

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

IN RE PUBLICATION PAPER ANTITRUST LITIGATION	CIVIL ACTION NO. 3:04md1631 (SRU)
THIS DOCUMENT RELATES TO:	ALL ACTIONS

**RULING ON PLAINTIFFS' MOTION TO SUBSTITUTE OR JOIN
STORA ENSO OYJ AS A DEFENDANT**

Pursuant to Federal Rule of Civil Procedure 25(c), the plaintiffs move to substitute or join Stora Enso Oyj (“SEO”), the former parent of Stora Enso North America Corporation (“SENA”), as a defendant in this case. For the reasons that follow, the plaintiffs’ motion (doc. # 632) is DENIED.

I. Background¹

On February 15, 2005, the plaintiffs filed their Consolidated Amended Class Action Complaint, naming SEO and its subsidiary SENA, among others, as defendants. SEO was later dismissed from the case, *see* Ruling on Defs.’ Mot. for Summ. J. at 32-33 (doc. # 594), leaving SENA as the lone remaining defendant.

On September 20, 2007, while this case remained pending, SEO and NewPage Corporation (“NewPage”) entered into a Stock Purchase Agreement (the “SPA”) pursuant to

¹ The court assumes familiarity with the underlying facts of this case, a detailed explanation of which can be found in previous rulings. *See In re Publication Paper Antitrust Litig.*, No. 3:04-md-1631 (SRU), 2010 WL 5253364 (D. Conn. Dec. 14, 2010), *aff’d in part and vacated in part*, 690 F.3d 51 (2d Cir. 2012).

which NewPage acquired all of the outstanding stock—along with the assets and liabilities—of SENA.² Under the terms of the SPA, SEO also agreed to indemnify NewPage³ from various losses. Specifically, Article IX of the SPA, entitled “INDEMNIFICATION,” provided, in pertinent part:

SECTION 9.01. Indemnification Remedies. (a) From and after the Closing and subject to the limitations set forth in Section 9.01(b) and except with respect to all representations, warranties and covenants by [SEO] and [SENA] relating to Taxes (which, from and after the Closing, are covered exclusively by Article VII), [SEO] shall indemnify, defend and hold harmless [NewPage] from and against all Losses incurred by [NewPage] and its Representatives (“Purchaser Indemnified Persons”) that arise out of:

(i) any breach by [SEO] or [SENA] of its representations and warranties contained in Article II or Article III or inaccuracy in any certificate delivered by [SEO] or [SENA] pursuant to this Agreement (it being understood that when determining the existence of any such breach, such representations and warranties shall be interpreted without giving effect to the materiality or Material Adverse Effect standards imposed by Section 10.01(a) and 10.01(b));

(ii) any breach by [SEO] of its covenants, agreements and undertakings contained in this Agreement or any Related Document (subject to any additional limitations on liability or indemnification expressly set forth therein);

(iii) ***the Retained Liabilities***; or

(iv) the Excluded Assets and the Liabilities related thereto.

Stock Purchase Agreement at 63, attached as Ex. A to Pls.’ Mem. (doc. # 633-2) (emphasis added).⁴

² SENA is now known as NewPage Wisconsin System Inc., and is a wholly-owned subsidiary of NewPage. For ease of reference, I will continue to refer to the defendant as “SENA.”

³ Following the execution of the SPA, the plaintiffs added, then voluntarily dismissed, NewPage as a defendant in this action.

⁴ Section 9.03(b) of the SPA also provided that SEO would “control the defense of the Retained Liabilities.” Stock Purchase Agreement at 67. From all accounts, SEO has, in

The phrase “Retained Liabilities” is a defined term under the SPA, and is used only in connection with the indemnification provisions under section 9.01(a). Specifically, “Retained Liabilities” is defined as “those matters identified on Section 10.02(a)(i) of the Company [SENA’s] Disclosure Schedule, including any proceedings arising from or related thereto.” Stock Purchase Agreement at 81. The Disclosure Schedule, in turn, lists several pending lawsuits, including this case. *See* Company Disclosure Schedule at 22, attached as Ex. A to Pls.’ Mem. (doc. # 633-3).⁵

Almost four years later, on September 7, 2011, NewPage and SENA filed for Chapter 11 bankruptcy. *See In re NewPage Corp., et al.*, No. 11-12804 (KG) (Bankr. D. Del. 2012). On October 26, 2012, the Bankruptcy Court issued an order approving a stipulation among the parties that provided for a limited modification of the automatic stay to permit this antitrust litigation to proceed to trial. *See* Order Approving Stipulation, attached as Ex. C to Def.’s Opp’n (doc. # 634-3). Should the plaintiffs obtain a judgment against SENA, the stipulation permits the plaintiffs to return to the Bankruptcy Court as general unsecured creditors. *See id.*

Thereafter, on January 11, 2013, the plaintiffs filed the instant motion to substitute or re-

accordance with this provision, controlled SENA’s defense in this case.

⁵ Section 10.06 of the SPA provides that the SPA confers rights and benefits only upon the identified parties to the agreement. *See* Stock Purchase Agreement at 84 (“This Agreement shall be binding upon and inure to the benefit of each Party, its successors in interest and permitted assigns, and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person any rights, benefits or remedies of any nature whatsoever under or by reason of this Agreement.”). Thus, to the extent the plaintiffs are seeking to assert rights as third-party beneficiaries of the SPA, section 10.06 appears to foreclose that possibility. *See India.com, Inc. v. Dalal*, 412 F.3d 315, 321-22 (2d Cir. 2005) (“Under New York law . . . [w]here a provision exists in an agreement expressly negating an intent to permit enforcement by third parties . . . that provision is decisive.”) (internal quotation omitted). In any event, even if the SPA could be interpreted to confer rights on third-parties, such as the plaintiffs, that fact has no bearing on the specific question presented here—namely, whether the SPA transferred SENA’s potential antitrust liability to SEO so that SEO should be substituted or joined as a

join SEO—which has not filed for bankruptcy protection—as a defendant in this case.

According to the plaintiffs, the SPA’s use of the phrase “Retained Liabilities” to refer to this litigation means that SEO not only agreed to indemnify NewPage for losses associated with SENA’s alleged misconduct, but that SEO also assumed SENA’s liability directly. On that basis, the plaintiffs argue that SEO—not SENA—is the proper defendant, and should be substituted or joined under Rule 25(c).

II. Standard of Review

Federal Rule of Civil Procedure 25(c) provides, in relevant part: “If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.” Fed. R. Civ. P. 25(c). “The purpose of Rule 25(c) is to allow an action to continue unabated when an interest in a lawsuit changes hands, without initiating an entirely new suit.” *In re Rates - Viper Patent Litig.*, No. 09-cv-4068 (LTS), 2011 WL 856261, at *1 (S.D.N.Y. Mar. 10, 2011) (internal quotation omitted). The rule “does not affect the substantive rights of the parties,” but is instead “designed to facilitate the continuation of an action when an interest in a lawsuit is transferred” *Greystone Bank v. Peralta*, 10-cv-0695 (BMC), 2010 WL 3767619, at *1 (S.D.N.Y. Sept. 20, 2010) (citation omitted); *see also* WRIGHT, ET AL., 7C FED. PRAC. & PROC. CIV. § 1958 (3d ed. 2010) (“The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor is not named. An order of joinder is merely a discretionary determination by the trial court that the transferee’s presence would facilitate the conduct of the litigation.”).

defendant under Rule 25(c).

Thus, the “primary consideration in deciding a motion pursuant to Rule 25(c) is whether substitution will expedite and simplify the action.” *Banyai v. Mazur*, No. 00-cv-9806 (SHS), 2009 WL 3754198, at *3 (S.D.N.Y. Nov. 5, 2009).

“Substitution of a successor in interest or its joinder as an additional party under Rule 25(c) is generally within the sound discretion of the trial court.” *Organic Cow, LLC v. Ctr. For New England Dairy Compact Research*, 335 F.3d 66, 71 (2d Cir. 2003) (internal quotation omitted). However, “such discretion may not be abused by allowing substitution in the absence of a transfer of interest.” *In re Chalasani*, 92 F.3d 1300, 1312 (2d Cir. 1996). Put differently, “a determination that a party is, in fact, a successor-in-interest is a prerequisite to substitution” under Rule 25(c). *Levin v. Raynor*, No. 03-cv-4697 (GBD)(THK), 2010 WL 2106037, at *2 (S.D.N.Y. May 25, 2010).

III. Discussion

The plaintiffs seek to substitute or join SEO as a defendant in this case, arguing that SEO assumed direct liability for SENA’s alleged misconduct under the terms of the SPA. Because the transaction at issue was effectuated through a stock purchase agreement, the plaintiffs concede that, unless otherwise agreed, all of SENA’s assets and liabilities transferred automatically with its stock from SEO to NewPage when the SPA was executed in 2007. *See, e.g., Big Lots Stores, Inc. v. KB Acquisition Corp.*, 340 B.R. 726, 728 (D. Del. 2006). Nevertheless, the plaintiffs argue that, because the SPA’s indemnification provisions referred to this lawsuit as one of several “Retained Liabilities,” SEO not only agreed to indemnify NewPage for losses arising out of SENA’s alleged antitrust violations, but also assumed SENA’s liability, if any, directly. Building on that premise, the plaintiffs further contend that certain extrinsic evidence—including

alleged admissions by NewPage⁶ as well as SEO's conduct during the course of this litigation⁷—demonstrates that SEO intended to assume SENA's antitrust liability despite NewPage's acquisition of SENA's stock.

I disagree.

Under New York law, which the parties agree governs the construction of the SPA, “when the [contract] language is clear and unambiguous, the parties’ intent is to be discerned from the instrument in accordance with the plain and ordinary meaning of its language.” *Modern*

⁶ According to the plaintiffs, on April 21, 2008, after NewPage was added as a defendant in this action, NewPage—which was represented by the same law firm as SEO—filed an answer to the plaintiffs’ Fifth Amended Complaint, in which NewPage “admitted” the following allegation: “As part of [the 2007 transaction], Stora Enso agreed to retain any and all liability arising out of the conduct of Stora Enso North America Corporation alleged herein.” See Pls.’ Mem. at 5-6 (doc. # 633); Answer of NewPage Corp. to Fifth Am. Consolidated Class Action Compl. at 8 (doc. # 408). In the plaintiffs’ view, NewPage’s admission confirms that SEO did, in fact, assume SENA’s antitrust liability under the terms of the SPA.

As explained more fully below, because the contract language at issue here is unambiguous, I need not consider such extrinsic evidence in construing the SPA. See *RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 314 (2d Cir. 2003). But even if I were to consider it, I cannot conclude, as the plaintiffs suggest, that admissions by NewPage somehow bind SEO under the doctrine of judicial estoppel. “[J]udicial estoppel may be applied to bar a party from asserting a factual position in a given proceeding only when *that party* advanced a clearly inconsistent position in a prior proceeding and that inconsistent position was adopted by the court in some manner When any of these elements are missing, judicial estoppel does not apply.” *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997) (emphasis added). Here, the doctrine is clearly inapplicable because NewPage and SEO are entirely different parties, even if they happened to be represented by the same law firm. The plaintiffs’ arguments to the contrary are entirely without merit.

⁷ After NewPage and SENA filed for bankruptcy in September 2011, SENA failed to notify the plaintiffs—as well as this court—about the existence of the bankruptcy case and the resulting automatic stay of litigation. From the plaintiffs’ perspective, that failure reinforces the view that SEO—which did not file for bankruptcy protection—had already assumed SENA’s liability under the terms of the SPA and therefore saw no need to inform the parties or the court about SENA’s bankruptcy.

Although I agree that SENA should have promptly notified all parties about the 2011 bankruptcy filing, I fail to see how that oversight has any bearing on the meaning and interpretation of the SPA, executed in 2007. In any event, I need not even consider such extrinsic evidence in the absence of ambiguity in the language employed by the SPA.

Medical Lab., Inc. v. Dowling, 232 A.D. 2d 901, 902 (N.Y. App. Div. 1996). “Contract language is unambiguous if it has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.’” *Met. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (quoting *Breed v. Ins. Co. of N. Am.*, 46 N.Y. 2d 351, 355 (1978)). “Where a contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence.” *RJE Corp. v. Northville Indus. Corp.*, 329 F.3d 310, 314 (2d Cir. 2003) (internal quotation omitted). Moreover, “where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law” *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) (internal quotation omitted).

Here, after careful consideration, I conclude that the plain, unambiguous language of the SPA admits of only one interpretation: SEO agreed to indemnify NewPage for losses associated with SENA’s antitrust liability in this case, but did not agree to assume SENA’s liability directly.

First, the SPA makes no mention whatsoever of any assumption of liability by or on behalf of SEO. Although the SPA refers to this antitrust action as one of several “Retained Liabilities,” that phrase is specifically defined by section 10.02 to mean nothing more than a subset of lawsuits filed against SENA (including this one) pending at the time of the transaction. The mere fact that the parties to the SPA—none of which included any of the plaintiffs here—chose to refer to those lawsuits as “retained” liabilities (as opposed to “remaining” or “ongoing” liabilities) does not, without more, imply that SEO somehow took on SENA’s liabilities

directly.⁸ Indeed, given SENA's separate corporate existence as SEO's subsidiary prior to the 2007 transaction, SEO was never directly liable for SENA's alleged misconduct in the first place, and therefore had no liability to "retain." SEO would only become directly responsible for SENA's alleged anticompetitive activity if SEO affirmatively "assumed" that liability. Nothing in the SPA, however, indicates that SEO did anything of the sort.

Furthermore, it is significant that the phrase "Retained Liabilities" is used in only one section of the entire agreement—in section 9's *indemnification* provision. Thus, the term has meaning only in the context of SEO's promise to indemnify NewPage for losses arising out of certain lawsuits previously filed against its newly-acquired subsidiary, SENA. Because the SPA makes no other mention of "Retained Liabilities," and no other provision indicates or implies that SEO assumed SENA's liabilities in any manner whatsoever, I cannot conclude that the single use of that phrase renders SEO directly liable for millions of dollars in potential antitrust liability. Read as a whole, the SPA merely provides that SEO will indemnify NewPage for losses associated with SENA's pending lawsuits, not that SEO will take on SENA's liabilities as its own. *See Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y. 2d 352, 358 (2003) ("A written

⁸ Because the SPA's singular reference to "Retained Liabilities" is wholly unconnected to any contractual language concerning assumption of liability, the plaintiffs' reliance on cases such as *Caldwell Truck PRP v. Rexon Technology Corp.*, 421 F.3d 234 (3d Cir. 2005), and *Parker Hannifin Corp. v. Dayco Prods. LLC*, No. 1:04-cv-0897, 2005 U.S. Dist. LEXIS 43420 (N.D. Ohio Mar. 29, 2005), is unavailing. In each of those cases, the agreements at issue referred to "retained liabilities" in conjunction with express provisions for the assumption by one party of the liabilities of another. *See Caldwell Truck PRP*, 421 F.3d at 243 (construing an agreement that provided that a former parent would "assume and become liable for" certain environmental liabilities of a subsidiary, and observing that "one who assumes a liability, as distinguished from one who agrees to indemnify against it, takes the obligation of the transferor unto himself") (internal quotation omitted); *Parker Hannifin Corp.*, 2005 U.S. Dist. LEXIS 43420, at *7 (interpreting the phrase "retained liabilities" in an agreement that also contained an express "Assumption of Liabilities" provision). Nothing of that sort is present here. Rather, the "Retained Liabilities" referenced in the SPA were linked not to an assumption of liabilities provision, but merely to an indemnification provision.

contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. . . . The meaning of a writing may be distorted where undue force is given to single words or phrases.”) (internal quotation omitted).

Lastly, because the contractual language is unambiguous, I need not—and indeed cannot—consider any of the extrinsic evidence submitted by the plaintiffs to support a contrary interpretation of the SPA. *See RJE Corp.*, 329 F.3d at 314. Thus, the plaintiffs’ various arguments concerning alleged admissions by NewPage and/or SEO’s conduct after SENA filed for bankruptcy in September 2011 need not be addressed further.

In sum, the plaintiffs have failed to demonstrate that SENA’s alleged antitrust liability was “transferred” to or “assumed” by SEO—or any other party—under the terms of the SPA. Accordingly, there is no basis to substitute or join SEO as a defendant under Rule 25(c).

IV. Conclusion

For the above reasons, the plaintiffs’ motion (doc. # 632) is DENIED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 20th day of June 2013.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge