IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

INTERIM HEALTHCARE, INC, CATAMARAN ACQUISITION CORP. and CORNERSTONE EQUITY INVESTORS, IV, L.P.,	)	C.A. No. 00C-09-180 JRS (consolidated)
Plaintiffs,	)	
v.	)	
SPHERION CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Defendant's Motion for Partial Summary Judgment.
GRANTED.

Date Submitted: September 29, 2003
Date Decided: November 19, 2003

Sean J. Bellew, Esquire, COZEN O'CONNOR, Wilmington, Delaware; Robert W. Hayes, Esquire, Sarah E. Davies, Esquire and Mary Craine Lombardo, Esquire, COZEN O'CONNOR, Philadelphia, Pennsylvania. Attorneys for Plaintiffs.

Allen M. Terrell, Jr., Esquire and Alyssa M. Schwartz, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Delaware. Attorneys for Defendant.

SLIGHTS, Judge[1]

[1]Appointed to sit temporarily as Vice Chancellor by Order of the Supreme Court of Delaware dated December 20, 2001. *See* Del. Const. Of 1897, art. IV, § 13 (2).

I. Introduction

On this motion for partial summary judgment, the Court must determine whether the equitable remedy of reformation is available when the party seeking relief has asserted a legally and factually viable claim for breach of the contract it seeks to have reformed. The Court also must determine whether a party to a contract may seek to reform the instrument based on an alleged mutual mistake of fact regarding a future event, the outcome of which neither party to the contract can control. In this case, the issue arises more than six years after the parties entered into a Restated Stock Purchase Agreement (the "Agreement") for the sale of Interim Healthcare, Inc. ("Interim") by defendant, Spherion Corporation ("Spherion") to plaintiffs, Catamaran Acquisition Corp. ("Catamaran") and Cornerstone Equity Investors, IV L.P. ("Cornerstone") (collectively "plaintiffs").

A post-sale administrative audit of Interim's reimbursements from the Medicare program found that Interim had been substantially overpaid by Medicare prior to the sale. Plaintiffs were required to repay a significant portion of the overage back to Medicare as part of a negotiated settlement. Because neither party believed at the time of the sale that Interim had been overpaid by Medicare to the extent revealed in the audit, plaintiffs contend that the parties were mutually mistaken as to a material fact underlying the Agreement, i.e, the value of Interim, and that the

resulting purchase price for Interim was grossly inflated. Plaintiffs seek reformation of the purchase price provision of the Agreement to reflect the true value of Interim as revealed by the post-sale audit.

The Agreement as written provides a platform from which plaintiffs may argue breach and seek compensatory damages, including the amount they contend they overpaid for Interim. There is no need to reform the contract because it already clearly reflects the intent of both parties.

Moreover, the undisputed record reveals that both parties were aware that an administrative audit of Interim's Medicare reimbursements might be performed after the sale and that both parties knew that the outcome of the audit could not be directed or controlled by either party. Under these circumstances, plaintiffs cannot sustain their burden of proving that a mutual mistake of fact existed at the time the parties executed the Agreement. Consequently, in the absence of a mutual mistake, or unilateral mistake coupled with knowing silence or fraud, plaintiffs cannot prevail on their claim for reformation.[2] Spherion's motion for summary judgment is **GRANTED.**

[2]As discussed below, plaintiffs' eleventh-hour assertion of fraud, particularly given the procedural history of this case, is not sufficient to create a genuine issue of material fact with respect to unilateral mistake.

II. Facts

A. The Parties

Cornerstone manages investment funds on behalf of sophisticated investors. Prior to the events giving rise to this controversy, Cornerstone's investment activities led it into the healthcare industry on several occasions, both as an investor in and acquirer of healthcare businesses.[3] When Cornerstone became aware that Spherion would sell Interim at auction, it formed Catamaran so that it could participate in the bidding and, if successful, acquire Interim.[4]

Spherion, a Delaware holding company, owned several temporary staffing businesses, including Interim. At the time of the sale, Interim was the second-largest independent home health care company in the United States.[5]

B. Interim's Relationship With Medicare

A portion of Interim's pre-sale patient population participated in the Medicare program. This program, administered by the Health Care Financing Administration

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[3]For instance, Cornerstone has either acquired or invested in such companies as Health Management Associates, Total Pharmaceutical Care, Guardian Care, Coventry Health, Primary Health, Regent Assisted Living and Specialty Hospitals of America. D.I. 84, Ex. 15, at AB000331.

[4]Interim is a named plaintiff in this suit. Unless otherwise specified, the Court's references to Interim will be in its capacity as the entity which was sold, as opposed to any separate interest it may have as a plaintiff in this action.

[5]D.I. 84, Ex. 12, at SPH012139.

of the Department of Health and Human Services ("HCFA"), reimburses healthcare providers for certain covered services provided to Medicare beneficiaries. The reimbursement scheme is highly regulated and strictly enforced. Interim, as a provider of services to Medicare beneficiaries, was entitled to be reimbursed for healthcare services it rendered to these beneficiaries and for a portion of the costs associated with providing these services.

HCFA engages "fiscal intermediaries," usually private insurance service companies, to determine initially what provider costs will be reimbursed. The fiscal intermediaries use well-publicized formulas when determining reimbursable costs and rely upon the providers to submit claims for reimbursement that are consistent with these formulas. In its most basic form, a reimbursement transaction involves a provider, such as Interim, estimating its costs and billing the fiscal intermediary at periodic intervals during the fiscal year. At the end of the fiscal year, the fiscal intermediary adjusts the provider's estimated costs so that they match the actual reasonable costs. HCFA then reaches a "settlement" with the provider whereby the provider either owes money to Medicare, Medicare owes money to the provider or it is agreed that the periodic reimbursements paid to the provider reflected the provider's actual reimbursable costs.

Although Medicare reimbursements represented only a portion of Interim's

pre-sale income, they were significant enough to affect the company's bottom line financial performance.[6] It is not surprising, then, that the Medicare aspects of Interim's business would be particularly significant to any suitors who might be interested in acquiring Interim when it became available on the market.

C. The Auction

In 1996, Spherion decided to sell Interim so that it could focus its business on more traditional commercial staffing markets. The sale was to follow an open auction. Prior to the sale, Interim had been operated much like a division of Spherion's diversified whole. Accordingly, in anticipation of the sale, Spherion undertook the process of preparing pro forma income statements for Interim which would reflect its value as an independent operating entity. Interim's financial statements essentially had to be prepared from scratch because Spherion had never maintained separate financial records for the healthcare aspect of its business.

Once prepared, Interim's income statements were audited by Deloitte & Touche LLP ("Deloitte & Touche"). As part of the audit process, Spherion directed Deloitte & Touche to "evaluate the fairness of presentation of the financial statements in conformity with generally accepted accounting principles in all respects."[7]

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[6] According to Spherion, Medicare-reimbursed services represented approximately 20-22% of Interim's total services in 1996.

[7] D.I. 84, Ex. 4, at DT000002.

Because separate financial records had never been prepared for Interim, and because the pro forma income statements were prepared to paint a picture of Interim as a separate operating entity, which in reality it was not, Deloitte & Touche felt compelled to test all of the data underlying the Interim pro forma statements, including the balance sheets, profit and loss statements, account statements and, significantly, the Medicare cost reports.

Deloitte & Touche engaged a Medicare specialist to assist with its review of the Medicare reimbursements, and particularly to review the propriety of Interim's cost reports and the adequacy of Interim's Medicare reserves in the event of an overpayment. At the conclusion of its audit, Deloitte & Touche issued a report in which it concluded that the financial statements were "clean" and, as adjusted, reflected Interim's financial condition as a separate entity. Thereafter, the Deloitte & Touche audit was incorporated into a Confidential Descriptive Memorandum prepared by the investment banking firm Alex.Brown for distribution to the participants in the auction. Although Spherion engaged Alex.Brown to assist in the conduct of the auction, it alleges that it never sought a valuation of Interim from Alex.Brown or any other investment banking firm. Instead, Spherion was content to allow the auction process to set the price for Interim.

The auction took place in 1997. Originally, thirty four suitors were solicited.

Eventually the bidders dwindled down to two, one of which was Catamaran. Catamaran's preliminary expression of interest to Alex.Brown suggested a willingness to explore a bid range of $120 million to $150 million. Its first bid was $128 million. After discussions with Alex.Brown, the bid was raised to $134 million and the auction gavel fell at that price.[8]

D. The Agreement

Spherion's acceptance of Catamaran's bid was followed by an extended period of negotiations and due diligence.[9] Plaintiffs engaged several experts to assist them during this process, including consultants with Medicare reimbursement expertise. Plaintiffs' healthcare experts found no significant problems with Interim's cost reports or its reporting methodology. The consultants also opined that Interim's Medicare reserves were conservative.

The Agreement, executed on September 26, 1997, contained numerous representations and warranties regarding Medicare reimbursements. For instance,

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[8]The parties dispute how Catamaran calculated its bid. Plaintiffs contend that Spherion was aware that Catamaran used an earnings before interest, taxes, depreciation and amortization ("EBITDA") based multiplier when it valued Interim. Spherion, on the other hand, alleges that Catamaran never disclosed how it calculated its bid and that, to this day, Spherion does not know how Catamaran arrived at its final offer. Although the Court recognizes that a factual dispute exists with respect to this issue, it is not a "material" issue of fact in the context of the issues raised in this motion.

[9]The record reveals that plaintiffs undertook some due diligence prior to the submission of Catamaran's final bid.

Spherion represented in Section 3.16 that, to the best of its knowledge, Medicare had not initiated or threatened to initiate any investigations of Interim, other than routine audits. Section 3.17 specified that:

> Any and all cost reports, budgets, and other filings required to be filed pursuant to any Law issued by or relating to the Medicare program and any other governmental healthcare program due as of or before the Closing Date and which may be due as a result of the Closing has or will be timely filed by the Seller Group except where a failure to file would not have a Material Adverse Effect. Except as stated in Schedule 3.17, such cost reports and other filings are complete and in compliance in all material respects with applicable Laws. Except as set forth in Schedule 3.17, to the knowledge of the Seller Executives, after consultation with the Healthcare Executives, there are no existing overpayments due and owing to HCFA or any existing material overpayments due and owing to any other third party payor from any member of the Seller Group.

The Agreement also contained representations and warranties not specifically addressing Medicare reimbursements but arguably broad enough to cover claims arising from them. Spherion warranted in Section 3.20 that, with the exception of specifically identified claims, it was not aware of any actual or threatened litigation against Interim. In Section 3.29, Spherion warranted that there were no undisclosed liabilities that would have a "Material Adverse Effect" on Interim.[10]

Significantly, Spherion stopped short of specifically warranting that a future audit of Interim's cost reports would not reveal an overpayment by Medicare. Indeed,

[10] "Material Adverse Effect" is defined in the Agreement as "any change of effect that, individually or in aggregate, is materially adverse to the financial condition, business or results of operations of the Healthcare Business taken as a whole."

the absence of this warranty - - perhaps better characterized as an indemnity provision -- is quite conspicuous given the attention paid by the parties to Medicare reimbursement issues in the Agreement. Both parties clearly were experienced in the healthcare field, and it is evident from the record that both parties knew prior to the sale that Medicare audits were common and that the outcome of the audits were not certain.[11] The parties knew full well that the audits were conducted by fiscal intermediaries over whom they had no control. Indeed, it was fully understood that the fiscal intermediaries were retained by HCFA to insure that Medicare was paying to providers no more than it owed. Since the audit was being conducted at the request and on behalf of the party paying the bills, the auditor's motivation to conduct a careful and thorough audit was understood by all who participated in the Medicare program. The absence of a warranty or indemnity provision specifically addressing audits of Medicare cost reports is significant and likely reveals the indisputable reality that no one can say for sure how a Medicare audit will turn out until the auditor delivers the good or bad news.

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[11]Plaintiffs were familiar with the audit process long before they considered an acquisition of Interim. During the due diligence review of Interim, plaintiffs own healthcare consultants reported that Interim had been the subject of past audits and that adjustments had been made as a result of those audits. They also predicted that an audit of 1996 cost reports would occur but predicted that man power constraints would likely limit the scope of the audit. Moreover, both parties were aware that the government had launched "Operation Restore Trust," an investigatory initiative targeting home healthcare companies. In this environment of heightened scrutiny, an audit of Interim's cost reports was all the more likely.

E. The Audit

In 1998, less than a year after the sale, Interim's fiscal intermediary, Palmetto Government Benefits Administrators ("PGBA"), announced that it would conduct an audit of Interim's 1996 cost reports.[12] An audit of the 1997, 1998 and 1999 cost reports followed. In a letter dated October 16, 1998, PGBA proposed several adjustments to Interim's accounting methodology. Since the adjustments would have resulted in Interim refunding millions of dollars to the government, Interim retained counsel and Medicare specialists to assist in its negotiations with PGBA and HCFA.[13] Spherion also participated in these negotiations. Over the course of two years, Interim convinced HCFA to reverse many of the adjustments proposed by PGBA. Other adjustments were endorsed by HCFA.[14] After HCFA asserted its final position, PGBA issued Notices of Program Reimbursement ("NPR's") to Interim's network of

[12]Prior to the sale, Interim's fiscal intermediary had been Aetna Life Insurance Company ("Aetna"). For reasons not entirely clear in the record, HCFA assigned Interim to PGBA shortly before the closing. Spherion has argued that PGBA took a much more aggressive view toward cost reporting methodology than Aetna had taken over the years, and that it reneged on several agreements Interim had reached with Aetna in connection with past audits of Interim's cost reports. Spherion maintains that PGBA's audit process was flawed and its audit results contrary to Medicare policy and regulations.

[13]Plaintiffs initially calculated that PGBA's proposed adjustments would result in a $40 million liability to HCFA.

[14]The final overpayment calculated by HCFA was approximately $12 million. Of this amount, plaintiffs attribute roughly $7.6 million to 1996 overpayments. The cost reports for fiscal year 1996 were the only reports subject to audit that predated the sale. Spherion contends, therefore, that they were the only cost reports audited by PGBA that were subject to the representations and warranties in the Agreement.

providers pursuant to which Medicare payments to Interim were withheld to pay down the liability to HCFA.

In September of 2001, Interim reached an agreement with its creditors to restructure the company and settled with HCFA. As a result of the settlement agreement, and with Spherion's approval, Interim paid the government approximately $5.2 million as a global settlement for overpayments received in fiscal years 1994 and 1996 through 1999.

During the course of negotiations with PGBA, plaintiffs discovered documents indicating that Aetna had expressed concerns to Interim in 1995 regarding Interim's cost allocation methodology. Spherion did not provide these documents to plaintiffs during due diligence nor did it disclose their content. According to plaintiffs, these documents reveal that Spherion was on notice that Interim's fiscal intermediary was not satisfied with its cost reports and that an audit likely would result in a substantial overpayment liability for Interim. Plaintiffs contend that Spherion purposefully withheld this information during due diligence.

III. The Procedural History

Plaintiffs filed their complaint in the Superior Court on September 25, 2000. In their initial pleading, plaintiffs alleged that Spherion breached the Agreement and committed fraud by failing to disclose during due diligence that Interim was the

defendant in a medical negligence suit involving severe neurological injuries to a young child. In April of 2001, plaintiffs sought to amend the complaint to remove the fraud claim and to include allegations regarding the Medicare overpayment and prayers for equitable relief (rescission and reformation). Plaintiffs argued that because they were unable to allege that Spherion had knowingly misled them with respect to the Medicare overpayments, they could not seek legal reformation and were limited, therefore, to equitable reformation in the Court of Chancery. The Court agreed. The motion to amend was granted and the equitable claims and associated legal claims were transferred to the Court of Chancery.[15] The Superior Court retained jurisdiction over the remaining legal claims.[16] Several months later, the parties stipulated to consolidate the actions for discovery purposes and to resolve the claims at a consolidated bench trial.

IV. The Parties' Contentions

Plaintiffs have alleged that the net effect of PGBA's audit was an overstatement of income in Interim's pro forma income statements for 1996 of $3.8 million. Based on the EBITDA multiplier plaintiffs allege was utilized to value

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[15] *Catamaran Acquis. Corp. v. Spherion Corp.*, 2001 Del. Super. LEXIS 227, at *27-28 (concluding that only the Court of Chancery could reform a contract when the basis for reformation was mutual mistake based on an innocent misrepresentation).

[16] *Id.*

Interim, the purchase price was inflated by $24,000,000. Plaintiffs seek reformation of the Agreement to reflect the true value of Interim at the time of the sale. They allege that the parties labored under a mutual mistake of fact with respect to the extent of Interim's exposure to HCFA for overpayments received in 1996. Because the pro forma income statements assumed no exposure to HCFA beyond Interim's Medicare reserves, and because both parties knew that plaintiffs were relying upon the income statements to value the company, the mistake was mutual and related to a fact material the Agreement - - the purchase price. According to plaintiffs, the Agreement should be reformed to reduce the purchase price from $134 million to $110,766,551.

Alternatively, plaintiffs allege that Spherion knew that its cost reports were not accurate but failed to disclose this to the plaintiffs during pre-sale negotiations. Because Spherion knew that plaintiffs were relying upon inaccurate pro forma income statements to value Interim, but remained silent with respect to the Medicare overpayment issue, plaintiffs contend that reformation is the appropriate remedy to correct their unilateral mistake.

On August 29, 2003, Spherion filed a Motion for Partial Summary Judgment on Plaintiffs' reformation claim. Spherion contends that plaintiffs have not set forth clear and convincing evidence of a mutual mistake that would warrant reformation.

In this regard, Spherion urges the Court to take note of Cornerstone's sophistication in the healthcare market and the breadth of their due diligence. Moreover, Spherion asserts that the Agreement reflects the true intent of the parties after months of arms-length negotiations. If Spherion breached the Agreement, damages will provide the plaintiffs with full, fair and complete relief.

V. Discussion

A. Standard of Review

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[17] The Court will view the evidence in the light most favorable to the non-moving party.[18] The initial burden of showing that no material issues of fact exist and, in the case of a defense motion, that the plaintiff's claims are not viable as a matter of law, rests with the moving party.[19] When the defendant meets this burden, the burden shifts to the plaintiff to demonstrate that material issues of fact exist and that the claims are valid as a matter of law.[20]

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[17] *Wilson v. Joma, Inc.*, 537 A.2d 187, 188 (Del. 1988).

[18] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. 1990).

[19] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[20] *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991).

B. Reformation

Plaintiffs seek the equitable remedy of reformation. Implicit in their prayer for relief, therefore, is an allegation that they have no adequate remedy at law.[21] In tandem with their reformation claim, plaintiffs also have alleged that Spherion breached various warranty provisions in the Agreement for which they seek compensatory damages, including the amount they allege they overpaid for Interim as a result of the non disclosure of the 1996 Medicare overpayment. At oral argument, counsel for plaintiffs acknowledged that the Court need not address the reformation claim at trial if the plaintiffs prevail on their breach of warranty claim. Before the Court addresses the merits of the reformation claim, it must first consider whether equity has a proper place in this controversy given what, at first glance, appears to be an available and adequate remedy at law.

"Reformation is an equitable remedy which emanates from the maxim that equity treats that as done which ought to have been done."[22] The purpose of reformation is to correct a contract in order to express the true agreement of the

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[21] *See El Paso Natural Gas Co. v. Transmission Gas Co.*, 669 A.2d 36, 39 (Del. 1995)(equity will not intervene when the plaintiff can obtain full, fair and complete relief at law); *Gordon v. Nat'l Railroad Passenger Corp.,* 1997 Del. Ch. LEXIS 52, at*16 (same).

[22] 27 WILLISTON ON CONTRACTS §70:19 (4th Ed. 2003).

parties.[23] The Court will reform a contract only when the plaintiff has demonstrated with clear and convincing evidence that a valid oral agreement exists and that the terms of that agreement are not properly reflected in the written instrument.[24] Plaintiffs must also demonstrate, with clear and convincing evidence, that the reason the written instrument does not reflect the parties' true agreement is either that both parties were under the mistaken impression that the scrivener had properly memorialized the agreement in the instrument, or that one party was mistaken in this regard and the other, knowing of the mistake, remained silent.[25] Typically, the claim for reformation will be coupled with a claim for damages for breach of the reformed contract or specific performance.[26]

Here, plaintiffs have identified several warranties and representations in the Agreement which they contend were violated when Spherion failed to submit proper cost reports to Medicare and failed to disclose this fact during due diligence. The warranties upon which plaintiffs rely clearly express the intentions of the parties;

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[23] *Cerebrus Intern, Ltd. v. Apollo Management, L.P.*, 794 A.2d 1141, 1151 (Del. 2002), citing *Colvocoresses v. W.S. Wasserman Co.,* 28 A.2d 588, 589 (Del. Ch. 1942).

[24] *See Gracelawn Memorial Park, Inc. v. Eastern Memorial Consult., Inc.*, 280 A.2d 745, 748 (Del. Ch. 1971).

[25] *See Amstel Assoc., L.L.C. v. Brinsfield-Cavall Assoc.,* 2002 Del. Ch. LEXIS 54, at *15-16, citing *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980).

[26] *See* DOBBS, REMEDIES §4.3, at 256 (West 1973)("Reformation is almost always sought so that some other remedy may then be pursued.").

plaintiffs do not seek to reform them. Instead, plaintiffs contend that, based on developments which occurred after the sale (the PGBA audit), they now believe the purchase price provision of the Agreement does not reflect the true agreement of the parties. Yet, they acknowledge that if they prevail on their breach of warranty claim, the Court need not rewrite the purchase price provision because breach damages will include the difference between the purchase price and the actual value of Interim at the time of the sale.

Plaintiffs' claim for reformation is misplaced for two reasons. First, it is clear that plaintiffs have an adequate remedy at law. Their breach of warranty claim is legally viable, procedurally postured for prompt disposition and, if successful, a proper vehicle for full, fair and complete relief.[27] The fact that plaintiffs may not sustain their burden of proof at trial with respect to the breach of warranty claim does

[27] *See Theis v. Board of Educ.,* 2000 Del. Ch. LEXIS 48, at *5 ("This Court can not exercise its equity jurisdiction on any claim where an adequate remedy at law is available. An adequate remedy at law must be as complete, practical, and efficient to the ends of justice and to its prompt administration as the equitable remedy. In order to divest this Court of equity jurisdiction, the legal remedy must afford plaintiff 'full, fair and complete relief.'")(citations omitted); 1 POMEROY, EQUITY JURISPRUDENCE, §178, at 247 (5th Ed. 1941)("Even when the cause of action ... does involve some particular feature ... over which the concurrent jurisdiction normally extends [such as fraud, mistake accident, trust, accounting, etc.] ..., if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient and certain - that is, would do full justice to the litigant parties - in the particular case, the concurrent jurisdiction of equity does not extend to such case.").

not mean that an adequate remedy at law is not available to them.[28] If they sustain their burden of proof at trial, breach damages will adequately compensate them if they paid too much for Interim.[29]

Reformation is not available here for another reason. As stated, reformation is appropriate when the parties mistakenly believed that the written instrument properly memorialized their agreement when, in fact, it did not.[30] Under such circumstances, the court will reform the contract to reflect the definitive agreement

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[28] *See Willing v. Mazzocone,* 393 A.2d 1155, 1158 (Pa. 1978)("In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor."); *Chartiers Valley School Dist. v. Virginia Mansions Apts., Inc.*, 489 A.2d 1381, 1386 (Pa. Super. 1985)("the adequacy of a legal remedy is not measured by the success or failure of a legal claim.").

[29] The Court is mindful that plaintiffs pled reformation as an alternative basis for relief in the event Spherion successfully defends the breach of warranty claim on the ground it was mistaken regarding the extent of the Medicare overpayment liability. The Court also recognizes that pleading alternative grounds for relief is appropriate under the Court's rules. *See* Del. Ch. Ct. R. 8(d)(2). *See also The Travelers Indem. Co. v. North American Phillips Corp.*, 1992 Del. Ch. LEXIS 187, at *5-6 (noting that reformation may be pled as an alternative basis for relief to legal claims). But, in this case, where plaintiffs have acknowledged that the warranties they contend were breached are clearly and unambiguously stated in the Agreement, and that breach damages will fully and completely compensate them for their alleged losses, the Court is hard-pressed to find a justification for allowing a reformation claim to proceed to trial. The "best knowledge"warranties that would allow a mistake defense to be presented were thoroughly negotiated and drafted in the Agreement as intended by both parties. The case is now well beyond the pleadings stage -- plaintiffs have been given a full and fair opportunity to develop a factual record in support of their reformation claim. What this record reveals, however, is that damages will provide an available, full, fair, prompt, and practical remedy. Under these circumstances, plaintiffs' prayer for equitable relief must give way to the relief available at law.

[30] 27 WILLISTON ON CONTRACTS §70:19, at 255 (4th Ed. 2003)("The purpose of reforming a contract on the basis of mutual mistake is to make a defective writing conform to the agreement of the parties upon which there was mutual assent.").

reached by the parties. To do so, the court must be presented with clear evidence of the agreement; without this evidence, "there would be no standard by which the writing could be reformed."[31] As Professor Williston explains:

> It is not enough that the parties would have come to a certain agreement had they been aware of the actual facts. Reformation requires an antecedent agreement, which the written instrument attempts to express. However, any mistake must have been in the drafting of the instrument, not in the making of the contract. An instrument will not be reformed due to a mere misunderstanding of the facts, or a mistake as to an extrinsic fact which, if known, would probably have induced the making of a different contract or no contract at all. If there has been any misunderstanding between the parties, or a misapprehension by one or both, so that there is no mutuality of assent, then the parties have not made a contract, and neither will the court do so for them.[32]

Plaintiffs' prayer for reformation in this case is tantamount to a request that the Court write a new contract for the parties. As of the date of the Agreement, it is undisputed that neither party knew for a fact that PGBA would conduct an audit, much less what the results of any such audit might be. Indeed, as a practical matter, it would be impossible for either party to predict the outcome of an audit over which they have no control. At most, then, plaintiffs have identified a mutual "mistake" of the parties with respect to their predictions regarding the outcome of a future event.

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[31] *Id.*

[32] *Id.* at 255-56.

For purposes of reformation, this is no "mistake" at all.[33]

Moreover, it is clear that the Agreement as drafted accurately reflects the parties' agreement with respect to price as it existed when the Agreement was made. The Agreement, including its purchase price provision, was the product of an active auction, lengthy negotiations and extensive due diligence. There was no mistake in the drafting of the instrument itself; no "scivener's error" occurred here. Indeed, it would appear that plaintiffs now take the position that if they had known of Interim's liability for Medicare overpayments, they would have reached a different agreement altogether with respect to price, or might not have made an offer for Interim at all. Plaintiffs' misunderstanding does not make a case for reformation.[34] If warranties with respect to Medicare claims or future liabilities have been breached, plaintiffs may seek appropriate compensatory damages.

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[33] *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202-1203 (Fed. Cir. 1994), citing RESTATEMENT (SECOND) OF CONTRACTS §151 cmt. a (1981)("A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined.").

[34] The following example from the RESTATEMENT (SECOND) OF CONTRACTS §151, cmt. a, (1981), illustrates this point:

> Illustration 2: A contracts to sell and B to buy stock amounting to a controlling interest in C Corporation. At the time of making the contract, both A and B believe that C Corporation will have earnings of $1,000,000 during the following fiscal year. Because of a subsequent economic recession, C Corporation earns less than $500,000 during that year. Although B may have shown poor judgment in making the contract, there was no mistake of either A or B.

For the first time in their answering brief (in a footnote), plaintiffs have offered an alternative basis for reformation: the court must rewrite the contract because Spherion knew that its cost reports were problematic but failed to disclose this fact during due diligence.[35] This new argument is troubling given the procedural history of this case. At the time plaintiffs sought to amend their complaint to add new claims,[36] including equitable claims, they also sought to transfer the case from the Superior Court to the Court of Chancery. They argued they had no basis to plead fraud and, indeed, the fraud count was dropped from the amended complaint.[37] Under these circumstances, they correctly observed that the Superior Court could not grant a remedy for an innocent misrepresentation; only the Court of Chancery could intervene under such circumstances.[38] The Court agreed and transferred the reformation claim to the Court of Chancery.[39]

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[35]D.I. 89, at 23.

[36]The proposed amended complaint was essentially a rewrite of the complaint. The pleading went from 56 to 134 paragraphs and from two to six counts. (D.I. 1; D.I. 7, at Exh. A).

[37]D.I. 7, at 5 ("[I]t appears that the Interim plaintiffs' claim for fraud is not viable, and therefore, should be withdrawn.").

[38]*Catamaran*, 2001 Del. Super. LEXIS 227, at *11-12, citing *E.I. DuPont De Nemours & Co. v. HEM Research, Inc.*, 1989 Del. Ch.. LEXIS 132, at *14, n.12; *In re Brandywine Volkswagon*, 306 A.2d 24, 28 (Del. Super. 1973).

[39]*Catamaran,* 2001 Del. LEXIS 227, at *26-28.

At no time during the more than two years this case has been pending in this Court have plaintiffs sought to amend their complaint to plead unilateral mistake or fraud at all, much less with requisite particularity.[40] And, at this late date, such an application would be spurious at best. Plaintiffs allege they first uncovered the information which forms the basis of their unilateral mistake argument -- Aetna's correspondence to Interim raising concerns regarding its cost allocation methodology -- during the course of the PGBA audit. Aetna's expressions of concern, therefore, were well known to plaintiffs at the time they filed their first complaint (which made no mention of the Medicare overpayment issue) and their amended complaint (which described the Medicare overpayment in detail but made no mention of concealed information). An amendment on the eve of trial, under these circumstances, would not be appropriate.

Plaintiffs' unilateral mistake argument also suffers from the same fatal infirmity as their mutual mistake argument. Plaintiffs cannot point to a definitive agreement of the parties to which the Court can refer when reforming the Agreement. There is no evidence that the parties would have agreed to a lesser price for Interim had Spherion placed Aetna's alleged problems with Interim's cost reports front and

[40] *See* Del. Ct. Ch. R. 9(b)("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). *See also* D.I. 4 at ¶¶ 37-47.

center on the negotiating table. Indeed, the undisputed record suggests the contrary. Spherion disagreed with Aetna's criticisms of its cost reports and intended to challenge Aetna's position in the event of an audit. There is absolutely no basis to argue from the record that Spherion would have accepted less for Interim at the time it negotiated the Agreement even if Aetna's concerns were a feature of the parties' negotiations. The Court will not rewrite the Agreement in the absence of clear and convincing evidence that another agreement was, in fact, reached by the parties.[41] That predicate cannot be proven in this case. Consequently, reformation is not the solution to plaintiffs' problems here.

C. Rescission

Spherion has moved for summary judgment only with respect to plaintiffs' claim for reformation. In its brief, Spherion indicates that it is not seeking summary judgment on plaintiffs' rescission claim because the Superior Court, in its decision on plaintiffs' motions to amend and transfer, already has determined that rescission is not practical in this case. This characterization of the Superior Court's decision is accurate. When determining whether to allow plaintiffs to amend their complaint to add equitable claims, and whether to transfer these claims to the Court of Chancery, the Superior Court observed that it would be all but impossible to unwind a

[41] *Cerebrus,* 794 A.2d at 1151.

transaction involving the sale of a company which occurred more than six years ago.[42] The Court concluded, therefore, that the rescission claim was "futile" for purposes of the required analysis under Court of Chancery Rule 15.[43] The Court did, however, specifically leave the door open for a rescissory damages claim.[44]

Spherion has not moved for summary judgment on plaintiffs' claim for rescissory damages and the Court is not inclined to address it *sua sponte.* By declining to address the rescissory damages claim, however, the Court does not intend to suggest that the claim is legally viable. Spherion may argue at trial that rescissory damages are not appropriate either because they are not supported by the factual record, not supported as a matter of law, or both. Indeed, given the Court's decision with respect to the reformation claim, it is only fair to warn the plaintiffs that

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[42] *Catamaran,* 2001 Del. Super. LEXIS 227, at *15-16 ("The Court is satisfied ... that the Court of Chancery would find it 'impossible to unscramble the eggs' by rescinding the Agreement [a]nd, therefore, ... [the] equitable rescission claim - - at least in its current form - - is futile for purposes of Rule 15."), citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983); *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 501 (Del. 1981); *Stegemeier v. Magness*, 728 A.2d 557, 565 (Del. Ch. 1999); *Harman v. Masoneilan Intern'l, Inc.*, 418 A.2d 1004, 1006-07 (Del. Ch. 1980); *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 603 (Del. Ch. 1974)).

[43] At the time this judge addressed this question he was attempting to predict how the Court of Chancery would respond to the prayer for equitable rescission in order to decide the jurisdictional issue. *Catamaran,* 2001 Del. LEXIS 227, at *14. I stopped short of finally adjudicating the claim, however, so that the Court of Chancery could determine on its own whether the rescission claim was appropriate. Now that I have been designated to sit as the Vice Chancellor in this case, and having had the opportunity to consider the issue again, I am satisfied that I properly determined that the rescission claim was futile and that it should not be presented at trial.

[44] *Catamaran,* 2001 Del. Super. LEXIS 227, at *19 ("plaintiffs will have their opportunity to seek ... rescissory damages in the Court of Chancery.").

they will likely face a tough road ahead with respect to the rescissory damages claim.[45] The ultimate decision in this regard, however, will await trial.

VI. Conclusion

Based on the foregoing, the Motion for Summary Judgment is **GRANTED** with respect to plaintiffs' claim for reformation. Plaintiffs' prayer for rescission is not practical in this case and, therefore, the Court will not consider the claim at trial. Plaintiffs' claim for rescissory damages, however, will be adjudicated at trial along with the breach of warranty claims. Because the matter will be tried as a consolidated bench trial, and because the breach of warranty claims are all the subject of a separate motion for summary judgment, the Court has determined that the most efficient alignment of the claims for trial is as follows: the rescissory damages claim will be litigated in the Court of Chancery action; the breach of warranty claims, including the claims relating to the Medicare overpayment, will be litigated in the Superior Court action.[46]

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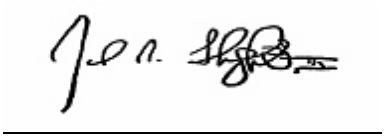
[45] *See Liberto v. Bensinger*, 1999 Del. Ch. LEXIS 241, at *29 (rescission not appropriate when alleged mistake or misrepresentation relates to an opinion about a probable future event). *See also Elysian Federal Savings Bank v. Sullivan,* 1990 Del. Ch. LEXIS 30 (claims for breach of warranty and rescission are inconsistent and, in appropriate cases, plaintiffs must elect one remedy to the exclusion of the other).

[46] *See* DEL. CODE ANN., tit. 10, § 1902 (1999)(court may remove or transfer claims to another State court of competent jurisdiction).

IT IS SO ORDERED.



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