IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

THOMAS A. DAVIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. NO.: 6:08-cv-3286-HFF**
	)	
MPW INDUSTRIAL SERVICES, INC.,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, by and through his counsel, W. Andrew Arnold, and files this Memorandum in Opposition to Defendant's Motion for Summary Judgment as follows:

I. INTRODUCTION/SUMMARY

On July 26th, 2005, when David Barrows (Director of Operations) gave the letter offering Tom Davis (Plaintiff) a promotion, Plaintiff reminded Barrows of several omissions in terms of compensation, including a 1% "new work bonus" that had been part of the oral offer communicated to Plaintiff previously. Barrows called Paul Bechard, the General Manager for MPW's Facilty Management Group at the time, to ask whether these omitted items, including the new work bonus, should be included in the offer letter. Bechard had full profit and loss accountability and authority to act on behalf of MPW. After hanging up, Barrows handwrote notations referencing the omitted items in writing on the offer letter and signed and dated the additions. (DeFazio Dep Exh. 1). Plaintiff signed the amended offer the next day and began performing the duties of account manager.

In regards to the new work bonus, General Manager Paul Bechard later testified:

Q. Was Tom Davis a hard worker?

A. Yeah. Very. I know Tom's not on record here and can't comment but several times through the course of the years I had discussions with Tom and my referral earlier about him not taking vacation, you know he took a lot on himself. Yeah. He was there seven days a week and I said Tom, you got to -- you got to pull the throttle back and take some vacation. Let your managers manage. Get the heck out of there.

Q. Did it appear that he was motivated by the promise of a 1% new work bonus?

A. Well, it would sure motivate me.

Q. And did—from 2005, July 2005 at the time Tom Davis become account manager at [MPW], until the time he left did the gross---billed revenues increase substantially for [the BMW account]?

A. Yes, sir, they did.

Q. And so, at least on the surface, it appears that the new incentive bonus worked in that case?

A. Yes. It met the intent.

Q. Did—did Tom Davis earn a new work bonus?

A. Yeah, absolutely.

Q. And is it in your view is he owed that new work bonus as promised?

A. Yes, I think he is. Again, I expressed my disappointment, you know from a credibility standpoint **promising people things that weren't delivered upon**.

(Bechard Dep. pp. 71-72)(emphasis added).

This case asserting claims for breach of contract and for a violation of the South Carolina Wage Payment Act is Tom Davis' last chance to collect the $125,000 unpaid but earned new work bonus as well as $11,073.46 in unreimbursed expenses.

II. STATEMENT OF FACTS

A. MPW Enters into a Contract with BMW.

In November 2004, MPW Industrial Services, Inc. entered into a contract with BMW Manufacturing Company, LLC to provide facilities management and support services. The contract was to commence on January 1, 2005. (DeFazio Dep. Exh. 2). It was a three (3) year contract that could be extended by the parties. The contract "scope" is stated in Schedule 1. (DeFazio Dep. Exh. 2). The base amount of the contract was $1,975,001.00. (DeFazio Dep. Exh. 2; DeFazion Dep. p. 53; Davis Dep. at 138). Monthly invoices and payments in the amount of $164,519 were submitted for this base amount. (T. Davis Dep. 127.)

The $1.975 million base contract amount was based upon task rates negotiated for 41 employees. Tom Davis testified that the base contract amount "corresponds to 41 people times 2080 hours each year times $23.15, which is the bill rate. I believe if you calculate it out, Jeff, the $164,000 is the $1,975,001 divided by 12. We can get a calculator and see." (Davis Dep. at 127). To increase margins, MPW worked short and at times only put 34 people on the floor. However, the contract also opened the door to work beyond the initial scope, which created a much bigger opportunity to increase revenues. MPW wanted to increase revenues at BMW and wanted to use their onsite account manager to get more work.

B. MPW Decides to Incentivize Up-Selling By Account Manager

The contract was structured so that any additional tasks beyond the $1.975 million scope was to be invoiced separately. (DeFazio Dep. Exh. 2). So, after the contract took effect in January 2005, discussions began within MPW about turning the account manager into a de facto sales representative who works onsite. The MPW Facilities Group General Manager at the time, Paul

Bechard, testified that his idea was to give the account manager a 1% commissions "new work bonus" instead of paying a sales representative a 3% commission:

> [L]ooking at the intent of the new work bonus, I keep wanting to say commission but new work incentive plan. . . .So it was – there was lot of efficiency there because if you don't have salespeople calling on existing accounts where you have to pay 3 percent commission, then if you come up with a plan to have operation account manager get additional revenue at existing accounts without engaging the salesperson and having to pay the sales commission at 3 percent, it's a pretty effective tool.

(Bechard Dep. 54).

Bechard said his idea was simple:

> "And we tried to keep it very simple, straightforward. Going back to the original intent, the original intent was to take our existing accounts and grow the existing accounts, the revenue in those accounts. So tried not to make it too complex.

(Bechard Dep. at 53). And, just as simple was the manner of calculation according to its author, G.M. Paul Bechard:

> Q. And any increase above the baseline budget would entitle –in this case for BMW – would entitle Tom Davis to a 1 percent of the gross increase?
>
> A. Of the gross billed revenue, correct.

(Bechard Dep. 68.) And after testifying that "**as a P and L owner, I had the authority to act without a policy,**" Paul Bechard testified as follows:

> Q. **So, with that authority, you would have promised Tom Davis that he would – that he would receive a new work bonus of 1 percent for any increase of the baseline contract amount after July 2005.**
>
> Mr. Dunleavy: Object to the form. You can go ahead. You can go ahead, I'm sorry.
>
> A. **Yes.** That was, to my recollection, that was the intent.

(Bechard Dep. at 67.)(emphasis added).

C. Tom Davis is Promoted to Account Manager and Promised New Work Bonus.

For many years, Jodie Kern had been MPW's Account Manager at BMW. In early 2005, Kern decided to take a job elsewhere, which created an opening. Kern had been offered a new work bonus to stay with MPW in 2005, but he turned it down. On July 26th, 2005 (Kern's last day on the job,), David Barrows, Director of Operations, offered Tom Davis the job as Account Manager. However, the letter omitted several items related to compensation, which had been represented to Tom Davis as being part of the account manager compensation package. Tom Davis testified:

> Q. Okay. Now, the July 26, 2005 meeting, after you read this letter, what specifically did you tell Barrows?
>
> A. What I told Dave Barrows was that this letter of offering had omitted some key points; the account manager was supposed to get the truck and fuel card, 15 percent bonus based upon my annual salary as the account manager [for turnover and safety], and the one percent new work bonus.

(Davis Dep. at 186). Davis testified very specifically as to what happened next.

> "Dave [Barrows] said, okay, let me make a telephone call. So Jody moved out of the way, and he picked up the telephone and called Paul Bechard. Basically what he told Paul, hey, I'm here in the MPW office with Jody [Kern] and Tom [Davis] and I have reviewed the letter of offering with Tom and both Jody and Tom have pointed out that the letter of offering is incomplete; it's missing some key points. So, he told Paul what those were, and Paul told him, yes those should be on there. David actually as he was talking to Paul on the phone was writing and you see the bullet points he put down here.

(Davis Dep. at 59-60.) The items handwritten on the letter are exactly as follows:

- Truck and Fuel card
- 15% Bonus based on turnover, OSHA goals, and audit scores as outlined in the contract.
- New work bonus for increase of contract at BMW.

(DeFazio Dep. Exh. 1). The handwritten note is dated "7/26/05", and it is signed by David Barrows with the consent and authority of the General Manager, Paul Bechard. There is no dispute of fact on any of these points.

D. BMW Account Experiences Explosive Growth under Tom Davis.

Although it took almost a year, Tom Davis and MPW began to see additional BMW tasks beyond the scope of the contract to be handled by MPW, which required additional manpower and generated additional revenue. The BMW account under Davis grew faster than any other MPW account. Bechard believed the growth was attributable to the new work bonus: "And the record shows, the record being the substantial increase—it was our number one account for growth. So, it worked." (Bechard Dep. at 67.)

The BMW contract provided for base revenues equal to $493,577 a quarter. The first quarter of 2005 showed revenues of $523,266. However, by the end of the first quarter of 2006, revenues generated by the BMW contract skyrocketed to over a $1 million, double the baseline. By then end of the first quarter 2007, revenues generated were $2.9 million, which was six times the contract baseline. Paul Bechard testified that the "new work bonus" lived up to expectations and "met the intent." (Bechard dep. at 72).

However, the growth did not happen by accident. Tom Davis was working some weeks 100 hours or more. (Davis Dep. at 188.) During his three year tenure as account manager, Davis worked all but two holidays. Davis took no vacation in 2006 or 2007. (Davis Dep. at 189-90). Bechard pleaded with Davis to take some time off. (Bechard Dep. at 71-72) Part of the need for Davis' presence each day was due to the fact that MPW worked short on labor to increase margins, which required Tom Davis to do manual labor in addition to his managerial duties. However, his hard

work and constant accessibility was around the clock advertising on behalf of MPW. Tom Davis believed the new work bonus justified his hard work.

E. Davis Raises Issue of 1% New Work Bonus: MPW Affirms/Ratifies Promise.

The new work bonus was based upon annual increase in revenue above the base contract amount. In an April 23, 2006 email with his new Director of Operations (John Fuertes), Tom Davis indicated that his "contract specifies an additional 1% bonus (above and beyond my 15% bonus) on all new business." (DeFazio Exh. 9). Mr. Fuertes never responded in writing or orally to this first email, although Davis did not expect him to respond.

Tom Davis completed his first fiscal year ending in May 2006. He believed he would receive payment at the same time of other bonuses, and expected that to be sometime in September 2006. Also, in September 2006, Davis received a spreadsheet that had his company vehicle listed as "Business Use Only." (Davis Dep. at 52-53). The information on the spreadsheet was different than what had been represented to him. On September 3, 2006, Davis sent John Fuertes and Paul Bechard an email stating that his company vehicle was for both personal and business use. Davis referred to his offer letter, and once again specifically referenced that his letter stated that "I will be paid 1% of any new business generated in addition to the 15% annual bonus that I receive as the Account Manager." (Davis Dep. at 52-55; DeFazio Dep. Exh. 11).

On September 5 (2006), Fuertes asked Davis to forward him a copy of the offer letter, which Davis forwarded on September 6 to Fuertes. (DeFazio Dep. Exh. 14) Mr. Fuertes forwarded to Bechard and to human resources. It should be noted that there is nothing in writing from any person in management taking exception to Davis' assertion that his compensation package included personal use of his truck and the 1% bonus to be paid on all work over and beyond the $1.975 million contract amount.

To the contrary: Davis testified that he had numerous conversations with Paul Bechard beginning in October 2006 and extending until the next year during which Bechard recommitted/ratified the earlier commitment made to Tom Davis. Bechard told Davis that, "I have discussed the letter of offering with Jim Neville (Director of Human Resources), we sat down and talked about it and he said, Jim and I concurred that MPW has a moral obligation to pay you this. **MPW will honor your letter of offering**." (Davis Dep. at 73.) Bechard remembers being asked about when payment of the new work bonus would occur and that "my only response would have been I've waiting to hear back from corporate, which was true." (Bechard Dep. at 45). Bechard stated that he was disappointed by Defendant's refusal to pay the promised bonus payments: **"[W]hen you promise someone that your team that's working hard is going to be incentivized to grow the business, you know, it's – it's only right that, you know, you follow through on your – on your commitments."** (Bechard Dep. at 45, lines 18-22).

Later that fall in 2006, Bechard and Jim Neville phoned Tom Davis. Neville began by congratulating Davis on the explosive growth of the BMW account. Neville then said he wanted "to talk about your letter of offering. He said, I know Paul has already told you that he and I discussed your letter of offering, and I said, yes sir. He said, Paul and I agree that that's what your letter of offering promises, MPW has a moral obligation to honor the letter of offer, and we will." (Davis Dep. at 74).

What about the new work bonus payments? Neville stated, "just want you to know that so hang in there and we will take care of you. We'll work out the payment details, but I want you to know we're going to honor that commitment, and we'll discuss it more when I visit you down at BMW. (Davis Dep. at 74). About a month later, Neville and Bechard visited BMW and during lunch, Neville once again reassured Davis that MPW would honor the obligation in the offer letter.

(Davis Dep. at 76). They even joked with Davis about how much money he was going to make from all the new work Davis was securing from BMW. (Davis Dep. at 76-77).

In November 2006, Neville and Bechard were back at BMW for another meeting at which a bombshell was dropped: BMW wanted MPW to expand its work to assist a "Tier One Supplier" of BMW, which resulted in a substantial increase in manpower needed. As Tom Davis recalls, "So the way the one percent new business bonus came up is both Jim [Neville] and Paul [Bechard] knew that this was a tremendous additional load on my shoulders. Jim [Neville] said, don't worry, your one percent new business bonus will apply to this work as well and any other you get here at BMW or outside of BMW." (Davis Dep. at 79).

There were other meetings and discussions outlined in Davis' testimony about the new work bonus, including one at which Bechard said that the bonus would be paid quarterly. (Davis Dep. at pp. 79-91, 139-144). For example, in June 2007, Davis met with Troy Crouch, a human resources representative, who proposed to suspend Davis for being tardy with his emails after Davis' workload became almost unbearable. (Davis Dep. 109-111). Davis raised the issue of a double standard with MPW and referenced the failure of MPW to timely pay his 1% new work bonus. There was no formal response to this complaint by Davis of the failure to pay his new work bonus.

In the fall of 2006, there had not been a sense of urgency: The new work bonus would have only been $4,529.14. (Davis Dep. Exh. 11). However, in 2006-07, Davis had earned an additional $44,721 in compensation. (Davis Dep. Exh. 11.) And by the time of his termination, the earned but unpaid new work bonus totaled $125,258. (Davis Dep. at 183, Davis Dep. Exh. 11.)

F. Tom Davis Never Paid $11,073.46 in Unreimbursed Expenses.

Part of Tom Davis' compensation package was reimbursement of his work related expenses including cell phone expenses, buying snacks for manager meetings and safety meetings. From

August 2005 until December 2006, Plaintiff would complete his expense reports, attach receipts and was always reimbursed 100% of the expenses he submitted. (Davis Dep. 145-147). However, Plaintiff testified that in January 2007, it became more and more difficult to keep up with emails and expense reports with him working up to 100 hours a week:

> Q. I want to shift gears for a minute and talk about your other claim in this case, which is the expense reports. My understanding is that you kept documentation on your expense reports from some period of time prior to your termination?
>
> A. Yes.
>
> Q. Why didn't you turn them in when you got the documentation?
>
> A. Okay. Actually, the documentation basically would entail receipts. Okay. I can easily explain why I did not turn in my expense reports [on time]. Priot to this, I was rarely ever tardy with expense reports. In fact, I believe maybe two months tardy.
>
> Q. Let me interrupt you. Prior to what?
>
> A. Prior to January 2007. A significant event took place at the BMW account in January of 2007. Corey Buckson was promoted to what Paul [Bechard] called Area Manager of Production Support, and told me directly in a telephone conversation, I do not want Corey Buckson involved in operations in the paint shop. So, I was now left with an additional load of not only being the account manager and fulfilling those duties and obligations and responsibilities, but also with handling Corey's previous load as the operations manager, as well as performing technicians duties because we were running seven people short on manpower on average from our cleaning teams. So I got to the breaking point where I could no longer get everything done.
>
> Q. Okay. So, it wasn't that Corey was doing your expense reports out of the paint shop you had other obligations?
>
> A. Yes.
>
> Q. And those prevented you from completing expense reports?
>
> A. Yes.

Q. Were you aware of any company policy concerning the timing of turning in expense reports?

A. I knew the company wanted us to get our expense reports turned in expeditiously. If possible, within two months.

Q. Well, were you aware of any company policy regarding reduction of expense reports or refusal to pay expense reports that were turned in too late?

A. No.

(Davis Dep. at 146-47). In May 2008, when Davis was told he was being suspended (prior to termination), Davis submitted his expense reports totaling $11,073.46.

Davis submitted his reports along with all of his receipts for customary expenses that had previously been reimbursed. He was told that they would be reimbursed on this occasion as well. (Davis Dep. at 152-53). As DeFazio, Defendant's Controller testified, Ron McLean was the person responsible for reviewing an approving these tardy expense reports. (DeFazio Dep. at 89-90). In June and/or July of 2008, McClain reviewed and on each report he handwrote the amount of approved expenses to be reimbursed and signed as "approved.". (DeFazio Dep. Exh. 6; DeFazio Dep. at 89-92). McLean approved $8,065.71 of the submitted reports, although Defendant has offered no reason why the other $3,000 was disallowed. (DeFazio Dep. Exh. 6). However, after Davis advised MPW that he was getting legal counsel, DeFazio decided not to pay the approved amount. (DeFazio Dep. 80-83; Davis Dep. at 154).

G. Davis Terminated for Allowing Subordinate Employees to Use His Unused Vacation Time.

Tom Davis had been too busy to take his earned vacation. He had not taken any vacation in 2006 and 2007. (During Plaintiff's tenure as account manager, the BMW account grew from 41 employees to 240 employees with revenues to match.) Davis was also constantly trying to get his employees raises in recognition for their hard work. So, Davis followed the example of his

predecessor and rewarded his employees with extra vacation days, which he had been too busy to take. This was the reason Tom Davis was fired. (Davis Dep. at 172-176). And what Defendant conveniently omits from its memorandum (as it does so much of the facts that support Plaintiff's claims) is that Monte Black, owner of the company, called to offer Plaintiff another account manager position just weeks after his termination. (Davis Dep. at 98-101). Plaintiff rejected the offer and advised Black that he must be paid his new work bonus before he would consider such an offer. (Davis Dep. at 101).

Plaintiff has never been paid a penny of his new work bonus or reimbursed any of the expenses he submitted after January 2007.

III. ARGUMENT

A. There Is Substantial Evidence of a Contractual Obligation To Pay Plaintiff a "New Work Bonus."

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Roberts v. Gaskins,* 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). *Potomac Leasing Co. v. Otts Mkt., Inc.,* 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) "It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms." In this case, the evidence establishes that Defendant made an offer to promote Plaintiff to account manager, which included a "new work bonus of 1 percent for any increase of the baseline contract amount after July 2005." (*See* Bechard Dep. at. 67). Plaintiff testified that he accepted the offer and performed the duties of account manager in consideration for the promises made to him orally as well as those contained in the July 2005 offer letter. Both parties signed the letter as a mutual manifestation of consent to the terms of the offer. The testimony of

Bechard and Plaintiff clearly establish that the contract included both written and oral terms. (Discussed in more detail in the "Meeting of the Minds" section.)

"Under South Carolina law, the parol evidence rule generally excludes evidence which would give a perfectly clear agreement a different meaning or effect than that indicated by the plain language of the agreement." *Harbour Town Yacht Club Boat Slip Owners Assoc. v. Safe Berth Management, Inc.*, 421 F.Supp. 2d 908, 911 (D.S.C. 2006)(Judge Duffy's opinion is discussed in more detail below) *citing Taylor v. Taylor*, 291 S.C. 261, 353 S.E.2d 156 (1987). If the agreement is completely integrated, then parol evidence is inadmissible. *Id.* (citation omitted). "The parol evidence rule is particularly applicable where the writing in question has an integration clause." *Id. citing U.S. Leasing Corp. v. Janicare, Inc.,* 294 S.C. 312, 364 S.E.2d, 205-06 (1988); *see Wilson v. Landstrom,* 281 S.C. 260, 315 S.E.2d 130 (1984).

The offer letter contains almost all of the term of the offer made by Defendant and accepted by Plaintiff. (DeFazio Exh. 1). However it is clear by the express terms of the offer letter that it is not intended to be a completely integrated contract. First, the letter specifically indicates that oral terms will be communicated by Dave Barrows (Director of Facilities Management and Support Services): **"Dave will provide details of your target bonus and the method of calculation."** (DeFazion Exh. 1). This alone demonstrates that there were other terms of the offer, which Barrows had been authorized to communicate orally.

However, there is additional evidence that the offer letter is not a completely integrated agreement: The offer letter also includes handwritten bullet points, which are intended to note additional terms, but clearly are not intended to be complete. "Truck and fuel card" was the first bullet point and was shorthand for an agreement that would grant Plaintiff personal and business use of the pick-up truck he had been using. (Davis Dep. at 53-55). This was later confirmed by email

and honored. There is a 15% bonus referenced in the second bullet point, which indicates "as outlined in the contract." (DeFazio Exh. 1)(referencing the BMW contract). This second handwritten bullet point was also honored. The dispute is about the third bullet point, which states "new work bonus for increase of contract at BMW." This is the only promise, typewritten or handwritten, contained in the letter not honored.[1]

"**Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated."**[2] *Restatement (2nd) of Contracts* § 216 (1) *Consistent Additional Terms* (West 2009)(Attached). When the written evidence of the contract does not contain all the terms of the transaction between the parties, parol evidence (not contradicting the terms of the writing) is admissible for the purpose of showing the meaning, intent and omitted terms of the agreement. *See Id. at comments A and B; Harbour Town Yacht Club Boat Slip Owners Assoc.* 421 F.Supp. 2d at 911. And, "if a contract is ambiguous, or capable of more than one construction, the question of what the parties intended becomes one of fact, and therefore should be decided by the jury." *Id. at 910-11; see also Land v. Wal-Mart Stores East, L.P.,* 2008 WL 1766723 (D.S.C. 2008)(Attached).

The July 26, 2005 offer letter clearly contains part, but not all, of the terms and conditions of Plaintiff's employment contract.[3] Because the offer letter was clearly not intended to be a completely integrated agreement and does not have a integration clause, this court must look to extrinsic evidence to determine whether additional terms existed and what those terms were. As it

[1] It should be noted that other terms of Plaintiff's compensation were not included in the offer letter such as the promise to reimburse Plaintiff for his expenses. Defendant does not deny such a promise, although it disputes the terms of this promise.

[2] Comment B to §216 (1) states: "For this purpose, the meaning of the writing includes not only the terms explicitly stated but also those fairly implied as part of the bargain of the parties in fact."

[3] Plaintiff is not contending that there was a contract for future employment but clearly there was an at-will employment contract that provided for compensation in exchange for performance of account manager duties. *See Land v. Wal-Mart Stores East, L.P.,* 2008 WL 1766723 at FN3.

relates to the new work bonus, the offer letter states clearly that the new work bonus will be calculated based upon the increase of the contract with BMW, which by the terms of the BMW-MPW contract had a baseline amount of $1,975,001 per year. (DeFazio Exh. 2 (see Schedule 2 p. 27 of 41); Davis Dep. at 186-87; DeFazio Dep. at 53, lines 12-15). Thus, although the court may consider evidence of consistent additional terms and parol evidence to determine intent and meaning, it may not consider evidence that contradicts the written terms of the contract. *See e.g., Harbour Town Yacht Club Boat Slip Owners Assoc.* 421 F.Supp. 2d at 911; Restatement (2nd) of Contracts §216 (1)(quoted above).

Although the offer letter indicates that the new work bonus will be triggered by an increase in revenues above the baseline contained in BMW contract, it does not include the percentage of this increase that Plaintiff would be entitled to. As outlined above and discussed below, there were many oral statements that the new work bonus was to be 1% of the increase of gross revenues above the contract baseline. Paul Bechard testified that the amount was "1% for any increase of the baseline contract amount after July 2005." (Bechard at 67). Plaintiff testified that the amount was 1% of any increase above the BMW contract's baseline. Plaintiff more specifically testified this was the amount that he and Dave Barrows confirmed contemporaneously with his adding the handwritten bullet point to the offer letter. (Davis Dep. at 186-87).

Moreover, there were several emails further confirming that the bonus amount was to be 1%. In an email dated February 24, 2005 (which was written during initial discussions with Plaintiff about the promotion), Kerns asked General Manager Bechard "Does the 1% apply to Tom Davis and George Pittman as well?" (DeFazio Exh. 8). Bechard answered "When they become account managers." (DeFazio Exh. 8). Kern communicated this to Plaintiff on more than one occasion and during the first time that Kern offered Plaintiff the account manager's job. (Davis Dep. at 13-14,

185). Negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish the meaning of an agreement. *See e.g., Restatement (2nd) of Contracts* § 214 *Evidence Of Prior Or Contemporaneous Agreements And Negotiations* (West 2009)(Attached)[4].

In addition, on April 23, 2006, Davis sent Barrow's replacement, John Fuertes, an email which stated "[i]ncidentally, my contract specifies an additional 1% bonus (above and beyond my 15% bonus) on all new business." (DeFazio Dep. Exh. 9). There was no response by anyone with Defendant disclaiming or disputing Plaintiff's entitled to the bonus. Defendant's silence is evidence of that agreement or acquiescence to the Plaintiff's statement. *See e.g Facelli v. Southeast Marketing Co.*, 284 S.C. 449, 327 S.E.2d 338 (S.C. 1985)(held employee who continued to work without objection after being notified of change in compensation consented to change in compensation); Edell & Associates, P.C. v. Law Offices of Peter G. Angelos 264 F.3d 424 (4th Cir. 2001)(Fourth Circuit applying Maryland law held a party's silence was admissible on the issue of terms of a contract "where services are rendered under such circumstances that the party who benefitted thereby knows the terms on which they are being offered and receives the benefit of those services in silence….")*T.E. Cuttino Const. Co. v. Rigid Steel Structures,* 869 F.2d 594 (4th Circuit 1989)(Fourth Circuit applying South Carolina held "it was reasonable for [Plaintiff] to rely upon [Defendant's] silence and then subsequent work as acquiescence.")

Again, September 3, 2006, after Plaintiff had helped land a large increase in work at BMW, Plaintiff stated in another email that the offer letter "states that I will paid 1% of any new business generated…." (DeFazio Dep. Exh. 10). On this occasion, Fuertes (who replaced Barrows) asked to see the letter (DeFazio Exh. 11) and Plaintiff emailed a copy of the offer letter. (DeFazio Exh. 14.)

[4] Plaintiff has omitted the comments to §214, which number 42 pages. Plaintiff is more than willing to supplement by producing the comments section upon request.

There was no reply email or statement dissenting, disclaiming or disputing Plaintiff's understanding of his entitlement to a 1% new work bonus.

> Where it is affirmatively shown, by either direct or circumstantial evidence, that a writing or document has been brought to the attention of a party, and the circumstances are such that, if the party dissented from the statements contained therein, his or her dissent would naturally have been manifested by some objection, his or her failure to deny the accuracy thereof may be relevant as an admission, and hence the writing and the failure to object thereto may be shown in evidence. Evidence of the failure to deny the truth of written statements is especially admissible where other statements in the same document are disputed.

32 CJS Evidence § 541. *By silence or acquiescence—In respect to written statements* (2009). "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." *Restatement (2nd) of Contracts* § 202 (4) *Rules In Aid Of Interpretation* (West 2009)(Attached).[5]

However, as stated above, there is much more than Defendant's mere silence and/or acquiescence. After Plaintiff forwarded the letter to Fuertes, Defendant expressly and repeatedly promised to honor the agreement. Davis testified that he had numerous conversations with Paul Bechard beginning in October 2006 and extending until the next year during which Bechard recommitted/ratified the earlier commitment made to Tom Davis. Bechard said that, "I have discussed the letter of offering with Jim Neville (Director of Human Resources), we sat down and talked about it and he said, Jim and I concurred that MPW has a moral obligation to pay you this. MPW will honor your letter of offering." (Davis Dep. at 73.) Plaintiff's testimony accounts for

[5] Plaintiff has omitted the comments to §202, which number 88 pages. Plaintiff is more than willing to supplement by producing the comments section upon request.

almost 10 different affirmations of the commitment. This is clear evidence of the agreement of the parties and of a meeting of the minds, but of course there is much more.

1. An Unmistakable Meeting of the Minds on Material Terms.

Despite the fact that the General Manager testified clearly that he had made the exact promise that Plaintiff now seeks to enforce, Defendant argues that there was no "meeting of the minds." To evaluate this claim, we can only look at the evidence of (a) the intentions and understandings of the person authorized to make the offer on behalf of Defendant and (b) the intentions and understandings of Plaintiff, who accepted the offer. In *Player v. Chandler,* 299 S.C. 101, 05, 382 S.E.2d, 891, 894 (1989) the South Carolina Supreme Court asserted:

The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.

a. Purpose and Intention of Defendant.

And after testifying that "**as a P and L owner, I had the authority to act without a policy,**" Paul Bechard, Defendant's General Manager at the time, testified as follows:

> Q. So, with that authority, you would have promised Tom Davis that he would – that he would receive **a new work bonus of 1 percent for any increase of the baseline contract amount after July 2005.**
>
> A. **Yes.** That was, to my recollection, **that was the intent**.

(Bechard Dep. at 67.)(emphasis added)[6]. The intent of Defendant could hardly be any more clearly stated.

[6] Defendant's counsel objected to this question.

b. Intention and Understanding of Plaintiff.

As stated above, when Plaintiff was made the offer of account manager, his offer letter omitted several key terms of compensation. Jody Kern had approached Plaintiff about accepting the account manager position and had communicated the 1% new work bonus to Plaintiff. In an email dated February 24, 2005 (which would written during initial discussions with Plaintiff about the promotion), Kerns asked General Manager Bechard "Does the 1% apply to Tom Davis and George Pittman as well?" (DeFazio Exh. 8). Bechard answered "When they become account managers." (DeFazio Exh. 8). Kern communicated this to Plaintiff. Although Kern did not have the authority to bind the company with a promise made on his own accord, Kern had been directed by Bechard, who did have the authority, to communicate the terms of the new work bonus to Plaintiff.

When Plaintiff was formally offered the BMW account manager position on July 26, 2005, he understood clearly that an annual bonus equal to 1% of any increase of the baseline amount contained in the BMW contract would be part of that compensation package. After Plaintiff pointed out the omission of the new work bonus to Dave Barrows, Barrows called Bechard before handwriting the three omitted items into the offer letter, including "new work bonus for increase of contract at BMW." (Davis Dep. 59-60, 186; DeFazio Exh. 1). Barrow signed and dated the handwritten additions as a manifestation of assent.

In his deposition Tom Davis testified has to his understanding of the new work bonus as follows:

> Q. And the handwritten note, new work bonus for increase of contract at BMW, is it your understanding that would be a bonus for the increase of the contract at BMW?
>
> A. Yes, and as I stated previously, **one percent of the new work bonus above the contract**.

Q. And the contract was what amount?

A. $1,975,001 per year.

Q. So, the bonus for the increase of that amount?

A. Yes.

(Davis Dep. at 186-87). Tom Davis understanding **matches perfectly the understanding and intent** of Defendant (as testified to by Paul Bechard). There was a meeting of the minds.

c. Material Terms

Defendant argues that the material terms of the contract between the parties are not set out with "reasonable certainty." In regards to calculating the new work bonus, there must be a "definite method for ascertaining it." *McPeters v. Yeargin Constr. Co., Inc.* 290 S.C. 327, 350 S.E.2d 208, 211 (S.C. Ct. App. 1986). As demonstrated in the preceding section and quotes, there is a definite (and simple) method for determining Plaintiff's new work bonus: 1% x Increase in BMW Gross Revenues (above $1.975 million) = New Work Bonus.

In fact, Defendant's objection is not that there is not a definite method of determination but that it is not complicated enough. However, the General Manage who authorized Plaintiff's new work bonus stated "we tried to keep it very simple, straightforward." (Bechard Dep. at 53). As clearly demonstrated, Bechard and Plaintiff had a meeting of the minds on the method of calculating the bonus. Moreover, Plaintiff produced a spreadsheet using gross revenue numbers provided by Defendant and testified quite specifically **using Bechard's method of calculation**:

> "No. The way I calculated it is very simple. You take $1,975,001 annually, take that and take what we were making annually, subtract the $1,975,001 from that and that gives you the gross revenue that was above the contractually agreed task scope. I should be paid one per cent of that. It's a very simple calculation. There is nothing complicated about it."

(Davis Dep. at 126. See also Davis Dep. at 121-129; 183).

Using the Bechard method of calculation, the spread sheet calculates the bonus to be $125,258. (Davis Dep. at 183, Davis Dep. Exh. 11.)

Reluctantly, Shane DeFazio, Defendant's Controller and designee at Defendant's 30(b)(6) deposition admitted there was no problem calculating a bonus using the Bechard method relied upon by Plaintiff:

> Q. Right. And if the promise was to calculate a bonus on all amounts above 1.975 that information can be gleaned from Plaintiff's Exhibit 3?
>
> Objection, lack of foundation.
>
> A. I mean if you're asking if you can get total revenue for specific time periods from our P& L, yes you can.
>
> Q. And if you take those revenues and subtract 1.975, that would tell you the increase over that base contract amount for that given year?
>
> A. I guess I'm not—I'm not agreeing with the base amount but it'll tell you the difference between 1.975 and whatever the number is on the P & L.
>
> Q. And if 1.975 is the base contract amount, that would give you the increase, that one percent times that increase would give you what Tom Davis is claiming—
>
> A. That shows you that incremental amount—
>
> Q. That he claiming he's entitled to?
>
> A. It could potentially show that, yeah….

(DeFazio Dep. 125-126.)[7] Thus, Bechard and Davis agree on the method of calculation, which not only calculates the bonus to a "reasonable certainty" but calculates it to the penny.[8]

[7] After answering the question, DeFazio continues to disputes that the BMW contract amount is $1.975 million, although the contract itself states this fact and DeFazio admitted it on page 53 of his deposition (lines 12-15). Moreover, he disputes that Tom Davis was solely responsible for all the increase of revenue, which of course, he is entitled to do. And which is irrelevant to the issue of whether Davis is entitled to the bonus as promised.

[8] There are questions of fact which Defendant can dispute: Whether Plaintiff is entitled to the entire month of July 2005 or the partial month he was account manager; whether after the BMW contract expired in December 2008, the contract

Defendant also attempts to claim that because there was no specific agreement as to the time of payment of the annual bonus that they get a pass on paying Plaintiff the bonus he earned. It is a bold attempt to turn a violation of the South Carolina Wage Payment Statute into a defense. (Discussed below in Section 3). However, controlling South Carolina precedent (not cited by Defendant) makes clear that failure to specific a precise time for payment is in no way fatal. The Supreme Court in *Davis v. Cordell* 237 S.C. 88, 115 S.E.2d 649, 654 (1960) stated that uncertainty as to timing of the payment only means that the court will imply payment within "a reasonable time." Specifically the Court held:

> As to the time for payment of all or any part of the purchase price (other than the down payment of $100), the contract is completely devoid of certainty. For all that appears on its face, appellant or his heirs or assigns could have deferred payment as long as they might wish, for no obligation to pay was to arise until he or they might desire to have one or more lots conveyed to him or them or another. **Uncertainty in that regard does not, however, render the contract void; a reasonable time will be implied.**

Cordell, 115 S.E.2d at 654.(emphasis added.) More recently, the South Carolina Court of Appeals, citing *Cordell*, held:

> While there is no specification of the timing of the periodic payments (i.e. monthly, quarterly, yearly, etc.) we do not believe this omission would be fatal to a decree of specific performance because reasonable terms could be implied by the court.

Mullins v. Benton, 309 S.C. 85, 419 S.E.2d 838 (S.C. App. 1992)

Of course, the South Carolina Wage Payment Statute states specifically when a bonus shall be paid upon termination: "When an employer separates an employee from the payroll for any reason, the employer shall pay all wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days." S.C. Code § 41-10-50.[9]

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amount remained $1.975 million, which it appears it did. So, Defendant can attack the calculation at the margins, but as the method of calculation there was a clear meeting of the minds.

[9] Plaintiff testified that other annual bonuses were paid at one of two times: End of calendar year or end of fiscal year.

2. Bait and Switch: The Project Booking Bonus Plan DRAFT

Defendant spends much time attempting to present evidence to contradict the terms of the written terms of the contract, which are contained the July 26, 2005 offer letter. As stated above, although parol evidence is admissible to explain an ambiguous term or supply a missing term, it is not admissible to contradict written terms of a contract. *See e.g., Harbour Town Yacht Club Boat Slip Owners Assoc.* 421 F.Supp. 2d at 911; Restatement (2nd) of Contracts §216 (1) *Consistent Additional Terms (West 2009)*. Plaintiff's offer letter states quite clearly that the bonus will be calculated based upon "the increase of the contract at BMW." (DeFazio Ex. 1). Anything that **contradicts** this written term is inadmissible parol evidence.

The evidence establishes that Plaintiff was promised a new work bonus and that this promise was stated in his offer letter. However, during the same period, there was a draft of a "Project Booking Bonus" circulating MPW management to pay a similar bonus to other account managers, which according to Defendant was never approved. (DeFazio Dep. Ex. 7; Dep. p. 97-10; 101-02). However, Plaintiff is not relying on the Project Booking Bonus that was never implemented company wide. In fact, Plaintiff testified that he never even saw a copy:

Q. Right. You understood there was an attempt for a program to put this in place for other account managers?

A. Right.

Q. But you never saw such a program?

A. No. I did not.

Q. In regards to your conversations about your new work bonus, those weren't in reference to that program, were they?

A. No.

Because controlling precedent is so clear, Plaintiff will not belabor the point, but there is a solid argument that "course of

Q. That was in reference to your offer letter dated July 26, 2005?

A. Right.

(Davis Dep. 187-88).

Ironically, Defendant's argument asserting the requirement of a "meeting of the minds" is nothing more than an attempts to interject parol evidence of a bonus program that was never implemented and never part of the bargain struck with Plaintiff.

B. There is Substantial Evidence that Plaintiff is Entitled to Reimbursement of Expenses.

As stated in much detail in the fact section above, in May 2008, Plaintiff submitted his expense reports totaling $11,073.46 along with all of his receipts for customary expenses that had previously been reimbursed. Plaintiff was told that they would be reimbursed on this occasion as well. (Davis Dep. at 152-53). As DeFazio, Defendant's Controller testified, Ron McLean was the person responsible for reviewing and approving these tardy expense reports. (DeFazio Dep. at 89-90). In June and/or July of 2008, McClain reviewed and on each report he handwrote the amount of approved expenses to be reimbursed and signed as "approved." (DeFazio Dep. Exh. 6; DeFazio Dep. at 89-92). McLean approved $8,065.71 of the submitted reports. (DeFazio Dep. Exh. 6). However, after Plaintiff advised that he was getting legal counsel, DeFazio decided not to pay the approved amount. (DeFazio Dep. 80-83; Davis Dep. at 154). Of course, this is the definition of bad faith.

Defendant has produced two different policy and procedures for reimbursing expenses. (DeFazio Dep. Exh. 4 and 5). One of those policies indicates that tardy expenses will be reimbursed at 75%, which is about what the McLean's approved amount ($8065.71) makes up 72% of the total submitted by Plaintiff ($11,073.46). (DeFazio Dep. Exh. 4). Although Plaintiff never saw these policies, it is clear that Plaintiff submitted expenses, that there was an agreement to reimburse these

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dealing" supplies the term of when the bonus would be paid. (Davis Dep. 183-185).

expenses and that there was a decision to reimburse $8,065.71. Based upon these undisputed facts, Defendant is arguing that there are no facts upon which a jury could award Plaintiff any portion of his unreimbursed expenses when it is simply just not true.

C. There is Substantial Evidence that Defendant Violated the South Carolina Wage Payment Statute.

In addition to the breach of contract claims, Plaintiff has alleged violations of the South Carolina Wage Payment Act. S.C. Code §41-10-10 *et. seq.* The Act defines wages as "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract." S.C. Code §41-10-10(2). As clearly demonstrated above, Plaintiff is claiming a bonus pursuant to a contract, which is clearly encompassed under the Act.[10]

After spending 18 pages arguing that Plaintiff has no evidence that he is entitled to a new work bonus or reimbursement of expenses, Defendant actually argues that "at the very least a *bona fide* dispute as to whether Davis was entitled to any new work bonus." However, like the arguments that precede this one, Defendant omits material facts and ignores controlling precedent. First, omitted or ignored facts, which clearly would permit a finding of bad faith:

- Plaintiff was provided an offer letter which specifically promised that he was to be paid a new work bonus, which Defendant denies ever existed.
- Paul Bechard, General Manager of Defendant at the time, testified that Plaintiff earned the bonus and should be paid the bonus. (Bechard Dep. 71-72).

[10] Interestingly, Defendant's defense also puts this case squarely within the coverage of the act. The Wage Payment Act applies to wages due under contract or **policy.** Defendant's defense is that there was no contract, but a draft policy, which would create a question of fact under the act irrespective of the contract issue. However, since the evidence of a contract is so compelling, Plaintiff will spend no more than a footnote on this point.

- Bechard testified that he pleaded with management to pay the bonus but was ignored. He further testified: "I expressed my disappointment, you know from a credibility standpoint promising people things that weren't delivered upon." (Bechard Dep. at 71-72).

- Bechard further testified that "when you promise someone that your team's that working hard is going to be incentivized to grow the business, you know, it's – it's only right that, you know, you follow through on your – on your commitments." (Bechard Dep. at 45, lines 18-22).

- Plaintiff testified (and email corroborate) that he sent an email on April 23, 2006 which alerted the John Fuertes (Barrow's replacement) of the new work bonus, which was ignored.

- Plaintiff testified (and emails corroborate) that in September 2006, Plaintiff again raised the issue of his new work bonus.

- Bechard testified that he advised the CFO that "we had made a promise to our team and it would be smart to make good on –make good on that promise." (Bechard Dep. at 42).

- Plaintiff testified that he had repeated discussions with the director of human resources (Neville) and the General Manager (Bechard) beginning in October 2006 about his new work bonus. During these discussions Neville and Bechard reassured that the Defendant had every intention of paying him and at each delay would indicate that Defendant was merely working on a payment schedule.

- Plaintiff advanced the company $11,073.43 in expenses which under his employment agreement were reimbursable. Defendant actually approved over $8,000, but when Plaintiff indicated that he would bring a wage payment action, decided not to pay Plaintiff amounts conceded that he was owed.

The evidence is overwhelming that Defendant made a promise, reaffirmed and ratified the promise over and over, and then after revenues grew by 6 times the contract baseline, refused to pay Plaintiff the new work bonus. And just because it could, Defendant refused to reimburse Plaintiff business expenses, even those Defendant determined were approved.

Moreover, Defendant has brazenly attempted to turn its own violation of the wage payment statute into a defense of its obligations. South Carolina Code § 41-10-30 reads in part: "Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages

agreed upon, **the time and place of payment,** and the deductions which will be made from the wages, including payments to insurance programs." Defendant now argues because it failed to comply with this mandate it does not have to pay Plaintiff amounts promised, affirmed and ratified repeatedly.

South Carolina precedent states otherwise. In *Ross v. Ligand Pharmaceuticals, Inc*., 371 S.C. 464, 639 S.E.2d 460 (S.C. App. 2006), the South Carolina Court of Appeals held that an departure policy that set "target dates" for payment of commissions violated the South Carolina Wage Payment Statute because it did not provide "time and place for payment." However, there was no "time certain" time for payment, which the defendant in *Ross* asserted excused its obligation to pay the plaintiff after he was fired *before* it decided to pay the commission. The Court held that the failure to provide a time certain for payment was itself a violation of the South Carolina Wage Payment Act and upheld an award of treble damages plus attorney fees.

The facts are compelling that not only has Defendant acted in bad faith and in an unreasonable manner, but that Defendant has intentionally refused to pay amounts owed to Plaintiff. The facts are compelling that it intentionally mislead Plaintiff. The issue of whether bad faith exists is a question of fact, which should await a trial on all of the issues.[11] *Dorman v. Allstate Ins. Co.,* 332 S.C. 176, 504 S.E.2d 127 (S.C. App., 1998.). Just because lawyers can think of arguments to get their client out of an otherwise enforceable obligation does not by itself create a *bona fide* dispute.

[11] Plaintiff believes that because the jury will consider all other issues, the jury should be asked to render an advisory verdict on the issue of whether a bona fide dispute exist. And in any event, this court should hear testimony presented at trial before making a final decision on any disputed issue of fact.

IV. Conclusion

Plaintiff has produced substantial evidence in support of his claims for breach of contract as well as a violation of the South Carolina Wage Payment Act. Accordingly, this Court should deny Defendant's Motion for Summary Judgment and order a trial by jury of this matter.

Respectfully submitted,

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