EFiled: Jan 26 2022 02:41PM EST
Filing ID 67266152
Case Number 366,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REX MEDICAL, L.P., a Pennsylvania limited partnership, Plaintiff Below, Appellant, v. ARGON MEDICAL DEVICES, INC., a Delaware corporation, Defendant Below, Appellee.	:	No. 366, 2021 Court Below: Court of Chancery of the State of Delaware C.A. No. 2020-1080-JTL REDACTED - PUBLIC VERSION FILED JANUARY 26, 2022

APPELLANT'S OPENING BFIEF

Dated: January 11, 2022

Of Counsel:

McCARTER & ENGLISH, LLP
Adam J. Budesheim
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 622-4444

MCCARTER & ENGLISH, LLP
Daniel M. Silver (#4758)
Sarah E. Delia (#5833)
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, Delaware 19801
Tel: (302) 984-6300

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

NATURE OF PROCEEDINGS

In 2015, Appellant Rex Medical L.P. ("Rex") sold its medical device product line of retrievable inferior vena cava ("IVC") filters, which it marketed under the brand names Option and OptionElite, to Appellee Argon Medical Devices, Inc. ("Argon") pursuant to an Asset Purchase Agreement (the "APA"). Ten million dollars of the purchase price was put aside as an escrow fund to secure indemnity for Argon for any indemnifiable losses that Argon actually incurred within fifteen months of closing. When the fifteen months expired without Argon suffering any indemnifiable losses, the entire amount remaining in the escrow fund should have been released to Rex, per the APA and the corresponding Escrow Agreement, but Argon laid claim to the escrow fund and thereby prevented the escrow agent from releasing the funds to Rex. Although Rex timely objected and demanded release of the escrow fund to Rex, Argon effectively froze the funds. The $10 million remains in escrow, untouched by either party.

Rex filed the action below seeking (a) declarations pursuant to the APA and Escrow Agreement that Argon's purported claim to the escrow fund was invalid; and (b) an award of specific performance requiring Argon to issue with Rex a joint instruction to the escrow agent directing the release of the escrow fund to Rex. Rex moved for judgment on the pleadings, and Argon cross-moved. After briefing

and a hearing, Vice Chancellor Laster incorrectly ruled in Argon's favor, finding that Argon's notice of potential future losses, despite Argon suffering no actual indemnifiable Loss, prevents the release of the escrow fund to Rex until the underlying claims are resolved. The Vice Chancellor's ruling is contrary to the plain language of the APA and the Escrow Agreement, both of which require Argon to suffer or incur indemnifiable losses before it can make a claim on the escrow fund, and should be reversed by this Court.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by failing to interpret the terms of the APA and Escrow Agreement relating to the release of an indemnification escrow fund according to their plain meanings, but instead interpreting the agreements to conform with the court's existing views of how model purchasing and escrow agreements operate.

2. The Court of Chancery erred in concluding that Argon's Draw-Down Requests (as defined in the Escrow Agreement) met the requirements of the Escrow Agreement to preclude the distribution of the Escrow fund to Rex, despite Argon not having suffered or incurred any indemnifiable Losses (as defined in the APA) as of March 23, 2017 (the "Escrow Release Date").

STATEMENT OF FACTS

A. The Parties

Rex is a Pennsylvania limited partnership that specializes in the development, manufacturing and marketing of innovative, minimally invasive medical devices. (A18 at ¶ 13). Argon is a Delaware corporation that manufactures, markets, distributes, and sells various medical devices for use in various markets. (A193 at ¶ 14).

B. The APA and the Escrow Agreement

On December 23, 2015, Rex and Argon executed the APA and related agreements, including the Escrow Agreement which was an exhibit to the APA. (A195-96 at ¶ 23). Through the APA, Rex sold to Argon several product lines, including the Option and OptionElite IVC filter product line, as well as related intellectual property, all component parts, and any improvements to the product line. (*Id.*). Argon agreed to pay $160,000,000 (the "Purchase Price") for the assets it acquired (A59 at § 3.1), but $10,000,000 of the Purchase Price was deposited with an escrow agent for the purpose of securing indemnification payments that might become due to Argon in the first fifteen months after the close of the transaction. (A59 at § 3.2(b); A100-01 at § 2(b)). At closing, Argon paid Rex only $150,000,000, with the other $10,000,000 placed into escrow (the "Escrow

Fund"). (A59 at § 3.2(a); A196 at ¶ 24). The Escrow Fund is "to be held and released in accordance with the provisions of [the APA] and the Escrow Agreement." (A59 at § 3.2(b); A196 at ¶ 25).

Section 8.1 of the APA sets forth Rex's indemnification obligations, for which the Escrow Fund acts as a temporary security for fifteen months after the closing date for the APA. Section 8.1 states that Rex shall: "indemnify and hold harmless [Argon] against and in respect of all Losses which [Argon] *suffer[s] or incur[s]* as a result of, arising out of or in connection with . . . any Excluded Liability." (A83-84 at § 8.1 (emphasis added); A198 at ¶ 32). Excluded Liabilities include claims arising out of product liability claims involving products manufactured by or on behalf of Rex before the APA closing, including the Option and OptionElite IVC filters.[1] (A57 at § 2.4(e); A199 at ¶ 34).

If Argon "suffers or incurs" Losses arising out of Excluded Liabilities *within the fifteen months after closing*, Argon can submit a Draw-Down Request to demand payment from the Escrow Fund for indemnifiable Losses actually incurred

[1] [redacted] (A56 at § 2.3(e)). [redacted] (A55-56 at § 2.3(c); *see also* A132 at § 8(d)).

by Argon. (A89 at § 8.7; A100-01 at §§ 2(b) and 2(c)). The Escrow Agreement does not have any effect on Argon's indemnification rights under the APA – it neither creates, expands, conditions, nor limits Argon's rights to indemnification. Instead, the Escrow Fund provides a source of funding for, and only for, indemnification claims made during the fifteen-month term of the Escrow Agreement for then-indemnifiable Losses. Indeed, any requests by Argon for payment from the Escrow Fund had to have been made by the Escrow Release Date of March 23, 2017, the final day of the fifteen-month period.[2] (A89 at § 8.7). There is no provision in the APA or the Escrow Agreement that contemplates claims against or payments from the Escrow Fund for *potential* Losses that *may be* incurred after the Escrow Release Date. Absent indemnifiable Losses already incurred and properly noticed, the Escrow Fund was to be released on March 23, 2017. Consequently, any indemnifiable Losses suffered or incurred by Argon after the Escrow Release Date would not be paid by the Escrow Fund. Expiration of the fifteen-month period did not alter or limit Argon's rights to seek indemnification

[2] The Escrow Fund labels this date the "Final Release Date." (A101 at § 2(c)). The term "Escrow Release Date" will be used herein in place of "Final Release Date" to reduce the number of defined terms used in this briefing. The trial court adopted the same convention in its MJOP Order. (Ex. A at ¶ 11, n.1).

from Rex; it simply means that Argon cannot turn to the Escrow Fund for payment after the Escrow Release Date.

Section 8.7 of the APA states that, "*in accordance with the Escrow Agreement*, any remaining portion of the Escrow Fund that is not subject to then-pending claims for indemnification pursuant to Section 8.1(a)" as of the Escrow Release Date shall be released to Rex. (A89 at § 8.7 (emphasis added); A197 at ¶ 28). Section 2(c) of the Escrow Agreement clarifies that "then-pending claims" for indemnification are "Outstanding Claim Amounts." (A101). Outstanding Claim Amounts include "the amounts listed in each *valid* and unpaid Draw-Down Request made by [Argon] on or prior to [March 23, 2017]." (*Id.* at § 2(c) (emphasis added)). A "Draw-Down Request" is "a written notice signed by an officer of [Argon], stating (A) that [Argon] *is* entitled to payment from the Escrow Fund pursuant to Article 8 of the [APA] and (B) *the amount due* to [Argon]." (A100-01 at § 2(b) (emphasis added)).

The Escrow Agreement further states that [redacted] (*Id.*). If Rex timely delivered an Objection Notice, the Escrow Agent was precluded from

disbursing the disputed portion of the Draw-Down Request until the Escrow Agent received either a joint instruction from Rex and Argon or a final, non-appealable judgment or decree of a court of competent jurisdiction. (*Id*.).

C. The IVC Filter Lawsuits

Beginning in or around March 2016, numerous plaintiffs filed lawsuits against Rex and Argon alleging injury from the use or implantation of Option or OptionElite filters. (A200 at ¶ 37). By the Escrow Release Date, approximately 66 lawsuits had been filed and served on Argon and Rex alleging injury from IVC filters. (A201 at ¶ 38). Rex, through its insurer, paid for the defense of both Rex and Argon against these claims; Argon did not incur a single penny of Loss relating to these claims as of the Escrow Release Date. (A15 at ¶¶ 5-6; *see also* A142, A160 (referring to potential Losses)).

D. Argon's Purported Draw-Down Requests

On March 17, 2017, less than one week before the Escrow Release Date of March 23, Argon sent a letter titled "Draw-Down Request" to the Escrow Agent, demanding release of the entire Escrow Fund to Argon and attaching an exhibit listing 56 IVC filter lawsuits filed and served on Argon. (A141; A201 at ¶ 39). Argon claimed that each lawsuit constituted an "Excluded Liability" under the APA. (A141).

On March 23, 2017 (the Escrow Release Date), Argon sent a letter titled "Supplemental Draw-Down Request" to the Escrow Agent, again demanding release of the entire Escrow Fund based on the pending lawsuits. (A159; A201 at ¶ 40). This supplemental letter included exhibits listing the 56 lawsuits identified in the March 17 letter, plus an additional 10 lawsuits not included in the March 17 letter. (A162-81). The March 17 letter and the March 23 letter both claimed that "Argon . . . is entitled to payment from the Escrow Fund pursuant to Article 8 of the Purchase Agreement for all Losses that it . . . *may suffer or incur* as a result of, arising out of, or in connection with" the 66 lawsuits listed in the letters. (A142; A160 (emphasis added)). Neither letter identified any amount of Losses actually incurred as of the date of the letter. Instead, both letters confirmed that "at this time, Argon is unable to determine with specificity the amount of Losses that Argon . . . *may suffer or incur* in connection with" the 66 lawsuits listed in the letters and purported to reserve Argon's rights "relating to the *potential Losses* arising out of or in connection with" the 66 lawsuits. (*Id*. (emphasis added)). Despite conceding no actual Losses, the letters stated that "the amount due to Argon is the entire balance of the Escrow Funds." (*Id*.[3]).

[3] Argon denies that it ever demanded that the entire Escrow Fund be released to it (A190 at ¶ 7), but the contents of the March Draw-Down Requests speak for

Simply put, Argon's Draw-Down Requests both characterize the claimed losses as *future*, *possible*, *contingent losses which might never happen*; neither request advanced a presently sustained or actually incurred loss.

E. Rex Timely Objects to the Invalid Draw-Down Requests

On March 23, 2017, Rex served on the Escrow Agent an Objection Notice to Argon's March 17 and March 23 letters and demanded the Escrow Agent release the entire Escrow Fund to Rex. (A183). Rex's Objection Notice stated that Argon's purported Draw-Down Requests were "not valid because Argon is not currently entitled to payment from the Escrow Fund pursuant to Article 8 of the Purchase Agreement." (A184). The Objection Notice also stated that because the purported Draw-Down Requests were not valid, they "cannot be considered Outstanding Claim Amounts for purposes of Section 2(c) of the Escrow Agreement" and that "[a]s there are no Outstanding Claim Amounts as of the date hereof (the Final Release Date), Rex is entitled to disbursement of the entire balance of the Escrow Fund . . . ." (A185).

---

themselves to the contrary. Moreover, if Argon had not demanded the entire balance of the Escrow Fund, the Escrow Agent would have released to Rex the amount of the Escrow Fund not covered by Argon's demand. (A101 at § 2(c)).

F. The Proceedings Below

Rex filed a complaint in the Court of Chancery on December 21, 2020, seeking a declaration pursuant to the APA and Escrow Agreement that Rex is entitled to the balance of the Escrow Fund and an award of specific performance requiring Argon to issue with Rex a joint instruction to the Escrow Agent directing the release of the Escrow Fund to Rex. (A14). Argon answered on January 19, 2021. (A187). On January 27, 2021, Rex filed a motion for judgment on the pleadings, requesting a declaration of its right to the entire Escrow Fund and an order requiring Argon to issue a joint instruction to the Escrow Agent releasing the fund to Rex (A214). Argon cross-moved on April 1, 2021. (A245). Following briefing and oral argument before Vice Chancellor Laster, the Court of Chancery ruled in Argon's favor (the "MJOP Order"), and final judgment was entered on October 19, 2021 (the "Final Order").[4] In the MJOP Order, the trial court concluded that Argon had submitted valid Draw-Down Requests against the Escrow Fund and that the Escrow Agent should maintain the Escrow Fund until the claims at issue in Argon's Draw-Down Requests were resolved. (Ex. A). Rex timely filed its notice of appeal on November 18, 2021.

[4] The MJOP Order and Final Order are attached hereto as Exhibits A and B, respectively.

As of the date of this brief, the $10,000,000 initially deposited into the Escrow Fund remains untouched.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT A CLAIM FOR INDEMNIFICATION WITHOUT A CORRESPONDING RIGHT TO INDEMNIFICATION PRECLUDED TIMELY RELEASE OF THE INDEMNIFICATION ESCROW FUND

A. Question Presented

Did the Court of Chancery commit legal error by ruling that, under the unambiguous terms of the APA and Escrow Agreement, a Draw-Down Request by Argon without a corresponding right to indemnification as of the Escrow Release Date precluded release of the Escrow Fund to Rex on the Escrow Release Date? This question was raised in the trial court and is thus preserved for appeal. (A219-42).

B. Standard of Review

The standard for this Court's review of the Court of Chancery's judgment is *de novo*. A trial court's decision on a motion for judgment on the pleadings necessarily "presents a question of law" that this Court "'review[s] de novo,' to determine whether the court committed legal error in formulating or applying legal precepts." *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010) (quoting *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993)).

C. Merits of the Argument

The trial court erred by failing to interpret the agreements together in accordance with their plain terms and improperly imputing meaning to provisions of the APA and the Escrow Agreement based at least in part on the trial court's "sense of the world." (A384 at 47:4-12; *see also* Ex. A ¶¶ 3, 8, 29(b) (referring to "custom" and citing model agreements)). When read together, the agreements are in harmony and make clear that because Argon did not suffer or incur any indemnifiable Losses prior to the Escrow Release Date, Argon's purported Draw-Down Requests were invalid and thus Argon has no claim to any of the Escrow Fund. Consequently, the entirety of the Escrow Fund should have been released to Rex in March 2017.

The terms of the APA and Escrow Agreement are straight-forward: the Escrow Fund was to be held for a period of 15 months, and if Argon incurred any indemnifiable Losses during that period, it could submit a Draw-Down Request demanding payment for the Losses it suffered. In order to be valid, a Draw-Down Request must state that Argon "is entitled to payment from the Escrow Fund" and the "amount due" to Argon from the Escrow Fund. (A100-01 at § 2(b)). The Escrow Agent was to release the balance of the Escrow Fund to Rex at the end of

the 15-month period, except to the extent there were Outstanding Claim Amounts, which are defined as "valid" and unpaid Draw-Down Requests. (A101 at § 2(c)).

Argon's purported Draw-Down Requests did not meet these requirements. The purported Draw-Down Requests stated only that Argon "*may* suffer or incur" Losses in the future and expressly conceded that Argon had not suffered or incurred any indemnifiable Losses. (A142, A160; *see also* Ex. A at ¶ 23 ("it is undisputed that to date, Buyer has not suffered any Losses"). Because these Draw-Down Requests did not establish Argon was "entitled to payment from the Escrow Fund" and did not state an "amount due" Argon from the Escrow Fund, the Draw-Down Requests were not valid. They did not give Argon any right to the Escrow Fund and should not have precluded Rex from receiving the full amount of the Escrow Fund. The trial court should have granted Rex's motion for judgment on the pleadings and ordered Argon to issue a Joint Instruction with Rex to the Escrow Agent directing release of the entire Escrow Fund to Rex. As it stands, Argon's purported claims for indemnification will require the Escrow Fund, which has been held for nearly five years, to continue to be held for an indeterminate period until the underlying lawsuits against Argon and Rex are resolved, despite the fact that Argon has incurred no indemnifiable Losses. This Court should

reverse and remand the trial court's ruling with instructions to enter judgment in favor of Rex.

The trial court's foundational error in reaching its conclusion that the Escrow Fund should be withheld from Rex despite Argon not suffering any indemnifiable losses as of the Escrow Release Date stems from a misinterpretation of the phrase "claims for indemnification." (*See, e.g.*, Ex. A at ¶ 25). Section 8.7 of the APA requires that on the Escrow Release Date – the end of the 15-month escrow period – the balance of the Escrow Fund is to be released to Rex, except for any portion "subject to then-pending claims for indemnification." (A89 at § 8.7). As discussed further below, based on the language of the indemnification obligation in the APA (*see* A83 at § 8.1(a)), the APA's requirement that the indemnification obligation should be interpreted "in accordance with the Escrow Agreement" (*see* A89 at § 8.7), and the overall context of the APA and the Escrow Agreement, it is clear that "claims for indemnification" are demands by Argon for payment of indemnifiable Losses *already suffered or incurred*. The trial court, however, relied on external sources such as model agreements (with terms that differ from the APA and Escrow Agreement) and unrelated notice provisions of the APA to conclude that "claims for indemnification" includes any notice of a potential, future claim for indemnification. In other words, a party can have

"claims for indemnification" without having any corresponding right to indemnification (because the party did not suffer any indemnifiable Loss). The trial court erroneously conflated notice requirements for a Third Party Claim with requirements for a claim for indemnification for actual Loss, and concluded that such notice of a potential loss was sufficient to prevent release of the Escrow Fund to Rex. The terms and conditions of the agreements, as addressed below, refute the trial court's interpretation and conclusions and require a ruling that the entire Escrow Fund should be released immediately to Rex because Argon did not suffer any indemnifiable Loss.

1. The Agreements Are Unambiguous and the Trial Court Erred by Relying Upon Extrinsic Authorities Which Are Inapposite in Any Event.

Because the trial court concluded in its MJOP Order that the agreements are unambiguous, the trial court erred by interpreting the APA and Escrow Agreement through the prism of its preconception of how the agreements should operate. Contracts are to be interpreted according to the plain meaning of the terms contained therein. *Neurvana Med., LLC v. Balt USA, LLC*, 2020 WL 949917, at *15 (Del. Ch. Feb. 27, 2020) (quoting *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 104 (Del. 2013)). Nevertheless, during oral argument on the parties' motions for judgment on the pleadings, the trial court expressed its "sense of the

world" that notice of a claim – even for *potential* Losses – "keeps the escrow amount locked up until the claim is resolved." (A384 at 47:4-12). The court's view derived from its "worldly experience" handling such cases and from reviewing treatises such as the ABA *Model Stock Purchase Agreement* and the ABA *Model Asset Purchase Agreement*. (*Id.*). This predisposition of the trial court was not confined to oral argument, but rather flowed into the court's written order, which clearly follows the trial court's "sense of the world," rather than the actual language of the agreements. (Ex. A at ¶¶ 3, 8, 29(b)). Indeed, the trial court's central conclusion – that Argon need not suffer indemnifiable Loss to make a claim for indemnification that "keeps the escrow amount locked up" – relied on commentary to the model agreements as legal support and ran contrary to the actual terms and conditions of the agreements.

The trial court cited to model agreements to support its conclusion that under a "standard contractual structure" of indemnification obligations and escrow funds, "if a claim for indemnification has been made, then escrowed funds in the amount of the claim remain in escrow until the claim is resolved." (Ex. A at ¶ 8 (citing 2 ABA Mergers & Acquisitions. Comm., *Model Stock Purchase Agreement with Commentary* 20 (2d ed. 2010); 2 ABA Comm. on Negotiated Acquisitions, *Model Asset Purchase Agreement with Commentary* 54 (2001)). However, the first

treatise cited by the court addresses a model escrow agreement provision that explicitly provides for notice of a claim "it *may* have" under the purchase agreement. (Ex. C at p. 19 (emphasis added)). As discussed in more detail below, the agreements here expressly require that a claim against the Escrow Fund must be for Losses actually suffered or incurred. The model agreements contain different language, and it was error for the trial court to rely on treatises to inform its analysis of how the present APA and Escrow Agreement should work.

Other provisions of the model agreements also differ from the APA and the Escrow Agreement here. For example, the commentary states that under an escrow agreement, "no particular form or details are required for a Claim." (Ex. D at p. 295). The Escrow Agreement here, however, has very specific requirements for a claim against the Escrow Fund, most significantly, a statement that Argon is entitled to payment from the Escrow Fund and the amount due from the Escrow Fund. (A100-01 at § 2(b)). The trial court's determination that what amounts to nothing more than an indemnification *notice* (even without a right to receive indemnification) should preclude release of the Escrow Fund to Rex is reflective of the contents of the treatises on the model agreements, not the actual terms and conditions of the APA and the Escrow Agreement.

These treatises appear to have influenced the court to interpret the agreements contrary to their plain meaning. Under the actual terms of the agreements – as opposed to the trial court's "sense of the world" – Argon has no right to any of the Escrow Fund and the entire amount should have been ordered released to Rex.

The trial court further asserted that if Rex had wanted an agreement that required Argon to incur actual Losses before it could make a claim on the Escrow Fund, it should have written such a contract. (Ex. A at ¶ 29(b)). Respectfully, that is exactly the framework for which Rex bargained and to which Argon agreed. The trial court, by viewing the APA and the Escrow Agreement in light of its "sense of the world" and "commonly used structures," misinterpreted the provisions of the agreements contrary to their plain meaning. The trial court misconstrued provisions in the agreements to allow Argon to place an indefinite hold on the Escrow Fund based on the possibility that it may at some point in the future incur indemnifiable Losses. The agreements contemplate no such result.

2. The Trial Court Erred by Failing To Interpret the APA and the Escrow Agreement Together in Accordance with the Plain Meaning of Their Terms.

a. Argon Must Have Suffered or Incurred Losses To Make a Valid Claim Against the Escrow Fund.

Both the APA and the Escrow Agreement contain provisions requiring the release of the balance of the Escrow Fund to Rex at the conclusion of 15 months, except to the extent the fund is subject to a valid demand by Argon for payment from the Escrow Fund for Losses *actually incurred* by Argon prior to the end of the 15-month period. The APA provision states, in part:

> Release of Escrow Fund: On the date that is fifteen (15) months after the Closing Date (the "Escrow Release Date"), Buyer and Seller shall jointly instruct the Escrow Agent to release and pay to Seller, in accordance with the Escrow Agreement, any remaining portion of the Escrow Fund that is not subject to then-pending claims for indemnification pursuant to Section 8.1(a).

(A89 at § 8.7). The trial court, however, focused on the phrase "not subject to then-pending claims for indemnification," and concluded that the phrase means that any assertion by Argon of a possibility of Losses in the future serves to preclude release of the Escrow Agreement to Rex. (Ex. A at ¶ 25). The trial court stated that "claims for indemnification" do not require an actual right to indemnification, but can include notices of *potential* Losses that could give rise to a right to indemnification *in the future* – an overly broad interpretation that is

inconsistent with the language of the APA and aligns with the trial court's preconceptions of how the agreements *should* operate rather than the actual terms contained therein.

The trial court's analysis wholly ignores APA Section 8.1(a) (A83) in interpreting "indemnification claim," despite the clear requirement of Section 8.7 (A89) that the pending claims for indemnification must be made pursuant to that very section. Section 8.1(a) of the APA does not define "indemnification claims," but it establishes that Argon's right to indemnification from Rex is only for "Losses which [Argon] suffer[s] or incur[s]" arising out of certain defined liabilities. (A83 at § 8.1(a)). The only basis for indemnification per Section 8.1 is Losses actually suffered or incurred; there is no indemnification for potential Losses or future Losses not yet incurred. Therefore, a plain reading of the phrase "then-pending claims for indemnification pursuant to Section 8.1(a)" requires a claim for indemnification to be based on Losses already suffered or incurred by Argon.

Instead of interpreting "claims for indemnification" in the context of APA Section 8.1(a) as expressly required by the APA, the trial court relied on Section 8.3, "Notices and Defense of Claims; Settlements." (A85-86). The trial court erroneously described Section 8.3 as specifying the requirements for asserting a

claim for indemnification (Ex. A at ¶ 6), but to the contrary, Section 8.3 merely sets forth the conditions for Argon to provide notice to Rex. APA Section 8.3 defines the term "Claim Notice" (but not "claims for indemnification") and requires that a party give notice of a Third Party Claim against it, or the facts or liability giving rise to a claim, as a condition precedent to an indemnification claim. (A85 at § 8.3(a) ("If a Party hereto seeks indemnification under this Article 8, such Party . . . shall give written notice (a "Claim Notice") to the other Party …")). Section 8.3 does not set forth the requirements for indemnification, nor does Section 8.3 dispense with the requirement of Section 8.1(a) that indemnification is only for Losses suffered or incurred by Argon. The trial court thus erred in it's reliance on Section 8.3, rather than Section 8.1(a) as expressly directed by the "Release of Escrow Funds" provision, Section 8.7.

Contrary to the trial court's assertion, the "plain language" of Section 8.3 does not support its reading of "claims for indemnification." The trial court reasoned that because a Claim Notice, per a parenthetical in Section 8.3, only requires a statement of the amount of a claim "if known and quantifiable," that no actual Loss is necessary for the claim. (Ex. A at ¶ 6). However, the wording of the parenthetical in Section 8.3 assumes at a minimum there is already Loss and simply recognizes the party may not yet know the amount of the Loss.

b. The APA Provisions Regarding Release of the Escrow Funds Must Be Interpreted in Conjunction with the Escrow Agreement.

The trial court's interpretation and application of the "then-pending claims for indemnification" language from the "Release of Escrow Fund" provision in APA Section 8.7 also runs afoul of the express requirement that Section 8.7 be interpreted "in accordance with the Escrow Agreement." (A89). Both Section 8.7 of the APA, which addresses release of the Escrow Fund to Rex, and Section 3.2 of the APA, which establishes the Escrow Fund, state the fund it is to be held and released "in accordance with the Escrow Agreement." (*See* A89 at § 8.7; A59 at § 3.2(b)). Clearly, these two agreements, drafted and executed together, are intended to be read and construed together. Instead, the trial court relied on an unsupported interpretation of the undefined term "indemnification claim" to override the clear requirements of the Escrow Agreement.

When the agreements are read together, it is clear that the "then-pending claims for indemnification" referenced in the APA are claims made against the Escrow Fund. The Escrow Agreement contains a provision that parallels the "Release of Escrow Fund" provision in the APA, but contains significantly more detail. (*See* A101 at § 2(c)). It is a maxim of contract interpretation that a more general provision of a contract should be interpreted in the context of more specific

provisions. *See Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 2021 WL 305741, at *7 (Del. Ch. Jan. 29, 2021), *aff'd*, No. 61, 2021, 2021 WL 5754886 (Del. Dec. 3, 2021) ("Specific language in a contract controls over general language[.]") (citing *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005)). Here, the specifics of the Escrow Agreement provide context for understanding the APA's general guidance on the release of the Escrow Fund to Rex.

The APA states that the Escrow Agent shall release the "remaining portion" of the fund "not subject to then-pending claims for indemnification," and the Escrow Agreement specifies how to calculate the amount not subject to pending indemnification claims. (*Compare* A89 at § 8.7 *with* A101 at § 2(c)). The Escrow Agreement states that the amount to be paid to Rex is the "remaining portion" of the Escrow Fund

> over . . . the aggregate of all Outstanding Claim Amounts (as defined below), if any, subject to any indemnification claims timely made by [Argon] pursuant to the Purchase Agreement that are pending as of such date (each such pending claim, an "Unresolved Claim"). For purposes of this Section [2(c)], "Outstanding Claim Amount" means, as of a particular date, an amount equal to the aggregate of (i) the amounts listed in each valid and unpaid Joint Instruction and (ii) the amounts listed in each valid and unpaid Draw-Down Request made by [Argon] on or prior to the [Escrow Release Date].

(A101 at § 2(c)). Under this provision, the amount of the Escrow Fund to be released to Rex is the remaining portion less the Outstanding Claim Amounts, which are valid and unpaid Draw-Down Requests.[5] A Draw-Down Request must assert that Argon "is entitled to payment from the Escrow Fund" and the amount due Argon. (A100-01 at § 2(b)). In other words, Argon must have a present right to indemnification for Losses actually suffered or incurred in order to make a valid Draw-Down Request. The trial court agreed that Rex's interpretation of the plain meaning of these terms, by themselves, was reasonable (Ex. A at ¶ 29), which should have ended the analysis with a ruling in Rex's favor. It is undisputed that Argon did not suffer or incur any indemnifiable Losses by the Escrow Release Date. Therefore, Argon could not make a valid Draw-Down Request, and, without a valid Draw-Down Request, Argon has no right to any of the Escrow Fund.

Likewise, "Outstanding Claim Amount" is also "subject to" established-but-unpaid indemnification claims timely made by Argon. In other words, an Outstanding Claim Amount must be based on a pending claim for, and presently established right to, indemnification under the APA. An unpaid Draw-Down Request made under the Escrow Agreement is not enough to prevent release of the

[5] There were no Joint Instructions issued so that is not relevant to the analysis here.

Escrow to Rex; Argon must also have made an indemnification claim for the Losses incurred that remains pending.

The structure of this provision undermines the trial court's ruling in at least two ways. First, it directly ties retention of the Escrow Fund to Draw-Down Requests and, as noted, Draw-Down Requests require a present entitlement to payment from the Escrow Fund, not a general indemnification claim for potential or future Losses. Second, by making clear that an Outstanding Claim Amount must be subject to an indemnification right under the APA, the Escrow Agreement makes clear that an indemnification claim is necessary, but not sufficient, for a valid claim against the Escrow Fund that would prevent its release to Rex after the Escrow Release Date. In other words, by incorporating indemnification claims as necessary for an Outstanding Claim Amount, the Escrow Agreement makes clear that an indemnification claim by itself does not preclude the release of the Escrow Fund to Rex without a valid and unpaid Draw-Down Request.

The trial court misconstrues these provisions in its analysis. When addressing Section 2(c), the trial court stated that "The Escrow Agreement Release-Date Provision also expressly refers to the release of the Escrow Fund being 'subject to any indemnification claims timely made by Buyer pursuant to the Purchase Agreement that are pending as of such date (each such pending claim, an

"Unresolved Claim")."' (Ex. A at ¶ 29(a)). The trial court's statement is incorrect. The release of the Escrow Fund was not "subject to any indemnification claims timely made"; rather, the release of the Escrow Fund was subject to Outstanding Claim Amounts, and it is the Outstanding Claim Amounts that are "subject to any indemnification claims timely made." The trial court's analysis erroneously bypasses the Outstanding Claim Amounts requirement (which requires a valid and unpaid Draw-Down Request), but the plain language of the Escrow Agreement does not permit the court's interpretation.

It makes perfect sense for the Escrow Agreement to require more than a pending claim for potential indemnification to prevent release of the Escrow Fund to Rex. Section 2(c) of the Escrow Agreement authorizes the Escrow Agent to release the Escrow Fund to Rex after the Escrow Release Date if there are not any Outstanding Claim Amounts. (A101). The Escrow Agreement does not require any action from Rex or Argon for the agent to release the funds; the release is automatic if there are no Outstanding Claim Amounts. An indemnification claim notice under the APA would not prevent the release of the Escrow Fund to Rex because the Escrow Agent would not be aware of the indemnification claim, unless it was included in a Draw-Down Request. Under the APA, Argon and Rex are required to provide indemnification claim notices only to each other (A85 at §

8.3(a)); there is no requirement or mechanism by which an indemnification claim notice would be transmitted to the Escrow Agent other than as part of a Draw-Down Request. Thus, the trial court's conclusion that a pending indemnification claim notice, without meeting additional requirements of APA Section 8.1 and the Escrow Agreement, prevents release of the Escrow Fund to Rex is fatally flawed – the Escrow Agent would not be aware of the indemnification claim and would release the fund to Rex regardless of the claim, unless it is made part of a valid Draw-Down Request timely submitted.

c. Argon's Draw-Down Requests Were Not Valid.

As discussed above, Argon's Draw-Down Requests were not valid because they did not meet the requirements for a Draw-Down Request under the Escrow Agreement. The Escrow Agreement requires a Draw-Down Request to state that Argon "is entitled to payment from the Escrow Fund pursuant to Article 8 of the Purchase Agreement" and "the amount due" to Argon. (A100-01 at § 2(b)). As noted above, the trial court acknowledged that Rex reasonably interpreted the plain meaning of this provision to require Argon to have a present right to indemnification with a specific amount presently due.[6] (Ex. A at ¶ 29). Clearly,

[6] Indeed, the very name – "Draw-Down Request" – confirms it is intended to be a request for *payment*, not a placeholder for potential future Losses.

Argon's Draw-Down Requests did not meet the plain language requirements. The Draw-Down Requests asserted that Argon "may suffer or incur" Losses from the lawsuits and stated that the amount due was unknown but "could reasonably be expected to exceed" the Escrow Fund. (A142; A160). Argon did not identify a present right to indemnification nor did it identify a specific amount presently due. (Ex. A at ¶ 23). Notably, these deficiencies in the Draw-Down Requests were not just a failure to meet a specific form for the request; rather, they are a fundamental inability by Argon to meet the requirements for a Draw-Down Request because Argon had no present right of indemnification.

The trial court erred by concluding that, despite failing to meet the express requirements of a Draw-Down Request, Argon's Draw-Down Requests were "valid" when placed in "context." (Ex. A at ¶ 29). The court identified three bases for this "context," but each has already been refuted:

1.) The court's flawed interpretation of "claims for indemnification" as not requiring actual Losses is contrary to the APA's requirement that a claim for indemnification be supported by actual indemnifiable Losses (*see* Ex. A at ¶ 29(a) (citing A88 a § 8.7);

2.) The court's citation to "indemnification claims timely made" in the Escrow Agreement misconstrues the phrase as a limit on the release of

the Escrow Fund, when that phrase actually modifies the term "Outstanding Claim Amounts" (*see* Ex. A at ¶ 29(a) (citing A101 § 2(c)).

3.) The court relied on its interpretation of a "commonly used structure" from the model purchase and escrow agreements, rather than applying the APA and Escrow Agreement as written (*see* Ex. A at ¶ 29(b) (citing model agreements).

As discussed above, the trial court's misapplication of these provisions is contrary to the language of the APA and the Escrow Agreement. The bases on which the trial court relied to avoid the plain meaning of the requirements for a Draw-Down Request do not support the trial court's ruling.

The trial court summarized its explanation by describing a two-tiered system of indemnification claims, but this summary highlights that the court's reasoning has no basis in the language of the agreements and is inherently contradictory. The trial court explained its position as follows:

> Seller argues that the Draw-Down Requests were invalid because Buyer had not yet suffered Losses, but this argument confuses Buyer's ultimate right to indemnification (which requires Losses) with Buyer's ability to make a claim for indemnification (which does not require Losses). It also confuses Buyer's right to receive payment from the Escrow Fund (which requires Losses) with Buyer's assertion of an entitlement to amounts in the Escrow Fund (which only requires a claim for indemnification).

(Ex. A at ¶ 28). The description ties back to the trial court's erroneous reliance on APA Section 8.3, "Notice and Defense of Claims; Settlements," to interpret "claims for indemnification," rather than Section 8.1(a), "Seller's Indemnity," as expressly required by the APA. (*See supra* Section 2(a)). The above-quoted paragraph from the trial court's MJOP Order appears to conflate "Claim Notice," which is the requirements for Argon advising Rex that it is named in a Third Party Claim, with "claim for indemnification," which is a demand for indemnification for Losses actually incurred, per Section 8.1(a) of the APA. There is no support in the APA for the trial court's assertion that a "claim for indemnification" "does not require Losses."

The second sentence from the trial court purports to distinguish between Argon's right to receive payment from the Escrow Fund from Argon's entitlement to amounts in the Escrow Fund, but there clearly is no relevant difference between the two. Right to receive payment and entitlement to amounts in the Escrow Fund are effectively the same. The word "entitlement" is defined to mean "[a]n absolute right to a (usu. monetary) benefit . . . granted immediately upon meeting a legal requirement." Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster Online Dictionary (defining "entitlement" to include "a right to benefits specified especially by law or contract"); *In re Solera Ins. Coverage Appeals*, 240 A.3d

1121, 1132 (Del. 2020) ("This Court often looks to dictionaries to ascertain a term's plain meaning."). Thus, entitlement to the amounts in the Escrow Fund means an absolute right to amounts in the Escrow Fund. Argon cannot have an "entitlement" to amounts in the Escrow Fund unless it has suffered or incurred indemnifiable Losses. Before Argon has incurred indemnifiable Losses, it has no "absolute right" to any portion of the Escrow Fund; therefore, without indemnifiable Losses, Argon has no "entitlement" to any amount of the Escrow Fund. Thus, trial court's contrary assertion is inherently flawed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment in favor of Argon and remand for entry of judgment in favor of Rex.

Dated: January 11, 2022

Of Counsel:

McCARTER & ENGLISH, LLP
Adam J. Budesheim
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Tel: (973) 622-4444

McCARTER & ENGLISH, LLP

/s/ *Daniel M. Silver*
Daniel M. Silver (#4758)
Sarah E. Delia (#5833)
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, Delaware 19801
Tel: (302) 984-6300

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2022, a true and correct copy of the **Redacted – Public Version of Appellant's Opening Brief** was served via File & ServeXpress on the following counsel of record:

Raymond J. DiCamillo, Esquire
John M. O'Toole, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

/s/ *Daniel M. Silver*
Daniel M. Silver (#4758)