IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Column Form Technology, Inc., a California corporation, formerly a division of Advanced Concrete Enhancement, Inc. dba Column Form Technology, and Blayde Penza,	)	
Plaintiffs,	)	
v.	)	C.A. No. 12C-09-050 JRJ CCLD
Caraustar Industries, Inc., a Delaware corporation,	)	
Defendant.	)	

Date Submitted: March 10, 2014
Date Decided: June 10, 2014

OPINION

Upon Plaintiffs' Motion for Partial Summary Judgment: **GRANTED, in part, and DENIED, in part**

Upon Defendant's Motion for Partial Summary Judgment: **GRANTED, in part, and DEFERRED, in part**

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Jurden, J.

On September 10, 2012, plaintiffs Column Form Technology, Inc. ("CFT") and Blayde Penza ("Mr. Penza"), then CFT's president and sole shareholder (together, the "Plaintiffs"), filed this action for breach of contract against defendant Caraustar Industries, Inc. ("Caraustar").[1] The Plaintiffs' complaint alleges that Caraustar breached an agreement called the Exclusive Agency and Distribution Agreement (the "Distribution Agreement").[2]

Before the Court are two motions for partial summary judgment. On September 30, 2013, Caraustar filed a Motion for Partial Summary Judgment seeking a declaration that pursuant to the Distribution Agreement's liability limitation section, Caraustar may be liable for no more than $75,000 for the alleged breach of the Distribution Agreement.[3] On November 4, 2013, Plaintiffs filed a Motion for Partial Summary Judgment seeking an order declaring the following: (1) that Caraustar breached the Distribution Agreement; (2) that the indemnification provision in the Distribution Agreement controls the question of the damages to which Plaintiffs are entitled; and (3) that the indemnification provision in the Distribution Agreement entitles Plaintiffs to damages for Caraustar's breach of the Distribution Agreement, without limitation, thereby rendering Caraustar's Motion for Partial Summary Judgment moot.[4] In the alternative to denying Caraustar's Motion for Partial Summary Judgment, Plaintiffs move for leave pursuant to

[1] Plaintiffs initially named Caraustar Industrial and Consumer Products Group, Inc. ("CICPG"), a subsidiary of Caraustar Industries, Inc., as a defendant in this case as well. CICPG was dismissed from the case by stipulation on January 2, 2013. *Stipulation of Dismissal So Ordered by J. Street,* Trans. ID 48700878.

[2] Compl. ("Compl."), Trans. ID 46352491. The complaint also contained a second count ("Count II"), which alleged that Caraustar breached an agreement titled the Consulting Agreement. *Id.* On December 4, 2013, Caraustar filed a Motion for Summary Judgment on Count II. *Def. Mtn. Summ. J. on Count II,* Trans. ID 54651277. On January 14, 2014, Plaintiffs wrote a letter to the Court and asked that judgment be entered for Caraustar on that motion. *Letter to Court from Blake Rohrbacher,* Trans. ID 54844389. On January 17, 2014, this Court granted Caraustar's Motion for Summary Judgment as to Count II. *Order on Def.'s Mtn. Summ. J. on Count II,* Trans. ID. 54864822.

[3] Def.'s Op. Br. in Supp. Mtn. for Partial Summ. J. ("Def. Op. Br."), Trans. ID 54305992, at 19.

[4] Pls.' Op. Br. in Supp. Mtn. for Partial Summ. J. and Ans. Br. in Opp. To Def.'s Mtn. for Partial Summ. J. ("Pls. Op. Br."), Trans. ID 54496237, at 6-7.

Superior Court Civil Rule 56(f) ("Rule 56(f)") to take discovery pertaining to the proper interpretation and enforceability of the liability limitation section.[5]

On December 4, 2013, Caraustar filed its Answering Brief, wherein Caraustar asks the Court to declare that Caraustar is entitled to summary judgment on the indemnification issues contained in Plaintiffs' Motion for Partial Summary Judgment.[6]

The Court heard argument on these motions on March 10, 2014. For the following reasons, Caraustar's motion is **GRANTED, in part,** and **DEFERRED, in part**, and Plaintiffs' motion is **GRANTED, in part,** and **DENIED, in part.**

I. BACKGROUND

Mr. Penza, at all relevant times, was the president and sole shareholder of CFT.[7] Mr. Penza invented a system called the Column Cast System (the "CCS"), which is used to construct decorative concrete columns.[8] The CCS uses a vinyl jacket with two metal bars, latches that attach to the bars and hold the jacket together, and foam insets, all of which create a form into which reinforcing steel can be placed and concrete poured to produce decorative columns.[9]

Caraustar is one of North America's largest integrated manufacturers of 100% recycled and converted paper products.[10] Among Caraustar's products are cardboard forming tubes used to construct concrete columns.[11]

In February 2009, CFT operated a booth at the World of Concrete Exhibition in Las Vegas, Nevada.[12] At this exhibition, the CCS won the "Most Innovative Product Award."[13]

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[5] *Id.* at 7.
[6] Ans. ("Ans."), Trans. ID 48062036, ¶ 22.
[7] Comp. ¶ 1.
[8] *Id.* at ¶ 10.
[9] Aff. of Blayde M. Penza in Supp. of Pls.' Mtn. for Partial Summ. J. and Opp. to Def.'s Mtn. for Partial Summ. J. ("Penza Aff."), Trans. ID 54496237, at ¶ 4.
[10] Ans. ¶¶ 3, 4.
[11] *Id.* at ¶ 4.
[12] *Id.* at ¶ 13.

Also at this exhibition, Mr. Penza met John Lea ("Mr. Lea"), who was the Vice President and Division Manager at Caraustar Industrial and Consumer Products Group, Inc. ("CICPG"), a subsidiary of Caraustar.[14] Mr. Penza and Mr. Lea had discussions about Caraustar distributing the CCS.[15] The two remained in contact throughout 2009 and upon Caraustar's exit from bankruptcy in November 2009, Mr. Lea sent Mr. Penza a proposal of initial terms for the parties' future relationship.[16] On December 4, 2009, Mr. Penza sent Mr. Lea revisions to this proposal.[17] Later that day, Mr. Lea sent Mr. Penza a formal proposal of initial terms on behalf of Caraustar.[18] Mr. Penza responded to Mr. Lea, "approved as revised."[19] Caraustar subsequently wired $75,000 to CFT.[20] The parties continued to discuss the specific structure and terms of what would become formal agreements.[21] Caraustar would be the party to draft the agreements.[22]

On February 26, 2010, CFT and Mr. Penza executed both the Distribution Agreement and an agreement called the Consulting Agreement.[23] On March 2, 2010, Caraustar executed the same agreements.[24] The Distribution Agreement provided that Caraustar would have the exclusive right to distribute the CCS in North America for an initial term of three years.[25] The

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[13] *Id.* at ¶ 14.
[14] *Id.* at ¶¶ 3, 15. CICPG was dismissed from this action. *Supra* n. 1.
[15] *Id*. at ¶¶ 15-16.
[16] Ans. at ¶ 17.
[17] *Id.* at ¶ 26.
[18] *Id.* at ¶ 29.
[19] Penza Aff. at ¶ 13.
[20] Ans. ¶ 31.
[21] *Id.* at ¶¶ 32, 41.
[22] Penza Aff. at ¶ 16.
[23] Compl. at ¶ 43. Plaintiffs did bring a breach of contract claim regarding the Consulting Agreement. For a discussion on this claim, see *supra* n. 1.
[24] Ans. at ¶ 44.
[25] Compl., Ex. A, at ¶¶ 1(a), 2.

Consulting Agreement provided that Caraustar would pay CFT for CFT's help in developing and promoting the CCS.[26]

In December 2010, the Consulting Agreement expired and Mr. Lea informed Mr. Penza that Caraustar would not extend its term.[27] CFT tried to persuade Caraustar to continue their business relationship, however, Caraustar did not agree.[28] On December 15, 2010, Caraustar sent a "Notice of Expiration and Termination" (the "Notice") to Mr. Penza which confirmed that Caraustar would not extend the Consulting Agreement.[29] In the Notice, Caraustar offered to make additional payments in exchange for CFT and Mr. Penza's waiving any breach of contract claims as a result of Caraustar's termination of the Distribution Agreement.[30] On January 17, 2011, Caraustar confirmed that it and CFT no longer had any business relationship.[31]

II. STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[32] "[T]he moving party bears the burden of establishing the non-existence of material issues of fact."[33] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[34] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[35] Thus, the court must accept all undisputed factual assertions and accept the

[26] Compl., Ex B, at Annex B; Ans. at ¶ 57.
[27] Ans. at ¶ 67.
[28] Penza Aff. at ¶ 36.
[29] Compl., Ex. C.
[30] Compl., Ex. C. Although it is unclear exactly how CFT responded to this offer, sufficient evidence has not been presented that would indicate that CFT accepted it.
[31] Penza Aff., Ex. I.
[32] Super. Ct. Civ. R. 56(c).
[33] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).
[34] *Id.*
[35] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

non-movant's version of any disputed facts.[36] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[37] On the other hand, "[w]hen the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law."[38]

III. DISCUSSION

A. Caraustar's Motion for Partial Summary Judgment

Caraustar seeks a declaration that it may be liable for no more than $75,000 for the alleged breach of the Distribution Agreement.[39] Caraustar bases this position on section 13(i) of the Distribution Agreement titled **LIMITATION OF LIABILITY** ("Section 13(i)"), which reads in pertinent part as follows:

> EXCEPT FOR THE PARTIES, [sic] INDEMNIFICATION OBLIGATIONS HEREUNDER, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, INCIDENTIAL, INDIRECT, PUNITIVE OR SPECIAL DAMAGES, (INCLUDING LOST PROFITS, SAVINGS, COMPETITIVE ADVANTAGE, GOODWILL OR BUSINESS INTERRUPTION) FROM ALL CAUSES OF ACTION OF ANY KIND, INCLUDING CONTRACT, TORT OR OTHERWISE, EVEN IF ADVISED OF THE LIKELIHOOD OF SUCH DAMAGE OCCURING. TO THE FULLEST EXTENT PERMITTED BY LAW, THE TOTAL MAXIMUM AGGREGATE LIABILITY OF EITHER PARTY TO THE OTHER, REGARDLESS OF WHETHER SUCH LIABILITY IS BASED ON BREACH OF CONTRACT, TORT, STRICT LIABILITY, BREACH OF WARRANTIES, FAILURE OF ESSENTIAL PURPOSE OR OTHERWISE, WITH RESPECT TO THIS AGREEMENT OR OTHERWISE, SHALL BE LIMITED TO DIRECT DAMAGES PROXIMATELY CAUSED BY ANY BREACH OF, OR FAILURE TO COMPLY WITH, OR ANY OTHER ACT OR OMISSION IN CONNECTION WITH THIS AGREEMENT,

[36] *Id.* at 99-100.
[37] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).
[38] *Tyson Foods, Inc. v. Allstate Ins. Col.*, 2011 WL 3926195, at *4 (Del. Super. Aug. 31, 2011).
[39] Def. Op. Br. at 19.

> AND ANY SUCH DAMAGES SHALL NOT BE GREATER THAN THE *AGGREGATE FEES PAID BY CARAUSTAR TO CFT UNDER THIS AGREEMENT*. THIS LIMITATION OF REMEDIES IN THIS SECTION 13(i) REPRESENT THE AGREED AND BARGAINED-FOR UNDERSTANDING OF THE PARTIES, AND CFT AND PRINCIAPL [sic] ACKNOWLEDGE THAT THE AGGREGATE FEES PAID BY CARAUSTAR HEREUNDER REFLECT SUCH ALLOCATIONS.[40]

Caraustar contends that Section 13(i) limits its liability to $75,000 and, therefore, it is entitled to summary judgment on that issue for four reasons: (1) the provision is unambiguous; (2) the provision is enforceable under Delaware law; (3) no purported unfair bargaining impairs the provision's enforceability; and (4) "aggregate fees" equal $75,000. As to the first argument, Caraustar contends that Section 13(i) is an unambiguous liability limitation;[41] that "[t]he parties agree that 'aggregate fees' paid under the Distribution Agreement amount to at least $75,000";[42] that many agreements contain terms not specifically defined, however, this does not render those terms ambiguous;[43] that Delaware courts look to dictionaries for assistance when determining the plain meaning of terms that are not defined in a contract;[44] that according to *Black's Law Dictionary*, the term "aggregate" means formed by combining into a single whole or total, and the word "fee" means a charge for labor or services; that when one employs these definitions, the relevant language in Section 13(i) provides that damages for breach of the Distribution Agreement "shall not be greater than" the combined total amount of charges paid by Caraustar to CFT for CFT's services under the Distribution Agreement;[45] and that the total charges for services under the Distribution Agreement is $75,000.[46]

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[40] Compl., Ex. A, at ¶ 13(i) (bold typeface omitted) (italics added).
[41] Def. Op. Br. at 7.
[42] *Id.* at 8-9.
[43] *Id.* at 11.
[44] *Id.*
[45] *Id.*
[46] *Id.*

As to Caraustar's argument regarding Section 13(i)'s enforceability under Delaware Law, Caraustar contends that this Court holds such provisions enforceable when damages are uncertain and the amount agreed upon is reasonable;[47] that damages were uncertain when the Distribution Agreement was executed because the parties expressly agreed in the Distribution Agreement that the product's sale and distribution was speculative;[48] that Section 13(i)'s language demonstrates that the parties agreed that the stipulated amount was reasonable;[49] that Section 13(i) is also reasonable in that the parties intended that recoverable damages would increase accordingly with the fees paid to CFT;[50] and that in any event, "'aggregate fees' are at least $75,000."[51]

As to Caraustar's fourth argument, Caraustar contends that the Plaintiffs' unfair bargaining argument is inconsistent with Section 13(i)'s language because the parties expressly agreed that the liability limitation represents the agreed and bargained-for understanding of the parties;[52] that the Plaintiffs' complaint contains no allegations of unfair bargaining;[53] that Plaintiffs were represented by counsel throughout their dealings with Caraustar;[54] and that Plaintiffs even allege in their complaint that the Distribution Agreement was valid and enforceable.[55]

Lastly, Caraustar contends that Section 13(i) limits its liability to $75,000;[56] that the term "aggregate fees" does not include any fees paid under the Consulting Agreement because the Consulting Agreement was not incorporated into the Distribution Agreement through Section

[47] Def. Op. Br. at 12.
[48] *Id.*
[49] *Id.* at 13-14.
[50] *Id.* at 14.
[51] *Id.*
[52] *Id.* at 15.
[53] Def. Op. Br. at 15.
[54] *Id.*
[55] *Id.* at 16.
[56] *Id.* at 17.

13(f) of the Distribution Agreement ("Section 13(f)");[57] that Section 13(f) merely states that the Distribution Agreement and its exhibits, which include an unsigned form version of the Consulting Agreement, "supersede and cancel any and all other contracts and arrangements between the parties[]";[58] that when the parties wanted to incorporate an exhibit into the Distribution Agreement, specific language was used to express the incorporation; and that the "aggregate fees" paid to CFT under the Distribution Agreement was $75,000, which was an "advanced payment of working capital for CFT's production of samples and products to be distributed by Caraustar."[59]

In response, Plaintiffs argue that Caraustar's Motion for Partial Summary Judgment should be denied because there is a genuine issue of material fact concerning both the interpretation of Section 13(i) and its enforceability. In the alternative, the Plaintiffs request that additional discovery regarding the interpretation and enforceability of Section 13(i) be permitted pursuant to Rule 56(f). As to the Plaintiffs' interpretation argument, the Plaintiffs contend that the language "aggregate fees paid by Caraustar to CFT under this Agreement" is ambiguous and discovery regarding the parties' negotiation of that provision is necessary to determine its appropriate interpretation;[60] that Plaintiffs' position is that "aggregate fees" equal $425,000, which is comprised of the $75,000 payment to CFT in December 2009 and the consulting fees that Caraustar paid to CFT under the Consulting Agreement;[61] that under the Consulting Agreement, which was attached as an exhibit to the Distribution Agreement, the consulting fees were required to be paid;[62] that if the parties only intended "aggregate fees" to constitute monies

[57] *Id.*
[58] *Id.*
[59] Def. Op. Br. at 3, 19.
[60] Pls. Op. Br. at 24.
[61] *Id.* at 24-25.
[62] *Id.* at 25.

paid under the Distribution Agreement, that amount would be $0 because the only fees or compensation referenced in the Distribution Agreement are (1) payment of the difference between the distributor's list price and the cost of raw materials to CFT if Caraustar sold a CFT-manufactured CCS, and (2) payment of a royalty if Caraustar sold a CCS that it manufactured;[63] and that Caraustar made none of the foregoing payments to CFT.[64]

As to the Plaintiffs' enforceability argument, Plaintiffs contend that the liability limitation issue cannot be decided on summary judgment;[65] that Delaware courts enforce a liability limitation provision when damages were uncertain at the time the contract was executed and the amount is reasonable;[66] that damages were not impossible to ascertain because the parties had worked together since December 2009;[67] that the liability limitation provision is not reasonable because Section 13(i) failed to recognize that measuring both parties' potential damages by reference to the amounts that Caraustar paid to CFT under the Distribution Agreement bears no reasonable relationship to the actual damages that Plaintiffs would suffer if Caraustar breached;[68] that Section 13(i) does not pass muster under the *Donegal*[69] and *Rob-Win*[70] factors because although Section 13(i) was in bold and capital letters, it was found in the "miscellaneous" section;[71] and that Caraustar yielded superior bargaining power in an unfair manner over a financially vulnerable party, resulting in an unfair and unreasonable contractual provision.[72]

The Court first finds that the issue as to whether Section 13(i) is enforceable under Delaware law may be decided on Caraustar's Motion for Partial Summary Judgment. The

[63] *Id.* at 26.
[64] *Id.*
[65] *Id.* at 27.
[66] Pls. Op. Br. at 27.
[67] *Id.*
[68] *Id.* at 28-29.
[69] *Donegal Mut. Ins. Co. v. Tri-Plex Sec. Alarm Sys.*, 622 A.2d 1086 (Del. Super. Ct. 1992).
[70] *Rob-Win, Inc. v. Lydia Sec. Monitoring, Inc.*, 2007 WL 3360036 (Del. Super. Ct. Apr. 30, 2007).
[71] Pls. Op. Br. at 29-30.
[72] *Id.* at 30.

Plaintiffs cite several Delaware Superior Court cases to support their position that the enforceability of a liability limitation clause should not be decided on a motion for summary judgment.[73] As Caraustar points out, however, this Court routinely decides such an issue on a motion for summary judgment.[74] Therefore, the Court finds that the Plaintiffs' argument on this issue is without merit.

As to whether Section 13(i) is enforceable, under Delaware Law, liability limitation clauses that relieve a party of liability for its own negligence are generally disfavored.[75] However, they may be "enforceable where damages are uncertain and the amount agreed upon is reasonable."[76] Such clauses will not be enforced, "unless the contract language makes it crystal clear and unequivocal that the parties specifically contemplated that the contracting party would be relieved of its own defaults."[77] "It is not the reference to 'negligence' generally, but a reference to the negligent wrongdoing of a party protected by the limitation which is required."[78] In upholding liability limitation clauses, this Court has looked to factors including the length of the contract, the clarity of the language, the clarity of the disclaimed liability, and whether the clause was in boldface type.[79]

The Court finds that Section 13(i) is enforceable under Delaware law. In the section immediately preceding Section 13(i) of the Distribution Agreement, the parties explicitly agreed

[73] Pls. Op. Br. at 27. Plaintiffs cite the following cases: *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540, 553-54 (Del. Super. Ct. Feb. 28, 1977); and *Hampton v. Warren-Wolfe Assoc. Inc.*, 2004 WL 838847, *3 (Del. Super. Ct. Mar. 25, 2004)).
[74] *See e.g., RHA Construction, Inc. v. Scott Engineering*, 2013 WL 3884937, at *8 (Del. Super. Ct. July 24, 2013); *Donegal Mut. Ins. Co.*, 622 A.2d at 1090.
[75] *Delmarva Power & Light Co., v. ABB Power T & D Co., Inc.*, 2002 WL 840564, at *6 (Del. Super. Ct. Apr. 30, 2002); *J.A. Jones Constr. Co.*, 372 A.2d at 546).
[76] *Rob-Win, Inc.*, 2007 WL 3360036, at *5 (quoting *Donegal Mut. Ins. Co.*, 622 A.2d at 1089).
[77] *J.A. Jones Constr. Co.*, 372 A.2d at 553.
[78] *Id.*
[79] *Rob-Win, Inc.*, 2007 WL 3360036, at *6 (citing *Donegal Mut. Ins. Co.*, 622 A.2d at 1089-90).

that "**the sale and distribution of [CCS] is speculative . . . .**"[80] Contrary to the Plaintiffs' contentions, the Court is not convinced that damages were certain at the time that the Distribution Agreement was executed. The Court is convinced, however, that when the parties restricted their liability to "DIRECT DAMAGES PROXIMATELY CAUSED BY ANY BREACH OF, OR FAILURE TO COMPLY WITH, OR ANY OTHER ACT OR OMISSION IN CONNECTION WITH THIS AGREEMENT, AND ANY SUCH DAMAGES SHALL NOT BE GREATER THAN THE AGGREGATE FEES PAID BY CARAUSTAR TO CFT UNDER THIS AGREEMENT," this was a reasonable limitation.[81] Additionally, the parties explicitly agreed that "THE LIMITATION OF REMEDIES IN THIS SECTION 13(i) REPRESENT THE AGREED AND BARGAINED-FOR UNDERSTANDING OF THE PARTIES, AND CFT AND PRINCIAPL [sic] ACKNOWLEDGE THAT THE AGGREGATE FEES PAID BY CARAUSTAR HEREUNDER REFLECT SUCH ALLOCATIONS."[82] Section 13(i) is also in capital letters and the entire section is in bold typeface. Moreover, the Court is not convinced by the Plaintiffs' unfair bargaining argument because when the Distribution Agreement was negotiated and executed, the parties were all represented by counsel. Therefore, the Court finds that Section 13(i) is enforceable under Delaware law and **GRANTS** Caraustar's Motion for Partial Summary Judgment on that issue. Because the Court finds that Section 13(i) is enforceable under Delaware law, the Plaintiffs' request for additional discovery pursuant to Rule 56(f) on that issue is **DENIED**.

As to the Plaintiffs' interpretation argument, the interpretation of a contract is purely a determination of law.[83] When interpreting a contract, the court gives priority to the parties'

[80] Compl., Ex. A, at ¶ 13(h) (bold typeface in original).
[81] *Id.* (bold typeface omitted).
[82] *Id.*
[83] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 236 (Del. 2001).

intentions and will construct the contract as a whole, giving effect to all provisions therein.[84] Clear and unambiguous language will be given its ordinary and usual meaning.[85] A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.[86] Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to two or more different interpretations.[87]

After reviewing the parties' arguments and the Distribution Agreement as a whole, the Court finds that Section 13(i) clearly and unambiguously limits Caraustar's liability to the "AGGREGATE FEES PAID BY CARAUSTAR TO CFT UNDER THIS AGREEMENT."[88] The Court therefore **GRANTS** Caraustar's Motion for Partial Summary Judgment on this issue. The parties strongly dispute, however, whether the term "aggregate fees" includes fees from the Consulting Agreement, which is attached as an exhibit to the Distribution Agreement. In *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, the Delaware Supreme Court found that "[w]hen the provisions in controversy are fairly susceptible [to] different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions."[89] The Court finds that although the above language clearly and unambiguously limits Caraustar's liability, there is an ambiguity regarding the scope of that limitation. Section 13(i) can reasonably be interpreted to include payments made under the Consulting Agreement, which is attached as an exhibit to it. Section 13(i) can also reasonably be interpreted to exclude such payments. Therefore, the Court's decision on Caraustar's Motion for Partial Summary Judgment regarding Section 13(i) limiting

[84] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).
[85] *Id.* at 780.
[86] *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).
[87] *Id.* (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).
[88] Compl., Ex. A, at ¶ 13(h) (bold typeface omitted).
[89] 702 A.2d 1228, 1232 (Del. 1997) (citations omitted).

Caraustar's liability to $75,000 is **DEFERRED**, and Plaintiffs' request for further discovery pursuant to Rule 56(f) is **GRANTED** as to the scope of Section 13(i)'s limitation only.

B. Plaintiffs' Motion for Partial Summary Judgment

Breach of the Distribution Agreement

Plaintiffs first seek a declaration that Caraustar breached the Distribution Agreement by terminating it prior to its expiration without having proper grounds to do so. The Plaintiffs contend that the Distribution Agreement had a three-year term;[90] that pursuant to Sections 5(a) and 11, the Distribution Agreement explicitly enumerated circumstances under which the parties could terminate the Distribution Agreement;[91] that none of these circumstances existed;[92] and if one of the circumstances did exist, it is undisputed that Caraustar did not comply with the Distribution Agreement's notice and cure provisions.[93]

In response, Caraustar requests more discovery pursuant to Rule 56(f) regarding a number of genuine factual disputes that may justify or excuse Caraustar's termination of the Distribution Agreement;[94] that Caraustar entered into the Distribution Agreement based on Mr. Penza and Mr. Lea's representations, both of whom personally invested in CFT; that Mr. Penza and Mr. Lea's personal investments are just coming to light;[95] that Caraustar needs discovery to determine whether material misrepresentations were made which may have induced Caraustar to enter into the Distribution Agreement;[96] that Caraustar was given the false impression that Mr. Lea was working solely for Caraustar and its benefit;[97] that both Mr. Lea and Mr. Penza

[90] Pls. Op. Br. at 19.
[91] *Id.*
[92] *Id.* at 19-20.
[93] *Id.* at 19, n. 13.
[94] Def.'s Ans. Br. in Opp. to Pls.' Mtn. for Partial Summ. J. and Reply Br. in Further Supp. of its Mtn. for Partial Summ. J. ("Def. Ans. Br."), Trans. ID. 54651277, at 12.
[95] *Id.*
[96] *Id.* at 14.
[97] *Id.*

convinced Caraustar that Caraustar's single use cardboard forming tubes would complement the CCS, which was incorrect;[98] that there is now evidence that that the Plaintiffs were in breach of the representations and warranties in the Distribution Agreement before Caraustar actually terminated it;[99] and that under the Distribution Agreement, Section 6(p) provided that Mr. Penza and his son would have sole and exclusive control over CFT's management and affairs, although Plaintiffs conceded that, at some point, they granted Mr. Lea a 50% interest in CFT's patent on its product.[100]

In reply, Plaintiffs contend that Caraustar has not raised a genuine issue of material fact that Caraustar was justified in breaching the Distribution Agreement; and for Caraustar to raise a genuine issue of material fact, it must do so by submitting something such as an affidavit to support its position that Plaintiffs materially breached the Distribution Agreement.[101]

The Court finds that Caraustar materially breached the Distribution Agreement by terminating it before its three-year term expired and, therefore, **GRANTS** the Plaintiffs' Motion for Partial Summary Judgment on that issue. Caraustar does not dispute the fact that it terminated the Distribution Agreement before the three-year term expired. Caraustar attempts to excuse its breach by arguing that through discovery it became aware that the Plaintiffs themselves might have been in breach of the Distribution Agreement. Caraustar also seeks to excuse its breach by arguing that there is a dispute of material fact as to whether Caraustar was induced to enter into the Distribution Agreement based on material misrepresentations, which would render the Distribution Agreement invalid and unenforceable. Caraustar's arguments on this issue are without merit. Any alleged breach by the Plaintiffs did not cause Caraustar to

[98] *Id.*
[99] *Id.* at 15.
[100] Def. Ans. Br. at 15.
[101] Pls.' Reply Br. in Further Supp. of its Mtn. for Partial Summ. J. ("Pls. Reply Br."), Trans. ID 54839517, at 9.

breach the Distribution Agreement; Caraustar chose to terminate the Distribution Agreement before the expiration of its three-year term. Had Plaintiffs been in breach of the Distribution Agreement, Caraustar was obligated to comply with the notice and cure requirements of Section 11(a)(ii) before Caraustar would have been justified in terminating the Distribution Agreement. The Court is not persuaded that there is a genuine issue of material fact that Plaintiffs materially breached the Distribution Agreement in a manner that would justify Caraustar's breach.

Caraustar's argument that the Distribution Agreement may be invalid and unenforceable for a number of reasons is similarly without merit. Caraustar fails to provide affidavits or a persuasive argument that if the allegations it sets forth are true, Caraustar would not have executed the Distribution Agreement. Additionally, Caraustar cannot seek to enforce one part of the Distribution Agreement while simultaneously seeking to avoid the entire Distribution Agreement.[102]

The Indemnification Clause

The Plaintiffs next seek a declaration that Section 10 of the Distribution Agreement, which is titled **CARAUSTAR'S LIMITED INDEMNIFICATION OBLIGATION** ("Section 10"), controls the question as to the damages to which Plaintiffs are entitled, and that Section 10 entitles Plaintiffs to damages without limitation for Caraustar's breach of the Distribution Agreement. Section 10 reads in pertinent part as follows:

> (a) Caraustar agrees to and does hereby indemnify, save and hold CFT and Principals harmless from any and all liability, loss, damage, cost and expense, including legal expenses and attorneys fees, (collectively "liability") arising out of or connected with any:
>
> (i) Breach or alleged breach of this Agreement;
>
> (ii) Products manufactured, repaired or modified by Caraustar or its agents; and,

[102] Caraustar seeks to restrict its liability pursuant to Section 13(i) while seeking to excuse its breach on the basis that the Distribution Agreement is invalid and unenforceable.

> (iii) Products not manufactured and sold to Caraustar by CFT.
> (b) CFT will notify Caraustar of any action commenced on any claim subject to Caraustar's indemnity obligation hereunder.
> (c) Caraustar may participate in the defense of any such claim through counsel of Caraustar's selection at Caraustar's own expense, but CFT will have the right at all times, in its sole discretion, to retain or resume control of such claim.[103]

The Plaintiffs contend that Section 10 applies rather than Section 13(i) because Section 13(i) begins with the statement "**EXCEPT FOR THE PARTIES, [sic] INDEMNIFICATION OBLIGATIONS HEREUNDER** . . . ."[104] The Plaintiffs contend that Section 10 clearly and unambiguously concerns Caraustar's indemnification obligations;[105] that Section 13(i)'s language clearly demonstrates that Caraustar's obligation to indemnify the Plaintiffs under Section 10 is not subject to Section 13(i);[106] that in the present case, unlike the more limited indemnity provision present in the *Henkel*[107] case, Section 10 provides a broad indemnification obligation that was explicitly carved out of Section 13(i).[108]

In response, Caraustar contends that Section 10 addresses only third-party indemnification, rather than first-party indemnification;[109] that the Plaintiffs' suit does not concern third-party losses;[110] that the *Henkel* case concerned an asset purchase agreement, which often include first-party indemnification;[111] that the agreement in *Henkel* expressly provided that the indemnification provisions in the agreement were, except for certain equitable remedies, the parties' sole and exclusive remedies against each other;[112] that the Plaintiffs' reading of Section

[103] Compl., Ex. A, at ¶10(a).
[104] Pls. Op. Br. at 21.
[105] *Id.*
[106] *Id.*
[107] *Henkel Corp. v. Innovative Brands Holdings. LLC*, 2013 WL 396245, at *3 (Del. Ch. Jan. 31, 2013).
[108] Pls. Op. Br. at 21.
[109] Def. Ans. Br. at 18.
[110] *Id.*
[111] *Id.* at 19.
[112] *Id.*

10 would lead to absurd results;[113] that under Plaintiffs' reading, Section 10(a)(i) would require Caraustar to indemnify Plaintiffs even if it is later found that Caraustar did not breach the Distribution Agreement;[114] that Section 10(c) would suggest that CFT would have the right to assume control of Caraustar's defense;[115] and that Caraustar is entitled to summary judgment on this issue.[116]

After reviewing the parties' arguments, the Distribution Agreement as a whole, and the contract interpretation standard set forth above, the Court finds that Section 10 does not control the question of the amount of damages to which the Plaintiffs are entitled. As Caraustar points out, Plaintiffs' interpretation of Section 10 would permit Plaintiffs to step into Caraustar's shoes in this dispute and take over Caraustar's defense. Such an interpretation would defy logic. Therefore, the Court **DENIES** the Plaintiffs' Motion for Partial Summary Judgment on this issue and **GRANTS** Caraustar's Motion for Partial Summary Judgment on this issue.

III. CONCLUSION

As to Caraustar's Motion for Partial Summary Judgment, for the reasons stated above, the Court **GRANTS** its motion in that Section 13(i) limits Caraustar's liability; the Court **DEFERS** its motion as to the scope of Section 13(i)'s limitation; the Court **GRANTS** the Plaintiffs' request to take further discovery pursuant to Rule 56(f) regarding the scope of the limitation only; the Court **DENIES** the Plaintiffs' request for further discovery pursuant to Rule 56(f) regarding the enforceability of Section 13(i); and the Court **GRANTS** Caraustar's motion for partial summary judgment in that Section 10 does not impact its liability limitation in this action between Caraustar and the Plaintiffs.

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[113] *Id.* at 21.
[114] *Id.*
[115] Def. Ans. Br. at 21.
[116] *Id.* at 22.

As to the Plaintiffs' Motion for Partial Summary Judgment, for the reasons stated above, the Court **GRANTS** its motion in that Caraustar breached the Distribution Agreement and **DENIES** the remainder of Plaintiffs' motion.

IT IS SO ORDERED.

/s/Jan R. Jurden
Jan R. Jurden, Judge