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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIEL M. MULLENIX and
CINDY C. MULLENIX, D & C
ENTERPRISES, INC., a Washington
corporation, f/k/a INLAND MEATS,
INC.,

Plaintiffs,

vs.

SYSCO SPOKANE, INC.,
a Delaware corporation,

Defendant.

No. CV-13-305-LRS

**ORDER GRANTING
PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT RE CALCULATION
OF EARNOUT AMOUNT DUE**

BEFORE THE COURT is Plaintiffs' Motion For Partial Summary Judgment Re Calculation Of Earnout Amount Due (ECF No. 19). The motion was heard with oral argument on June 12, 2014. Colette C. Leland, Esq., argued for Plaintiffs. Thaddeus O'Sullivan, Esq., argued for Defendant.

I. BACKGROUND

On May 1, 2012, Inland Meats, Inc. (now known as D & C Enterprises), Daniel M. Mullenix, Cindy C. Mullenix, and Sysco Spokane, Inc., entered into a contract for the sale of substantially all of Inland's assets to Sysco. This contract is referred to as the Asset Purchase Agreement (APA). The sale closed on May 18, 2012. The sale price was \$2,000,000. Of the purchase price, \$250,000 was withheld as an indemnity,

**ORDER GRANTING MOTION
FOR PARTIAL SUMMARY JUDGMENT - 1**

1 and \$750,000 was held back as an earnout payable over two “Performance Periods,”
2 that being two one year periods following the closing. Mr. Mullenix entered into a
3 two year employment agreement as part of the APA.

4 The purpose of the earnout was to provide an incentive to Mr. Mullenix to
5 retain Inland’s customers and convert them to Sysco customers. During a
6 Performance Period, Mullenix would receive credit for 100 percent of sales to
7 customers who formerly bought only from Inland (Seller Customers) and would
8 receive a prorated credit for customers Inland shared with Sysco (Shared Customer).
9 If the total credit for sales to both Seller and Shared Customers was at least 50 percent
10 of Inland’s total Base Year sales, Sysco would pay an earnout on a sliding scale from
11 \$187,500 to \$375,000.

12 At issue in this partial summary judgment motion is whether Defendant
13 unjustifiably deprived Mr. Mullenix of an earnout amount pursuant to the provisions
14 of the APA and the amendments thereto. Plaintiffs are moving for summary
15 judgment on their “Ninth Claim For Relief: Breach Of Contract-APA” pled in their
16 Verified Amended Complaint (ECF No. 10).

17
18 **II. UNDISPUTED FACTS¹**

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21 ¹ The court has gleaned these uncontroverted facts from the Statements of
22 Facts filed by the parties (ECF Nos. 20, 35 and 50). Although Defendant offers
23 “responses” to Plaintiffs’ Statement of Facts Nos. 41, 43, 48 and 52, these
24 responses do not controvert any of Plaintiffs’s facts. In their Supplemental LR
25 56.1 Statement Of Undisputed Facts (ECF No. 50), Plaintiffs correct citations to
26 the record where the spreadsheets referenced in Fact Nos. 48 and 52 can be found.
27
28

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1 Section 2.5 of the May 1, 2012 APA concerned “Earnout Payments.” The
2 amount of the earnout payable to Mullenix was dependent upon the Retained Sales
3 Percentage for each Performance Period. Section 2.5(a)(iv). The Retained Sales
4 Percentage was to be determined by dividing the Performance Period Retained Sales
5 Amount by the Base Sales Amount. Section 2.5(a)(viii), (x). The Retained Sales
6 Amount is the sum of Sysco Spokane’s sales to the Seller Customers and the sum of
7 Mullenix’s prorated credit for sales to each Shared Customer. Section 2.5(a)(viii),
8 (xiii).

9 Because Inland and Sysco Spokane sold to some of the same customers, the
10 parties agreed Inland would receive credit for Performance Period sales to the Shared
11 Customers according to a pre-determined percentage (Shared Account Percentage).
12 The higher Inland’s percentage, the more credit it would receive in the two
13 performance periods following the sale. Section 2.5(a)(xiii) of the APA states:

14
15 “Seller Shared Account Percentage” means, with respect to
16 each Shared Customer, the percentage . . . set forth on Schedule
17 2.5(a)(xiii) attached hereto in respect of such Shared Customer
18 which was calculated by dividing (i) Seller’s [Inland’s] gross
19 sales of all products to such Shared Customer during the Base
20 Period by (ii) the sum of Seller’s and Purchaser’s [Sysco
21 Spokane’s] and its Affiliates’ gross sales of all products to such
22 Shared Customer during the Base Period [April 1, 2011 through
23 March 31, 2012].

24 The parties had to determine and agree on each party’s base year sales to each
25 account in the Base Year in order to arrive at the Shared Account Percentages that
26 were to be used to calculate the total Retained Sales Percentage for each Performance
27 Period.

28 On May 1, 2012, the parties executed the APA without an agreed Schedule
2.5(a)(xiii) as referred to in Section 2.5(a)(xiii).

On May 18, 2012, the parties entered into an “Amendment to Asset Purchase

1 Agreement” (also known as the First Amendment). (See pp. 139-141 of ECF No. 24-
2 2). Paragraph 3(i) of the First Amendment states:

3 Prior to the Closing Date [May 18], Seller [Inland Meats, Inc.]
4 has delivered to Purchaser [Sysco Spokane] **all** information
5 required for the **completion** of Schedule 2.5(a)(xiii) other
6 than the Base Sales Amount attributable to sales to URM
7 Food Services/URM Stores, Inc. during the Base Period
8 for which the URM customer for such products is
9 identifiable to Seller, on a customer by customer, month
10 by month basis (the “Direct URM Customer Sales Amounts”).
11 Notwithstanding anything to the contrary set forth in this
12 Section 2.5 [of the APA], the parties hereby agree that Seller
13 shall have until July 1, 2012 to provide to Purchaser all
14 Direct URM Customer Sales Amounts, which information
15 shall be provided in MS Excel and shall use the same
16 Shared Customer names as those included on Schedule
17 2.5(a)(xii). Seller hereby agrees that the sum of all
18 Direct URM Customer Sales Amounts and all gross
19 sales of products to all other Seller Customers and
20 Shared Customers for the Base Period, as set forth on
21 the **final** Schedule 2.5(a)(xiii), shall be an amount that
22 is within \$15,000 of the Base Sales Amount.

23 (Emphasis added in **bold**).

24 Paragraph 3(ii) states:

25 Within fifteen (15) days following the date on which the
26 Direct URM Customer Sales Amounts are delivered to
27 Purchaser [Sysco Spokane], Purchaser, shall prepare,
28 with the reasonable input of Seller [Inland Meats, Inc.],
and deliver to Seller a **completed** version of Schedule
2.5(a)(xiii), which shall set forth a list of the Seller
Customers, the Shared Customers and the Seller Shared
Account Percentage with respect to each Shared Customer.
. . . Within fifteen (15) days following its receipt of Purchaser’s
proposed Schedule 2.5(a)(xiii), Seller shall notify Purchaser
in writing whether Seller objects to the calculations set forth
therein (the “Objection Notice”). **If Seller fails to deliver the**
Objection Notice to Purchaser within such fifteen (15)
day period, then Seller shall be deemed to have accepted
and agreed to Schedule 2.5(a)(xiii)

(Emphasis added in **bold**).

24 A Second Amendment To Asset Purchase Agreement was entered into on June
25 29, 2012, extending to August 1, 2012, the date on which Seller (Inland Meats, Inc.)
26 was to deliver the Direct URM Customer Sales Amounts to Purchaser (Sysco
27 Spokane).

28
**ORDER GRANTING MOTION
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1 Pursuant to the Second Amendment, Robert P. Sanders, Inland’s accountant,
2 sent the detail of Inland’s URM shared customer information to Kirk Vogeley, Senior
3 Director of Finance for Sysco Corporation² and to Lisa Payrow, outside counsel for
4 Sysco Spokane, on July 31, 2012.

5 Ms. Payrow advised Mr. Vogeley that “Sysco now has 15 days to complete the
6 spreadsheet listing the Seller Customers, Shared Customers and Seller Shared
7 Account Percentages (with reasonable input of Seller).”

8 The following day Mr. Vogeley emailed Mr. Sanders to inquire about possible
9 missing information regarding the URM sales. On August 7, Mr. Vogeley followed
10 up his inquiry and notified Mr. Sanders that Michael Nguyen, Vice President of
11 Finance/CFO for Sysco Spokane, was “completing the Sysco sales portion for all
12 shared customers.” Mr. Vogeley explained he was “just trying to make sure Inland’s
13 total sales reconcile.”

14 Mr. Sanders explained: “What we sent a short time ago was the shared
15 accounts. There are also apparently non shared URM accounts and also the direct
16 sales to URM. I think the missing link may be the detail of the non shared URM
17 accounts.”

18 On August 16, 2012, Ms. Payrow asked Inland to agree to toll the
19 15-day period within which Sysco Spokane was required to provide a complete
20 Schedule 2.5(a)(xiii), until such time as Mr. Sanders was able to provide the missing
21 information regarding the URM Seller Customers.

22 Brian Hipperson, Inland’s counsel, agreed and confirmed Inland would provide
23 the information no later than Monday, September 17, 2012.

24 On August 17, 2012, Mr. Vogeley forwarded to Mr. Sanders a spreadsheet of
25 shared accounts from Mr. Nguyen’s latest update. The updated spreadsheet stated
26 Sysco Spokane’s Base Year sales to Shared Customers as \$5,693,241.

27
28 ² Sysco Corporation is the parent company of Sysco Spokane, Inc.

1 Mr. Vogeley opined that the parties still needed to resolve the discrepancy in
2 the sales to URM customers who were not shared between Inland and Sysco.

3 In accordance with the parties' agreements, Mr. Sanders sent two spreadsheets
4 to Mr. Vogeley on September 17, 2012.

5 Mr. Sanders suggested these spreadsheets would answer Mr. Vogeley's
6 questions regarding the reconciliation of URM sales. Mr. Sanders explained
7 additional invoices were found that should have been included in the original shared
8 customer spreadsheet, which brought the total URM sales to \$2,537,000, "a bit higher
9 than the original sales figure."

10 On September 18, 2012, Mr. Vogeley responded "I think we should now have
11 all the pieces of the puzzle."

12 Mr. Vogeley proposed the parties continue to use the original URM base sales
13 amount of \$2,500,188, and suggested Mr. Nguyen would update the "master
14 spreadsheet to reflect Inland Base Year sales of \$8,844K and this is what Mike will
15 use to calculate the earnout If you and Dan [Mullenix] would please let us know
16 if this is acceptable, we can then proceed with growing the sale to ensure a win/win
17 for everyone."

18 Mr. Vogeley's proposed spreadsheet again stated Sysco Spokane's Base Year
19 sales to the Shared Customers as \$5,693,241.

20 Mr. Vogeley followed up with Mr. Sanders on September 25 to confirm Mr.
21 Sanders and Mr. Mullenix agreed with the spreadsheets attached to Mr. Vogeley's
22 September 18 email. "We would like for this to get finalized so that Mike can start
23 tracking the progress of the sales for earnout purposes through one final consolidated
24 spreadsheet."

25 The following day Mr. Sanders confirmed Mr. Mullenix's agreement. Mr.
26 Vogeley then directed Mr. Nguyen to update the consolidated spreadsheet with URM
27 detail by customer.

28 On October 2 (15 days following the transmission of the missing URM

1 information), Mr. Nguyen notified the parties that he had consolidated all of the
2 spreadsheets into one per Mr. Vogeley's request. The attached spreadsheet again
3 stated Sysco Spokane's Base Year Sales to Shared Customers as \$5,693,241.

4 Mr. Vogeley was a recipient of Mr. Nguyen's email notification and he responded
5 to it as follows:

6 I noticed one formula correction that needed to be made
7 to reflect the [Inland] base year sales as \$8.8m as you noted
8 below. I changed the formula in column AA so we are using
9 the new total for Inland's sales from column X and what we
10 had in Column U originally. **Going forward Mike, you just
plug the YTD sales in each customer in Column AC and then
annualize for the appropriate period in cell AD574. Based on
the retention achieved you would update AD577 to arrive at
the earnout amount.**

11 (ECF No. 22-1 at p. 8)(Emphasis added).

12 Mr. Vogeley forwarded by email to Mr. Mullenix for his review the
13 consolidated spreadsheet referred to above. Mr. Vogeley carbon copied the other
14 participants in the negotiations, Mr. Nguyen, Ms. Payrow, and Sysco Spokane
15 President Kevin Pribilsky, on the same email forwarding the aforementioned
16 consolidated spreadsheet. The spreadsheet included a list of the Seller Customers,
17 the Shared Customers, and the Seller Account Percentages with respect to each
18 Shared Customer, as required by the APA and the First Amendment thereto. Mr.
19 Vogeley's formula adjustment did not alter Sysco Spokane's Base Year Sales figure.
20 Mr. Mullenix did not register any objection to the consolidated spreadsheet within
21 fifteen (15) days.

22 On March 29, 2013, Kevin Pribilsky forwarded a year-to-date calculation of
23 the earnout to Mr. Mullenix, and asked Mr. Mullenix to alert Mr. Pribilsky to any
24 accounts that were not getting credit. The spreadsheet Mr. Pribilsky provided
25 calculated Mullenix's Retained Sales Percentage based upon a Sysco Spokane Base
26 Year Sales Amount of \$8,820,151.

27 On April 23, 2013, Mr. Mullenix asked Mr. Pribilsky to send him updated
28 figures for retained sales percentages. Mr. Pribilsky responded by providing a

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1 spreadsheet, again showing Sysco Spokane's Base Year Sales for April 1, 2011
2 through March 31, 2012, as \$8,820,151.

3 Mr. Mullenix's employment was terminated on May 16, 2013. On July 1,
4 2013, Sysco Spokane provided a spreadsheet calculating the Retained Sales
5 Percentages under the APA for the First Performance Period. This spreadsheet
6 constituted the "Retained Sales Notice" called for by Section 2.5(c) of the APA
7 (provided no later than 45 days after the end of the First Performance Period). This
8 spreadsheet listed Sysco Spokane Base Year Sales as \$9,178,938. Mr. Mullenix
9 timely objected per the APA.

10 On August 8, 2013, Sysco sent an updated Retained Sales Percentage
11 calculation, which added Performance Period sales it had failed to track in its July 1,
12 2013 calculation, but also boosted Sysco Spokane's Base Year Sales to \$10,115,946.
13 Mr. Mullenix sent a supplemental objection the following day, notifying Sysco
14 Spokane it had improperly used Base Year sales figures that did not comport with the
15 APA.

16 Using Sysco Spokane's Base Year Sales as set forth in the October 2, 2012
17 spreadsheet to calculate the Retained Sales Percentage for the First Performance
18 Period yields 79.16% of Inland Base Year Sales, for an earnout of \$281,250.00.

19 Using Sysco Spokane's Base Year Sales as set forth in the spreadsheets
20 provided by Mr. Pribilsky from March 29, 2103 forward yields a Retained Sales
21 Percentage less than 50% and entitles Mr. Mullenix to no earnout.

22 23 **III. DISCUSSION**

24 Interpreting a contract provision is a question of law if the interpretation does
25 not depend on the use of extrinsic evidence or if only one reasonable inference can
26 be drawn from the extrinsic evidence. *GMAC v. Everett Chevrolet, Inc.*, 179
27 Wn.App. 135, 317 P.3d 1074 (2014). During interpretation, a court's primary goal
28 is to ascertain the parties' intent at the time they executed the contract. *Berg v.*

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1 *Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). “[E]xtrinsic evidence is
2 admissible as . . . an aid in ascertaining the parties’ intent.” *Id.* at 667. Extrinsic
3 evidence should not, however, be used to import into a contract an intent that is not
4 expressed in the contract itself. *Id.* at 669. A court looks for the parties’ intent in the
5 contract’s language, subject, and objective; the circumstances surrounding formation;
6 the parties’ subsequent conduct; and the reasonableness of the parties’ interpretations.
7 *Tanner Elec. Coop v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d
8 1301 (1996). “Summary judgment as to contract interpretation is proper if the
9 parties’ written contract, viewed in light of the parties’ other objective manifestations,
10 has only one reasonable meaning.” *GMAC*, 179 Wn.App. at 135.

11 The plain language of Paragraph 3(ii) of the First Amendment contemplated
12 that Sysco Spokane would deliver a “completed” version of Schedule 2.5(a)((xiii) to
13 Inland within fifteen (15) days following the date on which Inland delivered the
14 Direct URM Customer Sales Amounts to Sysco Spokane. The Direct URM Customer
15 Sales Amounts were delivered to Sysco Spokane on September 17, 2012. Exactly
16 fifteen (15) days later on October 2, 2012, Sysco Spokane delivered to Inland a
17 spreadsheet “set[ting] forth a list of the Seller Customers, the Shared Customers and
18 the Seller Shared Account Percentage with respect to each Shared Customer”
19 precisely as contemplated by Paragraph 3(ii). The only reasonable inference that can
20 be drawn from the extrinsic evidence is that the parties intended the spreadsheet
21 delivered by Sysco Spokane on October 2, 2012 to be the “completed” Schedule
22 2.5(a)(xiii).

23 “Completed” is consistent with the circumstances surrounding the delayed
24 creation of the October 2, 2012 spreadsheet, the parties’ references to the URM Direct
25 Customer Sales Amounts as the “last piece,” Mr. Vogeley’s expressed desire to get
26 this “finalized,” and the parties’ reference in Paragraph 3(i) to the “completion” of
27 Schedule 2.5(a)(xiii)(“Prior to the Closing Date [May 18], Seller [Inland Meats, Inc.]
28 has delivered to Purchaser [Sysco Spokane] all information required for the

1 completion of Schedule 2.5(a)(xiii) other than the Base Sales Amount attributable to
2 sales to URM Food Services/URM Stores, Inc. during the Base Period for which the
3 URM customer for such products is identifiable to Seller, on a customer by customer,
4 month by month basis). Not only did Sysco Spokane make sure to respond within
5 15 days, as called for by Paragraph 3(ii) of the Amendment to the Asset Purchase
6 Agreement, but it made no disclaimer of any type when it provided the October 2,
7 2012 spreadsheet, consistent with an intention that the spreadsheet was the
8 “completed” Schedule 2.5(a)(xiii) from which the Retained Sales Percentage would
9 be computed to determine the earnout amount.

10 Deposition testimony from Sysco Spokane CFO Michael Nguyen, cited in
11 Plaintiffs’ Supplemental Statement of Facts Nos. 76-86 (ECF No. 50), is further proof
12 that the parties, by their pre-October 2, 2012 conduct and subsequent conduct,
13 intended the October 2, 2012 spreadsheet to be the “completed” Schedule 2.5(a)(xiii).
14 Mr. Nguyen identified the October 2, 2012 spreadsheet as the spreadsheet he was
15 working on with Mr. Vogeley into which he input Sysco Spokane’s base year sales
16 and which calculated the shared account percentages. He confirmed he calculated
17 Sysco Spokane’s base year sales as \$5,693,241 based upon he and his staff pulling
18 sales records from Sysco Spokane’s system on all accounts that were active within
19 the system. He had no reason to believe at the time that he and his staff had not
20 calculated all base year sales. Upon completion of his calculation, Mr. Nguyen
21 provided Sysco Spokane President, Kevin Pribilsky, with an opportunity to review
22 the Sysco Spokane base year sales entered into the spreadsheet. Mr. Pribilsky made
23 no corrections. Mr. Nguyen understood his portion of the report to be finished and
24 the only updates he made to the spreadsheet were performance period updates of
25 actual or hypothetical sales. After Mr. Vogeley forwarded the October 2, 2012
26 spreadsheet to Inland, Mr. Nguyen shifted from calculating Sysco Spokane’s base
27 year sales and shared account percentages to tracking performance period sales for
28 the earnout calculation. Mr. Nguyen did not recall ever being asked to make any

1 adjustments to the Sysco Spokane base year sales reported on the October 2, 2012
2 spreadsheet, nor does he recall any person from Sysco Spokane discussing with him
3 between October 2, 2012 and August 1, 2013, the possibility that the base year sales
4 for Sysco Spokane reported on the spreadsheet were incorrect or inaccurate.

5 Sysco Spokane says the October 2, 2012 spreadsheet cannot be the
6 “completed” Schedule 2.5(a)(xiii) contemplated by the parties because that
7 spreadsheet fails to account for “actual gross sales” of “all” of its products to several
8 shared customers. Sysco Spokane offers several examples of what it says are “omitted
9 Sysco Spokane base period sales in the October 2, 2012 spreadsheet” which it says
10 “inaccurately inflates Inland’s Seller Shared Account Percentage and “result[s] in an
11 outcome not intended by the Parties, namely basing the earnout on false base period
12 sales numbers.”

13 While Section 2.5(a)(xiii) of the APA refers to “gross sales of all products,” it
14 does not refer to “actual gross sales.” Moreover, Defendant had an adequate
15 opportunity to account for the gross sales of all of its products to shared customers.
16 Such an opportunity for both parties was all they mutually intended as reflected in the
17 language of the First Amendment. It is what each of them were provided as reflected
18 in their course of dealing leading up to the delivery of the October 2, 2012
19 spreadsheet. As noted above, Sysco Spokane made no sort of disclaimer when it
20 tendered the spreadsheet. There is simply nothing in the language of Section
21 2.5(a)(xiii) of the APA that is inconsistent with the language in Section 3(i) and (ii)
22 of the First Amendment to the APA. Neither Section 2.5(a)(xiii) or the First
23 Amendment provide exceptions for late-discovered errors or misrepresentations.

24 Sysco Spokane also asserts the APA required the gross sales be prepared in
25 accordance with Generally Accepted Accounting Principles (GAAP), and that the
26 numbers in the October 2, 2012 spreadsheet were not so prepared. According to
27 Sysco Spokane, “[i]t is impossible to prepare a Retained Sales Notice in accordance
28 with GAAP without using all of the base period gross sales for both Inland and Sysco

1 Spokane in calculating the Seller Shared Account Percentage.” Defendant cites
2 Section 2.5(c) of the APA which provides in relevant part:

3 Purchaser [Sysco Spokane] shall be responsible for calculating the
4 Performance Period Retained Sales Amount and the Retained
5 Sales Percentage. Purchaser will deliver a notice (the “Retained
6 Sales Notice”) to the Seller no later than forty-five (45) days
7 after the end of each Performance Period which sets forth in
8 reasonable detail Purchaser’s calculation of the Performance
9 Period Retained Sales Amount for the applicable Performance
10 Period, and the associated Retained Sales Percentage and
11 Performance Period Earnout Payment payable to Seller, if any.
12 The Retained Sales Notice will be accompanied by a report of
13 an appropriate officer of Purchaser stating that the Retained Sales
14 Notice was prepared in accordance with GAAP.

15 As Plaintiffs note, there is no express requirement in Section 2.5(a)(xiii) or
16 Section 2.5(c) that Schedule 2.5(a)(xiii) be prepared in accordance with GAAP,
17 although the parties knew how to include such a requirement as evidenced by Section
18 2.5(c) and by Section 2.4(a) and (b) pertaining to “Calculation of Closing Net
19 Working Capital.” Furthermore, the court agrees with Plaintiffs that application of
20 GAAP to only performance period numbers is consistent with GAAP’s principles and
21 that recalculation of previously agreed base year figures was not required. This is
22 confirmed by Mr. Vogeley’s statement that “[g]oing forward” Sysco Spokane should
23 simply input its year-to-date sales into Schedule 2.5(a)(xiii).³

24 Plaintiffs also correctly note that applying Section 2.5(c) of the APA to
25 Schedule 2.5(a)(xiii) would subject Schedule 2.5(a)(xiii) to a second verification and
26 dispute procedure beyond the verification and dispute procedure already called for
27 in the First Amendment to the APA at Section 3(ii) and (iii). Plaintiffs say this would

28 ³ In his Supplemental Declaration, Mr. Sanders states no agent of Sysco
Spokane ever requested a GAAP certification of Inland’s base year sales or
indicated that Sysco Spokane certified Inland’s base year sales used to calculate
the Retained Sales Percentage. (ECF No. 53 at Paragraph 16).

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1 render superfluous the latter verification and dispute procedure. The court agrees.
2 This is another indication that interpretation of the provisions in the First Amendment
3 to the APA relating to preparation of Schedule 2.5(a)(xiii) is not in anyway materially
4 impacted by what is contained in the APA itself.

5 After October 2, 2012, Mr. Mullenix did not waive his right to assert that the
6 October 2, 2012 spreadsheet constituted the “completed” Schedule 2.5(a)(xiii).
7 Although Mr. Pribilsky says that during the spring of 2013, he made it “clear” to Mr.
8 Mullenix that he (Pribilsky) was correcting the Sysco Base Year Sales, it would have
9 been reasonable for Mr. Mullenix to assume at that point, as he asserts in his
10 Declaration and Supplemental Declaration (ECF No. 24 at Paragraphs 12 and 13;
11 ECF No. 51 at Paragraphs 10 and 11), that his discussions with Mr. Pribilsky
12 concerned performance period sales impacting the earnout calculation, not base year
13 sales. Neither Mr. Pribilsky’s March 29, 2013 email (ECF No. 24-4 at p. 146) or his
14 April 23, 2013 email (ECF No. 24-7 at p. 156) put Mr. Mullenix on clear notice that
15 after nearly six months, and with the First Performance Period coming to a close,
16 Sysco Spokane now specifically intended to revise the October 2, 2012 spreadsheet.
17 Per the terms of the APA, Mr. Mullenix timely provided an objection to Sysco
18 Spokane’s July 1, 2013 Retained Sales Notice which further adjusted upwards Sysco
19 Spokane’s base year sales. Although Mr. Mullenix’s July 16, 2013 objection did not
20 take issue with Sysco Spokane’s base year sales, the follow-up supplemental
21 objection by his counsel, dated August 12, 2013, did: “The revised earnout
22 calculation appears to inappropriately uses calculations of Sysco’s base year sales to
23 shared accounts that does not comport with the contract.” (ECF No. 24-11 at p. 202).
24 The fact the supplemental objection did not specifically refer to the October 2, 2012
25 spreadsheet or propose an adjustment to Sysco Spokane’s Retained Sales Notice is
26 inconsequential.⁴ Moreover, pursuant to Section 10.3 of the APA, any modification

27
28 ⁴ In December 2012, Plaintiffs’ counsel addressed a separate earnout dispute

1 of the APA had to be in writing signed by all of the parties.

2 The extrinsic evidence does not permit a reasonable inference that the parties
3 mutually intended the October 2, 2012 spreadsheet to contain only preliminary base
4 years sales figures. Further supporting this conclusion is that: 1) Mr. Pribilsky
5 changed the base year sales amounts nearly six months later without the knowledge
6 and input of CFO Nguyen who was a key player from Sysco Spokane in preparing
7 the October 2, 2012 spreadsheet; 2) after October 2, 2012, Sysco Spokane never
8 provided Mr. Mullenix with a document it specifically identified as a now
9 “completed” Schedule 2.5(a)(xiii); and 3) Sysco Spokane’s interpretation would
10 require the court to unreasonably believe the parties did not intend to have a binding
11 upfront benchmark upon which to base the earnout amount, therefore leaving Mr.
12 Mullenix guessing until near the expiration of the First Performance Period about the
13 benchmark against which new sales would be measured.

14 The only reasonable inference that can be drawn from the extrinsic evidence
15 is the parties mutually intended the October 2, 2012 spreadsheet to be the
16 “completed” Schedule 2.5(a)(xiii). Therefore, Mr. Pribilsky’s subsequent upward
17 revisions of Sysco Spokane’s base year sales amount, whatever the motive, constitute
18 an impermissible unilateral alteration of the parties’ agreement for which no
19 consideration was given.

20 21 **IV. CONCLUSION**

22 Plaintiffs’ Motion For Partial Summary Judgment (ECF No. 19) is
23 **GRANTED**. The court hereby declares the spreadsheet delivered to Mr. Mullenix
24 on October 2, 2012 is the “completed” Schedule 2.5(a)(xiii) referred to in the First
25

26 with Sysco Spokane, Inc., unrelated to the amount of Sysco Spokane’s base year
27 sales which, as noted, were not revised upward by Mr. Pribilsky until April 2013.
28

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1 Amendment to the APA. Based on the figures contained in that spreadsheet, Plaintiff
2 is entitled to an earnout amount of \$281,250.00 for the First Performance Period, an
3 amount that falls within the range the parties contemplated (maximum of \$375,000
4 per performance period). Plaintiff is also entitled to prejudgment interest on the
5 earnout amount of \$281,250.00. The court reserves determination of whether
6 Plaintiff should be allowed to audit performance period sales numbers in order to
7 confirm the earnout amount.

8 //

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10 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
11 order and provide copies to counsel.

12 **DATED** this 3rd day of July, 2014.

13
14 *s/Lonny R. Suko*

15 LONNY R. SUKO
16 Senior United States District Judge
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