STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

RES EXHIBIT SERVICES, LLC ,

Plaintiff

-vs- Index No. 2009/13815

TECAN GROUP, LTD., TECAN U.S., INC.,
TECAN TRADING AG,

Defendants

Special Term
February 13, 2014

APPEARANCES

PHILLIPS LYTLE LLP
Chad W. Flansburg, Esq.
Attorneys for Plaintiff

HISCOCK & BARCLAY, LLP
Thomas B. Cronmiller, Esq.
Attorneys for Defendants

DECISION

Rosenbaum, J.

Plaintiff, RES Exhibit Services, LLC, moves for an order granting it summary judgment on liability for breach of the Trade Show Services Contract

pursuant to CPLR 3212; summary judgment on liability for costs or fees of the action, including reasonable attorneys' fees pursuant to Paragraph 16 of the contract; and a resolution Order against Defendants conclusively establishing Defendants' breach of the contract. Plaintiff further seeks a preclusion Order precluding Defendants from introducing any evidence in opposition to Plaintiff's claims and evidence of damages, including the costs for the missing exhibit services reflected in Exhibit GG pursuant to CPLR 3126, and an instruction to the jury at trial that an adverse inference may be drawn against Defendants concerning their failure to disclose documentary evidence of the bills, invoices, contracts, agreement and/or project authorization forms that relate to the trade show services for the sixty trade shows attended by Tecan Group between 2007 and 2011. If the Court does not grant sanctions pursuant to CPLR 3126, Plaintiff seeks a conditional order of default unless Defendants produce to Plaintiff a sworn accounting after conducting a full and complete search of their records that accounts in detail for all North American trade show expenditures of Tecan Group for the 60 trade shows set forth in the Discovery Order, including expenditures for exhibit design and fabrication, property rental, drayage, audio/visual design services, project management, transportation, prep, show management, labor, receiving services, storage, and any other miscellaneous show services set forth in the form PAF used by the parties; and costs and attorneys fees related to this motion for failing to comply with the Discovery Order. If necessary, Plaintiff also seeks to amend the Consent Scheduling Order to permit Defendants additional time to complete documentary discovery and for the parties to conduct depositions. Finally, Plaintiff requests the costs and disbursements of this motion.

Defendants, Tecan Group, Ltd., Tecan U.S., Inc., and Tecan Trading AG, cross move for an order compelling Plaintiff to respond to Defendants' Second Notice for Discovery and Inspection within 10 days, and an order precluding

Plaintiff from offering any evidence at trial and striking the Complaint, pursuant to CPLR 3126, if Plaintiff fails to comply with the Court's Order compelling discovery.

This action stems from a Trade Show Service Contract (the "Agreement") between RES and an entity referred to in the Agreement as "Tecan Group" on or about April 18, 2006. Signing for "Tecan Group" in the agreement is Monica Jenkins, a former employee of Tecan US, Inc., using the title "Marcom." Pursuant to the Agreement, RES contends that it obtained the right to design, fabricate, and supply all exhibits and perform all show site services utilized by Tecan Group for trade shows, conventions and similar events for a period of five years. RES alleges that if Tecan Group wanted to have trade show services provided by a third party during the contract time frame, it had to obtain a Good Faith Estimate (GFE) and provide that GFE to RES in order to allow RES the opportunity to provide a Project Authorization Form (PAF) for the same project. It is alleged that RES then had the right, if it chose, to perform those services at a price no more than 110% of the GFE. Section 3(b) of the Agreement provides:

> If within five years of the date of this contract Tecan Group desires to have like services (as set forth under paragraph 2(a)) provided by a third-party (other than RES), it shall obtain a written Good Faith Estimate (GFE) which shall contain an itemized and detailed description of the specific content of the services to be performed by the third-party, and must provide the GFE to RES so as to allow RES to provide Tecan Group a project Authorization Form (PAF) for the same project. RES will then have the right, if it so desires, to perform such services at a price not more than 110% of the estimate. RES must notify Tecan Group of its intent to exercise this right within ten business days of the receipt of the Written GFE.

Plaintiff contends that Tecan Group failed to use RES for many trade

shows, or to provide RES a GFE prior to contracting with third party trade show vendors for the performance of trade show services at these shows. Defendants argue that Monica Jenkins did not have authority to bind either Tecan Group, Ltd. or Tecan Trading AG, entities Defendants allege are organized under the laws of Switzerland, and that she further did not have authority to bind her employer, Tecan U.S., Inc. Defendants contest RES' allegation that the "Tecan Group" named in the Agreement includes the Suisse entities.

Summary Judgment

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Id. See also, Olisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324 , *citing* Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). A motion for summary judgment may be denied as premature where "facts essential to justify opposition may exist" but are in the control of the other party and discovery has not yet taken place. See CPLR 3212(f); Morris v. Hochman, 296 A.D.2d 481 (2d Dept. 2002).

Tecan Group

Whether a contract is ambiguous is a question of law to be resolved by the Court. See Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995). "'The best evidence of what parties to a written agreement intend is

what they say in their writing.'" Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), *quoting* Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

RES argues that the clear and unambiguous language of the Agreement grants it the exclusive right to design, construct, and supply exhibits for Tecan Group for trade shows, conventions, and similar events for five year from the date of contracting. The Agreement is dated April 18, 2006. According to RES, "Tecan Group," as set forth in the Agreement, is the name commonly used by Defendants to describe Tecan Group, Ltd. and its subsidiaries. Through the Affidavit of James V. Leonardo, RES notes that Tecan Annual Report collectively refers to Tecan Group, Ltd. and its subsidiaries as "Tecan Group" (Plaintiff's

Exhibit B); that "Tecan Group" was used in a Chief Financial Officer's Report to describe the collective company (id.; see also, Exhibit F); that the Tecan website refers to the collective company as "Tecan Group" (id. at Exhibit A); and that press releases use "Tecan Group" to describe the collective company (id. at Exhibit E). Mr. Leonardo contends that based upon his experiences, "Tecan Group" is an assumed name for the collective company. Affidavit of James V. Leonardo, ¶18. The Court notes that exhibits presented in this regard are not authenticated.

Thus, RES argues that the Agreement is unambiguous and also argues the meaning of "Tecan Group" can be derived by resort to extrinsic evidence. Such a resort to extrinsic evidence in an unambiguous document is specifically prohibited by New York law. See Chelsea Piers L.P. v. Hudson River Park Trust, 106 A.D.3d 410 (1st Dept. 2013). While RES in reply contends that the Agreement is unambiguous and that "Tecan Group" is an assumed name used to collectively mean Tecan Group, Ltd. and all of its subsidiaries, the inescapable flaw in that argument is that the evidence of the assumed name is extrinsic evidence that, if the Agreement if truly unambiguous, is inadmissible. See, e.g., Perry v. Edwards, 79 To A.D.3d 1629, 1630 (4th Dept. 2010). "To be entitled to summary judgment, the moving party must establish that its construction of the agreement is the only construction which can fairly be placed thereon." Geurrucci v. School Dist. of City of Niagara Falls, 41 Misc.3d 1217(A) (Sup.Ct. Niagara Co. 2013), *citing* W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d at 162. Where there is an ambiguity, the Court may consult extrinsic evidence to resolve the ambiguity, but "where 'the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact.'" Chen v. Yan, 109 A.D.3d 727, 729 (1st Dept. 2013), *quoting* Amusement Bus. Underwriters v. American Intl. Group, 66 N.Y.2d 878, 880 (1985).

Contrary to RES' contentions, the Court finds the use of "Tecan Group," an entity not defined in the Agreement, to be ambiguous as the term is used in the Agreement. Whereas the proper full name of RES ("RES Exhibit Services, LLC") is used in the opening paragraph of the Agreement, reference to the buyer is simply "Tecan Group," a name which it is uncontroverted does not belong to any party to this action without further specificity. Furthermore, Monica Jenkins signed the Agreement using the title "Marcom" and beneath a blank line where the name of the entity on whose behalf she was signing was intended to be written. Ms. Jenkins was an employee of Tecan US at the time she signed the Agreement. There is no indication before the Court that Plaintiff ever performed any services for the Suisse entities.

On the facts before the Court, considering in particular that the Court must construe ambiguities against the drafter of the Agreement (RES), see Macquarie Holdings (USA) Inc. v. Song, 82 A.D.3d 566, 567 (1st Dept. 2011), summary judgment based upon the language of the Agreement insofar as RES seeks a finding of liability as to Tecan Group collectively to include the Suisse entities (Tecan Group, Ltd. and Tecan Trading AG) is denied. RES chose to insert the name "Tecan Group" into the Agreement despite the fact that it was dealing with Monica Jenkins, an employee of Tecan US.

Tecan US

RES further argues that, at a minimum, Tecan U.S. is a party to the Agreement. The Agreement was signed by an employee of Tecan US, and RES contends that the evidence establishes ratification of the Agreement by a principal of Tecan US. See Plaintiff's Exhibits O and U. The issue of ratification can be properly determined on summary judgment. See Sunseri v. Macro Cellular Partners, 263 A.D.2d 365, 365-66 (1st Dept. 1999). "[R]atification is a question of fact unless the evidence is undisputed and different inferences cannot reasonably be drawn from it." Robinson v. Day, 103 A.D.3d 584, 586

(1st Dept. 2013). See also, Hedeman v. Fairbanks, Morse & Co., 286 N.Y. 240, 248-49 (1941) ("But where no written authority of the agent has been proven, questions of agency and of its nature and scope and of ratification by or estoppel of the principal, if dependent upon contradictory evidence or evidence, though not contradictory or disputed, from which different inferences reasonably may be drawn, are questions of fact to the jury under proper instructions by the court").

Ratification "imputes an agent's conduct to a principal who 'condones those acts and accepts the benefits of them.'" In re Bennett Funding Group, Inc., 336 F.3d 94, 100 (2d Cit. 2003), *quoting* Matter of New York State Med. Transporters Assoc., 160 A.D.2d 710 (2d Dept. 1990). "[R]atification may arise when, after an agent acts beyond its authority, the principal condones those acts and accepts the benefits of them." Id. at 712. "'The act of ratification, whether express or implied, must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language.'" Lipman v. Vebeliunas, 39 A.D.3d 488, 490 (2d Dept. 2007), *quoting* Holm v. C.M.P. Sheet Metal, 89 A.D.2d 229, 233 (4th Dept. 1982).

Plaintiff contends that Exhibits O and U demonstrate that there is no dispute as to ratification. Exhibit O is an exchange of e-mails between David Yauchzee of RES and Mark Hozza, Vice President and General Manager of Tecan US. Mr. Yauchzee sent the first two e-mails:

> Mark,
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> I have not heard back on this. We have to bring closure to any proposed new Amendment(s) by the end of next week (12/5) or we will have no choice but to enforce the original Agreement, which I don't want to have to do. I would ask that Tecan please pay immediate attention to this so we can get our project teams working together on the show planning for ALA

which is less than 60 days out. . .

Mark,

Per my last email today was my deadline. Our attorney will be over later this afternoon. Please advise.

Plaintiff's Exhibit O. Mr. Hozza, on behalf of Tecan US, responded:

David,

I have spoken to our counsel, since we both cannot agree on terms for the amendment, we will keep the original contract in place without any amendments.

Best Regards,
Mark

Id. Exhibit U is another email exchange between Mr. Yauchzee and Mr. Hozza.

Mr. Yauchzee stated:

Mark,

I left you a voice mail on this matter last week as well, but I know you have been traveling. Essentially at this point, as our attorneys and companies can agree to disagree on the boundaries of the contract for Lab Automation, I would like to assess our working future together overall. Again setting Lab Automation disagreement aside for a moment, what does the future hold for the remainder of the US shows for duration of the RES/Tecan contract? Clearly the properties are staying in the US and will be managed from US office for all shows here, which falls under RES' contract jurisdiction.

I believe that Tecan and RES can still work together and possibly even avoid litigation, but I want to be clear that if I cannot demonstrate some positive momentum for our counsel by next week, we are prepared to commence action on the overall past and future unfulfilled shows. . .

Id. at Exhibit U. Mr. Hozza responded:

> David,
>
> At this point, we have no plans for any trade shows that would require your services under the agreement. If and when we do, we will be sure to give you sufficient notice. . .

Id.

The Court agrees with RES. Even assuming the veracity of the contents of Ms. Jenkins' Declaration just for the purposes of this discreet argument, the email communications from Mr. Hozza, Tecan US's Vice President and General Manager, affirmatively ratify the Agreement. The emails reference the RES/Tecan Agreement and Mr. Hozza specifically states that because an amendment cannot be agreed to, "we will keep the original contract in place without any amendment." Id. As there is no indication from either party that there were any other pending contracts between RES and Tecan during this time frame, the only inference is that Mr. Hozza was referring to the Agreement that is the subject of this litigation. Consequently, even if Ms. Jenkins lacked authority,[1] apparent or otherwise, Mr. Hozza ratified the contract between RES and Tecan US.

"[W]here on summary judgment the opposing party fails to submit extrinsic evidence in support of its interpretation of a contract or other instrument, the resolution of any ambiguity in terms is a matter of law for the court. . . ." Desco Vitro Glaze of Schenectady v. Mechanical Constr. Corp., 159 A.D.2d 760, 761-62 (3d Dept. 1990). Defendants submit the Affidavit of Claire Rhodes, Marketing Communications & Products Coordinator of Tecan US, Inc., to outline the parties' course of dealing. Ms. Rhodes states: "In any event, neither Tecan Ltd. nor Tecan AG entered into any contract with the Plaintiff in this matter." Affidavit of Claire Rhodes, ¶4. Ms. Rhodes acknowledges that

[1] An issue the Court need not, and does not, determine as a matter of law.

Tecan US and RES had an arrangement whereby RES handled "trade show services for the four large trade shows attended annually by Tecan US." Id. at ¶6. Ms. Rhodes states that while RES claims Tecan US was required to undertake all trade show activities through RES, company records indicate that such was not the course of dealing between them. Id. at ¶8.

Here, the Agreement contains a merger clause:

> 18. CONSTRUCTION OF AGREEMENT
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> This Agreement constitutes the entire Agreement and understanding of the parties. Unless in writing, signed by both parties, and unless specifically acknowledged by both parties to be an amendment to this Agreement, no other terms and conditions shall be effective. Any language to the contrary notwithstanding, it is understood and agreed between the parties that this Agreement specifically supercedes all terms and conditions set forth on any other documents or papers signed or exchanged between, except as provided in the preceding sentences.

Plaintiff's Exhibit F. Ms. Rhodes' contention that the course of dealing varies the terms of the Agreement is belied by the unambiguous merger clause prohibiting a change in the Agreement except by a writing signed by both parties. Neither of the cases cited by Defendants in support of finding a question of fact based upon course of dealing related to a contract containing a merger clause. See New Moon Shipping Co. v. MAN B&W Diesel AG, 121 F.3d 24, 31 (2d Cir. 1997); Tankers and Tramps Corp. v. Tugs Jane McAllister and Margaret M. McAllister, 358 F.2d 896, 899 (2d Cir. 1966). Reported cases that allow for consideration of course of dealing despite a merger clause are confined to leases and UCC 2-201 cases. See, e.g., TSS-Seedman's, Inc. v. Elota Realty CO., 72 N.Y.2d 1024, 1027 (1988); Big Tree Energy Partners v. Bradford, 219 A.D.2d 27 (3d Dept. 1996). The alleged course of dealing does not raise a question of fact. If a product or service was provided by a third

party to Tecan US, a GFE should have been obtained and provided to RES.

Defendants further contend that even if Tecan US is a party to the contract, there is an issue of fact as to whether the costs allegedly paid to third party trade show service providers are covered by the Agreement. The Court notes that interplay between Sections 3(A) and 3(B) of the Agreement highlights an ambiguity in the Agreement. Section 3(A) states:

> (A) Tecan Group, in consideration of the terms herein grants to RES the exclusive right to design, construct and supply all exhibits utilized by Tecan Group for trade shows, conventions and/or similar events for a period of five years from the date of this contract, except as provided herein. The parties will negotiate in good faith for the price of all such services not expressly provided for in the PAF. . . .

Plaintiff's Exhibit F. Section 3(B),[2] however, only contemplates a GFE in the event that Tecan seeks to use the services of a third party other than RES. Thus, if Tecan US internally, without using any third party sources, supplied the products and services, such action would not be in breach of the Agreement. See, e.g., Affidavit of Cheryl Rhodes, ¶9 ("[T]here are any number of small events for which Tecan US did not utilize the services of RES, or any trade show services company . . . In some circumstances, a Tecan US salesperson would go to such an event carrying a table-top display in how own vehicle which he would set up or take down on his own"). Internal handling of exhibit services by Tecan US does not constitute a breach of the Agreement.

Ms. Rhodes further avers that:

> In and around 2009, a decision was made in Switzerland that all large trade shows would be centrally handled from Switzerland, by Tecan AG. Toward that end, Tecan AG contracted with a European company called Expomobilia for two identical trade

[2] The full text of Section 3(b) is set forth *supra*.

> show displays. Of those two displays, one would be used in Europe, and one in North America. . . .

Id. at ¶12. Defendants argue that Tecan AG was not a party to the contract, was not an authorized agent for Tecan US when it contracted with third party vendors, and that there is an issue of fact as to whether RES was to perform the services for which Tecan AG hired other entities. First, the Court acknowledges that indeed Tecan AG was not a party to the subject Agreement, as discussed *supra*.

On the question of whether Tecan AG was an authorized agent of Tecan US, the Court notes that Tecan US had a contract with RES containing Sections 3 (A & B). The Agreement gave RES the exclusive right (over third parties) to supply all trade show services and required providing RES with a GFE in the event there was a desire to have "like services" performed by a third party. The fact that the larger Tecan corporate entity determined that exhibits would be handled differently from 2009 on did not absolve Tecan US of responsibility under the Agreement with RES. The Agreement remained in effect as there is no provision providing for its termination in such a circumstance. Thus, regardless of whether Tecan AG was an authorized agent of Tecan US, Tecan US required and desired exhibit services which were provided to it, and for which Tecan US paid for those services from it accounts. See Plaintiff's Exhibit II. The services were performed because Tecan US required and desired those services to be performed, and the Agreement grants to exclusive right to conduct those services for Tecan US to RES.

Defendants also contend that the word "services" is not defined by the Agreement, nor is "trade show" or "exhibit," thus creating an ambiguity. Section 3(A) grants RES the "exclusive right to design, construct, and supply all exhibits utilized" by Tecan in trade shows, conventions and/or similar events and further provides an illustrative, but not exhaustive, list of examples of such services. Section 3(A) is broad, inclusive, and unambiguous. As drafted, the

Agreement gives RES a broad and exclusive right to provide all services associated with the design, construction, and supply of exhibits for trade shows, conventions, and/or similar events. As noted *supra*, in the event Tecan US sought to use a third party (other than RES and other than performing the services internally), Tecan US was required to provide RES with a GFE pursuant to Section 3(B).

RES' motion for summary judgment as to liability for breach of the Agreement is granted in part as to Tecan US only as set forth *supra* and is otherwise denied.

Section 16 of the Agreement states:

> 16. ATTORNEYS' FEES
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> In the event it is necessary to take legal action, including arbitration or court action, with respect to any dispute or agreement between the parties, or to collect the outstanding balance of the account, it is mutually agreed that the prevailing party will receive costs or expenses incurred, which includes reasonable attorneys' fees.

Plaintiff's Exhibit F. RES is granted summary judgment as to liability pursuant to Section 16, and the Court adds that any eventual award will take into account the partial denial of the motion for summary judgment, set forth *supra*.

CPLR 3126

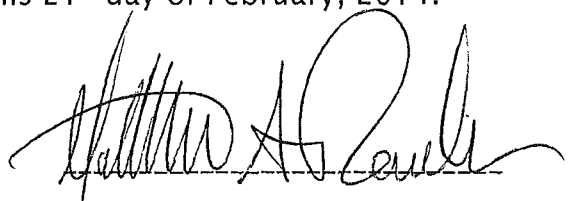
RES seeks a resolution order and other CPLR 3126 sanctions due to Defendants' alleged failure to comply with the discovery order. RES contends that Defendants have defied the Courts discovery order and engaged in gamesmanship and recalcitrant behavior. The motion for sanctions pursuant to CPLR 3126 is denied without prejudice. Given the Court's decision *supra,* Defendants are directed to supplement their responses accordingly by March 30, 2014. Defendants' production should include an accounting of all trade show service expenditures for Tecan US during the relevant time frame. Following

that date, the Court will hold a conference with counsel to discuss the progress and any ongoing problems with discovery. A new Scheduling Order will also be set.

RES' application for costs and fees is denied.

Defendants' also cross move for an order compelling discovery. At Special Term, counsel for RES indicated that the discovery would be sent out to defense counsel promptly. Thereafter, the Court received correspondence from Mr. Flansburg indicating that the requested discovery responses had been provided to defense counsel. As such, Defendants' motion to compel is rendered moot.

Signed at Rochester, New York this 21st day of February, 2014.



Matthew A. Rosenbaum
Supreme Court Justice