EFiled: Sep 29 2020 12:22PM EDT
Filing ID 65972348
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

REPLY 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: September 29, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

PRELIMINARY STATEMENT

Plaintiffs respectfully submit that the result remains clear: Under the existing jurisprudence of the Delaware courts, (1) a contractual shortening of a limitations period is enforceable only if the shortening is reasonable, (2) the reasonableness of the shortening is measured by the time left from the accrual of the cause of action to the expiration of the shortened period—a reasonable amount of time must be left to permit access to the courts—and (3) a cause of action for breach of a contractual indemnification obligation accrues upon the denial of the claim for indemnification (or unreasonable delay in responding to the claim).

Application of these rules leads ineluctably to the conclusion that the contractual shortening in this case was unreasonable and therefore unenforceable. This is so because it left no time between the accrual of the cause of action and the expiration of the limitations period. When a dispute arose between the parties, the limitations period had already expired. Specifically, by the time that the limitations period expired on August 11, 2018, defendants had not denied the claim for indemnification (and there had not yet been unreasonable delay in responding to the claim). As described below, defendants' assertion that plaintiffs delayed in noticing the indemnification claim is incorrect.

Unless the rules described above are rejected, the trial court's decision enforcing the period must be reversed. It should not matter that the period ended

on a fixed date or was derived from a survival period. There is no logical reason—and neither the trial court nor defendants have offered any reason—why the rules should treat differently (a) contractual limitations periods described by fixed time periods from accrual and (b) those that are described by fixed end dates or are derived from survival periods. The trial court's decision therefore must be reversed.

Relevance of Accrual: In their Answering Brief,[1] defendants do not distinguish—or even attempt to distinguish—the uniform cases establishing that the date when the cause of action accrues is relevant to determining whether the contractual shortening of the limitations period is reasonable. As those cases establish, the time between accrual of the cause of action and the expiration of the limitations period is the very measure of reasonableness. Reasonable time must be left in which the cause of action may be asserted. Defendants cite no case to the contrary. There remains no support for the trial court's illogical determination that accrual is "irrelevant." It is contrary to all authority and should be reversed.[2]

---

[1] "Answering Brief" and "AB" refer to the [Corrected] Appellees' Answering Brief, dated September 16, 2020. Unless otherwise defined, capitalized terms herein have the meaning assigned in the [Corrected] Opening Brief of Appellants CFM Acquisition LLC and Clean Focus Corporation, dated August 20, 2020 ("Opening Brief" or "OB").

[2] Defendants do not dispute that the dismissal of Count II was based wholly on the dismissal of Count I, thus to the extent the dismissal of Count I is reversed, the dismissal of Count II must also be reversed.

Time of Accrual: Defendants also do not distinguish the cases establishing that a cause of action for breach of a contractual promise to indemnify, such as Count I, accrues only upon the denial of the claim for indemnification (or unreasonable delay in accepting it). While acknowledging the cases, defendants suggest they do not apply because they supposedly state only the "general" rule. (AB at 26.) This is not so.

The rule cited by plaintiffs is the most specific rule for claims like Count I, for breaches of contractual promises to indemnify. Although the rule is derived from a general rule (all claims for breach of contract accrue upon the breach), the rule cited by plaintiffs is the specific rule applied in cases concerning claims, precisely like Count I, for breaches of contractual promises to indemnify. *See Cooper Indus., LLC v. CBS Corp.*, 2019 WL 245819, at *4 (Del. Super. Jan. 10, 2019); *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 WL 2699880, at *5 (Del. Super. June 11, 2014). Defendants do not and cannot distinguish this specifically applicable authority.

The rule advocated by defendants, although also a specific rule, applies to a different type of claim, for enforcement of a statutory right to indemnification under Section 145 of the DGCL, which allows for an immediate cause of action upon the arising of the right and is not at issue in this case. *Scharf v. Edgcomb Corp.*, 864 A.2d 909 (Del. 2004); *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560

(Del. 2002). If expanded to apply to all claims for breach of contractual promises to indemnify, including claims like Count I that are neither based upon nor derived from statutory rights, the rule advocated by defendants would not only conflict with the cases cited by plaintiffs, but would be impractical. It makes no sense to say that a plaintiff should sue before a defendant has breached the contract. This Court should hold that the trial court erred in not applying the specific rule of accrual set forth in the authorities plaintiffs cited in their Opening Brief. Count I could not have accrued until defendants denied the claim (or unreasonably delayed in accepting it).

Defendants and the trial court are therefore wrong to say that Count I accrued when the Tax Cut and Jobs Act was enacted on December 22, 2017 and that plaintiffs delayed in noticing their indemnification claim. At that time, plaintiffs were not yet even entitled to indemnification.

On December 22, 2017, with the enactment of the Tax Cut and Jobs Act, all that had occurred was a "Change in Tax Law," as defined in the MIPA (A015) and the Operating Agreement. (A152.) Under Section 8.2 of the MIPA, defendants were required to indemnify plaintiffs only for Losses resulting from a Tax Law Change *Adjustment*, which had not yet occurred and would not occur for many months.

The MIPA defines a Tax Law Change *Adjustment* as "any decrease in the amount of Firstar's" capital contributions "to the extent required pursuant to the [Operating Agreement] due to the Change in Tax Law." (A026-27.) Although, upon the enactment of the Tax Cut and Jobs Act, Firstar had the option to decrease the amount of its capital contributions, it had not yet done so. At that time, the parties could only speculate about the amount by which it might later do so.[3]

The Tax Law Change *Adjustment* did not occur before March 27, 2018, when Firstar first proposed the amendment to the Operating Agreement, to decrease its capital contributions. The amendment was not signed until August 3, 2018. Plaintiffs submitted their indemnification claim by their May 9, 2018 letter, in anticipation of the signing of the amendment. If anything, plaintiffs' indemnification claim was early, not late.[4] Finally, because the MIPA set no deadline by which defendants were required to respond to the claim, under applicable law and common sense, defendants were given a reasonable time after the May 9 letter to investigate and respond to the claim (and also for the amendment to be signed), before their failure to respond could amount to a breach.

---

[3] Firstar had the option to *eliminate* its further contributions, but it reserved its rights and, in March 2018, proposed instead to reduce its overall maximum contribution and its funding rate. (OB at 12.)

[4] Plaintiffs did not "squander" any portion of the survival period as defendants suggest. (AB at 20 n.10.) They gave notice of their claim only six weeks and two days after receiving Firstar's proposed amendment to reduce its contributions and even before the proposed amendment was signed. (A438-39; A468-71.)

See Good v. Moyer, 2012 WL 4857367, at *4 (Del. Super. Oct. 10, 2012) ("If a contract does not include a performance date, courts will imply that performance must occur within a reasonable time."). In December 2017, plaintiffs were far from having any cause of action to assert.

Rejection Date. Defendants agree that, on a motion to dismiss, the trial court was required to accept as true all well-pled allegations. Defendants also agree that the trial court nonetheless rejected the Complaint's allegation that defendants "did not dispute their obligation to indemnify Plaintiffs" for losses resulting from the Act "prior to the February 22, 2019 filing of the Verified Complaint." (A588.) The trial court found that defendants "disputed the demand two months before the Expiration Date," thus in June 2018. (Order ¶ 1(g).) The trial court therefore erred in making a factual finding on a motion to dismiss that squarely rejected an allegation that it was required to assume was true.

Defendants argue that the trial court was permitted to disregard the allegation because, they say, it was conclusory and contradicted by the evidence and other allegations. (AB at 32-33.) But the trial court said no such thing; it simply overlooked or chose not to credit the allegation.

Moreover, the allegation was neither conclusory nor contradicted: It was not conclusory because it was supported by multiple other detailed factual allegations, including the allegations concerning the April 2018 meeting, in which defendants

acknowledged their obligation to indemnify plaintiffs, asking how much they would need to pay, and the correspondence between the parties, in which defendants, in June 2018, were requesting additional information "in order to assess your indemnification claim." (A615-17.)

The allegation also obviously was not contradicted by the evidence or other allegations. Defendants say that it was contradicted by the correspondence between the parties and allegations concerning the correspondence because the correspondence did not accept the indemnification claim. According to defendants, the failure to immediately accept the indemnification claim constituted a rejection of the claim. But this is not so as a matter of law. As previously explained, as a matter of law, and consistent with common sense, defendants were given a reasonable time to investigate and respond to the claim, before any failure to accept the claim could amount to a rejection.

In all events, to disregard an allegation, any contradiction by evidence must be unambiguous. Here, defendants' correspondence, with its failure to expressly reject the claim, while quibbling with the amount of the claim and requesting additional information to assess the claim, could not possibly be viewed as an unambiguous rejection of the claim, warranting disregard of a well-pled allegation. Indeed, in their Answering Brief, defendants themselves cite the same correspondence as evidence that they were then still "evaluating Sellers' request

for indemnity in good faith," not rejecting it. (AB at 38-39 (citing A449; A452-53; A616-17).)

Finally, even if the allegation could be disregarded and the trial court's ruling that defendants rejected the indemnification claim in June 2018 were upheld, the period would still be unreasonably short and unenforceable. The amendment with Firstar was not even signed until August 3, 2018, leaving only an unreasonable eight days to file suit before the Expiration Date on August 11, 2018. Even if this were not so, and if the claim had accrued in June 2018, it would have left only an unreasonable two months to file suit before the Expiration Date. Defendants do not distinguish the authorities plaintiffs cited establishing that eight-day and two-month periods are unreasonable.

* * *

At bottom, defendants concede that they were required to indemnify plaintiffs for their losses resulting from the Tax Law Change Adjustment. It is clear that both parties and Firstar expected the amount to be substantial; otherwise they would not have provided for it in the various contracts and placed substantial amounts in escrow. Defendants further concede that they were considering whether to provide indemnification when the Expiration Date passed. Defendants' delay in rejecting the claim coupled with the trial court's decision has allowed defendants a substantial windfall. Defendants should not be granted a windfall

based upon an unusual provision that is not enforceable under Delaware law and that caught plaintiffs by surprise—supposedly barring a cause of action before there was even a dispute and any reason to consider limitations periods.[5]

[5] Defendants incorrectly suggest that, in July 2018, plaintiffs were aware that the limitations period would soon expire. (AB at 2, 13.) The cited July 20, 2018 letter rather reflects plaintiffs informing defendants that, even if the July 20 letter were construed as the notice of the indemnification claim, as opposed to the May letter, the claim was still being made within the required time. (A460.)

ARGUMENT

Defendants do not dispute that plaintiffs' entitlement to indemnification arose within the survival period in Section 8.1 of the MIPA. They do not dispute that plaintiffs noticed their claim for indemnification within the required notice period. They generally do not dispute that what the trial court applied to bar Count I was not a survival period, but the contractually shortened *limitations period* in Section 8.5 of the MIPA. And they do not dispute that the reasonableness requirement applies to a contractually shortened limitations periods.

If, with a few sentences toward the back of their brief (AB at 35), defendants mean to suggest that Count I might have been barred by the survival period, not the limitations period, with the result that the reasonableness requirement might not apply, defendants are wrong. The trial court plainly held that Count I was barred by the limitations period in Section 8.5, and it evaluated the reasonableness of the period. (Order ¶ 1(d)-(g).)

Moreover, the survival period was satisfied because plaintiffs' entitlement to indemnification arose before the expiration of that period. If defendants were correct in suggesting that an entitlement arising within a survival period evaporates at the end of a survival period, many claims would evaporate during litigation, and there would be a rush to decide claims before they evaporated. If defendants

instead mean to say that, under the survival period, the entitlement would evaporate only if not asserted in litigation before the end of the survival period, then the survival period is operating as a limitations period and is subject to the reasonableness requirement.

I. ACCRUAL PRINCIPLES ARE RELEVANT.

All the authority supports plaintiffs' position that accrual is not only relevant, but that the time between accrual and expiration is the determinant of reasonableness. Defendants cannot distinguish the authority and have not done so. They have cited no contrary authority. The Court should find that the trial court erred in holding that accrual is irrelevant.

Defendants say that accrual principles do not apply when parties negotiate an end date, but they cite nothing that supports the proposition. One case they cite, *GRT*, says precisely the opposite. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *7, *17 (Del. Ch. July 11, 2011) (addressing limitations period ending "twelve (12) months after the Closing Date" and stating that "ordinary principles of claim accrual apply"). The other did not involve a contractually shortened limitations period at all. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (Del. 2009). For purposes of assessing reasonableness, no principled distinction can be made between a period that ends on a specified date and one that ends on the same date pursuant to a formula, with both leaving the same time in which to file a complaint before expiration. (OB at 26-27.)

Defendants suggest that accrual does not matter when the right to indemnification begins well before expiration. (*See* AB at 15.) But they cite nothing to support the notion. And the fact that the *right* to indemnification arises

early does not address the unreasonableness of having no time or almost no time in which to file a *cause of action*.

Defendants' theory, that the parties intended for the Tax Cut and Jobs Act to be enacted in 2017, for a claim to accrue in 2017, and then for plaintiffs to have eight months to get a complaint on file, is not found in the Complaint. But, even if it were true, it would explain only *why* the parties agreed to the limitations period. Not why it is reasonable. If anything, it suggests that the parties intended for plaintiffs to have time to file a claim, and that the events played out in an unintended manner. They also suggest that the limitations period was designed to prevent claims only based upon future tax acts, those occurring *after* the Expiration Date, not the anticipated Tax Cut and Jobs Act. If so, the period again is functioning in an unintended manner.

II. PLAINTIFFS' CAUSE OF ACTION DID NOT ACCRUE IN DECEMBER 2017.

Defendants acknowledge the general accrual rule for breaches of contract, which is that a cause of action for breach of contract accrues upon the breach. (AB at 26.) They contend that plaintiffs apply only this general rule, when the more specific rule is to the contrary, that the cause of action for breach accrues upon the entitlement to indemnification. (*See id.*) In fact, plaintiffs apply the general rule for breaches of contract *and* the specific rule that applies to precisely the cause of action here, for breach of a contractual right to indemnification. The cases plaintiffs cite concern precisely the cause of action here.

Defendants cannot successfully distinguish these Delaware cases. They concede that it is "true generally" that "a breach of contract presumably occurs when [the indemnifying party] denies a request for indemnification" under the agreement, as set forth in *Cooper*. (AB at 27.) They argue that *Cooper* and the other cases that plaintiffs cited are inapplicable because plaintiffs were *entitled* to indemnification as of December 22, 2017, the date the tax law changed. (*Id.*) As a threshold matter, they are wrong as to the indemnification trigger. The Change in Tax Law change itself, without the subsequent Tax Law Change Adjustment, did

not trigger the right to indemnification.[6] But in all events, the date that plaintiffs became entitled to indemnification is not the date upon which plaintiffs had *a right to sue defendants* for breach of that obligation. The vesting of a contractual right to payment is distinct from accrual of a cause of action permitting plaintiffs to seek a judicial remedy enforcing that right to payment. (OB at 32.)[7]

Unable to distinguish these Delaware authorities, defendants say that the Fifth Circuit rejected the notion that plaintiffs' claim accrued at breach. (AB at 34-35 (citing *Marathon E.G. Holding Ltd. v. CMS Enterprises Co.*, 597 F.3d 311, 322 (5th Cir. 2010).) But that court applied Texas law. *See Marathon*, 597 F.3d at 322 (applying "Texas' clear rule regarding the accrual date of indemnity claims for limitations purposes" and further explaining that, under Texas law, "indemnity agreements are strictly construed in favor of the indemnitor"). The MIPA is governed by Delaware law, and plaintiffs' claim is for breach of the MIPA. Delaware law governing defendants' breach of their obligation to indemnify plaintiffs is set forth in the cases that plaintiffs cited.

---

[6] The MIPA provides a right to indemnification for a Tax Law Change Adjustment, that is, a reduction in Firstar's capital contribution resulting from a Change in Tax Law. (A064-65.)

[7] Defendants' discussion of when "exact damages" are fixed is irrelevant. (AB at 34.) This dispute concerns when defendants' contractual indemnification obligation was triggered and when it was rejected, not the fixing of damages.

Defendants do not dispute that the *Scharf* decision applied by the trial court addressed a different type of claim, one for statutory director and officer indemnification, which does not require breach before suit can be brought. *See Stifel*, 809 A.2d at 560. It makes no difference that *Scharf* also involved contractual claims because they were derivative of the statutory right. The 2004 Chancery opinion indeed makes clear that, for limitations period purposes, the defendants were entitled to the benefits of the corporation law, which would include Section 145's immediate suit allowance. *See Scharf v. Edgcomb Corp.*, 2004 WL 718923, at *14-15 (Del. Ch. Mar. 24, 2004), *reversed on other grounds* 864 A.2d. 909 (Del. 2004).

Defendants make a generalized argument, under *Scharf*, that a claim for indemnification accrues, for purposes of the running of the applicable limitations period, when the "underlying matter" is certain, regardless of the nature of the indemnification, arguing that the underlying matter was certain upon the enactment of the Tax Cut and Jobs Act. (AB at 24-25.) In addition to being wrong again as to the trigger for entitlement to indemnification, defendants' generalized argument is contradicted by the *specifically applicable* authorities cited by plaintiffs. In those cases, the entitlement to indemnification preceded the breach, but the courts

held that the claim did not accrue until the breach. *See Cooper*, 2019 WL 245819, at *4; *Laugelle*, 2014 WL 2699880, at *5.[8]

It makes no sense to apply the holding in *Scharf* as a general rule of accrual to all causes of action to enforce any contractual indemnification obligations regardless of their nature, as defendants seek to do here. This general rule would permit, and even require, as defendants argue it did here, a party with a conditional contractual right to payment to seek relief from a court as soon as the right is triggered, without regard to whether or not the paying party intends to satisfy its obligation—even before any breach has occurred. This inefficient result is what the ripeness doctrine is designed to prevent. *See XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217-18 (Del. 2014) ("[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); *Allstate*, 443 A.2d at 1292

[8] In *LaPoint*, the order of events was reversed, with the refusal of the obligation coming *before* the obligation was triggered such that the statute of limitations began to run when the underlying matter triggering the indemnification obligation was "resolved with certainty." *LaPoint*, 970 A.2d at 198. Defendants themselves explain that in *Allstate*, a "claim that insurance carrier breached its contract with an insured driver accrued *when the carrier denied coverage*...." (AB at 28 n.29 (citing *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286, 1287 (Del. 1982)).) Similarly, the *Winshall* decision that defendants cited found that contractual indemnification claims accrued *at the time of breach*. *Winshall v. Viacom Int'l, Inc.*, 2019 WL 960213, at *11-12 (Del. Super. Feb. 25, 2019).

("Established contract case law thus recognizes that until a breach occurs, there is no justiciable controversy under the contract ... upon which a party may sue.").[9] The *Scharf* decision does not support or require this inefficient result.

The law established by the Delaware cases that plaintiffs cited is well reasoned: It would make no sense to permit, and even require, the filing of a lawsuit before a claim for indemnification has been made and the counterparty has either rejected it or been given a reasonable time to consider it. The Court should apply this law and hold that the trial court erred in not applying it.

[9] Defendants' suggestion that *Querequan v. New Castle County*, 2006 WL 2522214, at *5 (Del. Ch. Aug. 18, 2006), holds otherwise is wrong. (AB at 21.) It did not even suggest that a claim for breach of a contractual promise to indemnify could ripen before breach.

III. ON THE MOTION TO DISMISS, THE TRIAL COURT WAS NOT PERMITTED TO FIND, CONTRARY TO THE ALLEGATIONS, THAT THE INDEMNIFICATION CLAIM WAS REJECTED IN JUNE 2018.

Defendants agree that the trial court was required to accept as true all well-pled allegations. Defendants also agree that the trial court did not accept as true one of the Complaint's central allegations, that defendants did not deny the indemnification claim before the Expiration Date. The trial court found precisely the contrary, that defendants rejected the indemnification claim two months before the Expiration Date. (Order ¶ 1(g); AB at 31.)

Defendants argue that the trial court was permitted to disregard the allegation because, according to defendants, it was not well-pled. The argument should be rejected because the trial court made no such determination; it simply disregarded the allegation.

Moreover, there was no deficiency in the allegation. Defendants argue that it was conclusory or contradicted by the evidence concerning the June correspondence and the allegations that reference the correspondence. (AB at 32-33.) But neither is true. It was not conclusory because it was supported by multiple particularized allegations of fact. For example, the Complaint alleged that, far from rejecting the claim, in April 2018, "Mr. Silvestrini and Mr. Chester *acknowledged* the Tax Law Change and *asked how much* of the Escrow Amount *would be clawed back* as a result of the Tax Law Change." (A615 (emphasis

added).) The Complaint further alleged the details of the parties' June correspondence, in which defendants, again far from rejecting the claim, responded to the May 9 notice, first by saying that they were "preparing questions" and then by providing their questions, saying that "additional information is required in order to assess your indemnification claim." (A616-17; *see also* A449.) If the claim were rejected, there would have been no point in assessing it.

That same correspondence made clear that the claim was still under consideration: "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." (A451; *see also* A452 (informing plaintiffs that "the following information is required *in order to assess* your indemnification claim") (emphasis added).)

Nor was the allegation contradicted by the evidence and allegations concerning the June correspondence. As made clear above, it was supported by the evidence and allegations that referenced the evidence. To argue that it was contradicted by the evidence and allegations, defendants primarily treat their failure in the June correspondence to accept the indemnification claim as tantamount to a rejection of the claim. But that is wrong. As a matter of law and common sense, defendants were given a reasonable time, after the May 9 notice, to

investigate and accept the claim before their delay in accepting it would constitute a rejection. *See Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1035 (Del. Ch. 2008) (requiring performance "within a reasonable time in the absence of a contractual term to the contrary"); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 285 (3d Cir. 2000) ("[W]e agree with the district court's alternative basis for dismissing appellants' breach of contract claim, i.e., that a reasonable time period has not expired.").

Defendants otherwise treat their statements, in the June correspondence, that they disputed the *amount* of the claim as tantamount to disputing the claim itself. But this too is wrong, for multiple reasons. First, the precise amount of the claim was relatively unimportant because the claim already substantially exceeded the cap by more than $1 million.[10] Second, as previously explained, if defendants had disputed the claim itself, there would have be no point to their requests for information to "assess" the claim. Finally, for purposes of other arguments, defendants fully concede that, at the time of their June correspondence, they were still "evaluating Sellers' request for indemnity in good faith." (AB at 38-39 (citing

[10] Defendants gave every appearance of disputing the amount only provisionally, subject to the receipt of confirming information. If defendants' position were final, they would not have requested support for plaintiffs' position on the amount. Defendants themselves say they "disagreed with [p]laintiffs' loss calculations and requested additional information" and that "the parties 'were going back and forth about value.'" (AB at 32, 38-39.)

A449; A452-53; A616-17).) The correspondence does not contradict the allegation that, in June 2018, defendants had yet to reject the claim.

The evidence is certainly far from unambiguously contradicting the allegation that the claim was not rejected before the Expiration Date, as would be required to disregard the allegation. *See H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003) ("Under Rule 12(b)(6), 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." (emphasis added)); *see also Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 327 (Del. Ch. 2003) (same).

Defendants' related contention that the trial court was permitted to disregard the allegation because it was inconsistent with the other allegations concerning the June correspondence, which the court accepted as true, is creative fiction. (AB at 31.) The trial court said nothing about crediting other allegations, and as explained above, neither the allegations concerning the June 2018 correspondence nor the correspondence itself contradicted the allegation that defendants did not reject the claim before the Expiration Date. For this reason, even if the trial court accepted the other allegations concerning the June 2018 correspondence, it was still required also to accept the allegation that the claim was not rejected before the Expiration

Date. The trial court's factual finding in disregard of the allegation must be reversed.

Defendants' contention that nothing changed, from June 2018 until February 22, 2019, when the complaint was filed, to cause the cause of action to accrue (AB at 30 n.35), is wrong. A reasonable time had passed, with defendants still not accepting the claim. Moreover, by that time, plaintiffs, having grown frustrated with the delays, brought the issue to a head in September 2018, stating that they would sue, if the claim were not promptly accepted. Yet defendants still demurred. Defendants conspicuously do not acknowledge their letter dated October 15, 2018, in which they again asked for more information rather than executing the joint instruction.[11]

Defendants make no counter-arguments to rebut plaintiffs' alternative arguments. Plaintiffs argued that, even if the trial court's finding of rejection in June 2018 was proper, the cause of action still did not accrue until August 3, 2018, when the amendment with Firstar was signed and the Tax Law Change Adjustment occurred, leaving an unreasonable eight days in which to file suit before the Expiration Date on August 11, 2018. Plaintiffs also argued that, even if this were

[11] Plaintiffs are not seeking to "create" any standard for breach, much less a "subjective standard," as defendants argue. (AB at 30.) The standards for breach are well-established. As explained in plaintiffs' Opening Brief, and again above, defendants' failure to perform their obligation to indemnify plaintiffs, after a reasonable time to perform has expired, constitutes a breach of that obligation.

not so, but holding the assumption that the trial court's finding of rejection in June 2018 was proper, the claim would still would not have accrued until June 2018, leaving a still unreasonable two months in which to file suit before the Expiration Date. Defendants do not distinguish the cases cited by plaintiffs establishing that eight days and two months are unreasonable time periods, rendering the contractually shortening unenforceable, even in these scenarios. Defendants merely repeat the incorrect notion that the cause of action accrued in December 2017. (AB at 22-23, 34.)

IV. PLAINTIFFS' EQUITABLE ESTOPPEL ALLEGATIONS DO NOT REQUIRE A SEPARATE CAUSE OF ACTION.

Plaintiffs demonstrated that the trial court erred by dismissing Count I as time-barred by either disregarding or incorrectly rejecting plaintiffs' allegations that defendants' conduct equitably estops defendants from arguing that Count I is time-barred. (OB at 40-44.) In new arguments not made to the trial court below, which should be rejected on that basis alone,[12] defendants say that plaintiffs' equitable estoppel allegations may be rejected because the Complaint does not have a separate claim for equitable estoppel and because the allegations demonstrate defendants' "good faith" consideration of the indemnification claim rather than equitable estoppel. (AB at 37-40.) Neither argument justifies dismissal of Count I.

First, plaintiffs were not required to plead equitable estoppel as a separate claim to address defendants' limitations defense. *See McNair v. Taylor*, 2007 WL 1218681, at *1 n.3 (Del. Super. Mar. 30, 2007) ("[T]he plaintiff is not required to anticipate affirmative defenses in his complaint.").

Second, if defendants are correct that the *only* reasonable inference that can be drawn from the allegations is that, prior to the Expiration Date, they "were evaluating Sellers' request for indemnity in good faith" (AB at 38-39), it cannot

[12] *See Chester Cnty. Employees' Retirement Fund v. New Residential Investment Corp.*, 2018 WL 2146483, at *1 (Del. 2018) (declining to "indulge … arguments for the first time on appeal").

also be correct that the same allegations unambiguously demonstrate that defendants disputed the request prior to the Expiration Date, as defendants otherwise contend and the trial court determined. (AB at 5 (citing Order ¶ 1(g).) Defendants cannot have it both ways. They either rejected the indemnification claim and led plaintiffs to believe that they were continuing to evaluate it, or they were continuing to evaluate it and there was no breach until after the Expiration Date. Either way, the trial court's dismissal of Count I is erroneous and should be reversed.

CONCLUSION

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: September 29, 2020

CERTIFICATE OF SERVICE

I, Kevin P. Rickert, Esquire, do hereby certify that on September 29, 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)