

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WALTER A. WINSHALL, in his capacity as)
the Stockholders' Representative,)
)
Plaintiff,)
)
v.) C.A. No. 6074-CS
)
VIACOM INTERNATIONAL INC. and)
HARMONIX MUSIC SYSTEMS, INC.,)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: December 3, 2012

Date Decided: December 12, 2012

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STRINE, Chancellor.

I. Introduction

This case arises out of the purchase by the media conglomerate Viacom of Harmonix Music Systems, a developer of music-based video games. Viacom bought Harmonix in September 2006 for consideration of \$175 million in cash and an earn-out payment based on Harmonix's 2007 and 2008 revenues. Under the agreement between Viacom and Harmonix's stockholders, \$12 million of the \$175 million cash was placed into escrow and would be used to indemnify Viacom if, among other things, Viacom suffered losses arising out of breaches of representations and warranties made by Harmonix. Unless Viacom sought indemnification within 18 months of the closing of the merger between Viacom and Harmonix, the escrow was to terminate and the \$12 million was to be paid to Harmonix's former stockholders.

In April 2008, a few days before the 18 month escrow period ended, Viacom requested indemnification from the former Harmonix stockholders for losses it claimed it had suffered on account of purported breaches of the representations and warranties in the merger agreement. These alleged breaches related to losses that Viacom incurred in defending against three claims concerning the use of intellectual property in a video game that was under development when Viacom bought Harmonix, *Rock Band*. In July 2008, after the escrow period had expired, Viacom requested indemnification from Harmonix's former stockholders for the costs of defending against a fourth claim relating to the use of intellectual property in *Rock Band*, once again alleging breaches of the representations and warranties in the merger agreement.

In September 2008, the representative of Harmonix's former stockholders, Walter Winshall, rejected Viacom's requests for indemnification, and demanded that the escrow money be released. Viacom refused to authorize the release of the escrow money and Winshall filed a complaint in this court demanding that the money be released. Winshall then moved for summary judgment. Viacom has opposed summary judgment, claiming that Harmonix breached the representations and warranties and arguing also that the Harmonix stockholders have an obligation to cover its defense costs even if there was no breach of the representations and warranties.

I grant Winshall's motion. There is no genuine issue of any material fact, and thus Winshall's complaint is ripe for summary judgment under Court of Chancery Rule 56. Viacom cannot claim indemnification based on the representations and warranties that Harmonix made as to the state of its business at the time Viacom bought it, because all of its claims relate to alleged infringements of intellectual property *after* the deal closed. Nor can Viacom claim that Harmonix has breached its representations that neither it nor its senior officers knew of any claims against Harmonix or of any infringements of intellectual property rights, because Winshall has supplied affidavits in support of his position, and Viacom has not offered any evidence to challenge them, in the form of affidavits, depositions, or otherwise. Viacom's argument that the Harmonix stockholders have a duty to pay its defense costs even when there has not been a breach of the representations and warranties in the merger agreement is based on a misreading of the agreement. Finally, I hold, in the alternative, that the indemnification request that

Viacom made of Winshall in July 2008 is time-barred. Therefore, I grant summary judgment in favor of Winshall.

II. Background

In 2006, Viacom, the defendant in this case, entered into an agreement (the “Merger Agreement”) to buy the entirety of Harmonix, a maker of music-themed video games. The stockholders of Harmonix (the “Sellers”) were represented by Walter Winshall, the nominal plaintiff in this case.¹ The parties agreed that Viacom would pay the Sellers \$175 million in cash, plus an “earn-out” based on Harmonix’s 2007 and 2008 earnings.² Under a separate agreement (the “Escrow Agreement”), the parties agreed to deposit \$12 million of the \$175 million into escrow.³ The escrow cash was to be used to fine-tune the final purchase price to take into account Harmonix’s financial situation at the time of closing and any unexpected costs associated with the transaction, and also to indemnify Viacom for certain losses, including those arising out of the breach of representations and warranties in the Merger Agreement.⁴ Viacom closed the purchase of Harmonix on October 27, 2006.⁵ The money in the escrow account was to be disbursed

¹ The Merger Agreement provides that consideration would be paid to the class of “Merger Consideration Recipients,” which includes not just Harmonix stockholders but also those who held options and warrants on Harmonix’s stock. V. Am. Compl. Ex. A § 10.7 (“Agreement and Plan of Merger” (Sept. 20, 2006)) [hereinafter MA]. These Merger Consideration Recipients are responsible for indemnifying Viacom for breaches of representations and warranties in the Merger Agreement, and Winshall represented all of them. *Id.* §§ 8.2, 10.8. For convenience, I refer to all the Merger Consideration Recipients as the “stockholders” or “Sellers.”

² *Id.* § 2.1(c)(ii)(A),(B),(J). The earn-out has already been litigated in this court. *Viacom Int’l, Inc. v. Winshall*, 2012 WL 3249620 (Del. Ch. Aug. 9, 2012).

³ *Id.* §§ 2.1(c)(ii)(F), 3.9; *see* V. Am. Compl. Ex. B § 2(b) (“Escrow Agreement” (Oct. 27, 2006)) [hereinafter EA].

⁴ EA § 4(a).

⁵ *Id.* pmb1.

to the Sellers 18 months after this date, provided that there was no claim for indemnification outstanding, but could only be disbursed with the agreement of both Viacom and Winshall.⁶

A. The Merger Agreement And The Escrow Agreement

Section 8.2(a)(i) of the Merger Agreement provides that the Sellers would indemnify Viacom “against any and all Losses” arising out of “the breach of any representation or warranty of [Harmonix] contained in this Agreement.”⁷ The Merger Agreement provides time limits in which Viacom had to bring different kinds of indemnification claims.⁸ Claims of nonfraudulent breaches of representations as to Harmonix’s use of intellectual property, which are the alleged breaches in this case, had to be brought within 18 months of the date of closing of the Merger, *i.e.* by April 27, 2008.⁹

Section 8.2(d) of the Merger Agreement sets out the mechanism by which Viacom was permitted to seek indemnification as to claims by third parties arising out of breaches of the representations and warranties. Viacom was required to give Winshall written notice within 30 days of receiving notice of a claim for which it would request indemnification, although the failure to provide written notice within 30 days would only affect Viacom’s rights under the Merger Agreement if the Sellers were “adversely

⁶ *Id.* § 5(a),(c); *see id.* § 4(c)(i).

⁷ MA § 8.2(a)(i).

⁸ *Id.* § 8.1.

⁹ *Id.*; *see id.* § 4.15 (representations and warranties as to intellectual property).

prejudiced” by this failure.¹⁰ The Merger Agreement provides that, for a claim as to which Viacom may request indemnification, the Sellers are liable for the costs of Viacom’s defense of the claim.¹¹

Three of the representations and warranties in the Merger Agreement are relevant to this case. In § 4.15(k), Harmonix represented that it “ha[d] adequate rights . . . as is necessary for the current use” of software it had developed.¹² In § 4.15(n), Harmonix represented that there were no claims pending against Harmonix of which Viacom was not aware, and that Harmonix and four of its senior officers—Alex Rigopulos, Eran Egozy, Michael Dornbrook, and Greg LoPiccolo—did not know of any such claims.¹³ And in § 4.15(o), Harmonix represented that “neither the operation of the Business, nor any activity of the Company, nor any manufacture, use, importation, offer for sale and/or sale of any Current Game” constituted a violation of a third party’s intellectual property rights, with the exception of patents and foreign trademarks, and that Harmonix did not know of any violation of a third party’s rights to patents and foreign trademarks.¹⁴

¹⁰ *Id.* § 8.2(d)(i).

¹¹ *Id.* (providing that Viacom may defend or settle a claim “at the expense of the applicable indemnifying parties”); *id.* § 8.2(d)(ii) (providing that Winshall may take over the defense of third-party claims, and that the Sellers will be responsible for the costs of the defense; but providing further that Viacom may still choose to defend some types of claim itself, and that the Sellers must pay “the reasonable fees and expenses” of Viacom’s counsel); *id.* § 8.2(d)(iii) (providing that, if Winshall defends a claim, Viacom may participate in the defense of the claim at the Sellers’ expense).

¹² *Id.* § 4.15(k).

¹³ *Id.* § 4.15(n).

¹⁴ *Id.* § 4.15(o).

B. Viacom Gives Harmonix Notice Of Third-Party Claims Based On *Rock Band*

Harmonix was developing the game *Rock Band* at the end of October 2006, when Viacom purchased Harmonix.¹⁵ *Rock Band* was released on November 20, 2007.¹⁶ On April 24, 2008, three days before the 18-month deadline set in the Merger Agreement, Viacom wrote to Winshall informing him of three claims against it for violation of intellectual property, and stated that it might seek indemnification for losses on the grounds of alleged breaches of the representations and warranties.¹⁷

In the first claim against Viacom, Activision, which had certain rights as to music video games that Harmonix had previously developed, the *Guitar Hero* series, alleged that in *Rock Band* Harmonix had infringed patents, copyrights, and trademarks that Activision owned.¹⁸ In the second claim, 1st Media LLC, a patent assignee, alleged that Harmonix in *Rock Band* had infringed a patent 1st Media held.¹⁹ In the third claim,

¹⁵ See, e.g., Rigopulos Dep. Tr. 29:16-30:2.

¹⁶ V. Am. Compl. ¶ 76.

¹⁷ *Id.* Ex. D (letter to Winshall from Viacom (April 24, 2008)).

¹⁸ In its briefing, Viacom has acknowledged that Harmonix disclosed potential claims relating to Activision's patents in Schedule 4.15(n) to the Merger Agreement. Defs.' Br. in Opp. 9 n.7. Viacom has also acknowledged that Activision did not assert patent infringement claims against Harmonix. *Id.* Viacom now seeks to recover losses related only to alleged copyright and trademark infringements, which were the claims Activision pled before the arbitration tribunal that adjudicated the claims. *Id.*; see *id.* Ex. 4 (Compl., *Activision Publishing, Inc. v. MTV Networks, Inc.* (June 25, 2008) (arbitration)); *id.* Ex. 5 (First Am. Compl., *Activision Publishing, Inc. v. MTV Networks, Inc.* (Sept. 22, 2008) (arbitration)) [hereinafter *Activision Am. Compl.*].

¹⁹ V. Am. Compl. Ex. D Attach. D Ex. 1 (First Am. Compl., *1st Media LLC v. doPi Karaoke, Inc.*, Case No. 2:07-cv-01589-KJD-RJJ (D. Nev. Feb. 22, 2008)) [hereinafter *1st Media Am. Compl.*].

Gibson Guitar Corp., a maker of musical instruments, alleged that in *Rock Band* Harmonix had infringed a patent Gibson held.²⁰

In its letter, Viacom stated that it “hereby reserve[d] the right to seek indemnification for any other claims or matters by the parties named above or by other third parties that may result due to the [Harmonix’s] breach of its representations and warranties under the [Merger] Agreement.”²¹ On July 21, 2008, almost three months after the deadline for informing Winshall of third-party claims against it had passed, Viacom gave Winshall notice of another patent infringement complaint from Konami Digital Entertainment Co., a Japanese entertainment company.²²

C. Viacom Defends Itself Against The Claims And Blocks The Disbursement Of The Escrow Funds

The Merger Agreement provided that Viacom could tender to Winshall the defense of claims as to which Viacom “[might] request indemnification,” but Viacom did

²⁰ *Id.* Attach. A (Compl., *Gibson Guitar Corp. v. Harmonix Music Sys.*, Case No. 3:08-cv-00294 (M.D. Tenn. Mar. 20, 2008)); *id.* Attach. B (Am. Compl., *Gibson Guitar Corp. v. Walmart Stores, Inc.*, Civil Action No. 3:08-0279 (M.D. Tenn. Apr. 4, 2008)) [hereinafter Gibson Am. Compl.]. The Gibson claim also alleged that Harmonix had violated its patent in the *Guitar Hero* games. *E.g.*, *id.* ¶¶ 32-42. In its briefing, Viacom has not distinguished the Gibson *Guitar Hero* claim from the Gibson *Rock Band* claim, so Viacom has waived any argument that the Gibson *Guitar Hero* claim should be treated separately from its *Rock Band* claims. *Emerald P’rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (“Issues not briefed are deemed waived.”); *see* Defs.’ Br. in Opp. 17-18. Furthermore, Viacom did not give Winshall proper contractual notice of any claims based on the *Guitar Hero* games. The Merger Agreement required Viacom to “specify in reasonable detail the amount of the claim and the basis for the claim,” but Viacom merely attached the Gibson complaints and informed Winshall that Gibson was asserting claims “including but not limited to the assertion that [Harmonix’s] *Rock Band* videogame product infringe[d] U.S. Patent No. 5,990,405.” V. Am. Compl. Ex. D at 2; *see* MA § 8.2(d)(i).

²¹ V. Am. Compl. Ex. D.

²² *Id.* Ex. E (letter to Winshall from Viacom (July 21, 2008)); *see id.* Attach. A (Compl., *Konami Digital Entm’t Co. v. Harmonix Music Sys., Inc.*, Case No. 6:08-CV-286 (July 7, 2008)) [hereinafter Konami Compl.].

not do so and instead defended itself.²³ Viacom settled the Activision copyright and trademark claims.²⁴ The Gibson and Konami claims were dismissed with prejudice.²⁵ The 1st Media claim was also dismissed, and an appeal is pending.²⁶ Viacom represents that these claims have cost it over \$28 million in legal fees.²⁷

In September 2008, four months after the end of the 18-month escrow period, Winshall demanded the release of the escrowed funds.²⁸ In its response, in January 2009, Viacom refused to do so, citing the alleged breaches of the representations and warranties in the Merger Agreement.²⁹ Winshall filed a complaint in December 2010, seeking declaratory relief that Viacom was not entitled to indemnification, with his claim divided into four sub-claims corresponding to the 1st Media, Gibson, Activision, and Konami claims.³⁰ Winshall also sought an order requiring Viacom to release the escrow cash to the Sellers.³¹ For the reasons that follow, I grant Winshall the relief he seeks.

III. Analysis

I first discuss the applicable standard for summary judgment under Delaware Court of Chancery Rule 56. I next address, and reject, Viacom's argument that the

²³ MA § 8.2(d).

²⁴ V. Am. Compl. Ans. ¶ 65; Defs.' Br. in Opp. 9.

²⁵ V. Am. Compl. Ans. ¶¶ 64, 66; Defs.' Br. in Opp. 8-10.

²⁶ V. Am. Compl. Ans. ¶ 63; Defs.' Br. in Opp. 8.

²⁷ Defs.' Br. in Opp. 8-10. In addition, Viacom alleges that it gave "substantial consideration" to settle the Activision claim. V. Countercl. ¶ 19 (Mar. 1, 2012).

²⁸ V. Am. Compl. Ex. G (letter from Marc F. Dupré to Michael D. Fricklas (Sept. 26, 2008)).

²⁹ *Id.* Ex. I (letter from Viacom to Winshall (Jan. 28, 2009)).

³⁰ V. Compl. ¶¶ 32-86; V. Am. Compl. ¶¶ 52-105. Winshall also sought relief against Viacom for allegedly manipulating the earn-outs payable to the Sellers. V. Compl. ¶¶ 20-31; V. Am. Compl. ¶¶ 24-50. I dismissed this count last year. *Winshall v. Viacom Int'l, Inc.*, 2011 WL 5506084 (Del. Ch. Nov. 10, 2011).

³¹ V. Compl. ¶¶ 87-99; V. Am. Compl. 106-18.

Sellers have an obligation to pay Viacom’s defense costs even if there is no breach of the representations and warranties in the Merger Agreement. I then find, on the basis of the undisputed record before me, that Harmonix has not breached any of the representations and warranties in the Merger Agreement.

A. The Standard For Summary Judgment

Under Delaware Court of Chancery Rule 56, summary judgment will be granted if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”³² I am to draw inferences from the record “in the light most favorable to the nonmoving party to determine if there is any dispute of material fact.”³³ But, the party opposing summary judgment may not rely on “mere allegations or denials” to try to create a dispute of material fact.³⁴ Rather, it must “set forth specific facts showing that there is a genuine issue for trial.”³⁵ The opposing party may do so by affidavits, or, if it cannot obtain affidavits, by depositions or discovery.³⁶ If the opposing party cannot show that there is a genuine issue of fact for trial, summary judgment must be granted.³⁷

B. The Sellers’ Obligation To Indemnify Viacom

Section § 8.2(a) of the Merger Agreement provides that the Sellers would indemnify Viacom and hold it “harmless from and against any and all Losses, which may

³² Del. Ct. Ch. R. 56(c); *see GMG Capital Invs., LLC v. Athenian Venture P’rs I, L.P.*, 36 A.3d 776, 783 (Del. 2012) (discussing the standard for summary judgment).

³³ *Aeroglobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

³⁴ Del. Ct. Ch. R. 56(e).

³⁵ *Id.*

³⁶ *Id.*; *id.* 56(f).

³⁷ *Id.* 56(e).

be sustained or suffered by [Viacom] based upon, arising out of or by reason of: (i) the breach of any representation or warranty of [Harmonix] contained in this Agreement.”³⁸ But Viacom, despite this plain language that makes clear that there must be a *breach* of a representation or warranty for it to be indemnified against loss, argues that the Sellers are responsible for paying its defense costs “if the allegations of the claim at issue fall within scope of the representation or warranty.”³⁹ These defense costs constitute the entirety of the claims at stake in this case.⁴⁰

In support of this argument, which it did not advance in its communications with Winshall, Viacom points to two clauses in § 8.2(d) of the Merger Agreement. First, it notes that § 8.2(d)(i) provides that Viacom has the right to conduct the defense of any claim “at the expense of the applicable indemnifying parties.”⁴¹ Second, Viacom notes that § 8.2(d)(ii) provides that if Viacom chooses not to permit Winshall to assume the defense of certain types of claims, Winshall shall pay “the reasonable fees and expenses of counsel retained by [Viacom].”⁴²

But, neither of these clauses helps Viacom, because Viacom is citing them out of their contractual and logical context. Section 8.2(d)(i) only covers claims as to which Viacom “may request indemnification *pursuant to Section 8.2(a) or Section 8.2(b)*,”

³⁸ MA § 8.2(a).

³⁹ Defs.’ Br. in Opp. 17.

⁴⁰ The only claim that Viacom has settled, rather than had dismissed, is the Activision claim, and Viacom has not put any financial value on the settlement. *Id.* at 8-10; V. Countercl. ¶ 19. But, Winshall has not argued that it should be granted summary judgment simply because no court has found that there has been a breach of the representations and warranties, and thus I do not consider this argument as a basis for Winshall’s motion.

⁴¹ MA § 8.2(d)(i).

⁴² *Id.* § 8.2(d)(ii).

which are the sections of the Merger Agreement that set out when Viacom may seek indemnification.⁴³ And because Viacom’s only ground for seeking indemnification is under § 8.2(a)(i), the plain language of which makes the obligation to indemnify dependent on the existence of a “breach” of a representation or warranty, Viacom must show that there has been such a breach. This is made more obvious by the clause that Viacom seeks to rely on, which provides that defense fees will only be paid by the “indemnifying parties.”⁴⁴ This makes clear that, for the Sellers to cover Viacom’s costs, Viacom’s right to indemnification must have been triggered.

Section 8.2(d)(ii) is no more favorable to Viacom. Section 8.2(d)(ii) follows on directly from § 8.2(d)(i), and discusses only the treatment of “such claim[s]” as are mentioned in § 8.2(d)(i)—*i.e.*, claims made “pursuant to Section 8.2(a) or Section 8.2(b),” which for the purposes of this motion involve a breach of a representation or warranty.⁴⁵

As well as contradicting the contractual language, Viacom’s interpretation of the Merger Agreement is odd. If the Sellers were really to be responsible for paying for the defense of Viacom against any claim that involved an arguable breach of representations and warranties, regardless of whether a breach of representations and warranties was ultimately proven, we should expect to find the relevant contractual provision stating this

⁴³ *Id.* § 8.2(d)(i).

⁴⁴ *Id.*

⁴⁵ *Id.* § 8.2(d)(ii).

in as many words.⁴⁶ Second, Viacom’s interpretation would lead to the Sellers being responsible for paying attorney’s fees for claims that they could never have predicted: provided that a claim related in some way to the subject matter of at least one of the many representations and warranties so as to “aris[e] out of” it, in Viacom’s view, the Sellers would have to pay to defend it. The Sellers could thus be on the hook for defending against frivolous claims that had nothing at all to do with the state of Harmonix when they sold it to Viacom. Viacom has not cited in support of its position any merger cases where a party has had a duty to defend another party from claims without there being a breach of representations and warranties.⁴⁷ Because Viacom’s interpretation of the

⁴⁶ The cases that Viacom cites in support of its argument all involve contracts with this kind of clear and unambiguous language. *See, e.g., United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *3 (Del. Super. Ct. June 13, 2011) (interpreting contract providing for defense costs, even if the allegations of the claim were “groundless, false, or fraudulent”).

⁴⁷ The cases that Viacom relies on are chiefly cases involving the scope of insurance policies. *United Westlabs*, 2011 WL 2623932 (scope of business liability insurance contract); *DynCorp v. Certain Underwriters at Lloyd’s, London*, 2009 WL 3764971 (Del. Super. Ct. Nov. 9, 2009) (same); *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456853 (Del. Super. Ct. May 21, 2001) (same); *see also In re WorldCom, Inc., Secs. Litig.*, 354 F. Supp. 2d 455 (S.D.N.Y. 2005) (discussing validity of contract for directors’ and officers’ liability insurance).

The one merger case on which Viacom relies, *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (Del. 2008), does not, in my view, support Viacom’s position. Viacom quotes *LaPoint* for the proposition that “a defense may be required even if there never turns out to be any liability to indemnify.” *Id.* at 197; Defs.’ Br. in Opp. 18. But this is a quotation from another case, *Molex Inc. v. Wyler*, 334 F. Supp. 2d 1083, 1086 (N.D. Ill. 2004), a fact that Viacom fails to indicate. In *Molex*, the federal district court issued a declaratory judgment that the defendant was obligated to defend the plaintiff based on a contract “to indemnify and defend [the plaintiff] for any loss or expenses relating to any claim made by persons not disclosed in the Purchase Agreement who might claim any right to [the target company’s] stock.” *Id.* at 1085. The district court interpreted this as a duty to defend that was independent of any potential duty to indemnify. *Id.* at 1086. But, *Molex* does not apply here, because the language in the *Molex* purchase agreement is different from that in the Merger Agreement in this case. In *LaPoint*, our Supreme Court discussed *Molex* to explain why a duty to indemnify, as opposed to a duty to defend, only comes into existence after a court has found a breach of a contractual term. *LaPoint*, 970 A.2d at 197. The plaintiffs in *LaPoint* in fact only sought payment of attorney’s fees *after* this court had found that the defendant had breached the terms of the purchase agreement and

Merger Agreement contradicts its plain text and evident logic, I find that the Sellers have no duty to pay for Viacom's defense costs, absent a breach of representations and warranties.

C. Viacom Has Not Created A Triable Issue Of Fact That There Has Been A Breach Of The Representations And Warranties

I analyze the representations and warranties in two parts. First, I discuss those that relate to the state and conduct of Harmonix's business at the time it was sold to Viacom, and second, I discuss those that relate to the knowledge of Harmonix and its officers when it was sold.

1. The Representations Based On Harmonix's Business

There are two representations and warranties that relate to Harmonix's business rather than its knowledge or the knowledge of its officers at the time of the transaction, § 4.15(k) and § 4.15(o)(i).

a. Section 4.15(k)

Section 4.15(k) provides:

Except as set forth on Schedule 4.15(k), with respect to (i) the Company Developed Software, and (ii) Software licensed to the Company by a third party, in either case, used in Games in development or in Current Games (in accordance with the terms of the applicable Publishing Agreement), the Company (A) has adequate rights therein as is necessary for the current use (if any) of such Company Developed Software and Software by the

thus determined that the defendant had a duty to indemnify the plaintiffs. *Id.* at 187-90. The Supreme Court noted that “[the defendant’s] duty to indemnify [the plaintiffs] did not arise until the Court of Chancery determined that [the defendant] had breached the [m]erger [a]greement,” and the purchase agreement at issue in *LaPoint* closely tracked the language of the Merger Agreement in this case, providing that the defendant would indemnify the plaintiffs only in the event of a “breach” of a representation or warranty. *Id.* at 190, 197. Therefore, insofar as *LaPoint* is relevant to this case, I read it as supporting Winshall’s position.

Company, or (B) had adequate rights therein as was necessary to license, transfer, convey and/or assign copyright ownership in Company Developed Software to Publishers as required under the terms of the Publishing Agreement.

This provision cannot apply to any alleged violations of intellectual property rights in *Rock Band*, because it covers the “current use” of the intellectual property, which must refer to the use of the intellectual property in October 2006, when Viacom purchased Harmonix. The claims for which Viacom seeks indemnification all relate to the final *Rock Band* video game that was produced in November 2007.⁴⁸ What Viacom was doing with *Rock Band* over a year after the merger closed cannot be considered “current use.” This conclusion follows from the plain meaning of the term “current use,” and is supported by the use of the present tense, in “*has* adequate rights.”⁴⁹ This must refer to

⁴⁸ As I have noted, Viacom has not properly briefed any claims for indemnity based on Gibson’s patent claim as to the *Guitar Hero* games, and Viacom did not properly present any such claim to Winshall. But, even if Viacom had not waived this claim, the result would be the same. The *Guitar Hero* games are “Current Games” for the purposes of the Merger Agreement. MA Schedule 4.15(a)(viii). But the patent claim asserted by Gibson as to the *Guitar Hero* games cannot fall under § 4.15(k) of the Merger Agreement, because this would violate the principle of construction that a court must “giv[e] effect to all provisions” in a contract. *See Riverbend Cmty., LLC v. Green Stone Eng’g, LLC*, 2012 WL 4950759, at *2 (Del. Oct. 17, 2012) (citation omitted). If the Gibson patent claim fell under § 4.15(k), this would make redundant the distinction that the Merger Agreement makes elsewhere between patent claims, as to which Harmonix only represented that it and its officers had no *knowledge* of a violation, and other claims, as to which Harmonix represented that there *were* no violations. *See* MA § 4.15(o). Rather, § 4.15(k) must read to exclude violations of patents and federal trademarks as to Current Games, and instead cover other kinds of intellectual property, such as copyrights.

⁴⁹ *See, e.g., ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68-69 (Del. 2011) (“One [traditional] principle [of contract interpretation] is to give effect to the plain meaning of a contract’s terms and provisions when the contract is clear and unambiguous.”).

the use to which Harmonix was putting the *Rock Band* prototype in October 2006, not any future use.⁵⁰

It would also be strange if the Sellers had indemnified Viacom, in 2006, against intellectual property claims arising out of a *future* version of *Rock Band*. *Rock Band* was still under development at the time the Merger Agreement was executed. The Sellers had no control over *Rock Band* once Viacom had purchased Harmonix, and the development of *Rock Band* was completed when Harmonix was under Viacom's control. The claims as to which Viacom seeks indemnification are that the final, published version of *Rock Band* infringes third parties' intellectual property rights, and do not allege that any prototype of *Rock Band* before the sale infringed those rights.⁵¹ Indeed, as Winshall points out, the claims focus on parts of *Rock Band* added *after* the sale, such as the artwork and instrument-style controllers.⁵² There is no reason why the Sellers would have indemnified Viacom for infringements of intellectual property rights arising out of

⁵⁰ Because of this, there is no need to consider whether *Rock Band* might be "Company Developed Software," which the parties dispute. But, if I did consider this issue, I would likely conclude that *Rock Band* was not Company Developed Software. Company Developed Software is defined in the Merger Agreement as "all Software developed by the Company and, if delivered to a third party, in the form so delivered by the Company . . ." MA § 4.15(w)(iii). *Rock Band* was in development at the time at the time that Viacom bought Harmonix, and it is thus hard to characterize it as "developed." Cf. *id.* § 4.15(w)(xvii) (defining "Software" as "software of any nature, whether operational or in development . . ."). Furthermore, the language of § 4.15(w)(iii) appears to contemplate that "developed" software is in a state that could be "delivered to a third party," and it is unlikely that *Rock Band* was in such a state in October 2006. See Rigopulos Dep. 32:20 (stating that *Rock Band* "didn't really exist" in October 2006). Therefore, I would likely find that *Rock Band* was not Company Developed Software for the purposes of § 4.15(k).

⁵¹ See Activision Am. Compl. ¶¶ 11-38; Gibson Am. Compl. ¶¶ 43-52; 1st Media Am. Compl. ¶¶ 14-15; Konami Compl. ¶¶ 4, 11, 16, 21.

⁵² See, e.g., Activision Am. Compl. ¶ 28 (alleging that the "look and feel" of the final *Rock Band* game infringed Activision's intellectual property rights); Gibson Am. Compl. ¶¶ 46 (alleging that the *Rock Band* controllers infringed Gibson's intellectual property rights).

Harmonix's actions at a time when the Sellers no longer controlled Harmonix, and Viacom has not pointed to any case law that can support such an expansive interpretation of the indemnification provisions.⁵³ I therefore find, as a matter of law, that there has been no breach of the representations in § 4.15(k).

b. Section 4.15(o)(i)

Section 4.15(o)(i) provides:

Except as set forth on Schedule 4.15(o), (i) neither the operation of the Business, nor any activity of the Company, nor any manufacture, use, importation, offer for sale and/or sale of any Current Game in accordance with the terms of the applicable Publishing Agreement infringes on, constitutes a misappropriation of (or in the past constituted a misappropriation of), or violates (or in the past infringed on or violated) any intellectual property rights of a third party except for the rights of any person or entity under (A) any Mark under any Law other than U.S. federal or U.S. state Law or (B) any Patent

Viacom does not claim that *Rock Band* is a “Current Game.”⁵⁴ Instead, Viacom claims that Harmonix's development of *Rock Band* is included within “the operation of the Business, [] or any activity of the Company,” and that any claims arising out of the development of *Rock Band* thus fall within the scope of the representation and warranty.

This argument does not persuade me. First, it is clear that the representation only covers the present time, not the future. The term “Business,” as in “operation of the

⁵³ Under Delaware law, indemnity provisions are to be construed strictly rather than expansively. See, e.g., *Seither v. Balbec Corp.*, 1995 WL 465187 (Del. Super. Ct. July 27, 1995), *aff'd sub nom. Seither v. Charles F. Beatty, Inc.*, 676 A.2d 906 (Del. 1996), *abrogated on other grounds, Toll Bros., Inc. v. Considine*, 706 A.2d 493 (Del. 1998) (“[I]ndemnity contracts tend to be narrowly construed by the Courts.”) (citations omitted).

⁵⁴ See MA Schedule 4.15(a)(viii) (defining “Current Games”). The *Guitar Hero* games, which are the subject of one of Gibson's claims, are Current Games. But, Gibson's claim as to the *Guitar Hero* games is a patent claim, which is excluded from the scope of § 4.15(o)(i) of the Merger Agreement. Therefore, I would not need to consider this claim here, even if Viacom had not waived it.

Business,” is defined in the Merger Agreement as “the business of the Company *as currently conducted*.”⁵⁵ As noted in the discussion of the phrase “current use,” this must refer to October 2006, and not November 2007.

All Viacom can rely on, then, is its claim that the alleged violations of intellectual property rights claimed by Activision, Gibson, 1st Media, and Konami relate to an “activity of the Company.” But, the claims brought by the third parties as to which Viacom seeks indemnification related to the content of the *Rock Band* game as published and sold to the public in November 2007, and not to Harmonix’s activities before this time.⁵⁶ Therefore, there is no claim that Harmonix’s “activit[ies]” in 2006 were in breach of a representation or warranty. And, as I have noted, there is no reason why the Sellers might have indemnified Viacom against losses arising out of infringements of intellectual property rights that took place at the time of *Rock Band*’s publication in 2007, when the Sellers no longer controlled Harmonix.

Viacom’s interpretation would also violate a basic principle of contract interpretation, by making redundant the phrase “Current Game.” If any *future* games, such as *Rock Band*, as well as Current Games, were covered by the representations in the Merger Agreement, there would be no need to have an enumeration of the Current Games in the Merger Agreement. The clause in § 4.15(o) relating to the “Current Games,” and the enumeration of these Current Games in Schedule 4.15(a)(viii), would be superfluous. Viacom’s interpretation would thus run afoul of the principle that, where possible, effect

⁵⁵ *Id.* § 4.15(w)(i) (emphasis added).

⁵⁶ *E.g.*, Activision Am. Compl. ¶¶ 11-38.

is to be given to all terms in the contract.⁵⁷ I therefore find, as a matter of law, that there is no violation of the representation in § 4.15(o)(i).

2. The Representations Based On The Knowledge Of Harmonix And Its Officers

The representations in § 4.15(n) and § 4.15(o)(ii) relate to the knowledge of the Harmonix officers of any claims against the company. Section 4.15(n) provides:

Except as set forth on Schedule 4.15(n), there are no (i) pending or, to the knowledge of the Company, threatened claims asserted in writing, or (ii) oral statements made directly to or actually known to Alex Rigopulos, Eran Egozy, Michael Dornbrook or Greg LoPiccolo that a reasonable person would interpret as a claim, against the Company alleging that any of the operation of the Business or any activity by the Company, or the manufacture, sale, offer for sale, importation, and/or use of any Current Game (A) infringes or violates (or in the past infringed or violated) any intellectual property rights of a third party, or (B) constitutes a misappropriation of (or in the past constituted a misappropriation of) any subject matter of any intellectual property rights of a third party.

Section 4.15(o)(ii) provides:

[Except as set forth on Schedule 4.15(o)] the Company has no knowledge, that the operation of the Business, or any activity of the Company, or any manufacture, use, importation, offer for sale and/or sale of any Current Game in accordance with the terms of the applicable Publishing Agreement infringes on or violates (or in the past infringed on or violated) the rights of any person or entity under (A) any Mark under any Law other than U.S. federal or U.S. state Law or (B) any Patent.

Winshall has submitted affidavits that none of the Harmonix officers was aware of *any* of the claims that would later be brought against Harmonix, whether based on foreign

⁵⁷ *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 2012 WL 4950759, at *2 (Del. Oct. 17, 2012) (“We must construe the agreement as a whole, giving effect to all provisions therein.”) (citation omitted).

trademarks, patents, or any other kind of intellectual property.⁵⁸ Viacom has not submitted any evidence to challenge this, and has only pointed to evidence that the Harmonix officers knew of the existence of the Konami patents, not of any claim relating to these patents.⁵⁹ But, Viacom's submission is not sufficient to defeat summary judgment. Rule 56(e) provides that a party opposing summary judgment may not rely on "mere allegations or denials of the adverse party's pleading," but must set forth "specific facts showing that there is a genuine issue for trial."⁶⁰ The opposing party may show that there is an issue for trial either by providing affidavits, or by filing an affidavit under Rule 56(f) showing why it needs discovery to address the summary judgment motion.⁶¹ Viacom has neither proffered facts creating a bona fide factual issue for trial nor filed a Rule 56(f) affidavit. Viacom cannot show that there is an issue for trial simply by pointing to the fact that the Harmonix officers knew of the Konami patent, and, in his deposition, the founder of Harmonix testified that the company believed that it was *not* infringing patents.⁶² Therefore, I find as a matter of law that there has been no breach of §§ 4.15(n) and 4.15(o)(ii), and I grant summary judgment to Winshall.

⁵⁸ Aff. of Michael Dornbrook ¶ 6 (Dec. 22, 2011); Aff. of Eran Egozy ¶ 6 (Dec. 22, 2011); Aff. of Gregory LoPiccolo ¶ 6 (Dec. 21, 2011); Aff. of Alexander P. Rigopulos ¶ 6 (Dec. 22, 2011).

⁵⁹ See Defs.' Br. at 10.

⁶⁰ Del. Ct. Ch. R. 56(e); *Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979) ("It is settled law in Delaware that where a moving party's affidavits in support of a Rule 56 motion negate the opposing party's pleadings, the opposing party must submit countervailing evidence or affidavits or judgment may be granted.").

⁶¹ Del. Ct. Ch. R. 56(e); *id.* R. 56(f).

⁶² Rigopulos Dep. 56:6-10.

D. In Any Case, The Konami Patent Claim Would Be Time-Barred

As a final matter, I discuss the timeliness of the Konami patent claim. Because I have already found in favor of Winshall as to all of the claims asserted by Viacom, this is an alternative ruling as to the Konami claim only.

The Merger Agreement made clear that all claims for indemnification must be brought within 18 months of closing.⁶³ Viacom brought the Activision, Gibson, and 1st Media claims to Winshall's attention within 18 months of closing, on April 24, 2008, but informed Winshall of the Konami claim after the 18 month period had elapsed.⁶⁴ Viacom argues that because it inserted a "placeholder" in its April 24 letter to Winshall, in which it reserved its rights to "seek indemnification for any other claims or matters . . . by other third parties," it should be allowed to ignore the 18-month time limit and sue at any point in the future.⁶⁵

This would constitute a unilateral rewriting of the contract and is impermissible. The Sellers bargained to indemnify Viacom for claims brought within 18 months, not claims brought after 18 months. Under § 8.1 of the Merger Agreement, the Sellers had "no liability with respect to any claim for any breach . . . of any representation or warranty" unless Viacom notified Winshall "in writing *of such a claim*" within 18 months of the closing date.⁶⁶ Viacom did not notify Winshall of Konami's claim. It is irrelevant that Viacom notified Winshall of the alleged *breach* of the representations and

⁶³ MA § 8.1.

⁶⁴ V. Am. Compl. Ex. D; V. Am. Compl. Ex. E.

⁶⁵ V. Am. Compl. Ex. D at 2.

⁶⁶ MA § 8.1 (emphasis added).

warranties before this time, as Viacom argues, because the Merger Agreement refers to notification of *claims*.⁶⁷ Therefore, even if I had not already found for Winshall on all the claims, I would rule that the Konami claim is time-barred.

IV. Conclusion

I grant the motion for summary judgment on count two of the Amended Complaint, including the four sub-counts. I also grant the motion for summary judgment on count three of the Amended Complaint. IT IS SO ORDERED.

⁶⁷ Defs.' Br. in Opp. 18-20.