Representaciones E Investigaciones Medicas, S.A. De C.V. v Abdala
2017 NY Slip Op 31619(U)
July 31, 2017
Supreme Court, New York County
Docket Number: 655112/2016
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

REPRESENTACIONES E INVESTIGACIONES MÉDICAS, S.A. DE C.V., as successor to TEVA PHARMACEUTICALS HOLDINGS MÉXICO, S.A. DE C.V.; and LEMERY, S.A. DE C.V., a subsidiary of TEVA PHARMACEUTICAL INDUSTRIES LIMITED,

Plaintiffs,

- against -

DECISION AND ORDER
Index No. 655112/2016

FERNANDO ESPINOSA ABDALÁ; LEOPOLDO DE JESÚS ESPINOSA ABDALÁ; and PPTM INTERNATIONAL S.à.r.l.,

Mot. Seq. Nos.: 006, 007 and 009

Defendants.

O. PETER SHERWOOD, J.:

I. BACKGROUND

In this case, Teva Pharmaceuticals Industries Limited purchased (through party subsidiaries Teva Pharmaceuticals Holdings México S.A. de C.V. and Lemery, S.A. de C.V. [together Teva]) a Mexican pharmaceutical company, Representaciones E Investigaciones Médicas S.A. DE C.V. (Rimsa) from Fernando Espinosa Abdalá and Leopoldo de Jesús Espinosa Abdalá (the Espinosa Brothers), and the intellectual property used by Rimsa from the Espinosa Brothers' holding company (through some other entities) in Luxembourg, PPTM International S.a.r.l. (PPTM). The total sale price came to $2.3 Billion. Teva claims that defendants lied about and concealed violations of the law which keep Rimsa from selling its products, and which undermine the value of the company and its intellectual property.

II. THE FACTS

As this is a motion to dismiss, the facts are taken from the complaint.

Teva claims an international reputation for quality, and wanted to expand into the Mexican market for pharmaceuticals while maintaining its reputation. Rimsa was in the middle of a long-term scheme to sell defective and illegal products and hide these facts from Mexican regulators.

Mexican pharmaceuticals must be submitted to the Comisión Federal para la Protección Contra Riesgos Sanitarios (COFEPRIS), similar to the Food and Drug Administration in the United States. Once approved, the product sold must match the approved formulation. Rimsa avoided the COFEPRIS review by creating a fraudulent "fast track" program, in which it submitted falsified applications for formulations it had not yet developed or tested. It would then sell products under those approved formulations, even if the product was different. Rimsa kept two sets of records of its products, which it called "double paperwork," so it would have one set of papers and computer records which would show compliance with the regulations, and one reflecting Rimsa's true activities. Rimsa also lied to the COFEPRIS about its suppliers and what tests it had performed to determine the shelf life of the products.

The Espinosa Brothers were senior officers of Rimsa, and well aware of its actions, including the fast track program and the double paperwork. They lied to Teva during the acquisition and presented it with the false documents. They were also aware of the falsity of the representation in the acquisition agreement that Rimsa was operating materially in compliance with applicable laws. Teva relied on those false representations, and the double paperwork prevented Teva from discovering the fraud.

A week after the transaction closed, Teva received an anonymous e-mail alerting it to the falsified product registrations, double paperwork, and other issues. Teva then alerted the COFEPRIS, which inspected the Rimsa plant and ordered Teva to stop production of 44 different products. COFEPRIS subsequently shut the plant down entirely. It is unknown if and when Rimsa will be able to sell its products again, and Teva has suffered reputational damage, in addition to losing the benefit of its bargain in purchasing Rimsa.

Teva filed suit, asserting claims for

1- Fraud- for defendants' misrepresentations in the representations and warranties in the agreements and during the due diligence. Plaintiffs argue the fraud defeats the purpose of the transaction and seek rescission or rescissory damages, as well as punitive damages.
2- Breach of Contract- for breach of the representations and warranties in the agreements, as Rimsa was not operating in material compliance with applicable laws and regulations and PPTM's financial statements were not properly prepared and did

not fairly represent its financial state. Additionally, Rimsa's conduct negatively impacted the value of the intellectual property purchased from PPTM. Plaintiffs argue the fraud defeats the purpose of the transaction and seek rescission or rescissory damages.

3- Indemnification- Pursuant to section 10.3 of each relevant contract, plaintiffs seek indemnification from losses due to defendants' breaches of the representations and warranties.

4- Declaratory Judgment- Plaintiffs seek a declaratory judgment that they may recover for their losses from the Espinosa Brothers and PPTM without limitation by the two agreements. While the Share Purchase Agreement and the Asset Purchase Agreement have clauses limiting indemnification to certain funds held in escrow (10.6[c]) and a clause limiting each seller's liability to the purchase price (*id.* at[d]), each clause has an exception for "instances of fraud, *dolo* or *mala fe* (in each case, as determined by a court of competent jurisdiction)." Plaintiffs seek a declaratory judgment that the exceptions to these limitations apply here, and they may recover all of their damages.

III. MOTION 006- ESPINOSA BROTHERS' MOTION TO DISMISS

The Espinosa Brothers move to dismiss the claims for fraud (Count I), indemnification (Count III), and declaratory judgment (Count IV), as well as the breach of contract claims (Count II) as far as it seeks recisission or recissory damages.

A. Arguments of Espinosa Brothers

The Espinosa Brothers cast this as a case of buyer's remorse. It is, essentially, a breach of contract claim for contract damages limited to the $100 million held in escrow. Teva is a sophisticated entity which performed its own, extensive, due diligence, and should not be allowed to rewrite the agreement and obtain an after-the-fact windfall discount.

1. Fraud

The Espinosa Brothers argue this claim is duplicative of the breach of contract claim, despite the additional claim for punitive damages, and so should not survive (006 Memo at 2, 9-11). It is also barred by the merger clause of the Stock Purchase Agreement (SPA) which provides that Teva was not relying on any statements outside the SPA, itself, including statements made in due diligence (*id.* at 2, 11-14, citing SPA § 5.26). The Espinosa Brothers

also argue that the claim fails to meet the heightened pleading standard of CPLR 3016(b) (006 Memo at 8-9). Even if misstatements made during due diligence were actionable, they were made to Teva Pharmaceuticals Industries Limited, and not to either of the party subsidiaries, and the parties may not rely on statements made to another entity (006 Memo at 2). Sophisticated entity Teva simply cannot rely on the broad, general statement in the SPA that Rimsa was "in compliance in all material respects with the Laws, judgments and orders applicable to it" (*id.* at 15, citing Complaint, ¶ 100). Further, plaintiffs performed their own due diligence, and must have concluded that the issues raised here were not sufficiently problematic to stop them from making the purchase (*id.* at 3). It is not alleged that the Espinosas frustrated Teva's due diligence (*id.* at 15-16). Nor are there factual allegations to support the conclusory statement that the Espinosa Brothers intended to deceive Teva (*id.* at 16). The warranties with the disputed representations are not included as "Fundamental Representations" of the SPA, so are not truly material (*id.* at 15, citing SPA § 1.1[cc]). Finally, punitive damages are not available (*id.* at 17-18). There is no public wrong, and contract damages are sufficient (*id.*). Any misrepresentations to the COFEPRIS are not compensable to Rimsa in this proceeding, and any public injury is to the people of Mexico, not New York (*id.* at 18).

2. Rescission

The agreement limits the remedies available here to indemnification, and that limitation should be enforced (*id.* at 19-20, citing SPA § 10.4). Rescission is an extraordinary remedy, available only where the parties may be returned to their original states and where there is no adequate remedy at law (*id.* at 20). Here, plaintiffs have a sufficient remedy in their contract damages and have failed to plead the lack of an available remedy at law (*id.* at 20-21). Additionally, rescission is no longer available, as Teva has shut down Rimsa, destroying its value and making it impossible to unwind the transaction (*id.* at 4, 20-22). Rescission must be sought promptly. Teva did not act for over six months after the transaction closed and they found out about the alleged fraud (*id.* at 23). Teva's failure to raise this issue in a timely manner, before shutting Rimsa down, is unreasonable, and effectively waives this claim (*id.* at 22-24).

3. Indemnification and Declaratory Judgment

The indemnification claim should also be dismissed as duplicative of the breach of contract claim. It is based on the same conduct and seeks the same damages as are available under the breach of contract claim (006 Memo at 24).

The declaratory judgment claim should be dismissed because it merely clarifies rights and obligations that are at issue in the other claims- whether plaintiffs' remedy is limited to the contents of the escrow account, or whether it may look to the defendants, personally, for relief (*id.* at 24-25). Plaintiff has an adequate remedy in its breach of contract action, making this claim, which only asks the court to opine as to what remedy may be available for the other claims, gratuitous (*id.*). The claim also fails on the merits, as Teva's argument that the exception to the limitation of liability clause in the SPA depends on their alleging fraud, or other breach of certain enumerated representations and warranties (*id.* at 25). Teva has not done that.

B. Plaintiffs' Opposition

1. Fraud

Teva argues that the fraud claim is not duplicative of the breach of contract claim because a fraud claim can be based on representations stated in a contract, when those representations are statements of (false) fact and not about future performance (006 Opp at 7-8, *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291–92 [1st Dept 1999] ["a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim"]). Rimsa's claim to be compliant with applicable laws is a statement of current fact, not a promise of future performance, so can support a fraud claim. Teva also argues it alleged separate damages (006 Opp at 9-10). The contract claim seeks benefit-of-the-bargain damages. The fraud claim seeks "traditional reliance damages based on the actual value of what Plaintiffs received in return for the $2.3 billion they paid" (*id.* at 10, *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). This claim is also the basis for punitive damages, which separate it from the contract claim, as they do not seek the same damages (*id.*, *Savattere v Subin Assoc., P.C.*, 261 AD2d 236, 237 [1st Dept 1999]). Nor is this a mere bald claim for punitive

damages, as in the cases cited by the Espinosa Brothers, this claim is supported by the allegation that "Defendants' fraud was egregious and continuing in nature and was not directed only to Plaintiffs but to Mexican regulators and to the public generally" (006 Opp at 10, citing Complaint ¶ 159). Plaintiffs claim that, had the defendants not engaged in this pre-agreement fraud, Teva would not have wasted time in the negotiations (006 Opp at 10).

Plaintiffs also argue that the merger clause is not sufficiently specific to exclude the use of parol evidence to show fraud in the inducement (*id.* at 11, citing *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959] [it is a "fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract . . . . To put it another way, where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made"]). Plaintiffs argue that the disclaimer in the Stock Purchase Agreement is too broad to exclude the evidence it wants to raise here (006 Opp at 12). Plaintiffs also contend that, even if the merger clause were sufficiently specific, it would still be unenforceable, as the facts are "matters peculiarly within the [other] party's knowledge , and the [plaintiff lacks knowledge] by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" (*id.* at 12, quoting *TIAA Glob. Investments, LLC v One Astoria Sq. LLC*, 127 AD3d 75, 87 [1st Dept 2015] [it was impractical for purchaser to test for the presence of the proper insulation, since testing could have been destructive and they were not permitted to damage the property at issue]). Here, the fraud was peculiarly within the Espinosa Brothers' knowledge, making the disclaimers unenforceable.

As to the defendants' argument that the fraudulent statements were made to the parent company, and not to the plaintiffs, the complaint does not specifically allege to which Teva entity the statements were made (006 Opp at 13). Further, if the individuals to whom the statements were made did not work for the plaintiffs, they were conducting the due diligence on the plaintiffs' behalf, acting as their agents, and the information was conveyed to them with the intention it be communicated to plaintiffs and that plaintiffs would act on it (*id.* at 13-14).

Finally, the complaint pleads the rest of the elements of the fraud claim. First, justifiable reliance, as Teva met with management, submitted over 500 due diligence requests, and spent

two days at Rimsa's plant going over books and records (*id.* at 14). Teva's efforts were thwarted because they were shown falsified documents (*id.*). Teva is also entitled to rely on the contractual representation that Rimsa was in compliance (*id.* at 14-15). The complaint pleads materiality of the statements, as it states that any similar company would have seen Rimsa's regulatory violations as "serious and important," as did the COFEPRIS (*id.* at 15). As far as these representations and warranties not being categorized as "Fundamental Representations" in the SPA, that does not make them irrelevant. Breaches of non-"Fundamental Representations" are grounds for refusing to close if there is a material adverse effect (*id.*). The time and expense Teva went to in investigating Rimsa shows these issues were actually material, and its investigation was only thwarted by the falsified books (*id.* at 16). Finally, plaintiffs have pled knowledge, citing specific dates on which the Espinosa Brothers were informed of legal violations (*id.* at 16). Plaintiffs also argue that the punitive damages are appropriate because there was a public wrong, in that the same documents used to defraud plaintiffs were also used to fool COFEPRIS and threaten public safety in Mexico. While New York law does not permit a court to punish a party for out of state conduct, such as Rimsa's actions in Mexico, Teva contends that out-of-state conduct may be "probative when it demonstrates the deliberateness and culpability of the defendant's action" (*id.* at 17, quoting *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408, 409–10 [2003]). Teva argues that the allegations about the defendants' deception of COFEPRIS and the danger to the Mexican public are not intended to support punishing the defendants for those actions in this suit, but to show that the defendants' actions related to Teva are truly reprehensible (*id.* at 18).

2. Rescission

Plaintiffs argue that the limitation of remedies in the SPA is unenforceable as they have alleged facts to the effect that defendants' conduct was fraudulent or "smacks of intentional wrongdoing" (*id.* at 18, quoting *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983] ["an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing"]). Further, plaintiffs have pled damages for which there is no adequate remedy at law, such as reputational injury, or damage to customer goodwill, and while it may not be possible to restore the parties to precisely their pre-contract positions, those positions can be

substantially restored, in that plaintiffs could recover the purchase price and defendants could get the intellectual property back (006 Opp at 19). Defendants should not be allowed to escape liability for their fraud by requiring restoration be so exact (*id.*, quoting *Butler v Prentiss*, 158 NY 49, 64 [1899] ["When, without fault on the part of the one defrauded, . . . it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied, because it would become a loophole for the escape of fraud"]). Plaintiffs also claim to have acted in a timely fashion, putting defendants on notice of their reservation of rights to seek rescission in a letter dated July 2016, not long after receiving the first tip about Rimsa's prior conduct that March (006 Opp at 22). At any rate, the question of whether a claim for rescission is timely is a question of fact (*id.* at 23).

3. Indemnification and Declaratory Judgment

The indemnification claim is distinguishable from the breach of contract claim because it seeks attorneys' fees (*id.*, citing *Myers Indus., Inc. v Schoeller Arca Sys., Inc.*, 171 F Supp 3d 107, 123 [SDNY 2016]["Because the indemnity claim provides for recovery of indirect injuries and attorney's fees, . . . the Plaintiffs' claim for contractual indemnification is not duplicative of either their fraudulent inducement or breach of contract claims"]).

Plaintiffs argue the declaratory judgment claim serves the practical purpose of allowing a jury to clarify whether it believes the Espinosa Brothers acted in bad faith and the basis for the damages, in the event it finds liability on the contract claim and not the fraud claim (006 Opp at 24). It will also provide clarity on what plaintiffs may collect from the Espinosa Brothers, personally (*id.* at 24-25). The SPA also refers to fraud . . . "as finally determined by a court of competent jurisdiction"

C. Espinosa Brothers' Reply

1. Fraud

The facts which plaintiffs claim are then-present facts, and which underlie this claim, do not make it separate from the breach of contract claim because the facts are not extraneous to the contract and do not involve a separate duty (006 Reply at 1-2, quoting *Torchlight Loan Services, LLC v Column Fin., Inc.*, 11 CIV. 7426 RWS, 2012 WL 3065929, at *10 [SDNY July 25, 2012][" it is not sufficient that the alleged misrepresentations are about then-present facts; rather,

they also must be "extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract."]; *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]). Defendants point to *J.E. Morgan Knitting Mills, Inc. v Reeves Bros., Inc.* in which the court decided that a fraud claim "which alleges that defendants knew at the time of contract execution that their warranty therein against undisclosed liabilities burdening the property was false, was properly dismissed as duplicative of plaintiffs' cause of action for breach of contract [as the] fraud alleged is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages" (243 AD2d 422, 423 [1st Dept 1997]).

Here, the Espinosas contend there is no alleged misrepresentation which is separate from the contract and not barred by the merger clause. The merger clause specifically calls out statements made during Teva's due diligence, and is sufficiently specific (006 Reply at 4-5, quoting SPA § 5.26). There is no requirement that specific statements be called out. The parties are sophisticated and chose to specify a category of statements (006 Reply at 5). While plaintiffs argue that the information was within the Espinosas' peculiar knowledge, plaintiffs have not alleged that the information "could not be discovered through the exercise of reasonable diligence" and that it is not its "own evident lack of due care which is responsible for [its] predicament," as they had access to the Rimsa premises and books for their due diligence (*Rodas v Manitaras*, 159 AD2d 341, 342 [1st Dept 1990]).

Plaintiffs claim the issue regarding to whom the allegedly problematic statements were made is resolved because the complaint is vague on that point. Defendants argue that vagueness is fatal, as that claims is thus lacking in the required particularity (006 Reply at 7).

As to scienter, plaintiffs allege defendants knew or must have known about the fraudulent statements, but they fail to allege intent to deceive. There is also no justifiable reliance, because the plaintiffs had access of all of Rimsa's books during the site visit, and cannot blindly trust the representations of their equally sophisticated counterparty, but relied only on what they were "shown" (*id.* at 8, quoting Complaint ¶90). Plaintiffs' decision to rely on what they were given rather than obtaining the information to which they were entitled is fatal to the fraud claim, as they "have been so lax in protecting themselves that they cannot fairly ask for the law's protection" (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 279

[2011][plaintiff released "defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties," mandating dismissal of the plaintiffs' claims]).

The exclusion of these representations and warranties from the category of "Fundamental Representations" in the SPA which could stop the closing shows that they were not material to the extent necessary to state a cause of action for fraud (006 Reply at 8-9). Had plaintiffs discovered the information before the closing, the closing would not have been cancelled for that reason (*id.* at 9).

The claims also seek the same rescission remedy, and the claim for punitive damages cannot save this claim. As the fraud alleged was aimed at Teva, not at the general public, punitive damages are not available (*id.*). Even if it were aimed at the general public, it would be at the general public of Mexico, and this court lacks an interest in punishing defendants for unlawful acts committed outside its jurisdiction (*id.*, quoting *State Farm Mut. Auto. Ins. Co.*, 538 US at 421 ["Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"]).

2. Rescission

Plaintiffs voluntarily contracted away their right to claim rescission (006 Reply at 10). There is neither a fraud exception nor a public policy reason to reinstate the claim (*id.*). They have also waived rescission by their actions in not acting immediately, or at least before destroying the company's value (*id.* at12). Plaintiffs' allegations about when they confirmed the allegations and concluded there had been fraud are vague. They had access to all the relevant information and documents, and the history of their discoveries is exclusively within their own knowledge (*id.* at 13). The delay while they destroyed Rimsa's value is unreasonable as a matter of law (*id.* at 14).

Nor have plaintiffs alleged a proper claim. They cite no case which supports the premise that rescission can be granted based on reputational damage, especially as reputational harm is done and cannot be ameliorated by rescission (*id.* at 11). Further, no reputational harm has been alleged to the plaintiff entities in this case, only to the Teva Pharmaceutical Industries Ltd. (*id.*). Nor could rescission return the parties to the status quo (*id.* at 12).

3. Indemnification and Declaratory Judgment

This duplicative cause of action cannot be resurrected by focusing on the additional claim for attorneys' fees (*id.* at 14). This is their contractual remedy, and plaintiffs cite no support for their position that this remedy would include attorneys' fees (*id.*).

Since plaintiffs have another "adequate alternative" remedy, in the breach of contract claim, this judgment is unavailable (*id.* at 14-15, quoting *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988], *disapproved of on other grounds by Faulkner v Arista Records LLC*, 602 F Supp 2d 470 [SDNY 2009]).

D. Discussion

1. Standard for Motion to Dismiss

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

2. Fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

Plaintiffs base this claim on misrepresentations in three representations and warranties of the SPA:

> Compliance with Applicable Laws: "The Target Companies are currently conducting . . . their operations in compliance in all material respects with the Laws, judgments and orders applicable to any Target Company" (SPA § 5.8).
>
> Financial Statement Preparation: "The Financial Statements have been prepared from the books, records and accounts of the Target Companies . . . and in accordance with the Accounting Principles as in effect for the periods covered thereby and present fairly in all material respects the financial condition of the Target Companies" (SPA § 5.6).
>
> Position Since Reference Date: "Since the Reference Date and except with respect to acts required in connection with the transfer of the Shares to Purchaser at Closing, (a) the Target Companies have not conducted their respective business in any material respect not in the Ordinary Course of Business and (b) there has not been any event, circumstance, development, state of facts, occurrence, change or effect which has had a Company Material Adverse Effect, and no event, circumstance, development, state of facts, occurrence, change or effect exists or has occurred which would reasonably be expected, individually or in the aggregate, to result in a Company Material Adverse Effect" (SPA § 5.7).

Since the breach of contract claim is based on the breach of the same representations and warranties about Rimsa's compliance with the law and about its financial statements, the portion of the fraud claim based on the representations and warranties is duplicative of the breach of contract claim. As far as the fraud claim is based on false statements the Espinosa Brothers made during due diligence, it is barred by the merger clause of the SPA, which states:

> "No Further Representations. Notwithstanding anything contained in this Article V or any other provision of this Agreement, it is the explicit intent of each party hereto that the Sellers are not making any representation or warranty whatsoever, express or implied with respect to any Target Company, except those representations and warranties set forth in this Article V and in entering into this Agreement and acquiring the Shares from the Sellers, the Purchaser expressly acknowledges and agrees on behalf of itself and its Affiliates, including the Guarantor, that it is not relying on any statement, representation or warranty, including, but not limited to, those which may be contained in any confidential information memorandum or similar materials containing information regarding the Target Companies or any of their businesses or in any materials made available to the Purchaser or its Affiliates, including the Guarantor, during the course of its Due Diligence Investigation of the Target Companies, other than those representations and warranties set forth in this Article V. The Purchaser acknowledges and agrees on behalf of itself and its Affiliates, including the Guarantor, that any representation contained in this Article V that consists solely

> of a listing obligation is intended merely as an aid to their Due Diligence Investigation and does not constitute a representation or warranty capable of being breached by the Sellers"

(SPA Section 5.26).

According to the complaint, Teva was shown false documents and given false information during due diligence, and, deceived, decided to proceed with the transaction. However, Teva is a sophisticated entity and performed extensive due diligence (*see* Complaint, ¶ 78) before entering into a major transaction, including a site visit and employee interviews (*id.* at ¶¶ 78, 86-89). Plaintiffs are correct that "where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]). However, this waiver is not unenforceably broad, as plaintiffs claim. Here, "plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations" (*id.* at 320-21). This is similar to the merger clause in *Danann*[1]. This merger clause specifies that the purchaser "expressly acknowledges and agrees . . . that it is not relying on any statement, representation or warranty . . . in any materials made available . . . during the course of its Due Diligence Investigation," which are the representations and materials providing the basis for the remainder of the fraud claim.

The merger clauses in the cases relied upon by plaintiff were found to be too vague or boilerplate, and thus insufficient to bar the use of parol evidence to support claims for fraud in

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[1] "The Seller has not made and does not make any representations as to the physical condition, rents, leases, *expenses, operation* or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby *expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is'* . . . . It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, *and that the same is entered into after full investigation, neither party relying upon any statement or representation,* not embodied in this contract, made by the other."

inducing the contract, are more general. In *Laduzinski v Alvarez & Marsal Taxand LLC*, the merger clause merely stated: "[t]his Agreement constitutes the entire agreement between the parties with respect to subject matter and supersedes all previous understandings, representations, commitments or agreements, oral or written" (132 AD3d 164, 169 [1st Dept 2015]). The merger clause in *Magi Communications, Inc. v Jac-Lu Assoc*, was broad and general. It read: "This Agreement contains the entire agreement of the parties hereto with respect to the subject matter herein contained and there are no representations or warranties, except set forth herein" (65 AD2d 727, 728 [1st Dept 1978]). The merger clause in *Barash v Pennsylvania Term. Real Estate Corp,* was more specific. It stated as follows:

> "Landlord or Landlord's agents have made no representations or promises with respect to said building, the land upon which it is erected or the demised premises except as herein expressly set forth and no rights, easements or licenses are acquired by Tenant by implication or otherwise except as expressly set forth herein. The taking possession of the demised premises by Tenant shall be conclusive evidence, as against Tenant, that Tenant accepts the same, 'as is' and that said premises and the building of which the same form a part were in good and satisfactory condition at the time such possession was so taken."

(26 NY2d 77, 81–82 [1970]). The Court of Appeals held that this was a general merger clause, and did not bar the introduction of parol evidence that the parties had omitted terms of the lease which had induced the tenant to enter into the agreement (*id.* at 86). Nor do "boilerplate statements regarding the speculative and risky nature of investing in mortgaged-backed CDOs and the possibility of market turns" "preclude, as a matter of law, [a] claim of justifiable reliance on [a defendant's] misrepresentations and omissions" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 138, 140 [1st Dept 2014]; *see also Lorne v 50 Madison Ave. LLC*, 32 Misc 3d 1226(A) [Sup Ct 2011][" merger clause is insufficiently specific to bar evidence of fraud in the inducement [based on the defendants' statements that the unit was complete and ready for occupancy] when it did 'not disclaim reliance on any specific representations, but rather on "representations, promises, understandings, discussions, negotiations, agreements, estimates, valuations, projections and opinions, whether written or oral, as well as a broker's set-up, terms sheet, floor plans, drawings and data *of any kind*"']).

The merger clause in the SPA disclaims reliance on materials presented or viewed during due diligence, which is exactly the basis for the plaintiffs' claim for fraud. As mentioned above,

Teva is a sophisticated entity. If it had wanted to include a carve-out that it could rely on the materials presented to it, or information included in due diligence, or a representation that the material it viewed during due diligence was correct, it could have done so. It did not.

Plaintiffs further argue that the merger clause cannot be enforced here, because it only applies where "the facts represented are not matters peculiarly within the [representing] party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation" (*TIAA Glob. Investments, LLC v One Astoria Sq. LLC*, 127 AD3d 75, 87 [1st Dept 2015]). The court in that case found an issue of fact in that, while the plaintiff buyer had broad access for performing due diligence, it was unclear if it would have been practical for the plaintiff to perform the possibly invasive testing required to get inside the walls and check the construction. Accordingly, the motion to dismiss was denied (*id.*). Here, plaintiffs allege the defendants presented them with the double-bookkeeping documents, false responses to their due diligence requests, and powerpoint slides with false information, and hid the true facts from them during the due diligence process. However, they also allege they performed "extensive" and "thorough" due diligence (Complaint at ¶ 78). They "conduct[ed] a [two day] site visit at Rimsa's plant . . . , interviewed Rimsa employees and inspected Rimsa's books and records" (*id.* at ¶ 86). Teva inspected "Rimsa's internal records" and "examined the product formulations, the manufacturers of the active pharmaceutical ingredients, the manufacturing processes, and the stability test results, relying on the integrity of the information provided" (*id.* at ¶¶ 88-89 [emphasis added]). Teva alleges it failed to discover that several of the most important products being sold by Rimsa did not contain the ingredients specified in their registered formulations, a problem not revealed by the product dossiers they were shown (*id.* at ¶¶ 90-91). Unlike the case cited above, plaintiffs have not alleged how the alleged misrepresentations remained particularly in the knowledge of the defendants despite Teva's access to Rimsa's personnel, facility, and products. For example, they have alleged that they had access to the registered and approved formulations, and to the products- they do not allege any reason why they could not have established that the products did not match the formulations.

It is well settled that "the general rule is that if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of

knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Schumaker v Mather*, 133 NY 590, 596 [1892]). "Where a party has no knowledge of a latent condition and no way of discovering the existence of that condition in the exercise of reasonable diligence then . . . he may overcome a specific disclaimer clause and introduce parol evidence of fraudulent inducement" (*Rodas v Manitaras*, 159 AD2d 341, 343 [1st Dept 1990]). Here, plaintiffs have provided no explanation for why the truth was outside their reach. Unlike the plaintiffs in *TIAA Global Investors*, Teva provides no reason that it could not have discovered the truth. It only states it did not discover the truth. Plaintiffs have failed to allege facts to support their argument that the merger agreement cannot be enforced. Accordingly, the first cause of action alleging fraud shall be dismissed.

3. Rescission

"In order to justify the intervention of equity to rescind a contract, a party must allege fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof" (*Babylon Assoc. v Suffolk County*, 101 AD2d 207, 215 [2d Dept 1984]).

Plaintiffs have failed to allege the lack of an adequate remedy at law. Rescission of the contract would result in the Rimsa shares returning to the Espinosa Brothers and money returning to Teva. Accordingly, the payment of money is an adequate remedy for Teva. Teva claims to have "several" types of damages which cannot be remedied with money, including reputational damages, because some of the alleged damages may be difficult to quantify (006 Opp at 19-20). As far as plaintiffs claim reputational damages, the only such injury supported by the Complaint would be to Teva Pharmaceutical Industries Limited, which is not a party to this action. Neither of the subsidiaries listed as plaintiffs here are alleged to have significant reputation or customer goodwill. As far as plaintiffs allege damages may be difficult to ascertain, they provide no reason Teva's damages would be more difficult to determine than those of a plaintiff in any other case (*id.*). Accordingly, the claim for rescission fails.

4. Indemnification and Declaratory Judgment

Plaintiffs argue that the indemnification claim is not duplicative of the breach of contract claim because this claim, pursuant to the SPA, includes attorneys' fees, which are not necessarily included in a breach of contract claim (006 Opp at 23). However, plaintiffs base their claim for attorneys' fees on the indemnification provision in the SPA (SPA § 10.3, 10.2). Accordingly, these are the damages plaintiffs maintain are contemplated by the contract. Accordingly, it is duplicative of the breach of contract claim.

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (Civil Practice Law and Rules 3001). "Under the principle that a court may legitimately exercise judicial discretion by declining declaratory relief where the plaintiff has another adequate remedy, courts have held that a declaratory judgment action should normally not be entertained when a full and adequate remedy is already provided through other judicial proceedings, such as . . . an action for breach of contract" (NYJUR DECLJUDS § 13).

Plaintiffs seek a declaratory judgment that "the losses they suffered are recoverable against the [defendants] personally and without limitation pursuant to the express exceptions in Section 10.6(c) and (d) of the agreements" (Complaint, ¶ 196). Plaintiffs claim this is necessary to obtain clarification that they can reach the defendants for their damages. This is duplicative of the breach of contract claim, and, as far as plaintiffs are concerned the finder of fact may be insufficiently specific, a special verdict can be sought to require the jury to address the issue. This claim will also be dismissed.\

IV. Motion 007- Defendant PPTM's Motion to Dismiss

A. PPTM's Arguments

PPTM was the counterparty to the Asset Purchase Agreement (APA) by which Teva purchased the intellectual property used by Rimsa for $1.84 Billion. The Complaint does not allege PPTM participated in fraud or in the Rimsa due diligence, or that Teva did not receive the IP for which it paid.

1. Fraud

PPTM argues the fraud claim against it must fail because it is duplicative of the breach of contract claim, being based on allegedly false representations and warranties in the APA, and because it fails to plead facts with the required particularity (as allegations of fraud by "defendants" are insufficient) (007 Memo at 11). The only specific allegations relate to representations in the APA about PPTM's financials, the lack of adverse effects, and the validity of the IP. These also underlie the breach of contract claim (*id.*). The alleged fraud was not extraneous to the agreement. Nor does the complaint allege PPTM made false representations of material fact (*id.* at 13).

While the plaintiffs allege bad acts by Rimsa, they do not specifically allege how those acts caused the representations in the APA to be false, or what accounting principles were violated, how the IP was not valid, or how it caused a material adverse effect on the value of the IP (*id.* at 16-17). Nor do plaintiffs allege PPTM knew any of the statements were false (*id.* at 18). PPTM argues that plaintiffs try to impute the knowledge of the Espinosa Brothers to it, but that strategy is ruled out by the APA (attached as Exhibit B to Colon Bosolet Affirmation, NYSCEF Doc. No. 58, § 1.1[dd] [limiting knowledge of the seller to "the actual knowledge of the individuals set forth on Schedule 1.1(dd) of the Disclosure Letter, after reasonable due inquiry"]) and the Disclosure Letter, which only includes the individuals Pascal Bernard Robinet and Valerie Pechon (attached as Exibit C to Colon Bosolet Affirmation, NYSCEF Doc. No. 59, at 4). Further, the Espinosa Brothers are separated from PPTM by a complex chain of trusts and other companies (Complaint, ¶¶23, 98).

2. Breach of Contract

The complaint fails to state a claim for breach of contract based on the falsity of the representations and warranties set forth in the APA because it fails to make any non-conclusory allegations that support the conclusion that the representations and warranties were false.

3. Indemnification and Declaratory Judgment

As no breach has been alleged, plaintiffs are not entitled to indemnification. Nor does the fraud carve-out apply, allowing additional remedies, because plaintiffs have not alleged fraud by PPTM.

PPTM argues it should be dismissed for the reasons discussed above.

B. Plaintiffs' Opposition

Plaintiffs argue that Rimsa's regulatory fraud made certain representations and warranties false; specifically that (1) PPTM's financial statements fairly represent the value of the IP; (2) there was no material adverse effect on the IP over the last 9 months; and (3) the IP was valid (007 Opp at 2). Prior to the transaction, the Espinosa Brothers transferred the IP to PPTM. Rimsa exclusively licensed the IP from PPTM and the IP derived its value from the Rimsa licenses (*id.* at 3). Teva argues that Rimsa's violations prevent Teva from using the IP, jeopardize the patents, and damage the trademarks by damaging Rimsa's reputation (*id.* at 6-7).

4. Fraud

This claim is not duplicative because a false representation and warranty may form the basis of a fraud claim, and there are sufficient allegations that the representations and warranties were false (*id.* at 9-11). The APA section 5.5 represented that PPTM's financial statements presented its financial condition fairly in all respects, which they did not, since PPTM's financials did not reflect the IP's reduced value due to Rimsa's actions (*id.* at 11-13). Even if plaintiffs could license the IP elsewhere, it has lost much of its current value, based on its use by Rimsa. Rimsa's regulatory fraud diminished the value of the associated trademarks, as Rimsa's reputation was destroyed. Therefore, the representation that there were no material adverse effects on the IP was incorrect (*id.* at 13). Similarly, Rimsa's actions "weakened and jeopardized" the IP, and if the same fraudulent documents presented to COFEPRIS were used to obtain the patents, that would make the representation in the APA at § 5.11 that the patents and registrations are valid and enforceable false.

As far as the fraud claim requires knowledge, Teva claims knowledge can be rationally inferred by imputation (007 Opp at 17). The Espinosa Brothers could be found to be officers or directors of PPTM, as their control of PPTM is alleged in the complaint, allowing the Espinosas' knowledge to be attributed to PPTM (*id.* at 17-18). Also, the entities are sufficiently close that knowledge could be imputed between Rimsa and PPTM (*id.* at 19). Further, PPTM's legal representative, Luis Jorge Perez Juarez, also Rimsa's former CEO, knew about the Rimsa regulatory fraud (*id.* at 20). His knowledge can be imputed to PPTM (*id.*). The provision limiting knowledge of the seller in the APA does not apply to the fraud claim, as it applies only to certain irrelevant representations and warranties (*id.* at 21). Nor would such a limitation be

enforceable (*id.* at 21-22). Further, knowledge is not a required element when rescission is sought (*id.* at 22, citing *Jack Kelly Partners LLC v Zegelstein*, 140 AD3d 79, 85 [1st Dept 2016], *lv to appeal dismissed,* 28 NY3d 1103 [2016] ["even an innocent misrepresentation is sufficient for rescission"]).

5. Breach of Contract

As discussed above, Teva argues that the allegations of falsity are sufficient.

6. Indemnification and Declaratory Judgment

Since PPTM's arguments against these claims are based on the insufficiency of the allegations for the contract and fraud claims, and since those are sufficient, Teva argues that these causes of actions should survive (007 Opp at 23-24). Plaintiffs also claim that the fraud exception to the limitation of liability in the APA (§§ 10.6[c] and [d]) does not require allegations of fraud performed by PPTM- Rimsa's fraud is sufficient (*id.* at 24). At least, the provision is ambiguous and should be interpreted, for now, in plaintiffs' favor (*id.*).

C. PPTM Reply

1. Fraud

Since plaintiffs seek damages, not just rescission, proof of scienter is required. PPTM disputes whether plaintiffs have sufficiently alleged it had knowledge of events at Rimsa, whether the Espinosa Brothers' knowledge can be imputed down to it, and whether a close relationship with Rimsa is enough to impute knowledge. It also notes that the allegations regarding Mr. Juarez were not mentioned in the complaint. Teva merely presents a regulatory filing Juarez signed after leaving Rimsa and almost a year after the APA, which provides no support for Teva's conclusions (*id.* at 9). Nothing in the Complaint or the document suggests Juarez had authority to act for PPTM related to Rimsa, or that Juarez was PPTM's agent at the time of the APA. Further, he is not one of the agreed-upon individuals whose knowledge would bind PPTM. Teva does not claim it did not agree to that limitation provision knowingly and voluntarily, and the allegations of fraud do not permeate the contract, so there is no reason to disregard it (*id.* at 10).

Rescission is barred by the contract (*id.* at 11-12). Rescission is also not possible, due to what Teva has done to Rimsa (*id.* at 12).

2. Breach, Indemnification and Declaratory Judgment

Teva has not sufficiently alleged the falsity of the statements. There is no allegation that suggests how accounting principles could have required PPTM to disclose third party misconduct of which it was not aware (*id.* at 13). Nor has Teva alleged, in detail, a material adverse effect on the purchased IP, as the patents have intrinsic value, apart from Rimsa's license (*id.* at 13-14). Further, Teva does not allege the patents are invalid, only that they might be. Plaintiffs make no argument about PPTM's knowledge about the enforceability of the IP or the validity of the trademarks.

As there are no satisfactory allegations of misrepresentations, the breach of contract claim fails, as do the last two claims. Further, a third-party fraud cannot trigger the fraud exception to the APA limitation of liability provision. Teva's proposed interpretation makes no sense. The APA requires fraud by PPTM to escape the limitation of remedy clause, and no viable fraud claim has been pled (*id.* at 15).

D. Discussion

1. Fraud

Similarly to the fraud claim against Rimsa, this fraud claim is duplicative of the breach of contract claim. "To sustain a claim for fraudulently inducing a party to contract, the plaintiff must allege a representation that is collateral to the contract, not simply a breach of a contractual warranty, and damages that are not recoverable in an action for breach of contract" (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 32 Misc 3d 758, 774 [Sup Ct 2011], *on reconsideration,* 33 Misc 3d 1208(A) [Sup Ct 2011], *revd on other grounds,* 102 AD3d 488 [1st Dept 2013]). This is not a situation where the breach of contract alleged is for failure to perform and the fraud is a mis-statement of current fact, collateral to the contract. The breach and the fraud are both based on the truth or falsity of the representations and warranties. The claims are duplicative, and the fraud claim must be dismissed.

2. Breach of Contract

The three representations and warranties of PPTM are as follows:

APA § 5.5: "Financial Statement Preparation. The Financial Statements have been prepared from the books, records and accounts of the Seller referenced therein and in

accordance with the Accounting Principles as in effect for the periods covered thereby and present fairly in all material respects the financial condition of the Seller referenced therein as of such dates and the results of operations of the Seller referenced therein for such periods"

APA § 5.6: "Position Since Reference Date. Since the Reference Date and except with respect to acts required in connection with the Purchase, (a) the Seller has not conducted its business in any material respect not in the Ordinary Course of Business and (b) there has not been any event, circumstance, development, state of facts, occurrence, change or effect which has had a Material Adverse Effect, and no event, circumstance, development, state of facts, occurrence, change or effect exists or has occurred which would reasonably be expected, individually or in the aggregate, to result in a Material Adverse Effect."

APA § 5.11(b): Intellectual Property. ". . . the patents and registrations forming part of the Owned Seller Intellectual Property is valid and to the Knowledge of the Seller, enforceable.

Plaintiffs argue that the Financial Statement representations were false because the statements over stated the value of the IP by not accounting for the fact that "Rimsa's violations prevent Teva from using those patents and trademarks now that products are off the market" (007 Opp at 11). However, that reduction in value is not alleged to have taken place until after the transaction. As far as plaintiffs argue that the trademarks were overvalued because they were associated with Rimsa, and "Rimsa's regulatory violations impaired the value of the trademarks by 'destroying Rimsa's reputation as a manufacturer of quality products" (Complaint, ¶ 137), the destruction of Rimsa's reputation did not occur until after the transaction. Plaintiffs have not pled sufficient facts to show this representation was false at the time of the transaction.

Plaintiffs argue that the Material Adverse Effect representation was false because "Rimsa's legal violations prevent the company from selling its products" (007 Opp at 14-15, quoting Complaint, ¶ 137). The Material Adverse Effect representation states that "[s]ince the Reference Date," there has not been an event, or change of circumstances, which would have a material adverse effect. Rimsa not being allowed to sell its products was an event occurring after the transaction. Nor do plaintiffs point to any other event or change in circumstances which occurred during the relevant period which would have an impact on the value of the IP. Plaintiffs have not pled sufficient facts to show this representation was false at the time of the transaction.

Plaintiffs argue that the validity clause was false because the IP was "substantially weakened and jeopardized" by Rimsa's actions, and that if the patents were obtained using the same documents as were submitted to COFEPRIS, their validity would also be in danger (*id.* at 16). However, the cited clause does not discuss the strength of the IP, but whether it is valid and enforceable. Plaintiffs do not argue it is not valid, only that if it was issued based on false information, its validity could be challenged. As to the representation that the IP is enforceable, the representation limits that to the Knowledge of the Seller, a defined term, limited to the actual knowledge of the two individuals mentioned above. Plaintiffs make no allegations about the knowledge of those individuals. Accordingly, plaintiffs have not pled sufficient facts to show this representation was false at the time of the transaction.

As the fraud and breach of contract claims fail, so must the claims for indemnification and declaratory judgment.

V. MOTION 009- OSC TO RESTRAIN FUNDS

Plaintiffs moved by Order to Show Cause for injunctive relief to stop defendants from transferring or dissipating funds from the proceeds of the transactions at issue, requiring the proceeds to be deposited with the court, and requiring the defendants to tell the plaintiff how much is restrained according to the order, where it is, and who has the authority to disburse the money. Pending the hearing of the Order to Show Cause, defendants were restrained from transferring the money.

Plaintiff claims that, shortly after the transaction, PPTM transferred nearly $1.7Billion from the proceeds to a Swiss bank account of a British Virgin Islands holding company (009 Memo at 1). Given the Espinosas' fraudulent conduct, and the defendants' residence outside the United States, plaintiffs are concerned that they will attempt to transfer and hide their funds. This court has the power to restrain the funds and preserve the status quo as to the specific funds which are the subject of the action (*id.* at 8).

To receive injunctive relief, the moving party must "establish a likelihood of success on the merits, irreparable injury absent the grant of injunctive relief, and that the balance of the equities tips in their favor" (*Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008]). As the discussion above illustrates, plaintiffs have not shown a likelihood of success on

the merits. It is noteworthy that the Espinosas argue that COFEPRIS issued its final report on its Rimsa investigation in March 2017, concluding that COFEPRIS never relied on false or inaccurate information from Rimsa, that Rimsa's products are safe and effective, and that Rimsa never violated Mexican law (009 Opp at 8-9). It is far from clear that plaintiffs will be entitled to these funds even if they prevail because they will have to get past the limitations of liability in the two contracts in order to obtain damages in excess of those already held in the escrow accounts.

Irreparable injury without relief has not been established. Plaintiffs seek money damages, and money is fungible. PPTM is alleged to have transferred funds shortly after the transaction at issue. Plaintiffs do not provide a basis for concluding any further transfers are intended, other than relying on the argument that PPTM and the Espinosas are bad, fraudulent, actors.

Nor has the balance of the equities been shown to tip in plaintiffs' favor. Plaintiffs have not shown evidence of dissipation of funds, or plans to do so, only speculation.

The motion for injunctive relief will be denied.

Accordingly, it is hereby

ORDERED that the motion of defendants Fernando Espinosa Abdala and Leopoldo de Jesus Espinosa to dismiss (motion sequence number 006) is GRANTED and the First (fraud), Third (indemnification) and Fourth (declaratory judgment) causes of action are DISMISSED in their entirety, as is the Second (breach of contact) cause of action to the extent it seeks recession or recessionary damages; and it is further

ORDERED that the motion of defendant PPTM International S.a.r.l. (motion sequence number 007) is GRANTED in its entirety and the complaint as to it is DISMISSED; and it is further

ORDERED that the claims against said defendants are hereby severed and the Clerk of the Court is directed to enter judgment against plaintiffs and in favor of PPTM International S.a.r.l., together with costs and disbursements upon presentation of a proper bill of costs; and it is further

ORDERED that the motion of plaintiffs for a preliminary injunction to restrain funds of defendants (motion sequence number 009) is DENIED and the stay entered by this court dated May 12, 2017 (NYSCEF Doc. No. 199) is hereby VACATED; and it is further

ORDERED that the remaining defendants shall serve and file their answer to the remaining allegations in the complaint within twenty (20) days of service of a copy of this Decision and Order with Notice of Entry; and it is further

ORDERED that all counsel for the remaining parties shall appear for a preliminary conference on Tuesday, September 19, 2017 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: July 31, 2017

ENTER

O. PETER SHERWOOD
J.S.C.