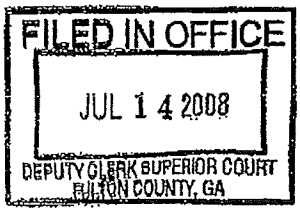
COMPLAINT – BREACH OF CONTRACT, BREACH OF GUARANTY, AND FRAUD – BUSINESS DISPUTE

"Redacted"

DUPLICATE

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



[redacted],

Plaintiffs,

v.

[redacted],

Defendants.

CIVIL ACTION
FILE NO. [redacted]

JURY TRIAL DEMANDED

VERIFIED COMPLAINT

Plaintiff [redacted] ("[redacted]"), on his own behalf and as attorney-in-fact for selling shareholders in the Stock Purchase Agreement (the "Agreement"), shows the Court the following as his complaint against defendants [redacted] ("[redacted]") and [redacted]

NATURE OF THE ACTION

1.

[redacted] brings this lawsuit to require [redacted], a large overseas conglomerate headquartered in Switzerland, and its subsidiary [redacted], to properly calculate and pay the full purchase price for [redacted] shares in his family-owned business [redacted] ("[redacted]").

2.

At the time [redacted] acquired the [redacted] shares in [redacted], the company was in the business of developing, manufacturing and licensing heat shield technology for automotive and other uses. On February 16, 2006, [redacted] entered into an Agreement with [redacted] pursuant to which [redacted] and his associated shareholders, primarily extended family members, sold their [redacted] shares to [redacted]. In consideration for selling these shares, [redacted] agreed to pay a purchase price that was based on the upcoming 2006 fiscal year EBITDA (the "Purchase Price Adjustment"). [redacted] expected and believed that a majority of the purchase price for the shares would arise from the Purchase Price Adjustment.

3.

Rather than pay the Purchase Price Adjustment, [redacted] engaged in a fraudulent scheme to avoid paying the full amount due for the [redacted] shares. [redacted] fraudulent scheme included, *inter alia*: 1) providing false and misleading financial data in an attempt to obscure the basis for the 2006 EBITDA calculation, including the failure to account for missing invoices; 2) failing to include all sales revenues in the EBITDA calculation, including certain scrap and prototype sales and licensing revenues; 3) giving

mysterious allowances to customers, debited against sales revenue, as a means to depress EBITDA; 4) reducing prices to customers in violation of the covenants set forth in the Agreement; 5) improperly calculating expenses under the covenants set forth in the Agreement; 6) falsely plugging a "0" number for total interest, and using a method of calculating depreciation and amortization that is not in compliance with the covenants set forth in the Agreement; and 7) falsely stating that [redacted] experienced no currency fluctuations, asset disposal or forgiveness of debt in 2006; and 8) engaging in improper licensing practices, including improper termination of a license through a related-party transaction.

4.

Based on this fraudulent EBITDA report, [redacted] incredibly claimed that no further payments were due to [redacted] or his family, and [redacted] has thereby failed to pay millions of dollars due on the purchase price for the [redacted] shares. [redacted] seeks damages for breach of contract and fraud for himself and his family members, as well as the recovery of prejudgment interest, attorney's fees and costs.

PARTIES, JURISDICTION AND VENUE

5.

Plaintiff [redacted] is the former President, Chief Executive Officer and largest shareholder of [redacted]. [redacted] serves as attorney-in-fact for certain family members and others with respect to the sale of the shares of [redacted] to [redacted].

6.

Defendant [redacted], formerly known as [redacted], is a [redacted] Corporation qualified to do business in Georgia, which has its principal place of business in [redacted], Georgia. On information and belief [redacted] is merely the successor company to [redacted].

7.

Upon information and belief, defendant [redacted] is the Swiss parent company of [redacted] guaranteed the payment and performance of the obligations contained in the Agreement.

8.

Venue and jurisdiction is proper in this Court pursuant to Section 7.5 of the Agreement, which provides in part:

> Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought

against any of the parties in the courts of the State of Georgia, County of Fulton . . . , and each of the parties consents to the jurisdiction of such courts (and the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.

9.

This Court has subject matter jurisdiction over this matter pursuant to Ga. Const. Art. VI, § 4, ¶ 1 of the Georgia Constitution and as otherwise provided by law.

FACTS

[redacted] *Business*

10.

[redacted] was the President and CEO of [redacted], a company founded in 1937, which was in the business of developing, manufacturing and licensing heat shield technology. [redacted] and his extended family owned a 46% interest in [redacted].

11.

[redacted]s primary heat shield technology was used to insulate the high temperature areas in automobile exhaust systems. [redacted]s heat shield technology was also sold for other automotive and appliance applications.

12.

[redacted] also owned a substantial portfolio of intellectual property, including 26 United States patents and approximately 126 patents in 28

foreign countries. [redacted] also licensed its technologies to others and received royalties from those licenses.

[redacted] Acquires the [redacted] Shares

13.

In November 2005, [redacted] began negotiations to purchase all of the [redacted] capital stock, options and warrants issued to [redacted] and members of his extended family ("the [redacted] Shares").

14.

On January 18, 2006, [redacted] entered into a Letter of Intent for the acquisition of the [redacted] Shares. Pursuant to the terms of the Letter of Intent, [redacted] agreed to negotiate exclusively with [redacted] and to provide [redacted] complete access to [redacted]s books and records so that [redacted] could conduct due diligence regarding the proposed acquisition.

15.

In connection with the execution of the Letter of Intent, [redacted] also made an advance payment of $1,000,000 and took title to some of the [redacted] Shares, subject to the Purchase Price Adjustment that would be due in connection with the final Agreement to be negotiated between the parties.

The Agreement

16.

On February 16, 2006, [redacted] and [redacted] entered into the Agreement at issue in this litigation. Pursuant to the Agreement, [redacted] acquired all of the remaining [redacted] shares and made an additional payment to [redacted].

17.

Paragraph 5.2 of the Agreement provided for a Purchase Price Adjustment based on the Company's EBITDA for the 2006 fiscal year, calculated pursuant to the following formula:

> EBITDA Payment = [(FY 2006 EBITDA x 5) x (total number of Company's shares of capital stock sold by Sellers to Buyers pursuant hereto or pursuant to the Letter of Intent, calculated on an as converted common stock basis) (total number of shares of the Company's capital stock outstanding as of the Closing, calculated on an as-converted to common stock basis)] – (U.S. $1,815,894 + JAWSH $243,750 = $2,059,644 purchase price paid by Buyer for shares of the capital stock of the Company pursuant to Section 5.9 hereof)

18.

Because the purchase price was to be based on EBITDA for 2006, [redacted] required that [redacted] agree that "the Company continue to operate in a manner consistent with past practices." Section 5.2 of the Agreement also contained a number of specific restrictions on operation of the Company during 2006 and generally prohibited [redacted] from taking "any action"

without a valid business purpose "which could reasonably be expected to reduce the EBITDA Payment."

[redacted] Fails To Make Any Payment Under Section 5.2

19.

Shortly after signing the Agreement, [redacted] engaged in alarming conduct that signaled to [redacted] that [redacted] did not intend to make the Purchase Price Adjustment.

20.

At the time the parties negotiated the Agreement, [redacted] was concerned that [redacted] s former CFO, [redacted], was working with [redacted] in an effort to orchestrate a hostile takeover of [redacted] in the event a final Agreement with [redacted] could not be reached. As part of the negotiations, [redacted] demanded assurances from [redacted] that [redacted] would have no role at the company after the transaction, because [redacted] was concerned that [redacted] would work to deny [redacted] the benefits of the Purchase Price Adjustment required by Section 5.2.

21.

In order to allay [redacted] fears, [redacted] through its President, [redacted], promised in a February 16, 2006 letter agreement, that "[redacted] will not be employed in any capacity or engaged as an

independent contractor or other agent by [redacted] Corporation or [redacted] America" and that he "shall not be given access to any of [redacted] Corporation's facilities."

22.

Despite [redacted] explicit agreement that [redacted] would not have any role at [redacted] after the Agreement, [redacted] incredibly named [redacted] as the CFO of [redacted] (now known as [redacted]). [redacted] served as [redacted] CFO until November 2006. Upon information and belief, [redacted], during his employment, secretly sought to prevent [redacted] from receiving the Purchase Price Adjustment required by Section 5.2. Indeed, [redacted] sent a March 30, 2006 e-mail to his superior at [redacted] concerning [redacted] financial position, stating **"Too Much EBITDA! ha ha."** On April 5, 2006, [redacted] also sent an e-mail to his superior about how to account for certain matters, stating that [redacted] ***should "first make sure this does not benefit the final EBITDA calculation."***

23.

In addition, Section 5.2(d)(v) of the Agreement provided that [redacted] will not "fail to provide [support] to the sales engineering organization of the Key Employees consistent with past practices." [redacted] son, [redacted], was the Vice President of Sales and a designated "Key Employee"

under the Agreement who was working on a large sales deal when [redacted] unceremoniously terminated his employment without cause. Incredibly, [redacted] did not replace [redacted]. After his departure, [redacted] duties were performed by a [redacted] receptionist who had no sales experience whatsoever.

24.

On May 23, 2006, [redacted] through counsel, sent a letter to counsel for [redacted], stating that "in light of some recent events and other information increasingly becoming known, it appears that the Buyer may be in breach of, or intends to breach, the covenants set forth in Section 5.2(d) of the Purchase Agreement with respect to the operation of the Company through December 31, 2006. Please be advised that the Sellers intend to vigorously pursue claims for breach under the Purchase Agreement."

25.

Paragraph 5.2 required [redacted] to "[p]romptly upon the determination of the Company's EBITDA for the 2006 fiscal year and in any event no later than March 31, 2007. . . deliver to [redacted] a certificate setting forth its calculations (in reasonable detail) of the Company's EBITDA for the 2006 fiscal year."

26.

On April 2, 2007, [redacted] received a letter and supporting materials from [redacted] of [redacted], dated March 30, 2007, purporting to contain a computation of the Purchase Price Adjustment required by Section 5.2 of the Agreement ("the [redacted] Calculation"). Based on the [redacted] Calculation, [redacted] claimed *that no additional payment was due to* [redacted] *and his associated shareholders for their shares in* [redacted].

27.

Pursuant to Section 5.2(c) of the Agreement, [redacted] gave notice on April 9, 2007 that he disagrees and objects to the [redacted] Calculation.

Discovery of the Fraudulent Calculation

28.

The materials supporting the [redacted] Calculation were presented in a way that purposely obscured the manner in which [redacted] calculated EBITDA and made it exceedingly difficult for [redacted] to determine whether [redacted] had run the company in accordance with the requirements of Section 5.2(d).

29.

The [redacted] Calculation included supporting materials that had included new sub-account numbers for existing accounts, documents that were written in German and the calculation lacked supporting detail. In

addition, all revenue accounts were also changed to another new "catch-all" sub-account in November 2006, making the supporting materials even more confusing.

30.

The Agreement required that "[i]n conjunction with Buyer's delivery to [redacted] of a certificate setting forth Buyer's calculation of the Company's EBITDA for the 2006 fiscal year, Buyer shall also deliver [redacted] a balance sheet and income statement as of and for the month of the Closing." [redacted] failed to provide these supporting documents.

31.

After receiving the [redacted] Calculation, [redacted] engaged in a painstaking analysis of the materials he was given. Based on his knowledge of the operation of the company and its accounting system, [redacted] was able to determine that [redacted] had failed to properly calculate EBITDA in an effort to depress the amount owed to [redacted].

32.

[redacted] accounting system generates invoices on a sequential basis each time an order is shipped. The supporting materials in [redacted] calculation showed hundreds of invoice numbers that were missing and unaccounted for in 2006. For an extended period in November 2006, no

shipments were shown to have taken place, something that is impossible given the daily activity of the Company's business.

33.

[redacted] further discovered that the [redacted] Calculation contained no revenues for any prototypes or samples, something that cannot be true given the nature of the Company's business.

34.

[redacted] further discovered that [redacted] had given improper price reductions to certain customers in violation of the Agreement. Section 5.2(d)(iii) generally prohibits [redacted] from reducing the prices charged to customers. [redacted] notified [redacted] that [redacted] had decided to provide pricing reductions to certain large customers, but assured [redacted] in a March 29, 2006 e-mail that these reductions would not be used in calculating the Purchase Price Adjustment under the Agreement. The March 29, 2006 e-mail stated, "[t]his is part of the SPA; no price reductions affect EBITDA calculation." Despite [redacted] representation that these reductions would not be used to decrease revenues, [redacted] discovered that [redacted] failed to include the revenues lost due to these discounts in its calculation. [redacted] also improperly gave one customer several substantial credits related to these price reductions.

35.

[redacted] also discovered that the [redacted] Calculation contained improper "prompt payment" discounts when the payment records showed that the customer had not paid promptly as required to receive the discounts. On information and belief, these "prompt payment" discounts were not actually given at all and were merely used as a means to depress EBITDA. [redacted] also determined that [redacted] gave discounts to one customer in an amount that suggested sales revenues from that customer were much greater than what was actually reported in [redacted] calculation.

36.

During 2006, [redacted] also entered into a cross licensing agreement with an [redacted] licensee which eliminated the need for the licensee to renew the license. This related party transaction resulted in a substantial loss of royalty revenue for 2006.

37.

Given the above, the proper amount of the Purchase Price Adjustment cannot be determined from the supporting materials provided by [redacted]. Those materials fail to reflect the actual EBITDA for 2006 and fail to reflect the proper operation of the business under covenants set forth in the Agreement.

COUNT I

BREACH OF CONTRACT

38.

[redacted] incorporates by reference the allegations contained in paragraphs 1 through 37 as if set forth verbatim herein.

39.

The Agreement is a valid and enforceable contract.

40.

[redacted] has fully performed or tendered all performance required under the Agreement.

41.

[redacted] has breached its obligations to [redacted] as set forth in the Agreement by failing to accurately calculate and pay the Purchase Price Adjustment based on the Company's true 2006 EBITDA.

42.

[redacted] has also breached the implied covenant of good faith and fair dealing by acting to deprive [redacted] of the benefits of the Purchase Price Adjustment contained in the Agreement.

43.

[redacted] is entitled to recover damages resulting from [redacted] failure to properly calculate and pay the Purchase Price Adjustment based on the Company's 2006 EBITDA.

COUNT II

BREACH OF GUARANTY

44.

[redacted] incorporates by reference the allegations contained in paragraphs 1 through 43 as if set forth verbatim herein.

45.

[redacted] guaranteed the "due and punctual payment and performance of all obligations of Buyer" under the Agreement.

46.

Pursuant to the terms of the Guaranty, [redacted] is liable for [redacted] failure to properly calculate and pay the Purchase Price Adjustment based on the Company's 2006 EBITDA.

COUNT III

FRAUD

47.

[redacted] incorporates by reference the allegations contained in paragraphs 1 through 46 as if set forth verbatim herein.

48.

[redacted] had a right to expect full and fair communications from [redacted] regarding the parties' relationship under the Agreement and the parties' adherence to the obligations set forth in the Agreement.

49.

[redacted] intentionally failed to disclose and therefore actively concealed from [redacted] the true performance of the Company in an effort to avoid making the Purchase Price Adjustment payment.

50.

[redacted] conduct was done intentionally, with malice, and for the purpose of depriving [redacted] of the Purchase Price Adjustment.

51.

[redacted] relied on [redacted] obligation to act truthfully and to accurately disclose the performance of the Company in calculating the Purchase Price Adjustment in selling his shares to [redacted]

52.

[redacted] conduct was done in furtherance of their own private interests, and was willful, malicious, wanton, and oppressive, and done with conscious indifference to the consequences and with specific intent to harm. Accordingly, [redacted] is entitled to an award of punitive damages in an amount to be proven at trial and sufficient to punish, penalize and deter [redacted] from engaging in such conduct in the future.

COUNT VI

ATTORNEY'S FEES

53.

[redacted] incorporates by reference the allegations contained in paragraphs 1 through 52 as if set forth verbatim herein.

54.

Defendants have acted in bad faith and caused [redacted] unnecessary trouble and expense. Therefore, defendants are liable to [redacted] for his

expenses of litigation, including attorney's fees pursuant to O.C.G.A. § 13-6-11 and as otherwise provided by law.

WHEREFORE, [redacted] prays:

(1) That the Court enters judgment for [redacted] on all claims for relief asserted in the Complaint in an amount to be proven at trial, including punitive damages;

(2) That the Court enters judgment in favor of [redacted] for pre-judgment and post-judgment interest at the legal rate;

(3) That the Court awards [redacted] reasonable attorney's fees and expenses of litigation;

(4) That all costs be assessed against defendants; and

(5) That the Court awards such other relief as shall appear proper and just.

This 14th day of July, 2008.

Respectfully submitted,

[redacted]

[redacted]

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

[redacted]

Plaintiffs,

v.

[redacted]

Defendants.

CIVIL ACTION
FILE NO.

JURY TRIAL DEMANDED

VERIFICATION

Personally appeared before the undersigned officer duly authorized to administer oaths, [redacted], who being duly sworn, deposes and says that he has personal knowledge of the facts alleged in the Verified Complaint, except those that state legal conclusions or are stated to be on information and belief.

This 11th day of July, 2008.

[redacted]

Sworn to and subscribed before me
this 11th day of July, 2008.

Notary Public

My Commission Expires:

CATHERINE M. McCORD
NOTARY PUBLIC
COBB COUNTY, GA.
MY COMM. EXPIRES
JULY
4
2012