STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ROMEO EXPEDITORS INC., a/k/a REI KORTEN, a corporation, and JOSEPH CARETTI, an individual,

Plaintiffs,

vs. Case No. 2013-2609-CK

EMPLOYEES ONLY, INC., a corporation,

Defendant.

and

EMPLOYEES ONLY, INC., a corporation,

Defendant/Counter Plaintiff,

vs.

ROMEO EXPEDITORS INC., a/k/a REI KORTEN, a corporation,

Plaintiff/Counter Defendant.
_____/

OPINION AND ORDER

Defendant Employees Only, Inc. ("Defendant") has filed a motion for partial summary disposition on Count I of Plaintiffs' Complaint, pursuant to MCR 2.116(C)(10). Plaintiffs Romeo Expeditors Inc. ("Plaintiff REI") and Joseph Caretti ("Plaintiff Caretti") in turn cross-filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) and request that summary disposition be granted in their favor.

Facts and Procedural History

On September 27, 2011, Plaintiff REI and Defendant, a professional employment organization ("PEO"), entered into a written Client Services Agreement ("Agreement"). PEOs enter into a co-employment relationship with the contracting company for human resource management and enable the contracting company to obtain favorable rates on employment taxes and workers' compensation insurance premiums in return for an administrative fee. Under the Agreement, Defendant is responsible for paying Plaintiff REI's employees' wages, unemployment taxes, and workers' compensation premiums, and in consideration Plaintiff REI is responsible for paying Defendant a fixed markup on Plaintiff REI's payroll. Plaintiff REI alleges that Plaintiff Caretti, allegedly on behalf of Defendant as a sales agent, made certain oral representations that the Agreement would have Defendant beating a competitor's rates.

The Agreement, under Section 4, further makes reference to, and specifically incorporates, a separate document titled, "Schedule 1 – Client Fee Schedule - 2012" ("Fee Schedule"). Section 4 of the Agreement states:

> The Client [Plaintiff REI] shall pay the fees set forth on Schedule 1 attached hereto from the Effective Date through the termination of this Agreement as provided herein. The fees may or may not represent the actual cost to the Company [Defendant] and may include the cost of miscellaneous administration, filing, reporting and similar costs.

The Fee Schedule lists the marked-up rates to be charged according to job code. The language at the top of the Fee Schedule states:

> The following is the schedule of fees to be charged in connection with the Client Services Agreement between the Company [Defendant] and the Client [Plaintiff REI]. The fees may or may not represent the actual cost to the Company [Defendant] and may include, by way of example, administrative costs, filing, and reporting costs, and such fees are subject to adjustment.

Defendant characterizes this fee as part of a "bundled pricing model," wherein the fees are not disaggregated and specifically itemized, but instead are represented in a single fixed rate. For

instance, as part of the Fee Schedule, the rates provided under the Workers' Compensation heading are listed simply as "Included."

The Agreement further details the parties' obligations to one another and includes, of particular importance to this litigation, the following provisions: a notice of dispute clause, a fee adjustment clause, and a merger clause. The notice of dispute clause, under Section 4A, states that "[i]f the Client [Plaintiff REI] disputes the accuracy of an Invoice for any reason, it shall provide written notice of dispute providing details of any claimed inaccuracy within 48 hours of receipt." The fee adjustment clause, under Section 4D, states that "[t]he Client [Plaintiff REI] acknowledges the charges invoiced by the Company [Defendant] are subject to adjustment based on any of the following occurrences: . . . (iv) an increase or change in applicable tax rates by any taxing authority . . .". Lastly, the merger clause, under Section 12E, titled "Entire Agreement/Modification" states the following:

> This Agreement constitutes the entire Agreement between parties regarding the services to be provided and the allocation of responsibilities and liabilities among the parties and supercedes [sic] and replaces any prior agreements, presentations or discussions, whether oral or written. All attachments and Schedules to this Agreement are incorporated herein by reference and made a part thereof.

Each page of the Agreement was initialed by Plaintiff REI, and the Fee Schedule was also signed by Plaintiff REI. The Agreement went into effect January, 2012 and was renewed for a second term in 2013.

On March 26, 2013, Defendant allegedly approached Plaintiff REI about increasing Defendant's rates in response to an increase in Michigan's unemployment tax rate. In response, Plaintiff REI's financial controller allegedly questioned whether this new rate would only apply up until the relevant wage base was met and was allegedly met with resistance by Defendant and given an unsatisfactory answer. Plaintiff REI then allegedly conducted an investigation into the

charges and upon finding alleged substantial overcharges, stopped submitting its payroll information to Defendant in April, 2013.

On June 27, 2013, Plaintiffs filed a thirteen count complaint against Defendant. Count I, the subject of the instant matter, broadly alleges that Defendant breached the Agreement, and provides, in relevant part:

> That the Defendant[] breached that contract [Agreement] by *inter alia*, arbitrarily, unilaterally, secretly, and in bad faith conducting business in numerous improper manners, including but not limited to: overcharging REI/KORTEN Michigan SUTA fees in contravention to the statutorily limited taxable wages; overcharging REI/KORTEN non-Michigan SUTA fees in contravention to statutorily limited taxable wages; overcharging REI/KORTEN FUTA fees in contravention to the statutorily limited taxable wages; overcharging REI/KORTEN Worker's Compensation Insurance fees; overcharging REI/KORTEN non-taxable FICA benefits; failing to disclose the financial overcharges to Plaintiff; converting the monies paid for the overcharges; and failing to refund or credit Plaintiff for monies converted for the overcharges.

Pls Compl ¶22.

On August 9, 2013, Defendant filed both its answer and a counter complaint. On February 26, 2014, Defendant filed the instant motion for partial summary disposition. On April 1, 2014, Plaintiffs filed a response to Defendant's motion for partial summary disposition and a cross motion for partial summary disposition. On April 18, 2014, Defendant filed its response to Plaintiffs' cross motion for partial summary disposition.

On June 16, 2014, the Court held a hearing in connection with Defendant's motion and Plaintiffs' cross motion. At the conclusion of the hearing, the Court took the matter under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced during the hearing, and is now prepared to render its decision.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court

considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In support of its motion, Defendant contends that the language of the contract unambiguously provides that it will charge a fixed bundled rate, represented as a total markup based on gross wages, and is not restricted to charging only actual costs. Defendant relies on *Downriver Maintenance Corporation v Decker*, unpublished opinion per curiam of the Court of Appeals, issued August 30, 2002 (Docket No. 232875) as further support. Defendant also asserts that the Agreement's merger clause prevents Plaintiff REI from introducing any evidence to contradict the Agreement's allegedly unambiguous language. Additionally, Defendant argues that Plaintiff REI failed to comply with the notice of dispute clause in the Agreement, as a condition precedent to a breach of contract claim, and therefore Plaintiff REI's claims should be barred.

Plaintiff REI responds by contending that the language of the Agreement unambiguously provides that Defendant may only charge actual costs plus an administrative fee. Specifically, Plaintiff REI asserts that the language of the Agreement contemplates "costs" only as those that actually occur in administrating the contract as opposed to administrative fees. Plaintiff REI further contends that Defendant substantially overcharged Plaintiff REI by charging uncapped rates on tax and workers' compensation thereby breaching the Agreement. Stated another way,

by failing to reduce the rates applied once the relevant wage bases were met Defendant overcharged Plaintiff REI and therefore breached the Agreement. Additionally, Plaintiff contends that *Downriver*, *supra* is inapplicable in the instant matter because of the "bundled" pricing model used by Defendant. Plaintiff REI also argues that the notice of dispute clause was complied with, and that in any event failure to comply with the clause does not bar litigation for breach of contract.

Alternatively, Plaintiff REI also argues that the Agreement's language is ambiguous as to charges, thereby creating a genuine issue of material fact. To resolve the alleged ambiguity, Plaintiff REI argues that extrinsic evidence of intent, demonstrated through Plaintiff Caretti's pre-Agreement negotiations with Plaintiff REI, as well as a separate contract from a competing PEO, should be considered by the Court.

"In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In Re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "If the language of the contract is clear and unambiguous, it must be enforced as written[,]" *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012), because "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts Co v Nagel Precision Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

"If the contract language is clear and unambiguous, its meaning is a question of law." *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). "Where a contract is clear and unambiguous, parol evidence cannot be admitted to vary it." *In re Skotzke Estate*, 216 Mich App 247, 252; 548 NW2d 695 (1996). A contract is unambiguous, "however inartfully worded or clumsily arranged" when it "fairly admits but of

one interpretation." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). On the other hand, "[a] contract is said to be ambiguous when its words may reasonably be understood in different ways." *Id.* However, "a court will not create ambiguity where none previously existed." *Haring Charter Twp v Cadillac*, 290 Mich App 728, 731; 811 NW2d 74 (2010).

Under the Agreement, Paragraph 4 provides that "[t]he fees may or may not represent the actual cost to [Defendant] and may include the cost of miscellaneous administration, filing, reporting and similar costs." Defendant contends this language is unambiguous and that it allows Defendant to assess fees without regard to whether costs are incurred. Defendant further contends that this language is representative of the fact that Plaintiff REI agreed to a bundled and fixed pricing model. Plaintiff REI argues, on the other hand, that this language unambiguously restricts Defendant to only assessing fees if costs are incurred. Ostensibly, Plaintiff REI interprets this language to mean that costs are only incurred by Defendant until the relevant wage bases are met; once the caps are met there are no longer any associated costs and Defendant's fixed fee must be reduced to reflect this. Alternatively, Plaintiff REI also argues that this language is ambiguous, thereby making the Agreement's meaning a question of fact and summary disposition at this juncture inappropriate.

The language of the Agreement in this matter is clear: the fees charged may represent the actual costs, but are not restricted to representing the actual costs. Reading the Fee Schedule together with the Agreement, the Court is convinced that there is no other reasonable alternative understanding: Defendant is not limited to charging actual costs. The fact that the contracted rate is fixed also supports this holding. The Court is not persuaded by Plaintiff REI's interpretation that the language of the Agreement restricts Defendant to charging only actual costs, because this

interpretation ignores the plain and ordinary language of the Agreement. There is no language in the Agreement that imposes a mandatory charge of actual costs. The Court finds that it is simply not reasonable to understand the phrase "may or may not" to mean a mandatory "must." The phrase "may or may not" is not the equivalent of "must"; on the contrary, the phrase "may or may not" expresses either a permissive or a probabilistic condition – not a mandatory one. To read the Agreement's language as one of a mandatory restriction would be to essentially rewrite the plain and unambiguous language of the Agreement, and that the Court will not do. *See Smith, supra* at 702 ("[C]ourts may not change or rewrite plain and unambiguous language in a contract under the guise of interpretation because 'the parties must live by the words of their agreement.'") Because the Agreement's language is unambiguous, the Court must enforce the terms as written. *See McCoig Materials, supra*.

Moreover, because the Court finds the Agreement's language unambiguous, the Court cannot accept Plaintiff REI's alternative assertion that the Agreement is ambiguous and create an ambiguity where none previously existed. *Haring Charter Twp, supra*. While Plaintiff REI contends that intent must considered via the parol evidence of Plaintiff Caretti's affidavit concerning his representations that Defendant would "beat" a competitor's prices and a proposed contract from the competitor in question, the Court simply does not have the right "to look to extrinsic testimony to determine [parties'] intent when the words used by them are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998); see also *Gorman v Sable*, 120 Mich App 831, 842; 328 NW2d 119 (1982) ("[W]here a written agreement is clear and unambiguous, parol evidence of prior negotiations may not be admitted to alter or vary the terms of the written agreement.")

In addition, Plaintiff Caretti's representations are also barred by the merger clause in the Agreement that states in pertinent part: "This Agreement constitutes the entire Agreement between parties regarding the services to be provided and the allocation of responsibilities and liabilities among the parties and supercedes [sic] and replaces any prior agreements, presentations or discussions, whether oral or written." Whatever representations Plaintiff Caretti may have made as an alleged sales agent on behalf of Defendant are parol and have no place in the Court's interpretation of the Agreement, nor in the face of the Agreement's merger clause.

Additionally, it is unclear how the proposed contract by competing PEO, "E-Connect", in any way advances Plaintiff REI's argument. The E-Connect contract provided that "[t]he proposed rates will be reduced as applicable wage bases are met" – which is exactly the language that Plaintiff REI would have the Court read into the Agreement. However, the E-Connect contract demonstrates that Plaintiff REI knew exactly what type of language it wanted to be in its contract with Defendant and simply failed to obtain it in the present instance with the Defendant. Whether Plaintiff REI reasonably expected that this language would appear in the Agreement or be read into the Agreement is irrelevant, as a party's reasonable expectations have no application in unambiguous contracts. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003); *see also Raska, supra* ("[T]he expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable.") Again, "[t]his court does not have the right to make a different contract for the parties or look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *Michigan Chandelier Co v Morse*, 297 Mich. 41, 49, 297 N.W. 64 (1941). Ultimately, "[i]t is not the job of this Court to save litigants from their bad bargains or their

failure to read and understand the terms of a contract." *Wells Fargo Bank, NA v Cherryland Mall Ltd P'Ship*, 295 Mich App 99, 126; 812 NW2d 799 (2011).

The Michigan Court of Appeals has previously considered a factually similar case, in the unpublished opinion of *Downriver Maintenance Corp v Decker*, unpublished opinion per curiam of the Court of Appeals, issued August 30, 2002 (Docket No. 232875). Although unpublished opinions of the Court of Appeals are not binding precedent upon this Court, they may "be considered instructive or persuasive." MCR 7.125(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n3; 783 NW2d 133 (2010).

In *Downriver*, the plaintiff corporation ("Downriver") entered into a leased employee management agreement, with the defendant Defined Employee Management ("DEM") in 1996, based initially on an oral agreement between Downriver's owner and DEM's president. *Downriver, supra*, unpub op at 1. DEM would procure, among other benefits, favorable workers' compensation premiums and unemployment tax rates for Downriver at the expense of an administrative fee, much like Defendant contracted to do for Plaintiff REI in the instant matter. *Id.* In 1999, the parties executed a written contract that included reference to a separately attached and incorporated document that provided relevant fees and rates to be charged. *Id.* at 1-2. However, in 2000, Downriver sued DEM alleging that "marked up" charges for workers' compensation insurance and unemployment tax rates constituted both fraud and breach of contract. *Id*. at 2. Like Plaintiff REI, Downriver alleged that the written agreement mandated that only actual costs be charged, and that charging inflated rates constituted a breach of the agreement. *Id.* at 3. The Court of Appeals held that DEM's "marked up" charges did not constitute a breach of contract, because the agreement "never declared that the charged rates would represent only actual costs." *Id.* The Court looked to the contract itself, which required

that Downriver compensate DEM for charges incurred with performing the contract along with the separately attached document of rates to be charged for performance, and concluded that "the unambiguous and reasonable interpretation provides that defendant [DEM] is not limited to charging only actual costs since the relevant rates are included in a separate document." *Id*.

In the instant matter, the Court finds the *Downriver* reasoning persuasive and adopts it. Here, the Agreement referenced and incorporated a separately attached Fee Schedule which set forth the relevant rates to be charged, like the written agreement at issue in *Downriver*. The Court is not persuaded by Plaintiff REI's assertion that *Downriver* is inapplicable because the Fee Schedule does not show exactly what Defendant is charging as a "rate sheet" might. This argument is disingenuous as Plaintiff REI concedes in the very next sentence of its motion that Defendant will charge a fixed marked up percentage according to the Fee Schedule, and the Fee Schedule provides exactly the percentage to be charged according to job code. Thus the unambiguous and reasonable interpretation of the Agreement in conjunction with the Fee Schedule is that Defendant is not limited to charging only actual costs since the relevant rates are included in a separate document. *Downriver, supra*. Therefore, the fixed marked up percentages charged by Defendant does not constitute a breach of contract. *Downriver*, *supra*.

Furthermore, Plaintiff REI failed to comply with the notice of dispute clause under the Agreement, which states that "[i]f the Client [Plaintiff REI] disputes the accuracy of an invoice, it shall provide a written notice of dispute providing details of any claimed inaccuracy within 48 hours of receipt." The Court agrees with Defendant's characterization of this notice of dispute clause as a condition precedent. "A condition precedent is a 'fact or event that the parties intend must take place before there is a right to performance.' If the condition is not satisfied, there is no cause of action for a failure to perform the contract." *Harbor Park Mkt, Inc v Gronda*, 227

Mich App 126, 131; 743 NW2d 585 (2007) (internal citations omitted). Plaintiff REI did not timely dispute the inaccuracy of the challenged invoices, and therefore failed to satisfy the condition precedent to litigation.

Based on the Court's reading of the unambiguous language of the Agreement and the Court's adoption of the *Downriver* rationale, the Court finds that Defendant's conduct does not constitute a breach of contract. As such, Defendant is entitled to partial summary disposition on this breach of contract claim. Additionally, Plaintiff REI's failure to comply with notice of dispute clause also entitles Defendant to partial summary disposition as to this matter.

Conclusion

For the reasons set forth above, Defendant's motion for partial summary disposition pursuant to MCR 2.116(C)(10) is GRANTED. Plaintiffs' cross motion for partial summary disposition pursuant to MCR 2.116(C)(10) is DENIED. This Opinion and Order neither resolves the last pending claim nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: July 15, 2014

JCF/sr

Cc: *via e-mail only*
David K. Pontes, Attorney at Law, dpontes@orlaw.com
James E. Baiers, Attorney at Law, JBaiers@ClarkHill.com
Lawrence M. Scott, Attorney at Law, lscott@orlaw.com
Albert B. Addis, Attorney at Law, aaddis@orlaw.com