EFiled: Oct 14 2024 04:33PM EDT
Filing ID 74746807
Case Number 166,2024

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,	)	C.A. No. 166, 2024
v.	)	Court Below: Court of Chancery of the State of Delaware
SONOVA UNITED STATES HEARING INSTRUMENTS, LLC,	)	C.A. No. 2023-0922-PRW
Defendant Below, Appellee.	)	

APPELLEE'S ANSWERING BRIEF ON APPEAL

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
D. McKinley Measley (#5108)
Alec F. Hoeschel (#7066)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
dmeasley@morrisnichols.com
ahoeschel@morrisnichols.com

Attorneys for Sonova United States Hearing Instruments, LLC

OF COUNSEL:

W. Brantley Phillips, Jr.
Joseph B. Crace
Margaret V. Dodson
BASS, BERRY & SIMS PLC
150 3rd Avenue South, Ste. 2800
Nashville, TN 37201
(615) 742-6200

October 14, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

The Court of Chancery correctly dismissed the Complaint, and this Court should affirm for the multiple independent reasons discussed herein.

Appellant Thompson Street Capital Partners ("TSCP") filed this action seeking "an order that Sonova's [Indemnification Claim] [N]otice cannot serve as a basis to withhold escrowed funds, and a mandatory injunction to release the funds," (Appellant's Opening Br. on Appeal 2). It did so knowing that those escrowed funds represent Appellee Sonova United States Hearing Instruments, LLC's ("Sonova") sole source of recovery for any breaches of TSCP's representations and warranties under the parties' Merger Agreement. In truth, TSCP seeks a court-ordered forfeiture of Sonova's indemnification rights under the Merger Agreement based on a tortured, draconian reading of that contract's notice requirements. Mindful of the extreme nature of its position, TSCP insists that it "does not seek a waiver finding or otherwise ask the Court to determine indemnification rights" and that the Complaint "does not require or seek a ruling about the merits of any indemnification claim." (Appellant's Opening Br. on Appeal 22 (quoting A027, ¶ 39.)) But, in asking Delaware courts to void Sonova's indemnification claim notice and mandate release of the escrow funds without any further proceedings, that is exactly what TSCP is asking this Court to do.

As the Court of Chancery correctly concluded, "[t]he Escrow Agreement also included notice procedures; *those* procedures governed the release of the Indemnity Escrow Fund…. Like the Merger Agreement, the written notice 'shall specify in reasonable detail the nature and dollar amount of the Claim.'" (Appellant's Opening Br. on Appeal, Ex. A ("Dismissal Order") 3–4.) For purposes of preventing the release of the Indemnity Escrow Fund, "[c]onsistent with its limited scope and purpose," such notice under the Escrow Agreement "need only give notice to the Escrow Agent of Sonova's pending indemnification claims." (*Id.* at 11.) And, as the Court of Chancery held, Sonova's Claim Notice "does just that…. The Notice was valid for the purpose of stopping a release of the Indemnity Escrow Fund." (*Id.* at 8, 11.) Given the Escrow Agreement's unambiguous contractual language, there is no basis for overturning the lower court's dismissal of TSCP's Complaint, and nothing in the Merger Agreement—a contract that governs Sonova's underlying indemnification rights and *not* the release of the escrow—permits a different outcome.

Indeed, even if the Court were to find the notice requirements in the Merger Agreement apply here—and they do not—TSCP still has failed to state a claim for the declaratory and mandatory injunctive relief it seeks. TSCP's Complaint does not plead the necessary elements of a claim for injunctive relief or specific performance. When, as here, a plaintiff fails to recite even the basic legal

elements of a claim for injunctive relief, much less how the facts of the case satisfy those elements, the claim must be dismissed as a matter of law.

With respect to the Merger Agreement, TSCP also has failed to plead that Sonova's notice was untimely or failed to satisfy any conditions precedent to indemnification. Per the express terms of the Merger Agreement, as long as Sonova gave written notice prior to the applicable contractual deadline, its claim was timely and must be resolved on its merits. While TSCP clearly would prefer to bypass the indemnity claims process, TSCP has no contractual right to have an otherwise timely notice declared a "nullity" or "invalid on its face" via a preemptive order releasing the indemnity escrow.

Moreover, contrary to what TSCP argues, the Merger Agreement's substantive content requirements for an indemnification claim notice are not a condition precedent to recovery for an indemnification claim. Under Delaware law, in order for notice requirements to be enforced as a preclusive condition precedent, the agreement's language to that effect ***must be plain and unambiguous*** so as to avoid an otherwise unintended forfeiture. Unlike the cases cited by TSCP, that is simply not the case here. The Merger Agreement also includes a no-waiver clause that must be read in conjunction with the notice requirements. Thus, even if the Court accepts TSCP's argument that Sonova's claim notice was "pretextual" or "vague," that would not change the proper outcome here because the Merger

Agreement's substantive content requirements do not govern the validity of Sonova's claim notice.

Finally, it is well-settled that courts can disregard conditions precedent to avoid an inequitable result. Here, TSCP seeks to obtain a forfeiture of indemnification rights valued at more than $7 million despite not having pled any actual prejudice or material harm stemming from the purported deficiencies in Sonova's claim notice. TSCP will have ample opportunity to contest Sonova's indemnification claims on the merits when those claims are litigated, and the escrowed funds will be safeguarded in a claim reserve until a final determination of the indemnification claims occur. That is what TSCP bargained for, and it cannot use this Court to change the terms of that bargain now.

SUMMARY OF ARGUMENT

In its "Summary of Argument," TSCP asserts that the Court of Chancery's decision should be reversed for two principal reasons. Sonova denies both reasons as follows:

(a) Denied. The Court of Chancery correctly held that TSCP's Complaint failed to satisfy the pleading requirements under Delaware law. Courts regularly interpret contracts and apply unambiguous contractual language to dismiss claims on a Rule 12 Motion when, as here, the plain and unambiguous language of the contracts at issue make clear that the claims lack merit.

(b) Denied. The Court of Chancery accepted TSCP's repeated assertions that this case was not about whether Sonova had forfeited or waived its right to indemnification but, instead, was about whether Sonova's claim notice was sufficient to prevent release of the Indemnity Escrow Fund. Applying the unambiguous terms of the Escrow Agreement—which controls the release of the Indemnity Escrow Fund—the lower court found that Sonova's notice was both timely and sufficiently specific to prevent release of the escrow. In addition, while the Court of Chancery correctly held that the Merger Agreement's notice provisions did not decide the instant dispute, it nonetheless concluded that Sonova's claim notice was likewise sufficient to preserve Sonova's indemnification rights under the Merger Agreement. Taking into account the entirety of the parties' agreements,

Sonova had only to serve a timely written notice to preserve its indemnification rights, which Sonova did. While the Merger Agreement includes substantive content requirements (with which Sonova complied), these requirements did not constitute conditions precedent to indemnification under Delaware law and, thus, are irrelevant to the limited issues before this Court on appeal.

COUNTERSTATEMENT OF FACTS

A. Factual Background

1. The Parties

Appellant TSCP is a private equity fund established as a Delaware limited partnership acting in its capacity as the Members' Representative for the former members of Alpaca Group Holdings, LLC ("Sellers"), which sold certain audiology practices to Appellee Sonova. (A014, ¶¶ 3–4.) This action stems from Sonova's acquisition of the audiology practices, and Sonova's subsequent discovery post-closing that the Sellers breached their representations and warranties regarding the practices' compliance with controlling healthcare billing regulations and applicable payor contracts.

2. The Transaction

The parties' rights and remedies relevant to this appeal are set out in an Agreement and Plan of Merger dated effective January 13, 2022 (the "Merger Agreement") and in an Escrow Agreement dated effective February 28, 2022 (the "Escrow Agreement"). (A014, ¶ 5.) The Escrow Agreement, which Appellant attached as an exhibit to its Complaint and therefore forms part of the pleadings, was separately entered into between TSCP, as Members' Representative, Sonova, and JPMorgan Chase Bank, N.A. (the "Escrow Agent"). (A072–90.) Pursuant to the Escrow Agreement, a portion of the Transaction Price ($7.75 million, or the "Indemnity Escrow Fund"), was deposited with the Escrow Agent as Sonova's

security and sole recourse for breaches of the Sellers' representations and warranties in the Merger Agreement. (A038; A072.)

The transactions contemplated by the Merger Agreement closed on February 28, 2022 (the "Closing"). (A016, ¶¶ 12–13.) As part of those transactions, Sellers made a number of representations and warranties in the Merger Agreement concerning the businesses that Sonova purchased, including, but not limited to, the following:[1]

> - Section 3.8: Sellers made various representations and warranties about the status of various Contracts, including that the purchased businesses were in compliance with the terms of those Contracts. (A105.)
>
> - Section 3.11: Sellers represented and warranted that "during the past six years the Company and its Subsidiaries have complied in all material respects with applicable Laws or Orders, and have not received written notice of the issuance or proposed issuance of any Order by any Governmental Authority concerning any actual violation or any alleged

[1] TSCP's Complaint failed to attach material portions of the Merger Agreement, including the representations and warranties cited in Sonova's claim notice. (A106, n.2.) Sonova attached the entire Merger Agreement as an exhibit to its Motion to Dismiss, and the entire Merger Agreement forms part of the record. *See, e.g.*, *In re Gardner Denver, Inc.*, 2014 WL 715705, at *2 (Del. Ch. Feb. 21, 2014) (explaining that a court may consider documents, such as the full Merger Agreement here, that are "'integral to a plaintiff's claim and incorporated into the complaint….' The public policy behind these exceptions is plain: allegations largely predicated upon documents not presented to the Court in the pleadings should not escape the Court's review under Rule 12(b)(6) by the plaintiff's merely alleging 'selected and misleading portions' of those documents." (first quoting *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); and then quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995))).

material violation of any Law or Order by the Company or any of its Subsidiaries." (A106.)

- Section 3.21: Sellers made a number of representations and warranties concerning the Company's compliance with Healthcare Laws, including, but not limited to, representations and warranties that (i) the Company, its Subsidiaries, and Practice Entities are "currently and ha[ve] for the past six years been in compliance in all material respects with all Healthcare Laws applicable to it or its business, properties or assets;" (ii) such entities are "in compliance in all material respects with all provisions of each Federal Health Care Program in which they participate and/or from which they receive and have received reimbursement;" (iii) all billing practices of the Company, its Subsidiaries, and the Practice Entities to all third party payors, including Federal Health Care Programs and private or commercial insurers, "are and have been in compliance in all material respects with all applicable Laws and third party payor rules, and, other than in the ordinary course and refunded to the applicable third party payor, none of the Company, its Subsidiaries or the Practice Entities have billed or received any payment or reimbursement in excess of amounts allowed by such Laws and third party payor rules;" and (iv) none of the Company, its Subsidiaries, any Practice Entity "or any of their respective officers, directors, employees, contractors or agents, has … submitted or caused to be submitted any false or fraudulent claim for payment, or any false statement material to a false claim, to a Federal Health Care Program or other third-party payor." (*See* A105–06.)

Pursuant to Merger Agreement Section 9.2, Sellers agreed to indemnify Sonova for damages or other losses relating to any breaches of the foregoing representations and warranties that Sonova identified before the conclusion of the Survival Period – *i.e.*, within eighteen (18) months of the Closing. (*See* A035, Merger Agreement Section 9.1.) Merger Agreement Section 9.3.2(a) governs the process by which Sonova notifies TSCP of any indemnification claims, stating:

> Any claim by a Purchaser Indemnified Party on account of Damages under this Article IX (a "**Claim**") … will be asserted by giving the Members' Representative reasonably prompt written notice thereof, but in any event not later than 30 days after the Purchaser Indemnified Party becomes actually aware of such Claim, provided that no delay on the part of the Purchaser Indemnified Party in notifying the Members Representative 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 the Purchaser Indemnified Party 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 the Purchaser Indemnified Party. The Purchaser Indemnified Parties 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.

(A036.) Thus, per Merger Agreement Section 9.3.2, in order to make a claim on the Indemnity Escrow Fund, Sonova is required to provide TSCP with timely (*i.e.*, within the Survival Period) written notice of any Claims. (A036–37.) Pursuant to Merger Agreement Sections 9.3(b) and 9.4.1, Sonova's recovery for any indemnity-related damages is limited to the Indemnity Escrow Fund. (A036–38.)

Additional terms specific to the Indemnity Escrow Fund, including the terms that govern its release, are set forth in the related Escrow Agreement dated effective February 28, 2022. (A014, ¶ 5; A072–90.) In order for Sonova to make a

claim against the Indemnity Escrow Fund, pursuant to Escrow Agreement Section 3(a)(ii), Sonova must separately serve a claim notice to the Escrow Agent, "specify[ing] in reasonable detail the nature and dollar amount of the claim and certify[ing] that Purchaser has delivered a copy of such Claim Notice to Representative and the information set forth in such Claim Notice complies with the terms of the Merger Agreement, upon which certification the Escrow Agent shall conclusively rely." (A073.) Once served, under Escrow Agreement 3(a)(ii), "each Claim shall be deemed to be an "Open Claim" and the Escrow Agent shall reserve within the Indemnity Escrow Account an amount equal to the amount of such Open Claim (such reserved amount, the "Claim Reserve")." (*Id.*) The Claim Reserve will be retained by the Escrow Agent until a resolution or final determination of the underlying indemnification claim. (*See id.*, Escrow Agreement 3(a)(iii).)

After the Survival Period expired, pursuant to Merger Agreement Section 9.5:

> [T]o the extent the funds remain (*sic*) in the Indemnity Escrow Fund exceed the aggregate amount of all Claims made prior to the Survival Date and not fully resolved prior to the time of determination, such excess funds shall be promptly released … for distribution to the Merger Participants in accordance with their respective Pro Rata Shares. The Members' Representative and the Purchaser shall deliver joint written instructions to the Escrow Agent instructing the Escrow Agent to make any distributions from the Indemnity Escrow Fund as expressly provided herein.

(A039.)

3. Sonova's Claim Notice

It is undisputed that, prior to the expiration of the Survival Period, Sonova delivered a claim notice (the "Claim Notice") jointly to TSCP and the Escrow Agent notifying TSCP that Sonova was investigating suspected material breaches of the Merger Agreement's representations and warranties. The Claim Notice states in pertinent part:

> 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….
>
> 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.

(A093–94.) Relatedly, as required under the Escrow Agreement, Sonova provided notice to the Escrow Agent and informed the Escrow Agent that such notice complied with the terms of the Merger Agreement, which the Escrow Agent accepted. (A026, ¶ 36.) Sonova directed the Escrow Agent to establish a Claim Reserve in the full amount of the Indemnity Escrow Fund until such claim was resolved. (*See* A027, ¶ 38; A093–94.)

B. Procedural History

a. TSCP's Complaint

TSCP filed this action on September 11, 2023. (A010.) Prior to filing, TSCP made no effort to resolve Sonova's claims as required by the Merger Agreement and rebuffed Sonova's various attempts to discuss the matters identified in the Claim Notice. TSCP's Complaint sought the following relief:

- As Count I, TSCP sought a declaration that Sonova's Claim Notice failed to satisfy the requirements of both the Merger Agreement and the Escrow Agreement, and for that reason Sonova's Claim Notice cannot serve as the basis for withholding the Indemnity Escrow Amount. (*See* A028–29, ¶¶ 41–45.) Among other things, TSCP argues that Sonova's Claim Notice was untimely, despite admitting that it was served prior to the Survival Date (the third anniversary of the Closing), and that the notice was inadequately specific for purposes of both the Merger

Agreement ***and*** the Escrow Agreement. (A020–24, ¶¶ 24–30; A026–27, ¶ 37.)

- As Count II, TSCP sought specific performance and purportedly "tailored" injunctive relief ordering Sonova to instruct the Escrow Agent to release the Indemnity Escrow Fund to TSCP, despite the fact that the Escrow Agent had accepted Sonova's Claim Notice for purposes of the Escrow Agreement and created a claim reserve. (A028-29, ¶¶ 40, 46–51.)

b. Sonova's Motion to Dismiss and the Court of Chancery's Order Dismissing this Action.

On November 30, 2023, Sonova filed its brief in support of its motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief could be granted. (A008.) In relevant part, Sonova argued the Complaint should be dismissed because TSCP failed to plead facts demonstrating that Sonova's Claim Notice was either untimely or insufficiently specific for purposes of preventing the release of the Indemnity Escrow Fund, under either the Merger Agreement or the Escrow Agreement. (A103–04.) Notably, TSCP made no effort in its Complaint to plead any of the elements of injunctive relief, despite seeking a mandatory injunction that ordinarily requires a much stronger showing. (A104–05.) The Court of Chancery reviewed full briefing and heard oral argument on Sonova's motion on March 5, 2024.

On March 26, 2024, the Court of Chancery entered an order granting Sonova's motion and dismissing TSCP's Complaint. In the Dismissal Order, the

Court of Chancery rejected TSCP's argument that only the Merger Agreement controlled and, instead, focused on the Escrow Agreement. The lower court correctly noted that the Escrow Agreement "also included notice provisions" and that ***"[t]hose*** procedures governed the release of the Indemnity Escrow Fund." (Dismissal Order 3–4.) Indeed, the Dismissal Order merely tracked TSCP's own framing of the issues in this case:

> 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…. [T]he 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.

(*Id.* at 8 (emphasis in original).)

Thus, in granting Sonova's Motion to Dismiss, the lower court rejected TSCP's argument that Sonova's Claim Notice was either untimely or insufficiently specific and dismissed Count I for declaratory relief. (*Id.* at 10–11.) The Court of Chancery held that the Claim Notice was timely for purposes of the Escrow Agreement, remarking, "[t]he Escrow deadline was August 29, 2023. Sonova sent

the notice on August 25, 2023. Thus, the notice was timely under the Escrow Agreement."[2] (*Id.* at 8–9.)

The Court of Chancery also found Sonova's Claim Notice was sufficiently specific:

> [Escrow Agreement] 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.

(*Id.* at 11.)

Finally, the Court of Chancery separately dismissed Count II "[b]oth because a request for specific performance is a remedy, and not a standalone claim, and because that remedy is tied [to] Count I's viability…." (*Id.* at 11–12.) This appeal followed.

---

[2] Though not necessary to determine the outcome of this action, the Court of Chancery also analyzed timeliness under the Merger Agreement "[f]or thoroughness." (Dismissal Order 9.) The lower court found that, despite TSCP's allegations that Sonova was aware of facts giving rise to the claim as early as January 2023, "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." (*Id.*)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT SONOVA'S CLAIM NOTICE WAS SUFFICIENT TO STOP RELEASE OF THE INDEMNITY ESCROW FUND.

A. Question Presented

Whether the Court of Chancery correctly held that TSCP failed to state a claim for relief because (1) Sonova's Claim Notice was timely for purposes of the Escrow Agreement and, although not dispositive, for purposes of the Merger Agreement (Dismissal Order 8–10); and (2) Sonova's Claim Notice was sufficiently specific for purposes of preventing release of the Indemnity Escrow Fund (A103–04; Dismissal Order 8–11.)

B. Scope of Review

The dismissal of a contractual dispute for failure to state a claim under Rule 12(b)(6) is subject to *de novo* review. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 610 (Del. 2003). A motion to dismiss is properly granted when it appears with "reasonable certainty that … the plaintiffs would not be entitled to relief." *Id.* at 610–11. In ruling on the motion to dismiss, the court considers the well-pleaded factual allegations in the complaint, as well as documents attached to the complaint that are integral to the plaintiff's claim. *Id.* at 611. The court is not required to accept conclusory allegations not supported by factual allegations. *Page v. Oath Inc.*, 270 A.3d 833, 842 (Del. 2022).

C. Merits of Argument

1. The Court of Chancery correctly found that the Escrow Agreement controls the release of the Indemnity Escrow Fund.

It is a bedrock principle of Delaware law that courts are required to "construe the [parties'] agreement as a whole, giving effect to all provisions therein." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (rejecting interpretation of contract that would effectively read another provision out of the agreement); *see United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1129 (Del. 2020) ("When interpreting contracts, we construe them as a whole and give effect to every provision if it is reasonably possible." (quoting *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013))). Accordingly, "the meaning which arises from a particular portion of the agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *Shell Oil Co.*, 498 A.2d at 1113. Delaware courts sometimes refer to this principle as giving the various provisions of an agreement a "harmonious reading." *Erving v. ABG Intermediate Holdings 2, LLC*, 2022 WL 17246320, at *5 n.39 (Del. Ch. Nov. 28, 2022) (citation omitted); *Menn v. ConMed Corp.*, 2022 WL 2387802, at *38 (Del. Ch. June 30, 2022) (rejecting interpretation of contract that would "run afoul of the principle of contract interpretation that requires [] court to

interpret the various provisions of a contract harmoniously"), *judgment entered*, (Del. Ch. 2022).

Courts apply this bedrock principle regardless of whether the various provisions are found in the same document or across the multiple documents that comprise the parties' agreement. For example, in *Fortis Advisors LLC v. Medtronic Minimed, Inc.*, 2024 WL 3580827 (Del. Ch. Apr. 29, 2024), one of the issues before the court related to the interpretation of the term "such date" in the parties' escrow agreement. *Id.* at *9. In interpreting the term, the court rejected the defendant's argument that the terms of the parties' merger agreement had "priority" over the terms of the escrow agreement. *Id.* at *9–10. Because the merger agreement included an integration clause that specifically included the escrow agreement as part of the parties' agreement, "ordinary interpretive principles" required the court to read the agreements together as a "unitary contractual scheme." *Id.* at *9; *see also Fla. Chem. Co. v. Flotek Indus. Inc.*, 262 A.3d 1066, 1082 (Del. Ch. Aug. 17, 2021) ("The Purchase Agreement contains an integration clause which confirms that the Purchase Agreement and the Terpene Agreement should be read together as a unitary contractual scheme."). Delaware law thus required the court to read the integrated agreements "harmoniously." *Fortis Advisors LLC*, 2024 WL 3580827, at *10.

Here, Merger Agreement Section 11.13 establishes the parameters of the parties' "unitary contractual scheme." *Id.* at *9. That section provides that "[The

Merger Agreement] and the Ancillary Agreements … constitute the complete, integrated agreement among the Parties with respect to the subject matter of this Agreement and such Ancillary Agreements." (A045.) Annex I defines "Ancillary Agreements" as "the Escrow Agreement." (A051.) Thus, Delaware law required the Court of Chancery to interpret the Merger Agreement and Escrow Agreement "harmoniously." It did just that. The Dismissal Order holds that the Escrow Agreement governs the release of the escrow funds, whereas the Merger Agreement governs the merits of any indemnification claim. (Dismissal Order 3–4.) This holding reads the agreements harmoniously and as a whole, just as the parties contemplated in Merger Agreement Section 11.13.

Adopting TSCP's contrary interpretation that the Merger Agreement's notice provision controls release of the escrow would render the Escrow Agreement's notice provision—which TSCP claims substantively differs from the Merger Agreement's notice provision—meaningless. According to TSCP, it is "inapposite" whether Sonova gave notice of its indemnification claim to the Escrow Agent. (Appellant's Opening Br. on Appeal 17.) But, if TSCP is to be believed that this case is not about the merits of the Sonova's indemnification claim under the Merger Agreement,[3] then it necessarily follows that the case must be about whether

[3] TSCP made such a representation no less than nine times in the lower court proceedings.

Sonova gave appropriate notice of its claim to the Escrow Agent. The Escrow Agreement necessarily governs the analysis of that issue. Otherwise, Escrow Agreement Section 3(a)(ii) serves no purpose.

TSCP further argues that the "Merger Agreement's primacy" is "reflected" in both the Escrow Agreement's requirement that Sonova certify the information in its Claim Notice complies with the terms of the Merger Agreement and its prohibition against any compliance-related assessment by the Escrow Agent. (Appellant's Opening Br. on Appeal 35–36.) TSCP goes on to explain that such 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." (*Id.* at 36.) Adopting TSCP's argument as to the interplay between the Merger Agreement and the Escrow Agreement, however, would put the Escrow Agent in exactly that position. If a Claim Notice is only valid to prevent the release of the Indemnity Escrow Fund when it complies with all the terms of the Merger Agreement, then either the Escrow Agent or the Court is forced into the position of refereeing disputes between the parties regarding the efficacy of the Claim Notice. The Escrow Agreement prohibits the first option, and reason and judicial efficiency prohibit the second. This quandary is avoided only by interpreting the Escrow Agreement and Merger Agreement as the Court of Chancery

did—the Escrow Agreement governs the release of the Indemnity Escrow Fund, and the Merger Agreement governs the merits of any indemnification claim.

TSCP argues that Sonova "acknowledged" in its briefing and/or argument to the Court of Chancery that "9.3.2 [of the Merger Agreement] controls the determinative analysis here." (Appellant's Opening Br. on Appeal 35.) The Delaware Supreme Court, however, has made clear that only statements of fact, and not conclusions of law, can constitute a judicial admission. *Levinson v. Delaware Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1186 (Del. 1992) ("This Court has held that 'judicial admissions which are binding on the tendering party are limited to factual matters in issue and not to statements of legal theories or conceptions.'"). Regardless, TSCP's argument is nonsensical. Any such statement by Sonova in briefing or in response to questions from the Court of Chancery was premised on Sonova's underlying—and consistently stated—legal position that the operative requirements for a valid notice under the Merger Agreement and Escrow Agreement ***are exactly the same***, in that all that Sonova must do to avoid a waiver of its indemnification rights is to serve a written notice prior to the Survival Period expiration. (*See* Section I.C.4 *infra* (discussing how the Merger Agreement's notice provision does not impose any condition precedent to indemnification other than timeliness).)

TSCP offered other nonsensical interpretations of the Escrow Agreement in its Opening Brief. For example, TSCP states that the release of the Escrow Fund was "mandatory and tied to a specific date." (Appellant's Opening Br. on Appeal 4.) But any release of the Indemnity Escrow Fund is necessarily qualified by the requirements of the detailed scheme set forth in both the Merger Agreement and the Escrow Agreement for the assertion and determination of indemnification claims. (A035–39.) Part of that scheme is the Merger Agreement's requirement of a claim reserve (the escrowed funds) for indemnification claims (A036–39), and the Escrow Agreement's requirement that the Escrow Agent withhold the escrowed funds in response to a timely claim notice (A073, § 3(a)(ii)). Such requirements are equally "mandatory" and must be given effect.

In short, TSCP's position is "inapposite" with Delaware law requiring courts to give effect to every term in the parties' contracts, including the Escrow Agreement that TSCP signed, and TSCP's position should be rejected for that reason.

2. The Court of Chancery correctly found that TSCP failed to plead facts demonstrating that Sonova's Claim Notice was untimely under either the Escrow Agreement or the Merger Agreement.

The parties do not dispute that Sonova had until August 29, 2023, to file a Claim Notice pursuant to the Escrow Agreement to prevent release of the

Indemnity Escrow Fund. (Appellant's Opening Br. on Appeal 4–5.) The parties also do not dispute that Sonova served its Claim Notice on both TSCP and the Escrow Agent on August 25, 2023. (*Id.* at 5.) These undisputed facts require a finding that Sonova's Claim Notice was timely under the Escrow Agreement.

In addition, while unnecessary to reaching a decision on the merits of Sonova's Motion to Dismiss, the Court of Chancery also correctly determined "for thoroughness" that Sonova's Claim Notice was timely under the Merger Agreement. As with the Escrow Agreement, TSCP does not dispute that Sonova served its Claim Notice within the "Survival Period" established by Merger Agreement Section 9.1. (*See id*.) By serving its Claim Notice on August 25, 2023, Sonova complied with this provision by making a claim for indemnification within 18 months of the Closing Date.

The Court of Chancery also correctly found that TSCP failed to plead "actual and material prejudice" stemming from Sonova's alleged failure to provide "reasonably prompt" written notice "not later than 30 days after [Sonova] becomes aware of such claim." (Dismissal Order 10.) The Court of Chancery correctly concluded that TSCP "has not pled the actual and material prejudice needed to deem the Notice untimely under Section 9.3.2(a) of the Merger Agreement." (*Id.*) This provision states that, in order to excuse the indemnifying party's indemnification obligation, any such delay in providing notice must "actually and materially

prejudice[] the Merger Party." (*Id.*) As the lower court correctly observed, TSCP did not plead any non-conclusory allegations of actual and material prejudice and, instead, improperly relied on "three conclusory statements that Sonova's delay resulted in missed opportunities to reduce the damages associated with the improper billing practices." (*Id.*)

3. The Court of Chancery correctly found that Sonova's Claim Notice was sufficiently specific for purposes of the Escrow Agreement.

The Court of Chancery correctly held that the Escrow Agreement's clear and unambiguous language requires only that a Claim Notice "specify in reasonable detail the nature and dollar amount of the Claim." (Dismissal Order 11.) *See GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) ("The Court will interpret clear and ambiguous terms according to their ordinary meaning."); *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1996) ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable."). The Court of Chancery correctly found that Escrow Agreement "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." (Dismissal Order 11.) "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." (*Id.*) Because

the Claim Notice meets these requirements, the Court of Chancery correctly held that the Claim Notice was sufficiently specific to notify the Escrow Agent of Sonova's pending indemnification claim.

4. TSCP Has Failed to State a Claim.

While the Chancery Court correctly held that the specificity requirements of the Merger Agreement are not properly at issue, TSCP has nonetheless failed to state a claim for the relief it seeks: voiding Sonova's Claim Notice and imposing a wholesale forfeiture of Sonova's right to indemnification.

a. The Merger Agreement's substantive notice provisions are not a condition precedent to indemnification relief.

The underlying merits of Sonova's indemnification claim (including whether or not Sonova's Claim Notice met substantive requirements under the Merger Agreement) are not properly at issue here, as TSCP itself has emphasized at nearly every turn. However, regardless of what TSCP claims, TSCP's argument that the Merger Agreement includes a preclusive condition precedent requiring Sonova to serve a claim notice attaching "'***all***' [supporting] material evidence" in effect seeks a judicial declaration that Sonova has forfeited its indemnification rights. (Appellant's Opening Br. on Appeal 7, 17 ("And any failure in compliance entitles Plaintiff to … an order … that compels Sonova to execute a Joint Instruction releasing the [Indemnity Escrow] Fund.").)

Delaware law, however, disfavors conditions precedent because of their tendency to cause a forfeiture. *QC Holdings, Inc. v. Allconnect, Inc.*, 2018 WL 4091721, at *7 (Del. Ch. Aug. 28, 2018) ("the law does not favor a forfeiture"); *Stoltz Realty Co. v. Paul,* 1995 WL 654152, at *9 (Del. Super. Ct. Sept. 20, 1995) (refusing to enforce condition precedent that would lead to inequitable result). For that reason, Delaware courts refuse to enforce conditions precedent that could cause a forfeiture unless the language of the agreement "clearly provide[s]" for one. *QC Holdings, Inc.*, 2018 WL 4091721, at *7; *see also Larian as Trustee of Larian Living Trust v. Momentus Inc.*, 2024 WL 386964, at *9 (Del. Sup. Ct. Jan. 31, 2024) ("unambiguous, express language" standard applied because proposed condition precedent was capable of causing forfeiture). To be enforced as a condition precedent, the parties' language must clearly and unambiguously state the consequences of the failure to satisfy the provision. *Nucor Coatings Corp. v. Precoat Metals Corp.*, 2023 WL 6368316, at *10 (Del. Super. Ct. May 19, 2023). When the parties' language does not provide for a forfeiture in clear and unambiguous terms, "then a court will construe the agreement to avoid causing one." *QC Holdings, Inc.*, 2018 WL 4091721, at *7.

By extension, Delaware courts have refused to construe provisions as conditions precedent when doing so would cause a party to forfeit an indemnification claim. For example, in *Nucor Coatings Corporation*—cited widely throughout

TSCP's opening brief—the defendant argued that the plaintiff's right to indemnity was conditioned on the plaintiff complying with certain notice requirements. 2023 WL 6368316, at *11. While the court found that the requirement of written notice was a condition precedent because the contract specifically stated that the plaintiff would have no claim for indemnification unless it provided reasonable notice of the claim, it rejected the defendant's argument that other aspects of the notice provisions were also conditions precedent. *Id.* According to the court, a separate provision requiring information substantiating the claim was not a condition precedent because the language that provision used—"shall make available"—was ambiguous and because the agreement did not "tie the consequence of forfeiture" to the requirement. *Id.* at *12.

TSCP treats the *Nucor* decision as being dispositive of its interpretation of the parties' agreements. This is a counterfactual reading of the *Nucor* decision. The *Nucor* court actually ruled ***against*** a party arguing to stretch contractual limitations on indemnification beyond their reasonable bounds, and it refused to impose a preclusive condition precedent that would work the same type of forfeiture that TSCP seeks here. *See id.* at *12 (holding that a "[c]ontract interpretation that adds a limitation not found in the plain language of the contract is untenable"). In other words, *Nucor* supports Sonova's position. TSCP's misplaced reliance on

Nucor in the absence of any other authority in support of its arguments only highlights the weakness of TSCP's appeal.

Similarly, in *Blue Cube Spinco LLC v. Dow Chemical Company*, the court refused to construe a notification provision as a condition precedent when the language of the parties' agreement did not state a consequence for failing to provide proper notice. 2021 WL 4453460, at *11 (Del. Super. Ct. Sept. 29, 2021). The court explained that construing the notice requirement as a condition precedent was particularly inappropriate when it "would cause a total forfeiture of a sophisticated indemnification scheme executed in connection with an acquisition of various chemically-sensitive and intellectual properties, and that would expose the buyer to an array of environmental liabilities." *Id.*; *see also QC Holdings*, 2018 WL 4091721, at *6–7 (refusing to construe provision as condition precedent because it was "commercially irrational").

Tellingly, TSCP repeatedly refers to the parties' purported "agree[ment] that any failure in compliance was an absolute bar on recovery," and says indemnification was contingent on "timely delivery of a claim notice that fulfilled the requirements of Section 9.3.2 of the Merger Agreement," without actually citing any contractual language that supports this interpretation. (*See*, *e.g.*, Appellant's Opening Br. on Appeal 4–6.) To be clear, unlike the provision at issue in *Nucor*, which expressly stated that all claims for indemnification "shall be subject

to the provision of proper notice as specified in" specifically identified contractual provisions, 2023 WL 6368316, at *12, the only requirement tied to Sonova's indemnification rights is the timely provision of a written claim notice. There is no dispute that Sonova served a timely written notice prior to the expiration of the Survival Period.

Despite TSCP's efforts to rewrite the Parties' agreements in their appellate brief, nothing in Merger Agreement Section 9.3.2(a) suggests—much less expressly states—that the parties intended for a failure to describe an indemnification claim in granular detail or to provide documentary evidence of the claim to result in the forfeiture of the right to assert any indemnity claim. TSCP's interpretation of the "requirements" of the notice provision suffers from the same fatal flaw as the interpretations in *Blue Cube* and *QC Holdings*: it would create a commercially irrational result. Under TSCP's interpretation, Sonova would be exposed to "an array of … liabilities," *see Blue Cube*, 2021 WL 4453460, at *11, simply by neglecting to include, for example, some of the available written evidence supporting the claim at the time the notice was served and regardless of whether TSCP was prejudiced in any way. Delaware courts have consistently rejected interpretations that result in such lopsided outcomes.

b. TSCP has not alleged any credible prejudice resulting from the substantive contents of Sonova's Claim Notice.

Furthermore, even if this Court concluded that providing documentary evidence in support of an indemnification claim was a necessary condition precedent under the Merger Agreement, which it is not, TSCP still cannot state a claim for relief as a matter of law. As set forth above, Delaware courts have long refused to enforce a forfeiture for a technical breach of a contract. *See Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970) ("[Equity] will disregard a forfeiture occasioned by failure to comply with the very letter of an agreement when it has been substantially performed."). In particular, when failure to satisfy a condition precedent would result in forfeiture, the condition ***must be material*** to the parties' agreement and the failure to satisfy it ***must result in prejudice***. *Nucor Coatings Corp.*, 2023 WL 6368316, at *14; *see also Eisenmann Corp. v. Gen. Motors Corp.*, 2000 WL 140781, at *19 n.16 (Del. Super. Ct. Jan. 28, 2000) ("Not every 'condition' necessarily rises to the stature of a preclusive condition precedent, even if a boilerplate provision says so. The Court will not impose a non-material condition precedent on the parties when it would create an absurd result."); *cf. Wilkins v. Birnhaum*, 278 A.2d 829, 830 (Del. 1971) (Delaware courts consider equities before enforcing forfeiture).

Here again, *Nucor* is instructive. The *Nucor* court recognized that, before a forfeiture can result from a failure to satisfy a condition precedent, the party seeking the forfeiture "has the burden of showing that it has thereby been prejudiced." 2023 WL 6368316, at *14. The court went on to reject a forfeiture argument when a party, like TSCP, failed to specify how it "suffered any prejudice or incurred damages from" the noncompliance, "but instead argues [the party seeking indemnification] has forfeited its right to indemnification based on a technical breach." *Id.* Again, "[t]he Court will not impose a non-material condition precedent on the parties when it would create an absurd result." *Id.*

TSCP has not pled any plausible allegations of actual and material prejudice and, instead, relied on what the Court of Chancery described as "three conclusory statements that Sonova's delay resulted in missed opportunities to reduce the damages associated with the improper billing practices." (Dismissal Order 10.) In deciding a motion to dismiss, a court is not required to accept such conclusory allegations as true "without specific supporting factual allegations." *Nucor*, 2023 WL 6368316, at *3. Moreover, a trial court is required to accept only those "reasonable inferences that logically flow from the face of the complaint" and "is not required to accept every strained interpretation of the allegations proposed by the plaintiff." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *see also Page*, 270 A.3d at 842. Here, the lower court appropriately found

that it was not bound to accept TSCP's "vague and conclusory statements [of purported prejudice] unsupported by facts." (Dismissal Order 10.) The lower court's holding should not be disturbed, especially when doing so would result in an inequitable forfeiture of Sonova's bargained-for indemnification rights.

c. TSCP's arguments impermissibly ignore the Merger Agreement's no-waiver provision.

Ignoring a contract's no-waiver provision would be contrary to bedrock principles of Delaware contract law requiring courts to construe the parties' agreement as a whole, making certain to give effect to *all* terms of their agreement. *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). Accordingly, Delaware courts refuse to interpret a single provision of an agreement in a way that "conflicts with the agreement's overall scheme or plan." *Id.* TSCP's interpretation of the Merger Agreement gives no effect to the agreement's no-waiver provision.

TSCP's position has no basis in law. As the *Nucor* court explained, when, as here, the parties' no-waiver provision required that any waiver be in writing and not be presumed, such a provision "protect[s] a party from forfeiture that might have resulted in the absence of such a provision." *Nucor*, 2023 WL 6368316, at *13; *see also Blue Cube*, 2021 WL 4453460, at *2. Thus, "[t]he assertion that [Sonova] has forfeited this right [to indemnification] by failing to comply with a purported

condition precedent contravenes [the no-waiver] provision." *Nucor*, 2023 WL 6368316, at *13. "An attack on these technical grounds is precisely what [a no-waiver clause] is meant to avoid." *Id.* As no such written waiver has occurred in this case, the Merger Agreement's no-waiver provision is fatal to TSCP's interpretation of the parties' agreements.

CONCLUSION

As set forth above, TSCP's challenge to the lower court's rulings on Sonova's Motion to Dismiss has no merit. The lower court correctly held that TSCP's Complaint failed to state a claim for release of the Indemnity Escrow Fund and properly dismissed the action pursuant to Del. Ct. Ch. Rule 12(b)(6). For the reasons set forth herein, the judgment of the lower court should be affirmed.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

OF COUNSEL:

W. Brantley Phillips, Jr.
Joseph B. Crace
Margaret V. Dodson
BASS, BERRY & SIMS PLC
150 3rd Avenue South, Ste. 2800
Nashville, TN 37201
(615) 742-6200

/s/ D. McKinley Measley
D. McKinley Measley (#5108)
Alec F. Hoeschel (#7066)
1201 N. Market Street
Wilmington, DE 19801
(302) 658-9200
dmeasley@morrisnichols.com
ahoeschel@morrisnichols.com

Attorneys for Sonova United States Hearing Instruments, LLC

October 14, 2024