SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
----------x

BETA HOLDINGS, INC., BETA INTERNATIONAL, INC., BETA HOLDINGS HOLDCO, LLC, BETA ACQUISITION I CO., INC., and BETA ACQUISITION II CO., INC.,

Plaintiffs,

-against-

ROBERT J. GOLDSMITH and RAFAEL RAMOS,

Defendants,

-against-

CORINTHIAN-BETA INVESTMENTS, LLC, CORINTHIAN CAPITAL GROUP, LLC, KENNETH CLAY, and ANTHONY PUCILLO,

Counterclaim Defendants.

----------x

Index No.: 652401/2012

Mtn Seq. No. 009

DECISION AND ORDER

JEFFREY K. OING, J.:

Background

The Transaction

On November 17, 2009, plaintiffs, Beta Holdings, Inc. ("Beta Holdings" or the "Company"), Beta International, Inc. ("Beta International"), Beta Holdings Holdco, LLC ("Beta Holdco"), Beta Acquisition I Co., Inc. ("Beta Acquisition I"), and Beta Acquisition II Co., Inc. ("Beta Acquisition II") (collectively, "plaintiffs" or "Beta"), and defendants, Robert J. Goldsmith ("Goldsmith") and Rafael Ramos ("Ramos") (collectively, "defendants" or "sellers"), entered into a Stock Purchase Agreement ("SPA"), dated November 17, 2009, in which plaintiffs

acquired all of the capital stock of Beta Holdings, a Texas corporation engaged in selling valves and pipes to the oil and gas industry (Stein Affirm., 11/19/13, Ex. 1A).

Pursuant to the SPA, Beta Holdings and Beta II issued a series of promissory notes (the "notes") to defendants. The notes include a senior loan note in the amount of $3,000,000 with a maturity date of December 11, 2011; a series A-1 note in the amount of $10,200,000 with a maturity date of December 11, 2016; a series A-2 note in the amount of $1,800,000 with a maturity date of December 11, 2016; a series B-1 note in the amount of $1,000,450 with a maturity date of December 11, 2011; a series B-2 note in the amount of $176,550 with a maturity date of December 11, 2011; a series C-1 and C-2 for payment of Cosider restricted cash note with a maturity date upon receipt by Beta Holdings of restricted cash; and an equity note in the amount of $3,373,000 with a maturity date of December 11, 2016.

In addition, the parties entered into a Stock Pledge Agreement, dated December 11, 2009, in which Beta Holdings granted defendants a security interest in shares of Beta International held by Beta Holdings (Stein Affirm., 11/19/13, Ex. 3). Beta Holdings and defendants also entered into a Guaranty Agreement, dated December 11, 2009, in which Beta International guaranteed the obligations under the senior loan note (Id., Ex. 4).

Plaintiffs' Claims

Plaintiffs claim that defendants breached numerous representations and warranties in the SPA which allowed defendants to inflate revenues and profits, and overstate the strength and capabilities of Beta Holding's business, thus causing plaintiffs to overpay for the Company. In support of this contention, plaintiffs make the following claims regarding a subsidiary of Beta Holdings, Universal Flow Valve ("UF" or "Universal Flow") and certain valves sold by UF and the Company generally (hereinafter, the "UF/valve issues").

Universal Flow Products and Country of Origin

Plaintiffs assert that prior to the SPA Beta Holdings did not show the proper country of origin on valves Universal Flow sold under the Universal Flow brand. The only geographic reference on the UF valves was Houston, Texas, when in fact the valves were manufactured predominantly in China, with some valves manufactured in Korea and Italy.

Certificates of Origin

Prior to the SPA, and in violation of federal law, Universal Flow had a practice of sending UF valves to Mexico with NAFTA paperwork designating the United States as the country of origin, even though the UF valves were manufactured mainly in China. Plaintiffs also claim that prior to the SPA, Beta Holdings sold and delivered Universal Flow products in Asia that falsely identified the United States as the country of origin.

American Petroleum Institute ("API") Monogram

Next, plaintiffs claim that since at least April 2007, UF was not authorized to sell products carrying the API Monogram, an oil and gas industry seal of approval that many of UF's customers require as a condition to their purchase of Universal Flow products. By letter, dated April 17, 2007, the API informed Universal Flow that it had determined that UF was "using a forged API Certificate of Authority in an attempt to pass [UF's] Houston facility off as being certified by API under the API Monogram Program" (Stein Affirm., 11/19/13, Ex. 5, Ex. 26). API further rescinded all rights of Universal Flow "to use the API monogram on any API Spec 6A and API Spec 6D products manufactured at [UF's] host facility located" in China (Id.). Plaintiffs contend that despite API's revocation of UF's authority to use the API monogram, UF tags continued to carry the API logo in 2007, 2008, and 2009.

Name Plates

Plaintiffs next claim that defendants engaged in counterfeiting the name plates on other manufacturers' products that the Company sold. Universal Flow sold valves manufactured by other companies in addition to selling its own brand of valves. Plaintiffs assert that Miles Williams, a quality control officer who Beta Holdings hired after closing of the SPA, discovered a box of name plates for other valve manufacturers in Beta Holding's warehouse. The name plates were identical to

those used by other manufacturers except that the specifications were blank.

Further, plaintiffs contend that there can be no dispute that product specifications were altered so that products sold appeared to meet customer specifications when in fact they did not. Plaintiffs claim that in May 2009 the name plates on a series of valves were removed and substituted with name plates showing a different part number and different specifications.

Product Test Certifications

Plaintiffs further claim that defendants sold valves with fabricated product test certifications for tests that had never been performed, including high pressure gas tests.

IRS Audit and Additional Tax Liabilities

In addition to the UF/valve issues, plaintiffs claim that following the closing of the SPA, an IRS audit identified additional tax liabilities of more than $2 million for periods predating the closing. The IRS found that Beta Holdings owed additional taxes in the amount of $1,820,753, plus interest of $223,656, for the period ending October 2008, and additional taxes of $164,838, plus interest of $4,989, for the period ending October 2009, for a total of $2,227,975 (Leavitt Aff., Exs. 2 and 3). Plaintiffs demanded that defendants pay these tax liabilities, however, defendants failed to do so and Beta Holdings ultimately paid the IRS for these tax liabilities (Leavitt Aff., Exs. 5 and 6).

Parties' Correspondence

On April 20, 2010, plaintiffs sent defendants a first notice of indemnity claim and advised them that they are entitled to indemnification under sections 10.2(a) and 12.1(a) of the SPA as a result of defendants' non-payment of tax liabilities incurred prior to the closing.

Subsequently, on September 19, 2011, plaintiffs again wrote to defendants with a second notice of indemnity claim advising defendants that they are entitled to indemnification under sections 10.2(a) and 12.1(a) of the SPA as a result of defendants' breaches of the representations and warranties in the SPA. Further, plaintiffs informed defendants that they were electing to exercise their right to a set-off against any or all amounts claimed due under section 5 of the Senior Loan Note, section 4 of the Series B-1 Note and Series B-2 Note, and section 10.7 of the SPA. Thereafter, on November 10, 2011, plaintiffs sent defendants an amended first notice to update the amounts set out in the first notice of indemnity claim.

On December 8, 2011, plaintiffs wrote to defendants pursuant to section 7 of the Stock Pledge Agreement demanding a return of the collateral as defined in that agreement, including all stock certificates and accompanying stock powers (Stein Affirm., 11/19/13, Ex. K). Plaintiffs claimed that Beta Holdings had satisfied all of its obligations under the Stock Pledge Agreement and the Senior Loan Note. In addition, plaintiffs advised

defendants that the Guaranty Agreement was terminated because Beta Holdings had satisfied all its obligations under the Senior Loan Note, and that plaintiffs had exercised their rights to a set-off under section 5 of the Senior Loan Note and section 10.7 of the SPA in an amount that exceeded the amounts claimed due under the Senior Loan Note, the Stock Pledge Agreement or the Guaranty Agreement.

Defendants responded by letter dated December 15, 2011, demanding payment under the Notes.

Finally, plaintiffs sent defendants a third notice of indemnity claim, dated December 23, 2011, claiming that they are entitled to indemnification under sections 10.2(a) and 12.1(a) of the SPA.

SPA Provisions

Based on the foregoing, plaintiffs commenced this action asserting claims for breaches under the following relevant provisions of the SPA set forth in Article IV entitled "Representations and Warranties of the Seller Parties": § 4.4 (Financial Statements), § 4.6 (Absence of Undisclosed Liabilities), § 4.7 (Absence of Certain Changes or Events), § 4.10 (Intellectual Property), § 4.17 (Compliance with Law; Necessary Authorizations), § 4.21 (Universal Flow Manufacturing Matters), § 4.22 (Business Generally), § 4.26 (Disclosure), and § 4.28 (Export Controls).

Plaintiffs also point to Article X of the SPA, entitled "Indemnification", which provides, in relevant part:

> Each of the Sellers ... shall jointly and severally indemnify and hold harmless each [plaintiff] ... against and in respect of any and all claims, costs, expenses, damages, Liabilities, losses or deficiencies (including, without limitation, counsel's fees and other costs and expenses incident to any suit, action or proceeding) ... arising out of, resulting from or incurred in connection with (i)any inaccuracy in any representation or the breach of any warranty made by any Seller Party in this Agreement or in any other Transaction Document, (ii) the breach by any Seller Party in this Agreement or in any other Transaction Document, (iii) the breach by any Seller Party of any covenant or agreement to be performed by it or them under this Agreement or in any other Transaction Document ....

(SPA, § 10.2).

Plaintiffs claim that under the SPA, defendant sellers agreed to "indemnify and hold [plaintiffs] harmless from and against any loss, claim expense, and other damage attributable to (i) all Taxes (or the non-payment thereof) of the Acquired Entities ... for all Taxable periods ending on or before the Closing Date" (SPA, § 12.1[a]).

Plaintiffs' Motion for Summary Judgment

Plaintiffs assert the following seven causes of action in their complaint: (1)fraud; (2) breach of contract; (3) indemnification; (4) declaratory judgment (set-off); (5) declaratory judgment (termination of Guaranty Agreement and Stock Pledge Agreement); (6) injunctive relief; and (7) unjust Enrichment.

Plaintiffs move, pursuant to CPLR 3212, for an order granting them summary judgment on liability on the following causes of action: second, third, fourth, fifth, and seventh.

Defendants' Claims

Defendants claim that Beta suffered no damages based on the UF/valve issues, and, therefore, plaintiffs' contract, indemnification, and fraud claims must fail. Damages are an essential element of Beta's contract and fraud claims and Beta does not, and cannot, show that it suffered any harm based on the value of the Company at the time of closing.

First, Beta has admitted that the UF/valve issues were immaterial and that the pre-closing statements were accurate. After the sale of the Company, Beta retained McGladrey & Pullen, LLP ("McGladrey") to audit Beta's pre-closing statements. Shortly after McGladrey began its work, Beta discovered the UF/valve issues. In a January 6, 2011 letter from Mark Claffey and Bryan Leavitt, Beta Holdco's Chief Financial Officer and Chief Executive Officer, respectively, to McGladrey, plaintiffs asserted the following, in relevant part:

> Beta's new management discovered during 2010 that valves Beta shipped domestically and internationally were not always properly marked with respect to country of origin, manufacturer, specifications and/or trademarks, and were not always described accurately in paperwork accompanying shipments. Since discovery, Beta's new management has worked diligently to address these legal and compliance deficiencies. A quality control officer has been hired by Beta and is charged with inspecting all outgoing product to insure full compliance. Beta has instructed all staff that all

> products leaving Beta's facility must be properly marked and accurately described in accompanying paperwork. All products in Beta's warehouse are currently being inspected to insure that is properly marked. Additionally, Beta is designing and implementing a quality control procedure to detect and prevent any such deficiencies in the future. We do not believe that any accounting for or disclosure of this matter in the financial statements is required as we consider the likelihood of a material adverse consequence to the Company in connection with this matter to be remote.

(Wolff Affirm., Ex. A., pp. 4-5). In a May 16, 2012 letter, also from Claffey and Leavitt to McGladrey, plaintiffs again reiterated that "[w]e do not believe that any accounting for or disclosure of this matter in the financial statements is required as we consider the likelihood of a material adverse consequence to the Company in connection with this matter to be remote" (Wolff Affirm., Ex. Z, p. 5). Furthermore, in a 12/1/11 memo entitled "Beta Management's View Regarding Legacy Business Practices and the Potential for Future Liabilities," plaintiffs provided the following:

> Sales transactions at Beta International in 2009 and prior years did not always correctly document the country of manufacturing origin, or clarify that the valve was not certified in accordance with American Petroleum Industry [API] standards. These shortcomings in our earlier business practices have been resolved and furthermore, we believe our liabilities for these prior transactions are minimal for many reasons:
>
> The valves originated from a high quality supplier in China that has been an API certified facility for several years. The valves are considered to be of exceptional quality and performance. It is Management's belief that the customer would accept any valves in question because [the] manufacturing source itself is fully certified.

> The majority of all valves manufactured today originate from China. Even valves that carry non-China (i.e. Italy) country of origin markings almost certainly contain major components sourced from China. The quality of the Universal Flow valves and supporting manufacturing certifications established at the Chinese plant, such as API 6D, would resolve any country of origin concerns raised by our customers. Most customers have been buying Chinese-sourced valves for years and would not be surprised to learn that Universal Flow originated from China.
>
> Lastly, the life-cycle of a Universal Flow valve is relatively short, typically just a few years. Furthermore, the majority of Universal Flow Valves are small bore and inexpensive. These small bore valves are typically thrown away during each plant maintenance cycle because it is more cost effective to use a new valve instead of repairing or refurbishing a used valve. With each passing year and subsequent annual or bi-annual maintenance on the equipment, there are fewer valves are in service today that were sold in 2009 or earlier years.
>
> In summary, Beta International and its UF Valve product line has not experienced any warranty claims from end customers resulting from either the API Monogram or country of origin issues, since these business practices were resolved. While we can't guarantee there won't be future claims, the above rationale supports a limited impact to Beta International.

(Wolff Affirm., Ex. T).

Defendants contend that in light of Beta's clear admissions that the UF/valve issues were immaterial McGladrey rendered its opinion that the pre-closing financial statements were accurate (Wolff Affirm., Ex. W, p. 1).

Defendants also argue that Beta has admitted that the Company was worth what it paid for it in 2009. In that regard, defendants point to a report prepared by Navigant Consulting ("Navigant"). Navigant was engaged by Corinthian Capital Group,

LLC ("Corinthian"), Beta's parent company, so that Corinthian could "allocate the total purchase price paid among the acquired assets for financial reporting purposes" (Wolff Affirm., Ex. B, p. 11). Indeed, Navigant issued a report to Corinthian entitled "ASC 805 Valuation of Certain Assets of Beta Holdings, Inc." with a valuation date of December 11, 2009 (id.). Navigant found that its "analysis indicated a Business Enterprise Value that was consistent with the purchase price paid by Corinthian" (Id., p. 21).

Defendants also point out that Leavitt testified at his EBT that Beta has not incurred any customer related damages or losses based on the UF/valve issues, nor has there been any notices from governmental entities regarding the NAFTA issues (see Wolff Affirm., Ex. U, Leavitt Transcript, 10/11/12, pp. 147-149; Ex. G, Leavitt Transcript, p. 274).

Defendants also argue that they did not breach any representations and warranties in Article IV of the SPA. In that regard, the core provisions of the SPA upon which Beta bases its claims are limited by an express materiality standard and Beta has admitted that the UF/valve issues were immaterial.

Specifically, section 4.4 concerns financial statements and provides:

> The Financial Statements ... have been prepared from the books and records of the Company and its subsidiaries, and present fairly in all material respects (i) the consolidated financial position of the Company and its subsidiaries at the dates thereof, (ii)

> the consolidated results of operations, changes in stockholders' equity and cash flows of the Company and its subsidiaries, for the periods then ended ....

(emphasis added).

Section 4.7 entitled, Absence of Certain Changes or Events, provides that:

> [S]ince the Balance Sheet Date no Acquired Entity has: (a) suffered any Material Adverse Effect, and no fact or condition exists or, to the knowledge of the Seller Parties, is contemplated or threatened that might reasonably be expected to cause a Material Adverse Effect in the future.

(emphasis added).

Material Adverse Effect is defined as follows:

> [A]ny circumstance, effect or change that would reasonably be expected to be, individually or in the aggregate with any other circumstance, change or effect, materially adverse to (x) the earnings (actual or potential), operations, assets, liabilities, properties, condition (financial or otherwise), prospects, results of operations, net worth, management or permits of the Company, taken as a whole, or the Business, (y) the ability of any party to consummate timely the transactions, contemplated hereby or to perform its obligations hereunder, or (z) the ability of Parent, the Buyer of the Company to own and/or conduct the Business after the Closing.

Section 4.10 which deals with intellectual property provides:

> Each of the Acquired Entities owns or possesses, free and clear of any Encumbrance, adequate valid licenses or other valid rights to use all of their Proprietary Rights, and there as not been any material written or, to the knowledge of the Seller Parties, oral assertion or claim against any of the Acquired Entities challenging the validity or the use by any of the Acquired Entities of any of the foregoing.

(emphasis added).

Section 4.17 deals with compliance with the law and provides that:

> Each Acquired Entity is duly complying and has duly complied, in all material respects, in respect of its business, operations and Properties, with all applicable laws .... No Acquired Entity is aware of any material present or past failure to comply or of any past or present events, activities or practices of any Acquired Entity that may be construed to indicate interference with or prevention of continued compliance, in any material respect, with any laws, rules or regulations or that may give rise to any common law or statutory liability, or otherwise form the basis of any material Proceeding.

(emphasis added).

Section 4.22 entitled, Business Generally, provides:

> To the knowledge of the Seller Parties, since the Balance Sheet Date, no events or transactions have occurred that could be expected to have a Material Adverse Effect ....

(emphasis added).

Section 4.26, Disclosure, provides:

> No representation or warranty by any of the Seller Parties ... contains or will contain any untrue statement of material fact or omits to state a material fact ....

(emphasis added).

And, section 4.28 provides the following regarding export controls:

> The Company and its Subsidiaries have at all times conducted its export transactions materially in accordance with (i) all applicable United States export and re-export control laws ....
>
> (a) The Company and each of its Subsidiaries has obtained, and is in material compliance with, all

> export licenses, license exceptions and other consents ....

(emphasis added).

Defendants contend that by plaintiffs' own admissions the UF/valve issues are immaterial and do not constitute breaches of the SPA because, among other things: (1) Beta admitted that, by accounting standards, the UF/valve issues were immaterial (Wolff Affirm. Ex. A, January 6, 2011 Letter from B. Leavitt and M. Claffey to McGladrey, p. 5); (2) Beta admitted that, by business standards, the UF/valve issues were immaterial, asserting in an internal memorandum that "the business is still thriving despite the lack of API and the reduced impact of Made in China sales channels" (Wolff Affirm., Ex. X, July 20, 2011 e-mail from M. Claffey to M. Couch, p. 2); and (3) no customer or governmental entity has asserted any claim based on the UF/valve issues.

In addition, as for plaintiffs' argument that defendants breached their representation and warranty that the company possessed all valid licenses or other valid rights "necessary for the conduct of the Business as presently conducted" (SPA, § 4.10[e]), defendants point out that section 4.10 of the SPA expressly provides:

> Schedule 4.10(g) of the Disclosure Schedule sets forth a list of all material license and similar agreements between any Acquired Entity and third parties, under which an Acquired Entity is granted rights to the use, reproduction, distribution, manufacture, sale or licensing of items embodying the patent, copyright, Trade Secret, trademark or other proprietary rights of such third parties.

The API certification is not listed in the disclosure schedule. Furthermore, Beta and Corinthian were aware that although the valves were manufactured by an API certified facility, UF itself was not independently API certified at the time of the sale (see Wolff Affirm., Ex. N, Clay Transcript, pp. 153 -154; Ex. U, Leavitt Transcript, pp. 48-50).

As for section 4.6, which deals with undisclosed liabilities, defendants point out that Beta admits that there are no undisclosed liabilities.

Defendants next argue that plaintiffs fail to establish a breach of section 4.21 for defective manufacturing design. Defendants assert that the UF valves have always been manufactured by an API certified manufacturer. Furthermore, defendants point to an internal Beta Company Memorandum regarding the UF/valve issues, including the API issues, wherein Beta stated "the valves originated from a high quality supplier in China that has been an API certified facility for several years. The valves are considered to be of exceptional quality and performance" (Wolff Affirm., Ex. T).

Defendants' Cross-motion for Summary Judgment

Defendants cross-move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint.[1]

---

[1]Defendants seek summary relief on the following issues: (1) that the pre-closing financial statements on which plaintiffs base their claims were accurate; (2) that the alleged UF issues

Discussion

Plaintiffs maintain that despite whether or not Beta has sustained damages from customer, government, or agency claims, the damages plaintiffs seek in this action are the difference between the amount plaintiffs paid for the Company and what a knowledgeable investor would have paid had it known about the UF/valve issues before the closing of the SPA. In addition to this claim, the other basis of plaintiffs' damages are the tax liability that Beta incurred after the closing of the SPA.

Defendants frame their cross-motion as one for declaratory relief rather than to dismiss any one particular cause of action. While a search of this record compels this Court to grant plaintiffs' motion to the extent it seeks summary judgment on the claims concerning the tax liabilities, it also compels dismissal of plaintiffs' causes of action as they pertain to the claim for overpayment of the Company.

---

were immaterial; (3) that sellers did not represent that UF was API certified; (4) that Beta Holdings, on the date of closing, was worth what plaintiffs paid, and in fact has increased in value since the date of the closing; (5) that plaintiffs have incurred no warranty claims or other liabilities in connection with any customers or governmental entities; and (6) that defendants did not breach sections 4.4, 4.6, 4.7, 4.10, 4.17, 4.21, 4.22, 4.26, and 4.28 of the SPA; (7) that plaintiffs have not suffered and are not entitled to recover from defendants out-of-pocket damages based on the value of Beta Holdings on the date of closing as fraud, contract, or indemnification damages; and (8) that plaintiffs are not entitled to indemnification for warranty claims or other liability in connection with any customers or governmental entities.

First, regarding the tax liabilities, plaintiffs are entitled to summary judgment against defendants for the tax liabilities that were assessed against the Company for a period of time pre-closing of the SPA. Defendants' attempt to raise an issue of fact regarding the tax liabilities by arguing that these particular tax obligations were previously resolved by the parties' working capital adjustment is unpersuasive. As plaintiffs point out, and defendants do not dispute, any claim that the tax liabilities at issue were encompassed in the working capital adjustments makes no temporal sense given that the tax liabilities were not imposed until April 2012, after the parties entered into the SPA.

Accordingly, the branch of plaintiffs' motion for summary judgment on the second cause of action based on defendants' failure to pay the pre-closing tax liabilities as required under section 12.1(a) of the SPA is granted. In addition, plaintiffs' are entitled to summary judgment on that branch of the third cause of action seeking indemnification under section 12.1(a) of the SPA for the tax liabilities incurred.

Defendants' cross-motion for summary judgment on these claims is denied.

As for plaintiffs' claim in the second cause of action for breach of the representations and warranties in the SPA, plaintiffs fail to show that the UF/valve issues constitute material breaches under the SPA. A majority of the provisions of

the SPA cited by plaintiffs contain a materiality standard (SPA, §§ 4.4, 4.7, 4.10, 4.17, 4.22, 4.26, 4.28). The record indisputedly demonstrates that there have been no customer or governmental claims made against plaintiffs concerning the UF/valve issues. Thus, plaintiffs fail to demonstrate that they have suffered any damages. Further, this record clearly indicates that plaintiffs themselves did not consider the UF/valve issues to be material. In that regard, Beta represented to its auditor, McGladrey, that it did "not believe that any accounting for or disclosure of this matter in the financial statements is required as we consider the likelihood of a material adverse consequence to the Company in connection with this matter to be remote" (Wolff Affirm., Ex. A, pp. 4-5). In the 12/1/11 Beta memo, "Beta Management's View Regarding Legacy Business Practices and the Potential for Future Liabilities," plaintiffs stated that they believed that their "liabilities for these prior transactions are minimal for many reasons ...." (Wolff Affirm., Ex. T). In fact, there is nothing in this record to indicate that plaintiffs considered the UF/valve issues to be material at the time plaintiffs discovered those issues, or thereafter. And, again, plaintiffs do not claim that any customer or governmental entity has asserted any claims against plaintiffs based on the UF/valve issues.

In addition, even though sections 4.6 and 4.21 of the SPA do not contain a materiality component, based on this record,

plaintiffs fail to demonstrate that defendants knew "of any basis for the assertion" of any "Liabilities" as that term is defined in the SPA (SPA, § 4.6) or that defendants knew that the UF/valve issues "could reasonably be expected to result in or provide a basis for any Warranty Claim" (SPA, § 4.22).

Accordingly, that branch of plaintiffs' motion for summary judgment on second cause of action for breach of contract related to the SPA's representations and warranties is denied. Further, for those same reasons, defendants' cross-motion for summary judgment is granted and this branch of the second cause of action is dismissed.

Likewise, plaintiffs are not entitled to summary judgment on their claim that they paid more for the Company than what it was worth. The Navigant report provides in relevant part the following:

> Our analysis also included a reconciliation of our concluded Fair Values of the Subject Assets to the purchase price paid by Corinthian. We utilized the Income Approach (DCF Method) using projections based on discussions with Management to estimate the Business Enterprise Value of Beta. This analysis indicated a Business Enterprise Value that was consistent with the purchase price paid by Corinthian. In addition, the estimated Fair Values of the Subject Assets were reasonable with respect to the purchase price.

(Wolff Affirm., Ex. B, p. 21).

Plaintiff argues that defendants misconstrue the Navigant valuations and ignore that Navigant's December 11, 2009 valuation reported a Business Enterprise Value of the Company at $19.8

million and an Adjusted Purchase Price of $16.7 million (Wolff Affirm., Ex. B, VII) while on December 9, 2009, the parties provided an Enterprise Value of the Company at the time of closing at $28.7 million (Wolff Affirm., Beta Internation [sic] Closing Funds Flow, Ex. M). Plaintiffs contend that the December 11, 2009 valuation was actually completed on December 20, 2010 and noted the negative impact on sales as a result of the UF/valve issues, "including the practice of using the API logo and selling the valves as if they were API authorized" (Pls.' Reply Mem. at pp. 26-27).

In fact, the section of the Navigant report that plaintiff refer to provides instead that "[s]ales related to Universal Flow products were projected to decrease from $7.0 million in fiscal year 2009 to $3.5 million in fiscal year 2010 and then increase to $16.2 million in fiscal year 2011 when API certification is expected" (Wolff Affirm., Ex. B, p. 14). This corresponds with plaintiffs' assertion that they "do not contend that Defendants failed to disclose the loss of the API license" and were aware that the Company lacked the API certification when they entered the deal (Pls.' Reply Mem. at p. 15).

Plaintiff's reliance on the affidavit of their expert, Seymour Preston Jr., is also unavailing in raising a triable issue of fact as to whether plaintiffs overpaid for the Company. While Preston describes the approaches he used to determine the "price a knowledgeable buyer with the benefit of full disclosure

would have reasonably paid for the [Company], knowing in advance material information, including the [UF/valve issues] in which Beta had been engaged" (Preston Aff., ¶ 3), he fails to provide any data demonstrating the application of the approaches he used to reach his conclusion. Instead, he merely describes the methodologies employed and then concludes that "a buyer with the benefit of full disclosure would put a price on Beta of approximately $6.7 million to $8.8 million" as opposed to the $26.7 million purchase price of the Company (Id., ¶ 17). Because the affidavit is conclusory, and fails to address pertinent facts in this record, such as the Navigant report and that report's conclusion that plaintiffs paid the correct amount for the Company, it is insufficient to raise a triable issue of fact (Roques v Noble, 73 AD3d 204 [1st Dept 2010] ["[E]xpert testimony must be based on facts in the record"]).

The insufficiency of the Preston affidavit is further amplified when the affidavit of defendants' expert, Jeffrey A. Compton, is considered. Compton concluded that the fair value of the invested capital was $16,703,323 and the net assets given up by the sellers was $16,703,323 (Compton Aff., ¶¶ 22-23). Compton bases this conclusion on his analysis of the work conducted by Beta's auditors and Navigant (Compton Aff., ¶¶ 7 - 21). As for the Preston affidavit, Compton claims that he "cannot determine the reliability of his calculations alleging damages because he

has not provided sufficient detail to replicate his work" (Compton Aff., ¶ 24).

Accordingly, that branch of plaintiffs' motion for summary judgment on their claim that they overpaid for the Company is denied. Further, for these same reasons, that branch of defendants' cross-motion for summary judgment is granted, and this claim is dismissed.

For the reasons noted, supra, plaintiffs' claim for unjust enrichment (seventh cause of action) fails because they did sustain any damages such that equity and good conscience would provide a remedy against defendants (Mandarin Trading Ltd. v Wildenstein, 65 AD3d 448 [1st Dept 2009]). As such, defendants' cross-motion for summary judgment dismissing this claim is granted and it is hereby dismissed.

To the extent the remaining causes of action for indemnification (third cause of action), declaratory judgment -- set-off (fourth cause of action), declaratory judgment -- termination of Guaranty Agreement and Stock Pledge Agreement (fifth cause of action), all find as their basis the claim for breach of the SPA, as noted, supra, plaintiffs are not entitled to summary judgment on these claims. Further, for those same reasons, defendants' cross-motion for summary judgment dismissing these claims is granted, and they are hereby dismissed.

With regard to the fraud claim (first cause of action), the record demonstrates that there was no material misrepresentation,

omission, or damages, if such existed (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553 [2009]). Indeed, plaintiffs' own conduct and admissions belie any finding that a factual issue exists concerning defendants' purported misrepresentations. Accordingly, that branch of defendants' cross-motion for summary judgment dismissing this claim is granted, and it is hereby dismissed.

Defendants' cross-motion for summary judgment dismissing the claim for injunctive relief (sixth cause of action) is granted, and it is hereby dismissed given that the basis for such relief is no longer available.

Accordingly, it is hereby

ORDERED that branch of plaintiffs' motion for summary judgment on liability on the second cause of action for breach of contract is granted to the extent that the claim is based on section 12.1(a) of the SPA; and it is further

ORDERED that branch of plaintiff's motion for summary judgment on the third cause of action for indemnification is granted to the extent that the claim is based on section 12.1(a) of the SPA; and it is further

ORDERED that branch of plaintiffs' motion for summary judgment on the remaining claims is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted in part and denied in part in accordance with this decision and order; and it is further

ORDERED that counsel shall appear in Part 48 (Room 242) for a status conference on January 27, 2015 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/2/14

HON. JEFFREY K. OING, J.S.C.