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IN THE SUPREME COURT OF THE STATE OF DELAWARE

REX MEDICAL, L.P., a Pennsylvania limited partnership, Plaintiff Below, Appellant, v. ARGON MEDICAL DEVICES, INC., a Delaware corporation, Defendant Below, Appellee.	No. 366, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-1080-JTL REDACTED – PUBLIC VERSION FILED FEBRUARY 25, 2022

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

FEDERAL CASES

STATE CASES

RULES

NATURE OF PROCEEDINGS

In December 2015, Appellant Rex Medical L.P. ("Rex") sold a medical device product line to Appellee Argon Medical Devices, Inc. ("Argon"). In the corresponding Asset Purchase Agreement ("APA") and separate Escrow Agreement, Rex and Argon agreed to place in escrow $10 million of the purchase price to secure funding for claims for indemnification Argon might assert against Rex related to that purchased product line. This amount was to remain in escrow for 15 months following the closing of the transaction, but the release of the funds was subject to any pending claims for indemnification or "Draw-Down Requests" made by Argon during that 15-month period.

Numerous plaintiffs subsequently filed product liability lawsuits against both Rex and Argon, alleging precisely the claims for which Rex owed indemnification to Argon. Accordingly, before the escrowed funds were set to be released, Argon asserted claims for indemnification against Rex under the APA and submitted two Draw-Down Requests under the Escrow Agreement, stating that Argon sought to secure the escrowed funds for indemnification in relation to 66 lawsuits that had been filed at that time. At the time of the Draw-Down Requests and the claims for indemnification, the underlying lawsuits were still pending. Rex timely objected to the Draw-Down Requests.

The 15-month period expired on March 23, 2017, with Argon's Draw-Down Requests and claims for indemnification still pending. Two-and-a-half years later, in December 2020, Rex sued Argon, seeking a declaration that Argon's Draw-Down Requests were invalid and Rex was entitled to have all of the escrowed funds released to it, along with an order of specific performance. Based on the Parties' briefs, the plain language of the Parties' agreements, and oral argument, the Court of Chancery concluded that: (i) Argon submitted valid Draw-Down Requests based on pending claims for indemnification, (ii) the Parties' agreements prohibited the release of the escrowed funds until those claims were resolved, and therefore (iii) Rex was not entitled to the release of the escrowed funds.

Rex contends that Argon must have already suffered or incurred ***actual*** or liquidated losses (*e.g.*, a judgment or settlement) to prevent the release of the escrowed funds after the end of the 15-month period under the terms of the APA and the Escrow Agreement. Relatedly, Rex contends that Argon needed a "present entitlement" to indemnification (rather than just a pending claim) to make a valid Draw-Down Request under the Escrow Agreement. As the Court of Chancery correctly found, neither argument has merit.

For the reasons set forth below, Argon respectfully requests that the Court affirm the judgment of the Court of Chancery.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err when it interpreted the APA and Escrow Agreement—based on the text of the agreements—as requiring an escrow agent to hold escrowed funds expressly for the purpose of indemnification until Argon's pending claims for indemnification are resolved. *See* Section I.

2. Denied. The Court of Chancery did not err in concluding that Argon made valid Draw-Down Requests (which precluded the release of the escrowed funds) pursuant to the requirements of the Escrow Agreement, where those Draw-Down Requests met all of the Escrow Agreement's requirements, including properly stating that the amount of losses Argon faced could exceed the amount of the escrowed funds. *See* Section II.

STATEMENT OF FACTS

I. THE PARTIES

Appellee Argon is a Delaware corporation that manufactures, markets, distributes, and sells various medical devices (A18 ¶ 14). Appellant Rex is a Pennsylvania limited partnership that develops, manufactures, and markets medical devices (*id.* ¶ 13).

II. THE APA AND THE ESCROW AGREEMENT

A. The Creation of the Escrow Fund

On December 23, 2015, Rex sold its business in a line of medical devices, known as inferior vena cava or IVC filters, to Argon pursuant to the APA (A16 ¶ 3; A21 ¶ 23; *see also* A38–97) and entered into a separate Escrow Agreement (A16 ¶ 4; *see also* A99–113). Under the APA, Argon agreed to pay Rex $160 million for the assets it acquired and to deposit $10 million of that purchase price into escrow (the "Escrow Fund") (A21 ¶ 24). The Parties stipulated that the express "purpose[]" of the Escrow Fund was to "secur[e] indemnification payments to" Argon "pursuant to" the APA (A59 § 3.2(b); *see also* A99 § 1(b)). The Parties also agreed that the Escrow Fund would "be held and released in accordance with the provisions of" Article 8 of the APA and the Escrow Agreement (A59 § 3.2(b)). However, the Parties agreed that to the extent there was any inconsistency between the terms of

the APA and the terms of the Escrow Agreement (a form of which was attached as Exhibit B to the APA), the APA would control (A93 § 9.12).

B. Rex's Contractual Indemnity Obligations to Argon

Section 8.1 of the APA identifies and describes Rex's obligations to indemnify Argon (A83–84 § 8.1). More specifically, it provides Rex's obligation to "indemnify and hold harmless" Argon "against and in respect of all ***Losses***[1] which [Argon] suffer[s] or incur[s] as a result of, arising out of, or in connection with . . . any ***Excluded Liability***"[2] (A83 § 8.1(a)) (emphasis added). The Parties do not dispute that product liability claims involving IVC filters manufactured by or on behalf of Rex prior to the December 2015 closing of the APA are "Excluded

[1] The APA defines "Losses" as "any losses, damages, judgments, settlements, levies, assessments, fines, Taxes, liabilities, costs and expenses (including interest and penalties, lost profits, diminution in value . . . , costs of investigation and reasonable attorneys', accountants' and experts' fees and expenses actually incurred in connection therewith . . . ." (A47 § 1.1).

[2] The APA defines "Excluded Liabilities" to encompass "[a]ll liabilities, obligations, claims, causes of action or Legal Proceedings arising out of Products sold, donated or otherwise disposed of prior to the Closing" and "[a]ll liabilities, obligations, claims, causes of action or Legal Proceedings arising out of product liability and warranty claims or any claim for injury to any Person or property involving the Products sold by Seller [Rex] or manufactured by or on behalf of Seller [Rex] prior to the Closing Date . . ." (A56–57 §§ 2.4(d) and (e)). "Products" are defined to include Products set forth in Schedule 1.1C of the APA (A48), which undisputedly include the at-issue IVC Filters.

Liabilities" for which Rex owes Argon indemnification under Section 8.1 of the APA (*see* Rex's Br. at 5).

Section 8.3 of the APA sets out the process by which a Party may assert a claim for indemnification (A85–87 § 8.3). The Party seeking indemnification must "give written notice . . . to the other Party [the Indemnifying Party]" of its claim for indemnification "as promptly as reasonably practicable after receiving written notice of any Legal Proceeding or other claim against it . . . or discovering the liability or facts giving rise to such claim for indemnification" (A85 § 8.3(a)).[3] The Party seeking indemnification must "describ[e] the claim, the amount thereof (***if known and quantifiable***) and the basis thereof" (*id.*) (emphasis added).

The APA sets the "Escrow Release Date" for March 23, 2017 (15 months after the closing date) (A89 § 8.7; A21 ¶ 26), at which time the Parties "shall jointly instruct the Escrow Agent to release and pay to [Rex], in accordance with the Escrow Agreement, any remaining portion of the Escrow Fund ***that is not subject to then-pending claims for indemnification*** pursuant to Section 8.1(a)" of the APA (A89 §

[3] The APA defines Legal Proceeding as "any action, suit, litigation, arbitration, proceeding (including any civil, criminal, administrative, investigative or appellate proceeding), hearing, inquiry, audit, examination or investigation commenced, brought, conducted or heard by or before, or otherwise involving, any court or other Governmental Authority or any arbitrator or arbitration panel" (A47 § 1.1(a)).

8.7) (emphasis added).[4] Similarly, the Escrow Agreement states that the release of the Escrow Fund is "***subject to any indemnification claims timely made by Buyer pursuant to the Purchase Agreement that are pending as of such date***" (A101 § 2(c)) (emphasis added). Thus, under both the APA and the Escrow Agreement, the Escrow Fund's release is subject to claims for indemnification that are pending as of the Escrow Release Date.

In addition to a claim for indemnification defined in the APA, the Escrow Agreement sets forth two additional concepts relevant to this dispute. First, the Escrow Agreement contains a procedure by which Argon can make a "Draw-Down Request." A Draw-Down Request is a written notice issued by Argon to the Escrow Agent stating that Argon "is entitled to payment from the Escrow Fund pursuant to Article 8 of the" APA and "the amount due to" Argon (A100 § 2(b)). [redacted]

[4] The Escrow Agreement refers to this date as the "Final Release Date" (A101 § 2(c)).

Second, the Escrow Agreement provides that any release of the escrowed amount is subject to any "Outstanding Claim Amounts" (A101 § 2(c)). Specifically, the Escrow Agreement provides that the amount of the Escrow Fund to be released on the Escrow consists of "(A) any remaining portion of the Escrow Fund . . . over (B) the aggregate of all Outstanding Claim Amounts (as defined below), if any, subject to any indemnification claims timely made by Buyer pursuant to the [APA] that are pending as of such date" (*id.*). An Outstanding Claim Amount is defined as "the amounts listed in each valid and unpaid Draw-Down Request made by Buyer on or prior to the [Escrow Release Date])" (*id.*).

C. The IVC Filter Lawsuits

Beginning around March 2016, numerous individuals sued Rex and Argon alleging bodily injuries from the implantation of IVC filters (A25 ¶ 37). By the Escrow Release Date, Argon had been named as a defendant in at least 66 lawsuits (*id.* ¶ 38).

D. Argon's Indemnification Notices and Draw-Down Requests

1. Argon's Indemnification Notices to Rex

As Argon received notification of the product liability claims being filed against it by IVC filter patients, Argon began sending timely, valid indemnification

notices to Rex on a rolling basis (A183–84 (acknowledging receipt of indemnification notices)).

2. Argon's Draw-Down Requests to the Escrow Agent

a. *The First Draw-Down Request*

On March 17, 2017—six days prior to the Escrow Release Date—Argon served on the Escrow Agent its first Draw-Down Request, stating that it had been named as a defendant in 56 IVC filter lawsuits (A141). Argon explained that, because the claims alleged in the lawsuits involved "products sold by Rex or manufactured by or on behalf of Rex prior to the Closing Date," each of the lawsuits was an Excluded Liability under the APA, and Argon was therefore entitled to indemnification pursuant to Article 8 of the APA for all losses that Argon "suffer[ed] or incur[red] as a result of, arising out of, or in connection with the Lawsuits" (A141–42).

Argon further explained in the Draw-Down Request that "[t]he vast majority of the Lawsuits do not identify the amount of damages being sought by the applicable claimant," so "at this time, Argon is unable to determine with specificity the amount of Losses that Argon [ ] may suffer or incur in connection with the Lawsuits" (A142). Argon explained, however, that "the aggregate amount of such Losses could reasonably be expected to exceed the amount of the Escrow Funds"

(*id.*), and that "for purposes of this Draw-Down Request, ***the amount due to Argon is the entire balance of the Escrow Funds***" (*id.*) (emphasis added).[5]

b. *The Second, Supplemental Draw-Down Request*

On March 23, 2017—the Escrow Release Date—Argon served on the Escrow Agent a Supplemental Draw-Down Request (A159), in which Argon informed the Escrow Agent that it had become aware of 10 additional IVC filter lawsuits (A159–60). Argon again explained that each of the lawsuits was an Excluded Liability for which Argon was entitled to indemnification from Rex and that, because "the Additional Lawsuits do not identify the amount of damages being sought by the applicable claimant . . . Argon is unable to determine with specificity the amount of Losses that Argon [ ] may suffer or incur in connection with the Additional Lawsuits" (A160). Argon noted that "the aggregate amount of such Losses arising from [all of the Lawsuits] could reasonably be expected to exceed the amount of the Escrow Funds," and thus "for [the] purposes of this Supplemental Draw-Down

[5] Argon attached to the Draw-Down Request an exhibit listing the 56 lawsuits or claims that had been filed, including the name of each plaintiff, docket number, venue, approximate filing date, approximate date of service, and approximate filter implantation date (A143–57).

Request, together with the Original Draw-Down Request, ***the amount due to Argon is the entire balance of the Escrow Funds***" (*id.*) (emphasis added).[6]

On March 23, 2017, Rex served on the Escrow Agent an Objection Notice to Argon's Draw-Down Request and Supplemental Draw-Down Requests (together, the "Draw-Down Requests") (A183). Rex "acknowledge[d] receipt of several indemnification notices from Argon pursuant to Article 8 of the Purchase Agreement" and asserted that "Rex has timely objected to [these] notices and no outstanding claim of Argon for indemnification pursuant to Article 8 of the Purchase Agreement has been resolved," among other things (A184).

To date, the Escrow Agent has not released the $10 million in the Escrow Fund to either Party (A16–17 ¶ 7).

III. PROCEDURAL HISTORY

More than two-and-a-half years after the Escrow Release Date, on December 21, 2020, Rex filed a complaint in the Court of Chancery seeking a declaration that Argon's Draw-Down Requests were invalid (ignoring the separate pending indemnification requests) and that Rex was therefore entitled to have the entire $10

[6] Argon attached to the Supplemental Draw-Down Request an exhibit listing the 56 lawsuits identified in the March 17 letter, as well as the additional 10 lawsuits (A162–81). Argon again provided information about each of those lawsuits (*id.*).

million balance of the Escrow Fund released to it, along with an order of specific performance requiring Argon to issue a joint instruction with Rex to the Escrow Agent directing the Escrow Agent to release the Escrow Fund's balance to Rex (A14, A29–33).

The Parties filed cross-motions for judgment on the pleadings (A214; A245). Following briefing and oral argument, the Court of Chancery issued an opinion on September 20, 2021, holding that Argon had submitted valid Draw-Down Requests and that Rex was not entitled to release of the Escrow Fund because "[t]he plain language of the parties' agreements requires that the Escrow Agent continue to hold the Escrow Fund until [the pending] claims are resolved" (Rex's Br., Ex. A ¶ 33). Specifically, the Court of Chancery found that the agreements' plain language "recognizes that for a party to assert a claim for indemnification, the Indemnified Party need not have suffered indemnifiable Losses" and that "[t]he claim for indemnification [ ] does not have to specify a particular dollar amount of Losses" for indemnification (*id.* ¶ 6). While the Court of Chancery noted that Argon's ultimate "right to payment" required actual losses, it also recognized that, under the Parties' agreements, "the Escrow Agent will keep funds in escrow as long as there are unresolved claims for indemnification" (*id.* ¶ 7). The Court of Chancery

acknowledged that this "is a standard contractual structure" for escrow agreements (*id.* ¶ 8), although its holding was expressly based on its interpretation of the contractual language (*see, e.g.*, *id.* ¶ 25 ("Under the plain language of the APA Release Provision, the Escrow Fund must remain in escrow pending resolution of Seller's claims for indemnification"); *id.* ¶ 29(a) ("[T]he APA Claim Notice Provision makes clear that a valid notice of claim need only describe 'the amount thereof (if known and quantifiable).'"); *id.* ¶ 31(d) ("Consistent with the plain language of the APA Release Provision, the plain language of the Escrow Agreement Release-Date Provision calls for the Escrow Agent to continue to hold the Escrow Fund pending the resolution of the Unresolved Claims.")).

The Court of Chancery entered final judgment on October 19, 2021 (Rex's Br., Ex. B). Rex now appeals.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY CONCLUDED THAT THE ESCROW FUND CANNOT BE RELEASED BECAUSE CLAIMS FOR INDEMNIFICATION REMAIN PENDING.

A. Question Presented

Whether the Court of Chancery correctly interpreted the APA and Escrow Agreement as providing that the Escrow Fund cannot be released while legal proceedings for which Argon seeks indemnification are pending.

This issue was preserved, although, as discussed below, certain arguments now made by Rex were waived (A267–76).

B. Scope of Review

This Court reviews *de novo* issues of contract interpretation, *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033 (Del. 2013), and the grant of a motion for judgment on the pleadings, *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010).

C. Merits of the Argument

In interpreting contracts, courts "give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014) (internal quotation marks omitted); *see Sunline Com. Carriers, Inc. v.*

CITGO Petroleum Corp., 206 A.3d 836, 846 (Del. 2019). A contract's provisions are unambiguous, and can be interpreted and enforced as a matter of law, where they have only one meaning and are not "reasonably or fairly susceptible of different interpretations." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 927 n.60 (Del. 2017) (citation omitted).

As explained below, as the Court of Chancery correctly found, the four corners of the APA unambiguously provide that the Escrow Fund must be withheld subject to Argon's pending indemnification claims, regardless of whether Argon actually suffered or incurred losses prior to the Escrow Release Date (Rex's Br., Ex. A ¶ 25 ("Under the plain language of the APA Release Provision, the Escrow Fund must remain in escrow pending resolution of [Argon's] claims for indemnification")). Rex's interpretation of both the APA and the Escrow Agreement ignores key language and would lead to absurd results. And despite Rex's contentions to the contrary, the Court of Chancery did not interpret the agreements through improper reference to outside sources.

The Court of Chancery's opinion must be affirmed.

1. Under The Plain Language of the Parties' Agreements, the Escrow Fund Must Be Withheld While Argon's Indemnification Claims Remaining Pending.

Rex's case hinges on its argument that the Escrow Fund is required to be released unless Argon had suffered or incurred actual losses (*e.g.*, a judgment or settlement) by the Escrow Release Date. Put another way, Rex's position is that, because none of the product liability suits for which Argon was owed indemnification by Rex had been liquidated in a settlement or judgment as of the Escrow Release Date, the Escrow Fund must be released.

That premise is inconsistent with the text and intent of the Parties' agreements.

a. *The Parties Intended for the Escrow Fund to Secure a Source of Funding For Rex's Indemnification Obligations For Any Claims Pending on the Escrow Release Date, Without Regard to Actual Losses.*

"When interpreting a contract, the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). Argon and Rex's intent in establishing the Escrow Fund is expressly stated in their agreements: Rex was selling a line of medical devices to Argon, which could be subject to claims, including product liability lawsuits, and the Parties therefore intended to create "source of funds to secure the indemnification obligations of [Rex] pursuant to the Purchase Agreement" (A99 ¶ 1(b); *see also* A59 § 3.2(b)). As the

Court of Chancery found, "the purpose of the Escrow Fund was to provide security for [Argon's] right to indemnification from [Rex]" (Rex's Br., Ex. A ¶ 3). Consistent with that stated intention, the Parties agreed on an escrow arrangement that ensured Argon would have a source of funds for ***any*** indemnification claims that arose within the 15 months after the transaction closed. The APA plainly reflects this agreement and—crucially—nowhere states or suggests that the Escrow Fund's release turns on whether Argon's claims had crystallized into losses within the 15 months before the Escrow Release Date (which would be highly unlikely given the ordinary cadence of product liability lawsuits) (*see* A89 § 8.7; A101 § 2(c)).

To the contrary, Section 8.7 of the Purchase Agreement is unambiguous: the Escrow Fund's release is "subject to then-pending claims for indemnification pursuant to Section 8.1(a)" (A89 § 8.7). Section 8.1(a), in turn, addresses "Indemnification by Seller" by setting forth the circumstances under which Rex must indemnify Argon (*see* A83 § 8.1(a)). It makes sense that pending indemnification claims made pursuant to Section 8.1(a) (*i.e.*, indemnification claims made by Argon) would limit the Escrow Fund's release, because those claims concerned Rex's "indemnification obligations" to Argon, and establishing "a source of funds to secure" Rex's obligations was the essential and expressed intent behind

the Escrow Fund (A99 § 1(b); *see also* A59 § 3.2(b)). As the Court of Chancery found, "[t]he plain language of the APA Release Provision contemplates that before the Escrow Release Date, [Argon] might have made 'claims for indemnification pursuant to Section 8.1(a)' that remained pending on the Escrow Release Date" and requires that "the Escrow Fund [ ] remain in escrow pending resolution" of any such claims (Rex's Br., Ex. A ¶ 5 (quoting A89 § 8.7); *id.* ¶ 25).

The Escrow Agreement is to the same effect. Section 2(c) of the Escrow Agreement states that the Escrow Fund's release is "subject to ***any*** indemnification claims timely made by Buyer [Argon] pursuant to the Purchase Agreement that are ***pending*** as of" the Escrow Release Date (A101 § 2(c) (emphasis added)). Notwithstanding Rex's contentions to the contrary, the Escrow Agreement cannot be reasonably read to conflict with the APA by imposing an additional condition to the Escrow Fund's release such that it may only be released subject to some subset of claims for indemnification that involved losses that Argon had already suffered or incurred. And even if there was such a conflict, as discussed below (at Section I.C.2.b, *infra*) the APA makes clear that the provisions of the APA, not the Escrow Agreement, would control. *See United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1130–31 (Del. 2020) (a contractual provision "resolve[d] any conflict" in an

agreement where the provision stated that its terms "shall control" "[i]n the event of any conflict" regarding the contract's interpretation).

Delaware courts have consistently interpreted agreements with similar language as permitting a buyer that has asserted a pending indemnification claim to prevent the release of escrowed funds. *See, e.g.*, *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at *15–16 (Del. Ch. Oct. 31, 2019) (where contracts provided that "escrowed funds not subject to a pending or unresolved claim for indemnification were required to be disbursed to Sellers" on a certain date, the buyers did not breach the contracts by refusing to release escrowed funds while an indemnification claim "was pending"), *aff'd*, 241 A.3d 220 (Del. 2020); *Project Boat Hldgs., LLC v. Bass Pro Grp., LLC,* 2019 WL 2295684, at *24 (Del. Ch. May 29, 2019) (same).

b. *Argon and Rex's Agreements Do Not Provide That a Party Must Suffer or Incur Actual Losses Before Making a Claim for Indemnification.*

Rex contends that claims for indemnification must involve an "actual loss" that a Party has "already suffered or incurred" (*e.g.*, Rex's Br. at 16–17 (emphasis omitted)). This contention ignores the text of the Parties' agreements.

(i) The APA Provides That a Party May Make a Claim for Indemnification *Before* Suffering or Incurring Losses.

Section 8.3(a) of the APA states that a Party must issue written notice of a claim for indemnification "***as promptly as reasonably practicable after receiving written notice of any Legal Proceeding*** or other claim against it . . . or discovering the liability or facts giving rise to such claim for indemnification" (A85 § 8.3(a) (emphasis added)). As the Court of Chancery found, "[t]he plain language" of this provision "recognizes that for a party to assert a claim for indemnification, [the party seeking indemnification] need not have suffered indemnifiable Losses" (Rex's Br., Ex. A ¶ 7). Indeed, the only reasonable interpretation of the provision is that, in at least some (if not most) circumstances, the APA requires a Party to make a claim for indemnification ***before*** that Party has suffered or incurred actual losses. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 n.21 (Del. 2010) (a court must favor a reasonable construction of a contract over an unreasonable one). For example, in the context of litigation, Section 8.3(a) requires a Party to make a claim for indemnification soon after it has been served a complaint that names it as a defendant in a lawsuit that would give rise to indemnification—and thus long before it could have incurred costs or damages in connection with the lawsuit. *See ESG Hldngs., LLC v. Lear Corp.*, 2017 WL 3485816, at *3 (D. Del. Aug. 14, 2017) (applying

Delaware law; an APA that provided that indemnification notices could be based on a "claim or demand" contemplated that the parties could assert such notices "well before any finding of liability").

This interpretation is supported by other language in Section 8.3(a) recognizing that a Party may not know or be able to quantify the amount of its indemnification claim when it makes such a claim (*see* A85 § 8.3(a) & (b) (a Claim Notice regarding a claim for indemnification must "describe[e] the claim, the amount thereof (***if known and quantifiable***) and the basis thereof") (emphasis added)). Again, an obvious example of a situation where that would arise is where—like here—the Party has been named a defendant in a recently-filed lawsuit and cannot yet know or quantify the amount of costs or damages it will ultimately incur.

Rex contends that "the wording" of the parenthetical in Section 8.3(a)—"if known and quantifiable" (*id.*)—somehow "***assumes*** at a minimum there is already [a] Loss" (Rex's Br. at 23 (emphasis added)). But that cannot be squared with the just-discussed requirement that a Party give notice of a claim for indemnification "promptly . . . after receiving written notice of any Legal Proceeding or claim against it" (A85 § 8.3(a)). If Argon and Rex had actually intended for each Party to wait until after it had incurred losses before making a claim for indemnification, as Rex

contends, they easily could have so stated. *Cf. Sparton Corp. v. O'Neil*, 2018 WL 3025470 (Del. Ch. June 18, 2018) (contract expressly limited the plaintiff's right to indemnification "to losses 'that [were] ***actually incurred*** prior to'" a specific date (quoting applicable contract) (emphasis added)). As the Court of Chancery correctly found, that is not the provision to which Argon and Rex agreed (Rex's Br., Ex. A ¶ 29 (finding that the "Parties could [have] agree[d] to a different structure, but they would need to do so clearly and explicitly" and the Parties did not "do that")).

Other subsections of Section 8.3 provide further support for the interpretation that claims for indemnification can encompass situations where a Party has not yet incurred or suffered actual losses. For example, Section 8.3(b) gives the Indemnifying Party 30 days to dispute "any [indemnification] claim," reiterating that the amount of the claim might not be "known and quantifiable" at that time—without regard to losses (A85 § 8.3(b)). Section 8.3(c) enables the Indemnifying Party "to participate in" and, under certain circumstances, "control and appoint lead counsel [in the] defense" of claims brought by a third party, as well as to give "prior written consent" of "any settlement of" a claim brought by a third party (A85–86 § 8.3(c)). And Section 8.3(d) addresses each Party's entitlement to control the defense of third-party claims that are Specified IP Liabilities, based in part on whether "such claim

seeks monetary damages only" (A86 § 8.3(d) (emphasis added)). The requirements in Sections 8.3(c) and 8.3(d) would be meaningless if a Party could make an indemnification claim only ***after*** it had it incurred losses by, for example, having incurred attorney's fees, settled a case, or litigated a case to judgment. By then, it would be too late for the other Party to participate in or control the defense, let alone sign off on any settlement.[7] Taken together, the subsections of Section 8.3 show that the Parties intended that claims for indemnification could include claims for which losses had not yet been suffered or incurred, such as in the context of litigation.

Rex seeks to downplay the significance of Section 8.3 by asserting that it merely concerns "Claim Notice[s]," which Rex contends are purportedly distinct from claims for indemnification, and thus only "sets forth the conditions for Argon to provide ***notice*** to Rex," as opposed to defining substantively what Rex is obligated to indemnify (Rex's Br. at 23 (emphasis added); *see also id.* at 31–32). This distinction makes little sense. Under Section 8.3, Claim Notices not only constitute

[7] Indeed, under Rex's interpretation, it would be unnecessary for Section 8.3(d) of the APA to reference whether a claim "seeks monetary damages" at all (A86 § 8.3(d)), because the dispositive consideration would be whether the Party seeking indemnification had already suffered or incurred a loss, making what the claim "seeks" moot.

the written notice through which a Party must assert any claim for indemnification (*see* A85 § 8.3(a) ("If a Party [ ] seeks indemnification under this ARTICLE 8, such Party . . . shall give written notice (a "Claim Notice") to the other Party" describing "***such*** claim for indemnification" (emphasis added))), they also set forth the processes for disputing and defending such a claim (A85–87 § 8.3(b)–(d)) and for determining the amount of indemnification owed under them (A87 § 8.3(e)). Even the title of Section 8.3—"Notice ***and Defense*** of Claims; Settlements"—makes clear that it involves more than simply notice requirements (A85 § 8.3) (emphasis added). Further, though Section 8.3 does not expressly declare that it is defining "claim for indemnification," it plainly describes the information a Party should provide when it "seeks indemnification" and learns of circumstances "giving rise to such claim for indemnification" (A85 § 8.3(a)).

(ii) The Escrow Agreement, like the APA, Does Not Require a Party to Have Already Suffered or Incurred Losses to Assert an Indemnification Claim.

The Escrow Agreement plainly states that the Escrow Fund's release is "subject to ***any*** indemnification claims timely made by [Argon] pursuant to the Purchase Agreement that are pending as of" the Escrow Release Date (A101 § 2(c) (emphasis added)). Like the APA, the Escrow Agreement does not state or suggest

that a Party must have already incurred losses to make an indemnification claim, and it does not reference any particular provision of the APA that might impose that requirement (*see id.*). Indeed, only one provision in the entire Escrow Agreement mentions "Losses" at all: the provision regarding indemnification ***of the Escrow Agent***, which has nothing to do with Argon's claims for indemnification against Rex, let alone the release of the Escrow Fund (*see* A108–09 § 7(l)).

2. Rex's Interpretation of the Agreements Ignores Key Language, is Unreasonable, and Leads to Absurd Results.

Rex offers various interpretations of the APA and Escrow Agreement that Rex claims support its position that the Escrow Fund can be withheld only for indemnification claims for which Argon has already suffered or incurred losses. As discussed below, each of Rex's interpretations is without merit.

a. *The APA Provision Regarding Rex's Indemnification Obligations, Section 8.1(a), Does Not Indicate That Claims for Indemnification Must Be Based On Losses That Argon Already Suffered or Incurred.*

Rex contends that the APA "requires a claim for indemnification to be based on Losses already suffered or incurred by Argon" (Rex's Br. at 22). This contention is apparently based on the notion that Section 8.7 states that the Escrow Fund's release is "subject to then-pending claims for indemnification pursuant to Section

8.1(a)" (A89 § 8.7), and Section 8.1(a) states that Rex must indemnify Argon for losses that Argon "suffer[s] or incur[s]" (Rex's Br. at 22 (quoting A83 § 8.1(a)).

Despite Rex's characterization to the contrary, however, Section 8.1(a) has nothing to do with whether a pending claim for indemnification must involve actual losses. It does not even mention claims for indemnification (A83 § 8.1(a)). Rather, as Rex acknowledges in its brief, Section 8.1(a) "sets forth Rex's indemnification obligations" (Rex's Br. at 5)—as distinct from Argon's indemnification obligations (*compare* A83 § 8.1(a) *with* A84 § 8.2(a) (Argon's indemnification obligations); *see also infra* at Section I.C.2.b). This is clear from the title, language, and structure of Section 8.1(a), and this interpretation of Section 8.1(a) plainly aligns with the Parties' intent that the Escrow Fund would be "a source of funds to secure" Rex's obligations (A99 ¶ 1(b); *infra* at Section I.C.1.a; *see also* A59 § 3.2(b)).

More broadly, Rex's interpretation of the relationship between Section 8.7 and Section 8.1(a) wrongly equates "claims for indemnification" with indemnification obligations by suggesting that *both* "require an actual right to indemnification" (Rex's Br. at 21). That interpretation is not correct. As the Court of Chancery correctly noted, these are two distinct and separate concepts (*e.g.*, Ex. A. to Rex's Br. ¶ 7 ("The plain language of the [APA] distinguishes between

[Argon's] ultimate right to an indemnification payment and [Argon's] ability to make a claim for indemnification."); *id.* ¶ 28).

Simply stated, claims for indemnification are written requests that a Party makes when it "seeks indemnification" under the APA (*see* A85 § 8.3(a)). As the Court of Chancery explained, "[t]o make a claim for indemnification . . . [Argon] need not have suffered a Loss" but rather "only need point to (i) a Legal Proceeding or other claim against it . . . that could give rise to a right for indemnification or (ii) other 'facts giving rise to such claim for indemnification'" (Rex's Br., Ex. A ¶ 7 (quoting *id.*)). Indemnification obligations, by contrast, are the responsibility of the Indemnifying Party "to indemnify and hold harmless" the other Party from losses arising under certain circumstances (A83 § 8.1(a); A84 § 8.2(a)). Indemnification obligations arise only ***after*** the Party seeking indemnification has made a claim for indemnification ***and*** either (i) the Indemnifying Party has not disputed the claim within 30 days; (ii) the Parties reached an agreement regarding indemnification; or (iii) a court issued "a final, nonappealable judgment or decree" (*see, e.g.*, A87 § 8.3(e)). By conflating the two, Rex seeks to impose a requirement for the ultimate indemnification obligation—that a Party suffered or incurred a loss—to a mere claim for indemnification. This is an "untenable" interpretation of the Parties' agreements.

See RAA Mgmt., LLC v. Savage Sports Hldngs., Inc., 45 A.3d 107, 113 n.4 (Del. 2012) ("Contract interpretation that adds a limitation not found in the plain language [is] untenable." (citation omitted)).

b. *Rex's Interpretation of the Relationship Between Draw-Down Requests and Pending Indemnification Claims Has Been Waived and is Unreasonable.*

Rex also argues that the pending claims for indemnification can prevent the release of the Escrow Fund ***only if*** Argon ***also*** has asserted a valid Draw-Down Request (*see, e.g.* Rex's Br. at 27 ("[A]n indemnification claim by itself does not preclude the release of the Escrow Fund to Rex without a valid and unpaid Draw-Down Request"); *see also id.* at 26–29). Stated differently, Rex asserts that pending indemnification claims are not an independent basis separate and apart from Draw-Down Requests in order to prevent or limit the release of escrowed funds (*see id.*).

As an initial matter, Rex waived this argument because Rex did not raise it before the Court of Chancery despite having every opportunity to do so. *See* Del. Supr. Ct. R. 8.[8] Further, this argument presumes that Argon did not make a valid

[8] Rex fails to (and cannot) provide any explanation regarding why "[t]he interests of justice" require this Court to consider the argument on appeal. *See Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1281 (Del. 2014) (declining to consider an argument that a party waived because "such

Draw-Down Request pursuant to the APA (and thus Argon cannot prevent the Escrow Fund's release, because pending claims for indemnification purportedly do not serve as an independent basis to do so). As explained in Section II.C.1, this argument is without merit, because Argon asserted two valid Draw-Down Requests (*infra* at Section II.C.1).

In any event, Rex's argument—that Argon's assertion of a pending indemnification claim cannot, on its own, prevent the Escrow Fund's release—flatly conflicts with the APA. The Escrow Agreement provides that the amount of the Escrow Fund to be released is calculated by determining the difference between the "remaining portion of the Escrow Fund" and "the aggregate of all Outstanding Claim Amounts" (which includes "the amounts listed in each valid and unpaid Draw-Down Request") "if any, subject to any indemnification claims timely made by [Argon]" (A101 § 2(c); *see also* Rex's Br. at 25–27). Rex contends that this reference to "indemnification claims timely made by [Argon]" (A101 § 2(c)) merely "modifies the term 'Outstanding Claim Amounts'" (Rex's Br. at 30–31), purportedly signifying "that an indemnification claim is necessary, but not sufficient, for a valid

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consideration [was] not required 'in the interests of justice'" (quoting Del. Supr. Ct. R. 8)).

claim against the Escrow Fund" (*id.* at 27). However, the APA provides that the Escrow Fund's release is subject ***only*** to Argon's "then-pending claims for indemnification" (A89 § 8.7)—without mentioning Draw-Down Requests at all. Given that, the most reasonable way to read the Escrow Agreement is to interpret a Draw-Down Request as something separate from and independent to a claim for indemnification. This understanding allows for an interpretation of the Parties' agreements in a way that "is reasonable" and "harmonizes" their terms. *See Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) (discussing basic principles of contract interpretation).

Rather than attempt to read the two agreements to be consistent, *see Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221 n.52 (Del. 2012), Rex asserts that the Escrow Agreement, not the APA, governs the Escrow Fund's release and that the Escrow Agreement requires a Party to make a Draw-Down Request, not just a claim for indemnification, to prevent the Escrow Fund's Release (*see e.g.*, Rex's Br. at 25–27). Again, this argument is beside the point because Argon did make two valid Draw-Down Requests.

But even if Argon had not done so, Rex's claim is without merit. That is because Section 9.12 of the APA states that "[i]n the event of a conflict between the

terms and conditions of this Agreement and any terms, conditions or disclosures contained in any . . . Exhibit attached hereto, the terms of this Agreement shall control" (A93 § 9.12), and the Parties attached a form of the Escrow Agreement to the APA as Exhibit B (A42; A98). As discussed above (*see supra* Section I.C.1), under the APA, the existence of pending indemnification claims asserted by Argon prevents disbursement of the Escrow Fund to Rex, regardless of whether Argon has incurred actual losses or made a Draw-Down Request. Thus, as the Court of Chancery found, "if [Rex] were right that the Escrow Agreement mandated release of the Escrow Fund, then the APA Release Provision would control and call for the Escrow Fund to remain in escrow" (Rex's Br., Ex. A ¶ 26 (citing A93 § 9.12)).

Tellingly, Rex does not even cite Section 9.12 of the APA anywhere in its Opening Brief, much less acknowledge and address it. Instead, Rex claims that the Escrow Agreement (rather than the APA) must control the Escrow Fund's release because it contains "more detail" than the APA (Rex's Br. at 24–25). To be sure, provisions of agreements with specific language typically control over provisions with more general language "due to the reasonable inference that specific provisions express more exactly what the parties intended," but that is obviously inapplicable where the Parties have already expressly agreed which terms should control in the

event of a conflict. *Katell v. Morgan Stanley Grp., Inc.*, 1993 WL 205033, at *4 (Del. Ch. June 8, 1993) (noting that "unequivocal language controls over qualified language").

In addition, Rex points to language in the APA and Escrow Agreement stating that the Escrow Fund is to be held and released "in accordance with the Escrow Agreement" and contends that this language indicates that the Escrow Agreement controls (Rex's Br. at 24 (citing A89 § 8.7; A59 § 3.2(b))). As the Court of Chancery found, however, that language merely means that the two agreements are to be read together, with the APA governing indemnification (*see* A83–85 §§ 8.1, 8.2) and the Escrow Agreement governing logistics and details about how the escrow is handled (*e.g.*, A99; *see also* A59 § 3.2(b) (Escrow Fund shall be "held and released in accordance with the provisions of ARTICLE 8 [which concern indemnification] and the Escrow Agreement"); Rex's Br., Ex. A ¶ 9 ("The Escrow Agreement implement[s] the concepts set forth in the APA Release Provision"); *id.* ¶ 27 ("In reality, there is no conflict between the APA Release Provision and the Escrow Agreement.")). It does not suggest that the Escrow Agreement supersedes the express requirements of the APA, nor could it, in light of the Parties' agreement to the contrary.

c. *Rex's Interpretation of the Agreements Would Lead to Absurd Results*.

Finally, Rex's view that the Escrow Fund can be withheld only for pending indemnification claims for which Argon has already suffered or incurred actual losses would defeat the Parties' bargained-for intent in establishing the Escrow Fund—to provide Argon with a guaranteed means of indemnification for any indemnification claims that arose within 15 months after the closing date in the event that Rex had no other assets with which to pay those claims (A59 § 3.2(b); A99 § 1(b); *infra* at Section I.C.1(a)). If Rex's interpretation were correct and Rex no longer had other funds because, for example, it was facing bankruptcy, Argon would not be able to obtain indemnification for those claims for any lawsuits that did not resolve within the 15 months preceding the Escrow Release Date.

This would nullify protections that were valuable to Argon when it agreed to buy Rex's medical devices line—a business that is routinely subject to product liability lawsuits by patients that, once filed, could last for many years. *See ESG*, 2017 WL 3485816, at *4 n.3 (escrow arrangement where indemnifying party could withhold the escrow's release due to pending indemnification claims had "value" to the party seeking indemnification because it provided a source of indemnification funds separate from the indemnifying party's assets). As part of the Parties'

agreement, Rex accepted the risk that the Escrow Fund might be withheld subject to pending indemnification claims involving losses that had not been realized. Rex cannot now ask the Court to transform the Parties' arrangement and allocation of risks by adding a condition that appears nowhere in the bargained-for contracts requiring that Argon have suffered or incurred actual losses to withhold the Escrow Fund. *See Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020) ("[I]t is axiomatic that courts cannot rewrite contracts. . . . Doing so does not respect the parties' freedom of contract."). As the Court of Chancery correctly noted: "[The] Parties could agree to a different structure, but they would need to do so clearly and explicitly. The Escrow Agreement does not do that" (Rex's Br., Ex. A ¶ 29(b)).[9]

Rex's interpretation of the terms of the Escrow Fund's release is especially absurd in light of the reasonable knowledge of sophisticated parties regarding how long it can take for claims of this type to be resolved. The point is illustrated by the situation Argon faces: more than half of the lawsuits that are subject to Argon's claim on the Escrow Fund were filed in the first few months of 2017 (*see* A162–64

[9] For example, when they wanted to apply different rules to certain types of indemnification claims, the Parties did so in express terms (*see, e.g.*, A88 § 8.5 (providing specific deadlines by which the Parties were required to provide written notice for indemnification claims relating to tax matters and intellectual property)).

(listing lawsuits)). No reasonable party could possibly believe that those lawsuits would have been fully and finally resolved within less than four months (by the March 23, 2017 Escrow Release Date), let alone that Argon would have incurred any (or all of its) damages by then. *See, e.g.*, *Osborn*, 991 A.2d at 1160 ("An unreasonable interpretation [of a contract] produces an absurd result or one that no reasonable person would have accepted when entering [it].").

3. The Court of Chancery Did Not Erroneously Consider Outside Sources.

In addition to promoting an untenable interpretation of the agreements, Rex criticizes the Court of Chancery for having purportedly interpreted the agreements "through the prism of its preconception of how the agreements should operate" (Rex's Br. at 14, 17; *see also id.* at 17–20). Rex takes issue with the Court of Chancery's reference to the customary structure of escrow funds and ABA commentary on model agreements (*see, e.g.*, Rex's Br. at 18 (citing Ex. A ¶¶ 3, 8, 29(b))). This argument lacks merit.

In the first place, the court below described in detail the text of various provisions related to the Escrow Fund (Ex. A ¶¶ 3–7, 9–12). The Court of Chancery also described each of the Parties' positions with reference to "the plain language" of the agreements (*id.* ¶ 25–26, 29) and stated its conclusions about the meaning of

the agreements by analyzing their "plain language" (*e.g*, *id.* ¶¶ 7, 27, 29(a)). Indeed, the court below used the phrase "plain language" in reference to the agreements' text a dozen times in ten different paragraphs throughout its opinion (*see id.* ¶¶ 5–7, 25–27, 29, 29(b), 29(d), 33).

Nevertheless, Rex accuses the Court of Chancery of resting its "central conclusion" on "commentary to the [ABA] model agreements" and its "preconceptions" (*see* Rex's Br. at 18, 22). A reading of the opinion, however, makes clear that the court below did no such thing. It referenced those sources merely to note that the Parties designed the escrow in a "customary" way, not to reach conclusions about the meaning of their agreements (Rex's Br., Ex. A ¶ 3; *see also id.* ¶¶ 8, 29(b)).[10] That was in no way improper, much less reversable error. *See, e.g.*, *Express Scripts, Inc. v. Bracket Hldgs. Corp.*, 248 A.3d 824, 831 (Del. 2021) ("When sophisticated parties craft purchase agreements, they typically follow a time-tested template."). Indeed, this Court has recently cited to one of the ***same*** treatises to which the Court of Chancery here referred, for the very same purpose: to

[10] Similarly, at oral argument the Court of Chancery mentioned its "sense of the world" and "worldly experience" for the opposite reason that Rex suggests it did. The court below indicated that it could ***not*** "cite to" its "sense of the world" and "worldly experience" with regard to how "indemnification provisions and escrow agreements mainly work" in order to interpret contracts (A384:4-15).

explain its interpretation of an unambiguous contractual term in part by indicating that the approach parties took in their contracts was "customary." *Id.* at 831 n.29 (citing ABA Mergers & Acquisitions Comm'n, *Model Stock Purchase Agreement with Commentary* 302–03); *see also id.* n.30 (same).

* * *

There is no dispute here that, on the basis of the pleadings and the plain language of the relevant agreements, Argon asserted claims for indemnification for lawsuits that fell within the scope of Rex's indemnification claims and that those claims for indemnification remained pending as of the Escrow Release Date. The Parties' central dispute is whether Argon was required to incur or suffer actual losses in order to make those claims. For the reasons stated above, the APA and Escrow Agreement impose no such requirement, and the Court of Chancery correctly found that the Escrow Fund cannot be released while Argon's claims for indemnification remain pending.

II. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT ARGON'S DRAW-DOWN REQUESTS WERE VALID, PROHIBITING RELEASE OF THE ESCROW TO REX.

A. Question Presented

Whether the Court of Chancery correctly concluded that Argon asserted valid Draw-Down Requests pursuant to the Escrow Agreement.

This issue was also preserved (A219–44).

B. Scope of Review

This Court reviews *de novo* issues of contract interpretation, *Activision Blizzard*, 106 A.3d at 1033, and the grant of a motion for judgment on the pleadings, *W. Coast Opportunity Fund,* 12 A.3d at 1131.

C. Merits of the Argument

The Court of Chancery correctly held that Argon's Draw-Down Requests are valid and that they "properly assert that the amount of Losses could exceed the entire Escrow Fund" (Rex's Br., Ex. A ¶ 33). Even if the Court were to agree with Rex that the indemnification claims were not grounds to withhold release of the Escrow Fund, Argon's Draw-Down Requests create an independent basis for withholding the release of the Escrow Fund. Therefore, "[t]he plain language of the parties' agreements requires that the Escrow Agent continue to hold the Escrow Fund until those claims are resolved" (*id.*).

1. Argon's Draw-Down Requests Were Valid Under the Parties' Agreements.

The Escrow Agreement sets out the requirements for a valid Draw-Down Request: it must be "a written notice signed by an officer of [Argon]" and delivered to the Escrow Agent "[a]t any time on or prior to" the Escrow Release Date, "stating (A) that [Argon] is entitled to payment from the Escrow Fund pursuant to Article 8 of the [APA] and (B) the amount due to [Argon]" (A100 § 2(b)). Both of Argon's Draw-Down Requests complied with those requirements.

It is undisputed that Argon timely submitted both Draw-Down Requests (Rex's Br. at 8–9). Rather, Rex contends that the Draw-Down Requests were invalid because they purportedly failed to "state that Argon 'is entitled to payment from the Escrow Fund pursuant to Article 8 of the Purchase Agreement'" and "did not state an 'amount due'" (*Id.* at 9, 15, 29 (quoting A100–01). But Argon's Draw-Down Requests stated that "the amount due to Argon is the entire balance of the Escrow Funds," and that "the aggregate amount" of the losses it faced "could reasonably be expected to exceed the amount of the Escrow Funds"—which, tellingly, Rex does not dispute (A142; *see also* A160).

As the Court of Chancery correctly found, these statements adequately communicated Argon's view that the amount due exceeded the escrowed funds, and

they satisfied the requirements set forth in the Escrow Agreement (Rex's Br., Ex. A ¶ 27 ("[Argon's] . . . Draw-Down Requests asserted [Argon's] entitlement to the entire Escrow Fund. The Escrow Agent therefore was not permitted to release any amounts from the Escrow Fund on the Escrow Release Date.").

2. Rex's Interpretation Conflicts With the Text of the Parties' Agreements.

Rex interprets Section 2(b) the Escrow Agreement as "requir[ing] Argon to have a present right to indemnification with a specific amount presently due" (Rex's Br. at 29). Rex even claims that "the trial court acknowledged that Rex reasonably interpreted the plain meaning" of that provision (*id.*). This is misleading: the Court of Chancery noted that Rex's interpretation "would be [ ] reasonable" ***if*** the language regarding the requirements of Draw-Down Requests was "read in isolation," but the Court of Chancery then immediately made clear that it disagreed because "[w]hen read in the context of the Purchase Agreement and the balance of the Escrow Agreement, [Rex's] reading is ***not*** reasonable" (Rex's Br., Ex. A ¶ 29 (emphasis added)).

Indeed, the APA expressly recognizes that a Party might be unable to ascertain or quantify the amount of its indemnification claims at the time it makes such claims, as was the case for Argon (A85 § 8.3(a) (a party claiming indemnification must

provide notice describing, among other things, "the claim" and "the amount thereof (***if known and quantifiable***)" (emphasis added)). As the Court of Chancery also noted, courts applying Delaware law have interpreted similar contractual language as allowing for indemnification claims of unknown amounts (Rex's Br., Ex. A ¶ 29(b)). *See, e.g.*, *i/mx Info. Mgmt. Sols., Inc. v. Multiplan, Inc.*, 2013 WL 3322293, at *8 (Del. Ch. June 28, 2013) (in a case where an escrow agreement provided that escrowed funds "minus [a] Disputed Amount" were to be released on a specific date, finding that party did not need to "assign[] an exact number" to the Disputed Amount when its damages exceeded value of escrowed funds); *Pratt v. Atalian Glob. Servs. Inc.*, 2020 WL 7028690, at *12 (S.D.N.Y. Nov. 30, 2020) (party seeking indemnification complied with requirement to state "the amount thereof (if known and quantifiable)" where party stated that it could not "quantify all of the losses incurred" at that time).

Moreover, nothing in the agreements states or suggests that "Draw-Down Requests require a ***present*** entitlement to payment from the Escrow Fund" or "***present*** right of indemnification" (Rex's Br. at 27, 29–30 (emphasis added).) Nor does anything in the agreements state or suggest that "entitlement" is the same as the current, immediate "[r]ight to receive payment" (Rex's Br. at 32.) Rather, the

Escrow Agreement merely requires Argon to state in the Draw-Down Requests that it "is entitled to payment from the Escrow Fund pursuant to Article 8 of the [APA]" (A100 § 2(b); *see also* A264–67). That is exactly what Argon did, stating that it was "entitled to payment from the Escrow Fund" (*see* A264–67; *see also* A142; A160). *See ESG Holdings*, 2017 WL 3485816, at *3 (applying Delaware law and interpreting a contractual provision regarding party's "entitle[ment] to indemnification" as concerned with "the relevant claim's nature and origin," not whether the party has already suffered a loss, because that was consistent with how the parties referred to "entitle[ment] to indemnification" in their APA and escrow agreements). As the Court of Chancery found, under the APA and Escrow Agreement, "[a] claim against the Escrow Fund does not depend on having suffered specific Losses that give rise to a present right to indemnification" (Rex's Br., Ex. A ¶ 29(a)).

In short, Rex's argument that the Parties' agreements "require Argon to have a present right to indemnification with a specific amount presently due" (Rex's Br. at 26–27, 29) contradicts the plain language of the APA and Escrow Agreements and conflicts with other cases applying Delaware law to interpret similar language.

The Court of Chancery correctly rejected this argument, and its judgment must be affirmed.

CONCLUSION

The Court of Chancery's Order should be affirmed.

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