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Order on Motions for Summary Judgment (BARTON PROTECTIVE SERVICES, LLC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BARTON PROTECTIVE SERVICES, LLC and SPECTAGUARD ACQUISITION, LLC,	)	**Civil Action No.: 2006CV115190**
Plaintiffs,	)	
v.	)	
CHARLES BARTON RICE, SR., CHARLES BARTON RICE, JR. TRUST, KIMBERLY ANN RICKEY TRUST, KATHRYN PROULX, and THE BANK OF NEW YORK TRUST COMPANY, N.A.	)	
Defendants.	)	

FILED IN OFFICE
MAR 10 2008
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Counsel appeared before the Court on February 5, 2008, and February 21, 2008, to present oral arguments on the following motions: (1) Shareholder Defendants' Motion for Partial Summary Judgment, filed August 27, 2007; (2) Plaintiffs' Motion for Summary Judgment, filed October 2, 2007; (3) Shareholder Defendants' Motion for Summary Judgment, filed December 17, 2007; (4) Plaintiffs' Motion for Summary Judgment on Shareholder Defendants' Counterclaims, filed December 17, 2007; and (5) Plaintiffs' Motion for Partial Summary Judgment on Plaintiffs' Claims, filed December 17, 2007.

After reviewing the record of the case, the briefs submitted on the motions, and the arguments presented by counsel, the Court finds as follows:

I. Facts

This case involves a series of claims brought by Plaintiffs after a purchase of Shareholder Defendants' company ("Barton") for breached representations and warranties, as well as two counterclaims brought by Shareholder Defendants.

On May 12, 2004, Plaintiffs and Defendants Charles Barton Rice, Sr., Charles Barton Rice, Jr. Trust, Kimberly Ann Rickey Trust, and Kathryn Proulx (collectively, the "Shareholder Defendants" or "Shareholders") entered into an Agreement and Plan of Merger (the "Merger Agreement") to purchase Barton. On August 2, 2004, the parties closed the Merger Agreement and executed an escrow agreement (the "Escrow Agreement").

The Merger Agreement contained a series of representations, warranties, and covenants. In addition, the Merger Agreement defined the parties' indemnification obligations.

Under the terms of the Escrow Agreement, the first $9 million of the purchase price was placed into an escrow account (the "Escrow Account") to serve as the source for the payment of claims relating to the Merger Agreement. The Merger Agreement defined the procedures for Plaintiffs to submit Escrow Account claims (a "Claim Notice") and for Shareholder Defendants to respond (a "Claim Notice Response").

On February 17, 2006, Plaintiffs delivered to Shareholder Defendants and the Escrow Agent a Claim Notice alleging several Merger Agreement breaches and demanding the release of certain Escrow funds. In March, Shareholder Defendants responded with a Claim Notice Response denying Plaintiffs' claims and instructing the Escrow Agent not to release any funds.

On April 10, 2006, Plaintiffs filed this action alleging various warranty, representation, and covenant breaches.

II. Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The

moving party need only eliminate one essential element of a party's claim to prevail on summary judgment. Real Estate Int'l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

III. Plaintiffs' Motion for Summary Judgment Relating to Claim Notice Response

Plaintiffs seek summary judgment from the Court on the grounds that Shareholder Defendants' Claim Notice Response did not comply with the notice terms of the Merger Agreement.

On February 17, 2006, Plaintiffs delivered to Shareholder Defendants and the Escrow Agent a Claim Notice. On February 24, 2006, Shareholder Defendants sent a response letter acknowledging their receipt of the Claim Notice and stating their intent to object to it.

Pursuant to Section 16 of the Merger Agreement, Shareholder Defendants had twenty (20) days (until March 9, 2006) to respond with a Claim Notice Response. Additionally, the Merger Agreement set forth the manner in which notices were to be sent specifying Plaintiffs' General Counsel's fax number and certain forms of certified mail. On March 7, 2006, Shareholder Defendants sent a Claim Notice Response denying Plaintiffs' request and instructing the Escrow Agent not to release any funds from the Escrow Account. Shareholder Defendants sent the Claim Notice Response to Plaintiffs by regular U.S. mail and fax, but transposed one digit in the fax number. Plaintiffs' General Counsel received the U.S. mail letter on March 10, 2006, which indicated that the response had also been sent by fax. The General Counsel then checked the office fax machines and recovered Shareholder Defendants' fax sent on the 7th, which was sitting on the machine next to the machine for the designated number.

On March 17, 2006, Plaintiffs sent a response letter to Shareholder Defendants stating that the Claim Notice Response was not received in accordance with the terms of the Merger Agreement. Citing Section 5(a) of the Escrow Agreement, Plaintiffs stated that the claims in the Claims Notice were deemed to be accepted. Thereafter, Shareholder Defendants responded and

re-sent their Claim Notice Response by fax, this time to the correct fax number, and by certified mail.

Plaintiffs argue that the plain language of the Merger Agreement requires compliance with the twenty (20) day response window for Claim Notice Responses and the form of notice delivery. Plaintiffs claim that Shareholder Defendants' failure to comply strictly with the notice provisions entitles them to summary judgment.

Pursuant to O.C.G.A. § 13-4-20, performance "substantially in compliance with the letter and spirit of the law" may satisfy a party's obligations. See, e.g., Rome Health Care, 264 Ga. App. 265 (2003) (holding that default and termination notices "substantially complied" with the notice provisions of the contract sufficient to affirm the trial court's refusal of a directed verdict on the issue); Wallick v. Period Homes Ltd., 252 Ga. App. 197, 203 (2001), ("Substantial compliance with notice provisions, however, may suffice so long as the information is communicated."). Here, Shareholder Defendants indicated their intent to object in their initial communication on February 24th and then sent their Claim Notice Response on March 7th by fax and regular mail. The fax was received on March 7th, although it was not seen by the General Counsel until the 10th. The fax number used in the first Claim Notice Response was one digit off of the number designated in the Merger Agreement, was sent to a fax machine sitting next to the designated machine, and was a number that Shareholder Defendants had used to correspond with the General Counsel on previous occasions. In accordance with the doctrine of substantial compliance, as codified in O.C.G.A. § 13-4-20, the March 7th Claim Notice Response substantially complied with the notice requirements under Section 16 of the Merger Agreement.

In addition, to award Plaintiffs all the monies in the Escrow Account because of Shareholder Defendants' failure to use the correct fax number and failure to send the Claim Notice Response by certified mail, as opposed to regular U.S. mail, would result in a windfall for Plaintiffs. Plaintiffs' General Counsel testified that he would not have acted differently had the Claim Notice Response been sent to the correct fax number on March 7th. A party is only entitled to damages necessary to make it whole or to reflect the benefit of the bargain; anything more is a windfall. See Ryland Group v. Daley, 245 Ga. App. 496, 503 (2000). Such an award for a technical error would be a windfall to Plaintiffs.

Plaintiffs' Motion for Summary Judgment in connection with the late-received Claim Notice Response is hereby **DENIED**.

IV. Shareholder Defendants' Motion for Partial Summary Judgment on the Damages Theory

Shareholder Defendants move for summary judgment on the issue of damages for several of the claims. Shareholder Defendants characterize these damages as seeking consequential damages, which, they argue, are excluded from Plaintiffs' indemnification rights under the Merger Agreement. Shareholder Defendants also challenge Plaintiffs' use of a multiplier in calculating their damages amounts, and thus, Shareholder Defendants argue that if "consequential" damages are excluded and the use of a multiplier is disallowed, Plaintiffs cannot exceed the $1.85 million damages threshold in order to recover any money from the Escrow Account.

Shareholder Defendants object to several breach claims on the grounds that the damages sought are excluded by Section 12 (Indemnification) of the Merger Agreement. Section 12.2 states that Barton and the Shareholder Defendants shall jointly and severally "indemnify, defend and hold harmless...[Plaintiffs].. from and against any and all Damages which arise out of, result

from, or relate to (a) any breach of any representation or warranty made by [Barton and Shareholder Defendants]... ." Damages are defined in the Merger Agreement as "the amount of any loss, liability, claim, damage (excluding incidental and consequential damages", expense (including reasonable costs of investigation and defense and reasonable attorneys' fees), whether or not involving a Third Party Claim." Finally, Section 12.8 states that the indemnification rights in Section 12 are the "exclusive remedies" of the parties. Shareholder Defendants argue that Plaintiffs' damages theory with respect to the CUMA and AAFES claims are consequential damages and therefore excluded from the definition of Damages.

Plaintiffs agree that consequential damages are excluded by the Merger Agreement, but they contend that they are not asking for consequential damages; they are asking for the difference between the value of certain matters or contracts they purchased from Barton and the value of what they actually received.

Consequential damages are those claimed to result as a secondary consequence of the defendant's non performance while general damages are those which generally flow from the breach. Dan B. Dobbs, Law of Remedies, § 12.4(3) § 12.2(3). Often claims for consequential damages are claims for "lost profits." But sometimes "lost profits" are used to show the value of the enterprise that a party was promised as opposed to the value that the party received. See Dobbs § 12.3(4). In such a case, they would not be consequential damages.

The Court of Appeals in Imagining Systems International Inc. v. Magnetic Resonance Plus, Inc., 237 Ga App. 640, 644 (1997) recognized that there are two types of "lost profits" – those that are consequential damages and those that are direct or general damages.

The Damages definition in the Merger Agreement excludes consequential damages, but make no mention of "lost profits."

Damages related to a breach of warranty are typically calculated by subtracting the value of the thing as conveyed from the value of the thing as warranted. Franklin v. Augusta Dodge, Inc., 287 Ga. App. 818, 823 (2007) (affirming a trial court's calculation of warranty damages as the difference at the time and place of acceptance between the value of the goods as accepted and the value of the goods as warranted). In this case, Plaintiffs purchased a company that they projected to have a certain degree of profitability based upon the representations and warranties of the Shareholder Defendants. If those representations and warranties were breached so that the value of the company at the time of the Closing was decreased, the natural measure of damages would be the difference between the value of Barton as warranted versus the value of Barton as delivered. Accordingly, Plaintiffs' damages claims are not excluded by Section 12 of the Merger Agreement.

The Court hereby **DENIES** Shareholder Defendants' Motion for Summary Judgment on the issue of damages.

V. Defendant Shareholder Motion for Summary Judgment on All Remaining Claims & Plaintiffs' Motion for Summary Judgment on Certain Plaintiffs' Claims

Plaintiffs' Complaint seeks recovery from the Shareholder Defendants for various alleged breaches of representations, warranties, and covenants in the Merger Agreement. Shareholder Defendants moved for summary judgment on all of these claims, and Plaintiffs filed their own motion for summary judgment on the liability issue of four of the alleged breaches. Each claim is addressed below.

A. CUMA

Plaintiffs contend that prior to August 2, 2004, (the "Closing Date" of the Merger Agreement), Barton was not in compliance with a California labor regulation requiring it to pay a weekly uniform maintenance allowance to certain types of employees ("CUMA"). Cal. Labor Code § 2802; Cal. Code Regs. Titl. 8, § 11070(9)(a); California Division of Labor Standards

Enforcement ("CDLSE") Minimum Wage Information Sheet, DLSE-2007-M(2007); CDLSE Opinion Letters 1991.02.13and 1994.02.16-1. Since discovering the issue a few weeks after the Closing, Plaintiffs began paying an additional $6.75 per week to the affected employees. Plaintiffs allege that Barton's failure to comply with the CUMA requirements violated representations and warranties contained in Section 3.11 (Compliance with Laws) and Section 3.8 (No Liabilities) of the Merger Agreement.

1. Section 3.11 Compliance with Laws

The parties disagree about the meaning of Section 3.11 of the Merger Agreement. Shareholder Defendants argue that to prove a breach under this section, Plaintiffs must demonstrate both a violation of a law and notice received by Shareholder Defendants. Plaintiffs argue that Section 3.11 contains three separate representations.

Contract construction is a matter of law, and trial courts should interpret them according to the general rules of contract construction set forth in O.C.G.A. § 13-2-2. Glisson v. IRHA of Loganville, Inc., __ S.E.2d ___, 2008 WL204624 *1 (Jan. 25, 2008). First, a court must determine whether the contract is clear or ambiguous, which is a question of law. If no ambiguity exists, the court should enforce the contract according to its terms, looking only to the contract for its meaning. O.C.G.A. § 13-2-2; Glisson, 2008 WL204624, at *1.

This Court finds Section 3.11 to be unambiguous. Section 3.11 represents and warrants that, except as set forth on the applicable disclosure schedule, (i) Barton complied in all respects with and was not in violation of any applicable law or order, (ii) Barton had not received notice of a violation or advice that it was not in compliance with an applicable law or order, and (iii) to

the knowledge of certain Shareholders,[1] no circumstances existed that were likely to result in such a violation.

Shareholder Defendants argue that Barton had not received notice of a violation and that notice, in addition to a violation of a law, is required. This Court finds Section 3.11 to contain three separate representations and warranties. Plaintiffs are relying on the representation and warranty in subsection (i).

Plaintiffs presented deposition testimony[2] that Barton failed to pay either a higher wage incorporating an additional amount for the allowance, or to segment out the allowance costs from the employees' existing salaries. Shareholder Defendants' however, point to Barton's past president Pat McNulty's deposition testimony that Barton complied with CUMA by notifying employees of its policy that their higher wages encompassed the allowance. See, Gattuso v. Harte-Hanks Shoppers, Inc., 169 P.3d 889, 900 (Cal. 2007). Thus, whether or not Barton violated CUMA is a question of fact for the jury.

2. Section 3.8, No Liabilities

Under Section 3.8, Barton and the Shareholder Defendants represented and warranted that Barton had no liabilities required to be disclosed by GAAP,[3] except those listed on in the disclosure schedules, financial statement liabilities, and certain post-interim balance sheet liabilities. Plaintiffs remedied the perceived violation of CUMA by paying the affected employees $6.75 a week more, and they allege that such additional liability should have been

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[1] The Merger Agreement defines "knowledge," for purpose of the knowledge qualifier, as the actual knowledge of certain of the Shareholders.

[2] Defendants challenge Plaintiffs' reliance on Ms. Ritts' deposition testimony that Barton failed to pay the CUMA on the basis that she has no personal or professional knowledge regarding the CUMA requirements. Ms. Ritts' testimony, however, relates to Barton's payroll records and the absence of an identified CUMA payment therein. Segmentation of a CUMA payment is not required, but in its absence, the employer (e.g., Barton) must be able to demonstrate that it communicated its method of determining the CUMA portion of compensation intended as expense reimbursements under the statute. Gattuso v. Harte-Hanks Shoppers, Inc., 169 P.3d 889, 900 (Cal. 2007).

[3] "Under GAAP, 'liabilities are claims of creditors against the enterprise, arising out of past activities, that are to be satisfied by the disbursement or utilization of corporate resources." Accounting for Contingencies, Statement of Financial Accounting Standards No. 5.

disclosed under Section 3.8. Since the question of whether Barton violated its CUMA obligations is reserved for a jury, summary judgment on this alleged breach of Section 3.8 is premature.

3. Damages

Shareholder Defendants argue that Barton only represented that it was in compliance with any applicable laws as of the date of Closing and that since Plaintiffs paid no sums to the affected employees for the allowances prior to Closing, Shareholder Defendants are not liable for the amounts claimed.

Section 12.1 of the Merger Agreement, however, provides that all representations and warranties survive the Closing for 18 months. Fact questions remain as to whether there was a violation of CUMA and if so, were there damages and how to measure those damages.

The Court hereby **DENIES** both Shareholder Defendants' and Plaintiffs' Motions for Summary Judgment.

B. AAFES

Plaintiffs allege that Barton failed to pay certain employee holiday and vacation pay as required under their contract with the Army & Air Force Exchange Service ("AAFES"). After discovering the fact, Plaintiffs began paying the affected employees for the holiday and vacation time from the date of the Closing forward, but did not pay the employees for any pre-Closing periods. Plaintiffs allege that Barton's failure to pay such holiday and vacation pay under the AAFES contract violated Section 3.16 (Material Contracts) and Section 3.8 (No Liabilities).

1. Section 3.16(b) Material Contracts

Under Section 3.16(b) Barton and the Shareholder Defendants represented and warranted, in part, that, except as set forth on the applicable disclosure schedule, (i) Barton was not in violation or breach of any Material Contract[4], and (ii) to the knowledge of certain Shareholders, no other party to a Material Contract was in violation or breach of a Material Contract.

First, Shareholder Defendants assert that the knowledge requirement applies to Barton's breach of a Material Contract in addition to a breach by a third party. This Court disagrees and construes the knowledge requirement—which is set off by commas placed before the phrase "other party," and which is not placed at the beginning of the representation/warranty—to be applicable only to a breach by a third party.

Second, Shareholder Defendants assert that Plaintiffs had the opportunity to perform due diligence on the AAFES contract prior to Closing. If due diligence or access to information prior to closing an agreement was a defense to representations and warranties, it would render such clauses virtually meaningless. Due diligence and access do not negate the effect of a representation or warranty.

2. Section 3.8, No Liabilities

Under Section 3.8, Barton and the Shareholder Defendants represented and warranted that Barton had no liabilities required to be disclosed by GAAP, except as those listed on in the disclosure schedules, financial statement liabilities, and certain post-interim balance sheet liabilities. Plaintiffs allege that the unpaid holiday and vacation pay under the AAFES contract was a liability that should have been disclosed, and failure to do so, breached Section 3.8.

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[4] Material Contract is defined in Section 3.16(a) of the Merger Agreement.

Shareholder Defendants argue that since Plaintiffs paid no sums to the affected employees for work prior to Closing, Shareholder Defendants are not liable for the amounts claimed. Whether damages should be awarded and how to calculate damages are questions reserved for a jury.

The Court hereby **GRANTS** Plaintiffs' Motion for Summary Judgment on the issue of liability for breach of Section 3.16(b) and Section 3.8 of the Merger Agreement, and hereby **DENIES** Shareholder Defendants' Motion for Summary Judgment.

C. Employment Agreements

Barton and the Shareholder Defendants represented and warranted under Section 3.16(b) that each Material Contract was in full force and effect and constituted a legal, valid and binding agreement of Barton and, to the knowledge of certain Shareholders, of the other party to each Material Contract. Based on the Georgia case law at the date of the Closing, the restrictive covenants contained in the employment agreements with former Barton employees, Todd Carroll and John Garrigan, were unenforceable by Plaintiffs. SecurAmerica LLC, Mr. Garrigan's new employer, obtained a final order against Plaintiffs declaring that the restrictive covenants in Mr. Garrigan's employment agreement were unenforceable. Admiral Security, Mr. Carroll's new employer, brought a similar suit challenging substantially similar provisions of Mr. Carroll's employment agreement. This suit was settled after the conclusion of the SecurAmerica suit. Plaintiffs are not seeking monies paid to third parties, but rather they are seeking Plaintiffs' attorneys' fees incurred in the Carroll case.

Whether Plaintiffs were damaged by the unenforceability of these two contracts and whether they suffered any compensatory damages are questions that remain.

D. Cousins

Plaintiffs allege that Barton modified a security guard services contract with Cousins Properties, Inc., between the signing date of the Merger Agreement and the Closing Date. The renegotiated contract decreased the rates of payment to Barton, then Plaintiffs, for the remainder of its existing contract period which ended December 2004, and extended the term of the contract to 2007. Plaintiffs allege that the renegotiation of the Cousins' contract terms breached certain representations and warranties contained in Section 3.16(a) and covenants contained in Section 5.2.

1. Section 3.16(a), Materials Contracts

Under Section 3.16(a), Barton and Shareholder Defendants represented and warranted that they disclosed all Material Contracts, including those required under subsection 3.16(a)(v) where the customer paid $750,000 or more during the fiscal year ending October 25, 2003, and that Barton did not disclose the revised contract. To begin, Plaintiffs argue that the language in subsection 3.16(a)(v) requires the disclosure of later contracts with customers who paid $750,000 or more in the 2003 fiscal year. Plaintiffs' arguments, however, are without merit based upon the plain language of the provision and the disclosure obligation that it created for Barton and the Shareholder Defendants.

2. Section 5.2, Conduct of Business

Under Section 5.2, Barton and the Shareholder Defendants represented and warranted that Barton would continue to conduct its business in the Ordinary Course of Business[5] until the Closing Date including to refrain from modifying or amending a material term of any Contract

[5] Ordinary Course of Business is defined in the Merger Agreement to mean, "with respect to a Person, an action or failure to act generally consistent with the past custom and practices of such Person and is taken or not taken in the ordinary course of the normal day-to-day operations of such Person."

that "would result in a material decrease in the rights or benefits to [Barton] thereunder." Whether or not this contract was renegotiated in the "ordinary course of business" and whether the renegotiated rates resulted in a "material decrease" under Section 5.2(o), are questions of fact for a jury to determine.

Shareholder Defendants' Motion for Summary Judgment on the alleged breach of Section 3.16(a) for non-disclosure of the renegotiated Cousins contract is hereby **GRANTED**, but Shareholder Defendants' Motion for Summary Judgment on the alleged breach of the Section 5.2 is hereby **DENIED**.

E. Pillowtex

In 2003, Pillowtex Corporation paid Barton over $500,000 in connection with a debt. In July of that same year, Pillowtex filed for Bankruptcy under Chapter 11. In September 2005, the Chapter 11 trustee filed an adversary proceeding against Plaintiffs to recover the payments made to Barton as alleged pre-petition preference payments. Plaintiffs settled the proceeding for $62,000. Plaintiffs allege that Pillowtex preference payment breached Section 3.8 (No Liabilities) and Section 3.11 (Compliance with Laws).

1. Section 3.8, No Liabilities

The representations and warranties covered under Section 3.8 are addressed above in section V.B.2 of this Order. The liability did not exist prior to the Closing Date. The mere possibility of a yet-to-be determined claim is insufficient to qualify as a breach of Section 3.8.

2. Section 3.11, Compliance with Laws

Section 3.11 is discussed above in section V.A.1 of this Order. Shareholder Defendants argue that because they did not have notice of the alleged violation, they are not liable for the refunded amounts. In its analysis of the CUMA claims, this Court already determined that Section 3.11 contains three separate representations and warranties. Here Plaintiffs are relying on subsection (i) which states that Barton complied in all respects with and was not in violation

of any applicable law or order. Shareholder Defendants argue that because the preference payment proceeding was settled, Barton was never found to have violated any law in connection with receipt of payments from Pillowtex. Plaintiffs submitted an affidavit of Plaintiffs' General Counsel, stating that based upon his analysis of the law and facts of the dispute, the amount of the settlement violated 11 U.S.C. § 547. His affidavit is sufficient to withstand a motion for summary judgment.

Shareholder Defendants' Motion for Summary Judgment on the alleged breach of Section 3.8 is hereby **GRANTED,** but under Section 3.11, questions of fact remain. Shareholder Defendants' Motion for Summary Judgment under Section 3.11 is hereby **DENIED.**

F. Twin Hill

Plaintiffs allege that Shareholder Defendants failed to disclose a September 10, 2003 letter agreement with Twin Hill Acquisitions, Inc. in violation of Section 3.16(a), which is discussed in section V.D.1. of this Order. The Twin Hill letter agreement, however, was superseded by a comprehensive agreement on October 24, 2003, which was disclosed to Plaintiffs in the appropriate disclosure schedule to the Merger Agreement. Because the second agreement replaced the earlier one, Shareholder Defendants' had no obligation to disclose the Twin Hill earlier letter agreement.

Shareholder Defendants' Motion for Summary Judgment on the alleged breach of Section 3.16(a) regarding the Twin Hill letter agreement is hereby **GRANTED**.

G. Tabor/Equity Office Management

Both before and after the Closing Date, Equity Office Management (the company that operated the Tabor property), disputed various invoices from Barton and then later from Plaintiffs. To resolve the disputes, Plaintiffs refunded Tabor the disputed amounts, approximately $22,000 of which was attributable to pre-Closing Barton errors. Plaintiffs allege

that the Tabor dispute, which was not disclosed to Plaintiffs, violated Section 3.8(No Liabilities) and Section 3.16(b) (Material Contracts). Shareholder Defendants argue that because they had no knowledge of such overpayments, Plaintiffs' claim fails. Consistent with this Court's interpretation of the knowledge requirement in Section 3.8 and Section 3.16(6), Shareholder Defendants' Motion for Summary Judgment is hereby **DENIED.**

H. Licensing Violations

Plaintiffs paid fines for various licensing violations in New York[6] that were a result of Barton's pre-Closing actions. Plaintiffs allege that the various licensing violations breached Section 3.11(Compliance with Laws), which is addressed above in section V.A.1. of this Order. In accordance with the foregoing, Plaintiffs' Motion for Summary Judgment on the licensing violation claims is hereby **GRANTED**, and Shareholder Defendants' Motion for Summary Judgment is hereby **DENIED**.

VI. Plaintiffs' Motion for Summary Judgment on Shareholder Defendants' Counterclaims

Plaintiffs urge this Court to award them summary judgment on Shareholder Defendants' counterclaims for declaratory judgment regarding entitlement to the Escrow Account funds and attorneys' fees. Plaintiffs argue that their Complaint properly puts the question of entitlement to the Escrow Account funds in question and that Shareholder Defendants' declaratory judgment counterclaim is merely a recasting of Shareholder Defendants' defenses raised in their Answer. Thus, Plaintiffs argue, there is no actual, justiciable controversy that justifies a claim for a declaratory judgment under O.C.G.A. § 9-4-2(a).

In addition to a declaration that Shareholder Defendants' position is correct, Shareholder Defendants' counterclaim for declaratory judgment seeks an order directing the Escrow Agent to

[6] The Complaint and Plaintiffs' briefs also mention North Carolina licensing fines. However, they discussed only the $6500 fine from New York. Claims relating to North Carolina licensing fines have not been addressed.

release to them the funds in the Escrow Account on the grounds that Plaintiffs failed to comply with the indemnification procedures outlined in Section 12. Because entitlement to the funds in the Escrow Account is yet to be determined, Plaintiffs' motion must be denied. Therefore, Plaintiffs' Motion for Summary Judgment on Shareholder Defendants' Counterclaim for declaratory judgment is hereby **DENIED**.

Shareholder Defendants' other counterclaim seeks attorneys' fees and expenses for their declaratory judgment claim in addition to attorneys' fees for Plaintiffs' breach of the Merger Agreement and Plaintiffs actions in bad faith under O.C.G.A. § 13-6-11.

Attorneys' fees and expenses may not be awarded in connection with a declaratory judgment action. General Hospitals of Humana, Inc. v. Jenkins, 188 Ga. App. 825 (1988) (reversing an award of attorneys' fees and expenses on a declaratory judgment action). Thus, Shareholder Defendants' claim for attorneys' fees and expenses may not proceed on the declaratory judgment claim.

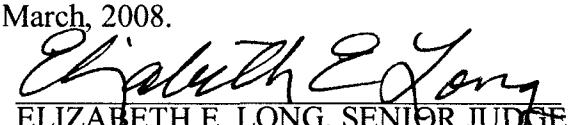
Shareholder Defendants contend that Plaintiffs breached the Merger Agreement by their failure to give timely notice of some of the claims and to provide sufficient information regarding each claim as required by the Merger Agreement. These contentions require findings of fact. Consequently, Shareholder Defendants' claims for attorneys' fees and expenses for breach of the Merger Agreement or under O.C.G.A. § 13-6-11 may proceed to trial.

Plaintiffs' Motion for Summary Judgment on Shareholder Defendants' Counterclaim for attorneys' fees and expenses is hereby **GRANTED in part** and **DENIED in part**.

VII. Conclusion

Because there were many separate motions for summary judgment and many separate issues, the Court will not attempt to summarize them. Each issue is addressed earlier in this Order.

SO ORDERED this 10th day of March, 2008.



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