IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

Submitted: February 24, 2013
Decided: March 11, 2013

On Defendants' Motion to Dismiss
DENIED

MEMORANDUM OPINION

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

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JOHNSTON, J.

The issue underlying this Motion to Dismiss is whether the forum selection clause in one contract is binding on the parties seeking relief pursuant to two related contracts. All three contracts have integration clauses. However, only one contract contains a forum selection clause.

FACTUAL AND PROCEDURAL CONTEXT

The Parties

For the purposes of this motion, all facts are set forth in the light most favorable to the non-moving party.

Newport Electronics, Inc. and Omega Engineering, Inc. (collectively "Defendants") are Delaware corporations with their principal places of business in Connecticut. High Technology Holding Corporation ("HTHC") was the sole shareholder of Newport Electronics. Newport Disc, Inc. and Omega Disc, Inc. (collectively "Plaintiffs") are Nevada corporations with their principal places of business in Connecticut. Omega Disc is wholly-owned by the 1999 Betty Ruth Hollander Family Trust No. 1 ("1999 Trust"). Newport Disc is wholly-owned by the 1997 Milton B. Hollander Family Trust ("1997 Trust" and collectively with the 1999 Trust, the "Hollander Trusts").

Pursuant to a Purchase Agreement dated August 14, 2011 ("Purchase Agreement"), the Hollander Trusts sold 100% of the outstanding capital stock and

equity in each of Omega Engineering and HTHC (the sole shareholder of Newport Electronics) to Spectris Inc.

Prior to execution of the Purchase Agreement, Omega Disc and Omega Engineering were parties to a commission agreement. Newport Disc and Newport Engineering were parties to a separate commission agreement. Section 6.05 of the Purchase Agreement required that the commission agreements be terminated as of the closing date of the Purchase Agreement. To effectuate Section 6.05, on September 30, 2011, Newport Electronics and Newport Disc entered into a Termination Agreement. Omega Engineering and Omega Disc entered into a similar Termination Agreement.

Contract Provisions

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

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

The Purchase Agreement also includes the following integration clause**,** set forth in Section 11.01:

> This Agreement, together with its schedules and exhibits, the Confidentiality Agreement and the Related Agreements contain the

> entire understanding of the parties with respect to the subject matter hereof and supersedes all prior agreements, either oral or written.

Both the Purchase Agreement and the Termination Agreements contain choice of law provisions, mandating that New York law governs the Agreements. Only the Purchase Agreement, however, has a forum selection clause. Section 11.04 of the Purchase Agreement provides in relevant part:

> Each of the parties to this Agreement irrevocably submits to the exclusive jurisdiction of the state courts and federal courts sitting in New York County in the State of New York, for the purpose of any Action[1] arising out of or relating to this Agreement.

Commission Payments

Under the terms of the Termination Agreements, Newport Disc and Omega Disc are entitled to payment of certain commissions from Newport Electronics and Omega Engineering, respectively.[2] Newport Disc and Omega Disc contend that they are entitled to payment of commissions from Newport Electronics and Omega

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[1] "Action" is defined by the Purchase Agreement as "any suit, litigation, hearing, examination, inquiry, investigation, audit, arbitration, cause of action, claim, complaint, criminal prosecution, governmental or other administrative proceeding, whether at law or at equity, before or by any Court or Governmental Authority, arbitrator or other tribunal."

[2] The Termination Agreements provide:

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

Engineering in the total amount of $1,666,784.[3] Newport Disc and Omega Disc further allege that these commissions have not been paid, and that by failing to meet their obligations under the Termination Agreements, Newport Electronics and Omega Engineering are in breach of contract. Newport Disc and Omega Disc brought this action on October 24, 2012.

Newport Electronics and Omega Engineering filed the present Motion to Dismiss on the grounds that this Court is an improper venue for Newport Disc and Omega Disc to assert their breach of contract claims. Newport Electronics and Omega Engineering allege that the broad language of the forum selection clause in the Purchase Agreement - relating to any claims "arising out of or relating to [the] Agreement" - mandates New York as the exclusive forum.

ANALYSIS

Standard of Review

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[4] When applying this standard, the Court will

[3] Newport Disc alleges that it is entitled to commissions in the amount of $137,777 and Omega Disc alleges it is entitled to commissions in the amount of $1,529,007.

[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

accept as true all non-conclusory, well-pleaded allegations.[5] In addition, every reasonable factual inference will be drawn in favor of the non-moving party.[6] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[7]

Parties' Contentions

Defendants contend that the forum selection clause contained within the Purchase Agreement is binding upon Plaintiffs' breach of contract claim, because the Termination Agreements are "part and parcel" with the Purchase Agreement. The Termination Agreements were entered into in connection with the Purchase Agreement, and the Termination Agreements incorporate by reference the Purchase Agreement.

Defendants argue that the forum selection clause is enforceable as part of the overall contractual relationship between the parties. While the breach of contract dispute arises out of alleged violations of the Termination Agreements, and the forum selection clause is contained solely in the Purchase Agreement, Defendants nevertheless assert that the Purchase Agreement and Termination Agreements are

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[5] *Id.*

[6] *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

[7] *Spence*, 396 A.2d at 968.

sufficiently related so that the forum selection clause controls the Termination Agreements. Defendants argue that the Purchase Agreement's forum selection clause is mandatory upon Plaintiffs' claims.

Plaintiffs argue that the integration clauses contained within the Termination Agreements clearly state that the Termination Agreements contain the parties' entire agreement. Therefore, the Termination Agreements supersede any prior agreements - including the Purchase Agreement. Further, the Termination Agreements specifically provide choice of law provisions. This suggests the parties' choice not to incorporate other provisions, such as forum selection, from the Purchase Agreement. Therefore, Plaintiffs urge the Court to deny the Defendant's Motion to Dismiss and retain jurisdiction.

Controlling Precedent[8]

Delaware generally favors forum selection clauses as being "presumptively valid and should be specifically enforced unless the resisting party clearly shows that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud and overreaching."[9] When interpreting a contract, the role of the

[8] The parties concurred at oral argument that, for the purpose of this Motion to Dismiss, there is no material difference between New York and Delaware law.

[9] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (citing *Capital Grp. Cos., Inc. v. Armour*, 2004 WL 2521295, at *6 (Del. Ch.)).

Court is to "effectuate the parties' intent."[10] The Court must "start by looking to the four corners of the contract to conclude whether the intent of the parties can be determined from its express language."[11]

In *CA, Inc. v. Ingres Corp.*,[12] the Court of Chancery considered a series of agreements executed by software companies in connection with divestiture of a business unit. CA acquired an entity in 1994 that owned the rights to the "Ingres" brand name.[13] In 2005, CA decided to divest the Ingres business and its corresponding product line.[14] Despite the divestiture, CA retained legacy customers who depended upon product support and maintenance for a product that Ingres now controlled.[15] In order to satisfy its customers, CA and Ingres executed a Legacy Support Agreement, which contained a broad forum selection clause in favor of Delaware for all claims that "arise out of" or "relate to" the Legacy Support Agreement.[16] In 2007, subsequent to the execution of the Legacy Support Agreement,

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[10] *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

[11] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

[12] 2009 WL 4575009 (Del. Ch.), *aff'd*, 8 A.3d 1143 (Del. 2010).

[13] *Ingres,* 2009 WL 4575009, at *5.

[14] *Id.* at *6.

[15] *Id.* at *6-9.

[16] *Id.* at *46.

and in response to a dispute between CA and Ingres, the parties executed a Reseller Agreement.[17] The Reseller Agreement provided that California law would govern the contract. However, the Reseller Agreement did not contain a forum selection clause.[18] The Reseller Agreement included an integration clause that expressly "supersedes all prior agreements and representations...relating to the subject matter of this Agreement."[19]

The dispute in *Ingres* primarily concerned Ingres' obligations under the earlier Legacy Support Agreement, which contained the forum selection clause. However, as a result of the structure of the contracts, the multiple agreements between the parties, and the complex nature of their relationship, the Court of Chancery determined that the provisions contained within the Reseller Agreement (which did not contain a forum selection clause) could not be separated from the overall relationship. Rather, the Reseller Agreement was found to be "'part and parcel' of a larger contractual relationship between CA and Ingres . . . and therefore must be understood within the context of that larger framework." Given the complexity of the relationship between the parties, and the inability of the Court to determine where the earlier agreement ended and the subsequent agreement began, the *Ingres* Court

[17] *Id.* at *14.

[18] *Id.* at *46.

[19] *Id.* at *31.

concluded that the integration clause in the Reseller Agreement subsequent agreement did not supersede the forum selection clause in the Legacy Support Agreement.[20]

In *Green Isle Partners, Ltd, v. Ritz-Carlton Hotel Co.,*[21] Green Isle was the owner and lessee of certain property in Puerto Rico known as The Ritz-Carlton, San Juan Hotel, Spa & Casino. Pursuant to a Hotel Operating Agreement, entered into between The Ritz-Carlton Hotel Company ("RCHC") and Green Isle on December 15, 1995, RCHC became the operator of the hotel. The Hotel Operating Agreement gave RCHC certain exclusive rights, but did not include a forum selection clause.[22] The Hotel Operating Agreement contained an integration clause.[23]

On December 19, 1995 - four days after RCHC and Green Isle entered into the Hotel Operating Agreement - RCHC, Green Isle, and the Puerto Rico Tourism Development Fund ("TDF") entered into a Nondisturbance and Attornment Agreement ("Attornment Agreement"). The Attornment Agreement, in addition to setting out the various rights of the respective parties, provided Puerto Rico would be the exclusive venue for any action or proceedings arising out of the Attornment Agreement. After experiencing cash-flow problems, and threatened with foreclosure,

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[20] *Id.*

[21] 2000 WL 1788655 (Del. Ch.).

[22] *Id.* at *1.

[23] *Id.* at *4.

Green Isle filed suit in Delaware to assert its rights. RCHC moved to dismiss on the grounds that the Attornment Agreement provided Puerto Rico was the exclusive venue for such litigation.[24]

The Court of Chancery found that the rights that Green Isle was seeking to enforce arose under the Hotel Operating Agreement, not the Attornment Agreement. Because there was no exclusive forum clause provided by the Hotel Operating Agreement, Green Isle was not bound by such a limitation. The forum selection clause, which was included in a subsequently-enacted Attornment Agreement, did not control the forum. The effect of the integration clause in the Hotel Operating Agreement was to leave Green isle "free to bring this action in any appropriate forum it chooses, including Delaware."[25]

"Absent fraud or other unconscionable circumstances, . . . the existence of an integration clause between sophisticated parties is conclusive evidence that the parties intended the written contract to be their complete agreement."[26] The "mere reference" to a second agreement as part of the "entire agreement" of the parties, without an "express provision" incorporating the forum selection clause, reflects the parties'

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[24] *Id.* at *1-2.

[25] *Id.* at *4-5.

[26] *Progressive International Corp. v. E.I. duPont de Nemours & Co.,* 2002 WL 1558382, at *7 (Del. Ch.).

intention that the forum selection clause does not apply to disputes arising from the first contract.[27] Absent a clear intention to the contrary, an integration clause should be interpreted to limit the forum selection clause to the agreement containing the forum selection clause.

The Purchase Agreement Forum Selection Clause Does Not Control This Action

The controlling forum selection issue in this case is whether the parties' dispute can be resolved by reference to the Termination Agreements; or whether this action cannot be determined without examination of the Purchase Agreement as "part and parcel" of a larger, more complex, contractual relationship.[28] The Complaint claims that pursuant to the Termination Agreements, Newport Disc and Omega Disc are entitled to payment of certain commissions from Newport Electronics and Omega Engineering. As reflected in certain tax returns, the commissions due Newport Disc and Omega Disc under the Termination Agreements total $137,777 and $1,529,007, respectively. Plaintiffs claim that Defendants have breached their obligations under the Termination Agreements by failing to make the commission payments as required. As a result of Defendants' alleged breaches, Plaintiffs have sustained damages in an amount to be determined at trial.

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[27]*Coopervision, Inc. v. Intek Integration Technologies, Inc.,* 794 N.Y.S.2d 812, 819 (N.Y. Supr. 2005).

[28]*See Ingres*, at *47.

Defendants argue that the commissions that Plaintiffs claim to be owed are "directly and intimately related to a broader dispute under the Purchase Agreement. Those commissions arose as a result of modifications that were made to historic transfer pricing arrangements between the Defendant companies and their related foreign companies shortly before execution of the Purchase Agreement."

Nevertheless, in neither Defendants' briefs, nor in oral argument, have Defendants identified specific provisions of the Purchase Agreement that would control Plaintiffs' claims. Instead, Defendants generally assert that had they filed an Answer to the Complaint, they would have set forth how the Purchase Agreement comes into play. Additionally, upon questioning by the Court, Defendants were unable to point to any authority supporting the proposition that either defenses or counter-claims, which are based on a related contract, can divest Plaintiffs of their chosen forum, when the original contractual claims are not limited by a forum selection agreement; and on the face of the Complaint, Plaintiffs' claims can be resolved without reference to the parties' contractual relationship beyond the Termination Agreements identified in the Complaint.

CONCLUSION

The Court finds that Plaintiffs' claims arise under the Termination Agreements, which have integration clauses, and lack forum selection clauses. Plaintiffs'

Complaint sets forth a *prima facie* case for issues that can be resolved by reference to the terms of the Termination Agreements. On the face of the Complaint, Plaintiffs' claims do not depend upon interpretation of the Purchase Agreement as part of a complex contractual relationship. In their Motion to Dismiss, Defendants have not identified specific provisions of the Purchase Agreement that would affect the outcome of this litigation.

THEREFORE, Defendants' Motion to Dismiss must be **DENIED.** The New York forum selection clause set forth in the Purchase Agreement does not prohibit this action, arising from the Termination Agreements, from proceeding in Delaware.

IT IS SO ORDERED.

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