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Case Number 293,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICERCA BIOSCIENCES, LLC, a Delaware limited liability company,	)	
Plaintiff/Counterclaim Defendant Below, Appellant,	)	No. 293, 2015
v.	)	Appeal from the Case Below: Delaware Superior Court
NORDION INC., fka MDS INC., a Canadian corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation,	)	New Castle County C.A. No. N13C-10-280-MMJ-CCLD
Defendants/Counterclaim Plaintiffs Below, Appellee.	)	

APPELLANT RICERCA BIOSCIENCES, LLC'S OPENING BRIEF

Dated: July 27, 2015

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NATURE OF PROCEEDINGS

This is an appeal from the lower court's January 23, 2015 Opinion granting Defendants/Counterclaim Plaintiffs Nordion Inc., fka MDS Inc. and Nordion (US) Inc. fka MDS Pharma Services (US) Inc.'s (collectively, "Nordion") Motion for Summary Judgment and denying Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC's ("Ricerca") Motion for Summary Judgment, a copy of which is attached hereto as Exhibit A, and May 12, 2015 judgment, a copy of which is attached hereto as Exhibit B, entered in favor of Nordion and against Ricerca in this indemnification action.

In February 2010, Ricerca, as buyer, and Nordion, as seller, entered into a Stock and Asset Purchase Agreement (the "SAPA"). Two years later, BioAxone Biosciences, Inc. ("BioAxone"), claiming to be the successor-in-interest of BioAxone Therapeutic Inc., which had been a Nordion customer, filed a complaint in Florida naming both Ricerca and Nordion as defendants (the "BioAxone Lawsuit"). Both parties defended and settled the BioAxone Lawsuit.

In October, 2013, Ricerca commenced the case below seeking indemnification from Nordion under the SAPA for its costs of defending and settling the BioAxone Lawsuit. Nordion then filed a Counterclaim seeking the same relief from Ricerca. After discovery, the parties filed cross motions for

summary judgment, each contending that it was entitled to indemnification from the other under the SAPA as a matter of law.

The trial court entered summary judgment in favor of Nordion on its Counterclaim against Ricerca. (See Ex. A.) Ricerca timely appealed the lower court's entry of summary judgment in favor of Nordion to have that judgment reversed in favor of Ricerca.

SUMMARY OF ARGUMENT

1. The lower court erred in granting summary judgment in favor of Nordion because Ricerca never purchased the assets or assumed the liabilities belonging to Nordion's then-shuttered Biopharmaceuticals Unit. The definition of "Purchased Business" in the SAPA identifies by name the three discrete business units of Nordion's Discovery and Pre-Clinical Business that Ricerca purchased, but omits the fourth: Nordion's shuttered Biopharmaceuticals Unit, a liability of which was the subject of the case below.

2. As the long-closed Biopharmaceuticals Unit never was part of the "Purchased Business," (i) none of the assets of the Biopharmaceuticals Unit were transferred to Ricerca, and (ii) none of the liabilities of the Biopharmaceuticals Unit were assumed by Ricerca. Since the BioAxone Lawsuit arises from a liability of the unpurchased Biopharmaceuticals Unit, it is considered a "Retained Liability" under the SAPA for which Nordion is solely responsible under the SAPA, and against which Nordion is obligated to indemnify Ricerca.

3. Until the commencement of the below litigation, all parties understood these to be the terms of the SAPA. At all times after the execution of the SAPA, Nordion maintained exclusive dominion and control over the lab space, lab equipment and lab records of the closed Biopharmaceuticals Unit. Nordion even sold the lab equipment at auction after the SAPA. Nordion cannot, after the

commencement of an action regarding the Retained Liabilities, ignore its post-closing admissions in the record — admissions in writing and by Nordion's own conduct — and now argue that the liabilities of the unpurchased Biopharmaceuticals Unit were assumed by Ricerca.

4. In the event that this Court determines that the pertinent language of the SAPA is in any way ambiguous, the record evidence of Nordion's post-closing conduct confirms Ricerca's plain language reading of the SAPA. Specifically, the record shows that the lab space of the closed Biopharmaceuticals Unit remained Nordion's, and Ricerca had no access to the lab and did not use the lab. Similarly, the lab equipment remained Nordion's, kept within the closed lab space to which Ricerca had no access. Nordion later sold the lab equipment at auction, and Ricerca never received a penny of the sale proceeds. Nordion also expressly agreed that the lab records of the closed Biopharmaceuticals Unit would remain Nordion's.

5. Accordingly, Ricerca is entitled to reversal of the Order granting Nordion's motion for summary judgment and denying Ricerca's motion for summary judgment. Ricerca's motion for summary judgment should be granted and a judgment should be entered in favor of Ricerca and against Nordion.

STATEMENT OF FACTS

A. Events Leading To The Below Litigation.

i. The Parties

Ricerca is a Delaware limited liability company with its principal place of business in Concord, Ohio. (Ex. A at 2.) Ricerca is a contract research organization that is engaged in the business of providing pre-clinical discovery support and research and development services to pharmaceutical and biotech companies for drug development. (Id.)

Nordion is a Canadian corporation with its principal place of business in Ottawa, Canada. (Id.) Nordion is a global health science company that manufactures products to be used for the prevention, diagnosis, and treatment of disease. (Id.)

ii. The Biopharmaceuticals Unit

Nordion's Discovery and Pre-Clinical business group formerly included four discrete units: (1) pharmacology; (2) drug metabolism and pharmacokinetics; (3) drug safety assessment; and (4) biopharmaceuticals manufacturing. (A497.) The Biopharmaceuticals Unit was operated out of Nordion's Bothell, Washington facility. (Ex. A at 3.) The Biopharmaceuticals Unit manufactured, among other things, bacterial cell banks. (Id.) Ricerca has never engaged in the business of cell bank manufacturing. (A477.)

In March 2003, BioAxone retained Nordion to manufacture a Bacterial Master Cell Bank to assist BioAxone in the production of a new drug. (Ex. A at 3.) The cell bank was manufactured by Nordion's Biopharmaceuticals Unit. (Id.) The Biopharmaceuticals Unit included a laboratory where the master cell bank was manufactured and lab equipment that was used to manufacture the master cell bank. (A150-184.)

Nordion closed the Biopharmaceuticals Unit in 2006, years before the SAPA. (Ex. A at 4.) This is undisputed. At that time, Nordion sealed off and decommissioned the laboratory belonging to its Biopharmaceuticals Unit, including the laboratory equipment, and let go the employees that staffed Nordion's Biopharmaceuticals Unit. (A483.) This also is undisputed. It is also undisputed that Nordion retained the records of the closed Biopharmaceuticals Unit and maintained them under the account name of Nordion at a third-party document storage facility near Bothell, Washington. (Id.)

iii. The SAPA

Nearly three and one-half years following Nordion's closure of its Biopharmaceuticals Unit, Ricerca, as buyer, and Nordion, as seller, entered into the SAPA. (A018-148.) The portion of the SAPA dealing with the purchase of stock dealt solely with the shares of Nordion's foreign based Taiwan and Lyon businesses. (A521.) Ricerca never purchased the stock of any Nordion business

based in Bothell, Washington, the former location of the Biopharmaceuticals Unit. (Id.) Ricerca instead purchased certain assets and a sublease of a portion of the space at Nordion's Bothell, Washington site. (A477, 499.)

Given that Nordion closed its Biopharmaceuticals Unit years before the parties entered into the SAPA, the "Purchased Business" definition contained in the SAPA logically omitted that business unit:

> "Purchased Business" means the discovery and pre-clinical contract research services business delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch, as well as the related training, equipment, installation, repair, maintenance, customer support and application consulting services directed to or involving discovery and pre-clinical contract research services) as conducted by [Nordion] (directly or indirectly through its Subsidiaries) on or prior to the Closing Date at any location other than the facility located in King of Prussia, Pennsylvania.

(A046, emphasis added.) Thus, while the express definition of "Purchased Business" included three discrete units comprising Nordion's Discovery and Pre-Clinical Business (pharmacology, drug metabolism and pharmacokinetics, and drug safety assessment), it omitted Nordion's shuttered fourth unit: biopharmaceuticals manufacturing. (Id.) Again, this is undisputed. (Ex. A at 13.) It also is undisputed that the SAPA contains no provision for: (a) Ricerca's acquisition of the shuttered biopharmaceuticals laboratory, (b) the equipment for that laboratory, (c) the records of the closed Biopharmaceuticals Unit (which

Nordion houses with a third party under a contract), or (d) dealing with the former employees of the closed Biopharmaceuticals Unit. (Ex. A at 9.)

The extensive record in this case also shows that the parties never intended the SAPA to deal with the assets and liabilities of the closed Biopharmaceuticals Unit. For example, Ricerca and Nordion never engaged in any discussions or negotiations regarding the assets or liabilities of the Biopharmaceuticals Unit, nor did Ricerca conduct any due diligence concerning the assets or liabilities of the closed Unit. In fact, at no time during the negotiations of the SAPA was the closed Biopharmaceuticals Unit discussed. (A499.) Even Ian Lennox, the former President and Chief Executive Officer of Ricerca who negotiated and executed the SAPA on Ricerca's behalf, testified that Ricerca did not intend to purchase the closed Biopharmaceuticals Unit (or its assets) and did not assume any liabilities of Nordion related to the closed Unit. (A499-500.)

As the Biopharmaceuticals Unit is not contained within the "Purchased Business" definition of the SAPA, it is considered an "Excluded Asset" under the SAPA and Nordion is required to indemnify Ricerca for any liabilities associated with that Excluded Asset. "Excluded Assets" are defined in the SAPA as follows:

> "Excluded Assets" means all right, title and interest of Parent [Nordion] in all of its Subsidiaries, the Excluded Businesses and all Assets (excluding the Discovery and Pre-Clinical Companies, the Discovery and Pre-Clinical Business, and the Discovery and Pre-Clinical Assets), including . . . .

(A036-37.) Section 10.2(a) of the SAPA requires Nordion to indemnify Ricerca both for any "Retained Liability" and for "the past, present or future ownership or use of the Excluded Assets." (A135.) "Retained Liability" means "any and all Liabilities . . . resulting from or arising out of the present, past or future . . . ownership or use of any Excluded Assets." (A047-50.) The definition continues, "'Retained Liabilities' shall also include the following: . . . (vii) all Liabilities arising out of or related to any Excluded Asset or to any other Asset not transferred to the Buyer at the Closing." (Id., emphasis added.)

iv. The Parties' Post-SAPA Conduct

The parties post-SAPA conduct also shows that each party understood that Ricerca did not acquire any assets or assume any liabilities of Nordion's closed Biopharmaceuticals Unit.

First, per the SAPA, Ricerca subleased certain space at the Bothell, Washington facility from Nordion, but the sublease did not include the lab formerly occupied and used by Nordion's Biopharmaceuticals Unit. (A477.) The closed lab space remained Nordion's and was kept locked. (A483.) Ricerca had no access to the lab and did not use the lab. (Id.)

Second, the lab equipment of the closed Biopharmaceuticals Unit remained Nordion's, kept within the closed lab space to which Ricerca had no access.[1] (A484.)

Third, after the parties entered into the SAPA, Nordion actually sold the lab equipment belonging to its Biopharmaceuticals Unit at two auctions. (A486-488.) Ricerca never received a penny of the sale proceeds. (A477.) In fact, more than a year after the execution of the SAPA, Ricerca and Nordion discussed a potential purchase by Ricerca of certain assets of the closed lab. (A512). If Ricerca had purchased the lab equipment through the SAPA, there would be no reason for Ricerca to attempt to purchase the same equipment it already owned over a year later.

Fourth, Nordion retained responsibility for all of the lab records of the Biopharmaceuticals Unit after the closing of the SAPA. As early as August 31, 2010, Ricerca's John Bolling wrote an email to, among others, Nordion's Debbie Sabatino stating that Nordion should keep the records relating to the Biopharmaceuticals Unit: "records related to the GMP unit (biopharmaceuticals) should stay with Nordion." (A490-492.) Nordion expressly signified its agreement with this division of records, although the actual division of boxes

[1] While the schedules to the SAPA do show the purchase of certain equipment by Ricerca, none of the lab equipment of the closed Biopharmaceuticals Unit is reflected in the schedules.

appears not to have taken place until September 2012, when it acknowledged: "[t]he changes suggested by John will be made per the 4 bullets: -records related to the GMP unit (biopharmaceuticals) should stay with Nordion . . . ." (Id.) And when Nordion transferred to Ricerca, in error, certain records of the Biopharmaceuticals Unit, Nordion's legal counsel, Erin Zipes, acknowledged "that the below six [sic] boxes that I'd requested from you are in fact now in Ricerca's Iron Mountain account #W5871, possibly due to an administrative error. (A524, emphasis added.) Because Ricerca received these documents in error before the final division of these stored boxes, Ricerca provided certain of them to BioAxone in January and February 2012 as a courtesy, stating: "Ricerca did not assume any liability or responsibility for any discontinued MDS Pharma Services operations. That being said, we are willing to attempt to provide copies of the documents that you have requested, for the stated fee." (A494-495.)

v. The BioAxone Lawsuit

In April 2012, BioAxone initiated litigation in the United States District Court for the Southern District of Florida, naming both Nordion and Ricerca as defendants. The BioAxone Lawsuit is a public record captioned BioAxone Biosciences, Inc. v. Nordion (US), Inc., et al., Case No. 12-cv-60739, S.D. Florida, Fort Lauderdale Division, and a copy of the BioAxone complaint is annexed to Ricerca's Complaint as Exhibit B. (A150-184.)

The BioAxone Lawsuit alleged that the cell bank Nordion manufactured in 2003 was contaminated with animal origin products which created the risk that the U.S. Food and Drug Administration could find any drug BioAxone derived from the cell bank to be unfit for testing or use. (Id.) BioAxone sought damages in tort from both Ricerca and Nordion. (Id.)

During the BioAxone litigation, Ricerca and Nordion each made a demand on the other to defend, indemnify, and hold harmless, as provided by the SAPA. (Ex. A at 5.) Both parties refused the other's demand. (Id.) Subsequently, Ricerca and Nordion independently settled the BioAxone Lawsuit for $150,000.00 and $200,000.00, respectively. (Id.)

B. The Case Below.

On October 23, 2013, Ricerca commenced the case below seeking indemnification from Nordion under the SAPA for its costs of defending and settling the BioAxone Lawsuit and for its costs in bringing and prosecuting the Delaware action. (A010-184.) Nordion filed a Counterclaim seeking the same relief from Ricerca. (A185-302.) The parties engaged in written discovery, but no depositions were taken. (A001-009.) The parties agreed to forgo fact depositions and instead to rely solely upon the parties' respective document productions and any affidavits or declarations submitted under Supr. Ct. Civ. R. 56(e) in support of their dispositive motions. The parties have stipulated that the documents produced

by each party in the litigation are authentic business records that would constitute admissible evidence for purposes of Rule 56. The parties filed their cross motions for summary judgment on September 26, 2014. (Ex. A at 3.) The lower court heard oral argument on November 20, 2014. (Id.; A525-575.)

C. The Lower Court's Decision.

The court below granted Nordion's summary judgment motion against Ricerca and denied Ricerca's cross motion for summary judgment. In its Opinion, the lower court found that the SAPA is unambiguous and provides that the closed Biopharmaceuticals Unit was purchased by Ricerca, and Ricerca therefore assumed the liability of the BioAxone Lawsuit that arose from the closed Biopharmaceuticals Unit. (Ex. A at 13.) While acknowledging that the Biopharmaceuticals Unit is not specifically mentioned by name in the SAPA, the lower court nevertheless concluded that the Biopharmaceuticals Unit fits within the description of work and services contained in the definition of "Purchased Business." (Id.) The court below also concluded, in error, that the language of the SAPA is clear that all liabilities arising from Nordion's Discovery and Pre-Clinical Business were assumed by Ricerca under the SAPA. (Id.)

ARGUMENT

I. The BioAxone Lawsuit is a Retained Liability of Nordion because Ricerca did not purchase the closed Biopharmaceuticals Unit

A. Question Presented

Did the lower court err in granting summary judgment in favor of Nordion and against Ricerca where the lower court determined that Ricerca purchased the closed Biopharmaceuticals Unit and, therefore, assumed the liability of the BioAxone Lawsuit? (A319-320; A506-509.)[2]

B. Scope of Review

Motions for summary judgment are reviewed de novo. Motorola, Inc. v. Amkor Tech., Inc., 849 A.2d 931, 935 (Del. 2004). This Court reviews a grant of summary judgment "both as to facts and law to determine whether or not the undisputed facts, viewed in the light most favorable to the opposing party, entitle the party to judgment as a matter of law." Id. If material issues of fact exist, then summary judgment is inappropriate. Id; Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979); Ebersole v. Lowengrub, 180 A.2d 467, 469-70 (Del. 1962).

On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the trial court's findings are clearly

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[2] Pursuant to Rule 14(b)(vi) of the Supreme Court of Delaware, the "A__" citations to Ricerca's Appendix in the Question Presented sections herein refer to the pages in Ricerca's summary judgment briefs where the questions were preserved in the lower court.

supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process. Brehm v. Eisner, 906 A.2d 27, 41-42 (Del. 2006). In appropriate circumstances, this Court may review de novo mixed questions of law and fact and in certain cases make its own findings of fact upon the record below. Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1276 (Del. 1994).

C. Merits of Argument

The lower court erred because the parties' agreement makes clear that Ricerca neither purchased Nordion's closed Biopharmaceuticals Unit nor assumed liability for the BioAxone Lawsuit.

The interpretation of the terms of the SAPA is governed by New York law.[3] Under New York law, contracts are, in the first instance, interpreted and enforced based on their plain language. Embraer Fin. Ltd. v. Servicios Aereos Profesionales, S.A., 42 A.D.3d 380, 381 (N.Y. App. Div. 2007). It is fundamental that courts enforce contracts and do not rewrite them. Grace v. Nappa, 46 N.Y.2d 560, 565 (N.Y. 1979). "The courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the

[3] Section 11.4 of the SAPA provides that the agreement is governed by and construed in accordance with the laws of the State of New York without giving effect to any choice or conflict of law provision or rule. (A142.) The parties agree that there is no meaningful substantive difference between New York and Delaware contract law on the issues presented in this case. (Ex. A at 7.)

parties under the guise of interpreting the writing." Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16, 19 (N.Y. 1961). When parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms. W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162 (N.Y. 1990). Courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 72 (N.Y. 1978).

In construing the provisions of a contract, ascertainment of the intention of the parties is paramount. Brown Bros. Elec. Constrs. v. Beam Constr. Corp., 41 N.Y.2d 397, 400 (N.Y. 1977). Where the intention of the parties is clearly and unambiguously set forth in the agreement itself, effect must be given to the intent as indicated by the language used without regard to extrinsic evidence. Mallard Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 291 (N.Y. 1973); see also West Weir & Bartel v. Carter Paint Co., 25 N.Y.2d 535, 540 (N.Y. 1969) (where contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence).

The lower court erroneously found that the definition of "Purchased Business" in the SAPA included Nordion's Biopharmaceuticals Unit. (Ex. A at 13.) The plain language of the SAPA belies the lower court's conclusion that Ricerca purchased Nordion's closed Biopharmaceuticals Unit as part of Nordion's

"Discovery and Pre-Clinical Business." Since the plain language of the SAPA shows that Ricerca did not purchase Nordion's Biopharmaceuticals Unit, Ricerca could not have assumed any liabilities associated with that unit.

The SAPA defines "Discovery and Pre-Clinical Business" as the "Purchased Business." (A033.) The SAPA's definition of "Purchased Business" includes three of Nordion's Discovery and Pre-Clinical Business units, but excludes Nordion's Biopharmaceuticals Unit:

> "Purchased Business" means the discovery and pre-clinical contract research services business delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch, as well as the related training, equipment, installation, repair, maintenance, customer support and application consulting services directed to or involving discovery and pre-clinical contract research services) as conducted by [Nordion] (directly or indirectly through its Subsidiaries) on or prior to the Closing Date at any location other than the facility located in King of Prussia, Pennsylvania.

(A046, emphasis added.) Nordion's pre-SAPA organizational chart shows Nordion's Discovery and Pre-Clinical Business was comprised of four units: (1) Biopharmaceuticals; (2) Pharmacology; (3) Drug Metabolism and Pharmacokinetics; and (4) Drug Safety Assessment. (A497.) Yet, the definition of "Purchased Business" expressly includes three of the four Discovery and Pre-Clinical Business units (pharmacology, drug metabolism and pharmacokinetics and drug safety assessment) and excludes one: Biopharmaceuticals. (A046.) The

specific identification of certain Discovery and Pre-Clinical Business units and the omission of one plainly and unambiguously demonstrates, within the four corners of the SAPA, that Ricerca neither purchased nor intended to purchase Nordion's closed Biopharmaceuticals Unit. Had the parties intended to include the closed Biopharmaceuticals Unit in the definition of "Purchased Business," they would have identified it expressly just as they identified the other discrete business units. See Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp., 2013 Del. Ch. LEXIS 110, at *26 (Del. Ch. May 1, 2013).

Despite the plain language of the SAPA, the lower court erroneously concluded that the Biopharmaceuticals Unit, while not named, fits within the description contained in the definition of "Purchased Business." (Ex. A at 13.) The lower court reached this conclusion because it found that the description reflects the type of work and services that were offered by the Biopharmaceuticals Unit. (Id.) The lower court did not provide any explanation for how it concluded that the description contained in the definition reflects the work and services of the long-closed Biopharmaceuticals Unit. (Id.) This flawed analysis reflects an improper reliance on extrinsic evidence as opposed to a proper resort to the plain language of the SAPA. See Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 72 (N.Y. 1978) (holding that courts should be extremely reluctant to interpret an agreement as

impliedly stating something which the parties have neglected to specifically include).

The lower court's analysis also violates well-established rules of construction. Here, the lower court determined that a description contained in a parenthetical in the definition of "Purchased Business" included the closed Biopharmaceuticals Unit (even though that business unit, unlike the others, was not expressly identified). That parenthetical, however, immediately follows the business units that the parties actually did identify. (A046.) Under well-established rules of construction, the description following the specifically named units modifies and applies to only those specifically named units. See Aspen Advisors LLC v. UA Theatre Co., 861 A.2d 1251, 1265 (Del. 2004) (the well-established rule of construction, ejusdem generis, is that where general language follows an enumeration of persons or things, by words a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned). The use of the word "including" after the specifically enumerated business units shows that the parties intended the description to be illustrative of the work and services performed by those identified units only. Therefore, the definition of "Purchased Business" does not include the closed Biopharmaceuticals Unit.

Nowhere in the SAPA do the parties mention the Biopharmaceuticals Unit. (Ex. A at 4; A018-148.) The SAPA contains no provision under which Ricerca acquired the lab, the lab equipment, the records, or the former employees of the closed Biopharmaceuticals Unit. (Id.) Neither the lab nor the lab equipment of the closed Biopharmaceuticals Unit were part of the transaction. Moreover, the documents produced in this litigation show that Ricerca and Nordion never engaged in any discussions or negotiations concerning any assets or liabilities of the Biopharmaceuticals Unit (or that Ricerca even conducted due diligence concerning any assets or liabilities of the closed Biopharmaceuticals Unit). Had Ricerca intended to assume the liabilities of a business unit that Nordion closed over three years before the date of the SAPA, there would have been some mention of it in the SAPA and in the due diligence.

As Ricerca did not purchase the closed Biopharmaceuticals Unit as part of the transaction, Ricerca cannot be obligated to indemnify Nordion in connection with the BioAxone Lawsuit, a past liability of the Biopharmaceuticals Unit. To the contrary, Nordion is required to indemnify Ricerca. Section 10.2(a) of the SAPA requires Nordion to indemnify Ricerca both for any "Retained Liability" and for "the past, present or future ownership or use of the Excluded Assets." (A135.) Under the definitions in Section 1.1 of the SAPA, "Retained Liability" means "any and all Liabilities . . . resulting from or arising out of the present, past or future . . .

ownership or use of any Excluded Assets." (A047-50.) The definition continues, "'Retained Liabilities' shall also include the following: . . . (vii) all Liabilities arising out of or related to any Excluded Asset or to any other Asset not transferred to the Buyer at the Closing." (Id.) The plain language of the SAPA means that any liabilities arising from any asset not transferred to Ricerca are retained liabilities of Nordion. It is undisputed that the closed Biopharmaceuticals Unit was not transferred to Ricerca and therefore the BioAxone Lawsuit is a Retained Liability of Nordion.

The BioAxone Lawsuit arose out of, or was related to Excluded Assets (". . . any other Asset not transferred to the Buyer [Ricerca] at Closing"). The BioAxone Lawsuit arose from and relates to the Biopharmaceuticals Unit. (A150-184.) For the reasons set forth at length above, the Biopharmaceuticals Unit was not purchased by Ricerca in the deal. It is also undisputed that in October 2006, almost three and one half years prior to the SAPA, Nordion decided to close the Biopharmaceuticals Unit.[4] (Ex. A at 4.) It is further undisputed that the lab, including the lab equipment, was decommissioned and sealed off, and the employees who staffed the unit were let go. (A483.) Therefore, the closed unit was not and could not have been transferred to Ricerca. The BioAxone Lawsuit is

[4] There may be occasions where it is appropriate for the trial court to consider some undisputed background facts to place the contractual provision in its historical setting. Eagle Indus. V. DeVilbiss Health Care, 702 A.2d 1228, 1232 n.7 (Del. 1997).

a "Retained Liability" of Nordion, and the lower court committed reversible error by granting Nordion's motion for summary judgment and denying Ricerca's motion for summary judgment.

II. Should This Court Determine that the SAPA is Ambiguous, the Post-Closing Conduct of the Parties Confirms Ricerca's Plain Language Reading of the SAPA, and Judgment should be Entered in Favor of Ricerca

A. Question Presented

In the event this Court determines that the SAPA is in any way ambiguous, does the undisputed record regarding the parties' post-closing conduct confirm Ricerca's plain language reading of the SAPA and obligate Nordion to indemnify Ricerca? (A321-325; A509-516.)

B. Scope of Review

Motions for summary judgment are reviewed de novo. Motorola, Inc. v. Amkor Tech., Inc., 849 A.2d 931, 935 (Del. 2004). This Court reviews a grant of summary judgment "both as to facts and law to determine whether or not the undisputed facts, viewed in the light most favorable to the opposing party, entitle the party to judgment as a matter of law." Id. If material issues of fact exist, then summary judgment is inappropriate. Id; Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979); Ebersole v. Lowengrub, 180 A.2d 467, 469-70 (Del. 1962).

On appeal from a decision granting summary judgment, this Court reviews the entire record to determine whether the trial court's findings are clearly supported by the record and whether the conclusions drawn from those findings are the product of an orderly and logical reasoning process. Brehm v. Eisner, 906 A.2d 27, 41-42 (Del. 2006). In appropriate circumstances, this Court may review

de novo mixed questions of law and fact and in certain cases make its own findings of fact upon the record below. Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1276 (Del. 1994).

C. Merits of Argument

Ricerca submits that the plain language of the SAPA entitles Ricerca to indemnification from Nordion for the reasons set forth at length above. However, in the event that this Court finds that the relevant language of the SAPA is in any way ambiguous, the post-closing conduct of the parties confirms Ricerca's plain language reading of the SAPA that Ricerca did not purchase the closed Biopharmaceuticals Unit and the BioAxone Lawsuit is a "Retained Liability" of Nordion under the SAPA.

Absent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing. Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 338 (N.Y. 1950). The SAPA contains an integration clause.[5] (A144.) Nevertheless, the presence of an integration clause does not exclude consideration of evidence explaining the terms such as course of dealing, usage of

[5] Section 11.9 of the SAPA provides that the agreement constitutes "the entire agreement among the parties hereto with respect to the matters covered by this Agreement and thereby, and supersede all previous written, oral or implied understandings among them with respect to such matters."

trade or course of performance. 767 Third Ave. LLC v. Orix Capital Mkts., LLC, 800 N.Y.S.2d 357 (N.Y. Sup. Ct. 2005). Extrinsic evidence may be considered where a term is sufficiently ambiguous, despite the presence of an integration clause. Id.; see also Tobin v. Union News Co., 18 A.D.2d 243, 245 (N.Y. App. Div. 1963), aff'd, 13 N.Y.2d 1155 (when an ambiguity arises from a written agreement, the intention of the parties must be ascertained in the light of the surrounding facts and circumstances and parol evidence is admissible for this reason); Smith v. Smith, 277 A.D. 694, 695 (N.Y. App. Div. 1951) ("[W]here words used in a written contract are susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and the subject matter of the instrument and parol evidence may be admissible to clear up any ambiguity in the language employed").

The question of whether a writing is ambiguous is the exclusive province of the Court. Sutton v. East Riv. Sav. Bank, 55 N.Y.2d 550, 554 (N.Y. 1982). An omission or mistake in a contract does not constitute an ambiguity. Gearns v. Commercial Cable Co., 293 N.Y. 105, 109 (N.Y. 1944). The question of whether an ambiguity exists must be ascertained from the face of the agreement without regard to extrinsic evidence. Breed v. Insurance Co. of North Amer., 46 N.Y.2d 351, 355 (N.Y. 1978). In the event that this Court finds that the relevant language

of the SAPA is ambiguous, the parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties. Fed. Ins. Co. v. Ams. Ins. Co., 258 A.D.2d 39, 44 (N.Y. App. Div. 1999).

There is only one conclusion that can be reached after reviewing the entirety of the evidence regarding the parties' post-SAPA conduct: Ricerca did not purchase the closed Biopharmaceuticals Unit as part of the transaction. First, per the SAPA, Ricerca subleased certain space at the Bothell, Washington facility from Nordion, but the sublease did not include the space formerly occupied by Nordion's closed Biopharmaceuticals Unit. (A477.) In fact, the closed lab space belonging to Nordion's Biopharmaceuticals Unit remained Nordion's and was kept locked. (A483.) Ricerca had no access to that space or the lab and used neither. (Id.) Nordion has offered no evidence to dispute these facts. Because Nordion's lab was not transferred to Ricerca, any liability arising out of or relating to the lab (i.e., the BioAxone Lawsuit) is a "Retained Liability" of Nordion.

Second, it is undisputed that Ricerca did not acquire any of the lab equipment belonging to Nordion's closed Biopharmaceuticals Unit. After the execution of the SAPA, the lab equipment of the closed Biopharmaceuticals Unit remained Nordion's, kept within the closed lab space to which Ricerca had no access. (A484.) Indeed, emails produced by Nordion in this litigation show that Nordion's Mario LeDuc sold the lab equipment at two (2) auctions after the SAPA.

(A486-488.) Ricerca never received a penny of those sale proceeds. (A477.) In fact, more than a year after the execution of the SAPA, Ricerca and Nordion discussed a potential purchase by Ricerca of certain assets of the closed lab. (A512). If Ricerca had purchased the lab equipment through the SAPA, there would be no reason for Ricerca to attempt to purchase the same equipment it already owned over a year later. Because Nordion's lab equipment, including the equipment used to manufacture the BioAxone cell bank, was not transferred to Ricerca, any liability arising out of or relating to Nordion's lab equipment is a "Retained Liability" of Nordion. (A047-50.)

Third, the undisputed record shows that Nordion retained all of the records of the Biopharmaceuticals Unit. Nordion's own document production shows that Nordion retained responsibility for all of the lab records of the Biopharmaceuticals Unit after the closing of the SAPA. As early as August 31, 2010, Ricerca's John Bolling wrote an email to, among others, Debbie Sabatino of Nordion stating: "records related to the GMP unit [biopharmaceuticals] should stay with Nordion." (A490-492.) Nordion expressly signified its agreement with this division of records, although the actual division of boxes appears not to have taken place until September 2012, and responded: "[t]he changes suggested by John will be made per the 4 bullets: -records related to the GMP unit (biopharmaceuticals) should stay with Nordion . . . ." (Id.) Further, Erin Zipes (Nordion's legal counsel) sent

an email on September 21, 2013 acknowledging "that the below six [sic] boxes that I'd requested from you are in fact now in Ricerca's Iron Mountain account #W5871, possibly due to an administrative error. (A524, emphasis added.) Nordion's retention of the lab records makes sense since Nordion also retained the lab space and lab equipment. Thus, Nordion, not Ricerca, clearly retained the assets of the closed Biopharmaceuticals Unit used to make the contaminated cell bank complained of in the BioAxone Lawsuit.

Nordion's counterclaim points to Ricerca's apparent post-SAPA possession and control of records from the closed Biopharmaceuticals Unit as evidence that Ricerca also acquired the liabilities of that unit. Specifically, Nordion's counterclaim cites post-SAPA documents from January and February 2012, before the division of boxes had been completed, showing that Ricerca provided records in response to requests by BioAxone. (A197.) However, standing alone this tells only a small, and therefore misleading, part of the story. The entirety of the evidence shows that when Peggy Conley of Ricerca emailed Lisa McKerracher of BioAxone on January 25, 2012, Ms. Conley expressly stated: "Ricerca did not assume any liability or responsibility for any discontinued MDS Pharma Services operations. That being said, we are willing to attempt to provide copies of the documents that you have requested, for the stated fee." (A494-495.) This shows

that Ricerca was only being helpful. The lab records belonged to Nordion at all times.

Ricerca has also offered evidence in the form of sworn testimony by Mr. Ian Lennox, former President and Chief Executive Officer of Ricerca who negotiated and ultimately executed the SAPA on behalf of Ricerca. Mr. Lennox testified that Ricerca did not intend to purchase the closed Biopharmaceuticals Unit nor did it intend to assume any liabilities of Nordion related to the closed Biopharmaceuticals Unit. (A499-500.) Mr. Lennox also testified that at no time during the negotiation did the parties discuss the closed Biopharmaceuticals Unit. (A499.) Mr. Lennox's testimony further demonstrates that the closed Biopharmaceuticals Unit was not purchased by Ricerca as part of the transaction. Nordion has offered no testimony or other evidence to dispute Mr. Lennox's testimony.

In sum, should this Court find that the SAPA is in any way ambiguous, the undisputed record of the parties' post-closing conduct definitively shows that Ricerca did not purchase the closed Biopharmaceuticals Unit, and the BioAxone Lawsuit is a "Retained Liability" of Nordion under the SAPA. The lower court's Order should be reversed and judgment should be entered in favor of Ricerca as a matter of law.

CONCLUSION

The lower court erred in concluding that Ricerca purchased the closed Biopharmaceuticals Unit as part of the transaction and therefore assumed the liability of the BioAxone Lawsuit. Ricerca did not buy the closed Biopharmaceuticals Unit as part of the deal, nor was it transferred to Ricerca at closing, rendering the BioAxone Lawsuit arising from the Biopharmaceuticals Unit a "Retained Liability" of Nordion under the SAPA. Nordion is obligated to indemnify Ricerca.

Accordingly, the judgment should be reversed and a judgment should be entered in favor of Ricerca Biosciences, LLC.

Dated: July 27, 2015

By: */s/ Michael J. Barrie*
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Exhibit A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RICERCA BIOSCIENCES, LLC, a Delaware limited liability company,	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	C.A. No. N13C-10-280 MMJ CCLD
NORDION INC., fka MDS Inc., a Canadian Corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation	)	
Defendants/Counterclaim Plaintiffs.		

Submitted: November 20, 2014
Decided: January 23, 2015

On Plaintiff's Motion for Summary Judgment
DENIED
On Defendants' Motion for Summary Judgment
GRANTED

OPINION

Michael J. Barrie, Esquire, Stephen M. Ferguson, Esquire (Argued), David W. Mellot, Esquire, Benesch Friedlander Coplan & Aronoff LLP, Attorneys for Plaintiff/Counterclaim Defendant

Patricia L. Enerio, Esquire, Melissa N. Donimirski, Esquire (Argued), Proctor Heyman LLP, Attorneys for Defendants/Counterclaim Plaintiffs

JOHNSTON, J.

PROCEDURAL CONTEXT

Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC ("Ricerca") is a Delaware limited liability company with its principal place of business in Concord, Ohio. Ricerca is a contract research organization that is engaged in the business of providing pre-clinical discovery support and research and development services to pharmaceutical and biotech companies for drug development.

Defendant/Counterclaim Plaintiff Nordion Inc. ("Nordion") is a Canadian corporation with its principal place of business in Ottawa, Canada.[1] Nordion is a global health science company that manufactures products to be used for the prevention, diagnosis, and treatment of disease.

Ricerca instituted this action on October 23, 2013. Ricerca alleges that Nordion breached the parties' Stock Asset Purchase Agreement ("SAPA") by failing and refusing to defend and indemnify Ricerca during litigation with BioAxone Biosciences, Inc. ("BioAxone"). Ricerca seeks to recover $350,000 in damages for its costs and expenses in defending and settling the BioAxone lawsuit.

Nordion filed a counterclaim, alleging that Ricerca breached the SAPA by failing and refusing to defend and indemnify Nordion for the same BioAxone

[1] Nordion was formerly known as MDS Inc., but changed its name to Nordion in 2010. Nordion US is a wholly-owned subsidiary of Nordion. Nordion US is a Delaware corporation with its principal place of business in Ottawa, Canada and is the successor-in-interest to MDS Pharma Services (US) Inc. For purposes of this Opinion all aforementioned entities will be referred to as Nordion.

litigation. Nordion seeks to recover $488,951.93 in damages for its costs and expenses in defending and settling the BioAxone lawsuit.

On September 26, 2014, Ricerca and Nordion filed cross Motions for Summary Judgment. Oral argument was heard on November 20, 2014.

UNDISPUTED FACTS

In 2000, Nordion launched a full-service contract research organization comprised of drug discovery and development companies. The organization was divided into five business groups: (1) Discovery and Pre-Clinical; (2) Early Clinical Research; (3) Bioanalytical; (4) Clinical Research; and (5) Central Lab. The focus of this litigation is the Discovery and Pre-Clinical business group.

In 2003, the Discovery and Pre-Clinical business group opened a new biopharmaceutical facility in Bothell, Washington. Simultaneously, the Discovery and Pre-Clinical group established a Biopharmaceuticals Unit to be operated out of the Bothell, Washington facility. The Biopharmaceuticals Unit manufactured, among other things, bacterial cell banks.

In March 2003, BioAxone retained Nordion to manufacture a Bacterial Master Cell Bank to assist BioAxone in the production of a new drug. The cell bank subsequently was manufactured by the Biopharmaceuticals Unit of the Discovery and Pre-Clinical group at the Bothell, Washington facility.

In 2006, Nordion closed the Biopharmaceuticals Unit. The other units of the Discovery and Pre-Clinical group continued to work out of the Bothell, Washington facility.

The SAPA

In 2009, Nordion announced that it would be selling its various business groups, including the Discovery and Pre-Clinical group. In late 2009, Nordion and Ricerca began negotiating the SAPA. In February 2010, Ricerca and Nordion executed the SAPA. Under the SAPA, Ricerca agreed to purchase all the assets of Nordion's Discovery and Pre-Clinical group.

Included in the SAPA were provisions that required certain liabilities to be retained by Nordion, and other liabilities to be assumed by Ricerca. The SAPA also contained indemnification provisions for the benefit of both Nordion and Ricerca. Under these provisions, the right to indemnification was dependent on whether the damages related to a retained or an assumed liability. The closed Biopharmaceuticals Unit was not specifically addressed in the SAPA.

BioAxone Litigation

In April 2012, BioAxone initiated litigation in the United States District Court for the Southern District of Florida, naming both Nordion and Ricerca as defendants ("BioAxone Litigation"). BioAxone alleged that the cell bank Nordion

manufactured in 2003 was contaminated with animal origin products, which created the risk that the FDA could find any drug BioAxone derived from the cell bank to be unfit for testing or use. BioAxone sought damages in tort from both Nordion and Ricerca.

During the BioAxone Litigation, Ricerca and Nordion each made a demand on the other to defend, indemnify, and hold harmless, as provided by the SAPA. Both parties refused the other's demand. Subsequently, Ricerca independently settled the BioAxone Litigation for $150,000. Similarly, Nordion independently settled the BioAxone Litigation for $200,000.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If

[2] Super. Ct. Civ. R. 56(c).
[3] *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991).
[4] Super. Ct. Civ. R. 56(c).
[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

Where the parties have filed cross motions for summary judgment and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[7] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[8]

ANALYSIS

Parties Contentions

Ricerca contends that Nordion breached the SAPA by refusing to defend and indemnify Ricerca during the BioAxone Litigation. Ricerca alleges that the language of the SAPA is unambiguous in providing that the liability of the BioAxone Litigation was retained by Nordion because the Biopharmaceuticals Unit was never the subject of negotiation under the SAPA. Ricerca argues

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[7] Super. Ct. Civ. R. 56(h).
[8] *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *10 (Del. Super.).

Nordion must indemnify Ricerca for the damages it suffered relating to settlement of the BioAxone Litigation.

Conversely, Nordion contends that Ricerca breached the SAPA by refusing to defend and indemnify Nordion during the BioAxone Litigation. Nordion alleges that the SAPA is unambiguous in that Ricerca assumed *all* liabilities arising out of the operation of the Discovery and Pre-Clinical Business group, which included liabilities of the Biopharmaceuticals Unit. Nordion argues it is entitled to indemnification by Ricerca for the damages Nordion suffered in connection with settling the BioAxone Litigation.

Contract Interpretation

Section 11.4 of the SAPA states: "This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York." However, the Court finds no meaningful substantive difference between New York and Delaware contract law on the issues presented in this case.[9] In addition, at oral argument Ricerca's and Nordion's counsel agreed that there was no meaningful substantive difference between New York and Delaware law relating to the issues

[9] *See ION Geophysical Corp. v. Fletcher Intern., Ltd.*, 2010 WL 4378400, at *6 (Del. Ch.) (citing *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *5 (Del. Ch.) ("Under New York law, as in Delaware, the construction and interpretation of an unambiguous written contract is an issue of law within the province of the court.") (internal quotations omitted).

in these motions. Therefore, the Court will apply Delaware law in reaching its conclusions.[10]

Contract terms are interpreted according to their plain, ordinary meaning, unless there is an ambiguity.[11] "Contract language is not ambiguous merely because the parties dispute what it means."[12] Rather, contract language is ambiguous only if it is reasonably susceptible of two or more interpretations, or can have two or more different meanings.[13]

However, if the Court concludes that contract language is unambiguous, the Court's interpretation must be confined to the contract's "four corners."[14] Extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.[15] Instead, the Court will interpret the contract's terms using a reasonable third party standard.[16]

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[10] *See Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 4880659, at *3 n.16 (Del. Ch.) (applying Delaware law where plaintiff's counsel's research did not identify any meaningful distinction between New York and Delaware law on the legal issues presented in the case).
[11] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).
[12] *Id.*
[13] *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992); *see also Omneon* 41 A.3d at 385 ("To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning.").
[14] *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *5 (Del. Super.).
[15] *Eagle Indus., Inc. v. DeVilbliss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[16] *Cedars Acad.*, 2010 WL 5825343, at *5.

Central Issue Governing Disposition

Ricerca and Nordion set forth several arguments to advance their opposing claims for indemnification under the SAPA. However, the Court finds that there is one central issue that governs the disposition of this case—whether under the plain language of the SAPA, Ricerca assumed the liability, or Nordion retained the liability. The liability in question is the Bacterial Master Cell Bank manufactured by the Biopharmaceuticals Unit for BioAxone.

If the Court finds that Nordion retained the liability, then Ricerca is entitled to indemnification by Nordion for their damages associated with the BioAxone Litigation. Alternatively, if the Court finds that Ricerca assumed the liability, then Nordion is entitled to indemnification by Ricerca for their damages associated with the BioAxone Litigation.

Relevant Terms of the SAPA

The parties did not specifically address the Biopharmaceuticals Unit in the SAPA. This is most likely due to the fact that the Biopharmaceuticals Unit closed in 2006, three years prior to when negotiations for the SAPA began in late 2009. Therefore, the Court must look to relevant terms of the SAPA to determine whether the Biopharmaceuticals Unit was intended to be part of the Discovery and Pre-Clinical business group at the time of closing.

Section 11.9 of the SAPA is an integration clause, which provides in relevant part: "This Agreement...constitute[s] the entire agreement among the parties hereto with respect to the matters covered by this Agreement and thereby, and supersede[s] all previous written, oral or implied understandings among [the parties] with respect to such matters."

Sections 10.2 and 10.3 of the SAPA contain the indemnification provisions for Nordion and Ricerca, respectively. Section 10.2 obligates Nordion to defend, indemnify, and hold harmless Ricerca for reasonable costs and expenses, including attorney's fees, and damages resulting from a "Retained Liability" from and after the closing date. Similarly, Section 10.3 requires Ricerca to defend, indemnify, and hold harmless Nordion for damages arising or resulting from any "Assumed Liability" from and after the closing date. Section 10.3 also allows Nordion to recover its attorney's fees in connection with defending an assumed liability.

Section 1.1 of the SAPA, titled "Certain Definitions," provides the definitions for the relevant, and disputed, terms. Section 1.1 provides:

> "Assumed Liabilities" means any and **all Liabilities other than Retained liabilities**, whether arising before, on or after the Closing Date, of the Asset Seller or any of its predecessor companies or businesses, to the extent arising out of the present, past or future operation or conduct of the Discovery and Pre-Clinical Business, or the present, past, or future ownership or use of any Purchased Assets **in the Discovery and Pre-Clinical Business** (including the ownership or use of the

Discovery and Pre-Clinical Assets), including the following:

> (i) all Liabilities **relating to, arising out of or resulting from all torts and personal injury** Actions to the extent they are related to, result from or arise out of the operations or conduct of the Discovery and Pre-Clinical Business or the ownership or use of the Purchased Assets in the Discovery and Pre-Clinical Business, whether arising before, on or after the Closing Date.

* * *

"Excluded Assets" means all right, title, and interest of [Nordion] in all of its Subsidiaries, the Excluded Businesses and all Assets (**excluding the Discovery and Pre-Clinical Companies, the Discovery and Pre-Clinical Business, and the Discovery and Pre-Clinical Assets**)...

* * *

"Excluded Businesses" means all of the current or former businesses of [Nordion] and its Subsidiaries, **other than the Discovery and Pre-Clinical Business**....

* * *

"Retained Liabilities" means any and all Liabilities, whether arising before or after the Closing Date, of [Nordion] or any of its predecessor or successor companies or businesses...to the extent relating to, resulting from or arising out of the present, past or future operations or conduct of the **Excluded Businesses**, or ownership or use of any **Excluded Assets**...provided, however, that **Retained Liabilities shall...in no event include the Assumed Liabilities**....

* * *

> "Purchased Business" means the discovery and pre-clinical contract research service business delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch, as well as the related training, equipment installation, repair, maintenance, customer support and application consulting services directed to or involving discovery and pre-clinical contract research services) as conducted by [Nordion]…on or prior to the Closing Date at any location other than the facility located in King of Prussia, Pennsylvania.

(Emphasis added).

The Court's Interpretation of the SAPA

The Court must look to the plain language of the SAPA to determine whether the contract language is ambiguous. The following chart highlights the most important aspects of the relevant SAPA terms:

Assumed Liabilities	• **all** liabilities **except** Retained Liabilities • **includes** torts and personal injuries resulting from Discovery & Pre-Clinical Business
Excluded Assets	• equals Excluded Business • **not** Discovery & Pre-Clinical Business/Assets • specifically lists the excluded businesses
Excluded Business	• **not** Discovery &Pre-Clinical Business/Assets
Retained Liability	• includes **all** Excluded Businesses and Excluded Assets • does **not** include Assumed Liabilities
Purchased Business	• describes the discovery and pre-clinical contract research services

Based on the totality of the relevant contract terms, the Court finds that the SAPA is unambiguous because it is only reasonably susceptible of one interpretation. The Court finds that the SAPA unambiguously provides that the Biopharmaceuticals Unit was intended to be included as part of the Discovery and Pre-Clinical group at the time of closing. Therefore, the liability of the Biopharmaceuticals Unit was assumed by Ricerca. The Court need not consider extrinsic evidence to determine the parties' intent.

While the Biopharmaceuticals Unit is not specifically mentioned by name in the SAPA, the Court finds that the Biopharmaceuticals Unit fully fits within the description contained in the Purchased Business definition. The Purchased Business definition accurately reflects the type of work and services that were offered by the Biopharmaceuticals Unit, particularly the work and services provided to BioAxone in 2003.

Moreover, the language of the SAPA makes it clear that all liabilities arising from the Discovery and Pre-Clinical Business were assumed by Ricerca. The SAPA language also specifies that the activities described in the definition of Purchased Business were intended to be transferred to Ricerca as part of the Discovery and Pre-Clinical Business. Therefore, the Biopharmaceuticals Unit—as described in the Purchased Business definition—was included as part of the Discovery and Pre-Clinical Business. As a result, the tort liability arising from the

BioAxone Litigation was assumed by Ricerca. Accordingly, Ricerca is obligated to indemnify Nordion for the costs Nordion incurred in defending and settling the BioAxone Litigation.

CONCLUSION

The Court finds that no genuine issue of material fact exists to prevent the Court from granting summary judgment. The contract language of the SAPA is unambiguous. The Court finds as a matter of law that the liabilities of the Biopharmaceuticals Unit were part of the Discovery and Pre-Clinical business group, and were assumed by Ricerca. Under the SAPA, and as a matter of law, Ricerca is obligated to indemnify Nordion for the costs Nordion incurred during the BioAxone Litigation.

THEREFORE, Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC's Motion for Summary Judgment is hereby **DENIED**, and Defendants/Counterclaim Plaintiffs Nordion Inc.'s and Nordion (US) Inc.'s Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/
The Honorable Mary M. Johnston

Exhibit B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RICERCA BIOSCIENCES, LLC, a Delaware limited liability company,	:	
Plaintiff,	:	
v.	:	C.A. No. N13C-10-280 MMJ CCLD
NORDION INC., fka MDS Inc., a Canadian corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation,	:	
Defendants.	:	
NORDION INC., fka MDS Inc., a Canadian corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation,	:	
Counterclaim Plaintiffs,	:	
v.	:	
RICERCA BIOSCIENCES, LLC, a Delaware limited liability company,	:	
Counterclaim Defendant.	:	

FINAL ORDER AND JUDGMENT

WHEREAS, Plaintiff Ricerca Biosciences, LLC ("Ricerca") brought this action on October 23, 2013, against Nordion Inc. and Nordion (US) Inc. (together,

"Nordion") asserting a claim for breach of the Stock and Asset Purchase Agreement (the "SAPA") between the parties; and

WHEREAS, on December 19, 2013, Nordion filed its Answer and Counterclaim asserting that Ricerca breached the SAPA; and

WHEREAS, on September 26, 2014, the parties filed cross motions for summary judgment; and

WHEREAS, on November 20, 2014, the Court heard the oral arguments on the parties' cross motions for summary judgment; and

WHEREAS, this Court issued an Opinion on January 23, 2015 (the "Opinion"), granting Nordion's motion for summary judgment and denying Ricerca's motion for summary judgment; and

WHEREAS, this Court found as a matter of law that Ricerca is obligated pursuant to §§ 10.2 and 10.3 of the SAPA to indemnify Nordion for the costs, expenses and legal fees Nordion incurred pursuant to litigation with third party BioAxone Biosciences, Inc. (the "BioAxone Litigation"), including the settlement paid by Nordion to BioAxone Biosciences, Inc.; and

WHEREAS, pursuant to the SAPA, Nordion is entitled to receive its fees and expenses incurred in this action in the amount of $166,936.08;

WHEREAS, each party has stipulated to the reasonableness of the fees and expenses under the SAPA of the other party;

IT IS HEREBY ORDERED, for the reasons stated in the Opinion, that:

1. Judgment is hereby entered in Nordion's favor in the amount of $655,888.01. This amount is comprised of the following fees and costs incurred by Nordion under the SAPA:

Settlement of BioAxone Litigation	$200,000
BioAxone Litigation attorneys' fees and costs:	$288,951.93
Ricerca v. Nordion attorneys' fees:	$158,930.00
Ricerca v. Nordion costs:	$8,006.08
	$655,888.01

2. For all liability amounts, Ricerca shall pay to Nordion pre-judgment and post-judgment interest. Pre-judgment interest shall be at the legal rate set forth in 6 *Del. C.* § 2301(a) for the period in question. Set forth in Schedule A annexed hereto are the dates and amounts of the indemnified amounts incurred by Nordion.

3. The total amount of pre-judgment interest assessed in Nordion's favor, pursuant to Paragraph 2 and Schedule A to this Final Order and Judgment, is $41,188.51.

4. Post-judgment interest shall accrue on the indemnity amount of $655,888.01 beginning on the date immediately following entry of this Order until the date Ricerca pays all such amounts at the interest rate of 5.75%. The daily amount of post-judgment interest will be $103.32 per day.

5. Pursuant to Superior Court Civil Rule 58(2), this Final Order and Judgment is a final judgment and the Prothonotary is hereby directed to enter final judgment as to all claims and defenses asserted in this matter as described above.

IT IS SO ORDERED THIS 12th DAY OF May, 2015.

Judge Mary M. Johnston

FILED PROTHONOTARY
2015 MAY 12 PM 12:06

SCHEDULE A

PAYMENT DATE	PAYMENT AMOUNT	INTEREST RATE	INTEREST ACCRUAL PERIOD
July 30, 2012	$14,042.70	5.75%	July 31, 2012 - January 23, 2015
August 22, 2012	$480.60	5.75%	August 23, 2012 - January 23, 2015
November 2, 2012	$3,439.65	5.75%	November 3, 2012 - January 23, 2015
January 22, 2013	$13,156.90	5.75%	January 23, 2013- January 23, 2015
February 8, 2013	$1,742.40	5.75%	February 9, 2013- January 23, 2015
March 11, 2013	$1,656.15	5.75%	March 12, 2013- January 23, 2015
April 15, 2013	$19,322.80	5.75%	April 16, 2013- January 23, 2015
May 20, 2013	$13,563.48	5.75%	May 21, 2013- January 23, 2015
June 18, 2013	$37,905.03	5.75%	June 19, 2013- January 23, 2015
July 16, 2013	$48,011.96	5.75%	July 17, 2013- January 23, 2015
July 29, 2013	$18,140.75	5.75%	July 30, 2013- January 23, 2015
August 20, 2013	$30,889.79	5.75%	August 21, 2013- January 23, 2015
September 20, 2013	$937.50	5.75%	September 21, 2013- January 23, 2015
September 26, 2013	$11,571.18	5.75%	September 27, 2013- January 23, 2015
September 27, 2013	$200,000.00	5.75%	September 28, 2013- January 23, 2015
October 25, 2013	$15,472.36	5.75%	October 26, 2013- January 23, 2015
December 20, 2013	$8,460.00	5.75%	December 21, 2013- January 23, 2015
February 6, 2014	$2,681.00	5.75%	February 7, 2014- January 23, 2015
March 5, 2014	$13,945.93	5.75%	March 6, 2014- January 23, 2015
April 4, 2014	$12,142.58	5.75%	April 5, 2014- January 23, 2015
May 6, 2014	$10,779.00	5.75%	May 7, 2014- January 23, 2015

June 5, 2014	$2,901.40	5.75%	June 6, 2014- January 23, 2015
July 3, 2014	$3,410.00	5.75%	July 4, 2014- January 23, 2015
August 6, 2014	$15,879.76	5.75%	August 7, 2014- January 23, 2015
September 4, 2014	$22,175.00	5.75%	September 5, 2014- January 23, 2015
October 6, 2014	$30,227.17	5.75%	October 7, 2014- January 23, 2015
November 6, 2014	$15,208.57	5.75%	November 7, 2014- January 23, 2015
December 4, 2014	$25,847.67	5.75%	December 5, 2014- January 23, 2015
January 9, 2015	$153.00	5.75%	January 10, 2015- January 23, 2015