IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IMPACT INVESTMENTS COLORADO II, LLC and BAKER INVESTMENT TRUST,	)	
Petitioners/Counterclaim Respondents,	)	C.A. No. 4323-VCP
v.	)	
IMPACT HOLDING, INC.,	)	
Respondent/Counterclaim Petitioner.	)	

MEMORANDUM OPINION

Submitted: May 15, 2012
Decided: August 31, 2012

Edmond D. Johnson, Esq., Bradley W. Voss, Esq., PEPPER HAMILTON LLP, Wilmington, Delaware; *Attorneys for Petitioners/Counterclaim Respondents.*

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PARSONS, Vice Chancellor.

This action is before me on a motion for summary judgment relating to alleged breaches of a stock purchase agreement entered into by the parties.

The stock purchase agreement called for a post-closing purchase price adjustment and specified the procedure for determining that adjustment. The stock purchase agreement also provided for an escrow account to serve as the source for indemnity claims made within one year of the closing. The day before the cut-off for indemnity claims against the escrow account, the buyer sent the sellers a notice asserting that the sellers had breached a number of the representation and warranty provisions and thereby caused damages in excess of the amount held in escrow.

The sellers filed this action to obtain release of the escrow account arguing, among other things, that the purchase price adjustment forecloses the buyer from reasserting many of its claims and that the buyer's notice was insufficient. The buyer responded by denying sellers' claims and filing counterclaims seeking to recover damages for breach of certain representations and warranties against both the escrow account and the sellers directly. Sellers have moved for summary judgment on all counts of their petition and of buyer's counterclaim.

Having considered the parties' arguments, the express terms of the governing contracts, and the record before me at this stage, I find there are genuine issues of material fact as to whether the buyer complied with the notice provisions of the stock purchase agreement. Because buyer's claims regarding sugar credits and trade show expenses were taken into account at the purchase price adjustment stage, however, sellers are entitled to summary judgment on these claims. With regard to the other asserted

claims, including those related to other inventory, prepaid expenses, and returns and allowances, there are genuine issues of material fact as to whether, for example, those items were taken into account in connection with the purchase price adjustment. Therefore, I grant in part and deny in part the sellers' motion for summary judgment.

I. BACKGROUND

A. The Parties

Impact Confections, Inc. ("Impact Confections" or the "Company") is a Colorado-based candy manufacturer famous for its Warheads brand of candy. Impact Confections was founded by Bradley C. Baker ("Baker")[1] in 1980.

Impact Investments Colorado II, LLC ("IICII") and Baker Investment Trust ("Baker Trust" and, together, the "Sellers") were the majority shareholders of Impact Confections before the sale, and stand in the position of Petitioners and Counterclaim Respondents in this action (collectively "Petitioners"). Before the transaction giving rise to this dispute, Baker served as President, Chief Executive Officer, and director of Impact Confections. He currently serves as the manager of IICII and the Trustee of Baker Trust.

In 2008, Sellers entered into a transaction with Impact Holding, Inc. ("Holding" or "Buyer"), whereby Holding purchased the stock of Impact Confections (the "Sale"). Holding, the Respondent and Counterclaim Petitioner ("Respondent"), is a Delaware

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[1] Bradley C. Baker's brother, L. Allen Baker, Jr., is the former Executive Vice President, Chief Financial Officer, Secretary, and Treasurer of Impact Confections. Because Allen Baker plays only a minor role in the matter currently before me, I will refer to him, if necessary, as Allen Baker in this Memorandum Opinion.

corporation formed by Brazos Private Equity Partners, LLC ("Brazos") for the purpose of acquiring and holding Impact Confections.

The Sale closed on January 15, 2008. Between the closing date and August 2009, Baker also served as an officer and director of both Holding and Impact Confections.

B. Facts[2]

1. The underlying transaction

On January 15, 2008, Holding and IICII entered into a Stock Purchase Agreement ("SPA") whereby Holding acquired 100% of the outstanding capital stock of Impact Confections in return for cash.[3] Respondent paid a "Preliminary Purchase Price" of $38 million less the sum of: (1) $2.7 million paid to a minority interest holder; (2) $2 million held in an escrow account; (3) the aggregate amount of all outstanding debt at closing; (4) any transaction costs unpaid at closing; and (5) an amount to be contributed by Sellers to Buyer.[4] As is often the case in transactions of this type, a number of items were indeterminate at the time of closing. Consequently, the Purchase Price was to be adjusted within sixty days of closing pursuant to a specified process (the "Purchase Price Adjustment").

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[2] Unless otherwise noted, the facts set forth in this Memorandum Opinion are undisputed and taken from the pleadings, admissions, and affidavits submitted to the Court.

[3] Burns Aff. Ex. E, SPA, § 2(e).

[4] *Id.* § 2(b)(iii)(2).

2. The Purchase Price Adjustment

The process for making the Purchase Price Adjustment is outlined in Section 2(e) of the SPA. The agreement acknowledged that the Preliminary Purchase Price was based on "Target Working Capital" of $9,800,000.[5] Within sixty days of closing, Buyer was required to deliver a "Closing Statement" to Sellers setting forth "Net Working Capital" as of the closing date ("Final Working Capital"), in accordance with GAAP.[6] If Final Working Capital exceeded Target Working Capital, Buyer would pay Sellers the difference, and if Target Working Capital exceeded Final Working Capital, Sellers would pay Buyer the difference.[7]

Upon receipt of the Closing Statement, Sellers had thirty days to deliver to Buyer a "Notice of Disagreement" as to any disputes Sellers had with respect to the Closing Statement or Final Working Capital.[8] If Sellers submitted a Notice of Disagreement, the parties then had thirty days to negotiate in good faith to resolve the dispute. If not resolved within that thirty-day period, the dispute then was to be arbitrated by an independent accounting firm.[9]

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5 *Id.* § 1.

6 *Id.* § 2(e)(i).

7 *Id.* § 2(e)(iii).

8 *Id.* § 2(e)(ii).

9 *Id.*

If Seller did not submit a Notice of Disagreement or if the arbitrator made a final determination, the resolution of Final Working Capital would be "final, conclusive and binding on the Parties."[10] Notably, the SPA further provided that Sellers would "not be obligated to indemnify Buyer against any Adverse Consequences as a result of, or based upon or arising from, any claim or liability to the extent such claim or liability is *taken into account* in determining any adjustment of the Purchase Price."[11]

3. Representations and warranties in the SPA

The SPA also contained a number of representations and warranties concerning the Company. Most importantly, Sellers represented and warranted that: (1) the Company's Financial Statements had been prepared in accordance with GAAP ("Financial Statements Representation"); (2) the last twelve months of EBITDA ("LTM EBITDA") was at least $7 million ("LTM EBITDA Representation"); (3) other than inventory written off immediately before closing to remove unusable and unsaleable inventory, all inventory was usable and saleable in the ordinary course of business ("Inventory Representation"); (4) all taxes had been timely paid ("Tax Representation"); and (5) Accounts Receivable reserves had been established and were adequate ("Accounts Receivable Representation").[12]

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10 *Id.*

11 *Id.* § 6(f) (emphasis added).

12 *Id.* §§ 4(g), (h), (i), (l), and (p).

4. The Escrow Account

The SPA provided that $2,000,000 of the Purchase Price was to be withheld and deposited into an Escrow Account ("Escrow"), which would be governed by the Escrow Agreement ("EA").[13] All indemnification claims arising out of representations and warranties concerning the Company were to be pursued against the Escrow.[14] The Escrow also had a sunset provision, whereby all rights to indemnification terminated at 5:00 p.m., Dallas, Texas time on January 15, 2009 (twelve months after closing).[15]

5. Procedure for seeking indemnification

To state an effective claim for indemnification, Buyer had to comply with specific notice procedures. The SPA requires that Buyer provide Sellers with written notice (a "Claim Notice") that described "the applicable Adverse Consequence, the amount thereof, if known, and the method of computation of such Adverse Consequence, all with reasonable particularity and containing a reference to the provisions of this Agreement."[16] The same section of the SPA, however, provides that failure to follow these procedures does not relieve the "Indemnifying Party" of its obligations "except to the extent that such Indemnifying Party is materially prejudiced as a result of such failure to give

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13 *Id.* § 2(b)(iii)(2); Burns Aff. Ex. I, EA.

14 SPA § 6(k)(iv).

15 *Id.* § 6(k)(vi); EA § 3(d)(ii).

16 SPA § 6(c)(i).

notice."[17] The EA requires that the "Claimant" "*promptly* notify the non-Claiming Party in writing of any sums . . . subject to indemnification."[18] According to the EA, a Claim Notice shall consist of "a description of the Claim, the amount (which may be estimated in the event of Indemnity Claims) of the Claim in United States dollars and, in the case of an Indemnity Claim, each Buyer Group Member."[19] The failure to provide prompt notice, however, does not amount to a waiver "unless the resulting delay materially and adversely prejudices the non-Claiming Party."[20]

6. Petitioners and Respondent participate in the Purchase Price Adjustment

On March 14, 2008, Buyer, through Lucas T. Cutler and Vinson & Elkins L.L.P., submitted a "Closing Statement setting forth the Final Working Capital Pursuant to Section 2(e) of the [SPA]."[21] In an attached chart, Buyer stated that Final Working Capital was $11,126,819, which represented a "Working Capital Overage" of $1,326,819 above the SPA-defined Target Working Capital of $9,800,000.[22]

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17 *Id.*

18 EA § 3(b) (emphasis added).

19 *Id.*

20 *Id.*

21 Voss Aff. Ex. DD, Closing Statement.

22 Closing Statement Ex.

On April 11, 2008, within the thirty days required by Section 2(e)(ii) of the SPA, Sellers, through Baker, sent Buyer a Notice of Disagreement.[23] The Sellers disputed Buyer's: (1) $52,066.00 disallowance of unamortized trade show expenses from the "Prepaid Assets" line item; (2) $43,421.00 disallowance of sugar credits from the "Other Current Assets" line item; and (3) $68,013.00 inclusion of an accrual for insurance policies and premiums in the "Accrued Expenses" line item.[24]

There is no dispute that the parties negotiated the disputed items in good faith.[25] Both sides acknowledge, for example, that there were express negotiations over differences concerning sugar credits and unamortized trade show expenses.[26] On May 16, 2008, Buyer, through its counsel, agreed to a revised calculation of Final Working Capital that included the disputed $52,066.00 of unamortized trade show expenses as a Prepaid Asset, and, by implication, left unchanged the other two disputed items.[27] That same day, Sellers acknowledged and agreed to the revised calculation, and on May 19, 2008, Buyer caused a $1,378,885 Working Capital Overage to be wired to Sellers.[28]

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23 Voss Aff. Ex. EE, Notice of Disagreement.

24 *Id.*

25 Voss Aff. Exs. FF, GG, and HH.

26 Pet'rs' Op. Br. 15; Resp't's Ans. Br. 24 ("During the purchase price adjustment process, the parties expressly negotiated regarding differences over sugar credits and trade show expenses.").

27 Voss Aff. Ex. II.

28 Voss Aff. Exs. JJ and KK.

7. Respondent files Claim Notice and Petitioners file Notice of Dispute

On January 14, 2009, Buyer provided Sellers with a Claim Notice for indemnification in the amount of the full $2,000,000 held in Escrow for Adverse Consequences amounting to more than $2,300,000.[29] The Claim Notice included: (1) a list of the SPA sections corresponding to the representations and warranties Buyer accused Sellers of breaching; (2) a statement that Sellers had failed to fulfill their obligation to pay "Tax Liabilities"; and (3) an assertion that Sellers had failed to calculate properly the Final Working Capital and Working Capital Overage.[30]

On January 19, 2009, Sellers provided Buyer with a Notice of Dispute of Buyer's Claim Notice ("Notice of Dispute").[31] The Notice of Dispute asserted that the Claim Notice failed to provide a description of the claim or the amount of such claim.[32] The Notice of Dispute also alleged that the Claim Notice's failure to describe the claims materially prejudiced Sellers' ability to determine whether to accept or reject the claims and their opportunity to take advantage of investment opportunities.[33]

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29 Burns Aff. Ex. B, Claim Notice.

30 *Id.* § 1(a), (b), (c).

31 Voss Aff. Ex. SS, Notice of Dispute.

32 Notice of Dispute at 2.

33 *Id.*

C. Procedural History

On January 30, 2009, Sellers filed a petition in this Court (the "Petition") seeking, among other things: (1) a declaratory judgment that Buyer had failed to provide legally sufficient notice of its claim; (2) a judgment in favor of Sellers for damages for breach of contract; (3) an order compelling Buyer to release the Escrow; and (4) attorneys' fees.

On March 19, 2009, Buyer filed its original Answer to Petition and Counterclaim. Buyer's Answer alleged that Sellers had withheld and misrepresented financial information, and, because Buyer's claims were the result of such fraud, those claims should not be limited by the SPA. Buyer's Counterclaim sought, among other things: (1) a declaratory judgment that Sellers had breached their representations and warranties and that Buyer's claims are meritorious; (2) an injunction compelling Sellers to notify the Escrow Agent to release the full Escrow Amount to Buyer; and (3) damages arising out of the breach of the SPA and fraud.[34]

On May 29, 2009, Sellers moved to dismiss Counts II and IV of the Counterclaim and for judgment on the pleadings as to Count I of the Counterclaim. Sellers argued that Buyer had failed to state a claim or allege fraud with particularity and that the Court could decide the adequacy of Buyer's Claim Notice based on the terms of the SPA and EA. On July 22, 2009, Buyer moved for leave to amend its Counterclaim to provide clarification and describe certain changed circumstances. I granted that motion on

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[34] Answer & Countercl. at 18.

August 13, 2009, and Buyer filed its First Amended Counterclaim (the "Amended Counterclaim") on December 4, 2009.

On January 26, 2012, Sellers moved for summary judgment in their favor on all counts of their Petition and the Amended Counterclaim. After extensive briefing, the Court heard argument on May 15. This Memorandum Opinion constitutes my ruling on Sellers' motion.

D. Parties' Contentions

Sellers seek summary judgment on their claim for release of the Escrow and on the Amended Counterclaim. Specifically, Sellers argue that the procedure for resolving Final Working Capital and the Purchase Price Adjustment forecloses Buyer from seeking damages for breach of related representations and warranties. Sellers also request summary judgment on the ground that Buyer's Claim Notice was insufficient to preserve any claim to the Escrow.

In response, Buyer denies that the Purchase Price Adjustment forecloses its claim for indemnification. Buyer also maintains that its Claim Notice fully satisfied the requirements of the SPA. Hence, Buyer not only opposes Sellers' motion, but asks the Court to enter summary judgment in its favor as to both issues.

II. ANALYSIS

A. Standard for Summary Judgment

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law."[35] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[36] In addition, summary judgment may be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial"[37] or when the Court "decides that a more thorough development of the record would clarify the law or its application."[38]

When an issue presented for summary judgment is one of contractual interpretation, "the role of a court is to effectuate the parties' intent,"[39] taking the contract as a whole and "giving effect to each and every term."[40] If the language of the agreement is "clear and unambiguous," the reviewing court finds the parties' intent in the ordinary

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35 *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

36 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

37 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

38 *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

39 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

40 *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011); *see also GMC Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.").

and usual meaning of the words they have chosen.[41] If, however, "the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions"[42] from extrinsic evidence, such as "overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry."[43] Determining intent from extrinsic evidence "may be accomplished by the summary judgment procedure in certain cases where the moving party's record is not *prima facie* rebutted so as to create issues of material fact."[44] Generally, on a motion for summary judgment, the moving party must show there is no genuine issue of material fact, and "summary judgment may not be awarded if the [disputed contract] language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation."[45]

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41 *Lorillard Tobacco Co.*, 903 A.2d at 739 (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195–96 (Del. 1992)); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007), *aff'd sub nom. Robino-Bay Court Plaza, LLC v. W. Willow-Bay Court LLC*, 985 A.2d 391 (Del. 2009) (TABLE).

42 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (footnotes omitted); *see also Hynansky v. Vietri*, 2003 WL 21976031, at *2 n.14 (Del. Ch. Aug. 7, 2003) (citing *Eagle Indus.*, 702 A.2d at 1232) (considering extrinsic evidence on motion for summary judgment).

43 *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (internal quotation marks and footnote omitted), *aff'd*, 7 A.3d 486 (Del. 2010) (TABLE).

44 *Eagle Indus*., 702 A.2d at 1233.

45 *GMC Capital Invs., LLC*, 36 A.3d at 784.

Court of Chancery Rule 56(d) provides that:

> [I]f, after a summary judgment motion, a trial is still necessary, such as where judgment is not rendered upon the whole case or for all the relief requested, the court shall, if practicable, determine what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.[46]

If the court finds that there are uncontroverted facts, "[i]t shall thereupon make an order specifying the facts that appear without substantial controversy . . . and direct [] such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."[47]

In this case, both Sellers and Buyer have demonstrated the existence of genuine issues of material fact regarding the main claims and defenses asserted against them. For that reason, I conclude that both motions should be denied for the most part. But, pursuant to Rule 56(d), I also have determined that a small number of issues are without substantial controversy. To the extent indicated in this Memorandum Opinion, those issues and the underlying facts regarding them will be deemed established at trial. As to the other issues for which I deny summary judgment, I have not attempted to address them in detail because they require a more thorough development of the facts through a trial.

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[46] *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 4896227, at *7 (Del. Ch. Dec. 18, 2009).

[47] Ct. Ch. R. 56(d).

B. Did Respondent's Claim Notice Preserve Its Alleged Entitlement to the Escrow?

Both the SPA and the EA impose notice requirements on Buyer. The SPA's notice requirements are set forth in Section 6(c)(i), which requires any "Buyer Group" that "believes it has suffered Adverse Consequences" to notify Sellers. Regarding the specific manner of providing notice, Section 6(c)(i) provides that:

> Any notice given pursuant to this [Section] shall be in writing and shall describe the applicable Adverse Consequence, the amount thereof, if known, and the method of computation of such Adverse Consequence, all with reasonable particularity and containing a reference to the provision of this Agreement . . . provided, however, that the omission by Indemnified Party to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligations under this [Section], except to the extent that such Indemnifying Party is materially prejudiced as a result of such failure to give notice.

Section 6(a)(vi), which sets forth an "Expiration Date" for all claims, is also relevant. It provides:

> All rights to indemnification provided for in Section 6(a) shall terminate at the close of business on January 15, 2009; provided, that the obligation to indemnify the Buyer Group Members shall continue after January 15, 2009 as to any Adverse Consequence of which any Buyer has notified the Baker Sellers in accordance with Section 6(c) or Section 6(d) on or prior to January 15, 2009.

The EA also specifies parallel notice requirements for claims against the Escrow. EA Section 3(b) states:

> The party or parties making any Claim hereunder (the "Claiming Party") shall promptly notify the non-Claiming party in writing of any sums which the Claiming Party claims are subject to indemnification ("Claims Notice"). Failure to

> exercise promptness in such notification shall not amount to a waiver of such claim unless the resulting delay materially and adversely prejudices the non-Claiming Party. Such notice shall consist of a description of the Claim, the amount (which may be estimated in the event of Indemnity Claims) of the Claim in United States dollars and, in the case of an Indemnity Claim, each Buyer Group Member.

EA Section 4 also establishes an Expiration Date for indemnification claims. It states:

> Expiration of Indemnification Claims. Any indemnification Claim against the Escrowed Property for indemnification of Adverse Consequences pursuant to Section 6 of the Purchase Agreement that is not asserted by Buyer in a writing received by the Sellers and the Escrow Agent on or before 5:00 p.m., Dallas, Texas time, on the twelve month anniversary of the date of this Agreement (the "Expiration Date") may not be asserted or pursued and shall be irrevocably waived, and Buyer shall not be entitled to make any Indemnification Claims against the Escrowed property for indemnification with respect thereto.

The day before the cut-off for indemnity claims, Buyer provided Sellers with a Claim Notice. The parties essentially agree that the Claim Notice was filed before the one-year deadline, but disagree as to its sufficiency. Both the SPA and the EA required any Claim Notices to be filed before 5:00 p.m. on January 15, 2009, and Buyer filed the Claim Notice on January 14, 2009. Therefore, it will be deemed established at trial pursuant to Rule 56(d) that Buyer timely filed the Claim Notice.

The parties, however, fiercely contest: (1) whether Buyer provided adequate notice and (2) whether, in any event, Buyer's claims are preserved because Sellers failed to demonstrate material and adverse prejudice. I now address each of these issues in turn, beginning with the sufficiency of Buyer's Claim Notice.

1. Sufficiency of the Claim Notice

The parties strongly disagree as to whether the Claim Notice provided adequate detail to meet the requirements of Section 3(b) of the EA and Section 6(c)(i) of the SPA.

Section 3(b) of the EA requires the Claiming Party to supply: (1) a description of the claim; (2) the amount of the claim; and (3) a description of each Buyer Group Member. Similarly, Section 6(c)(i) of the SPA requires a Claim Notice to be in writing and specify: (1) the applicable Adverse Consequences; (2) the amount of the Adverse Consequences; and (3) the method of computation of that amount, all with reasonable particularity. The Claim Notice indicated that the claim was brought on behalf of Holding, as "Buyer Group Member," and made a claim for Adverse Consequences in excess of $2,300,000. Therefore, Buyer's Claim Notice appears to meet the second and third requirements of EA Section 3(b) and the second requirement of SPA Section 6(c)(i). The Claim Notice also: (1) listed, at least by reference to SPA section numbers, the representations and warranties Sellers are charged with breaching; (2) alleged that Sellers had failed to pay their Tax Liabilities; and (3) asserted damages related to the miscalculation of Final Working Capital. Thus, in at least some respects, the Claim Notice also arguably satisfies the first requirement of both EA Section 3(b) and SPA Section 6(c)(i).

Nonetheless, Sellers contend that the Claim Notice lacked the particularity required by both the EA and the SPA. Sellers argue that, at the very least, Buyer should have provided a "factual or legal explanation for Respondent's assertions," a description

of the breaches, claims, or amounts, and the applicable subsections.[48] Buyer retorts that its Claim Notice was sufficient to put Sellers "on notice," and that the level of detail Sellers seek "is simply not required by the SPA or the [EA]."[49] Buyer's argument, however, evades the express language of the SPA requiring that a Claim Notice be made with "reasonable particularity."[50]

In that regard, the parties raise two questions that the Court cannot resolve on summary judgment. The first is the legal question as to the proper meaning of "with reasonable particularity." The second is the factual question of whether Buyer's Claim Notice satisfied the "reasonable particularity" requirement.

"A contract is not ambiguous merely because the parties disagree as to its proper construction. Instead, ambiguity exists when the terms of a contract are reasonably susceptible to different interpretations or have two or more different meanings."[51] Here, the term "reasonable particularity" is susceptible to two reasonable interpretations. Buyer argues that "reasonable particularity" requires the Claiming Party to itemize the particular representations and warranties that were breached, such that the other party is on "notice." Sellers, on the other hand, argue that "reasonable particularity" requires significantly more detail. Determining the meaning of "reasonable particularity" in the

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48 Pet'rs' Op. Br. 45; Pet'rs' Reply Br. 19–20.

49 Resp't's Ans. Br. 27–28.

50 SPA § 6(c)(i).

51 *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at *6 (Del. Ch. Mar. 1, 2007).

context of this case is made more difficult by the fact that although that phrase is used in SPA Section 6(c)(i), it does not appear in EA Section 3(b). Because I conclude resolution of the meaning of "reasonable particularity" would benefit from the "more highly textured factual setting of a trial," I deny summary judgment on this issue.[52] Moreover, the issue of whether the Claim Notice actually meets the requirements of the applicable contracts also raises questions of fact, and must be determined after a full trial on the merits.[53]

2. Applicability of material prejudice provisos

The parties also have raised a second issue regarding notice. That issue is whether, even if Buyer's Claim Notice was insufficient, Buyer's claims still are preserved because Sellers were not materially and adversely prejudiced by any delay in supplying an adequate notice.

Both SPA Section 6(c)(i) and EA Section 3(b) provide that a failure to provide timely notice does not waive a claim or relieve a party of its indemnification obligation unless that party is materially prejudiced as a result of the lack of notice. Specifically, SPA Section 6(c)(i) states, "the omission by the Indemnified Party to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligation

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52 *Id.*

53 *DeJesus v. Richards Paving, Inc.*, 2006 WL 2709400, at *2 (Del. Super. Sept. 21, 2006) ("Other factual questions include . . . whether sufficient notice was provided to Plaintiff of a dispute . . . .").

under this Section 6, *except to the extent that such Indemnifying Party is materially prejudiced as a result of such failure to give notice*."[54] Similarly, EA Section 3(b) states:

> The party or parties making any Claim hereunder (the "Claiming Party") shall *promptly* notify the non-Claiming party in writing of any sums which the Claiming Party claims are subject to indemnification ("Claims Notice"). *Failure to exercise promptness in such notification shall not amount to a waiver of such claim unless the resulting delay materially and adversely prejudices the non-Claiming Party*.[55]

Buyer argues that even if its Claim Notice was deficient, Sellers are not entitled to summary judgment because Sellers were not materially prejudiced. According to Buyer, therefore, a failure to provide a timely and sufficiently detailed notice only bars an indemnification claim to the extent that Sellers suffered material prejudice as a result of those deficiencies.

Sellers respond that EA Section 4 and SPA Section 6(a)(vi), which establish the time limit for claims and have no exception based on material prejudice, govern and supersede the material prejudice provisos. Sellers argue that if Buyer could submit a Claim Notice after 5:00 p.m. on January 15, 2009, EA Section 4 and SPA Section 6(a)(vi) would be read out of their respective contracts. According to Sellers, therefore,

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[54] SPA § 6(c)(i) (emphasis added).

[55] EA § 3(b) (emphasis added).

such an interpretation would be inconsistent with the principle of contract construction that seeks to give each provision of the contract full effect.[56]

Buyer advances a different interpretation of EA Section 3(b). In its view, the failure to provide prompt notice is *never* a waiver unless the nonmoving party can prove material and adverse prejudice.[57]

Sellers' reading of EA Sections 3(b) and 4 calls for a bright-line test.[58] The clear and unambiguous reading of EA Section 4 is that any claim against the Escrow that is not asserted before 5:00 p.m., Dallas, Texas time, on January 15, 2009 is waived. Consequently, the requirements of EA Section 3(b) only apply if the Claiming Party provides notice within the twelve-month deadline. Thus, claims made before January 15, 2009, must have been made promptly or before the non-Claiming party suffered any material and adverse prejudice, while claims made after January 15, 2009 are untimely and irrevocably waived.

On the other hand, Buyer's interpretation of the EA does not give effect to each and every term of the agreement. Buyer suggests that a Claim Notice or an amended Claim Notice filed after 5:00 p.m. on January 15, 2009, should be accepted and effective

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56 *See E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[A] court must construe the agreement as a whole, giving effect to all provisions therein.").

57 Tr. 44.

58 Tr. 59 ("Our reading is that notice may be made within the indemnity period, so long as there's no prejudice to the indemnifying party. But when a notice is delayed beyond the end of the indemnity period, any notice is ineffective.").

if the non-Claiming party is not materially and adversely prejudiced by the delay. Buyer's interpretation, however, would eviscerate the express provisions of EA Section 4, which provide an explicit cut-off date for indemnity claims. Buyer effectively invites the Court to read EA Section 3(b)'s material and adverse prejudice qualification into the general deadline set by Section 4. The parties could have added a material and adverse prejudice clause to EA Section 4, but chose not to. "Delaware law will not create contract rights and obligations that were not part of the original bargain, especially . . . where . . . the contract could easily have been drafted to expressly provide for them."[59] If Buyer wanted the contracts to provide that notice, or a supplemental notice intended to cure the deficiencies in an otherwise timely notice, submitted after the Expiration Date would be acceptable absent a showing of material and adverse prejudice by the other party, Buyer should have bargained for such a provision.

Moreover, Buyer's interpretation ignores the purpose of the expiration provision. Section 5 of the EA provides instructions for having payment made from the Escrow for funds in excess of any claims on the first business day following the Expiration Date.[60] When read in conjunction with Section 5, Section 4 reflects a clear intent to allow the Escrow Agent to release or retain funds based on the Claims filed before 5:00 p.m. on the

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59 *Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *12 (Del. Ch. Dec. 15, 2006).

60 EA § 5.

Expiration Date. Buyer's reading would make it impossible for the Escrow Agent to determine which claims were still pending, and would render Section 5 meaningless.[61]

Although the parties focused on the interplay between EA Sections 3 and 4, the Court would reach the same conclusion under the SPA's parallel provisions. Section 6(c)(i) of the SPA specifies the requirements for a written notice in terms similar to Section 3(b) of the EA, but Section 6(c)(i) also specifically states that the items specified must be provided with "reasonable particularity." In addition, Section 6(c)(i) contains a proviso stating that an Indemnified Party's failure "to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligation under this Section 6, except to the extent that such Indemnifying Party is *materially prejudiced* as a result of such failure to give notice."[62]

At first blush, Section 6(c)(i)'s material prejudice proviso appears to leave open the possibility that a party that fails to give proper Claim Notice before the Expiration Date could cure that deficiency after the Expiration Date. When read alongside the expiration provision of SPA § 6(a)(vi), however, it becomes apparent that the material prejudice proviso was *not* intended to enable a party to submit or cure a Claim Notice after January 15, 2009. The language of Section 6(a)(vi) distinguishes between a Claim Notice that was "in accordance with 6(c)" on January 15, 2009 and a Claim Notice that

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61 *OBrien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'").

62 SPA § 6(c)(i) (emphasis added).

was not. A Claim Notice in accordance with Section 6(c) preserves indemnification claims after the Expiration Date, whereas nothing in the SPA suggests that a Claim Notice not in accordance with Section 6(c) could preserve an indemnification claim. Section 6(a)(vi) specifically contemplates the possibility that a party might not comply with Section 6(c)(i)'s requirements on or before January 15, 2009 and thereby lose its claim. "When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[63] Thus, under the plain reading of the SPA, Section 6(c)(i) does not permit the Buyer to amend a deficient notice after January 15, 2009.

I find this interpretation of the Claim Notice provisions to be the only reasonable interpretation supported by the evidence; therefore, I will deem it established at trial pursuant to Rule 56(d). Thus, at trial, a Claim Notice determined to be inadequate and not cured before the Expiration Date will be considered ineffective, even if the non-claiming party fails to prove it was materially prejudiced before the deficiency was cured.

3. Material prejudice

Because I have determined that a failure on the part of Sellers to show "material and adverse prejudice" would not enable Buyer to cure an alleged deficiency in its Claim Notice, the parties' respective arguments about the existence *vel non* of "material and adverse prejudice" is moot. Accordingly, I need not and do not reach the question of

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63 *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195–96.

whether either party is entitled to summary judgment based on a showing of, or a failure to show, that Sellers were prejudiced by an inadequate Claim Notice.

4. Excuse based on false statements or omissions

Buyer also argues that even if the Claim Notice was deficient and Sellers had alleged and presented evidence of harm, Buyer is excused based on Sellers' failure to provide adequate information.[64] In Section II.B.2., *supra*, I declined to grant summary judgment as to the deficiency of Buyer's Claim Notice based on the existence of genuine issues of material fact regarding that argument. Because I find those issues likely to be closely intertwined with the question of the adequacy of the information Sellers provided to Buyer and to involve disputed issues of fact, I consider it premature and inconsistent with the efficient administration of justice for the Court to attempt to evaluate the latter argument in isolation. Therefore, I will not address the adequacy of the information Buyer received any further at this time.

C. Are Sellers Entitled to Summary Judgment on Claims "Taken Into Account" in the Post-Closing Purchase Price Adjustment?

I next address whether the post-Closing Purchase Price Adjustment forecloses Buyer from seeking indemnification against Sellers. The key disagreement between the parties involves how to harmonize SPA Sections 2(e) and 6(f). A canon of contractual interpretation is that all contract provisions should be harmonized and given effect where

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[64] Resp't's Ans. Br. 30–31.

possible.[65] SPA Section 2(e) provides the procedure for resolving Impact Confections' Final Working Capital:

> **Post-Closing Purchase Price Adjustment.**
>
> (i) Buyer and Baker Sellers acknowledge and agree that the Preliminary Purchase Price is based upon the Target Working Capital, and that such Preliminary Purchase Price may need to be adjusted subsequent to the Closing Date on the basis set forth herein. Accordingly, as soon as practicable but in no event later than sixty (60) days after the Closing Date, Buyer shall deliver to Baker Sellers a written statement ("Closing Statement") which sets forth the Net Working Capital as of the Closing Date (the "Final Working Capital"), prepared in accordance with GAAP consistently applied. The Final Working Capital shall be based on a physical inventory of the Company (not including the inventory that is part of the Inventory Reduction) and its Subsidiaries as of the Closing Date to be undertaken by Buyer. Baker Sellers and their accountants shall have the right to review all records, work papers and calculations of Buyer related to the Closing Statement.

Section 6(f), on the other hand, limits the Buyer's ability to seek indemnification for claims taken into account in determining the Purchase Price Adjustment:

> Purchase Price Adjustment. Notwithstanding anything to the contrary herein, Sellers shall not be obligated to indemnify Buyer against any Adverse Consequences *as a result of, or based upon or arising from*, any claim or liability *to the extent such claim or liability is taken into account* in determining any adjustment of the Purchase Price.[66]

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65 *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, – A.3d. –, –, 2012 WL 2783101, at *13 (Del. July 12, 2012).

66 SPA § 6(f) (emphasis added).

The crux of the dispute centers on the appropriate interpretation and application of "to the extent . . . taken into account." To determine whether a claim is foreclosed by SPA Section 6(f), this Court first must discern the meaning of the phrase "to the extent . . . taken into account," and second, determine whether, under that definition, any of the claims currently at issue actually were taken into account "in determining any adjustment of the Purchase Price."

Sellers put forth a broad reading of the contested phrase, whereas Buyer proffers a narrow reading. Specifically, Sellers construe "to the extent . . . taken into account" to include all the components of Final Working Capital.[67] For its part, Buyer contends the phrase includes only those items actually asserted and adjusted in connection with the Purchase Price Adjustment.[68]

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[67] Pet'rs' Reply Br. 11–12 ("[T]he Purchase Price Adjustment resolved only those items comprising Final Working Capital . . . .").

[68] Resp't's Ans. Br. 24 ("Impact Holding cannot recover for specific claims that it asserted in connection with the [P]urchase [P]rice [A]djustment and for which the purchase price was indeed adjusted.").

1. Claims related to sugar credits and trade show expenses are barred by SPA Section 6(f)

A few of the claims Buyer asserts in this action were "taken into account" during the Purchase Price Adjustment under even the narrower reading of SPA Section 6(f) espoused by Buyer itself. These claims, therefore, are ripe for summary judgment or adjudication pursuant to Rule 56(d).

Buyer alleges in its Amended Counterclaim that Sellers' reporting of unused sugar credits as "Other Current Assets" caused an overstatement of Final Working Capital by $43,321 and an overstatement of LTM EBITDA by $67,938 in breach of both the Financial Statement Representation and the LTM EBITDA Representation.[69] Buyer also claims that the inclusion of prepaid trade show expenses as a "Current Asset" led to an overstatement of Final Working Capital by $65,504.[70] Sellers, on the other hand, seek summary judgment on these claims because they were resolved during the Purchase Price Adjustment, and thus "taken into account" under Section 6(f). Buyer disagrees, however, arguing that the Purchase Price Adjustment merely forecloses further recovery under Section 6 "for amounts that it had actually received pursuant to Section 2(e), but does not limit Impact Holding's right to recover for any other amount."[71]

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69 Burns Aff. Ex. F ("BVA Report") at IMP008528; Am. Countercl. 10.

70 BVA Report at IMP008528.

71 Resp't's Ans. Br. 24 n.11.

The Sellers' Notice of Disagreement specifically disputed the disallowance of unamortized trade show expenses and sugar credits.[72] Moreover, the parties expressly negotiated over these items, and reached agreement on May 16, 2008.[73] Thus, under any reasonable interpretation of "taken into account," these items were "taken into account in determining" the "adjustment of the purchase price."[74] Any interpretation that would exclude these items from what was taken into account not only would render SPA Section 6(f) meaningless, but also would make the Purchase Price Adjustment a moot exercise. The Purchase Price Adjustment serves a legitimate purpose only if the parties are precluded from rehashing disputes negotiated and settled through that adjustment, and SPA Section 6(f) makes clear that the parties understood that.

Because both sugar credits and unamortized trade show expenses were "taken into account" in determining the adjustment, Buyer is barred from pursuing a further claim for indemnification from the Escrow regarding these expenses. Accordingly, pursuant to Rule 56(d), I hold that Buyer's claims regarding sugar credits and unamortized trade show expenses previously were taken into account in the Purchase Price Adjustment and, therefore, are barred.

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72 Notice of Disagreement.

73 *See supra* note 26 and accompanying text; Voss Aff. Exs. II, JJ, and KK.

74 SPA § 6(f).

2. SPA Section 6(f) of the SPA does not bar Buyer's claims related to personal property taxes

Although Buyer did not cross-move for summary judgment, it is entitled to a determination under Rule 56(d) that its claims related to personal property taxes are *not* barred by Section 6(f).[75] "When a party moves for summary judgment under Chancery Court Rule 56 . . . and the state of the record is such that the nonmoving party clearly is entitled to such relief, the judge may grant final judgment in favor of the nonmoving party."[76]

Even under Sellers' expansive construction of "to the extent . . . taken into account," claims related to personal property taxes were not "taken into account" during the Purchase Price Adjustment. Sellers concede as much in a footnote in their opening brief, stating that the only exception to the host of claims "based entirely on alleged errors in Net Working Capital" is the alleged liability for a personal property tax.[77]

Net Working Capital is defined by the SPA as:

> [T]he excess of (a) the current assets of Company . . . including without limitation accounts receivable, inventory, prepaid expense, and other current assets . . . , Tax refunds and accruals for Tax assets such as, but not limited to, Company's accrual for the net operating loss, and the

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75 *See, e.g.*, *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992) (Rule 56 "gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment"); *Rosenmiller v. Bordes*, 607 A.2d 465, 469 (Del. Ch. 1991) ("Although plaintiffs did not cross move for summary judgment . . . , they were nonetheless entitled to decree of summary judgment . . . .").

76 *Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196, 1199 (Del. 1987).

77 Pet'rs' Op. Br. 3 & n.2.

> inventory subject to the Inventory Reduction, less (b) the current liabilities of Company . . . , but excluding Debt, accrued Income Taxes, deferred Tax liabilities, and accruals for transaction related expenses if such amounts are to be paid by Sellers, but including all other accrued current liabilities of the Company. A schedule of the line items of Company's balance sheet to include in the calculation of Net Working Capital is attached as Annex II.[78]

Notably, the "line items of Company's balance sheet" in Annex II do not include personal property taxes in the calculation of Net Working Capital.[79] Thus, the Purchase Price Adjustment could not have "taken into account" personal property taxes.

Any other interpretation would render meaningless the explicit representations and warranties included in the SPA. If the Purchase Price Adjustment foreclosed representations and warranties unrelated to the calculation of Net Working Capital, Buyer would be deprived of the representations and warranties it bargained for, including the Tax Representation. Accordingly, pursuant to Rule 56(d), I find that Buyer's claims regarding personal property taxes were not "taken into account" in the Purchase Price Adjustment. Sellers, however, are free to assert any other defenses they may have related to Buyer's personal property tax claims.

3. Other representations and warranties

In its Amended Counterclaim, Buyer alleges that Sellers breached six key representations and warranties in the SPA.[80] Specifically, Buyer alleges that Sellers: (1)

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78 SPA § 1.

79 SPA Annex II.

failed to prepare the Company's Financial Statements in accordance with GAAP in breach of the Financial Statements Representation; (2) overstated LTM EBITDA by $501,558 in breach of the LTM EBITDA Representation; (3) misreported inventory reserves as usable and saleable in breach of the Inventory Representation; (4) misrepresented that certain New Mexico taxes had been timely paid in breach of the Tax Representation; and (5) failed properly to record customer returns and to include adequate reserves in breach of the Accounts Receivable Representation.[81]

To determine whether Sellers are entitled to summary judgment on Buyer's remaining claims—*i.e.*, the claims unrelated to sugar credits, unamortized trade show expenses, and personal property taxes—the Court must first examine the meaning of "to the extent . . . taken into account." Assuming the meaning of that term can be determined as a matter of law at this stage, this Court still would have to resolve the question of whether the claimed item was "taken into account" in Final Working Capital. I turn next to these issues.

a. Meaning of "to the extent . . . taken into account"

Sellers seek dismissal of these claims on the theory that Buyer should be foreclosed from revisiting numbers that were part of Final Working Capital. Although Sellers have not posited an explicit definition of "to the extent . . . taken into account," they generally assert that "to the extent . . . taken into account" incorporates the

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80 Am. Countercl. 8–15.

81 *Id.* (citing SPA § 4(g), (h), (i), (l), and (p)).

"components" of Final Working Capital.[82] Because all of "Respondent's [or Buyer's] contentions . . . are based on alleged errors in the *components* of Final Working Capital," Sellers assert that Buyer should be precluded from reasserting claims in this action related to items necessary to calculate Final Working Capital.[83] Sellers further contend that any other interpretation would "entirely eviscerate the SPA's provision relating to the Purchase Price Adjustment and Final Working Capital."[84] According to Sellers, the Purchase Price Adjustment process would be worthless if Buyer could raise claims stemming from the Final Working Capital number after final resolution of the Purchase Price Adjustment.

Buyer responds that construing SPA Section 6(f) to foreclose its claims would read SPA Section 2(e) out of existence and render Buyer's indemnification rights "meaningless."[85] According to Buyer, such an interpretation would reduce the period for raising indemnification claims to sixty days, instead of the one year provided for in the SPA. To avoid that purportedly unintended result, Buyer advances two alternative interpretations that ostensibly harmonize Sections 2(e) and 6(f). Buyer's preferred interpretation is that Section 6(f) was intended to prevent the parties from "double dipping," and recovering under both the Purchase Price Adjustment procedure of Section

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82 Pet'rs' Op. Br. 44.

83 *Id.* (emphasis added).

84 Pet'rs' Reply Br. 12.

85 Resp't's Ans. Br. 21.

2 and the indemnification procedures under Section 6.[86] In the alternative, Buyer argues that Section 2(e) was intended to prevent Buyer from recovering under Section 6 for amounts that actually were disputed and negotiated during the Purchase Price Adjustment process.

As previously noted, a contract is ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[87] Here, both parties have put forth reasonable interpretations;[88] on the one hand, it appears that the parties did intend the Purchase Price Adjustment process to resolve issues regarding Final Working Capital, while on the other hand, Buyer persuasively argues that any reasonable interpretation of SPA Sections 2 and 6 must give some effect to the one-year period evident in Section 6 for the presentation of indemnification claims. It is not possible on the current record to determine which of the parties' competing interpretations of the provisions at issue more accurately reflects the

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86 *Id.* at 24.

87 *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

88 I note, however, that Buyer's "double dipping" interpretation does not appear reasonable. SPA Section 6(f) was intended to give primacy to the Purchase Price Adjustment and provide final resolution to those items resolved through the Purchase Price Adjustment process. Buyer's "double dipping" interpretation, however, would force the parties to readjudicate claims resolved through the Purchase Price Adjustment. For example, Buyer acceded to Sellers' position on the trade show expenses in the Purchase Price Adjustment and, therefore, did not "recover" on that claim. In that sense, Buyer's attempt to raise a claim based on trade show expenses in this action technically would not be "double-dipping," even though the parties expressly addressed that issue previously.

parties' intent when they entered into the SPA. Indeed, the proper construction may be something different from the competing interpretations proffered by the parties. Moreover, where a relevant contract term is ambiguous, it generally is not possible to resolve that ambiguity on summary judgment, because, among other things, the Court may look beyond the four corners of the agreement to extrinsic evidence to make that determination.[89] For these reasons and because resolution of the meaning of "to the extent . . . taken into account" would benefit from a more well-developed factual record, I deny summary judgment on Buyer's remaining claims for breaches of representations and warranties.[90]

b. Whether the remaining claims were "taken into account"

Even if the meaning of "taken into account" was unambiguous, the record is too unclear at this stage for this Court to determine whether the remaining claims were "taken into account" in the Purchase Price Adjustment.

The record is devoid of evidence, for example, relating to Buyer's method of calculating Final Working Capital. There are also a number of relevant factual issues regarding: (1) the details of Buyer's initial calculation of Net Working Capital and Sellers' calculation of its Notice of Disagreement; (2) which items were included in the calculation of Net Working Capital; and (3) what the parties intended as to the

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89 *See Matria Healthcare*, 2007 WL 763303, at *6 ("If, however, a contract's language is ambiguous, then the Court will look beyond the 'four corners' of the agreement to extrinsic evidence.").

90 *United Rentals*, 937 A.2d at 830.

interrelationship of the Purchase Price Adjustment and Buyer's indemnification rights. An important example of such issues involves the extent to which Buyer had an obligation under SPA Section 2(e)(i) to conduct a physical inventory of Impact Confections in connection with preparing and delivering its Final Working Capital.[91]

For all of these reasons and because a more thorough development of the record would clarify the relevant facts and law in these areas, I deny summary judgment on the remaining claims—*i.e.*, the claims unrelated to sugar credits, unamortized trade show expenses, and personal property taxes.[92]

D. Attorneys' Fees

Section 7(s) of the SPA provides that "the prevailing party . . . shall be entitled to recover all reasonable costs incurred in connection [with the action], including without limitation reasonable attorneys' fees." Because this action must proceed to trial, the Court has not yet identified the "prevailing party." Therefore, I deny Sellers' motion for summary judgment on their claim for attorneys' fees.

E. Escrow Account

Although I have granted Sellers' motion, in part, as to the claims related to sugar credits and trade show expenses, I decline to order release of any part of the Escrow.

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91 In its Answering Brief, Buyer appears to misinterpret Sellers' contention and responds that, under Delaware law, pre-acquisition due diligence does not disqualify a claim for breach of a representation or warranty in the purchase agreement. Resp't's Ans. Br. 25–27. I consider Buyer's argument in this regard inapposite.

92 *Tunnell*, 2006 WL 452780, at *2.

Even after excluding the claims for sugar credits and trade show expenses, Buyer's claims still exceed the entire amount of the Escrow ($2,000,000).[93]

III. CONCLUSION

For the reasons stated, I deny Petitioners' motion for summary judgment, except to the extent that I have identified certain issues under Rule 56(d) as being without substantial controversy in this Memorandum Opinion, and I will deem those issues as established for purposes of trial.

IT IS SO ORDERED.

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93 *See* BVA Report; Am. Countercl.