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Case Number 293,2015D

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 REPLY BRIEF

Dated: September 14, 2015

Michael J. Barrie (#4684)
Stephen M. Ferguson (#5167)
Benesch, Friedlander, Coplan & Aronoff LLP
222 Delaware Avenue, Suite 801
Wilmington, Delaware 19801
(302) 442-7010
(302) 442-7012

Attorneys for Ricerca Biosciences, LLC

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ARGUMENT

Nordion's answering brief ignores the parties' bargained-for language in the SAPA and attempts to rewrite the parties' agreement. Those terms show that Ricerca neither purchased the assets nor assumed the liabilities belonging to Nordion's then closed Biopharmaceuticals Unit. The SAPA's definitions of "Purchased Business" and "Assumed Liabilities" specifically omit these assets and liabilities. Since the SAPA is clear that Ricerca did not acquire the assets or assume the liabilities of Nordion's Biopharmaceuticals Unit, the liability relating to the BioAxone Lawsuit — the indemnification for which gives rise to this action — is a "Retained Liability." Nordion is solely responsible to deal with this liability and provide indemnity to Ricerca.

The parties' negotiations and post-closing conduct confirms this plain reading of the SAPA. The parties never discussed or conducted due diligence about the closed Biopharmaceuticals Unit during the negotiation of the SAPA. At all times after the execution of the SAPA, Nordion maintained exclusive dominion, control and ownership of the lab space, lab equipment and lab records of the closed Biopharmaceuticals Unit. After the SAPA, Nordion, which retained ownership of the lab equipment of the closed Biopharmaceuticals Unit, sold the lab equipment to third parties. Nordion even approached Ricerca over a year after the SAPA to try to sell to Ricerca the same assets that Nordion now contends Ricerca purchased

under the SAPA. Had Ricerca purchased the lab equipment of the closed Biopharmaceuticals Unit under the SAPA, there would have been no reason for Nordion to contact Ricerca years later about purchasing the same assets. Nordion cannot ignore these undisputed facts. The Court should reject Nordion's pretextual arguments, hold Nordion to its contract and reverse the judgment of the lower court.

I. Nordion Cannot Refute the Plain Language of the SAPA That Shows That Ricerca Did Not Purchase the Closed Biopharmaceuticals Unit

Nordion incorrectly argues that the plain language of the SAPA provides that Ricerca purchased Nordion's discovery and pre-clinical business as a whole, including the closed Biopharmaceuticals Unit, and assumed all liabilities arising out of the operation of that business. (AB at 19.)[1] The plain language of the SAPA belies Nordion's argument and the lower court's conclusion.

The SAPA defines "Discovery and Pre-Clinical Business" as the "Purchased Business." (A033.) The SAPA's definition of "Purchased Business" includes three parts of Nordion's discovery and pre-clinical business, but excludes Nordion's Biopharmaceuticals Unit that Nordion closed in 2006 (years before the SAPA):

> "Purchased Business" means the discovery and pre-clinical contract research services business delivering <u>pharmacology, drug metabolism and pharmacokinetics and drug safety</u>

[1] "AB" refers to Nordion's Answering Brief filed on August 27, 2015 (Filing ID 57781790).

> 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 parts: (1) Biopharmaceuticals; (2) Pharmacology; (3) Drug Metabolism and Pharmacokinetics; and (4) Drug Safety Assessment. (A497.) The definition of "Purchased Business" expressly includes only three of the four parts of the discovery and pre-clinical business (pharmacology, drug metabolism and pharmacokinetics and drug safety assessment) and excludes one: Biopharmaceuticals. (A046.) The specific identification of certain parts of the discovery and pre-clinical business 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 parts of Nordion's discovery and pre-clinical

business. See Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp., 2013 Del. Ch. LEXIS 110, at *26 (Del. Ch. May 1, 2013).

Nordion attempts to avoid the plain language of the SAPA by first quibbling with Ricerca's use of the term "units" to describe the four parts of Nordion's discovery and pre-clinical business as identified in a pre-SAPA organizational chart produced by Nordion in the litigation. (AB at 21.) Nordion's argument fails as it is mere semantics that has no bearing on the plain language definition of "Purchased Business." The definition of what Ricerca purchased (and, therefore, what liabilities Ricerca assumed) is a fundamental term of the SAPA. Ricerca carefully wrote into this definition what it actually purchased to the exclusion of everything else. In analyzing what was specifically included and excluded from the "Purchased Business" definition, Ricerca simply uses the term "units" to describe the distinct parts or services that comprised Nordion's discovery and pre-clinical business prior to the SAPA. Nordion cannot — and does not — dispute that Nordion's discovery and pre-clinical business once consisted of pharmacology, drug metabolism and pharmacokinetics, drug safety assessment, and biopharmaceuticals. Nordion cannot — and does not — dispute that the definition of "Purchased Business" identifies only three of these discrete parts or services and omits the fourth: biopharmaceuticals. The SAPA omits

biopharmaceuticals because the parties did not intend to include it within the definition of the "Purchased Business."

Nordion next contends that the definition of "Purchased Business" functions to describe generally Nordion's discovery and pre-clinical business. (AB at 21-22.) Nordion's argument is flawed in several respects. To begin, the parties' written definition of what Ricerca acquired from Nordion cannot be disregarded. Had the parties actually desired that the term "Purchased Business" be defined generally as Nordion's discovery and pre-clinical business, they would have done so. Next, Nordion's argument directly contradicts the SAPA. The SAPA defines "Discovery and Pre-Clinical Business" as the "Purchased Business," not the other way around as Nordion argues. (A033.) And "Purchased Business" specifically omits biopharmaceuticals from its definition.

The use of the verb "delivering" in the definition of "Purchased Business" does not change the result, as Nordion urges it should. (AB at 22.) Three of the four discrete parts of Nordion's discovery and pre-clinical business immediately follow the verb "delivering": pharmacology, drug metabolism and pharmacokinetics and drug safety assessment. Therefore, the parties' specific identification of certain parts of Nordion's discovery and pre-clinical business and the omission of the fourth (biopharmaceuticals) after the verb "delivering" shows

that Ricerca neither purchased nor intended to purchase Nordion's closed Biopharmaceuticals Unit.

Lastly, under the well-established rules of contract construction, the description contained in the parenthetical immediately following the specifically named parts modifies and applies to only those specifically named parts. 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 parts of Nordion's discovery and pre-clinical business shows that the parties intended the description to be illustrative of the work and services performed by those identified parts only. Therefore, the definition of "Purchased Business" does not include the closed Biopharmaceuticals Unit.

Nordion next attempts to save its claim through other provisions of the contract. These arguments fail because the definition of "Purchased Business" does not include the closed Biopharmaceuticals Unit. Nordion first argues that Ricerca assumed the liability of the BioAxone Lawsuit because under the SAPA, Ricerca assumed all liabilities relating to "all tort 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 . . . whether arising before, on or after the Closing Date." (A027; AB at 20.) The plain language of the "Assumed Liabilities," however, makes clear that Ricerca assumed only those liabilities resulting from or arising out of the operations of the "Purchased Business." As noted above, the "Purchased Business" excludes the closed Biopharmaceuticals Unit. Accordingly, this argument fails.

Nordion's argument also fails because it ignores that "Assumed Liabilities" excepts from its definition "Retained Liabilities," which are liabilities retained by Nordion. "Assumed Liabilities" is defined as "any and all Liabilities *other than Retained Liabilities* . . . . " (A026) (emphasis added). 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.) It is undisputed that after the Biopharmaceuticals Unit was closed in 2006, 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 and its assets were not and could not have been transferred to

Ricerca. The BioAxone Lawsuit, therefore, is a "Retained Liability" of Nordion and it is Nordion that is obligated to indemnify Ricerca for the BioAxone Lawsuit.

Nordion next argues that if the definition of "Purchased Business" does not include the Biopharmaceuticals Unit as Ricerca suggests, then the Biopharmaceuticals Unit should have been expressly named as an "Excluded Business" in the SAPA. (AB at 22.) Nordion's argument is defeated by the plain language in the SAPA's definition of "Excluded Businesses":

> "Excluded Businesses" means all of the current or former businesses of Parent and its Subsidiaries, other than the Discovery and Pre-Clinical Business. For the avoidance of doubt, the Excluded Businesses include the business, activities and operations of Parent's late stage Pharma Services business delivering Phase II-IV contract research services, the Phase I-II Business, as well as the Parent Nordion and Parent Analytical Technologies businesses, each as described in the Form 40-F.

(A037.) The plain language of "Excluded Businesses" means all current and former businesses of Nordion other than the "Discovery and Pre-Clinical Business" (which the SAPA defines as the "Purchased Business"). As the closed Biopharmaceuticals Unit is not part of the "Purchased Business," it is an "Excluded Business" under the SAPA.

Nordion next contends that the Biopharmaceuticals Unit cannot be considered an "Excluded Asset" because the definition of "Excluded Assets" cannot be reasonably understood to include the Biopharmaceuticals Unit. (AB at 22.) Again, Nordion's argument contradicts the plain writing of the definition.

"Excluded Assets" are defined as, *inter alia*, "Assets constituting ownership interests in . . . the Excluded Businesses . . . ." (A036-37.) "Excluded Businesses" literally means everything other than the "Purchased Business," and the "Purchased Business" specifically omits the closed Biopharmaceuticals Unit.

Nordion also argues that the closed Biopharmaceuticals Unit cannot be an "Excluded Asset" when it was, at one time, included within Nordion's discovery and pre-clinical business. (AB at 23.) Nordion's argument again fails because all of the parts or services that comprised Nordion's discovery and pre-clinical business prior to the SAPA are identified in the "Purchased Business" definition, except biopharmaceuticals.

Nordion's focus on the definition of "Excluded Assets" is also misplaced because Nordion's "Retained Liabilities" (which is dispositive for purposes of Ricerca's indemnification claim) are broader than the "Excluded Assets." 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.) As set forth above, the plain language of the definition of "Retained Liabilities" includes any liabilities arising from any asset not transferred to Ricerca. It is undisputed that the closed Biopharmaceuticals Unit was not transferred to Ricerca. Therefore, even assuming *arguendo* that the closed Biopharmaceuticals Unit is not an "Excluded Asset," the BioAxone Lawsuit still is

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

II. The Negotiation History and Post-Closing Conduct of the Parties Confirms Ricerca's Plain Language Reading of the SAPA

The plain language of the SAPA requires Nordion to indemnify Ricerca for the BioAxone Lawsuit. In the event, however, that the Court determines that the relevant language of the SAPA is ambiguous (given the parties' very different understanding of the terms), the parties' negotiation history and post-closing conduct confirms the plain language reading of the SAPA: that Ricerca did not purchase Nordion's closed Biopharmaceuticals Unit, and that the BioAxone Lawsuit is Nordion's "Retained Liability" under the SAPA.

Nordion argues that the SAPA was "heavily negotiated" between "two sophisticated parties" and those negotiations show that Ricerca assumed the liabilities in connection with the BioAxone Lawsuit. (AB at 1, 26.) Nordion, however, does not and cannot point to a single discussion about the closed Biopharmaceuticals Unit. The documents produced in this litigation demonstrate that the parties never discussed — let alone negotiated — terms concerning any asset or liability of the Biopharmaceuticals Unit. In fact, Ricerca never conducted due diligence concerning the closed Biopharmaceuticals Unit. There was no mention of the Biopharmaceuticals Unit in the negotiations or discussions because

it did not exist and had not existed for over three years. No "sophisticated" buyer would assume the liabilities attached to a part of the seller's business that had been closed for years without discussing or conducting diligence on the closed unit prior to consummating the transaction.

In express violation of the SAPA, Nordion wrongfully argues that draft iterations of the definition of "Assumed Liabilities" show that Ricerca assumed liabilities related to the closed Biopharmaceuticals Unit. (AB at 27-29.) Section 1.2 of the SAPA, however, prohibits Nordion from making this argument: "[a]ny language from prior drafts of this Agreement, to the extent not included in the definitive version of this Agreement executed by the parties hereto, shall not be deemed to reflect the intention of any party hereto with respect to the transaction contemplated thereby." (A053.) The Court should not permit Nordion to violate the very agreement it purportedly seeks to enforce. The prohibition notwithstanding, Nordion's argument fails because the draft iterations cited by it do not reference the shuttered Biopharmaceuticals Unit. (*See* AB at 27-29.)

Despite Nordion's incorrect assertions, Ricerca has not offered inadmissible post-contract evidence to alter or modify the SAPA. (AB at 30-31, 33-34.) Rather, Ricerca has presented the entirety of the evidence, which demonstrates that the parties have acted in conformance with the plain language of the SAPA. Moreover, in the event that the relevant language of the SAPA is determined by the

Court to be ambiguous, the parties' course of performance under the contract is 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).

First, Nordion never transferred possession of the physical location occupied by the Biopharmaceuticals Unit to Ricerca. While Ricerca subleased from Nordion certain space at the Bothell, Washington facility, Ricerca did not sublease the space occupied by Nordion's closed Biopharmaceuticals Unit. (A477.) In fact, the premises belonging to Nordion's Biopharmaceuticals Unit remained in Nordion's exclusive and locked down control. (A483.) Ricerca neither accessed nor used that space or could it. (Id.) So compelling is this evidence that Nordion's answering brief does not — and cannot — refute it, let alone address it.

Second, it is undisputed that under the SAPA Ricerca did not acquire any of the lab equipment belonging to Nordion's closed Biopharmaceuticals Unit. Nordion kept this equipment locked down within its premises to which Ricerca had no access. (A484.) Emails produced by Nordion in this litigation actually show that Nordion sold this lab equipment at two (2) auctions after the SAPA. (A486-488.) Ricerca never received a penny of those sale proceeds. (A477.) Nordion's ironic argument, therefore, should it prevail in this Court, is that it has admitted to converting Ricerca's alleged property to its own use.

Nordion attempts to argue that an email written more than a year after the execution of the SAPA in which Ricerca stated to Nordion its interest in purchasing certain assets of the closed lab is evidence that Ricerca acquired the assets and assumed the liabilities of the Biopharmaceuticals Unit under the SAPA. (AB at 33; B1154.) This evidence only supports Ricerca's arguments. Had Ricerca actually acquired the assets of the Biopharmaceuticals Unit under the SAPA, Ricerca would have no need to acquire those same assets years later. It is disingenuous for Nordion to argue, on the one hand, that Ricerca acquired the assets and assumed the liabilities of the Biopharmaceuticals Unit under the SAPA where, on the other hand, it maintained exclusive control of the Biopharmaceuticals Unit's assets and premises and even sold the lab equipment to a third party. Nordion has presented no evidence showing that any of the lab equipment of the closed Biopharmaceuticals Unit was transferred to Ricerca as part of the transaction. 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, Nordion's own document production shows that it 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.) It is axiomatic that Ricerca would have taken the records belonging to the shuttered Biopharmaceuticals Unit had it actually acquired the assets and assumed the liabilities of the Biopharmaceuticals Unit under the SAPA.

Nordion argues that an administrative error relating to certain records constitutes evidence that Ricerca purchased the closed Biopharmaceuticals Unit as part of the transaction. Specifically, Nordion cites to post-SAPA documents from January 2012, *before* completion of the division of the records. (AB at 32.) This argument is misleading. The entirety of the evidence shows that when Ricerca emailed BioAxone on January 25, 2012, prior to the assertion of any claim by BioAxone, Ricerca 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.) Nordion's own legal counsel confirmed this: "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.) In response to that email, Ricerca promptly sent those six boxes of original records to Nordion, and Ricerca retained no copies of those records as they belonged to Nordion. (A522.)

Nordion also argues that Ricerca's knowledge of the existence of the closed Biopharmaceuticals Unit at the time of contracting due to Mr. Lennox's "inside knowledge" of Nordion's business somehow shows that Ricerca assumed liabilities related to the Biopharmaceuticals Unit. (AB at 29-30.) Ricerca's general awareness of the existence of the closed Biopharmaceuticals Unit is irrelevant to the issue of whether Ricerca purchased the closed Biopharmaceuticals Unit as part of the transaction. Again, it is undisputed that the parties had no discussions concerning the assets or liabilities of the closed Biopharmaceuticals Unit, that Ricerca did not intend to purchase the closed Biopharmaceuticals Unit, and that Ricerca did not intend to assume any liabilities of Nordion related to the closed Biopharmaceuticals Unit. (A499-500.)

The undisputed record of the parties' negotiation history and post-closing conduct confirms Ricerca's plain language reading of the SAPA: 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

Based on the foregoing arguments and authorities cited therein, as well as the arguments and authorities set forth in Ricerca's Opening Brief, Ricerca respectfully requests that this Honorable Court reverse the lower court's 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.

Dated: September 14, 2015

By: */s/ Michael J. Barrie*
Michael J. Barrie (#4684)
Stephen M. Ferguson (#5167)
Benesch Friedlander Coplan
& Aronoff LLP
222 Delaware Avenue, Suite 801
Wilmington, Delaware 19801
(302) 442-7010
(302) 442-7012

Attorneys for Ricerca Biosciences, LLC