

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

MQVP, Inc.,

Debtor.

U.S. District Court Appeal
Case No. 07-CV-11791

On Appeal From:

Case No. 06-51141
Chapter 11
Hon. Marci B. McIvor

MQVP, Inc.,

Plaintiff-Appellant,

v.

Adv. Pro. No. 06-05635

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

**DEFENDANT-APPELLEE NATIONWIDE MUTUAL
INSURANCE COMPANY'S BRIEF ON APPEAL**

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**COUNTER-STATEMENT OF THE ISSUE PRESENTED AND THE APPLICABLE
STANDARD OF APPELLATE REVIEW**

The sole issue presented in this case is whether the bankruptcy court properly determined that Nationwide was entitled to summary judgment as to MQVP's breach of contract claim, where MQVP's claim for unpaid fees under the parties' Master Consulting Agreement relies on a fee provision that was subsequently modified both by a letter from MQVP's president to Nationwide and by MQVP's conduct in submitting invoices for four years based on the adjusted fee referenced in that letter.

This Court reviews *de novo* the bankruptcy court's decision to grant Nationwide's motion for summary judgment. See *In re Valley X-Ray Co.*, 360 B.R. 254, 258 (E.D. Mich. 2007).

Federal Rule of Bankruptcy Procedure 7056 makes Fed. R. Civ. P. 56 applicable in adversary proceedings. Rule 56 provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, 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." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989). The moving party bears the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. at 325. The burden then shifts to the nonmoving party to produce evidence that would support a finding in its favor. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-52 (1986).

The party opposing a motion for summary judgment "may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 442 (quoting *Liberty Lobby*, 477 U.S. at 248). The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material

facts." *Id.* at 242-43; *see also Liberty Lobby*, 477 U.S. at 248; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If after reviewing the record as a whole a rational factfinder could not find for the nonmoving party, summary judgment is appropriate." *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001).

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Nationwide requests oral argument because MQVP has sought to make this case appear far more complex than it really is, and Nationwide believes that oral argument will greatly assist the Court in reaching its determination of MQVP's appeal.

COUNTER-STATEMENT OF THE CASE AND OF THE FACTS

MQVP's statement of the case and of the facts is improperly one-sided and argumentative, and lacks appropriate references to the record, as required by Fed. R. Bankr. P. 8010(a)(1)(d). It also ignores undisputed facts relied on by the bankruptcy court. Nationwide therefore provides the following counter-statement.

A. The Parties' Original Master Consulting Agreement, Orders, and Addendums

The original consulting agreement between Nationwide and MQVP was known as Master Consulting Agreement No. 12058, which had an effective date of September 15, 2000 (the "Master Consulting Agreement"). The Master Consulting Agreement was subsequently amended several times by way of various orders and addendums (the Master Consulting Agreement, Order No. 1, Addendum to Order No. 1 to Master Consulting Agreement No. 12058, Addendum No. 2 to Order No. 1, and Order No. 2 are all attached as Exhibit A to Nationwide's Brief in Support of Motion for Partial Summary Judgment ("Summary Judgment Brief"), attached hereto as **Exhibit 1**, and shall collectively be referred to as the "Agreement").

In relevant part, the Master Consulting Agreement (as modified by Addendum to Order No. 1) contained the following provision relating to MQVP's fee under the agreement:

To administer MQVP among the parties (including Client, manufacturers and distributors), Client will pay Vendor 3% of the price, as supplied by the participating distributors, of eligible MQVP parts specified on all Nationwide, Allied, and/or other affiliate company collision repair appraisals. Administration of MQVP is outlined in Master Consulting Agreement No. 12058, effective September 15, 2000 by and between Client and Vendor. Client shall pay this 3% administration fee for MQVP starting 9/1/2000.

B. The Parties' Subsequent Modification of the Agreement's Fee Provision Through MQVP's June 14, 2002 Waiver Letter and Subsequent Course of Conduct in Remitting Invoices in a Modified Monthly Fee Amount

MQVP initially sent monthly invoices to Nationwide that were based on the Master Consulting Agreement's original fee provision, i.e., a fee equal to 3% of eligible MQVP parts. (Copies of the invoices dated May 1, 2002, June 1, 2002, and July 1, 2002 are attached as Exhibit B to Nationwide's Summary Judgment Brief (Exhibit 1)). *See also* Affidavit of Terry M. Fortner, attached as Exhibit C to Nationwide's Summary Judgment Brief (Exhibit 1).

On June 14, 2002, however, MQVP's President, Ronald Ritchie, sent Nationwide a letter stating that MQVP was going to "adjust" its original percentage fee to a flat fee of \$38,000 per month, beginning with MQVP's August 2002 invoice:

The program acceptance has developed to the point that we propose to **adjust the monthly MQVP fees for Nationwide Insurance to \$38,000.00 per month beginning with the August, 2002 invoice. This fee level will remain through the balance of the contract period ending January 2003.**

(Copy attached as Exhibit D to Nationwide's Summary Judgment Brief (Exhibit 1) (emphasis added)).

Pursuant to the waiver letter from Mr. Ritchie, MQVP began in August 2002 to submit invoices to Nationwide reflecting the modified monthly fee amount of \$38,000 (which was increased to \$39,900 in January 2005). In the meantime, MQVP also adjusted the original percentage fee being paid by a Nationwide affiliate, Allied Property and Casualty Insurance Company (hereinafter, collectively, "Nationwide"). That fee was modified to a flat monthly fee of \$12,600, commencing with the fee for December 2005.

For nearly four years (until Nationwide terminated the agreement effective October 27, 2006), Nationwide paid all of the monthly invoices submitted by MQVP, as evidenced by

electronic fund transfer ("EFT") reimbursement records (which confirm wire transfer transactions) and a copy of a check dated October 23, 2006. (Copies of the EFT reimbursements and the October 23, 2006 check, along with the corresponding MQVP invoices (as well as an index of payments), are attached as Exhibit E to Nationwide's Summary Judgment Brief (Exhibit 1). *See also* Affidavit of Terry M. Fortner, attached as Exhibit C to Nationwide's Summary Judgment Brief (Exhibit 1).

During that time, MQVP never protested Nationwide's payment of the modified monthly fee pursuant to the June 14, 2002 waiver letter, nor otherwise reserved its right to enforce the original fee provision.¹ MQVP instead continued to submit invoices to Nationwide reflecting the modified monthly fee.²

¹ MQVP also never raised an issue about the modified monthly payment being insufficient when, from June 2006 to August 2006, Nationwide remitted its payments to Results Systems Corporation ("RSC"), which had notified Nationwide that MQVP was in default to RSC, and that RSC had "acquired all rights to [MQVP's] accounts receivable." The letter instructed Nationwide to pay all sums due to MQVP directly to RSC pursuant to Michigan's Uniform Commercial Code, Mich. Comp. Laws § 440.9607. Nationwide, Allied and other Nationwide affiliates subsequently filed an interpleader complaint in Oakland County Circuit Court (Case No. 06-075233-CK). On August 6, 2006, the Oakland County Circuit Court entered an Order directing Nationwide to "pay to RSC all amounts owed to MQVP as an account debtor until RSC is paid in full." Pursuant to this order, Nationwide remitted to RSC its modified monthly fee payments amounts for the periods from June 2006 through August 2006. (See index of payments attached as part of Exhibit E to Nationwide's Summary Judgment Brief (Exhibit 1)). Nationwide began redirecting its payments to MQVP when it filed for bankruptcy.

² Although MQVP asserts for the first time in its brief on appeal that Nationwide "did not pay the \$39,900 monthly minimum payment for the last month of its participation in the MQVP Program," MQVP never alleged such a claim in its Complaint or raised it in response to Nationwide's motion for summary judgment, as the bankruptcy court observed in denying MQVP's motion for reconsideration. MQVP has therefore failed to preserve for appeal any claim concerning allegedly unpaid invoices. It is well established that appellate courts "will not entertain on appeal factual recitations not presented to the [lower court]." *Chicago Title Ins. Co. v. Magnuson*, ___ F.3d ___; 2007 WL 1461396 (6th Cir. 2007) ("In reviewing summary judgment, we look at [the] record in the same fashion as the district court"). MQVP's assertion is also irrelevant to the bankruptcy court's determination that the modified monthly fee payment

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C. Proceedings in the Bankruptcy Court

On August 17, 2006, MQVP filed for Chapter 11 bankruptcy. After Nationwide terminated the Master Consulting Agreement, MQVP claimed, for the first time, that Nationwide owed an additional \$2,700,923.09 under the original fee provision. When Nationwide responded that it had fully complied with the agreement as modified by the June 14, 2002 letter from MQVP's president, MQVP brought an adversary proceeding against Nationwide, claiming that Nationwide had breached the agreement's original fee provision. Nationwide moved for partial summary judgment³ on the ground that the original fee provision had been modified and/or waived pursuant to the June 14, 2002 letter, as well as by MQVP's subsequent ratification of that letter by submitting invoices based on the modified monthly fee amount.

Following a hearing held on March 20, 2007 (transcript attached at **Exhibit 2**), the bankruptcy court granted Nationwide's motion for summary judgment and dismissed MQVP's Complaint against Nationwide in an order entered on March 21, 2007. (See **Exhibit 3**). In pertinent part, the court determined that "as a matter of law the express language of the waiver letter and plaintiff's conduct subsequent to the letter demonstrate an unequivocal intention to relinquish its right to fees on a percentage basis and accept a fixed monthly fee as the contractual method of payment." (See March 20, 2007 Hrg Tr. at p. 28). MQVP subsequently filed a motion for reconsideration, which the bankruptcy court denied. (**Exhibit 4**).

Footnote continued from previous page ...

was, in any event, all that Nationwide was obligated to pay pursuant to the June 14, 2002, modification of the original agreement.

³ Nationwide sought "partial" summary judgment only in the sense that it was requesting summary judgment only on MQVP's single claim for breach of contract, and not on Nationwide's claims under its counterclaim, which remains pending in the bankruptcy court.

II. SUMMARY OF ARGUMENT

This Court should uphold the bankruptcy court's decision for the simple reason that the evidence unequivocally demonstrated MQVP's waiver of the original percentage fee provision and the resulting modification of the parties' Master Consulting Agreement. Not only did MQVP's president, Ronald Ritchie, waive that provision and modify the original agreement by virtue of his July 14, 2002 letter to Nationwide, but MQVP went on to ratify that waiver and modification by submitting monthly invoices for almost four years that were based upon the modified monthly fee referenced in the letter. MQVP has failed to present any basis whatsoever for disturbing the bankruptcy court's well-reasoned decision. As the bankruptcy court properly determined, Nationwide was entitled to summary judgment under basic and well established principles of contract law. Accordingly, the bankruptcy court's decision should be affirmed.

III. ARGUMENT

A. **The Bankruptcy Court Properly Determined That Nationwide Provided Consideration for The Modification of the Original Fee Provision**

MQVP first argues that there was no consideration for its waiver of the original percentage fee and resulting modification of the Master Consulting Agreement to provide for a modified flat monthly fee. Contrary to MQVP's assertion, there is no question that Nationwide provided consideration for the modification because it continued to do business with MQVP as opposed to exercising its contractual right to terminate the Master Consulting Agreement. Although MQVP claims that the bankruptcy court did not address the consideration issue, that is patently untrue. As the bankruptcy court aptly explained:

Had plaintiff attempted to collect the percentage fee at any time after – well, really after June 200[2] when the letter was entered into or modified the contract, defendant could have attempted to renegotiate or terminate the contract. Instead, plaintiff invoiced defendant for the flat fee and accepted defendant's payment of these invoices for four years. . . .

(March 20, 2007 Hrg Tr. at 29).

It is well established that when a party has the right to terminate a contract, forbearance from the exercise of that right constitutes consideration for the modification of the contract. *R.S.&V. Company v. Atlas Van Lines, Inc.*, 917 F.2d 348, 353 (7th Cir. 1990); *Bobrow Palumbo Sales, Inc. v. Broan-Nutone, LLC*, 2007 WL 29401, pg. 4 (E.D.N.Y.2007) (when a party is free to terminate a contract on written notice, its agreement not to exercise this right constitutes sufficient consideration for a modification of the contract). Here, there is no dispute that Nationwide had the right to terminate the Master Consulting Agreement upon 60 days written notice. In that regard, Section 9 of the agreement (as modified by Order No. 1) provided, in relevant part, as follows:

The initial term of this Order shall be one (1) year, and will automatically continue thereafter until terminated by either party, without cause, by giving sixty (60) days prior written notice to the other party.

(See Exhibit A to Nationwide's Summary Judgment Brief (Exhibit 1)).

Thus, as the bankruptcy court properly recognized, Nationwide's forbearance from exercising its termination right and continuing to do business with MQVP constituted more than adequate consideration for the modification.

B. The Bankruptcy Court Properly Determined That There Was No Genuine Issue of Material Fact as to Whether MQVP Waived the Original Fee Provision

MQVP next argues that the bankruptcy court "erroneously placed the burden on MQVP to establish it did not waive the Agreement," and that genuine issues of material fact existed precluding summary judgment. To the contrary, the bankruptcy court properly recognized that under the familiar standards applicable to motions for summary judgment, it was MQVP's burden to respond to Nationwide's well-supported motion by coming forward with evidence demonstrating a genuine issue of material fact as to whether MQVP waived its right to seek

enforcement of the original fee provision, and that it failed to do so. In no sense did the bankruptcy court shift the ultimate burden of proof to MQVP. The court merely pointed out MQVP's failure to present any evidence creating an issue of fact for trial.

Despite MQVP's assertions, the bankruptcy court's decision is also entirely consistent with established Ohio law regarding waiver of contract rights. MQVP does not dispute that under Ohio law, which governs the Master Consulting Agreement, a party waives a contract right if it is demonstrated that the party had:

- (1) an existing right, benefit, or advantage;
- (2) knowledge, actual or constructive, of the existence of such right, benefit, or advantage; and
- (3) an actual intention to relinquish it or an adequate substitute for such intention.

See Gomez v. Huntington Trust Co., N.A., 2001 WL 1112690, at *7 (N.D. Ohio 2005) (citing *Weaver v. Weaver*, 36 Ohio App. 3d 210, 212, 522 N.E.2d 574 (Ohio App. 1987)). Finally, where, as here, "the waiver is based upon an agreement, consideration is also necessary." *Parente v. Day*, 16 Ohio App. 2d 35, 38, 241 N.E.2d 280 (Ohio App. 8 Dist. 1968).

In its brief on appeal, MQVP does not appear to challenge the bankruptcy court's analysis of the first two waiver factors, nor could it. Since MQVP's breach of contract claim was entirely based on its assertion that it was entitled to enforce the terms of the original percentage fee provision, MQVP cannot possibly dispute that it conferred a right on MQVP to receive the original percentage fee in exchange for the services MQVP provided to Nationwide. Nor can MQVP conceivably dispute that it had either actual or constructive knowledge of that right. The Master Consulting Agreement (at Addendum to Order No. 1) clearly set forth the original fee

provision. Further, prior to agreeing to the modified monthly fee, MQVP's invoices reflected the original percentage fee. (See Exhibit B to Nationwide's Summary Judgment Brief (Exhibit 1)).

But even if MQVP did not have actual knowledge of its rights under the original fee provision, the June 14, 2002 waiver letter itself demonstrated that MQVP most certainly had constructive knowledge of its rights, as the bankruptcy court correctly recognized:

Even if MQVP did lack actual knowledge of its percentage rights under Addendum 1, constructive knowledge can be inferred from the existence of the June 2002 modification letter. That letter proposes to, quote, adjust, unquote, the monthly fee, an adjustment MQVP would not make unless it knew that a fee had already been set. Prior to June 2002, plaintiff knew it had a contractual right to be paid on a percentage basis. There is no question of fact on this issue

(March 20, 2007 Hrg Tr. at 26). Even if MQVP was uncertain as to precisely the amount of monthly fees to which it was entitled under the original fee provision, it certainly had constructive knowledge that it was entitled to fees in some amount when it explicitly agreed to modify those fees to the modified monthly fee amount. *See Adcor Industries, Inc. v. Bevcorp.*, 411 F. Supp. 2d 778, 800 (N.D. Ohio 2005) (holding that even though a party may not have literally seen or read a document, the party has constructive knowledge of such document if "they knew about [it]"). Since, as the bankruptcy court observed, it would make no sense for a party to propose to "adjust" a fee unless it knew that a fee had already been set, there can be no question that MQVP "knew about" the original fee provision even if it was somehow unsure of its specific fee terms. Thus, there was no genuine issue of material fact as to whether MQVP had constructive knowledge of its rights under the original fee provision.

As to the third waiver factor, i.e., intention to relinquish a known right, MQVP essentially argues that genuine issues of material fact existed as to whether MQVP did in fact waive its right to rely on the original fee provision. In support of that assertion, MQVP first contends that the June 14, 2002 waiver letter is somehow ambiguous because it does not

expressly state that it waives the original percentage fee. Despite MQVP's assertion, however, there is nothing ambiguous about the language of the waiver letter, which again states, in relevant part:

[W]e propose to adjust the monthly MQVP fees for Nationwide Insurance to \$38,000 per month beginning with the August, 2002 invoice.

Under the Master Consulting Agreement, the only "fee" that Nationwide was required to pay to MQVP on an ongoing basis was the original percentage fee. (See Addendum to Order No. 1, attached at Exhibit A to Nationwide's Summary Judgment Brief (Exhibit 1)). Thus, in clear and unambiguous language, the June 14, 2002 waiver letter modified the original percentage fee to a flat monthly fee of \$38,000. The bankruptcy court correctly recognized that the waiver letter must be construed in accordance with its plain language and rejected MQVP's baseless assertions that the waiver letter somehow meant something other than it what it so clearly stated. *See Alternatives Unlimited-Special, Inc. v. Ohio Department of Education*, 168 Ohio App. 3d 592, 601, 861 N.E.2d 163 (Ohio App. 10 Dist. 2006) ("When the terms of the contract are clear and unambiguous, a court may not in effect create a new contract by finding an intent not expressed by the parties in the clear language used within the contract") (quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146 (1978)).

In addition to the waiver letter, the bankruptcy court also relied on the undisputed evidence regarding the parties' course of conduct. As the court explained in *Gomez*, 2001 WL 1112690 at * 7 (quoting *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198 (1936)):

"Relinquishment can be either by 'express words or conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform.'"

Here, the bankruptcy court properly determined that there is no genuine issue of material fact as to whether MQVP relinquished its right to receive the original percentage fee by both its express

words (via the waiver letter) and its subsequent conduct. By submitting invoices to Nationwide from August 2002 through October 2006 that reflected the modified monthly fee referenced in the waiver letter, and by accepting Nationwide's payment of that modified monthly fee without protest or reservation, MQVP indisputably waived the original fee provision through its conduct. In fact, during the entire four-year period that Nationwide was paying the modified monthly fee as invoiced, MQVP continued to provide services to Nationwide without ever claiming that Nationwide was in fact supposed to be paying the original percentage fee.

Finally, as discussed above, Nationwide provided more than adequate consideration for MQVP's waiver of the original fee provision and resulting modification of the Master Consulting Agreement by forbearing from exercising its termination rights under the agreement and continuing to do business with MQVP for more than four years based on the understanding that all Nationwide was obligated to pay was the modified monthly flat fee.

While MQVP asserts that it "produced evidence to refute the alleged waiver" and vaguely alludes to affidavits it submitted (which contain nothing but conclusory denials that the original fee provision was waived) along with various e-mails and other documents, MQVP never even discusses those documents or otherwise explains how its so-called "evidence" supposedly created a genuine issue of material fact in light of the June 14, 2002 waiver letter and MQVP's subsequent course of conduct. That is because MQVP cannot do so. As the bankruptcy court observed, MQVP failed to present any evidence "that it expected additional payments or that there was an ongoing dispute regarding the proper amount of payments" (March 20, 2007

Hrg Tr. at 27). Thus, the bankruptcy court properly determined that Nationwide was entitled to summary judgment, and its decision should be affirmed.⁴

C. There is No Merit to MQVP's Cursory Argument That the June 14, 2002 Waiver Letter Was Unauthorized

At various points in its brief, MQVP alludes to the June 14, 2002 waiver letter as having somehow been "un-authorized." That assertion, however, lacks merit, which perhaps explains MQVP's failure to offer any real argument on the issue, instead simply referring to the letter as an "un-authorized [p]roposal [l]etter." MQVP's failure to brief the authorization issue is alone reason for the Court to reject it. "[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Benge v. Johnson*, 474 F.3d 236, 245 (6th Cir. 2007) (quotation marks omitted). As the Sixth Circuit has explained, appellate courts "are not self-directed boards of legal inquiry and research, but essentially arbiters of legal questions presented and argued by the parties." *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 448 (6th Cir. 2006).

But even if the Court were to reach the authorization issue, it is without merit. It is notable that MQVP has never denied that Ronald Ritchie was the president of MQVP at the time that he signed the June 14, 2002 waiver letter. Thus, even if, as MQVP implies, Mr. Ritchie was not expressly authorized to waive the original fee provision (which is, again, an argument that MQVP never even bothers to develop in its brief), it is established law that the president of a corporation "has, at the very least, the apparent authority to bind the corporation which employs

⁴ To the extent MQVP seeks to rely on materials not submitted to the bankruptcy court at the time it decided Nationwide's motion for summary judgment, such as the e-mails that MQVP's counsel brought to the hearing and the affidavit of John Arvay that MQVP submitted to the bankruptcy court in its motion for reconsideration, those materials must be disregarded on appeal. The Sixth Circuit has made quite clear that in reviewing a lower court's summary judgment decision, an appellate court reviews the record "in the same fashion as the [lower] court." *Chicago Title Ins. Co. v. Magnuson*, ___ F.3d ___; 2007 WL 1461396 (6th Cir. 2007).

his or her services." *Sasaki v. McKinnon*, 124 Ohio App. 3d 613, 617, 707 N.E.2d 9 (Ohio App. 8 Dist. 1997); *see also Stocker v. Castle Inspections, Inc.*, 99 Ohio App. 3d 735, 651 N.E.2d 1052 (Ohio App. 8 Dist. 1995). The bankruptcy court properly recognized this when it denied MQVP's motion for reconsideration. (*See* Exhibit 4 at 6-7).

Moreover, even if Ronald Ritchie did not have authority to bind MQVP to the terms of the June 14, 2002 waiver letter, MQVP is still bound by the resulting modification to the original fee provision because, as the bankruptcy court aptly explained (*see id.*), the undisputed evidence demonstrates that MQVP ratified the terms of the waiver letter by its subsequent conduct. "Ratification may be implied when there is actual knowledge of an agreement, acceptance of its benefits and a failure to repudiate within a reasonable time." *Pavlovich v. National City Bank*, 435 F.3d 560 (6th Cir. 2006) (quoting *Young v. International Brotherhood of Locomotive Engineers*, 114 Ohio App. 3d 499, 683 N.E.2d 420, 425 (Ohio App. 8 Dist. 1996).

MQVP does not dispute that for four years after the waiver letter was sent to Nationwide, MQVP continuously submitted invoices reflecting the modified flat monthly fee referenced in the waiver letter. Indeed, the invoices that MQVP submitted to Nationwide continued to reflect this modified fee until the Master Consulting Agreement was terminated in October 2006. It was only then that MQVP asserted a claim that the original percentage fee was owed. Up until that point, MQVP had continuously accepted the benefits conferred by the waiver letter. Again, there is no dispute that Nationwide paid the invoices submitted by MQVP. Moreover, because Nationwide had the right to terminate the Master Consulting Agreement upon 60 days notice to MQVP, it could have done so had MQVP asserted a right to the original percentage fee. By executing the waiver letter, MQVP thus received the benefit of continued, and substantial,

business with Nationwide. Simply put, there is no merit whatsoever to MQVP's superficial claim that the waiver letter was somehow "un-authorized."⁵

D. The Bankruptcy Court Correctly Held That the Original Agreement Was Properly Modified Even Without a Writing Signed by Both Parties

Although MQVP never fully develops the argument in its brief, MQVP further contends that there could have been no modification of the original fee provision because the Master Consulting Agreement required modifications to be in writing and signed by the parties. In addition to being waived for failure to adequately brief it, *see Bengel*, 474 F.3d at 245, MQVP's argument lacks merit and should be rejected, just as the bankruptcy court rejected it:

[T]he Court finds that the modification of the original contract is enforceable even though it was not signed by both parties. . . . Ohio law recognizes certain exceptions to written modification requirements. Quote, "Several courts have held that an oral modification of a written contract can be enforceable notwithstanding a provision to the contract requiring modification to be in writing where, as here, the parties have engaged in a course of conduct in conformance with the oral modification and where the party seeking to enforce the oral modification would suffer injury if the modification were deemed invalid"

As noted earlier, MQVP's conduct subsequent to the June 2002 letter confirmed with the letter. The percentage fee arrangement became a fixed fee arrangement whereby plaintiff billed and defendant paid 38,000 or \$39,000 per month. Nationwide will obviously suffer injury if the modification is deemed invalid. Had plaintiff attempted to collect the percentage fee at any time after – well, really after June 200[2] when the letter was entered into or modified the contract, defendant could have attempted to renegotiate or terminate the contract. Instead, plaintiff invoiced defendant for the flat fee and accepted defendant's

⁵ To the extent MQVP seeks to undermine the waiver letter by characterizing it is a "proposal," that effort likewise fails. The use of the word "propose" denotes an offer sufficient to bind MQVP. *Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 8; 472 N.E.2d 765 (Ohio App. 6 Dist. 1984) ("To be binding, a promise or offer need not be in writing – an oral representation whether denoted as a 'promise,' 'offer,' or 'proposal,' is sufficient to bind the party") Nationwide, in turn, accepted MQVP's offer to modify the original fee provision by making monthly payments of the modified fee to MQVP as invoiced. Thus, Nationwide accepted MQVP's offer through its performance. *See Motorists Mutual Insurance Co. v. Columbus Finance, Inc.*, 168 Ohio App. 3d 691, 696, 861 N.E.2d 605 (Ohio App. 10 Dist. 2006) ("[C]onduct sufficient to show agreement, including performance, constitutes acceptance").

payment of these invoices for four years. There are no genuine issues of material fact regarding plaintiff's course of conduct and that that course of conduct constituted a proper modification of the original contract. . . .

(March 20, 2007 Hrg Tr. at 28-29).

A modification of a contract is recognized under Ohio law notwithstanding a provision in the contract to the contrary. Thus, in *Exact Software North America, Inc. v. Infocon Systems, Inc.*, 2004 WL 952876 at * 5 (N.D. Ohio 2004) (citing *Lincoln Electric Co. v. St. Paul Fire and Marine Ins. Co.*, 210 F.3d 672, 687 (6th Cir. 2000)), the court explained that

an oral modification of a written contract can be enforceable notwithstanding a provision in the contract requiring modifications to be in writing where, as alleged here, the parties have engaged in a course of conduct in conformance with the oral modification and where the party seeking to enforce the oral modification would suffer injury if the modification were deemed invalid.

As discussed previously, the undisputed evidence before the bankruptcy court demonstrated unequivocally that MQVP engaged in a course of conduct that conformed with the parties' oral agreement (which MQVP then memorialized in the June 14, 2002 waiver letter) under which the fee was modified from the original percentage fee to the a flat monthly fee. Further, as the bankruptcy court recognized, Nationwide would "obviously" suffer injury if the modification were deemed invalid. Again, Section 9 of the Master Consulting Agreement gave Nationwide the absolute right to terminate the agreement, without cause, upon 60 days notice. If MQVP had insisted that the original percentage fee be paid at any time during the four-year period in which MQVP was submitting invoices to Nationwide reflecting the modified monthly fee, Nationwide would have had an opportunity to terminate the agreement. However, since MQVP continued to invoice Nationwide for only the modified monthly fee, and accepted Nationwide's payments without protest for a four-year period, Nationwide was deprived of its right to terminate the agreement before four years' worth of fees had accumulated.

Finally, and in any event, MQVP's assertion that the original fee provision was not properly modified is ultimately a red herring because even if the waiver letter alone did not qualify as a modification, MQVP still waived its right to the original percentage fee by submitting the invoices that reflect the modified flat fee. *See Gomez*, 2001 WL 1112690 at * 8 (explaining that a party's waiver of its rights under an agreement is separate and distinct from a party's attempt to modify the terms of an agreement, and that a party can waive its rights even if it does not have the right to modify the agreement). Either way, the bankruptcy court properly determined that there was no genuine issue of material fact as to whether MQVP waived the original fee provision.

IV. CONCLUSION

For all of the reasons stated, Nationwide requests that the Court affirm the bankruptcy court's decision granting summary judgment to Nationwide and dismissing MQVP's Complaint.

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CERTIFICATE OF SERVICE

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