IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NEWPORT DISC, INC., a Nevada corporation and OMEGA DISC, INC., a Nevada corporation,	)	
Plaintiffs,	)	
	)	C.A. No. N12C-10-228 MMJ CCLD
v.	)	
NEWPORT ELECTRONICS, INC., a Delaware corporation and OMEGA ENGINEERING, INC., a Delaware corporation,	)	
Defendants.	)	

Submitted: September 5, 2013
Decided: October 7, 2013

On the Plaintiffs' Motion for Summary Judgment
GRANTED

OPINION

John L. Reed, Esquire, Scott B. Czerwonka, Esquire, DLA Piper LLP (US), Wilmington, Delaware, Timothy E. Hoeffner, Esquire (argued), DLA Piper LLP (US), New York, New York, Attorneys for Plaintiffs

Donald E. Reid, Esquire, Karl G. Randall, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Rollin A. Ransom, Esquire (argued), Sidley Austin LLP, Los Angeles, California, Attorneys for Defendants

JOHNSTON, J.

INTRODUCTION

This litigation arises out of a contract dispute. Plaintiffs Newport Disc, Inc. ("Newport Disc") and Omega Disc, Inc. ("Omega Disc") (collectively, "Plaintiffs") filed suit against Defendants Newport Electronics, Inc. ("Newport Electronics") and Omega Engineering, Inc. ("Omega Engineering") (collectively, "Defendants") on October 24, 2012. Plaintiffs assert one count of Breach of Contract. Plaintiffs seek damages for breach of contract, attorneys' fees and expenses, and request that the Court dismiss Defendants' fraud defense with prejudice.

The primary issues in this case are: (1) whether Defendants breached their contractual obligations in the Termination Agreements to make commission payments to Plaintiffs; and (2) whether the Termination Agreements were the result of mutual mistake.

FACTUAL AND PROCEDURAL CONTEXT

The Parties

Plaintiffs are Nevada corporations with their principal places of business in Connecticut. Plaintiff Newport Disc is wholly owned by the 1997 Milton B. Hollander Family Trust ("1997 Trust"). Plaintiff Omega Disc is wholly owned by the 1999 Betty Ruth Hollander Family Trust No. 1 ("1999 Trust").

Defendants are Delaware corporations with their principal places of business in Connecticut. Defendants currently are owned by Spectris, Inc. ("Spectris"). Pursuant to a Purchase Agreement dated August 14, 2011 ("Purchase Agreement"), the Hollander Trusts sold 100% of the outstanding capital stock and equity in each of Omega Engineering and High Technology Holding Corporation ("HTHC") (the sole shareholder of Newport Electronics) to Spectris. Prior to the acquisition, Defendant Newport Electronics was a wholly-owned subsidiary of HTHC, which was wholly owned by the 1997 Trust. Defendant Omega Engineering was owned by the 1999 Trust.

Newport Disc and Omega Disc were formed in 2006 as Interest Charge Domestic International Sales Corporations ("IC-DISCs"). IC-DISCs are designed to minimize the tax a domestic corporation must pay on foreign sales. The tax advantage is found by "assum[ing] that the parent has sold the product to the DISC at a hypothetical 'transfer price' that produced a profit for both seller and buyer when the product was resold to the foreign customer."[1] A commission is paid to the IC-DISC based on qualified export sales and related costs. The Commission is calculated pursuant to IRS rules and regulations.

[1] *Boeing Co. v. United States*, 537 U.S. 437, 440-41 (2003).

Parties' Relationship before the Termination Agreement

Since 2006, Newport Disc and Newport Electronics were parties to a Commission Agreement and Omega Disc and Omega Engineering were parties to a similar Commission Agreement. Grant Thornton LLP, an independent public accounting firm, prepared Plaintiffs' tax returns and calculated the commission payments from 2006 through 2011. Defendants paid Plaintiffs the amount calculated by Grant Thornton in 2006 through 2010. Historically, Plaintiffs received commission income and then distributed it to the Hollander Trusts after paying nominal expenses.

Purchase Agreement Section 6.05 as amended requires that the Commission Agreements be terminated as of the Purchase Agreement's closing date.[2] The transaction closed on September 30, 2011. To effectuate Section 6.05, Omega Engineering and Omega Disc entered into a Termination Agreement on September 30, 2011. Newport Electronics and Newport Disc entered into a similar

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[2] The amendment to Purchase Agreement Section 6.05 provides in relevant part:

> [N]otwithstanding anything contained in this Agreement, accrued and unpaid commissions under the Commission Agreements will not be taken into account in calculating the Closing Net Working Capital Amount, but rather shall [be] settled as between the parties to the applicable Commission Agreements in accordance with the applicable termination agreement entered into by Omega Engineering or Newport Electronics, Inc. on the Closing Date.

Termination Agreement on the same date. Richard Kremheller executed the Termination Agreements as an officer of both Plaintiffs and Defendants.

Termination Agreement Provisions

The Termination Agreements contain identical integration clauses, which provide in relevant part:

> This Termination Agreement contains the entire agreement among the parties hereto with respect to the subject matter hereof and supersedes all prior agreements, written or oral, among the parties identified above with respect thereto.

The Termination Agreements contain choice of law provisions, mandating that New York law governs the Agreements.

Commission Payments

Newport Disc and Omega Disc are entitled to commission payments from Newport Electronics and Omega Engineering, respectively. The Termination Agreements provide:

> [U]pon the final determination of any DISC taxable income for any period prior to the date hereof, [Newport Electronics/Omega Engineering] agrees to pay to [Newport Disc/Omega Disc] within ten Business Days after such final determination any commissions owed to [Newport Disc/Omega Disc] pursuant to the Agreement for such period.

Newport Disc's and Omega Disc's 2011 tax returns were signed and filed with the Internal Revenue Service on September 17, 2012. Plaintiffs' counsel sent an invoice to Defendants' counsel on October 9, 2012 requesting the commissions

be paid by October 23, 2012. Plaintiffs received no response by October 23, 2012 and filed this lawsuit on October 24, 2012. Plaintiffs allege one count of breach of contract.

Defendants filed a Motion to Dismiss based a forum selection clause contained in the Purchase Agreement, but not in the Termination Agreements. By Memorandum Opinion dated March 11, 2013, this Court denied the Motion to Dismiss, finding that "[o]n the face of the Complaint, Plaintiffs' claims do not depend upon interpretation of the Purchase Agreement as part of a complex contractual relationship."

Plaintiffs filed a Motion for Summary Judgment on July 15, 2013. Plaintiffs seek commission payments in the amount of $137,777 and $1,529,007 to Newport Disc and Omega Disc, respectively. Plaintiffs seek an award of attorneys' fees and expenses. Plaintiffs request that Defendants' fraud defense be dismissed with prejudice. This is the Court's opinion on the Motion.

STANDARD OF REVIEW

Motion for Summary Judgment

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[3] All facts are viewed in a light most favorable to the non-moving

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

party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[7]

When a motion for summary judgment is supported by affidavits and admissible documentary evidence, an adverse party may not rest upon mere allegations or denials. The party opposing summary judgment must respond, by affidavit or otherwise as provided in Rule 56, setting forth "specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."[8] If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law. If the non-moving party makes evidentiary

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[4] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

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

[6] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[8] Super. Ct. Civ. R. 56(e); *Price v. Acme Markets, Inc.,* 2010 WL 4062007, at *2 (Del. Super.).

submissions, the Court may treat the issues as if cross motions have been filed. In such a case, no inferences will be drawn in favor of the non-moving party.[9]

Although Defendants did not file a cross motion for summary judgment, Defendants conceded at oral argument that the Court may decide the issue of mutual mistake on the evidence submitted.

ANALYSIS

Parties' Contentions

Plaintiffs contend that the Termination Agreements should be enforced according to their terms because the Agreements are unambiguous and each contains an integration clause. Plaintiffs assert that Defendants have breached their obligations under the Termination Agreements by failing to make the commission payments within ten business days of the final determination of Plaintiffs' taxable income in 2011. Plaintiffs argue that Defendants have acted in bad faith during the course of this litigation by asserting frivolous defenses. Plaintiffs seek a finding that that Defendants' acts justify an award of attorneys' fees under the bad faith exception to the American Rule.

Defendants contend that Plaintiffs have failed to establish damages by not submitting admissible evidence of the amounts owed under the Termination Agreements. Defendants argue (in their briefs) that granting summary judgment in

[9] *Smartmatic Internation Corp. v. Dominion Voting Systems International Corp.*, 2013 WL 1821608, at *3 (Del. Ch.).

favor of Plaintiffs is not appropriate because genuine issues of material fact exist regarding Defendants' mutual mistake defense. Defendants contend that the Termination Agreements do not reflect the parties' intent, as described in contemporaneous documents and the submitted declarations. Defendants also argue that the language in the Termination Agreements supports a finding of mutual mistake.

Breach of Contract Claim

Contract Interpretation

A contract is interpreted according to the specific language the parties agreed to in writing. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms."[10] "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed."[11]

A *prima facie* breach of contract case requires the following essential elements: "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages."[12]

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[10] *W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990).

[11] *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978) (citing *Morlee Sales Corp. v. Manufacturers Trust Co.*, 172 N.E.2d 280, 282 (N.Y. 1961)).

[12] *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 893 N.Y.S.2d 237, 239 (N.Y. App. Div. 2010).

The Court finds that Plaintiffs have established a *prima facie* case of breach of contract. The Termination Agreements set forth Defendants' obligation to pay commissions upon the final determination of DISC taxable income. Plaintiffs have presented evidence of damages in the amount of the unpaid commissions under the Termination Agreements. IRS Schedule P (Form 1120-IC-DISC) shows the calculation of 2011 commissions. Further explanation of how commission payments were calculated historically is found in the document entitled "Omega FIN 48 Review for 2010 – IC DISC."

Generally Accepted Accounting Principles require a company in Omega Engineering's position to assess its uncertain tax positions. Richard Kremheller, Vice President and Controller of Omega Engineering during the relevant time, prepared Omega FIN 48 to comply with this requirement. Omega FIN 48 defines the components of the commission calculations and the calculation methods to the extent possible, noting where Grant Thornton was responsible for the detailed calculations.

Defendants contend that Plaintiffs fail to establish damages in three ways: (1) Plaintiffs' tax returns are inadmissible hearsay; (2) the commission calculations are incorrect on their face; and (3) Plaintiffs fail to provide the Commission Agreements giving rise to Defendants' financial liability.

Admissibility of Tax Returns

Defendants contend that to the extent Plaintiffs rely on 2011 tax returns to establish damages, the tax returns are inadmissible hearsay. Defendants cite *Scotto v. Brady*,[13] in which the court found that the plaintiff's personal tax return contained inadmissible hearsay and could not establish plaintiff's loss.

This case is distinguishable from *Scotto*. In *Scotto*, the plaintiff provided his individual income tax return to prove his personal losses.[14] The reported losses on his income tax return were based on a trading summary. The *Scotto* Court found, as a matter of law, that the plaintiff "failed to establish the authenticity of the trading summary."[15] The objectionable hearsay in *Scotto* was the trading summary underlying the tax return. The tax return itself was not deemed hearsay.

The Court finds that in the context of this case, Plaintiffs' tax returns fall within the business records exception to the hearsay rule.[16] Delaware Rule of Evidence ("D.R.E.") 803(6) provides for the admission of an out-of-court record if: (1) the record was prepared in the regular course of business; (2) the record was made near the time of the event; (3) the information and circumstances are

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[13] 410 Fed. Appx. 355 (2d Cir. 2010).

[14] *Id*. at 361.

[15] *Id*.

[16] D.R.E. 803(6).

trustworthy; and (4) a custodian or other qualified witness is available to testify, or the record can be authenticated by a written declaration according to D.R.E. 902(11).[17]

This Court previously has held that for the purposes of D.R.E. 803(6), the term "other qualified witness" should be interpreted broadly.[18] The "other qualified witness" must understand the record-keeping system,[19] and be able to attest that:

> (1) [T]he declarant in the records had knowledge to make accurate statements; (2) the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) the declarant made the record in the regular course of business activity; and (4) such records were regularly kept by the business.[20]

Here, Plaintiffs kept financial information, necessary to file annual tax returns, in the regular course of business. The tax returns were prepared by Grant Thornton, LLP. Grant Thornton used information compiled in the Access database

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[17] D.R.E. 902(11) provides that certified domestic records of regularly conducted activity can be admitted into evidence without extrinsic evidence of authenticity:

> [I]f accompanied by a written declaration of its custodian or other qualified person . . . certifying that the record: (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conduced activity; and (C) was made by the regularly conducted activity as a regular practice.

[18] *Del. Acceptance Corp. v. Swain*, 2012 WL 6042644, at *3 (Del. Super.); *State v. McCoy*, 2012 WL 1415698, at *3 (Del. Super.).

[19] *Trawick v. State*, 845 A.2d 505, 508 (Del. 2004).

[20] *Id*. at 509.

by Omega Engineering employee Maryann Lang to prepare the tax returns for the years 2006 through 2010. During that time, Lang reported to Kremheller. Due to Spectris' acquisition of Omega Engineering, the 2011 Access database was given to Kremheller, who in turn provided the information to Grant Thornton. Plaintiffs' tax returns were used in the regularly-conducted business activity of determining commission payments.

The Court finds that the 2011 tax returns were prepared in the regular course of business, and within the time frame ordinarily required for timely filing with the IRS. The returns were accepted without objection by the parties for purposes of calculating commissions for the years 2006 through 2010. Defendants have failed to present any evidence or plausible reason why the trustworthiness of the 2011 returns should be questioned.

Further, Plaintiffs can authenticate the tax returns in accordance with D.R.E. 803(6). Plaintiffs could have a qualified witness, presumably a representative of Grant Thornton, who can testify and make the appropriate attestations. In the alternative, a written affidavit could be submitted in accordance with D.R.E. 902(11).

The rationale behind the business records exception is that records that are "properly shown to have been kept as required[,] normally possess a circumstantial

probability of trustworthiness."[21] The Court is persuaded that under the circumstances, the tax returns are admissible as business records.

Commission Calculations

Defendants contended at oral argument that the 2011 commission calculations are incorrect on their face because the commission amount is considerably greater than in prior years. Plaintiffs submitted the following charts summarizing Omega Engineering and Newport Electronics' commissions owed to or receivable from their respective IC-DISC during the years 2006 through 2011.

[21] *State v. McCoy*, 2012 WL 1415698, at *3 (Del. Super.) (citing *Liptak v. Rite Aid, Inc.*, 673 A.2d 309, 319 (N.J. Super. Ct. App. Div. 1996)).

Newport Electronics Inc - Receivable from (payable to) Newport DISC

	DISC Gross income per the tax return	DISC expenses (paid by DISC)	DISC taxable income per tax return	Comission paid to Trust by IC DISC	Excess (under) distribution in year	Excess (under) distribution cumulative	Commission paid by Newport to IC DISC
2006	340,625	7,405	333,220	480,000	146,780	146,780	480,000
2007	362,477	4,025	358,452	480,000	121,548	268,328	480,000
2008	401,978	4,025	397,953	218,000	(179,953)	88,375	225,000
2009	265,848	4,025	261,823	224,000	(37,823)	50,552	236,000
2010	386,306	4,260	382,046	331,494	(50,552)	0	348,000
2011	421,442	435	421,007	271,000	(150,007)	(150,007)	271,000
	2,178,676	24,175	2,154,501	2,004,494			2,040,000

DISC gross income per return (amt owing from Newport to IC DISC)	2,178,676
Commission paid by Newport to IC DISC	(2,040,000)
Expenses paid by Newport for DISC - considered commission amts	(7,405)
Over payment in 2010 - receivable owing from Newport	6,506
Newport payable to IC DISC - Sep 30 2011	137,777

DISC taxable income per the tax return - comes directly from the applicable year's tax return prepared by GT.

Commission paid to Trust by IC DISC - this is the actual cash paid from the IC DISC to the 1997 MBH Trust during the year.

Excess (under) distribution cumulative - this represents the amount over paid or owing to the Trust. This amount represents the accumulated income (retained earnings) on the balance sheet for the Newport DISC.

Commission paid by Newport to IC DISC - this is the amount of commissions paid directly by Newport to the IC DISC.

Newport payable to IC DISC - Newport owes the IC DISC the gross income amount per the tax return. The payable is determined by taking the cumulative gross income amounts less the cumulative commissions paid.

Omega Eng Inc - Receivable from (payable to) Omega DISC

	DISC Gross income per the tax return	DISC expenses (paid by DISC)	DISC taxable income per tax return	Comission paid to Trust by IC DISC	Excess (under) distribution in year	Excess (under) distribution cumulative	Commission paid by Omega to IC DISC
2006	2,177,428	7,405	2,170,023	2,510,000	339,977	339,977	2,510,000
2007	2,964,101	4,025	2,960,076	2,400,000	(560,076)	(220,099)	2,400,000
2008	4,069,994	4,025	4,065,969	3,503,000	(562,969)	(783,068)	3,510,000
2009	3,210,194	4,025	3,206,169	3,925,000	718,831	(64,237)	3,935,000
2010	4,509,115	4,260	4,504,855	4,295,000	(209,855)	(274,092)	4,305,000
2011	5,465,580	435	5,465,145	4,200,000	(1,265,145)	(1,539,237)	4,200,000
	22,396,412	24,175	22,372,237	20,833,000			20,860,000

DISC gross income per return (amt owing from Omega to IC DISC)	22,396,412
Commission paid by Omega to IC DISC	(20,860,000)
Expenses paid by Omega for DISC - considered commission amts	(7,405)
Omega payable to IC DISC - Sep 30 2011	1,529,007

DISC taxable income per the tax return - comes directly from the applicable year's tax return prepared by GT.

Commission paid to Trust by IC DISC - this is the actual cash paid from the IC DISC to the 1999 BRH Family Trust during the year.

Excess (under) distribution cumulative - this represents the amount over paid or owing to the Trust. This amount represents the accumulated income (retained earnings) on the balance sheet for the Omega DISC.

Commission paid by Omega to IC DISC - this is the amount of commissions paid directly by Omega to the IC DISC.

Omega payable to IC DISC - Omega owes the IC DISC the gross income amount per the tax return. The payable is determined by taking the cumulative gross income amounts less the cumulative commissions paid.

Both Omega Engineering and Newport Electronics experienced record high gross income and DISC taxable income in 2011. The charts include abbreviated descriptions of the commission calculations for 2011.

The Court finds that the 2011 calculations are not inconsistent with the methodology used for the 2006 through 2010 commissions. The commission amounts are consistent with increased 2011 income. Defendants have failed to point to any evidence or inference rebutting Plaintiffs' documentation of commission calculations, which appear to the Court to be performed in the same manner as commissions for the previous five years.

Commission Agreements and Liability

Defendants contend that Plaintiffs have not established damages due to their failure to provide actual commission agreements giving rise to commission liability. Defendants take issue with any commission agreements produced by Plaintiffs, because the agreements do not detail how the commissions would be calculated.

The Termination Agreements refer to the payment of any "commissions owed to DISC pursuant to the Agreement." The Termination Agreement defines "the Agreement" as "that certain Export Property Sale, Commission, License and Lease Agreement, dated January 4, 2006." The Export Property Sale, Commission,

License and Lease Agreements ("Commission Agreements") define "Services Commission" as:

> a commission, the amount of which shall be agreed upon by the parties and may vary from time to time by mutual agreement; so as to provide the maximum federal income tax benefits to [Omega Engineering or Newport Electronics] and [its respective Disc Entity] under the intercompany pricing rules of section 994 of the Code and the regulation thereunder.

The Court finds that the language in the Commission Agreements, when considered together with the parties' course of conduct beginning in 2006, evidence that the parties agreed to a commission calculation methodology. Although the precise calculation method was not codified in writing, the parties formed an implied in fact contract. "A contract implied in fact rests upon the conduct of the parties and not their verbal or written words."[22]

Beginning in 2006, Grant Thornton prepared Plaintiffs' tax returns in conjunction with calculating the IC-DISC commission. Each year, the tax return and commission amounts were finalized approximately nine months after the end of the calendar year. Defendants paid the commissions as calculated by Grant Thornton in each of the five years preceding this dispute.

The Court finds that Defendants have failed to rebut Plaintiffs' *prima facie* case for breach of contract. Plaintiffs established each element of breach of

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[22] *Watts v. Columbia Artists Mgmt. Inc.*, 591 N.Y.S.2d 234, 236 (N.Y. App. Div. 1992).

contract through the Termination Agreements, tax returns, and evidence of the commission calculations. Plaintiffs are entitled to damages in the amount of $137,777 to Newport Disc and $1,529,007 to Omega Disc.

Mutual Mistake Defense

Mutual mistake can furnish the basis for reforming a written agreement.[23] A mutual mistake "must be one made by both parties to the agreement so that the intentions of neither are expressed in it."[24] Before a reformation can be granted, the party seeking relief must establish the right to such relief by "clear, positive and convincing evidence."[25] Relief "may not be granted upon a probability nor even upon a mere preponderance of evidence, but only upon a certainty of error."[26]

A reformation claim is based on the assertion that the writing does not reflect the agreement of the parties, and generally the parol evidence rule will not bar parol evidence.[27] To prevent parties from abusing this path to contract reformation, a heavy presumption exists "that a deliberately prepared and executed

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[23] *Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233 (N.Y. 1986).

[24] *Nash v. Kornblum*, 186 N.E.2d 551, 553 (N.Y. 1962) (citing *Amend v. Hurley*, 59 N.E.2d 416, 419 (N.Y. 1944)).

[25] *Id*. (citing *Ross v. Food Specialties*, 160 N.E.2d 618, 620 (N.Y. 1959)).

[26] *Id*.

[27] *Chimart Assocs. v. Paul*, 489 N.E.2d at 234.

written instrument manifest[s] the true intention of the parties."[28] The party seeking relief must "show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties."[29]

Defendants contend in their briefs[30] that summary judgment should not be granted because questions of material fact exist as to whether the Termination Agreements reflect the intent of the parties. Defendants argue that both Plaintiffs and Spectris (which was asked to authorize the Termination Agreements on behalf of Defendants) did not intend to change the economics of the transaction between Spectris and the Hollander Trusts with respect to any commission payable under the Termination Agreements.

Defendants support their mutual mistake defense with three points. First, Defendants argue that contemporaneous documentary evidence shows that the parties intended for Spectris to be made whole for any commissions paid to Plaintiffs. Second, the declarations Defendants submitted and Kremheller's statements confirm the understanding that Spectris was to be made whole for commission payments to Plaintiffs. Third, the language of the Termination Agreements supports a finding of mistake.

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[28] *Id*. (citing *Backer Mgt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978)).

[29] *George Backer Mgmt. Corp. v. Acme Quilting Co., Inc.*, 385 N.E.2d at 1066.

[30] However, at oral argument, Defendants conceded that the Court may decide the issue of mutual mistake on the evidence submitted.

Contemporaneous Documents

Defendants contend that contemporaneous documents show that the parties intended for Spectris to be made whole for any commissions paid to Plaintiffs. Defendants support this argument with affidavits executed by Spectris employees Jeremy Morcom and Roger Stephens, as well as by Jed Rosenkrantz, counsel for Spectris.

Morcom testified that he understood that, under the original language in Purchase Agreement Section 6.05, any commissions "accrued and unpaid" as of the closing would be "reflected in the net working capital amount," and would directly affect the total purchase price. Morcom stated that it was his understanding and intention that under the amended Purchase Agreement Section 6.05, "even though the amount of the commissions may not be taken into account in calculating the Closing Net Working Capital Amount, Spectris would still be made whole for any commissions that were owed the Disc Entities."

Rosenkrantz participated in a conference call on September 16, 2011 between attorneys and representatives from Spectris and the sellers of Newport Electronics and Omega Engineering. Rosenkrantz took notes on the call under the heading "Termination of Disc Commission Agreements." The notes state "Suggest: take it out of working cap, do an estimate, make post-closing payment adjustment."

Defendants point to an email sent by another participant in the September 16, 2011 conference call, Spectris Employee Roger Stephens. Stephens emailed fellow Spectris employee David Goldstein shortly after this conference call. The email states that it was Stephens' understanding that any payments due between parties would be calculated and settled within the Working Capital adjustment, and if it takes "somewhat longer to bottom out the calculations and then settle the correct tax treatment," the issue will be carried over beyond the working capital adjustment and separately reconciled. The email concludes, "but, as this is way outside my knowledge," Stephens requested Goldstein call Kremheller and "run the detail to the ground."

The Court does not find that these contemporaneous documents present clear and convincing evidence that the Termination Agreements are the result of mutual mistake. Defendants' extrinsic evidence focuses on Spectris' understanding of the Purchase Agreement. Defendants' affidavits seek to establish that prior to the amendment of Purchase Agreement Section 6.05 on September 30, 2011, Spectris understood that there was a proposal to separately reconcile any commissions due.

Declarations Submitted by Defendants

Defendants' argue that the submitted declarations and Kremheller's statements confirm the understanding that Spectris was to be made whole for commissions paid to Plaintiffs.

Morcom's affidavit states that he authorized the amendment to Purchase Agreement Section 6.05, with the understanding and intention that Spectris would be made whole for any commissions that were owed the Disc Entities. Defendants assert that Stephens' affidavit establishes that Kremheller "proposed the commission calculation be deferred to after the working capital adjustment process, and a separate reconciliation with Spectris be made to account for any commissions that were found due." Kremheller testified at deposition that he did not recall making a proposal regarding commission payments on the conference call and states that he explained "the process of what is involved in doing the IC-DISC returns."

Kremheller's deposition focuses on his understanding of the Purchase Agreement and the amendment to Purchase Agreement Section 6.05. Kremheller testified that he explained in the September 16, 2011 conference call that the tax returns would take longer than 90 days to complete.

The Court finds that the declarations, much like the contemporaneous documents, focus on Spectris' subjective intent regarding the Purchase Agreement and amending Purchase Agreement Section 6.05. Notably absent from Kremheller's deposition are questions and answers regarding the Termination Agreements. The declarations do not present clear and convincing evidence that the Termination Agreements are the result of mutual mistake.

Language in the Termination Agreements

Defendants contend that the language in the Termination Agreements supports a finding of mistake. Each Termination Agreement provides, in relevant part:

> If the Tax Returns for [Newport Electronics or Omega Engineering] for the period ending on the Closing Date have been completed and are ready for filing at or prior to the time Buyer is prepared to deliver to Sellers' Representative Buyer's Purchase Price Computation, the aggregate amount required to be paid by [Newport Electronics or Omega Engineering] to [Newport Disc or Omega Disc], or by [Newport Disc or Omega Disc] to [Newport Electronics or Omega Engineering], as the case may be, under this paragraph shall not exceed the applicable amount reflected in the Closing Net Working Capital Amount.

Defendants argue that the language in the Termination Agreement would make Spectris whole for this pre-closing commission liability if the tax returns were completed quickly, but would not make Spectris whole if the tax returns took longer to prepare. Defendants contend that it would be unreasonable to conclude that the parties intended different repercussions depending on the timing of tax returns.

Defendants rely on *D.B.* Zwirn,[31] in arguing that parol evidence is admissible to evaluate the claim of mutual mistake. In *D.B. Zwirn*, the contract at issue referred to Section 2.10, a section number that did not exist in the contract.

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[31] *D.B. Zwirn Special Opportunities Fund, L.P. v. Squire*, 164 Fed. Appx. 175, 176 (2d Cir. 2006).

D.B. Zwirn is distinguishable from this case because the contract language in *D.B. Zwirn* contained a clear typographical error and could not be enforced as written. Here, the Termination Agreement clause "If the tax returns are completed . . . prior to the time Buyer is prepared to deliver to Sellers' Representative Buyer's Purchase Price computation," is clear and can be enforced as written.

The Court finds that Defendants have not provided clear and convincing evidence that the language in the Termination Agreements is the result of mutual mistake. Kremheller testified that he understood that the tax returns were unlikely to be completed within 90 days. Kremheller explained the timeframe to Spectris representatives and counsel in the September 16, 2011 conference call. The Court is not persuaded that either party to the Termination Agreement believed that the tax returns would be done within 90 days of the September 30, 2011 closing (the time allotted for the Purchase Price Computation).

Defendants, as the party seeking relief, have the burden of establishing mistake as well as "exactly what was really agreed upon between the parties."[32] Due to the realistic expectations as to the timing of the tax returns, it is unlikely that the contentious clause here would have been triggered. In any event,

[32] *George Backer Mgmt. Corp. v. Acme Quilting Co., Inc.*, 385 N.E.2d at 1066.

Defendants have failed to establish an alternative contradictory to the contract language, of "what exactly was really agreed upon by the parties."[33]

The Court does not find Spectris' intent regarding the Purchase Agreement, which was executed between Spectris and the Hollander Trusts, to be interchangeable with the parties' intent in entering into the Termination Agreements. The Purchase Agreement Section 6.05 as amended, states that all accrued and unpaid commissions will be settled according to the Termination Agreements. The Purchase Agreement was dated August 14, 2011. Purchase Agreement Section 6.05 was amended on September 30, 2011. The Termination Agreements were effective September 30, 2011. The Termination Agreements include integration clauses.

The Court finds that Defendants have not demonstrated clear and convincing evidence of mutual mistake. Defendants have failed to present any evidence, by affidavit or document, sufficient to rebut Plaintiffs' *prima facie* case supporting their breach of contract claim. There are no genuine issues of material fact precluding summary judgment in favor of the Plaintiffs.

Attorneys' Fees

Under the American Rule, litigants are responsible for the costs of their own representation, absent statutory or contractual fee-shifting provisions.[34] "The

[33] *Id.*

Court has authority to award attorneys' fees and costs to prevailing parties when the losing party has acted in bad faith, even if there is no applicable contractual or statutory provision."[35] The standard for shifting fees under the bad faith exception is high. Attorneys' fees are appropriate only where the losing party has acted "vexatiously, wantonly, or for oppressive reasons."[36]

Plaintiffs request an award of attorneys' fees under the "bad faith" exception to the American Rule. Plaintiffs set forth four arguments to support their request for attorneys' fees:

1. Defendants did not pay the commissions or respond to Plaintiffs within the timeframe agreed to in the Termination Agreements, and subsequently filed a meritless motion to dismiss.
2. Defendants claimed falsely and in bad faith that Spectris agreed to a modification of transfer pricing to accommodate Sellers' failure to plan for tax consequences. This false claim resulted in increased litigation costs and unnecessary discovery.

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[34] *E.I. du Pont de Nemours & Co. v. Medtronic Vascular, Inc.*, 2013 WL 1792824, at *1 (Del. Super.).

[35] *Id*. at *2.

[36] *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005).

3. Defendants have distanced themselves from their earlier representation that they would not dispute the commission calculations, yet they are not using a qualified expert to analyze Grant Thornton's calculations.
4. Defendants used frivolous defenses in an attempt to delay contractual obligations, make litigation an unattractive option for Plaintiffs, and extract a favorable settlement.

The Court has determined that there is no basis for an award of attorneys' fees. Defendants' Motion to Dismiss put forth colorable arguments. Even though the Court finds that the Termination Agreements' plain language controls, Defendants provided extrinsic evidence in support of their contentions. The Court is not persuaded by Defendants' arguments and evidence. However, there are no grounds for a finding of bad faith that would justify shifting attorneys' fees.

CONCLUSION

Plaintiffs have established every element necessary to support their breach of contract claims. The Court finds that the Termination Agreements are unambiguous and can be enforced as written. Plaintiffs have proved damages through tax returns and the financial summary detailing commission calculations. The Court holds that there are no genuine issues of material fact regarding breach of contract. Defendants have failed to rebut Plaintiffs' *prima facie* case, as

required to survive a motion for summary judgment supported by sworn testimony and admissible documentary evidence.[37]

Defendants have not established by clear and convincing evidence that the Termination Agreements were the result of mutual mistake. There are no genuine issues of material fact regarding mutual mistake in the Termination Agreements.

The Court finds that Defendants did not act in bad faith and an award of attorneys' fees is not justified.

THEREFORE, Plaintiffs' Motion for Summary Judgment is hereby **GRANTED.** Plaintiffs are entitled to damages in the amounts of $137,777 and $1,529,007. Defendants' fraud defense is hereby **DISMISSED WITH PREJUDICE.**

The parties shall confer to present an implementing order for the Court's consideration by October 21, 2013. If the parties cannot agree as to a draft form of order, the Court will consider competing forms of order submitted by October 25, 2013.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

[37] Super. Ct. Civ. R. 56(e).