SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 48

----------X

FIRST AMERICAN FINANCIAL CORPORATION and INTERTHINX, INC.

Plaintiffs,

- v -

VERISK ANALYTICS, INC. and INSURANCE SERVICES OFFICE, INC.,

Defendants.

----------X

INDEX NO.	650850/15
MOTION DATE	
MOTION SEQ. NO.	004, 005

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Motions 004, 005) 1, 19, 20, 21, 22, 23, 24, 37, 53, 54, 55, 65, 67, 68, 144, 147, 165, 167, 170 - 357
were read on this motion JUDGMENT - SUMMARY.

In motion sequence number 004, plaintiffs First American Financial Corporation (FAFC) and Interthinx, Inc. (Interthinx) seek summary judgment on their amended complaint. Defendants Verisk Analytics, Inc. (Verisk) and Insurance Services Office, Inc. (ISO) cross-move for summary judgment dismissing the amended complaint.

Background

Defendant Verisk is a publicly-traded data analytics company and parent company of defendant ISO (NYSCEF Doc. No. [NYSCEF] 247, Wong[1] aff, ¶¶ 1, 3). Verisk owned 100 percent of the shares of ISO (NYSCEF 169, Purchase Agreement [PA] at 1). ISO owned 100% of the shares of plaintiff Interthinx, a provider of technology, data, and services to

[1] Thomas Wong is Verisk's Senior Counsel (NYSCEF 247, Wong aff, ¶ 1).

mortgage lenders (*id.*; NYSCEF 254, PowerPoint at 2). In 2013, Verisk started to market the sale of Interthinx as well as other subsidiaries.

On February 5, 2014, FAFC, Interthinx, Verisk, and ISO entered into a Purchase Agreement (PA), whereby FAFC agreed to purchase 100% of the shares of Interthinx from defendants (*see* NYSCEF 169, PA). Interthinx Services, Inc. (ISI), Interthinx's wholly-owned subsidiary, and the ACI Division of ISO (ACI) were also included in this purchase[2] (*id.*).

PA's Sale and Purchase Provisions

Section 2.2 of the PA describes the "Purchase Price" as follows:

> (a) *Purchase Price*. The aggregate purchase price (the '**Purchase Price**'), payable by [FAFC] to [ISO] for the Shares shall be that amount equal to:
>
> (i) One Hundred Fifty-Five Million Dollars ($155,000,000) (the '**Gross Purchase Price**'), *plus*
>
> (ii) the amount, if any, by which Net Working Capital is greater than Target Surplus NWC Amount, *minus*
>
> (iii) the amount, if any, by which Net Working Capital is less than Target Deficiency NWC Amount"

(NYSCEF 169, PA at 14). Article I, Definitions, defines the "Target Surplus NWC Amount" as "$8,300,000" and the "Target Deficiency NWC Amount" as "$7,3000,000" (*id.* at 12).

Section 2.5 (c) of the PA states,

> "[w]ithin sixty (60) days after the Closing Date, [FAFC] will prepare, or cause to be prepared (on the same basis as the preparation of the Historical Financial Statements), and deliver to [ISO] an unaudited statement (the '**Statement**'), which shall set forth [FAFC's] calculation of the Adjusted Closing Amount and Net Working Capital. At [FAFC's] request, [ISO] (i) shall reasonably cooperate and assist, and shall cause representatives to assist, [FAFC] and its representatives in the preparation of the Statement

[2] Pursuant to Section 1.1 of the PA, ACI was to be "assigned, transferred and conveyed from ISO to Interthinx" prior to the closing date (NYSCEF 169, PA at 1).

> and (ii) shall provide [FAFC] and its representatives with any information reasonably requested by them"

(*id.* at 18). "Upon receipt from [FAFC], [ISO] shall have forty-five (45) days to review the Statement (the '**Review Period**')" (*id.*, section 2.5[d]). "If [ISO] disagrees with '[FAFC's] computation of Adjusted Closing Amount or Net Working Capital, [ISO] shall, on or prior to the last day of the Review Period, deliver a written notice to [FAFC] (the '**Notice of Objection**')" (*id.*). According to section 2.5(e),

> "[u]nless [ISO] delivers the Notice of Objection to [FAFC] within the Review Period, [ISO] shall be deemed to have accepted [FAFC's] calculation of Adjusted Closing Amount and the Net Working Capital and the Adjusted Closing Amount and the Net Working Capital set forth in the Statement shall be final, conclusive and binding"

(*id.*).

PA's Representations and Warranties Provisions Concerning Interthinx

In section 4.5, defendants represent and warranty to FAFC

> (a) [c]omplete and accurate copies of the (i) unaudited financial statements consisting of the balance sheet of [Interthinx] and ISI as of December 31, 2012, December 31, 2011 and December 31, 2010 and the related statements of income for the years then ended (the '**Financial Statements**'), and (ii) unaudited pro-forma financial statements consisting of the balance sheet of [Interthinx], ISI and the ACI Division as at September 30, 2013 and the related statements of income for the 9-month period then ended (the '**Pro-Forma Interim Financial Statements**' and together with the Financial Statements, the '**Historical Financial Statements**') have been made available to [FAFC] ... .
>
> (b) [ISO] has delivered to [FAFC] a copy of the draft unaudited financial statements consisting of the balance sheet of [Interthinx] and ISI as of December 31, 2013 and the related statements of income for the year then ended (the '**Draft 2013 Financial Statements**'). To the Knowledge of [Interthinx], the Draft 2013 Financial Statements have been prepared in good faith in accordance with GAAP as in effect for calendar year 2013 on a

> consistent basis with prior years from the Book and Records of [Interthinx] ..."

(*id.* at 23-24).

Section 4.7 states, in part, that "(b) [e]ach of [Interthinx] and ISI is conducting its business in compliance in all material respects with all applicable Laws, Permits and Orders" (*id.* at 26).

Section 4.11 provides, in part,

> "(b) [Interthinx] is in possession of and [FAFC] will receive such working copies of all Software, including object and (for Software owned by or exclusively licensed to [Interthinx] of ISI) source code, and all related materials, licenses, and other documentation, as are necessary for the current conduct of the business of [Interthinx and ISI]"

(*id.* at 30). Section 4.14 states,

> "[e]xcept as set forth on Section 4.14 of [Interthinx] Disclosure Schedule, there is no action or proceeding, claim (including, without limitation, any mediation, litigation, governmental inquiry, prosecution, administrative proceeding or other investigation (each, an 'Action'), (i) pending or, to the Knowledge of [Interthinx], threatened against or affecting [Interthinx] or ISI or their respective businesses or properties or assets or (ii) that challenges or seeks to prevent, enjoin or otherwise delay the Contemplated Transactions. There is no unsatisfied judgment, penalty or award against [Interthinx] or ISI affecting its assets or properties"

(*id.* at 35). Section 4.16 states, in part,

> "(c) [Interthinx and ISI are, and since December 31, 2005, have been, in compliance in all material respects with the applicable Laws relating to the employment of employees, termination of employment, discrimination in employment, terms and conditions of employment, wages, hours of work and overtime payments, pension plans and pension insurance, occupational safety and health and employment practices, and have not engaged in any unfair labor practices"

(*id.* at 37). Section 4.25 states,

> "[e]xcept as set forth on the schedules to the Transitional Services Agreement and of Section 4.25 of the [Interthinx] Disclosure Schedule, the assets (tangible and intangible) currently owned, leased or licensed by [Interthinx] and ISI are sufficient for the continued conduct of [Interthinx] Business after the Closing in substantially the same manner as conducted prior to the Closing and constitute all of the assets (tangible and intangible) necessary to conduct the business of [Interthinx] and ISI as currently conducted"

(*id.* at 40).

PA's Covenants Provisions

Section 6.11 states, in part,

> "(b) [t]he Restricted Parties agree that, commencing at Closing and ending on the two-year (2) anniversary of the Closing Date, they shall not (and shall cause their respective Affiliates not to), (i) solicit the employment or engagement of services of any Person who is a Key Employee of [Interthinx] or ISI at any time between the date hereof and the Closing, hire any such Person, or persuade, induce or attempt to persuade or induce any such Person to leave his, her or its employment or to refrain from providing services to [Interthinx], ISI, [FAFC] or its Affiliates ... ."
>
> (c) The Restricted Parties acknowledge that any violation of this Section 6.11 will result in irreparable injury to [FAFC] and agree that [FAFC] shall be entitled to preliminary and permanent injunctive relief, without the necessity of proving actual damages, as well as an equitable accounting of all earnings, profits, and other benefits arising from any violation of this Section 6.11, which rights shall be cumulative and in addition to any other rights or remedies to which [FAFC] may be entitled"

(*id.* at 52-53). The PA defines the term "Key Employee" to mean:

> "(i) any employee of [Interthinx] or ISI who is a director, vice president or more senior officer of [Interthinx] or ISI and (ii) to the extent not 6included in clause (i) Jeff Moyer, Constance Wilson, Paul Harris, Brett Waterman, Nick Ivankovic, Ashley Woodworth, Nick Volpe, Dave Roberts, Ilya Verlinsky, James Harris and Shane DeZilwa. For purposes of this Agreement, Key Employee shall not include any individual who is also a member of senior management of [ISO]"

(*id.* at 7).

PA's Indemnification Provisions

Section 9.1 of the PA states, in part, that "(a) [a]ll of the representations and warranties contained in [the PA] and the Ancillary Agreements shall survive until March 31, 2015 and shall then cease and terminate and shall have no further effect, except for the Fundamental Representations which shall survive indefinitely" (*id.* at 57). The PA defines the term "Fundamental Representations" to mean "the representations and warranties of [ISO] contained in Sections 3.1 ..., 3.2 ..., 3.4 ..., 3.5 ..., the representations and warranties of [Interthinx] contained in Sections 4.1 ..., 4.3(a)-(f) ..., 4.4(a)(i) ..., 4.6 ..., 4.22 ..., and the representations and warranties of [FAFC] contained in Sections 5.1 ..., 5.2 ..., and 5.5 ..." (*id.* at 5).

Section 9.2 (a) requires ISO to indemnify and defend FAFC, Interthinx, and ISI

> "against, and shall hold them harmless from, any and all Losses suffered or incurred by any [FAFC] Indemnitee to the extent arising out of or resulting from:
> (i)any inaccuracy or breach of any representation or Warranty made by Verisk or ISI in Article III, or [Interthinx] in Article IV of [the PA] ... ;
> (ii) any breach of or failure by Verisk, [ISO] or [Interthinx] to perform any covenant or obligation ... contained in [the PA] or any of the Ancillary Agreements to be performed at or prior to Closing;
> (iii) any breach of or failure by Verisk or ISO to perform any covenant or obligation ... contained in [the PA] or any Ancillary Agreements to be performed after Closing; (iv) any Action identified in Section 4.14 of [Interthinx's] Disclosure and any subsequent claim that arises in such Actions ... ."

(*id.* at 58). According to section 9.2(b):

> "[ISO] shall not be liable for any Losses pursuant to Section 9.2(a)(i) (other than Losses related to Fundamental Representations) unless (i) each individual claim, or each group claim arising out of a substantially similar set of related facts and circumstances, made by [FAFC] Indemnitees is a Qualifying

> Warranty Breach and (ii) the total of all such Losses for any claims for indemnification made by [FAFC] Indemnitees under Section 9.2(a)(1) (other than Losses related to Fundamental Representations) with respect to all Qualifying Warranty Breaches exceeds, in aggregate, the Threshold Amount, in which event [ISO] shall be liable for all such Losses from the first dollar"

(*id.*). In addition, the PA defines the term "Loss" to mean:

> "any loss, damage, claim, disbursement, costs, expenses, penalty or settlement payment but, except in the case of Losses indemnified pursuant to Section 9.2(a)(iv), expressly excludes any consequential, incremental, indirect, special, punitive or exemplary damages. "Loss" shall also include any costs or expenses actually incurred by a Person to enforce its rights under this Agreement"

(*id.* at 8). "Qualifying Warranty Breach" is defined as "an inaccurate representation or breach of warranty or combination thereof made by a party to this Agreement in this Agreement resulting in Losses to another Person in an amount equal to or greater than $50,000" (id. at 11). The "Threshold Amount" is defined as "an amount equal one percent (1%) of the Gross Purchase Price" (*id.* at 13).

Section 9.6 provides, in part,

> (d) [s]ubject to Section 6.11 and Section 10.13, the parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from fraud on the part of a party hereto in connection with the transactions contemplated by this Agreement) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be pursuant to the indemnification provisions set forth in this Article IX.

(*id.* at 62).

PA's Guarantee Provision

Finally, section 10.14, provides, in part, that "Verisk unconditionally guarantees to [FAFC], the full and complete performance by [ISO] and each of its Affiliates, as applicable, of

its respective obligations under this Agreement and shall be liable for any breach of any representation, warranty, covenant or obligation of [ISO] under this Agreement. This is a guarantee of payment and performance" (*id.* at 66).

Post-Closing

The sale closed on March 11, 2014, and FAFC paid defendants the sum of $155 million. Also on March 11, 2014, ISO and FAFC entered into a Transitional Services Agreement (TSA), pursuant to which ISO agreed to provide certain transitional services to Interthinx for up to six months after the closing of the PA (NYSCEF 170, TSA).

On April 30, 2014, Gina Healy of FAFC sent an email to David Grover[3] stating that FAFC was awaiting the financials (NYSCEF 176, Healy Email). Grover responded that FAFC should use the trial balances provided to them on April 21, 2014 (*id.*). That trial balance included a line for "fees received in advance and amounts due to customers" in the amount of $249,001.34: $128,854.34 unearned fees from the Interthinx business plus $120,147 of deferred revenue from ACI (NYSCEF 177, Lau Email). FAFC allegedly relied on the trial balance sheet to determine the Adjusted Closing Amount and Net Working Capital (*id.*; NYSCEF 178, Rust Email).

On June 14, 2014, ISO sent a Notice of Objection, disputing FAFC's calculations as to accounts receivable (NYSCEF 179, Heeb Email). In July 2014, the parties came to a compromise on those calculations (NYSCEF 180, Carmichael Email; NYSCEF 181, 7/24/14 Healy Email). The current liabilities calculation never changed (*Compare* NYSCEF 180, Carmichael Email, *with* NYSCEF 178, Rust Email).

[3] David Grover was Verisk's vice president and assistant controller. At the time of his deposition in June 2017, Grover was controller, chief accounting officer and a vice president of Verisk (NYSCEF 172, David Grover deposition tr at 10-11).

On July 24, 2014, after gathering data from its trip to Verisk and ACI, FAFC asked Verisk for a list of what was being amortized as of the closing of the sale, in terms of ACI's prepaid customer subscription and service agreements (NYSCEF 183, Peek Email). FAFA inquired if Verisk had continued to recognize them as amortizable items for April through June (*id.*). On July 28, Verisk provided that information (NYSCEF 184, Carlson Email). On that same day, FAFC requested a meeting with Verisk to "help [FAFC] understand how the subscriptions were handled from a revenue perspective as [FAFC was] not seeing deferred revenue on the [trial balance] provided on 3-11 that would seem to cover the amount of subscription amortization that seems to be coming across in ACI's revenue monthly" (NYSCEF 174, Meeting Request Email).

On July 28, 2014, ISO wired FAFC $3,830,164, the Adjusted Closing Amount (NYSCEF 182, Wire Confirmation).

After discovering an issue with ACI's deferred revenue, FAFC made multiple requests to Verisk for reimbursements for overpayment under the PA. Specifically, by letter dated October 14, 2014, FAFC informed Verisk that "the information Verisk provided to [FAFC] pursuant to Section 2.5(c) of the [PA] ... improperly failed to include $2,191,640.67 of ACI fees paid in advance (the 'Omitted ACI Liability')" and that it is "owed payment for the Omitted ACI Liability in the amount of $2,191,640.67" (NYSCEF 189, 10/14/14 Letter). Verisk responded by letter dated November 14, 2014, disputing FAFC's claim that the calculation of Net Working Capital was improperly inflated by $2,191,640.67 (NYSCEF 190, 11/14/14 Letter).

On December 16, 2014, FAFC sent a Notice of Claim to Verisk, seeking indemnification for claims by a former Interthinx employee and others for violations of the

California Labor Code (NYSCEF 265, 12/16/14 Notice of Claim). On December 19, 2014, FAFC sent Verisk another Notice of Claim, seeking indemnification for breach for the PA provision prohibiting ISO from hiring certain Key Employees (NYSCEF 198, 12/19/14 Notice of Claim).

By letter dated February 13, 2015, FAFC outlined Verisk and ISO's alleged breaches under sections 2.5, 4.7(b), 4.11(b), 4.14, 4.16(c), 4.25, and 6.11of the PA and cited the indemnification and notice provisions of Article IX of the PA (NYSCEF 219, 2/13/15 Letter). Defendants did not comply with FAFC's requests for indemnification and this action ensued.

Plaintiffs allege although they fulfilled their obligations under the PA, defendants breached the terms of the PA by failing to disclose the existence of the $2,191,640.67 in ACI deferred revenue (first cause of action); hiring back certain Key Employees who were expected to continue employment with Interthinx as part of the sale of the business units to FAFC (second cause of action); failing to transfer working copies of licenses for all of the software and related documentation necessary to conduct the businesses being purchased (third cause of action); and failing to disclose that Interthinx was in violation of the California Labor Code (fourth cause of action) (NYSCEF 1, Complaint).

Defendants moved to dismiss the complaint, and on November 4, 2015, the court (Oing, J.) denied that motion (Motion Sequence No. 001) (NYSCEF 64, 11/4/15 Order; NYSCEF 68, Transcript).

On September 12, 2017, this court granted plaintiffs' motion to amend the complaint (Motion Sequence Number 003) (NYSCEF 143, 9/12/17 Order). Plaintiffs filed an amended complaint adding a fifth cause of action for breach of contract based on defendants' failure to indemnify certain pre-existing Labor Law claims (NYSCEF 167, Amended Complaint).

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*). Here, the parties have filed competing motions for summary judgment.

The amended complaint alleges five causes of action for breaches of the PA. "The elements of such a claim include the existence of a contract, the plaintiff's performance there under, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted]).

First Cause of Action - ACI Deferred Revenue

Plaintiffs' first cause action alleges that defendants breached sections 2.5(c) and 4.5 of the PA by failing to disclose the existence of a $2,191,640.67 deferred revenue liability on Interthinx's books (ACI Deferred Revenue). Plaintiffs assert that defendants' alleged failure to provide FAFC with true and correct financial information resulted in FAFA's inability to negotiate a fair Purchase Price for the business units being sold. Plaintiffs also assert that FAFC did not discover the omission of the ACI Deferred Revenue until July 2014, after the parties had agreed on a final Net Working Capital amount. Thus, plaintiffs contend that

FAFC is entitled to adjust the $155,000,000.00 Purchase Price by subtracting the $2,191,640.67 in deferred liability.

Defendants do not dispute that the ACI Deferred Revenue was omitted from the financial statements provided to FAFC or that the deferred revenue is a liability for accounting purposes. Rather, defendants maintain that the omission was inadvertently made when defendants were carving out ACI's financials from ISO, as ACI did not have its own financial statements. Nevertheless, defendants assert that the information provided to FAFC did accurately report ACI's total revenue as well as the total cost to run ACI.

Defendants also assert that FAFC learned that ACI had a significant amount of deferred revenue before the Closing when FAFC made an onsite visit in March 2014 to ACI. Defendants contend that FAFC was aware that there was a significant amount of revenue deferred each month but never raised the issue until July 2014 after FAFC requested the wire transfer of the working capital adjustment amount.

In any event, defendants argue that plaintiffs cannot show actual indemnifiable Losses, as defined in the PA. While defendants admit that deferred revenue is a liability from an accounting perspective, they assert that the omission had no effect on the parties' post-Closing Net Working Capital calculation as the inclusion of the ACI Deferred Revenue would have not have impacted the adjustment called for under the PA. Defendants assert there would have been an impact on the pre-closing calculation of the target net working capital band, lowering the pre-closing net working capital calculation, meaning no net change in FAFC's position. Defendants argue that plaintiffs only focus on the ACI Deferred Revenue's impact during the post-Closing time period and ignore that the impact was on the pre-closing calculation.

Defendants also assert that the ACI Deferred Revenue did not actually cost FAFC anything because it was really just an obligation to provide services to ACI customers who had yearly support and maintenance contracts with ACI. They assert that FAFC has not demonstrated that it incurred any costs or done anything more than letting the contracts expire to extinguish the liability from the ACI Deferred Revenue.

Finally, defendants assert that the ACI Deferred Revenue is not a "Current Liability" under section 2.5(a)(iii), which defines the term to mean "the following items as would be set forth on the Financial Statements: (A) accounts payable and accrued liabilities; and (B) fees received in advance and amounts due to customers" (NYSCEF 169, PA at 16-17). Thus, defendants maintain that the ACI Deferred Revenue cannot be considered in the calculation of the post-Closing Net Working Capital.

There is no dispute that the ACI Deferred Revenue was not disclosed to FAFC. The issue is whether this failure was a breach under the PA.

It is well established that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Furthermore, a written agreement "will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose. * * * The meaning of a writing may be distorted where undue force is given to single words or phrases" (*Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [internal quotation marks and citation omitted]).

Reading the PA as a whole, plaintiffs' current objections to the calculation of post-Closing Net Working Capital, and in turn, the Adjusted Closing Amount, fall within the PA's indemnification provisions in Article IX and not the price adjustment provisions in Article II.

The PA provides the exclusive remedy of indemnification for any financial misrepresentations by the seller, thereby precluding the use of the post-closing adjustment provision as a remedy. Specifically, section 9.6(d) provides that

> "the parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims ...for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of the [PA], shall be pursuant to the indemnification provisions set forth in ... Article IX"

(NYSCEF 169, PA at 62). Plaintiffs argue that section 2.5 of the PA was a covenant breached by the defendants. However, section 9.1(c) is clear that "[t]he covenants and obligations of the parties contained herein that by their terms are to be performed after the Closing shall survive the Closing in accordance with their terms" (*id.* at 57).

Section 2.5 (c) provides that ISO shall provide [FAFC] and its representatives with any information reasonably requested by them to assist FAFC in preparing its calculation of the Adjusted Closing Amount and Net Working Capital within 60 days after the Closing Date. The terms of this provision expired 60 days after the Closing Date. In fact, the court (Oing, J.) previously determined that "section 2.5 is not applicable ... once the adjusted closing amount is paid" (NYSCEF Doc. No. 68, tr at 16:12-14). Thus, the court turns to Article IV of the PA.

Article IV sets forth Interthinx's representations and warranties (NYSCEF 169, PA at 21-40). Specifically, pursuant to section 4.5, Interthinx represents and warranties complete and accurate copies of the Historical Financial Statements (*id.* at 23-24).

As stated above, defendants do not dispute that the ACI Deferred Revenue was omitted from the financial statements they provided to FAFC. However, they argue that

plaintiffs cannot prove Losses as a result of this failure and that this failure to disclose is not a "Qualifying Warranty Breach."

Section 9.2 (a) requires ISO to indemnify and defend FAFC and Interthinx

> "against, and shall hold them harmless from, any and all Losses suffered or incurred by any [FAFC] Indemnitee to the extent arising out of or resulting from:
> (i)any inaccuracy or breach of any representation or Warranty made by Verisk or ISI in Article III, or [Interthinx] in Article IV of [the PA] ..."

(*id.* at 58). Loss is defined as "any loss, damage, claim, disbursement, cost, expense, penalty or settlement payment but, except in the case of Losses indemnified pursuant to section 9.2(a)(iv), expressly excludes any consequential, incremental, indirect, special, punitive or exemplary damages. 'Loss' shall also include any costs or expenses actually incurred by a Person to enforce its rights under this Agreement" (*id.* at 8).

According to section 9.2(b):

> "[ISO] shall not be liable for any Losses pursuant to Section 9.2(a)(i) (other than Losses related to Fundamental Representations) unless (i) each individual claim, or each group claim arising out of a substantially similar set of related facts and circumstances, made by [FAFC] Indemnitees is a Qualifying Warranty Breach and (ii) the total of all such Losses for any claims for indemnification made by [FAFC] Indemnitees under Section 9.2(a)(1) (other than Losses related to Fundamental Representations) with respect to all Qualifying Warranty Breaches exceeds, in aggregate, the Threshold Amount, in which event [ISO] shall be liable for all such Losses from the first dollar"

(*id.* at 58). "Qualifying Warranty Breach" is defined as "an inaccurate representation or breach of warranty or combination thereof made by a party to this Agreement in this Agreement resulting in Losses to another Person in an amount equal to or greater than $50,000" (id. at 11). Thus, the key to indemnification is Loss, as defined by the PA.

Here, there are issues of fact as to whether FAFC suffered a Loss. This is clear from the parties' expert reports, as well as questions raised as to the ACI Deferred Revenue's impact on the pre-closing net working capital calculation. Also, there is no evidence presented of any costs incurred by FAFC in relation to the ACI Deferred Revenue. Thus, summary judgment cannot be granted on this first cause of action in favor of either party.

Second Cause of Action - Key Employees

Plaintiffs also argue that they are entitled to indemnification for defendants' breach of section 6.11(b) of the PA, which prohibits defendants from soliciting and hiring certain specified Key Employees from Interthinx or ISO for two years after the Closing. Plaintiffs maintain that Verisk solicited and hired Shane DeZilwa, one of the named Key Employees, only seven months after the Closing. Plaintiffs assert that they are entitled to any benefits realized by Verisk after hiring DeZilwa.

To support their request for summary judgment on their claim, plaintiffs offer, among other things, a March 13, 2015 letter, in which counsel for defendants state,

> "We recognize that a Verisk company hired Mr. DeZilwa. It was nothing more than a simple mistake. Verisk has addressed the internal issue that led to the mistake and it should not happen again. It does not believe, however, that your client has suffered any compensable monetary damage that fulfills the requirements of Section 9.2 of the [PA]"

(NYSCEF 54, 3/13/2015 Letter).

In opposition, defendants deny soliciting DeZilwa, and assert that plaintiffs fail to show that defendants used wrongful means to hire him. Defendants also argue that plaintiffs knew that DeZilwa was designated as a Key Employee under the PA, but did nothing to stop him from rejoining Verisk after plaintiffs learned of his hiring. Thus, defendants assert that

plaintiffs waived any rights complain about DeZilwa departing and rejoining Verisk. Defendants also argue that the restrictive covenant in section 6.11(b) of the PA is unenforceable because it does not protect any legitimate interests of FAFC. Defendants further assert that plaintiffs cannot show any damages resulting from Verisk's hiring of DeZilwa.

Although DeZilwa was not bound by any restrictive covenant as an at-will employee, under section 6.11(b) of the PA, FAFC bargained explicitly to protect itself from the loss of Key Employees to Verisk after the purchase of Interthinx. The submissions make clear that Verisk nevertheless hired DeZilwa less than two years after the Closing.

On June 8, 2017, DeZilwa testified that in the fall of 2014, he reached out to nonparty Verisk Innovative Analytics to inquire about an opportunity after hearing from a former employee that he was leaving the company (NYSCEF 196, DeZilwa depo tr at 177:12-22; 207-209). He also testified that he heard directly from the employee and had not seen any advertisements for the position (*id.* at 213:9-11).

New York courts recognize the enforceability of restrictive covenants (*Bdo Seidman v Hirshberg*, 93 NY2d 382 [1999]). Non-recruitment covenants are subject to "reasonableness" scrutiny because, while they are anti-competitive in nature, they are "inherently more reasonable and less restrictive" than noncompete covenants (*OTG Mgt., LLC v Konstantinidis*, 40 Misc 3d 617, 621 [Sup Ct, NY County 2013]). A non-recruitment covenant, as opposed to a noncompete covenant, does not infringe on an employee's ability to engage in an occupation (*id.* citing *Lazer Inc. v Kesselring*, 13 Misc 3d 427, 431 [Sup Ct, Monroe County 2005]). Furthermore, non-recruitment covenants do not affect in the same way the

powerful considerations of public policy which militate against sanctioning the loss of livelihood (*id.*).

The non-recruitment clause is enforceable because it is reasonable in scope and imposes no meaningful burden on Verisk. The plain language of section 6.11(b) of the PA is susceptible to only one interpretation: Verisk agreed not to solicit or hire certain Key Employees of Interthinx, including Shane DeZilwa, for two years after the Closing of the PA, unless the Key Employee responds to a general solicitation. Shane DeZilwa testified that he had not seen any advertisements for the position, and there is no showing that Shane DeZilwa responded to a general solicitation before being hired by Verisk. Hiring DeZilwa, even without solicitation, clearly violates section 6.11(b) of the PA.

Thus, plaintiffs have established entitlement to summary judgment on the issue of liability for their claim that indemnification based on defendants' breach. Defendants assertions that FAFC waived its rights under the restrictive covenant and that the restrictive covenant is unenforceable lack merit and are insufficient to defeat summary judgment. Nevertheless, the dispute between the parties as to the Loss incurred by FAFC as a result of the breach warrants a trial on that issue.

Third Cause of Action - Software Licenses

Plaintiffs also seek indemnification for defendants' breach of section 4.11 of the PA, which requires defendants to provide working copies of licenses for the software and related documentation necessary to conduct the businesses purchased by FAFC. Plaintiffs assert that at the time of the Closing of the PA, there were numerous Microsoft licenses that were being used to run Interthinx that were not exempted from transfer to FAFC. Plaintiffs claim

defendants never transferred the licenses, and that plaintiffs were forced to purchase software licenses.

Defendants deny owning the licenses for the software and assert that, instead, Interthinx subcontracted for various software from third-party vendors from affiliate companies. Defendants also claim that FAFC knew, prior to the Closing, that Interthinx did not own the licenses it utilized, and that FAFC waived the claim regarding the software licenses by proceeding with the Closing. In fact, defendants maintain that the parties entered into the TSA so that Interthinx could continue to use Verisk's licenses during the transition to FAFC. Defendants also assert that they offered to transfer a portion of the requested licenses and all of the servers, but that some of the licenses were not transferrable.

Section 4.11 of the PA clearly requires Interthinx to transfer to FAFC certain "working copies of all Software ... as are necessary for the current conduct of the business" of Interthinx and ISI. However, the court cannot conclusively determine, from the submissions, whether defendants breached their obligations under the PA. The existence of triable issues of fact regarding the necessity, ownership, and transferability of the software licenses preclude summary judgment at this time. Thus, the competing motions for summary judgment as to the third cause of action in the amended complaint are denied.

Fourth and Fifth Cause of Action - Labor Law Actions and Pre-Existing Claims

Plaintiffs argue that they are entitled to indemnification based on defendants' alleged breach of sections 4.7(b), 4.14, and 4.16 of the PA, in which they represented and warranted, among other things, that Interthinx was "conducting its business in compliance in all material respects with all applicable Laws, Permits and Orders," that "there is no action ... pending, ... threatened against or affecting [Interthinx] or [ISI] or their respective businesses or

properties or assets," and that since December 31, 2005, Interthinx and ISI have been in compliance with all applicable Laws relating to the employment of employees ... ." (NYSCEF 169 at 26-27, 35, 37).

Plaintiffs assert that in November 2014, Interthinx was threatened with a class action lawsuit, and that in March 2015, Interthinx was served with the summons and complaint in the class action lawsuit, entitled *Sager v Interthinx* (Case No. BC 570330, Super Ct, Cal) (*Sager* Action), alleging violations of the California Labor Code when defendants owned Interthinx. Plaintiffs also assert that in April 2015, another class action, *Weber v Interthinx, Inc.* (Case Number 15-cv-646) (*Weber* Action), alleging violations of federal labor laws and the California Labor Code during the period that defendants owned Interthinx, was commenced in the United States District Court for the Eastern District of Missouri.

Plaintiffs assert that, pursuant to section 9.2(a)(i), defendants were notified of the request for indemnification regarding the *Sager* Action in December 2014, and that defendants were notified of the request for indemnification concerning the *Weber* Action in April 2015. Plaintiffs insist that defendants wrongfully declined to indemnify them in the *Sager* and *Weber* Actions, which were eventually settled. The Settlement in the *Sager* and *Weber* actions states, in part:

> "This Settlement represents a compromise and settlement of disputed claims, including but not limited to disputes related to FLSA claims and California claims, plead in the above-titled lawsuits. Nothing in this Settlement is intended to be construed or will be construed as an admission by Defendants that Plaintiffs' claims in the Action have merit or that they have any liability to Plaintiffs or to the Settlement Class on those claims, or an admission by Plaintiffs that Defendants' defenses in the Action have merit"

(NYSCEF Doc. No. 236, Settlement and Release).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). The promise to indemnify should not be found unless it can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*id.* at 492).

As previously stated, section 9.2(a)(i) of the PA imposes on ISO a duty to indemnify FAFC from, among other things, "any and all Losses suffered and incurred by any [FAFC] Indemnitee to the extent arising out of or resulting from: ... any inaccuracy or breach of any representation or warranty made by ... or [Interthinx] in Article IV of [the PA]." Constrained to a strict construction of section 9.2(a)(i), the court concludes that the indemnity provision does not impose a duty to indemnify on defendants. Courts must avoid reading unintended duties into indemnification provisions (*905 5th Assocs., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

There has been no finding in the *Sager* and *Weber* Actions of an "inaccuracy or breach of any representation or warranty" made by Interthinx in connection with those actions. The Settlement Agreement expressly states that nothing therein "is intended to be construed or will be construed as an admission" of liability by defendants. Thus, plaintiffs' fourth cause of action for indemnification in the *Sager* and *Weber* Actions based on section 9.2(a)(i) must fail, as a matter of law, and defendants are entitled to summary judgment dismissing the that cause of action.

In May 2013, Weber also became a party to series of lawsuits known as the Shaw Action.[4] Thus, plaintiffs assert that the Weber Action arose in the Shaw Action and defendants were contractually obligated to defend and indemnify Plaintiffs for the Weber Action under Section 9.2(a)(iv) of the PA.

Section 9.2(a)(iv) affords FAFC indemnification for "any and all Losses suffered by any [FAFC] Indemnitee to the extent arising out of or resulting from ...any Action identified in Section 4.14 of [Interthinx's] Disclosure Schedule and any subsequent claim that arises in such Actions ... ." Section 4.14 of Interthinx' Disclosure Schedule includes, among other things, the *Shaw* Action. Defendants defended and indemnified the plaintiffs in the *Shaw* Action, which was ultimately settled without any admission of liability by defendants (NYSCEF Doc. No. 230, Shaw Action Settlement).

Section 9.1(a) of the PA states that "[a]ll of the representations and warranties contained in [the PA] shall survive until March 31, 2015 ..., except Fundamental Representations which survive indefinitely." Here, plaintiffs seek indemnification from defendants based on the alleged breach of sections 4.7(b), 4.14, and 4.16 of the PA, which are not included in the list of "Fundamental Representations" as defined in the PA. Thus, the representations and warranties allegedly breached by defendants expired on March 31, 2015, and notice of a claim for indemnification had to be given before then. Plaintiffs acknowledge that they failed to provide defendants with notice of indemnification for the *Weber* Action prior to March 31, 2015, when the representations and warranties contained in

[4] Section 4.14 of the Company Disclosure Schedule discloses three existing class action lawsuits: *Shaw v Interthinx, Inc., et al.*, a case filed in the U.S. District Court for the District of Colorado; *Dehdashtian v Interthinx, Inc., et al.*, a case filed in the U.S. District Court for the Central District of California; and *Nagl v. Interthinx, Inc.*, a case filed in the Superior Court of the State of California (collectively, the Shaw Action).

sections 4.7(b), 4.14, and 4.16 of the PA "cease[d] and terminate[d] and ... ha[d] no further effect" (NYSCEF 169 at 57).

Plaintiffs' assertion that defendants' indemnification obligations survive indefinitely under section 9.1(c), which pertains to "covenants and obligations of the parties ... that by their terms are to be performed after the Closing." The Court cannot simply ignore the express language of section 9.1(a), as plaintiffs urge. A contract must be construed to give effect to each and every part (*Maxine Co., Inc. v Brinks's Global Servs. USA, Inc.*, 94 Ad3d 53, 56 [1st Dept 2012]). Construing the PA according to its express terms, it is clear that the representations and warranties for which plaintiffs seek indemnification expired on March 31, 2015.

The assertion that the *Weber* Action arose from the *Shaw* Action are unsupported by the submissions and, as stated, Weber was not included in the Settlement in the Shaw Action. Nor do the express terms of the PA support plaintiffs' assertion that notice of indemnification in the *Shaw* Action somehow rendered timely the notices in the *Weber* Action.

Absent timely notice of indemnification under section 9.1(d), the representations and warranties in sections 4.7(b), 4.14, and 4.16 of the PA ceased, terminated, and had no further effect. As such, plaintiffs' claims for breach of those representations must be dismissed. Thus, defendants are entitled to summary judgment dismissing the fifth cause of action in the amended Complaint.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment, designated Motion Sequence Number 004, is granted, in part, to the extent of granting partial summary judgment in favor of plaintiffs and against defendants in that defendants are liable to plaintiffs on the second

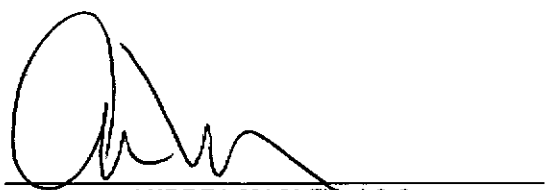
cause of action, and the amount of a judgment to be entered shall be determined at a trial, and the motion is otherwise denied; and it is further

ORDERED that defendants' motion for summary judgment, designated Motion Sequence Number 005, is granted, in part, to the extent of granting partial summary judgment in favor of defendants and against plaintiffs on the fourth and fifth causes of action and those causes of action are dismissed against defendants, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a pre trial conference in Room 242 on July 21, 2020, at 10AM.

Motion Seq. No. 04 :

4/19/2020
DATE

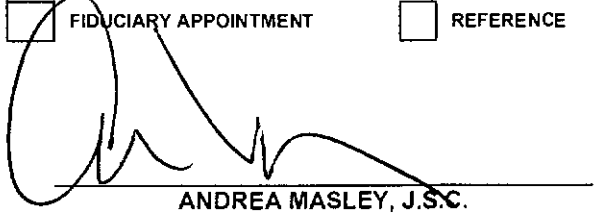


ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION	
		GRANTED	DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE

Motion Seq. No. 05 :

4/19/2020
DATE



ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION	
		GRANTED	DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE