

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERG CHILLING SYSTEMS, INC.,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
HULL CORPORATION, et al.,	:	NO. 00-5075
Defendants.	:	

MEMORANDUM AND ORDER

SCHILLER, J.

June , 2003

On November 6, 2000, Plaintiff Berg Chilling Systems, Inc. (“Berg Chilling”) commenced this action against Defendants Hull Corporation and SP Industries, Inc. (“SPI”). Beginning January 13, 2003, this matter was tried without a jury for four consecutive days. I now enter the following Findings of Fact and Conclusions of Law as required by Federal Rule of Civil Procedure 52(a) and apportion damages among the parties as set forth below.

FINDINGS OF FACT

I. PARTIES AND GENERAL BACKGROUND

Plaintiff Berg Chilling is a Canadian corporation located in Toronto, Ontario. (1/13/03 Tr. at 11.) Defendant Hull Corporation is a Pennsylvania corporation located in Warminster, Pennsylvania. (1/14/03 Tr. at 146.) Defendant and Third-Party Plaintiff SPI is a New Jersey corporation located in Buena, New Jersey. (Ex. P-160.) Third-Party Defendants John Hull and Lewis Hull served as officers of Hull Corporation at times relevant to this action.¹

¹ Hull Corporation filed a third party complaint against Alfa Laval Inc. In a Memorandum and Order filed November 26, 2002, I granted Alfa Laval Inc.’s Motion for Summary Judgment. Alfa Laval Inc.’s cross-claim against Hull Corporation was dismissed

The underlying source of the dispute in this matter is allegedly defective freeze-drying equipment, shipped to China pursuant to a contract between Berg Chilling and a Chinese company, that resulted in an international arbitration panel rendering an award against Berg Chilling. After the arbitration panel's decision, Berg Chilling commenced this action against Defendant Hull Corporation, the company that had assembled the freeze-drying equipment, and Defendant SPI, a company that allegedly assumed Hull Corporation's contractual obligations with respect to the freeze dryers when Hull Corporation and SPI entered into an asset purchase agreement. Berg Chilling claimed that Defendants were liable for breach of contract, breach of express warranty, breach of implied warranty, and indemnity and contribution. Hull Corporation filed a cross-claim against SPI claiming the right to indemnity and contribution, and SPI then filed a counter-cross-claim against Hull Corporation, claiming breach of representations and warranties and breach of the indemnity and defense provisions in the asset purchase agreement. In addition, SPI filed a Third-Party Complaint against Third-Party Defendants John Hull and Lewis Hull, who served as Hull Corporation officers at times relevant to this action, claiming breach of contract and fraud and misrepresentation. Third-Party Defendants John Hull and Lewis Hull filed a counterclaim against SPI, alleging that SPI had a duty to defend and/or indemnify them in this lawsuit.

pursuant to Local Rule of Civil Procedure 41.1(b) on February 14, 2003.

II. EQUIPMENT CONTRACT, PURCHASE ORDER, AND PARTIES' PERFORMANCE

A. Equipment Contract

On or about March 30, 1995, Hua Du Meat Products Company ("Huadu"), a Chinese company, entered into a contract with Plaintiff Berg Chilling, a Canadian company, for the purchase of equipment to be used for the preparation of meat products and freeze dried food products at Huadu's facility near Beijing. (Ex. P-20 (Contract for Supply of Food Freeze Drying System ("Equipment Contract")); 1/13/03 Tr. at 25.) Berg Chilling did not agree to manufacture the freeze dryers and instead agreed to find a company to manufacture the freeze dryers. (Ex. P-20; 1/13/03 Tr. at 25.) The Equipment Contract sets forth specific "through-put requirements" and other specifications for the freeze dryers. (Ex. P-20; 1/13/03 Tr. at 17-18, 24; 1/14/03 Tr. at 65.)

B. Purchase Order to Hull Corporation

Several weeks after Berg Chilling entered into the Equipment Contract, Berg Chilling and Hull Corporation agreed that Hull Corporation would manufacture the freeze dryers required by the Equipment Contract. (1/13/03 Tr. at 41.) On April 20, 1995, Berg Chilling issued a purchase order that required Hull Corporation to supply two freeze dryers pursuant to the specifications set forth in the Equipment Contract. (Ex. P-21.)² By letter dated April 20, 1995, Hull Corporation agreed to "jump on board" with the terms and conditions outlined in the Equipment Contract for the project agreed to by Huadu and Berg Chilling ("Huadu Project"). (Ex. P-22; 1/13/03 Tr. at 48; 1/14/03 Tr. at 40.) Although Hull Corporation had produced several food freeze dryers in the past, it had not manufactured any food freeze dryers as large as those called for by the Equipment Contract.

² As used herein, "P" refers to Plaintiff Berg Chilling's trial exhibits and "D" refers to Defendant SPI's trial exhibits.

(1/14/03 Tr. at 91.) The design of the freeze dryers was reviewed and approved by Berg Chilling. (1/13/03 Tr. at 18-22, 24.)

C. Delays in Delivery and Damage to Freeze Dryers

Under an agreement that amended the Equipment Contract with respect to, *inter alia*, deadlines for delivery, Hull Corporation was obligated to have the freeze dryers ready for shipment by June 15, 1996. (Ex. P-43; 1/13/03 Tr. at 51; 1/14/03 Tr. at 73-74.) However, the freeze dryers were not prepared for shipment to Huadu until mid-October 1996. (1/13/03 Tr. at 53.) Berg Chilling was responsible for shipping the freeze dryers from Hull Corporation to China, and initially opted to ship them from the port of Camden. (1/13/03 Tr. at 54-57, 172, 202.) While in Berg Chilling's custody, shipment of the freeze dryers was delayed, and the equipment remained in port for approximately three weeks before being shipped. (1/13/03 Tr. at 56, 173.) As an alternative arrangement, Berg Chilling elected to have the freeze dryers shipped by truck to the port of Vancouver.³ En route to Vancouver, one of the trucks was involved in an accident that resulted in damage to the freeze dryers. (1/13/03 Tr. at 56-58.) Instead of repairing the damaged freeze dryer before shipment, Berg Chilling decided to continue with the shipment of both freeze dryers. (1/13/03 Tr. at 58.)

D. Failed Start-Up

In April 1997, a Hull Corporation service technician traveled to the Huadu facility in China to perform "start-up activities." (1/13/03 Tr. at 60.) As a prerequisite to Huadu's acceptance of the freeze dryers under the Equipment Contract, the parties were required to demonstrate that the freeze

³ Neither the trial testimony nor the parties' proposed findings of fact indicate whether the freeze dryers were shipped to the port of Vancouver, Canada or the port of Vancouver, Washington.

dryers complied with the through-put requirement set forth in the Equipment Contract. (1/13/03 Tr. at 60-61.) During the start-up activities, a Hull Corporation service technician conducted preliminary testing⁴ on the freeze dryers, and the results of the testing showed that the freeze dryers were functioning less than optimally. (1/13/03 Tr. at 78.)

After this testing, Huadu forwarded a list of concerns about the freeze dryers to Berg Chilling. (Ex. P-104; 1/13/03 Tr. at 62-65.) Berg Chilling forwarded this list to Hull Corporation, and Hull Corporation responded to the concerns raised by Huadu. (Ex. P-110; 1/13/03 Tr. at 64-65.) Berg Chilling also met with Huadu, and Huadu expressed concerns about the freeze dryers. (Ex. P-116; 1/13/03 Tr. at 73-74.)

When Hull Corporation's service technician returned to the United States in May 1997, there had not been an attempt to conduct any performance testing of the freeze dryers. (1/13/03 Tr. at 78-79.) As a result, Huadu refused to make final acceptance of the freeze dryers. (1/13/03 Tr. at 79.) In June and July 1997, subsequent to the departure of Hull Corporation's service technician from the Huadu facility, Hull Corporation did not cooperate with Berg Chilling in its attempts to address the defects and deficiencies in the freeze dryers. (Exs. P-132; P-141; 1/13/03 Tr. at 80.)

E. Modified Agreement

In early October 1997, John Hull of Hull Corporation and representatives of Berg Chilling traveled to China to discuss with Huadu various proposed modifications to the freeze dryers in an effort to persuade Huadu not to terminate the Equipment Contract. (1/13/03 Tr. at 87-89; 1/15/03 Tr. at 69-70.) John Fay, a Hull Corporation engineer, prepared engineering materials and designs

⁴ Preliminary testing is distinct from the performance testing that was required to show that the equipment could satisfy the through-put requirements.

used in the presentation to Huadu and Berg Chilling. (1/14/03 Tr. at 102-03.) On October 8, 1997, Huadu, Berg Chilling, and Hull Corporation executed an agreement that modified certain terms set forth in the Equipment Contract (“Modified Agreement”). (Ex. P-184; 1/13/03 Tr. at 90.) Under the agreement, Hull Corporation was obligated to perform technical work, assembly work, testing work, and production work on the freeze dryers according to the Modified Agreement and the engineering plans John Fay had designed while he was a Hull Corporation employee. (1/14/03 Tr. at 103-04.) The agreement also called for Berg Chilling and Hull Corporation to arrange, at their own cost, respectively, modifications to the freeze dryers. (Ex. P-184.) Furthermore, Hull Corporation and Berg Chilling separately agreed that Berg Chilling would expend \$100,000 for further work on the freeze dryers, and, in addition, would also bear the costs of its own laborers, overhead, expenses and transportation costs. (Ex. D-81; 1/14/03 Tr. at 7, 9.)

III. ASSET PURCHASE AGREEMENT

A. Negotiations Between Hull Corporation and SPI

Around the same time, in August of 1997, Hull Corporation began negotiating a business transaction with SPI. (1/16/03 Tr. at 80-81.) John Hull and Lewis Hull of Hull Corporation authored a memorandum discussing this transaction to Hull Corporation that was distributed to Hull Corporation employees and shareholders on September 3, 1997. This memorandum described the transaction as one that would “merge Hull’s Food, Drug and Chemical Division with SPI’s VirTis Division.” (Ex. P-160.) It continued: “The synergy between VirTis’ research freeze dryers and Hull’s production freeze dryers is obvious, and exciting! . . . Hull Corporation will retain its corporate structure and present shareholders. . . . Details of the merged freeze dryer operations . . .

will be firmed up over the next several weeks.” (*Id.*) The following day, September 4, 1997, a preliminary press release was issued. (Ex. P-161.) The language contained in the preliminary press release was drafted by SPI, Hull Corporation, and a public relations firm and approved by both parties. (1/16/03 Tr. at 85.)

On September 9, 1997, in response to the request from Berg Chilling for additional information, Hull Corporation advised Berg Chilling that “[i]f Hull’s freeze drying division should be transferred to another entity, Hull’s responsibility will of course be assumed by the successor.” (Ex. P-163.) This statement was based on the understanding that “all contracts and agreements were acquired assets of Hull Corporation.” (1/14/03 Tr. at 187-88.)

B. Purchase Order Under the Asset Purchase Agreement

Hull Corporation and SPI entered into an asset purchase agreement dated August 25, 1997 (“Asset Purchase Agreement”). (Ex. P-146.) That transaction closed on October 15, 1997, approximately one week after Huadu, Berg Chilling and Hull Corporation had entered into the Modified Agreement. (1/16/03 Tr. at 87.) The Asset Purchase Agreement was drafted by SPI’s counsel. (1/16/03 Trans. at 82.) SPI’s Jack Partridge indicated that the intent of SPI was specifically to acquire Hull Corporation’s FDC Division as an ongoing business. (1/16/03 Tr. at 112-13.)

Prior to the closing of the Asset Purchase Agreement, SPI conducted due diligence on Hull Corporation. (1/14/03 Tr. at 113.) Hull Corporation cooperated with SPI in its due diligence efforts. (1/14/03 Tr. at 113.) Hull Corporation did not conceal from SPI the Huadu Project or information regarding the Huadu Project. (1/16/03 Tr. at 44, 114.) In a letter dated September 11, 1997, counsel for Berg Chilling indicated to Hull Corporation that they were taking the position that Hull Corporation had breached the Equipment Contract and had advised Berg Chilling of “its rights and

remedies in the circumstances . . . [including] the right to commence legal action against [Hull Corporation]. . . .” (Ex. P-11.) However, approximately one month later, Hull Corporation, Berg Chilling, and Huadu entered into the Modified Agreement. Moreover, by the time of the closing of the Asset Purchase Agreement, the climate had changed, and, at that time, there was no threat of litigation. (1/13/03 Tr. 200-01; 1/14/03 Tr. at 16-17; 1/15/03 Tr. at 69-70, 90; 1/16/03 Tr. at 16.)

Under the Asset Purchase Agreement, Hull Corporation agreed to sell, and SPI agreed to buy, “substantially all of [Hull Corporation’s] assets, properties, rights and businesses used in or related to the conduct of the Business.” (Ex. P-146, Recital B.) The Asset Purchase Agreement defined the “Business” as the “manufacturing, remanufacturing, installing, servicing, marketing, selling and distributing standard and customized vacuum drying, freeze drying . . . and related products, equipment and systems for customers involved in the pharmaceutical . . . and food industries.” (Ex. P-146, Recital A.) The Asset Purchase Agreement also provided the following:

1.2 Enumeration of the Purchased Assets. The Purchased Assets shall include, without limitation, the following items used in or related to the conduct of the Business:

- (i) all contracts and agreements, including, without limitation, sales orders and sales contracts, purchase orders and purchase contracts, quotations and bids, letters of credit issued to [Hull Corporation], service agreements, distribution agreements, supply agreements, sales representative agreements, license agreements, computer software agreements and technical service agreements (collectively, the “Contracts”).

(Ex. P-146, Article 1.2.) The Asset Purchase Agreement further provided that the “Purchased Assets” did not include certain “Excluded Assets.” The “Excluded Assets” were specifically set forth on Schedule 1.3(f) of the Asset Purchase Agreement. Neither the Hull Purchase Order nor the Modified Agreement were among the assets listed in Schedule 1.3(f). (Ex. P-146, Article 1.3,

Amended Schedule 1.3(f).⁵ In addition, under the Asset Purchase Agreement, SPI agreed to buy all “accounts receivable” from Hull Corporation including approximately \$50,000 of accounts receivable in connection with the Huadu Project. (Ex. P-146 Article 1.2(f); Schedule 4.2(h); 1/16/03 Tr. at 95-96.) At trial, SPI’s CEO, Jack Partridge, testified that SPI purchased from Hull Corporation the accounts receivable specifically relating to the Huadu Project. (1/16/03 Tr. at 95-96.) At the time of the closing, three percent of the purchase price under the Equipment Contract remained unpaid pending Huadu’s final acceptance of the freeze dryers. (Ex. P-20, Chapter 3; 1/16/03 Tr. at 20.) Furthermore, the Schedules to the Asset Purchase Agreement reference the account receivable on the Huadu Project. (Ex. D-2, Schedule 4.2(h).)

C. Other Provisions of the Asset Purchase Agreement at Issue

A number of other provisions of the Asset Purchase Agreement are at issue in this case:

4.2 [Hull Corporation’s] Representations and Warranties.

* * *

(u) There is no litigation or proceeding, in law or in equity, and there are no claims, proceedings or governmental investigations before any commission or other administrative authority, pending, or, to [Hull Corporation’s] knowledge, threatened, against or involving [Hull Corporation]. . . .

(v) [Hull Corporation] has not made any oral or written warranties with respect to the quality of defects of . . . products or services which it has sold or performed There are no claims pending or, to [Hull Corporation’s] knowledge, anticipated or threatened against [Hull Corporation] with respect to the quality of or absence of defects in such products or services. . . .

* * *

(ff) The representations and warranties of [Hull Corporation] . . . do not omit to state a material fact necessary in order make the representations, warranties or statements contained herein not misleading. . . .

(Ex. D-1.)

⁵ Neither contract was listed as an “Excluded Liability” under Section 2.2 of the Asset Purchase Agreement. (Ex. P-246 at 4-5.)

Furthermore, the Asset Purchase Agreement includes provisions related to indemnification:

8.2 Indemnification Obligations of [Hull Corporation]. . . [Hull Corporation] shall defend, save and keep harmless [SPI] . . . against and from all Damages sustained or incurred . . . resulting from or arising of or by virtue of:

* * *

(c) the failure to discharge when due any liability or obligation of [Hull Corporation] other than the Assumed Liabilities, or any claim against [SPI] with respect to any such liability or obligation or alleged liability or obligation' [or] (d) any claims by parties other than [SPI] to the extent caused by acts or omissions of [Hull Corporation] on or prior to the Closing Date, including, without limitation, claims for Damages which arise or arose out of [Hull Corporation's] operation of the Business. . . .

(Ex. D-1.)

8.5 Third Party Claims. Following the receipt of notice of a claim by any person who is not a party to this Agreement which may give rise to a claim indemnification under this Article . . . the party receiving the notice . . . shall forthwith notify the other party The Indemnified Party shall, upon reasonable notice, tender the defense of a Third Party Claim to the Indemnifying Party. . . . If an Indemnified Party is entitled to indemnification against a Third Party Claim, and the Indemnifying Party fails to accept a tender of, or assume, the defense a Third Party Claim [and the Indemnified Party is forced to defend the action, then] the Indemnified Party shall be reimbursed . . . for the reasonable attorneys' fees and other expenses of defending, contesting, litigating and/or settling the Third Party Claim. . . ."

(Ex. D-1.) Additionally, John Hull and Lewis Hull executed a Joinder to evidence that they made certain representations and warranties with respect to the Asset Purchase Agreement, affirming that they "agreed to the same extent as if they were Sellers to be bound by and comply with and perform [certain of] the agreements and indemnifications" set forth in the Asset Purchase Agreement. (Ex. D-4.) Articles 4.2(u), 4.2(v), and 4.2(ff) are not included in the Joinder as specifically as binding on John Hull and Lewis Hull individually.

D. Side Letter

On October 15, 1997, the same date as the closing of the Asset Purchase Agreement, SPI and Hull Corporation entered into a “side letter” agreement. (Ex. D-3; 1/16/03 Tr. at 19.) Under this letter, SPI and Hull Corporation agreed that SPI would complete the remaining work on the Huadu Project. (1/16/03 Tr. at 19, 50, 92.) As set forth in the letter, SPI agreed to fund the remaining work on the Huadu Project, and Hull Corporation would reimburse SPI for certain expenses. (1/16/03 Tr. at 19, 22, 50, 111-12.) In March 1999, SPI sent Hull Corporation an invoice in the amount of \$217,759 for expenses incurred by SPI for work performed under the Modified Agreement. (Ex. D-42; 1/16/03 Tr. at 27.) Hull Corporation fully satisfied its obligations to cover SPI’s out-of-pocket expenses as required by the side letter. (1/16/03 Tr. at 103.) After October 15, 1997, SPI paid for all personnel costs associated with the engineering, design, modification, start-up, and performance testing of the freeze dryers. (1/16/03 Tr. at 73-74, 143-44.)

IV. SPI’S WORK AT THE HUADU PROJECT

After the closing of the Asset Purchase Agreement, Hull Company, a division of SPI, attempted to complete the engineering work, modification work, and start up activities remaining under the Hull Purchase Order and Modified Agreement.⁶ (1/13/03 at 99-100; 1/14/03 at 175.) After the closing, Hull Company performed work on-site at the Huadu Project. (1/13/03 at 100-01.) Similarly, after October 15, 1997, SPI funded the work remaining under the Hull Purchase Order and the Modified Agreement. (Ex. P-219; 1/13/03 Tr. at 102-03.) Hull Company performed the

⁶ After the closing of the Asset Purchase Agreement, it would have been impracticable for Hull Corporation to perform the work remaining on the Huadu Project because of the assets that had been sold to SPI. (1/16/03 Tr. at 92-93.)

engineering work relating to the size of the piping between the drying chamber and the condensing chamber. (1/16/03 Tr. at 58-59.)

John Fay, who had worked for Hull Corporation prior to the Asset Purchase Agreement, oversaw the engineering work done by Hull Company on the Huadu Project. (P-105; 1/13/03 Tr. at 103.) Furthermore, after the closing of the Asset Purchase Agreement, Don Reiter, formerly a Hull Corporation service technicians, was employed by SPI as a service technician and worked on-site on the Huadu Project. (1/13/03 Tr. at 104.) After October 15, 1997, Hull Company employed Lewis Hull as its chairman and retained John Hull as a consultant. (1/14/03 Tr. at 104-05, 179.) John Hull provided consulting services with respect to the Huadu Project. (Ex. P-251; 1/14/03 Tr. at 176-78.) On May 29, 1998, after learning that Huadu was not going to accept the modified equipment, and seven months after closing on the Asset Purchase Agreement, SPI first notified Berg Chilling of its “belief” that SPI did not assume any liability for the Hull Purchase Order or the freeze dryers. (Ex. P-262; 1/13/03 Tr. at 125; 1/16/03 Tr. at 121.)

V. EVENTS LEADING TO ARBITRATION

A. Failure to Meet Through-Put Requirements

The through-put requirements set forth in Section 2.8.0(H) of Appendix 2 to the Equipment Contract (Ex. P-20) specified that the equipment was required to freeze-dry certain quantities of beef, mushroom, and shrimp per twenty-four hour period and do so according to set standards of quality. In June 1998, Berg Chilling employed Walter Pebley, a trained engineer and Vice President of Business and Technical Development for Oregon Freeze Dry, Inc., as a consultant to evaluate the design and performance of the freeze dryers as modified by Hull Company. (1/15/03 Tr. at 13-16,

35-37.) After studying the contract specifications and technical drawings, Mr. Pebley traveled to China to perform tests on the freeze dryers. (1/15/03 Tr. at 37-40.) While conducting on-site testing, Mr. Pebley observed that the attempted freeze drying of carrots had non-uniform results. (1/15/03 Tr. at 42.) Mr. Pebley observed that there was a vapor conductance problem and recommended increasing the diameter of the piping between the drying and condensing chambers. (1/15/03 Tr. at 46.) Mr. Pebley shared his recommendation with John Fay and Bernard Kashmer, who were working for Hull Company, but the recommendation was not implemented. (Ex. P-306; 1/15/03 at 46, 52.) In June 1998, Mr. Pebley determined that the through-put capacity of the modified freeze dryers was significantly below the through-put requirements set forth in the Equipment Contract and the Modified Agreement. (Ex. P-306; 1/15/03 Tr. at 56, 60-61.)

Mr. Kashmer, along with two other Hull Company employees, Chuck Dern and John Fay, performed engineering and design work on the modified freeze dryers. (1/16/03 Tr. at 32,58,67.) Their work performed pursuant to the Modified Agreement included determining the diameter of the pipe between the drying and condensing chambers. (Ex. D-67 at 1; 1/16/03 Tr. at 65-66.) Without remedying the problem associated with the diameter of the pipe, the freeze dryers could not have met the through-put requirements. (1/14/03 Tr. at 109-10, 160-61; 1/14/03 Tr. at 52-54.)

B. Failure to Meet Deadlines for Final Acceptance

In November 1997, Huadu, Berg Chilling, and Hull Company corresponded about Huadu's concern that progress under the Modified Agreement was unsatisfactory. (Ex. P-202; 1/13/03 Tr. at 104, 111.) In March 1998, John Hull and Don Berggren traveled to China to discuss a further extension of time. (1/13/03 Tr. at 111.) Huadu agreed to further extend the deadline for final acceptance of the freeze dryers to April 27, 1998. (1/13/03 Tr. at 112.) This deadline was later

extended to May 20, 1998. (Ex. P-257; 1/15/03 Tr. at 78.) Huadu stated in writing that it would not agree to any extensions after that date (Ex. P-260), and Berg Chilling urged Hull Company to complete the modifications by this deadline. (Ex. P-282; 1/13/03 Tr. at 121-22.)

As the deadline for final acceptance became imminent, the parties were still unable to demonstrate that the freeze dryers could meet the through-put requirements and other specifications in the Equipment Contract. (1/13/03 Tr. at 113.) After unsuccessful preliminary testing of the freeze dryers, Huadu advised Berg Chilling and Hull Company in a letter dated May 13, 1998 that “the modified freeze dryers still [have] fatal weaknesses and fail[] to reach the decisive specifications, and so they will not meet the requirement[s] for freeze drying of food products.” (Ex. P-265; 1/13/03 Tr. at 115.) No performance tests were attempted prior to the May 20, 1998 deadline. (1/15/03 Tr. at 76-79.)⁷

VI. ARBITRATION PROCEEDINGS

On March 29, 1999, Huadu submitted an arbitration claim against Berg Chilling to the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden (“Arbitration Institute”), alleging breach of contract. (Ex. P-441; 1/13/03 Tr. at 133.) When Berg Chilling received notice of the arbitration, it sent a copy of the notice to John Hull at Hull Corporation. Berg Chilling sent other letters to John Hull at Hull Corporation on April 21, 1999 and May 24, 2000. (Ex. P-369, D-113; Tr. dated 1/13/03, at 133, 135, 186.) Berg Chilling, however, waited approximately one year

⁷ Defendants contend that Huadu interfered with their work and prevented them conducting the performance testing. The evidence introduced at trial does not support this contention, and, in any event, the evidence does not show that the freeze dryers could have met the through-put requirements by May 20, 1998.

before formally requesting that Hull Corporation participate in the Arbitration Proceeding. (Ex. P-448; 1/13/03 Tr. at 141-42.) Berg Chilling did not offer to allow Hull Corporation to control the defense of the action brought against Berg Chilling by Huadu, and, rather, offered to engage in a “joint defense” with Hull Corporation. (1/13/03 Tr. at 135.)

On December 7, 2000, the Arbitration Institute rendered its Arbitral Award (“Arbitral Award”). (Ex. P-389.) The Arbitration Institute concluded that Berg Chilling was liable for all of the seller’s obligations under the Equipment Contract and was liable for any breaches of the Equipment Contract. (Ex. P-389 at 21-22.) The Arbitral Award contains no finding of fact or conclusion of law that states that Hull Corporation or SPI was liable for Huadu’s damages. (Ex. P-389 at 21-22.) During the arbitration proceedings, Berg Chilling’s witness, Mr. Pebley, testified that the freeze dryers were improperly designed. Such testimony did not represent the interests of Hull Corporation. (1/15/03 Tr. at 53-54.)

Berg Chilling did not pay the full amount of damages awarded against it in the Arbitral Award. Instead, in June of 2002, Berg Chilling settled the claims against it. (Ex. P-2.) Pursuant to this settlement, Berg Chilling paid Huadu \$1 million. In addition, Berg Chilling was relieved from the expenses imposed by the Arbitral Award of retrieving the freeze dryers and other equipment. (Ex. P-2; 1/13/03 Tr. at 155, 157-58.)

VII. DAMAGES

Berg Chilling claims that it has been damaged in the amount of \$3,191,855.79. This amount reflects the total of the following: (a) the Arbitral Award of \$2,494,034.84;⁸ (b) long distance telephone expenses of \$1,024.54; (c) temporary accounting assistance of \$2,282.75; (d) servicemen salaries of \$41,227.08; (e) amount of \$21,211.73 invoiced by Agincourt Travel Service Ltd.; (f) employee travel expenses of \$31,841.62; (g) professional fees, including engineering reports prepared for the proceedings before the Arbitration Institute, of \$97,325.74; (h) the cost of repair parts of \$146,117.97; and (i) Lang Michener's legal fees of \$356,789.52.

In connection with its work on the freeze dryers Berg Chilling agreed to expend the amounts listed as items (b) through (e) and (h) in Exhibit P-440. (Ex. D-81; 1/14/03 Tr. at 7.)

CONCLUSIONS OF LAW

I. BERG CHILLING'S VOUCHER AND ESTOPPEL ARGUMENTS

In ruling on Berg Chilling's motion for summary judgment, I found that factual disputes precluded the entry of summary judgment in favor of Berg Chilling with respect to the voucher doctrine. *See* Memorandum and Order of November 26, 2002 at 11-12. In light of the evidence

⁸ Under the Arbitral Award, Berg Chilling was required to pay Huadu \$1.7 million plus interest at the rate of 7.1%. However, the settlement agreement reached by Berg Chilling and Huadu provided that Berg Chilling would pay Huadu \$1 million and Huadu would retain the freeze drying equipment. (Ex. P-2.) Huadu and Berg Chilling further agreed that Berg Chilling would seek to recover in this lawsuit the balance of the unpaid Arbitral Award (\$844,034.80), and that Berg Chilling would reimburse Huadu as follows: (a) Berg Chilling would receive the first \$1.65 million recovered in the instant lawsuit; (b) Huadu would receive the next \$350,000; and (c) Berg Chilling and Huadu would equally divide any amounts recovered in excess of \$2 million. (Ex. P-2.)

presented at trial, I find that the Arbitral Award is not binding on Hull Corporation.⁹ First, the manner in which Berg Chilling attempted to “vouch in” Hull Corporation was inadequate. “If the [vouchee] exercises the right to defend the [voucher], he assumes the position of one who controls an action brought against another.” RESTATEMENT (SECOND) OF JUDGMENTS § 57, n. a (1982) (discussing effect on indemnitor of judgment against indemnitee). In the instant case, Berg Chilling merely asked for Hull Corporation’s cooperation and participation, and, as such, did not present Hull Corporation with the opportunity to control the litigation proceedings as contemplated by the voucher doctrine. Second, because an “indemnitor is bound by the result only when its interests have been adequately represented in the original action by the indemnitee,” *SCAC Transport (USA), Inc. v. S.S. “Danaos,”* 845 F.2d 1157, 1162 (2d Cir. 1987) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 57 (1982)), Berg Chilling must show that it adequately represented Hull’s interests in the arbitration proceedings. At trial, Berg Chilling failed to do so. The evidence does not show that Berg Chilling defended the arbitration with sufficient diligence for the Arbitration Institute’s findings to be binding on Hull Corporation.

Berg Chilling also argues that SPI should be judicially estopped from arguing that it did not assume any liabilities in connection with the Huadu Project and equitably estopped from contending that the Asset Purchase Agreement was not a merger. Any inconsistencies on the part of SPI with respect to its assumption of liabilities do not rise to the level of an “affront to the court’s authority” necessary for judicial estoppel to apply. See *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 777-78 (3d Cir. 2001). Furthermore, SPI is not equitably estopped from

⁹ Berg Chilling does not contend that the voucher doctrine applies to SPI. (Pl.’s Post-Trial Findings of Fact and Concl. of Law at 55-56.)

contending that the Asset Purchase Agreement was not a merger. In order for a party to be equitably estopped from raising any argument, that party must (1) have made an intentional material misrepresentation (2) that was reasonably relied on to the other party's detriment. *See Heckler v. Comty. Health Servs.*, 467 U.S. 51, 59 (1984). Here, Berg Chilling cannot show that the press release at issue satisfies either requirement.

II. BREACH OF CONTRACT

In a previous memorandum addressing the parties' motions for summary judgment, I determined that New Jersey law governs this action. *See* Memorandum and Order of Nov. 26, 2002 at 8-9. Under New Jersey law, courts construe a contract by determining the intention of the parties "as disclosed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are to be regarded." *Dontzin v. Myer*, 694 A.2d 264, 268 (N.J. Sup. Ct. App. Div. 1997) (*quoting Casriel v. King*, 65 A.2d 514, 516 (N.J. 1949)). Furthermore, "[e]xtrinsic evidence is admissible as an aid to understand the significance of the contract language, but not to give effect to an intent at variance with that language. . . . 'In short, [courts] are to consider what was written in the light of the circumstances under which it was written, and give to the language a rational meaning consistent with the expressed general purpose.'" *Dontzin*, 694 A.2d at 268 (*quoting Casriel*, 65 A.2d at 517). Under New Jersey law, evidence of antecedent understandings and negotiations

will not be admitted for the purpose of varying or contradicting the writing.¹⁰ See *Filmlife, Inc. v. Mal “Z” Ena, Inc.*, 598 A.2d 1234, 1235 (N.J. Super. Ct. App. Div. 1991).

Under Article 1.2 of the Asset Purchase Agreement,¹¹ SPI purchased “all contracts and agreements, including, without limitation, sales orders and sales contracts, purchase orders and purchase contracts.” (Ex. P-146.) Article 1.2 is unambiguous, and Hull Corporation’s contracts with Berg Chilling fall within the plain meaning of this Article.

SPI, at least implicitly, recognizes that the contracts related to the Huadu Project fall within the scope of Article 1.2, arguing that “[d]espite the language in [Article] 1.2 of the Asset Purchase Agreement, none of the parties to the agreement ever intended or believed that Hull Corporation’s contracts with or obligations to Berg Chilling were ‘assets’ that could be purchased by SPI.” (Def. SPI’s Final Proposed Findings of Fact and Concl. of Law at 41 (Concl. of Law No. 18).) Moreover, even if I were to consider the parol evidence related to the intent of SPI and Hull Corporation in entering into the Asset Purchase Agreement, I would reach the same conclusion. The evidence and testimony reveals that the parties intended for SPI to acquire Hull Corporation’s contracts related to the Huadu Project. As officers of Hull Corporation and SPI stated (Ex. P-163; 1/16/03 Tr. at 118-

¹⁰ At various points during the trial and in related briefing, certain parties have referred to the work performed on the Huadu Project as “warranty” work. Because “warranty” work would have begun only after Huadu’s final acceptance of the freeze dryers (Ex. P-20, Section 7.4) and final acceptance never actually occurred, no “warranty” work was performed. SPI argues that the work performed after the closing of the Asset Purchase Agreement is warranty work within the meaning of Section 7.8 of the Asset Purchase Agreement. Section 7.8, however, is inconsistent with Section 1.2(i) and the side letter (Ex. P-186), and, therefore, does not support SPI’s contentions.

¹¹ The Asset Purchase Agreement is an integrated agreement. (Ex. D-1 at 33 (Article 10.4).)

21), as works in progress at the time of the closing, the Huadu contracts were purchased by SPI.¹² Furthermore, Hull Corporation and SPI neither excluded Hull Corporation's contracts related to the Huadu Project from the Asset Purchase Agreement nor intended to do so.¹³ Thus, under the terms of the Asset Purchase Agreement, SPI assumed Hull Corporation's responsibilities under the Equipment Contract and Modified Agreement.¹⁴ Moreover, because the freeze dryers were not able to meet the contractual through-put requirements, SPI and Hull Corporation each breached the terms of the Modified Agreement and Hull Purchase Order.

III. APPORTIONMENT OF DAMAGES

The Third Circuit has apportioned damages between the parties to a lawsuit based on each party's responsibility for a breach of contract.¹⁵ *See S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d

¹² The side letter (Ex. P-186) contains no language that exculpates SPI from liability or for the actual work that it performed pursuant to the terms of the letter, and, in fact, does not address SPI's obligations to Berg Chilling.

¹³ SPI acquired the Hull Purchase Order and Modified Agreement, and, therefore, is liable for the work it performed under those contracts. Because SPI's liability is established on this basis, it is not necessary to reach Berg Chilling's arguments related to successor liability under the de facto merger and continuation doctrines.

¹⁴ SPI argues that the assignment from Hull Corporation to SPI was void because of a non-assignment clause in Section 12.6 of the Equipment Contract. SPI may not enforce such a clause, however, because such a provision generally exist for the benefit of the "obligor." In such cases third parties cannot assert the invalidity of a prohibited assignment if the obligor makes no objection. *See* RESTATEMENT (SECOND) OF CONTRACTS at § 322, cmt. d. There is no reason to depart from this general rule in this case.

¹⁵ Additionally, Berg Chilling is entitled to contribution from Defendants. "The doctrine of contribution rests on principles of equity. . . . It is an attempt by equity to distribute equally among those who have a common obligation, the burden of performing that obligation." SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 36:14 (4th ed. 1990); *see also Resolution Trust Corp. v. Gross*, Civ. A. No. 93-5056, 1996 U.S. Dist. LEXIS 2293, at *4-5,

524, 527-28 (3d Cir. 1978). In *S.J. Goves & Sons*, the district court found that the plaintiff sustained substantial damages in connection with a construction project, but nonetheless concluded that all of the damages were not properly attributable to the defendant. *Id.* at 527. The district court accordingly divided the loss between the parties, and Third Circuit held that the district court’s allocation of damages was a “fair solution” in light of the facts of the case. *Id.* For the reasons summarized below, I conclude that Berg Chilling, SPI, and Hull Corporation were equally at fault, and apportion damages equally among the parties.

A. Fault on the Part of Berg Chilling

Berg Chilling’s argument that it merely acted as an innocent “middleman” – and therefore should not be held liable – is factually incorrect. This lawsuit is the result of the failure to deliver functioning equipment on a timely basis. Berg Chilling is partially responsible for this failure. Specifically, Berg Chilling was responsible for shipping the freeze dryers to China. While in Berg Chilling’s control, the delivery of the freeze dryers was delayed and one of the freeze dryers was damaged. More importantly, Berg Chilling, like Hull Corporation and SPI, took part in the design and/or the approval of the design of the freeze dryers and modifications thereto. In this regard, Berg Chilling is also at fault in this case.

B. Fault on the Part of Hull Corporation

1996 WL 89380, at *2 (E.D. Pa. Feb. 22, 1996) (finding that awards of contribution in actions sounding in contract are not inconsistent with Pennsylvania law). Under the doctrine of contribution, the “general principle [is] that liability should be imposed in proportion to fault.” *Dunn v. Prais*, 656 A.2d at 413, 419 (N.J. 1995) (quoting *Blazovic v. Andrich*, 590 A.2d 222, 230 (N.J. 1991)). Damages for contribution claims are apportioned between the wrongdoers on the basis of percentages of fault assigned by the trier of fault. *See Dunn*, 656 A.2d at 419.

Delays and problems with the freeze dryers are attributable to Hull Corporation. Specifically, Hull Corporation was not able to prepare the freeze dryers for shipment to Huadu by the June 15, 1996 deadline. Once the freeze dryers were in China, Hull Corporation was unable to start-up the freeze dryers and did not cooperate with Berg Chilling in the Summer of 1996 in attempting to remedy the significant performance problems with the freeze dryers.

C. Fault on the Part of SPI

As set forth above in the Findings of Fact, the evidence presented at trial established that: (1) SPI performed all work under the Modified Agreement, including the flawed engineering of the modified freeze dryers, the unsuccessful preliminary testing of the equipment, and the start-up activities at the Huadu facility; (2) SPI's work was not performed in a timely manner, preventing final acceptance from occurring prior on May 20, 1998; and (3) by May 20, 1998, the freeze dryers were not functioning as necessary to meet the through-put requirements.

D. Berg Chilling's Damages

Under the Settlement Agreement, Berg Chilling paid \$1 million to Huadu, and Berg Chilling is entitled to recover two-thirds of this amount from Hull Corporation and SPI. Accordingly, I award Berg Chilling \$333,333 from Hull Corporation and \$333,333 from SPI.¹⁶ Additionally, Berg Chilling claims that it is entitled to recover the \$650,000 "credit" for the freeze dryers that are now in the possession of Huadu. Berg Chilling, however, has not established that this amount accurately reflects the value of the equipment. In addition, even if the \$650,000 figure were accurate, it does

¹⁶ Berg Chilling argues that Hull Corporation and SPI should be held jointly and severally liable. However, Berg Chilling has not provided any persuasive authority for holding defendants jointly and severally liable in a breach of contract action when the plaintiff has also been shown to have been at fault. Accordingly, I will not hold Hull Corporation and SPI jointly and severally liable.

not take into account the costs Berg Chilling would have incurred in retrieving the equipment and/or finding another purchaser for the equipment.

Berg Chilling is not entitled to recover the damages outlined in Exhibit P-440 for accounting and travel expenses because Berg Chilling agreed to expend these in connection with its work on the freeze dryers. (Ex. D-81; 1/14/03 Tr. at 7.) Berg Chilling also argues that it is entitled to recover the amount of the attorneys' fees and professional fees it expended in connection with proceedings before the Arbitration Institute. While ordinarily Berg Chilling might be entitled to recover such fees, in this case such an award would be unconscionable. As discussed above, Berg Chilling did not adequately represent the interests of Hull Corporation, or, by extension, SPI, and for this reason it cannot recover its fees. Moreover, since Berg Chilling was equally liable with the Defendants herein, each must bear its own costs and counsel fees.

IV. REMAINING CLAIMS

A. SPI's Cross-claim Against Hull Corporation

SPI contends that Hull Corporation is liable to SPI for breach of contract. More specifically, SPI argues that Hull Corporation violated Sections 4.2(u), 4.2(v), 4.2(ff) of the Asset Purchase Agreement by failing to disclose that it had been threatened with litigation regarding the freeze dryers. However, the evidence reveals that any threat was rendered moot by the Modified Agreement.

Furthermore, SPI argues that it is entitled to indemnification from Hull Corporation pursuant to Sections 8.2 and 8.5 of the Asset Purchase Agreement. SPI's argument is unpersuasive because SPI is liable, for the reasons discussed above, for its own post-closing conduct. That is, SPI is

properly a party in this lawsuit for reasons wholly apart from any claim that “arose out of [Hull Corporation’s] operation of the Business . . . on or prior to the Closing Date” (Ex. D-1, Section 8.2(d)), and, consequently, it is not entitled to indemnification for its costs of defense.

B. Personal Liability of John Hull and Lewis Hull

SPI’s claims for fraud and misrepresentation against Messrs. Hull fail. SPI’s argument is that Messrs. Hull falsely represented to Berg Chilling that Hull Corporation’s liabilities had been transferred to SPI. Because I have found that Hull Corporation’s obligations were so transferred, no misrepresentation or fraud occurred.¹⁷

CONCLUSION

Accordingly, I will enter judgment in favor of Berg Chilling against Hull Corporation in the amount of \$333,333 and against SPI in the amount of \$333,333. This judgment shall not be joint and several. An appropriate Order follows.

¹⁷ Although John Hull and Lewis Hull did not raise this issue at trial, I conclude that Messrs. Hulls’ claim against SPI for breach of contract or indemnification cannot succeed. Defendants are liable for their respective conduct prior to and following the closing of the Asset Purchase Agreement. For similar reasons, Defendants’ cross-claims against one another cannot prevail.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERG CHILLING SYSTEMS, INC.,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
HULL CORPORATION, et al.,	:	NO. 00-5075
Defendants.	:	

ORDER

AND NOW, this day of **June, 2003**, upon consideration of the parties' Proposed Findings of Fact and Conclusions of Law and memoranda of law in support thereof and memoranda of law addressing issues related to the apportionment of damages, and following a trial on the merits, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Judgment is entered in favor of Plaintiff Berg Chilling Systems, Inc. and against Defendant Hull Corporation in the amount of three hundred thirty-three thousand three hundred thirty-three dollars (\$333,333.00).
2. Judgment is entered in favor of Plaintiff Berg Chilling Systems, Inc. and against Defendant SP Industries, Inc. in the amount of three hundred thirty-three thousand three hundred thirty-three dollars (\$333,333.00).
3. Judgment is entered in favor of Defendant SP Industries, Inc. and against Defendant Hull Corporation on Defendant Hull Corporation's cross-claim.
4. Judgment is entered in favor of Defendant Hull Corporation and against Defendant SP Industries, Inc. on Defendant SP Industries, Inc.'s counter-cross-claim.

5. Judgment is entered in favor of Third-Party Defendants John L. Hull and Lewis W. Hull and against Third-Party Plaintiff SP Industries, Inc. on Third-Party Plaintiff SP Industries, Inc.'s Third-Party Complaint.
6. Judgment is entered in favor of Third-Party Plaintiff SP Industries, Inc.'s and against Third-Party Defendants John L. Hull and Lewis W. Hull on Third-Party Defendants' counterclaim.

BY THE COURT:

Berle M. Schiller, J.