IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

PREGIS PERFORMANCE PRODUCTS LLC, ET AL.,	)	
Plaintiffs,	)	
v.	)	C.A. No. N18C-03-157 WCC CCLD
REX PERFORMANCE PRODUCTS LLC, ET AL.,	)	
Defendants.	)	

Submitted: July 11, 2019
Decided: September 4, 2019

Plaintiffs' Motion to Dismiss Defendants' Counterclaims GRANTED IN PART, DENIED IN PART

Plaintiffs' Motion for Partial Summary Judgment GRANTED IN PART, DENIED IN PART

Defendants' Motion for Summary Judgment – DENIED

MEMORANDUM OPINION

Thomas W. Briggs, Jr., Esquire (Argued); William M. Lafferty, Esquire; Thomas P. Will, Esquire; Jarrett W. Horowitz, Esquire; Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, Wilmington, DE 19801. Attorneys for Plaintiffs.

Patrick J. King, Esquire; Kirkland & Ellis LLP, 609 Main Street, Houston, TX 77002. Attorney for Plaintiffs.

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CARPENTER, J.

Before the Court are Pregis Performance Products LLC ("PPP" or "Pregis"), Olympus Growth Fund V, L.P. ("Olympus"), and Manu Bettegowda's ("Bettegowda") (collectively, "Plaintiffs") Motion to Dismiss Rex Performance Products LLC ("RPP" or "Rex"), Rex Hansen ("Hansen"), John Ballinger ("Ballinger"), and Robert E. Story, Jr.'s ("Story") (collectively, "Defendants") Counterclaims, as well as Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. This Opinion will address all outstanding Motions.

I. FACTUAL & PROCEDURAL BACKGROUND

A. The Parties

PPP is a Delaware limited liability company and a subsidiary of Pregis LLC, which is not a party to this litigation.[1] Plaintiff Olympus is a Delaware limited partnership that "owns approximately 90% of the ownership interests in Pregis LLC and controls a majority of the governing body of Pregis LLC."[2] Bettegowda is a vice president of PPP, as well as a member of the governing body and an officer of Pregis LLC.[3] Defendant Rex is a Michigan limited liability company, while Hansen, Ballinger, and Story are "direct or indirect ultimate owners of RPP."[4] Although not

[1] Compl. ¶ 18.
[2] *Id.* ¶ 20.
[3] *Id.* ¶ 21.
[4] *Id.* ¶ 19.

a party to this action, James Donald Tate ("Tate") is the former President and CEO of RPP.[5]

B. The Asset Purchase Agreement

On February 23, 2018, Plaintiff PPP entered into an Asset Purchase Agreement (the "APA") with Defendants to acquire "all of RPP's assets except certain defined 'Excluded Assets,' and assumed from RPP only a narrow, limited set of liabilities" (the "Sale" or "Transaction).[6] At its beginning, the APA states that "Seller [RPP] and Buyer [PPP] are collectively referred to herein as the 'Parties' and individually as a 'Party.'"[7] However, Tate was the primary negotiator for RPP and is a signatory to the APA.[8]

The final APA provided for a purchase price of $17 million.[9] In separate agreements, "Pregis negotiated a standard retention bonus of $1.5 million to be allocated among Tate and three members of RPP's management team, to be paid in installments beginning in June 2018, but only if those managers remained continuously employed through the payment of each installment, with the final installment due February 22, 2019."[10]

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[5] *Id.*
[6] *Id.* ¶¶ 1, 4.
[7] Pls.' Mot. for Partial Summ. J., Ex. A [hereinafter APA] Preamble, Page 1.
[8] Compl. ¶ 9; APA Cover and Signature Pages.
[9] Compl. ¶ 9.
[10] *Id.*

As set forth in Section 2.1(b) of the APA, the defined Excluded Assets include RPP's organizational documents and all claims or causes of action "exclusively relating to Excluded Assets or Excluded Liabilities."[11] Section 2.2(b) further provides:

> Except as expressly provided in Section 2.2(a) above, Buyer [PPP] will not assume or be liable for any Liabilities of Seller [RPP] or any other Liabilities whatsoever related to the Business and/or the Excluded Assets (all such Liabilities, other than the Assumed Liabilities, the "Excluded Liabilities").[12]

In Section 6.1(b), the signatories to the APA agreed that, except for a few limited circumstances, they would waive and release "to the fullest extent permitted by applicable Law, any and all other rights, claims and causes of action (including rights of contributions, if any) known or unknown, foreseen or unforeseen, which exist or may arise in the future, that it may have against Seller or any of its Affiliates, or Buyer or any of its Affiliates ...[13] Claims for fraud or misrepresentation and claims for intentional breach of the APA are expressly excluded from this waiver and release.[14] Additionally, Section 8.15 contains a special rule for fraud and states that "in no event shall any limit or restriction on any rights or remedies set forth in this

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[11] APA § 2.1(b)(xii).
[12] *Id.* § 2.2(b).
[13] *Id.* § 6.1(b).
[14] *See id.*

Agreement limit or restrict the rights or remedies of any Party for fraud by any other Party."[15]

Finally, the APA contains a merger and integration clause, which states that "[t]his Agreement and the documents referred to herein (including the schedules and exhibits hereto) contain the entire agreement between the Parties and supersede any prior understandings, agreements or representations by or between the Parties, written or oral, which may have related to the subject matter hereof in any way, including the Letter of Intent."[16]

C. Rex Files Lawsuits in Michigan and Texas

Three days after the Transaction closed, on February 26, 2018, Rex filed an action against Plaintiffs in Texas (the "Texas Action"), alleging that Tate "violated his common law fiduciary duties to RPP by taking a corporate opportunity in connection with the APA, and that [Plaintiffs] knowingly participated in the purported breach …"[17] On the same day, Rex also filed a complaint against Tate in Michigan for breach of its operating agreement (the "Michigan Action").[18] Rex's basic claim is that the $1.5 million retention agreement with senior management decreased the purchase price by the same amount.

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[15] *Id.* § 8.15.
[16] *Id.* § 8.7.
[17] Compl. ¶ 10.
[18] *Id.* at n.5.

At oral argument for the instant Motion to Dismiss on January 4, 2019, Plaintiffs' counsel informed the Court that the Texas Action had been dismissed for lack of personal jurisdiction.[19] The Court has been subsequently advised that the Texas decision was affirmed by the Court of Appeals for the Second Appellate District of Texas on August 22, 2019. According to Plaintiffs' counsel, the Michigan Action was proceeding with document discovery at that time.[20]

The briefs on these Motions also revealed that, approximately one month before the APA was to close, Defendants became aware of the $1.5 million retention agreement that their CEO had negotiated to retain senior management personnel. Despite learning about this agreement that forms the basis of its dispute with Pregis, Rex did not terminate the APA, raise the issue with Plaintiffs, or object in any manner to proceeding to settlement.

D. The Instant Litigation

On March 16, 2018, Plaintiffs filed their Complaint against Defendants, alleging fraud and breach of contract.[21] They also sought declaratory judgment regarding the Texas Action and indemnification pursuant to the terms of the APA.[22] In response, Defendants filed an Amended Answer and Counterclaims, alleging

[19] *See* Mot. to Dismiss Hr'g Tr. at 3-4.
[20] *See id.* at 4.
[21] *See* Compl.
[22] *See id.*

tortious interference with contract, unjust enrichment, and fraudulent concealment against all Plaintiffs.[23] Defendants' Counterclaims also set forth causes of action for breach of contract and fraudulent misrepresentation against Pregis.[24]

On September 12, 2018, Plaintiffs filed a Motion to Dismiss Defendants' Counterclaims. Prior to the Court's hearing on the Motion, Defendants agreed to dismiss their fraudulent misrepresentation claim against Pregis.[25] The Court reserved decision on Plaintiffs' Motion to Dismiss the remaining Counterclaims. Plaintiffs and Defendants have also moved for summary judgment. This is the Court's Opinion regarding all outstanding Motions.

II. PROCEDURAL CONTEXT

Before addressing the specific motions, the Court feels compelled to attempt to put this litigation in proper context. There is really no dispute that this litigation was filed here in response to Defendants filing the Texas action. The majority of the claims relate to the allegations made in Texas, and the filing clearly was done in an attempt to use this Court to undermine the Texas litigation.

However, once the Texas litigation was dismissed, Defendants then used the fact that Plaintiffs had filed litigation in this Court to bring counterclaims which raised in essence the same allegations which were asserted in Texas. As such, the

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[23] *See* Countercl.
[24] *See id.*
[25] Defs.' Opp'n Br. Mot. to Dismiss at 30.

filing of the counterclaims has caused this litigation to be procedurally upside down. Even though Pregis has made claims for breach of contract, there is no request or suggestion that they are attempting to renounce the contract or attempt to put aside the sale. In essence, Pregis seeks to enforce the indemnification provision of the contract, i.e. the costs associated with defending the Texas action and bringing about the litigation in Delaware. So while the Complaint asserts a breach of contract, it is far from what one would normally consider under such a claim.

When one pulls back from all of the legal verbiage, the dispute here is that Rex believes they were defrauded out of $1.5 million that should have been part of the purchase price but instead was negotiated out by their CEO with the assistance of the Plaintiffs, thus reducing the purchase price. If any counts remain after the Court rules on the various motions, the litigation will have to be put into a logical procedural posture for it to make any sense. Since the parties have not requested a jury trial, this will not be as difficult once the trial begins.

Having made these comments, the Court will now address the motions starting with Plaintiffs' Motion to Dismiss Defendants' Counterclaim and depending on those rulings, other motions may be moot.

III. DISCUSSION

A. Plaintiff's Motion to Dismiss Defendants' Counterclaims

When considering a Rule 12(b)(6) motion to dismiss, the Court "must determine whether the claimant 'may recover under any reasonably conceivable set of circumstances susceptible of proof.'"[26] It must also accept all well-pleaded allegations as true, and draw every reasonable factual inference in favor of the non-moving party.[27] At this preliminary stage, dismissal will be granted only when the claimant would not be entitled to relief under "any set of facts that could be proven to support the claims asserted" in the pleading.[28]

1. Counterclaim I: Tortious Interference With Contract

Under Delaware law, a claim for tortious interference with contract requires: "'(1) a contract, (2) about which [Plaintiffs] knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury.'"[29]

Plaintiffs first argue that Sections 2.2 and 6.1 of the APA preclude Defendants from pursuing Counterclaim I for tortious interference with contract.[30] According to

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[26] *Sun Life Assurance Co. of Can. v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, at *1 (Del. Super. Ct. Aug. 9, 2018) (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[27] *Id.*
[28] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014) (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[29] *Bhole, Inc. v. Shore Inv., Inc.*, 67 A.3d 444, 453 (Del. 2013) (quoting *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987)).
[30] *See* Pls.' Opening Br. Mot. to Dismiss at 10-16.

Pregis, Defendants' Counterclaim I, which alleges that Plaintiffs induced Tate to breach RPP's operating agreement, is an Excluded Asset and the damages sought through it are Excluded Liabilities under Section 2.2(b) of the APA.[31] Furthermore, Plaintiffs contend that RPP agreed to waive a claim for tortious interference with contract in Section 6.1(b) of the APA.[32] Even if the APA itself does not bar Counterclaim I, Pregis argues that Rex cannot establish causation[33] or show "that the alleged actions by Plaintiffs were unjustified."[34]

In response, Defendants contend that Delaware's "public policy precludes enforcement of [the APA] provisions intended to allow Pregis and its affiliates to avoid liability for their misconduct."[35] They further argue that the APA language cited by Plaintiffs was meant to shield PPP from liabilities that RPP might have created prior to the Transaction, rather than its "own actions in creating liabilities related to 'excluded assets.'"[36] Moreover, Section 8.15 of the APA "explicitly provides that RPP's rights and remedies are not limited" in the event of fraudulent conduct by another party, and Defendants assert that their tortious interference claim falls under this special rule because it is based on Plaintiffs' purported fraud.[37]

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[31] *See id.* at 11.
[32] *See id.* at 14.
[33] *See id.* at 18-19.
[34] *Id.* at 19.
[35] Defs.' Opp'n Br. Mot. to Dismiss at 16.
[36] *Id.* at 19.
[37] *Id.* at 21.

First, the Court agrees with Plaintiffs that the RPP operating agreement is an organizational document, and therefore an Excluded Asset under Section 2.1(b)(ii) of the APA. Pregis specifically negotiated for Rex's organizational documents to be "expressly excluded from the purchase and sale," and attempting to hold them liable for Tate's alleged breach of the operating agreement through a tortious interference claim is simply not possible under the terms of the APA. Since Defendants' tortious interference with contract claim is based upon a breach of the RPP operating agreement, which is an Excluded Asset, it cannot proceed.

Even if the Court did not believe the RPP operating agreement to be an Excluded Asset under the terms of the APA, a claim for tortious interference is also not part of the exclusions set forth in Section 6.1(b) of the APA. The Court finds that the conduct alleged in this counterclaim is not encompassed by Section 6.1(b) and believes this count should be dismissed. Tortious interference does not require the attempt to defraud an individual as an element nor is there some misrepresentation requirement. Plaintiffs complied with the terms of the APA, and Defendants received the purchase price set forth in the contract. This litigation is simply about Defendants believing they are now entitled to $1.5 million more due to the unscrupulous conduct of their CEO. While perhaps true, it is not covered under the only possible exception in Section 6.1(b) relating to fraud and misrepresentation, and as such, this count has been waived by Defendants and must be dismissed.

2. Counterclaim II: Unjust Enrichment

Unjust enrichment is "'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.'"[38] The elements of an unjust enrichment claim are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[39] Delaware courts have consistently refused to permit a claim for unjust enrichment "if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim."[40] Stated differently, "'[w]hen the [pleading] alleges an express, enforceable contract that controls the parties' relationship … a claim for unjust enrichment will be dismissed.'"[41]

Plaintiffs also contend that Defendants waived and released their right to pursue Counterclaim II for unjust enrichment in Section 6.1(b) of the APA.[42] Again, even if the APA does not preclude Counterclaim II, Plaintiffs argue that Defendants cannot show an enrichment, the absence of justification, or the absence of a remedy at law.[43]

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[38] *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (quoting *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988)).
[39] *Id.*
[40] *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 891 (Del. Ch. 2009).
[41] *Id.*
[42] *See* Pls.' Opening Br. Mot. to Dismiss at 14-16.
[43] *See id.* at 21-24.

Defendants respond by arguing that "the relation between Pregis's unjust enrichment and RPP's impoverishment arises from Pregis's fraud and misrepresentations," and they did not waive or release their ability to pursue such claims.[44] They also claim that Plaintiffs were enriched because, through "fraudulent conduct, Pregis was able to attain a $20,000,000 company for $18,500,000, paying $17,000,000 to RPP and $1,500,000 in bribes."[45] Defendants next argue that they are able to show Plaintiffs' alleged enrichment was unjust because it paid "RPP's sole negotiator to trade his loyalties and attain a lower price [for the company]..."[46] Finally, according to Defendants, there is no other legal remedy for Plaintiffs' alleged enrichment because "RPP is not attempting to enforce its rights under the APA; [but] is seeking damages for Pregis's bribery scheme."[47]

First, to characterize the conduct here as a "bribery" stretches one's imagination and at this juncture is not supported by the evidence disclosed to the Court. But even if it had some validity, Defendants are still bound by the limitations they agreed to in Section 6.1(b) of the APA. Unjust enrichment, under the facts here, is not a fraud or misrepresentation, but is simply an allegation that the conduct of Defendants' CEO and Plaintiffs depressed the sale price to Defendants' detriment.

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[44] Defs.' Opp'n Br. Mot. to Dismiss at 23.
[45] *Id.* at 27.
[46] *Id.* at 28.
[47] *Id.*

As such, even though Defendants claim they are not seeking to enforce their rights under the APA, the Court believes the APA governs the relationship between Plaintiffs and Defendants and ultimately gives rise to the unjust enrichment claim. Defendants are alleging that they suffered an impoverishment due to the depressed purchase price they received for RPP's assets. That purchase price, among other things, is set forth under the terms of the APA, which Defendants refer to as a "valid and enforceable contract"[48] in their pleadings. The Court consequently believes that Defendants' unjust enrichment claim arises from their contractual relationship with Plaintiffs, and it must be dismissed. It also appears they have an adequate remedy at law through the litigation that has been filed in Michigan. Therefore, Plaintiffs' Motion to Dismiss Defendants' Counterclaim II for unjust enrichment is granted.

3. Counterclaim III: Breach of Contract

In Delaware, a breach of contract action requires the claimant to show: (1) a contractual obligation, (2) a breach of that obligation, and (3) resulting damages.[49]

"Defendants' [breach of contract] theory is predicated on the notion that Pregis entered into the retention agreements while representing in Section 8.7 of the APA 'that there were no agreements, other than the APA, concerning the sale of RPP's assets to Pregis.'"[50] However, according to Plaintiffs, no breach of the APA

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[48] Countercl. ¶ 30.
[49] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct. Feb. 4, 2005).
[50] Pls.' Opening Br. Mot. to Dismiss at 25.

is possible because "even if Section 8.7 was a representation as to the existence of other agreements, it would only pertain to agreements amongst RPP and Pregis[,]" and not with the four individuals who separately signed retention contracts.[51] Furthermore, Plaintiffs contend that "Section 8.7 implements the parol evidence rule and is not a representation that there 'were no other agreements or understandings relating to the sale' with employees of RPP who would be hired by Pregis."[52]

Defendants claim they have adequately pled breach of contract because Section 8.7 of the APA "applies equally to 'prior understandings, agreements or representations ***by or between*** the Parties.'"[53] So, according to Defendants, Pregis breached Section 8.7 by representing that the APA superseded their prior agreements with RPP employees for retention bonus payments, even though it later continued to fulfill those agreements and ultimately paid the bonuses.[54] Finally, they contend that Plaintiffs "provide no rationale for why they should not be bound by the actual language of the [integration] clause."[55]

The Court finds that the retention bonus agreements Pregis allegedly had with Tate and three other former RPP employees do not constitute a breach of the APA's merger and integration clause set forth in Section 8.7. The APA does not supersede

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[51] *Id.*
[52] *Id.* at 26.
[53] Defs.' Opp'n Br. Mot. to Dismiss at 29.
[54] *Id.*
[55] *Id.* at 30.

the retention bonus contracts because they are separate agreements between different actors. The Court believes Section 8.7 of the APA only applies to "prior understandings, agreements, or representations by or between"[56] PPP, as Buyer, and RPP, as Seller, who are collectively referred to as the "Parties" and individually as a "Party" in the contract itself.[57]

This is nothing more than a standard integration clause meant to foreclose the "Parties" from later asserting their reliance on information outside the four corners of the APA. Defendants' position that it also serves to invalidate agreements by Pregis with individuals who are not "Parties" to the APA is unsupported. Moreover, the phrase "by ... the Parties," which Defendants rely on to support their interpretation, simply means that earlier agreements between or representations made by one Party to another during the Sale negotiations cannot later be used to rebut or undermine the terms set forth in the APA itself. It cannot reasonably be interpreted to replace or void prior agreements between or representations made by one Party of the APA to a non-Party.

The integration clause does not apply to the retention bonus contracts between Pregis and the former members of RPP's management team, because those RPP employees were not "Parties" to the Transaction governed by the APA. Since it was

[56] APA § 8.7.
[57] *Id.* Preamble, Page 1.

not possible for the APA to supersede these separate retention agreements and, consequently, for Plaintiffs to make such representations, the Court believes that Defendants have based their breach of contract counterclaim on an untenable theory. Therefore, Plaintiffs' Motion to Dismiss Defendants' Counterclaim III for breach of contract against Pregis is granted.

4. Counterclaim V: Fraudulent Concealment

To establish a claim for fraudulent concealment or intentional misrepresentation, Defendants must show: (1) deliberate concealment by the [Plaintiffs] of a material past or present fact, or silence in the face of a duty to speak; (2) that [Plaintiffs] acted with scienter; (3) an intent to induce [Defendants'] reliance upon the concealment; (4) causation; and (5) damages resulting from the concealment.[58]

Plaintiffs argue that "Defendants' [fraudulent concealment] claim must be dismissed because it relies on an untenable theory that [they] had a 'duty to disclose all material facts surrounding the APA.'"[59] According to Plaintiffs, no such duty existed because they were not fiduciaries of Defendants, but rather "an arms-length counter-party to a commercial transaction."[60] Furthermore, they contend that

[58] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) (citing *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983)).
[59] Pls.' Opening Br. Mot. to Dismiss at 31-32.
[60] *Id.* at 32.

"Defendants cannot identify any affirmative act that did 'prevent' the discovery of facts giving rise to the fraud claim, … because they admit to having learned of the retention payments of which they complain a month prior to the closing of the APA."[61] Finally, Plaintiffs argue that Defendants "could not have justifiably relied upon an absence of payments or any purported representation in the APA" because they admittedly knew about the retention bonuses prior to the Transaction's closing.[62]

In response, Defendants contend that, even though they had learned about the retention bonus payments before closing on the deal, "the damage had already been done by the time RPP signed the APA" and they had no choice but to proceed with the Transaction.[63] Defendants also argue their fraudulent concealment claim must proceed because they can sufficiently establish that "Pregis actively concealed the fact that it was paying Tate in exchange for a lower purchase price."[64]

For the purpose of this Motion, the Court will assume that the retention agreement for $1.5 million to senior management was unknown to Defendants until approximately a month before the closing of the APA. This concealment occurred during the negotiations for the purchase of Rex and if known in advance of

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[61] *Id.*
[62] *Id.* at 33.
[63] Defs.' Opp'n Br. Mot. to Dismiss at 30.
[64] *Id.* at 31.

January 24, 2018, it would perhaps have provided Defendants an opportunity to investigate and react to the agreement. In essence, the crux of Defendants' claim is that the retention agreement was concealed from them until it was too late to react. It is the concealment of the event that is the genesis of this claim. If Plaintiffs knowingly and willfully conspired with Tate to prevent Defendants from gaining knowledge of the retention agreement and it was done with the specific purpose of obtaining the assets of Rex at a reduced price, the elements of fraudulent concealment are present except for causation and damages. The discovery of the concealed event in advance of the execution of the APA merely relates to whether Defendants were harmed by the nondisclosure or could have taken reasonable action to prevent damages from occurring. As such, the Court does not believe that the knowledge of the retention agreement before closure of the APA prevents this claim from proceeding forward. Whether the concealment was deliberate, whether Plaintiffs intentionally kept the agreement secret to obtain an advantageous purchase price, or whether there is a connection between the concealment and damages allegedly suffered by Defendants are all matters which Defendants will be required to establish at trial. However, the Court cannot find a basis to dismiss the claim at this juncture.

IV. Parties' Summary Judgment Motions

A. Standard of Review

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[65] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[66] The Court must view all factual inferences in a light most favorable to the non-moving party.[67] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[68] Additionally, "the standard for summary judgment 'is not altered'" with cross-motions for summary judgment.[69]

B. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs have moved for summary judgment on three of their claims for breach of contract (Counts IV, V, and VI). They argue that the undisputed facts demonstrate Defendants breached Sections 4.3, 4.20, and 4.6 of the APA.[70]

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[65] Super. Ct. Civ. R. 56(c); *see also Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[66] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[67] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[68] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[69] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. Ct. 2001) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).
[70] Pls.' Opening Br. Mot. for Partial Summ. J. at 21.

According to Plaintiffs, "through Section 4.3, RPP represented to Pregis that signing and performing the terms of the APA would not result in a breach o[r] violation of RPP's operating agreement or any 'Law,' which is defined to include the common law."[71] However, Pregis claims "RPP's allegations in the Michigan and Texas Actions directly contravene its representation in Section 4.3."[72] More specifically, the Michigan litigation alleges that Tate breached RPP's operating agreement by diverting money from the company to himself.[73]

Plaintiffs next argue "RPP's [Section 4.20] representation that to its knowledge, its officers, managers, agents, and employees were in compliance with all Laws applicable to the Business, and that it had received no notice of any such violations of Law, is [also] in direct contravention of" its claims in the Michigan and Texas litigation.[74] They again contend that Defendants breached Section 4.20 because the Texas action alleges "Tate violated his common law fiduciary duties to RPP by taking a corporate opportunity in connection with the APA and the Michigan Action asserts that Tate breached duties of loyalty and care owed under RPP's operating agreement."[75]

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[71] *Id.* at 22.
[72] *Id.* at 23.
[73] *Id.*
[74] *Id.* at 24.
[75] *Id.*

Finally, Pregis alleges a breach of RPP's representation that it had not suffered any material theft since December 31, 2017, as set forth in Section 4.6 of the APA.[76] Plaintiffs argue they are entitled to summary judgment on their claim for breach of Section 4.6 because it "is undisputed that Defendants believed RPP suffered a material theft [through the retention payments] prior to the signing of the APA."[77]

In response, Defendants have also moved for summary judgment on the same breach of contract claims. They first argue that Tate's violation of the RPP operating agreement arose from his separate retention bonus arrangement, as opposed to the APA itself, and does not create a breach of the representation made in Section 4.3.[78] Rex also contends that Pregis has failed to establish any damages related to the alleged breach of Section 4.3.[79]

Defendants next claim that their alleged breach of Section 4.20 is not possible under "the APA's plain language."[80] More specifically, they argue that "the Business" is a defined term, and "[n]othing in either the Texas or Michigan Actions alleges that Tate failed to comply with the laws concerning 'the business of designing, engineering, manufacturing, servicing and selling polyethylene foam.'"[81]

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[76] Pls.' Opening Br. Mot. for Partial Summ. J. at 25.
[77] *Id.* at 25.
[78] *See* Defs.' Opp'n Br. Mot. for Partial Summ. J. at 15.
[79] *Id.*
[80] *Id.* at 16.
[81] *Id.* at 17.

Defendants again contend that Plaintiffs have failed to establish any damages stemming from the alleged breach of Section 4.20.[82]

Finally, Defendants respond to Plaintiffs' claim for breach of Section 4.6 by arguing that they are entitled to summary judgment because "the 'theft' referenced in the Texas Action was not completed and did not occur until after the APA was executed . . . ."[83] They also contend that Pregis once again failed to meet its burden of establishing damages.[84]

Before addressing the specific claims, it is important to recognize that Plaintiffs are not attempting to repudiate the APA or undo the sale. Instead, Plaintiffs appreciate that to obtain indemnification under Section 6.2 of the APA, their real interest here, they must fit Defendants' conduct into the limitations found in Section 6.2(a) of the APA. In pertinent part, that Section states that Defendants must indemnify Plaintiffs for any losses they may "suffer, sustain or become subject to, as a result of, in connection with or relating to:

> (i) the breach of any representation or warranty made by Seller or any Owner contained in this Agreement, . . .
>
> (ii) the breach or non-performance of any covenant or agreement made by Seller or any Owner contained in this Agreement, ..."[85]

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[82] *Id.*
[83] *Id.* at 18.
[84] Defs.' Opp'n Br. Mot. for Partial Summ. J. at 19.
[85] APA § 6.2(a).

Plaintiffs assert Defendants have breached Section 4.3, 4.20 and 4.6 of the APA thus giving them an indemnification right. The Court first finds that Section 4.6 and 4.20 are simply not covered by the alleged conduct asserted in Texas that forms the basis of Plaintiffs' Complaint. Pregis attempts to pigeonhole Defendants' Texas claim as an alleged "theft" under Section 4.6, but the Court finds the conduct here is not a theft relating to the business or its property. Neither Plaintiffs or Defendants' CEO "stole" money or property of Rex to which Defendants were entitled. This is a dispute over whether Defendants received a fair and unconflicted sale price not whether there was a material change in Defendants' financial position since the date of the "latest balance sheet" that would have materially affected Plaintiffs' interest in proceeding with the purchase. That is the representation made in Section 4.6 and nothing more. The allegations also do not fit within the definition of "Material Adverse Effect" set forth in Section 1.1. As such, the Court finds no breach of Section 4.6.

Section 4.20 is equally not applicable to the conduct alleged here. Clearly at the time the APA was executed there had been no claims or proceedings filed against Defendants or its employees reflecting a material violation of any "law." Therefore, the only possible breach is the representation by Defendants that their CEO was in compliance within all "laws" applicable to the business. While at first blush this would perhaps fit the alleged conduct, "law" is defined as "any law, statute,

regulation, code, constitution, ordinance, treaty, or rule of common law, administered or enforced by or on behalf of, any Governmental Authority."[86] Clearly, this part of the APA was intended to alert the buyer of any investigation or alleged violation of law asserted by a government agency that would affect Plaintiffs' willingness to proceed with the purchase of the company. It is not one covering the alleged improper conduct by the CEO asserted here. As such, the Court finds no breach of Section 4.20 of the APA.

However, Section 4.3 appears to cover a much broader factual scenario and was intended to have Defendants represent that they were unaware of any conflicts that they believed would materially cause a breach in the APA. This provision states in pertinent part:

> The execution, delivery and performance of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby by Seller do not and shall not (i) materially conflict with or result in any material breach of any of the terms, conditions or provisions of, (ii) constitute a material default under, (iii) result in a material violation of, ...[87]

It would appear to the Court that when Defendants became aware of the retention agreement and they believed it had materially affected the purchase price

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[86] APA § 1.1.
[87] APA § 4.3.

for the assets of the company, this section of the APA was violated by their failure to raise the issue with Plaintiffs. They clearly believed it was a material violation or breach of the APA, and their failure to raise it caused them to falsely represent under Section 4.3 that they were unaware of the conflict. This belief was further affirmed by Defendants when they filed the Texas and Michigan actions days after the APA was executed. If Defendants received legal advice that they should remain silent about their knowledge of the retention deal, proceed to settlement under the APA, take the sale proceeds and then pursue litigation, that advice was professionally unreasonable and caused a violation of Section 4.3 of the APA.

While the Court believes Section 4.3 of the APA to be applicable to the assertions made by Defendants in their litigation, it finds that since this litigation is a bench trial, there is no need to rule on the summary judgment until Defendants' presentation of its case on fraudulent concealment. The only ability for Defendants to avoid liability for indemnification under Section 6.2 is the fraud exception found in Section 8.15 of the APA. While the Court has significant concerns as to the Defendants' claim, it finds in fairness it will be in a better position to make a final ruling once it has heard the testimony at trial. As such, while the Court finds Plaintiffs have a good faith basis to assert indemnification under Section 4.3 of the APA, it will await the trial to determine whether or not the fraud exception would void Defendants' liability.

C. Defendants' Motion for Summary Judgment

Defendants have also moved for summary judgment on all of Plaintiffs' claims in this litigation. They argue the Court "must reject all of Pregis's claims seeking a declaration that RPP's claims in any of the pending lawsuits are improper and must similarly reject all of Pregis's claims seeking indemnification from RPP or its owners."[88] Defendants generally assert that the fraud exception found in Section 8.15 precludes Plaintiffs' claims from proceeding forward.

In response, Plaintiffs generally contend that Defendants' requests for summary judgment on the grounds of fraud should be denied "because it is undisputed [they] knew of the alleged wrongdoing far in advance of the closing of the APA."[89] Pregis additionally argues that its indemnification claim must proceed because they "have incurred and continue to incur Losses in connection with breaches of representations and Excluded Liabilities," resulting from their expenditures to defend the Texas and Michigan actions as well as expenses relating to this litigation.

With the dismissal of the Texas action and with the affirmance by the Texas Court of Appeals, it is unclear to the Court beyond the indemnification issue which of Plaintiffs' claims have been mooted by those decisions. It is also possible that the Court's ruling that Plaintiffs have a basis for indemnification assuming the fraud

[88] Defs.' Opening Br. Mot. for Summ. J. at 20.
[89] Pls.' Opp'n Br. Mot. for Summ. J. at 15.

exception in Section 8.15 is not applicable makes some of the counts in Plaintiffs' Complaint unnecessary. Put in simple terms, Defendants have an obligation to establish that Section 8.15 is applicable and if they fail to do so, Plaintiffs' indemnification claim materializes. The Court also believes that many of the arguments made by Defendants have been addressed either in the Court's decision on the Motion to Dismiss or Plaintiffs' Motion for Partial Summary Judgment.

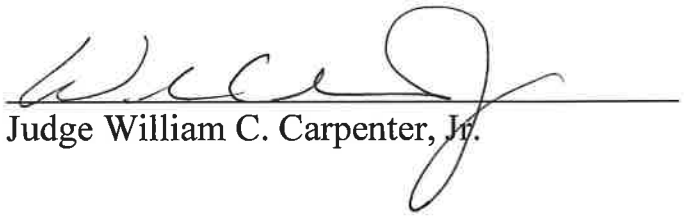
Therefore, the Court is requesting the parties to confer before the pretrial conference and be prepared to advise the Court if any of the arguments for summary judgment remain in need of a decision. Candidly, it appears that Defendants' arguments for summary judgment rest within their Section 8.15 fraud exception which the Court will not rule on until the trial is concluded. Clearly there are factual disputes that would prevent it from occurring pretrial in a summary judgment context. It also appears that most of Defendants' arguments are based upon their view of the facts which may or may not be established at trial. As such, at the moment, the Court will deny Defendants' Motion for Summary Judgment with the understanding that if a specific claim needs to be resolved before trial, they are free to raise that matter at the pretrial conference. The Court just does not see the need to address issues previously decided by this Court or Texas that are now moot simply because Defendants have filed a summary judgment motion.

V. CONCLUSION

Assuming for the moment that this matter will proceed to trial, the Court believes the logical presentation of evidence is for Rex to proceed first on its fraudulent concealment claim and then Pregis can present its defense to that claim. At the pretrial conference, we can discuss how best to present evidence regarding indemnification if that claim remains after the fraudulent concealment verdict.

For the foregoing reasons, Plaintiffs' Motion to Dismiss Defendants' Counterclaims is **GRANTED IN PART AND DENIED IN PART**, Plaintiffs' Motion for Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**, and Defendants' Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.