**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| FOUR CENTS HOLDINGS, LLC<br><br>Plaintiff,<br><br>v.<br><br>M&E PRINTING, INC. f/k/a NGS PRINTING INC.<br><br>Defendant. | ) | C.A. No. N23C-08-212-SKR CCLD |

Submitted: May 12, 2025
Decided: August 12, 2025

*Upon Defendant's Motion for Judgment on the Pleadings*

**GRANTED in part, DENIED in part.**

**MEMORANDUM OPINION AND ORDER**

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**Rennie, J.**

## I. INTRODUCTION

Plaintiff and Defendant executed an asset purchase agreement, through which Plaintiff purchased substantially all of Defendant's assets. Pursuant to their agreement, Defendant made certain representations and warranties regarding the accuracy of the financial statements it provided as well as its compliance with employment-related immigration laws. After closing, Plaintiff discovered that those representations and warranties were allegedly untrue, and as a result, it brought a claim for breach of contract.

Defendant now submits this Motion for Judgment on the Pleadings. Defendant contends that Plaintiff's claim is barred due to Plaintiff's failure to promptly provide an indemnification notice. Defendant further maintains that the indemnity provision in the agreement does not entitle Plaintiff to attorneys' fees in this action. For the reasons stated below, Defendant's Motion for Judgment on the Pleadings is **GRANTED in part** and **DENIED in part**.

## II. BACKGROUND[1]

### A. THE PARTIES AND THEIR AGREEMENTS

Plaintiff Four Cents Holdings, LLC ("Four Cents") is a Florida limited liability company headquartered in Glendale, California.[2] Defendant M&E Printing, Inc. ("M&E") is an Illinois limited liability company headquartered in Elgin, Illinois.[3]

On December 31, 2021 (the "Closing Date" or "Closing"), the Parties executed and closed on an Asset Purchase Agreement (the "APA").[4] Pursuant to the APA, Four Cents agreed to purchase all or substantially all of M&E's assets.[5] In conjunction with the APA, the parties entered into an Escrow Agreement,[6] pursuant to which Four Cents deposited $1,812,500 into an escrow fund.[7]

### B. M&E'S REPRESENTATIONS AND WARRANTIES UNDER THE APA

Under the APA, M&E made a series of representations regarding the accuracy of the financial statements that were used to determine the purchase price of the acquired assets.[8] Section 3.03 represents that those financial statements "have been

[1] The following facts are derived from Complaint and the documents incorporated therein and are presumed true solely for the purpose of this motion. *See* Compl. (D.I. No.1)
[2] Compl. ¶ 5
[3] *Id.* ¶ 6. On January 3, 2022, Defendant changed its name from "NGS Printing, Inc." to "M&E Printing, Inc." *Id.* ¶ 6. For clarity, this opinion refers to Defendant as "M&E."
[4] *Id.* ¶ 9; *see also* Compl. Ex. A (the "APA").
[5] *See generally* APA.
[6] Compl. ¶ 2.
[7] *Id.* ¶ 10.
[8] APA Art. III ("Representations and Warranties of Seller").

prepared in accordance with GAAP applied on a consistent basis throughout the period involved[.]"[9] It further provides that the financial statements "are based on the books and records of [M&E], and fairly present, in all material respect[s] the financial condition of [M&E]" for the relevant periods.[10]

In addition, the APA contains M&E's representations regarding its compliance with applicable laws and government orders. Under Section 3.14(b), M&E represents that it is "in compliance in all material respects with all Governmental Orders against, relating to, or affecting the Business or the Purchased Assets."[11] Section 3.15 further provides that "[M&E] is in compliance in all material respects with all Laws applicable to the conduct of the Business as currently conducted or the ownership and use of the Purchased Assets."[12] Lastly, Section 3.17(c) provides that M&E has been in compliance with all employment-related immigration laws.[13]

### C. THE INDEMNIFICATION PROVISION

Article VI of the APA (the "Indemnification Provision") sets forth the indemnity obligations that the parties owe to each other. Section 6.01 makes clear that M&E's representations and warranties within the APA "shall survive the

[9] APA § 3.03.
[10] *Id.*
[11] APA § 3.14(b).
[12] *Id.* § 3.15.
[13] *Id.* § 3.17.

Closing and shall remain in full force and effect until the date that is twelve[] months from the Closing Date[.]" (the "Survival Period").[14] Therefore, the representations and warranties contained in the APA remained in effect until December 31, 2022.[15] Pursuant to Section 6.02, M&E agreed to indemnify Four Cents for losses it might incur due to any breach of representations by M&E:

> [M&E] shall indemnify and defend each of [Four Cents] and its Affiliates and their Representatives (collectively, the Buyer Indemnitees") against, and shall hold each of them harmless from and against, and shall and reimburse each of them for, any and all Losses incurred or sustained by, or imposed, upon, the Buyer Indemnitees based upon, arising out of, with respect to or by reason of:
>
> > (a) any inaccuracy in or breach of any of the representations or warranties of [M&E] contained in [the APA], Ancillary Documents or in any certificate or instrument delivered by or on behalf of [M&E] pursuant to this Agreement.[16]

Section 6.02 further defines "Losses" to broadly include "losses, damages, liabilities, deficiencies, Actions, judgments, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers[.]"[17]

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[14] *Id.* § 6.01.
[15] *Id.*
[16] *Id.* § 6.02
[17] *Id.*

Section 6.06 provides certain procedures that a party must follow in seeking indemnification. It states that "[w]henever any claim shall arise for indemnification hereunder, the Party entitled to indemnification . . . shall promptly provide written notice of such claim to the other party. . . ."[18] Section 6.07 limits the manner by which a party's right to indemnification may be waived:

> The representations, warranties and covenants of the Indemnifying Party, and the Indemnified Party's right to indemnification with respect thereto, shall not be affected or deemed waived by reason of any investigation made by or on behalf of the Indemnified Party (including by any of its Representatives) or by reason of the fact that the Indemnified Party or any of its Representatives knew or should have known that any such representation or warranty is, was or might be inaccurate . . . .[19]

Relatedly, Section 7.07, the "Waiver" provision, provides in relevant part:

> No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. No failure to exercise, or delay in exercising, any right or remedy arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right or remedy hereunder preclude any other or further exercise thereof or the exercise of any other right or remedy.[20]

[18] *Id.* § 6.06 (emphasis added).
[19] *Id.* § 6.07.
[20] *Id.* § 7.07.

### D. THE ALLEGED BREACHES AND THE INDEMNIFICATION DEMAND[21]

At an unspecified time after Closing, Four Cents learned that certain representations contained in the APA are untrue.[22] Four Cents discovered that M&E had erroneously recorded a deposit as a sale, causing the financial statement that year to overstate the business' profits by $289,000.[23] Four Cents argues that, as a result of the overstatement, it overpaid for the assets by $1,732,000.[24] In addition, Four Cents learned that M&E had retained eight undocumented employees in violation of applicable immigration laws, and as a result, breached its representations contained in Sections 3.14(b), 3.15, and 3.17(c).[25]

On December 9, 2022, Four Cents sent an Indemnification Demand to M&E based on the alleged misrepresentations.[26] Four Cents demanded that M&E indemnify it for the damages caused by the alleged misrepresentations and requested immediate release of the escrow fund.[27] On December 28, 2022, M&E refused Four Cents' demand.[28] Litigation ensued.

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[21] At this stage, M&E does not directly challenge the sufficiency of the allegations of breach. The Court briefly discusses Four Cents' claims here only to provide relevant context.
[22] Compl. ¶ 31
[23] Compl. ¶ 14.
[24] *Id.* ¶ 22.
[25] *Id.* ¶ 27.
[26] *See id.* ¶¶ 32–33; *see also* Compl. Ex. C. (hereinafter the "Indemnification Demand").
[27] Compl. ¶ 34; Indemnification Demand at 5.
[28] *See generally* Compl. Ex. D.

## E. PROCEDURAL HISTORY

This action first began in the Court of Chancery, where Four Cents filed its Complaint on March 8, 2023.[29] On July 14, 2023, the parties stipulated to a transfer to this court.[30] On August 21, 2023, Four Cents filed its one-count Complaint in this Court, asserting breach of contract.[31] The Complaint seeks compensatory damages for the alleged breach, as well as any interest, costs, and fees incurred.[32] On September 18, 2023, M&E filed its Answer.[33] Thereafter, the parties exchanged initial discovery before agreeing to mediate.[34] On September 23, 2024, the Court entered a stay pending the results of the mediation.[35] The parties engaged in mediation on October 10, 2024, and November 13, 2024, to no avail.

On December 17, 2024, M&E filed its Motion for Judgment on the Pleadings.[36] The parties submitted briefing on the Motion.[37] The Court heard oral

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[29] Verified Compl., *Four Cents Holdings, LLC v. M&E Printing, Inc.*, C.A. No. 2023-0294-PAF, Transaction ID: 69300493, Dkt. 1.
[30] Stipulation and [Proposed] Order for Dismissal and Transfer to Superior Court, *Four Cents Holdings, LLC v. M&E Printing, Inc.*, C.A. No. 2023-0294-PAF, Transaction ID: 70329921, Dkt. 13.
[31] *See generally* Compl.
[32] Compl. at p. 14 (Request for Relief).
[33] D.I. No. 3.
[34] Stipulation and [Proposed] Order Staying Action in Favor of Mediation (D.I. No. 8).
[35] So Ordered (Stipulation and [Proposed] Order Staying Action in Favor of Mediation), STAYED Until Oct. 18, 2024.
[36] Def.'s Mot. J. Pleadings (D.I. No. 10).
[37] Opening Br. Supp. Mot. J. Pleadings (D.I. No. 10) [hereinafter "Def.'s Mot."]; Pl.'s Answering Br. Opp'n Def.'s Mot. J. Pleadings (D.I. No. 17) [hereinafter "Pl.'s Opp'n"]; Def.'s Reply Br. Further Supp. Mot. J. Pleadings (D.I. No. 18) [hereinafter "Def.'s Reply"]; Def.'s Sur-Reply Br. Further Supp. Mot. J. Pleadings (D.I. No. 35) [hereinafter "Def.'s Surreply"].

argument on March 21, 2025. On May 12, Defendant submitted supplemental briefing to address case authority that Plaintiff presented at oral argument.[38] The Motion is now ripe for decision.

## III. PARTIES' CONTENTIONS

### A. M&E'S CONTENTIONS

M&E asks the Court to grant its Motion on two separate grounds. First, M&E argues that Four Cents' breach-of-contract claim is barred because it did not provide timely notice in accordance with Section 6.06 of the APA.[39] M&E contends that, prior to Closing, it had informed Four Cents that certain revenues and expenses would need to be reclassified on the relevant financial statements.[40] M&E thus insists that, in first quarter of 2022, Four Cents was already aware of an issue with the financial statements.[41] In addition, M&E contends that Four Cents acknowledged it had learned of the employment issue "shortly after closing."[42] Hence, M&E argues that Four Cents failed to provide prompt notice when it only raised the issues on December 9, 2022, nearly a year after Closing.[43]

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[38] Def.'s Surreply (D.I. No. 35).
[39] Def.'s Mot at 13.
[40] *Id.* at 15.
[41] *Id.* at 17.
[42] *Id.*; Indemnification Demand ("Indeed, shortly after closing, Four Cents learned that somewhere between 8-9 long-standing employees were undocumented, did not meet, and could not meet, mandatory I-9 requirements and their employment otherwise did not comply with all applicable employment laws.").
[43] *Id.* at 17.

M&E next contends that the Indemnification Provision in the APA does not require M&E to reimburse Four Cents for the attorneys' fees and costs it incurred in this action.[44] M&E argues that Delaware courts, in deference to the American Rule, do not award attorneys' fees under a general indemnity provision absent clear and unequivocal language indicating the parties' intent to shift fees.[45] And it contends that the Indemnification Provision here does not contain such clear and unequivocal language.[46]

### B. FOUR CENTS' CONTENTIONS

Four Cents takes the opposite view. Four Cents first contends that its notice of breach was promptly made in accordance with Section 6.06, because it was provided within the Survival Period of the relevant representations.[47] Moreover, Four Cents argues that the APA does not impose a penalty for any failure to provide prompt notice, so it is not precluded from bringing the instant action even if the notice was untimely.[48] In addition, Four Cents argues that M&E's objection at most raises a question of fact as to whether the notice was promptly provided.[49] Specifically, Four Cents points out that M&E merely alleges that Plaintiff was supposedly aware of certain potential misrepresentations, but it does not identify

[44] *Id.* at 18.
[45] *Id.* at 18–22.
[46] *Id.*
[47] Pl.'s Opp'n at 10.
[48] *Id.* at 12–13
[49] *Id.* at 14–16.

when Four Cents completed its investigation and discovered the exact scope and effect of the misrepresentations.[50] Those factual issues, Four Cents posits, are not fit to be determined at the pleading stage.[51]

Four Cents also rejects the contention that M&E is not required to indemnify Four Cents' first-party claim. Four Cents argues that the APA's Indemnification Provision clearly provided a right to seek indemnification in first-party claims.[52]

## IV. STANDARD OF REVIEW

### A. SUPERIOR COURT CIVIL RULE 12(C)

Pursuant to Superior Court Civil Rule 12(c), any party may move for judgment on the pleadings.[53] The Court will not grant judgment on the pleadings unless, after drawing all reasonable inferences in favor of the non-moving party, no material issues of fact exists and movant is entitled to judgment as a matter of law.[54] "The standard for a motion for a judgment on the pleading is almost identical to the standard for a motion to dismiss."[55] "The Court must, therefore, accord the non-moving party the same benefits as a plaintiff defending a motion under Civil Rule

[50] *Id.* at 15.
[51] *Id.*
[52] *Id.*
[53] Super. Ct. Civ. R. 12(c).
[54] *Ford Motor Co. v. Earthbound, LLC*, 2024 WL 3067114, at *7 (Del. Super. June 5, 2024).
[55] *Id.* (citing *Silver Lake Off. Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Jan. 17, 2014) (internal quotations omitted).

12(b)(6)."[56] "The Court accepts the truth of all well-pleaded facts and draws all reasonable factual inferences in favor of the non-movant."[57]

### B. CONTRACT INTERPRETATION

"Delaware law adheres to the objective theory of contract[.]"[58] Under this standard, "a contract's construction should be that which would be understood by an objective, reasonable third party,"[59] Accordingly, words are given "their plain meaning unless it appears that the parties intended a special meaning."[60] When interpreting a contract, Delaware courts endeavor to "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."[61] Therefore, "[c]ourts will not read a contract to render a provision or term meaningless or illusory."[62]

## V. ANALYSIS

### A. THE PROMPT NOTICE PROVISION DOES NOT BAR PLAINTIFF'S CLAIM.

M&E argues that Four Cents' breach-of-contract claim is barred because it failed to provide M&E with prompt notice pursuant to Section 6.06. Under Section 6.06 of the APA, a party seeking indemnification "shall promptly provide written

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[56] *D'Antonio v. Wesley Coll., Inc*, 2023 WL 9021767, at *2 (Del. Super. Dec. 29, 2023).
[57] *Ford Motor Co.*, 2024 WL 3067114, at *7.
[58] *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014).
[59] *Id.* at 367–368.
[60] *Alcon Research, LLC v. Aurion. Biotech, Inc.*, 2025 WL 312371, *8 (Del. Ch. Jan. 27, 2025).
[61] *Salamone*, 106 A.3d at 368.
[62] *Schatzman v. Modern Controls, Inc.*, 2024 WL 4249939, at * 5 (Del. Super. Sep. 30, 2024) (internal citations and quotations omitted).

notice" to the other party "[w]henever any claim shall arise for indemnification hereunder." It appears to the Court that, because the pleadings contain little information regarding the exact timing and circumstances of Four Cents' discovery of the alleged misrepresentations, there is at least a factual dispute as to whether Four Cents promptly provided written notice after the indemnification claim arose.[63]

But even if Four Cents' notice was not promptly provided under the terms of Section 6.06, M&E's challenge still fails. For purposes of M&E's Motion, the prompt notice requirement is only relevant to the extent that a failure to provide such a notice would bar Four Cents' breach-of-contract claim. Essentially, M&E is arguing that a failure to meet Section 6.06's notice requirement would constitute a waiver of a party's right to bring an action.[64] But that is not true.

The APA does not impose any consequences or penalties for failing to provide an indemnification notice promptly. Nor does it state that provision of a prompt notice is a prerequisite to bringing a subsequent indemnification or breach-of-contract action. Quite the contrary, Section 7.07 provides that "[n]o failure to

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[63] The main factual allegation in the Complaint on this issue is found in Paragraph 31, which states:

> After Closing, Four Cents learned of the magnitude of [M&E's] misrepresentations, which misrepresentations inflated the Purchase Price and proximately caused Four Cents to incur additional costs and expenses in retaining replacement employees.

Compl. ¶ 31. Other than that, the only relevant information is Four Cents' statement in its Indemnification Demand that "shortly after closing, Four Cents learned that somewhere between 8-9 long-standing employees were undocumented, did not meet, and could not meet, mandatory I-9 requirements[.]" Compl. Ex. C (Indemnification Demand). Nothing in the pleadings identified the exact time by which the full scope and effect of the alleged misrepresentations surfaced.

[64] Def.'s Reply at 11–13.

exercise, or delay in exercising, any right or remedy arising from this Agreement shall operate or be construed as a waiver thereof[.]"[65] Hence, even if Four Cents was not prompt in delivering its indemnification notice, that delay in seeking indemnification does not block its right to sustain a claim of breach.

In reaching this conclusion, the Court finds its previous ruling in *Aveanna Healthcare, LLC v. Epic/Freedom, LLC*[66] particularly instructive. In *Aveanna*, the parties executed an escrow agreement in conjunction with an acquisition of two companies; the escrow agreement instituted procedures that the parties must follow in asserting indemnity claims.[67] The buyer in that case filed an indemnification notice to the seller, and it simultaneously sent the notice to an escrow agent seeking release of escrow funds.[68]

Pursuant to the escrow agreement, the seller was required to respond with a dispute notice within 30 days; otherwise, the escrow funds requested would be released to the buyer.[69] The seller filed its dispute notice three days late, and as a result, the escrow agent treated the indemnification request as uncontested and released the escrow funds.[70] Thereafter, the seller brought a claim challenging the buyer's possession of the escrow funds, alleging that the buyer's indemnification

[65] APA § 7.07.
[66] 2021 WL 3235739, at *1 (Del. Super. July 29, 2021).
[67] *Id.*
[68] *Id.* at *8.
[69] *Id.* at *6.
[70] *Id.* at *8.

notice was improper.[71] The buyer riposted that the seller waived a challenge to the escrow funds release when it failed to provide a timely dispute notice.[72]

The Court in *Aveanna* rejected the contention that the seller waived its right to challenge the release.[73] As the Court pointed out, the requirement for the seller to dispute an indemnification notice within 30 days only served to prevent an early release of escrow funds.[74] It did not, however, provide that a failure to file such a dispute notice would preclude the seller from challenging the validity of the buyer's indemnification notice by other means, such as suing for breach of the escrow agreement.[75] More importantly, the Court noted that the escrow agreement contained a "No Waiver" provision, which provided that a failure to exercise a right under the agreement did not operate as a waiver of that right.[76] The Court thus concluded that the "No Waiver" provision defeated the argument that the seller's untimeliness precluded its challenge to the buyer's continued possession of the escrow funds.[77]

Indeed, absent express language, Delaware courts have consistently refused to find that strict compliance with indemnification procedures is prerequisite to a

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[71] *Id.* at *11.
[72] *Id.*
[73] 2021 WL 3235739, at *30.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

later-filed claim for breach of contract.[78] For example, in *Anvil Holding Corp. v. Iron Acquisition Co.*, the Court of Chancery held that the parties' failure to engage in negotiations pursuant to indemnification procedures provided in the contract did not provide a basis to dismiss a later-filed breach-of-contract complaint.[79] In making that determination, the Court of Chancery observed that the parties' contract "does not state that a failure to negotiate would be grounds to dismiss an Indemnified Party's later complaint."[80] Similarly, in *Eurofins Panlabs, Inc. v. Ricerca Biosciences LLC*, the Court of Chancery refused to dismiss the complaint for the plaintiff's failure to strictly comply with the contract's indemnification notice requirement.[81] The court pointed out that the contract that the parties bargained for did not "explain how the Court should enforce a failure to comply with the [notice] provision."[82] It thus concluded that "no provision in the [contract] requires

[78] *See Anvil Holding Corp. v. Iron Acquisition Co.*, 2013 WL 2249655, at *3 (Del. Ch. May 17, 2013); *Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC*, 2014 WL 2457515, at *3 (Del. Ch. May 30, 2014); *see also Blue Cube Spinco LLC v. Dow Chem. Co.*, 2021 WL 4453460, at *2 (Del. Super. Sept. 29, 2021) (holding that delay in providing proper notice under insurance policy does not bar claim when (1) the notice provision does not expressly create a condition precedent and (2) a no waiver provision states that "no failure or delay by any party ... in exercising any right ... shall operate as a waiver thereof"); *accord Thompson St. Cap. Partners IV, L.P. v. Sonova United States Hearing Instruments, LLC*, 2025 WL 1213667, at *13 (Del. Apr. 28, 2025) (despite express language indicating that non-compliance with notice requirements operates as a waiver/forfeiture of right to bring claims, finding that the defendant/appellee's non-compliance with timing and specificity requirements may be excused if the non-compliance "were not material to the agreement and would result in a disproportionate forfeiture").
[79] 2013 WL 2249655, at *11 (Del. Ch. May 17, 2013).
[80] *Id.*
[81] 2014 WL 2457515, at *3 (Del. Ch. May 30, 2014).
[82] *Id.*

[dismissal] and the Court will not re-write the contract to impose such a requirement."[83]

Here, the APA does not state that a failure to "promptly" provide notice would bar a claim for breach. Moreover, the parties' bargained-for "no waiver" language contained in Section 7.07 precludes the argument that a delay in seeking indemnification operates as a waiver. Hence, the prompt notice requirement does not preclude Four Cents' claim for breach of contract. Accordingly, M&E's motion for judgment on the pleadings is **DENIED** on this point.

### B. FOUR CENTS IS NOT ENTITLED TO RECEIVE ATTORNEYS' FEES AND COSTS IT INCURS IN THIS ACTION.

The next dispute concerns whether Four Cents is entitled to receive attorneys' fees based on the Indemnification Provision. Four Cents relies on Section 6.02, which requires M&E to indemnify, defend, and reimburse Four Cents for "any and all Losses incurred or sustained by . . . [Four Cents] based upon, arising out of, with respect to or by reason of . . . any inaccuracy in or breach of any of the representations[.]"[84] "Losses" is defined to include "reasonable attorneys' fees and the cost of enforcing any right to indemnification hereunder[.]"[85] Hence, Four Cents argues that its attorneys' fees constitute "Losses" that M&E must pay as a result of

[83] *Id.* at *4.
[84] *See* Pl.'s Opp'n at 16–17.
[85] APA § 6.02.

its breach of the APA.[86] M&E, on the other hand, insists that this language does not clearly indicate an intent to shift fees as required by Delaware law.[87]

Delaware follows the American Rule, under which litigants generally bear the responsibility of paying their own litigation costs.[88] Consistent with the American Rule, Delaware courts have found that "[s]tandard indemnity clauses are not presumed to apply to first-party claims."[89] This presumption may only be rebutted by a "clear and unequivocal articulation" that the parties intended to shift attorneys' fees in first-party suits.[90] The language embodying that intent must be "explicit," meaning "expressed without ambiguity or vagueness."[91] "There is no specific language that must be used in order for an indemnity provision to provide recovery for first-party actions[,]"[92] However, "without precise language setting forth an intent to shift fees, counsel should not expect the Court to deviate from the American Rule if care has not been taken in drafting a contract's language."[93]

Here, no such "clear and unequivocal articulation" exists in the APA's indemnity language. Rather, the Indemnification Provision broadly establishes

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[86] Pl.'s Opp'n at 16–20.
[87] Def.'s Surreply at 16.
[88] *DeMatteis v. RiseDelaware Inc*., 315 A.3d 499, 508 (Del. 2024).
[89] *Deere & Co. v. Exelon Generation Acqs., LLC*, 2016 WL 6879525, at *1 (Del. Super. Nov. 22, 2016).
[90] *In re Bracket Corp. Litig.*, 2020 WL 764148, at *16 (Del. Super. Feb 7, 2020).
[91] *See Schneider Nat. Carriers, Inc. v. Kuntz*, 2022 WL 1222738, at *31 (citation modified).
[92] *Deere & Co.*, 2016 WL 6879525, at *1–2.
[93] *In re Bracket Holding Corp. Litig.*, 2020 WL 764148, at *16 (citation modified).

M&E's obligation to indemnify Four Cents for the "Losses" incurred by any breach of the representations or warranties contained in the APA.[94] The definition of "Losses" does not explicitly reference first-party actions.[95] And the Indemnification Provision does not contain any reference to "prevailing parties,"[96] which is a "hallmark term of fee-shifting provisions."[97] Delaware courts have been loath to read this type of general indemnity provision to cover fee-shifting in first-party actions.[98]

Four Cents also pointed to Section 6.06 for support.[99] As referenced in the previous section, Section 6.06 requires provision of prompt written notice whenever a claim for indemnification arises. In addition, Section 6.06 states that "[i]f the notice involves a claim from a third party against the Indemnified Party," a series of procedures would apply.[100] Relying on this language, Four Cents argues that the APA "specifically anticipates that there could be first party claims."[101] Otherwise,

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[94] *See* APA § 6.02.
[95] *See id.*
[96] *See generally* APA Art. VI.
[97] *See TranSched Sys. Ltd.*, 2012 WL 1415466, at *3 (Del. Super. Mar. 29, 2012).
[98] *See, e.g., Nasdi Holdings, LLC v. North American Leasing, Inc.*, 2020 WL 1865747, at *6 (Del. Ch. Apr. 13, 2020) (concluding that "the indemnification provision does not contain a 'clear and unequivocal articulation' of the intent to require reimbursement for attorneys' fees incurred through first-party actions" because "Plaintiffs do not point to any []fee-shifting specific language in the indemnification provision, other than the general definition of Losses elsewhere in the Purchase Agreement"); *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *2 (Del. Super. Nov. 22, 2016).
[99] Tr. of March 21, 2025 Mot. Hr'ng (D.I. No. 36) [hereinafter "Tr."] at 56:2–58:15.
[100] APA § 6.06.
[101] Tr. at 57:10–11.

according to Four Cents, it would be unnecessary to include the language of "[i]f the notice involves a claim from a third party."[102] The Court does not find this argument persuasive.

Recently, this Court in *Fortis Advisors LLC v. Boston Dynamics Inc.* refused to find an intent to shift fees when addressing similar language.[103] The indemnity provision there similarly required the indemnifying party to "indemnify, defend and hold harmless" the indemnified party "from and against any and all Losses[.]"[104] And the agreement contained a similar, broad definition of "Losses" that included "reasonable attorneys and experts fees and expenses."[105] Further, the definition of "Losses" at-issue was specified to apply "whether or not involving a Third Party Claim."[106]

This Court in *Fortis Advisors* found that, despite the inclusion of the language of "whether or not involving a Third Party Claim," the indemnity provision did not sufficiently demonstrate the parties' intent to shift fees in first-party claims.[107] Specifically, the Court noted that "[i]f the parties intended to include indemnification

[102] Tr. at 57:11–14.
[103] 2025 WL 1356521, at *6 (Del. Super. Apr. 29, 2025).
[104] *Id.* at *1.
[105] *Id.* at *6 n.10.
[106] *Id.* at *6.
[107] *Id.*

rights for first party claims such as this, their attorneys would have included explicit language stating just that."[108]

Following this rationale, Section 6.06's reference to third-party claims, at best, only *suggests* that indemnification may potentially be sought in cases other than third-party claims. It is no substitute for a clear and unequivocal indication that the parties agreed to shift fees in first-party actions.[109]

Moreover, the parties knew how to formulate clear and specific fee-allocation language as demonstrated by its inclusion of such language in another part of the APA. Section 1.05(c)(iv) of the APA governs the allocation of fees in a case where the parties engage an independent professional to resolve a dispute on post-closing price adjustment. It expressly provides:

> Fees of the Independent Professional. The fees and expenses of the Independent Professional shall be paid by [M&E], on the one hand, and [Four Cents], on the other hand, based upon the percentage that the amount actually contested but not awarded to [M&E] or [Four Cents], respectively, bears to the aggregate amount actually contested by [M&E] and [Four Cents].[110]

Several cases from this Court have determined that the existence of a fee-shifting clause elsewhere in the contract demonstrates that the parties did not intend

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[108] *Id.* at *6.
[109] *See id.*; *see also Ashland LLC v. Samuel J. Heyman 1981 Continuing Trust for Heyman*, 2020 WL 6562958, at *7 (noting that reference to "Third-Party Claim" does not clearly indicate that first party claims are included under the definition of "Losses").
[110] APA § 1.05(c)(iv).

the use of general indemnity clauses to shift fees in first-party actions.[111] For example, in *Deere & Co. v. Exelon Generation Acquisitions, LLC*, the Court found that the parties' use of fee-shifting language in provisions governing the fees of independent engineer and auditor, coupled with their failure to include such language in the indemnity provision, "indicates a lack of intent to create a clear and unequivocal agreement to shift fees in first-party actions."[112] A similar outcome was reached in *Ashland LLC v. Samuel J. Heyman 1981 Continuing Trust for Heyman*, where the Court held that the parties' inclusion of a fee-shifting provision regarding suits for recovery of termination fees demonstrated that "the parties knew how to draft explicit fee-shifting language."[113] Here, like in those cases, the parties' use of specific fee-shifting language in Section 1.05 further indicates that, if they intended to shift fees in a first-party, breach-of-contract action such as this, they would have explicitly stated it. But they did not.

In an effort to buttress its argument, Four Cents leans on this Court's decision in *Schneider National Carriers, Inc. v. Kuntz*.[114] That case is distinguishable. In *Schneider*, the Court found that the contract contained an indication that the parties

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[111] *See, e.g., Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *2 (Del. Super. Nov. 22, 2016); *Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman*, 2020 WL 6582958, at *7 (Del. Super. Nov. 10, 2020).
[112] 2016 WL 6879525, at *2 (Del. Super. Nov. 22, 2016).
[113] 2020 WL 6582958, at *7 (Del. Super. Nov. 10, 2020) ("[T]he Court notes that the parties knew how to draft explicit fee-shifting language in other provisions which further demonstrates that that the parties did not intend for Losses to encompass fee-shifting on first-party claims.").
[114] 2022 WL 1222738 (Del. Super. Apr. 25, 2022).

intended fee-shifting to cover claims between the contracting parties.[115] The Court made the finding based on four factors: first, the indemnity provision expressly included certain claims that may only arise between the contracting parties; second, the definition of "Losses" in the contract distinguished between damages sought in third-party claims and other claims; third, the notice provision in the contract reflected an understanding that the indemnity provision was not limited to third-party claims; fourth, and most importantly, the contract did *not* provide for fee-shifting *elsewhere* in the contract.[116] *Schneider* further noted that the Court's precedents "do not require that an indemnity clause expressly state that it covers first party claims."[117] It simply required such an intent to be "expressed without ambiguity or vagueness."[118] The Court thus found the intent existed based on the four factors summarized above.[119]

Unlike *Schneider*, however, here the APA *does* provide for a clear and distinct fee-shifting provision in another part of the agreement—Section 1.05. Hence, the contractual intent of the parties is more ambiguous and unclear than in *Schneider* and makes this case more analogous to cases such as *Deere* and *Ashland*, where the Court found inclusion of fee-shifting language elsewhere in the contract to be

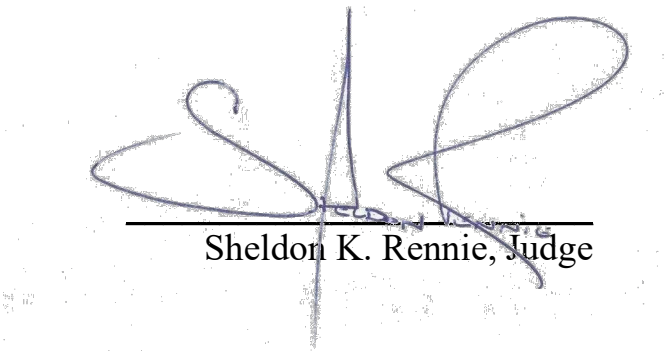
[115] *Id.* at *29.
[116] *See id.* at 30–31.
[117] *Id.* at *31 (Del. Super. Apr. 25, 2022).
[118] *Id.* (internal citation omitted).
[119] *See id.*

dispositive.[120] The Court does not find a clear and unequivocal intent for the parties to overcome the presumption of the American Rule. Accordingly, M&E's motion for judgment on the pleadings is **GRANTED** on the issue of attorneys' fees.

## VI. CONCLUSION

For the reasons set forth above, M&E's Motion for Judgment on the Pleadings is **GRANTED** as to Four Cents' request for attorneys' fees, and **DENIED** as to the breach-of-contract claim at large.

**IT IS SO ORDERED.**



Sheldon K. Rennie, Judge

[120] *See Deere & Co.*, 2016 WL 6879525, at *2; *Ashland LLC*, 2020 WL 6582958, at *7.