docket 27, Ex. E.

[10] Docket 33 (App. to Pl.'s Resp. to Def.'s Mot. for Summ. J.), Ex. S.

alleging that Carestream committed breach of contract by refusing to perform under the Supply Agreement, wrongfully terminating the Supply Agreement, and violating several duties under New York's Uniform Commercial Code.[11]

III. Parties' Contentions

Carestream's Motion argues that it was under no legal obligation to purchase M & G's PET pellets, because M & G's pellets did not qualify for use on machinery at the Windsor plant and M & G abandoned the testing necessary to complete qualification. Therefore, according to Carestream, it eliminated its requirements for Product in good faith for a "legitimate business reason." Carestream argues that the PET powder it subsequently purchased from ECC was not "Product" within the meaning of the Supply Agreement, because the powder did not match the contractual specifications describing the PET pellets. Finally, Carestream contends that the limitation of liability clause in the Supply Agreement precludes M & G's claim for lost profits and consequential damages.

In response, M & G essentially suggests that Carestream fabricated claims that its PET pellets did not qualify for use on its machines as a bad-

[11] Docket 1 (Compl.). The Court dismissed an additional count alleging fraud in the inducement on July 30, 2008.

faith pretext for reducing their requirements in order to avoid the contract. M & G asserts that under the purchase arrangement between it and Carestream, "qualification" of the pellets was specifically and unambiguously defined to mean qualification for use at the New York Kodak Park facility. M & G argues that Carestream is attempting to have a different, self-created accreditation process implied into the Supply Agreement. Because the Supply Agreement is not ambiguous, M & G argues that there is no basis to depart from the defined qualification process set forth in the Kodak Park Agreement. Moreover, if the Court nevertheless considers the Supply Agreement to be ambiguous, that ambiguity would raise a material factual dispute as to what the parties intended by the use of the term "qualified." Finally, M & G emphasizes that the limitation of liability clause, by its terms, applies only to claims arising from the "supply of goods" or termination of the Supply Agreement "as provided for herein." M & G argues that its claims do not relate to either scenario, or at least raise a dispute as to the intent of the provision, such that the Court cannot hold at this stage that the provision bars the damages it seeks.

M & G contends that it is entitled to partial summary judgment on two issues. First, M &G requests that the Court hold as a matter of law that Carestream never invoked its contractual right to seek a price adjustment for

2008 on the basis of a competitive offer. Second, M & G contends that Carestream was obligated as of July 12, 2007, to meet its PET resin requirements by purchasing from M & G.

Carestream responds by emphasizing its position that M & G's PET pellets were never accredited for use in its Windsor facility and that M & G abandoned the parties' contractual relationship by discontinuing testing and technical efforts to achieve accreditation despite its own consultants' opinions that further trials were necessary. Carestream therefore considers the meet-competition clause of the Supply Agreement irrelevant, because it is applicable only if Carestream could obtain a "comparable" product (i.e., one that would function in the Windsor machines). Carestream also notes that the meet-competition provision was not available to it until January 1, 2008.

IV. Standard of Review

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[12] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are

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

material facts in dispute or if judgment as a matter of law is not appropriate.[13]

V. Analysis

Before analyzing the merits of the arguments before it, the Court recognizes that the law of New York will govern the substantive merits of the claim, pursuant to the choice-of-law provision contained in the Supply Agreement.[14]

Under New York law, the Court must interpret written contracts in conformity with the parties' intent.[15] The first and best evidence to which the Court turns in discerning that intent is the text of the agreement itself.[16] Accordingly, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."[17]

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[13] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

[14] "As a general proposition, Delaware courts will recognize and enforce contractual choice-of-law provisions if the selected jurisdiction has a material connection with the transaction." *Trilogy Dev. Group, Inc. v. Teknowledge Corp.*, 1996 WL 527325, at *3 (Del. Super. Aug 20, 1996).

[15] *See, e.g.*, *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (N.Y. 2002); *Slatt v. Slatt*, 477 N.E.2d 1099, 1100 (N.Y. 1985).

[16] *Greenfield*, 98 N.Y.2d at 562; *WWW Assoc., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990).

[17] *Greenfield*, 98 N.Y.2d at 569; *see also WWW Assoc.*, 566 N.E.2d at 642; *Omansky v. Whitacre*, 866 N.Y.S.2d 109, 109-10 (N.Y. App. Div. 2005).

The existence of ambiguity in a written contract is a question of law.[18] An ambiguity arises "if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[19] The resolution of an ambiguous term is a question for the trier-of-fact if "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence."[20]

Although the mere existence of cross-motions for summary judgment does not necessarily imply that summary judgment is inappropriate, in this case the cross-motions serve to highlight material factual disputes regarding liability. The parties contest whether M & G's PET pellets were qualified for use at the Windsor facility under the Supply Agreement. This dispute is, in turn, central to the question of whether Carestream acted in good faith by declining to order PET pellets from M & G and instead returning to the use of PET powder. Neither of these inquiries can be resolved by summary judgment.

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[18] *WWW Assoc.*, 566 NE.2d at 642; *Van Wagner Adver. Corp. v. S & M Enters.*, 492 N.E.2d 756, 758 (N.Y. 1986).

[19] *E-Z Eating 41 Corp. v. H.E. Newport, L.L.C.*, 2009 WL 1351228, at *10 (N.Y. Sup. Ct. Mar. 25, 2009) (quoting *Feldman v. Nat'l Westminster Bank, N.A.*, 303 A.D.2d 271, 271 (N.Y. App. Div. 2003)).

[20] *Village of Hamburg v. Am. Ref-Fuel Co. of Niagara*, 727 N.Y.S.2d 843, 845 (N.Y. App. Div. 2001).

The Court concludes that the Supply Agreement is ambiguous in its use of the term "qualified." The Supply Agreement states that Kodak's 2007 Maximum Annual Volume is to be prorated "to the number of full and partial months of the year that [M & G's] PET pellets are *qualified for use at the site* and the site is capable of processing greater than 80% of their PET demand in the form of PET pellets."[21] M & G contends that the sole qualification process contemplated by the Supply Agreement is a Qualification Performance Requirements Event, referred to in § 12.3 as a basis for termination of the Supply Agreement and defined in the Kodak Park Agreement.

Nothing in the provision stating that the PET pellets must be "qualified for use at the site" references § 12.3 or indicates that "qualified for use" is synonymous with the Qualification Performance Requirements Event defined in the Kodak Park Agreement. If the parties' intent was to invoke the Qualification Performance Requirements Event, it seems likely that they would have done so directly, rather than using the generic word "qualified" without any further explanation. Moreover, Carestream has presented documents and deposition testimony suggesting that a particular accreditation or qualification process at the Windsor facility was

[21] Supply Agreement, App. B (emphasis added).

contemplated by both sides before Carestream's obligation to purchase under the Supply Agreement was triggered.[22] The parties' intent as to how M & G's PET resin pellets were to be "qualified," and the issue of whether they in fact achieved qualification and thus conformed with the contract, therefore remain questions of fact that must be resolved by the jury.

Furthermore, these factual issues are central to the question of whether Carestream acted in good faith by negotiating with ECC to obtain PET powder in lieu of M & G's PET pellets and in requesting price concessions from M & G. Requirements contracts are governed by § 2-306(1) of the New York Uniform Commercial Code (UCC).[23] Section 2-306(1) provides that:

> A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Federal courts applying New York's version of UCC § 2-306 have "exempted decreases in orders from the 'unreasonably disproportionate'

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[22] *See, e.g.*, Docket 26 (Excerpted Dep. Tr. of Mark Adlam), at A-5, A-8; Docket 26 (Excerpted Carestream Change Management Request), at A-13-15; Docket 26 (Letter from Fred Fournier), at A-16.

[23] *See Laing Logging Inc. v. Int'l Paper Co.*, 644 N.Y.S.2d 91, 93 (N.Y. App. Div. 1996).

proviso and concluded that 'when a buyer takes less than the stated estimate in a requirements contract, the sole test is good faith.'"[24] The official comments to § 2-306 elaborate upon the circumstances under which a buyer's requirements may be increased or reduced:

> Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. . . . The essential test is whether the party is acting in good faith.[25]

The comments further suggest that any agreed estimate "is to be regarded as a center around which the parties intend the variation to occur."[26] A plaintiff claiming a breach of § 2-306(1) must demonstrate not only that the defendant reduced or eliminated its requirements, but that there was "no legitimate business reason" for the reduction.[27]

Citing to *Dienes Corp. v. Long Island Rail Road Co.*, Carestream contends that the existence of any legitimate business reason for reducing requirements provides a buyer with an automatic presumption of good faith. This argument misreads *Dienes*. As *Dienes* in fact states, a buyer's decision

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[24] *MDC Corp. v. John H. Harland Co.*, 228 F. Supp. 2d 387, 396 (S.D.N.Y. 2002) (quoting *Dienes Corp. v. Long Island R.R. Co.*, 2002 WL 603043, at *5 (E.D.N.Y. Mar. 19, 2002)).

[25] U.C.C. § 2-306 cmt. 2.

[26] U.C.C. § 2-306 cmt. 3.

[27] *MDC Corp.*, 228 F. Supp. 2d at 496.

must stem from motivations other than avoidance of the contract, and the presumption of good faith only arises "[a]bsent a showing that the buyer acted in bad faith" in reducing or eliminating its requirements.[28] The buyer's decision must be motivated by considerations "independent of the terms of the contract or any other aspect of [the buyer's] relationship with [the seller]."[29]

Here, Carestream is not entitled to a presumption of good faith because M & G has made a sufficient showing of bad faith. M & G argues that ECC's PET powder essentially substitutes for PET pellets in Carestream's film manufacturing process. Thus, by obtaining PET powder from ECC, Carestream did not actually reduce its requirements for PET resin, regardless of the resin's form, but rather breached the Supply Agreement by changing suppliers to obtain a comparable substitute good. M & G's assertions find support in the deposition testimony of Carestream personnel that ECC's PET powder and M & G's PET pellets were substitutes for each other in Carestream's process.[30] Even if PET powder

[28] *Dienes*, 2002 WL 603043, at *3.

[29] *NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F. Supp. 1004, 1009 (S.D.N.Y. 1991) (quoting *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1339 (7th Cir. 1988)).

[30] Docket 33, Ex. N (Excerpted Dep. Tr. of Todd N. Arndorfer), at 50.

does not constitute a substitute for PET pellets, a triable issue of fact persists as to whether Carestream was motivated by a desire to avoid the Supply Agreement and whether Carestream acted in good faith in its trials to qualify M & G's PET pellets for use on its Windsor facility machinery. By presenting evidence, including multiple internal e-mails from Carestream personnel, that suggests Carestream may have invented or exaggerated quality issues with M & G's PET pellets in order to avoid the Supply Agreement, M & G has raised a triable issue as to Carestream's good faith.[31]

Turning to Carestream's argument that the Supply Agreement's liability limitation provision bars M & G from seeking lost profits or consequential damages, the Court disagrees. Carestream cites several cases for the proposition that liability limitation provisions are permissible under UCC § 2-719(3) and will be enforced unless the defendant has committed "egregious intentional misbehavior evincing extreme culpability."[32] The cases on which Carestream relies, however, involved damage limitation provisions that were clearly applicable to the plaintiff's claims and

[31] *See, e.g.*, Docket 30, Exs. D, E; Docket 33, Ex. S.

[32] Docket 26 (Def.'s Mot. for Summ. J.), at 4 (citing *Tradex Europe SPRL v. Conair Corp.*, 2008 WL 1990464, at *3 (S.D.N.Y. May 7, 2008)).

sufficiently broad that they would have limited damages for *any* breach of the contracts at issue.[33]

Here, by contrast, M & G's action against Carestream seeks damages allegedly arising from Carestream's breach of its obligation to purchase under the Supply Agreement. The liability limitation contained in § 23.0 of the Supply Agreement limits both parties' liability to direct damages for claims "arising out of or in connection with *supply of goods* provided for under this agreement or for termination of this agreement as provided for herein."[34] The plain language of the liability limitation does not contemplate a breach by either party involving or resulting in the *non*-supply of goods, nor does it address repudiation or termination of the Supply Agreement by means other than those provided in the contract. Accordingly, the Court cannot find that Carestream is entitled to summary judgment on the challenged portions of M & G's damages claims.

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[33] *See Tradex Europe SPRL*, 2008 WL 1990464, at *1, 3 (applying provisions that limited contractual parties' liability for "all breaches of any provisions of [the agreement between the parties] or any other breaches of conditions or terms, or in any other way arising out of or related to [the] agreement for all causes of action whatsoever and regardless of the form of action" and provided that "under no circumstances shall any party be liable to any other party . . . for special, incidental, exemplary, punitive, multiple, consequential or indirect damages"); *Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 283 F. Supp. 2d 436, 449 (S.D.N.Y. 2003) (applying limitation of liability agreement that provided "[i]n no event shall [defendant] be liable for any incidental, indirect, special, or consequential damages . . . regardless of the cause or foreseeability thereof.").

[34] Supply Agreement, § 23.0 (emphasis added).

M & G's summary judgment motion also seeks a ruling by the Court that Carestream never invoked its right under the Supply Agreement's meet-competition clause to seek a price adjustment from M & G in 2008. By its terms, the meet-competition clause could not be invoked until January 1, 2008. Carestream concedes that it could not invoke its rights under § 13.2 during 2007, although it asserts that this does not mean it could not have sought a price adjustment under § 13.2 had the parties' contractual relationship continued. Because the parties do not dispute that the meet-competition clause was inapplicable at the time of the alleged breach, M & G's Motion for Partial Summary Judgment as to Carestream's fifth affirmative defense, asserting the meet-competition clause, will be granted. The Court notes, however, that its decision does not address the potential relevance of the meet-competition clause to M & G's claimed damages, an issue not fully addressed by the parties upon these motions.

VI. Conclusion

For the foregoing reasons, Defendant Carestream's Motion for Summary Judgment is hereby **DENIED**. Plaintiff M & G's Motion for Partial Summary Judgment is **GRANTED in part** as to Carestream's fifth affirmative defense and **DENIED in part**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Somers S. Price, Esq.
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Steven J. Margolin, Esq.
Andrew D. Cordo, Esq.