SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART 61**

Justice

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CYPRESS GROUP HOLDINGS, INC.,

Plaintiff,

- v -

ONEX CORPORATION, CYPRESS MANAGER LLC, GARY HARGER, MARY ELLEN HARGER, DAVID J. MANSELL, DAVID R. HIRSCH, BRATTLE STREET INVESTMENTS, L.P., STEVEN KOTLER, 1170821 ONTARIO INC.,1170809 ONTARIO INC.,1170812 ONTARIO INC.,1170698 ONTARIO INC., KYZALEA COMPANY, CYPRESS EXECUTIVE INVESTCO II LTD., 1320976 ONTARIO INC.,ONEX CYPRESS PARTNERS II LLC,3062601 NOVA SCOTIA COMPANY, AMERICAN FARM INVESTMENT CORPORATION, 1301449 ONTARIO INC.,1352536 ONTARIO INC.,1352537 ONTARIO INC.,1376653 ONTARIO INC.,1170819 ONTARIO INC., EHON CANADIAN HOLDINGS LTD (FORMERLY EHON CANADIAN INVESTMENTS LTD.), JOHN TROIANO, and ERIC ROSEN,

Defendants.

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INDEX NO. 653408/2015

DECISION AND ORDER AFTER TRIAL

OSTRAGER, J.:

This action was the subject of a four-day bench trial that took place from March 11 through March 14, 2019. The Court heard testimony from nine live witnesses including plaintiff's damages expert and one witness by deposition designation. Many of the key facts are not in dispute. Specifically, it is undisputed that on July 14, 2014 plaintiff Cypress Group Holdings, Inc. (hereinafter referred to as plaintiff) purchased the Cypress Insurance Holding Group and its subsidiaries ("Cypress") from defendants for approximately $63 million on July 14, 2014. The purchase price was based upon the book value of Cypress, and the plaintiff largely funded the purchase with debt financing which has not been fully repaid. It is also undisputed that the purchase was made pursuant to a March 18, 2014 Stock Purchase Agreement ("SPA") that prohibited defendants from entering into any agreement prior to the closing that modified, amended, or extended a "Material Contract" without the plaintiff's consent. And, it is

undisputed that Cypress' book value was modestly inflated by reason of certain overcharges Cypress had imposed on policyholders in Texas.

It is also undisputed that Cypress had (and plaintiff acquired in connection with the July 14, 2014 purchase) a service contract with MajescoMastek ("Majesco"), a software service provider that performed services relating to insurance policy issuance and administration. Further, it is undisputed that the SPA specifically identified the Majesco service contract as a "Material Contract." Also undisputed is that the Majesco services agreement was amended by a June 24, 2014 agreement captioned the "Third Addendum" that was executed by Cypress' President and CEO, Gary Harger, without the plaintiff's consent. The Third Addendum compromised for $510,000 in service credits a claim that Cypress had against Majesco and also "confirmed" the duration of the Cypress-Majesco relationship. There is no dispute that Majesco drafted both the services agreement and the Third Addendum. Finally, it is undisputed that plaintiff reached a separate settlement with Majesco on February 1, 2016 which terminated the Majesco relationship and provided for a net payment by Majesco to plaintiff while excusing plaintiff's obligation to pay certain termination and service fees.

Plaintiff has asserted a multitude of claims against defendants, all of which are discussed below, but the major dollar claim involves the services agreement between Cypress and Majesco. In the latter connection, the evidence adduced at trial overwhelmingly demonstrated that the Majesco system was a functional disaster for Cypress and, after the closing, the plaintiff. The "Initial Term" of the Cypress-Majesco services agreement, as expressly defined in the Majesco services agreement with Cypress, was February 11, 2011 to February 11, 2016.

Plaintiff claims that the Third Addendum not only adversely compromised claims that Cypress had against Majesco on unreasonable terms, but also extended the duration of the

Cypress-Majesco relationship by 27 months. Defendants, on the other hand, contend that the Third Addendum conferred a benefit on the plaintiff in the form of a $510,000 services credit and that the term of the Cypress-Majesco services agreement, fairly read, was for a term of five years from the first "go live" date of the Majesco system, which defendants claim was May 13, 2013, so that the Third Addendum merely confirmed the end date of the Majesco services agreement. Plaintiff claims that the "go live" date of the Majesco system was actually August 2012 when Cypress began making Application Service Provider ("ASP") payments which introduces further ambiguity into the issue of the initial term of the agreement. Significantly, the term "go live" is not defined in the services agreement.

Defendants contend that even though the plaintiff never saw the Third Addendum until after the closing, the plaintiff waived any claim relating to it because the plaintiff was aware of preliminary documents and discussions relating to what became the Third Addendum. The Court rejects this waiver claim as plaintiff was entitled to rely on the express terms of the SPA which prohibited Cypress from entering into any agreement prior to the closing that modified, amended, or extended a "Material Contract." Prior to trial, the Court found the provisions of the Cypress-Majesco services agreement governing the term of the agreement to be ambiguous and therefore denied defendants' motion for partial summary judgment on the issue of the term of the agreement. For the same reason, the Court subsequently denied plaintiff's motion for summary judgment. As reflected, *infra*, there were also numerous issues of fact relating to plaintiff's "Policy Fee Breach" claim.

Defendants have conceded liability on the "Policy Fee Breach" relating to defendants' liability for inflating the book value of Cypress by reason of the overcharges Cypress imposed on Texas policyholders that were eventually settled by plaintiff on November 20, 2015. Defendants

have conceded liability and tendered to plaintiff $601,000 reflecting the $943,270 amount that was paid as restitution to the Texas Department of Insurance by plaintiff for overcharges through June 30, 2014, as well as additional sums for vendors, legal fees, and defendants' calculation of pre-judgment interest from October 2015 (the date plaintiff notified defendants of the overcharges) through September 30, 2018. The $601,000 tender reflects a $500,000 deductible for which provision is made in the SPA for claims such as the plaintiff's "Policy Fee Breach" claim, provided that the claim does not arise out of deliberate and willful conduct. Defendants dispute plaintiff's additional claims for certain internal costs and lost interest on the financing of the inflated book value. The plaintiff has not accepted defendants' tender, and defendants have not paid the plaintiff the $601,000. The plaintiff also asserts that it is entitled to recover all restitution costs, including sums plaintiff paid in addition to the $943,270 because plaintiff did not discover the overcharges until October 2015 and plaintiff had to pay the Texas Insurance Department restitution in the total amount of $1,089,157. Plaintiff also contends that prejudgment interest should run from at least the date of the closing.

Except for the claim for "internal labor costs" which fails because the salaries and benefits plaintiff paid its employees and overhead incurred in the ordinary course of business did not arise from any breach of the SPA, the Court agrees with the plaintiff's position on the date from which interest should run. The Court disagrees with plaintiff on the principal amount plaintiff should recover, which should be $943,270. The Court finds that there was no credible evidence adduced at trial that these overcharges were deliberate or willful, so the $500,000 reduction made by defendants is appropriate. On the other hand, the book value of Cypress was undoubtedly inflated by the "Policy Fee Breach" by $943,270, and the plaintiff did incur additional interest charges on the inflated book value amount from July 14, 2014 until November

20, 2015. The interest should be calculated at the lowest rate of plaintiff's financing costs. The plaintiff will confer with counsel for defendants to compute the sums in addition to $601,000 due to plaintiff from defendants on the Policy Fee Breach claim and submit a judgment reflecting the proper calculations, including prejudgment interest on the entire sum.

The issues with respect to the Third Addendum are orders of magnitude less complex than both parties have advocated. The Third Addendum provides in relevant part:

> for good and other valuable consideration, ... MajescoMastek and [Cypress] have agreed to amend the [Majesco] Services Agreement in certain respects and enter into this Third Addendum.

The parties therefore agree as follows:

> 3. Commencing the first of July, 2014 and for the following 46 months which is the balance of the Initial Term of five (5) years remaining on the Agreement, MajescoMastek will provide Clients with a services credit of $10,581/month. This amounts to a total services credit of $510,000 over the 47-month period. The end of the Initial Term of the Agreement is May 12, 2018, subject to optional renewal periods as set forth in Section 3(a) of the Agreement. Any outstanding balance owed by MajescoMastek will be forfeited in the event the Agreement is terminated early pursuant to the provisions of the Agreement.
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> 4. No Waiver. Except as expressly set forth herein, *the execution and delivery of this Third Addendum shall in no way affect any of the respective rights, powers or remedies of either party nor constitute a waiver of any provision of the Agreement.* All provisions of the Agreement, including attachments thereto, not addressed by this Third Addendum remain in full force and effect. By signing this Third Addendum each party expressly acknowledges and agrees that this Third Addendum conforms to the requirements for amendments and modifications as set forth in Section 16 of the Agreement. (Emphasis added).

The testimony adduced at trial, and most particularly the testimony of Cypress President and CEO, Gary Harger, established that the Majesco software system was entirely sub-optimal and the subject of numerous complaints from Mr. Harger and Cypress' operational personnel. Mr. Harger was conflicted inasmuch as he was a paid member of the Board of Directors of Majesco as well as a paid consultant to Majesco until August 31, 2014. The former

position held by Harger with Majesco was disclosed to plaintiff; the latter position Harger held with Majesco was not. Mr. Harger also owned 11% of Cypress. Given Harger's fully memorialized disgust with the performance of the expensive and "crippling" Majesco system, there was no justifiable reason for Harger to enter the Third Addendum in June 2014, irrespective of whether the Third Addendum extended the term of the Majesco services agreement. Indeed, the testimony adduced at trial established that Cypress could likely have terminated Majesco for cause in June 2014.

For the avoidance of doubt, the Court found Harger's testimony entirely self-serving and lacking credibility. Harger never sought to share the Third Addendum with the plaintiff and, significantly, the Third Addendum was signed contemporaneously with Harger's attendance at a Majesco board meeting. And, after Harger left Cypress and learned that plaintiff was contemplating the termination of the Majesco services agreement, Harger reminded Majesco about its entitlement to a seven-figure termination fee. The competent evidence adduced at trial established to the Court's satisfaction that the conflicted Harger entered into the Third Addendum because he believed, incorrectly, that the $510,000 in service credits would increase the book value of Cypress and therefore increase the purchase price. This settlement was unreasonably low given the litany of complaints Harger had against Majesco before June 24, 2014. And, manifestly, if Majesco did not believe that there was ambiguity relating to the term of the services agreement there would have been no need for the parties to confirm the duration of the services agreement. From Harger's point of view, he was selling the company and was not concerned with the duration of the period of time the new owners would be subject to the services agreement.

The services agreement provides in relevant part:

> 3. Term and Termination
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> (a) **Initial Term**. The term of this Agreement shall commence on the date hereof [February 11, 2011] and shall continue for a period of five (5) years (the "Initial Term") and at the end of the Initial Term and of each year thereafter, shall automatically renew for additional (1) year periods in accordance with the terms and conditions set forth in Exhibit B, unless terminated as set forth below.

Exhibit B is captioned "Financial Terms" and sets forth various provisions for early termination fees, payment schedules, rate cards and renewal terms. Under the heading "**4. Renewal Term(s)**" one of the bullet points is "Initial Term—5 year of ASP [Application Service Provider] relationship from the first GO-LIVE. Fees to be reviewed after the expiry of Initial term. Increase not to exceed 20% of monthly fee." There is textual support in Section 3(d) of the services agreement for the February 11, 2011 to February 11, 2016 initial term of the agreement. And, the general counsel of Cypress, David Koestner, shared this view of the initial term of the agreement.

Nevertheless, there are two "initial term" definitions. One in bold in the signed services agreement and one contained in section 4 of Exhibit B to the services agreement under the bolded item 4 captioned "Renewal Term." This creates an ambiguity, and the self- serving testimony of the two people who negotiated the agreement (Harger of Cypress and Michael Andrews of Majesco) does not resolve the ambiguity to the Court's satisfaction. The better view, based on the plain text of the Majesco drafted agreement, is that the provisions can be harmonized because Cypress paid Majesco $8 - $10 million in equipment between February 11, 2011 and May 13, 2013 and the "Renewal Terms" could be interpreted to apply in circumstances in which the *Initial Term* is extended. However, for purposes of deciding this case, it is not necessary to resolve any ambiguity.

The Court has already found that Harger improperly entered the Third Addendum for improper purposes. But, the express terms of the Third Addendum provide that the agreement in no way affected "any of the respective rights, powers or remedies of either party nor constitute a waiver of any provision of the Agreement". It is undisputed that the services agreement was terminated by mutual consent prior to the end of the earliest termination date under any reading of the services agreement. Recognizing this to be the case, the Court nevertheless credits so much of the testimony of Joe King, plaintiff's Co-Chief Executive Officer, who testified that but for his (*reasonable*) belief that the Third Addendum extended the services agreement and his (*clearly incorrect*) belief that the Third Addendum compromised all claims that plaintiff had against Cypress, King would have negotiated a more favorable settlement agreement with Majesco than the one he negotiated. The Court is fortified in this conclusion by the fact that Majesco agreed to waive $1,537,000 in termination fees to which it was due and other payments to which it was due while terminating the contract on February 1, 2016 and paying plaintiff a modest sum. King further testified that these same beliefs dictated a slower transition out of the Majesco software than plaintiff desired which resulted in significant damages to plaintiff. While plaintiff's damages relating to the Third Addendum issue cannot be easily quantified, the Court credits King's testimony and finds that plaintiff suffered meaningful damage as a result of the Third Addendum, including damages for pre-June 24, 2014 conduct by Majesco..

Weighing all the testimony and the credibility of the nine witnesses who testified at trial, as well as the documents introduced in evidence, the Court awards plaintiff on its Third Addendum claim the sum of $2,000,000 with pre-judgment interest at the statutory rate of 9% per annum from June 24, 2014 to the date of this decision.

Finally, the SPA makes provision for the award of reasonable attorney's fees for the successful prosecution of indemnification claims, including the only indemnification claims reasonably contemplated by the SPA. In this case, the excellent lawyering done by both parties in their trial and written presentations was wildly out of proportion to the sums the Court has found to be reasonably at issue. The Court taxes Cypress with $1,250,000 in attorney's fees which is approximately half of the legal fees for which recovery is sought after four years of hotly contested litigation. The Court awards no further costs, including no costs for expert fees as plaintiff's expert offered no testimony that meaningfully bore on the outcome of the case.

The parties are directed to settle a judgment reflecting this decision with the understanding that the judgment should be rendered against Onex Corporation, Cypress Manager, LLC ("Onex") as the entity to which all other defendants are members. If this understanding is correct, the claims against all other defendants are dismissed with the further understanding that Onex has the option to tax the LLC members with their proportionate share of the judgment. If this understanding is incorrect, the parties should promptly notify the Court.

Dated: March 28, 2019

Barry R. Ostrager, JSC

BARRY R. OSTRAGER
JSC