IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NUCOR COATINGS CORPORATION,	)	
	)	C.A. No. N22C-11-222 MAA CCLD
Plaintiff,	)	
v.	)	
PRECOAT METALS CORP. and PRECOAT MEZZANINE LLC,	)	
Defendants.	)	

Submitted: May 19, 2023
Decided: August 31, 2023

Upon Defendants' Motion to Dismiss:
DENIED.

MEMORANDUM OPINION

S. Michael Sirkin, Esquire, R. Garrett Rice (Argued), Esquire, and Holly E. Newell, Esquire, of ROSS ARONSTAM & MORITZ LLP, Wilmington, Delaware, Attorney for Plaintiff.

Joseph L. Christensen, Esquire, of CHRISTENSEN & DOUGHERTY LLP, Wilmington, Delaware, and Kimberly F. Rich (Argued), Esquire, of BAKER & McKENZIE LLP, Dallas, Texas, Attorneys for Defendant.

Adams, J.

INTRODUCTION

This is a breach of contract action between Plaintiff Nucor Coatings Corporation and Defendant Precoat Metals Corporation, a coil coating company. Plaintiff is a subsidiary of the Nucor Corporation ("Parent Company"), a leading manufacturer of steel products. Plaintiff purchased a metal coil coating facility (the "Facility") from Defendant pursuant to the terms of an Asset Purchase Agreement (the "Contract"). After closing, Plaintiff alleges it discovered that the Facility was operating in violation of environmental laws and that much of the equipment was in disrepair. After Plaintiff's attempts at seeking indemnification from Defendant were unsuccessful, Plaintiff filed suit in this Court, claiming Defendant breached the Contract by refusing to indemnify it, and that Defendant's Guarantor was equally responsible for fulfilling Defendant's obligations under the Contract. This is the Court's decision on Defendant's motion to dismiss this action. For the reasons that follow, the motion to dismiss is DENIED.

FACTS

Plaintiff's Parent Company "manufactures a diverse range of steel and steel products, many of which require cleaning and coating processes."[1] Nucor Steel Arkansas, a subsidiary of Parent Company, manufactures various types of steel

[1] Unless otherwise stated, facts are drawn from the Amended Complaint. The Court hereinafter refers to the Amended Complaint as the "Complaint" or "Compl."

products and became interested in operating a coil coating line. On October 27, 2020, Plaintiff purchased the "Facility" located in Arkansas from Defendant for $66.5 million under the terms of an Asset Purchase Agreement (the "Contract"). Defendant's guarantor, Sequa Guarantor ("Guarantor") also executed the Contract unconditionally guaranteeing Defendant's obligations. Plaintiff's acquisition of the Facility closed on December 1, 2020.

I. The Facility

Plaintiff owns and operates the Facility and works closely with Nucor Steel Arkansas. Some of the coil coating processes conducted at the Facility produce wastewater, emissions, and pollutants, including volatile organic compounds (VOCs) and other hazardous air pollutants. The Facility's operations are subject to federal, state, and local environmental laws and regulations. These laws mandate that the Facility maintain processes to treat and dispose of the emissions and pollutants that it generates. The exhaust containing VOCs undergoes a particular treatment process, by running it through a thermal oxidizer—an air pollution control system—which decomposes the hazardous gasses into carbon dioxide and water vapor. The thermal oxidizer releases cooled air into the atmosphere through a stack. This treatment process is meant to limit emissions of air pollutants to meet standards set by environmental laws.

Plaintiff alleges that it had limited access to the Facility before signing the Contract, and during the time between signing and closing. In October 2020, Defendant conducted a VOC capture and destruction efficiency test and gaseous emissions test (identified collectively as a "Stack test") at the Facility, which did not detect any compliance issues. Plaintiff alleges Defendant did not allow it to be present during this testing and that it did not receive the report from this test until "right before" closing.[2]

II. The Contract

Plaintiff purchased the Facility and various assets associated with the Facility pursuant to the terms of the Contract. The Contract contains the following sections or provision that are relevant to the motion to dismiss:

- Section 2.04 ("Excluded Liabilities"): This section contains an enumerated list of liabilities for which the parties agreed Plaintiff would not be liable, specifically subsection (h) relating to liabilities arising from violations of Environmental Laws or to the release, threatened release or disposal of hazardous materials prior to closing.
- Article III: Representations and Warranties of Seller [Defendant]: 3.07 ("Adequacy of Assets") and 3.14 ("Environmental Matters").

[2] Compl. ¶ 57.

- Article IV: Representations and Warranties of Buyer [Plaintiff]: 4.07 ("Disclaimer; Independent Investigation").
- Article IX: Indemnity: 9.01(g), relating to the procedure for seeking indemnification from Defendant, 9.02 ("Indemnification and Payment of Damages by Seller [Defendant]"), 9.03 ("Limitations on Seller's [Defendant's] Obligations"), and 9.07 ("Procedure for Indemnification – Other Claims").
- Article XI: Guaranty of Sequa Guarantor.[3]

III. After closing, Plaintiff discovers pre-existing violations of environmental laws at the Facility.

After closing, Plaintiff hired a consultant to perform a "wall-to-wall" environmental audit of the Facility so that Plaintiff could identify any environmental issues.[4] The consultant's report identified twenty-three areas of noncompliance, some of which were in violation of environmental laws and required Plaintiff to take corrective action. Of paramount concern to Plaintiff was its discovery that the air pollution system, including the thermal oxidizer, was not functioning properly. Some of the duct work was disconnected, allowing emissions to be released

[3] Contract at 11.01. "Subject to Section 11.05, Sequa Guarantor hereby unconditionally and irrevocably guarantees to Buyer and its successors and permitted assigns the timely performance of all obligations of Seller under this Agreement . . . . Buyer acknowledges and agrees that Seller's Obligations are subject to and shall be determined in accordance with the express terms and conditions of this Agreement." *Id.*

[4] Compl. ¶ 59.

untreated instead of being routed through the air pollution control equipment. When the ductwork was reconnected and the thermal oxidizer took in the full amount of exhaust that was meant to be routed through it, Plaintiff then discovered that the thermal oxidizer was unable to "achieve the capture and control efficiencies required by Environmental Laws."[5] Plaintiff alleges that the Facility only passed the October 2020 stack test because the full amount of exhaust was not being routed through the thermal oxidizer.[6] Plaintiff alleges these emissions-related issues were present before closing and resulted in violations of Environmental Laws.

Plaintiff alleges three additional areas of non-compliance with Environmental Laws in its Complaint.[7] Plaintiff alleges it has had to expend a significant amount of money on corrective actions. The most significant cost is replacing the thermal oxidizer, which Plaintiff claims is beyond repair.[8] Plaintiff alleges over $5 million of the costs associated with the new thermal oxidizer have been or will be incurred while taking corrective action in the most cost-efficient manner and to achieve the least stringent applicable standards under environmental law; and that no costs were incurred to improve, modify, or expand the Facility.[9] Plaintiff characterizes the costs associated with the new thermal oxidizer and other corrective action as

[5] Compl. ¶ 64.
[6] Compl. ¶ 65.
[7] Compl. ¶ 67.
[8] Plaintiff alleges the costs associated with the new thermal oxidizer is approximately $6.7 million. Compl. ¶ 69.
[9] Compl. ¶ 70; *see* Contract at Sec. 9.03(D).

Environmental Law Damages. Plaintiff further alleges it has had to fix or replace other equipment and machinery that was either malfunctioning or nonfunctioning at the time of closing. Plaintiff had to shut down the Facility's coil coating line due to safety concerns the day after it took over the Facility and lists several critical equipment failures. Plaintiff characterizes the costs associated with repairing and replacing equipment as "Critical Equipment Damages."

IV. Plaintiff's Indemnification Demands

Prior to filing its complaint, Plaintiff made two demands for indemnification from Defendant. Plaintiff made its first demand on February 24, 2022 for Environmental Law Damages, pursuant to sections 9.02(a) and (d), 2.04, and 3.14 of the Contract. Defendant denied in all respects Plaintiff's claim for indemnification. Plaintiff made its second demand on May 27, 2022 for Critical Equipment Damages pursuant to section 9.02(a) and 3.07. Defendant refused this second demand and, to date, has refused to indemnify Plaintiff for any of its alleged damages.

V. The Amended Complaint

Plaintiff filed its Amended Complaint on January 18, 2023 and alleged three counts for breach of contract:

- Count I: Defendant's refusal to indemnify Plaintiff for Environmental Law Damages pursuant to sections 9.02(a) and (d), 2.04(h), and 3.14. Plaintiff alleges its Environmental Law Damages exceed $5 million.
- Count II: Defendant's refusal to indemnify Plaintiff for Critical Equipment Damages pursuant to sections 9.02(a) and 3.07. Plaintiff alleges its Critical Equipment Damages are at least $6,650,000. [10]
- Count III: Guarantor breached its guarantee obligation and is obligated to pay at least $11,650,000 in actual and compensatory damages.

STANDARD OF REVIEW

In considering a motion to dismiss filed pursuant to Superior Court Civil Rule 12(b)(6), the Court must accept all well pled allegations as true.[11] "A complaint's allegations are well-pleaded if they put the opposing party on notice of the claims being brought against it."[12] While "[v]agueness or lack of detail . . . are insufficient grounds upon which to dismiss a complaint under Rule 12(b)(6)[,]"[13] courts are not "required to accept as true conclusory allegations without specific supporting factual

[10] Plaintiff filed its original complaint on December 14, 2022.
[11] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[12] *Hale v. Elizabeth W. Murphey School, Inc.*, 2014 WL 2119652, at *2 (Del. Super. May 20, 2014) (cleaned up); *see also Bramble v. Old Republic Gen. Ins. Corp.*, 2017 WL 345144, at *3 (Del. Super. Jan. 20, 2017) ("Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant.'") (quoting *Diamond State Telephone v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).
[13] *Bramble*, 2017 WL 345144, at *3 (internal citations omitted).

allegations or every strained interpretation of the allegations . . .”[14] The court must assess whether the claimant “may recover under any reasonably conceivable set of circumstances susceptible of proof.”[15] The Court must draw every reasonable factual inference in favor of the non-moving party and must deny the Motion to Dismiss if the claimant may recover under that standard.[16] Dismissal will not be granted unless a claim is clearly without merit.[17]

As a general matter, when deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court is limited to reviewing the allegations in the complaint. The Court may review, however, documents extrinsic to the Complaint when one or both of the following conditions are present: (1) when the document is “integral to a plaintiff’s claim and incorporated into the complaint[;]” or (2) “when the document is not being relied upon to prove the truth of its contents.”[18]

[14] *Clouser v. Doherty*, 175 A.3d 86 (TABLE), 2017 WL 3947404, at *4 (Del. 2017) (international quotations and citations omitted).
[15] *Hackett v. TD Bank, N.A.*, 2023 WL 3750378, at *2 (Del. Super. May 31, 2023) (internal quotations omitted).
[16] *Id.*
[17] *Bramble*, 2017 WL 345144, at *3 (internal citations omitted).
[18] *Id.* (internal citations omitted).

ANALYSIS

I. Count I: Breach of Contract Based on Defendant's Refusal to Indemnify for Environmental Law Damages Pursuant to Sections 9.02(a) and (d), 2.04(h), and 3.14 of the Contract

A. Relevant Contractual Provisions

In Count I, Plaintiff alleges that Defendant breached the Contract by refusing to indemnify Plaintiff pursuant to Section 9.02(a) for the untruth or inaccuracy of its representation in Section 3.14, and for refusing to indemnify Plaintiff pursuant to Section 9.02(d) for the excluded liability provided in Section 2.04(h).

1. Section 1.01 ("Liabilities" and "Damages")

Section 1.01 provides definitions for certain essential terms used in the Contract. "Liabilities" is defined as "all obligations, liabilities or commitments of any kind whatsoever, whether know or unknown, suspected or unsuspected, foreseeable or unforeseeable, contingent or fixed, liquidates or unliquidated, insured or uninsured, matured or unmatured or otherwise."

With respect to the definition of "Damages," Section 1.01 refers the reader to Section 9.02, which defines that term as follows: "any loss, *Liability*, claim, damage, expense, fine or penalty (including the same as they relate to injury to any Person or property, costs of investigation, defense and settlement, and reasonable attorneys' fees, whether or not involving a Third-party Claim) . . . ."[19]

[19] Contract at Sec. 1.01, 9.02 (emphasis added).

2. Section 9.02 ("Indemnification and Payment of Damages by Seller [Defendant]")

In Section 9.02, Defendant agreed to indemnify Plaintiff "from any loss, Liability, claim, damage, expense, fine or penalty . . . arising, directly or indirectly, from or in connection with:

> (a) the untruth or inaccuracy of any representation or warranty of [Defendant] set forth herein or in any certificate or document delivered pursuant hereto
>
> . . .
>
> (d) any Excluded Liabilities . . . ."

3. Section 3.14 ("Environmental Matters")

Plaintiff alleges Defendant violated Section 9.02(a) by violating Section 3.14(a). Section 3.14(a), states in relevant part,

> except as set forth on Schedule 3.14(a) and except as would not reasonably be expect [sic] to result in a material Liability to [Plaintiff]: (i) *the Business and Assets are in compliance with all applicable Environmental Laws;* (ii) specifically, without limiting the generality of the foregoing Section 3.14(a)(i), *all Hazardous Materials generated by or in connection with the Business or the Assets is and has been handled and disposed of in compliance with all applicable Environmental Laws* . . . (iv) neither [Defendant] nor, to the Knowledge of [Defendant,] any other Person has caused any existing contamination by, or any Release of, any Hazardous Materials on, at, under or around any of the Assets or the Business resulting from [Defendant's] operation of the Business . . . .[20]

[20] Contract at Sec. 3.14(a) (emphasis added). "Environmental laws" is defined in Section 1.01 of the Contract as "any and all Legal Requirements relating to noise, or to pollution or protection of

4. Section 2.04 ("Excluded Liabilities")

Plaintiff alleges Defendant violated Section 9.02(d) by refusing to indemnify Plaintiff for a specific excluded liability contained in Section 2.04(h). Section 2.04(h), provides in relevant part:

> Notwithstanding anything herein to the contrary [Plaintiff] does not and will not assume, or otherwise become liable or responsible for, any Liabilities of [Defendant] of any type or nature other than the Assumed Liabilities as a result of this Agreement. Without limiting the generality of the foregoing, [Defendant] . . . agrees to . . . be responsible for all Liabilities (the "Excluded Liabilities") (x) of [Defendant] as of the Closing and (y) without duplication, the following Liabilities: . . . *(h) all known or unknown Liabilities to the extent relating to violations of Environmental Laws arising out of the operation of the Business at the Facility prior to the Closing, or to the Release or threatened Release, or disposal of Hazardous Materials at or from the Facility prior to the Closing.*[21]

B. Defendant's Position

Defendant asserts Plaintiff's claim for indemnification for Environmental Law Damages is prohibited by Section 9.03 ("Limitations on Seller's Obligations"), specifically 9.03(d)(ii) (the "No Dig" Provision), and 9.03(D). Defendant also asserts that Plaintiff failed to comply with the procedures for requesting

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human health or the environment (including, but not limited to, the air, surface water, ground water, wetlands, land surface or subsurface strata), including, but not limited to, Legal Requirements relating to air and water emissions or discharges, Releases or threatened Releases of Hazardous Materials, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, recycling, reporting or handling of Hazardous Materials."

[21] Contract at Sec. 2.04(h) (emphasis added).

indemnification pursuant to sections 9.07(b) and (c), and that this noncompliance bars its claim.

1. Section 9.03(d)

Section 9.03(d) states that "from and after closing" Plaintiff is not entitled to make any claim for indemnification or institute any legal action under Section 9.02(a) "in respect of any breach of the representations and warranties set forth in Section 3.12 (Environmental Matters), or Section 9.02(d), in respect of any Excluded Liabilities set forth in Section 2.4(h),

> to the extent such Damages arose, directly or indirectly, as a result of any actions taken by Buyer [Plaintiff] to (i) implement any cleanup or corrective action that is not required by Environmental Law and that is not conducted to achieve the least stringent applicable remediation standards under applicable Environmental Laws or in the most cost-effective manner or (ii) *voluntarily initiate, perform or cause to be performed by any Person or Governmental Authority any soil, surface water or groundwater investigation, other than any such investigation (x) required to comply with applicable Environmental Law or (y) first initiated and required by any Governmental Authority*.[22]

[22] Contract at Sec. 9.03(d) (emphasis added). The Court notes that Section 9.03(d) contains several drafting errors. This section twice refers to "Section 3.12 (Environmental Matters)," however the section for Environmental Matters is Section 3.14, not 3.12. Section 3.12 relates to "Title to Personal Property." This section also twice refers to "Section 2.4(h)" but the Contract does not contain a provision numbered "2.4(h)." The Court infers that the section referred to is 2.04(h). 9.02(d) provides for indemnification for "Excluded Liabilities" and Section 2.04 is titled Excluded Liabilities. Subsection (h) of 2.04 refers to liabilities relating to violations of environmental laws or to the release, threatened release or disposal of hazardous materials prior to closing.

2. Section 9.03(D)

Section 9.03(D) states:

> Notwithstanding anything to the contrary set forth herein, no damages shall be subject to indemnification by [Defendant] under Section 9.02(a) in respect of any breach of the representations and warranties set forth in Section 3.12 [sic] (Environmental Matters) Section 9.02(d) in respect of any Excluded Liabilities set forth in Section 2.4(h) [sic], to the extent that such Damages (including costs of cleanup, for corrective actions, or for any capital improvements or expenditures) . . . arise out of or relate to any *additions or improvements to, or equipment for, the Facility*, including any Facility construction, development, modification, expansion or decommissioning activities.[23]

3. Section 9.07 ("Procedure for Indemnification – Other Claims")

Section 9.07(a) provides that a claim for indemnification "may be asserted by written notice." Section 9.07(b) states that Plaintiff "shall make available to the Indemnifying Person [Defendant] the information relied upon by the Indemnified Person [Plaintiff] to substantiate the Direct Claim, together with all such other information as the Indemnifying Person [Defendant] may reasonably request." Section 9.07(c) provides that Plaintiff shall not undertake "any removal, remedial or response action" to which it "may be entitled to indemnification without providing reasonable prior written notice to the Indemnifying Person [Defendant]."

[23] Contract at Sec. 9.03(D) (emphasis added). *See supra* n. 22 regarding typographical errors in Section 9.03(d).

C. Principles of Contract Interpretation

Defendant's grounds for dismissal are based upon the interpretation of various provisions in the Contract and their interrelation. "Delaware adheres to the 'objective' theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party."[24] "When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions."[25] "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . . ."[26] A plain reading of the Contract, and the application of basic principles and cannons of contract interpretation, resolve most of the questions presented by this motion.

D. Plaintiff has sufficiently alleged breach of contract based on Defendant's refusal to indemnify it for Environmental Law Damages (Count I).

Plaintiff has sufficiently alleged at the pleading stage that Defendant did not comply with Section 9.02(a) and (d) of the Contract. Pursuant to Section 9.02(a),

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[24] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[25] *Plaze, Inc. and Apollo Aerosole Industries LLC v. Callas*, 2018 WL 1560057, at *2 (Del. Ch. Mar. 29, 2018) (quoting *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014)); *see also* Restatement (Second) of Contracts § 202 (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.").
[26] *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, n.45 (Del. 2015) (citing Restatement (Second) of Contracts § 203).

Defendant agreed to indemnify Plaintiff from, among other things, any loss, liability, claim, damage, expense, fine or penalty arising from the untruth or inaccuracy of any of Defendant's representations. In Section 3.14, Defendant represented that the business and assets were in compliance with all applicable environmental laws and that hazardous materials generated by the Facility were disposed of in compliance with those laws.[27]

Plaintiff alleged that it hired a professional consultant shortly after closing who identified areas of noncompliance that were in violation of Environmental Laws. Plaintiff alleged in detail that the Facility's air pollution control system was malfunctioning to the extent that it could not "achieve the capture and control efficiencies required by Environmental Laws."[28] Plaintiff also alleged some of the ductwork was disconnected which allowed emission to be released untreated throughout the facility and into the environment, and that this occurred prior to closing.[29] Due to Defendant's misrepresentations regarding the Facility's compliance with Environmental Laws, Plaintiff alleged that it undertook required

[27] The parties agreed that Defendant's representations and warranties regarding environmental matters in Section 3.14 would continue for three years after the closing date. Contract at Sec. 9.01(a). The parties closed on December 1, 2020 and Plaintiff filed its complaint on December 14, 2022, thus Plaintiff's filing was timely. Compl. ¶ 58.

[28] Compl. ¶ 64.

[29] Compl. ¶ 62. Plaintiff also alleged that the Facility's wastewater treatment system failed to meet the requirement imposed by the city of Blytheville, Arkansas, where it is located; that its emergency diesel generator was out of compliance with EPA regulations and had to be disconnected, and that its practice of pumping sanitary sewer waste to an on-site constructed pond was impermissible.

corrective action to bring the Facility into compliance which resulted in Environmental Law Damages.[30] Plaintiff also sufficiently alleged that Defendant misrepresented the fact that hazardous materials had been disposed of in accordance with Environmental Laws.[31]

Plaintiff also sufficiently alleged that Defendant breached the Contract by refusing to indemnify it for an excluded liability, specifically 2.04(h). Pursuant to Section 2.04(h), the parties agreed that Plaintiff would not be responsible for liabilities relating to violations of Environmental Laws prior to closing or the release of hazardous materials prior to closing.[32] Plaintiff alleged that the audit revealed violations of Environmental Laws that occurred prior to closing and that "required [Plaintiff] to take corrective actions at the Facility."[33] Plaintiff alleges its "Environmental Law Damages were incurred in the course of and are related to remedying a violation of or non-compliance with Environmental Laws or 'Releases of Hazardous Materials' as defined in the Agreement."[34]

[30] Compl. ¶ 61.
[31] Compl. ¶ 6; *see* Contract at Sec. 3.14.
[32] *See supra* ANALYSIS I.A.4. for a full quotation of Section 2.04(h).
[33] Compl. ¶¶ 61-66.
[34] Compl. ¶ 71.

1. Plaintiff's claim for indemnification pursuant to 9.02(a) and (d) is not barred by Section 9.03(d)(ii).

Plaintiff's claim for Environmental Law Damages pursuant to sections 9.02(a) and (d) is not barred by Section 9.03(d)(ii).[35] Defendant argues that Count I should be dismissed because Plaintiff voluntarily caused a soil, surface water or ground water investigation that was not required by Environmental Law or first initiated and required by a governmental authority.[36] Nowhere in Plaintiff's complaint, however, did it allege that it conducted a soil, surface water, or groundwater investigation. The Court will not assume these facts into the complaint based solely on the fact that Plaintiff characterized the audit as a "wall-to-wall environmental audit." A comprehensive reading of the Complaint suggests that the focus of the audit was on air quality and emissions of hazardous gasses, not soil or water testing.[37] Defendant's conclusory argument that a "wall-to-wall environmental audit" must

[35] Defendant focuses on subsection (ii) related to voluntary soil, surface water, or groundwater investigations; and focuses on subsection (D) related to additions or improvements to the Facility. In the event Defendant also intended to argue that Count I is barred by Section 9.03(d)(i), the Court finds that Section 9.03(d)(i) also does not defeat Count I. Plaintiff expressly alleged that the corrective action was conducted "in the most cost-efficient manner and to achieve the least stringent applicable standards under Environmental Laws," in compliance with this section. There is not sufficient evidence in the record at this stage of the proceedings to dismiss Plaintiff's claim for Environmental Law damages on the basis that the corrective action was not required by any environmental law or conducted in the "most cost-effective manner."

[36] *See* Contract at Sec. 9.03(d)(ii), (x), (y).

[37] The environmental audit report is not attached to the Complaint, but the sections of the Complaint relative to Count I focus mostly, if not entirely, on the Facility's air pollution control system. Plaintiff alleged that the "air pollution control system was compromised in a serious way[,]" that the air ducts associated with the thermal oxidizer were disconnected, that the thermal oxidizer was in disrepair, and the emergency diesel generator was out of compliance. Compl. ¶¶ 62, 64, 67.

necessarily include soil, surface water, and groundwater testing is unavailing. Defendant provides no support for its assumption that the audit included surface water or ground water testing and the Contract does not define these terms.[38]

2. Plaintiff's claim for indemnification pursuant to 9.02(a) and (d) is not barred by Section 9.03(D).

Section 9.03(D) excludes damages "including costs of cleanup, for corrective actions, or for any capital improvements or expenditures" that "arise out of or relate to *additions or improvements to, or equipment for,* the Facility . . . ." Plaintiff expressly alleged that "[n]one of the Environmental Laws Damages were incurred to improve, modify, or expand the Facility in any way not required by Environmental Laws" and that all of the damages resulted from remediations necessary to bring the Facility into compliance with environmental laws.[39] Defendant cites to Plaintiff's allegations that Plaintiff "remediated the ductwork, ordered a new thermal oxidizer[,] and 'had to spend a significant amount of money on corrective actions.'"[40]

[38] Plaintiff did allege that the Facility's wastewater treatment system was in significant disrepair and that Defendant's practice of disposing of sanitary sewer water on site was impermissible, but Defendant has not shown that "surface water" or "groundwater" is equivalent to "wastewater" or "sanitary sewer water." On a motion to dismiss, the Court must draw every reasonable factual inference in favor of the non-moving party, thus it cannot decide as a matter of law, based on the record before it, that Plaintiff's claim for indemnification is barred by Section 9.03(d)(ii). *See Hackett v. TD Bank, N.A.,* 2023 WL 3750378, at *2 (Del. Super. May 31, 2023) (internal quotations omitted).

[39] Compl. ¶ 71. Plaintiff alleges "over $5 million of the costs associated with the new thermal oxidizer have been or will be incurred while taking corrective actions. . . ." *Id.* ¶ 70.

[40] Mot. Dismiss at 21 (quoting Complaint ¶¶ 64, 68, 69-71).

The Court will first address whether Plaintiff has sufficiently alleged the work it conducted was only remedial in nature, or whether it qualifies as an "addition or improvement to" the Facility as Defendant argues, before addressing the clause "or equipment for." For the reasons that follow, the Court finds Plaintiff sufficiently alleged that some of the costs it incurred were a result of remedial work and therefore not excluded from indemnification by Section 9.03(D), which only excludes "additions or improvements" to the Facility.[41]

a. Plaintiff's claim for indemnification for the costs of remediation is not barred by Section 9.03(D).

The Contract does not provide a definition for "additions" or "improvements." The Court, therefore, will supply to these terms their plain meaning with reference to their dictionary definitions and compare them to "remediate."[42] "Improvement" is the act or process of improving, while the verb "to improve" is to "enhance in value or quality" or "to make better." "Addition" is defined as "a part added" or

[41] Section 9.03(D) provides that "additions or improvements" "includ[e] any Facility construction, development, modification, expansion or decommissioning activities."

[42] When a contract does not define a given term, that term must be given its ordinary, common meaning. *Bank of New York Mellon as Trustee for the Certifcateholders of CWALT, Inc. v. Tang*, 2019 WL 1091156, at *2 (Del. Super. Mar. 8, 2019); *Cornell Glasgow LLC v, La Grange Properties*, 2012 WL 6840625, at *12 (Del. Super. Dec. 7, 2012) ("In Delaware, courts routinely refer to dictionaries to discern a contractual term's ordinary meaning."); *see also Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006) (stating Delaware courts use dictionaries to identify the plain meaning of words not defined in a contract because "dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract. Dictionary definitions change over time, provide the contemporary meaning of ordinary words, and note when a particular definition of a term has become obsolete.") (internal citations omitted).

"anything added."[43] The transitive verb form, "to add," is defined as "to join or unite so as to bring about an increase or improvement."[44] To remediate is "to correct something that is wrong or damaged or to improve a bad situation"[45] or simply "to provide a remedy for."[46]

While there is similarity between the processes of making something better and correcting something that is wrong, there is a critical distinction between the terms "improve" and "remediate" salient to the scope of Section 9.03(D). To remedy something assumes that something is lacking, deficient or in disrepair and requires work to return it to its satisfactory state. "To improve" does not include this predicate state. "To improve" could mean the act of altering something that already functions properly or adequately solely for the purpose of further optimizing it.

The Court finds, therefore, that the express terms, "additions or improvements" do not include remediation or remedial work. The Court also finds that, "under the interpretive principle that the expression of one thing is the exclusion of another[,]" the parties purposefully excluded remediations from Section

[43] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/addition (last visited Aug. 29, 2023).
[44] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/add (last visited Aug. 29, 2023).
[45] CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/remediate (last visited Aug. 29, 2023).
[46] COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/remediate (last visited Aug. 29, 2023).

9.03(D).[47] The terms "additions or improvements," as well as the expressly included terms exemplifying them ("construction, development, modification, expansion"), relate to some form of optimization or upgrade unconnected to any sort of wrong, dysfunction or disrepair.

The Court finds, drawing all reasonable inference in favor of Plaintiff, that Plaintiff alleged it undertook work, at least some of which was remedial in nature. Plaintiff alleged that various assets were in disrepair or nonfunctional and that Plaintiff expended costs to fix or correct these issues as required by Environmental Laws. The Court cannot say that Count I is wholly without merit at this stage due to some possible vagaries regarding the precise work that was done and whether it qualifies as only remediation and repair or whether some of it constitutes additions or improvements. The record is not sufficiently developed for the Court to conclude as a matter of law that none of the costs Plaintiff incurred were a result of work done to remediate issues with the Facility.[48]

[47] *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1060 (Del. 2011).
[48] Additionally, the fact that Plaintiff had to spend a significant amount of money does not mean, as Defendant argues, that Plaintiff could not have spent that money to repair and remediate the Facility to bring it into compliance with environmental laws.

b. The Court cannot decide as a matter of law that Section 9.03(D) excludes from Plaintiff's claim for indemnification the cost of a new thermal oxidizer, associated required equipment, and cleanup or corrective action arising from this equipment.

Plaintiff alleged it ordered a new thermal oxidizer because the one that it purchased from Defendant was emitting hazardous materials in violation of Environmental Laws and was beyond repair. Plaintiff alleges "the costs associated with the new thermal oxidizer will be approximately $6.7 million" which "includes not only the oxidizer itself, but other required associated major expenses like ductwork, installation, and piping, each of which exceed $100,000."[49] Plaintiff also alleged that "over $5 million of the costs associated with the new thermal oxidizer have been or will be incurred while taking corrective action . . . ." Pursuant to Section 9.02(a), Defendant agreed to indemnify Plaintiff for the any untruth or inaccuracy in the representation it made in Section 3.14 ("Environmental Matters"). Pursuant to Section 9.02(d), Defendant agreed to indemnify Plaintiff for the excluded liability listed in Section 2.04(h). Section 2.04(h) provides, "[n]otwithstanding anything herein to the contrary," Defendant is not liable for any liabilities except for the Assumed Liabilities and Excluded Liabilities, the latter of which includes violations of Environmental Laws prior to closing or to the release, threatened release, or disposal of hazardous materials prior to closing. Section

[49] Compl. ¶ 69.

9.03(D) provides, "notwithstanding anything to the contrary . . . no damages are subject indemnification" under Section 9.02(a) and (d), 3.14, and 2.04(h), "to the extent such damages (including costs of cleanup, for corrective actions, or for any capital improvements or expenditures) . . . (D) arise out of . . . additions or improvements to, or equipment for, the Facility . . . ."

Defendant argues that the clause in 9.03(D)—"or equipment for"— is unambiguous and excludes indemnification for the new thermal oxidizer and associated required equipment. Plaintiff argues that 9.03(D) does not exclude the new thermal oxidizer from indemnification because it is not an "addition[] or improvement[]" to the Facility; or at least the competing "notwithstanding" clauses create an ambiguity that cannot be resolved on a motion to dismiss. In essence, Defendant interprets "or equipment for" in isolation as categorically excluding from indemnification any new equipment purchased for the Facility while Plaintiff argues this exclusion only applies if the equipment qualifies as an addition or improvement to the Facility.

While both parties provide scant caselaw to support their respective interpretations, the Court agrees with Plaintiff that, at this stage, it is premature to exclude from count I the cost of replacing the thermal oxidizer.

Delaware courts follow the maxim that "the general does not detract from the specific."[50] This principle of contract interpretation dictates that "where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[51] This principle "can be thought of as reading the specific as an exception to the general, which allows a harmonizing of otherwise conflicting provision."[52] When a provision is ambiguous, *i.e.* that it is reasonably susceptible to two or more interpretations, courts should generally refrain from resolving the ambiguity on a motion to dismiss.[53] Reading sections 2.04(h) and 9.03(D) together, the Court cannot find at this stage that Section 9.03(D) categorically excludes from indemnification all purchases of new equipment. The record is not adequately

[50] *CSH Theatres, LLC v. Nederlander of San Francisco Assoc.*, 2018 WL 3646817, at *24 (Del. Ch. July 31, 2018) *aff'd in part, rev'd in part, In re Shorenstein Hays-Nederlander Theatres LLC*, 213 A.3d 39 (Del. 2019).

[51] *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *24 (Del. Ch. July 22, 2015) (quoting *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005)); *ITG Brands, LLC v. Reynolds American, Inc.*, 2019 WL 4593495, at *9 (Del. Ch. Sept. 23, 2019) (when interpreting a contract, "courts favor specific over general provisions when they conflict because of the reasonable inference that specific provisions express more exactly what the parties intended.") (internal quotation omitted).

[52] *CSH Theatres, LLC v. Nederlander of San Francisco Assoc.*, 2018 WL 3646817, at *24 (Del. Ch. July 31, 2018) *aff'd in part, rev'd in part, In re Shorenstein Hays-Nederlander Theatres LLC*, 213 A.3d 39 (Del. 2019); *ITG Brands, LLC*, 2019 WL 4593495, at *9.

[53] *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Hldgs. Pvt. Ltd*., 2013 WL 5787958, at *4 (Del. Ch. Oct. 25, 2013). "Ambiguity does not exist simply because the parties disagree about what the contract means. . . . Rather, contracts are ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *See ITG Brands, LLC*, 2019 WL 4593495, at *9 (quoting *Cooper Tire & Rubber Co.*, 2013 WL 5787958, at *4). In *ITG Brands*, the Court of Chancery found that one provision of greater specificity was in conflict with a more general provision. The court denied the parties' cross-motions for partial judgment on the pleadings as to the effect of these conflicting provisions because both parties presented reasonable opposing interpretations.

developed for the Court to decide as a matter of law the parties' shared intent, *i.e.* whether 9.03(D) excludes all new equipment or only that equipment that results in an improvement or addition to the Facility.[54]

3. Plaintiff's claim for indemnification pursuant to 9.02(a) and (d) is not Barred by Sections 9.07(b) and (c).

Defendant asserts that its obligation to indemnify Plaintiff for Environmental Law Damages is precluded because Plaintiff did not comply with conditions precedent contained in Sections 9.07(b) and (c) before filing a direct claim. Plaintiff responds that these provisions are not conditions precedent. Plaintiff further contends that even if these provisions are conditions precedent, they do not provide a ground for dismissal for two reasons: (1) Plaintiff has sufficiently alleged its performance; and (2) nonperformance of conditions precedent need to be raised as an affirmative defense, or in a cross claim or counterclaim, as opposed to a motion to dismiss.

a. Sections 9.07(b) and (c) are not conditions precedent because they are not included in Section 9.01(g).

"A condition precedent is an act or event, other than a lapse of time, that must exist or occur *before* a duty to perform something promised arises."[55] Whether a

[54] *See ITG Brands, LLC,* 2019 WL 4593495, at *9 ("the court will need to examine whatever parol evidence may exist on the interplay between [the two provisions] before determining which of the parties' competing interpretations represents their shared intent").
[55] *Aveanna Healthcare, LLC v. Epic/Freedom, LLC,* 2021 WL 3235739, at *25 (Del. Super. July 29, 2021) (cleaned up).

provision qualifies as a condition precedent is a question of contract interpretation which the Court may resolve as a matter of law.[56] The Court examines whether the parties intended for a provision to act as a condition precedent by looking to the plain language of the provision.[57] A condition precedent must be expressed in clear and unambiguous terms, though no specific language is required.[58]

"Conditions precedent are not favored in contract interpretation because of their tendency to work a forfeiture."[59] Because of the risk of forfeiture, a provision must employ unambiguous language to qualify as a condition precedent.[60] A term or provision is ambiguous if it is "fairly or reasonably susceptible to more than one meaning."[61] "If the language does not clearly provide for a forfeiture, then a court will construe the agreement to avoid causing one."[62] When a provision does not identify the consequences of a party's failure to perform, *i.e.* how the provision will

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[56] *Id*.
[57] *Ainslie v. Cantor Fitzgerald, LP*, 2023 WL 106924, at *10 (Del. Ch. Jan. 4, 2023).
[58] *Aveanna Healthcare, LLC*, 2021 WL 3235739, at *25 (cleaned up).
[59] *Thomas v. Headlands Tech Principal Holdings, LP*, 2020 WL 5946962, at *5 (Del. Super. Sept. 22, 2020) (quoting *Stoltz Realty Co. v. Paul*, 1995 WL 654152, at *9 (Del. Super. Sept. 20, 1995) (quoting 17A Am. Jur. 2d Contracts § 471)); *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco., LLC*, 2022 WL 34688, at n.159 (Del. Ch. Jan. 4, 2022) (same); *Blue Cube Spinco LLC, v. Dow Chemical Company*, 2021 WL 4453460, at *10 (Del. Super. Sept. 29, 2021) (internal quotation omitted).
[60] *See Thomas*, 2020 WL 5946962, at *5 (internal citations omitted).
[61] *Blue Cube Spinco LLC*, 2021 WL 4453460, at *7 (quoting *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012)).
[62] *QC Holdings, Inc. v. Allconnect, Inc*., 2018 WL 4091721, at *7 (Del. Ch. Aug. 28, 2018) (internal citation omitted).

be enforced, it does not qualify as a condition precedent.[63] If a condition precedent does exist, the party claiming breach must "demonstrate that the condition on which the underlying obligation is contingent has been satisfied. An unexcused and unsatisfied condition keeps a dependent duty from accruing, thwarting an otherwise ripe breach claim."[64]

Section 9.01(g) is relevant to the analysis of whether section 9.07(b) and (c) are conditions precedent.[65] Section 9.01(g) states that all claims for indemnification "shall be subject to the provision of proper notice as specified in Sections 9.06 and 9.07" and then specifies that Plaintiff shall have no claim for indemnification unless it "has given written notice . . . setting forth in reasonable detail the basis of the claim for which indemnification is sought . . . ."[66] The Court interprets "basis of the claim" to mean the reasons or grounds upon which Plaintiff seeks indemnification. The "written notice" requirement identified in Section 9.01(g) corresponds to the procedural requirement of written notice contained in Section 9.07(a). Section 9.01(g) states in unambiguous terms that the consequence of failing to provide

[63] *Blue Cube Spinco LLC,* 2021 WL 4453460, at *11 (Del. Super. Sept. 29, 2021) (citing *Eurofins Panlabs, Inc. v. Ricerca Bioscis., Inc.,* 2014 WL 2457515, at *3–4, n.21 (Del. Ch. May 30, 2014) (finding contract's notice provision did not clearly express a condition precedent, because "most notably" it did "not tie to its mandatory notice procedures any consequences for failing to lodge an indemnification notice properly".).
[64] *Aveanna Healthcare, LLC,* 2021 WL 3235739, at *25 (cleaned up).
[65] *See supra* ANALYSIS Section I.B.3. for a summary of the requirements in sections 9.07(b) and (c).
[66] Section 9.06 of the Contract relates only to third party claims for indemnification and is not relevant to Plaintiff's claims.

written notice of a direct claim for indemnification along with a basis therefore is an effective waiver or forfeiture of that claim.

Notably, Section 9.01(g) only conditions Plaintiff's right to indemnification on the written notice requirement in 9.07(a); it does not tie the consequence of forfeiture to the requirements of 9.07(b) and (c). Section 9.01(g) does not state that Plaintiff would waive its right to indemnification if it failed to "make available . . . information relied upon . . . to substantiate" its claim or information requested by Defendant.[67] Section 9.01(g) also does not state that Plaintiff had to provide "prior written notice" before taking any "removal, remedial or response action" pursuant to 9.07(c). [68] Section 9.01(g) only conditions a direct claim for indemnification on the written notice requirement. The parties could have contracted to condition Plaintiff's right to indemnification on 9.07(b) and (c) by expressly including these requirements in 9.01(g) as they did with Section 9.07(a), but they did not. Whether this was intentional or a result of an oversight in drafting, the Court will not construe the requirements 9.07(b) and (c) as conditions precedent and read them into

[67] Contract at Sec. 9.07(b).
[68] Contract at Sec. 9.07(c).

9.01(g).[69] "Contract interpretation that adds a limitation not found in the plain language of the contract is untenable."[70]

b. Section 9.07(b) does not qualify as a condition precedent because it is ambiguous.

With respect to Section 9.07(b), the Court also finds that it does not qualify as a condition precedent because, whether Plaintiff was obligated to initiate the transmission of information substantiating its claim is not clear based on the plain language of the provision. The phrase "shall make available" is ambiguous because it is susceptible to more than one reasonable interpretation.[71] This phrase does not identify the specific act, if any, Plaintiff was required to undertake to substantiate its claim. The use of the words, "make available," leaves the meaning of the phrase open to more than one reasonable interpretation.

"Available" is variously defined as "present or ready for immediate use, accessible or obtainable,"[72] "able to be used or reached,"[73] "that can be used" or

[69] *See Union Oil Co. of California v. Mobil Pipeline Co.,* 2006 WL 3770834, at *12 (Del. Ch. Dec. 15, 2006) ("Delaware law will not create contract rights and obligations that were not part of the original bargain, especially where, as here, the contract could easily have been drafted to expressly provide for them.").
[70] *Emmons v. Hartford Underwriters Ins. Co.,* 697 A.2d 742, 746 (Del. 1997).
[71] *See Blue Cube Spinco LLC, v. Dow Chemical Company,* 2021 WL 4453460, at *7 (Del. Super. Sept. 29, 2021) (quoting *Alta Berkeley VI C.V. v. Omneon, Inc.,* 41 A.3d 381, 385 (Del. 2012)).
[72] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/available (last visited Aug. 29, 2023).
[73] CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/available (last visited Aug. 29, 2023).

"that can be gotten, had, or reached."[74] The phrase "shall make available," therefore, could mean that Plaintiff needed only to have this information in its possession such that it was accessible by Defendant, or ready for Defendant's use.

Defendant appears to interpret this phrase to mean that Plaintiff was obligated to transmit this information upon its own initiative without Defendant's request. Section 9.07(b), however, does not employ any words, like "provide," "transmit," or "send," to indicate this. The use of these terms would have made clear Plaintiff's obligation to send this information to Defendant without Defendant first requesting it. If the parties believed the procedure in 9.07(b) was critical enough that Plaintiff's right to indemnification should depend upon it, the parties could have drafted language accordingly or at the very least included a time frame within which Plaintiff was required to provide this information, relative to the date of written notice.

c. Section 12.05 signals Section 9.07(b) and (c) were not intended to be conditions precedent resulting in forfeiture of indemnification.

The Court also finds that Section 12.05 ("Waiver of Breach, Right or Remedy"), is further evidence that the parties did not intend a permanent waiver or forfeiture of potential indemnification claims as a result of Plaintiff's imperfect compliance with Section 9.07. This provision is contained in "Article XII: General,"

[74] COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/available (last visited Aug., 2023).

which contains a series of general provisions applicable to the Contract. Section 12.05 provides in relevant part that "[t]he waiver by any Party of any breach or violation by another party of any provision of this Agreement or of any right or remedy of the waiving Party . . . *shall be in writing and may not be presumed or inferred from any Party's conduct.*" This type of provision, typically called a "no waiver" provision can, in some instances, protect a party from forfeiture that might have resulted in the absence of such a provision.[75] "Generally, no waiver provisions give a contracting party some assurance that its failure to . . . strict[ly] adhere[ ] to a contract term . . . will not result in a complete and unintended loss of its contract rights if [a party] later decides strict performance is desirable."[76]

The plain language of this provision indicates in clear and unambiguous terms that any right provided to either party to the Contract is not waived unless that party has expressly waived that right in writing. Defendant has not asserted, and there is no evidence in the record, that Plaintiff waived its right to indemnification in writing. Defendant's assertion that Plaintiff has forfeited this right by failing to comply with a purported condition precedent contravenes this provision, as that assertion infers or assumes that Plaintiff was waiving its right to indemnification by

[75] *Blue Cube Spinco LLC,* 2021 WL 4453460, at *11 (holding "No Waiver Provision confirm[ed] that failure to satisfy the Notice Provision d[id] not relieve [defendant] of its indemnification duties").

[76] *Id.* at *10 (quoting *Rehoboth Mall Ltd. P'ship v. NPC Int'l, Inc.*, 953 A.2d 702, 704 (Del. 2008)) (omissions and alterations in original) (internal quotation marks omitted).

failing to comply with section 9.07(b) and (c). An attack on these technical grounds is precisely what Section 12.05 is meant to avoid.

d. Failure to satisfy a condition precedent is an insufficient basis to dismiss Plaintiff's claim on a motion to dismiss.

Even if sections 9.07(b) and (c) did qualify as conditions precedent, the Court declines to dismiss Count I (and Count II) on that basis at the pleading stage. For a breach of contract claim to survive a motion to dismiss, it is sufficient to "simply allege first, the existence of the contract; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff."[77] The court will not dismiss a claim at the pleading stage unless the plaintiff cannot recover under any reasonably conceivable set of facts.[78] The Court finds that Plaintiff has sufficiently pled the basic elements of a breach of contract claim. Plaintiff pled generally that it had met all of its performance obligations under the Contract.[79] While Plaintiff may ultimately be unable to prove its claims beyond this stage of the

[77] *W.D.C. Holdings, LLC v. IPI Partners, LLC*, 2022 WL 2235005, at *9 (Del. Ch. June 22, 2022) (quoting *Garfield v. Allen*, 277 A.3d 296, 328 (Del. Ch. 2022)); *see also Humanigen, Inc. v. Savant Neglected Diseases, Inc.*, 238 A.3d 194, 202 (Del. Super. Aug. 17, 2020) (same).

[78] *Hackett v. TD Bank, N.A.*, 2023 WL 3750378, at *2 (Del. Super. May 31, 2023) (internal quotations omitted).

[79] Plaintiff generally averred that it "has complied with the terms of the Agreement and fully performed its obligations thereunder." Compl. ¶ 91. *See Eisenmann Corp. v. General Motors Corp.*, 2000 WL 140781, at *18 (Del. Super. Jan. 28, 2000), *cert. denied* (denying defendant's motion to dismiss based on plaintiff's failure to plead that specific conditions precedent were satisfied when plaintiff "certainly alleged complete performance generally."). Super. Ct. Civ. R. 9(c) ("it is sufficient to aver generally that all conditions precedent have been performed or have occurred.").

proceedings, "that is not the test to survive a motion to dismiss."[80] "[I]t is axiomatic that the task of narrowing and clarifying the basic issues and ascertaining the facts relative to the other issues is the role of the deposition and discovery process."[81]

e. Even if section 9.07(b) and (c) are conditions precedent, Defendant has not shown prejudice or that the conditions are material; and enforcement would cause a disproportionate forfeiture.

Before any forfeiture can result from a plaintiff's failure to satisfy a condition precedent, the defendant "has the burden of showing that it has thereby been prejudiced."[82] Defendant has not argued that it has suffered any prejudice or incurred damages from Plaintiff's breach of sections 9.07(b) and (c), but instead argues Plaintiff has forfeited its right to indemnification based on a technical breach.

Additionally, "[n]ot every 'condition' necessarily rises to the stature of a preclusive condition precedent, even if a boilerplate provision says so. The Court will not impose a non-material condition precedent on the parties when it would create an absurd result."[83] Notably, Defendant does not assert that sections 9.07(b) and (c) were material parts of the agreement and the fact that Section 9.01(g) only

[80] *Central Mortgage Co. v. Morgan Stanley Mortg. Capital Holdings, LLC,* 27 A.3d 531, 536 (Del. 2011).
[81] *Eisenmann Corp.*, 2000 WL 140781, at *17.
[82] *State Farm Mut. Auto. Ins. Co. v. Johnson,* 320 A.2d 345, 347 (Del. 1974) (holding when a plaintiff-insurer has not complied with a notice provision as a condition precedent to seeking coverage, the defendant-insurer must show it has been prejudiced as a result before any forfeiture can result).
[83] *Eisenmann Corp.*, 2000 WL 140781, n. 16 (citing Restatement (Second) of Contracts § 229).

mentions that failure to provide written notice pursuant to 9.07(a) would result in a forfeiture, the Court does not find that 9.07(b) and (c) are material.

Finally, "the Court may excuse the nonoccurrence of a condition that would cause a disproportionate forfeiture unless its occurrence was a material part of the agree[ment]."[84] Even if these provisions were conditions precedent, dismissing Plaintiff's claim for Environmental Law Damages would result in a disproportionate forfeiture. Plaintiff provided timely detailed notices of indemnification and has sufficiently alleged a meritorious claim for damages.[85] Dismissing Plaintiff's claim for over $5 million in damages solely on the basis that it might not have provided additional supporting documentation to substantiate its indemnification claim or begun responsive action without prior written notice would be fundamentally unfair.[86] Defendant has not shown that it has suffered prejudice or damages at all, let alone anywhere near the damages that Plaintiff has alleged. Plaintiff's forfeiture of its claims, therefore, would be grossly disproportionate to any hypothetical loss

[84] *Id.* (citing Restatement (Second) of Contracts § 229); § 229 ("To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange . . . . in appropriate circumstances, [courts may] excuse the non-occurrence of a condition solely on the basis of the forfeiture that would otherwise result.").

[85] Plaintiff also attached a preliminary cost estimate to its first claim for indemnification. Ex. B to Compl.

[86] The Court again notes that in Plaintiff's First Notice of Indemnification, it exclusively employed the future tense when referring to needed repair and replacement work. Ex. B to Compl.

Defendant has suffered from Plaintiff's noncompliance with sections 9.07(b) and (c).

f. Even if section 9.07(b) and (c) are conditions precedent, Plaintiff has sufficiently alleged compliance as to Count I.

Even if the Court were to entertain dismissal on the basis that Plaintiff failed to specifically allege satisfaction of material conditions precedent, it finds that with respect to Count I, Plaintiff has satisfied these conditions. Although Plaintiff does not specifically allege in the body of the complaint that it satisfied sections 9.07(b) and (c), Plaintiff's First Notice of Indemnification, (Exhibit B to Complaint), sufficiently establishes that these conditions were met.[87] Exhibit B shows that Plaintiff asserted its direct claim for indemnification by written notice, in compliance with Section 9.07(a). The notice contains information relied upon to substantiate its claim in compliance with 9.07(b).[88] The notice also sufficiently establishes at this stage of the proceedings that Plaintiff provided reasonable prior written notice of the costs associated with its response action before it undertook that action, in compliance with 9.07(c). The notice states that, "[t]o resolve these issues, additional

[87] On a Rule 12(b)(6) motion to dismiss, the court may review documents extrinsic to the Complaint when the document is "integral to a plaintiff's claim and incorporated into the complaint. *Bramble v. Old Republic Gen. Ins. Corp.*, 2017 WL 345144, at *3 (Del. Super. Jan. 20, 2017) (internal citations omitted).

[88] Exhibit B to Compl. "[W]e have learned that the Facility [sic] air pollution system for the coating application stations and final coat curing ovens is misrouted and compromised, resulting in emissions that are not routed through the thermal oxidizer. In addition, the oxidizer is in poor repair and unable to achieve required capture and control efficiencies." *Id.* A preliminary cost estimate was attached to this notice. *Id.*

repairs and replacement of equipment *will be* required. The costs associated with this repair and replacement work *are anticipated to be* in excess of $5 million." Troy Brooks, the president of Nucor Coatings Corporation and author of this notice, also attached a preliminary cost estimate to the notice. Based on the content of the notice and allegations in the Complaint, the Court finds it is reasonably conceivable that Plaintiff met the Section 9.07 requirements with respect to Count I.

II. Count II sufficiently alleges a breach of contract for Critical Equipment Damages pursuant to sections 9.02(a) and 3.07 of the Contract.

Count II of Plaintiff's Complaint alleges that Defendant breached the Contract by refusing to indemnify it for false representations, pursuant to sections 9.02(a) and 3.07 ("Adequacy of Assets"). Defendant argues Count II should be dismissed pursuant to Rule 12(b)(6) because Plaintiff has not sufficiently alleged Defendant breached Section 3.07 ("Adequacy of Assets") or Section 3.14 ("Environmental Matters").[89] Defendant also raises the following sections of the Contract as defenses to Count II: sections 4.07(a) and (b) ("Disclaimer; Independent Investigation"), and sections 9.07(b) and (c) ("Procedure for Indemnification").

Pursuant to Section 3.07, Defendant represented that the "Assets licensed to [Plaintiff] comprise the assets that are sufficient to run, service, or maintain the equipment included in the Assets from and after the Closing Date in substantially

[89] Def. Reply Br. at 17-18.

the same manner as run, serviced, or maintained by [Defendant] prior to closing." Plaintiff also alleged in its complaint that Defendant made false representation regarding environmental matters pursuant to Section 3.14.[90]

A. Sections 9.07(b) and (c) are not grounds for dismissal of Count II.

In Defendant's argument for dismissing Count II, it expands on its position that sections 9.07(b) and (c) are conditions precedent with which Plaintiff has failed to comply. Defendant argues that Plaintiff did not provide sufficient information substantiating its claim for Critical Equipment Damages in violation of Section 9.07(b), and did not provide "reasonable prior written notice" before undertaking "removal, remedial or response action," in violation of Section 9.07(c). As detailed above, these subsections are not conditions precedent and even if they were, they are not material preclusive conditions precedent that demand a forfeiture of Plaintiff's second breach of contract claim. The Court will not dismiss Count II on this basis. Although Plaintiff's Second Notice of Indemnification does strongly suggest Plaintiff undertook its response action before providing this notice, the Court does not find that this is fatal to Count II. Defendant has not argued that it has suffered

[90] *See* ANALYSIS Section I.A.2. for a full quotation of Section 3.14 of the Contract. Plaintiff alleged in Count I and III that Defendant materially breached the Agreement by making false representations under Section 3.14. Compl. ¶ 92, 108; *see also* Second Notice of Indemnification (Ex. C to Compl.) (stating Plaintiff has had to expend significant cost to repair critical equipment and that it believed this constituted a breach of representations "including, but not limited to, those set forth in Section 3.07)."

prejudice or incurred damages by Plaintiff undertaking response action before sending the notice of indemnification.[91]

B. The "as is" provision in Section 4.07(a) does not negate Defendant's representation in sections 3.07 and 3.14.

Defendant also contends that Plaintiff agreed to purchasing equipment assets "as is" in Section 4.07(a) and that Plaintiff acknowledged in Section 4.07(b) that it had conducted an independent investigation of the assets to its satisfaction. A plain reading of Section 4.07(a) shows that it is limited by the representations and warranties in Article III. Section 4.07(a) states in relevant part:

> [Plaintiff] acknowledges and agrees that, *except to the extent expressly set forth in Article III,* (a) neither [Defendant] nor any of its affiliates make any representation or warranty . . . . The parties hereby agree that neither [Defendant] nor any of its affiliates or representatives has made or is making any representation or warranty whatsoever . . . *except to the extent expressly set forth in Article III. . . . Except as otherwise expressly provided herein (including as expressly set forth in Article III)* [Defendant's] . . . assignment of the assumed liabilities "as is, where is, with all faults" and [Defendant] expressly disclaims any representations or warranties of any kind or nature . . . as to the condition . . . of the Assets . . . .[92]

[91] *See Verizon Commc'ns Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2019 WL 2517418, at *10 (Del. Super. Apr. 26, 2019) (denying defendant-insurer's motion to dismiss because defendant did not prove it suffered prejudice resulting from plaintiff's violation of a condition precedent to filing the action); *see also supra* n. 84.

[92] Contract at Sec. 4.07(a).

This provision clearly indicates three times that Defendant's disclaimer as to its representations and warranties regarding the condition or quality of the assets is limited by and does not disclaim those representations made in Article III. The Court must read the Contract as a whole to identify the parties' intent with respect to individual provisions while also attempting to harmonize them where possible.[93] Pursuant to Section 3.07, Defendant represented that the "assets are sufficient to run, service, or maintain the equipment . . . in substantially the same manner" as they were prior to closing. Defendant represented in Section 3.14 that the assets were in compliance with Environmental Law and that hazardous materials in connection with the assets were being disposed of according to environmental laws. The "as is" provision of Section 4.07 is therefore limited by sections 3.07 and 3.14. If the "as is" provision was meant to function as an absolute disclaimer as to the condition or quality of the assets, it would render sections 3.07 and 3.14 meaningless. A contractual provision can have no purpose or effect if it is completely nullified by another.[94] If the intent of the parties was to write out sections 3.07 and 3.14 with

[93] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

[94] *O'Brien v. Progressive Northern 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.") (internal quotation omitted); *Dermatology Assoc. of San Antonio v. Oliver Street Dermatology Mgmt. LLC,* 2020 WL 4581674, at *29 (Del. Aug. 10, 2020) ("Delaware law rejects interpretations of contracts that render provisions null and void.")

Section 4.07, it raises the question as to the purpose of including them in the first place.

Section 4.07(b) ("Due Diligence" Clause) likewise does not bar Plaintiff's recovery under Count II. Defendant essentially argues that subsection (b) functions as a waiver of all claims Plaintiff may have had after closing and that "its pre-Closing investigation should have covered the claims it now raises."[95]

The fact that Plaintiff agreed in Section 4.07(b) that it conducted an independent investigation to its satisfaction does not function as a waiver of breach. Nothing in the language of this section supports Defendant's interpretation. The Court will not assume that this provision constitutes a waiver or forfeiture of Plaintiff's right to indemnification when there is a complete absence of language in the provision to support this. The Court finds that Section 4.07 is an acknowledgement that Plaintiff conducted an independent investigation and verification of assets to its satisfaction before closing, not that Plaintiff was prohibited from seeking relief if it later discovered upon further investigation that Defendant breached its representations and warranties. Plaintiff was "entitled to rely upon the accuracy of th[ose] representations []regardless of what [its] due diligence may have or should have revealed."[96]

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[95] Def. Reply Br. at 20.

[96] *Arwood v. AW Site Services, LLC*, 2022 WL 705841, at *27 (Del. Ch. Mar. 9, 2022) (second and third alterations in original) (quoting *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d

Additionally, the second sentence of Section 4.07(b) states that "in making [Plaintiff's] determination to proceed with the transactions" Plaintiff not only relied on its investigation but also relied on the "representations and warranties expressly set forth" in the Contract. Plaintiff asserts in the Complaint that it did in fact rely on Defendant's express representations and warranties and that Defendant breached the representations contained in sections 3.07 and 3.14.[97]

C. Plaintiff has stated a claim of breach of representation or warranty pursuant to Section 3.07.

Plaintiff alleges in Count II of its Complaint that Defendant made false representations pursuant to Section 3.07,[98] which resulted in damages, and that Defendant is obligated to indemnify Plaintiff pursuant to Section 9.02(a).[99] Pursuant

513, 548 (Del. Super. 2005), *aff'd*, 886 A.2d 1278 (Del. 2005) ("the extent or quality of plaintiffs' due diligence is not relevant to the determination of whether [Defendant] breached its representations and warranties in the Agreement. To the extent [Defendant] warranted a fact or circumstance to be true in the Agreement, plaintiffs were entitled to rely upon the accuracy of the representation []regardless of what their due diligence may have or should have revealed")).

[97] In support of Defendant's position that Section 4.07(b) exculpates it from liability, it quotes an excerpt from the Court of Chancery's decision in *Certainteed Corp. v. Celotex Corp*., where the court denied Defendant's motion to dismiss the plaintiff's claims for indemnification, finding that not all of the plaintiff's claims were time-barred. 2005 WL 217032, at *1 (Del. Ch. Jan. 24, 2005). This case does not stand for the proposition that Defendant implies that it does. The question before the Court here is whether a due diligence clause exculpates a Defendant from breaches of representations or warranties that Plaintiff discovered after closing. In contrast, the question in *Certainteed Corp.* was whether the statute of limitations for false representations was tolled by the "inherently undiscoverable" exception. *Id.* at *8.

[98] "Assets . . . licensed to [Plaintiff] . . . comprise the assets that are sufficient to run, service, or maintain the equipment included in the Assets from and after the Closing Date in substantially the same manner as run, serviced, or maintained by [Defendant] prior to closing." Contract at Sec. 3.07.

[99] "[Defendant] agrees to indemnify and hold harmless [Plaintiff] . . . from any loss, Liability . . . arising, directly or indirectly, from or in connection with: (a) the untruth or inaccuracy of any

to Section 3.07, Defendant represented that the "assets are sufficient to run, service, or maintain the equipment . . . in substantially the same manner" as they were prior to closing. Defendant contests in its Reply Brief that it did not violate Section 3.07 "because it provided [Plaintiff] with the equipment necessary to run the Facility 'in substantially the same manner as run, serviced, or maintained by Seller prior to Closing' and maintained the good-faith belief that 'the Business and Assets [were] in compliance with all applicable Environmental Laws,'" citing to sections 3.07 and 3.14.[100]

Section 3.07 read in isolation is minimally informative, because it provides no information as to the manner in which Defendant ran, serviced, or maintained the equipment prior to closing, making any comparison to how Plaintiff alleges it was able to run the equipment *after* the closing not possible. "[W]hen interpreting a contractual provision, a court should attempt to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term."[101] When a particular provision can be better understood with reference to another provision in the contract, courts will read these provisions together to discern the intended

representation or warranty of [Defendant] set forth herein or in a any certificate or document delivered pursuant hereto . . . ." Contract at Sec. 9.02(a).

[100] Def. Reply Br. at 18.

[101] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011); *Council of the Dorset Condominium Apts. v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.") (internal citations omitted).

meaning.[102] Contracts are to be read "so as not to render any part of the contract as mere surplusage."[103] Applying these principles to Section 3.07, the Court therefore interprets this clause in conjunction with the representation Defendant made in Section 3.14, because it informs what otherwise would be a vacuous clause.

Section 3.14 speaks to the manner in which Defendant ran, serviced, or maintained its equipment. Defendant warranted that the assets were in compliance with Environmental Laws, that hazardous materials generated by those assets were handled and disposed of in compliance with Environmental Laws, and that Defendant did not cause any contamination by, or release of, hazardous materials on or around the assets.[104] Reading sections 3.07 and 3.14 together, Defendant warranted that, prior to closing, it was running, servicing, or maintaining the assets in a manner that was in compliance Environmental Laws, including disposing hazardous materials generated by those assets in compliance with Environmental Laws, and in a manner that did not cause contamination on or around the assets. Defendant did not just represent that it "maintained a good-faith belief" that the

[102] *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1260 (Del. 2010) ("[a] single clause or paragraph of a contract cannot be read in isolation, but must be read in context.") (alterations in original).
[103] *Osborne ex rel. Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del. 2010); *Warner Commc'ns, Inc. v. Christ-Craft Industries, Inc.* 583 A.2d 962, 971 (Del. Ch. 1989)*, aff'd,* 567 A.2d 419 (TABLE), 1989 WL 136971, at *1 (Del. 1989) ("An interpretation that gives an effect to each term of an agreement, instrument or statute is to be preferred to an interpretation that accounts for some terms as redundant.").
[104] Contract at Sec. 3.14.

assets were in compliance with all applicable Environmental Laws, as it argues in its Reply Brief;[105] Defendant represented the assets "*are in compliance* with all applicable environmental laws."[106]

Plaintiff sufficiently alleged that after closing, and during the representation and warranty period, that it was unable to operate the equipment in compliance with Environmental Laws, which was the manner in which Defendant warranted it was operating the equipment prior to closing. In other words, Plaintiff alleged that it was unable to operate the equipment in substantially the same manner as Defendant warranted it had been doing prior to closing.[107] For these reasons, the Court finds that Plaintiff has alleged a basis for seeking indemnity pursuant to Section 9.02(a) for the untruth or inaccuracy of the representation Defendant made in Section 3.07.

III. Plaintiff has sufficiently stated a claim against Guarantor (Count III)

Pursuant to Section 11.01 of the Contract, Guarantor unconditionally guaranteed Defendant's obligations under the Contract in the event of Defendant's failure to do so.[108] The Court has found that Plaintiff stated claims for breach of contract on Counts I and II based on Defendant's alleges misrepresentations and refusals to indemnify, thus Guarantor may have a future obligation to pay damages

[105] Def. Reply Br. at 18.
[106] Contract at Sec. 3.14.
[107] Compl. ¶ 74-75, 84.
[108] *See supra* n. 3 for the text of Section 11.01 of the Contract.

for which Defendant has direct liability. Defendant's motion to dismiss Count III at this stage in the litigation is therefore DENIED.[109]

CONCLUSION

For the reasons set forth herein, the motion to dismiss is DENIED.

IT IS SO ORDERED.

/s/ Meghan A. Adams

Meghan A. Adams, Judge

[109] Defendant only asserts that Guarantor owes no contractual obligation to Plaintiff based on its argument in Counts I and II that Defendant owes no contractual obligation to Plaintiff.