STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

AGILITY HEALTH, LLC, as successor to Agility Health, Inc.,

Plaintiff/Counter-Defendant,

vs.

FPCG, LLC, d/b/a Forbes Private Capital Group,

Defendant/Counter-Plaintiff.
_____/

Case No. 13-00830-CKB

HON. CHRISTOPHER P. YATES

ORDER DIRECTING APPLICATION OF THE MICHIGAN RULES PRESCRIBING CALCULATION OF PREJUDGMENT INTEREST

The Court has finished the heavy lifting in this case, but there remains one dispute about the calculation of prejudgment interest. In the wake of the Court's rulings on several significant issues, the parties reached an agreement as to the amount of damages flowing from a breach of contract by Agility Health, LLC ("Agility"), see Stipulation (August 8, 2014), but the parties could not agree as to whether New York or Michigan law governs the calculation of prejudgment interest. Resolution of that issue makes a substantial difference because New York law prescribes a nine-percent interest rate applicable from the date of the breach, whereas Michigan law dictates a much lower interest rate applicable from the filing of the complaint. After careful consideration, the Court concludes that the less-generous Michigan prejudgment-interest rules govern this case.

Agility and FPCG, LLC, d/b/a Forbes Private Capital Group ("Forbes") had the foresight to anticipate nearly every dispute that could arise under their contract. Not surprisingly, they bargained over a choice-of-law provision and ultimately agreed in the engagement letter executed on April 2,

2012, that their contract "shall be governed by and construed in accordance with the laws of the State of New York without regard to the conflict of law principals [sic] thereof." See Defendant/Counter-Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit A (letter agreement dated April 2, 2010, § 12). Michigan law favors the enforcement of contractual choice-of-law provisions, Turcheck v Amerifund Financial, Inc, 272 Mich App 341, 345 (2006), and the parties agree that the choice-of-law provision is enforceable. But Agility asserts that the Court must apply Michigan law to calculate prejudgment interest because the contractual choice-of-law provision only controls issues of substantive law. In Agility's view, the issue regarding prejudgment interest constitutes a matter of procedure, so the Court must apply Michigan law to calculate the interest due.

To be sure, even when a choice-of-law clause requires the Court to apply the substantive laws of another state, the Court "'nevertheless adheres to its own system of formal judicial procedure and remedies.'" See Rubin v Gallagher, 294 Mich 124, 128 (1940). Our Court of Appeals has explained that "the purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages." See Attard v Citizens Ins Co of America, 237 Mich App 311, 319 (1999). Furthermore, our Supreme Court has concluded that prejudgment interest is available as a remedy, rather than as a substantive right, see Denham v Bedford, 407 Mich 517, 530 (1980), and that Michigan law controls the calculation of prejudgment interest. See Mitchell v Reolds Farms Co, 268 Mich 301, 312 (1934) ("Where interest is allowed, not under contract but by way of damages, the rate must be according to the *lex fori*.").

The Court acknowledges that Michigan's application of local law to the measure of recovery despite a contractual choice-of-law clause conflicts with the approach prescribed by section 207 of the Restatement (Second) of Conflict of Laws. See Restatement, Conflict of Laws, 2d, § 207 ("The

measure of recovery for a breach of contract is determined by the local law of the state selected by application of the rules of §§ 187-188."). Beyond that, the Court recognizes that our Supreme Court has adopted the framework of sections 187 and 188 of the Restatement (Second) of Conflict of Laws. Chrysler Corp v Skyline Industrial Services, Inc, 448 Mich 113, 126-127 (1995). But the Michigan appellate courts have yet to adopt the rule proposed in section 207 of the Restatement (Second) of Conflict of Laws. Consequently, binding precedent – no matter how antiquated it may be – obligates the Court to rely upon Michigan law in calculating prejudgment interest.* Accordingly, because the parties have reached an agreement as to the amount of damages resulting from the breach of contract, the Court invites the parties to submit a proposed final judgment that employs Michigan law in the calculation of prejudgment interest.

IT IS SO ORDERED.

Dated: October 10, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

* Admittedly, the position advanced by Forbes reflects the modern view in a world where the parties to contracts often intentionally make choice-of-law determinations in their agreements. But the Court cannot simply disregard a decision of our Supreme Court on the theory that events have overtaken the logic that undergirds our Supreme Court's decision. Such license for the lower courts to take binding precedent into their own hands would wreak havoc on our system.