IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

I/M[X] INFORMATION MANAGEMENT SOLUTIONS, INC., a Delaware corporation,	)	
Plaintiff,	)	C.A. No. 7786-VCP
v.	)	
MULTIPLAN, INC., a New York corporation, and HMA ACQUISITION CORPORATION, a Delaware corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 11, 2013
Date Decided: March 27, 2014

Jeremy D. Anderson, Esq., Joseph B. Warden, Esq., FISH & RICHARDSON P.C., Wilmington, Delaware; *Attorneys for Plaintiff*.

Srinivas M. Raju, Esq., Robert L. Burns, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Allen M. Gardner, Esq., Christopher J. Fawal, Esq., LATHAM & WATKINS LLP, Washington, D.C.; *Attorneys for Defendants*.

PARSONS, Vice Chancellor.

This action arises from a dispute over funds that were placed in escrow pursuant to the sale of certain of plaintiff's subsidiaries to the defendants. According to the documents that governed the sale of the subsidiaries and the escrow funds agreed to by the plaintiff and the defendants, the money being held in escrow was to be released to the plaintiff on July 29, 2012, unless the defendants, at that time, had a pending claim for indemnification. On July 29, 2012, the defendants refused to release the escrow funds on the basis that they had a pending claim for indemnification because a hospital that worked with one of the subsidiaries it bought was alleging that the subsidiary breached its contract with the hospital by granting a third party unauthorized access to preferential treatment rates. The plaintiff disagreed that the hospital's allegations entitled the defendants to withhold the escrow funds. Consequently, it filed suit to secure the release of those funds. Several months after the plaintiff initiated this lawsuit, the defendants, for the first time, informed the plaintiff that they also had a pending claim for indemnification as of July 29, 2012, based on the same hospital's objection to the same subsidiary's interactions with a different third party.

The plaintiff has moved for partial summary judgment on the issue of whether the later asserted "pending claim" provides a valid basis for defendants to withhold the escrowed funds based on the language of agreements governing the sale of the subsidiary and the escrow. The plaintiff argues that the second pending claim does not meet the definitional criteria enumerated in the parties' agreements as of July 29, 2012, and even if it did, the defendants had not given the plaintiff adequate notice of that fact in accordance with the relevant terms of their agreements. The defendants counter that the second

pending claim satisfied the requisite contractual standards and ripened before the July 29, 2012 deadline, and that the notice they provided to the plaintiff regarding the first pending claim also sufficed to give the plaintiff adequate notice of the second pending claim.

Having considered the parties' briefs and heard argument on the motion, I conclude that the second pending claim was not a "Pending Claim" within the meaning of the parties' agreements as of July 29, 2012, and that, in any event, the defendants failed to give the plaintiff the contractually mandated notice which it was entitled to of their purported second "Pending Claim." Therefore, I grant the plaintiff's motion for partial summary judgment.

I. BACKGROUND

A. The Parties

Plaintiff, i/m^{x} Information Management Solutions, Inc. ("IMX" or "Plaintiff"), is a Delaware corporation that provides development, management, and advisory services for employee health plans.

Defendant MultiPlan, Inc. ("Multiplan") is a New York corporation that develops and operates healthcare provider networks and offers related cost management services to insurance companies and other health benefit payors. Defendant HMA Acquisition Corporation ("HMA" and, together with Multiplan, "Defendants") is a Delaware corporation that was formed to acquire several IMX subsidiaries.

B. Facts[1]

In July 2005, Queens Medical Center ("QMC") and Health Management Network, Inc. ("HMN"), a subsidiary of IMX, entered into a Participating Hospital Agreement. This agreement allowed HMN to offer discounted rates to clients that it directed to QMC for medical services.

On April 29, 2011, IMX entered into a Stock Purchase Agreement (the "SPA" or "Agreement") with HMA to facilitate the sale of several IMX subsidiaries, including HMN, to HMA. Under the SPA, IMX made several representations and warranties regarding material contracts involving the entities, such as HMN, it was selling. This included HMN's Participating Hospital Agreement with QMC.

In addition, IMX agreed to indemnify HMA for any material breaches of its representations and warranties. Section 8.2 of the SPA states, in relevant part, "[Defendants] shall be entitled to indemnification for any and all Damages incurred by [Defendants] to the extent based upon, arising out of or related to (a) any breach of any representation or warranty [IMX] has made in this Agreement or any inaccuracy in such representation or warranty."[2]

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1 These facts are drawn from the parties' affidavits and the exhibits attached thereto. Unless otherwise noted, to the extent there was any disagreement between the parties, I adopted Defendants' position consistent with my obligation to draw all inferences in the non-moving party's favor at this stage of the proceedings. Additional background facts are provided in this Court's June 28, 2013 Memorandum Opinion on Defendants' motion to dismiss. *I/Mx Info. Mgmt. Solutions, Inc. v. MultiPlan, Inc.*, 2013 WL 3322293 (Del. Ch. June 28, 2013).

2 Aff. of Robert L. Burns, Esq. ("Burns Aff.") Ex. B § 8.2.

Section 8.6 of the SPA outlines the procedures the parties must follow to make an indemnification claim pursuant to the Agreement. This provision reads, "[i]f any Action is commenced or threatened that may give rise to a claim for indemnification by any Indemnified Party, then such Indemnified Party will promptly give notice to the Indemnifying Party."[3] The SPA defines an "Action" as "any claim, action, or suit, or any proceeding or investigation, by or before any Governmental Authority or any arbitration or mediation before any third party."[4] Section 8.6 goes on to state that "failure to notify the Indemnifying Party will not relieve the Indemnifying Party of any liability that it may have to the Indemnified Party, except to the extent the defense of such Action is materially and irrevocably prejudiced by the Indemnified Party's failure to give such notice."

Finally, the parties agreed in Section 8.1 of the SPA that "[n]o claim for breach of any representation or warranty contained in this Agreement may be asserted pursuant to this Agreement unless such claim is asserted in writing on or before the Survival Expiration Date."[5] The Survival Expiration Date was July 29, 2012.

Contemporaneous with the SPA, the parties also entered into an Escrow Agreement to hold money for making certain potential payments, including payments of indemnification claims. Section 3(a)(iv) of the Escrow Agreement requires the release of

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3 *Id.* at § 8.6.

4 *Id.* at 1.

5 *Id.* at § 8.1.

all funds in escrow to IMX on the Survival Expiration Date, except "if any claim pursuant to Section 8.2 of the [SPA] shall have been properly asserted by the [Defendants] on or prior to the Survival Expiration Date and shall remain pending on the Survival Expiration Date."[6] In that case, "the portion of the Escrow Funds to be released to [IMX] as contemplated by this sentence shall be the amount of the Escrow Funds, minus the Disputed Amount . . . as of the Survival Expiration Date." Thus, a claim for indemnification based on a breach of the representations and warranties in the SPA is valid and may serve as a basis for withholding escrow amounts only if it is asserted on or before July 29, 2012, the Survival Expiration Date.

By May 2012, QMC had advised Defendants that QMC believed the Veterans Administration ("VA") had accessed improperly discounted rates under HMN's Participating Hospital Agreement. QMC and Multiplan attempted, unsuccessfully, to negotiate a resolution of this issue.

On May 31, 2012, QMC sent Multiplan a letter revealing that it had become aware that Kaiser Foundation Hospitals in Hawaii ("Kaiser") had been accessing impermissibly HMN's Participating Hospital Agreement rates. The purpose of QMC's letter was to "provid[e] HMN, Inc. written notification of our position in accordance with Section VII.3 [of the Participating Hospital Agreement]."[7] The letter did not make any demands on Defendants, but stated "[y]our prompt attention to this matter will be appreciated."

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6 Burns Aff. Ex. C § 3(a)(iv).

7 Burns Aff. Ex. G.

Multiplan received the letter on June 4, 2012. While there were discussions within Multiplan about this letter's significance, there does not appear to be any evidence that Multiplan discussed the letter with QMC before the Survival Expiration Date.

On June 21, 2012, Keith Vangeison of Multiplan sent a letter to QMC to address the ongoing issue between the two entities regarding the VA. The letter, which was a follow up to unsuccessful negotiations between QMC and Multiplan, focused solely on the VA and did not mention Kaiser. Approximately two weeks later on July 5, 2012, QMC responded to Vangeison's letter. QMC's response also focused entirely on the VA and did not mention Kaiser. The last paragraph of the response stated, "[QMC] demands that HMN, Inc. stop providing network access to third parties who are not covered under the Agreement. [QMC] reserves the right to pursue all legal remedies if this matter is not resolved by July 17, 2012."[8]

Nearly three months later, and approximately two months after the Survival Expiration Date, on September 26, 2012, counsel for QMC sent its second letter to Multiplan's general counsel regarding Kaiser. This letter, unlike QMC's July 5 letter as to the VA, did not suggest that a lawsuit was probable or imminent. Instead, the letter, like the May 31 letter, referred to Section VII.3 of the Participating Hospital Agreement, and called for Multiplan and QMC to work in cooperation to investigate and resolve the underlying issue. QMC's counsel requested a response by October 8, 2012.

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[8] Burns Aff. Ex. J.

Amidst the ongoing letter exchange between Multiplan and QMC, Defendants also began corresponding with IMX regarding indemnification under the SPA. On June 25, 2012, Defendants informed IMX that they were demanding indemnification in accordance with Section 8.6 of the SPA. IMX responded on July 3 that Defendants had failed to specify sufficiently the basis for their indemnification demand, to which Defendants replied on July 26 with more information regarding their claim. Thereafter, IMX demanded the release of the Escrow Funds on July 30. Defendants refused to comply, stating that there was a pending indemnification claim. After an exchange of letters regarding whether Defendants had "manufactured" their indemnification claim, IMX commenced this action on August 15, 2012.

C. Procedural History

After IMX filed its initial complaint, on September 25, 2012, Defendants moved to dismiss that complaint. On November 6, 2012, IMX filed an amended complaint (the "Complaint"), seeking fundamentally the same relief. Thereafter, Defendants again moved to dismiss the Complaint in its entirety. After full briefing on that motion, I heard argument on March 20, 2013.

On April 26, 2013, Defendants moved to stay discovery pending resolution of their motion to dismiss. I granted Defendants' motion to stay subject to a limited carve-out requiring Defendants to disclose certain facts that they had represented they would produce at the March 20, 2013 argument. On June 28, 2013, I issued a Memorandum Opinion denying Defendants' motion to dismiss and vacating the previously ordered stay of discovery.

Approximately three months later and with the benefit of only limited discovery, on September 30, 2013, IMX moved for partial summary judgment that the Kaiser issue could not constitute a legitimate basis for Defendants to retain control of the escrow funds under the terms of the SPA and the Escrow Agreement. This Memorandum Opinion constitutes my ruling on IMX's motion for partial summary judgment.

D. Parties' Contentions

IMX seeks partial summary judgment on two independent bases. First, IMX argues that because QMC had not commenced or threatened to commence an Action, as defined by the SPA, against HMN or Multiplan before the Survival Expiration Date for anything related to Kaiser, any issues with Kaiser cannot form the basis of a valid indemnification claim. Thus, Defendants cannot use the Kaiser issue to justify their refusal to release the escrow funds. Second, IMX avers that even if the Kaiser issue could be considered a valid indemnification claim, Defendants failed to provide it with adequate notice of that claim before the Survival Expiration Date as required by the terms of the parties' agreements.

Defendants assert that, based on the evidence presented on this motion, a reasonable trier of fact could determine that QMC had threatened to commence an Action against Multiplan and HMN related to Kaiser before the Survival Expiration Date, and, therefore, summary judgment that the Kaiser issue cannot form the basis of an indemnification claim is improper. Defendants also argue that once it provided IMX with notice that it had an indemnification claim related to QMC and the VA, it was not obligated by the terms of the SPA or the Escrow Agreement to provide IMX with

additional notice of other indemnification claims related to QMC. According to Defendants, the notices they gave to IMX regarding indemnification in June and July 2012 are sufficient to constitute notice of the Kaiser issue because IMX knew that QMC was asserting at least one indemnifiable claim against Defendants.

II. ANALYSIS

IMX has moved for partial summary judgment on two grounds. For the reasons discussed in this section, I conclude that Defendants neither had an indemnification claim regarding Kaiser before the SPA's July 29, 2012 cutoff, nor did they adequately notify IMX of their purported claim. Therefore, each of the grounds for IMX's motion for partial summary judgment provide separate and independent bases for granting that motion.

A. Legal Standard

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show 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."[9] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[10] Summary judgment will be denied when the legal question

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9 *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

10 *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

presented needs to be assessed in the "more highly textured factual setting of a trial."[11] Summary judgment also will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[12] The burden is on the moving party to show the absence of any genuine issue of material fact.[13] "When the moving party shows that no genuine issue of material fact exists, 'the burden shifts to the nonmoving party to substantiate its adverse claim by showing that there are material issues of fact in dispute.'"[14] Finally, if "a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate."[15]

When the issue being presented for summary judgment is one of contractual interpretation, summary judgment may be appropriate where "the dispute centers on the

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11 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union,* 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

12 *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

13 *Quereguan v. New Castle Cty.*, 2004 WL 2271606, at *2 (Del. Ch. Sept. 28, 2004).

14 *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *9 (Del. Ch. Oct. 2, 2009) (quoting *Conway v. Astoria Fin. Corp*., 837 A.2d 30, 36 (Del. Ch.2003)).

15 *Banet v. Fonds de Regulation*, 2009 WL 529207, at *3 (Del. Ch. Feb. 18, 2009). The inverse also is true. If a rational trier of fact could not find any material fact that would favor the non-moving party in a determinative way, then summary judgment is appropriate.

proper interpretation of an unambiguous contract."[16] Therefore, the threshold inquiry on a motion for summary judgment is whether the contract is ambiguous.[17] Ambiguity is said to exist "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[18] Ambiguity does not exist, however, simply because the parties disagree about what the contract means.[19]

When interpreting a contract, the court will give effect to the parties' intent based on the parties' words and the plain meaning of those words.[20] The Court will give disputed terms their ordinary and usual meaning.[21] Of paramount importance is what a reasonable person in the position of the parties would have thought the language of the contract meant.[22] If either party demonstrates that their construction of the contract "is

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16 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007) (citing *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007)); *see also AHS N.M. Hldgs., Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *3 (Del. Ch. Feb. 2, 2007).

17 *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

18 *Rhône–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

19 *United Rentals, Inc.*, 937 A.2d at 830.

20 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

21 *AHS N.M. Hldgs., Inc.*, 2007 WL 431051, at *3.

22 *Id.* (citing *Rhône–Poulenc Basic Chems. Co.*, 616 A.2d at 1195–96).

the *only* reasonable interpretation," that party may be entitled to summary judgment.[23] In addition, "[i]f parties introduce conflicting interpretations of a term, but one interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may, as a matter of law and without resorting to extrinsic evidence, resolve the meaning of the disputed term in favor of the superior interpretation."[24]

B. The Scope of the Record on This Motion

Before turning to the merits, I note that IMX brought this motion for partial summary judgment early in the discovery period before a complete record could be developed. In briefing, however, Defendants asserted that the facts and documents currently available are more than sufficient to defeat IMX's motion. Furthermore, although Court of Chancery Rule 56(f) allows parties to petition the Court for the opportunity to take additional discovery on a motion for summary judgment when facts essential to the defense of that motion are not yet a part of the record, Defendants have made no such request here.[25] Consequently, Defendants have waived any right to claim

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[23] *United Rentals, Inc.*, 937 A.2d at 832 n.104 (noting that a party seeking summary judgment effectively bears the burden of demonstrating that its interpretation is the *only* reasonable interpretation as a matter of law).

[24] *Wills v. Morris, James, Hitchens & Williams*, 1998 WL 842325, at *2 (Del. Ch. Nov. 6, 1998) (accepting one party's interpretation where the other party's interpretation resulted in an internal redundancy).

[25] Moreover, Defendants have not submitted the requisite Rule 56(f) affidavit. *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1033 (Del. Ch. 2008).

they have been prejudiced by the timing of IMX's motion or that they needed additional discovery to respond to the motion.

C. Section 8.6 of the SPA is Unambiguous

Under Section 8.6 of the SPA, an "Action," defined as "any claim, action, or suit, or any proceeding or investigation, by or before any Governmental Authority or any arbitration or mediation before any third party," must be commenced or threatened before the Survival Expiration Date to give rise to an indemnification claim. Because no Action was commenced against Defendants before the Survival Expiration Date, IMX's motion, in this regard, depends on whether QMC had threatened to bring an Action against Defendants regarding the Kaiser issue. The word "threaten" in this context is unambiguous.

The parties disagree as to whether QMC's actions before July 29, 2012 constituted a threat to bring a Kaiser-related Action against HMN. The Agreement does not define the word "threaten," and neither party has suggested that the word should be ascribed anything other than its commonly understood meaning. The Merriam-Webster Dictionary defines "threaten" as "to utter threats against," "to give signs or warning of," or "to announce as intended or possible."[26] The same dictionary defines a threat as "an expression of intention to inflict evil, injury, or damage" or "an indication of something

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[26] Merriam–Webster Online Dictionary, http://www.merriam-webster.com/dictionary/threaten (last visited Mar. 14, 2014).

impending."[27] Thus, the relevant inquiry in this case is whether QMC "gave signs or warnings" to Multiplan that it was going to commence an Action regarding the Kaiser issue or announced to Multiplan that it intended to, or that it was possible that it would, commence an Action regarding the Kaiser issue.

It appears that regardless of which definition is used, for QMC to have threatened to commence an Action against Multiplan, QMC would have to do more than simply notify Multiplan of a problem. Rather, QMC also must have expressed that it was going to do something about that problem, in such a way that a reasonable person would understand that QMC was intending to press the issue through a proceeding before a third party. In other words, in this case, that "something" must be commencing an Action. With that framework in mind, I now address whether QMC "threatened" to bring an Action against Defendants relating to Kaiser before July 29, 2012.

D. QMC Did Not Threaten to Bring an Action Against Defendants Regarding Kaiser Before the Survival Expiration Date

Multiplan argues that a series of letters from QMC to Multiplan between May and July 2012 raise a question of material fact as to whether QMC had threatened to commence an Action against HMN. Having reviewed those letters, I conclude that the cited correspondence between QMC and Multiplan, considered individually or together, fails to create any such genuine issue of material fact.

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[27] *Id*. Black's Law Dictionary provides similar definitions. According to Black's, a threat is a "a communicated intent to inflict harm or loss on another or on another's property" or "an indication of an approaching menace." BLACK'S LAW DICTIONARY 1519 (8th ed. 2008).

1. The correspondence that explicitly mentions Kaiser

The first correspondence between QMC and Multiplan regarding Kaiser occurred on May 31, 2012. In a letter to Multiplan, Bonnie Brown, QMC's Contract Coordinator, wrote:

> It has come to our attention that [Kaiser] has been accessing the HMN, Inc. network rates. [QMC] requested written documentation providing Kaiser legal authority to access the HMN, Inc. network seven weeks ago. [QMC] has not received any documentation to date and believes it is accessing the network inappropriately. Queen's is providing HMN, Inc. written notification of our position in accordance with Section VII. 3 [of the Participating Hospital Agreement].
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> Your prompt attention to this matter will be appreciated. Please call me at your earliest convenience to discuss the matter further.[28]

The letter makes no mention of anything that could be considered an "Action" under the Agreement, nor is there any language that reasonably could be interpreted as an explicit threat to commence one. Moreover, the letter cannot reasonably be viewed as containing an implicit threat to initiate an Action. The provision of the Participating Hospital Agreement cited in the letter, Section VII. 3, states in relevant part that:

> In the event that [QMC] believes that any Payor is, or may be, accessing the Reimbursement Amounts set forth in the Attachments inappropriately (e.g. to non-eligible individuals), [QMC] shall notify [HMN] immediately in writing. Upon receipt of such notice, [HMN] *will work in cooperation* with [QMC] and Payor to determine whether such Payor appropriately accessed the Reimbursement Accounts.[29]

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[28] Burns Aff. Ex. G.

[29] Burns Aff. Ex. A at 9 (emphasis added).

Thus, QMC's citation to the Participating Hospital Agreement evidences a desire on QMC's part to work in tandem with HMN to resolve a potential issue. It does not exhibit an intent by QMC to engage any sort of third-party neutral to address its potential issue with HMN.[30] Significantly, QMC's letter did not mention Section VIII of the Participating Hospital Agreement, which addresses how the parties will resolve disputes that arise from their contract. Section VIII does address subjects such as mediation and arbitration, both of which are "Actions" under the Agreement. QMC used the May 31, 2012 letter as a means to notify Multiplan of a potential issue with their contractual relationship and to propose resolving that issue through collaboration. The letter cannot reasonably be understood as a threat by QMC to commence an Action against HMN.

This conclusion is bolstered by the fact that QMC did not communicate with Multiplan again in writing regarding Kaiser until QMC's letter on September 26, 2012, nearly four months later and approximately two months after the Survival Expiration Date. In the September 26 letter, the subject of which was "Notice of Violation of Participating Hospital Agreement," counsel for QMC provided Multiplan with additional information about the Kaiser dispute. While the letter states that QMC had made repeated requests to *Kaiser*, not HMN, for documentation to support Kaiser's use of

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[30] If it was determined that Kaiser had been accessing HMN's rates improperly, Section VII.3 states that, at that point, HMN would be obligated to use reasonable efforts to ensure that Kaiser reimburses QMC for the money it owes to it and QMC could ask HMN to terminate Kaiser's access to HMN's rates. Thus, even if Kaiser was found to have accessed impermissibly HMN's rates, there is no indication that QMC would want or need to commence an Action assuming HMN complied with its obligations under Section VII.3.

HMN's rates, it does not refer to the May 31, 2012 letter or any other communication between QMC and HMN regarding Kaiser.

As with the May 31 letter, the September 26 letter does not mention anything that could be considered an Action, nor does it contain any explicit threat to commence one. Moreover, the September 26 letter also invokes Section VII.3 of the Participating Hospital Agreement, and requests, two separate times, that QMC and HMN work in cooperation to determine whether Kaiser improperly accessed HMN's rates. The letter asks that HMN respond by October 8, or slightly less than two weeks later. In my view, no reasonable trier of fact could find that the September 26 letter constituted a threat to commence an Action. Therefore, it also would be unreasonable to view the May 31 letter as such a threat, because it: (1) was sent four months earlier; (2) was not preceded by any other communications between the parties; (3) invoked a cooperative clause of the Participating Hospital Agreement; and (4) lacked a deadline to respond. Instead, the May 31 letter was a notification from QMC to HMN regarding a potential problem, and nothing more. Thus, there is no genuine issue of material fact as to whether a reasonable person in Multiplan or HMN's position could view the letter as a threat to commence an Action.

2. Correspondence between QMC and Multiplan in June and July 2012

Multiplan argues that statements made in correspondence between QMC and Multiplan in June and July 2012 regarding a separate issue involving the VA raise a genuine issue of material fact as to whether QMC had threatened to commence an Action against Multiplan regarding Kaiser. I disagree. On June 21, 2012, Keith Vangeison,

Executive Vice President of Network Development for Multiplan, wrote to Brown at QMC about the VA issue. The letter specifically discusses conversations "pertaining to reimbursement by the [VA] for services rendered to VA members, pursuant to [QMC's] agreement" with HMN. It does not make any reference to Kaiser.

On July 5, 2012, Amita Goyal, a Corporate Director at QMC, wrote to Vangeison "in response to [his] letter dated June 21, 2012." In the July 5 letter, Goyal asserts QMC's "position that [Multiplan's] subsidiary, HMN, Inc., has wrongfully applied the terms of the [Participating Hospital Agreement] to members of the [VA]." The letter further explains why QMC considered the VA ineligible to utilize HMN's preferential rates under the Participating Hospital Agreement. Thus, the letter responds to a letter about the VA and focuses on the VA. Nevertheless, Multiplan argues that the language of the July 5 letter's final paragraph represents a threat by QMC to commence an Action against HMN with respect to the Kaiser issue.

The last paragraph of the July 5 letter states in relevant part, "[QMC] demands that [HMN] stop providing network access to third parties who are not covered under the Agreement. [QMC] reserves the right to pursue all legal remedies if this matter is not resolved by July 17, 2012." Multiplan contends that the term "third parties" in this paragraph raises a material issue of fact as to whether QMC was threatening to commence an Action against HMN for the VA situation only or for both the VA and Kaiser situations. This argument lacks merit for several reasons.

First, the relevant inquiry is an objective, not a subjective, one. That is, the question is not what QMC intended by its reference to "third parties" in the July 5 letter,

but rather what a reasonable person would have understood that term to mean. Therefore, Multiplan cannot create a genuine issue of material fact based solely on its subjective understanding of QMC's language in the July 5 letter, as it has attempted to do.[31]

Second, Multiplan's proffered interpretation of the July 5 letter is unreasonable because it ignores entirely the context of the letter itself and the context in which the letter was sent. As stated previously, the July 5 letter directly responded to a June 21 letter that dealt exclusively with the VA. Until the final paragraph, the July 5 letter discussed only the VA. QMC asserted that the VA was neither a party to the agreement between QMC and HMN, nor a "client" under that agreement's terms. Therefore, QMC apparently deemed the VA to be a "third party." In addition, the letter made no reference to any other third party. Thus, viewed in its proper context, *i.e.*, as part of a letter about the VA that was sent in response to a letter regarding the VA, the reference to "third parties" denoted the VA, and I am convinced that IMX, or an objective reader, reasonably would have understood the term to denote the VA.[32]

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[31] Although Multiplan was free to bargain for terms in the SPA that would make its subjective perspective relevant to whether a claim had been threatened, the SPA is devoid of any such language.

[32] In analyzing the pending motion, I also have considered both of the declarations submitted by Vangeison. Vangeison avers that Multiplan believed that QMC had threatened to commence an Action regarding Kaiser. Vangeison's (or Multiplan's) subjective belief, however, is largely irrelevant. The proper inquiry is whether a reasonable person would believe that QMC had threatened to initiate litigation against Multiplan. Multiplan has cited no authority for its position that its own, subjective belief creates a genuine issue of material fact as to whether QMC had threatened to commence an Action. I also note that the reasonableness of Multiplan's subjective belief is undermined by the relevant documents as well

This interpretation is confirmed by the sentence that follows the "third parties" language in the July 5 letter. That sentence reads: "[QMC] reserves the right to pursue all legal remedies if this matter is not resolved by July 17, 2012." Multiplan became aware of the VA issue by mid-April 2012, at the latest. Multiplan and QMC had engaged in "conversations" about the VA issue since that time, and in the June 21 letter, Multiplan advised QMC that it disagreed with QMC's position as to the VA and that it wished to continue to provide preferential rates to the VA. Again, when considered in its proper context, the only litigation or Action, as defined in the SPA, that reasonably could be viewed as having been threatened in the July 5 letter, is an Action in direct response to HMN's refusal to stop the VA from accessing its rates. Thus, because QMC informed HMN that it would "pursue all legal remedies" unless HMN stopped providing network access to "third parties," and QMC made that threat in a document that discussed only the VA issue, I reject Multiplan's argument that "third parties" reasonably could be understood to have referred to entities other than the VA and, specifically, to Kaiser.

Third, even assuming that the words "third parties" included more than the VA, there is no reasonable basis for Multiplan's assertion, and no reasonable fact finder could conclude, that those words included Kaiser. By as late as September 26, 2012, QMC was proposing to work cooperatively with HMN to resolve the Kaiser issue, and, even then, QMC gave HMN until October 8 to respond to its overture. In essence, Multiplan

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as Vangeison's failure to mention the September 26 letter or any communications other than the May 31 letter between QMC and Multiplan regarding Kaiser.

contends that QMC threatened to sue it regarding the Kaiser issue if it was not resolved by July 17, 2012,[33] notwithstanding that the parties still had not resolved the issue and had no other communications about it until two months later, when QMC sent another letter to Multiplan seeking, again, to resolve the issue cooperatively and without any threat of legal action. On its face, this assertion is dubious. When I also consider that, in contrast, the July 5 threat of litigation reasonably can be understood as relating only to the VA issue, an issue about which the parties both had been aware for longer than the Kaiser issue and actually had communicated, I reject Multiplan's broader interpretation of the July 5 letter as unreasonable and not supported by the evidence presented in connection with this motion.

It also is notable that according to Vangeison, "in its correspondence with QMC, Multiplan decided to address the complaints regarding the VA and Kaiser separately, in part because Multiplan continued to investigate facts underling QMC's allegations regarding Kaiser."[34] Thus, at the time of the July 5 letter, Multiplan was making a conscious effort to keep the VA and Kaiser issues distinct in its communications with

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[33] Multiplan's assertion is particularly unreasonable here because Multiplan and QMC do not appear to have had any discussions regarding Kaiser between the May 31 and the July 5 letter in which QMC announced the July 17 deadline. In fact, it appears that during that period Multiplan had investigated QMC's allegations as to Kaiser only internally. In contrast, the parties had been discussing the VA issue. Thus, it would be unreasonable to interpret QMC's statements in question as relating to Kaiser when the only issue the parties actually were dealing with pertained to the VA.

[34] Burns Aff. Ex. H ¶15.

QMC. Multiplan has not proffered any reasonable explanation as to why QMC suddenly would interject the Kaiser issue into a discussion that ostensibly pertained only to the VA issue. Therefore, based on the record before me, I conclude that Multiplan has not raised a genuine issue of fact as to whether the July 5 letter refers to the Kaiser issue or otherwise reflects a threat to commence an Action based on the Kaiser issue.

Under the plain language of the Agreement, Multiplan is entitled to stop the release of the escrow funds if an Action was commenced or threatened before the Survival Expiration Date, which could give rise to a claim for indemnification. No Action related to Kaiser was commenced before the Survival Expiration Date. I also conclude that no reasonable trier of fact could conclude, based on this record, that QMC had threatened to commence an Action relating to the Kaiser issue before the Survival Expiration Date.[35] QMC notified Multiplan that there was an issue with Kaiser in May 2012, but QMC took no other steps and had no other communication with Multiplan related to that subject until September 2012, two months after the Survival Expiration Date. The mere notice of an issue, standing alone, does not trigger Multiplan's indemnification rights under the Agreement. Rather, QMC also had to threaten to do something about that issue, namely, commence an Action. QMC's May 31 letter, considered alone or in conjunction with Multiplan's correspondence with QMC regarding

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[35] *Se. Pa. Transp. Auth. v. Volgenau*, 2013 WL 4009193, at *10 (Del. Ch. Aug. 5, 2013) ("[E]ven where colorable . . . or [in]significantly probative [evidence] is present in the record, [summary judgment is appropriately granted] if no reasonable trier of fact could find for the plaintiff on that evidence.") (citations and internal quotation marks omitted).

the VA, does not, as a matter of law, constitute a threat to commence an Action regarding the Kaiser issue. Thus, Multiplan did not have an "Indemnification Claim" relating to Kaiser as of the Survival Expiration Date, and the Kaiser issue cannot serve as a basis for Multiplan to withhold the escrowed funds. Therefore, IMX's motion for partial summary judgment on this issue is granted.

E. Multiplan Did Not Provide IMX Sufficient Notice of the Kaiser Issue Before the Survival Expiration Date

In addition to being entitled to summary judgment because QMC had not threatened to commence an Action relating to Kaiser before the Survival Expiration Date, IMX also is entitled to summary judgment for an independent reason. That reason is that, even if QMC had threatened to commence a Kaiser-related action before the Survival Expiration Date, Multiplan failed to notify IMX of that fact.

Multiplan first argues that, under the SPA, its notice to IMX was adequate so long as IMX was not prejudiced by the timing of the notice. Under Section 8.6 of the Agreement, Multiplan's failure to provide prompt notice of an Indemnification Claim to IMX does not relieve IMX of its indemnification obligations, unless Multiplan's failure in that regard results in the defense to an Action being materially and irrevocably prejudiced. To the extent Multiplan argues that Section 8.6 absolves it from providing adequate notice of an Indemnification Claim before the Survival Expiration Date, however, Multiplan has misinterpreted the parties' agreement. In fact, Multiplan's interpretation would render the unambiguous language of Section 8.1, which requires that any claim for breach of a representation or warranty of the Agreement be brought on or

before the Survival Expiration Date, meaningless. Therefore, I conclude that such an interpretation of Section 8.6 would be unreasonable.[36]

Under Section 8.6, IMX not only is entitled to receive prompt notice of an Indemnification Claim, but also has the right to assume and conduct the defense of any Action brought by a third party subject to any Indemnification Claim. IMX's rights in this regard are limited, however, if it fails to give Multiplan notice that it is assuming the defense within twenty days of receiving notice of an Indemnification Claim. This fact undermines Multiplan's argument that it is required to give only minimal notice under the SPA of an Indemnification Claim. Rather, the language of Section 8.6 suggests that Multiplan must provide IMX with information sufficient to enable IMX to determine whether or not it wishes to assume the defense of an Indemnification Claim.

In this case, one entity, QMC, had raised two separate issues with Multiplan regarding the VA and Kaiser, respectively. QMC provided Defendants distinct notices for each of these issues. In addition, the VA and Kaiser issues differ in terms of the

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[36] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term 'meaningless or illusory.'"). The language of Section 8.6 is better understood as referring to events that occurred during the Survival Expiration period. It would encompass, for example, a situation in which an entity commenced an Action against Multiplan the day after the SPA is signed. If Multiplan waited six months to inform IMX, IMX still would be obligated to indemnify Multiplan if Multiplan's delay did not prejudice the defense to the Action. If, however, Multiplan notified IMX after the Survival Expiration Date, it would not be entitled to indemnification, even if such late notice would not have prejudiced the defense in any way. In other words, Section 8.6 cannot be read to modify or limit Section 8.1.

timeframe in which those issues developed[37] and the nature of the alleged breaches of the Participating Hospital Agreement that each involves.[38] In order to exercise its rights to assume the defense under Section 8.6, IMX would have had to receive at least some minimal information about the differences between the VA and Kaiser issues. The differences here are not likely to be superficial in that they implicate the availability of certain defenses and strategies, as well as suggest the relative complexity of the issues. It would be unreasonable to infer that these factors would have no bearing at all on IMX's decision to exercise, or decline to exercise, its rights under Section 8.6 to assume Multiplan or HMN's defense.

In that regard, no reasonable fact finder could conclude that the notice Multiplan provided to IMX with respect to its purported Indemnification Claim as to Kaiser satisfies the plain language and purpose of Section 8.6. Multiplan contends that it first notified IMX of the Kaiser Indemnification Claim at some point between June 19 and June 25, 2012.[39] On June 25, Marcy Feller, Multiplan's General Counsel, wrote IMX to inform it that:

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[37] The VA issue pertains to matters that first arose before the SPA was executed on April 29, 2011, whereas the Kaiser issue relates solely to events that occurred after December 31, 2011.

[38] In the case of the VA, QMC accuses HMN of directly breaching the Participating Hospital Agreement by deliberately giving the VA access to preferential rates. As to Kaiser, QMC alleges that HMN failed to prevent another party, Stratose, from giving Kaiser access to preferential rates.

[39] Multiplan asserts that notice was given on June 19, 2012, but they have not provided any documentary support for that assertion. In addition, Multiplan does

> It has been brought to our attention by [QMC], Honolulu, HI, that one or more payor entities may have been permitted inappropriate access to reimbursement rates set forth in the provider's agreement with [HMN] originally effective July 1, 2002. The dispute as to such rate access, in whole or in part, pertains to matters arising prior to the effective date (April 29, 2011) of the Stock Purchase Agreement entered into by HMA Acquisition Corp. and [IMX].[40]

The June 25 letter did not make any reference to Kaiser, despite the fact that Multiplan was in possession of the May 31 letter from QMC. In fact, as discussed *infra*, there is no evidentiary basis upon which a fact finder reasonably could conclude that the language quoted above relates to Kaiser.

After IMX responded on July 3 by rejecting Multiplan's Indemnification Claim, counsel for Multiplan wrote to IMX on July 26 to discuss further the issue of indemnification. In that letter, Multiplan wrote:

> As you know, on June 19, 2012 HMA provided you written notice of an Indemnification Claim relating to the rates charged for certain services provided by [QMC]. HMA is in the process of working with [QMC] to understand the precise contours of their claims but we can tell you that their claims appear to implicate a breach of Section 4.12 of the Purchase Agreement.
>
> [QMC] is claiming that it received incorrect reimbursement amounts in breach of their contract, which is a Material Contract pursuant to Section 4.12 of the Purchase Agreement. [QMC] contends that the breach is material and *that it occurred prior to the execution of the Purchase Agreement*. [QMC's] claims may well implicate other provisions of the

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not argue that the alleged June 19 communication contained any information that was not also included in the June 25 letter.

[40] Burns Aff. Ex. M.

> Purchase Agreement and HMA will notify you of any other potential breaches as it learns more.[41]

Similar to the June 25 letter, this letter mentioned the VA, but contained no reference to Kaiser.

On August 2, counsel for IMX wrote to Multiplan, disputing the validity of Multiplan's Indemnification Claim and demanding "[a]ll documents that relate to the Queens Medical Center alleged claim." Four days later, on August 6, counsel for Multiplan responded. After reiterating Multiplan's position, counsel wrote, "I do, however, want to provide the documentation [IMX] requested relating to the Pending Claim (even though [IMX] possesses much of it already). The agreements at issue in [QMC's] claims and correspondence between [QMC] and Multiplan are attached." Attached to the letter were the Participating Hospital Agreement, a document describing HMN's offerings to the VA, the previously discussed June 21 letter from Multiplan to QMC addressing the VA issue, the previously discussed July 5 letter from QMC to Multiplan addressing the VA issue, and an August 2 letter from Vangeison to QMC responding to the July 5 letter. Like Multiplan's other two letters, Vangeison's August 2 correspondence was in the same format and focused entirely on the VA issue.[42] Kaiser is not mentioned in either the August 6 letter itself or in any of the documents Multiplan

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41 Burns Aff. Ex. O (emphasis added).

42 This further supports the conclusion that no reasonable trier of fact could conclude that the reference in the July 5 letter to "third parties" included Kaiser.

attached to it in response to IMX's request for "all documents" related to the alleged QMC claim.

I conclude, therefore, that no reasonable fact finder could find, on this record, that Multiplan had given IMX notice of the Kaiser issue before the Survival Expiration Date. In its letters to IMX, Multiplan stated on two separate occasions that the issues with QMC related to actions that occurred before the SPA was executed. That timeframe encompasses only the VA issue; the Kaiser issue did not arise until January 1, 2012, several months after the SPA was executed. In addition, all of the documentation that Multiplan provided to IMX in support of its Indemnification Claim discussed exclusively the VA issue and made no mention of Kaiser. Finally, even though Multiplan had received a letter from QMC regarding an issue with Kaiser on May 31, 2011, it did not disclose that fact to IMX until many months after the Survival Expiration Date. Multiplan had every reason to present as strong a case as possible for indemnification to IMX on or before the Survival Expiration Date lapsed.[43] In that regard, Multiplan has not offered any reasonable explanation as to why it failed to bring the Kaiser issue, generally, or the May 31 Kaiser letter, specifically, to IMX's attention when IMX asked repeatedly

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[43] Multiplan's silence in these circumstances also undermines the credibility of Vangeison's self-serving assertions in his declarations that Multiplan believed QMC had threatened to commence an Action against them regarding Kaiser. For purposes of IMX's motion for partial summary judgment, however, I accept Vangeison's declaration as true. Vangeison's conclusory statements, however, are not sufficient to overcome the objective documentary evidence that shows that Multiplan had no reasonable basis to believe QMC had threatened to commence an Action against it based on the Kaiser issue and that, in any event, Multiplan never gave IMX notice of such a threatened claim.

for additional information about Multiplan's purported Indemnification Claim.[44] Nor has Multiplan offered any cogent argument as to how IMX could be expected to make an informed decision about whether to assume the defense of any Kaiser-related issues or claims when it was unaware any such issues or claims even existed.

Finally, Multiplan argues that regardless of whether it provided IMX with notice of the Kaiser issue before the Survival Expiration Date, such notification was unnecessary. According to Multiplan, its sole indemnification obligation under the SPA was to provide IMX with notice that Multiplan had a claim for breach of the representations and warranties in the SPA. Stated differently, Multiplan contends that once it informed IMX that QMC had accused Multiplan of being in breach of the Participating Hospital Agreement, IMX had adequate notice of an Indemnification Claim. Multiplan avers that this is true regardless of how many independent causes of action QMC may assert against Multiplan for breach of the Participating Hospital Agreement. This aspect of Multiplan's argument is also unpersuasive.

As discussed previously, Multiplan's approach to notice under the SPA would undermine substantially IMX's right to decide whether or not to assume the defense of

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[44] Contrary to its earlier argument, Multiplan's failure to provide IMX with any information about the Kaiser issue until over ten months after the Survival Expiration Date arguably has prejudiced IMX. Although I have not relied on this point in deciding the pending motion for partial summary judgment, I note that because IMX received no timely notice of the Kaiser issue, negotiations and litigation regarding that issue have been, according to IMX, directed solely by Multiplan, to the exclusion of IMX's right to assume and direct the defense of Indemnification Claims under Section 8.6 of the SPA. Multiplan has not disputed IMX's assertions in this regard.

any indemnification claim. Multiplan appears to argue that once IMX learned that QMC had alleged that there were one or more problematic payor entities it could have decided at that time to assume the defense for that Action and all other QMC-related litigation. That argument, however, simply ignores: (1) the fact that no claim had even been threatened as to the Kaiser issue as of the Survival Expiration Date; and (2) the existence of material differences between the VA and Kaiser issues that might cause IMX to want to assume the defense of one, but not the other.[45]

In addition, this Court has expressed skepticism towards Multiplan's proffered definition of the word "claim" in the escrow context on at least one occasion. In *Winshall v. Viacom International Inc.*,[46] the court addressed a dispute, much like the one

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[45] Multiplan's interpretation also would give rise to the unreasonable possibility that Multiplan, and not IMX, effectively would control whether IMX decides to assume Multiplan's defense. If, for example, an entity accused Multiplan of four separate breaches of a Material Contract under the meaning of the SPA, under Multiplan's construction of the word "claim," once Multiplan informs IMX that the entity has asserted any of the alleged breaches, then Multiplan would have made an Indemnification Claim that covers all four alleged breaches. Under the clear language of Section 8.6, IMX has twenty days to decide whether to exercise its right to assume the defense for *all* of those alleged breaches, even though it would be unaware that three of them even exist. If Multiplan advises IMX about the other three breaches twenty-one or more days after it notifies IMX of its Indemnification Claim, IMX's rights to assume the defense would be more uncertain. Allowing Multiplan to put IMX in the untenable position of having to choose between assuming the defense of claims without adequate information or foregoing some of its rights to assume the defense of claims would be tantamount to rewriting impermissibly the language or purpose of Section 8.6. *See Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) ("[I]t is not the proper role of a court to rewrite or supply omitted provisions to a written agreement.").

[46] 2012 WL 6200271 (Del. Ch. Dec. 12, 2012).

in this case, regarding the release of funds that were placed in escrow as part of an acquisition. Under the terms of the agreement at issue in *Winshall*, the selling company had no liability with respect to any claim for breach of a representation or warranty in the agreement unless the acquiring company, Viacom, notified a stockholder representative in writing of such a claim within 18 months of the merger. Three days before the 18-month deadline, Viacom notified the shareholder representative of three pending claims. Viacom's notice also reserved "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 [seller's] breach of its representations and warranties under the [Merger] Agreement."[47] Nearly three months later, and after the 18-month deadline had passed, Viacom notified the shareholder representative of a fourth claim.

Although the court in *Winshall* found that there had been no breach of any of the agreement's representations or warranties, and, thus, no basis for Viacom to withhold the money it was keeping in escrow, the court held that Viacom's attempt to assert the fourth claim was inadequate for a separate and independent reason. While Viacom had attempted to incorporate "placeholder" language in its letter to the shareholder representative, the court found that such language amounted to a "unilateral rewriting of the contract" and was, therefore, "impermissible." The court also concluded that "[i]t is irrelevant that Viacom notified [the shareholder representative] of an alleged breach of the representations and warranties before [the 18 month deadline], as Viacom argues,

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[47] *Id.* at *3.

because the Merger Agreement refers to notification of claims."[48] Thus, the fourth claim, which was asserted after the 18-month deadline, was time-barred.

Winshall is not directly controlling here. Nevertheless, the Court's refusal to sanction Viacom's use of broad "placeholder" language in its notice to the shareholder representative is instructive. Multiplan's interpretation of a "claim" resembles Viacom's rejected attempt to inject a "placeholder" into its agreement. Multiplan notified IMX that: (1) QMC threatened an Action; and (2) the threat was based on allegations that HMN had permitted certain entities to access improperly its preferential rates. If that was sufficient for purposes of the SPA, Multiplan could look back, after the Survival Expiration Date, to find any instance in which QMC had contacted HMN about reimbursement issues before the Survival Expiration Date and attempt to include those issues within the scope of its Indemnification Claim. This would undermine, if not defeat entirely, the purpose of the Survival Expiration Date.

That is what happened in this case. Defendants were aware of issues relating to Kaiser in May 2012, and, yet, they made no effort to tell IMX about Kaiser until well into this litigation, which was started in August 2012, and after the Survival Expiration Date. Defendants were obligated by contract to notify IMX of an indemnification claim before or on the Survival Expiration Date. But, Defendants' expansive definition of the word "claim" would allow them to assert the Kaiser issue as an indemnification claim well after the Survival Expiration Date, even though they were aware of it earlier and had

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[48] *Id.* at *8.

every opportunity to convey that fact to IMX. The plain and unambiguous terms of the parties' agreements do not countenance such conduct. Therefore, I conclude that Multiplan's contention that the word "claim" in the SPA is sufficiently broad to include the issue QMC raised as to Kaiser is unreasonable, and I reject that interpretation as a matter of law.

Finally, Multiplan's interpretation of "claim" is inconsistent with the word's plain meaning. Black's Law Dictionary defines "claim" as "the aggregate of operative facts giving rise to a right enforceable by the court."[49] As discussed previously, the VA issue and the Kaiser issue were based on completely separate sets of facts. QMC's allegations of breach as to the VA issue were separate and unrelated to its allegations of breach as to the Kaiser issue. In addition, assuming QMC actually had threatened to commence an Action regarding the Kaiser issue, Multiplan's ability to seek indemnification for the Kaiser issue would not have depended, in any way, on its ability to seek indemnification for the VA issue. Because "the aggregate of operative facts" surrounding both the VA issue and the Kaiser issue independently "gave rise to a right enforceable by the court," each issue constitutes a separate claim, for which specific notice would have to be given to IMX.

As such, I conclude that, as a matter of law, Multiplan failed to provide IMX with adequate notice of the Kaiser issue before the Survival Expiration Date. This constitutes a separate and independent ground, in addition to the fact that QMC had not threatened to

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[49] BLACK'S LAW DICTIONARY 264 (8th ed. 2008).

commence an Action regarding the Kaiser issue before the Survival Expiration Date, for granting IMX's motion.

III. CONCLUSION

For the foregoing reasons, IMX's motion for partial summary judgment is granted. Any claim arising from QMC's allegations with respect to Kaiser is not indemnifiable and provides no grounds for Defendants to continue withholding any Escrowed Funds, as defined by the parties' agreements.

IT IS SO ORDERED.