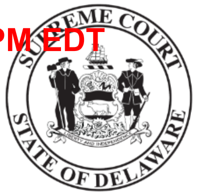
EFiled: Mar 14 2022 02:37PM EDT
Filing ID 67391622
Case Number 366,2021



# IN THE SUPREME COURT OF THE STATE OF DELAWARE

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FILED MARCH 14, 2022

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| REX MEDICAL, L.P.,<br>a Pennsylvania limited partnership,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>ARGON MEDICAL DEVICES, INC.,<br>a Delaware corporation,<br><br>Defendant Below,<br>Appellee. | : | No. 366, 2021<br><br>Court Below: Court of Chancery of the State of Delaware<br><br>C.A. No. 2020-1080-JTL |

## APPELLANT'S REPLY BRIEF

Dated: February 25, 2022

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## INTRODUCTION

Appellant Rex[1] is entitled to release of the full balance of the Escrow Fund at issue in this litigation. The answering brief filed by Appellee Argon fails to refute Rex's arguments and is unable to establish a legal basis for keeping the Escrow Fund locked in escrow. The contracts governing the relationship between Rex and Argon, the APA and the Escrow Agreement appended to it, both executed on December 23, 2015, establish clearly that the Escrow Fund was to be released to Rex 15 months after execution of the APA (the Escrow Release Date), less the amount of any valid and unpaid Draw-Down Requests filed by Argon. Because Argon had not suffered or incurred any indemnifiable Losses by the Escrow Release Date, the two purported Draw-Down Requests that Argon submitted to the Escrow Agent were not valid.

Unable to rely on the Draw-Down Requests to prevent the release of the Escrow Fund to Rex, Argon argued in these proceedings that an "indemnification claim," absent a valid Draw-Down Request, could prevent the release of the Escrow Fund to Rex. Argon ascribes a meaning to the undefined term "indemnification claim" that is unsupported by the text of the agreements and then

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[1] Capitalized terms undefined herein have the meanings ascribed to them in Appellant's opening brief. (Dkt. 11; "Rex Br.").

attempts to use that term to override the express and unambiguous terms of the APA and the Escrow Agreement. Lacking any actual Losses for which it could then demand indemnification under the APA, Argon is forced to argue indemnifiable Losses were not a prerequisite for retention of the Escrow Fund. Indeed, the entire premise of Argon's claim is that it made a valid indemnification claim, despite not having incurred any indemnifiable Losses, and such indemnification claim prevents the release of the Escrow Fund to Rex.

Argon's position is untenable in the light of the plain wording and the structure of the APA and the Escrow Agreement. Argon's answering brief misconstrues key passages from the agreements and cites others out of context, but when the two agreements are read together and harmonized, it is clear that the Escrow Fund should be released to Rex (and should have been released to Rex nearly five years ago). Therefore, the trial court's ruling in Argon's favor should be vacated and remanded with instructions for judgment to be entered for Rex.

## ARGUMENT

### I. THE ESCROW AGREEMENT REQUIRES THE ESCROW FUND TO BE RELEASED TO REX BECAUSE ARGON DID NOT SUBMIT A VALID DRAW-DOWN REQUEST BEFORE THE ESCROW RELEASE DATE.

The Escrow Agreement provides detailed directions on the handling of the Escrow Fund, including the release of the Escrow Fund after the expiration of fifteen months, the Escrow Release Date. The Escrow Agreement requires the Escrow Agent, within 2 business days of the Escrow Release Date, to

> release to [Rex] . . . an amount equal to the excess 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 [Argon] pursuant to the [APA] that are pending as of such date (each such pending claim an "Unresolved Claim").

(A101 at § 2(c)). "Outstanding Claim Amount" is defined, in relevant part, as the aggregate of "the amounts listed in each valid and unpaid Draw-Down Request made by [Argon] on or prior to the [Escrow Release Date]." *Id.* Because, as discussed further below, Argon did not submit any valid Draw-Down Requests, there were no Outstanding Claim Amounts as of the Escrow Release Date and the Escrow Fund should have been released to Rex.

In disputing the need for a valid Draw-Down Request before the Escrow Release Date, Argon misconstrues an excerpt from the text of Section 2(c) to argue, erroneously, that a claim for *potential* indemnification, absent actual Losses,

can prevent the release of the Escrow Fund. Argon describes Section 2(c) as stating 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." (Ans. Br. at 19 (emphasis added by Argon); *see also id*. at 25). This is not what Section 2(c) states – Section 2(c) says that it is the "aggregate of all Outstanding Claim Amounts," not the release of the Escrow Fund to Rex, that is "subject to any indemnification claims timely made" by Argon. (A101).

The grammatical structure of Section 2(c) further refutes Argon's reading of the provision. *See Viking Pump, Inc. v. Liberty Mut. Ins. Co*., 2007 WL 1207107, at *17 n.97 (Del. Ch. Apr. 2, 2007, *revised* Apr. 13, 2007) (Strine, V.C.) (quoting *Wirth & Hamid Fair Booking, Inc. v. Wirth*, 192 N.E. 297, 299 (N.Y. 1934)) ("[P]unctuation and grammatical construction are reliable signposts in the search [for contractual intent]."); *ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *4 (Del. Ch. Sept. 23, 2019) ("In discerning the plain meaning of a contract, the court may look to the grammatical construction of a contractual provision." (citing, *inter alia*, 11 Williston on Contracts § 32:9 (4th ed.) ("Courts often pay attention to grammar and punctuation in determining the proper interpretation of a contract . . . ."))). The prepositional phrase, "subject to any

indemnification claims timely made," modifies another prepositional phrase, "over the aggregate of all Outstanding Claim Amounts." (A101 at § 2(c)). Argon's interpretation would have the phrase "subject to any indemnification claims timely made" modifying either the verb "release" or the noun "amount" of the Escrow Fund to be released to Rex, but that is not how the provision is structured. "[O]ver the aggregate of all Outstanding Claim Amounts" modifies "amount," and "subject to any indemnification claims timely made" modifies "over the aggregate of all Outstanding Claim Amounts." (*Id.*) Argon cannot simply ignore "over the aggregate of all Outstanding Claim Amounts" in Section 2(c) to pretend that "subject to any indemnification claims timely made" modifies "release" or the "amount" to be released to Rex.

As discussed in oral argument before the trial court, Section 2(d) of the Escrow Agreement reinforces the interpretation that the "indemnification claims timely made" language is part of "Outstanding Claim Amounts" and not an independent basis for withholding the Escrow Fund from release to Rex. (A354-55). Section 2(c) defines "indemnification claims timely made" as "Unresolved Claims." (A101). Section 2(d) states that upon resolution of such Unresolved Claims, the Escrow Agent shall make disbursements "in respect of such Outstanding Claim Amount" and "with respect to the subject matter of such

Outstanding Claim Amount." (*Id.*). Per the language of Section 2(d), "indemnification claims timely made," which are "Unresolved Claims," are part of any "such Outstanding Claim Amount." Thus, not only the grammatical structure of Section 2(c) but also the content of Section 2(d) confirms that the term "indemnification claim" is not a separate basis for withholding the Escrow Fund from release, but is rather only part of "Outstanding Claim Amounts."

Notably, Argon does not even attempt to rebut Rex's argument on the structure of Section 2(c). Instead, Argon tries to sidestep the argument by pivoting to a discussion of the APA. (Ans. Br. at 30). Argon cannot refute the plain language of the Escrow Agreement which confirms that the release of the Escrow Fund is limited only by Outstanding Claim Amounts.

## II. ARGON'S PURPORTED DRAW-DOWN REQUESTS DO NOT MEET THE REQUIREMENTS OF THE ESCROW AGREEMENT AND ARE INVALID.

The Escrow Agreement sets forth specific requirements for Draw-Down Requests. As the very name implies, a Draw-Down Request is a request for *payment* from the Escrow Fund. The Escrow Agreement requires that Draw-Down Requests state that Argon "is entitled to payment from the Escrow Fund pursuant to Article 8 of the Purchase Agreement" and also state "the amount due to" Argon. (A100-01 at § 2(b)). Argon argues that nothing in the Escrow Agreement requires Argon to have a present entitlement to payment to make a Draw-Down Request (Ans. Br. at 42), but this argument defies common sense. The phrase "is entitled to payment" contemplates a present right to indemnification, both by the choice of wording (present tense of the verb) and by the context of the provision. A Draw-Down Request is a request for payment, and if Argon is not entitled to any payment from Rex at the time it makes the request, it logically follows that Argon has no basis for making a request for payment through a Draw-Down Request. Argon does not dispute that it is entitled to payment *only* if it suffers or incurs Losses for which Rex owes it indemnification; because Argon also does not dispute that it had not suffered or incurred Losses when it made the purported Draw-Down Requests, Argon had no right to make a Draw-Down Request.

Apparently recognizing that its purported Draw-Down Requests did not (and could not) state an amount actually due, Argon cites to two cases to try to rehabilitate its position, but neither supports its argument. Argon alleges that *i/m[x] Information Management Solutions, Inc. v. Multiplan, Inc.*, 2013 WL 3322293 (Del. Ch. June 28, 2013) and *Pratt v. Atalian Global Services, Inc.*, 2020 WL 7028690 (S.D.N.Y. Nov. 30, 2020) interpreted similar contractual language to allow indemnification claims of unknown amount. (Ans. Br. at 42). As Rex explained in briefing before the trial court, both cases are readily distinguishable because the contracts differed on key terms. (*See* A295-97 and cases cited therein). Argon does not attempt to address this key distinction.

Argon's two purported Draw-Down Requests assert that Argon "*may* suffer or incur" Losses and that the amount of Losses arising from the lawsuits "*could reasonably be expected* to exceed the amount of the Escrow Funds." (A142, A160 (emphasis added)). The purported Draw-Down Requests acknowledge that Argon has not suffered or incurred any Losses, and that it has only the *potential* to suffer or incur Losses in the future.[2] There is no basis in the agreements for Argon to

[2] Argon suggests that as long as its purported Draw-Down Requests merely repeat the words in Section 2(b) of the Escrow Agreement, then it has made a valid Draw-Down Request. (Ans. Br. at 42-43). Because Argon did not suffer or incur any indemnifiable Losses, its recitation of language from the Escrow Agreement that it

demand payment for Losses it has not incurred and may never incur, nor is there any basis in the agreements for a Draw-Down Request to be used as a placeholder for future Losses.

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had an entitlement to *payment* from the Escrow Fund was simply not true. To the extent Argon's brief suggests that Argon's Draw-Down Requests would be valid even if they asserted a false entitlement to payment, that argument should be rejected summarily by this Court.

## III. ARGON DID NOT HAVE AN INDEMNIFICATION CLAIM UNDER SECTION 8.7 OF THE APA BECAUSE ARGON DID NOT SUFFER OR INCUR ANY INDEMNIFIABLE LOSSES.

Although Argon pivots to the APA to avoid Rex's argument regarding the structure of Section 2(c) of the Escrow Agreement, the APA is consistent with the Escrow Agreement and also requires that Argon must suffer or incur indemnifiable Losses to prevent the release of the Escrow Fund to Rex after the Escrow Release Date. Section 8.7 of the APA states that after the Escrow Release Date (March 23, 2017), the Escrow Agent shall "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)." (A89 at § 8.7). Argon wrongly asserts that its notice to Rex of a lawsuit filed against Argon is sufficient to implicate this provision. To the contrary, a "claim for indemnification," as referenced in Section 8.7, requires actual Losses for which Argon has a right to receive payment from Rex.

"Claim for indemnification" is not a defined term in the APA, but its meaning can be determined through its use in the agreement.[3] Section 8.7 refers to

[3] Notably, Black's Law Dictionary defines "claim" to include "[t]he assertion of an existing right . . . ." Black's Law Dictionary, (11th ed. 2019). Under this particular definition, "claim for indemnification" means the claimant has an "existing right" to indemnification. Argon did not have an "existing right" to indemnification

pending claims for indemnification "pursuant to Section 8.1(a)." (A89 at § 8.7). Section 8.1(a) requires Rex to "indemnify and hold harmless [Argon and its affiliates] against and in respect of all Losses which [Argon or its affiliates] suffer or incur as a result of, arising out of or in connection with . . . any Excluded Liability." (A83 at § 8.1(a)). Section 8.1(a) conditions Rex's obligation to indemnify Argon upon Argon having suffered or incurred Losses. There is no language in Section 8.1(a) that could be construed to suggest Argon is entitled to indemnification for potential Losses that it *may* suffer or incur. By qualifying "claims for indemnification" as made "pursuant to Section 8.1(a)," the APA establishes that, at least for purposes of Section 8.7, only claims for indemnification for suffered or incurred Losses can preclude the release of the Escrow Fund to Rex.

Argon does not offer any logical rebuttal to Rex's position that Section 8.7, by requiring indemnification claims "pursuant to Section 8.1(a)," requires Losses actually suffered or incurred. Argon merely asserts that Section 8.1(a) "has nothing to do with whether a pending claim for indemnification must involve actual losses." (Ans. Br. at 27). Instead, Argon relies on the trial court's distinction

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because it did not suffer or incur any indemnifiable Losses. (*See also* MJOP Order ¶ 28 (referring to Argon's "ultimate right to indemnification (which requires Losses)").

between a "right to receive payment from the Escrow Fund (which requires Losses) with [an] assertion of an entitlement to amounts in the Escrow Fund (which only requires a claim for indemnification)," but as Rex explained in its opening brief, there is no support for the trial court's conclusion. (*See* Rex Br. at 31-32). The plain meaning of "entitlement," as defined in Black's Law Dictionary and the Merriam-Webster Online Dictionary,[4] refutes the trial court's reasoning that Argon could have "entitlement" to amounts of the Escrow Fund while not having a present right to payment from the Escrow Fund. (*See id.*). Argon's brief does not even attempt to address Rex's argument and instead simply adopts and repeats the trial court's erroneous reasoning.

Because "claim for indemnification" is not defined in the text of the APA, Argon concocts its own definition. (Ans. Br. at 28). Argon asserts that "claims for indemnification are written requests that a Party makes when it 'seeks indemnification' under the APA." (*Id.*). However, that definition does not support Argon's position. If Argon's definition was accurate, it would not allow a claim for indemnification without corresponding Losses suffered or incurred. Argon's

[4] The word "entitlement" is defined to mean "[a]n absolute right to a (usu. monetary) benefit . . . granted immediately upon meeting a legal requirement." Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster Online Dictionary (defining "entitlement" to include "a right to benefits specified especially by law or contract").

proposed definition still requires a party to "seek indemnification," and Argon offers no explanation for how a party can "seek indemnification" to which it is not presently entitled. As set forth in Section 8.1(a), indemnification contemplates payment for Losses Argon actually suffers or incurs. *Hill v. LW Buyer LLC*, 2019 WL 3492165, at *10 (Del. Ch. July 31, 3019) (stating that the "concept of indemnification" is "repaying a loss to make the indemnitee whole").

As support for its proposed definition of "indemnification claim," Argon relies on Section 8.3(a) of the APA (rather than Section 8.1(a) as expressly required by Section 8.7). (Ans. Br. at 25-28). However, Section 8.3(a) does not help Argon's position. Section 8.3, titled "<u>Notice and Defense of Claims; Settlements</u>" neither defines "indemnification claim" nor authorizes a party to seek indemnification for which it has no present right. (A86). Rather, Section 8.3(a) defines a "Claim Notice," which is written notice to the indemnifying party of a legal proceeding or other claim or notice of the discovery of the liability or facts giving rise to a claim for indemnification. (*Id.* at § 8.3(a)). A Claim Notice is distinct from a claim for indemnification. (*See also* A88 at § 8.5 (describing a claim for indemnification as separately from a Claim Notice, which precedes the claim for indemnification)). A claim notice can be, and often is, provided *before* liability or the amount of damages are fully established. That does not change the

fact that Argon is not entitled to indemnification if it does not have any Losses for which it can be indemnified. Both the trial court and Argon conflate "Claim Notice" with a right to indemnification, ignoring the structure of Section 8.3(a), which makes clear that a Claim Notice is necessary for indemnification, but does not anywhere state that they are one and the same. The language that the trial court cites to, and on which Argon also relies, identifies what comprises the defined term "Claim Notice," rather than the undefined term "indemnification claim."

Argon cites to Section 8.3(e) to suggest that a claim on the Escrow Fund does not require a right to indemnification, but this provision simply addresses how the amount of an indemnification claim is determined. (A87). Nothing in the provision bridges the gap between Argon's view of "indemnification claim" and its right to indemnification. In other words, Section 8.3(e) does not describe the transition from a mere claim for indemnification to a right to be indemnified.

Argon cites to various other provisions of Section 8.3, but none of them support Argon's assertion that it is entitled to make a claim on the Escrow Fund without having suffered Losses. For example, Argon cites to Section 8.3(b) which allows a party to dispute an indemnification claim and in its claim dispute, it must identify the amount in dispute "if known and quantifiable." (Ans. Br. at 23). Simply because the amount in dispute may not be known and quantifiable does not

mean that there is no Loss at all, but merely that a Loss can be of an indeterminate amount. Moreover, Section 8.3(b) requires the parties to try to resolve the dispute through negotiations and, if they are unable to do so within 30 days, the parties can resort to litigation as set forth in Section 9.8. (A85). It would be odd to require parties to negotiate and then litigate a claim for indemnification when there is no Loss incurred by the indemnified party and, therefore, no right to indemnification. In other words, Section 8.3(b) presumes an existing right to indemnification for incurred Loss and does not in any way support Argon's position.

Sections 8.3(c) and 8.3(d) address the defense of Third Party Claims, but Argon fails to explain how the right of one party to control the defense of a third party claim gives rise to a right of indemnification. (Ans. Br. at 23-24). The right to defend or associate in the defense of a Third Party Claim is not included in the parties respective indemnification obligations in Sections 8.1 and 8.2 of the APA; instead it is addressed separately in Section 8.3, along with Claim Notices. (*Compare* A83 at § 8.1 and A84 at § 8.2 *with* A85 at § 8.3(c) and A86 at § 8.3(d)). If Argon provides Rex with a Claim Notice of a lawsuit against it, the Claim Notice triggers *Rex's* right to participate in or assume control of the defense of the claim. (A85 at § 8.3(c)). Nothing in Section 8.3(c) gives Argon a right to indemnification (that right is established by Section 8.1(a)). The same conclusion

applies to defense of Specified IP Liability Claims as set forth in Section 8.3(d); the rights of the parties to control the defense has no bearing on whether they have a right to indemnification without having suffered or incurred any Losses.

## IV. THE APA DOES NOT CONTRADICT OR OVERRULE THE ESCROW AGREEMENT.

Because the express terms of the Escrow Agreement, including the definitions of Draw-Down Request and Outstanding Claim Amounts, establish that Argon cannot prevent the release of the Escrow Fund to Rex because it did not suffer or incur any indemnifiable Losses, Argon invokes Section 9.12 of the APA to assert that Section 8.7 of the APA overrides the Escrow Agreement. (Ans. Br. at 30-31). Section 9.12 states that when terms of the Escrow Agreement and the APA conflict, the APA prevails. (A93).

Argon's reliance on Section 9.12 is misplaced. First, there is no conflict between the APA Section 8.7 and the Escrow Agreement Section 2(c).[5]

Second, Section 8.7 of the APA, as well as Section 3.2(b) establishing the Escrow Fund, states explicitly that the Escrow Fund is to be held and disbursed "in accordance with the Escrow Agreement." (A59; A89). Therefore, any interpretation of how Section 8.7 applies to the Escrow Fund must be interpreted in connection with the Escrow Agreement. Argon wrongly asserts that Rex does not

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[5] Argon criticizes Rex for not addressing Section 9.12 in its opening brief. (Ans. Br. at 32). But Section 9.12 only applies if there is a conflict, and the trial court expressly ruled that there was no conflict. (MJOP Order ¶ 27). Rex does not assert there is a conflict, and, therefore, does not dispute the trial court's determination that Section 9.12 is not implicated. (*Id.*).

read the agreements consistently (Ans. Br. at 31), but Rex agrees that both agreements must be read together. (Rex Br. at 24 ("Clearly, these two agreements, drafted and executed together, are intended to be read and construed together.")). When they are read together, it is clear that the "subject to then-pending claims for indemnification pursuant to Section 8.1(a)" language in Section 8.7 is a parallel to the Escrow Agreement's reference to "subject to any indemnification claims timely made by [Argon] pursuant to the Purchase Agreement." (*Compare* A89 at § 8.7 *with* A101 at § 2(c)). As addressed above, the "indemnification claims timely made" language in the Escrow Agreement is part of Outstanding Claim Amounts (valid and unpaid Draw-Down Requests), and APA Section 8.7's language on "subject to then-pending claims for indemnification" should be interpreted in the same light. It is Argon that does not read two the agreements together and insists that an undefined term – "indemnification claim" – should override the expressly defined terms of the Escrow Agreement.

Nothing in the APA prohibits reading the undefined term "claims for indemnification" in conjunction with and consistent with the Escrow Agreement, which is unambiguous with respect to requirements for release from the Escrow Fund. Even without the "in accordance with the Escrow Agreement" language in the APA, the reference to "indemnification claims" in Section 8.7 still should be

read in conjunction with the Escrow Agreement. As discussed in Rex's opening brief, it is a maxim of contract interpretation that the more general provisions of a contract are interpreted in the context of the more specific provisions. (*See* Rex Br. at 24-25 and cases cited therein). Argon does not dispute this maxim, but argues it is inapplicable because provisions of the APA control if there is a conflict with the Escrow Agreement. (Ans. Br. at 32-33 ("To be sure, provisions of agreements with specific language typically control over provisions with more general language . . . .")). However, not only is there no conflict when "claims for indemnification pursuant to Section 8.1(a)" is understood as requiring actual indemnifiable Losses, but even if there was a conflict, the specific requirement of Section 8.7 that the release of the Escrow Fund to Rex is to be handled in accordance with the Escrow Agreement should control over the general provisions of Section 9.12 regarding conflicts between the APA and schedules attached thereto.

Argon attempts to dismiss the relevance of the "in accordance with the Escrow Agreement" language in Section 8.7 by reiterating the trial court's conclusion that it relates solely to the "logistics and details about how the escrow is handled" (Ans. Br. at 33), but the logistics and details further support release of the Escrow Fund to Rex. For example, the Escrow Agent is a party to the Escrow

Agreement, not the APA (*compare* A94-97 *with* A111-13), and the Escrow Agent operates according to the directives of the Escrow Agreement. The Escrow Agreement requires the Escrow Agent to release to Rex the balance of the Escrow Fund over Outstanding Claim Amounts. (A101 at § 2(c)). As discussed in Rex's opening brief, the Escrow Agent would not be aware of an indemnification claim by Argon against Rex unless that indemnification claim is included in a Draw-Down Request. (Rex Br. at 28). Based on the logistics of the Escrow Agreement, an indemnification claim would not serve as an independent basis for the Escrow Agent to withhold the Escrow Fund from Rex because the Escrow Agent would not even know of its existence. Indemnification claims are made by one party to the APA to another; there is no requirement in the APA that the claims be sent to the Escrow Agent, nor is there a mechanism for doing so. Even if the Escrow Agent was advised of the existence of an indemnification claim, the Escrow Agreement permits the Escrow Agent to disburse any portion of the Escrow Fund to Argon ***only*** pursuant to a Draw-Down Request. (A100 at § 2). Thus, even if the Escrow Agent held the Escrow Fund based on an indemnification claim, it could not release the funds except pursuant to a valid Draw-Down Request; there is no mechanism by which Argon can obtain payment from the Escrow Fund other than a valid Draw-Down Request. Because Argon did not submit valid Draw-Down

Request (and it cannot submit one after the Escrow Release Date, which is long past), there is no contractual basis for the Escrow Agent to release any of the fund to Argon.

## V. RELEASE OF THE ESCROW FUND TO REX IS CONSISTENT WITH THE PURPOSE AND PLAIN LANGUAGE OF THE ESCROW FUND AND DOES NOT LEAD TO ABSURD RESULTS.

Argon's citation to the "purpose" of the Escrow Fund ignores the express and unambiguous language of the agreements. (Ans. Br. at 18). The APA identifies the purpose of the Escrow Fund as "securing indemnification *payments*" to Argon pursuant to the APA. (A59 at § 3.2(b) (emphasis added)). It is undisputed that no indemnification payments were owed to Argon during the time period of the Escrow Fund, and, therefore, it is consistent with the purpose of the Escrow Fund to release the fund to Rex. Although Argon posits that the Escrow Fund was to secure indemnification payments for any lawsuits brought against Argon prior to the Escrow Release Date, the APA does not state as much. (Ans. Br. at 22). For the reasons discussed above, the Escrow Fund is available to Argon only for Losses actually suffered or incurred, and identified in a Draw-Down Request, on or before the Escrow Release Date. As that did not happen, the purpose of the Escrow Fund has been satisfied, and it should be released to Rex as part of its purchase price paid by Argon to Rex under the APA. (A59 at § 3.2).

Moreover, Rex's position on release of the Escrow Fund does not lead to "absurd results." (Ans. Br. at 34-36). Argon's argument looks at only a narrow slice of the indemnification provisions of the APA, rather than the full agreement.

The APA contains three primary categories of indemnifiable liabilities, one of which is "Excluded Liabilities." (A83 §§ 8.1(a)(i)-(iii)). Excluded Liabilities includes eleven subcategories of indemnifiable Liabilities, some of which are further divided into sub-subcategories. (A56-A57 at §§ 2.4(a)-(k)). Product liability litigation implicates only two of the Excluded Liability subcategories.

Argon's argument that release of the Escrow Fund after 15 months renders the Escrow Fund useless to Argon ignores the many other categories and subcategories of indemnifiable liabilities to which the Escrow Fund could apply in the span of 15 months after the Closing Date. Those other categories can easily result in indemnifiable Losses before the Escrow Release Date. In fact, certain indemnification rights expire after only 15 months, meaning any indemnifiable Losses necessarily must be incurred before the Escrow Release Date. (*See, e.g.*, A88 at § 8.5 (stating that "the rights of the Parties to seek indemnification" with respect to certain representations and warranties "shall expire on the date that is fifteen months after the Closing Date")). Many other categories of indemnifiable liabilities also can result in Losses during the 15-month period. Even for product liabilities claims, the parties can incur defense costs during the entire pendency of the litigation, which could result in indemnifiable Losses prior to the Escrow Release Date.

In fact, Argon's "absurd results" argument ignores that the reason Argon did not have any indemnifiable Losses during the 15-month escrow period is because Rex provided a defense to Argon for the lawsuits filed during that time. (MJOP Order ¶ 16). If Argon had defended itself, the defense costs it incurred, if they otherwise met the requirements for Excluded Liabilities,[6] could have been submitted through a valid Draw-Down Request for payment from the Escrow Fund. Instead, Argon would like to leverage the fact that Rex paid all Argon's defense costs to claim Rex's interpretation of the agreements is unreasonable for suggesting the Escrow Fund covers only Losses incurred before the Escrow Release Date.

In short, there is nothing unreasonable or absurd about the Escrow Fund being released to Rex on the Escrow Release Date when Argon had not suffered or incurred any indemnifiable Losses before the Escrow Release Date (and still hadn't years later). (*See* MJOP Order ¶ 23 ("[I]t is undisputed that to date, [Argon] has not suffered any Losses relating to the Lawsuits.")).

[6] Rex does not concede and expressly reserves all of its rights as to whether any of the lawsuits Argon noticed to Rex prior to the Escrow Release Date are Excluded Liabilities under the APA. (A57 at §§ 2.4(d) and (e)). That issue is not part of this litigation.

## VI. REX DID NOT WAIVE ANY OF ITS ARGUMENTS REGARDING THE DRAW-DOWN REQUESTS.

Argon wrongly asserts that Rex "waived" its argument that indemnification claims are not an independent basis to prevent the release of the Escrow Fund to Rex because Rex did not raise this issue before the trial court. (Ans. Br. at 29-30). To the contrary, Rex raised the issue in its Reply Brief filed with the Court of Chancery on April 23, 2021, disputing Argon's claim that indemnification claims "provide an independent basis for preventing release of the Escrow Fund to Rex." (A298-99). Moreover, even if Rex had not raised the issue expressly in its briefing before the Court of Chancery, the Court of Chancery discussed the very issue in its MJOP Order, which renders the issue appropriate for discussion on appeal. (*See* MJOP Order ¶¶ 28-29).

## CONCLUSION

For the foregoing reasons and those set forth in Appellant's opening brief, the Court should reverse the judgment in favor of Argon and remand for entry of judgment in favor of Rex.

Dated: February 25, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of March, 2022, a true and correct copy of the **Redacted - Public Version of Appellant's Reply Brief** was served via File & ServeXpress on the following counsel of record:

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