Panwest NCA2 Holdings LLC v Rockland NCA2 Holdings, LLC
2022 NY Slip Op 30438(U)
February 8, 2022
Supreme Court, New York County
Docket Number: Index No. 653890/2020
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

---X

PANWEST NCA2 HOLDINGS LLC

Plaintiff,

- v -

ROCKLAND NCA2 HOLDINGS, LLC,

Defendant.

---X

INDEX NO. 653890/2020

MOTION DATE 07/06/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 71, 72

were read on this motion to/for DISMISS.

Upon the foregoing documents the Seller's (hereinafter defined) motion to dismiss pursuant to CPLR 3211(a)(1) & (7) is denied in its entirety.

The critical issue which dooms the Seller's motion is whether fraud claims and breach of contract claims are barred by a post-closing adjustment provision in the MIPA (hereinafter defined) that does not provide that it is the exclusive procedure by which the Buyer (hereinafter defined) and the Seller would resolve any claims arising out of the contract. Because they are not, the Seller is not entitled to dismissal of this action.

The gravamen of the complaint is that the Seller committed fraud and otherwise breached their obligations set forth in Sections 4.4, 6.1(1), 6.2 and 8.2 of the MIPA (hereinafter defined) by lying to the Buyer that the NAM (hereinafter defined) costs incorrectly appeared on the budget that they submitted and which budget they replaced without the NAM costs (which costs not

only correctly had appeared on the budget but also were specifically approved by them) and that they otherwise failed to disclose the Pond Survey Report (hereinafter defined) which would have alerted the Buyer to the fact that the Seller had failed to maintain the freeboard and that approximately $2 million of remediation work was needed imminently – *i.e.*, requiring the work to be complete within two years – by December, 2022 (NYSCEF Doc. No. 44) . These claim sounds in fraud and fraudulent inducement and therefore are outside of the contract. As such, the Buyer may also plead unjust enrichment in the alternative to the fraud and breach of contract claims and it can not be said that such claim is duplicative requiring dismissal at this stage of the litigation (*Tutor Perini Bldg. Corp. v Port Auth. of N.Y. & N.J.*, 191 AD3d 569, 571 [1st Dept 2021])

Additionally, although the parties agreed pursuant to Section 2.5 of the MIPA to a post-closing adjustment procedure, the parties did not agree that Section 2.5 was either the exclusive remedy under the MIPA for fraud based adjustments or that it was a pre-condition to bringing a lawsuit. For the avoidance of doubt, although arguably the Buyer should have also included such fraudulent concealed line item NAM charges on a post-closing reconciliation statement as a current liability pursuant to Section 2.5 of the MIPA, the Buyer sent timely notice of the breach of the MIPA with respect to the fraudulently concealed new NAM current liability charge (and certain other breaches) and, as pled, this is not merely a post-closing accounting adjustment as contemplated by Section 2.5 of the MIPA. The failure to have included the number on a post-closing reconciliation statement given the timely notice of default is therefore of no moment.

Lastly, the Seller is not entitled to dismissal based on the fact that the December 10, 2020 inspection shows that the permit was not violated (NYSCEF Doc. No. 59). The Seller had an absolute obligation under the MIPA to deliver the Pond Survey Report (MIPA Section 4.12[b]) which the Buyer alleges was not delivered and would have given them additional information as to when and whether remediation work was required and what might be entailed in completing the remediation work so that the Buyer could get a sense of the scope of such work and its pricing. Whether the Buyer may have otherwise known that remediation work was required in the future or otherwise could have determined the timing of when such work was required is not something that can be decided at this stage of the litigation. Stated differently, the fact that the Buyer may have been aware of a letter of intent for a 15 year ground lease extension for a term beginning in 2024 did not put the Buyer on notice of the imminent need to do approximately $2 million of remediation work to be completed by the end of 2022 entitling the Seller to dismissal at this stage.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a Membership Interest Purchase Agreement (the **MIPA**; NYSCEF Doc. No. 65), dated November 26, 2019, by and between Rockland NCA2 Holdings, LLC (**Seller**) and PanWest NCA2 Holdings LLC (**Buyer**), pursuant to which the Seller agreed to sell and the Buyer agreed to purchase a natural gas-fired cogeneration facility located in Clark County, Nevada (the **Plant**) and the companies associated with the Plant, for $35,833,535.

Pursuant to the MIPA, the parties agreed that the Seller would share information with the Buyer, and that the Buyer would rely on that information and the representations and warranties of the

Seller in the MIPA in entering into the transaction (except to the extent expressly addressed in the MIPA):

> **Section 6.1 Conduct of Business.** From the date of this Agreement through the Closing, except as otherwise contemplated or permitted by this Agreement (including the matters set forth on Schedule 6.1, as specifically required by applicable Law or the terms of any Permit or Disclosed Contract or as consented to by Buyer in writing (which consent shall not be unreasonably withheld, conditioned or delayed), (x) Seller will use commercially reasonable efforts to cause the Acquired Companies to (i) conduct the Business in the ordinary course of business of the Acquired Companies and consistent with past practices; *provided, however*, that notwithstanding anything to the contrary herein, Seller may cause the Acquired Companies to make any number and size of distributions of Cash prior to the Closing, to the extent permitted under the Credit Agreement, and (ii) preserve intact the Business and its relationships with customers, suppliers and others having significant business relationships with the Acquired Companies and (y) Seller shall not permit any Acquired Company to:
>
> (l) approve or make any capital expenditures in an aggregate amount exceeding Fifty Thousand Dollars ($50,000), except for capital expenditures (i) described in Schedule 6.1, (ii) that are required to comply with applicable Law, (iii) made in response to any emergency, or (iv) that otherwise constitute ordinary course repair or maintenance expenditures as a result of an unplanned or unexpected event;
>
> (NYSCEF Doc. No. 65; § 6.1).
>
> **Section 6.2 Access.**
>
> (a) Prior to the Closing Date, or, if earlier, until the date this Agreement is terminated pursuant to Section 10.1, Seller shall afford (and shall cause the Acquired Companies to afford) to Buyer and its authorized Representatives reasonable access, during normal business hours, to the properties (including the Facility and the Real Property), books, contracts and records of the Acquired Companies with respect to the Business (other than the Excluded Records), and to the appropriate officers and employees of the Acquired Companies, in each case, as reasonably requested by Buyer and as may be necessary to assist Buyer in connection with Buyer's understanding of the Business and integrating the Business into Buyer's organization following the Closing; *provided, however*, that such access shall be subject to and in accordance with the terms and conditions of the Real Property Agreements, shall only be upon reasonable advance written notice, shall not unreasonably interfere with or disrupt personnel or operations of the Business, and shall be at Buyer's sole cost and expense; *provided, further*, that neither Buyer nor any of its Affiliates or Representatives shall have (i) the right to perform or conduct (A) any environmental sampling with respect to the assets of the Acquired Companies or (B) any Phase II environmental site assessment with respect to the assets of the Acquired Companies or (ii) access to the Excluded Records. Seller shall have the

right to have Representatives of Seller present at all times during any inspections, assessments, interviews and examinations and impose reasonable restrictions and requirements for safety purposes. Notwithstanding the foregoing, Buyer shall have no right of access to, and Seller shall have no obligation to provide to Buyer, any information the disclosure of which (1) would reasonably be expected to (x) jeopardize any privilege relating to such information available to the Acquired Companies, Seller or any Affiliate of Seller or (y) cause the Acquired Companies, Seller or any Affiliate of Seller to breach a confidentiality obligation; or (2) Seller reasonably concludes would be in violation of Law or would reasonably be expected to result in a commencement of Litigation by any Governmental Authority. Subject to Section 6.11, it is further agreed that neither Buyer nor its Representatives shall contact any of the employees, customers, suppliers, landlords, licensors or Persons that have a business relationship with any Acquired Company in connection with the transactions contemplated hereby or the assets of any Acquired Company, whether in person or by telephone, mail or other means of communication, without the specific prior written authorization of Seller and without Representatives of Seller being present. Notwithstanding anything to the contrary in this Agreement, Buyer shall not have access to the Excluded Records, whether prior to, at or after the Closing.

(*id.*, § 6.2).

Section 4.4 Financial Statements; No Undisclosed Liabilities.

(a) Seller has made available to Buyer (i) the audited balance sheet and related audited statements of operations, cash flows and changes in member's capital of each of the Company and the Project Company, in each case, as of and for the fiscal year ended December 31, 2018 and (ii) the unaudited balance sheet and related unaudited statements of operations, cash flows and changes in member's capital of each of the Company and the Project Company as of and for the nine (9) months ended September 30, 2019 (collectively, the "**Financial Statements**"). Except as set forth in Schedule 4.4(a), the Financial Statements have been prepared in accordance with GAAP and fairly present, in all material respects, the financial position of the Project Company as of the respective dates thereof or for the respective periods set forth therein; *provided, however*, that the Financial Statements that are unaudited are subject in all respects to year-end adjustments and do not contain all footnotes and schedules required in audited financial statements.

(b) Except for (i) current liabilities reflected in the Economic Effective Date Net Working Capital or related to Taxes, (ii) liabilities which will not be applicable to the Acquired Companies after the Closing, (iii) liabilities incurred in the ordinary course of business since December 31, 2018, (iv) liabilities that have been incurred in connection with the transactions contemplated by this Agreement, (v) liabilities disclosed on Schedule 4.4(b) or permitted by Section 6.1, (vi) liabilities under Disclosed Contracts disclosed in the Disclosure Schedules or (vii) liabilities that would not, in the aggregate, be material to the Acquired Companies, taken as a whole, the Acquired Companies have

no material liabilities that would be required to be reflected on the Financial Statements prepared in accordance with GAAP which are not reflected or reserved against in the Financial Statements.

(c) Except (i) pursuant to the Credit Agreement, (ii) as set forth in the Financial Statements, (iii) as taken into account in Economic Effective Date Net Working Capital, or (iv) any other Indebtedness that will be satisfied in full at or prior to the Closing, the Acquired Companies do not have any material outstanding Indebtedness, and Seller does not have any outstanding Indebtedness relating to the Acquired Companies, in each case, for which the Acquired Companies will be liable after the Closing

(*id.*, § 4.4).

Section 4.12 Environmental Matters.

(a) Except as set forth in Schedule 4.12, as disclosed in the assessments and documents made available to Buyer as described in Section 4.12(b), or as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Companies:

(i) Each Acquired Company is and, to the Knowledge of Seller, has been since the Initial Ownership Date, in compliance in all material respects with all applicable Environmental Laws, which compliance includes the possession of and compliance with the terms and conditions of any Permits required under applicable Environmental Laws to own and operate the Business. Schedule 4.12(a) sets forth a complete and accurate list of all material Permits held by the Acquired Companies that are required for the Business under applicable Environmental Laws (collectively, the "**Environmental Permits**"). Except as set forth on Schedule 4.12(a), each Environmental Permit set forth on Schedule 4.12(a) is, subject to Bankruptcy and Equity Exceptions, in full force and effect and are validly held in the name of the Acquired Companies or such other Person as is set forth on Schedule 4.12(a), and there is no Litigation pending, or, to the Knowledge of Seller, threatened in writing alleging that any Acquired Company is in violation in any material respect of any Environmental Permit.

(ii) There are no (A) pending or, to the Knowledge of Seller, threatened Environmental Claims directly against any Acquired Company, or (B) to the Knowledge of Seller, pending or threatened Environmental Claims relating to any Facility, the Business or any Real Property, in each case of (A) or (B), which remain unresolved.

(iii) There has been no Release of any Hazardous Materials, except in compliance with Environmental Laws, resulting from the Project Company's operations of, or in connection with the Business on, at or from any Facility or any Real Property for which applicable Environmental Law requires notice, further investigation or response action by any Acquired Company.

(iv) The Facility is not listed on the National Priorities List pursuant to CERCLA, or listed on the Comprehensive Environmental Response Compensation Liability Information System List, or any analogous state list of sites.

(v) Except as set forth in the Disclosed Contracts, none of the Acquired Companies has contractually assumed, or otherwise assumed by operation of law, the liabilities of any third party relating to any Environmental Law or Hazardous Substance.

(b) ***Seller has made available to Buyer all material final environmental investigations, studies, audits, tests or other reports conducted by or for Seller or any Acquired Company, in each case, since the Initial Ownership Date and that relate to environmental matters in connection with the Facility***.

(c) Except as set forth on Schedule 4.12(c), to the Knowledge of Seller, the Acquired Companies currently hold all material rights, title and interest in and to the water rights necessary for the operation of the Business as of the date of this Agreement, and there is no restriction currently existing under any material Contract or Material Permit which would restrict or limit, or give any Person (other than the Acquired Companies) any material rights with respect to, any sale or transfer of such water rights.

(d) Notwithstanding any other provision of this Agreement to the contrary, this Section 4.12 contain the sole and exclusive representations and warranties of Seller with respect to the environment, occupational health and workplace safety, including matters related to Environmental Laws, Environmental Claims and Hazardous Materials.

(*id.*, § 4.12 [emphasis added]).

Because the results from operations may not match the budget provided by the Seller, the parties agreed to a post-closing adjustment procedure with respect to those items:

Section 2.5 Post-Closing Purchase Price Reconciliation.

(a) Prior to or on the date that is sixty (60) days after the Closing Date, Buyer shall prepare and deliver to Seller a statement (the "***Adjustment Statement***") that shall set forth Buyer's good faith calculation, as of 12:01 a.m. Pacific Time on the Economic Effective Date in the case of clause (i) below, and as of 12:01 a.m. Pacific Time on the Closing Date in the case of clause (ii) below, of (i) Net Working Capital (the "***Economic Effective Date Net Working Capital***") and (ii) the Prohibited Payments (the "***Closing Prohibited Payments***"), together with reasonably supporting information and calculations. Buyer's calculation of Economic Effective Date Net Working Capital shall be consistent with the methodology set forth on Schedule 1.1- NWC, and otherwise determined in accordance with GAAP applied using the accounting principles, practices and methods that were used in the preparation of the Financial Statements.

(c) If Seller notifies Buyer of any Initial Reconciliation Disputes in accordance with Section 2.5(b), then Buyer and Seller shall, over the ten (10) days following the date of such notice (the "***Resolution Period***"), attempt in good faith to resolve the Initial Reconciliation Disputes, and any written resolution by them as to any disputed item shall be final, binding, conclusive and nonappealable for all purposes of this Agreement. If, at the conclusion of the Resolution Period, Buyer and Seller have not reached an agreement on the disputed items, then all Initial Reconciliation Disputes remaining in dispute (the "***Final Reconciliation Disputes***") shall be submitted by Seller and Buyer to a nationally recognized independent auditor that is not the independent auditor for any Party or its respective Affiliates and as to which the Parties shall reasonably agree prior to expiration of the Resolution Period (the "***Neutral Auditor***"). All fees and expenses relating to the work, if any, to be performed by the Neutral Auditor pursuant to this Section 2.5 shall be allocated fifty percent (50%) to Seller and fifty percent (50%) to Buyer. Except as provided in the preceding sentence, all other costs and expenses incurred by the Parties in connection with resolving any Final Reconciliation Disputes hereunder before the Neutral Auditor shall be borne by the Party incurring such cost and expense. With respect to each disputed line item of the Economic Effective Date Net Working Capital and Closing Prohibited Payments, the Neutral Auditor's final determination, if not in accordance with the position of either Seller or Buyer, will not be in excess of the higher, nor less than the lower, of the amounts advocated by Buyer in the Adjustment Statement or the corresponding amount claimed by Seller in its initial notice of dispute delivered pursuant to Section 2.5(b). For the avoidance of doubt, the Neutral Auditor shall not review any line item or make any determination with respect to any matter other than the Final Reconciliation Disputes. The Parties shall instruct the Neutral Auditor to render its reasoned written decision and its basis therefor, acting as an expert and not as an arbitrator, as soon as practicable but in no event later than sixty (60) days after its engagement (which engagement shall be made no later than ten (10) Business Days after the end of the Resolution Period). Such decision shall be made on the basis of the principles, procedures, policies and methods set forth in Section 2.5(a), shall be set forth in a written statement delivered to Seller and Buyer and shall be final, binding, conclusive and nonappealable for all purposes hereunder. Notwithstanding anything else contained herein, no Party may assert that any award issued by the Neutral Auditor is unenforceable because it has not been timely rendered. The term "***Final Adjustment Statement***" shall mean the definitive Adjustment Statement setting forth the final determination of the Economic Effective Date Net Working Capital (the "***Final Economic Effective Date Net Working Capital***") and the Closing Prohibited Payments (the "***Final Closing Prohibited Payments***") and resulting from (i) agreement by Seller and Buyer during the Resolution Period or otherwise, (ii) a deemed acceptance pursuant to Section 2.5(b) or (iii) the determination by the Neutral Auditor in accordance with this Section 2.5(c).

(*id.*, § 2.5[a] & [c]).

Significantly, and as is typical, the parties also agreed that in the event that the representations and warranties were not true at closing, the Buyer did not have to close.

> **Section 8.2 Conditions to Obligations of Buyer.** The obligation of Buyer to consummate the Closing is subject to the satisfaction of the following conditions (any one or more of which may be waived in writing by Buyer, to the extent permitted by Law, in its sole discretion):
>
> (a) Seller shall have delivered (or be ready, willing and able to deliver at Closing) to Buyer all agreements, instruments and documents required to be delivered by Seller pursuant to Section 2.3(b);
>
> (b) The Seller Approvals set forth on Schedule 8.2(b) and the Buyer Approvals (other than those listed on Schedule 6.5) shall have been duly made, given or obtained and shall be in full force and effect; *provided, however*, that the absence of any appeals and the expiration of any appeal period with respect to any of the foregoing shall not constitute a condition to Closing hereunder.
>
> (c) (i) ***Each of the representations and warranties made by Seller in Article III and Article IV (other than the Seller Fundamental Representations and the representations and warranties in Section 4.8 (Absence of Changes)) (without regard to any Material Adverse Effect or materiality qualifications set forth in any such representations and warranties) shall be true and correct as of the Closing Date as though made at and as of such time*** (other than representations and warranties that speak as of another specific date or time (including, for the avoidance of doubt, any representation or warranty specified herein as being made as of or through the date of this Agreement), which need only be true and correct as of such date or time), except to the extent that any and all failures of such representations and warranties to be so true and correct, taken as a whole, would not have a Material Adverse Effect (provided, however, that solely with respect to the term "Material Adverse Effect" used immediately prior to this parenthetical, the term "Material Adverse Effect" shall be without regard to clauses (f), (h), (i), (j), or (o) in the definition of "Material Adverse Effect") or material adverse effect on Seller's ability to perform its obligations hereunder or to consummate the transactions contemplated hereby, (ii) each of the Seller Fundamental Representations shall be true and correct in all respects as of the Closing Date as though made at and as of such time (other than representations and warranties that speak as of another specific date or time (including, for the avoidance of doubt, any representation or warranty specified herein as being made as of or through the date of this Agreement), which need only be true and correct as of such date or time), and (iii) the representations and warranties in Section 4.8 (Absence of Changes) shall be true and correct in all respects as of the date on which they speak;
>
> (d) ***Seller shall have performed or complied, in all material respects, with all of the covenants and agreements required by this Agreement to be performed or complied with by Seller at or before the Closing***;

> (e) ***Seller shall have delivered to Buyer a certificate dated as of the Closing Date, representing that the conditions specified in Section 8.2(c) and Section 8.2(d) have been fulfilled***;
>
> (f) No outage of the entire Facility shall be ongoing and the Facility shall be running for twenty-four (24) consecutive hours before Closing; *provided, however*, that if (i) all of the conditions to the Closing set forth in this Article VIII have been satisfied or waived in accordance with this Agreement (other than (A) those conditions that by their nature can be satisfied only at the Closing and (B) the condition set forth in this Section 8.2(f)) and (ii) Buyer does not, within two (2) days following the date on which the last of the conditions set forth in this Article VIII has been satisfied or waived by the Party entitled to waive such conditions (other than those conditions that by their nature can be satisfied only at the Closing), irrevocably waive the condition set forth in this Section 8.2(f), Seller shall be entitled to terminate this Agreement; and
>
> (g) No Material Adverse Effect shall have occurred.
>
> (*id.*, § 8.2 [emphasis added]).

The parties further agreed that the Buyer was to do its own due diligence and limited the Buyer's reliance on the Seller's representations to those contained in Article III and IV of the MIPA (which included the obligations to provide accurate financial information and all environmental reports). The accuracy of the information was a condition to the Buyer's obligation to close. Stated differently, the parties agreed that the Seller would provide all accurate information and would represent the same was true at the time the MIPA was signed and at closing and that the Buyer would complete its own analysis and come to its own conclusions:

> **Section 5.10 Independent Investigation.** BUYER ACKNOWLEDGES AND AGREES THAT IT (A) HAS, WITHOUT RELIANCE ON SELLER, ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES, MADE ITS OWN INQUIRY AND INVESTIGATION INTO, AND, BASED THEREON, HAS FORMED AN INDEPENDENT JUDGMENT CONCERNING, SELLER, THE ACQUIRED COMPANIES, THE ACQUIRED INTERESTS, THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY AND THE ENVIRONMENTAL CONDITIONS THEREON),

THE BUSINESS AND THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT, AND (B) HAS BEEN FURNISHED WITH, OR GIVEN ADEQUATE ACCESS TO, SUCH INFORMATION ABOUT THE ACQUIRED COMPANIES, THE ACQUIRED INTERESTS, THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY AND THE ENVIRONMENTAL CONDITIONS THEREON), THE BUSINESS AND ANY OTHER RIGHTS OR OBLIGATIONS TO BE TRANSFERRED HEREUNDER OR PURSUANT HERETO, AS IT HAS REQUESTED. BUYER FURTHER ACKNOWLEDGES AND AGREES THAT (I) THE ONLY REPRESENTATIONS, WARRANTIES, COVENANTS AND AGREEMENTS MADE BY SELLER, ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES ARE THE REPRESENTATIONS, WARRANTIES, COVENANTS AND AGREEMENTS MADE BY SELLER IN ARTICLE III AND ARTICLE IV, AND BUYER HAS NOT RELIED UPON ANY OTHER REPRESENTATIONS OR OTHER INFORMATION MADE OR SUPPLIED BY OR ON BEHALF OF SELLER, ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES, INCLUDING ANY INFORMATION PROVIDED BY OR THROUGH SELLER'S FINANCIAL ADVISORS OR ATTORNEYS, OR MANAGEMENT PRESENTATIONS, DATA ROOMS OR OTHER DUE DILIGENCE INFORMATION, AND THAT BUYER WILL NOT HAVE ANY RIGHT OR REMEDY ARISING OUT OF ANY SUCH REPRESENTATION OR OTHER INFORMATION, AND (II) ANY CLAIMS THAT BUYER MAY HAVE FOR BREACH OF ANY REPRESENTATION OR WARRANTY SHALL, SUBJECT TO ARTICLE IX, BE BASED SOLELY ON THE REPRESENTATIONS AND WARRANTIES SET FORTH IN ARTICLE III AND ARTICLE IV (EACH AS MODIFIED BY THE DISCLOSURE SCHEDULES).

(*id.*, § 5.10).

Section 9.6 Waiver of Other Representations.

(a) NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, IT IS THE EXPRESS INTENT OF EACH PARTY HERETO, AND THE PARTIES HEREBY AGREE, THAT NONE OF SELLER NOR ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES HAS MADE OR IS MAKING ANY REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING ANY IMPLIED REPRESENTATION OR WARRANTY AS TO THE CONDITION, MERCHANTABILITY, USAGE, SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE WITH RESPECT TO THE ACQUIRED INTERESTS, THE ACQUIRED COMPANIES, THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY), OR THE BUSINESS OR ANY PART THEREOF, ***EXCEPT THOSE REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE III AND ARTICLE IV.*** WITHOUT IN ANY WAY LIMITING THE FOREGOING, EXCEPT FOR THOSE REPRESENTATIONS AND WARRANTIES CONTAINED IN ARTICLE III AND

ARTICLE IV, NONE OF SELLER NOR ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES MAKES ANY REPRESENTATION OR WARRANTY REGARDING ANY ENVIRONMENTAL CLAIMS, ENVIRONMENTAL LAWS, HAZARDOUS MATERIALS, OR OTHER ENVIRONMENTAL MATTERS OR WITH RESPECT TO ANY FINANCIAL PROJECTIONS OR FORECASTS RELATING TO THE ACQUIRED INTERESTS, ANY ACQUIRED COMPANY, THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY), OR THE BUSINESS OR ANY PART THEREOF.

(b) EXCEPT AS OTHERWISE EXPRESSLY CONTAINED IN ARTICLE III AND ARTICLE IV, THE ACQUIRED INTERESTS, THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY), AND THE BUSINESS ARE BEING TRANSFERRED THROUGH THE SALE OF THE ACQUIRED INTERESTS "**AS IS, WHERE IS, WITH ALL FAULTS**", AND SELLER, ITS AFFILIATES AND ITS AND THEIR RESPECTIVE REPRESENTATIVES EXPRESSLY DISCLAIM, AND BUYER, ON BEHALF OF ITSELF, ITS AFFILIATES (INCLUDING, FROM AND AFTER THE CLOSING, ANY ACQUIRED COMPANY) AND ITS AND THEIR RESPECTIVE REPRESENTATIVES EXPRESSLY DISCLAIM RELIANCE UPON ANY AND ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, INCLUDING REPRESENTATIONS AND WARRANTIES AS TO THE CONDITION, VALUE OR QUALITY OF THE ACQUIRED INTERESTS, THE ACQUIRED COMPANIES, THE ASSETS OF THE ACQUIRED COMPANIES OF ANY TYPE OR DESCRIPTION (INCLUDING THE FACILITY AND THE REAL PROPERTY), THE BUSINESS OR THE PROSPECTS (FINANCIAL OR OTHERWISE), RISKS AND OTHER INCIDENTS OF THE ACQUIRED INTERESTS, THE ACQUIRED COMPANIES AND THE ASSETS OF THE ACQUIRED COMPANIES (INCLUDING THE FACILITY AND THE REAL PROPERTY), AND THE BUSINESS. WITHOUT LIMITING THE GENERALITY OF THE PRECEDING STATEMENTS, EXCEPT AS SET FORTH IN ARTICLE III AND ARTICLE IV, (I) SELLER MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS, STATUTORY, OR IMPLIED AND (II) SELLER EXPRESSLY DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR ANY REPRESENTATION, WARRANTY, STATEMENT OR INFORMATION MADE OR COMMUNICATED (ORALLY OR IN WRITING) TO BUYER OR ANY OF ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES (INCLUDING ANY OPINION, INFORMATION, PROJECTION OR ADVICE THAT MAY HAVE BEEN PROVIDED TO BUYER BY ANY REPRESENTATIVE OF SELLER OR ANY OF ITS AFFILIATES). EXCEPT AS SET FORTH IN ARTICLE III AND ARTICLE IV, SELLER EXPRESSLY DISCLAIMS ANY REPRESENTATION OR WARRANTY, EXPRESS, STATUTORY OR IMPLIED, AS TO (A) THE PHYSICAL OR OPERATING CAPACITY OF THE FACILITY, (B) ANY ESTIMATES OF THE VALUE OF THE BUSINESS OR FUTURE REVENUE GENERATED BY THE BUSINESS, (C) THE MAINTENANCE, REPAIR, CONDITION, QUALITY, SUITABILITY, DESIGN OR MARKETABILITY OF THE FACILITY OR ANY

OTHER ASSETS OR PROPERTY OF THE ACQUIRED COMPANIES, (D) THE CONTENT, CHARACTER OR NATURE OF ANY DESCRIPTIVE MEMORANDUM, REPORTS, BROCHURES, CHARTS OR STATEMENTS PREPARED BY THIRD PARTIES, OR (E) ANY OTHER MATERIALS OR INFORMATION THAT MAY HAVE BEEN MADE AVAILABLE OR COMMUNICATED TO BUYER OR ITS AFFILIATES OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES IN CONNECTION WITH THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT OR ANY DISCUSSION OR PRESENTATION RELATING THERETO.

(c) BUYER ACKNOWLEDGES THAT THE REPRESENTATIONS AND WARRANTIES SET FORTH IN ARTICLE III AND ARTICLE IV AND IN ANY CERTIFICATE OF SELLER DELIVERED HEREUNDER ARE THOSE ONLY OF SELLER AND NOT OF ANY OTHER PERSON INCLUDING ANY AFFILIATE (INCLUDING ANY ACQUIRED COMPANY) OR REPRESENTATIVE OF SELLER OR ANY OF ITS AFFILIATES. BUYER FURTHER ACKNOWLEDGES, ON BEHALF OF ITSELF AND ITS AFFILIATES, THAT IT HAS NOT RELIED ON ANY REPRESENTATION ***NOT EXPRESSLY SET FORTH IN ARTICLE III AND ARTICLE IV OF THIS AGREEMENT***.

(*id.*, § 9.6; [emphasis added]).

Pursuant to Section 11.12 of the MIPA, the parties agreed that New York law would govern the dispute and that disputes between the parties would be brought in the New York State and Federal courts.

BNP Paribas is the Seller's agent and investment banker and at times communicated with the Buyer on behalf of the Seller. NAES Corporation (**NAES**) is the Plant's operations and maintenance provider.

The Plant and evaporation pond are located on land owned by PABCO Gypsum (**PABCO**) which the Seller leased pursuant to a lease which was scheduled to terminate on December 31, 2023 (NYSCEF Doc. No. 68). PABCO offered to the Seller a Non-Binding Letter of Intent (the **LOI**; NYSCEF Doc. No. 68) to extend the ground lease for a 15 year term commencing on

January 1, 2024 pursuant to which PABCO permitted the Seller to use a portion of the property for the purpose of installing a temporary evaporation pond during the time that certain remediation work was anticipated that it would after 2024 be needed:

> Evaporation Pond Option:
>
> Lessee shall be entitled to utilize real property on the Leased Premises, located in reasonably close proximity to the existing evaporation pond, for the purpose of installing a new temporary evaporation pond to be used until the existing pond is remediated and reconditioned for reuse. All costs and expenses relating to such installation or replacement, or obtaining regulatory approvals required in connection with the closure or remediation of the existing evaporation pond, shall be borne by Lessee. At the termination of the Lease and Agreements, Lessee shall close and remediate the existing evaporation ponds in place in a manner consistent with applicable laws and regulations and the requirements of the existing agreements
>
> (NYSCEF Doc. No. 68).

On May 16, 2019, the Seller conducted a pond survey (the **Pond Survey Report;** NYSCEF Doc. No. 51) which revealed that the Seller was not maintaining an appropriate freeboard and that in fact remediation was needed sooner and also gave information as to the scope of the remediation work:

> Here is our preliminary report, ***we are missing the plan elevation by more than a foot, I don't believe this is settlement*** so I'm not sure that the benchmark is the same as it was when they built the site.
>
> (NYSCEF Doc. No. 67; [emphasis added])

Subsequently, the Buyer was informed that remediation work was needed to be complete by December, 2022 – more than a year before the LOI lease extension was to begin and that as such the LOI provided no notice of the imminency of the need to do the work or the scope of the work so that the Buyer could properly price the work:

> Based on the observations set forth in the inspection report, the following corrective actions are required:
>
> **Long Term (2 Years)**
>
> 1. RESERVOIR – Other: Remove sediment and mineralization to ensure adequate storage for operation. – Photos Attached.
>
> (NYSCEF Doc. No. 44).

The Seller received the Pond Survey Report on May 22, 2019 – *i.e.*, approximately six months before the MIPA was executed **but did not give the Buyer the Pond Survey Report until after the closing** in violation of Section 4.12(b) of the MIPA. Indeed, as alleged, the Seller merely told the Buyer that the groundwater discharge permit was set to expire on June 30, 2019 (NYSCEF Doc. No. 50) and was not yet updated because there was backlog at the Nevada Division of Environmental Protection. In the complaint, discussed below, the Buyer alleges that the Seller breached its obligations under the MIPA and otherwise actively fraudulently concealed this report by telling its staff not to discuss the Pond Survey Report with the Buyer (NYSCEF Doc. No. 45, ¶ 27).

As early as September 27, 2019 (*i.e.*, approximately a month before the MIPA was executed) the Buyer began requesting from the Seller the 2020 projected budget (the **2020 Budget**; NYSCEF Doc. No. 52). The Seller did not however provide the 2020 Budget until December 3, 2019. The 2020 Budget included a new line item current liability charge titled Non-Annual Maintenance (**NAM**) in the amount of $579,700 (the **2020 Budget Report**; NYSCEF Doc. No. 47) that had not appeared in the financial statements for the previous years.

By email, dated December 10, 2019, from the Buyer to the Seller, the Buyer inquired about the new NAM line item charges that had not appeared in the 2017-2019 budgets (NYSCEF Doc. No. 48). Remarkably, and significantly, by email, dated December 10, 2019, the Seller's agent BNP Paribas responded that: "***[t]hese items are actually a mistake on [the Seller's] end and those rows should not have been included in the backup. They were left over rows and do not reflect any view of expenses in 2020***" (*id.; [emphasis added]*). The Seller subsequently provided the Buyer with a revised budget which did not include the new NAM line item current liability charge (NYSCEF Doc. No. 49). However, after the closing, NAES informed the Buyer that on December 2, 2019, the Seller had approved the new NAM line item current liability charge for the 2020 Budget (NYSCEF Doc. No. 52).

By letter, dated March 16, 2020 (NYSCEF Doc. No. 52; the **March 2020 Default Letter**), from the Buyer to the Seller, the Buyer declared a default under the MIPA. To wit, in the March 2020 Default Letter, the Buyer declared a Seller default under Sections 6.1, 6.2(a), 6.2(d), and 4.2 of the MIPA based on Seller's lying to the Buyer that the new NAM line item current liability charge was an error in the 2020 Budget. The Buyer demanded indemnity under Section 9.2 of the MIPA and either an adjustment to the purchase price in respect of the fraudulently concealed $579,700 NAM line item costs or that the Seller refund the same by April 16, 2020 and threatened legal action if the Seller failed to comply.

Separately, with respect to post-closing adjustments contemplated by Section 2.5 of the MIPA, by letter, also dated March 16, 2020 (the **March 2020 Section 2.5 Post-Closing Adjustment Letter;** NYSCEF Doc. No. 55), from the Buyer to the Seller, the Buyer demanded an adjustment

of the purchase price in the amount of $1,987,225.00 based on charges to be incurred in connection with the Seller's failure to maintain the two-foot freeboard as required by its permit creating a contingent liability in the amount of $1,987,225.00 which would have been disclosed to the Buyer had the Seller sent, and not, as pled, actively concealed the Pond Survey Report.

By letter, dated April 6, 2020 (NYSCEF Doc. No. 53; the **Seller's NAM Response**), from the Seller to the Buyer, the Seller responded to the March 2020 Default Letter stating (i) the Buyer suffered no indemnifiable damages because the Seller was not obligated to provide the Buyer with the budget before the execution of the MIPA, (ii) the Buyer was required to close after the MIPA was executed regardless of what the budget said, (iii) that the Seller waived all representations and warranties pursuant to Section 4.20, (iv) that the Buyer represents in Section 5.10 that they were given proper access to all the books and records, (v) pursuant to Section 9.6 the Seller disclaims any representations and warranties, and (vi) the Buyer might be in breach of Section 5.10 by sending the demand letter.

By letter, also dated April 6, 2020 (NYSCEF Doc. No. 56; the **Seller's Post-Closing Adjustment Response**), from the Seller to the Buyer, the Seller responded that (i) Net Working Capital only includes current liabilities, which is limited to expenditures likely to occur within the year, that it is unlikely that the pond remediation would be occurring within the year and therefore, it should not be included in the Net Working Capital for the reconciliation process, (ii) the remediation does not meet the contingent liability standard to be a contingent liability, (iii) the Seller was not obligated to provide the Pond Survey Report because it was not material or final, pursuant to Section 4.12(b) of the MIPA, (iv) that $1,987,255 is an excessive amount for the pond remediation because there are other methods for rectifying the freeboard height issue,

and (v) the Buyer knew the pond would need to be remediated within the next few years based on the LOI.

By letter, dated April 16, 2020 (NYSCEF Doc. No. 54), from the Buyer to the Seller, the Buyer responded to the Seller NAM Response Letter stating (i) approval of the NAM cost was a violation of Section 6.1(l), (ii) the Seller provided the Buyer with a different version of the budget in violation of 6.2(a), (iii) the budget that was provided to NAES had to be provided to the Buyer pursuant to Section 6.2(d), (iv) that the Seller's argument that the Buyer can forgo the NAM costs would cause the Buyer to be in breach of one of its contracts with NAES and therefore, the Seller has violated Section 4.2, (v) the Buyer relied on the budget that the Seller provided, (vi) the Seller was not permitted to provide the Buyer with inaccurate documents, and (vii) the Seller has until April 27, 2020 to advise the Buyer as to whether it will comply with the Buyer's demand or else the Buyer will pursue legal action.

By letter, also dated April 16, 2020 (NYSCEF Doc. No. 57; the **April 2020 Post-Closing Adjustment Response**), the Buyer responded to the Seller's Post-Closing Response Letter and declared a default under Section 4.12 of the MIPA and otherwise indicated that inasmuch as the parties disagreed on the amount of the contingent liability, a neutral auditor should be appointed to reconcile the proper amount pursuant to Section 2.5(c) of the MIPA. The Buyer also indicated in the April 2020 Post-Closing Adjustment Response that the reconciliation process pursuant to Section 2.5 of the pond remediation costs may not be appropriate as an adjustment and that it may be that legal action is necessary to address these costs associated with the Seller's active concealment of the failure to maintain the appropriate freeboard.

By email, dated April 20, 2020 (NYSCEF Doc. No. 58), from the Seller to the Buyer, the Seller further rejected the Buyer's position by stating that the Seller (i) does not intend to pay for the NAM costs, (ii) considers the 10-day resolution period, pursuant to Section 2.5(c) of the MIPA to have begun with the Seller's Post-Closing Adjustment Response letter on April 6, and therefore, it had expired, (iii) that if the parties continue to be at an impasse, they recommend Ernst and Young as the neutral auditor (NYSCEF Doc. No. 58).

By letter (NYSCEF Doc. No. 44), dated December 10, 2020, from the Department of Conservation And Natural Resources of the State of Nevada (the **DECNR**) to the Plant Manager, Chris Benkman, the DECNR informed Mr. Benkman that, based on their December 1, 2020 inspection, the dam was in "fair" condition but that the removal of sediment and mineralization would be necessary over the next two years.

The Buyer sued the Seller on August 18, 2020 (NYSCEF Doc. No. 1). The court dismissed the complaint without prejudice. On June 8, 2021, the Buyer filed an amended complaint (NYSCEF Doc. No. 45) alleging the following causes of action: (first) Breach of Contract with respect to the new NAM line item current liability charges, (second) Breach of Contract with respect to the Pond Remediation Costs, (third) Fraud with respect to the new NAM line item current liability charges, (fourth) Fraudulent Concealment with respect to the new NAM line item current liability charges, (fifth) Fraud with respect to the Pond Remediation costs, (sixth) Fraudulent Concealment with respect to the Pond Remediation costs, and (seventh) Unjust Enrichment.

On July 6, 2021, the Seller filed a motion to dismiss the Buyer's first amended complaint (NYSCEF Doc. No. 62) pursuant to CPLR 3211(a)(1) and (7) arguing that (i) the Buyer is foreclosed from bringing this action because the Seller did not properly avail itself of the Section 2.5 post-closing adjustment procedure, (ii) lying about the NAM charge was not a default under the MIPA because it was not necessary to *understand the business* pursuant to the language of Section 6.2 of the MIPA, (iii) because the LOI indicated that a lease needed to be extended with PABCO the Buyer knew that the pond remediation work was necessary notwithstanding its failure to deliver the Pond Survey Report and in any event the pond is in compliance with its permit, and (iv) the Buyer expressly waived its rights to rely on Seller representations pursuant to the MIPA. The Seller's arguments fail.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the facts alleged are accepted as true and the pleadings are liberally construed to provide plaintiff with every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court will consider whether as alleged, the facts fit a cognizable legal theory (*id.*). A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

I. Breach of Contract (first cause of action) Not Dismissed – Concealed NAM Line Item

To demonstrate a claim for breach of contract, plaintiff must establish (i) there was a binding contract, (ii) plaintiff performed, (iii) defendant failed to perform, and (iv) plaintiff suffered

damages (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013]). Contractual provisions providing for an alternative process of dispute resolution must be express and unequivocal to constitute a waiver of a party's right to their day in court (*Mario & Di Bono Plastering Co. v Rivergate Corp.*, 140 AD2d 164, 166 [1st Dept 1988]).

Affording the Buyer every favorable benefit of their pleadings, the well pled complaint sets forth a claim sounding in breach of contract. As discussed above, it is undisputed that the representations in Section 4.4 of the MIPA were not true, correct and complete at the time of the closing. The Seller's fraudulent concealment of the new line item NAM current liability and the Pond Survey Report prevented the Buyer from doing its complete analysis under the MIPA (which the Buyer had a right to do particularly given the limitation on reliance of the Seller's representations) and robbed the Buyer of its contractual right to walk away from the transaction. Additionally, pursuant to Section 6.1(l) of the MIPA, the Seller's approval of the new line item NAM current liability was not permitted without the Buyer's consent.[1] Further, the Seller's actions may be a violation of the language of Section 6.2(d) of the MIPA as well for failure to provide the 2020 Budget Report prior to the closing. Despite Seller's contention Section 2.5 of the MIPA does not bar this lawsuit or these charges because Section 2.5 of the MIPA does not provide that it is the exclusive dispute resolution section for fraudulently concealed charges or that the Buyer waived its right to sue (*Mario & Di Bono Plastering Co.*, 140 A.D.2d at 166). Accordingly, dismissal must be denied.

[1] Contrary to the Seller's contentions, repairs can be capital expenditures if they are performed for the purposes of rehabilitating, modernizing or improving a property (*Gibson & Assocs. v Comm'r*, 136 TC 195, 233 [2011]).

II. Breach of Contract (second cause of action) Not Dismissed – Pond Survey Report

The well-pled complaint adequately alleges that the Seller breached Section 4.12(b) of the MIPA by failing to make available the Pond Survey Report. The Seller's argument that the Pond Survey Report was not material or final and that therefore the Seller is entitled to dismissal fails. The fact that the Buyer estimates the cost of remediation to be $2 million and that the Seller disputes that this is proper amount highlights why this disclosure was material under the circumstances. The Buyer was entitled to all available information and the Seller's breach of its obligation to deliver this information and the Seller's representation that it had in fact made available all information under Article IV particularly given that the Seller was not making other representations in the MIPA. That the inspection indicates that the permit was not violated does not change the result. Nor does the LOI provide sufficient information as to the imminent need for the remediation work or the scope of the work. As discussed above, the LOI addressed a lease extension commencing in 2024. The work is needed much sooner than that. Pursuant to Section 4.12(b) of the MIPA, the parties agreed that the Buyer was to be given all information so that it could make its own determination and conduct its own due diligence. The Seller could not take that away. Additionally, for the reasons set forth above, the parties discussed the Section 2.5 reconciliation process did not waive the Buyer's right to pursue legal action (*Mario & Di Bono Plastering Co.*, 140 A.D.2d at 166). Accordingly, the branch of the Seller's motion seeking to dismiss the Buyer's second cause of action is denied.

III. Fraud (third cause of action) and Fraudulent Concealment (fourth cause of action) Not Dismissed – NAM Line Item

To plead a prima facie case of fraud, the plaintiff must allege that the defendant (i) made a material misrepresentation of fact (ii) the misrepresentation was made intentionally to defraud or

mislead, (iii) the misrepresentation was reasonably relied upon, and as a result (iv) plaintiff suffered damage from the reliance (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586 [1st Dept 2009]). A claim for fraudulent concealment requires, in addition to the fraud elements, that the defendant had a duty to disclose (*id.*). A disclaimer within a contract cannot prevent justifiable reliance on a seller's misrepresentation unless (i) the disclaimer was specific about the type of facts that would be misrepresented or undisclosed and (ii) the facts are not such that they are peculiarly within the knowledge of the seller (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). As discussed above, the Seller made at least two material misrepresentations upon which the Buyer is alleged to have relied to their detriment (with respect to information that was in Seller's unique possession) – *i.e.*, the false statement that the new NAM line item charge should not have been in the budget and also the replacement budget removing such charge inappropriately. This misrepresentation denied the Buyer its rights under Section 4.4 and 8.2 of the MIPA. As such, dismissal is inappropriate.

IV. Fraud (fifth cause of action) and Fraudulent Concealment (sixth cause of action) Not Dismissed – Pond Remediation

As discussed above, as pled, the Seller concealed the Pond Survey Report which would have disclosed to the Buyer sufficient information to understand that approximately $2 million of remediation costs were imminent. The Seller had this information months before the MIPA was even executed. The failure to disclose this report and the allegations that the Plant employees were told not to discuss the Pond Survey Report is more than sufficient to make out a claim of fraud and fraudulent concealment (*IDT Corp*, 63 AD3d at 586). The Seller's arguments that the LOI provided the Buyer with proper notice that the pond would need to be remediated fails or as

to the costs of such remediation fails at this stage of the pleadings. On its face, the non-binding LOI indicates that the Seller and NAES were bargaining for an extension of the lease commencing more than a year after the work needed to be completed. It simply does not utterly refute the claim by indicating the imminent need for remediation or the costs of such remediation. Accordingly, the Seller's motion must be denied.

V. Unjust Enrichment (seventh cause of action) Not Dismissed

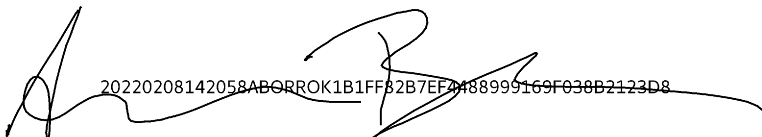
The well pled complaint also properly asserts a claim for unjust enrichment. To assert a claim for unjust enrichment the plaintiff must demonstrate (i) defendant was enriched, (ii) at plaintiff's expense, and (iii) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] *quoting Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]). As alleged, the law requires that Seller not be permitted to improperly benefit from its lying about the new line item NAM charge, the false revised budget that it submitted or the fraudulent concealment of the Pond Survey Report and the imminent remediation work. The Seller disputes whether these charges are proper Section 2.5 adjustments and whether the Seller breached the MIPA generally and as such, at this stage it cannot be said to be a duplicative claim. The claim as pled can be pled in the alternative at this stage of litigation and is not duplicative of the breach of contract claim requiring dismissal (*Tutor Perini Bldg. Corp. v Port Auth. of N.Y. & N.J.*, 191 AD3d 569, 571 [1st Dept 2021]). As pled, this claim is "off the contract." Finally, for the avoidance of doubt, it does not matter that the Buyer asserted the defaults and discussed conciliation pursuant to Section 2.5 of the MIPA as the provision is not either an exclusive dispute resolution

provision or a pre-condition to bringing the lawsuit. Accordingly the branch of the Seller's motion to dismiss seeking to dismiss the Buyer's seventh cause of action is denied.

Accordingly, it is

ORDERED that the Seller's motion to dismiss is denied; and it is further

ORDERED that parties shall appear for a preliminary conference on February 17, 2022 at 11:30 AM.



2/8/2022				ANDREW BORROK, J.S.C.		
DATE						
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[x] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE