IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CHRISTOPHER V. HAM, as Seller Representative, on behalf of himself and Troy E. Stoughton, Plaintiff, v. LINQUEST CORPORATION, a Delaware corporation, TMC DESIGN CORPORATION, a New Mexico corporation, and MADISON DEARBORN PARTNERS, LLC, a Delaware limited liability company, Defendants.	)	C.A. No. N23C-05-131 PRW CCLD

Submitted: February 23, 2024
Decided: April 18, 2024
Issued: April 29, 2023*

MEMORANDUM OPINION AND ORDER

Upon Plaintiff Christopher V. Ham's Motion for Summary Judgment,
DENIED.

Upon Defendants LinQuest Corporation, TMC Design Corporation, and Madison Dearborn Partners, LLC's Motion to Dismiss,
GRANTED.

Andrew D. Cordo, Esquire, Leah E. León, Esquire, Joshua A. Manning, Esquire, WILSON SONSINI GOODRICH & ROSATI, P.C., Wilmington, Delaware; John S. Kingston, Esquire, William M. Thompson II, Esquire, Christopher Collum, Esquire, THOMPSON COBURN LLP, St. Louis, Missouri, *Attorneys for Plaintiff Christopher V. Ham.*

Matthew W. Murphy, Esquire, Matthew D. Perri, Esquire, Mari Boyle, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Timothy W. Knapp, Esquire, Taylor S. Rothman, Esquire, KIRKLAND & ELLIS, LLP, Chicago, Illinois, *Attorneys for Defendants LinQuest Corporation, TMC Design Corporation, and Madison Dearborn Partners, LLC.*

WALLACE, J.

Plaintiff Christopher Ham sold his company to Defendant LinQuest Corporation. As part of the agreement governing the sale, the parties put $7,000,000 in escrow for indemnification purposes and named certain other entities (now named as other Defendants) as indemnified parties. Eventually, Defendants noticed Mr. Ham of a third-party claim against them and withheld the indemnity escrow funds. Mr. Ham brought an action in Chancery to release those funds. But soon after that action was initiated, Defendants voluntarily released the withheld funds. As a result, the Chancery action was withdrawn.

Mr. Ham then came here. In this suit, he says that the Defendants' indemnification letter was issued in bad faith and was, therefore, a breach of the contracts between the parties. Mr. Ham believes that he's entitled to attorney's fees spent litigating in Chancery. He also asks the Court to declare that forevermore he has no obligation to indemnify Defendants. Defendants now move to dismiss two of Mr. Ham's claims. He's countered that not only is dismissal unwarranted but—because in his view there are no genuine issues of material fact as to either of those claims—he's due summary judgment.

Mr. Ham asks the Court to issue a declaration without an actual controversy and before a quantified indemnification claim has been made. That request doesn't hold up to the Declaratory Judgment Act's requirements and must be dismissed.

Both sides spill a great deal of ink on the terms of the indemnification

provisions with respect to first-party claims and attorney's fees. But the underlying requirement that Defendants must have materially failed to perform before their indemnification obligations are triggered is largely ignored. Here, there just isn't a cognizable material failure to perform. Mr. Ham's conclusory allegations of bad faith don't meet even the plaintiff-friendly standard imposed at this stage. And without an underlying material failure to perform properly alleged, there is no need for the Court to dive deeper into the parties' pool of contract interpretation. Even still, without doubt, Mr. Ham cannot state a claim for attorney's fees from the Chancery litigation he brought.

Accordingly, and for the reasons further explained now, Defendants' Motion to Dismiss certain claims is **GRANTED** and Plaintiff's Motion for Summary Judgment on those same claims is **DENIED** as **MOOT**.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. The Parties

Christopher Ham, a resident of New Mexico, is the Plaintiff in the instant matter.[2] He brings this lawsuit in his capacity as the Seller Representative on behalf

---

* This decision is issued after consideration of the parties' requests for redaction of what they posited was confidential information.

[1] This background is drawn from the pleadings, which include the Amended Complaint and the documents incorporated therein.

[2] Amended Complaint ("Am. Compl.") ¶ 3 (D.I. 31).

of himself and Troy E. Scoughton.[3] Messrs. Ham and Scoughton are co-founders of TMC Design Corporation.[4]

LinQuest Corporation, TMC Design Corporation, and Madison Dearborn Partners, LLC (collectively, the "Buyers") are named as defendants.[5] LinQuest and Madison Dearborn are Delaware companies, while TMC is incorporated in New Mexico.[6]

B. The Purchase

LinQuest purchased TMC from Mr. Ham on December 31, 2020.[7] A Stock Purchase Agreement ("Purchase Agreement"), an Escrow Agreement, and other Ancillary Agreements outline the various contractual provisions governing the sale.[8] The following provisions of those agreements are most pertinent in resolving the parties present motions.

---

[3] *Id*.

[4] *Id*. ¶ 12.

[5] *Id*. ¶¶ 4-6.

[6] *Id*.

[7] *Id*. ¶¶ 1, 14.

[8] *Id*.; Defendants' Opening Brief in Support of their Motion to Dismiss Plaintiff's First Amended Complaint ("Defs.' Mot."), Ex. 1 ("Purchase Agreement") (D.I. 38); Plaintiff's Combined Answering Brief in Opposition to Defendants' Motion to Dismiss and Opening Brief in Support of His Motion for Summary Judgment ("Pl.'s Ans. Br."), Ex. 1 ("Escrow Agreement") (D.I. 43). Neither the Purchase Agreement nor the Escrow Agreement is part of the pleadings, but both are integral to the Complaint and incorporated by reference therein. So, the Court may consider both agreements. *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

C. The Purchase Agreement

The Purchase Agreement governed the sale of TMC to LinQuest.[9] Mr. Ham's obligation to indemnify LinQuest is described in Section 8.02(a):

> . . . each Seller shall . . . indemnify, pay and defend each Buyer Indemnified Party[10] and save and hold such Indemnified Party harmless against and pay on behalf of or reimburse such Indemnified Party as and when incurred for any and all Losses (whether or not involving any third party claims) suffered, sustained or incurred by any Indemnified Party based upon, arising out of, resulting from or constituting: (i) any failure of any representation or warranty of a Seller contained in this Agreement or in any Ancillary Agreement delivered by such Seller hereunder to be true and correct in all respects as of the date of this Agreement and as of the Closing, in each case, as if made of such time (except to the extent any such representation or warranty expressly relates solely to an earlier date (in which case as of such earlier date)) . . . .[11]

Conversely, LinQuest's obligations to indemnify Mr. Ham are described in Section 8.02(b):

> . . . Buyer shall indemnify, pay and defend each Seller Indemnified Party and save and hold such Indemnified Party harmless against and pay on behalf of or reimburse such Seller Indemnified Party as and when incurred for any and all Losses (whether or not involving any third party claims) suffered, sustained, or incurred by any Seller Indemnified Party based upon, arising out of, resulting from or constituting: (i) any failure of any representation or warranty of Buyer contained in this Agreement or in any Ancillary Agreement . . . or (ii) any failure by Buyer to perform in all material respects any

---

[9] Am. Compl. ¶ 1.

[10] The Purchase Agreement defines "Buyer Indemnified Parties" as "Buyer and each of its Affiliates, the Company and each of their respective Representatives, successors and assigns and the direct and indirect equity holders of each of the foregoing." Purchase Agreement § 10.01. This includes LinQuest, TMC, and Madison Dearborn.

[11] *Id*. § 8.02(a).

> covenant or agreement contained in this Agreement or any Ancillary Agreement.[12]

And under Purchase Agreement Section 8.04(g):

> For purposes of (i) determining whether there has been a breach of any representation or warranty in this Agreement or any Ancillary Agreement to be true and correct . . . such representations and warranties alleged to have been breached . . . shall be construed as if any qualification or limitation with respect to materiality, whether by reference to the terms "material," "in all material respects," "in any material respect," "Material Adverse Effect" or similar words, were omitted or deleted from the text of such representations, warranties and covenants.[13]

"Action" is defined in Section 10 as: "any action (by any private right of action of any Person or by any Governmental Entity), suit, litigation, claim, complaint, grievance, charge, audit, investigation, inquiry, mediation or other proceeding[]."[14]

Section 8.01 governs the survival of indemnification claims:

> The Special Representations (other than the Tax and Employee Benefits Representations) shall survive the Closing and terminate on the date that is 24 months after the Closing Date . . . . No Indemnifying Party shall have any liability for any Losses with respect to the breach of any representation, warranty, covenant or other agreement unless an indemnification claim is asserted in writing pursuant to Section 8.03 prior to the expiration as provided in this Section 8.01 of such representation, warranty, covenant or other agreement; provided, that if an indemnification claim is asserted in writing pursuant to Section 8.03 prior to such expiration, then such representation, warranty, covenant or other agreement, and the right of indemnity with respect thereto, shall survive until the resolution of such claim (regardless of when Losses as a result thereof or in connection therewith or relating thereto

[12] *Id*. § 8.02(b).

[13] *Id*. § 8.04(g).

[14] *Id*. § 10.01.

> may actually be incurred). Notwithstanding anything to the contrary contained in this Agreement, there shall be no limitations on the period during which a claim may be made for Losses incurred or sustained by any of the Indemnified Parties as a result of Fraud.[15]

Section 8.03(a) governs the process for making a third-party indemnification claim.

It provides that:

> All claims for indemnification made under this Agreement resulting from, related to or arising out of a third-party claim against an Indemnified Party shall be made in accordance with the following procedures. The Indemnified Party shall give prompt written notification to the Indemnifying Party of the commencement of any Action relating to a third-party claim for which indemnification may be sought or, if earlier, upon the assertion of any such claim by a third party. Such notification shall include a description in reasonable detail (to the extent known by the Indemnified Party) of the facts constituting the basis for such third-party claim and the amount of the Losses claimed . . . .[16]

D. THE ESCROW AGREEMENT

Section 4 of the Escrow Agreement governs the indemnity escrow funds.

Section 4(b)(i) states:

> On December 30, 2022 (the "Release Date"), the Escrow Agent shall deliver to Seller Representative all of the remaining Indemnity Escrow Fund, less the aggregate amount, if any, of funds requested for distribution from the Indemnity Escrow Fund in all pending Indemnity Escrow Claims (as defined in Section 4(d)) delivered by Buyer prior to the Release Date in accordance with Section 4(b)(iii). For purposes of this Agreement, an Indemnity Escrow Claim is "pending" if a Claim Notice (as defined in Section 4(b)(iii) has been delivered to the Escrow Agent, with a copy to Seller Representative and which such Claim Notice may be given at any time before 5:00 p.m. Central Time on the

[15] *Id*. § 8.01 (underlining in original).

[16] *Id*. § 8.03(a).

> day immediately prior to the Release Date, but has not yet been resolved by either a Joint Release Instruction or a Final Determination. An Indemnity Escrow Claim will remain "pending" until it is resolved by either a Joint Release Instruction or a Final Determination . . . .[17]

Section 4(b)(iii) provides the procedure for indemnity escrow claims by Buyers. It states, in pertinent part:

> Prior to the Release Date, if Buyer determines in good faith that any Buyer Indemnified Party is entitled to payment from the Indemnity Escrow Fund in respect of an Indemnity Escrow Claim, then Buyer shall deliver a written notice of such Indemnity Escrow Claim, which sets forth the basis for the Indemnity Escrow Claim and the specific amount of the requested distribution of the Indemnity Escrow Fund (a "Claim Notice"), to both Seller Representative and the Escrow Agent.[18]

E. THE INDEMNITY LETTER AND PROCEEDINGS

Pursuant to those agreements, LinQuest deposited $7,000,000 into an indemnity escrow account,[19] with two understandings: (1) the indemnity escrow account would provide the source of funding for any payment of any indemnification obligation required to be made to LinQuest;[20] and (2) the date for release of the escrowed funds (less the funds requested for all pending indemnity escrow claims) to Mr. Ham was set for December 30, 2022.[21]

On December 12, 2022, the Buyers jointly sent a letter by email and post to

[17] Escrow Agreement § 4(b)(i) (underlining in original).

[18] *Id*. § 4(b)(iii) (underlining in original).

[19] *See* Am. Compl. ¶ 35; Purchase Agreement § 2.02(b).

[20] *See* Escrow Agreement.

[21] *See id*. § 4(b)(i).

Mr. Ham ("Buyers' Indemnification Letter").[22] The letter described two anonymous written complaints TMC had received. Those complaints alleged five possible incidents of wrongdoing.[23]

The Buyers' Indemnification Letter further reads:

> If and to the extent any Identified Issue is true, it represents the failure of Special Representations of the Sellers contained in the Purchase Agreement . . . to be true and correct . . . . Pursuant to Section 8.03 of the Purchase Agreement, this letter serves as notice to the Sellers . . . of a claim for indemnification under Section 8.02(a)(i) of the Purchase Agreement . . . .[24]

The letter elaborates that the "investigation is ongoing," and that the Buyers are "not able to determine the precise amount of Losses that they have or will suffer, sustain, or incur . . . ."[25] It also provides that the Buyers "reasonably believe in good faith

---

[22] Am. Compl., Ex. A ("Buyers' Indemnification Letter").

[23] The Buyers' Indemnification Letter states as follows:

> The Complaints allege: (1) [redacted] ; (2) [redacted] ; (3) [redacted] ; (4) [redacted] ; and (5) [redacted] .

Id. at 1.

[24] *Id*. at 2.

[25] *Id*.

that the Losses may exceed the Indemnity Escrow Funds and thus do not consent to the release of, expressly assert a claim over, and request release to Buyer, all funds currently remaining in the Indemnity Escrow Account."[26]

As a result of the Buyers' Indemnification Letter and subsequent proceedings, the escrowed funds weren't released to Mr. Ham on the contractually prescribed release date;[27] they have been since.[28]

F. THE ENSUING LITIGATION

Mr. Ham first filed an action for specific performance in the Court of Chancery on February 1, 2023 (the "Chancery Action").[29] His action sought to compel LinQuest to issue instructions directing the escrow agent to release all funds held in escrow.[30] Soon thereafter, LinQuest released the $7 million held in escrow.[31] Mr. Ham then voluntarily dismissed his Chancery Action on May 8, 2023.[32]

Four days later, Mr. Ham brought suit here. First, he filed a complaint seeking: (1) a declaration that he has no obligation to indemnify or defend the

---

[26] *Id.*

[27] Am. Compl. ¶¶ 35-38.

[28] *See id.* ¶ 38.

[29] *Christopher V. Ham v. LinQuest Corp.*, No. 2023-0118-PAF ("Chancery Action"), Verified Complaint for Specific Performance (Ch. Dkt. 1).

[30] *Id.*

[31] Am. Compl. ¶ 38.

[32] Chancery Action, Notice of Voluntary Dismissal (Ch. Dkt. 6).

Buyers; and (2) an order awarding him attorney's fees and costs.[33] Later, Mr. Ham included an indemnification claim against LinQuest seeking reasonable attorney's fees and expenses from the Chancery Action.[34]

So now before this Court, Mr. Ham has three causes of action: (1) a request for a declaration that he has no obligation to indemnify the Buyers (Count I);[35] (2) a breach-of-contract claim against LinQuest alleging that the earlier retention of the escrowed funds occurred without a good-faith indemnification claim (Count II);[36] and, (3) a breach-of-contract claim against LinQuest premised on a failure to fund a capital expenditure (Count III).[37]

The Buyers have responded with a motion to dismiss Mr. Ham's Counts I and II.[38] He's answered with summary judgment motion on those same counts.[39]

II. PARTIES' CONTENTIONS

As to Count I, all Buyers argue that the declaration request is unripe because none of them are actively seeking payment from Mr. Ham for any losses incurred.[40]

---

[33] D.I. 1.

[34] Am. Compl. ¶ 39.

[35] *Id*. ¶¶ 45-49.

[36] *Id*. ¶¶ 50-57.

[37] *Id*. ¶¶ 58-65.

[38] *See generally* Defs.' Mot.

[39] *See generally* Pl.'s Ans. Br.

[40] Defs.' Mot. at 9-16. As a separate matter, Madison Dearborn also argues that Mr. Ham expressly agreed not to file any claim against it, so it cannot be a named defendant at all. *Id*. at 16-

LinQuest independently moves to dismiss Count II. LinQuest posits that its motion is proper because Mr. Ham isn't entitled to attorney's fees under the Purchase Agreement.[41] It maintains that the Purchase Agreement and the Escrow Agreement contain no contractual fee-shifting provision that would allow for attorney's fees from the Chancery action to be recovered here.[42]

Mr. Ham opposes the Buyers' motion and counters with his own ask for summary judgment on those same counts. Via Count I, Mr. Ham asks the Court to declare that he is under no obligation to indemnify the Buyers.[43] According to Mr. Ham, the Buyers haven't submitted a meritorious indemnification claim under the Purchase Agreement.[44] Mr. Ham further insists that because the allegations in the Buyers' Indemnification Letter are indisputably unfounded and time-barred under the Purchase Agreement, he is due his sought-after declaration as a matter of law.[45]

Mr. Ham also opposes the Buyers' motion to dismiss Count II of his amended

---

18. Because the Court dismisses Count I in whole, Madison Dearborn's individualized arguments about dismissal need not be further addressed.

[41] *Id*. at 19-22; Defendants' Combined Reply in Support of their Motion to Dismiss Plaintiff's First Amended Complaint and Brief in Opposition to Plaintiff's Motion for Summary Judgment ("Defs.' Re. Br.") at 10-16 (D.I. 53).

[42] Defs.' Mot. at 19-22; Defs.' Re. Br. at 12.

[43] Am. Compl. ¶¶ 45-49.

[44] Pl.'s Ans. Br. at 14-17.

[45] Pl.'s Ans. Br. at 18-21.

complaint. In that count, Mr. Ham charges that LinQuest has breached the Purchase Agreement by not first determining in good faith that an indemnified party was entitled to payment and by temporarily refusing to release the escrowed funds.[46] In his eyes, LinQuest wrongfully caused him to incur losses including reasonable attorney's fees and expenses actually paid—$140,437.50—when litigating his Chancery Action.[47] Mr. Ham insists that the Purchase Agreement unequivocally permits him to recover attorney's fees incurred because LinQuest didn't honor its contractual obligations.[48] Too, Mr. Ham asserts that the Purchase Agreement's plain terms allow for its indemnification provisions to be applied to direct claims between the contracting parties.[49] And in his view, there is no genuine issue of material fact that the Buyers' Indemnification Letter is without merit so he is due summary judgment on that count.[50]

III. STANDARD OF REVIEW

A. MOTIONS TO DISMISS

"Under Superior Court Civil Rule 12(b)(6), the legal issue to be decided is, whether a plaintiff may recover under any reasonably conceivable set of

---

[46] Am. Compl. ¶¶ 36, 53.

[47] *Id.* ¶ 56.

[48] Pl.'s Ans. Br. at 21-26; Plaintiff's Reply Brief in Support of His Motion for Summary Judgment ("Pl.'s Re. Br.") at 14-15 (D.I. 57).

[49] Pl.'s Ans. Br. at 21-26.

[50] *Id.*

circumstances susceptible of proof under the complaint."[51] Under that Rule, the Court will:

> (1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as "well pleaded" if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) [not dismiss the claims] unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[52]

"If any reasonable conception can be formulated to allow Plaintiffs' recovery, the motion must be denied."[53] This is because "[d]ismissal is warranted [only] where the plaintiff has failed to plead facts supporting an element of the claim, or that under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."[54]

B. Summary Judgment Motions

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

---

[51] *Vinton v. Grayson*, 189 A.3d 695, 700 (Del. Super. Ct. 2018) (cleaned up).

[52] *Id.* (alteration in original) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011)).

[53] *Id.* (citing *Cent. Mortg. Co.*, 27 A.3d at 535).

[54] *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004) (citation omitted).

judgment as a matter of law."[55] The movant bears the initial burden of proving his motion is supported by undisputed facts.[56] If the movant meets that burden, the non-movant must show there is a "genuine issue for trial."[57] To determine whether such a genuine issue exists, the Court construes the facts in the light most favorable to the non-movant.[58]

The "Court may not be able to grant summary judgment 'if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record.'"[59] But "[i]f the Court finds that no genuine issues of material fact exist, and the moving party has demonstrated [its] entitlement to judgment as a matter of law, then summary judgment is appropriate."[60]

---

[55] Del. Super. Ct. Civ. R. 56(c); *Options Clearing Corp. v. U.S. Specialty Ins. Co.*, 2021 WL 5577251, at *7 (Del. Super. Ct. Nov. 30, 2021).

[56] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[57] Del. Super. Ct. Civ. R. 56(e); *see also Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) ("If the facts permit reasonable persons to draw but one inference, the question is ripe for summary judgment." (citation omitted)).

[58] *Judah v. Del. Tr. Co.*, 378 A.2d 624, 632 (Del. 1977) (citations omitted).

[59] *Radulski v. Liberty Mut. Fire Ins. Co.*, 2020 WL 8676027, at *4 (Del. Super. Ct. Oct. 28, 2020) (quoting *CNH Indus. Am. LLC v. Am. Cas. Co. of Reading*, 2015 WL 3863225, at *1 (Del. Super. Ct. June 8, 2015)).

[60] *Brooke v. Elihu-Evans*, 1996 WL 659491, at *2 (Del. Aug. 23, 1996) (citing *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973)); *see also Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 677 (Del. Super. Ct. 1999) ("However, a matter should be disposed of by summary judgment whenever an issue of law is involved and a trial is unnecessary." (citing *Mitchell v. Wolcott*, 83 A.2d 759, 761 (Del. 1951))).

IV. DISCUSSION

A. MR. HAM IS NOT DUE THE REQUESTED DECLARATION.

In Count I, Mr. Ham asks for the Court to declare that he has no obligation to indemnify the Buyers for any potential indemnification proceedings.[61] Delaware's Declaratory Judgment Act empowers this Court to "declare rights, status and other legal relations whether or not further relief is or could be claimed."[62] But "[n]ot all disputes . . . are appropriate for [a declaration] when the parties request it."[63] Most often the Court first looks to see if there is an extant actual controversy.[64] That's because the Court "has discretion to decline declaratory judgment jurisdiction, and will do so where a proposed declaration would not advance the litigation, but rather, would waste judicial resources."[65]

For an "actual controversy" to exist, the following four prerequisites must be satisfied:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one

---

[61] Am. Compl. ¶¶ 45-49.

[62] DEL. CODE ANN. tit. 10, § 6501-13 (2022). The "purpose of the Declaratory Judgment Act is to enable the courts to adjudicate a controversy prior to the time when a remedy is traditionally available and, thus, to advance the stage at which a matter is traditionally justiciable." *Reylek v. Albence*, 2023 WL 4633411, at *6 (Del. Super. Ct. July 19, 2023) (quoting *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 591–92 (Del. 1970)) (cleaned up).

[63] *Intermec IP Corp. v. TransCore, LP*, 2021 WL 3620435, at *25 (Del. Super. Ct. Aug. 16, 2021) (quoting *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 816 (Del. 2018)).

[64] *E.g., XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216 (Del. 2014).

[65] *Intermec IP Corp.*, 2021 WL 3620435, at *25 (citations omitted).

> who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.[66]

With respect to the second element, "[a]n actual controversy which justifies resort to the declaratory judgment act exists where one side makes a claim of a present, specific right and the other side makes an equally definite claim to the contrary."[67]

The fourth element requires a case to be "ripe."[68] A case is ripe for judicial review when the dispute has matured to the point where the plaintiff has suffered or will imminently suffer an injury.[69] Using a "common sense assessment" of the facts, the Court should hear a dispute when "litigation sooner or later appears to be unavoidable and where the material facts are static."[70] If facts are still unknown or changing, however, the Court should be reluctant to weigh into the controversy for fear it might be offering only advice and a premature binding decision.[71]

As to indemnity claims, Delaware courts decline "to enter a declaratory

---

[66] *Reylek*, 2023 WL 4633411, at *6 (citation omitted).

[67] *In re COVID-Related Restrictions on Religious Servs.*, 302 A.3d 464, 494 (Del. Super. Ct. 2023) (quoting *Clemente v. Greyhound Corp.*, 155 A.2d 316, 320 (Del. Super. Ct. 1959)).

[68] *XL Specialty Ins. Co.*, 93 A.3d at 1217.

[69] *Town of Cheswold*, 188 A.3d at 816 (citing *New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 2013 WL 6904387, at *7 (Del. Ch. Dec. 30, 2013)), *aff'd*, 2014 WL 7010183 (Del. Nov. 13, 2014)).

[70] *Id*. (quoting *XL Specialty Ins. Co.*, 93 A.3d at 1217).

[71] *Id.* (citing *Calagione v. City of Lewes Planning Comm'n*, 2007 WL 4054668, at *3 (Del. Ch. Nov. 13, 2007)).

judgment . . . until there is a judgment against the party seeking it."[72] What is more, "indemnification claims do not accrue until the underlying claim is finally decided."[73]

Here, Mr. Ham's request for a declaration fails under the second and fourth elements of the actual controversy test.

First, there is no extant controversy involving Mr. Ham's rights or legal relations. Mr. Ham asks for this Court to declare that "[he] has no obligation, whether under the Purchase Agreement or otherwise, to indemnify [the Buyers] for the Indemnification Proceedings."[74] But the Buyers haven't initiated any actual indemnification proceeding against Mr. Ham; they've only noticed him of potential claims.[75] Thus, there isn't yet the "equally definite claim to the contrary" required for the Court to declare that Mr. Ham need not indemnify the Buyers under the

---

[72] *XL 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 relevant part, rev'd in part,* 901 A.2d 106 (Del. 2006).

[73] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009). The *LaPoint* court stated that an indemnification claim is not yet ripe "until the underlying liability has been established" because a declaration as to the duty to indemnify "may have no real-world impact if no liability arises in the underlying litigation." *Id.* at 197 (quoting *Molex Inc. v. Wyler*, 334 F.Supp.2d 1083, 1085 (N.D.Ill. 2004)); *see also Scharf. v. Edgcomb Corp.*, 864 A.2d 909, 919 (Del. 2004) ("Generally, the matter on which the claim for indemnification is premised may be said to have been resolved with certainty only when the underling investigation or litigation is definitively resolved.").

[74] Am. Compl. ¶ 49.

[75] The Buyers' Indemnification Letter only serves as written notice, not as a claim itself. *See* Purchase Agreement § 8.03(a) (listing notice requirements of a potential claim). Nor have the Buyers yet quantified any claim. *See* Purchase Agreement § 8.03(b) (requiring the claim "set forth a claimed amount if then known and determinable").

Purchase Agreement.

Second, the request for declaratory judgment is unripe. Mr. Ham invokes the Buyers' Indemnification Letter as evidence of his need for current judicial intervention.[76] But the letter merely serves as notice of potential future claims. That means the Buyers' underlying liability hasn't yet been established with certainty. And now that the escrow funds have been released, it's unclear if, at all, Buyers will further pursue indemnification by making any quantified indemnity claim. Put simply, judicial intervention isn't presently necessary, and litigation doesn't appear unavoidable. Any declaration now would amount to a mere advisory decision.[77] Mr. Ham's Count I is, therefore, **DISMISSED.**

B. MR. HAM HASN'T ADEQUATELY PLED AN ACTIONABLE BREACH BY LINQUEST OF EITHER THE PURCHASE AGREEMENT OR THE ESCROW AGREEMENT.

To plead a breach-of-contract claim, a plaintiff must allege: (1) the existence of a contract; (2) a breach of the contract; and, (3) damages suffered as a result of the breach.[78]

---

[76] *See* Am. Compl. ¶¶ 9-10.

[77] *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 275 (Del. Super. Ct. 1989) ("[T]he Court must be sure that it does not construct hypothetical factual situations on which it makes a finding, putting forth an advisory opinion. The matter would clearly not be ripe for adjudication in that situation."); *see also XL Specialty Ins. Co.*, 93 A.3d at 1218-19 (declining to issue an "impermissible advisory opinion" where the dispute between the parties had "not yet assumed a concrete and final form" (internal quotations omitted)).

[78] *E.g., VLIW Tech., LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

Delaware courts "adhere[] 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."[79] "When the contract is clear and unambiguous, [this Court] will give effect to the plain-meaning of the contract's terms and provisions."[80] But a contract may be deemed ambiguous when it is subject to multiple reasonable interpretations.[81] And when a contract is ambiguous, that "rais[es] factual issues requiring consideration of extrinsic evidence to determine the intended meaning of the provision[s] in light of the expectations of the contracting parties."[82]

At the motion to dismiss stage, this Court can't just choose between two differing reasonable interpretations of what it finds to be ambiguous provisions.[83] Rather, "when parties present differing—but reasonable—interpretations of a contract term," the Court would need to examine extrinsic evidence to discern the parties' agreement; "[s]uch an inquiry cannot proceed on a motion to dismiss."[84] So, at bottom, dismissal can only happen "if the defendant['s] interpretation is the only

---

[79] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citing *NBC Universal v. Paxson Commc'ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005).

[80] *Id*. at 1159-60 (citing *Rhone Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

[81] *Id*. at 1160.

[82] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1229 (Del. 1997).

[83] *Khushaim v. Tullow Inc*., 2016 WL 3594752, at *3 (Del. Super. Ct. June 27, 2016) (quoting *VLIW Tech., LLC*, 840 A.2d at 615).

[84] *Id*. (quoting *Renco Grp., Inc. v. Mac Andrews AMG Holdings LLC*, 2015 WL 394011, at *5 (Del. Ch. Jan. 29, 2015)).

reasonable construction as a matter of law."[85]

Here, Mr. Ham charges that LinQuest breached the Purchase Agreement and the Escrow Agreement by refusing to release escrowed funds without a good-faith indemnification claim.[86] He says that breach caused losses in the amount of the $140,437.50 he paid in attorney's fees and costs litigating the Chancery Action.[87] On this, Mr. Ham's claim, as pled, fails to survive dismissal.

1. LinQuest complied with the Purchase Agreement.

As a preliminary matter, the operative indemnification procedure provisions are unambiguous.[88] In order to trigger the Buyers' indemnification obligation, the Purchase Agreement requires: (1) a specific notification of an indemnification claim (including written notification and reasonable detail about the basis of the claim); and (2) a failure of "any representation or warranty" or to perform "in all material respects any covenant or agreement" between the parties.

The notification procedure for third-party indemnification claims is clearly elucidated: "The Indemnified Party shall give prompt written notification to the

---

[85] *Id*. (quoting *Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del.1996)).

[86] Am. Compl. ¶¶ 53, 54.

[87] *Id*. ¶ 56.

[88] Notably, the parties don't provide differing interpretations of the specific provisions discussed here. Instead, they focus their briefing on whether the provisions apply to "direct claims," and whether attorney's fees are contracted for. *See* Defs.' Mot. at 19-22; Pl.'s Ans. Br. at 21-26; Defs.' Re. Br. at 10-16; Pl.'s Re. Br. at 14-15.

Indemnifying Party of the commencement of any Action relating to such a third-party claim for which indemnification may be sought . . . ."[89] "Action" is defined in the Purchase Agreement as: "any action (by any private right of action of any Person or by any Governmental Entity), suit, litigation, claim, complaint, grievance, charge, audit, investigation, inquiry, mediation or other proceeding . . . ."[90]

The Purchase Agreement further requires that: "Such notification shall include a description in reasonable detail (to the extent known by the Indemnified Party) of the facts constituting the basis for such third-party claim and the amount of Losses claimed . . . ."[91]

While Mr. Ham suggests otherwise, the Buyers' Indemnification Letter followed the Purchase Agreement's specific notification procedure for indemnification claims, both in its delivery of written notification and its level of detail about the basis of the claim.

First, the Buyers' Indemnification Letter was prompt. The Buyers gave written notification to Mr. Ham of the commencement of an action (in this case the complaints it had received) relating to a third-party claim for which indemnification might be sought. The Buyers' December indemnification letter notified Mr. Ham that "[i]n August and September 2021, the Company received two anonymous

---

[89] Purchase Agreement § 8.03(a).

[90] *Id.* § 10.01.

[91] *Id.* § 8.03(a).

written complaints."[92]

Second, the Buyers' Indemnification Letter was reasonably detailed. The claim clearly describes the contents of the complaints the Buyers received:

> The Complaints allege: (1) ; (2) ; (3) ; (4) ; and (5) .[93]

This is certainly a reasonably detailed description of the facts that form the basis for the claim the Buyers asserted. The Purchase Agreement allows that a notification may include matters "to the extent known by the Indemnified Party."[94] So, it was obviously anticipated that an Indemnified Party would and need not know all the facts at the time of notification. This is further made clear by the Purchase Agreement's inclusion of terms like "investigation" and "inquiry" in its definition

---

[92] Buyers' Indemnification Letter at 1.

[93] *Id.*

[94] Purchase Agreement § 8.03(a).

of "Action,"[95] which suggests an intent to include ongoing issues that have not been resolved. The Buyers' Indemnification Letter also states: "At this time, the Buyers' investigation is ongoing, and they are not able to determine the precise amount of the Losses that they have or will suffer, sustain or incur based upon, arising out of or resulting from the Identified Issues."[96] That, too, is sufficient to satisfy the Purchase Agreement's notice requirements for indemnification claims.

So, the Buyers plainly complied with the notification procedures provided in the Purchase Agreement when they initially sent their Indemnification Letter.[97]

2. Mr. Ham fails to plead a failure to perform that would trigger LinQuest's indemnification obligations under the Purchase Agreement.

Importantly, whether LinQuest and the Buyers followed the *exact* prescribed notice procedure is not at issue here—the notice was unquestionably prompt and reasonably detailed. Instead, the real question posed to the Court is whether the Buyers' purportedly ill-grounded notification triggered any Purchase Agreement-borne indemnification obligation flowing from Buyers to Mr. Ham. The Purchase Agreement requires a material failure to perform in order to trigger any such

---

[95] *Id.* § 10.01.

[96] Buyers' Indemnification Letter at 2.

[97] As a result, Plaintiff's allegations that any future indemnification claims are "time-barred" carry no weight, because they presuppose that the indemnification letter was invalid. *See* Pl.'s Ans. Br. at 20. The indemnity letter's procedural compliance means that future quantified indemnity claims are not time-barred.

obligation. In that regard, the Purchase Agreement provides:

> Buyer shall indemnify . . . each Seller Indemnified Party . . . as and when incurred for any and all Losses…suffered by any Seller Indemnified Party based upon, arising out of, resulting from or constituting: (i) any *failure of any representation or warranty* of Buyer contained in this Agreement or in any Ancillary Agreement . . . or (ii) any *failure by Buyer to perform in all material respects any covenant or agreement* contained in this Agreement or any Ancillary Agreement.[98]

And under Purchase Agreement Section 8.04(g):

> [f]or purposes of (i) determining whether there has been a breach of any representation or warranty in this Agreement or any Ancillary Agreement to be true and correct . . . such representations and warranties alleged to have been breached . . . shall be construed as if any qualification or limitation with respect to materiality, whether by reference to the terms "material," "in all material respects," "in any material respect," "Material Adverse Effect" or similar words, were omitted or deleted from the text of such representations, warranties and covenants.[99]

So, for Buyers' indemnification obligations to be triggered, the Purchase Agreement unambiguously requires a material failure of some representation or warranty (which is not pled) or to perform in all material respects one of the agreements' covenants or agreements. Here, Mr. Ham has not sufficiently alleged a material failure to perform that could conceivably trigger LinQuest's Section 8.02(b) indemnification obligations.

According to Mr. Ham, LinQuest "failed to perform in all material respects

---

[98] Purchase Agreement § 8.02(b) (emphasis added).

[99] *Id*. § 8.04(g).

the Escrow Agreement."[100] More specifically, Mr. Ham says LinQuest did not "determine in good faith that an indemnified party was entitled to payment" as required by Section 4(b)(iii) of the Escrow Agreement.[101] But the mere fact the escrow funds were later released—with Buyers' consent—doesn't mean that the indemnity claim was initiated in bad faith. An inference of bad faith might follow if LinQuest knew that the notification's itemized issues weren't true at the time of the indemnification notice and sent its letter with the sole purpose of blocking Mr. Ham from receiving the escrowed funds in December. But Mr. Ham hasn't penned any such allegation, nor a suggestion of a factual basis to support it.[102]

To the contrary, the current iteration of Mr. Ham's complaint describes LinQuest filing a procedurally proper indemnification claim, investigating that

---

[100] Am. Compl. ¶ 34.

[101] *Id.* ¶ 36.

Section 4(b)(iii) states:

> Prior to the Release Date, if Buyer determines *in good faith* that any Buyer Indemnified Party is entitled to payment from the Indemnity Escrow Fund in respect of an Indemnity Escrow Claim, then Buyer shall deliver a written notice of such Indemnity Escrow Claim, which sets forth the basis for the Indemnity Escrow Claim and the specific amount of the requested distribution of the Indemnity Escrow Fund (a "Claim Notice"), to both Seller Representative and the Escrow Agent.

Escrow Agreement § 4(b)(iii) (emphasis added).

[102] Mr. Ham submitted an affidavit attesting to his knowledge that none of the complaints the Buyers reference in their indemnification letter are true. *See* Pl.'s Ans. Br., Ex. 2. But it is inconsequential at this stage whether those complaints *are* true; it would matter only that the Buyers *knew* the complaints weren't true and yet still decided to send their letter. Mr. Ham's affidavit does not attest to such and therefore, even if considered, wouldn't save his inadequate pleading of this claim.

claim, and then releasing the withheld escrow funds to avoid further litigation.[103] What's more, LinQuest's prompt release of those funds after commencement of the Chancery Action limited the potential consequences of their retention.

As pled, there are insufficient averments (or facts alleged) to support a possible finding that LinQuest brought its indemnification claim in bad faith—purportedly to withhold the escrow funds it has since released. Thus, there is no reasonably conceivable claim that LinQuest breached Section 4(b)(iii) of the Escrow Agreement—much less that it breached that agreement in all material respects.

Mr. Ham also broadly alleges that LinQuest failed to perform under the Escrow Agreement (again, in all material respects) by failing to provide a Purchase Section 8.03(a)-compliant indemnification claim notice.[104] As noted earlier, the Buyers' Indemnification Letter did comply with Section 8.03(a).

Put simply, Mr. Ham's claim that LinQuest failed to perform "in all material respects" any covenant or agreement between the parties isn't reasonably conceivable.[105] Consequently, LinQuest's indemnification obligations under Section 8.02(b) of the Purchase Agreement were never triggered. And without the trigger on those obligations having been pulled, any further interpretation of the

---

[103] *See* Am. Compl. ¶¶ 9, 21, 22, 38.

[104] *Id*. ¶¶ 27, 34-35.

[105] *See Cent. Mortg. Co.*, 27 A.3d at 537 ("the governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability" (internal quotations omitted)); *id.* at 537 n.13 (and "[o]ur governing 'conceivability' standard is more akin to 'possibility,' . . .").

indemnification provisions—as both parties spend the vast majority of their briefings doing—is rendered moot. There just isn't the necessary underlying failure to perform pled (or existing) here.

3. Any claim for attorney's fees by Mr. Ham fails not only under the operative contract provisions, but also under applicable Delaware law.

The plain language of Purchase Agreement § 8.02(b) conditions indemnification upon the existence of a failure by LinQuest to perform a covenant or agreement.[106] No such failure to perform exists.[107] And the Purchase Agreement imposes no independent duty to pay defense costs[108] nor contains any fee-shifting provision.[109]

Absent such an express contractual provision, Mr. Ham wouldn't be entitled to attorney's fees in the Chancery Action under Delaware law. "Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs."[110] That said, the rule may sometimes be abrogated if it is shown that the losing party acted in bad faith.[111] But first the bad faith exception is applied

---

[106] Purchase Agreement § 8.02(b).

[107] *See* Part V(B)(2), *supra*. In turn, the Court need not resolve whether the Purchase Agreement's indemnification provisions allow attorney's fees to be recoverable in direct first-party claims. The underlying requirements triggering any potential indemnification just haven't been met.

[108] *See Winshall v. Viacom Intern., Inc.*, 76 A.3d 808, 819 (Del. 2013).

[109] *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 352 (Del. 2013) ("In contract ligation, where the contract contains a fee-shifting provision, we will enforce that provision.").

[110] *Id*. (quoting *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007)).

[111] *Kuang v. Nat. Cole Corp.*, 884 A.2d 500, 506 (Del. 2005) ("One well-recognized exception to the American Rule is where the losing party has acted in bad faith, vexatiously, wantonly, or for

against a loser only within the litigation of the case for which it is sought, and then only in "extraordinary cases."[112] And the party seeking to invoke that rare exception must demonstrate by "clear evidence that the party from whom fees are sought . . . acted in subjective bad faith."[113]

In sum, Mr. Ham has not adequately pled a claim that might entitle him to the attorney's fees he seeks. Accordingly, the Buyers' Motion to Dismiss Count II of Mr. Ham's Amended Complaint is **GRANTED.**

C. MR. HAM'S MOTION FOR SUMMARY JUDGMENT IS MOOT.

Mr. Ham responded to the Buyers' prayer for dismissal of his Counts I and II with a motion seeking summary judgment thereon. Because the Court grants Buyers' motion to dismiss those same counts, Plaintiff's prayer for summary judgment is **MOOT**.[114]

---

oppressive reasons. The purpose of this so-called 'bad faith' exception is to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process. Delaware courts have awarded attorney's fees for bad faith when parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims.") (cleaned up and citations omitted); *Dover Hist. Soc., Inc. v. City of Dover Plan. Comm'n*, 902 A.2d 1084, 1093 (Del. 2006) (observing that bad faith has been found to exist in cases where, *inter alia*, "parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims, misled the court, altered testimony, or changed position on an issue") (cleaned up and citations omitted).

[112] *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (internal quotation marks and citations omitted).

[113] *Id.*

[114] It is also worth noting that Mr. Ham's reflexive request for summary judgment in response to the Buyers' motion to dismiss is these circumstances is also ill-pled. *See Hackett v. TD Bank*, 2023 WL 3750378, at *4 (Del. Super. Ct. May 31, 2023) (noting that a request for summary judgment in response to defendant's motion to dismiss was "procedurally improper" absent reliance on documents not contained within the complaint).

V. CONCLUSION

There is no actual current Mr. Ham-to-LinQuest indemnification controversy at present and Mr. Ham's claim for declaratory relief thereon is unripe. As well, no possible indemnification obligation that LinQuest might owe to Mr. Ham was ever triggered; Mr. Ham's attempt to recoup his litigation expenditures in his short-lived Chancery Action isn't supported by any of the operative language of the subject agreements nor by the facts he's alleged here.

As a result, Buyers' motion to dismiss Count I which seeks a declaration in Mr. Ham's favor now is **GRANTED**, without prejudice to action on any actualized indemnification claim that might later be brought. Buyer's motion to dismiss Count II is also **GRANTED** because Mr. Ham cannot seek his attorney's fees for the Chancery Action via the claim he has brought here. In turn, Mr. Ham's motion for summary judgment on each of those two counts is **DENIED** as **MOOT**.

IT IS SO ORDERED.

Paul R. Wallace, Judge