

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**FEDERAL-MOGUL POWERTRAIN LLC,
And FEDERAL-MOGUL MOTORPARTS LLC,**

Plaintiffs/Counter-Defendants,

v.

**Case No. 19-178607-CB
Hon. James M. Alexander**

ASG TECHNOLOGIES GROUP, INC.,

Defendant/Counter-Plaintiff,

and

TENNECO INC.,

Additional Counter-Defendant.

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**OPINION AND ORDER RE: (1) PLAINTIFFS' MOTION
FOR SUMMARY DISPOSITION OF COUNTS I AND II OF THE COMPLAINT AND
(2) PLAINTIFFS' AND COUNTER-DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION OF DEFENDANT'S COUNTERCLAIMS**

This matter is before the Court on Plaintiffs' Motion for Summary Disposition of Counts I and II of the Complaint pursuant to MCR 2.116(C)(10) and Plaintiffs' and Counter-Defendant's Motion for Summary Disposition of Defendant's Counterclaims pursuant to MCR 2.116(C)(8) and (C)(10). The Court dispenses with oral argument in accordance with MCR 2.119(E)(3).

By way of background, Federal-Mogul Corporation (“FMC”) entered into a Software License Agreement,¹ on September 30, 1999, with Mobius Management Systems, Inc. (“Mobius”) for the right to utilize certain software. In 2007, Defendant/Counter-Plaintiff ASG Technologies Group, Inc. (“ASG”) acquired Mobius and assumed Mobias’ rights and obligations under the 1999 Software License Agreement.

It is Plaintiffs’ position that FMC subsequently assigned its Software License Agreement to its subsidiaries, Plaintiffs Federal-Mogul Powertrain LLC (“FMP”) and Federal-Mogul Motorparts LLC (“FMM”) in 2018, following ASG’s written consent to the assignment. In his August 27, 2018 email, Karl Early, ASG’s Account Executive, purportedly agreed to the “no fee” 2018 Assignments. Plaintiffs allege that Mr. Early had actual or apparent authority to consent to the 2018 Assignments of the License Agreement on behalf of ASG. While there was no fee associated with the 2018 Assignments, Plaintiffs assert that they awarded ASG with new business and they made substantial payments to ASG under the new contracts.

Conversely, ASG argues that Mr. Early did not have the authority to contract on its behalf. What is more, ASG maintains that a new license agreement would need to be negotiated and executed upon a formal assignment of the ASG software. As such, ASG contends that no assignment from FMC to FMM and FMP occurred, and no license agreement was ever executed between ASG and FMM or FMP. In July 2019, ASG discovered that Tenneco Inc. (“Tenneco”) had acquired all of FMC’s assets and as a consequence, FMC was no longer in operation. With respect to Tenneco, ASG asserts that it never agreed to an assignment of the 1999 Software License Agreement, as amended, from FMC to Tenneco.

¹ Pursuant to Section 13(C) of the 1999 Software License Agreement, the laws of the State of New York govern this Agreement.

In August 2019, ASG purportedly demanded that Plaintiffs pay assignment fees as Mr. Early had no authority to consent to the “no fee” 2018 Assignments. Additionally, ASG asserted that FMM had consistently exceeded its software session entitlements by up to 127 sessions. Based upon ASG’s demands for an assignment fee as well as contract amendments in relation to the Software Lease Agreement, Plaintiffs FMP and FMM initiated litigation against Defendant ASG on December 18, 2019 on the following claims titled: (Count One) Breach of Contracts; (Count Two) Declaratory Judgment; and, (Count Three) Promissory Estoppel.

Thereafter, Defendant ASG filed Counterclaims against Plaintiffs FMP and FMM as well as Tenneco on claims titled: (Count One) Breach of Contract; (Count Two) Breach of Implied Duty of Good Faith and Fair Dealing; (Count Three) Breach of Contract; (Count Four) Unjust Enrichment; and, (Count Five) Declaratory Judgment.

Currently before the Court are Plaintiffs’ Motion for Summary Disposition of Counts I and II of the Complaint pursuant to MCR 2.116(C)(10) and Plaintiffs’ and Counter-Defendant’s Motion for Summary Disposition of Defendant’s Counterclaims pursuant to MCR 2.116(C)(8) and (C)(10).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). A (C)(8) motion may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* And, when deciding such a motion, the Court considers only the pleadings. MCR 2.116(G)(5). “A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits,

depositions, or admissions.” *Dalley v Dykema Gossett*, 287 Mich App 296, 305; 788 NW2d 679 (2010). (Citations omitted).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden, supra*; *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiffs’ Motion for Summary Disposition of Counts One and Two of the Complaint

In their motion, Plaintiffs seek summary disposition in their favor in relation to Count One, Breach of Contracts, and Count Two, Declaratory Judgment, of the Complaint. Under New York law, “[t]he elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage.” *U.S. Nonwovens Corp. v Pack Line Corp.*, 48 Misc 3d 211, 215; 4 NYS 3d 868 (2015). Plaintiffs maintain that they are entitled to judgment in their favor in consideration of the clear terms of the 1999 Software Licensing Agreement and ASG’s alleged breach of that Agreement.

“The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous...A contract is

unambiguous if on its face [it] is reasonably susceptible of only one meaning. Parol evidence cannot be used to create an ambiguity where the words of the parties' agreement are otherwise clear and unambiguous.” *Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106; 951 NYS2d 19 (2012). (Citations omitted).

According to Plaintiffs, ASG provided their written consent by way of Mr. Early’s June 15, 2018 email titled “Create two separate Mobius contracts for Powertrain and Motorparts.” In the email, Mr. Early wrote, “now is the best time to separate the contract into two.” See Exhibit B of Plaintiffs’ Motion. Pursuant to Paragraph 3 of the Software License Agreement,

“[t]itle to SYSTEM [the computer software components], all property rights therein and all materials supplied to Licensee under this Agreement shall remain the sole property of Mobius. *Licensee may not assign this Agreement without the prior written consent of Mobius.* Any attempt to assign any of the rights, duties or obligations of this Agreement without such consent is void.
See Exhibit A of Plaintiffs’ Motion. (Emphasis added).

Plaintiffs next rely on Mr. Early’s July 9, 2018 email in which he stated, “[w]e’ll use this one [checklist] to ensure we meet our goal of splitting the existing Federal Mogul Mobius contract into two contracts (one for each company)...” Following that statement, Mr. Early provided a list of eight tasks related to the goal of splitting the contract. See Exhibit C of Plaintiffs’ Motion.

On August 27, 2018, Mr. Early sent a third email in which he wrote, “[h]ere’s what we need from Powertrain to allow us to split the contract into two. The details around the assignment can be found in the attached Exhibit F. There is no fee for this assignment from Powertrain to Motorsports.” See Exhibit D of Plaintiffs’ Motion. Mr. Early again confirmed that “ASG is not asking for transfer fees for the license transfers to Federal-Mogul Powertrain LLC and Federal-Mogul MotorParts LLC.” See the September 17, 2019 email; Exhibit H of Plaintiff’s Motion.

Plaintiffs contend that these email communications qualify as written consent in accordance with the ruling of the United States District Court for the Southern District of New York in *Med. Self Care, Inc. ex rel. Dev. Specialists, Inc. v Nat'l Broad. Co.*, an unpublished opinion per curiam of the United States District Court, issued March 28, 2003 (Docket No. 01CIV4191(LTS)(RLE)). In that case, the District Court considered an email as a writing for purposes of enforcing a written consent clause of a contract. *Id.* Based upon these email communications, Plaintiffs argue that ASG consented to the “no fee” 2018 Assignments. Since the Agreement does not provide for any additional requirements, Plaintiffs maintain that ASG cannot attempt to impose additional financial requirements against them. “A court should not rewrite a contract or create new terms or change the terms made by the parties.” *Natwest USA Credit Corp. v Alco Standard Corp.*, 858 F Supp 401, 413 (SDNY 1994).

In opposition, ASG argues that Plaintiffs cannot even satisfy the first element of a breach of contract claim, namely the formation of a contract between the parties. ASG acknowledges that the 1999 Software License Agreement allowed FMM and FMP to utilize the software as subsidiaries of FMC. ASG is also aware of FMC’s desire to transfer its license to FMM and FMP so that they would be mutual Licensees. However, ASG contends that there is no licensing agreement between ASG and Plaintiffs because Karl Early was not authorized by ASG to enter into a contract on its behalf. Additionally, Mr. Early provided a checklist of required tasks to be completed in order to meet the parties’ goal of splitting the existing contract into two contracts. See Mr. Early’s July 9, 2018 email; Exhibit 1 of ASG’s Response. ASG characterizes the tasks in the checklist as a Health Check, which is the assessment to be completed before FMC’s license could be divided between FMM and FMP.

Moreover, ASG argues that its consent was conditioned on new agreements being signed. In Mr. Early's November 5, 2018 email, he noted that [o]ur contract team is working on the new contracts now." See Exhibit 1 of the Early Documents. ASG also contends that Plaintiffs understood that the assignment had not taken place. For example, ASG offers email communications from Michele Caswell, the IS Vendor Relations representative for Federal-Mogul, who wrote, "[w]e just had a meeting today with our legal to discuss this [i.e., splitting the ASG contract into two separate contracts]. I expect to have something soon to send to you and your contracts team." See Exhibit 3 of the Early Documents. ASG also presents the October 31, 2018 letter from Dave Bachleda, the IS Director for Powertrain, who wrote, "Federal-Mogul, on behalf of its Powertrain and Motorparts divisions, requests assignment of the following [ASG software] products to Federal-Mogul's Motorparts division....We understand from our discussions that there will be no fee for this assignment." See Exhibit 4 of the Early Documents. On September 10, 2018, Tod Nelson of FMC emailed Cindy Messing of FMP in which he stated "Michele Caswell and Dave Bachleda are reviewing the terms with legal in the separation document ASG requested. Until they approve and sign it, ASG cannot complete the segmentation." See Exhibit 6 of the Axel Documents.

In defense of ASG's claim that FMM breached the session usage restrictions under the Agreement, Plaintiffs contend that there is no provision that contains ASG's definition of a session or session-based usage restrictions. Therefore, ASG is not entitled to payments or other concessions based upon its session breach argument. In contrast, ASG asserts that the 1999 Software License Agreement has been a session-based license for 20 years. ASG refers to Exhibit F of the License Agreement, which provides numeric limitations on the number of sessions to be used. See Exhibit A of Plaintiffs' Motion. In addition, ASG offers printouts and

an email from Mr. Early to demonstrate that Plaintiffs were utilizing over four times the number of sessions of which they were entitled. See Exhibits 5 and 7 of the Giernoth Documents.

In their Reply, Plaintiffs reiterate their argument that FMC assigned the Software License Agreement to FMM and FMP after ASG provided its written consent to the assignments. As such, ASG lacks standing to challenge the validity of the 2018 Assignments since it is not a party to those contracts. See generally, *CRAFT EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 139 AD3d 638; 34 NYS 3d 7 (2016). About the session usage, Plaintiffs submit the Declaration of Dave Bachleda, who attests that the Exhibits to the Software Licensing Agreement only describe the software and not any session usage restrictions. Rather, Paragraph 4 of the Agreement outlines restrictions in use. Nowhere in Paragraph 4 is the use of the software restricted based on session usage. In terms of Plaintiffs' usage, Mr. Bachleda described a print button error in the software program that led to an inadvertent increase in session usage. See Exhibit A of Plaintiffs' Reply.

Based upon their arguments and supporting documentation, Plaintiffs seek summary judgment of their breach of contract claim against ASG and a declaration that ASG's emails constitute prior written consent, that ASG cannot unilaterally impose additional requirements on Plaintiffs, and that Plaintiffs are mutual Licensees under the Software License Agreement. However, the Court recognizes the factual dispute regarding the primary issue of whether ASG provided written consent for the 2108 Assignments. Whereas Plaintiffs argue that Mr. Early had actual or apparent authority to provide consent on behalf of ASG via email, ASG argues that Mr. Early was not authorized by the company to contract on its behalf. Additionally, ASG contends that certain tasks under the Health Check had to be satisfied prior to the contract being divided into two. ASG also referred to certain communications of Plaintiffs that raise the question in this

Court's mind as to whether Plaintiffs believed that ASG had consented to the assignment via email.

In relation to the session usage, Plaintiffs argue that the Restrictions in Use provision in the Software License Agreement does not reference session usage. In contrast, ASG relies on Exhibit F of the Agreement, which provides a certain number of sessions per product. Even if there are session usage restrictions, Plaintiffs defend their session usage on account of a software program error involving the print function. Certainly, the parties' arguments, affidavits, and documentary evidence have raised several factual issues. Since there is a question of fact concerning the validity of the purported assignments, the Court cannot resolve any issue in this lawsuit via summary judgment. Having reviewed the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to ASG, the Court find that the proffered evidence has established genuine issues of material fact whereby Plaintiffs are not entitled to judgment as a matter of law.

Counter-Defendants' Motion for Summary Disposition of Defendant's Counterclaims

In their motion, Plaintiffs/Counter-Defendants FMP and FMM and Counter-Defendant Tenneco ("Counter-Defendants") first argue that ASG's Breach of Contract claims, namely Counts One and Three, should be dismissed in consideration of ASG's assertion that there is no valid contract between the parties. According to Counter-Defendants, ASG's pleadings are premised on the claim that there is no contract between ASG and Counter-Defendants. Assuming *arguendo* that ASG is correct in its claim, Counter-Defendants contend that ASG cannot then satisfy the first element of a breach of contract claim, namely the formation of a contract between the parties. In addition, Counter-Defendants maintain that ASG cannot satisfy the damages element since it admitted that there was no fee for the subject assignment.

As an alternative argument against ASG's Count One, Counter-Defendants argue that ASG's Breach of Contract claim fails because FMP and FMM are mutual Licensees of the Software License Agreement pursuant to ASG's written consent. Counter-Defendants next assert that Exhibit Gⁱ of the Agreement, which requires a new software license agreement in the event that the Licensee divests FMC, is inapplicable to the facts herein since there is no evidence that FMM divested from FMC. Additionally, Counter-Defendants argue that the allegations in ASG's Counts One, Two, and Three concern purported wrongdoing by FMC and not by Counter-Defendants. Therefore, these counts should be dismissed.

Conversely, ASG argues that its Counts One through Three are against Tenneco only. According to ASG, it is undisputed that FMC merged into Tenneco on October 1, 2018. As a result, ASG asserts that Tenneco is liable for FMC's pre-merger breaches of the 1999 Software License Agreement. In terms of damages, ASG maintains that it has been injured as it did not receive the assignment fee for any assignment from FMC to Tenneco under the Agreement.

With respect to Count Three, ASG alleges that FMC, now Counter-Defendant Tenneco, breached the scope of the license by using more sessions than permitted under Exhibits F and G of the Software License Agreement. As such, ASG claims that it lost license and maintenance fees for the excessive usage of the software. In opposition, Counter-Defendants argue that Section 4 of the Agreement does not impose any session-based usage restrictions on the licensee.

Regarding ASG's Count Two, namely Breach of the Implied Duty of Good Faith and Fair Dealing, Counter-Defendants maintain that this claim should be dismissed in light of ASG's position that it does not have a contract with any of the Counter-Defendants. "A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties." *Duration Mun. Fund, L.P. v J.P. Morgan Sec., Inc.*, 77 AD3d 474, 474–

75; 908 NYS 2d 684 (2010). In response, ASG argues that FMC violated its duty of good faith and fair dealing by not disclosing the Tenneco acquisition for ten months, which allowed FMM and FMP to continue using the software. In fact, ASG continued to charge FMC for the software maintenance services because it thought that FMC was still in existence. See the December 28, 2018 Invoice to FMC; Exhibit 4 of the Zabell Documents. Conversely, Mr. Bachleda attests in his Declaration that ASG was aware of the upcoming Tenneco acquisition before it consented to the assignments in August 2018. See Exhibit A of Plaintiffs' Reply.

Next, Counter-Defendants seek dismissal of ASG's Unjust Enrichment claim, namely Count Four, on the ground that FMM and FMP are the mutual Licensees of ASG's express Software License Agreement. It is well settled that "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Hochheiser v. Alin*, 59 Misc. 3d 1207(A); 100 NYS 3d 609 (2018). In contrast, ASG argues that its Unjust Enrichment claim is based on Counter-Defendants' conduct after October 1, 2018 when ASG believes that the 1999 Software License Agreement had terminated.

In their Reply, Counter-Defendants again rely on ASG's claim that the Software License Agreement was not properly assigned to Tenneco and as a result, all counterclaims against Tenneco should fail considering the purportedly void contract. As a final argument, Counter-Defendants make the claim that ASG is not the owner or licensor of the software and consequently, has no right to license the subject software to Plaintiffs or any other customer. This argument will not be considered for its substance since ASG does not have the ability to respond to this new allegation. However, the Court will take note of this claim as yet another question of fact involved in this lawsuit.

As stated previously, the Court finds that there are numerous factual questions involved in this matter. Whether ASG consented to the 2018 “no fee” Assignments, whether there were session-usage restrictions, whether FMM and FMP violated any session usage restrictions, and whether the acquisition by Tenneco terminated the Software License Agreement are all examples of the questions of fact in this matter that cannot be determined by way of summary disposition.

Having reviewed the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to ASG, the Court find that the proffered evidence has established a genuine issue of material fact whereby Counter-Defendants are not entitled to judgment as a matter of law.

Therefore, Plaintiffs’ Motion for Summary Disposition of Counts I and II of the Complaint pursuant to MCR 2.116(C)(10) is DENIED.

It is further ordered that Plaintiffs’ and Counter-Defendant’s Motion for Summary Disposition of Defendant’s Counterclaims pursuant to MCR 2.116(C)(8) and (C)(10) is DENIED.

It is further ordered that Counter-Defendants’ request for attorney fees and costs is DENIED.

IT IS SO ORDERED.

October 13, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander
Circuit Court Judge

ⁱ In Exhibit G of the Software License Agreement, one additional term and condition is as follows: “[i]n the event Licensee divests Federal-Mogul Motorparts Corporation at a future time, Licensee may permanently assign to the divested entity some or all of the Licensed Product(s) under this Agreement for no additional fee payable to ASG other than ongoing annual maintenance payments provided that i) the Licensed Product(s) are covered under an active maintenance term; ii) the divested entity first enters into a new software license agreement with ASG, and iii) Licensee forfeits the rights to the assigned Licensed Product(s) subsequent to divestiture.” See Exhibit 1 of the Zabell Documents.