EFiled: Aug 20 2020 12:28PM EDT
Filing ID 65859974
Case Number 181,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CFM ACQUISITION LLC, CLEAN FOCUS CORPORATION, Plaintiffs Below, Appellants, v. MICHAEL SILVESTRINI, ANDREW CHESTER, ROBERT LANDINO, LUIS A. LINARES, and ARTHUR S. LINARES, Defendants Below, Appellees.	No. 181, 2020 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0145-JTL

[CORRECTED] OPENING BRIEF OF APPELLANTS CFM ACQUISITION LLC AND CLEAN FOCUS CORPORATION

YOUNG CONAWAY STARGATT & TAYLOR, LLP
C. Barr Flinn (No. 4092)
Elisabeth S. Bradley (No. 5459)
Kevin P. Rickert (No. 6513)
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
Facsimile: (302) 576-3292

Attorneys for CFM Acquisition LLC and Clean Focus Corporation

DATED: August 20, 2020

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

This appeal concerns a contractual shortening of a limitations period by a provision of a purchase agreement. The shortening was atypical in the sense that the shortened period both (a) ended on a fixed date (one year from closing) without an express tolling by notice provision, and (b) applied, not simply to representations that would be breached at closing (as would have been usual), but also to a covenant that could be breached after closing. The covenant was a promise by the sellers—appellees and defendants below—to indemnify the buyer—appellants and plaintiffs below—for losses resulting from a potential post-closing event, specifically a change in tax law reducing the capital contribution of a third party investor, defined as a "Tax Law Change Adjustment."

The Tax Law Change Adjustment occurred within the specified survival period, which was one year from closing, under the purchase agreement between the parties, the Membership Interest and Purchase Agreement (the "MIPA"). Plaintiffs provided notice of the claim for indemnification within the MIPA's notice period, also one year from closing. In response, defendants initially purported to entertain the claim, requesting information to confirm its amount, only later reversing gears. Defendants did not reject the claim, thereby breaching the promise to indemnify and permitting plaintiffs to file a lawsuit, until after the

contractually shortened limitations period had expired, leaving no time at all for plaintiffs to file a claim.

As detailed herein, it is well established, and the trial court agreed, that a contractual shortening of a limitations period is permissible only if it is reasonable. *See, e.g.*, *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2011 WL 2682898, at *6 (Del. Ch. July 11, 2011) ("[P]arties to a contract are entitled to shorten the period of time in which a claim for breach may be brought, i.e., the statute of limitations, so long as the agreed upon time period is a reasonable one."). This appeal concerns primarily the reasonableness of the contractual shortening of the limitations period in this case. It also concerns defendants' inequitable conduct—their gaming of plaintiffs before the expiration of the limitations period.

Before the trial court, defendants moved to dismiss all three counts of the complaint. Defendants moved for dismissal of the first count, a claim for breach of their contractual obligation to indemnify plaintiffs for losses resulting from the Tax Law Change Adjustment ("Count I"), pursuant to the contractually shortened limitations period. After briefing and telephonic argument on March 25, 2020, the trial court granted defendants' motion to dismiss Count I on April 3, 2020, by means of a two-page order ("Initial Order"). The Initial Order explained that dismissal of Count I was appropriate "under the plain language of Section 8.5(a) of the Membership Interest Purchase Agreement and for the reasons set forth in Part

II of the defendants' opening brief and Part I of the defendants' reply brief." The trial court also dismissed the second count of the complaint ("Count II"), a claim for breach of defendants' obligation to indemnify plaintiffs for certain pre-closing tax losses, on the ground that, after the dismissal of Count I, the pre-closing tax indemnification did not meet the MIPA's deductible. The trial court denied the motion to dismiss the third count of the complaint for fraud ("Count III").

Later, on April 28, after plaintiffs moved for an order permitting immediate appeal of the Initial Order, the trial court vacated the Initial Order and replaced it with an eight-page order ("Order"), which expanded on the reasons for dismissal set forth in the Initial Order.

In dismissing Counts I and II, the trial court made a series of clear errors: It held, for the first time, and against all prior precedent that, in assessing the reasonableness of a contractually shortened limitations period, the time between accrual of the claim and the expiration of the limitations period is irrelevant, such that a shortened limitations period may be reasonable, even if it leaves no time at all in which to file a claim.

The trial court also erred by holding, in the alternative, that Count I accrued many months before defendants breached the indemnification obligation. In doing so, the trial court applied the wrong accrual rule. It should have applied the accrual rule that applies specifically to claims, like Count I, for breaches of contractual

obligations to indemnify, but instead applied the accrual rule for statutory indemnification under Section 145 of the Delaware General Corporation Law ("DGCL"), a rule that has no application to claims like Count I.

In finding, also in the alternative, that defendants rejected the indemnity demand just before the expiration of the contractually shortened limitations period, the trial court further erred by making a factual finding on a motion to dismiss that contradicted plaintiffs' well-pled allegations and that not even defendants' counsel could support, when asked at argument.

Finally as to Count I, the trial court erred either by not addressing plaintiffs' claim of equitable estoppel based upon defendants' misleading conduct (neither the revised Order nor defendants' dismissal briefs mention equitable estoppel) or, to the extent the court meant to address it by addressing "course of dealing," by holding incorrectly that, as matter of law, a sophisticated party represented by counsel may not rely upon it.

The trial court also erred in dismissing Count II on the basis of its dismissal of Count I.

The trial court's dismissal decision was erroneous and should be reversed, and the matter should be remanded for further proceedings.

SUMMARY OF ARGUMENT

1. In dismissing Count I, the trial court committed reversible error by holding that "[a]ccrual principles are irrelevant" in assessing the reasonableness, and thus the enforceability, of a contractually shortened limitations period that "sets an end date," such that the period may be reasonable even if it bars a claim before it accrues and therefore leaves no time in which to bring the claim.

The holding contradicts substantially all prior authorities, leaves no standard by which to assess reasonableness, and is inconsistent with the policy of the reasonableness requirement, which is to allow plaintiffs sufficient time to access the courts. The trial court's only stated rationale, that the contractually shortened limitations period in Section 8.5 "sets an end date," merely describes the contract; it says nothing about whether the contract is reasonable. If merely agreeing to a limitations period, including agreeing to an end date, rendered the period reasonable, no contractual limitations period could ever be unreasonable; the reasonableness requirement would be a nullity.

2. In dismissing Count I, the trial court committed reversible error also by applying the wrong accrual rule to hold that Count I accrued many months before the contractually shortened limitations period expired, with the result that, according to the trial court, even if accrual principles are relevant, the period was reasonable. The trial court should have applied the controlling accrual rule, stated

in *ISN Software Corp. v. Richards, Layton, & Finger, P.A.*, 226 A.3d 727 (Del. 2020), and applied in *Cooper Indus., LLC v. CBS Corp.*, 2019 WL 245819 (Del. Super. Jan. 10, 2019) and *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 WL 2699880 (Del. Super. June 11, 2014), under which a claim for breach of a contractual obligation does not accrue until the defendant has breached and, more specifically, as specified in the latter two cases, a claim for breach of a contractual indemnification obligation does not accrue until the defendant has breached by rejecting the claim for indemnification.

Without addressing the controlling authority, the trial court chose an alternative accrual rule, set forth in *Scharf v. Edgcomb Corp.*, 864 A.2d 909 (Del. 2004). That rule has no application to the plaintiffs' claim because it applies to claims for statutory indemnification arising under Section 145 of the DGCL. Such claims, unlike plaintiffs' claim, accrue when the statutory right to indemnification arises because the indemnified party may then file a lawsuit, without any pre-suit demand. This is not so for the contractual promise to indemnify at issue in this appeal, which requires a breach before a lawsuit may be filed.

3. The trial court committed reversible error by rejecting plaintiffs' allegation that, before the expiration date, defendants did not refuse the indemnification claim and instead making a factual finding to the contrary on a motion to dismiss.

4. The trial court committed reversible error by either disregarding or rejecting plaintiffs' allegations of defendants' conduct that equitably estops defendants from arguing that Count I is time-barred. Plaintiffs' allegations reflect that until, and even after, the end of the contractually shortened limitations period, defendants falsely represented that they were assessing plaintiffs' timely indemnification claim, when they were instead merely running out the clock on what they would later argue is a contractually shortened limitations period barring indemnification.

5. The trial court committed reversible error by dismissing Count II based solely on the erroneous dismissal of Count I and the inability of Count II to satisfy a $200,000 deductible without Count I.

STATEMENT OF FACTS

A. The Parties and Relevant Non-Parties

Plaintiffs Clean Focus Corporation ("Clean Focus") and CFM Acquisition LLC, now formally named Greenskies Holdings LLC ("CFM"), are two separately owned but commonly managed Delaware entities. (A591 ¶¶ 14-15; A738.)

Via the MIPA, CFM, with Clean Focus as its guarantor, purchased defendants' interests in "Greenskies," a network of limited liability companies that develop, construct, operate and maintain solar energy projects. (A586-87 ¶¶ 1, 5; A606 ¶ 60.) Upon the August 11, 2017 closing of the MIPA, CFM assigned certain membership interests in Greenskies, including related rights under the MIPA, to Clean Focus. (A591 ¶¶ 14–15.)

Greenskies Holdings III ("Greenskies III") is one of the Greenskies entities that plaintiffs indirectly acquired in the acquisition. (A587 ¶ 2, A603 ¶ 49.) Greenskies III has two members: the Managing Member, which holds a 1% interest in Greenskies III, and Firstar, a "tax equity investor" member, which holds a 99% interest. (A587 ¶ 2; A598-99 ¶ 37.) Greenskies III's ownership structure resulted from the availability of tax benefits for solar projects, including a 30% investment tax credit. (A596-97 ¶ 30-33.) Solar projects often do not have taxable income for several years. (A596-97 ¶¶ 30–31.) As a result, tax equity investors

like Firstar often take large ownership interests for specified periods of years so they can use the tax benefits to offset their own taxable income. (A597 ¶ 32.)

Naturally, a change in tax law could disrupt this method of financing. Accordingly, upon a reduction in tax rates applicable to Firstar that would reduce the value of the tax benefits to Firstar and thus its investment return, the Greenskies III Operating Agreement ("Operating Agreement") relieved Firstar's obligation to make subsequent capital contributions to Greenskies III. (A603-04 ¶¶ 51-54; A190 § 5.01(d)(2)(k).) Alternatively, Firstar could reduce its subsequent capital contributions. (A604 ¶ 54; A187 § 5.01(d)(2).) Either way, the Managing Member, the only other investor, would be required to replace capital not provided by Firstar, for no offsetting benefit, thereby suffering losses. (A605 ¶¶ 55-56.)

B. The MIPA

Before entering the MIPA, plaintiffs and defendants anticipated that a change in tax law resulting in a decrease of Firstar's tax equity investment, i.e., a "Tax Law Change Adjustment," was likely to occur in the near future. (A603 ¶¶ 50-51; A606-07 ¶¶ 60, 62.) The MIPA defines a "Tax Law Change Adjustment" to mean the following:

> [A]ny decrease in the amount of Firstar's A-Tranche Capital Contribution or B-Tranche Capital Contribution or payment of supplemental cash distributions to Firstar with respect to GRE Fund III Holdco LLC, in each case,

> to the extent required pursuant to the Fund III Operating Agreement due to the occurrence of a Change in Tax Law or a Post-Funding Change in Tax Law, which Change in Tax Law or Post-Funding Change in Tax Law is a Tax Rate Decrease or a Depreciation Change.

(A026-27.)

The parties also anticipated that a Tax Law Change Adjustment would cause plaintiffs, through the Managing Member, to incur losses, and elected to allocate to defendants the risk of such losses. (A606-07 ¶¶ 61-62.) The MIPA requires defendants to indemnify plaintiffs for "any and all Losses actually incurred by [plaintiffs] to the extent resulting from:...(d) any Tax Law Change Adjustment." (A065 § 8.2(d).) To compensate plaintiffs for indemnifiable losses, the parties agreed that $2,600,000 of the sales price ("Escrow Amount") would be deposited in an escrow account in accordance with an Escrow Agreement. (A036-37 § 2.7(a); A312-13 ¶ 1(p)-(r); A331-54.)

Section 8.1 of the MIPA, entitled "Survival Periods," provides a series of survival periods for different types of indemnification rights. (A064.) For example, with some exceptions, representations and warranties survive "until the day the day that is twelve (12) months after the Closing Date," which is defined to be the "Expiration Date." (*Id.*) Covenants and agreements, with exceptions, survive until "twelve (12) months following the last day of the applicable period for which such covenant or agreement is required to be performed." (*Id.*)

Different tax items are given different survival periods. Toward the middle of Section 8.1, appears a provision at issue in this appeal: The right to indemnification concerning a Tax Law Change Adjustment survives "until the Expiration Date." (*Id.*)

After some interceding material, Section 8.1 concludes with a notice requirement:

> Notwithstanding anything herein to the contrary, no Seller shall have any liability in respect of any breach of or failure to perform any representation, warranty, covenant or agreement contained herein, or otherwise in respect of any indemnification obligation of such Seller hereunder, unless written notice of a claim for indemnification under this Article VIII, describing in reasonable detail the facts and circumstances on which such claim is based, is delivered to such Seller prior to the expiration of the applicable period set forth in the foregoing provisions of this Section 8.1.

(A064.)

The MIPA does not set any deadline for defendants to satisfy their obligation to provide indemnification for a Tax Law Change Adjustment.

The provision most at issue on this appeal, Section 8.5, entitled "Limitations on Indemnification," shortens the applicable limitations periods for indemnification claims to the Section 8.1 survival periods. It provides, in relevant part,

> It is the express intent of the Parties that, if the applicable period for an item as contemplated by this Section 8.5 is

> shorter than the statute of limitations that would otherwise have been applicable to such item, then, by contract, the applicable statute of limitations with respect to such item shall be reduced to the shortened survival period contemplated hereby. The Parties further acknowledge that the time periods set forth in Section 8.1 for the assertion of claims under this Agreement are the result of arms'-length negotiation among the Parties and that they intend for the time periods to be enforced as agreed by the Parties.

(A066 § 8.5(a).)

C. The Change in Tax Law and the Tax Law Change Adjustment

On December 22, 2017, the Tax Cut and Jobs Act was signed into law, decreasing the corporate tax rate from 35% to 21%, as of January 1, 2018, and relieving Firstar of its contractual obligations to make further capital contributions to Greenskies III, unless the parties agreed to decrease rather than eliminate Firstar's capital contributions. (A604 ¶ 54; A190 § 5.01(d)(2)(k); A609 ¶¶ 70, 72.) Firstar did not immediately eliminate or reduce its contribution but reserved the right to do so. (A609 ¶ 69; A355-56.) On March 27, 2018, Firstar proposed an amendment to the Operating Agreement to reduce its contributions. (A435-37.) On August 3, 2018, Firstar and the Managing Member signed the amendment fixing the amount by which Firstar reduced its capital contributions. (A611-12 ¶¶ 78, 81; A468-71.) The amendment constituted a Tax Law Change Adjustment and resulted in an aggregate loss of at least $3.3 million, exceeding the $2,600,000 Escrow Amount. (A611 ¶ 78; A612 ¶ 82.)

D. Plaintiffs' Claim for Indemnification of Losses Resulting from the Tax Law Change Adjustment

As plaintiffs alleged, on April 13, 2018, defendants Silvestrini and Chester acknowledged the Tax Law Change at an in person meeting with plaintiffs' managers and asked how much of the Escrow Amount would be clawed back as a result. (A615 ¶ 87.) Plaintiffs' managers explained that the indemnifiable losses would require release of the entire Escrow Amount. (*Id.*)

By letter dated May 9, 2018, emailed on May 10, thus even before the amendment described above had fixed the amount of loss, but with the expectation that the amendment would be signed, plaintiffs submitted "a claim for a Tax Law Change Adjustment under the MIPA" ("Claim Letter"). (A438.) The Claim Letter demanded indemnification for $4,089,695 of losses resulting from the Tax Law Change Adjustment, described in detail the facts and circumstances on which the claim was based and asked defendants to execute an enclosed Joint Written Instruction to release the full Escrow Amount to plaintiffs to satisfy the claim. (A616 ¶ 88; A438-48.)[1]

On May 21, 2018, having received no response from defendants, plaintiffs emailed defendants, asking if they had "any questions on the Tax Law Change Adjustment claim sent the week before last." (A616 ¶ 89; A450.) Mr. Silvestrini

[1] Plaintiffs reduced the amount requested in litigation to $3.3 million, still exceeding the Escrow Amount. (A616 ¶ 88.)

responded later that day, stating that defendants were "preparing questions and a request for additional information and will get that to you once we have it fully-drafted." (A616 ¶ 90; A449-50.) He further stated that defendants "disagree with the methods used to compute the loss associated with the change in law." (A449.)

On May 30, 2018, plaintiffs asked defendants to provide "requests and questions as soon as possible." (A617 ¶ 91; A449.)

Defendants responded nearly two weeks later, by letter dated June 11, 2018, emailed on June 12, stating that they disagreed with "the amount" of plaintiffs' claim and requesting additional information to assess the claim: "the amount of indemnifiable Losses shall be calculated net of any Tax benefits actually realized" and "additional information is required in order to assess your indemnification claim." (A617 ¶ 92 (citations omitted); A451-53.)

As requested, on July 20, 2018, plaintiffs provided further detailed explanations of how the losses were calculated. (A617-18 ¶ 93; A454-64.) According to defendants and the trial court, the contractually shortened limitations period ran on August 11, 2018.

On September 17, 2018, plaintiffs had not received a response to their July 20 letter, so plaintiffs sent another request to defendants, this time from outside counsel, stating: "If we do not timely receive the fully executed Joint Written Instruction from [defendants], we will proceed accordingly, including, if necessary,

by commencing litigation to compel [defendants'] contractually-mandated cooperation." (A618 ¶ 94; A473.)

A few days later, on or around September 20, 2018, defendants' counsel told plaintiffs' counsel that Mr. Silvestrini was working on a response. (A618 ¶ 95.) Nearly a month later, on October 15, 2018, defendants finally responded, without providing the executed Joint Written Instruction. Instead, defendants requested *more* information, stating that "once the amount of Losses is properly calculated, the amount recoverable will be reduced by the Deductible of $200,000, pursuant to Section 8.5(c) of the MIPA" and that they "look[ed] forward to receiving the information and analysis referred to above." (A618-19 ¶ 96; A478-80.)

E. Indemnifiable Losses Resulting from Pre-Closing Taxes

The MIPA provides that defendants "shall indemnify and hold harmless" plaintiffs "from and against any and all Losses actually incurred" by plaintiffs "to the extent resulting from...any Taxes of the Transferred Entities for any Pre-Closing Period." (A065 § 8.2(e)(ii).) Pursuant to this provision, on November 30, 2017, plaintiffs requested indemnification from defendants for $80,026.97 of fees and taxes paid for pre-closing periods. (A620-21 ¶¶ 101-103; A357-61.) Following further communications regarding the amount of loss incurred (A620-21 ¶ 103; A357-61; A362-410), on January 23, 2018, Mr. Silvestrini emailed plaintiffs, stating that the invoices "are our invoices to pay," that "those costs are

not yours to pay" and that "Clean Focus is indemnified from those expenses per the MIPA." (A411.) Defendants, however, did not provide the indemnification. (A621 ¶ 104.)

F. The Court of Chancery Action

On February 22, 2019, plaintiffs initiated the underlying action by filing a Verified Complaint in the Court of Chancery asserting three causes of action—two breach of contract claims for defendants' failure to satisfy their obligations to indemnify plaintiffs and one fraud claim (which is not a subject of this appeal) regarding misrepresentations in the MIPA. (A481-A529.)

1. Plaintiffs' Causes of Action on Appeal

Count I alleges that defendants breached the MIPA and the related Escrow Agreement by wrongfully refusing to direct the release of the Escrow Amount to satisfy defendants' obligation to indemnify plaintiffs for their loss of at least $3.3 million resulting from the Tax Law Change Adjustment. (A523 ¶ 134; A640 ¶¶ 153.) It seeks specific performance requiring defendants to execute a joint written instruction to release the escrow funds to plaintiffs. (A523 ¶¶ 136-37; A641 ¶¶ 155-56.)

Count II alleges that defendants breached the MIPA by wrongfully refusing to indemnify plaintiffs for pre-closing taxes and fees and seeks an order directing defendants to pay plaintiffs at least $80,026.97, plus attorneys' fees and costs, with

the specific amount to be determined at trial. (A523-24 ¶¶ 140-44; A641-42 ¶¶ 161-63.)

2. Defendants' Rule 12(b)(6) Motions

Defendants moved to dismiss the action on April 12, 2019, asserting for the first time that plaintiffs are not entitled to indemnification in any amount because plaintiffs did not file a complaint by August 11, 2018. (A555-57.) Defendants argued that the survival period set forth in Section 8.1 of the MIPA operates as a shortened limitations period barring Count I because the complaint was filed after August 11, 2018. (*Id.*) They further argued that Count II fails to state a claim because, without Count I, Count II does not meet the MIPA's $200,000 deductible for indemnification. (A563-64.) On May 24, 2019, plaintiffs amended their complaint, asserting the same three counts, primarily to add additional factual information supporting the fraud claim. (A585-A647.) Defendants moved to dismiss the amended complaint, for substantially the same reasons that they moved to dismiss the initial complaint. (Exhibit C at 21-22, 30-31.)

Plaintiffs responded that Count I is not time-barred because the usual rules of accrual apply to contractually shortened limitations periods and if the MIPA were construed to shorten the limitations period so that the claim would be barred before it accrued, the shortening would be unreasonable and therefore unenforceable. (Exhibit D at 27-43.) Plaintiffs further argued that Section 8.1 of

the MIPA is a survival period, not a limitations period, and to the extent Section 8.5 purports to shorten the limitations period, it at most shortens it to a period of one year from accrual. (*Id.* at 34-41.) Plaintiffs further argued that defendants' course of dealing is directly at odds with defendants' interpretation and that defendants' conduct equitably estops them from enforcing a contractual limitations period ending on August 11, 2018. (*Id.* at 28, 31, 34.) Plaintiffs argued that Count II is not subject to the deductible, but even if it is, the deductible does not bar Count II because Count I satisfies it. (*Id.* at 41.)

Defendants replied that accrual principles are irrelevant to survival periods, but also that the survival period operates as a contractual limitations period that, absent a lawsuit filed by August 11, 2018, bars Count I without regard to accrual principles. (Exhibit E at 2.) They further argued that their conduct is irrelevant because the parties are sophisticated and represented by counsel and defendants had no obligation to warn plaintiffs of the expiration date. (*Id.* at 2, 12, 14.)

The trial court held telephonic argument on March 25, 2020.

3. Orders Regarding Defendants' Motion to Dismiss

Nine days after argument, on April 3, 2020, the trial court issued a two-page Order Addressing Defendants' Motion to Dismiss ("Initial Order"), dismissing Counts I and II and declining to dismiss Count III. As to Count I, the Initial Order provided only:

> The motion to dismiss Count I is GRANTED under the plain language of Section 8.5(a) of the Membership Interest Purchase Agreement and for the reasons set forth in Part II of the defendants' opening brief and Part I of the defendants' reply brief. The leading authority is *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2011 WL 2682898, at *5–17 (Del. Ch. July 11, 2011).

(A736.) As to Count II, the Initial Order provided only:

> The motion to dismiss Count II is GRANTED on the grounds that it fails to state a claim under the plain language of Section 8.5(c) of the Membership Interest Purchase Agreement as explained in Part III of the defendants' opening brief and Part II of the defendants' reply brief.

(A736.)

Plaintiffs promptly sought leave to file an immediate appeal of the dismissal of Counts I and II. (A002, Dkt. 45.) Before defendants' response was due, on April 28, the trial court held a teleconference to inform the parties that it would vacate the Initial Order and enter a Revised Order Addressing Defendants' Motion to Dismiss. (Exhibit F.) The trial court explained that the Initial Order attempted to incorporate defendants' briefing by reference, but the revised order would "hit each of the issues" so that "there won't be any question about whether [the court] apparently rejected something." (*Id.* at 4.)

The same day, the trial court vacated the Initial Order and entered the Revised Order Addressing Defendants' Motion to Dismiss (defined above as the "Order" and attached hereto as Exhibit A). The Order includes the paragraphs

from the Initial Order dismissing Counts I and II on the basis of defendants' briefing and sets forth further bases for the dismissal of Counts I and II. The Order provides, among other things, that:

> The survival period set forth in Section 8.1 operates as a contractually prescribed statute of limitations. *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2011 WL 2682898, at *2-3. The plain language of Section 8.5 bars a Tax Law Indemnity Claim if it is filed after August 11, 2018, the Expiration Date....
>
> Accrual principles are irrelevant because the survival period sets an end date, not a start date for bringing a Tax Law Indemnity Claim.

(Order ¶ 1(d), (h).) The Order further provides that "even if accrual principles did apply, the plaintiffs' claims had accrued more than a year before they filed this action." (*Id.*) It separately states that "[t]he defendants disputed the demand two months before the Expiration Date" and "[t]he plaintiffs could have protected themselves by filing suit or seeking a declaratory judgment." (Order ¶ 1(g).) The Order provides that Count II fails to state a claim because "[t]he only claim identified by the plaintiffs that would meet the deductible was Count I, which is time-barred." (Order ¶ 2(d).)

Plaintiffs promptly sought leave to immediately appeal the revised Order dismissing Counts I and II. (A001, Dkt. 54.) On May 20, the trial court entered an Order Granting Motion for Entry of Partial Final Judgment (Exhibit B), and

plaintiffs filed a Notice of Appeal on May 28 and an Amended Notice of Appeal on June 18 (Supr. Ct. Dkt. 1, 9).

ARGUMENT

I. IN DETERMINING THAT THE CONTRACTUALLY SHORTENED LIMITATIONS PERIOD IS REASONABLE, THE TRIAL COURT ERRED BY HOLDING THAT ACCRUAL PRINCIPLES ARE IRRELEVANT.

A. Question Presented

In determining that the contractual limitations period is reasonable and enforceable, with the result that it bars Count I, did the trial court commit reversible error by holding that accrual principles are irrelevant, such that it does not matter whether the limitations period barred Count I even before it accrued? (Exhibit C at 28-30; Exhibit D at 28-30; Exhibit E at 2-5; A663-64; A669; Order ¶ 1(h).)

B. Scope of Review

"This Court reviews *de novo* a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 2020 WL 3529586, at *10 (Del. June 30, 2020). "When reviewing a ruling on a motion to dismiss, [the Court] (1) accept[s] all well pleaded factual allegations as true, (2) accept[s] even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw[s] all reasonable inferences in favor of the non-moving party, and (4) do[es] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of

circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

C. Merits of Argument

The trial court erred because accrual principles are indeed relevant in determining whether a contractually shortened limitations period is reasonable and therefore enforceable. The time between accrual and expiration of the contractual period is indeed the principal determinant of reasonableness.

As background, absent contractual shortening, Delaware statutory law provides three years "from the accruing of the cause of such action" for a plaintiff to file a lawsuit asserting a cause of action, like Count I, for breach of contract. 10 *Del. C.* § 8106(a).[2] The three year period chosen reflects a balance between "forcing a party to rush into court before properly investigating the factual and legal bases for its suit," on the one hand, and "protecting the courts and the public from the burden of tardily filed litigation," on the other hand. *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, 2015 WL 9060982, at *11 (Del. Ch. Dec. 16, 2015); *see also Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *1 (Del. Ch. Nov. 27, 2013) ("This determination necessarily represents a balancing of the interests of justice, which

[2] *See also Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013) ("In determining whether an action is barred by laches, the Court of Chancery will normally, but not invariably, apply the period of limitations by analogy as a measure of the period of time in which it is reasonable to file suit.").

include seeing parties to contracts made whole for their breach, as well as preventing allegedly-breaching parties from being unfairly made to address stale claims for which proof becomes progressively less trustworthy over time.").

Delaware law permits parties to shorten the limitations period by contract. It does not, however, dispense with the policy of permitting plaintiffs sufficient time to access the courts. It therefore is well-established that parties are permitted to shorten limitations periods by contract *only* if the shortened period is reasonable. *See GRT*, 2011 WL 2682898, at *6 ("[P]arties to a contract are entitled to shorten the period of time in which a claim for breach may be brought, i.e., the statute of limitations, so long as the agreed upon time period is a reasonable one."); *ESG*, 2015 WL 9060982, at *11 ("Parties do not have unbridled discretion to shorten the statute of limitations: 'Delaware decisions follow the general principle that contractual limitation of actions periods are valid if they are reasonable.'") (quoting *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del. Super. 1978)).

"A contractually shortened limitation period, in order to be reasonable, must provide a party sufficient time to effectively pursue a judicial remedy." 51 Am. Jur. 2 Limitation of Actions § 81. "A contractual period of limitation is reasonable if the plaintiff has a sufficient opportunity to investigate and file an action, the time is not so short as to work a practical abrogation of the right of action, and the action is not barred before the loss or damage can be ascertained." *Id.*; *see also* 6

A.L.R. 3d 1197 § 2[a] ("It appears to be generally recognized that the time allowed should be sufficient to allow the plaintiff to investigate and file his case within the limitation period, and that periods which are so short as to amount to a practical abrogation of the right of action, or which would require plaintiff to bring his action before his loss or damage can be ascertained, are unreasonable.").

In applying the reasonableness requirement, Delaware courts therefore have always assessed whether the contractually shortened limitations period has left a reasonable amount of time to bring suit, between the accrual of the cause of action and the expiration of the limitations period.[3] *Compare, e.g.*, *ESG*, 2015 WL 9060982, at *11 ("ten-day limitations period could be unreasonable" and "seems

[3] One possible exception is in the highly regulated and inapplicable property insurance context, which has since been addressed by statute. In the property insurance context, this Court has found reasonable one-year limitations periods running from the date of loss. *See Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 643 (Del. 2002) ("There is no doubt but that a one-year period of limitation of suit contained in an insurance policy is reasonable and binding upon the insured.") (citation omitted). In the insurance context, where insurers are statutorily required to "affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed," 18 *Del. C.* § 2304(16)(e), and policies typically require prompt proof of loss, a justiciable claim likely would accrue early in the year after loss. In 2008, the General Assembly addressed suit limitations provisions in property insurance policies, making clear that they "[m]ay not require that an action for a claim made under the contract be filed less than 1 year from the date of the denial of the claim by the insurer," 10 *Del. C.* § 8106(b)(1) and amended the insurance code to require "prompt and timely written notice to a policyholder making a claim informing the policy holder of…any contractual period of limitations regarding the filing of an action for the claimant's damages under the contract." *See* 76 Del. Laws, c. 223, *available at* https://delcode.delaware.gov/sessionlaws/ga144/chp223.shtml.

too short"); *Kiss Elec., LLC v. Conboy & Mannion Contracting, Inc.*, 2019 WL 5268630, at *7 (Del. Super. Oct. 9, 2019) ("120 days to seek redress" unreasonable and invalid), *with GRT*, 2011 WL 2682898, at *16-17 (enforcing "one-year period to conduct diligence and sue"); *Eni*, 2013 WL 6186326, at *1 (enforcing "fifteen-month period within which certain actions must be brought"); *Kilcullen v. Spectro Sci., Inc.*, 2019 WL 3074569, at *5 (Del. Ch. July 15, 2019) (12 month period enforceable); *AssuredPartners of Va., LLC v. Sheehan*, 2020 WL 2789706, at *15 (Del. Super. May 29, 2020) (two-year period enforceable). Accrual is relevant.

The trial court's stated basis for holding accrual irrelevant provides no basis at all. The trial court explained only that accrual principles are irrelevant because the contractual limitations period "sets an end date, not a start date for bringing a Tax Law Indemnity Claim." (Order ¶ 1(h).) This merely describes the contract. It does not explain why the contract is reasonable. If the parties' agreement were enough to render the time period reasonable, no contractually shortened time period could be unreasonable, and the reasonableness requirement would be a nullity.

The trial court provided no explanation why the same time period from breach would be reasonable, if it ends on a *date specified by the contract*, but unreasonable if it ends on precisely the same date, when the date is calculated based upon a *time period specified by the contract*. And there is no compelling

justification for such a distinction. In the leading case to have addressed the reasonableness of a contractual shortening of a limitations period involving a specified end date, *GRT*, 2011 WL 2682898, at *17, the Court of Chancery recognized that the "ordinary principles of claim accrual apply." In that case, accrual was not at issue because the limitations period left plenty of time from accrual to file suit: It concerned representations and warranties that were breached at closing,[4] with the result that the limitations period of one year from closing provided the same time from breach to file suit.

The trial court's ruling that "[a]ccrual principles are irrelevant" (Order ¶ 1(h))—that it does not matter whether the contractually shortened limitations period left sufficient time (or any time) for Count I to be filed—should be reversed. It should be reversed because it conflicts with the above described, well-established law. It should be reversed also because it would undermine Delaware's policy in favor of permitting parties adequate time, after accrual, to prepare and file their suit. Finally, it should be reversed because there is no alternative metric for assessing the reasonableness of a contractually shortened limitations period, other than the amount of time it allows for a plaintiff to file suit.

---

[4] *See GRT*, 2011 WL 2682898, at *6 ("Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made, a breach occurs on the date of the contract's closing and hence the cause of action accrues on that date.").

Of course, it should not matter that, in this case, the limitations period was borrowed from a survival period. The trial court made clear that it was applying the period as a limitations period, assessing whether the claim had been timely filed in court. (Order ¶¶ 1(d) ("The survival period set forth in Section 8.1 operates as a contractually prescribed statute of limitations."); *Id.* ¶ 1(e) ("The plaintiffs filed the Tax Law Indemnity Claim on February 22, 2019, well after the Expiration Date. Therefore, the plaintiffs' claim is barred by the MIPA under the reasoning in *GRT*.").) The contractual limitations period does not escape a reasonableness assessment simply because it is derived from a survival period.

Finally, the trial court's statement that plaintiffs "could have protected themselves by filing suit or seeking a declaratory judgment" (Order ¶ 1(g)) is not correct. As detailed below, *see infra* Arg.III.C, because their claim had not accrued, plaintiffs could not have filed suit or sought a declaratory judgment, before the contractually shortened limitations period expired. The trial court's statement is based upon the application of the wrong accrual rule.

II. THE COURT ALSO ERRED BY APPLYING THE WRONG RULE OF ACCRUAL, IN DETERMINING, IN THE ALTERNATIVE, THAT EVEN IF ACCRUAL PRINCIPLES APPLY IN EVALUATING REASONABLENESS, THE CONTRACTUALLY SHORTENED LIMITATIONS PERIOD WAS NONETHELESS REASONABLE.

A. Question Presented

In dismissing Count I as time-barred by a contractually shortened limitations period, did the trial court commit reversible error by determining that the limitations period was reasonable, and therefore enforceable, on the alternative basis that, even if accrual principles apply in assessing reasonableness, the limitations period is reasonable because plaintiffs' claim accrued on December 22, 2017? (Exhibit C at 27; Exhibit E at 6-12; Order ¶ 1(h).)

B. Scope of Review

"This Court reviews de novo a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Haley*, 2020 WL 3529586, at *10; *see also supra* Arg.I.B.

C. Merits of Argument

The trial court committed reversible legal error when it applied the wrong legal rule to determine when plaintiffs' claim accrued in relation to the contractually shortened limitations period. The trial court should have applied *ISN Software Corp. v. Richards, Layton, & Finger, P.A.*, 226 A.3d 727 (Del. 2020), *Cooper Indus., LLC v. CBS Corp.*, 2019 WL 245819 (Del. Super. Jan. 10, 2019) and *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 WL 2699880 (Del. Super. June

11, 2014), because they establish the controlling rule of accrual specifically applicable to claims, like plaintiffs' claim, for breach of a contractual promise to indemnify.

In the case of a claim for breach of an indemnity obligation, such as Count I, the claim does not accrue until the indemnification demand is denied. This is because "Delaware is an 'occurrence rule' jurisdiction, meaning a cause of action accrues 'at the time of the wrongful act'...." *ISN*, 226 A.3d at 732 (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)). "In Delaware, for contract claims, the wrongful act occurs at the time a contract is breached." *Id.* In *Cooper*, the trial court held that "a breach of contract presumably occurs when [the indemnifying party] denies a request for indemnification...since that is the moment 'the contract is broken.'" *Cooper*, 2019 WL 245819, at *4 (quoting *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010)). Similarly, in *Laugelle*, the court likewise held that "[i]n the event of refusal to indemnify, the cause of action may not ripen until the time that the actual refusal is communicated, and the outcome of the underlying dispute can be 'resolved with certainty.'" *Laugelle*, 2014 WL 2699880, at *5 (citing *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009) (indemnification claim

"did not fully ripen until [party] refused to honor its commitment to indemnify"[5])); *see also Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982) ("We hold that such a cause of action does not accrue, and hence the limitation of [§] 8106 does not begin to run, until the insurer denies coverage and notifies its insured of rejection of any claim for such benefits.").

The trial court inexplicably overlooked these cases to instead apply *Scharf v. Edgcomb Corporation*, 864 A.2d 909 (Del. 2004). *Scharf* sets forth the rule for accrual applicable to claims, unlike plaintiffs' claim, for statutory indemnity under Section 145 of the DGCL,[6] which may be asserted as soon as the indemnity obligation arises, before any refusal to provide indemnity. In *Scharf*, the plaintiff's

---

[5] In *LaPoint*, the indemnitor "refused to honor its commitment to indemnify" before the underlying matter triggering the indemnification obligation was "resolved with certainty" on appeal, thus the statute of limitations on the indemnification claim began to run when the "appeal was resolved." 970 A.2d at 198.

[6] The "legal standard" this Court applied in *Scharf* "was established in an earlier pretrial ruling and became the law of the case in [the later] proceedings." *Id.* at 915. The earlier ruling derived the standard from the relevant contract, which provided directors and officers a right to indemnity "to the fullest extent permitted by Delaware law" for claims asserted within six years and provided that the right would continue until "disposition" of the claims. *Scharf v. Edgcomb Corp.*, 1997 WL 762656, at *3-4 (Del. Ch. Dec. 4, 1997). In the later decision that was appealed, the court explained that under Section 145(c) a director or officer "may not pursue an indemnification claim until success has been achieved….[W]hen a cause of action 'accrues' carries consequences not only for time bar purposes but also for purposes of establishing when the initial opportunity to pursue an indemnification claim comes into existence." *Scharf v. Edgcomb Corp.*, 2004 WL 718923, at *14 n.54 (Del. Ch. Mar. 24, 2004), *reversed on other grounds* 864 A.2d. 909 (Del. 2004).

indemnification claim was "premised upon" Section 145. 864 A.2d at 914. Section 145 provides "a statutorily created remedy" that does not require a pre-suit demand. *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560 (Del. 2002). This is because the statutory language "clearly allows for the possibility that the Court of Chancery will order indemnification, thus negating the responsibility of the corporation to determine the propriety of the request in the first instance." *Id.*

Plaintiffs' claim, on the other hand, is for breach of defendants' contractual obligation to indemnify plaintiffs and is not premised on Section 145 of the DGCL or any other right that would allow plaintiffs to skip a pre-suit demand and refusal and proceed directly to court. *See Branin v. Stein Roe Inv. Counsel, LLC*, 2015 WL 4710321, at *6 (Del. Ch. July 31, 2015) ("[T]he vesting of a right under a contract and the accrual of a claim for statute of limitations purposes are not inextricably tied together....[F]or a claim to accrue or mature for statute of limitations purposes, the plaintiff must be able to bring suit."). Nor is plaintiffs' indemnification claim premised on a prior breach occurring at closing that would permit plaintiffs to go directly to court, such as the breaches of representations and warranties at issue in the *GRT* decision. (*See supra* n.4.) Instead, under well-settled accrual principles, plaintiffs' claim did not accrue until both the underlying matter giving rise to the indemnity obligation—the Tax Law Change Adjustment—was resolved with certainty *and* defendants breached the MIPA by

refusing to satisfy their indemnification obligation. The Tax Law Change Adjustment vesting plaintiffs' right to indemnity, and defendants' obligation to indemnify, had not even occurred on December 22, 2017, much less defendants' breach of that obligation. (*See* A609-19 ¶¶ 70-97.)[7]

Until defendants breached the MIPA by denying plaintiffs' indemnification demand, plaintiffs had no justiciable claim against defendants.[8] *See XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217-18 (Del. 2014) ("Generally, a dispute will be deemed ripe if litigation sooner or later appears to be unavoidable and where the material facts are static....[A] dispute will be deemed not ripe where the claim is based on uncertain and contingent events that may not occur, or where future events may obviate the need for judicial intervention.") (quotation marks and citations omitted).[9]

---

[7] As plaintiffs alleged, it was not until August 3, 2018 that the amendment fixing the Tax Law Change Adjustment was signed. (A611 ¶ 78.)

[8] *See Huff Energy Fund, L.P. v. Gershen*, 2016 WL 5462958, at *6 (Del. Ch. Sept. 29, 2016) ("To plead a breach of contract claim sufficient to withstand a motion to dismiss, a plaintiff must allege facts from which the Court may reasonably infer the existence of: 1) a contractual obligation; 2) *a breach of that obligation by the defendant*; and 3) a resulting damage to the plaintiff.") (emphasis added) (internal citations and quotation marks omitted).

[9] *See also B/E Aerospace, Inc. v. J.A. Reinhardt Holdings, LLC*, 2020 WL 4195762, at *6 (Del. Super. July 21, 2020) (dismissing declaratory judgment claim where "dispute over liability beyond the Escrow [was] highly remote and contingent").

If the trial court had applied the correct accrual rule for a contractual right to indemnification, it should have determined that plaintiffs' claim did not accrue until defendants breached the MIPA, by refusing the claim for indemnity. If the trial court had applied this rule, it should further have determined that (a) before the expiration of the contractually shortened limitations period, plaintiffs' cause of action had not even accrued (*see also infra* Arg.III.C), (b) the contractually shortened limitations period therefore left no time for plaintiffs to file suit and (c) the period is therefore unreasonable (*see also supra* Arg.I.C).

III. THE TRIAL COURT ERRED BY REJECTING PLAINTIFFS' ALLEGATION THAT DEFENDANTS DID NOT REFUSE THE INDEMNIFICATION CLAIM UNTIL AFTER THE EXPIRATION DATE AND MAKING AN IMPERMISSIBLE FACTUAL FINDING TO THE CONTRARY ON A MOTION TO DISMISS.

A. Question Presented

In dismissing Count I as time-barred by a contractually shortened limitations period, did the trial court, on a motion to dismiss, commit reversible error by rejecting plaintiffs' allegations that defendants did not refuse plaintiffs' indemnification claim until after the Expiration Date and resolve a material factual dispute regarding these allegations? (A615-19; Exhibit E at 6-8; Order ¶ 1(g).)

B. Scope of Review

"This Court reviews de novo a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Haley*, 2020 WL 3529586, at *10; *see also supra* Arg.I.B.

C. Merits of Argument

The trial court erred in treating as false, on the dismissal motion, a well-pled material allegation: The allegation was that, before the expiration of the contractual limitations period, defendants did not refuse plaintiffs' claim for indemnification. The allegation supported plaintiffs' argument that the contractual limitations period expired, before plaintiffs' claim accrued, and therefore was unreasonable. Specifically, the complaint first alleges that, in April 2018, defendants acknowledged the validity of the claim: "Mr. Silvestrini and Mr.

Chester acknowledged the tax law change and asked how much of the Escrow would be clawed back as a result of the Tax Law Change." (A615 ¶ 87.) It also alleges that, in May and June 2018, defendants stated that they were preparing questions concerning the claim and then posed the questions, stating that certain "additional information is required in order to assess your indemnification claim." (A616-17 ¶¶ 90, 92.) Most significantly, the complaint squarely alleges that defendants "did not dispute their obligation to indemnify Plaintiffs for losses resulting from the [tax] Act prior to the *February 22, 2019* filing of the Verified Complaint."[10] (A588 ¶ 4.) (Plaintiffs felt comfortable filing the complaint then only because, on October 15, 2018, well after the Expiration Date, defendants responded with still further delay after a threat by plaintiffs to commence litigation if the Escrow Amount was not immediately released.)

Rather than accepting as true plaintiffs' well-pled allegations concerning defendants' failure to dispute the claim before the Expiration Date, the trial court inexplicably treated the allegations as false: determining that the "defendants disputed the demand two months *before* the Expiration Date" in June 2018. (Order

[10] The MIPA sets no deadline for performance after which defendants would be deemed in breach of their obligation to indemnify plaintiffs. Accordingly, under Delaware law, defendants were obligated to release the funds "within a reasonable time." *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1035 (Del. Ch. 2008) (finding duty to make earnout payment "within a reasonable time in the absence of a contractual term to the contrary").

¶ 1(g) (emphasis added).) The trial court did not explain how it made this finding contrary to the allegations of the complaint.

It was impermissible, and reversible error, for the trial court to make such a contrary factual finding on a dismissal motion. *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001) ("Because a motion to dismiss under Chancery Rule 12(b)(6) must be decided without the benefit of a factual record, the Court of Chancery may not resolve material factual disputes; instead, the court is required to assume as true the well-pleaded allegations in the complaint.")

It was also an incorrect finding.[11] In their June correspondence, defendants do not dispute the claim. At argument, not even defendants' counsel contended that the correspondence constituted a denial of the claim. The trial court asked defendants' counsel as follows:

> Mr. Seaman, if I could just interrupt you there. Your friends draw a distinction between disputing the amount and disputing the claim. In other words, they suggest implicit in the manner in which your clients framed their responses was an acknowledgement that there was a claim there, the claim was going to need to be paid, but the question was how much. And, in fact, the parties eventually agreed that it wasn't going to be – not agreed -- but came to the conclusion that it wasn't going to be the full 4 million. It was going to exceed the escrow amount,

[11] Defendants have the "burden to prove a limitations period has lapsed and a claim is time-barred." *Commonwealth Land Title Ins. Co. v. Funk*, 2014 WL 8623183, at *6 (Del. Super. Dec. 22, 2014).

> but not to that degree. Can you respond to that line of reasoning that your friends have advanced?"

(A666:5-16.). In response, defendants' counsel did not state, as the trial court later found, that the responses had disputed the claim. Defendants' counsel instead admitted that, at that time, "the parties were focused on determining...how to calculate what plaintiffs' claim was" and that the parties "were going back and forth about value." (A666:24-A667:1; A667:8-11.) He then argued only that plaintiffs' cause of action accrued in June because, at that time, "there [was] no responding confirmation that indemnity would be paid." (A669:2-8.)

Even if defendants had rejected the indemnification demand in June, it would not have allowed a reasonable time to file a lawsuit before August 11. *See Kiss*, 2019 WL 5268630, at *7 (finding "120 days to seek redress" unreasonable and invalid). Moreover, plaintiffs' lawsuit would not have ripened until August 3, when the Tax Law Change Adjustment was "resolved with certainty" by signature of the amendment fixing Firstar's reduction of its contributions, leaving only 8 days to sue. *Laugelle*, 2014 WL 2699880, at *5; *see also LaPoint*, 970 A.2d at 198; *ESG*, 2015 WL 9060982, at *11 ("ten-day limitations period…seems too short").

The trial court impermissibly resolved this material issue of fact in a manner contrary to the allegations, defendants' own statements that they were assessing the

claim and needed more information to do so and the law governing accrual and reasonableness of shortened limitations periods.

IV. THE TRIAL COURT ERRED BY EITHER DISREGARDING PLAINTIFFS' EQUITABLE ESTOPPEL ALLEGATIONS OR INCORRECTLY REJECTING PLAINTIFFS' EQUITABLE ESTOPPEL ALLEGATIONS.

A. Question Presented

Did the trial court commit reversible error by dismissing Count I as time-barred by either disregarding or incorrectly rejecting plaintiffs' allegations of defendants' conduct that equitably estops defendants from arguing that Count I is time-barred? (Exhibit D at 40-41; A684.)

B. Scope of Review

"This Court reviews de novo a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Haley*, 2020 WL 3529586, at *10; *see also supra* Arg.I.B.

C. Merits of Argument

"An equitable estoppel arises whenever a party, by his voluntary conduct, has either deliberately or unconsciously led another party in reliance upon that conduct to change his position for the worse." *Wolf v. Globe Liquor Co.*, 103 A.2d 774, 776 (Del. 1954). "To establish estoppel, it must be shown that the party claiming estoppel lacked knowledge of the truth of the facts in question; relied on the conduct of the party against whom estoppel is claimed; and suffered a prejudicial change of position as a result of his reliance." *U.S. Bank Nat'l v. Swanson*, 2006 WL 3952032, at *2 (Del. 2006) (citation omitted). "Whenever the

other party, relying upon that conduct changes his position to his detriment, or puts himself in a position which cannot be undone without substantial expense, the person whose conduct has brought the situation about will be estopped from asserting his legal rights against the party so misled." *Wolf*, 103 A.2d at 776. "[T]he reliance upon the conduct...must be reasonable and justified under the circumstances." *Swanson*, 2006 WL 3952032, at *2.

It is a fair inference from plaintiffs' allegations that defendants deliberately misled plaintiffs, leading them to reasonably and justifiably believe that defendants were entertaining plaintiffs' indemnification claim, when plaintiffs had no way to know that, instead, defendants were running out the clock to reject plaintiffs' claim only *after* the date that defendants now argue was the deadline for a timely complaint. As reflected in plaintiffs' allegations, defendants falsely represented that they were assessing plaintiffs' indemnification claim, at each turn asking plaintiffs for more information concerning the amount of loss to enable them to "assess [plaintiffs'] indemnification claim." (A617 ¶ 92; *see also* A451-53 ("Essentially we need additional information to verify the method and calculations used to determine the losses Clean Focus actually incurred on Fund III projects, net of all benefits, as a result of the change in tax law referenced in your 5/10/2018 letter.").) In response to defendants' requests, plaintiffs provided "detailed explanations of how the losses were calculated." (A617-18 ¶ 93; A438-48.)

Defendants did not respond until *after* August 11, 2018, the date they now argue was the last day to file a timely complaint. (*See* A618-19 ¶¶ 94-97.) It was not until after this litigation was commenced that defendants asserted for the first time, in support of their dismissal motion, that the MIPA bars a claim to enforce defendants' indemnity obligation if a lawsuit is not filed by August 11, 2018. (A588 ¶ 4; A616 ¶ 90; A617 ¶ 92; A618-19 ¶ 96; A530-84.)

The trial court either did not address plaintiffs' equitable estoppel allegations and argument or it incorrectly held that equitable estoppel does not apply as a matter of law where "[t]he dispute involves sophisticated parties represented by counsel." (Order ¶ 1(i).) Either constitutes reversible error.

Neither the Order nor defendants' dismissal briefing mentions equitable estoppel. Defendants argued that plaintiffs failed to cite "applicable authority for the proposition that [d]efendants had an obligation to warn [p]laintiffs." (Exhibit E at 15.) But, plaintiffs did not argue that defendants had an obligation to warn plaintiffs.[12] Plaintiffs argued that "defendants should be estopped from asserting that Count I is time barred, based upon their conduct in leading defendants to

[12] Nor was an obligation to warn the basis of the decision that plaintiffs cited. *See Closser v. Penn Mut. Fire Ins. Co.*, 457 A.2d 1081, 1088 (Del. 1983) (finding "triable issue of estoppel" where defendant "raised for the first time the twelve month suit limitation as barring the claim" after a complaint was filed and plaintiff was "misled to his detriment in assuming there was no need to file suit within the time limitations of the [insurance] policy").

believe that they were entertaining the claim, until and even after they now contend it was barred." (Exhibit D at 40-41.) The trial court's failure to address this argument and plaintiffs' allegations of equitable estoppel is reversible error. *See Mennen v. Fiduciary Trust Int'l of Delaware*, 167 A.3d 507, 512–13 (Del. 2016) (reversing where trial court "erred by failing to address...two meritorious arguments").

To the extent the trial court rejected plaintiffs' equitable estoppel arguments on the same basis that it rejected plaintiffs' contractual course of dealing argument—that the parties are sophisticated and were represented by counsel—that rejection is reversible legal error. Neither the trial court nor defendants cited any legal rule precluding the applicability of equitable estoppel as a matter of law where parties are sophisticated and represented by counsel.[13] "Even sophisticated businessmen have the right to expect some semblance of honesty and candor in their dealings[.]" *LCT Capital, LLC v. NGL Energy Partners LP*, 2019 WL 6896463, at *4 (Del. Super. Dec. 5, 2019); *Millsboro Fire Co. v. Construction Mgmt. Service, Inc.*, 2009 WL 846614, at *6-7 (Del. Super. Mar. 31, 2009) (triable

[13] To the extent the trial court determined that plaintiffs' reliance on defendants' conduct was not reasonable, reasonableness is a factual determination that is impermissible on a motion to dismiss. *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity*, 624 A.2d 1199, 1206 (Del. 1993) ("Reasonableness is a question of fact to be determined by the finder of fact.").

issue of equitable estoppel prevented application of limitations period entered into between a company and an insurance broker).

V. THE TRIAL COURT ERRED BY DISMISSING COUNT II SOLELY ON THE BASIS OF THE ERRONEOUS DISMISSAL OF COUNT I.

A. Question Presented

Did the trial court commit reversible error by dismissing Count II based on the erroneous dismissal of Count I? (Exhibit C at 31-32; Exhibit E at 17-20; Order ¶ 2.)

B. Scope of Review

"This Court reviews de novo a decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Haley*, 2020 WL 3529586, at *10; *see also supra* Arg.I.B.

C. Merits of Argument

The trial court's dismissal of Count II was premised solely on the dismissal of Count I, which was erroneous and should be reversed for the reasons discussed above. Count II states a breach of contract claim for defendants' failure to satisfy their obligation to indemnify plaintiffs for pre-closing fees and taxes totaling $80,026.97. (A620-21 ¶ 103.)

In their dismissal motion, defendants argued for the first time that they are not obligated to indemnify plaintiffs for the $80,026.97 because it does not meet a $200,000 deductible in the MIPA. (Exhibit C at 30-32.) Defendants conceded that "[i]ndemnifiable losses incurred in connection with a Tax Law Indemnity Claim...would count towards the deductible" (Exhibit E at 17 n.8) but argued that

plaintiffs "did not suffer 'indemnifiable losses in connection with the Change in Tax Law" because "[t]hat claim is time-barred by the MIPA." (Exhibit C at 31.)

The trial court dismissed Count II on the basis that "[t]he only claim identified by the plaintiffs that would meet the deductible was Count I, which is time-barred." (Order ¶ 2(d).) For the reasons explained Sections I-IV, above, the trial court's dismissal of Count I is erroneous and should be reversed, thus the dismissal of Count II was also erroneous and should also be reversed.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court reverse the trial court's Order and Final Judgment dismissing Counts I and II of their complaint and remand to the trial court for further proceedings.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ C. Barr Flinn
C. Barr Flinn (No. 4092)
Elisabeth S. Bradley (No. 5459)
Kevin P. Rickert (No. 6513)
Rodney Square
1000 N. King Street
Wilmington, DE 19801-0391
Telephone: (302) 571-6692
Facsimile: (302) 576-3292

Attorneys for CFM Acquisition LLC and Clean Focus Corporation

DATED: August 20, 2020

CERTIFICATE OF SERVICE

I, Kevin P. Rickert, Esquire, Esquire, do hereby certify that on August 20, 2020, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

By File & ServeXpress

A. Thompson Bayliss, Esq.
John M. Seaman, Esq.
April M. Kirby, Esq.
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

/s/ Kevin P. Rickert
Kevin P. Rickert (No. 6513)