

Osprey Partners, LLC v Bank of N.Y. Mellon Corp.
2013 NY Slip Op 33541(U)
March 6, 2013
Supreme Court, New York County
Docket Number: 600862/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

OSPREY PARTNERS, LLC

Plaintiff,

-against-

THE BANK OF NEW YORK MELLON CORPORATION
and MADISON PERSHING LLC,

Defendants.

INDEX NO. 600862/2010

MOTION DATE Feb. 27, 2013

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: March 6, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 49**

-----X
OSPREY PARTNERS, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 600862/2010

Mot. Seq. Nos. 002 -and- 003

**THE BANK OF NEW YORK MELLON
CORPORATION and MADISON PERSHING LLC,**

Defendants,

-----X
O. PETER SHERWOOD, J.:

This is an action commenced by Plaintiff, Osprey Partners, LLC (“Osprey”), an Illinois limited liability company, against Defendants, Bank of New York Mellon Corporation (“BNY”), a Delaware corporation, and Madison Pershing LLC, now known as Pershing LLC (“Pershing”), a Delaware limited liability company, to recover monies alleged to be due and owing under a written Asset Purchase Agreement (the “APA”) and a Supplemental Agreement to the APA (“Supplemental Agreement”), pursuant to which BNY acquired from Osprey certain software to perform accounting calculations on investment accounts. The complaint asserts a single cause of action for breach of contract and seeks to recover damages of between \$3,640,435.00 and \$10,120,000.00.

In motion sequence number 002, Osprey moves for summary judgment predicated on its claim that “the negotiated formula for Contingent Payments under the parties’ [APA] requires payment for each account for which the Seller Software is ‘used’ during a Measurement Period (“MP”), if that use increases the MP High Water Mark” (Plaintiff’s Memorandum of Law in Support, p.1).

In a mirror image cross-motion, Defendants cross move for summary judgment dismissing the complaint, claiming that this action is “a baseless attempt to obtain a windfall” (Defendants’ Memorandum of Law in Opp., p. 1) as no ambiguity exists in the APA, the plain meaning of which establishes that no additional payments are due because the software was not “used” within the meaning of the APA.

In motion sequence number 003, Plaintiff makes a motion *in limine* to preclude the testimony of two expert witnesses, Jilian S. Millstein and David Egidi, on the ground that interpretation of the

APA is exclusively for the court as the parties do not claim that the APA is ambiguous and, therefore, extrinsic evidence, such as that offered by expert opinion, is inadmissible. Plaintiff contends that the testimony of Mssrs. Millstein and Egidi would be offered to vary the terms of the APA.

Defendants oppose the motion *in limine* claiming that Osprey's summary judgment motion opens the door for the very testimony it seeks to preclude as it contends in the first instance that the APA is clear and unambiguous, while at the same time relying on extrinsic evidence to support its interpretation of the APA. In any event, Defendants claim such motion is premature. Defendants contend that this motion becomes operative only if the court denies their cross-motion for summary judgment, finding that the APA is ambiguous, as only then would Defendants offer extrinsic evidence.

BACKGROUND

In 1998, Osprey was founded by non-party Jay Whipple to rewrite a software program ("the OSP Software") that performed portfolio accounting and measurement for securities accounts into a more modern programming language (Plaintiff's Rule 19-a Statement ¶ 4)¹. "That software enabled brokers to track positions, to reflect gains and losses, to calculate returns and compare them to indices and other benchmarks, and to report that information to customers or advisors" (Defendants' Rule 19-a Statement ¶ 1; *see also* Plaintiff's Rule 19-a Statement ¶ 31). The software was designed for the managed account industry, which consists of larger accounts managed by professional money managers, as opposed to retail accounts which are generally managed by the account owner. At the time Osprey developed the software, it differentiated between the back office engine and the front office presentation engine, calling the former the "OSP Software" and the latter "Falcon Software".

In or about 2000, Osprey entered into a service relationship with a company known as LFG, Inc., also known as Lockwood Advisors ("Lockwood"), an independent registered advisor that researched money managers and recommended investments for financial advisors of high net worth clients. Osprey ran Lockwood's "back office" operations, part of which consisted of opening and

¹The facts recited here are taken largely from the parties' Rule 19-a Statements and Responsive Rule 19-a Statements.

maintaining accounts through a company called Electronic Managed Account Technologies Inc. (EMAT), a joint venture between Osprey and Lockwood.

In 2003, BNY acquired Lockwood, EMAT and Pershing. Lockwood was placed under Pershing in the corporate structure. After the acquisition, BNY entered into negotiations to acquire the OSP Software from Osprey. On April 28, 2003, BNY and Osprey executed a Term Sheet which provided for BNY to purchase the OSP Software for an upfront payment of \$10 million (Dale Aff. in Support of Cross Motion, Exhibit "11") and payments of up to \$19 million over the five-year-period after closing, consisting of contingent payments of \$20 for each account "processed using Osprey software by BNY, its affiliates or any licensees thereof" (*id.*).

The APA Agreement

On or about September 12, 2003, a first draft of the APA was circulated by BNY's senior in-house counsel, David Egidi. Between September 2003 and April 20, 2004, Osprey and BNY exchanged numerous drafts of the APA. The final APA was executed as of April 19, 2004 (Hutchinson Affirm. in Support of Summary Judgment Motion, Exhibit "R"). The APA provided that it was an integrated agreement governed by New York law.

Section 2.05 of the APA provides that the "Purchase Price" of the OSP Software is equal to the sum of (i) the Signing Payment of \$1,000,000, plus (ii) the Closing Payment of \$9,000,000, plus (iii) the Contingent Payments defined in § 2.06. Section 2.06, titled "Contingent Payments" provides at subsection (a):

(a) The Contingent Payment for the first Measurement Period shall be equal to (x) \$20 times (y) a positive number equal to (i) the aggregate number of accounts for which the Seller Software was used by Buyer, its Affiliates or their licensees on the last day of the Measurement Period (regardless of the date of first use of the Seller Software with respect to such account) minus (ii) 40,000; provided, that an account will be counted once regardless of the number of software products comprising the Seller Software that may be used in connection with such account (for each Measurement Period, the "MP Total Accounts"). For each Measurement Period after the first, the Contingent Payment shall be equal to (q) \$20 times (r) the difference between the MP Total Accounts for such Measurement Period and the MP High Water Mark. If the MP Total Accounts amount for a Measurement Period is less than the then current MP High Water Mark, the Contingent Payment for such Measurement Period shall be equal to zero dollars. The "MP High Water Mark" shall be equal to the highest MP Total Accounts

amount for any Measurement Period prior to the then current Measurement Period. The foregoing payments are referred to individually as a "Contingent Payment" and collectively as the "Contingent Payments". All Contingent Payments will be made by wire transfer of immediately available funds to an account designated in writing by Seller.

For purposes of the APA, "Seller Software" consists of the two software packages, OSP Software and Falcon Software. The reference in section 2.06 (a) to the 40,000 accounts reflects the number of customer accounts that were managed using the OSP Software as of the time the software was acquired.

Section 2.06 (b) sets forth the procedure for BNY to notify Osprey on a quarterly basis of the number of accounts for which the OSP Software was used to perform portfolio accounting by business unit. It provides:

(b) Within 30 calendar days after the end of each Measurement Period, Buyer shall deliver to Seller (i) a statement (each, a "Usage Statement" and, collectively, the "Usage Statements) identifying by business unit the aggregate number of accounts for which the Seller Software was used by Buyer, its Affiliates or their licensees to perform portfolio accounting for such accounts on the last day of such Measurement Period, and (ii) a copy of Buyer's Execustats report dated the last day of such Measurement Period.

Section 2.06 (c) requires Osprey to notify Pershing in writing "in reasonable detail" of any objections to the Usage Statement within 20 days of receipt. If Osprey fails to make a timely objection, "the Usage Statement shall become final and binding".

Notably, the term "used" is not defined in the APA. This term is at the center of the dispute in this litigation.

The Supplemental Agreement

On March 20, 2006, Pershing and Osprey entered into a Supplemental Agreement to the APA providing for Pershing to pay \$5 per account for "Limited Use" of the OSP Software in connection with accounts that were on Pershing's Portfolio Evaluation Services ("PES") system, as opposed to the \$20 per account Contingent Payments that Pershing was paying for "full" use of the OSP Software to perform portfolio accounting pursuant to APA § 2.06. "Limited Use" as defined in Section 3 of the Supplemental Agreement means, as follows:

- account and sector returns;
- contributions and withdrawals;
- accruals;
- beginning and ending market value; and
- reporting on performance data only, including use of the OSP workstation to view performance reports and to research and monitor performance calculations; provided, however, that such use of the OSP workstation may be for internal diagnostic purposes only and shall not include client access.

Pershing Testing of OSP Software

Beginning in 2005 and continuing into 2009, Pershing engaged in intermittent testing of broader uses of the OSP Software to determine whether it could replace the then-current PES system. To that end, Pershing applied the OSP Software to 431,971 PES test accounts in what is known as a “production parallel testing environment.” None of the PES test accounts were reported to Osprey by Pershing in any Usage Statement and no Contingent Payments were made on any of the PES test accounts. The PES were never transitioned to the OSP software in a production environment.

Pershing also modified and tested the OSP Software for potential use with certain iNautix Enterprise Portfolio Management accounts (“iEPM test accounts”). As part of that testing, iEPM test accounts were placed on the OSP Software. These accounts were loaded as part of a Beta test for three broker-dealer clients of Pershing. As part of the Beta testing, Pershing placed 47,072 iEPM test accounts on the OSP software. None of these accounts were reported to Osprey in a Usage Statement and no Contingent Payments were made.

Pershing Erroneous Uploading of Accounts onto OSP Software

During the term of the APA, Pershing erroneously opened account records on the OSP Software for 29,957 inactive accounts known as the “Firm-Id 999 accounts”(the “FCC Accounts”). The accounts had been created not by Pershing, but by Lockwood’s former clearing firm, First Clearing Corporation, and were not held by current Lockwood clients. These accounts were purged from the OSP Software between July 31, 2009 and October 14, 2009. None of these accounts were reported to Osprey in a Usage Statement and no Contingent Payments were made.

September 2009 Usage Statement

On or about September 15, 2009, BNY provided Osprey with a Usage Statement for the Measurement Period ending on July 31, 2009 (the penultimate period under the APA). On

September 23, 2009, Osprey sent Pershing's CEO and Managing Director, Jim Seuffert, a written objection, claiming that the Usage Statements "may have systematically underreported the number of accounts that should be covered under the Contingent Payments or the Limited Use fees" specifically identifying the FCC Accounts and "Other 'Test Accounts'" that had not been included in the accounting (Hutchinson Affirm., Exhibit "U").

Seuffert responded by letter dated October 14, 2009, stating that the 29,757 accounts bearing the internal Firm-Id 999 were legacy accounts not held by current Lockwood clients and were erroneously uploaded onto the OSP Software and subsequently purged. With respect to the test accounts, Seuffert explained that the testing of the OSP Software for additional business units was not "use" within the meaning of the Contingent Payment section of the APA. As to the PES accounts, the OSP Software had been unable to accurately process the PES accounts and never generated any client-facing output. Seuffert explained further that no Contingent Payments were due for testing on the iEPM accounts as the Beta testers were not using OSP Software for their own benefit and were not paying iNautix for such use. Rather, the Beta testers were assisting Pershing by testing the functionality of the OSP Software.

The Present Action

On or about April 23, 2010, Osprey commenced this action claiming that Defendants had underpaid the Contingent Payments due under the APA. Plaintiff argues that the APA "provides Osprey with the right to Contingent Payments triggered by the use of any module of the Software for any account by one of the Defendants" (Complaint ¶ 33). The amounts at issue concern three groups of accounts. Specifically, Osprey claims that depending on the date the FCC Accounts may have been purged, Defendants owed Osprey at least \$539,140 (\$20 times 26,957 accounts) in unpaid Contingent Payments, on the ground that "loading" the FCC accounts onto the database and data aggregation modules of the OSP Software is sufficient use to warrant the Contingent Payments at the rate of \$20 per account and there is no recognized exception for erroneously loaded accounts. With regard to the PES accounts, Plaintiff argues that whether the use of the OSP Software in the "parallel testing environment" was restricted to or exceeded the "Limited Use" as defined by the Supplemental Agreement, Defendants owe Osprey between \$2,159,855 (assuming all Limited Use calculated at 413,971 accounts multiplied by \$5) and \$8,639,420 (assuming all greater than Limited Use calculated at 413,971 accounts multiplied by \$20) in unpaid Contingent Payments. Lastly,

Plaintiff contends that with respect to the iEPM accounts, Defendants owe Osprey at least \$941,440 (47,072 accounts multiplied by \$20) in unpaid Contingent Payments claiming that no exception was provided in the APA for use of the OSP Software consisting of post-closing “external acceptance testing” by third parties to whom Defendants were attempting to market use of the OSP Software for their own commercial advantage. Rather, Plaintiff avers, the APA provided a separate pre-closing testing period during which all free testing of the Software was to occur.

PARTIES’ CONTENTIONS -SUMMARY JUDGMENT MOTION/CROSS MOTION

A. Plaintiff’s Arguments

Plaintiff contends that the APA is clear and unambiguous on its face and is a fully integrated contract that requires payment for any post-closing use of the Seller Software that increases the MP High Water Mark. Plaintiff contends that it is undisputed that “Seller Software” is defined under the APA to mean both “Falcon Software” and “OSP Software” (Plaintiff’s Statement of Undisputed Facts ¶ 93; Defendants’ Response to Statement of Undisputed Facts ¶ 93). Plaintiff maintains that the final version of the APA requires Contingent Payments to be based on both (i) use of a released or production version of the Seller Software relied on by customers and also (ii) use of a “works in progress” version not yet available to customers. Plaintiff argues that if BNY had wanted to limit Contingent Payments to just the production versions of the software available to customers, it should have excluded the “work in progress” version of the software from the APA’s Contingent Payment formula.

In addition, Plaintiff contends that because the APA provides for one pre-closing testing period, no post-closing period of free testing may be implied. Indeed, Plaintiff claims that the APA’s testing provision required the Seller Software to be accepted or rejected by BNY before the closing and did not include any provision for post-closing testing. Plaintiff claims that Defendants protected themselves by negotiating the pre-closing testing regimen under which Osprey would add to the Seller Software certain functionality useful to Lockwood and then the entire package would be tested, with Defendants able to call off the deal if the software failed those tests. Plaintiff further avers that if Defendants wanted to modify the software post-closing, Lockwood could test modified versions of the Seller Software for free because of the way the MP High Water Mark accounting formula works, namely, that Defendants would only pay Osprey once for any account put on the OSP Software no matter how many products comprising the Seller Software the account might use. Thus,

Defendants could have created a parallel testing environment in which the same set of already paid-for Lockwood accounts could be opened simultaneously in both the production and testing versions of the Seller Software and there was no reason to have a negotiated post-closing testing of a modified version of the Seller Software. Plaintiff contends that at the time of the APA, the parties did not contemplate development of the Seller Software outside of Lockwood and the MP High Water Mark accounting formula was tailored to the number of open accounts on the Seller Software as that formula worked for Lockwood's business. Plaintiff contends that it was only when the modified Software was to be tested on new groups of accounts, such as PES and iEPM accounts, that the need for a post-closing testing provision arose.

In addition, Plaintiff states that the term "payment upon first production use" proposed for the Supplemental Agreement was expressly offered as a modification to the APA and infers that the Defendants knew that they needed such modification if they were to delay payment for the PES accounts to the first production use of the modified software. Osprey apparently rejected the proposed amendment. Plaintiff claims that despite not getting the modified payment term it proposed, Defendants elected to proceed with the development of both PES and iEPM accounts which triggered Contingent Payments. Indeed, Plaintiff contends that BNY knew at the time of the Supplemental Agreement that Osprey did not regard the APA as delaying Contingent Payments until first production use. As evidence of such, Plaintiff notes that Osprey agreed in or about August 2005 on a one-time basis to reduce the MP High Water Mark due to 10,000 previously deleted accounts reappearing on the system. Plaintiff claims that it was never aware of Defendants' view that the APA provided for free post-closing testing use.

Plaintiff contends that the MP High Water Mark was designed to provide Defendants with maximum flexibility in how they used the software while ensuring that Osprey would be paid for any net increase in the overall number of accounts using the software. In this respect, Contingent Payments became due only when the MP High Water Mark increased from one Measurement Period to the next. The APA sets a very tight time schedule for settling Contingent Payments at the end of each Measurement Period, to wit, 30 days for Defendants to issue a Usage Statement and 20 days for Osprey to object. Osprey contends that the key to making such tight time period work was its ability to quickly verify each Usage Statement. For this purpose, Osprey designed into the software

an “Execustats” report that showed the entire number of open accounts within the software’s database regardless of the condition of the account and BNY agreed to provide a copy of the Execustats report each time it delivered a Usage Statement.

Alternatively, Osprey maintains that even if BNY’s interpretation of the APA were accepted, BNY breached the covenant of good faith and fair dealing implied in every contract by “affirmatively impairing Osprey’s enjoyment of the benefits of the APA by delaying the production roll-out of both the PES and iEPM projects” (Plaintiff’s Memorandum of Law, p. 20). The PES project was abruptly placed on hold on June 16, 2009 to avoid the Contingent Payments by delaying the roll out until after October 31, 2009. Plaintiff claims that when it executed the Supplemental Agreement it had a reasonable expectation that the OSP Software would be used for the PES accounts in production mode at some time before BNY’s obligation to make Contingent Payments expired.

Plaintiff also claims that Defendants violated the covenant by choosing to shelve the iEPM project on “the doorstep of its success” (*id.* p. 21) thereby destroying Osprey’s rights under the APA even if, as BNY contends, payment was due only on production roll out. Plaintiff contends that Defendants are responsible for Osprey’s lost reasonable expectations and, thus, Osprey is entitled to the Contingent Payments for the PES and iEPM accounts even if BNY’s proposed construction of the APA is credited.

B. Defendants’ Arguments

Defendants contend that Plaintiff’s interpretation of the APA requiring payment for every account that touched the OSP Software, regardless of whether the only thing done is testing to determine whether the software could be used for its intended purpose or erroneous loading onto the OSP Software is strained and illogical. Defendants aver that Osprey has not pointed to provisions of the APA to support its position, but instead repeatedly resorts to extrinsic evidence which is improper on a motion for summary judgment based upon contract.

Defendants maintain that section 2.06 of the APA admits only one interpretation of the term “use”, namely, that the use triggering Contingent Payments requires portfolio accounting to be performed on customer accounts loaded on the OSP Software in a production environment and, therefore, Plaintiff’s claims must be dismissed. Defendants argue that the operative language of section 2.06 of the APA gave Osprey the potential to receive, in addition to the \$10 million up-front payment, up to an additional \$19 million over a five-year period, but only if the software was

actually “used”. This section provides that no Contingent Payment was due on the first 40,000 accounts using the software, which number was included as a “floor” to reflect the actual number of customer accounts already using the OSP Software to perform portfolio accounting at the time the APA was signed. Defendants contends that the fact that the 40,000 accounts were included in the up-front payment, shows that Contingent Payments would only be due to the extent additional customer accounts were loaded onto the OSP Software and portfolio accounting was performed.

Defendants also note that the “Usage Statement” required by section 2.06 (b) of the APA is limited and therefore Contingent Payments are due only to “accounts for which the Seller Software was used . . . *to perform portfolio accounting*” (emphasis added). Defendants further argue that section 2.06 (b) requires Pershing to provide Osprey with two reports each quarter: the Usage Statement, including accounts for which Contingent Payment is required, and a separate Execustats report , which includes additional non-compensable accounts. Defendants argue that if every account opened on the system triggered Contingent Payments there would be no need for a Usage Report. Rather, the only report needed would be the Execustats report.

Defendants also maintain that the parties’ course of conduct supports its interpretation of the APA, confirms that no Contingent Payments are due for test accounts or those loaded in error, and demonstrates that Osprey knew about the testing and erroneous loading, but chose to stay quiet and not object until the end of the five-year earn-out period. In supporting its contention and rebutting Plaintiff’s claims, Defendants depend upon extrinsic evidence.

With respect to the 2005 exchange noted by Osprey between two of Osprey’s owners concerning the account count for the July 31, 2005 Measurement Period and the alleged request to deduct erroneously loaded accounts from the Contingent Payments, Defendants question whether such conversation even occurred, but claim that even if it did, there is no basis under the APA requiring payment for accounts loaded in error.

Concerning the negotiations leading to the Supplemental Agreement, specifically the purported modification, Defendants claim that the proposed modification was limited to the structure of the monetary payment (*e.g.*, lump sum versus per account payment). It did not alter the determination of whether payment would be due. Defendants argue that contrary to Osprey’s assertions, the proposal modification is consistent with Pershing’s reading of section 2.06.

Defendants also dispute that Lockwood's payment for pending accounts and closed accounts undermines Pershing's position as Defendants claim that Lockwood paid for the accounts because they represented real customer accounts on the OSP Software on which portfolio accounting was performed.

Lastly, Defendants note that in a letter dated December 17, 2007 from Lockwood to Osprey, Lockwood explained the difference between the Usage Statement generated for the August - October 2007 Measurement Period and the usage submitted to be paid, stating that it was excluding for Contingent Payment purposes those accounts that were loaded in error and certain accounts that were loaded for testing purposes. Thus, Osprey was on notice of Defendants' position and having failed to object to the removal of the test accounts and those loaded in error in 2007, may not now be advance the position that all accounts loaded on the OSP Software were subject to the Contingent Payments provision of the APA.

Defendants point to other evidence in the record indicating that Osprey was aware from communications with Pershing from November 2008 through May 2009 that testing was being performed on the OSP Software, particularly with respect to PES accounts that were not in production. Yet, Osprey raised no objections until September 2009, the end of the earn-out period. Thus, Defendants claim that the record belies Osprey's claim that it considered testing of the OSP Software sufficient to trigger Contingent Payments. Defendants assert that Plaintiff should not be permitted to claim that "use" under the APA referred to all accounts loaded on the OSP Software without giving notice to Defendants of its position as such position would deprive Defendants of the ability to make considered choices concerning the OSP Software such as discontinuing testing. At a minimum, Defendants contend that the extrinsic evidence raises issues of material fact that preclude the grant of summary judgment.

C. Plaintiff's Opposition to Cross Motion and Reply

Plaintiff responds to Defendants' contentions, asserting that the Seller Software was clearly performing "portfolio accounting" during the production parallel testing of PES accounts and customer Beta testing of iEPM accounts because the software was summarizing and analyzing the actual securities transactions in each customer account to calculate and record performance metrics. However, Defendants' claim that the software had to be running in production mode is not supported by the language of the APA. Osprey requests that the Court exclude all extrinsic evidence and apply

traditional contract construction principles to find that Osprey is entitled to prevail on its claim for breach of contract.

Osprey also contends that “portfolio accounting” was being performed on the three groups of accounts at issue. Referring to various dictionary definitions to determine the meaning of “portfolio” and “accounting”, Plaintiff states that “portfolio accounting” means to summarize, analyze and record the results of securities transactions, as well as to report those results. Plaintiff contends that both the “Falcon Software” and the “OSP Software” perform portfolio accounting functions. Plaintiff argues that contrary to Defendants’ position, none of the dictionary definitions require that a client actually rely upon or pay for an accounting report before “accounting” is said to have been performed. Plaintiff contends that the APA reflects the parties’ agreement that use of the software is sufficient to trigger a Contingent Payment. Thus, Plaintiff argues that “portfolio accounting” cannot be construed to require both the making of the performance calculations and the reporting of them to Defendants’ customers. Thus, construing the APA as Defendants suggest to require “portfolio accounting” does not defeat Plaintiff’s arguments.

Osprey also challenges Defendants’ claim that the requirement that both a Usage Report and an Execustats Report be provided to support every payment calculation requires this court to find that they contain different information so as not to render either report superfluous. Instead, Plaintiff asserts that both reports must contain comparable information to be useful in assisting Osprey to make the correct payment calculation pursuant to APA section 2.06. Osprey can then use the Execustats Report, which is machine generated, to independently verify the Usage Statement, as they both are based upon the growth in the total number of open accounts in the database.

Plaintiff also maintains that APA’s definition of “Falcon Software” and “OSP Software” to include the most current release version as well as “all works in progress” versions of those software programs means that all versions of the software used in the PES and iEPM testing programs fall within the definition of “Seller Software” for purposes of APA’s Contingent Payments formula. Moreover, under various dictionary definitions of “use”, the work in progress versions of the Seller Software used to process the PES and iEPM accounts were clearly being “used” within the meaning of the APA, namely, for purposes of calculating performance metrics for each account based on such accounts real securities data.

Although both Osprey and Defendants appear in agreement that the APA should be construed within its four corners, without any extrinsic evidence, Plaintiff maintains that the facts pre-dating and surrounding execution of the Supplemental Agreement are admissible for the purpose of demonstrating that Defendants were aware of Osprey's understanding of the term "use" in the APA, but that Osprey was not aware of Defendants' contrary understanding. Having chosen to remain silent as to their contrary understanding, Plaintiff contends that Defendants must be bound after the Supplemental Agreement was signed by Osprey's understanding of what type of use triggers Contingent Payments.

DISCUSSION

A. Standard of Review on Summary Judgment

Summary judgment is the procedural equivalent of a trial (*see S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court must deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion, give that party the benefit of every favorable inference (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and deny summary judgment where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d at 338 *see Zuckerman*, 49 NY2d at 557; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]). The party opposing the motion must lay bare its proofs and demonstrate that it has a bona fide defense to the action. If the opposition papers show no real

defense, or at best a shadowy or perfunctory defense, summary judgment may be granted (*see DiSabato v Soffes*, 9 AD2d 297, 300 [1st Dept 1959]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Lopez v WS Distribution, Inc.*, 34 AD3d 759, 760 [2d Dept 2006]).

B. Breach of Contract

To sustain a breach of contract cause of action in New York, Plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff’s performance; (3) defendant’s breach of that agreement; and (4) damages sustained by Plaintiffs as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he 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 terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009][internal citations omitted]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67; *see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). A contract is ambiguous if it is “reasonably susceptible of more than one interpretation” (*Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Here, although both Plaintiff and Defendants rely on extrinsic evidence to support their respective arguments, both agree that the APA contains no ambiguities and, therefore, must be enforced according to its stated terms. In this regard, the parties’ intent must be determined based on the four corners of the APA. Extrinsic evidence of what the parties intended is not admissible.

A review of section 2.06 of the APA reveals that “use” of the Seller Software encompasses all accounts loaded onto the software, including accounts loaded for “testing” purposes, and that all accounts are relevant for purposes of determining Contingent Payments. Section 2.06(a) defines the accounts that should be included to calculate the Contingent Payment. It provides, without

limitation, that “[t]he Contingent Payment ... shall be equal to (x) \$20 times (y) ... (1) *the aggregate number of accounts for which the Seller Software was used* by Buyer, its Affiliates or their licensees ... minus (ii) 40,000” (emphasis added). Section 2.06(b) sets forth a scheme for reporting of usage. It provides that on a quarterly basis, Defendants shall deliver to Plaintiff “(i) a [Usage][S]tatement identifying by business unit the aggregate number of accounts for which the Seller Software was used by Buyer, its Affiliates or their licensees *to perform portfolio accounting for such accounts ...* and (ii) a copy of Buyer’s Executants reports ...” (emphasis added). The reporting provision does not provide for Plaintiff to exclude from reporting either “test” or “error” portfolio accounting performed during the reporting period.

The importance to the parties of agreement to provide full and transparent reporting is made manifest in section 2.06(c) which provides a limited time for Defendants to check usage of the Seller Software and for Plaintiff to raise any objections to Defendants’ calculation of the payments due for the reporting period. Sections 2.06(d) and (e) provide additional limited time periods for (1) negotiating disputes, (2) having a third party neutral resolve any outstanding disputes and (3) payment to be made. By making timely disclosure, Defendants could have questioned whether it should be required to pay for uses resulting from testing or erroneously loading of accounts onto the Seller Software. If Plaintiff refused to make allowances for such uses, Defendants could have continued testing using at no cost accounts for which payment was already made, protested the changes or discontinued use of the Seller Software for new accounts.

Other sections of the APA confirm that testing is not an excluded use. Section 6.06 of the APA makes specific provisions for a pre-closing “Testing Period” during which Defendants were permitted to test the Seller Software using their own test scripts and personnel to determine whether the Seller Software performed in accordance with the documentation and specifications provided by Plaintiff, including, “performance, capacity, end-to-end functionality, initial production use and other testing” (*id.* § 6.06 [c]). After the Testing Period, a 30-day “Correction Period” followed during which Plaintiff was to use its best efforts to correct any errors and Defendants then had fifteen days thereafter to perform testing on such corrections. Defendants were then to notify Plaintiff within ten days of the Final Testing Period that the errors have been corrected or, if errors continued to exist, Defendants were entitled to waive them and proceed to closing, terminate the agreement, or continue

to work on the errors for an agreed upon extension period while reserving the right to terminate the agreement. There is no indication in the record that Defendants sought an extension of the closing date to continue testing of the Seller Software or that they sought to modify the APA to provide for post-closing testing.

MOTION TO PRECLUDE EXPERT TESTIMONY

Regarding Plaintiff's motion *in limine* to preclude certain expert testimony to be offered by Defendants, the decision of the court on the summary judgment motion renders it academic. Even if the court had not granted the motion for summary judgment, the motion *in limine* would have been granted because parol evidence may not be used to clarify, contradict or qualify the provisions of the unambiguous contract (*see, e.g., Gordon and Breach Science Publishers, Inc. v New York Systems Exchange, Inc.*, 267 AD2d 52 [1st Dept 1999]; *Milonas v Public Employment Relations Bd.*, 225 AD2d 57, 65 [3d Dept 1996], *lv denied* 89 NY2d 811 [1997]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment on the cause of action for breach of contract is GRANTED and the cross-motion of Defendants for summary judgment is DENIED; and it is further

ORDERED that the motion *in limine* is DENIED as moot; and it is further

ORDERED that counsel shall appear at Part 49, 60 Centre Street, Courtroom 252, New York, New York on Wednesday, April 24, 2013 at 9:30 AM for a pre-trial conference on the issue of damages.

This constitutes the decision and order of the court.

DATED: March 6, 2013

ENTER,



O. PETER SHERWOOD

J.S.C.