COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2014-03029

WHITTIER IPA, INC.,

vs.

STEWARD HEALTH CARE NETWORK, INC.,

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND THE PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

The plaintiff, Whittier IPA, Inc. (Whittier) is an association of independent physicians who practice in the Newburyport area. The defendant, Steward Health Care Network, Inc. (SHCN or the Network) is a network of individual physicians, physician group practices, associations of physicians, and physician-hospital organizations. SHCN negotiates managed care contracts on behalf of its participating physicians and physician groups with third-parties, such as insurance companies, that pay for physician services rendered to patients. In the health care industry these third-parties are often referred to as Payors. Because SHCN acts on behalf of a large number of member physicians, it has the market power to negotiate contracts with Payors more beneficial to its network of physicians than individual physicians or smaller physician groups could negotiate for themselves. SHCN also provides certain other related services for the benefit of its member physicians. For the period January 1, 2012 through August 31, 2014, Whittier was a member of the SHCN network. This case arises out of a dispute between Whittier and SHCN concerning whether SHCN owes Whittier additional payments as a result of funds paid to SHCN by Payors in respect of medical services rendered by SHCN member physicians

during the period that Whittier was a member the SHCN network, but received after Whittier's membership had ended. Whittier has pled its claim against SHCN in five counts: breach of contract (Count I); tortious interference with contractual relations (Count II), breach of the covenant of good faith and fair dealing (Count III); violation of G.L. c. 93A (Count IV); and declaratory relief (Count V). SHCN has moved to dismiss Counts I, II, IV (to the extent it is derivative of Counts I and II) and Count V; but not Count III. Whittier has cross-moved for partial summary judgment on its claim for breach of contract (as to the breach but not the amount of alleged resulting damages) and Count V, which, in effect, seeks a declaration that SHCN breached its contract with Whittier. The question on which these competing motions turns is a classic question of contract interpretation which the court can decide by examining the carefully crafted documents that define the parties' relationship.

FURTHER BACKGROUND

The material and relevant facts necessary to decide this question of contract interpretation are not in dispute.[1]

On October 28, 2011 the parties entered into two interrelated contracts, both to be effective on January 1, 2012: The SHCN/IPA[2] Service Agreement (the Service Agreement) and the Letter Agreement. As is frequently the case in sophisticated contracts of this kind, the Service Agreement begins with a series of recitals, sometimes referred to as "Whereas" clauses. The last of these recitals states:

> WHEREAS, in addition to the terms and conditions set forth in the Agreement, SHCN and IPA further agree that the supplemental terms and conditions set forth in the Letter

[1] Both of the parties, but particularly SHCN, have devoted much attention to "facts" suggesting the motives of the parties in taking the actions that give rise to this litigation and the beneficial value of their respective positions to doctors and the health care industry, generally. The court finds such matters irrelevant to the question of the meaning of plain words used in the parties' contract documents.

[2] Whittier is defined as the "IPA" in the Service Agreement. Accordingly, where that acronym appears in quoted passages from the Service Agreement it means Whittier.

> Agreement, attached hereto as Exhibit I, between SHCN and IPA supplement and control the terms and conditions of this Agreement and, in the case of any difference, addition, clarification or contradiction, supersede the terms and conditions of this Agreement.

Much of the Service Agreement describes the obligations of the participating network physicians on the one hand and SHCN, on the other hand. Section 6 addresses termination. As relevant to this case, it states that either party may terminate the agreement on ninety days written notice to the other. The other Service Agreement provisions relevant to this case are found in the final section of the agreement, Section 8, which is entitled miscellaneous. Section 8.1 addresses potential conflicts between the SHCN's organic documents and reads as follows:

> 8.1. Relationship to Payor Contracts and Policies. The provisions of this Agreement are subject to the terms of any Payor Contract and applicable Policies[3]. In the event of a conflict between this Agreement or the Policies and a Payor Contract, the Payor Contract shall supersede with respect to the conflict. In the event of a conflict between this Agreement and IPA Participating Agreements, the provisions of this Agreement shall supersede with respect to the conflict. In the event of a conflict between this Agreement and the Policies (but not a Payor Contract), the Policies shall supersede with respect to the conflict. In the event of a conflict between IPA Policies and SHCN Policies, SHCN Policies shall supersede with respect to the conflict.

Section 8.3 is an integration clause and also reinforces the primacy of the Letter Agreement over the Service Agreement.

> 8.3. Entire Agreement/Conflict. This Agreement, including the Attachments hereto and the Letter Agreement and joinders thereto, constitutes and expresses the entire agreement and understanding between the parties hereto in reference to all matters herein referred to and supersedes all previous discussions, promises representations, and understanding, whether either oral or written, among the parties. In the event of any conflict between this Agreement and the Letter Agreement, the Letter Agreement shall control as well as with respect to any additions, deletions or supplementation set forth therein.

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[3] Policies are defined in the Services Agreement as follows: "Any agreements, policies, rules, regulations, and/or procedures adopted by SHCN relating to administration of the IPA's, Payor Contracts or agreements with IPA Particpating Providers, including, but not limit to, SHCN' by laws." SHCN has both a national board of directors that sets Policies on a national level and a Massachusetts Regional Division Board that sets Policies for Southern New England (hereafter the SHCN Board). The SHCN Board is comprised of officers of SHCN, representatives of Steward Health Care Networks, LLC and network physcians or their representatives.

The Letter Agreement is itself eight single spaced pages. It begins with the following introductory sentence: "This letter agreement ("Letter Agreement") memorializes agreements between Steward [SHCN] and Whittier that supplement and amend the terms of the [Service] Agreement." Indeed, the use of the term Whittier in the Letter Agreement, as opposed to the generic term, IPA, which could apply to any physician association, suggests that the Service Agreement was at least based on a template that all physician associations that joined the SHCN network would executed and the Letter Agreement memorialized individualized negotiations between Whittier and SHCN.

Of import to the present case is Section 3 of the Letter Agreement entitled: Service Agreement Termination. Part b of this section reads as follows:

> Whittier and Whittier Physicians shall be entitled to a share of any and all infrastructure payments, surplus, deficit, bonus or incentive payments it has been attributed by the attribution methodology determined by the SHCN Board without any penalty on account of the termination of the Service Agreement provide that SHCN receives such payments for Whittier from the Payors. The Parties agree that in applying any such SHCN Board-approved attribution methodology in the event the Service Agreement is terminated, SHC will equitably adjust the settlement of any risk arrangements in which Whittier Physicians have participated so that the Whittier Physicians are not prejudiced as a result of having participated therein for less than a full 12-month period.

The "incentive payments" identified in this Section 3.b refer to the following: Some contracts with Payors establish a fee schedule that Payors will pay directly to the physicians or physician groups for certain medical treatments, while other contracts with Payors establish a fee schedule but also make some of the payments from Payors contingent on the network (and network physicians) meeting certain contractual goals or metrics. This second type of contract is referred to in the industry as a "risk contract." In a risk contract the physicians are at risk for these additional payments (or penalties) if the network does not achieve its goals. Of necessity, any additional payments due the network of physicians will be paid well after the reporting

period closes and its results have been analyzed and compared against the goals and metrics. In the present case, Whittier alleges that SHCN received incentive payments in respect of years 2013 and 2014, but has not paid Whittier its pro rata share.

The Letter Agreement closes with the following statement:

> The Parties acknowledge and agree that the purpose and intent of this Letter Agreement is to supplement and amend the Service Agreement in certain material respects and that where this Letter Agreement is in conflict with the Service Agreement, this Letter Agreement shall be deemed to amend and supersede the relevant terms of the Service Agreement and shall govern the relationship of the Parties.

On June 2, 2014, SHCN sent Whittier written notice that it was terminating the Service Agreement effective August 31, 2014[4], which it was clearly entitled to do under the language of Section 6, thereto, quoted above.

At the time SHCN and Whittier executed the contract documents, there was nothing in any Policy (as defined in the Services Agreement, see n. 3, *supra*) that required an IPA, such as Whittier, to continue to be a member of SHCN to receive an incentive payment that covered a period when the IPA had been a member of SHCN. However, on November 13, 2013, the Massachusetts Board adopted a new Policy that did just that.[5] Relying on this new Policy, the August 31st termination letter stated:

> [P]roviders are only eligible for SHCN distributions if they participate in SHCN for the entire measurement period and continuously thereafter for a period of the earlier of thirteen months or the time of distribution, unless an exception is granted by SHCN. Therefore, without an explicit exception granted by SHCN, pursuant to the distribution Policy, the IPA [Whittier] is ineligible for distributions related to the 2013 and 2014 measurement periods.

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[4] The parties dispute whether SHCN acted in response to Whittier's stating that it was planning to terminate the agreement itself. This dispute is of no consequence to any issue raised by this motion, as the Service Agreement makes clear that either party can terminate with or without cause.

[5] The parties also dispute whether this new Policy was adopted in response to Whittier announcing that it was planning to terminate its membership or simply as part of a general consideration of new policies to govern the Network. Again, the motivation for the new policy, or whether it was generally beneficial to SHCN members, is not relevant to the issues raised by the pending cross-motions

It is the refusal of SHCN to pay Whittier the share of incentive payments received from Payors after August 31, 2014 to which it would have been entitled but for SHCN's adoption of this new distribution Policy that gives rise to this litigation and the cross-motions now before the court.

**DISCUSSION**

"The interpretation of a contested written contract is a question of law ordinarily appropriate for disposition by summary judgment." *Targus Group Int'l, Inc. v. Sherman*, 76 Mass. App. Ct. 421, 428 (2010) (internal citation omitted). When the terms of a contract are ambiguous, a court may admit parol evidence to resolve the ambiguity and determine the intent of the parties at the time the contract was made, but whether any contract is ambiguous is, in the first instance, a question of law for the court. See, e.g., *Basis Tech. Corp. v. Amazon.com*, 71 Mass. App. Ct. 29, 36 (2008) ("The preliminary question of the existence of an ambiguity in an agreement is a question of law . . . .") and *Gen. Convention of the New Jerusalem in the U.S. v. MacKenzie*, 449 Mass. 832, 835 (2007). ("When the words of a contract are clear, they must be construed in their usual and ordinary sense, and we do not admit parol evidence to create an ambiguity when the plain language is unambiguous.") A contract "term is ambiguous if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." *Citation Ins. Co. v. Gomez*, 426 Mass. 379, 381 (1998). In this case, the court has no problem finding that the parties' contract documents, obviously crafted by attorneys experienced in the field of physician networks and contracts, are clear and capable of only a single reasonable interpretation.

The Service Agreement and the Letter Agreement, which is attached to the Service Agreement as exhibit one thereto, are clearly integrated and together express the terms of the

parties' contractual arrangement. For the avoidance of any doubt, the primacy of the Letter Agreement over the Service Agreement, if the documents conflict in any respect, is repeated in four separate contract provisions, two in each document:

- Final WHEREAS clause of the Service Agreement: "SHCN and IPA further agree that the supplemental terms and conditions set forth in the Letter Agreement, attached hereto as Exhibit I, between SHCN and IPA supplement and control the terms and conditions of this Agreement and, in the case of any difference, addition, clarification or contradiction, supersede the terms and conditions of this Agreement."

- Section 8.3 of the Service Agreement: "In the event of any conflict between this Agreement and the Letter Agreement, the Letter Agreement shall control as well as with respect to any additions, deletions or supplementation set forth therein."

- Introduction to Letter Agreement: "This letter agreement ("Letter Agreement") memorializes agreements between Steward [SHCN] and Whittier that supplement and amend the terms of the Agreement."

- Closing paragraph of the Letter Agreement: "The Parties acknowledge and agree that the purpose and intent of this Letter Agreement is to supplement and amend the Service Agreement in certain material respects and that where this Letter Agreement is in conflict with the Service Agreement, this Letter Agreement shall be deemed to amend and supersede the relevant terms of the Service Agreement and shall govern the relationship of the Parties."

The Letter Agreement contains several provisions that reflect individualized negotiations between the parties on matters that are specific to Whittier, as opposed to other IPA members of SHCN. See, *e.g.*, Section 4, Infrastructure Support; Section 5, Additions within the Whittier Service Area; Section 8, Anna Jaques Hospital and Merrimack Valley Hospital; Section 9, SHCN Network Fees; Section 15,Transition Assistance; and other sections. The several references to the interpretive norm that any conflict between these two documents will always be resolved in favor of the Letter Agreement is consistent with the fact that the Service Agreement appears more generic in governing the relationship between SHCN and all its IPA members and the Letter Agreement includes matters unique to Whittier.

Among the specific arrangements between SHCN and Whittier included in the Letter Agreement is protection of Whittier's right to receive incentive payments in the event either party terminates Whittier's status as a member of the Network: "Whittier and Whittier Physicians shall be entitled to a share of any and all . . . incentive payments it has been attributed by the attribution methodology determined by the SHCN Board without any penalty on account of the termination of the Service Agreement provided that SHCN receives such payments for Whittier from the payors. . . . SHCN will equitably adjust the settlement of any risk arrangements in which Whittier Physicians have participated so that the Whittier Physicians are not prejudiced as a result of having participated therein for less than a full 12-month period." Clearly, in the absence of the new distribution Policy adopted by SHCN in November 2013, adding the requirement that an IPA be a member of SHCN at the time an incentive payment is received by a Payor to receive its share, there could be no question but that Whittier physicians would be contractually entitled to receive their aliquot share of sums received from Payors in respect of work they performed for the Payors' insureds as Network physicians.[6]

SHCN's principal argument in support of its contention that the contract documents unambiguously relieve it of the obligation to make the incentive payments (or support a reasonable alternative interpretation to that effect) is derived from Section 8.1. of the Service Agreement entitled: Relationship to Payor Contracts and Policies. That section identifies a hierarchy among Payor Contracts, SHCN Policies, IPA Policies, and the Service Agreement

[6] As a fall back argument SHCN argues that the withholding of this money is not a "penalty" and therefore this Section 3.b. of the Letter Agreement does not apply. This is an obvious misreading Section 3.b. It promises that Whittier will receive its share of Payor payments received by SHCN regardless of termination of the Service Agreement. It goes on to state that SHCN cannot impose a penalty on Whittier because of a termination. The payment is due whether the withholding is deemed a newly instituted restriction on payments otherwise due Whittier or a penalty because Whittier terminated or was terminated.

in the event terms of these contract documents or internal policy statements conflict. SHCN points to the following sentence as determinative of the parties' dispute in the present case: "In the event of a conflict between this Agreement and the Policies . . . , the Policies shall supersede with respect to the conflict." In reliance on that sentence, SHCN offers the following syllogism: the Letter Agreement amends the Service Agreement and is therefore a part of the Service Agreement; the restriction on payments to terminated IPAs is a SHCN Policy; therefore the Policy supersedes the Letter Agreement and no payments are due. The court finds this to be a false syllogism.

Section 8.3 states: "In the event of any conflict between this [Service] Agreement and the Letter Agreement, the Letter Agreement shall control as well as with respect to any additions, deletions or supplementation set forth therein." Nowhere in the Service Agreement (or the Letter Agreement) is there a provision that states that the Letter Agreement is subsumed within the Service Agreement or becomes a part of it. Rather it is a separate agreement between the parties that may add terms, supplement existing terms, or delete terms found in the Service Agreement. Section 8.1 does not address any hierarchy between SHCN Policies and the provisions of the Letter Agreement. Stated differently, Whittier did not agree that if the Whittier specific rights and benefits that it negotiated with SHCN and memorialized in the Letter Agreement conflicted with SHCN Policies, including Policies that did not even exist at the time Whittier executed the Letter Agreement, these rights and benefits would be a nullity.

Additionally, the interpretation suggested by SHCN would lead to an absurd result that these sophisticated parties represented by experienced counsel could not have intended. See *Bowser v. Chalifour*, 334 Mass. 348, 352 (1956) ("Contracts should be construed in

accordance with justice and common sense and the probable intention of the parties"). Under SHCN's interpretation, all of Whittier's rights and benefits carefully memorialized in the Letter Agreement could be undone by the SHCN Board adopting a contrary "Policy." If the parties' agreement was that any provision of the Letter Agreement could be superseded by a conflicting Policy then in effect, or as may thereafter be adopted by the SHCN board, they knew how to include such a provision in the Service Agreement or the Letter Agreement, or both documents, as they actually did in provisions of both the Letter Agreement and Service Agreement which unequivocally establish the primacy of the Letter Agreement in the event of any conflicting terms.[7] See, e.g., *Brillante v. R.W. Granger &Sons, Inc.,* 55 Mass. App. Ct. 542, 549 (2002) ("The parties were two business entities experienced in negotiating contracts. . . . If they intended to have such [a provision], they easily could have so provided in their contract.").

**ORDER**

For the foregoing reasons, the defendant's Motion to Dismiss is **DENIED**, and the plaintiff's cross-motion for summary judgment on Counts I and V is **ALLOWED** to the following extent: The Court declares that if incentive payments have been received by

[7] It is not at all clear that a provision that stated that the Policies supersede the Letter Agreement would necessarily apply to Policies that were in direct conflict with provisions of the Letter Agreement but adopted after the Letter Agreement was signed, unless the contract expressly stated that this provision would apply to Policies subsequently adopted. For example: "As a general rule, the law in existence at the time an agreement is executed necessarily becomes part of the agreement. . . . Amendments enacted after execution are not incorporated into an agreement unless the contract provisions clearly establish that the parties intended subsequent enactments into their agreement." *Mayor of Salem v. Warner Amex Cable Communications Inc.* 392 Mass. 666-67(1984) (internal quotations and citations omitted).

SHCN from Payors in respect of reporting periods during which Whittier was a member of SHCN, SHCN breached its contract with Whittier by failing to pay Whittier its pro rata share of those payments.

Mitchell H. Kaplan
Justice of the Superior Court

Dated: June 29, 2015