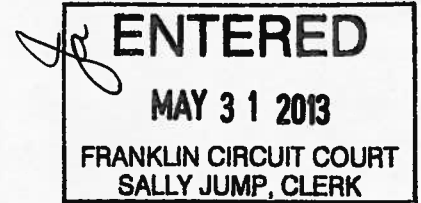


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II

CIVIL ACTION No. 12-CI-01373



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KENTUCKY SPIRIT HEALTH PLAN, INC.

PLAINTIFF

vs.

COMMONWEALTH OF KENTUCKY  
FINANCE AND ADMINISTRATION  
CABINET, et al.

DEFENDANTS

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**OPINION AND ORDER**

This matter is before the Court upon Plaintiff's *Motion for Summary Judgment* and Defendants' *Cross Motion for Summary Judgment*. Upon review of the parties' briefs and papers, and after being sufficiently advised, this Court hereby **DENIES** Plaintiff's *Motion* and **GRANTS** *Summary Judgment* in favor of Defendants.

**STATEMENT OF FACTS**

On October 22, 2012, Plaintiff, Kentucky Spirit Health Plan, Inc. (hereinafter "Kentucky Spirit")<sup>1</sup> filed an original action for declaratory relief relating to Medicaid Managed Care Contract No. MA 759 1200000084 3<sup>2</sup> (hereinafter "Contract").<sup>3</sup> Count I

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<sup>1</sup> Kentucky Spirit is a Kentucky corporation with its principal place of business in Lexington, Kentucky, doing business as a for-profit Medicaid managed care organization. Kentucky Spirit is a subsidiary of Centene Corporation, which, through various other subsidiaries, contracts to provide or is providing managed care services in multiple states.

<sup>2</sup> In accordance with its duty to solicit bids and award contracts, on behalf of the Cabinet for Health and Family Services, the Finance and Administration Cabinet ("Finance") issued a Request for Proposal on April 7, 2011 seeking proposals from managed care organizations to provide Medicaid managed care services to seven regions of the Commonwealth of Kentucky. Kentucky Spirit submitted its bid on May 25, 2011, and in July 2011 Finance awarded Kentucky Spirit, along with two other companies, a managed care contract to administer Medicaid benefits for seven regions being operated by the Department of Medicaid Services. On July 6, 2011, Kentucky Spirit executed Medicaid Managed Contract No. MA 759 1200000084 3. The initial term of the Contract is for three years, with four subsequent one year renewal options. Kentucky Spirit began administering the Medicaid managed program pursuant to the Contract on November 1, 2011.

of the Complaint seeks a declaration that Kentucky Spirit has the right to terminate the Contract effective July 5, 2013 without incurring the liability to pay any damages or penalties beyond those that are a result of the early termination provided by the Contract. Count II seeks a declaration that the only damages permitted to the Commonwealth, upon breach or termination, are liquidated damages pursuant to Section 39.11 of the Contract to be calculated in the amount of ten percent (10%) of one of Kentucky Spirit's monthly capitation payments. In its Complaint, Kentucky Spirit alleged that, because of the Commonwealth's acts and omissions, Kentucky Spirit has lost over \$120 million in performing its duties under the Contract. Seeking to prevent further losses, and after performing under the Contract for almost one year, on October 17, 2012, Kentucky Spirit tendered notice to the Commonwealth of its intent to terminate the Contract early, effective no later than July 5, 2013.

Defendants, collectively, are Commonwealth of Kentucky, Finance and Administration Cabinet (hereinafter "Finance"), Lori Flanery, Secretary of Finance, Commonwealth of Kentucky, Cabinet for Health and Family Services (hereinafter "CHFS"), Audrey Haynes, Secretary of CHFS, Commonwealth of Kentucky, Department of Medicaid Services (hereinafter "DMS") Lawrence Kissner, Commissioner of DMS. In its April 8, 2013 Answer and Counterclaim, Defendants alleged that Kentucky Spirit was in breach of contract for attempting to terminate the Contract prior to the expiration of the initial term. Specifically, Defendants maintains that, by way of its October 17, 2012

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<sup>3</sup> Following Kentucky Spirit's October 22, 2012 initiation of this lawsuit, Defendants filed a Motion to Dismiss or in the Alternative to Hold in Abeyance on December 5, 2012, based on Kentucky Spirit's failure to exhaust its administrative remedies and its failure to follow its contractual dispute resolution procedure. By Order dated January 23, 2013, this Court stayed litigation of Kentucky Spirit's claims for rescission and reformation of the Contract pending a formal, written determination on Kentucky Spirit's claims by Finance Secretary Flanery. Secretary Flanery issued her determination on March 14, 2013 denying all but one of Kentucky Spirit's claims and declining to award an adjustment on the only claim not denied.

letter, Kentucky Spirit has improperly and prematurely notified the Commonwealth of its intention to terminate its performance under the parties' Contract effective July 5, 2013, a full year before the expiration of the Contract's initial term of three years, as defined by Section 8.1 of the Contract. Defendants maintain that Kentucky Spirit cannot terminate its performance of its contractual obligations before the conclusion of the initial term, on July 5, 2014. Defendants seek a declaration detailing the following: 1) that Kentucky Spirit's stated intention and subsequent actions to terminate its performance under the Contract prematurely is a breach, repudiation and/or an anticipatory breach of the parties agreement, 2) that the initial term of the Contract runs through July 5, 2014, 3) that Kentucky Spirit does not have a contractual right to early termination under the Contract effective July 5, 2013 and finally, 4) that if Kentucky Spirit in fact terminates its performance under the Contract prior to July 5, 2014 that it will be obligated to remit to the Commonwealth, in accordance with Section 39.11 of the Contract, liquidated damages. Moreover, Defendants seek a declaration that, should Kentucky Spirit prematurely terminate its performance under the Contract, Kentucky Spirit would be responsible for compensating the Commonwealth by way of compensatory and special damages as well as attorney's fees.

This matter is properly before this Court as a declaratory action under KRS Chapter 418. *See* KRS 418.040. The parties' briefs and papers present this Court with an actual controversy as to whether Kentucky Spirit has the right to terminate its performance under the Contract prematurely and withdraw from Kentucky's Medicaid Managed Care Program effective prior to July 5, 2014. Additionally, the Court is presented with the questions of determining whether the Contract's liquidated damages

provision applies in the event Kentucky Spirit exercises any available right to terminate the Contract early as well as determining what the appropriate calculation of damages due, if any, under that provision as a consequence.

## ANALYSIS

### I. Standard of Review

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown “with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). “The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that

the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

The matter is properly before the Court on motions for summary judgment, as there are no genuine issues of material fact and because the construction and interpretation of the Contract is a question of law for the Court. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. Ct. App. 2002). The determination as to whether there are any ambiguities is also a question of law for the court to decide *de novo*. *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280, 284 (Ky. Ct. App. 2010). A court may consider extrinsic evidence regarding the circumstances surrounding the execution of the contract or the intended objectives of the contract when the contract is ambiguous. *Cantrell Supply*, 94 S.W.3d at 385. If a reasonable person would find a contract susceptible to different or inconsistent interpretations, a contract is ambiguous. *Id.* That one party intended a different result is insufficient to prove a contract’s terms ambiguous. *See Green v. McGrath*, 662 F.Supp. 337, 342 (E.D.Ky.1986).

When a contract is not ambiguous, the parties' intentions "must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply*, 94 S.W.3d at 385, citing *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000). The primary object in construing a written contract agreement is to effectuate the intentions of the parties, which is determined from the writing itself. *Withers v. Commonwealth, Department of Transportation*, 656 S.W.2d 747, 749 (Ky. Ct. App. 1983). "An unambiguous written contract must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence." *Cadleway Properties*, 338 S.W.3d at 286, citing *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657 (Ky. Ct. App. 2007). Even if the contracting parties may have intended a different result, a contract cannot be interpreted contrary to the plain meaning of its terms. *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky.2006).

Finally, "[t]he rule in construing contracts to which the government is a party is to resolve all ambiguities, presumptions, and implications in its favor. Where the public interest is affected, an interpretation is preferred which favors the public." *Codell Construction Co. v. Commonwealth*, 566 S.W. 2d 161, 164 (Ky. Ct. App. 1978).

## **II. Argument**

### **a. Introduction**

The primary issue before the Court is whether Kentucky Spirit's Managed Care Contract with the Commonwealth grants Kentucky Spirit a right to terminate the Contract prior to the expiration of the initial term of three years. Secondary to that issue is the Court's determination of the propriety and amount of damages due in the event Kentucky

Spirit terminates the Contract. Both of these issues are questions of contract construction and interpretation for this Court to review *de novo*.

Kentucky Spirit insists it has the right to terminate the Contract prior to the end of the initial period. Such power, Kentucky Spirit says, is bestowed by Section 39.13. Because Kentucky Spirit is exercising a right it believes is granted by the Contract, Kentucky Spirit insists that it has not breached the agreement. Having exercised its contractual rights, and therefore not being in breach of the agreement, Kentucky Spirit maintains that the Commonwealth is not entitled to liquidated damages under Section 39.11, as such damages are reserved to compensate the Commonwealth in the event of breach. In the alternative, Kentucky Spirit posits that, should the Court determine that liquidated damages are appropriate under the circumstances, such damages should be limited to an amount equal to ten percent of Kentucky Spirit's monthly capitation payment.

**b. Kentucky Spirit Has Not Yet Breached the Contract**

As a preliminary matter, the Court shall address the Commonwealth's assertion that Kentucky Spirit has already breached the Contract, or in the alternative that Kentucky Spirit's tendered notice was a repudiation or anticipatory breach of the Contract. On October 17, 2012, Kentucky Spirit tendered notice to the Commonwealth of its intent to terminate the contract effective July 5, 2013. On the same day, CHFS Secretary, Audrey Haynes, testified to the Kentucky Legislature's Interim Joint Committee on Health and Welfare that Kentucky Spirit lacked the right to terminate the Contract and was in breach of the Contract.

The doctrine of anticipatory breach or repudiation is recognized in Kentucky. See *Jordon v. Nickell*, 253 S.W.2d 237, 239 (Ky. 1952) citing *Paducah Cooperage Co. v. Arkansas Stave Co.*, 237 S.W. 412 (Ky. 1922); *Fidelity and Deposit Company of Maryland v. Brown*, 20 S.W.2d 284 (Ky. 1929). Under the doctrine, the repudiating party must make an “unequivocal repudiation or renunciation of an executory contract in advance of the time of performance.” *Jordon v. Nickell*, 253 S.W.2d at 239. Such action may then be regarded by the injured party as an anticipatory breach supporting an immediate action for damages. *Id.* “It is a universal rule that renunciation must be clear and unmistakable.” *Paducah Cooperage Co. v. Arkansas Stave Co.*, 237 S.W. 412, 413 (Ky. 1922). The doctrine requires unequivocal words or conduct evidencing an intent to repudiate the contract. *Brownsboro Rd. Rest., Inc. v. Jerrico, Inc.*, 674 S.W.2d 40, 42 (Ky. Ct. App. 1984); see also *Upton v. Ginn*, 231 S.W.3d 788, 792 (Ky. Ct. App. 2007).

The Court does not agree that Kentucky Spirit’s actions thus far constitute a breach, anticipatory breach or repudiation of the Contract. Kentucky Spirit began, and is still, performing its duties under the Contract at this time, and the facts and language surrounding Kentucky Spirit’s tendered notice do not evidence an intent to discontinue performance of its contractual obligations. Kentucky Spirit’s October 17, 2012 tendered notice is not a breach or repudiation, anticipatory or otherwise, of the Contract.

**c. Section 39.13 is a Notice Provision**

Kentucky Spirit maintains that it has the right to terminate the Contract before the end of the Contract’s initial term upon sufficient notice to the Commonwealth under Section 39.13, entitled<sup>4</sup> Termination by Contractor. That section states that “[t]he

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<sup>4</sup> Section 39.15 of the Contract provides that “[t]itles of sections used in this Contract are for reference only and shall not be deemed to be a part of this Contract.”



Contractor may terminate this Contract with notice given in accordance with the requirements of Section 40.13 at least six (6) months but not more than twelve (12) months prior to the end of the initial term of this Contract or any renewal terms.”

The Court does not agree that this Section confers upon Kentucky Spirit the right to early termination of the Contract. Rather, the Court believes that Section 39.13 is intended to inform Kentucky Spirit of when Kentucky Spirit may provide notice that it would not renew the Contract after the fixed, initial three year term. Looking to the Contract as a whole, other provisions in the Contract make it clear that the parties contemplated a transition period to phase out Kentucky Spirit and transition patients to another managed care provider. For instance, in Section 8.1, the Contract states that “[i]f the parties cannot agree on terms for renewal prior to June 30, 2014, then Contractor agrees to continue to provide services to Department for up to six (6) months after the end of the term [ . . .].” The purpose of this language is two-fold. First, the CHFS would receive at least six months notice and transition time before Kentucky Spirit’s performance duties would end, and second, Kentucky Spirit would avoid being responsible for performing the six month extension under the old capitation rates plus three percent. In reality, the Contract does not expire by its own terms without Kentucky Spirit providing notice of non-renewal according to Section 39.13. While the Contract will not automatically renew, if Kentucky Spirit does not tender its Section 39.13 notice, and if the parties do not agree to new rate terms by June 30, 2014, then Kentucky Spirit is responsible for performing its duties under the Contract for up to six more months.

Other provisions in the Contract, including the Sections which explain how and when the Commonwealth may terminate or cancel the Contract, support the inference

that the parties contemplated a transition period to last at least two but not more than six months. *See* for example, Section 39.8 (Termination for Convenience), Section 39.10 (Obligations Upon Termination). The only provision which provides for a somewhat immediate termination is Section 39.9, entitled Termination for Default. That provision permits Finance the “remedy of immediate termination of this Contract if the problem is not cured in the time frame specified by the [DMS].” So even in the event of default on behalf of Kentucky Spirit, the right to terminate the Contract ultimately rests with Finance, after a period to cure the default has passed.

Additionally persuasive is the Commonwealth’s reliance on Finance’s administrative regulations governing contracts with the State. All contracts awarded through the bidding process by the State must comply with the administrative regulations promulgated regarding procurement. 200 KAR 5:307, Section 7, which governs competitively negotiated contracts, provides that “[t]he terms and conditions of the contract shall not in any material respect deviate in a manner detrimental to the purchasing agency from the terms and conditions specified in the solicitation for proposals.” The Commonwealth directs the Court’s attention to Section 40.150 of the RFP, which provides that “[a]ny Contract resulting from this Solicitation shall be subject to the termination provisions set forth in 200 KAR 5:312.” 200 KAR 5:312 governs the termination of contracts. All of the methods discussed above, through which the Commonwealth may terminate the Contract, are discussed in 200 KAR 5:312, and the regulation does not contain a single provision for termination of a Contract by a Contractor.

There are several aspects of Kentucky Spirit's Section 39.13 interpretation that are particularly troubling. First, under Kentucky Spirit's interpretation, the parties are not afforded a transition period. For this reason alone, Kentucky Spirit's position is untenable, as there are obvious and serious consequences to terminating a managed care contract without allowing for a transition period. Second, assuming Section 39.13 does grant Kentucky Spirit the right of early termination, it is unclear when Kentucky Spirit's purported termination notice would need to be given and when the effective date of the termination would be. These pieces of information are important components to a very powerful right, and under Kentucky Spirit's interpretation, the Contract is completely silent on these issues or directly contradictory to other express terms in the Contract.

The only reasonable interpretation considering these weaknesses is to conclude that Section 39.13 is a notice provision, with the earliest possible termination date being the final date of the initial term of three years, July 5, 2014. Based on the plain meaning of the Contract's terms and an examination of the Contract as a whole, Kentucky Spirit does not have a right to terminate the Contract one year early under Section 39.13.

**d. Early Termination Would Be a Breach of Contract**

The plain language of Section 8.1 of the Contract is clear that Kentucky Spirit is obligated to fulfill a minimum initial term of three years, ending on July 5, 2014. Section 8.1 states that "[t]he initial term of the contract shall be for a period of three (3) years from the Execution Date of the Contract." Kentucky Spirit, then, is obligated to a minimum initial term of three years of performance, beginning July 6, 2011 and concluding July 5, 2014. As discussed above, because Section 39.13 does not give Kentucky Spirit the right to terminate the Contract early, any cessation of performance

under the Contract on the part of Kentucky Spirit would be a breach, or default, of the Contract. In the event of a default by Kentucky Spirit, the liquidated damages provision, Section 39.11<sup>5</sup> would be triggered.

### III. Conclusion

Kentucky Spirit brought the instant action seeking a declaration that it has the right under Contract Section 39.13 to terminate its performance duties prior to the end of the initial term. After a thorough review of the Contract and the parties' briefs and papers, the Court disagrees that Kentucky Spirit has such a right. Rather, the provision in question, Section 39.13, is a notice provision intended to inform Kentucky Spirit of when notice of non-renewal of the initial, or any subsequent, term is due. While Section 39.13 is arguably poorly drafted, the terms of the Contract as a whole are not ambiguous. If Kentucky Spirit were to cease performing its contractual duties before the end of the initial term, Kentucky Spirit would be breaching the Contract. As such, the Commonwealth would have the right to terminate the Contract due to Contractor default, and Section 39.11, the liquidated damages provision, would be triggered.

**WHEREFORE**, the Court hereby **DENIES** Plaintiff's *Motion* and **GRANTS** *Summary Judgment* in favor of Defendants.

This order is final and appealable and there is no just cause for delay.

**SO ORDERED**, this 31<sup>st</sup> day of May, 2013.

  
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**THOMAS D. WINGATE**  
Judge, Franklin Circuit Court

<sup>5</sup> In relevant part, Section 39.11, entitled Liquidated Damages, states that "[t]he Contractor acknowledges and agrees that in the event this Contract is terminated prior to the end of the term, [. . .] the Department will incur substantial inconvenience and additional expenses and costs which are difficult or impossible to accurately estimate. The contractor shall pay to the Department liquidated damages equal to ten percent (10%) of the Contractor's Capitation Payment. [. . .]"

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 9/24 day of May, 2013, to the following:


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