IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SPINEX TEC, LLC,

Plaintiff,

v.

AMENDIA, INC., OMNI ACQUISITIONS, INC., and OMNI SURGICAL, LLC, d/b/a SPINE360,

Defendants.

AMENDIA, INC., and OMNI ACQUISITIONS, INC.,

Third Party Plaintiffs,

v.

OMAR F. JIMENEZ,

Third Party Defendant.

CIVIL ACTION NO. 1:15-CV-0647-LMM

ORDER

This case comes before the Court on Defendants' Motion for Summary Judgment [25], Defendants' Motion for Joinder [40], Plaintiff's Motion for Partial Summary Judgment [26], Plaintiff's Motion to Amend [44], Third Party Defendant's Motion to Dismiss [33], and Plaintiff's Motion for Leave to File

Supplemental Briefing [52]. After due consideration, the Court enters the following Order:

I. BACKGROUND[1]

On November 1, 2013, Plaintiff entered into an intellectual property licensing agreement (the "Agreement") with Defendant Spine360. Dkt. No. [11] ¶ 7. Pursuant to the agreement, Plaintiff granted Spine360 exclusive license "to make, have made, use, offer to sell, sell, offer to import, and import the Licensed Products." Dkt. No. [7] at 5. Additionally, Plaintiff granted Spine360 the ability to practice the methods described and claimed in the Exclusive Licensed Patents and Exclusive Licensor Know-how. Id. The Exclusive Licensor Know-how includes "all inventions, improvements, works of authorship, copyrights, databases, designs, trade secrets, confidential information and other proprietary rights that are used in connection with or embody the Licensed Patents." Id. at 4.

Under the Agreement, Plaintiff retained all rights, title, and interest in the Licensed Patents and Licensor Know-how subject to the licenses granted by the Agreement. Id. at 7. Once Spine360 paid the License Fees in full, it would own "its inventions, works and other intellectual property rights . . . based on (in whole or in party) [the] Exclusive Licensed Patents and Exclusive Licensor Know-how." Id. However, if the Agreement were terminated prior to the full payment of the License Fee or if Spine360 committed a material breach, it would lose all rights, title and interest in the Licensed Patents and Exclusive Licensor Know-

[1] All facts are undisputed unless otherwise indicated.

how. Id. Moreover, the Agreement states that neither party was permitted to assign their interest in the Agreement without the written consent of the other party. Id. at 19-20.

As consideration for the Agreement, Spine360 agreed to pay Plaintiff $4,101,481.61 in multiple installments over the life of the Agreement. Id. at 8. The first installment of $226,481.61 was due upon the execution of the Agreement. Id. Within 30 days of the execution, a second installment of $125,000 became due. Id. Thereafter, Spine360 was to pay 15 quarterly installments in the amount of $250,000 each. Id. In addition to the $4,101,481.61, Spine360 was to pay Plaintiff royalties equal to seven percent of the net revenue generated from sales of the Licensed Products. Id. at 9.

On March 31, 2014, Defendant Amendia and Defendant Omni Acquisition entered into an Asset Purchase Agreement (the "APA") with Spine360 whereby they acquired substantially all of Spine360's assets. Dkt. No. [25-8] at 2. Initially, Defendants intended to keep all of Spine360's intellectual property agreements in place. Id. As a result, Amendia and Omni Acquisition attempted to assume Spine360's role in the Agreement.[2] Id. Defendants assert that they sent Plaintiff a Consent Form asking for its consent to the assignment which Plaintiff never

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[2] Plaintiff objects to this statement as a legal conclusion. Whether Amendia and Omni Acqusition succeeded in assuming the Agreement would be a legal conclusion. However, the statement does not say they succeeded. Instead it states they attempted to assume the Agreement. Whether Defendants attempted to assume the Agreement is an undisputed fact based on the record evidence. Id. ("As part of the [APA], the [Agreement] between SpineX Tec, LLC . . . and Omni shall be assigned and assumed by Amendia.").

signed. Dkt. No. [25-5] at 43-45. Plaintiff contends, however, that it never received the Consent Form and only found out about it during this litigation.

Nonetheless, after Defendants closed on the APA, Amendia and Omni Acqusition began working with Third Party Defendant Jimenez, principal of Plaintiff, to bring the Licensed Products to market. Dkt. No. [25-6] ¶ 22. Omni Acquisition continued to make fee installment payments pursuant to the Agreement, totaling $500,000, and legal fees totaling $26,594.51. Dkt. No. [25-3] ¶¶ 32-33, 35. Importantly, both Plaintiff and Defendants agree that, while Plaintiff worked with Amendia on marketing the Licensed Products, Plaintiff never expressly agreed to the assignment and currently denies consent to the assignment. Dkt. No. [12] at 8 ("Moreover, [Plaintiff] has not consented and does not consent to any assignment of the License Agreement between [Spine360] and Omni Acquisition.").[3]

On November 25, 2014, Omni Acquisition notified Plaintiff that Omni Acquisition was terminating the Agreement. Dkt. No. [11] ¶¶ 29-30, 32.[4] In the notice, Omni Acqusition informed Plaintiff that it believed "the Licensed Products are invalid, declare[d] improper inventorship, and are encumbered by third party claims." Dkt. No. [11-7] at 2.

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[3] Plaintiff has a filed supplemental briefing in which it explains it consented in the past but has rescinded its consent until Defendants cure their alleged breach. Dkt. No. [52].

[4] While the Notice of Termination sent by Omni Acquisition was undated, Plaintiff alleges, and Defendants do not deny, that it received the Notice on November 25, 2014. Id.

Plaintiff responded to the notice on December 15, 2014. Dkt. No. [11-8]. It accused Omni Acqusition and Amendia of "trying to avoid the unambiguous financial obligations owed" to Plaintiff under the Agreement. Id. at 2. According to Plaintiff's response, the Agreement only allowed for termination if Plaintiff had materially breached and was given notice and a chance to cure. Id. at 3. Plaintiff asserted that it had not breached, nor was it given notice and a chance to cure. Id.

On March 4, 2015, Plaintiff brought the instant action. Dkt No. [1]. In its Amended Complaint, Plaintiff asserts (1) breach of contract; (2) unjust enrichment; (3) alter ego liability; (4) tortious interference; and (5) attorney's fees/punitive damages. Id. Defendants filed a Motion to Dismiss which the Court granted as to tortious interference and punitive damages but denied as to breach of contract, unjust enrichment, alter ego liability, and attorney's fees. See Dkt. No. [23].

Thereafter, Defendants filed their Counterclaim/Third Party Complaint based on Federal Rule of Civil Procedure 14. Dkt. No. [24]. In that Complaint, Defendants allege one count for money had and received against Plaintiff and Third Party Defendant Jimenez. Id. Specifically, Defendants allege that Plaintiff and Jimenez, as Plaintiff's alter ego, were unjustly enriched when they accepted payment by Amendia without consenting to the assignment. Id. Defendants have asked the Court to pierce Plaintiff's corporate veil so as to hold Jimenez personally liable for Plaintiff's alleged debts.

After filing the Third Party Complaint, Defendants filed a Motion for Summary Judgment as to all remaining claims asserted by Plaintiff. Dkt. No. [25]. Plaintiff, in turn, filed a Motion for Partial Summary Judgment as to its claims for breach of contract and unjust enrichment. Dkt. No. [26]. Third Party Defendant Jimenez filed his Motion to Dismiss Defendants' Counterclaim/Third Party Complaint. Dkt. No. [33]. Specifically, the Motion argued that Defendants could not use Rule 14 to implead Jimenez because Jimenez would not be "liable to [Defendants] for all or part of" the claims asserted against them. FED. R. CIV. P. 14(a)(1).

Defendants recognized that they could not implead Jimenez under Rule 14. Consequently, they filed a Motion for Joinder of Jimenez as Defendant to the Counterclaim under Rule 19 in an attempt to cure any deficiencies.[5] Dkt. No. [40]. Plaintiff then filed a Second Motion to Amend Complaint to include a claim for fraudulent conveyance against Amendia and Omni Acquisition. Dkt. No. [44].

II. DISCUSSION

The Court will first discuss Defendants' Motion for Joinder as it determines whether Plaintiffs' Motion to Dismiss is moot. After that discussion, the Court

[5] In his Motion to Dismiss, Jimenez also argues that, aside from the procedural defects, the Court should dismiss Defendants' counterclaim/third party complaint for failure to state a claim. Therefore, even though Defendants have attempted to cure the procedural defects, Jimenez contends the Motion to Dismiss is not moot because there remains an issue as to whether Defendants have stated a valid claim.

will analyze each party's Motion for Summary Judgment and Plaintiff's Motion to Amend.

a. Motion for Joinder

i. *Legal Standard*

As stated earlier, Defendants filed a counterclaim against Plaintiff for money had and received. In asserting that counterclaim, Defendants have attempted to join Dr. Jimenez pursuant to Rule 13(h) and Rule 19. Rule 13(h) states, "Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim." Under Rule 19, courts must first decide if an absent party is required under subsection (a). Rule 19(a) dictates:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action.

FED. R. CIV. P. 19(a)(1).

Second, if joinder of the required party is not feasible, the court must consider if, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." FED. R. CIV. P. 19(b). However, Plaintiff does not contest that joinder of Jimenez would be unfeasible.

ii. *Analysis*

Defendants assert that Jimenez is a necessary party to their counterclaim because, without him, "this Court cannot accord complete relief among the existing parties." Dkt. No. [40] ¶ 6. Specifically, Defendants assert that Plaintiff is insolvent such that it would be unable to pay any judgment rendered in this matter. Dkt. No. [24] ¶ 36. As a result, they argue, Jimenez is necessary to accord complete relief.

While claimants cannot usually hold a member of an LLC liable for the personal debts of the LLC, a claimant may do so if it can show alter ego liability. Ralls Corp. v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303, 1328 (N.D. Ga. 2014) (quoting Baillie Lumber Co. v. Thompson, 612 S.E.2d 296, 299 (Ga. 2005) ("Georgia Courts will disregard the corporate form if 'a corporation is a mere alter ego or business conduit of a person' and the corporate form was 'used as a subterfuge so that to observe it would work an injustice.'")). To justify disregarding a corporate entity, "[c]ourts typically look at whether the principals commingled the assets of the company with their personal assets or otherwise confused the assets, records and liabilities of the individual and the corporation." In re Geer, 522 B.R. 365, 392 (Bankr. N.D. Ga. 2014). Additionally,"[p]iercing the corporate veil . . . is justified where the owner treats the company and himself as one unit . . . or where the owner uses corporate funds for personal expenses." Id. (citing Scott Bros., Inc. v. Warren, 582 S.E.2d 224 (2003)).

According to Defendants, Jimenez disregarded Plaintiff's corporate form and used Plaintiff as a mere instrumentality for the transaction of his own affairs. Dkt No. [24] ¶ 30. To support this allegation, Defendants assert that Jimenez, as the sole member of Plaintiff, (1) commingles Plaintiff's assets with his own personal assets, (2) confuses Plaintiff's assets with his own personal assets, (3) uses Plaintiff's funds for personal expenses, and (4) uses his personal address as Plaintiff's corporate address. Id. ¶¶ 27-28, 33-35. As a result, Defendants argue, there is now such unity of interest and ownership between Jimenez and Plaintiff that their separate personalities no longer exist. Id. ¶ 36.

Plaintiff and Jimenez argue that the Court should deny joinder for two reasons. First, Plaintiff argues Defendants' Motion is untimely. Plaintiff points to Applewhite v. Reichhold Chems., Inc., 67 F.3d 571 (5th Cir. 1995), where the court determined an action could be severed "if it is misjoined or might otherwise cause delay or prejudice." Id. at 574. Plaintiff asserts that allowing joinder at this stage in the litigation would cause undue delay or prejudice. However, Applewhite dealt with *permissive* joinder under Rule 20. See id. Defendants asserted *mandatory* joinder under Rule 19. See Dkt. No. [40].

Even if timeliness served as a reason to deny Defendants' Motion, Defendants correctly argue that they attempted to join Jimenez when they answered Plaintiff's Complaint on November 4, 2015, shortly before the parties filed their Motions for Summary Judgment. Dkt. No. [24] at 21. The Motion for Joinder, filed some months later, was simply to correct a defect in their initial filing. Dkt. No. [40]. Because Plaintiff was already on notice, the Court does not find that Defendants delayed in joining Jimenez as to cause prejudice to Plaintiff.

Plaintiff next argues that Defendants have not shown Jimenez is necessary to accord complete relief. According to Plaintiff, Defendants' alter ego allegations are merely threadbare recitations of the factors cited by Georgia courts in deciding whether to pierce the corporate veil.

In support of this argument, Plaintiff cites North American Clearing, Inc. v. Brokerage Computer Systems, Inc., 666 F. Supp. 2d 1299 (M.D. Fla. 2009). In that case, the court dismissed the plaintiff's claim for alter ego liability during summary judgment because the allegations were thin and the only evidence came from an affiant who lacked personal knowledge of the corporation. Id. at 1312.

However, in this case, the parties have not reached the summary judgment stage as to Defendants' counterclaim. Instead, the Court determines indispensability under Rule 19(a) "based upon the allegations of the complaint and the affidavits and other proofs adduced in contradiction or support thereof." See Estes v. Shell Oil Co., 234 F.2d 847, 849-50 (5th Cir. 1956) (denying a motion under Rule 12(b)(7) based on failure to join party under Rule 19(a) because the complaint and affidavits did not show indispensability).[6] The Court takes Defendants' allegations as true and finds they are sufficient to state a claim for alter ego liability. As a result, Defendants' Motion to Join Jimenez is **GRANTED**.

b. Motion to Dismiss

i. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to

[6] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

relief." FED. R. CIV. P. 8(a)(2). While this pleading standard does not require "detailed factual allegations," the Supreme Court has held that "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id.

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999) (citing Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998)). However, the same does not apply to legal conclusion set forth in the complaint. Iqbal, 556 U.S. at 678.

ii. *Analysis*

Jimenez asks the Court to dismiss Defendants' counterclaim for two reasons. First, Jimenez argues that Defendants' third party complaint is procedurally defunct because it was brought under Federal Rule 14 rather than 19 or 20. However, as discussed above, Defendants have cured that deficiency by filing their Motion for Joinder under Rule 19. Dkt. No. [40].

Jimenez next argues that Defendants' counterclaim for money had and received fails to state a claim upon which relief may be granted. According to Jimenez, "Defendants have asserted a single claim against SpineX and Dr. Jimenez: Money Had and Received." Dkt. No. [33-1] at 8. However, Jimenez argues, the allegations explicitly state "that the 'money paid' in this instance was paid to SpineX and *not* Dr. Jimenez." Id. (emphasis in original). Jimenez claims that, any other allegations against him are merely "threadbare" and insufficient to state a claim. Id. at 8-9.

However, Jimenez ignores the fact that Defendants bring the claim against him using alter ego liability such that the allegations against SpineX are imputed to him. Ralls Corp., 27 F. Supp. 3d at 1328. Because the Court has already determined that Defendants have properly alleged alter ego liability, the more pertinent question is whether Defendants properly alleged money had and received as against SpineX.[7]

[7] "Under the common law doctrine of money had and received, recovery is authorized against one who holds unspecified sums of money of another which he ought in equity and good conscience to refund." Taylor v. Powertel, 551 S.E.2d 765, 770 (Ga. Ct. App. 2001) (citing O.C.G.A. § 23-2-23(b)). The theory permits a party to recover "a payment mistakenly made when that mistake was caused by his lack of diligence or his negligence in ascertaining the true facts and the other party would not be prejudiced by refunding the payment-subject to a weighing of the equities between the parties by the trier of fact." Gulf Life Ins. Co. v. Folsom, 349 S.E.2d 368, 373 (Ga. 1986). "The elements of such action are: a person has received money of the other that in equity and good conscience he should not be

Importantly, Jimenez does not explicitly attack Defendants' allegations against SpineX. Instead, he only asserts that the direct allegations made against him are insufficient. Because Jimenez fails to properly challenge Defendants' claim for money had and received, and because Defendants bring this claim against him under alter ego liability, the Court must **DENY** his Motion to Dismiss.

c. Summary Judgment

i. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

A factual dispute is genuine if the evidence would allow a reasonable jury to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (citing Anderson, 477 U.S. at 248)).

The moving party bears the initial burden of showing the Court, by reference to materials in the record, that there is no genuine dispute as to any

permitted to keep; demand for repayment has been made; and the demand was refused." Taylor, 551 S.E.2d at 770 (citing Fain v. Neal, 103 S.E.2d 497, 499 (Ga. Ct. App. 1958)).

material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the non-moving party's case." Celotex Corp., 477 U.S. at 325. In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996) (citing Augusta Iron and Steel Works, Inc. v. Emp'rs Ins. of Wausau, 835 F.2d 855, 856 (11th Cir. 1988)).

Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the non-moving party. Id. (citations omitted). All reasonable doubts, however, are resolved in the favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

ii. Analysis

Both Plaintiff and Defendants Amendia and Omni Acquisitions have brought a motion for summary judgment. Plaintiff asks for partial summary judgment as to its breach of contract claim and unjust enrichment while Amendia and Omni Acquisitions ask for summary judgment as to all claims brought against them. The Court will go through each claim and determine if summary judgment is proper, and if so, for which party.

1. Breach of Contract—Spine360

Plaintiff contends it is entitled to summary judgment for its breach of contract claim against Spine360 because Spine360 impermissibly breached the Agreement when it failed to pay the remaining $3,000,000 owed. According to Plaintiff, Spine360 has not attempted to assert any valid basis for breaching the Agreement.[8]

To succeed on a breach of contract claim, a party must demonstrate a breach of the contract and resulting damages to the party who has the right to complain about the breached contract. Norton v. Budget Rent A Car Sys., Inc., 705 S.E.2d 305, 306 (Ga. Ct. App. 2010). A breach occurs "if a contracting party repudiates or renounces liability under the contract; fails to perform the engagement as specified in the contract; or does some act that renders performance impossible." UWork.com, Inc. v. Paragon Techs., Inc., 740 S.E.2d 887, 893 (Ga. Ct. App. 2013).

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[8] Plaintiff also insists that Spine360 has yet to terminate the Agreement. However, Plaintiff acknowledges that Omni Acquisition attempted to terminate the Agreement in its November 2014 letter. Nonetheless, according to Plaintiff, this was insufficient because it was done by a non-party to the Agreement. However, the Court finds that Plaintiff is on notice that Spine360 intended to terminate the Agreement when it stopped making scheduled payments and has made repeated representations that it intends to terminate the Agreement through this very litigation.

Defendants assert "failure of consideration" as Spine360's affirmative defense. Dkt. No. [8] at 1. More specifically, Defendants contend that"[t]he undisputed facts in the record . . . demonstrate that the Licensed Technology cannot be practiced without the significant risk of a patent infringement lawsuit." Dkt. No. [34] at 4. Therefore, according to Defendants, Spine360 did not receive adequate consideration such that the Agreement is void and any subsequent "breach" is not actionable.

Plaintiff contends that, even if Defendants could challenge the validity of the Licensed Patents, such a challenge is irrelevant because the Agreement contains a disclaimer of validity. According to Plaintiff, under Georgia law, such disclaimers in a patent license prevent defendants from asserting patent invalidity as a defense to breach of contract.[9]

As support, Plaintiff points to Meadow River Lumber Co. v. University of Georgia Research Found., 503 S.E.2d 655 (Ga. Ct. App 1998). In that case, licensees sued a patent licensor asserting failure of consideration because the

[9] Both parties appear to agree that state law dictates whether a patent license is void for lack of consideration even if they disagree about which law (federal or state) applies to the question of assignability—discussed *infra*. This is because a patent license, on its own, is merely a contract outside the realm of the patent act such that courts must utilize state law when engaging in contract construction. Meadow River Lumber Co. v. Univ. of Ga. Research Found., 503 S.E.2d 655 (Ga. Ct. App. 1998). It is only when the state law begins to contradict the federal patent policy that federal law applies. See *infra* Part C.*ii*.2.A. In this case, neither party has argued that, as to the issue of consideration, state law contradicts federal patent policy such that federal law should apply. Nor does the Court find that to be the case. As such, the Court applies Georgia law to the question of failure of consideration.

patents contemplated in their agreement were invalid under federal law. Id. at 657. Importantly, the agreement in question contained a disclaimer of validity similar to the one at issue here. Id.

The Georgia court held that the licensees did not bargain for the warranty of patent validity. Id. at 659. Instead, the license agreement was "but a promise by one having an interest in [the] patent to forbear from suing one who could commit what would be, but for the license, an infringement of that interest." Id. (quoting Rosenberg, Patent Law Fundamentals, Vol. 3, § 16.01[1], p. 16–13). Because validity of the patent was not part of the consideration, there could be "no claim for failure of consideration as a matter of law." Id.

Defendants counter that several Georgia courts have found failure of consideration when the patent is deemed worthless. See e.g. Smith v. Hightower, 76 Ga. 629 (1889); Wells v. Gress, 45 S.E. 418 (Ga. 1903). However, those cases are distinguishable from this case. In Smith there is no discussion as to whether the parties included a disclaimer of validity in their patent agreement. Smith, 76 Ga. at 630. Instead, the facts show that the agreement was made solely through the exchange of a promissory note. Id. In Wells, the court found that, regardless of whether the parties included a warranty of validity, Georgia law imposes an implied warranty of validity. Wells, 45 S.E. at 419.

However, unlike in Wells, Plaintiff and Spine360 explicitly agreed to disclaim any warranty of validity, implied or otherwise. Dkt. No. [7] at 18. See O.C.G.A. § 11-2-316 (listing ways in which a party may disclaim implied warranties). Because the parties did not bargain for the validity of the Licensed Patents, the Court finds there can be no failure of consideration defense.

Defendants fail to challenge any other element of Plaintiff's claim for breach of contract or provide any other argument as to why Plaintiff's Motion should not be granted against Spine360. Therefore, the Court **GRANTS** Plaintiff's Motion for Summary Judgment for breach of contract as to Spine360.

2. Breach of Contract—Amendia and Omni Acquisition

As to the remaining Defendants, Plaintiff contends that, under Georgia law, Amendia and Omni Acquisition assumed the Agreement through their actions and subsequently breached the Agreement. Defendants counter that federal law, not Georgia law, applies and prevents the free assignability of patent licenses such that they cannot be liable for breach of contract. In the alternative, Plaintiffs contend that, even if federal law prevents free assignability, Omni Acquisition and Amendia assumed the Agreement as a matter of law through *de facto* merger.

A. Federal or State Law

As support for their contention that federal law applies to the question of assignability, Defendants cite Board of Trustees of Leland Stanford Jr. University v. Roche Molecular Systems, Inc., No. C-05-04158, 2007 WL 608009, *19 (N.D. Cal. Feb. 23, 2007). That court held, "[t]he assignability of patent licenses is governed by federal law, even where the contract at issue would generally be governed by state law." Id. (citing In re CFLC, Inc., 89 F.3d 673, 679 (9th Cir.

1996)). Defendants also cite two other circuits which have come to the same conclusion. PPG Indus., Inc. v. Guardian Indus. Corp., 597 F.2d 1090, 1093 (6th Cir. 1979) ("Questions with respect to the assignability of a patent license are controlled by federal law."); Unarco Indus., Inc. v. Kelley Co., 465 F.2d 1303, 1306 (7th Cir. 1972) (same).

Defendants further argue that, under federal law, patent licenses cannot be assumed or assigned without express agreement by the licensor. As support, Defendants rely on CFLC, where the Ninth Circuit held that patent licenses are not freely assignable. CFLC, 89 F.3d at 679 (finding that free assignability of patent licenses undermines the goal of patent law to reward invention "because a party seeking to use the patented invention could . . . seek an assignment of an existing patent license from a licensee.").

Plaintiff counters that Georgia law applies, and allows assumption by implication. As support, Plaintiff cites Beghin-Say International, Inc. v. Ole-Bendt Rasmussen, 733 F.2d 1568, 1570-71 (Fed. Cir. 1984), which applied state law to a patent agreement. However, that case is distinguishable because the court in Beghin-Say was dealing with issues of contract interpretation. Id. at 1571 ("Unlike this suit, Crown Die was not an action involving interpretation of a contract."). Here, however, there is no dispute as to whether the Agreement called for express consent before assignment. Instead, the issue is whether, as a matter of law, a licensee may freely assign a patent license.[10]

While the Eleventh Circuit has not directly dealt with this issue, the Court agrees with the Sixth, Seventh, and Ninth Circuit that "[q]uestions with respect to assignability of a patent license are controlled by federal law" and that federal law prohibits free assignability. PPG Indus., 597 F.2d at 1093 (citing Unarco Indus., 465 F.2d at 1306). Specifically, the Court agrees with the reasoning of the Ninth Circuit in CFLC when it held that "[t]he construction of a patent license is generally a matter of state contract law . . . except where state law 'would be inconsistent with the aims of federal patent policy.'" CFLC, 89 F.3d at 677 (quoting Lear, Inc. v. Adkins, 395 U.S. 653, 673 (1969)) (internal citations omitted).[11] It found that:

> Allowing free assignability—or, more accurately, allowing states to allow free assignability—of nonexclusive patent licenses would undermine the reward that encourages invention because a party seeking to use the patented invention could either seek a license from the patent holder *or* seek an assignment of an existing patent license from a licensee. In

[10] Plaintiff cites a number of other cases, however, each one dealt with an issue of contract interpretation rather than the inherent assignability of a patent license. See MDS (Canada) Inc. v. Rad Source Techs., Inc., 579 F. App'x 700, 700-01 (11th Cir. 2014) (determining whether an attempted assignment of a patent license was an assignment or a sublicense without reference as to whether the assignment was allowed under state or federal law); Disk Authoring Techs. LLC v. Corel Corp., 122 F. Supp. 3d 98, 106 (S.D.N.Y. 2015) ("The parties disagree as to whether the [license] should be *interpreted* under Delaware or California law.") (emphasis added).

[11] While the Court relied on state law in its Order denying Defendants' Motion to Dismiss, at that stage of the litigation, neither party argued that federal law applied or that federal law would preclude assumption of the Agreement without Plaintiff's consent. See Dkt. Nos. [14, 17, 18].

> essence, every licensee would become a potential competitor with the licensor-patent holder in the market for licenses under the patents.

Id. at 679 (emphasis in original).

The question then for the Court is whether Plaintiff consented to the assignment. Courts have held that a patent license is not assignable "unless the patent owner authorizes the assignment *or* the license itself permits assignment." Id. (emphasis added). Accord PPG Indus., F.2d at 1093 ("It has long been held by federal courts that agreements granting patent licenses are personal and not assignable unless expressly made so."); Unarco Indus., 465 F.2d at 1306 (same). In this case, the Agreement allows for assignment but only with the express, written consent of the licensee, which never occurred.

Defendants argue that, because Plaintiff never expressly consented to the assignment, there could be no assignment under federal law. However, after oral argument, Plaintiff sought leave to file supplemental briefing wherein it stated that it impliedly consented to the assignment before these Defendants allegedly breached.[12] After Defendants' alleged breach, Plaintiff states that it has since rescinded that consent but will consent once again if Defendants pay the money owed under the Agreement. And while Plaintiff may have consented in the past and might potentially consent in the future, the undisputed facts show that they do not *currently* consent to the assignment. As such, the Court cannot say that

[12] While the Court **GRANTS** Plaintiff's Motion for Leave to File Supplemental Briefing [52], for the reasons discussed in this section the Court finds that it does not alter its analysis of the issue.

the Agreement is currently assigned to these Defendants such that they may be liable for breach of contract.

B. *De Facto* Merger

Plaintiff argues that, even if the Court finds that federal law precludes free assignability of the Licensed Patents, Defendants are still liable because their acquisition of Spine360 constitutes a *de facto* merger. A *de facto* merger exists only when: (1) there is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations; (2) there is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock—this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation; (3) the seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as practically and legally possible; and (4) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. Bud Antle v. Eastern Foods, Inc., 758 F.2d 1451, 1457-58 (11th Cir. 1985) (citing Keller v. Clark Equip. Co., 715 F.2d 1280, 1291 (8th Cir. 1983), cert. denied, 464 U.S. 1044 (1984)).

Before even addressing Plaintiff's arguments as to why the Court should find a *de facto* merger, the undisputed evidence shows that Plaintiff cannot prove at least one of the four elements. Specifically, the record shows that Amendia and

Omni Acquisition bought Spine360 in cash, not company stock. See Dkt. No. [25-4] at 8 (detailing the purchase price as cash only). According to Bud Antle, a court cannot find *de facto* merger when the acquiring company bought the acquired company in cash because:

> Where the assets are sold for cash [rather than stock], no basic fundamental change occurs in the relationship of the stockholders to their respective corporations, . . . and absent continuity of shareholder interest, the two corporations are strangers, both before and after the sale.

Bud Antle, 758 F.2d at 1458 (quoting Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977)) (alteration in original).

As a result, the Court finds Amendia and Omni Acquisition were neither assigned the Agreement nor did they participate in a *de facto* merger with Spine360. Plaintiff's Motion for Partial Summary Judgment on breach of contract is **DENIED** as to Amendia and Omni Acquisition and Defendants' Motion for Summary Judgment as to breach of contract against Amendia and Omni Acqusition is **GRANTED**.

3. Unjust Enrichment—Amendia and Omni Acquisition

Plaintiff alleges that, if its breach of contract claim fails,[13] it can still recover from Amendia and Omni Acquisition based on unjust enrichment. To assert a claim for unjust enrichment, "the plaintiff must show that (1) a benefit was provided, (2) compensation for that benefit was not received, and (3) failure to compensate renders the transaction unjust." Ralls Corp., 27 F. Supp. 3d at 1329

[13] Because the Court granted Summary Judgment against Defendant Spine360, this claim is only against the remaining Defendants.

(citing Clark v. Aaron's, Inc., 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012)). The action lies when "money is paid on the debt of another, with his consent and approval, where the person making the payment was obligated to make the payment, and no consideration or benefit inures to his benefit, and credit for such payments inures to the benefit of the other party." Ades v. Werther, 567 S.E.2d 340, 342 (Ga. Ct. App. 2002) (quoting Fleming v. C&S Nat'l Bank, 253 S.E.2d 76, 78 (Ga. 1979)). Importantly, the theory applies only "when there is no legal contract." WESI, LLC v. Compass Envtl. Servs., Inc., 509 F. Supp. 2d 1353, 1363 (N.D. Ga. 2007) (quoting Tidikis v. Network for Med. Comms. & Research, LLC, 619 S.E.2d 481, 485 (Ga. Ct. App. 2005)).

Defendants assert that Plaintiff never conferred a benefit upon Amendia and Omni Acquisition because the Exclusive Licensor Know-how had no value. As support, Defendants first point to a declaration made by Tim Lusby, an Amendia corporate officer, stating that $526,594.51 was more than enough compensation. See Dkt. No. [25-6] ¶ 38. Next, Defendants allege the Licensor Know-how is worthless because of purported prior art and Plaintiff's refusal to consent to assignment—all of which make it too risky for Defendants to bring the Licensed Products to market.

Plaintiff counters that Defendants' self serving affidavit does not entitle them to summary judgment. Specifically, Plaintiff argues that Defendants' *choice* not to proceed to market and their legal conclusion regarding the validity of the Licensed Patents is "externally contrived, not externally validated." Dkt. No. [35]

at 20. Or in other words, outside, tangible evidence does not support their contention.

The Court agrees with Plaintiff that Defendants' affidavits are insufficient to grant summary judgment in their favor. While the Defendants argue that Plaintiff has not pointed to any tangible evidence of its own, the Court disagrees. Plaintiff has provided numerous emails showing exchanges between Jimenez and Amendia/Omni Acquisition wherein the parties set up meetings and times to discuss how best to implement the Licensed Products and how best to use the Exclusive Licensor Know-how. See Dkt. Nos. [26-2 – 26-7].

However, the Court also finds that the emails are insufficient to grant summary Judgment in Plaintiff's favor. Instead, there is at least a question of fact as to what, if any benefit Amendia and Omni Acquisition gained from having the Know-how and discussing the Licensed Products with Jimenez. For that reason, the Court **DENIES** Defendants' and Plaintiff's Motions for Summary Judgment as to unjust enrichment.

4. Alter Ego Liability—Amendia

Plaintiff seeks to pierce the corporate veil to hold Amendia accountable to the full extent of Omni Acquisition's liability. "Georgia courts pierce the corporate veil 'to remedy injustices which arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility.'" Paul v. Destito, 550 S.E.2d 739, 748 (Ga. Ct. App. 2011) (quoting Cheney v. Moore, 387 S.E.2d 575, 576 (Ga. Ct. App.

1989)). "Under the alter ego doctrine, equitable principles are used to disregard the separate and distinct legal existence possessed by a corporation where it is established that the corporation served as a mere alter ego or business conduit of another." Renee Unlimited, Inc. v. City of Atlanta, 687 S.E.2d 233, 238 (Ga. Ct. App. 2009) (quoting Kissun v. Humana, Inc., 479 S.E.2d 751, 752 (Ga. Ct. App. 1997)).

To justify disregarding a corporate form, "[c]ourts typically look at whether the principals commingled assets of the company with their personal assets or otherwise confused the assets, records and liabilities of the individual and the corporation." In re Geer, 522 B.R. 365, 392 (N.D. Ga. 2014). Importantly, "*there must be insolvency* on the part of the corporation in the sense that there are insufficient corporate assets to satisfy the plaintiff's claim." Adams v. Unum Life. Ins. Co. of America, 508 F. Supp. 2d 1302, 1314 (N.D. Ga. 2007) (quoting Johnson v. Lipton, 328 S.E.2d 533, 534 (Ga. 1985)) (emphasis in original). Disregarding the corporate from is considered a remedy for this situation as it "allow[s] *corporate* creditors to pursue *individual* shareholders on *corporate* debts." In re Geer, 522 B.R. at 392 (emphasis in original).

Defendants mainly argue that Plaintiff may not recover under alter ego liability because Omni Acquisition is solvent and Plaintiff has not proven otherwise. As evidence of Omni Acquisition's solvency, Defendants point to Lusby's affidavit stating that it is solvent. Dkt. No. [26-6] ¶ 10.

Plaintiff sought production in discovery of "all Documents that relate to or refer to [Omni Acquisition's] assets, bank statements and earnings from February 1, 2014, to present." Dkt. No. [35-2] at 9. However, according to Plaintiff, Defendants never provided that information.

Plaintiff asks the Court to deny summary judgment on this claim based on Federal Rule of Civil Procedure 56(d). Rule 56(d) allows a court to deny a motion for summary judgment where a nonmovant cannot present facts essential to justify its opposition of the motion. FED. R. CIV. P. 56(d). However, the record shows that Plaintiff has not diligently sought evidence to prove its claim. As Defendants point out, Plaintiff failed to depose any Amendia or Omni Acquisition personnel. It never asked the Court to intervene when Defendants failed to provide the written discovery requested. Additionally, when asked if it required further discovery, Plaintiff denied needing the opportunity on the grounds that this case "is in its essence a collection case." Dkt. No. [38-1] at 2. The Court finds that Plaintiff's failure to gather evidence to support its claim requires the court to **GRANT** Defendants' Motion for Summary Judgment as to alter ego liability.

5. Attorney's Fees—All Defendants

Plaintiff brings a claim for attorney's fees against all Defendants. Defendants argue that the claim must be dismissed because there are no viable underlying claims. See O.C.G.A. § 13-6-11. However, Plaintiff has a claim against Spine360 for breach of contract and a claim against Amendia and Omni Acquisition for unjust enrichment. Plaintiff therefore has valid underlying claims such that the Court must **DENY** Defendants' Motion for Summary Judgment as to attorney's fees.

d. Motion to Amend

i. Legal Standard

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading once as a matter of course within 21 days after serving it, or 21 days after service of a motion or responsive pleading. FED. R. CIV. P. 15(a)(1). If a party seeks to amend its pleading outside these time limits, it may do so only by leave of court or by written consent of the adverse party. FED. R. CIV. P. 15(a)(2). "The court should freely give leave when justice so requires." Id. Accord Foman v. Davis, 371 U.S. 178, 182 (1962); Shipner v. E. Air Lines, Inc., 868 F.2d 401, 406-407 (11th Cir. 1989) ("Rule 15(a) severely restricts the district court's freedom, directing that leave to amend shall be freely given when justice so requires.").

Rule 15(a)'s liberal policy of "permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Shipner, 868 F.2d at 407. Thus, the Court should deny leave to amend only where the amendment will result in undue delay, bad faith, undue prejudice, a repeated failure to cure deficiencies by amendments previously allowed, or futility. Foman, 371 U.S. at 182; Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1263 (11th Cir. 2004) ("[D]enial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal.") (quoting Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir. 1999)). Cf. Bryant v. Dupree, 252 F.3d 1161, 1163-64 (11th Cir. 2001) (reversing district court's decision to deny leave to amend a complaint because there was no evidence of prejudice to the defendant).

ii. Analysis

Plaintiff wishes to amend its Complaint for a second time to include one claim for violation of the Uniform Voidable Transactions Act ("UVTA"), O.C.G.A. § 18-2-70, *et seq.*, based on Defendants' alleged fraudulent conveyances which occurred during the course of this litigation. Specifically, Plaintiff contends that Omni Acquisition and Amendia fraudulently transferred their interest in the Agreement back to Spine360 on March 20, 2015, to avoid any attendant obligations. Defendants contend that Omni Acquisition and Amendia had to transfer the Agreement back to Spine360 because Plaintiff repeatedly claimed that it never consented to the assignment.

The UTVA states, in relevant part:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor . . .

O.C.G.A. § 18-2-74(a)(1). To determine actual intent to defraud, Georgia courts look to the eleven "badges of fraud" listed in § 18-2-74(b). Res-Ga Hightower, LLC v. Golshani, 778 S.E.2d 805, 807 (Ga. Ct. App. 2015) (citing O.C.G.A. § 18-2-74(b)).

According to Plaintiff, nearly all of the eleven badges of fraud are present in this case. First, Plaintiff claims the transfer of the Agreement was to an insider. See O.C.G.A. § 18-2-74(b)(1). Next, Plaintiff claims Amendia retained possession or control of the Agreement after the transfer, evidenced by the fact that Amendia continued to list the Agreement as its property as late as July 2015. See O.C.G.A. § 18-2-74(b)(2). Plaintiff claims Defendants concealed the transfer. See O.C.G.A. § 18-2-74(b)(3). Plaintiff also notes the transfer was made after the suit was filed. See O.C.G.A. § 18-2-74(b)(4). According to Plaintiff, the transfer was to an insolvent entity. See O.C.G.A. § 18-2-74(b)(5) and (9).[14] And lastly, Plaintiff claims that Amendia and Omni Acquisition did not receive adequate consideration for the transfer. See O.C.G.A. § 18-2-74(b)(8).[15]

Defendants first assert that Plaintiff's claim under the UVTA is inappropriate based on the facts of this case. Specifically, Defendants argue that Plaintiff's new claim is at odds with its continued contention that it currently does not consent to the assignment of the Agreement. Defendants argue that, "the fact that SpineX objects to both Amendia and Spine360 possessing the

[14] The Court notes that, while Spine360 may be insolvent, the badges of fraud cited by Plaintiff require that the transferring entity be rendered insolvent by the transfer, not that the transfer be to an insolvent entity. O.C.G.A. § 18-2-74(b)(5) and (9).

[15] The Court notes that the badge of fraud cited by Plaintiff in its brief says nothing about consideration. See O.C.G.A. § 18-2-74(b)(9). Instead, the question of consideration is considered in § 18-2-74(b)(8). See O.C.G.A. § 18-2-74(b)(8).

agreement is in bad faith and begs the question 'who, according to SpineX, should actually possess the License Agreement?'" Dkt. No. [47] at 6.

Defendants also argue that the claim is ineffective because the purpose of the UVTA is to "prevent a debtor from placing his or her property beyond a creditor's reach." Id. at 3 (quoting Gilchinsky v. Nat'l Westminster Bank N.J., 732 A.2d 482, 488 (N.J. 1999)). According to Defendant, the Court must first inquire into "whether the debtor or person making the conveyance has put some asset beyond the reach of creditors which would have been available to them at some point in time 'but for the conveyance.'" Id. Here, Defendants argue, the transfer was from one named Defendant to another named Defendant such that the property at issue is not beyond Plaintiff's reach. Based on those issues alone, Defendants believe Plaintiff's Motion should be denied.

Looking at the substance of Plaintiff's claim, Defendants also contend that the Court should deny the Motion based on futility. Specifically, Defendants counter that each badge of fraud cited by Plaintiff does not apply. First, Defendants correctly argue that Spine360 is not an "insider" as contemplated by the statute. See O.C.G.A. § 18-2-74; O.C.G.A. § 18-2-71(8)(B). An insider includes:

(i) A director of the debtor;
(ii) An officer of the debtor;
(iii) A person in control of the debtor;
(iv) A partnership in which the debtor is a general partner
(v) A general partner in a partnership described in (iv); or
(vi) A relative of a general partner, director, officer, or person in control of the debtor.

O.C.G.A. § 18-2-71(8)(B). Spine360 does not fit into any of the six categories of insiders. See id.; Target Corp. v. Amerson, 755 S.E.2d 333, 338 (Ga. Ct. App. 2014) (finding that the claimant had not shown insider status because the alleged insider did not fit into any of the six categories defined by § 18-2-71(8)(B)).

Next, Defendants contend that Amendia has not retained possession or control over the Agreement. According to Defendants, the fact that Amendia listed the Agreement on its schedule of intellectual property does not show that Amendia actually possessed the Agreement. See e.g. Schempp v. Lucre Mgmt. Grp., LLC, 75 P.3d 1157, 1162 (Colo. App. 2003) (finding that mere retention of transferred property did not necessarily show possession or control, nor did it show intent to defraud).

And lastly, Defendants contend that, under both applicable law and the undisputed facts, Amendia and Omni Acquisition cannot be said to have concealed the transfer. According to Defendants, it did divulge the transfer in its initial disclosures. Specifically, when asked to produce all documents that Defendants might use to prove its claims or defenses, Defendants provided the APA with the amendment that shows the transfer of the Agreement back to Spine360. While Plaintiff believes this was not enough to constitute disclosure, Defendants contend that the UVTA prohibits "an *affirmative* act of active concealment, rather than a failure to proactively disclose." Dkt. No. [47] at 10 (quoting Schmidt v. HSC, Inc., 358 P.3d 727, 743 (Haw. Ct. App. 2015)) (emphasis added). As a result, Defendants argue, even if the initial disclosure was insufficient, Defendants never actively concealed the transfer such that the badge of fraud fails.

The Court agrees with Defendants' overall argument that the UVTA is not the proper vehicle for Plaintiff's stated claim. A fraudulent conveyance usually occurs when a defendant conveys assets to another entity so as to become "judgment proof." That is, the conveyance of the asset renders the defendant less able to pay a judgment rendered against it. But here, as Defendants have identified, the conveyance was to return intellectual property to Spine360 and that return has done nothing to influence whether Omni Acquisition or Amendia are judgment proof. However, Plaintiff is not concerned about Amendia and Omni Acquisition being judgment proof. Instead, Plaintiff worries that Spine360 is *currently* judgment proof such that it cannot recover any potential judgment for breach of contract.[16]

Such a result is inconsistent with Plaintiff's position that it has at least withdrawn its consent to the assignment of the Agreement. And, as Defendants have argued, the badges of fraud do not point to fraudulent intent.[17] As a result, the Court finds an amendment to the Complaint to add a claim for violation of

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[16] At oral argument, Defendants admitted that Spine360 is essentially a shell corporation and/or a division of Amendia. However, this still does not affect whether Omni Acquisition or Amendia are judgment proof as contemplated by the UVTA.

[17] Plaintiff argues that the list of factors described in the UVTA is not exclusive such that the Court should look at their arguments more broadly. See O.C.G.A. § 18-2-74(b). However, Plaintiff has couched each of its arguments into one of the listed factors and failed to provide any other factors for the Court's consideration.

the UVTA would be futile. Therefore, the Court **DENIES** Plaintiff's Motion to Amend the Complaint without prejudice.

III. CONCLUSION

In accordance with the foregoing, the Court **GRANTS** Defendants' Motion for Joinder [40]; **DENIES** Plaintiff's Motion to Dismiss [33]; **GRANTS IN PART** Plaintiff's Motion for Partial Summary Judgment and **DENIES IN PART** Plaintiff's Motion for Partial Summary Judgment [26]; **GRANTS IN PART** Defendants' Motion for Summary Judgment and **DENIES IN PART** Defendants' Motion for Summary Judgment [25]; **DENIES** Plaintiff's Motion to Amend [44]; and **DENIES** Plaintiff's Motion for Leave to File Supplemental Briefing [52].

As to Plaintiff's Motion for Summary Judgment, the Court grants the Motion as to Plaintiff's claim for breach of contract against Spine360 and denies the Motion as to Plaintiff's claim for breach of contract and unjust enirchment against Amendia and Omni Acquisition. As to Defendants' Motion for Summary Judgment, the Court grants the Motion as to Plaintiff's claim for breach of contract against Amendia and Omni Acquisition and Plaintiff's claim for alter ego liability against Amendia. The Court denies Defendants' Motion for Summary Judgment as to Plaintiff's claim for unjust enrichment against Amendia and Omni Acquisition and Plaintiff's claim for attorney's fees against all Defendants.

The parties' Consolidated Proposed Pre-trial Order is due on May 11, 2016. The Clerk is **DIRECTED** to submit this matter to the undersigned on May 12, 2016, if the parties fail to meet their deadline.

IT IS SO ORDERED this 13th day of April, 2016

Leigh Martin May

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE