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Order on Attorneys' Fees (MICROBILT CORPORATION)

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Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
JUN - 5 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

MICROBILT CORPORATION, Plaintiff, v. FIDELITY NATIONAL FINANCIAL INC., et al. Defendants,	* * * * * * * * * *	Civil Action No. 2003-CV-79446 (Business Division Two—EL)

ORDER ON ATTORNEYS' FEES

During oral argument on Defendants' Motion for Leave to File Counterclaims held on May 31, 2007, the Parties requested that the Court review and interpret section 12.6 "Attorneys' Fees" of the software licensing agreement (the "Provision") between Plaintiff and Defendants' predecessor, Credit Data Reporting Services, Inc., ("CDRS"). At issue is whether or not Defendants may be entitled to any attorneys' fees under their existing set-off and recoupment defenses and the scope of potential recovery. After reviewing the Provision, the Court finds as follows:

Contract construction is a question of law for the courts to determine. O.C.G.A. § 13-2-1. The Court must first determine whether the language of the contract is ambiguous or clear. Holcim (US), Inc., v. AMDG, Inc., 265 Ga. App. 818, 820 (2004). "[W]here the terms of a written contract are clear and unambiguous, the court will look to the contract alone..." Magnetic Resonance Plus, Inc. v. Imaging Systems Intern., 272 Ga. 525, 526 (2001).

The Provision states:

> If any sums due and owning under this Agreement are collected by or with the assistance of legal counsel, or if either party brings suit of any type against the other party and prevails in such action, then the non-prevailing party shall be liable to the prevailing party, and shall promptly remit to the prevailing party upon demand, all of the prevailing party's costs and expenses incurred with respect thereto, including without limitation court costs and attorneys' fees.

The Provision unambiguous states when a party is entitled to recover attorneys' fees. Recovery of attorneys' fees is permitted under two circumstances: (1) upon the collection of "sums due and owing" under the agreement with the assistance of counsel, and (2) upon bringing and "prevailing" on any suit. The first prong of the Provision encompasses any amount collected through Defendants' set-off and recoupment defenses. Therefore, it is unnecessary for Defendants to file separate counterclaims in order to recover attorneys' fees associated with these claims.

The Provision is also unambiguous with respect to the scope of recovery. The "prevailing" party may recover "costs and expenses incurred with respect thereto." Thus recovery of attorneys' fees is limited to the costs and expenses associated with the successful prosecution of a claim, and excludes those associated with the unsuccessful prosecution and/or defense of any claims. Additionally, this Court is bound by the rules defining a "prevailing party" established in Magnetic Resonance Plus, Inc. v. Imaging Systems International. 272 Ga. 525, (2001) (holding that in the absence of language suggesting that "prevailing party" has a special meaning, the phrase shall be construed consistent with statutory interpretation). In order to be entitled to recovery attorneys' fees, the "prevailing party" must first be awarded some form of relief on the merits of the case, whether it is monetary, equitable, or otherwise. Id. at 528. Thus, at trial, the issue of attorney's fees shall be bifurcated from the jury's consideration of the substantive issues.

SO ORDERED this 5th day of June, 2007.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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