IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LADENBURG THALMANN FINANCIAL SERVICES, INC., a Florida corporation, and SECURITIES AMERICA, INC., a Delaware corporation,	)	
Plaintiffs,	)	
v.	)	C.A. No. N16C-05-086 WCC CCLD
AMERIPRISE FINANCIAL, INC., a Delaware corporation,	)	**REDACTED PUBLIC VERSION**
Defendant.	)	

Submitted: September 16, 2016
Decided: January 30, 2017

Defendant's Motion to Dismiss
GRANTED IN PART – DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

Defendant Ameriprise Financial, Inc. ("Defendant" or "Ameriprise") has moved to dismiss the Complaint filed by Plaintiffs Ladenburg Thalmann Financial Services Inc. ("LTFS") and Securities America, Inc. ("SAI") (jointly, "Plaintiffs"). For the following reasons, Defendant's Motion is granted in part and denied in part.

I. FACTUAL BACKGROUND

This action for contract damages and declaratory relief arises in connection with a Stock Purchase Agreement ("SPA") between LTFS and Ameriprise. [1] On August 16, 2011, after conducting extensive due diligence,[2] LTFS agreed to purchase SAI from Ameriprise.[3] SAI is an independent broker of certain securities, including stocks, bonds, mutual funds, direct participation programs, real estate investment trusts ("REITs"), options, and managed accounts.[4] The transaction closed on November 4, 2011, at which point LTFS acquired all issued and outstanding shares of SAI from Ameriprise.[5]

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[1] Compl. ¶ 1.
[2] *Id.* ¶ 16 (alleging LTFS reviewed financial statements, business records, and other information made available by Ameriprise).
[3] *Id.* ¶¶ 1, 17 ("[LTFS]…agreed to buy, and Defendant agreed to sell, all of the outstanding and issued shares of common stock of Securities America Financial Corporation, the parent of SAI."); Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 3. LTFS is a Florida corporation and SAI and Ameriprise are Delaware corporations. Compl. ¶¶ 8-10.
[4] Compl. ¶ 15.
[5] *Id.* ¶¶ 1, 17.

A. The Stock Purchase Agreement

In connection with the stock purchase, LTFS secured certain contractual protections, including Ameriprise's representations that SAI had no undisclosed liabilities and that SAI had materially complied with all applicable laws.[6] It was further agreed, per § 8.02, that "from and after the Closing," Ameriprise would indemnify LTFS and SAI "in respect of, and hold them harmless against" certain "Losses,"[7] including those incurred due to any inaccuracy in or breach of its representations and warranties in Article 2 of the SPA.[8]

Ameriprise additionally agreed to indemnify Losses attributable to wrongful conduct engaged in by SAI prior to closing. Specifically, § 8.02(a)(iv) and corresponding Schedule 8.02(a)(I) provide indemnification for: (1) currently asserted claims as set forth in Schedule 2.07(i); (2) unasserted actions for loss of investment value in certain defined interests attributable to an offer or sale prior to Closing; and (3) Losses suffered by reason of the conduct of SAI's business on or

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[6] *Id.* ¶ 2.

[7] *See* Def. Mot. to Dismiss, Ex. 1 at 56 [hereinafter SPA]. "Loss" is defined under § 9.01 as "any and all damages, Liabilities, costs and expenses (including legal and related fees and expenses and regulatory fines, penalties or other charges)." SPA § 9.01. "Liabilities" are defined as "any and all debts, liabilities and obligations, whether accrued or fixed, absolute or contingent known or unknown, matured or unmatured or determined or determinable, including those arising under any Law, Action, or Governmental Order…." *Id.*

[8] SPA § 8.02(a).

before Closing, subject to Schedule 8.02(a)(II). [9] Schedule 8.02(a)(II) obligated Ameriprise to indemnify against "Claims made for any actual alleged Wrongful Act committed by [SAI]…in rendering or failure to render [its] Professional Services…" or "in Failing to Supervise a past or present Registered Representative...."[10]

In order to receive indemnification under the SPA, Plaintiffs were required to provide a Claim Notice or Indemnity Notice[11] to Ameriprise "setting forth in reasonable detail the specific facts and circumstances pertaining thereto as soon as reasonably practical" following discovery of the claim.[12] Such Notice had to set forth, in writing, the nature and basis of the claims, as well as the amount of the Loss sought to be indemnified (or at least an estimate thereof).[13]

B. The Investigations & Customer Claims

On or about January 8, 2013, Plaintiffs learned the Office of the Secretary of the Commonwealth of Massachusetts ("Massachusetts Regulator") was

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[9] *Id.* § 8.02(a)(iv) (providing indemnification against Loss suffered "by reason of or resulting from….those matters set forth on Schedule 8.02(a)(I)[,]" which is titled "Certain Other Indemnifiable Claims").
[10] *Id.*, Schedule 8.02(a)(II)(3).
[11] *Id.* § 9.01 (defining Claim Notices as pertaining to Third Party Claims pursuant to § 8.03, as opposed to Indemnity Notices, which relate to claims not involving Third Party Claims).
[12] *Id.* § 8.02(c)(i) ("[E]xcept to the extent the Indemnifying Party is not materially prejudiced thereby.").
[13] *Id.* § 9.01. Claim Notice is also defined to include copies of all papers served, if any, in connection with Third Party Claims. *Id.*

investigating SAI's sales of non-traded REITs to Massachusetts residents. [14] Plaintiffs allegedly notified Ameriprise of the ongoing investigation sometime prior to May 3, 2013. [15] Ameriprise refused to assume defense of the investigation at that time. [16]

SAI ultimately settled with the Massachusetts Regulator ("Massachusetts Settlement") in late May 2013.[17] As part of the settlement, SAI's sale of non-traded REITs was recognized as violating state securities law and Financial Industry Regulatory Authority ("FINRA") standards and certain affected customers were offered rescission as a result.[18] [redacted][19] [redacted][20]

Since May 2013, SAI has been the subject of a number of state and U.S. Securities and Exchange Commission ("SEC") investigations, many of which remain pending ("Investigations").[21] As a result, Plaintiffs have allegedly

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[14] Compl. ¶ 18.
[15] *Id.* ¶ 19.
[16] *Id.*
[17] *Id.* ¶ 20.
[18] *Id.*; Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 7.
[19] [redacted]
[20] [redacted]
[21] Compl. ¶¶ 4, 21. Plaintiffs state in their Brief that the SEC has since informed Plaintiffs that it does not, at this time, intend to proceed with an enforcement action against SAI. Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 8 n.3.

sustained significant losses, which they maintain are indemnifiable under the SPA.[22] Yet, Ameriprise has refused to indemnify Plaintiffs for these liabilities.[23]

Plaintiffs have purportedly also experienced a host of customer claims since the stock acquisition closed based on SAI's conduct prior to closing ("Customer Claims").[24] For purposes of confidentiality, Plaintiffs refer to the various claimants as Customers A, B, C, D, E, and F, and Registered Representatives A and B. Other than Customer F's claims, which are currently still pending, each of the underlying Customer Claims has since been resolved.[25] While Ameriprise has provided partial indemnification with respect to some of the Customer Claims, it has apparently refused to indemnify Plaintiffs in whole.[26]

C. The Instant Litigation

As a result of Ameriprise's refusal to indemnify all of the losses allegedly covered under the SPA, Plaintiffs commenced the instant litigation on May 9, 2016. Count I of the Complaint seeks damages for breach of § 8.02(a) and Schedules 8.02(a)(I) and (II) of the SPA.[27] Count II requests a declaratory judgment that Ameriprise is required to indemnify Plaintiffs "from Losses arising

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[22] Compl. ¶¶ 4, 21 ("[I]ncluding legal fees and other indemnifiable Losses, as defined by the SPA...").
[23] *Id.* ¶ 5.
[24] *Id.* ¶¶ 6, 23.
[25] *Id.* ¶ 23(h) ("The arbitration is currently pending."); Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 8.
[26] Compl. ¶ 23.
[27] *Id.* ¶ 41.

from the SEC and State Investigations and matters involving the Registered Representative A Tax Credits, Registered Representative B, Customer D, and Customers F, consistent with the terms of the SPA."[28]

On June 27, 2016, Ameriprise moved to dismiss the Complaint pursuant to Superior Court Civil Rules 12(b)(6), for failure to state a claim upon which relief can be granted, and 12(b)(1), for lack of subject matter jurisdiction. Alternatively, Ameriprise asks that Plaintiffs be required to provide a more definite statement under Superior Court Civil Rule 12(e). Plaintiffs oppose the Motion. This is the Court's decision on the Motion.

II. STANDARD OF REVIEW

In considering the Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), the Court must assume the truthfulness of the Complaint's well-pleaded allegations,[29] and afford Plaintiffs "the benefit of all reasonable inferences that can be drawn from [their] pleading."[30] Certain documents that are "integral to a plaintiff's claims…may be incorporated by

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[28] *Id.* ¶ 46.

[29] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996). *See also VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under "Delaware's judicial system of notice pleading, a plaintiff need not plead evidence" but must "only allege facts that, if true, state a claim upon which relief can be granted").

[30] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (noting, however, that the Court is not required to blindly accept all allegations or draw all inferences in a plaintiff's favor).

reference without converting the motion to a summary judgment."[31] At this preliminary stage, dismissal will be granted only when the Court is able to determine with "reasonable certainty" that Plaintiffs would not be entitled to relief "under any set of facts that could be proven to support the claims asserted" in the Complaint.[32]

The Motion to Dismiss for lack of ripeness, on the other hand, "is properly considered under Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction."[33] Ripeness presents the "question of whether a suit has been brought at the correct time."[34] The Court will dismiss a claim not ripe for judicial determination, "consistent with a well established reluctance to issue advisory or hypothetical opinions."[35] "The burden of establishing the Court's subject matter jurisdiction rests with the party seeking the Court's intervention[:]" Plaintiffs.[36]

Ameriprise alternatively asks that the Court order Plaintiffs to provide a more definite statement pursuant Rule 12(e). The Court will grant a 12(e) motion

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[31] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3-4 (Del. Super. Apr. 16, 2014).
[32] *See id.* (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[33] *See Homeland Ins. Co. of N.Y. v. Corvel Corp.*, 2011 WL 7122367, at *3 (Del. Super. Ct. Nov. 30, 2011) (citing *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006)).
[34] *See Bebchuk*, 902 A.2d at 740 (stating ripeness "goes to the very heart of whether a court has subject matter jurisdiction").
[35] *See id.* (citing *Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479-80 (Del. 1989)).
[36] *See Corvel Corp.*, 2011 WL 7122367, at *3.

if a claim is "so vague or ambiguous" that the opposing party cannot reasonably respond.[37]

III. DISCUSSION

Prior to addressing the arguments, the Court feels compelled to comment that the agreement at the core of this dispute is one only a transactional lawyer could love. The provisions of the SPA span sixty-four pages and the Schedules accompanying the agreement make up an additional eighty-six pages. Attempting to locate all of the applicable provisions and how they interact was like putting together a 1000-piece 3D puzzle. While I am sure counsel who handled this transaction believes such a lengthy document was necessary, it is difficult to imagine that a more straightforward design, perhaps even one that the clients could comprehend, could not have been achieved. Although creating a more condensed and clear version of the agreement would, no doubt, have been the more difficult task, the Court has to wonder if the SPA ultimately arrived at was the product of simply patching together recycled contract terms or duplicating what had been used previously over time. While the Court does not have any expectations that its comments will influence any change here, if said, perhaps the clients who must live with the consequences will expect more. The Court will now turn to the issues presented.

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[37] Super. Ct. Civ. R. 12(e) (requiring such motions specify "defects" and/or "details desired").

While the briefs submitted in connection with the Motion make every effort to complicate the issues presented, there are really only three matters in dispute: (1) whether the lawsuit was timely filed, (2) does the Complaint set forth a sufficient claim for indemnification under the SPA, and (3) are the issues presented ripe for judicial resolution. The Court will address each issue in turn.

A. Timeliness of Claims Under the SPA

In Delaware, "[t]he timeliness of claims may be determined on a motion to dismiss if the facts pled in the complaint, and the documents incorporated within the complaint, demonstrate that the claims are untimely."[38] In considering such a motion, the Court must apply "the plaintiff-friendly principles of Rule 12(b)(6)," accepting as true the Complaint's well-pled allegations and drawing all reasonable inferences in Plaintiffs' favor.[39] That said, "when a plaintiff seeks to excuse a late filing by invoking a tolling exception to the statute of limitations, the plaintiff bears the burden to plead facts demonstrating the applicability of the exception."[40]

According to Ameriprise, Plaintiffs' claims must be dismissed because the Complaint was filed outside the limitations periods set forth in the SPA and fails to present any facts that would justify granting an exception to the "contractual time bars."[41] Plaintiffs do not appear to dispute that their claims for indemnification are

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[38] *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).
[39] *See id.*
[40] *See id.*
[41] Def.'s Reply Br. at 4.

subject to a contractual statute of limitations, or that the Complaint was filed well after the prescribed time periods expired. Instead, Plaintiffs rely on the SPA's notice provisions, which they characterize as having "explicitly extend[ed] Ameriprise's warranties and indemnity obligations."[42] In other words, Plaintiffs assert that, by providing appropriate notice under the SPA, the contractual statute of limitation was tolled until the dispute was resolved.

Of course, to add to the complexity, the SPA actually sets forth two different limitations periods depending upon the claims made. With regard to Plaintiffs' claim for indemnification of losses attributable to inaccuracies in and/or breaches of Ameriprise's contractual representations and warranties, § 8.01 provides that such representations and warranties "expire[d] on the eighteen (18) month anniversary" of the November 4, 2011 Closing Date, or May 4, 2013.[43] Yet, a representation "in respect of which indemnity is sought" could "survive the time at which it would otherwise terminate" if Claim or Indemnity Notice was "timely given in good faith based on facts reasonably expected to establish a valid claim…on or prior to such termination date, until the related claim for indemnification has been satisfied or otherwise resolved…."[44] As for Plaintiffs' remaining claims, Schedule 8.02(d)(ii) states that Ameriprise's indemnity

[42] Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 13 (emphasis added).
[43] SPA § 8.01.
[44] *Id.*

obligations would expire on "the third (3rd) anniversary of the Closing Date," or November 4, 2014, "*except* for those Losses for which a Claim Notice or Indemnity Notice…was delivered prior to such…anniversary." [45]

Just as contracting parties have long been permitted to incorporate abbreviated time frames for filing enforceable claims, our courts have recognized the utility of express notice procedures for purposes of tolling those truncated limitations periods.[46] Indeed, the parties here agree that compliance with the SPA's notice provisions could operate to toll the applicable limitations periods.[47]

At the outset, the Court notes that very few of the allegations in the Complaint are accompanied by specific dates and as such, it is unable to ascertain precisely when or how notice was provided with respect to the claims for which Plaintiffs now seek indemnification. Of course, Plaintiffs will need to correct this during discovery in order to support its assertion that notice was appropriately given under the SPA. That said, the Complaint does allege that Plaintiffs "fully performed under the SPA" and "*fulfilled [their]… obligation to deliver notice* of a claim for indemnification *consistent with the terms of the SPA*."[48]

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[45] *Id.*, Schedule 8.02(d)(ii)(5).
[46] *See, e.g.*, *Aircraft Serv. Int'l, Inc. v. TBI Overseas Hldgs., Inc.*, 2014 WL 4101660, at *3-4 (Del. Super. Ct. Aug. 5, 2014).
[47] Aug. 23, 2016 Hearing Tr. at 6-7.
[48] Compl. ¶¶ 36, 40 (emphasis added).

While Ameriprise characterizes the allegations as too "conclusory,"[49] the Court finds it reasonable at this juncture of the litigation to infer, based on Plaintiffs' assertion that notice was provided "consistent with the SPA," that Ameriprise was notified of Plaintiffs' claims in accordance with the contract's prescribed timeframes. Such notice, if proven, could have operated to toll the contractual statute of limitations. Although the Court agrees there is much yet to discover on when and how notice was provided,[50] a motion to dismiss is simply "not the proper procedural vehicle to compel a plaintiff to provide information relevant to a defendant's statute of limitations defense."[51] For now, the Complaint satisfies the minimal pleading requirements in this respect, but whether its assertions are supportable is a matter to be determined in discovery.

Ameriprise also attached an October 2014 notice letter to its Motion, which it characterizes as establishing that any notice of the claims for indemnification under § 8.02(a)(i) was untimely and insufficient.[52] However, the Court refuses to rely on this letter as "independent grounds" for finding Plaintiffs' indemnification

[49] Def.'s Mot. to Dismiss at 16-20.

[50] *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 2012 WL 3201139, at *16 (Del. Ch. Aug. 7, 2012) ("Those dates are not ascertainable from the face of the complaint or the attached documents, and thus cannot form a proper basis for a motion to dismiss. …Morgan Stanley [even] concedes '[i]t is unclear from the face of the [Amended] Complaint which of the [Original Loans], if any, were purchased after December 14, 2006,' and then requests that '[Central Mortgage] ... be compelled to provide such information in order to demonstrate the timeliness of its claims.'").

[51] *See id.* ("Instead, Morgan Stanley may raise the statute of limitations as an affirmative defense in its responsive pleading to the Amended Complaint, and request that information through discovery.").

[52] Ameriprise thus urges the Court to dismiss these claims with prejudice.

claims time-barred. While it is true that the claim could be considered untimely if the letter was in fact intended as notice pursuant to § 8.01, Plaintiffs did not attach this document to their pleadings, nor does the Complaint ever expressly reference a October 2014 claim letter. The letter references prior dates and correspondence between the parties, and according to Plaintiffs, represents only "a sliver of a years-long record of correspondence between the Parties...."[53] Thus, even if it were proper for the Court to consider the October 2014 letter at this stage, there are questions surrounding the nature and context of the document resulting in factual issues improper for resolution on a motion to dismiss. The Court therefore declines Ameriprise's invitation to assume that the letter represents "the factual predicate[] upon which Plaintiffs' indemnification claims are based."[54] Because there appears to be factual issues surrounding whether notice was properly provided, further discovery is warranted and the Court will not, at this juncture, grant Ameriprise's Motion to Dismiss the Complaint as time-barred.[55]

B. Entitlement to Indemnification

Next, Ameriprise argues Plaintiffs' Investigations and Customer Claims are not indemnifiable under the plain language of the SPA. As there are different

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[53] Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 17.
[54] Def.'s Reply Br. at 8 (quoting *Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *4 (Del. Super. Ct. Sept. 4, 2008)).
[55] As a result of the Court's ruling, it need not address the assertion that Defendant has not suffered any prejudice due to the timing of the notice.

requirements for each type of claim, the Court will analyze the issues separately as follows.

1. Investigations Claims

Plaintiffs seek indemnification for losses allegedly sustained as a result of investigations pursued by "SEC and certain state regulators" based on SAI's pre-acquisition sale of non-traded REITs.[56] According to the Complaint, "resolution of these matters *may* require additional payments to customers and regulators to settle outstanding claims against SAI."[57]

Ameriprise argues dismissal is warranted because Plaintiffs failed to plead that the Investigations presently involve a "Claim" by a "customer or client" of SAI as required for indemnification under the SPA. Rather, the Investigations were pursued by various state and federal government agencies.[58] Further, "[t]o the extent there are unknown or future imposed civil fines and penalties," Ameriprise contends they cannot be classified as "Losses" under Schedule 8.02 (a)(II) because the term is defined to exclude civil and criminal fines or penalties.

While this issue would seem to be a simple one to resolve, getting to a conclusion is anything but. The indemnification provision of the SPA is set forth in § 8.02, which provides that Ameriprise would indemnify Purchaser, *i.e.* Plaintiffs, for "any and all Losses suffered, incurred or sustained by a Purchaser

[56] Compl. ¶¶ 21-22.
[57] *Id.* (emphasis added).
[58] Def.'s Mot. to Dismiss at 17.

Indemnitee by reason of or resulting from . . .(iv) those matters set forth on Schedule 8.02(a)(I)." Schedule 8.02(a)(I) proclaims to apply to:

> Losses suffered, incurred or sustained by a Purchaser Indemnitee by reason of or resulting from the conduct of the business of the Acquired Companies on or before the Closing Date, which do not arise from a matter described under Item 1 or 2 on this Schedule 8.02(a)(I), subject to the terms and conditions set forth on Schedule 8.02(a)(II).

Schedule 8.02(a)(II) sets forth the terms and conditions for indemnification for such claims. The relevant provisions of that schedule read as follows:

> Matters Covered: Broker/Dealer Professional Liability (Including Failure to Supervise)
>
> Claims made for any actual or alleged Wrongful Act committed by the Broker/Dealer or Broker/Dealer Employee:
>
> (a) in the rendering or failure to render Professional Services by the Broker Dealer or Broker Dealer Employee; or
>
> (b) in Failing to Supervise a past or present Registered Representative in the rendering or failure to render Professional Services by such Registered Representative on the behalf of the Broker/Dealer; or
>
> (c) in Failing to Supervise a past or present Registered Representative in connection with any activity of the Registered Representative other than the rendering or failure to render Professional Services by such Registered Representative on the behalf of the Broker/Dealer.

To determine the meaning of "Claim," one must look to the "Index of Defined terms for Schedule 8.02(a)(II)." The Index defines "Claim" as:

1. a written demand for monetary relief brought by an Indemnified Party's customer or client in such capacity;

2. a civil or arbitration proceeding for monetary or non-monetary relief brought by an Indemnified Party's customer or client in such capacity and which is commended by:

   (a) service of a complaint or similar pleading; or

   (b) receipt or filing of an arbitration demand or statement of claim.

Having traversed this trail between the SPA and corresponding Schedules, the Court arrives at several conclusions. First, to obtain indemnification under these provisions, the Claim must have been brought by a customer or client of the indemnified party. If this criteria is met, Defendant is obligated to pay Plaintiffs' "damages, judgments, settlement and Defense Costs" relating to that Claim.

Second, the Court finds that an investigation pursued by a governmental entity, such as the SEC or state securities regulator, is not a Claim brought by a customer or client. The relevant provisions and schedules do not allow for indemnification simply because a government investigation may relate to customer accounts or claims. In addition, the definition of "Loss" specifically excludes "civil or criminal fines or penalties" that would be imposed by governmental agencies. The Court recognizes that investigations may lead a customer or client to make a monetary demand or initiate litigation, but until that occurs, the

Ameriprise's indemnification obligations are simply not activated. As such, to the extent the Complaint is seeking coverage for expenses and costs associated with Investigations pursued by federal and state regulatory agencies, those claims are not indemnifiable under the SPA and will be dismissed.

2. Customer Claims

Ameriprise next contends that certain of the claims indentified in the Complaint as "Customer Claims" are not covered under the SPA.

The first "Customer Claim" at issue is that pertaining to "Customers B." The Complaint seeks indemnification for $573,316.29 in rescission damages awarded to Customers B.[59] Ameriprise classifies the award as an equitable, non-monetary remedy, which it claims cannot qualify as a "Loss" under the SPA because that definition expressly excludes costs of "complying with any settlement for or an award of non-monetary relief...." [60] Plaintiffs, on the other hand, characterize the rescission damages paid to Customers B as a monetary arbitration award, not incidental costs of compliance.[61] According to Plaintiffs, the rescission damages paid were "part and parcel of the award, and indeed the entirety of relief awarded to Customers B." [62] This is significant, Plaintiffs argue, because the SPA excludes only the "cost of complying" with an award or settlement granting non-

[59] Compl. ¶ 23(b).
[60] Def.'s Mot. to Dismiss at 21.
[61] Pls.' Answ. Br. in Opp'n to Def.'s Mot. to Dismiss at 21.
[62] *Id.*

monetary relief, it does not bar any and all indemnification based on equitable relief. Even if the contract did eliminate indemnification with respect to equitable remedies, Plaintiffs argue rescission *damages* constitute legal, rather than equitable, relief. [63]

The Court refuses to dismiss the claim based on the exclusion Ameriprise relies on here. Plaintiffs have advanced the reasonable interpretation that the SPA eliminates indemnification only for costs incurred in complying with an award or settlement of non-monetary relief, and does not clearly purport to exclude all equitable or non-monetary remedies from the definition of Losses subject to indemnification under the contract. As plead, the Complaint seeks indemnification of the sum of the award *paid* to Customers B, which would appear more analogous to "judgments" and "damages," as opposed to requesting that Ameriprise indemnify Plaintiffs' costs of complying with the award. As such, the Motion to Dismiss the allegation relating to Customers B is denied.

Ameriprise next argues that the Complaint fails to demonstrate indemnifiable claims for Customer D and Representative A because there is no allegation either party is a customer or client of SAI, as required under the SPA's definition of "Claim."[64] Specifically, Ameriprise maintains: (1) the Complaint pleads that Customer D's father, not Customer D herself, is the party pursuing the

[63] *Id.* at 22.
[64] Def.'s Mot. to Dismiss at 23.

claim;[65] and (2) the Complaint fails to allege the individuals categorized as Representative A are customers or clients of SAI.[66]

The allegations relating to Customer D are complicated by the fact that the "client" was a minor at the time the product was purchased and thus the funds were held in a Uniform Trust for Minors Account. Since the Complaint appears to reflect that the claim made by Customer D has been dismissed, the Court is unsure if Plaintiff is simply seeking defense costs or some other relief. Regardless, it does appear that, at some point, there was a client/customer relationship with Customer D or her representative. The Court is simply not in a position at this time, given the limited information before it, to dismiss the claim. Counsel will need to explore the facts relating to this matter in discovery. The same conclusion is reached as to the conduct of Customer D's father. It is unclear how he fits into the client/customer relationship, but to dismiss the claim, the Court would have to assume facts that simply have not been set forth by the parties.

The assertion for dismissal as to Representative A is that there is nothing in the Complaint to suggest that the thirteen settled claims were customers/clients of SAI. While the Complaint clearly could have been written with greater specificity, the fact that these thirteen claims have been satisfied promotes a reasonable inference that they met the client/customer designation. Otherwise, it is unclear

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[65] *Id.*
[66] *Id.* at 23-24.

why the claims would have been paid. As such, the claim relating to Representative A will not be dismissed at this time.

Finally, Ameriprise asks the Court to dismiss the claim as to Customer C since it appears the amount of the claim, $50,000, fails to meet the deductible set forth in Schedule 802(a)(II). In response, Plaintiff simply states the Court should accept its representation that it has met all the requirements for indemnification under the SPA. While the Court has decided at this juncture not to dismiss this claim, Plaintiff will need to provide more adequate support for this claim going forward. The claim does appear not to meet the deductible and the Court has no facts other than the limited assertions made in the Complaint. While the Court will give Plaintiff an opportunity to establish facts supporting its assertion that the claim exceeds the SPA's deductible, discovery may ultimately prove the claim cannot go forward.

C. Ripeness

Delaware courts will "decline to exercise jurisdiction over a case unless the underlying controversy is ripe."[67] The inquiry, for purposes of ripeness then, is whether the dispute has "matured to a point where judicial action is appropriate."[68] Declaratory judgment is appropriate only where an "actual controversy" exists

[67] *See XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014).
[68] *See id.* (quoting *Stroud*, 552 A.2d at 480).

between the parties.[69] In other words, there must be a controversy: (1) "involving the rights or other legal relations of the party seeking declaratory relief," (2) "in which…[a] legal interest is asserted against one who has an interest in contesting the claim," (3) that is "between parties whose interests are real and adverse," and (4) in which the issue presented is *"ripe for judicial determination."*[70]

In determining whether the ripeness requirement has been satisfied, the Court considers the following factors:

> (1) a practical evaluation of the legitimate interests of the plaintiff in a prompt resolution of the question presented; (2) the hardship that further delay may threaten; (3) the prospect of future factual development that might affect the determination made; (4) the need to conserve scarce resources; and (5) a due respect for identifiable policies of law touching upon the subject matter in dispute.[71]

In the context of indemnification, claims will "not typically ripen until after the merits of an action have been decided, and all appeals have been resolved."[72]

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[69] *See Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755 (Del. Ch. 1995) (citing *Stroud*, 552 A.2d at 479) ("One of the determining factors is the dispute's ripeness for adjudication."), *aff'd*, 670 A.2d 1337 (Del. 1995)).

[70] *See XI Specialty Ins. Co.*, 93 A.3d at 1216-17 (emphasis added) (quoting *Stroud*, 552 A.2d at 479-80)).

[71] *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 274 (Del. Super. Ct. 1989) (citing *Schick v. Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1238 (Del. Ch. 1987)).

[72] *See Yellow Pages Grp., LLC v. Ziplocal, LP*, 2015 WL 358279, at *4 (Del. Super. Ct. Jan. 27, 2015) (quoting *Hampshire Grp., Ltd. v. Kuttner*, 2010 WL 2739995, at *53 (Del. Ch. July 12, 2010)).

Courts in Delaware have thus declined "to enter a declaratory judgment with respect to indemnity until there is a judgment against the party seeking it."[73]

According to Ameriprise, Plaintiffs' claims concerning the Investigations, Registered Representative B, Customer D, and Customer F involve underlying actions and/or settlements that have yet to be decided or finalized.[74] As a result, Ameriprise argues the claims are unripe and must be dismissed. Because the Court dismissed the claims relating to the Investigations, it need only address Ameriprise's ripeness contentions to the extent they concern the Customer Claims.

Ultimately, the Court believes it would be premature to make the finding requested by Ameriprise and to dismiss these claims. Discovery may produce support for Ameriprise's allegation that the claims have not been settled or have not yet been paid. But, at this early stage in the litigation, the Court is without the factual basis necessary to dismiss the claims based on the ripeness arguments advanced by Ameriprise . While the Court has no intention of giving Plaintiff an adversarial opinion on their indemnification rights or potential litigation, the arguments of ripeness made by Ameriprise simply are premature.

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[73] *See XI Specialty Ins. Co.*, 93 A.3d at 1218 (quoting *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 872 A.2d 611, 632 (Del. Ch. 2005), *aff'd in part, rev'd in part*, 901 A.2d 106 (Del. 2006)).
[74] Def.'s Mot. to Dismiss at 25-26.

IV. CONCLUSION

For the reasons set forth in this Opinion, the claims relating to the Investigations by the SEC and other state regulatory agencies will be dismissed. Otherwise, the assertions set forth in the Complaint may proceed and the Motion to Dismiss is denied.

As an alternative to the dismissal of the Complaint, Ameriprise has asked the Court to require Plaintiff to file a more definitive statement. While the Court has concerns as to the specificity of allegations contained in the Complaint, it does not believe, given Delaware's liberal pleading rules, that a more definitive statement is required. There are discovery tools available to the Defendant with which it may obtain the information it seeks. As such, the request for a more definitive statement is also denied.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.