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Case Number 181,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

[CORRECTED] APPELLEES' ANSWERING BRIEF

John M. Seaman (#3868)
April M. Ferraro (#6152)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Michael Silvestrini, Andrew Chester, Robert Landino, Luis A. Linares, and Arthur S. Linares Defendants-Below Appellees

Dated: September 16, 2020

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NATURE OF THE PROCEEDINGS

When the parties finalized their Membership Interest Purchase Agreement dated June 30, 2017 (the "MIPA"), they expected that Congress and a new administration would soon reduce the corporate tax rate. The effect of that tax change would alter the economics of the transaction by which Michael Silvestrini, Andrew Chester, Robert Landino, Luis A. Linares, and Arthur S. Linares (together "Defendants," or "Sellers") sold their solar business – Greenskies – to Clean Focus Corporation ("Clean Focus") and CFM Acquisition LLC ("CFM," together "Plaintiffs," or "Buyers"). Sellers agreed that, post-closing, Buyers could seek indemnification from an escrow account for net losses resulting from an anticipated tax law change. But, under the agreement, the survival period for Buyers to bring such an indemnity claim lasted only until an expiration date that was twelve months after closing. The MIPA established a contractually shortened limitations period equal to the survival period for a Tax Law Indemnity Claim.

The MIPA closed on August 11, 2017. Four months later, in December 2017, the anticipated Tax Cut and Jobs Act was signed into law, reducing corporate tax rates from 35% to 21%. Plaintiffs knew they had an indemnity claim at that point. Yet Plaintiffs waited until May 2018 to give formal notice of their indemnity claim under the notice provision in the MIPA. In response, Defendants disputed whether Plaintiffs had suffered any net loss from the change in tax law, and whether Plaintiffs'

tax benefits offset any purported losses. During the parties' correspondence debating whether Plaintiffs suffered any net loss resulting from the tax law change, Plaintiffs *knew* they were operating under the MIPA's shortened limitations period. Plaintiffs' July 20, 2018 letter to Defendants acknowledged and fully understood the looming deadline to resolve the dispute or bring a Tax Law Indemnity Claim. Plaintiffs wrote, "As you know, the [Plaintiffs'] right to indemnification with respect to Losses resulting from any Tax Law Change Adjustment survives until the date that is twelve months after the Closing Date [i.e., August 11, 2018]." A460. The August 11, 2018 deadline came and went, but Plaintiffs never filed a claim. Thereafter, Plaintiffs' Tax Law Indemnity Claim was "irrevocably and unconditionally released and waived."

On February 22, 2019, Plaintiffs filed a three-count complaint against Defendants alleging that Sellers breached the MIPA by failing to instruct the escrow agent to release funds in respect of Sellers' purported obligation to indemnify Plaintiffs for losses incurred as a result of a change in tax law (Count I). This was nearly six months after the agreed-upon limitations period for filing a Tax Law Indemnity Claim had run. Plaintiffs also alleged that Sellers must indemnify Plaintiffs for $80,026.97 of pre-closing tax payments and filing fees (Count II) and that Sellers committed fraud by causing the Company to make material misrepresentations and omissions in the MIPA regarding warranties for solar power

components (Count III). A485. Plaintiffs amended their complaint on May 24, 2020. A585.

Defendants moved to dismiss the initial and amended complaints in their entirety. After briefing, oral argument, and an initial order, the Court of Chancery issued a revised order granting Defendants' motion to dismiss Counts I and II. OB Ex. A. Relying on the plain language of the MIPA, Defendants' briefs, and *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011), the trial court held that Plaintiffs' Tax Law Indemnity Claim was time barred. The Court of Chancery held that (i) the survival period in Section 8.1 of the MIPA operated as a contractually prescribed statute of limitations, (ii) the "plain language of Section 8.5 bars" Plaintiffs' Tax Law Indemnity Claim if filed after the survival period, *i.e.*, after August 11, 2018, (iii) accrual principles are irrelevant because the survival period set forth an end date, not a start date for bringing an indemnity claim, (iv) even if accrual principles were relevant, Plaintiffs' Tax Law Indemnity Claim accrued months before the survival period expired, (v) the survival period was reasonable and enforceable, (vi) the parties' course of dealing does not change this outcome, and (iv) because Plaintiffs filed their Tax Law Indemnity Claim on February 22, 2019, "well after" August 11, 2018, the claim "is [time] barred by the MIPA under the reasoning in *GRT*." OB Ex. A at ¶ 1(d)-(e).

The trial court also dismissed Count II on the grounds that it failed to state a claim under the MIPA because, after dismissing Count I, Plaintiffs' claim failed to meet the contractual deductible for indemnifiable losses. *Id.* at ¶ 2. The court denied Defendants' motion to dismiss Count III. *Id.* at ¶ 3.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that accrual principals are irrelevant when the parties agreed to a shortened limitations period for asserting indemnification claims for a tax law change that they knew and expected would occur soon after closing.

2. Denied. The trial court correctly held that, even if accrual principles applied, Plaintiffs' Tax Law Indemnity Claim accrued "when the outcome of the underlying matter [was] certain," *i.e.*, when, on December 22, 2017, the change in tax law occurred and Greenskies' investor was released from its obligation to make additional capital contributions. *Id.* at ¶ 1(h) The trial court thus correctly held that the contractual limitations period – which expired on August 11, 2018, or almost nine months after Plaintiffs' claim accrued – was reasonable.

3. Denied. The trial court correctly held that Defendants did not have to "reject" Plaintiffs' Tax Law Indemnity Claim for the claim to accrue. But even if they did, the trial court correctly held that Defendants "disputed the demand [for indemnity] two months before the Expiration Date." OB Ex. A at ¶ 1(g).

4. Denied. The trial court correctly rejected Plaintiffs' unpled equitable estoppel arguments.

5. Denied. The trial court correctly dismissed Count II for failing to satisfy the indemnity deductible.

STATEMENT OF FACTS

A. Greenskies' Tax Equity Investment and Ownership Structure

When the parties signed the MIPA, Greenskies was a collection of limited liability companies that developed, constructed, operated, and maintained solar projects throughout the United States. A596. At that time, the United States federal government offered a 30% investment tax credit for investors in solar projects like the ones Greenskies' operated. *Id.* Solar projects typically do not have taxable income during the first several years of operation. A597. To take advantage of the investment tax credits, "tax equity investors" often finance a portion of the solar project and use the tax credits to offset a portion of their own taxable income. *Id.* The value of the tax credits to the tax equity investor depends on the investor's tax rate. If the investors' tax rate increases or decreases, the value of the investment tax credits increases or decreases by the same rate.

B. The MIPA and the Anticipated Change in Tax Law

On June 30, 2017, Buyers and Sellers entered into the MIPA, under which Buyers purchased from Sellers all of the outstanding membership interests in Greenskies. A013; A606. Section 6.1(d) of the MIPA sets forth, as a condition to closing, the creation of GRE Fund III Holdco LLC ("Greenskies III"). A061; A141. Under Section 6.1(d), GRE Fund III Member LLC ("Manager"), a new limited liability company controlled by Sellers, and Firstar Development, LLC ("Firstar") would create Greenskies III. *Id.*; A018. Manager served as Greenskies III's

managing member or "sponsor," and Firstar served as Greenskies III's tax equity investor. A597-98. Firstar agreed to make a series of capital contributions to Greenskies III in exchange for 99% of Greenskies III's investment tax credits for six years. A601-02.

Before the MIPA closed on August 11, 2017, Sellers negotiated the terms of Greenskies III's operating agreement with Firstar. A603. During the negotiations, Sellers, Firstar, and Buyers expected that the federal government would soon reduce the corporate tax rate for 2018, thus reducing the value of Firstar's investment tax credits. A603 ("When Firstar and [Manager] entered into the Greenskies III Operating Agreement, they *anticipated* the possibility that changes to the tax law would diminish projected benefits to Firstar. … This is because[,] *in early 2017*, the new United States presidential administration had signaled possible changes in tax law, including the possibility of reducing the corporate tax rate[.]" (emphases added)).

To address the expected effects of the anticipated change in tax law, Sellers and Firstar agreed in Section 5.01(d)(2)(k) of Greenskies III's operating agreement that, if a change in tax law reduced the value of Firstar's investment tax credits, Firstar would be relieved of its obligation to make any further capital contributions unless the parties reduced Firstar's contributions by a commensurate amount. A609-

11. If Firstar's capital contributions were reduced, Manager would need to increase its capital contribution to make up the difference. A612.

Again anticipating that a change in tax law would occur and Manager would have to increase its capital contributions to Greenskies III, Buyers and Sellers agreed in Section 8.2(d) of the MIPA that Sellers would indemnify Buyers for any actual or net Losses Buyer incurred as a result of the anticipated change in tax law.[1] A065; A607. The parties knew that the anticipated change in tax law would occur by year end 2017. Accordingly, they included in Section 8.1 of the MIPA a survival period for indemnity claims arising from a change in tax law that expired on August 11, 2018 – one year after closing and at least seven-and-a-half months after any change in tax law for 2018 would take effect.

Section 8.1 states, in relevant part, that "[t]he right of the Purchaser Indemnified Parties to indemnification under Section 8.2(d) (Tax Law Change Adjustment) shall survive, and thus a claim may be brought in respect thereof, until the Expiration Date." A064. Unlike the survival periods applicable to other types

[1] The parties also capped Sellers' indemnity obligation at the amount in the indemnity escrow account. A036-37. The indemnity escrow account should have contained approximately $2.6 million on the Expiration Date. However, Plaintiffs failed to timely and fully fund the indemnity escrow account as required under the MIPA, and still refuse to do so. Sellers filed a separate action in the Court of Chancery seeking to compel Plaintiffs to fully fund the indemnity escrow account. *Silvestrini, et al. v. Greenskies Holdings LLC, et al.*, C.A. No. 2020-0100-JTL (Del. Ch.).

of indemnity claims, the portion of Section 8.1 that addresses Tax Law Indemnity Claims does not identify a "period" of time that starts upon the occurrence of an event. Instead, it references a specific end date – the Expiration Date.[2] Section 8.1 defines "Expiration Date" as "the day that is twelve (12) months after the Closing Date," or August 11, 2018.

In Section 8.5(a) of the MIPA, the parties confirmed, clearly and unambiguously, that (i) the survival periods in Section 8.1 shall operate as statutes of limitations, (ii) claims not made on or prior to the Expiration Date "shall be irrevocably and unconditionally released and waived," and (iii) the survival periods should be strictly enforced:

> Any claim under Article VIII required to be made on or prior to the expiration of the applicable survival period set forth in Section 8.1 . . . ***shall be irrevocably and unconditionally released and waived by the party seeking indemnification with respect thereto***. 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***

[2] *Compare* A064; *with* Section 8.1 ("The covenants and agreements contained in this Agreement (other than the covenants and agreements set forth in Sections 8.2 (c), (d), (e) and (f)) shall survive … until twelve (12) months following the last day such covenant or agreement is fully performed.), *and id.* (indemnity claims under Section 8.2(c) survive until "eight (8) years after the filing date of the first Tax Return"), *and id.* (indemnity claims under Section 8.2(e) survive until "sixty (60) days after the completion of such audit or examination").

> ***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 (emphases added).

These provisions made perfect sense. The parties (i) fully expected a specific change in tax law to occur, (ii) the parties knew that specific change would occur in 2017, and (iii) Sellers agreed only to indemnify Buyers for actual Losses incurred as a result of that specific, anticipated change in tax law. By requiring Buyers to file a Tax Law Indemnity Claim by August 11, 2018, the parties ensured that Buyers would have more than seven months to file a claim, but that Sellers would have no obligation to indemnify Buyers for Losses incurred as a result of any *subsequent* changes in tax law, perhaps later in 2018.

To avoid potentially costly disputes over smaller indemnity claims, the parties agreed in Section 8.5(c) of the MIPA that Buyers "shall not be entitled to recover from any Seller for any claims pursuant to Section 8.2 until the aggregate amount of the [Buyers'] indemnifiable Losses (excluding in respect of Specified Indemnification Obligations) equals or exceeds Two Hundred Thousand Dollars ($200,000) (the 'Deductible')." A067.

C. Plaintiffs' Post-Closing Indemnity Claim for Pre-Closing Taxes

On November 30, 2017, Plaintiffs sent Sellers an indemnity request for $80,026.97 of pre-closing taxes Greenskies purportedly owed. A357. Plaintiffs had not yet notified Sellers of any other indemnifiable losses. Plaintiffs' indemnity request did not meet the $200,000 Deductible.

D. The Tax Cuts and Jobs Act

By the end of 2017, the change in tax law Buyers, Sellers, and Firstar had long anticipated became a reality. On November 16, 2017 (almost eight months before the Expiration Date), the United States House of Representatives passed a bill that would reduce the corporate tax rates from 35% to 20%. A609. On November 22, 2017, Firstar issued a letter to Greenskies III's lenders, copying Buyers' counsel, reserving its rights to reduce its capital contributions to Greenskies III. *Id.*; A355-56. On December 22, 2017 (more than seven months before the Expiration Date), President Trump signed the Tax Cut and Jobs Act into law which reduced the corporate tax rate from 35% to 21%. A609.

E. Plaintiffs Wait More Than Four Months to Seek Indemnity

On May 9, 2018, more than four months after the expected change in tax law became effective, Plaintiffs sent a letter notifying Sellers that a Change in Tax Law had occurred and requesting indemnification for the lesser of $4,089,695 or the balance remaining in the indemnity escrow account. A439-40. Plaintiffs knew they had a "claim" as of this date. Sellers promptly responded by email on May 21, 2018

stating that they were "preparing questions and a request for additional information," but noting that they "disagree[d] with the methods used to compute the loss associated with the change in law." A449. That is, on May 21 (almost three months before the Expiration Date) Sellers disputed Plaintiffs' indemnity request. On May 30, 2018, Plaintiffs followed up and emphasized that they "would like to resolve this quickly" and promised to "respond promptly" to any information requests. A449.

On June 11, 2018, Sellers responded in a letter reiterating the statement in their May 21 email that they "disagree[d] with the assertion that [Buyers are] entitled to claim $4,089,695 against the Indemnity Escrow Account for a variety of reasons." A452. Sellers emphasized that Plaintiffs were entitled only to indemnification for "Losses actually incurred" as a result of a Change in Tax Law, net of any benefits from the Change in Tax Law, and requested additional information substantiating Plaintiffs' actual Losses. A451.

Despite their promise to "respond promptly" to Sellers information requests, Plaintiffs waited more than a month to provide any of the requested information. A449. On July 20, 2018, Plaintiffs sent Sellers another letter, this time claiming, without adequate support, that Plaintiffs had incurred $4,331,451 of actual Losses as a result of the Change in Tax Law. A455-60. Plaintiffs' letter concluded by referencing the clear deadline in the MIPA for Plaintiffs to file an action asserting a tax law change indemnification claim:

> "As you know, the Purchaser Indemnified Parties' right to indemnification with respect to Losses resulting from any Tax Law Change Adjustment ***survives until the date that is twelve months after the Closing Date***. This letter, together with Purchaser's May 2018 Letter, constitutes written notice of a claim for indemnification under the MIPA and describes in reasonable detail the facts and circumstances on which our claim is based."

A460. Thus, by July 20, 2018, Plaintiffs *knew* that they had an indemnity claim for a change in tax law, Sellers had disputed that claim, the claim had accrued, Plaintiffs had given notice of the claim, *and Plaintiffs knew that the clock was running to file a complaint asserting a Loss under the MIPA*. Indeed, Plaintiffs emphasized in the July 20 letter that "[i]t is *important* to note that Firstar triggered Tax Law Change on *November 22, 2017*." A458 (emphasis added). Yet Plaintiffs did nothing to preserve their claim or file an action before the survival period expired.

On August 11, 2018, the deadline for Plaintiffs to file an action seeking indemnification for Losses incurred as a result of a change in tax law came and went. Plaintiffs did not file a claim, and Plaintiffs' Tax Law Indemnity Claim was "irrevocably and unconditionally released and waived." A066. Nothing Sellers had done up until that point prevented Plaintiffs from filing a claim, or even encouraged Plaintiffs to refrain from filing a claim.

On September 17, 2018, Plaintiffs' counsel, now seemingly unaware of the MIPA's deadline referenced in their own July 20, 2018 letter, sent Sellers a letter stating: "If we do not timely receive the fully executed Joint Written Instruction from

Sellers, we will proceed accordingly, including, if necessary, by commencing litigation to compel Sellers' contractually-mandated cooperation." A473. At this point, Plaintiffs were already too late.

Almost six months after Plaintiffs' Tax Law Indemnity Claim was "irrevocably and unconditionally released and waived," Plaintiffs filed this lawsuit, in which they claim to have incurred $3.3 million of actual Losses as a result of the Change in Tax Law. A483; A587.

On April 28, 2020, the Court of Chancery properly dismissed Counts I and II of Plaintiffs' complaint as time barred (Count I) and for failure to meet the Deductible under the MIPA (Count II). OB Ex. A.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE CONTRACTUAL LIMITATIONS PERIOD WAS REASONABLE AND APPLIED IT TO DISMISS PLAINTIFFS' TAX LAW INDEMNITY CLAIM.

A. Question Presented

Did the trial court correctly hold that accrual principles are irrelevant when (i) a contract identifies a specific date on which an anticipated claim will expire, and (ii) the expiration date is more than seven months after the expected event giving rise to the claim was expected to, and did in fact, occur?

B. Scope of Review

This Court reviews a trial court's order granting a motion to dismiss *de novo*.[3] Contract interpretation is a question of law subject to *de novo* review.[4] Whether a complaint is time barred is also a question of law that the Court reviews *de novo*.[5]

C. Merits of Argument

The trial court correctly held that accrual principles are irrelevant when the parties' contract states that a claim will expire on a specific end date, and that end date is more than seven months after the event giving rise to the claim was expected to occur.

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

[4] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

[5] *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

Section 8.1 of the MIPA states that Plaintiffs' Tax Law Indemnity Claim survived, and thus Plaintiffs could bring "a claim . . . in respect thereof, ***until the Expiration Date***." A064. Section 8.1 does not identify a period of time that "starts" either when a certain event occurs or when Plaintiffs' claim accrues. Instead, it identifies an end date after which Plaintiffs' indemnity claim is irrevocably and unconditionally waived.[6] A066. Section 8.1 applicable to Plaintiffs' Tax Law Indemnity Claim is unique in this regard. *Every other* limitations period in Section 8.1 identifies a period of time that *starts* upon the occurrence of a specific event. A064; *see also supra* n.10. The reason for this difference is simple.

Sellers agreed to indemnify Plaintiffs for actual losses incurred as a result of a specific change in tax law – the change in tax law expected to occur at the end of 2017. *See* A606-607. The parties *knew* that the tax law would change in 2017 and expected that the tax law change would have an economic effect on the transaction. The parties also knew that a subsequent change in tax law, for 2019 as an example,

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[6] *See GRT, Inc.*, 2011 WL 2682898, at *15 ("[A] survival clause, like the one found in the Purchase Agreement, that expressly states that the covered representations and warranties will survive for a discrete period of time, but will thereafter 'terminate,' makes plain the contracting parties' intent that the non-representing and warranting party will have a period of time, i.e., the survival period, to file a claim for a breach of the surviving representations and warranties, but will thereafter, when the surviving representations and warranties terminate, be precluded from filing such a claim."); *see also Eni Hldgs., LLC v. KBR Group Hldgs., LLC*, 2013 WL 6186326, at *8 (Del. Ch. Nov. 27, 2013) (same).

likely would not occur until the end of 2018. Accordingly, the parties agreed to a specific *end date* for any Tax Law Indemnity Claim that would give Plaintiffs at least seven months to bring an indemnity claim for the expected change in tax law—August 11, 2018—but that would preclude Plaintiffs from bringing an indemnity claim for any subsequent changes in tax law. The *start date* for any Tax Law Indemnity Claim was simply the date of the tax law change, *not* the date of accrual for any "cause of action." No "cause of action" was necessary under MIPA §§ 8.1, 8.2(d) or 8.5 to trigger indemnity; rather, a change in tax law resulting in a net Loss would itself be enough to trigger indemnity.

Plaintiffs even concede that the plain language of the MIPA confirms that accrual principles are irrelevant and that their Tax Law Indemnity Claim expired on August 11, 2018. OB at 26 (acknowledging that the trial court's ruling that "the contractual limitations period 'sets an end date, not a start date[,] for bringing a Tax Law Indemnity Claim'" "describes the contract").[7] Plaintiffs' defense is that the plain language of the MIPA is unreasonable and unenforceable. *Id.* Plaintiffs' argument is meritless.

[7] "[T]he question of when a claim for contractual indemnification accrues depends on the contractual language." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009).

Delaware courts recognize the right of contracting parties to shorten a statutory limitations period and will enforce the contractual limitations period as long as it is reasonable.[8] Whether a contractual limitations period is reasonable will depend on "its application to the facts of a particular case."[9] The facts of this case make clear that the limitations period applicable to Plaintiffs' Tax Law Indemnity Claim was reasonable.

As Plaintiffs recognized in their complaint, (i) "in *early 2017*, the new United States presidential administration had signaled possible changes in tax law, including the possibility of reducing the corporate tax rate", (ii) "[t]he solar industry," including Sellers and Plaintiffs, "was paying particular attention to the possibility of a reduced corporate tax rate," and (iii) the parties "anticipated the possibility that changes to the tax law would diminish the projected benefits to

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[8] *See Wesselman v. Travelers Indem. Co.*, 345 A.2d 423, 424 (Del. 1975) ("[I]n the absence of an express statutory provision to the contrary, a statute of limitations does not proscribe the imposition of a shorter limitations period by contract."). *GRT, Inc.*, 2011 WL 2682898, at *2-3 (applying contractually prescribed one-year statute of limitations to contract claim when "the contract plainly shortened the three-year statute of limitations applicable to breach of contract claims to one year" and noting that "Delaware law does not have any bias against contractual clauses that shorten statutes of limitations"); *id.* 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.").

[9] *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, 2015 WL 9060982, at *11 (Del. Ch. Dec. 16, 2015).

Firstar" and thereby result in potential indemnifiable losses under the MIPA. A603 (emphasis added). That is, all parties anticipated a change in tax law and made plans several months in advance to address the anticipated effects of that change. Firstar ensured that it could reduce its capital contributions (A604), Plaintiffs ensured that they could seek indemnity if they suffered actual losses (A607), and Sellers ensured that Plaintiffs' indemnity claim would expire on a date certain (A064).

On November 22, 2017, even before the change in tax law became law, Firstar sent Plaintiffs' counsel a letter reserving its rights to reduce its capital contributions. A355-56. On December 22, 2017, the long-anticipated change in tax law finally became effective. A609. On May 10, 2018, Plaintiffs requested indemnity. A438. Plaintiffs never explain the reason for waiting four-and-a-half months to request indemnity. On May 21, 2018, and again on June 11, 2018, Sellers disputed Plaintiffs' indemnity request. A449; A452.

Plaintiffs saw the change in tax law coming, planned for it, acknowledged that it happened, and eventually put their plan in motion, but stopped short of filing a claim. Nothing about this sequence of events suggests that the deadline for filing an indemnity claim was unreasonable. Instead, it suggests that Plaintiffs – sophisticated parties with sophisticated counsel – dragged their feet.

Plaintiffs' defense is that, despite having agreed to a contractual limitations period ending on a date certain, they simply could not file a claim by that date

because of their mistaken belief that their claim had not accrued. OB at 28 ("because their claim had not accrued, plaintiffs could not have filed suit or sought a declaratory judgment"). Plaintiffs argue that they could not file an action to preserve their Tax Law Indemnity Claim until Sellers' "breached the MIPA by denying plaintiffs' indemnification demand." OB at 33. Plaintiffs, however, cite no such denial. Plaintiffs do not even identify any action Sellers took between August 11, 2018 and February 22, 2019 – when Plaintiffs finally filed suit – that caused their claim to accrue. Indeed, no denial was needed, because the indemnity claim was triggered by the change in tax law, not by Sellers' breach.

Plaintiffs never explain how they were able to send a claim letter demanding indemnification for more than $4 million on May 10, 2018 (A439-440), well in excess of the approximately $2 million indemnity cap, but were unable to file a complaint by August 11, 2018.[10] Plaintiffs seem to argue that their Tax Law Indemnity Claim could not be asserted – and was presumably unripe – until Sellers definitively rejected the demand in the claim letter. *See* § III, *infra*. Nothing in the

[10] Of course, had Plaintiffs sent their claim letter sooner, there would have been more time either to negotiate or receive Sellers' response before the Expiration Date. Plaintiffs have only themselves to blame for squandering the first four-and-a-half months of the survival period. *See also* A480 (Sellers asserting that Plaintiffs breached the MIPA by delaying delivery of the tax law indemnity claim for months after Firstar triggered the tax law change in November 2017). Plaintiffs also never requested a tolling agreement.

MIPA requires this result. Nor does Delaware law.[11] The dispute here was ripe because Sellers contested the amount and refused to instruct the escrow agent to release any funds in the indemnity escrow account.[12] Nothing else needed to occur for Plaintiffs to file their lawsuit. But if Plaintiffs had any doubt whatsoever about whether their claim was ripe, Plaintiffs were obligated either to assert the claim by filing a complaint, or seek a tolling agreement. Plaintiffs did neither and let the Expiration Date pass without filing a claim.

As Plaintiffs concede, the MIPA set forth an *end date* by which Plaintiffs had to file their Tax Law Indemnity Claim. OB at 26. When parties negotiate for a defined limitations period to file an anticipated claim (like a breach of representations and warranties), accrual principals do not apply.[13] Here, that end date was (i) twelve months from closing, (ii) more than eight months after Firstar reserved its rights to reduce its capital contributions, (iii) more than seven months after the anticipated change in tax law occurred, (iv) more than two months after

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[11] "[A] cause of action for common law indemnification does not accrue until after the party seeking indemnification has made payment to the third party and the dispute with that party is finally concluded. *There is no such requirement for a contractual indemnity claim*." *Quereguan v. New Castle Cty.*, 2006 WL 2522214, at *5 (Del. Ch. Aug. 18, 2006) (emphasis added) (citation omitted).

[12] Plaintiffs later threatened suit if they did not "receive the fully executed Joint Written Instruction from Sellers." A473. Plaintiffs never contended their claim was only triggered if Sellers definitively declared they were not indemnifying Plaintiff. A473.

[13] *See LaPoint*, 970 A.2d at 198; *GRT, Inc.*, 2011 WL 2682898, at *2-3.

Plaintiffs first demanded indemnity, and (v) more than two months after Sellers first disputed Plaintiffs' demand. Assuming that any of these events triggered the Tax Law Indemnity Claim that Plaintiffs knew was coming, Plaintiffs had plenty of time to file their claim before the Expiration Date.

None of Plaintiffs' authorities remotely suggests that the timeframes here are unreasonably short. Under any formulation, Plaintiffs had far more than the ten-day limitations period found unreasonable in *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*.[14]

Plaintiffs also cite *Kiss Electric, LLC v. Conboy & Mannion Contracting, Inc.*,[15] for the proposition that a 120-day limitations period is unreasonable. In *Kiss Electric, LLC*, a plaintiff electrical contractor sued for payment from a general contractor after asserting a mechanic's lien. The relevant contract contained an arbitration provision requiring that a party file suit within 120 days after the dispute arose. Plaintiff filed its mechanic's lien against defendants in less than 100 days and the court held that defendant waived arbitration by participating in that mechanic's lien litigation and posting a bond to satisfy the lien.[16] After finding that the arbitration provision had been waived, the court considered whether the 120-day

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[14] 2015 WL 9060982, at *11 (Del. Ch. Dec. 16, 2015); OB at 25-26.

[15] 2019 WL 5268630 (Del. Super. Oct. 9, 2019)

[16] *Id.* at *5.

period to file an arbitration, or other litigation, was reasonable. With no further analysis, the court concluded that "the limitation of 120 days to seek redress does reduce the ability to file a breach of contract claim by nearly 90%" and "this is unreasonable …."[17] The only reason Plaintiffs did not have more time after Sellers' response to file their complaint is that Plaintiffs delayed in delivering their request for indemnity. *See supra* n.10.

Whether a contractual limitations period is reasonable depends on "its application to the facts *of a particular case*."[18] Unlike in *Kiss Electric*, here, Plaintiffs *expected* a change in tax law would occur, knew they had a claim for indemnity for eight months, waited four-and-a-half months to request indemnity, understood that Sellers' disputed their indemnity request at least two months before the Expiration Date, and knew that they needed to file a claim for indemnity by the Expiration Date. Under these circumstances, the trial court reasonably enforced the parties "inten[t] for the time periods to be enforced." A066.

The trial court correctly held that accrual principles do not apply when the contract applies a defined survival period to an expected claim and the limitations period was reasonable.

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[17] *Id.* at *7.

[18] *ESG Capital Partners II, LP*, 2015 WL 9060982, at *11 (emphasis added).

II. THE TRIAL COURT CORRECTLY APPLIED ACCRUAL RULES TO CONCLUDE PLAINTIFFS' INDEMNIFICATION CLAIM ACCRUED BEFORE THE EXPIRATION DATE.

A. Question Presented

Did the trial court correctly hold that, even if accrual principles apply, Plaintiffs' Tax Law Indemnity Claim accrued on December 22, 2017, when the change in tax law occurred and more than eight months before the survival period ended, giving Plaintiffs more than enough time to file their claim?

B. Scope of Review

This Court reviews a trial court's order granting a motion to dismiss *de novo*.[19] Whether a complaint is time barred is also a question of law that the Court reviews *de novo*.[20]

C. Merits of Argument

An indemnification claim accrues "when the outcome of the underlying matter is certain." *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 920 (Del. 2004). To determine when a contractual indemnification claim accrues, the Court must "engage a two-part analysis to (1) identify the underlying matter, and (2) determine the date when the outcome of that underlying matter was resolved." *Commonwealth*

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[19] *Cent. Mortg. Co.*, 27 A.3d at 535.

[20] *LeVan*, 940 A.2d at 932.

Land Title Ins. Co. v. Funk, 2014 WL 8623183, at *5 (Del. Super. Dec. 22, 2014) (citing *Scharf*, 864 A.2d at 920).

Here, the "underlying matter" triggering Plaintiffs' indemnity claim was the change in tax law. OB Ex. A at ¶1(h). The outcome of the underlying matter was resolved on December 22, 2017, when the change in tax law was signed into law. Once the change in tax law occurred, Firstar was released from its obligation to make any further capital contributions. *Id.*; *see also* A190-91; A194-95; A355-56; A439. At that point in time, Plaintiffs allegedly suffered damage and had a claim. Sellers did not need to *reject* Plaintiffs' belated indemnity demand for the cause of action for indemnity to accrue. In any event, there is no dispute that Sellers refused to agree to the indemnity demand. A449.

Plaintiffs argue that the well-settled law articulated in *Scharf* does not apply because the plaintiff in *Scharf* sought indemnity under 8 *Del. C.* § 145. OB at 31-32. Plaintiffs ignore that the plaintiff in *Scharf* also sought indemnity under the defendant's "bylaws[] and an indemnity agreement," *i.e.*, both *contracts*. The cause of action in *Scharf* accrued when the underlying investigation against plaintiff concluded, not when defendant rejected Scharf's indemnification demand.[21] Here, the trial court correctly concluded that the underlying matter was resolved on

[21] 864 A.2d 920-21.

December 22, 2017, when the change in tax law decreased Firstar's capital contribution obligations, and increased Plaintiffs' capital contribution obligations. OB Ex. A at ¶ 1(h).

In an attempt to distinguish *Scharf*, Plaintiffs argue for a different, more general, accrual rule: that a cause of action for a breach of contract action accrues at the time of breach.[22] Even if that is the relevant standard (and it is not) Plaintiffs fare no better and their complaint was still untimely.[23] Breach of contract is a "[f]ailure, without legal excuse, to perform any promise which forms the whole or part of a contract."[24] Since Delaware is an "occurrence rule" jurisdiction, a cause of action accrues "at the time of the wrongful act," either at the time of injury or breach.[25] Under either scenario, Plaintiffs' argument fails.

If the indemnifiable "occurrence" was the change in tax law that reduced Firstar's funding obligations and increased Manager's funding obligations (as the trial court correctly held), Plaintiffs' cause of action accrued on December 22,

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[22] OB at 30 (citing *Cooper Indus. LLC v. CBS Corp.*, 2019 WL 245819, at *4 (Del. Super. Jan 10, 2019).

[23] This Court may affirm the trial court's order on alternative grounds. *See Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[24] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 77 (Del. Ch. 2013) (citation omitted).

[25] *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 732 (Del. 2020) ("A cause of action 'accrues' for statute of limitations purposes based on distinct triggering events.").

2017.[26] Plaintiffs did not need to know the full measure of their loss for the cause of action to accrue upon the change in tax law, because a cause of action for breach of contract accrues "at the time the contract is broken, not at the time when actual damage results or is ascertained."[27] Plaintiffs knew that for each dollar that Firstar did not contribute to the project, Manager would have to increase its contribution. A439. Plaintiffs could assert a Tax Law Indemnity Claim at that time.

But, even if the indemnifiable "occurrence" was Sellers' breach of the indemnification obligation (as Plaintiffs contend incorrectly), the cause of action accrued at least by May 21, 2018, when Sellers "disagreed" with Plaintiffs' claim letter and did not execute a joint instruction letter to release escrow funds. A449. At that time, Plaintiffs had a justiciable indemnity claim. Under either scenario, Plaintiffs' claim is untimely.

Plaintiffs cite *Cooper Industries, LLC v. CBS Corp.*, for the proposition that "a breach of contract presumably occurs when [the indemnifying party] denies a request for indemnification" under the agreement.[28] That may be true generally, but under MIPA §§ 8.1, 8.2(d), and 8.5, Plaintiffs became entitled to indemnification when the tax law changed. Whether Sellers denied or disputed Plaintiffs' claim for

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[26] *See* A439; *see also* OB Ex. A at ¶ 1(h).

[27] *Worrel v. Farmers Bank of Del.*, 430 A.2d 469, 472 (Del. 1981).

[28] 2019 WL 245819, at *4 (Del. Super. Jan. 10, 2019).

indemnification is irrelevant to whether Plaintiffs were *entitled* to indemnification. By contrast, Plaintiffs' entitlement to indemnification turned exclusively on whether the tax law changed before the Expiration Date. Even if *Cooper* were applicable, Sellers disputed Plaintiffs' entitlement to indemnification on May 21, 2018. A449. So, under *Cooper*, Plaintiffs' indemnification claim *still* accrued more than two months before the Expiration Date.[29]

Plaintiffs also rely on *Laugelle v. Bell Helicopter Textron, Inc.*,[30] and *LaPoint v. AmerisourceBergen Corp*.[31] Neither case is helpful to Plaintiffs. First, *Laugelle*'s discussion of ripeness is irrelevant because that case involved a third-party indemnification claim that was not final.[32]

LaPoint is distinguishable, too.[33] There, based on the applicable language, the indemnification claim "did not fully ripen until [the company] refused to honor its

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[29] *Allstate Insurance Co. v. Spinelli*, is distinguishable for substantially the same reasons as *Cooper*. 443 A.2d 1286, 1287 (Del. 1982); *id.* at 1292 (claim that insurance carrier breached its contract with an insured driver accrued when the carrier denied coverage—not when the insured driver learned that the third-party tortfeasor was an uninsured driver).

[30] 2014 WL 2699880 (Del. Super. June 11, 2014).

[31] 970 A.2d 185 (Del. 2009).

[32] *See Laugelle*, 2014 WL 2699880, at *5 (holding that cause of action for duty to defend arose when indemnitor rejected tender of defense, but cause of action for indemnity was unripe when underlying claim had not been "resolved with certainty.").

[33] *See Winshall v. Viacom Int'l, Inc.*, 2019 WL 960213, at *11-12 (Del. Super. Feb. 25, 2019) (rejecting a similar argument about *LaPoint* by noting that, unlike

commitment to indemnify" the indemnitees. 970 A.2d at 198. Here, based on MIPA §§ 8.1, 8.2(d), and 8.5, Plaintiffs' indemnification claim ripened when the tax law changed. But even if *LaPoint*'s reasoning is applied to this case, Plaintiffs' claim ripened on May 21, 2018, when Defendants disputed Plaintiffs' indemnification claim. A449. In all events, Plaintiffs' claim accrued well before the Expiration Date.

LaPoint, the claims at issue had accrued because "all of the information necessary to bring a claim for indemnification" was known).

III. DEFENDANTS DID NOT HAVE TO REJECT PLAINTIFFS' TAX LAW INDEMNITY CLAIM BEFORE THE CLAIM ACCRUED

A. Question Presented

Did the trial court correctly hold that Sellers rejected Plaintiffs' Tax Law Indemnity Claim before the Expiration Date?

B. Scope of Review

This Court reviews a trial court's granting of a motion to dismiss *de novo*.[34]

C. Merits of Argument

As explained in Sections I and II, accrual principles do not apply, but if they did, Plaintiffs' cause of action for indemnification accrued when the tax law change went into effect and Firstar decreased its contribution. At that point, Plaintiffs could allege damages and seek indemnity. OB Ex. A at ¶ 1(h).

Plaintiffs argue – incorrectly – that their indemnity cause of action could accrue only after Sellers *rejected* Plaintiffs' indemnity claim. OB at 35-37. Plaintiffs create a new subjective standard for determining breach and argue that they "*felt comfortable* filing the complaint [in February 2019]" only when Sellers continued to refuse to execute a joint instruction letter. *Id.* at 36 (emphasis added).[35]

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[34] *Cent. Mortg. Co.*, 27 A.3d at 535.

[35] This makes no sense because Sellers' position on the tax law indemnity claim never materially changed between the initial demand, the Expiration Date, and the date Plaintiffs filed this action. Nor do Plaintiffs identify any deadline by which Sellers were obligated to respond to the Tax Law Indemnity Claim. Plaintiffs offer

Plaintiffs further argue that the trial court erred when it "treat[ed] as false" the allegation that "before the expiration of the contractual limitations period, defendants did not refuse plaintiffs' claim for indemnification." OB at 35. Plaintiffs' argument ignores the plain language of the MIPA (§ I, *supra*), accrual principles for indemnity claims (§ II, *supra*), and Plaintiffs' own allegations.

In their complaint, Plaintiffs allege that they sent Sellers a demand for indemnity with a proposed joint written instruction to the escrow agent for the escrow release on May 9, 2018. A616. Plaintiffs also allege that, on May 21, 2018, Sellers responded that they "disagree with the methods used to compute the loss associated with the change in law." A616-17. Plaintiffs further allege that, on June 11, 2018, Sellers sent Plaintiffs another letter "indicating that they disagreed that Plaintiffs were 'entitled to claim $4,089,695 against the indemnity escrow for a variety of reasons." A617. Accepting these allegations as true, the trial court correctly held that Sellers "disputed [Plaintiffs' indemnity] demand two months before the Expiration Date." OB at Ex. A ¶ 1(g).

Plaintiffs now argue it was reversible error for the trial court to credit their own allegations – as was required on a motion to dismiss.[36] Plaintiffs point to a

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no explanation why they could not have filed suit, or at least requested a tolling agreement prior to the Expiration Date. *See* OB Ex. A at ¶ 1(g).

conclusory and contradictory allegation that Sellers "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" and argue that the trial court was required to disregard other allegations (supported by documentary evidence) demonstrating that that allegation was plainly false. OB at 36. The trial court was not required to accept as true "allegations contradicted by documents on which the Complaint is based."[37] The May 21 and June 11, 2018 correspondence that Plaintiffs attached to, and cited in, their complaint confirms that Sellers disputed Plaintiffs' request for indemnity no later than June 11, 2018. A616-17; A449; A452-53.[38] The court properly accepted those allegations as true.

Plaintiffs next argue that the trial court made an erroneous factual finding because, during argument, Sellers' counsel acknowledged that, before the Expiration Date, the parties "were going back and forth about value." OB at 38. The documents attached to the complaint confirm that statement was correct. A438-80. But

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[36] *Cent. Mortg. Co.*, 27 A.3d at 536 ("When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true[.]").

[37] *See Senchery v. Middletown Police Dep't.*, 2020 WL 4464526, at *1 (Del. Super. Aug. 3, 2020); *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 327 (Del. Ch. 2003) ("[A] complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.").

[38] There is no dispute Sellers never agreed to sign a joint instruction letter to the escrow agent despite Plaintiffs' requests, as early as May 10. A616-17.

Plaintiffs never explain why "going back and forth about value" – *and never agreeing to execute a joint instruction letter* – was not a denial of Plaintiffs' indemnity request. A667. Nor do Plaintiffs explain why extrinsic evidence regarding the parties' negotiations is relevant. *See* A668:2-7. The December 22, 2017 tax law change triggered Plaintiffs' indemnity right. Plaintiffs requested indemnity in a specific amount. Sellers never instructed the escrow agent to release *any* amount and instead "disagreed" with Plaintiffs' calculation. If a denial was even required (it was not), a disagreement was a denial and Sellers thus denied Plaintiffs' indemnity request two months before the Expiration Date, giving Plaintiffs plenty of time to file a claim.

Plaintiffs next argue that, even if Sellers denied Plaintiffs' indemnity claim two months before the Expiration Date, two months was not a reasonable amount of time to file an indemnity claim. OB at 38. For all the reasons explained in § I, *supra*, Plaintiffs had a reasonable opportunity to respond to Sellers' denial of the indemnity demand by filing a complaint. Indeed, Plaintiffs' own letter recognized the deadline. A480. If there was no deadline for Sellers' performance, as Plaintiffs argue (OB at 36, n.10), Plaintiffs were obligated to act promptly by affirmatively filing a claim. They did not.

Plaintiffs also argue that their right to indemnity was not "resolved with certainty" until the parties signed an amendment to Greenskies III's operating

agreement reducing Firstar's capital contribution. OB at 38. Plaintiffs are incorrect. While the amendment fixed Plaintiffs' exact damages, it was the change in tax law – which triggered Firstar's right to reduce its capital contributions and created any alleged Loss – that resolved with certainty Plaintiffs' right to indemnity.[39] "Rule 12(b)(6) requires notice pleading, not a statement of damages with precision."[40] Moreover, for breach of contract, a cause of action accrues "at the time the contract is broken, not at the time when actual damage results or is ascertained."[41]

Finally, Plaintiffs never address *Marathon E.G. Holding Ltd. v. CMS Enterprises Co.*, which expressly rejected the argument Plaintiffs make here, that "the cause of action [for tax indemnity] did not accrue until [defendant] denied [plaintiff's] claim for indemnity."[42] That court specifically rejected the argument that "[defendant] was not in breach of the contract … until it refused to indemnify [plaintiff] for the withholding taxes paid." *Marathon*, 597 F.3d at 322. The reasoning was simple. The breach claim "relates to a specific indemnity provision, for which a specific accrual rule applies," and "the specific accrual rule …

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[39] *See Simplexity, LLC v. Zeinfeld*, 2013 WL 5702374, at *7 (Del. Ch. Oct. 17, 2013) (holding that plaintiff need not "quantify its damages at the pleading stage").

[40] *Eni Hldgs., LLC*, 2013 WL 6186326, at *22.

[41] *Worrel*, 430 A.2d at 472.

[42] 597 F.3d 311, 322 (5th Cir. 2010) (holding tax indemnity claim was time barred); OB Ex. E at 9 n.5.

establishes that the cause of action for indemnity claims accrues[,] at the latest, *on the date on which the indemnitee suffered damage*, such as by payment of a claim" *Id.* (emphasis added). Here, Plaintiffs allegedly suffered damage upon a Tax Law Change Adjustment. A065 at §8.2(d). The damage occurred upon "any *decrease* in the amount of Firstar's A-Tranche Capital Contribution or B-Tranche Capital Contribution…." A026 (emphasis added).[43] Plaintiffs admit that "the Change in Tax Law resulted in Firstar (US Bank) *decreasing* its A-Tranche and B-Tranche Capital Contributions…." A439. The trial court thus correctly held that Plaintiffs knew they had been damaged as of December 22, 2017 when the Change in Tax Law occurred (*id.*), but certainly no later than May 10, 2018 (A439). OB Ex. A. at ¶ 1(h).

Ultimately, Plaintiffs misunderstand their own claim. It was not Plaintiffs' breach of contract claim that expired, it was Plaintiffs' right to assert a Tax Law Indemnity Claim that expired, which, even if accrual principles apply, accrued on December 22, 2017, when Plaintiffs knew they had an indemnity claim. After August 11, 2018, Sellers had no obligation to indemnify Plaintiffs and therefore could not breach the MIPA by failing to do so.

[43] Plaintiffs' indemnity claim was triggered by liability, not payment.

IV. THE TRIAL COURT CORRECTLY REJECTED PLAINTIFFS' UNPLED EQUITABLE ESTOPPEL ARGUMENT.

A. Question Presented

Did the trial court correctly reject Plaintiffs' unpled equitable estoppel argument?

B. Scope of Review

This Court reviews a trial court's granting of a motion to dismiss *de novo*.[44]

C. Merits of Argument

"Equitable estoppel is a narrow doctrine that is sparingly invoked and the party seeking to rely upon it has the burden to plead facts to support an equitable estoppel claim with 'sufficient specificity.'"[45] "The burden to plead equitable estoppel is a rightly stringent one."[46] "To establish [equitable] estoppel it must be shown that the party claiming estoppel lacked knowledge or the means of obtaining 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."[47] Equitable estoppel is traditionally used as a defense. *See* Ct. Ch. R. 8(c). "When equitable estoppel is raised as a separate cause of action, the

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[44] *Cent. Mortg. Co.*, 27 A.3d at 535.

[45] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 2012 WL 3201139, at *24 (Del. Ch. Aug. 7, 2012).

[46] *Id.* at *26.

[47] *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990).

standards are 'stringent' and the 'doctrine is applied cautiously, and only to prevent manifest injustice.'" 1 Corp. & Commercial Practice in the Delaware Court of Chancery § 15.02 (2019) (quoting *Progressive Int'l Corp. v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *6 n.26 (Del. Ch. July 9, 2002)).

Plaintiffs argue that "[n]either the Order nor defendants' dismissal briefing mentions equitable estoppel." OB at 42. The lack of any reference to equitable estoppel is for good reason: Plaintiffs never pled an estoppel claim. Plaintiffs' sole count relating to the Tax Law Indemnity Claim was for breach of contract. A640-41. Plaintiffs' entire equitable estoppel argument below was a fallback argument consisting of one sentence and one citation in their brief.[48] Of course, "[a]rguments in briefs do not serve to amend the pleadings"[49] and a plaintiff "cannot supplement the complaint through its brief."[50] This is because "[b]riefs relating to a motion to dismiss are not part of the record and any attempt contained within such documents to plead new facts or expand those contained in the complaint will not be

[48] OB at Ex. D at 40-41.

[49] *Cal. Pub. Empls.' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *12 (Del. Ch. 2002); *see also* Ct. Ch. R. 15(aaa).

[50] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010).

considered."[51] But even if Plaintiffs had properly pled equitable estoppel, the trial court correctly rejected the argument.

First, Plaintiffs cannot credibly argue that they "lacked knowledge or the means of obtaining knowledge of the facts in question[.]" Sections 8.1 and 8.5 unambiguously confirm that the contractual limitations period for Plaintiffs' Tax Law Indemnity Claim expired on August 11, 2018. Indeed, Plaintiffs July 20, 2018 letter expressly acknowledged that their "right to indemnification with respect to Losses resulting from any Tax Law Change Adjustment survives until the date that is twelve months after the Closing Date," or August 11, 2018. A460.

Second, Plaintiffs identify no conduct by Sellers that Plaintiffs reasonably relied upon in failing to timely file their Tax Law Indemnity Claim. Plaintiffs argue that "[i]t 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[.]" OB at 41. But Plaintiffs never pled that Sellers were pretending to entertain Plaintiffs' indemnification claim to "run out the clock." *See generally* A585-647. They were not. Before the Expiration Date, Plaintiffs were evaluating Sellers' request for indemnity in good faith. A449; A452-53; A616-17. Sellers disagreed with Plaintiffs' loss calculations

[51] *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002).

and requested additional information. *Id.* These allegations demonstrate good faith, not a ploy to dupe a sophisticated party with sophisticated counsel into failing to timely file a complaint.[52] Even if Plaintiffs were trying to run out the clock (they were not), Plaintiffs *knew* the clock was running, and Plaintiffs never allege that Sellers knew (or even realized) the clock was running. Nor do Plaintiffs ever allege that Sellers told Plaintiffs (or even implied) that (i) Plaintiffs should not file a complaint, (ii) Plaintiffs' Tax Law Indemnity Claim was not subject to the limitations period set forth in Sections 8.1 and 8.5, or (iii) Sellers would agree to toll the contractual limitations period.[53] Plaintiffs pled only that "no Seller disputed that the May 9, 2018 letter constituted a 'claim' that was 'made on or prior to' the Expiration Date." A617. It was true that Plaintiffs gave timely notice of a claim. But Sellers had no obligation to warn Plaintiffs or their counsel that they needed to file their Tax Law Indemnity Claim on or before the Expiration Date.[54] Indeed,

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[52] *See Cent. Mortg. Co.*, 2012 WL 3201139, at *24 (dismissing equitable estoppel claim where "[defendant's representative] is never quoted as stating that timeliness does not matter and that [defendant] would take back loans regardless of the statute of limitations.")

[53] *See Key Props. Grp, LLC v. City of Milford*, 995 A.2d 147, 153 (Del. 2010) (holding that "equitable estoppel claim fail[ed] for lack of any factual basis" where party "never promised … explicitly or implicitly" that it would not exercise its rights).

[54] *See also Moore Bus. Forms, Inc. v. Cordant Hldgs. Corp.*, 1995 WL 662685, at *9 (Del. Ch. Nov. 2, 1995) (holding that absent an affirmative duty to disclose an intent to terminate, the plaintiff could not reasonably rely on defendant's failure to disclose sooner its intention to terminate purchase agreement). Nor could

"[t]he fact that the parties were engaged in negotiations to avoid the suit is not a proper ground for tolling the statute of limitations."[55]

Third, Plaintiffs did not plead that they suffered a "prejudicial *change of position*."[56] Plaintiffs did not plead that they intended to timely file their Tax Law Indemnity Claim but decided not to after Sellers requested additional information. Nor would it have been reasonable for Plaintiffs to delay filing an indemnity claim simply because Sellers – after having expressly disagreed with Plaintiffs' loss calculations – requested additional information.

Contrary to Plaintiffs' arguments, the court addressed, and rejected, Plaintiffs' equitable estoppel argument, albeit implicitly.[57] The court granted Seller's motion to dismiss Count I "for the reasons set forth in Part II of [Sellers'] opening brief and Part I of the [Sellers'] reply brief." A736. In Part I of Sellers' reply brief, Sellers argued that they had no obligation to warn Plaintiffs, and their sophisticated counsel, that their Tax Law Indemnity Claim would expire. OB at Ex. C at 20-30. Sellers

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Plaintiffs have possibly relied on Sellers' *post-Expiration Date* correspondence in failing to file their Tax Law Indemnity Claim *on or before* the Expiration Date.

[55] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *13 (Del. Ch. May 4, 2005); OB at Ex. C at 29. As the Court recognized in *VLIW Tech., LLC*, tolling the limitations period during negotiations would allow "potential plaintiffs to engage in bad faith negotiations to ***lengthen*** the time they would have to bring a suit." *VLIW Tech*., 2005 WL 1089027, at 13 n.54 (emphasis added).

[56] *Waggoner*, 581 A.2d at 1136 (emphasis added).

[57] OB Ex. A at ¶ 1(i).

also argued that the trial court should not consider extrinsic evidence of the parties' negotiations and communications when construing an unambiguous limitations provision to conclude that Plaintiffs were duped into missing their filing deadline. OB at Ex. E at 14-15. In dismissing Count I, the trial court rejected Plaintiffs' improper attempts to resort to extrinsic course of dealing evidence. OB at Ex. A at ¶ 1(i). The trial court also cited MIPA § 8.5, in which Plaintiffs acknowledged that the parties had bargained for a shortened limitations period for Tax Law Indemnity Claims. *Id.* Plaintiffs' estoppel claim fails because they did not (a) lack knowledge or the means of obtaining knowledge of the shortened limitations period; (b) rely on Sellers' conduct or lack of warning; or (c) suffer any prejudicial change of position based on that reliance. But, even if the Court had not addressed Plaintiffs' equitable estoppel argument in its Order, the failure to address an argument that Plaintiffs never pled would not have been reversible error.

Finally, Plaintiffs argument is meritless that it was reversible error for the trial court to reject Plaintiffs' estoppel argument because "the parties are sophisticated and were represented by counsel" simply because neither side cited a case holding exactly that. Sellers provided ample, applicable supporting authorities.[58] But even

[58] *See* OB at Ex. C at 26-27 (citing *Coughlin v. NXP B.V.*, 2011 WL 5299491, at *1, n.5 (Del. Ch. Nov. 4, 2011); *see also Sterling Network Exch., LLC v. Dig. Phoenix Van Buren, LLC*, 2008 WL 2582920, at *5 (Del. Super. Mar. 28, 2008) (holding that limitations period expired "[g]iven that the parties are sophisticated, the contracts themselves are read strictly, and Digital is therefore bound by the time

if those authorities are distinguishable, a trial court's ruling is not invalid for lack of a directly analogous case. If that were true, trial courts could never rule on issues of first impression or rely on authorities *sua sponte*. In any event, Sellers' argument is unremarkable that this Court should strictly enforce a contractual limitations period where sophisticated parties, represented by sophisticated counsel, negotiated the limitations period (and included express language confirming that the period be strictly enforced).

Even if Plaintiffs had alleged an equitable estoppel claim (they did not), the trial court correctly rejected such a claim.

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limitations and methods of notice that they agreed to at signing."); *see also* OB Ex. E at 16 (citing *US HF Cellular Commc'ns, LLC v. Stiegler*, 2017 WL 4548461, at *5 (Del. Ch. Oct. 12, 2017) (the "presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when" "the parties are sophisticated entities that have engaged in arms-length negotiations.")).

V. THE TRIAL COURT CORRECTLY DISMISSED COUNT II BECAUSE IT FAILED TO MEET THE DEDUCTIBLE.

A. Question Presented

Did the trial court correctly dismiss Count II because, after the dismissal of Count I, Count II did not meet the Deductible?

B. Scope of Review

This Court reviews a trial court's granting of a motion to dismiss *de novo*.[59]

C. Merits of Argument

Plaintiffs' indemnity request for $80,026.97 of pre-closing taxes and expenses purportedly owed by Greenskies (Count II) is Plaintiffs' only remaining indemnity claim. Plaintiffs do not argue that the trial court misconstrued MIPA § 8.5(c) or that the claim in Count II fails to meet the $200,000 Deductible. Any such argument has been waived.[60] Plaintiffs' only argument is that the Deductible has been met because Plaintiffs Tax Law Indemnity Claim survives and exceeds the deductible. OB at 45-46. For the reasons set forth above, the trial court correctly dismissed Count I as time barred. Without Count I, Plaintiffs cannot meet the Deductible and the trial court's dismissal of Count II should be affirmed.

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[59] *Cent. Mortg. Co.*, 27 A.3d at 535.

[60] Del. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

CONCLUSION

Appellees respectfully request that this Court affirm the trial court's Order and Final Judgment dismissing Counts I and II of the Amended Complaint.

/s/ John M. Seaman
John M. Seaman (#3868)
April M. Ferraro (#6152)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Michael Silvestrini, Andrew Chester, Robert Landino, Luis A. Linares, and Arthur S. Linares Defendants-Below Appellees

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