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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMPSON STREET CAPITAL PARTNERS IV, L.P., IN ITS CAPACITY AS MEMBERS' REPRESENTATIVE, Plaintiff Below Appellant, v. SONOVA UNITED STATES HEARING INSTRUMENTS, LLC, Defendant Below, Appellee.	)	No. 166, 2024 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-0922-PRW

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

GREENBERG TRAURIG, LLP

Steven T. Margolin (#3110)
Bryan T. Reed (#6899)
222 Delaware Avenue, Suite 1600
Wilmington, Delaware 19801
(302) 661-7000

Attorneys for
Appellant/Plaintiff-Below

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This *de novo* appeal results from the erroneous dismissal of a Complaint under Rule 12(b)(6), where the determinative (and only) question before the lower court was whether it was reasonably conceivable – on a record of well-pled facts and judicial admissions – that Defendant-below failed to comply with specific contractual obligations to which it agreed following heavy negotiations over those precise obligations in the context of a Merger Agreement. *See* Ex. A.

SUMMARY OF THE ARGUMENT

Reversal is required because: (a) the Complaint's pleading more than satisfied Rule 12's lenient standard; and (b) the lower court ignored the Merger Agreement provision that Defendant-below admitted was controlling on the determinative legal issue presented. § I, *infra*.

STATEMENT OF FACTS

Unless otherwise defined, capitalized terms have the same meanings assigned to them in the Complaint. A012-31.

I. THE PARTIES

Plaintiff-below, Thompson Street Capital Partners IV L.P. ("Plaintiff"), filed the Complaint as Members' Representative in the January 13, 2022 agreement and plan of merger ("Merger Agreement") among former members of Alpaca Group Holdings, LLC ("Alpaca") and Defendant-below Sonova United States Hearing Instruments ("Sonova"), through which Sonova acquired certain audiology practices operated by Alpaca and its subsidiaries. *See* A014, ¶¶ 3-5; A016, ¶ 12. Sonova and Plaintiff are referenced herein as the "Parties."

II. SECTION 9.3.2 / PREREQUISITES TO INDEMNIFICATION

The Merger Agreement set forth bargained-for terms between sophisticated Parties. Specifically relevant to this appeal, Section 9.3.2 of the Merger Agreement set forth: (a) Sonova's conditional right to seek recovery from an Indemnity Escrow Fund ("Fund") for certain representation or warranty breaches; and (b) the prerequisites/conditions precedent that Sonova was required to meet before having any such right of recovery. *See* A017, ¶¶ 14-15; A019-21, ¶¶ 22-23; A025, ¶ 33;

A026-27, ¶ 37. Those requirements were both exacting by design and the product of heavy negotiations by counsel. *See* A019-21, ¶¶ 20-23; A024, ¶ 30; A025, ¶ 32; *id.* ¶ 34.

The transactions reflected in the Merger Agreement closed on February 28, 2022 ("Closing"). A016, ¶ 13. Consistent with common practice in acquisitions involving indemnification-related escrows, the Merger Agreement was accompanied by a standardized form of Escrow Agreement which the Parties and Escrow Agent executed that same day. *See* A072-75.

$7,750,000 was deposited into the Fund pursuant to the terms of the Merger Agreement, and the Escrow Agreement governed the Escrow Agent's obligations with respect to the Fund. A016-17, ¶¶ 13-15. Sonova's right to seek recovery from the Fund was contingent upon timely delivering to Plaintiff a Claim Notice that complied with the requirements in Section 9.3.2 of the Merger Agreement, absent which those monies would be released to Plaintiff. *See* A017-18, ¶¶ 16-17; A019, ¶ 21. That release was mandatory and tied to a specific date. A019, ¶ 20.

The Merger Agreement provided all relevant Indemnification claims expired 18 months from Closing, and that Sonova "***shall have no right to recover***" any indemnification amounts absent timely delivery of a Claim Notice that fulfilled the requirements set forth in Section 9.3.2 of the Merger Agreement.[1] A036, § 9.3.2(a). Thus, the Parties relatedly agreed that August 29, 2023 was the drop-dead date on which the Fund balance "***shall be released***" to Plaintiff unless Sonova had delivered a fully compliant Claim Notice before that date. *Id.*; A017, ¶ 16; A073, § 3(a)(i). This case therefore turns on whether the Claim Notice delivered to Plaintiff on August 25, 2023 met the requirements of Section 9.3.2 of the Merger Agreement.

In particular, as detailed in the Complaint and proceedings below, Section 9.3.2 required that Sonova deliver a Claim Notice which: (a) "describe[d] the Claim in reasonable ***detail*** [and] include[d] the justification for the demand under this Agreement with reasonable ***specificity***" (together, the "Specificity Requirement"); (b) "include[d] copies of ***all*** available material ***written evidence*** thereof" (the "Documentation Requirement"); and (c) "indicate[d] the estimated amount, if reasonably practicable, of Damages ***that has been*** or may be sustained by" Sonova in that regard ("Calculation Requirement"). *See, e.g.*, A021, ¶ 23 (quoting A036, § 9.3.2(a)).

[1] Unless otherwise indicated, emphasis in quoted text has been added.

Moreover, Sonova agreed that it had "no right" to the Fund unless its Claim Notice met each of the Specificity Requirement, the Documentation Requirement, and the Calculation Requirement (collectively, the "Substantive Prerequisites"). *Id.* Those Substantive Prerequisites were unconditional; Sonova's Claim Notice either complied with each of them, or it did not. And Sonova agreed that any failure in compliance was an absolute bar on recovery. *See id.*; A020-21, ¶ 23.

In addition to the Substantive Prerequisites, Section 9.3.2 of the Merger Agreement further provided that Sonova's Claim Notice had to be delivered to Plaintiff "not later than 30 days after [Sonova] becomes actually aware of such Claim" (the "Assertion Deadline"). A036, § 9.3.2(a); A019-20, ¶ 22. Meaning that Sonova missed the Assertion Deadline if it had awareness of its Claim at any time before July 26, 2023 – *i.e.*, more than 30 days from the date of its Claim Notice. A019-21, ¶¶ 22-24.

The Complaint explains that Sonova representatives stated their awareness of its Claim as far back as February 2022 – *i.e.*, more than 545 days before delivering its Claim Notice – as well as in January and May 2023. *See* A018, ¶ 18; A021, ¶ 24. Sonova missed the Assertion Deadline no matter which of those dates is used, and that failure of compliance was separately actionable from Sonova's breaches of the Substantive Prerequisites. The difference being that while each of those substantive breaches was an absolute bar on recovery, an untimely Claim Notice had the separate

effect of preventing recovery "to the extent [Sonova's] delay actually and materially prejudice[d]" Plaintiff. A022, ¶ 25; A036, § 9.3.2(a).

III. SONOVA'S NONCOMPLIANT CLAIM NOTICE

A. The Documentation Requirement

Sonova held its Claim Notice until the last possible moment, just one business day before the Fund's mandatory release to Plaintiff. And the Complaint explains the many ways in which that Claim Notice failed to comply with Section 9.3.2's Substantive Prerequisites and Assertion Deadline. *See* A017-28, ¶¶ 14-38. Most glaring among those breaches: the utter absence of documentation supporting Sonova's superficial Claim, despite the Documentation Requirement which obligated Sonova to attach copies of "***all***" material evidence of its Claim. *See* A036, § 9.3.2(a); A021, ¶ 23; A023, ¶ 29.

The time Sonova spent "investigat[ing] and analy[zing]" the matters contained in its Claim Notice necessarily involved reviewing notices from third-party payors, applicable third-party payor agreements, third-party compliance reports, billing and coding analysis, among other documentation. A023, ¶ 29; A024, ¶ 31. Nor is there any room for Rule 12 doubt that lawyers and other advisors would have been involved in Sonova's investigation/analysis, generating additional documentation and bills that were required to accompany any Claim. *See id.*; A220:4-11. Yet Sonova declined to include a single piece of supporting

documentation in its Claim Notice, making an overt choice to breach the Documentation Requirement for tactical reasons. *See* A023, ¶ 29; A024-25, ¶¶ 31-32; A092-94.[2]

Nor is Sonova's failure to comply with the Documentation Requirement simply a matter of well-pled allegations. As discussed herein (but omitted from the lower court's dismissal ruling), Sonova admitted its breach in the proceedings below. A244:2-10.

B. The Specificity Requirement

The Complaint explains that Sonova's non-disclosure strategy could also be seen in the Claim Notice itself, which breached the Specificity Requirement by providing just a superficial summary rather than the "detail[ed]" explanation and "justification" which Sonova was obligated to deliver. *See* A020-21 ¶ 23; A022-23, ¶¶ 26-28. That summary was nothing more than a vaguely worded statement of Sonova's "belief" that unspecified "items and/or services" were allegedly "billed under [unidentified] names and billing numbers of [unidentified] clinicians who did not personally provide the [unspecified] items and/or services to those [unidentified]

[2] Among other things, as discussed in the Complaint, Section 9.3(a) provided that both a $1,550,000 threshold and a $750,000 deductible had to be met before Sonova could recover one penny from the Fund. The Claim Notice did nothing to demonstrate that either of those requirements was met. *See* A025, ¶ 33.

patients" – non-specific assertions that came nowhere close to the contractually mandated mark. *See* A017-19, ¶¶ 17-20; A022-23, ¶ 28; A092-94; A148-49.

Indeed, Sonova made no attempt to provide even the most basic information called for by the Specificity Requirement, which at a minimum would have included identification of: (a) the specific states where the conduct was alleged to occur; (b) the specific legal entities through which the conduct was alleged to occur; (c) the specific providers who supposedly engaged in the conduct; (d) the specific contracts or third-party payors at issue; and (e) the specific facts justifying Sonova's assertion that improper conduct had occurred. *See* A022-23, ¶¶ 28-29.

These allegations are more than sufficient for Rule 12 purposes.

C. The Calculation Requirement

The Claim Notice also failed to comply with the Calculation Requirement, declining to provide any particularity about the Damages incurred even though Sonova's self-described "investigation and analysis of these matters" necessarily would have included known professional fees, third-party billing and coding auditor costs, and amounts repaid by Sonova to commercial/governmental payors. *See* A024-25, ¶¶ 30-31; A054 (defining "Damages" as "any and all losses, damages, . . . penalties, and settlements, together with . . . the reasonable cost of the investigation[.]").

Rule 12 infers (and common sense dictates) that, at a minimum, Sonova possessed the information necessary to calculate the specific fees/costs/repayments which "ha[d] been incurred" by the time of its Claim Notice. *See id.*; A036, § 9.3.2(a). Yet it chose to ignore the Calculation Requirement, which obligated Sonova to deliver that very computation along with full supporting documentation – regardless of whether additional Damages might not yet be subject to estimation.

Sonova instead resorted to gamesmanship, eschewing the required specifics in favor of an argumentative assertion that it did not yet know the total amount of Damages that might ultimately be claimed. *See* A024-25, ¶¶ 30-32; A094 ("As of this date, [Sonova's] investigation and analysis of these matters is continuing, and the aggregate amount of Damages relating to the Claim is not known or estimable with certainty."). But that was not the inquiry imposed by the Calculation Requirement and Sonova did nothing to provide the contractually mandated disclosure of its then-current Damages. A036, § 9.3.2(a).

D. The Assertion Deadline

In addition to breaching the Substantive Prerequisites, the Claim Notice was untimely because Sonova had awareness of its Claim long before the July 2023 Assertion Deadline tied to that Claim Notice. *See* § I(C)(2)(c), *infra*; A018, ¶ 18; A021, ¶ 24; A036, § 9.3.2(a). Specifically, the Complaint explains that Sonova stated its awareness:

- during communications with Alpaca's CEO/CFO in February 2022; and
- again during communications between January and May 2023.

A018, ¶ 18, A021, ¶ 24. The Complaint further explains that the resulting delay was inherently prejudicial to Plaintiff given the healthcare-industry overlay and statutes involved:

> Sonova caused the kind of material prejudice that [D]eadline was put in place to avoid, including by (a) increasing the risk of excess Damages by disregarding contractual and statutory refund/repayment periods; (b) negating the Parties' ability to negotiate with applicable third-party payors in good faith and in a timely manner where due credit would be given; and (c) potentially implicating a greater period of noncompliance in any final Damages.

A022, ¶ 25. That overlay and statutory regime is discussed *infra* and was acknowledged by Sonova during the proceedings below. *See* § I(C)(2)(c), *infra*.

* * *

The record establishes a more-than-reasonably-conceivable case that Sonova failed to comply with Section 9.3.2 of the Merger Agreement, and that is the only conclusion needed for reversal here.

As discussed herein, the lower court erred in deeming the Merger Agreement irrelevant and granting dismissal based upon an internal clause from the Escrow Agreement. Plaintiff respectfully submits that, for present purposes, two undisputed facts make the point: (1) as is apparent from the Escrow Agreement itself, that clause simply addressed the minimal notice Sonova was to give the Escrow Agent if Sonova asserted an indemnification claim against Plaintiff; but (2) that clause never purported to alter the Merger Agreement or the Substantive Prerequisites with which Sonova was obligated to comply when sending its Claim Notice to Plaintiff under Section 9.3.2 of the Merger Agreement.

Indeed, Sonova confirmed those facts during the proceedings below when repeatedly acknowledging that Section 9.3.2 of the Merger Agreement – not any clause in the Escrow Agreement – controlled the determinative question on its dismissal motion ("Motion"). *See, e.g.*, A200:17-21.

IV. THIS LITIGATION

The Merger Agreement was crystal clear that Sonova had "no right to recover" on its Claim given its breaches of the Substantive Prerequisites and Assertion Deadline. A036, § 9.3.2(a). Sonova was therefore contractually required to release the Fund to Plaintiff.

Sonova refused to comply with those agreed-upon obligations however, instead delivering its pretextual Claim Notice in an eleventh-hour attempt to avoid that release. Plaintiff therefore filed the Complaint on September 11, 2023, seeking a declaratory judgment regarding Sonova's breaches and specific performance by way of a mandatory injunction ordering Sonova to execute the Joint Instruction. *See* A012-94.

Sonova's Motion was the subject of full briefing (A095-191), and oral argument was held on March 5, 2024 (A195-250). The letter ruling that erroneously dismissed the Complaint was issued three weeks later. Ex. A hereto (the "Letter Decision").

The determinative issue in this *de novo* appeal remains as presented below: whether it is reasonably conceivable that Sonova's Claim Notice failed to comply with Section 9.3.2 of the Merger Agreement, considering the record and all related inferences in Plaintiff's favor. The Letter Decision disregarded this issue and, in the process, departed from both Rule 12's mandates and longstanding principles of Delaware law.

Specifically, the Letter Decision detoured into a strawman theory that dismissal was appropriate if Sonova complied with the Escrow Agreement's internal clause about what Sonova had to tell the Escrow Agent – a clause that even Sonova advised the court did not govern whether Sonova had met its Claim Notice obligations to Plaintiff under Section 9.3.2 of the Merger Agreement. *See* Ex. A, at 8; A200:17-21 (Sonova's conceding "[w]e think the ***Merger Agreement notice procedures are the ones that take primacy***").

As discussed herein, the Letter Decision was legal error and created a dangerous, wide-ranging problem for Delaware by departing from decades of bedrock contract law on which countless deals have been based.

ARGUMENT

I. THE LETTER DECISION ERRED IN GRANTING DISMISSAL

A. Question Presented

Under Rule 12's plaintiff-friendly standard, did the Complaint plead a reasonably conceivable claim that Sonova failed to comply with the Substantive Prerequisites and Assertion Deadline set forth in the Merger Agreement? A135-173; A194-250.

B. Scope of Review

"In reviewing the dismissal of a complaint under Rule 12(b)(6), the standard of appellate review is *de novo*." *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000).

Dismissal must not be granted "unless it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts which might be proven to support the allegations in the complaint." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). As with any such review, all well-pled facts "must be taken as true and all inferences therefrom are viewed in a light most favorable to the plaintiff." *Id.* at 610-11.

This Court likewise "review[s] questions of contract interpretation *de novo*." *Coronado Coal II, LLC v. Blackhawk Land & Res.*, 293 A.3d 372, 2023 WL 2339583, at *3 (Table) (Del. Mar. 3, 2023); *see also Parfi Holding AB v. Mirror Image Internet Inc.*, 817 A.2d 149, 154 (Del. 2002) (en banc) ("This Court reviews *de novo* the [trial court's] interpretation of the [agreement] as well as the application of relevant law.").

C. Merits of the Argument

The Letter Decision must be reversed on multiple legal grounds, including that it:

- ignored the Merger Agreement provision which, by Sonova's own admission, controlled the determinative question at issue on Sonova's Motion;
- misapplied Rule 12's lenient standard when assessing the Motion; and
- overlooked the widespread repercussions of holding that heavily negotiated terms in a Delaware-governed merger agreement are rendered meaningless by the presence of a form escrow contract that never even purports to modify the Merger Agreement's terms in any way.

It further appears that the Letter Decision was based on a fundamental misunderstanding of this action. As pled in the Complaint and manifest from the Merger Agreement's plain language, Sonova has "no right to recover" from the Fund unless it has complied with each of Section 9.3.2's prerequisites/conditions precedent – *i.e.*, the Substantive Prerequisites and Assertion Deadline. It is a classic gating requirement, and it dictates the specific package of documentation Sonova was obligated to provide in the Claim Notice it sent to Plaintiff.

Thus, as the Complaint explained, whether Sonova breached Section 9.3.2 is a "narrow question" that is resolved without regard to the so-called merits of whatever claim Sonova might believe it has. *See* A027-28, ¶¶ 39-40. The only relevant question is whether Sonova met Section 9.3.2's requirements for making such a Claim in the first place. And any failure in compliance entitles Plaintiff to precisely what is sought in this action: (a) declaratory judgment that Sonova breached its obligations under Section 9.3.2 of the Merger Agreement; and (b) an order of specific performance, as specifically authorized by Section 11.10 of the Merger Agreement, that compels Sonova to execute a Joint Instruction releasing the Fund.

For reasons which remain unclear, the Letter Decision nevertheless addressed a completely different question about a fundamentally different document that dealt with Sonova's responsibility to an entirely different person: *did Sonova track the Escrow Agreement's internal notice clause when telling the Escrow Agent that Sonova was seeking indemnification from Plaintiff.* That inquiry is inapposite to consideration of the Complaint and cannot serve as grounds for dismissal. Nor can it be reconciled with Sonova's admission that the Escrow Agreement in no way changed Sonova's contractual obligations to Plaintiff under Section 9.3.2 of the Merger Agreement – which remains the controlling provision in this Court's *de novo* review of the Complaint under Rule 12's plaintiff-friendly standard.

1. <u>Section 9.3.2 Is Enforceable As A Matter Of Law</u>.

Acknowledging this determinative analytical framework, Sonova sought dismissal by arguing that two Superior Court decisions rendered Section 9.3.2 unenforceable because it did not state the consequence of Sonova's noncompliance with the Substantive Prerequisites or Assertion Deadline. *See Blue Cube Spinco LLC v. Dow Chem. Company*, 2021 WL 4453460, at *1 (Del. Super. Ct. Sept. 29, 2021); *Nucor Coatings Corp. v. Precoat Metals Corp.*, 2023 WL 6368316, at *1 (Del. Super. Ct. Aug. 31, 2023); *see also* A120-121; A129; A187-189. As explained below and discussed herein, however, Sonova misread those decisions and sidestepped Section 9.3.2's actual language.

First, the operative sentence of Section 9.3.2 is unambiguous and plainly states the consequence of Sonova's noncompliance:

> ***[Sonova] shall have no right to recover any amounts*** pursuant to Section 9.2 unless [Sonova] notifies [Plaintiff] in writing of such Claim pursuant to Section 9.3 on or before the Survival Date.

A036, § 9.3.2(a). It is undisputed that Sonova's Claim Notice seeks to recover indemnity under Section 9.2 and that the requirements for Sonova's right to do so – *i.e.*, the Substantive Prerequisites and Assertion Deadline – are part of Section 9.3. *See* A092-94. It is therefore difficult to envision a plainer statement of the consequence for failing to comply with those requirements than having **"*no right*"** to such recovery. Moreover, the use of mandatory ***"shall"*** language leaves Sonova

no wiggle room to now advocate for permissive or discretionary application of the consequence provision to which it agreed. *E.g.*, *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1219 (Del. 2021) ("[T]he mandatory 'shall' [in contracts]. . . normally creates an obligation impervious to judicial discretion."); *see L-5 Healthcare P'rs LLC v. Alphatec Holdings Inc.*, 2024 WL 3888696, at *7 (Del. Ch. Aug. 24, 2024) (explaining that Delaware courts apply contractarian policies to the enforcement of remedy provisions).

Second, Sonova's reliance on *Blue Cube* and *Nucor* was misplaced because the Superior Court's analysis/discussion in those cases actually defeats Sonova's position on the determinative issue here. As previously noted, the Letter Decision departed from that issue and disregarded those cases.[3] But that issue remains determinative in this appeal, and examination of those cases underscores the need for reversal.

Blue Cube was the cornerstone of Sonova's advocacy below, which favored soundbites and high-level proclamations but omitted mentioning that the circumstances being examined there were so dissimilar from this action as to render that holding inapposite here. Among other things that are apparent from the decision and submissions in *Blue Cube:*

[3] *Nucor* is never mentioned in the Letter Decision, and *Blue Cube* is only cited for a basic procedural point that has no bearing on this appeal. *See* Ex. A, at 7 n.29.

- the dispute did not center on a merger agreement, let alone one in the heavily regulated healthcare sector;
- the contract being examined set forth certain indemnification rights, but allowed a general form of notice that was far less exacting than the Claim Notice requirements found in Section 9.3.2 of the Merger Agreement; and
- there was no allegation that the general form of notice delivered in *Blue Cube* was insufficient for the parties there to meaningfully engage on the asserted claim, as evidenced by the fact that they had already been engaging on it for months before litigation ensued.

Moreover, when viewed from a legal perspective, Sonova's misplaced reliance on *Blue Cube* becomes even more apparent because:

- unlike here, the parties there had not agreed upon any express prerequisites to seeking indemnification; and
- unlike here, the contract at issue there was utterly silent about the consequence of a non-conforming claim notice.

Blue Cube, 2021 WL 4453460 at *2, *11; *accord Blue Cube*, N21C-01-214 PRW CCLD, Trans. ID 66287927 at Ex. B, p.26 (Del. Super. Jan. 27, 2021). Those conspicuous absences drove the outcome in *Blue Cube.* Indeed, they caused the court to look for guidance elsewhere in that contract and, ultimately, to grant partial dismissal based on a boilerplate "no waiver" clause because it was the closest those

parties came to addressing how a defective notice would be treated. *Id.* at *2 ("The Notice Provision is silent on a non-conforming notice's consequences."). Sonova's reliance on that outcome is therefore unavailing because it dealt with the polar opposite of the situation presented here.

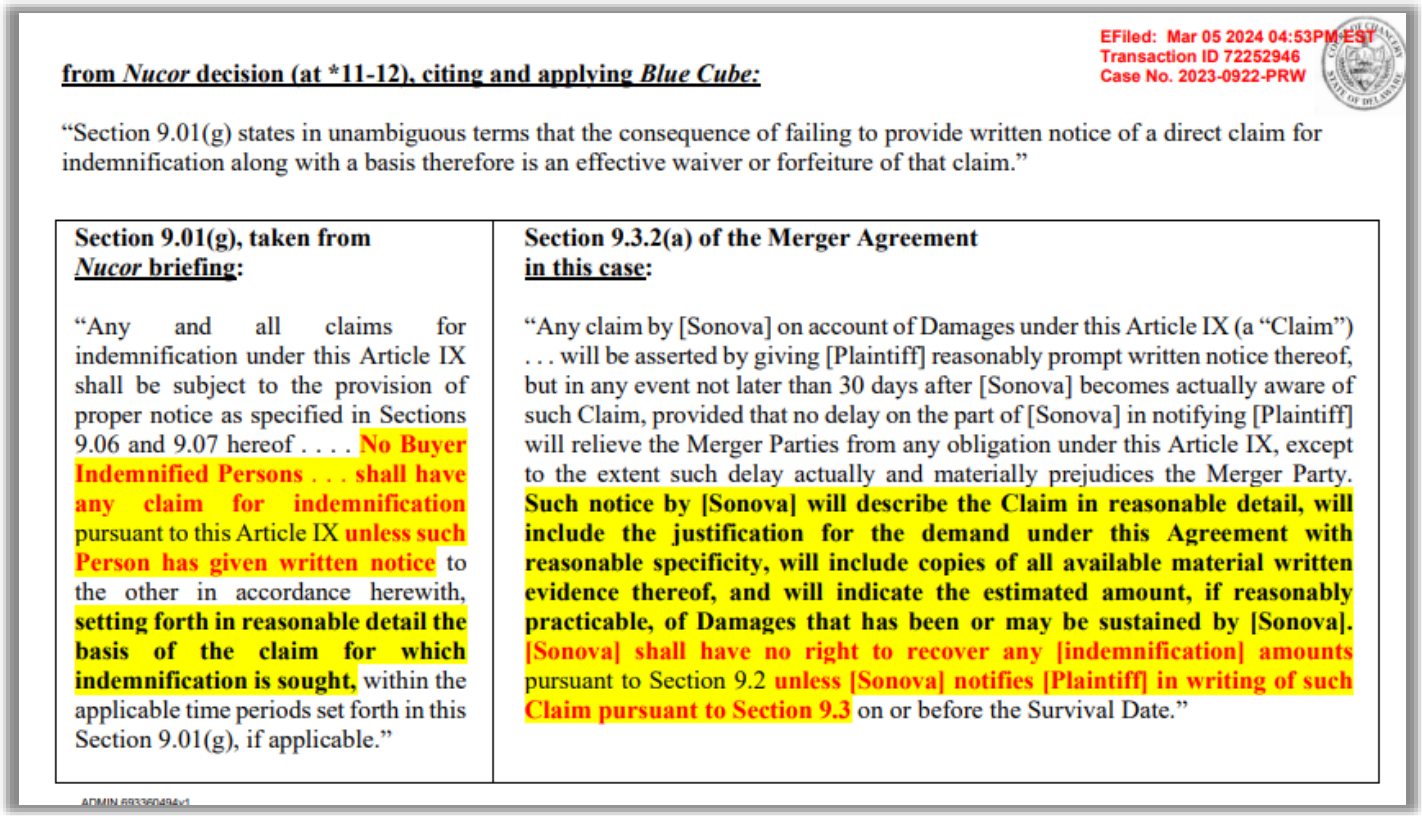
Third, the analysis undertaken in *Blue Cube* actually supports Plaintiff – and defeats Sonova's Motion – because it teaches that Delaware does enforce provisions which plainly state that a party loses the ability to pursue contractual indemnification upon its failure to comply with identified prerequisites/conditions precedent – just as Section 9.3.2 of the Merger Agreement does here. And that teaching is precisely what *Nucor* applied when finding enforceable a provision that was less detailed than Section 9.3.2 yet still passed the *Blue Cube* test.

The *Nucor* litigants also happened to cover indemnification matters in Article IX of their contract and, more specifically, included a consequence provision in Section 9.01(g) of that document:

> No Buyer Indemnified Persons . . . shall have any claim for indemnification pursuant to this Article IX unless such Person has given written notice to the other in accordance herewith, setting forth in reasonable detail the basis of the claim for which indemnification is sought, within the applicable time periods set forth in this Section 9.01(g), if applicable.

Nucor, 2023 WL 6368316, at *12; *Nucor*, N22C-11-222 (MAA) CCLD, Trans. ID 69901472, at 11 (Del. Super. Apr. 26, 2023). Applying *Blue Cube* to that provision, the *Nucor* court explained that the quoted language was enforceable because it "states in unambiguous terms that the consequence of failing to provide written notice of a direct claim for indemnification along with a basis therefore is an effective waiver or forfeiture of that claim." *Id.* at *12. And, as such, all of the policy concerns around waiver/forfeiture discussed in *Blue Cube* (and relied upon by Sonova's Motion) were satisfied as a matter of Delaware law. *Id.*

The parallels between that language and Section 9.3.2 of the Merger Agreement are self-evident; *Nucor's* application of *Blue Cube* confirms that Section 9.3.2 likewise effects an enforceable waiver/forfeiture of Sonova's ability to seek indemnification. And that conclusion only becomes more apparent when one views the *Nucor* provision side-by-side with Section 9.3.2 – which is why Plaintiff presented the following demonstrative at oral argument, after Sonova's reply brief doubled-down on its position but notably avoided any discussion of *Nucor*:



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Transaction ID 72252946
Case No. 2023-0922-PRW

from *Nucor* decision (at *11-12), citing and applying *Blue Cube*:

"Section 9.01(g) states in unambiguous terms that the consequence of failing to provide written notice of a direct claim for indemnification along with a basis therefore is an effective waiver or forfeiture of that claim."

Section 9.01(g), taken from *Nucor* briefing:	**Section 9.3.2(a) of the Merger Agreement in this case:**
"Any and all claims for indemnification under this Article IX shall be subject to the provision of proper notice as specified in Sections 9.06 and 9.07 hereof . . . . **No Buyer Indemnified Persons . . . shall have any claim for indemnification** pursuant to this Article IX **unless such Person has given written notice** to the other in accordance herewith, **setting forth in reasonable detail the basis of the claim for which indemnification is sought,** within the applicable time periods set forth in this Section 9.01(g), if applicable."	"Any claim by [Sonova] on account of Damages under this Article IX (a "Claim") . . . will be asserted by giving [Plaintiff] reasonably prompt written notice thereof, but in any event not later than 30 days after [Sonova] becomes actually aware of such Claim, provided that no delay on the part of [Sonova] in notifying [Plaintiff] will relieve the Merger Parties from any obligation under this Article IX, except to the extent such delay actually and materially prejudices the Merger Party. **Such notice by [Sonova] will describe the Claim in reasonable detail, will include the justification for the demand under this Agreement with reasonable specificity, will include copies of all available material written evidence thereof, and will indicate the estimated amount, if reasonably practicable, of Damages that has been or may be sustained by [Sonova]. [Sonova] shall have no right to recover any [indemnification] amounts** pursuant to Section 9.2 **unless [Sonova] notifies [Plaintiff] in writing of such Claim pursuant to Section 9.3** on or before the Survival Date."

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A193. In each column, the prerequisites/conditions precedent that had to be met by the party seeking identification are shown in bolded black text, and the related statements of consequence for that party's failure to do so are shown in bolded red text.

As this comparison demonstrates: (i) the consequence statement in Section 9.3.2 matches or exceeds the clarity found to be enforceable by *Nucor*; and (ii) the accompanying set of prerequisites/conditions precedent to which Sonova agreed are far more specific than those seen in *Nucor*. Which is not surprising. As explained by the Complaint, Section 9.3.2's requirements were integral to this deal and the

result of significant negotiations between sophisticated parties. *See* A019-21, ¶¶ 20-23; A024, ¶ 30; A025, ¶¶ 32-34.

Unable to muster a credible response on any of these points, Sonova resorted to *ipse dixit* – proclaiming that "*Nucor* doesn't have the relevancy or application" that was highlighted by Plaintiff's demonstrative because the prerequisites imposed by Section 9.3.2 appear immediately ahead of its consequence language, whereas in *Nucor* they appeared immediately behind the consequence language. A241:2-11. Plaintiff respectfully submits that, if anything, Sonova's strained advocacy underscores the need for reversal.

* * *

The Letter Decision erred as a matter of law by disregarding the determinative legal question in this action and instead addressing a peripheral matter that (by Sonova's own admission) had no bearing on the Motion or Sonova's obligations to Plaintiff under the Merger Agreement. *See* § I(C)(3), *infra*. Nevertheless, having now discussed the proper legal framework for this *de novo* appeal, we turn to the next part of the analysis: reasonable conceivability under Rule 12.

2. Sonova's Noncompliance With Section 9.3.2 Is Reasonably Conceivable On This Record.

The "pleading standards governing the motion to dismiss stage of a proceeding in Delaware . . . are minimal." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). The Court "accept[s] all

well-pleaded factual allegations in the Complaint as true" and "read[s] the complaint generously," construing all such allegations "in a light most favorable to the plaintiff." *Id.*; *Henry v. Middletown Farmers Mkt., LLC,* 2014 WL 4426311, at *2 (Del. Super. Ct. Sep. 8, 2014). Dismissal must therefore be denied unless plaintiff's claims are still not "reasonably conceivable" even under that "plaintiff-friendly standard of review." *Firefighters' Pension Sys. of Kan. City v. Presidio, Inc.*, 251 A.3d 212, 262 (Del. Ch. 2021); *see Cent. Mortg.*, 27 A.3d at 536 (holding that dismissal is only appropriate where the plaintiff "could not recover under any reasonably conceivable set of circumstances susceptible of proof.").

It also bears note (given Sonova's arguments below) that the ultimate merits of a dispute are irrelevant to the analysis. Even where it may "prove impossible for the plaintiff to prove his claims at a later stage of a proceeding," a defendant's dismissal motion must be denied if the minimal Rule 12 pleading standard is met. *Cent. Mortg.*, 27 A.3d at 536.

It is equally well-established that Delaware is a contractarian jurisdiction which steadfastly holds litigants to their bargained-for agreements. Among other things, that means our courts will not "relieve sophisticated parties of the contracts they willingly accepted" or "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); *SeaWorld Entm't v. Andrews*, 2023 WL

3563047, at *8 (Del. Ch. May 19, 2023); *see also L-5 Healthcare P'rs*, 2024 WL 3888696, at *7 ("Delaware courts are especially chary about relieving sophisticated business entities of the burden of freely negotiated contracts." (citation and internal quotation marks omitted)).

As previously discussed, the Letter Decision did not adhere to these standards, did not address the Complaint's allegations regarding Sonova's noncompliance with Section 9.3.2, and did not account for Sonova's admitted failure to provide a single piece of the supporting documentation expressly required by the Documentation Requirement. *See* § III(A), *supra.*

Because that admitted failure is alone sufficient to require reversal, it is the logical starting place for this Court's review of the record.

a. Failure To Comply With The Documentation Requirement.

The Complaint repeatedly discusses Sonova's obligation under the Documentation Requirement. *See id.* Among other things, the discussion includes factual allegations that, even though Sonova spent months investigating and analyzing matters, its Claim Notice "failed to include ***any*** materials or evidence supporting Sonova's claim – let alone 'copies of ***all available material*** written evidence thereof' as required by Section 9.3.2(a)." A023, ¶ 29 (quoting A036, § 9.3.2(a)) (emphasis original).

The Complaint further explains that, by definition, Sonova's investigation/analysis involved documents whose production was required by Section 9.3.2, including "notices from third-party payors, applicable third-party payor agreements, third-party compliance reports, billing and coding analysis," among other documentation evidencing Sonova's supposed claim. *Id.* The complete absence of those materials was further confirmed by the Claim Notice itself, a copy of which was attached to the Complaint as Exhibit C. A092-94.

In short, the Complaint was more than sufficient for Rule 12 purposes. And the record on this point exceeds those well-pled allegations because Sonova admitted in the proceedings below that "not one piece of paper went along with the [N]otice" despite the fact that Section 9.3.2 required it to include copies of all material documents underlying its Claim Notice. A244:2-11.

Thus, even if the Complaint had not otherwise pled a reasonably conceivable failure to comply with the Documentation Requirement, Sonova's judicial admission would still require reversal of the Letter Decision as a matter of law. *See, e.g., Merritt v. United Parcel Service*, 956 A.2d 1196, 1201-02 (Del. 2008) ("Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; ***counsel's statements to the court***) are termed 'judicial admissions.'"); *Yagman v. Allianz Ins.*, 2015 WL 5553462, at

*3 (C.D. Cal. July 9, 2015) ("Plaintiff's statement at the hearing on the motion to dismiss the [complaint] is deemed a judicial admission."); *Hornberger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2015 WL 13310465, at *3 (C.D. Cal. Jan. 22, 2015) (judicial admissions are properly considered in Rule 12 analysis).[4]

Again, each asserted violation of the Merger Agreement provides independent grounds for reversal. And the record confirms that Sonova's other breaches of Section 9.3.2 were also reasonably conceivable.

b. Failure To Comply With The Specificity And Calculation Requirements.

Sonova's decision to omit supporting documentation was echoed in its decision to avoid meaningful disclosure in the body of its Claim Notice. That avoidance was a violation of both the Specificity and Calculation Requirements. As noted above: (a) the Specificity Requirement obligated Sonova to provide objective facts "describ[ing] the Claim in reasonable detail" and to "include the justification for [its] demand…with reasonable specificity"; and (b) the Calculation Requirement obligated Sonova to (*inter alia*) state and support the specific fees/costs/repayments that "ha[d] been incurred" as of the Claim Notice date. *See* §§ III(B) & (C), *supra*.

[4] *See Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004) (noting the applicability of federal jurisprudence in this Court because "[t]he Delaware Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure."); *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr.*, 2018 WL 6331622, at *9 n.53 (Del. Ch. Dec. 4, 2018) (same).

The Complaint explains how Sonova chose not to comply with those obligations, instead offering a Claim Notice that did nothing more than: (a) vaguely assert its unsubstantiated "belief" that some unspecified "items and/or services" were supposedly "billed under the names and billing numbers of clinicians who did not personally provide the items and/or services to those patients" and (b) argumentatively assert that it did not yet know the total amount of "aggregate" Damages that might ultimately be asserted. *See id.*

The Complaint also explains how those nebulous assertions were devoid of the details necessary for Plaintiff to understand the Claim being made, much less evaluate it or take any related action:

> Among other things, [Sonova] failed to provide even basic information identifying: (a) the specific providers who supposedly engaged in such conduct, (b) the specific contracts or third-party payors supposedly at issue, or (c) any other reasonable factual basis for Sonova's assertion that improper conduct had supposedly occurred (including, for example, the specific laws and/or contractual provisions that had supposedly been breached).

A022-23, ¶¶ 27-28. In other words, Sonova's so-called "notice" fell far short of Section 9.3.2's requirements because it left Plaintiff almost entirely in the dark.

Those well-pled facts (and resulting inferences) are sufficient to satisfy the Rule 12 standard on these aspects of Plaintiff's case, adding to the grounds that call for reversal here because any failure to comply with the Substantive Requirements barred Sonova from pursuing the Fund. *See* § I(C)(1), *supra*.

c. Failure To Comply With The Assertion Deadline.

As discussed above, Sonova's Claim Notice also missed the Assertion Deadline imposed by Section 9.3.2 if Sonova had claim awareness prior to July 26, 2023. *See* § III(D), *supra*. And the Complaint plainly alleges that Sonova had such awareness, explaining that:

> Sonova had been aware of the facts underlying its supposed Claim since long before then -- as Sonova representatives confirmed in various communications with Alpaca's former CEO and CFO before the Merger Agreement closed ***in February 2022***, as well as communications with a continuing employee of Sonova ***in January 2023 and May 2023***."

A021, ¶ 24.

Thus, as previously discussed, the relevant inquiry about Sonova's untimeliness is whether the Complaint addresses the prejudice that resulted. *See* § III(D), *supra*. And that inquiry can only be addressed in the context of Sonova's tactical decision to withhold all of the information it was obligated to provide under the Substantive Prerequisites – thereby creating an untenable situation in which Plaintiff could not even evaluate the Claim being asserted, let alone quantify the particular prejudice attendant to Sonova's delay in asserting it.

Section 9.3.2 must be read as a whole. *See Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 924 (Del. 2023) ("When interpreting a contract, Delaware courts read the agreement as a whole and enforce the plain meaning of clear and unambiguous language."). Doing so confirms that the prejudice proviso attached to the Assertion

Deadline assumes Sonova's compliance with the Substantive Prerequisites because: (a) Sonova controls the information that Section 9.3.2 obligates it to provide; and (b) Sonova's compliance with those obligations is the only way Plaintiff could obtain the knowledge needed to assess the Claim being asserted or the impact of Sonova's delay.

Sonova chose to withhold that information/knowledge from Plaintiff. But, as the Complaint explains, Sonova knew the fallout from its tactics was definitionally prejudicial in the regulated healthcare sector:

> Sonova was well aware that these timing and particularity requirements were material provisions on which all other Parties relied when entering into the Merger Agreement. And by disregarding its claim deadline Sonova caused the kind of material prejudice that deadline was put in place to avoid, including by (a) increasing the risk of excess Damages by disregarding contractual and statutory refund/repayment periods; (b) negating the Parties' ability to negotiate with applicable third-party payors in good faith and in a timely manner where due credit would be given; and (c) potentially implicating a greater period of noncompliance in any final Damages.

A022, ¶ 25.

Moreover, Sonova acknowledged as much at oral argument after discussion about the significant civil and criminal penalties that are tied to delay under applicable healthcare statutes, such as 31 U.S.C. § 3729, 18 U.S.C. § 287, and 42 U.S.C. § 1320a-7a through 7k. *See* A226:1-A228:14 (discussing penalties that "include reoccurrence fines, treble damages, criminal fines, or jail time[,] and exclusion from rendering further services to be paid by Medicare or Medicaid….

That's why healthcare agreements include 30-day timelines like we see in the Merger Agreement. It's to allow these matters to be dealt with before the penalties and criminal sanctions can pile up."); A244:25-A245:5 (acknowledging "the potential for [those] civil and criminal implications," that Sonova would "ultimately…have to engage with the government" about the events underlying the Claim Notice, and that the information which Sonova had "gathered as a function of [its] internal investigation" but omitted from the Claim Notice "would be unhelpful to [Sonova]" in that regard); D.R.E. 202(a) (confirming that these "statutes of the United States" are a proper subject of judicial notice).

Sonova wanted it both ways, however, arguing that Plaintiff somehow should have managed to conjure-up the details that Sonova alone controlled and decided to omit from its Claim Notice. *See* A113-15. Sonova thus argued that it should benefit from the informational vacuum it created when breaching Section 9.3.2. Our law rejects such sword-and-shield tactics. *E.g.*, *Grunstein v. Silva*, 2012 WL 5868896, at *1 (Del. Ch. Nov. 12, 2012) (discussing Delaware decisions that prevent litigants from using as a sword the same information/documentation whose disclosure they shielded from their opponents). And the rationale underlying that rejection would have full application in the Rule 12 context even if Sonova was not contractually required to provide the details it chose to shield from Plaintiff here – details that are otherwise not available to Plaintiff without discovery. *See, e.g., Twede v. Univ. of*

Washington, 309 F.Supp.3d 886, 904-05 (W.D. Wash. 2018) ("Where a plaintiff is at an informational disadvantage—where the information necessary to plead with greater specificity is in the possession of the defendant—courts give plaintiffs 'some benefit of the doubt to go along with the specific facts it has pled.'" (citation omitted)); *Velazquez-Ortiz v. Negron-Fernandez*, 174 F.Supp.3d 653, 661 (D.P.R. 2016) (explaining that courts give "more latitude" where a plaintiff "cannot reasonably be expected" to have the information in question "without the benefit of discovery").

The Letter Decision brushed past the reality of Sonova's self-created informational vacuum in a one-sentence ruling that the Complaint's prejudice allegations were insufficient. Ex. A, at 9. That ruling was legal error under Rule 12's plaintiff-friendly standard. *See* pp. 15, 24-25, *supra*.

* * *

Reversal is mandated if Plaintiff has shown it to be reasonably conceivable that Sonova failed to comply with any aspect of Section 9.3.2, and the record includes a sufficient basis to find that Sonova breached all of those requirements. The Letter Decision's tangential ruling about a different contract does not and cannot alter this conclusion. Nevertheless, the Letter Decision's approach is addressed here in the interest of completeness and because it reinforces the need for reversal.

3. **The Letter Decision Examined The Wrong Contract.**

As noted above, dismissal was based on an unasserted theory that the Escrow Agreement's internal notice clause – which simply stated what Sonova had to tell the Escrow Agent – somehow governed this case to the exclusion of Section 9.3.2 and Sonova's related obligations to Plaintiff under the Merger Agreement. *See* Ex. A, at 3-4. That determination was legal error for several reasons.

To begin with, the Letter Decision overlooked (or misunderstood) the deal landscape here. Sonova's obligation to advise the Escrow Agent that an indemnification claim had been asserted against Plaintiff was related to, but separate from, Sonova's obligations to comply with the Substantive Prerequisites and Assertion Deadline that had to be satisfied for Sonova to assert such a claim in the first place. That fact is apparent from the contracts themselves, which unambiguously differentiate (a) which obligations are owed to whom, (b) what information must be provided to each recipient, and (c) why that information is being provided. *Compare* A036, § 9.3.2(a) (specifying the Substantive Prerequisites and Assertion Deadline that Sonova was required to meet in its formal Claim Notice to Plaintiff) *with* A073, § 3(a)(ii) (the mechanism through which Sonova advised the Escrow Agent that such a Claim Notice had been delivered).

Sonova could choose to comply with those contractual obligations separately, or to combine its compliance into a single submission. Both sets of obligations had

to be met either way. And it is undisputed that Section 9.3.2's exacting set of requirements are determinative in this action – not the Escrow Agreement's internal notice clause. Indeed, Sonova advised the lower court of that fact in response to a "basic question" asked at the outset of oral argument:

> THE COURT: [L]et me ask kind of a more I guess basic question. Which notice procedures should I be looking to? Which agreement? Because it appears that the Merger Agreement has certain notice procedures and the Escrow Agreement has certain notice procedures. Which should I be focusing on?
>
> SONOVA: We think ***the Merger Agreement notice procedures*** are the ones that take primacy.

A200:10-19. Sonova's briefing likewise acknowledged that Section 9.3.2 controls the determinative analysis here. *See* A107 ("***Merger Agreement Section 9.3.2(a) governs the process*** by which Sonova notifies Plaintiff of any indemnification claims."). The Letter Decision erroneously ignored these judicial admissions.

The Merger Agreement's primacy is also reflected in the Escrow Agreement, which required only vanilla disclosure <u>to the Escrow Agent</u> but expressly obligated Sonova to certify that it had fully "complie[d] with the terms of the ***Merger Agreement***" in the Claim Notice it delivered <u>to Plaintiff</u>. A073, § 3(a)(ii). That clause and the subsequent one also made clear that Sonova's certification would be "conclusively rel[ied] upon" by the Escrow Agent, without assessing its accuracy or even reading the Merger Agreement:

> Escrow Agent has no knowledge of, nor any obligation to comply with, the terms and conditions of any other agreement[,] nor shall Escrow Agent be required to determine if [Sonova] has complied with any other agreement.….Escrow Agent may conclusively rely upon any written notice, document, instruction or request delivered by [Sonova], without inquiry and without requiring substantiating evidence of any kind and Escrow Agent shall be under no duty to inquire into or investigate the validity, accuracy or content of any such document, notice, instruction or request.

A074, § 4. Such reliance provisions are commonplace because escrow agents don't want any responsibility connected to the formative deal agreements that govern the parties' rights and responsibilities to each other. And the Complaint alleges that "Sonova's strategy counted on [that] fact" here when certifying that it had complied with the Merger Agreement's requirements – which, as noted above, Sonova has now admitted was an untrue statement. A026, ¶ 35; A244:2-11.

The Letter Decision is at odds with all of these facts, all of which are undisputed or indisputable for Rule 12 purposes. And by relegating the Merger Agreement to irrelevance, the Letter Decision ran headlong into bedrock Delaware law that our courts: (a) will not rewrite the parties' agreements; (b) will not render any provision meaningless or illusory; and (c) when presented with related agreements, will read them together to avoid those prohibited outcomes. *See, e.g.*, *See L-5 Healthcare P'rs*, 2024 WL 3888696, at *8 (declining to "exercise . . . discretion against the great weight of [Delaware's] contractarian law to override the parties' clear, contractually stipulated intent and expectations as set forth" in the

parties' agreement); *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (Delaware courts "will not read a contract to render a provision or term 'meaningless or illusory.'"); *Fla. Chem. Co. v. Flotek Indus.*, 262 A.3d 1066, 1081 (Del. Ch. 2021) ("[A]s a general rule, contemporaneous contracts between the same parties concerning the same subject matter should be read together as one contract.").

Again, the determinative question presented by the Complaint (and the Motion) was whether Sonova had a right to pursue indemnification under the Merger Agreement, and the Merger Agreement is unambiguous that Sonova "shall have ***no right***" to do so unless it complied with each of Section 9.3.2's requirements in the Claim Notice it delivered to Plaintiff. Reversal would therefore be compelled even if the Letter Decision had not made any of the other errors identified above because it ignored the Merger Agreement and granted dismissal based on a strawman issue that was not before the court and cannot be reconciled with the record in any event. § IV, *supra*.

One final point bears note. The Letter Decision suggests that its approach was justified because the Complaint and Plaintiff's opposition to the Motion said this case was not about whether Sonova complied with Section 9.3.2 of the Merger Agreement. Ex. A, at 8 n.32. That suggestion is erroneous.

As can be seen from the 38 paragraphs of pleading that precede the one cited by the Letter Decision – allegations focused on Sonova's failures to meet the Substantive Prerequisites and Assertion Deadline found within Section 9.3.2 – Plaintiff made clear how this action turns on the same determinative issue of law discussed throughout this Opening Brief and is far narrower than the multitude of Delaware cases that have sought the release of escrowed funds:

> Unlike many escrow-related cases that have been addressed in [the Court of Chancery], the present action does not require or seek a ruling about the merits of any indemnification claim. Indeed, there is no practical way to assess the merits of a claim that Sonova has deliberately kept vague….
>
> This action instead presents a narrow question of law to be decided on the face of the Exhibits hereto: does the Purported Claim Notice comply with the plain-language requirements of the Merger Agreement and Escrow Agreement? Plaintiff respectfully submits that the answer is no, that the tailored equitable relief sought by this Complaint is therefore warranted, and that further litigation over the Escrow Fund is mooted as a result.

A027-28, ¶¶ 39-40.

The introductory sentences of Plaintiff's opposition to the Motion cited back to those paragraphs (and others) when reiterating their points in the context of Sonova's dismissal arguments, again making clear that this case is simply about whether Sonova complied with the Substantive Prerequisites and Assertion Deadline:

> Sonova's [Motion] goes to great lengths when trying to: (a) turn Rule 12 on its head; (b) expand this narrowly tailored case into something it is not; and (c) evade bedrock law that holds sophisticated parties to their Delaware-law contracts. None of those tactics pass muster.
>
> The Complaint could not have been more explicit. This case is not about the existence of an indemnification provision or the merits of any purported claim under that provision – let alone some attempt to "eliminate" that provision – as Sonova now pretends. *See* Compl. at ¶¶ 39-40.
>
> ***Rather, this case is limited to application of the plain-language contractual requirements that Sonova agreed it had to meet if any indemnification claim was being asserted, prerequisites that were heavily negotiated and deliberately more exacting than similar clauses this Court tends to address***. *See* Compl. at ¶¶ 21-30.

A141. The ensuing bullet points then referenced the Complaint's well-pled allegations that, "among other things," Sonova breached those Section 9.3.2-based requirements by: (a) failing to "include copies of all available supporting documentation" with its Claim Notice; and (b) failing to deliver that Notice "within 30 days after becoming aware of any claim, [missing] that contractual limitations period by more than 1½ years from the time [Sonova's] representatives first acknowledged awareness of the claim." A142.

The body of Plaintiff's opposition further explored those points in detail, focusing on Sonova's failures to comply with Section 9.3.2 – including Sonova's now-admitted breach of the Documentation Requirement – which was also the focus of both parties' presentations at oral argument.

It is puzzling that the Letter Decision suggested otherwise. Whatever the reason for that disconnect, however, it was reversible error and cannot be used to uphold the Letter Decision's approach or outcome.

Plaintiff respectfully submits that affirmance of the Letter Decision would also have wide-ranging policy implications for Delaware. It is axiomatic that escrow contracts are not formative transaction agreements in a merger or acquisition. They are peripheral documents (usually a bank form) that memorialize the escrow agent's limited obligations regarding funds being escrowed and, as seen in this case, usually provide for generic notice to the agent when a party to the merger/acquisition agreement has asserted a claim that could implicate those funds. Such peripheral documents do not override or alter the controlling terms of the parties' merger/acquisition agreement – at least, not under Delaware law and not without an express provision addressing that precise matter.

There is nothing remarkable about these principles; they have long been understood and relied upon in real-world deal practice. And yet they were cast aside by the Letter Decision's antithetical ruling, a result that renders meaningless both Section 9.3.2 of the Merger Agreement and untold volumes of similar provisions across the universe of Delaware law-governed acquisition agreements. Especially at a time when Delaware's corporate/commercial preeminence is being challenged, the Letter Decision will have repercussions well beyond this case if allowed to stand.

* * *

Plaintiff respectfully submits that the reversal called for here as a matter of law inherently covers Sonova's subordinate argument that specific performance is not available to Plaintiff on this Complaint. *See* A104-05. As noted above and explained in the Complaint, that argument was never well taken because Section 11.10 of the Merger Agreement expressly set forth Plaintiff's entitlement to specific performance in the event Sonova breached any of its obligations under Section 9.3.2. Given the manner in which Sonova's argument wound up being addressed in the proceedings below, however, it warrants discussion as part of this appeal.

4. <u>The Merger Agreement Calls For Specific Performance</u>.

The Motion presented Sonova's argument in two parts: one contending that the Complaint did not plead a basis for specific performance, and one challenging the way in which the Complaint styled its request for that relief.

Sonova's first argument is incorrect for all of the reasons previously discussed, including the presence of Section 11.10 and Sonova's express acknowledgement that it has "no right" whatsoever to pursue indemnification from the Fund unless the Claim Notice delivered to Plaintiff fully complied with Section 9.3.2's requirements. A044, at § 11.10; A036, § 9.3.2(a). Moreover, to the extent Sonova argued that enforcing its voluntarily agreed-upon obligations under Section

9.3.2 should somehow be considered an "inequitable" or an impermissible "forfeiture" of its ability to pursue indemnification (*see* A126, 130), that argument ignored the Merger Agreement's plain language and the teachings of both *Blue Cube* and *Nucor*. *See* § I(C)(1), *supra*. Said differently, Sonova's arguments were an exercise in avoidance that sought to turn Rule 12 on its head. And, regardless, Sonova's own caselaw confirmed that the Court of Chancery "will determine what remedy (if any) it will award ***after deciding the merits*** of [Plaintiff's] claims" rather than at the Rule 12 pleading stage. *E.g.*, *Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014); *see also Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 495 (Del. Ch. 2022) ("[P]laintiffs have shown that they lack an adequate remedy at law by pointing to provisions in the Purchase Agreement that provide expressly for a decree of specific performance[.]").

The second part of Sonova's argument sought dismissal because "specific performance and injunctive relief are considered remedies" rather than causes of action, and Plaintiff styled the Complaint to include that relief as the focus of Count II (entitled "Specific Performance/Mandatory Injunction"). A123. It was a technicality, at most, because: (a) the Complaint sought that same relief in the Prayer For Relief, (A030); and (b) Sonova's own caselaw recognized that a relief-not-cause-of-action argument "clean[s] up the pleading" but otherwise "has no effect on

the case" since the Court of Chancery decides how/whether to issue specific performance at the post-trial stage of a case. *E.g., Quadrant,* 102 A.3d at 203.

Moreover, as discussed below, Sonova's argument overlooked that Chancery practice has long accepted this stylistic approach in cases where the complaint's allegations set forth an underlying breach of contract – as the Complaint plainly does here. Plaintiff's opposition papers therefore provided several exemplars of this practice for reference, including a complaint filed by Sonova's counsel. *See, e.g.*, *McWane, Inc. v. Lanier*, C.A. No. 9488-VCP (Del. Ch. June 11, 2014) (at Count I); *Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C.*, 2018-0497-SG (Del. Ch. July 16, 2018) (at Count I); *FMLS Holding Co. v. Integris Bioservices, LLC*, C.A. No. 2023-0380- EMD (Del. Ch. April 4, 2023) (at Count IV). And, notably, Sonova conceded the point at oral argument. A248:11-15.

Nor is there anything surprising about this practice, since headings in a complaint are just organizational devices whose review must be informed by the totality of the allegations in that pleading. *E.g., Protas v. Cavanagh*, 2012 WL 1580969, at *5 (Del. Ch. May 4, 2012) (giving "little weight to the labels the plaintiff assigns to the claim" and instead looking "to the nature of the wrong alleged, taking into account all of the facts alleged in the complaint"); *Hartsel v. Vanguard Gp., Inc.*, 2011 WL 2421003, at *16 (Del. Ch. June 15, 2011) ("The manner in which a

plaintiff labels its claim and the form of words used in the complaint are not dispositive"); *NACCO Indus. v. Applica Inc.*, 997 A.2d 1, 27 (Del Ch. 2009) (taking "into account the particularized allegations in the Complaint as a whole" to rule on a motion to dismiss); *see also L-5 Healthcare P'rs*, 2024 WL 3888696, at *7 ("[I]t should come as no surprise that, where feasible, our courts favor enforcement of remedy provisions calling for specific performance."). And it is undisputed that the totality of Plaintiff's pleading is incorporated by reference into Count II here, including allegations that detail Sonova's underlying breaches of Section 9.3.2 and express agreement (in Section 11.10) to specific performance as the resulting enforcement mechanism. A029, ¶ 46.[5]

In short, the Complaint establishes a reasonably conceivable entitlement to the relief sought and that is the only examination called for under Rule 12. *E.g.*, *Aizen*, 285 A.3d at 495. The Letter Decision erred when misapplying Rule 12 and concluding that the Complaint had not pled a claim for Sonova's breaches, then dismissing Count II of the Complaint because it is "tied [to] the viability" of

[5] All of which is why Plaintiff noted below that, despite Sonova's overreach in arguing that clean-up cases should be used to impose a substantive ruling against Plaintiff, there was an easy fix: a three-word amendment adding "Breach of Contract" to Count II's heading. A165-66.

Plaintiff's underlying allegations about those well-pled breaches. Ex. A, at 11-12. Reversal of the Letter Decision is therefore required as a matter of law.

The Letter Decision also adopted Sonova's stylistic argument, but seemingly acknowledged that doing so did not result in Sonova's desired outcome – *i.e.*, that it did not provide grounds for dismissal of Plaintiff's allegations about Sonova's breaches (as summarized in Count I) or prevent Plaintiff from seeking specific performance to remedy those branches. Ex. A, at 12 n.44 (quoting *Quadrant*, 102 A.3d at 203). Thus, unless Sonova were to unexpectedly argue otherwise in its answering brief on appeal, there is no need for this Court to separately address the matter because it is subsumed in reversal of the Letter Decision.

Indeed, given that the Complaint seeks specific performance in both its body and Prayer for Relief, whether Count II is "cleaned-up" ultimately has no effect on this appeal or Plaintiff's case against Sonova because reversal of the Letter Decision is still required on each of the substantive matters discussed above. And Sonova expressly acknowledged in the Merger Agreement that Plaintiff's right to specific performance and other equitable relief was so fundamental here that the parties would not have entered this transaction without it. A044, at § 11.10.

Thus, Sonova's contrary contentions below notwithstanding, it is beyond debate that Delaware common law recognizes as a matter of equity what these parties codified in Section 11.10 of their Merger Agreement: "a decree of specific performance is 'the appropriate form of relief to compel the release of funds from an escrow account.'" *Aizen*, 285 A.3d at 495 (quoting *QC Hldgs., Inc. v. Allconnect, Inc.*, 2018 WL 4091721, at * 11 (Del. Ch. Aug. 28, 2018)).

CONCLUSION

For all of the foregoing reasons, reversal of the Letter Decision is warranted as a matter of law.

GREENBERG TRAURIG, LLP

/s/ Steven T. Margolin
Steven T. Margolin (#3110)
Bryan T. Reed (#6899)
222 Delaware Avenue
Suite 1600
Wilmington, Delaware 19801
(302) 661-7000

Attorneys for
Appellant/Plaintiff-Below

Dated: September 20, 2024

EXHIBIT A

EFiled: Mar 25 2024 08:40AM EDT
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Case No. 2023-0922-PRW

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

PAUL R. WALLACE
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0660

Steven T. Margolin
Bryan T. Reed
GREENBERG TRAURIG, LLP
222 Delaware Avenue, Suite 1600
Wilmington, Delaware 19801

D. McKinley Measley
Alexander F. Hoeschel
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
Wilmington, Delaware 19899

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Decided: March 25, 2024
Corrected: March 26, 2024

RE: *Thompson Street Capital Partners, IV, L.P., in its capacity as Members' Representative v. Sonova United States Hearing Instruments, LLC*
C.A. No. 2023-0922-PRW
Defendant's Motion to Dismiss

Dear Counsel:

Before the Court is the Rule 12(b)(6) Motion to Dismiss filed by Defendant Sonova United States Hearing Instruments, LLC. For the reasons explained below, that motion is **GRANTED**.

I. BACKGROUND[1]

Plaintiff Thompson Street Capital Partners, IV, L.P. ("Thompson Street"), acting in its capacity as the Members' Representative, brings this action to recover

[1] The Court issues this Letter Opinion in lieu of a more formal writing mindful that the parties have a fuller understanding of and familiarity with the factual background and operative agreements than is recounted herein.

escrowed funds.[2] Thompson Street alleges Defendant Sonova United States Hearing Instruments, LLC ("Sonova") provided a pretextual, invalid notice of its claims objection in order to avoid releasing the escrowed funds. It seeks an order that Sonova's notice cannot serve as a basis to withhold escrowed funds, and a mandatory injunction to release the funds.[3]

A. THE MERGER AGREEMENT

Sonova acquired equity interests in Alpaca Group Holdings, LLC and Alpaca Blocker Corp. (together with Alpaca Group Holdings, LLC "Alpaca") through the Agreement and Plan of Merger (the "Merger Agreement") dated January 13, 2022.[4] Section 9.2 of the Merger Agreement provided Sonova indemnification rights against Thompson Street based on breaches of certain representations and warranties.[5] Section 9.1 prescribes that claims based on certain breaches of representations and warranties will survive until eighteen months after Closing ("Survival Date").[6]

Section 9.3.2 describes the notice procedures to submit an indemnification

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2 Verified Complaint ("Compl.") ¶ 1.

3 *Id*. Prayer for Relief.

4 *See* Defendant's Opening Brief in Support of its Motion to Dismiss ("Op. Br."), Ex. A ("Merger Agreement") (D.I. 10).

5 Merger Agreement § 9.2.

6 *Id*. § 9.1. The Court assumes the Survival Date coincides with the Escrow Deadline, described below. *See* Compl. ¶ 13.

claim.[7] Sonova must give Thompson Street:

> reasonably prompt written notice [of a Claim], but in any event not later than 30 days after [Sonova] becomes aware of such Claim, provided that no delay on the part of [Sonova] in notifying [Thompson Street] will relieve the Merger Parties from any obligation under this Article IX, except to the extent such delay actually and materially prejudices the Merger Party. Such notice by [Sonova] will describe the Claim in reasonable detail, will include the justification for the demand under this Agreement with reasonable specificity, will include copies of all available material written evidence thereof, and will indicate the estimated amount, if reasonably practicable, of Damages that has been or may be sustained by [Sonova]. [Sonova] shall have no right to recover any amounts pursuant to Section 9.2 unless the Purchaser notifies the Members' Representative in writing of such Claim pursuant to Section 9.3 on or before the Survival Date.[8]

Section 9.3(c), cited therein, states that "[t]he Indemnity Escrow Fund shall be [Sonova's] sole and exclusive source of recovery for Damages under this Agreement, other than claims for Fraud, Pre-Closing Tax Liability and breaches of Fundamental Representations."[9] In a related escrow agreement (the "Escrow Agreement"), "the Indemnity Escrow Fund" means $7,750,000, which is the amount to be deposited with the escrow agent.[10]

B. THE ESCROW AGREEMENT

The Escrow Agreement also included notice procedures; *those* procedures

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[7] Merger Agreement § 9.3.2(a).

[8] *Id*. § 9.3.2(a).

[9] *Id.* § 9.3(c).

[10] *See* Compl., Ex. B ("Escrow Agreement") Recitals; Compl. ¶ 14.

governed the release of the Indemnity Escrow Fund. Under Section 3(a)(ii) of the Escrow Agreement, if Sonova "determines in good faith that it…has a claim to a payment from the Indemnity Escrow Fund pursuant to Article IX of the Merger Agreement (a 'Claim')," it must provide written notice of the Claim to the escrow agent and Thompson Street.[11] Like the Merger Agreement, the written notice "shall specify in reasonable detail the nature and dollar amount of the Claim."[12] But unlike the Merger Agreement, it does not require "copies of all available material written evidence."[13]

"[E]ach Claim shall be deemed to be an 'Open Claim' and the Escrow Agent shall reserve within the Indemnity Escrow Amount an amount equal to the amount of such Open Claim (such reserved amount, the 'Claim Reserve')."[14] Section 3(a)(i) of the Escrow Agreement then requires that the Indemnity Escrow Fund "shall be released . . . on August 29, 2023 to the extent the balance of the account exceeded the amount asserted for any "Open Claims" (the "Escrow Deadline").[15]

C. THE NOTICE

On August 25, 2023, Sonova delivered a two-page written notice (the

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[11] Escrow Agreement § 3(a)(ii).

[12] *Id*.

[13] Merger Agreement § 9.3.2(a).

[14] Escrow Agreement § 3(a)(ii).

[15] *Id.* § 3(a)(i).

"Notice") to Thompson Street and the escrow agent of its claims for indemnification pursuant to the notice procedures of Section 9.3.2 of the Merger Agreement and Section 3(a)(ii) of the Escrow Agreement.[16] The Notice raised concerns of improper billing practices, such as services that were never provided, but nevertheless billed and reimbursed.[17] Specifically, it alleges that items and services were improperly billed under the names and billing numbers of clinicians who did not personally

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[16] *See* Compl., Ex. C. ("Notice"). Paragraphs three and four of the Notice state that:

> Purchaser has become aware of certain billing practices of the Company, its Subsidiaries and the Practice Entities that Purchaser believes are not in compliance with applicable Laws and/or third-party payor reimbursement rules or other requirements. Specifically, Purchaser believes certain items and/or services provided by the Company, its Subsidiaries and the Practice Entities to patients in multiple states (including without limitation Arkansas, Michigan, New Jersey and Tennessee) were improperly billed under the names and billing numbers of clinicians who did not personally provide the items and/or services to those patients. As a result of those billing practices, Purchaser believes the Company, its Subsidiaries and the Practice Entities have billed and received payment or reimbursement to which they are not entitled under applicable Laws and/or third-party payor reimbursement rules and other requirements. The improper billing and receipt of payment or reimbursement to which they are not entitled constitute breaches of the representations and warranties of the Company contained in Sections 3.8, 3.11, and 3.21 of the Merger Agreement. Pursuant to Section 9.2 of the Merger Agreement, the Merger Participants agreed to indemnify and hold harmless Purchaser from, against and in respect of any Damages resulting from breaches of the representations and warranties contained in the Merger Agreement.
>
> As of this date, Purchaser's investigation and analysis of these matters is continuing, and the aggregate amount of Damages relating to the Claim is not known or estimable with certainty. Based upon Purchaser's investigation and analysis to date, Purchaser's maximum Damages relating to the Claim are in excess of the Indemnity Escrow Fund. Purchaser will supplement this Claim and Claim Notice as reasonably necessary as Purchaser learns additional information and concludes its investigation and analysis. Escrow Agent is hereby directed to establish a Claim Reserve in the full amount of the Indemnity Escrow Fund.

[17] *Id*.

provide the items and/or services to those patients.[18] The Notice identifies four states where the allegedly improper billing practices occurred,[19] as well as the provisions in the Merger Agreement allegedly breached.[20] The Notice states that damages are in excess of the Indemnity Escrow Fund amount.[21]

Accordingly, Sonova directed the escrow agent to not release the funds.[22] Based on communications with Alpaca's former officers and a continuing employee, Thompson Street believes that Sonova had knowledge of the facts underlying its claims before the 30-day deadline in Section 9.3.2 of the Merger Agreement.[23]

Thompson Street initiated this action via its Verified Complaint alleging that the Notice was vague and untimely.[24] Thompson Street seeks declaratory relief (Count I) and specific performance for release of the Indemnity Escrow Fund (Count II). In its motion to dismiss, Sonova argues that the Notice satisfied the parties' contractual requirements to prevent the release of the Indemnity Escrow Fund.[25]

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[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] Compl. ¶ 24.

[24] *Id*. ¶¶ 20, 24.

[25] Op. Br. at 10-13.

II. STANDARD OF REVIEW

In resolving a Rule 12(b)(6) motion, the Court (1) accepts as true all well-pleaded factual allegations in the complaint; (2) credits vague allegations if they give the opposing party notice of the claim; (3) draws all reasonable factual inferences in favor of the non-movant; and (4) denies dismissal if recovery on the claim is reasonably conceivable.[26] The Court need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[27]

Contract interpretation is a question of law and can in the proper instance be resolved on a motion to dismiss.[28] "But, to achieve dismissal, the motion must be supported by unambiguous contract terms."[29]

A complaint fails under Rule 12(b)(6) if the plaintiff's prayers don't demonstrate that is reasonably conceivable that it would be entitled to the relief

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

[27] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011), *overruled on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1277 (Del. 2018).

[28] *E.g.*, *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) ("Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language.").

[29] *Blue Cube Spinco, LLC v. Dow Chemical Co.*, 2021 WL 4453460, at *7 (Del. Super. Ct. Sept. 29, 2021) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003); *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012).

sought.[30] "Put differently, a claim targeted for dismissal will survive [only] if 'a possiblity of recovery' can be divined from it."[31]

III. DISCUSSION

Recall, the specific claims Thompson Street penned and the relief sought. This action ***is*** about the release of the Indemnity Escrow Fund; it ***is not*** about whether Sonova has waived its right to pursue indemnification claims on the grounds that it failed to submit a valid notice by the Escrow Deadline.[32] Namely, the action is about whether Thompson Street is entitled to a release of the Indemnity Escrow Fund on the basis that the Notice sent to the escrow agent was invalid. As now explained, the Notice was valid for the purpose of stopping a release of the Indemnity Escrow Fund.

A. TIMELINESS

The Notice was timely. The Escrow Deadline was August 29, 2023.[33] Sonova

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[30] *See Cent. Mortg.*, 27 A.3d at 537; *see also VLIW Technology*, 840 A.2d at 606 (Del. 2003) (a claim survives under Rule 12(b)(6) "unless it appears with reasonable certainty that the plaintiff cannot prevail on any set of facts which might be proven to support the allegations in the complaint.").

[31] *Unbound Partner's Ltd. P'ship v. Invoy Holdings Inc.*, 251 A.3d 1016, 1023 (Del. Super. Ct. 2021) (quoting *Firefighters' Pension Sys. of Kansas Dity, Mo. Tr. v. Presidio, Inc.*, 2021 WL 298141, at *15 (Del. Ch. Jan. 29, 2021)); *Cent. Mortg.*, 27 A.3d at 537 n.13 ("Our governing 'conceivability' standard is more akin to 'possibility. . . .'").

[32] *See* Plaintiff's Answering Brief in Opposition to Defendant's Motion to Dismiss at 1 (D.I. 13) ("This case is **not** about the existence of an indemnification provision or the merits of any purported claim under that provision.") (bold and underline in original); Compl. ¶ 39.

[33] Escrow Agreement § 3(a)(i).

sent the Notice on August 25, 2023.[34] Thus, the Notice was timely under the Escrow Agreement.

For thoroughness, the Court analyzes whether it was timely under the Merger Agreement. Section 9.1 requires assertion of a claim on or before the Survival Period, *i.e.*, eighteen months after closing.[35] In this case, Sonova met that requirement by filing on August 25, 2023.[36] Sonova must also provide "reasonably prompt" written notice "not later than 30 days after [Sonova] becomes aware of such claim."[37] Thompson Street alleges that various communications indicate that Sonova was aware of the underlying facts giving rise to the claims as early January 2023.[38]

Yet, even if Sonova had knowledge of the underlying facts to trigger the 30-day notice requirement, Thompson Street hasn't pled the actual and material prejudice needed to deem the notice untimely under Section 9.3.2(a) of the Merger Agreement. Section 9.3.2(a) states that "no delay on the part of [Sonova] in notifying [Thompson Street] will relieve the Merger Parties from any obligation under this Article IX, except to the extent such delay actually and materially

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[34] Compl. ¶ 18.

[35] Merger Agreement § 9.1.

[36] Compl. ¶ 18.

[37] Merger Agreement § 9.3.2(a).

[38] *Id*. ¶ 24.

prejudices the Merger Party."[39]

Thompson Street makes three conclusory statements that Sonova's delay resulted in missed opportunities to reduce the damages associated with the improper billing practice.[40] Because the Court need not accept such vague and conclusory statements unsupported by facts, Thompson Street hasn't pled that the delay caused *actual and material* prejudice. Thus, the Notice was timely.

B. SPECIFICITY

Section 3(a)(ii) of the Escrow Agreement tracks Section 9.3.2 of the Merger Agreement. Section 9.3.2 of the Merger Agreement requires that the notice (1) describe the claim in reasonable detail; include (2) the justification for the demand; (3) copies of all available material written evidence thereof, and (4) any estimated amount of damages, if reasonably practicable.[41] Section 3(a)(ii), on the other hand, requires that the notice "specify in reasonable detail the nature and dollar amount of the Claim."[42]

The Notice satisfies Section 3(a)(ii) of the Escrow Agreement. The Notice

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[39] Merger Agreement § 9.3.2(a).

[40] Compl. ¶ 25. Specifically, Thompson suggests that the delay caused prejudice, including "(a) increasing the risk of excess Damages by disregarding contractual and statutory refund/repayment periods; (b) negating the Parties' ability to negotiate with applicable third-party payors in a timely manner where due credit would be given; and (c) potentially implicating a greater period of noncompliance in any final damages." *Id*.

[41] Merger Agreement § 9.3.2(a).

[42] Escrow Agreement § 3(a)(ii).

states that Sonova "has become aware of certain billing practices…that are not in compliance with applicable laws and/or third-party payor reimbursement rules or other requirements."[43] The Notice continues and elaborates on the allegedly improper billing practices, stating that Sonova:

> believes certain items and/or services provided by the Company, its Subsidiaries and the Practice Entities to patients in multiple states (including without limitation Arkansas, Michigan, New Jersey and Tennessee) were improperly billed under the names and billing numbers of clinicians who did not personally provide the items and/or services to those patients.

The Notice also identifies the allegedly breached representations, citing to Section 3.8, 3.11 and 3.21 of the Merger Agreement. It further notes that its investigation into the matters is pending. And, it states that damages from these allegedly improper billing practices is in excess of the Indemnity Escrow Fund.

Section 3(a)(ii) does not require Sonova to present every minute detail or prove the merits of its claims. Indeed, Section 3(a)(ii) does not require production of all available written evidence. Consistent with its limited scope and purpose, the Notice need only give notice to the escrow agent of Sonova's pending indemnification claims. It does just that. Count I will be dismissed.

Sonova also seeks to dismiss Count II. Both because a request for specific performance is a remedy, and not a standalone claim, and because that remedy is tied

[43] *See* Notice.

the Count I's viability, Count II will be dismissed.[44]

IV. CONCLUSION

The notice provisions at issue here are unambiguous and Thompson Street's prayers for relief are fatally lacking. Sonova's motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

Paul R. Wallace, Judge*

[44] *See Quadrant Structured Prod. Co. v. Vertin,* 102 A.3d 155, 203 (Del. Ch. 2014) ("Injunctions are a form of relief, not a cause of action. This court will determine what remedy (if any) it will award after deciding the merits of Quadrant's claims, taking into account the wrongs (if any), the nature of the harm, the facts and circumstances, and any other equities of the case. As a technical matter, Counts III and VI are dismissed because they seek remedies rather than assert claims. Other than cleaning up the pleadings, this ruling has no effect on the case. In the remedial stage of this action, Quadrant may seek injunctive relief, and the court has not ruled out the possibility of a permanent injunction, if warranted.").

* Sitting by designation of the Chief Justice pursuant to *In re Designation of Actions Filed Pursuant to 8 Del. C. § 111* (Del. Feb. 23, 2023) (ORDER).