EFiled: Dec 14 2010 9:56AM EST
Transaction ID 34838310
Case No. 4912-VCS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAGE SOFTWARE, INC., AND SAGE SOFTWARE CANADA LTD.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4912-VCS
CA, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: October 11, 2010
Date Decided: December 14, 2010

Steven L. Caponi, Esquire, Elizabeth A. Sloan, Esquire, BLANK ROME LLP, Wilmington, Delaware, *Attorneys for Plaintiffs*.

David J. Teklits, Esquire, Kevin M. Coen, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware, *Attorneys for Defendant.*

STRINE, Vice Chancellor.

I. Introduction

The plaintiffs, Sage Software, Inc. and Sage Software Canada LTD. (collectively, "Sage") seek a declaration regarding the interpretation of the December 23, 2003 Agreement and Plan of Merger (the "Agreement") under which Sage acquired ACCPAC International, Inc. from the defendant, CA, Inc. (the "Merger"). As part of that Agreement, CA agreed to indemnify Sage for any "Tax Losses" associated with ACCPAC allocable to the period before the Merger closed.[1]

In 2006, the Canada Revenue Agency (the "CRA") concluded a portion of an audit of ACCPAC and proposed an assessment related to underpaid Canadian taxes allocable to the period before the Merger closed. On October 12, 2006, ACCPAC requested Competent Authority relief from the Canadian and United States governments, believing that Canada was proposing to tax it for activity already taxed by the United States. The purpose of a Competent Authority proceeding is to determine the proper allocation of taxes between the two taxing authorities — the CRA and the Internal Revenue Service.

In 2008, during the pendency of the Competent Authority proceeding, a proceeding which could take many years to complete, the CRA informed Sage that it planned to exercise its statutory right to collect 50% of the proposed assessment while the Competent Authority process was ongoing. As a result of the CRA's demand, Sage had to make a payment to the CRA in March 2008 or risk having its assets seized (the

[1] Section 10.3(a) of the Agreement defines "Tax Losses" as "any and all Taxes including without limitation reasonable attorney and other professional fees and expenses." Pl. Op. Br. Ex. 1 (Agreement) § 10.3(a).

"Required Interim Payment").[2] CA refused to reimburse Sage for that payment. In response, Sage brought this suit seeking a declaratory judgment that either: the Agreement required CA to reimburse Sage promptly for payments made to the CRA during the pendency of the Competent Authority process because those payments were "due and payable" to a taxing authority;[3] or the Agreement allows Sage to terminate the Competent Authority process unilaterally, render the CRA's assessment a "final resolution," and thereby trigger CA's obligation to reimburse Sage.

Both parties have moved for summary judgment claiming that the Agreement unambiguously supports their position. The parties agree that CA will be responsible for indemnifying Sage for any ACCPAC Tax Losses allocable to the period before the Merger closed, but they disagree about two distinct, but related issues.

First, the parties disagree about when CA's indemnity payment obligation arises. Sage reads the Agreement as requiring CA to promptly indemnify Sage for the Required

[2] The exact amount of the March 2008 payment is not clear from the record. In its March 11, 2010 letter requesting indemnification from CA, Sage stated that the Required Interim Payment was in the amount of CDN$ 9,971,599.36 as set forth in the letter from the CRA. Pl. Op. Br. Ex. 31 at CA00000116 (Letter from Sage to CA (Mar. 11, 2008)). But, the letter from the CRA that Sage references demands payment in the amount of CDN$ 8,492,528.70. *Id.* at CA00000169. It is clear, however, that the payment was in the CDN$ 8-10 million range. Sage also contends that additional payments have been made to the CRA since CA's initial refusal to indemnify Sage and that Sage has now paid $ 13,843,420 to the CRA that CA has wrongfully refused to indemnify. Pl. Op. Br. Ex. 34 (Letter from Sage to CA (May 22, 2009)). But, this lack of clarity in the record is not material to the current dispute because Sage seeks a declaratory judgment regarding the reading of the Agreement rather than an order requiring CA to make payment to Sage in any specific amount. Similarly, although I focus my analysis on the March 2008 Required Interim Payment, my reasoning and conclusions apply with equal force to any similar payment that Sage has been required to make to Canadian taxing authorities during the pendency of the Competent Authority process. Neither Sage nor CA contends that any payment after the March 2008 Required Interim Payment merits distinct analytical consideration.

[3] Agreement § 10.10.

Interim Payment because that amount was "due and payable."[4] CA, on the other hand, reads the Agreement to require that CA make indemnity payments to Sage only after the Competent Authority process has been completed and the amount owed to the CRA has become "final" in the sense that it "is no longer subject to appeal or other review."[5]

Second, the parties disagree about whether Sage has the right to unilaterally terminate the Competent Authority process. Sage argues that if CA's reading of the Agreement's timing requirement for indemnity payments is correct, the Agreement should be read to allow Sage to terminate the Competent Authority process unilaterally, thereby "finalizing" the amount owed to the CRA and triggering CA's payment obligation. CA, on the other hand, argues that the Agreement prohibits Sage from taking such unilateral action.

In this opinion, I agree with the parties that the Agreement is unambiguous and find that CA's reading is the more sensible way to read the Agreement as a whole. As a result, because the Competent Authority proceeding is a "review" related to an amount owed by CA to Sage under the indemnity provisions of the Agreement, CA is not required to indemnify Sage for the Required Interim Payment until the Competent Authority proceeding has concluded. Additionally, because the Agreement forecloses the possibility of Sage unilaterally withdrawing the Competent Authority request without making a prior proposal regarding settlement of the dispute to CA, CA is entitled to summary judgment on that issue as well.

[4] Compl. ¶ 27.
[5] Agreement § 10.10.

II. Factual Background

These facts are drawn from the parties' briefing and the attached exhibits.

A. Sage's Acquisition Of ACCPAC From CA

Sage, a multinational business[6] with over 13,000 employees in 24 countries, describes itself as the world's leading supplier of business software and services to small and medium sized businesses.[7] CA is also a large multinational software company specializing in information technology management software.[8] On December 23, 2003, Sage acquired ACCPAC, another business software company, from CA under the Agreement. Before the acquisition by Sage, ACCPAC operated as a subsidiary of CA and conducted most of its business in Canada although it also had operations in the United States.[9]

There are two discrete portions of the Agreement that deal with issues related to tax indemnification. Article VIII of the Agreement deals with "Tax Matters" and contains provisions related to the parties' rights and responsibilities in the case of disputes related to Tax Losses allocable to the period before the Merger closed. Article X of the Agreement deals with "Indemnification" and contains provisions creating CA's indemnification obligations and governing the timing of indemnification payments.

---

[6] The parent company of the plaintiffs is Sage Group plc, a British company headquartered in Newcastle Upon Tyne, England.
[7] "An Introduction to Sage," *available at* http://www.investors.sage.com/files/page/54/An_Introduction_to_Sage___2010.pdf.
[8] *See* http://www.ca.com/us/about-us.aspx.
[9] Pl. Op. Br. at 2.

The parties agree that those two articles of the Agreement create a system under which CA is required to indemnify Sage for any tax liability of ACCPAC allocable to the period before the Merger closed. That obligation is most clearly defined in § 10.3 of the Agreement which requires CA to indemnify Sage for Tax Losses above an agreed upon amount[10] associated with "[t]axes of [ACCPAC] and any [ACCPAC] Subsidiary allocable to [the period before the Merger closed]."

B. The CRA Audit And The Disputed Assessments

The Merger closed on March 8, 2004.[11] At the time of the acquisition, the CRA was in the process of conducting a tax audit of ACCPAC because the CRA was concerned that the way that ACCPAC and other CA entities had dealt with intercompany expenses had resulted in an underpayment of taxes to Canada.[12]

In the second half of 2006, the CRA concluded a portion of its audit of ACCPAC related to intercompany pricing. On September 12, 2006, Robert Stockton, the Senior Vice-President of Taxes for Sage, wrote to David S. Keating,[13] the Senior Vice-President of Tax for CA, indicating that Sage had received the preliminary findings from the CRA's audit for the fiscal years ending March 31, 2001 through March 8, 2004.[14]

---

[10] Agreement § 10.3(a)(i). The parties also agree that when negotiating the Agreement they agreed to a purchase price adjustment that the parties referred to as the "Tax Basket." *See* Agreement at A-11 (defining the term "Tax Basket"); Pl. Op. Br. Ex. A (Stockton Dep.) at 29. The Tax Basket contained approximately $10.1 million from which Tax Losses allocable to the period before the Merger closed would be covered before CA's duty to indemnify would arise. Pl. Op. Br. Ex. A (Stockton Dep.) at 29.

[11] Compl. ¶ 1.

[12] Pl. Op. Br. Ex B (Keating Dep.) at 18-20.

[13] David S. Keating is referred to as "Steven Keating" — his middle name — in portions of the record, including the parties' briefing.

[14] Pl. Op. Br. Ex. 7 (Letter from Stockton to Keating (September 12, 2006)).

On October 10, 2006, Keating emailed Stockton and Greg Hawes, the tax manager at Sage who was handling the audit, attaching a draft of a request for Competent Authority assistance.[15] Keating asked Hawes and Stockton to "please review the draft and give me your comments."[16] Two days later, on October 12, 2006, ACCPAC formally requested Competent Authority assistance from the IRS and CRA[17] to "avoid the double taxation caused by the Canadian tax authorities [sic] proposed adjustments on a number of intercompany related items."[18] As the actual taxpayer in question, the request for Competent Authority assistance was officially made by ACCPAC, which was controlled by Sage after the Merger.[19] But the decision to seek Competent Authority was made jointly by Sage and CA.[20]

Competent Authority assistance is a product of a bi-lateral tax treaty between Canada and the United States[21] and is designed to help taxpayers avoid double taxation

---

[15] Pl. Op. Br. Ex. 9 (Email from Keating to Stockton and Hawes (October 10, 2006)).
[16] *Id*.
[17] Coen Aff. Ex. 2 at CA00001324-CA00001325 (Letters from ACCPAC to the IRS and CRA (Oct. 12, 2006)).
[18] *Id.* at CA00001326.
[19] From the time the Merger closed, on March 8, 2004, until September 30, 2007 ACCPAC operated as a wholly-owned subsidiary of Sage. After September 30, 2007, Sage merged ACCPAC into itself, leaving Sage as the successor-in-interest to all of ACCPAC's rights and obligations.
[20] *See, e.g.*, Pl. Op. Br. Ex. B (Keating Dep.) at 28 (stating that the decision to file for Competent Authority was "between me and the tax manager of ACCPAC."); Pl. Op. Br. Ex. A (Stockton Dep.) at 36 ("Sage cooperated with [CA's] decision to file for competent authority. We let – up to [CA] to make that call, and we supported that at that time."); Pl. Op. Br. Ex. C (Hawes Dep.) at 48-49 (stating that the "decision to appeal" was made by "both" CA and Sage, and that there was "definitely correspondence" about the issue); Pl. Op. Br. Ex. 9 (Email from Keaton to Stockton and Hawes (Oct. 10, 2006)) (indicating that CA sent a draft of the Competent Authority request to Sage for comments).
[21] United States – Canada Income Tax Convention art. 26, U.S.-Can., Sept. 26, 1980, 1984 WL 23337.

by the CRA and IRS.[22] The Competent Authority process is not a direct appeal to the CRA or the IRS (as the case may be) of the underlying assessment, but a process under which the two taxing authorities — the CRA and IRS — can negotiate which country should be paid what portion of the taxes in question.[23] In a Competent Authority proceeding where the United States and Canada ultimately agree Canada is correct and that some of the taxes paid to the United States were owed to Canada, for example, there would be a reciprocal refund paid by the IRS of that amount so as to avoid double taxation of the taxpayer.[24] Once the taxpayer chooses to initiate the Competent Authority process, the taxpayer's role is to provide documentation to the taxing authorities and answer any questions that those authorities might have. In the case of a taxpayer, like Sage, who believes it faces double taxation by Canada for activities already taxed by the United States, it is the IRS as the party that would need to refund the taxpayer, and not the taxpayer itself, that advocates the taxpayer's position during the Competent Authority process.[25] The Competent Authority process can be lengthy and take several years to complete.[26]

In this case, after the Competent Authority process had been ongoing for over a year, in January of 2008, the CRA wrote a letter to Sage regarding the "collectability of

[22] *See* http://www.cra-arc.gc.ca/tx/nnrsdnts/cmp/wh-eng.html.
[23] Pl. Op. Br. Ex. B (Keating Dep.) at 33-35.
[24] *Id*.
[25] *Id.* at 37-39.
[26] *Id.* at 44.

50% of the amount" that was currently the subject of the Competent Authority process.[27] In that letter, the CRA referred Sage to two CRA Information Circulars — Information Circular 71-17R5[28] and Information Circular 98-1R2.[29] Those two circulars make two things clear. First, a request for Competent Authority relief does not suspend any obligation that the taxpayer might have to pay taxes to the CRA arising out of a reassessment made by the CRA or to make any payments related to that reassessment that the CRA might require.[30] Second, because Sage was a "large corporation" under Canadian tax law, the CRA could collect one half of the outstanding balance even if the amount remained under dispute.[31]

In February of 2008, the CRA sent a letter to Sage informing Sage that the CRA was exercising its right to collect the Required Interim Payment.[32] In that letter, the CRA

[27] Pl. Op. Br. Ex. 31 at CA00000120 (Letter from CRA to Sage (January 11, 2008)) (emphasis added).
[28] Canada Revenue Agency, Income Tax Information Circular No. 71-17R5, "Guidance on Competent Authority Assistance Under Canada's Tax Conventions," Jan. 1, 2005, *available at* http://www.cra-arc.gc.ca/E/pub/tp/ic71-17r5/ic71-17r5-e.pdf.
[29] Information Circular 98-1R2 was replaced on February 12, 2008 (nine days before the CRA sent its letter to Sage demanding payment) by Information Circular 98-1R3. Canada Revenue Agency, Income Tax Information Circular No. 98-1R3, "Collection Policies," Feb. 12 2008, *available at* http://www.cra-arc.gc.ca/E/pub/tp/ic98-1r3/ic98-1r3-e.pdf ("This document cancels and replaces Information Circular 98-1R2, Collection Policies, dated December 3, 2006 concerning collection policies."). The critical language regarding collection from large corporations, however, is identical in both circulars.
[30] CRA Information Circular No. 71-17R5 ¶ 46 ("An application for competent authority assistance does not suspend the requirement to pay the tax liability or interest thereon, or collection action by the CRA.").
[31] CRA Information Circular No. 71-1R2 ¶ 9.
[32] Coen Aff. Ex. 3 (Letter from CRA to Sage (February 21, 2008)).

described the payment as "an interim payment pending final determination of the amount collectible under legislation."[33]

C. Sage Pays The CRA But CA Refuses To Indemnify Sage For The Required Interim Payment While The Competent Authority Process Is Ongoing

The receipt of the February 21 payment demand from the CRA inspired a series of communications between Sage and CA. Initially, it appeared that CA considered the CRA's request to have triggered its obligation to make an indemnity payment to Sage for the Required Interim Payment.

On February 26, Keating emailed Hawes stating that CA was "talking with our [attorneys] later today as to how we will work the payment."[34] Two days later, Keating again emailed Sage informing it that CA's lawyers were discussing whether Sage should make the payment and request indemnity from CA or whether CA would just directly make the payment that was in excess of the Tax Basket to the CRA.[35] Keating also informed Sage that he had spoken with the CRA and that the CRA was willing to extend the deadline for payment.[36]

Meanwhile, however, there were changes afoot regarding CA's tax department's reading of the Agreement. David Maryles, who had been hired in December 2007 as CA's President of Global Taxation,[37] and was later given Keating's old title of Senior

[33] *Id*.
[34] Pl. Op. Br. Ex. 23 (Email from Keating to Hawes (Feb. 26, 2008)).
[35] Pl. Op. Br. Ex. 24 (Email from Keating to Hawes, Stockton and others (Feb. 28, 2008)).
[36] *Id*.
[37] Pl. Op. Br. Ex. D (Maryles Dep.) at 16.

Vice President of Tax on April 1, 2008,[38] reviewed the Agreement in late February or early March 2008 to evaluate CA's indemnity obligations in light of the CRA's payment demand.[39] Based on that review, Maryles concluded that CA did not have an obligation to indemnify Sage at that time because the Required Interim Payment was not "final" for purposes of the Agreement.[40]

This divergence between Maryles's and Keating's interpretation of the Agreement led to a turnaround in the position CA conveyed to Sage about CA's willingness to indemnify Sage for the Required Interim Payment. On March 11, Sage, apparently at CA's suggestion,[41] officially notified CA of its request for indemnification for the Required Interim Payment as required by the Agreement.[42] In that letter, Sage requested indemnification for the "Tax Losses associated with the Required [Interim] Payment, less the remaining amount of the Tax Basket."[43]

The following day, March 12, Nicholas Kokis, Vice President for Tax of CA, wrote to Keating reminding him to reach out to Sage about the payment and telling him that he and Maryles had spoken with Jim Hodge, the Treasurer of CA, and that they thought that Maryles's reading of the Agreement as requiring payment only after the

---

[38] *Id.* at 17. There is some dispute between the parties as to whether Maryles was Keating's boss when he was hired or only became his boss after April 1, 2008. Maryles contends that he was Keating's superior from the day that he was hired. *Id.* at 19. Sage contests this, claiming that Keating was Maryles's superior until April 1, 2008. Pl. Op. Br. at 9 n.4.
[39] Pl. Op. Br. Ex. D (Maryles Dep.) at 37-38.
[40] *Id.* at 38.
[41] *See* Pl. Op. Br. Ex. 31 (Letter from Sage to CA (March 11, 2008)) ("[CA] requested Sage provide formal written notice with respect to the Assessment and Sage's claim for indemnification for the Required Collection Payment during a conference call on March 10, 2008.").
[42] *Id.*
[43] *Id.*

resolution of the Competent Authority process was correct but that they would make the payment because it was in the "best interests of all parties to maintain this relationship going forward."[44] Later that same day, Keating emailed Stockton to inform him that CA's attorneys were working through the proper way to handle payment but that it would be unlikely that CA would have the necessary approvals to make the payment by the CRA's deadline and that Sage should be prepared to make the payment then.[45]

On March 13, the day after CA's internal email reflecting that payment would be made and Keating's email to Sage suggesting the same, CA sent a letter to Sage informing them that "on the advice of counsel" the Required Interim Payment related to tax obligations of ACCPAC Canada "in respect of which there has not yet been a final resolution for purposes of section 10.10 of the Agreement."[46] CA, therefore, contended that its obligation to indemnify Sage for the Required Interim Payment had not yet arisen.[47] But, in the name of continued mutual goodwill, CA offered to provide security to the CRA in the form of a letter of credit for the amount of the Required Interim Payment in lieu of payment itself if the CRA was amenable to such a solution.[48]

That same day, Sage responded with a letter from its outside counsel reiterating its position that CA was responsible for indemnifying Sage for the Required Interim Payment because § 10.10 of the Agreement requires CA to indemnify Sage for such Tax

[44] Pl. Op. Br. Ex. 25 (Email from Kokis to Keating (March 12, 2008)).
[45] Pl .Op. Br. Ex. 26 (Email from Keating to Stockton (March 12, 2008)).
[46] Coen Aff. Ex. 4 (Letter from CA to Sage (March 13, 2008)).
[47] *Id*.
[48] *Id*.

Losses when the amounts "become due and payable."[49] The result of this flurry of correspondence was that on March 17, 2008, Sage made the Required Interim Payment to the CRA.[50] The CRA was not amenable to CA's idea of providing a letter of credit in lieu of the payments.[51]

D. Sage Files This Lawsuit

For over a year after the Required Interim Payment was made to the CRA, all appeared to be quiet on the indemnification front. It was not until May 2009 that the issue was again raised by Sage. At that time, Marc Loupe, who had joined Sage as CFO in the summer of 2008,[52] sent a letter to his counterpart, Nancy Cooper, the CFO of CA, suggesting that CA pay half of the amount that Sage had been required to pay to the CRA as a result of the Competent Authority process to date. According to Loupe's calculations, that amount was $13,843,420 (using applicable exchange rates).[53] On July 2, 2009, CA responded to Sage's letter through its general counsel. In that letter, CA reiterated its position that no indemnity payments were due, expressed sympathy for Sage's concern and suggested that the two companies discuss hiring an outside advisor to help expedite the Competent Authority process.[54]

After Loupe's May 22 letter and CA's July 2 response, silence again ensued until Sage filed its complaint on September 23, 2009. It does appear, however, that at some

[49] Coen Aff. Ex. 5 (Letter from Sage's counsel to CA (Mar. 13, 2008)).
[50] Compl. Ex. A.
[51] Pl. Op. Br. Ex. B (Keating Dep.) at 106.
[52] Pl. Op. Br. Ex. F (Loupe Dep.) at 9.
[53] Coen Aff. Ex. 6 (Letter from Loupe to Cooper (May 22, 2009)). This amount represented the Required Interim Payment plus other payments that Sage allegedly made to the CRA as a result of the Competent Authority process.
[54] Coen Aff. Ex. 7 (Letter from Diamond to Loupe (Jul. 2, 2009)).

point after the July 2 letter was sent to Sage, CA, "working with Sage," enlisted an accounting firm to assist with the Competent Authority process.[55]

III. Legal Analysis

A. The Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[56] Although the parties both move for summary judgment, they disagree about some factual issues regarding the parties' course of conduct. Specifically, Sage takes issue with CA's assertion that Sage and CA jointly decided to appeal the tax assessment, with CA's assertion that Sage "twice dropped the issue" of indemnification for the payments to the CRA, and with CA's claim to not have appreciated or understood Sage's interpretation of the Agreement.[57]

Whether those disagreements should preclude a grant of summary judgment depends both on whether those disagreements are genuine and relate to material facts. Because parol evidence may not be considered to aid in the interpretation of unambiguous agreements,[58] the parties' differing takes on the factual record only stand as an obstacle to summary judgment if the Agreement is ambiguous. An agreement is not

[55] Pl. Op. Br. Ex. D (Maryles Dep.) at 95.
[56] Ct. Ch. R. 56.
[57] Pl. Ans. Br. at 2.
[58] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc*. 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.").

ambiguous because the parties disagree about its interpretation.[59] The test for ambiguity in an agreement is an objective one. An agreement is ambiguous if the provisions are reasonably or fairly susceptible to more than one meaning.[60]

With these principles in mind, I turn to the consideration of the key provisions of the Agreement — §§ 10.10 and 8.2 — that bear on whether CA had a duty to promptly indemnify Sage for the Required Interim Payment to the CRA.

B. Section 10.10 Of The Agreement Is Unambiguous And Supports CA's Position

Section 10.10 of the Agreement governs the timing of the indemnity payments required under article X of the Agreement. Section 10.10 states that:

> Section 10.10 Payments. Any amounts owed by [CA] to [Sage] under this Article X shall be paid within ten (10) business days notice from [Sage] following the final resolution (which is final in the sense that it is no longer subject to appeal or other review) of any dispute related to such amounts; *provided* that in the case of indemnity payments for a Tax Loss, [CA] shall not be required to make the portion of such payment, if any, that is not yet due and payable to a Tax Authority until ten (10) days before it is so due and payable. Any amounts that are not paid within such ten (10) business day period (or as otherwise set forth herein) shall accrue interest at an annual rate of six percent (6%) per year.[61]

Sage premises its right to reimbursement for the Required Interim Payment solely on its reading of § 10.10.[62]

---

[59] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction.").

[60] *Id.*

[61] Agreement § 10.10 (emphasis in original).

[62] Importantly, Sage eschewed any argument that the Required Interim Payment to the CRA was a cost of an appeal that CA had elected to control under § 8.2 of the Agreement. Sage's briefs and complaint are devoid of any argument that CA's obligation to promptly reimburse Sage for the Required Interim Payment arises independently under § 8.2 of the Agreement as a result of CA exerting control over the Competent Authority process. Although Sage does reference the

1. The Parties' Conflicting Arguments Regarding § 10.10

Sage reads § 10.10 as containing two independent parts. According to Sage, § 10.10 creates two separate categories of indemnification for payment purposes. Category one includes all of CA's indemnity obligations *except* indemnity for Tax Losses. Indemnity payments arising under category one are not required until "final resolution" of any dispute related to the indemnity amount (the "Finality Requirement"). Category two includes only CA's indemnity obligation for Tax Losses. Sage argues that indemnity payments under category two are not subject to the Finality Requirement like payments in category one. Instead, indemnity payments for items falling into category two — i.e., Tax Losses — are due ten days before any payment to a taxing authority must be made, without any requirement that the underlying amount of the Tax Loss be final. In other words, Sage argues that CA must make Tax Loss indemnification payments ten days before Sage has to pay a taxing authority, and that all other indemnification

---

fact that CA must bear the costs of appeals it elects to control under § 8.2, it does so in support of its reading of § 10.10 rather than as an independent basis for requiring CA to make indemnity payments to Sage for the Required Interim Payment while the Competent Authority process is ongoing. *See, e.g.*, Pl. Op. Br. at 14 (arguing that § 8 of the Agreement lends support to Sage's reading of § 10.10 by demonstrating the parties' intent regarding indemnification). Rather than rely on § 8.2, all of Sage's arguments are premised on the centrality of § 10.10 and rely on the notion that the Required Interim Payment is a Tax Loss for which Sage must be indemnified under Article X and that § 10.10's timing requirements should be read to require CA to reimburse Sage for the Required Interim Payment despite the pendency of the Competent Authority process. *See, e.g.*, Compl. ¶ 16 ("The disagreement between the parties regarding CA's tax indemnification obligation arises from their competing interpretations of Section 10.10 of the Agreement."); Compl. ¶¶ 24-25 (basing Sage's right to relief on §§ 10.3 and 10.10 of the Agreement); Pl. Op. Br. at 15 ("Section 10.10 lies at the heart of the parties' dispute."). In fact, at oral argument, it was the court that raised the issue of CA's duty to bear the cost of its own appeal. *Sage Software, Inc. v. CA, Inc.*, C.A. No. 4912-VCS (Sept. 29, 2010) (TRANSCRIPT) at 71. When asked why it did not put forward such an argument, Sage responded that the dispute had "matured past that," and that instead the focus was solely on § 10.10. *Id.*

payments are not due until ten days after the final resolution of any dispute related to the amount due.

Sage offers three primary arguments in support of its reading that § 10.10 contains two distinct categories of indemnification expenses — one comprising all non-Tax Loss indemnification, and one specifically for Tax Loss indemnification — each with its own timing requirements for payment. First, Sage argues that its reading is in line with the spirit of the rest of the Agreement which clearly intends for CA to be responsible ultimately for any ACCPAC Tax Loss allocable to the period before the Merger closed.[63] Second, Sage points to the language of § 10.3 that requires CA to "defend and hold harmless" CA in connection with Tax Losses allocable to the period before the Merger closed.[64] Sage argues that it would run contrary to the idea of holding it harmless to require Sage to make payments to the CRA but not be indemnified for those payments by CA until the resolution of any related disputes. Third, Sage argues that its reading of § 10.10 as containing two independent parts each with its own distinct timing requirement makes sense grammatically because semicolons are used to separate two independent clauses.[65] Sage thus contends that the part of § 10.10 before the semicolon deals exclusively with all indemnity payments other than Tax Losses and that the part after the semicolon beginning with the words "provided that" is its own category governed by only the words after the semicolon. By this argument, Sage contends that the Finality Requirement of the first part of § 10.10 does not apply to Tax Losses.

[63] Pl. Op Br. at 20.
[64] *Id*. at 18.
[65] *Id*. at 19.

By contrast, CA reads § 10.10 to apply the Finality Requirement to *all indemnification payments*. The use of the term "provided that," CA argues, does not accelerate CA's payment obligation but instead delays it further. That is, for a Tax Loss, CA does not have to satisfy its indemnity obligation by making a payment to Sage until the *later* of: 1) ten days after the final resolution of any dispute related to the indemnity amount; or 2) ten days before Sage must make a payment to a taxing authority. Thus, rather than creating two independent clauses, CA reads the words "provided that" as creating an additional condition precedent to its obligation to make indemnity payments in the case of Tax Losses.

CA offers two primary arguments why its reading of § 10.10 is correct. First, CA argues that courts have held that the words "provided that" create a condition precedent and not an exception.[66] Second, CA points to the fact that the second half of § 10.10 is written in the negative and is therefore intended to protect CA from having to make a payment on a tax claim that is final but not yet due and payable to a taxing authority.[67]

2. CA Is Correct That § 10.10 Requires Indemnity Payment For Tax Losses Only After The Final Resolution Of Related Disputes

I conclude that CA's argument that the Finality Requirement set forth in § 10.10 applies to all indemnification payments and that the words after the proviso simply provide additional protection for CA as to Tax Loss indemnification payments is the correct one for the following reasons.

[66] Def. Op. Br. at 14.
[67] *Id.*

As a starting point, the beginning of § 10.10 is a broad framing provision governing "any amounts owed" under Article X of the Agreement. By definition, that covers payments made under § 10.3 — namely, Tax Loss indemnification payments. In fact, in its complaint, Sage claims that CA's indemnity payments to Sage for Sage's payments to the CRA are owed to Sage "pursuant to Section 10.3"[68] Thus, the way the part of § 10.10 before the proviso is written is most sensibly read as setting the earliest time at which CA could be required to make a payment to Sage for *any* indemnification obligation arising under Article X of the Agreement.

Sage's argument that the second half of § 10.10, after the word "provided," creates a distinct category of indemnification obligations for timing purposes and is completely independent of the first half is not a sensible way to read the section as a whole. The words "provided that" normally create a condition.[69] Sage's contention that the semicolon in § 10.10 renders the second portion an independent clause as a matter of grammar is of little moment to this interpretive question. In fact, the cases that Sage itself cites in support of its position demonstrate that just because clauses are independent grammatically does not mean they do not relate to each other. In both *Wilmington Sav.*

[68] Compl. ¶ 11.

[69] 13 WILLISTON ON CONTRACTS § 38:16 (4th ed. 2010) ("Although no particular words are necessary for the existence of a condition, such terms as 'if,' '*provided that*,' 'on condition that,' or some other phrase that conditions performance usually connote an intent for a condition rather than a promise.") (emphasis added); *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, *3 (Del. Ch. Nov. 4, 2003) ("The words 'on condition that' or '*provided that*' or even the two-letter word 'if,' phrases typically used by parties to create conditions, are not present.") (emphasis added); RESTATEMENT (SECOND) OF CONTRACTS § 226 cmt. a ("No particular form of language is necessary to make an event a condition, although such words as 'on condition that,' '*provided that*' and 'if' are often used for this purpose") (emphasis added).

Fund Soc., FSB v. Chillibilly's, Inc.[70] and *Katell v. Morgan Stanley Group, Inc.*,[71] — two cases cited approvingly by Sage — the court interpreted a semicolon as creating an independent clause *that modified* the preceding text.[72] The fact that the second half of § 10.10 is related to the first half and not a totally independent provision is buttressed by the fact that the second half is written in the negative.

In contrast to a provision that gives rise to an independent affirmative obligation regarding the timing of payments for Tax Loss indemnification, the fact that the second half of § 10.10 is written in the negative supports CA's reading that the language *protects* CA from having to indemnify Sage for Tax Losses after those losses are final but before they are payable to a taxing authority. Specifically, § 10.10 provides that "[CA] shall not be required to make the portion of [indemnity payments for a Tax Loss], if any, that is not yet due and payable . . . ."[73] If Sage's reading was correct and the second portion of § 10.10 created a separate affirmative duty for CA to make indemnity payments for Tax Losses when those payments were due regardless of whether they were final, it would make more sense to draft the Agreement as an affirmative command. If the drafters of the Agreement wanted § 10.10 to be read as Sage is now advocating, a more sensible way to draft the second half would have been something akin to: "provided, however, that an

[70] 2005 WL 1654028 (Del. Super. June 10, 2005).
[71] 1993 WL 205033 (Del. Ch. June 8, 1993).
[72] *Wilmington Sav. Fund Soc.*, 2005 WL 1654028 at *1; *Katell*, 1993 WL 205033 at *4 (noting that because the agreement at issue in that case contained a comma, the phrase after the comma modified only the immediately preceding clause and that if the phrase after the comma was meant to modify all the preceding clauses "the drafters could have noted such by using more specific language after subsection (viii), such as 'provided, however ...', a phrase found in similar constructions elsewhere in the Partnership Agreement, or at least used punctuation indicating that the clause was independent of subsection (viii), such as a semicolon.").
[73] Agreement § 10.10.

indemnity payment for any Tax Loss shall be made ten days before any such payment is due and payable to a taxing authority, regardless of whether or not there is a final resolution of any dispute related to such amount." Additionally, the parties could have made the second half more clearly distinct from the first half by using a word such as "notwithstanding," rather than "provided."[74]

At bottom, although Sage is correct in saying that the Agreement makes CA ultimately responsible for indemnifying Sage for the Required Interim Payment, § 10.10 controls when the payments are due. The specific commands of § 10.10 regarding timing control the more general language found elsewhere in the Agreement that creates CA's indemnification obligations.[75] Of course, Sage claims that the lag in payment to it is somehow inconsistent with the basic structure of the indemnity it was offered.[76] But the Merger Agreement is a complex agreement, containing many economic tradeoffs. As a business matter, it is not at all unusual that an indemnitor would only pay when the amount to be paid is completely determined and certain. Indeed, the well known distinction between advancement and ultimate indemnification in corporate law

[74] *See Commercial Union Ins. Co. v M.V. Bremen Express*, 16 F. Supp.2d 403, 407 (S.D.N.Y 1998) (noting that the use of the word "notwithstanding" in a bill of lading indicated that when the subsection after the word "notwithstanding" applied, it superseded the subsection before the word "notwithstanding"); *cf. Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.")

[75] *See* RESTATEMENT (SECOND) OF CONTRACTS § 203 ("specific terms and exact terms are given greater weight than general language.").

[76] *See, e.g.*, Pl. Op. Br. at 14-15.

exemplifies this.[77] Here, the fact that Sage bears the interim costs of non-finality does not shock the conscience, it is the bargained for risk allocation and has a certain efficiency. For instance, if as a result of the Competent Authority process, Sage is found to owe no taxes to Canada, the Canadian government would need to return the Required Interim Payment to Sage. If Sage's reading were correct, it would be CA who would be out the money during the pendency of the Competent Authority process only to have that money possibly returned later.

a. The Required Interim Payment Was Not Final For Purposes Of § 10.10

Even though in its complaint Sage consistently referred to the Required Interim Payment as a payment made during an appeal,[78] in its opening summary judgment brief Sage argues that if CA's reading of § 10.10 is correct, the Required Interim Payment was both "final" and "due and payable."[79] This argument, which Sage reiterated at oral argument, really consists of two related contentions. First, Sage argues that the Required Interim Payment was a "final assessment" because "neither CA nor Sage could appeal the

[77] *Cf. Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212-13 (Del. 2005) ("Although the right to indemnification and advancement are correlative, they are separate and distinct legal actions. The right to advancement is not dependent on the right to indemnification.") (internal citations omitted).

[78] *See, e.g.*, Compl. ¶ 17 ("Defendant now contends that its indemnification obligation does not arise until after a final resolution by Canadian Taxing Authorities of the *tax appeals*.") (emphasis added); Compl. ¶ 22 ("Sage seeks a declaration that it . . . is permitted to withdraw the *current tax appeals*") (emphasis added); Compl. ¶ 26 ("Sage was required, and may be required in the future, by the Canadian Taxing Authorities to pay assessments for taxes attributable to ACCPAC Canada for the Pre-Closing Period *pending the appeal of such assessments*.") (emphasis added); Compl. ¶ 33 ("If Sage were to withdraw its *current appeals* . . .) (emphasis added); Compl. ¶ 34 ("Were Sage to withdraw its *current appeals* . . .) (emphasis added).

[79] Pl. Op. Br. at 21.

assessment through the Canadian system once referred to Competent Authority."[80] Implicit in this argument is the notion that the Competent Authority process is not itself an appeal that implicates the Finality Requirement of § 10.10. Second, Sage argues that because the CRA threatened to seize Sage's assets if the Required Interim Payment was not made, that the payment must have been final in the sense that the amount then due as the Required Interim Payment was certain and not itself subject to question.[81]

Sage's first argument, that the pendency of the Competent Authority process did not prevent the CRA's Required Interim Payment from meeting the Agreement's Finality Requirement, fails for two reasons. First, Sage's complaint itself refers repeatedly to the Competent Authority process as an ongoing appellate procedure. For instance, paragraph fourteen of Sage's complaint states, in reference to the Competent Authority process, that "[b]ecause the resolution of a *tax appeal* involves significant and lengthy negotiations between Canadian and American taxing authorities, a *final resolution of an appeal* can take several years."[82] These are judicial admissions.[83]

---

[80] *Id. See also Sage Software, Inc. v. CA, Inc.*, C.A. No. 4912-VCS (Sept. 29, 2010) (TRANSCRIPT) at 14 (stating that as between the CRA and the taxpayer there was no possibility to appeal the reassessment).

[81] *Id*.

[82] Compl. ¶ 14 (emphasis added); *see also supra* note 78.

[83] *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201-02 (Del. 2008) ("Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g., statements contained in pleadings*, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court) are termed 'judicial admissions' . . . judicial admissions, as distinguished from evidentiary admissions, are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court . . . A tribunal may, however, in the exercise of its discretion, relieve a party from the conclusiveness of its judicial admissions") (emphasis added) (internal citations omitted).

In any event, Sage's argument that the Required Interim Payment was final because the Competent Authority process is not an appeal fails because whether or not the invocation of Competent Authority assistance is an "appeal" for purposes of § 10.10, that assistance is clearly a form of "other review."[84] Section 10.10 defines "final resolution" to mean "final in the sense that it is no longer subject to appeal or other review."[85] If "review" and "appeal" were synonymous then there would be no reason to include both terms in the Agreement.[86] To give effect to the term "other review," it must have meaning distinct from "appeal." Therefore, even if Sage were permitted to revoke its prior admission and make the assertion that the assessments are not technically being "appealed," the assessments are not final because they are still subject to "other review" — namely, the Competent Authority process. In that regard, it is material that the CRA appears to view Competent Authority assistance as analogous to an appeal with regard to its ability to collect fifty percent of the proposed assessment from a "large corporation."[87] In fact, in its letter to Sage demanding payment in 2008, the CRA refers to the amount due as "under appeal," and describes the Required Interim Payment as an "interim payment pending final determination of the amount collectible under legislation."[88]

---

[84] Agreement § 10.10.
[85] *Id*.
[86] *See, e.g., O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Delaware courts have consistently held that an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive.").
[87] CRA Information Circular No. 71-17R5 ¶ 46 ("An application for competent authority assistance does not suspend the requirement to pay the tax liability or interest thereon, or collection action by the CRA.").
[88] Pl. Op. Br. Ex. 21 (Letter from the CRA to Sage (February 21, 2008)).

The CRA's reference to the amount as being "under appeal" raises the related question of whether Sage and CA actually did appeal the amount to the CRA before proceeding to Competent Authority. In Canada, a taxpayer begins an appeal by filing a notice of objection.[89] When a taxpayer plans to seek Competent Authority assistance, the CRA recommends that the taxpayer also file a notice of objection to preserve his right to appeal the underlying assessments to the CRA at the conclusion of the Competent Authority process.[90] There is evidence in the record that the parties did in fact file a notice of objection as suggested by the CRA. In his deposition, Hawes of Sage stated that Sage "not only appealed it, we took it to the next level, Competent Authority . . . ."[91] Similarly, Keating of CA indicated in his deposition that the parties filed a notice of objection and "the formality of dealing with a notice of objection is that they need something internally to say that you — that you want to appeal the issues at hand and to move it – to move it forward to Competent Authority."[92] Keating's assertion is bolstered by an October 29, 2007 email exchange between Keating and Hawes in which they discuss signing and mailing a notice of objection to the CRA assessment.[93] Given the timing of that email, however, what the parties were objecting to is not clear. If, as it appears, the parties reserved their right to later appeal the underlying assessments to the CRA, then that would undermine Sage's contention that the assessments currently under

[89] Pl. Op. Br. Ex. B (Keating Dep.) at 79.
[90] CRA Circular 71-17R5 ¶ 38 ("Taxpayers should protect their rights of appeal by filing a Notice of Objection against a (re)assessment and requesting that the Appeals Branch hold the Notice of Objection in abeyance, pending resolution of the issues by the competent authorities.").
[91] Pl. Op. Br. Ex. C (Hawes Dep.) at 46.
[92] Pl. Op. Br. Ex. B (Keating Dep.) at 79.
[93] Pl. Op. Br. Ex. 17 (Email from Keating to Hawes (October 29, 2007)).

Competent Authority review were final. Regardless, there are sufficient other reasons not to consider the Competent Authority review itself "final" for purposes of the Agreement.

Importantly, when the parenthetical language is removed from § 10.10, payment is not due until "final resolution . . . of *any dispute* related to such amount."[94] In other words, that provision does not require that the dispute be one in which Sage or CA is even involved. The Competent Authority process, as a dispute between the United States and Canada over the allocation of this "amount owed by [CA] to [Sage]" — i.e., the taxes — triggers the provision as well.[95]

Sage's second argument, that the Required Interim Payment was *itself* final regardless of whether the Competent Authority process or any other review was still ongoing because Sage had to make the payment or face the seizure of its assets, also misses the mark. It is certainly true that Sage had to pay the CRA the amount in question because the amount of the Required Indemnity Payment was not itself in dispute. But, there was clearly a dispute related to that amount. By way of analogy, if Sage had received a reassessment from a taxing authority for $1 million in deficiencies allocable to the period before the Merger closed, and chose to appeal that amount, and then the taxing authority required payment of the $1 million dollars as a matter of law pending the appeal, there would be little question that there was a dispute *related* to the payment of the $1 million dollars even though it would not be disputed that $1 million was required to be paid immediately. In other words, if Sage's contention was correct, and the fact

[94] Agreement § 10.10 (emphasis added).
[95] *Id.*

that there was no dispute as to the amount Sage was required to pay to the CRA during the pendency of the Competent Authority process rendered that interim amount "final" for purposes of the Agreement, the Agreement's Finality Requirement would be of little utility. Barring some sort of clerical error at the CRA, there could never be any dispute as to the amount that the CRA was asking to collect as an interim payment, but that does not change the reality that there would be an ongoing dispute related to that amount, just as the Agreement envisions and CA suggests.

In this case, the amount that Sage was required to pay to the CRA was not itself disputed. But, the Competent Authority process was related to that amount in the sense that it would ultimately determine if more money would need to be paid to the CRA or if the CRA would need to return a portion of the Required Interim Payment to Sage.[96]

3. CA Is Entitled To Summary Judgment On Count I

In Count I, Sage asks for a declaratory judgment that under § 10.10 of the Agreement, CA is required to indemnify Sage "at the time when payment is due, and *not* upon final resolution of a tax appeal."[97] Because the Agreement supports the opposite conclusion — namely, that CA's tax indemnity obligation arises after final resolution but in no case until 10 days before payment is due — CA is entitled to summary judgment.

[96] *See, e.g., Lillis v. AT&T Corp.*, 904 A.2d 325, 331 (Del. Ch. 2006) (noting that terms such as "relating to" are "paradigmatically broad terms").
[97] Compl. ¶ 28 (emphasis in original).

C. CA Is Entitled To Summary Judgment On Count II Because The Agreement Forbids Sage From Unilaterally Abandoning The Competent Authority Process

In Count II of its complaint, Sage seeks a declaratory judgment that the Agreement permits Sage to terminate the Competent Authority proceeding unilaterally if CA's indemnification obligation does not arise until the conclusion of that process.[98] In other words, Sage seeks the ability to withdraw from the Competent Authority process and "finalize" the amount due to the CRA, thereby triggering CA's indemnity obligation.[99]

This argument seems to have its origins in regret. Sage did not make the argument in its complaint or briefs that CA elected to control the Competent Authority process thereby triggering a separate obligation to reimburse Sage for the Required Interim Payment under § 8.2 of the Agreement.[100] The reason for that seems clear. If Sage had decided that it had no interest in or business purpose for challenging the CRA's proposed assessment,[101] and CA wished to pursue Competent Authority relief despite Sage's refusal, then CA may have been put in a position where it had to elect to control the Competent Authority process under § 8.2 of the Agreement. If CA made such an election, it would have the duty to bear any costs associated with resolution of the

[98] Pl. Op. Br. at 22.
[99] *Id.* at 22-23.
[100] *See supra* note 62.
[101] Sage contends that there was no business reason for Sage to pursue the Competent Authority process because ACCPAC's accounting practices that were in question are no longer used by Sage. Pl. Op. Br. Ex. A (Stockton Dep.) at 37. But, the fact remains that "Sage cooperated with [CA]'s decision to file for competent authority" and has jointly worked to provide the IRS data to help the IRS rebut the CRA's position during the Competent Authority process. *Id.* at 36, 57. Whatever Sage's reason for jointly pursuing Competent Authority relief — whether it was a desire to maintain a good relationship with CA, or the value the precedent might have for Sage going forward — there is no indication in the record that Sage forced CA's hand by indicating that it had no desire for further review and requiring CA to exercise its right under § 8.2 of the Agreement to elect to control the Competent Authority process.

Competent Authority process.[102] Arguably, this would have included the Required Interim Payment. But Sage did not go down that road. There is nothing in the record that suggests that CA elected to control the Competent Authority process under § 8.2(b).[103] That is, this is not a situation where *only* CA chose to appeal, properly elected to control that appeal under the Agreement by providing timely written notice to Sage, and then refused to pay the attendant costs to Sage. Instead, the record suggests that the decision to initiate the Competent Authority process was jointly made.[104]

---

[102] Agreement § 8.2(b) ("[CA] may elect to control the conduct of such Tax Claim or portion of any Tax Audit related solely to the Tax Claim, through counsel of [CA]'s own choosing and at [CA]'s own expense.").

[103] Section 8.2(b) requires that "[i]f [CA] desires to elect to control any such Tax Claim or portion of any Tax Audit related solely to the Tax Claim, [CA] shall within ten (10) business days of receipt of the notice of asserted Tax Claim notify [Sage] in writing of its intent to do so." Agreement § 8.2(b). It is only after CA "properly elects to control such Tax Claim" that § 8.2(b) would require CA to pay for any associated costs. *Id.* The interesting related question of who must bear the costs of an appeal and when the duty to reimburse Sage for those costs would arise if CA did not elect to control the disposition of a tax dispute but nevertheless participated in the process was not properly raised by the parties and will therefore not be addressed.

[104] At oral argument, Sage argued that the decision to implement the Competent Authority process rested solely with CA. *Sage Software, Inc. v. CA, Inc.*, C.A. No. 4912-VCS (Sept. 29, 2010) (TRANSCRIPT) at 83. That contention is contradicted by all of the record evidence. In support of its position Sage points to an October 29, 2007 email in which CA asks Sage to "put your name at the bottom of the letter and sign." *Id*. (arguing that the October 29, 2007 email from CA to Sage supports Sage's contention that CA controlled the decision to file for Competent Authority assistance); Pl. Op. Br. Ex. 17. The problem for Sage, however, is that what they are being asked to sign is not a request for Competent Authority assistance. That request appears to initially have been sent on October 12, 2006. Coen Aff. Ex. 2 (Letters from ACCPAC to the IRS and CRA requesting Competent Authority assistance (October 12, 2006)). In anticipation of filing for Competent Authority assistance, CA sent Sage a draft of the application on October 10, 2006 and asked for its comments. Pl. Op. Br. Ex. 9 (Email from Keaton to Stockton and Hawes (October 10, 2006)). At that time, Keating, CA's point man on the issue, indicated that he would be working out of ACCPAC's offices to finalize the Competent Authority application with Sage. The deposition testimony further supports the inference that the decision to implement the Competent Authority process was collaborative. Keating testified that the decision to seek Competent Authority assistance was "between me and the tax manager of ACCPAC." Pl. Op. Br. Ex. B (Keating Dep.) at 28. Most important, Sage's own witnesses admit that Sage supported the Competent Authority process. Stockton of Sage

Sage's argument that it should now be allowed unilaterally to terminate the Competent Authority process fails because the Agreement prohibits Sage from withdrawing an appeal or refusing to initiate an appeal without CA's prior written consent. Sage admits as much in its complaint stating that "[e]ven when Defendant [i.e., CA] chooses not to control the disposition of a tax claim, the Plaintiffs are precluded from settling, compromising or conceding any tax claims for which Defendant may be liable without the express written consent of Defendant."[105] This language tracks the language in § 8.2(b) of the Agreement which provides that "neither [Sage], [ACCPAC], nor any [ACCPAC subsidiary] shall settle, compromise, and/or concede any Tax Claim for which [CA] may be liable without the prior written consent of [CA]."[106]

Although CA's consent may not be unreasonably delayed or withheld,[107] Sage has not proposed any resolution of the Competent Authority process to which CA was given the chance to respond. In other words, in addition to not being a situation in which CA has properly elected to control the appeal and is now arguably shirking its payment obligation, this is also not a situation in which Sage has proposed a reasonable alternative to the Competent Authority process to which CA has been given a chance to consent and has refused to do so. Sage might not like that the Agreement requires them to

---

testified that "Sage cooperated with [Keating of CA's] decision to file for competent authority. We let – up to [Keating] to make that call, *and we supported that at that time*." Pl. Op. Br. Ex. A (Stockton Dep.) at 36 (emphasis added). Likewise, Hawes of Sage testified that the "decision to appeal" was made by "both" CA and Sage, and that there was "definitely correspondence" about the issue. Pl. Op. Br. Ex. C (Hawes Dep.) at 48-49.

[105] Compl. ¶ 12.

[106] Agreement § 8.2(b).

[107] *Id*.

temporarily bear the costs of pursuing a Competent Authority process which they do not have the unilateral authority to terminate, but the terms of the Agreement are clear.

Because the unambiguous language of § 8.2(b) forecloses the possibility of Sage unilaterally terminating the Competent Authority proceeding before presenting CA with a resolution proposal for it to accept or reject, CA is entitled to summary judgment on Count II. I refuse to permit Sage to bypass this contractual process through premature judicial involvement.

D. Reformation Is Not A Proper Remedy

In its opening brief, Sage contends for the first time that the Agreement should be reformed in light of the parties' course of conduct to require CA to indemnify Sage when payment is due to a taxing authority.[108] In order for the Agreement to be reformed Sage must demonstrate two things. First, it must show that either: 1) the parties were both mistaken as to a material portion of the Agreement; or 2) Sage was mistaken about a material portion of the Agreement and that CA knew of Sage's mistake but remained silent.[109] Second, Sage must show that the parties came to a "specific prior understanding that differed materially from the written agreement."[110]

Sage did not plead any facts in its complaint or point to any facts in the summary judgment record that suggest either one of these two requirements is met in this case, and its claim for reformation therefore fails.

[108] Pl. Op. Br. at 26-27.
[109] *Cerberus Int'l , Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002).
[110] *Id.* at 1151-52.

IV. Conclusion

For all of these reasons, Sage's motion for summary judgment is DENIED and CA's motion for summary judgment is GRANTED. This case is dismissed, each side to bear its own costs. IT IS SO ORDERED.