EFiled: Aug 27 2015 06:05PM EDT
Filing ID 57781790
Case Number 293,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICERA BIOSCIENCES, LLC, a Delaware limited liability company,	:	
Plaintiff/Counterclaim Defendant Below, Appellant,	:	
v.	:	C.A. No. 293, 2015
NORDION INC., fka MDS INC., a Canadian corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation,	:	
Defendants/Counterclaim Plaintiffs Below, Appellees.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: August 27, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

NATURE OF PROCEEDINGS

The fundamental question presented in this action is whether the plain terms of a carefully negotiated contract between two sophisticated parties -- Defendant/Counterclaim Plaintiffs Nordion Inc., f/k/a MDS Inc., and Nordion (US) Inc., f/k/a MDS Pharma Services (US) Inc. (together, "Nordion") and Ricerca Biosciencs, LLC ("Ricerca") -- should be enforced. Under the terms of a Stock and Asset Purchase Agreement ("SAPA"), broad indemnification rights were given to each party in connection with Ricerca's purchase of Nordion's Discovery and Pre-Clinical Business.[1] Ricerca agreed to indemnify Nordion if a tort, personal injury, contract, or environmental liability arose out of the present, past or future operation of the Discovery and Pre-Clinical Business. (A026-27 "Assumed Liabilities"). In the corollary provision, Nordion agreed to indemnify Ricerca if a violation of law or criminal liability arose out of its operation of that business. (A047-50 "Retained Liabilities"). Now that a liability has arisen from a tort action, Ricerca refuses to comply with the contract. As set forth herein, Ricerca's attempts to escape the terms of the carefully negotiated SAPA are unavailing and the Opinion of the Superior Court granting summary judgment in favor of Nordion should be AFFIRMED.

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[1] Unless otherwise defined, capitalized terms are those set forth in the SAPA.

SUMMARY OF ARGUMENT

1. Denied. As set forth below in Section I, the Superior Court properly granted summary judgment in favor of Nordion, finding that the unambiguous language of the SAPA included the Discovery and Pre-Clinical Business and Ricerca assumed all tort liabilities of that business, whether arising out of the present, past or future operations.

2. Denied. As set forth below in Section I, the Superior Court properly held that the tort liabilities of the entire Discovery and Pre-Clinical Business were Assumed Liabilities of Ricerca.

3. Denied. As set forth below in Section II, evidence of the negotiation and drafting history of the SAPA demonstrates that the parties intended that Ricerca would assume going concern tort liabilities of the Discovery and Pre-Clinical Business.

4. Denied. As set forth in Section II, the extrinsic evidence of the drafting history and negotiation of the SAPA evidences the parties' intent that Ricerca assumed the going concern tort liabilities of the Discovery and Pre-Clinical Business. That intent cannot be changed by a post-contractual action that does not rise to the level of course of performance.

5. Denied. The Opinion of the Superior Court granting Nordion's summary judgment motion should be affirmed.

STATEMENT OF FACTS[2]

Nordion is a global health science company that provides products used for the prevention, diagnosis and treatment of disease in addition to services related to health and life sciences. (*See* Op. at 2). Nordion (formerly known as MDS Inc.) is a Canadian corporation with its principal place of business in Ottawa, Canada. (*Id*.). Nordion US is Delaware corporation with its principal place of business in Ottawa, Canada, and it is the successor-in-interest to MDS Pharma Services (US) Inc. and a wholly-owned subsidiary of Nordion. (*Id*.).

Ricerca is a Delaware limited liability company and a contract research organization that engages in the business of providing pre-clinical discovery support and research and development services to pharmaceutical and biotech companies for drug development. (*Id*.).

MDS Pharma Services

In 2000, Nordion (then MDS Inc.) launched MDS Pharma Services ("Pharma Services"), a full-service contract research organization (known in the industry as a CRO). (Op. at 3). Pharma Services offered a full spectrum of services to meet the drug discovery and development needs of the pharmaceutical and biotechnology industries, which included both early stage development and

[2] Except where otherwise noted, these facts are taken from the Superior Court's Opinion on Summary Judgment ("Opinion" or "Op."). The Opinion is attached as Exhibit A to Appellant Ricerca Biosciences, LLC's Opening Brief (the "Opening Brief" or "OB").

late stage development businesses. (*See id*.). Pharma Services was divided into five business units: (1) Discovery and Pre-Clinical, (2) Early Clinical Research, (3) Bioanalytical, (4) Clinical Research, and (5) Central Lab. (*Id*.). Discovery and Pre-Clinical, Early Clinical Research and Bioanalytical comprised the early stage development businesses (the "Early Stage Businesses") while Clinical Research and Central Lab constituted the late stage development businesses (the "Late Stage Businesses"). (*Id*.).[3]

At the launch of Pharma Services in 2000, Nordion appointed Ian Lennox as President and Chief Executive Officer. (A202). In 2003, the Discovery and Pre-Clinical Business expanded its biopharmaceuticals capabilities with a new facility located in Bothell, Washington. (Op. at 3). The new facility offered included a Biopharmaceuticals Unit that provided, among other services, bacterial cell banking. (*Id*.; A216). The Biopharmaceuticals Unit was a division of the Discovery and Pre-Clinical Business of Pharma Services. (Op. at 3; B0075). In 2003, Lennox's title was President and CEO of the Drug Discovery and Development Sector, of which the Discovery and Pre-Clinical Business and the Biopharmaceuticals Unit were a part. (A204).

In March 2003, Nordion's Biopharmaceuticals Unit, as part of the Discovery

[3] A diagram of the relevant businesses, prepared by Nordion's counsel using documents produced in this action, may be found in the Appendix to Appellant Ricerca Biosciences, LLC's Opening Brief at A497.

and Pre-Clinical Business, was retained by BioAxone's predecessor-in-interest to prepare and maintain a Bacterial Master Cell Bank for a new drug, Cethrin. (Op. at 5; A166-82). These services later became the subject of the BioAxone Litigation. (Op. at 4-5).

In May 2004, Lennox resigned from Nordion, at which time he held the title of Group President and CEO, Pharmaceutical and Biotech Markets. (A206). Subsequently, in or about 2006, Lennox joined Ricerca as executive chairman, and later became Chairman and Chief Executive Officer of Ricerca in 2008. (B002 ¶ 27).

Pharma Services closed the Biopharmaceuticals Unit effective October 31, 2006. (Op. at 4; A480). The Discovery and Pre-Clinical Business remained a part of Pharma Services and continued to operate. (Op. at 4; B0081).

The Sale of MDS Pharma Services' Discovery and Pre-Clinical Business

In the spring of 2009, Nordion announced its intention to sell the various businesses run by Pharma Services, including its Early Stage Businesses, which included the Discovery and Pre-Clinical Business. (Op. at 4). Nordion hired Goldman, Sachs & Co. ("Goldman") to assist in the sale of the Pharma Services businesses by identifying potential purchasers and conducting a competitive auction process. (*Id.*). In April 2009, Nordion began negotiating a non-disclosure

agreement with Ricerca to govern the future purchase discussions and auction process (B0086), which was signed on April 9, 2009. (B0090).

Initially, Ricerca was contemplating the purchase of all of Pharma Services' Early Stage Businesses in a joint venture with other business partners. One of its business partners was Icon plc ("Icon"), another CRO. (B0094). The Ricerca and Icon joint venture contemplated that Ricerca would run the Discovery and Pre-Clinical Business while Icon and others would run the remainder of the Early Stage Businesses. (*See* B0114 "Early Stage Business;" B0134 "Ricerca Purchased Business;" B0120 "Icon Purchased Business"). The parties executed a Letter of Intent, which provided for a going-concern sale "less assets to be retained by the Seller." (B0407).

Lennox took the lead in negotiating the purchase on behalf of Ricerca, as well as with respect to due diligence related to the acquisition. (B0258 at 24:14-24). His intimate knowledge of the operations of Pharma Services and the Discovery and Pre-Clinical Business informed his handling of the negotiations. As one of Ricerca's business partners put it: "We are one of 2-3 bidders and have some strong inside knowledge." (B0267). Lennox's insider knowledge was so extensive that Nordion objected to Lennox's attendance at Ricerca's initial site visit at the Pharma Services Bothell facilities. (B0271). Nordion's concern was echoed by Ricerca's business partners in connection with another initial site visit:

"Ian [Lennox] is not allowed on any of the site visits as he is too well known by the employees from when he ran all of MDS Pharma." (B0267).

The SAPA Negotiations

Following the initial site visits, Nordion invited Ricerca to submit a bid as part of the auction process. (B0277). As part of that invitation, Nordion provided Ricerca with a first proposed draft of the SAPA (the "First Draft") (B0282-382), and requested that Ricerca's bid be accompanied by a mark-up of the First Draft. (B0277). The First Draft provided that Ricerca would assume the following liabilities:

> "**Assumed Liabilities**" means any and all Liabilities (**other than Retained Liabilities** of the type described in clauses (i) through (v) of the definition thereof), whether arising before, on or after the Closing Date, of Parent or any of its predecessor companies or businesses, or any of its Affiliates, Subsidiaries or divisions, **relating to, resulting from or arising out of the present, past or future operation or conduct of the Early Stage Business** . . . including the following:
>
> (a) [. . .] **all Liabilities relating to, arising out of or resulting from all other Actions which are related to, result from or arise out of the operations or conduct of the Early Stage Business . . . whether arising before, on or after the Closing Date . . .**

(B0290-91 "Assumed Liabilities") (emphasis added).

The Assumed Liabilities provision in the First Draft clearly contemplated that Ricerca, in purchasing the Early Stage Business, would assume all liabilities of the sold business, whether the liability arose "**before, on or after the Closing**

Date." (*Id*.). The corollary provision, Retained Liabilities, provided that Nordion would retain all liabilities related to businesses not sold (including the Late Stage Businesses and the Analytical Technologies business), as well as certain other specified liabilities. (B0307 "Retained Liabilities").

A month later, Nordion informed Ricerca that it was a finalist in the auction. (B0385). In response, Ricerca requested additional due diligence, a process which continued for several months. (*Id*.; B0388-89; B0392; B0394; B0397-99). In October, 2009, Lennox advised his business partners that Nordion's new CEO, Steve West, "is concerned about the parent company liabilities. . . ." (B0401).

In November, in connection with negotiations over the terms of the SAPA, Lennox noted to Icon and Ricerca's other business partners that the "most contentious issues based on [Nordion]'s comments were Liability (MDS moving us toward broad acceptance with noted carve outs like legal suits, Montreal, KOP, FDA) rather than our version of included liabilities. Ropes [& Gray][4] told us our position was very Buyer friendly – and a moderate ground position would be the result." (B0413). In connection with those comments, Ropes (Buyside) circulated a revised draft of the SAPA, in which Ricerca and Icon took the position that Assumed Liabilities would only include specifically scheduled liabilities. (B0430

[4] Ropes & Gray LLP ("Ropes") represented both Ricerca and Nordion in the SAPA negotiations. Ropes' Boston office represented Nordion ("Ropes (Sellside)"), while the New York office represented Ricerca ("Ropes (Buyside)").

"Assumed Liabilities;" B0441 "ICON Assumed Liabilities;" B0453 "Ricerca Assumed Liabilities"). Ricerca's and Icon's position on assumed liabilities was also set forth in an "Issues List" that was exchanged between the parties. (B0580-89). In its draft Issues List with respect to Assumed Liabilities, Ricerca stated: "Each of ICON and Ricerca will only assume specifically identified assets and specifically identified liabilities. This is the approach reflected in Ricerca's draft purchase agreement circulated by [Ropes (Buyside)] on 11/2/09." (B0582).

Nordion rejected the scheduled liability approach, and Ropes (Sellside) circulated a revised draft of the SAPA, which only minimally revised the definition of Assumed Liabilities from the First Draft (the "November 11 Draft"). The new definition, as contrasted with the First Draft, provided that:

> "Assumed Liabilities" means any and all Liabilities, ~~(~~other than Retained Liabilities ~~of the type described in clauses (i) through (v) of the definition thereof)~~, whether arising before, on or after the Closing Date, of Parent or any of its predecessor companies or businesses, ~~or any of its Affilities, Subsidiaries or divisions,~~ relating to, resulting from or arising out of the present, past or future operation or conduct of the Early Stage Business . . . including the following:
>
> (a) [. . .] all Liabilities relating to, arising out of or resulting from all ~~other~~ Actions which are related to, result from or arise out of the operations or conduct of the Early Stage Business . . . whether arising before, on or after the Closing Date . . .

(B0601 "Assumed Liabilities") (blacklining added). Nordion reinforced its position by revising the Issues List to reflect that the sale of the businesses was as a

"going concern" and subject to broad liability transfers, including pre-closing tort liabilities. (B0747).

While Ricerca was amenable to continuing to negotiate assumption of going concern liabilities, its business partner, Icon, was against it. Icon insisted that it would only accept a sale that involved scheduled liabilities in which only specifically identified, known liabilities were transferred. (B0750). As a result, on December 10, 2009, the parties agreed that Nordion would break up the sale of the Early Stage Businesses, and prepare separate purchase agreements, one with Ricerca for the purchase of the Discovery and Pre-Clinical Business, and one with Icon for the purchase of the remaining Early Stage Businesses. (B0751). Shortly thereafter, a revised SAPA was circulated in which the only business to be sold to Ricerca was the Discovery and Pre-Clinical Business.[5] (B0760, First Whereas Clause).

Nordion and Ricerca continued to negotiate the assumption of going concern liability pursuant to the SAPA and finally came to an agreement: Nordion would retain pre-closing liabilities with respect to criminal matters and violations of law. (B0972). Ricerca would assume pre-closing liabilities with respect to torts and personal injury, violations of contracts and environmental claims. (*Id.*). A final

[5] Ultimately, negotiations with Icon failed and the remainder of the Early Stage Businesses were acquired by Celerion, Inc., a sister corporation to Ricerca. (B0915; B0961 ¶ 2(b)).

version of the SAPA was circulated on January 30, 2010. (B0975). On February 9, 2010, more than six months after negotiations began, Nordion and Ricerca (by Lennox) executed the SAPA. (A018-148).

The Final SAPA

Accordingly, upon the closing of the SAPA in February 2010, Nordion sold "all of [its] right, title and interest in and to the Purchased Assets . . . and . . . all of the Discovery and Pre-Clinical Companies Stock . . ." to Ricerca. (A053 § 2.1). The "Purchased Assets" are defined as "the Discovery and Pre-Clinical Assets. . ." (A046 "Purchased Assets"). The Discovery and Pre-Clinical Assets are defined as "all right, title and interest . . . in the Discovery and Pre-Clinical Business. . . ." (A031-32 "Discovery and Pre-Clinical Assets"). The "Discovery and Pre-Clinical Business" is defined as the "Purchased Business." (A033 "Discovery and Pre-Clinical Business"). The definition of "Purchased Business," includes the Pharma Services Discovery and Pre-Clinical Business providing contract research services, including drug discovery and research services that were conducted by Nordion either directly or indirectly through its subsidiaries, on or **before** the Closing Date:

> "Purchased Business" means the discovery and pre-clinical contract research services business delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch, as well as the related training, equipment installation, repair, maintenance, customer support and application consulting services directed to or involving discovery and pre-clinical contract research services) **as conducted by Parent [MDS Inc., now**

> **Nordion, Inc.] (directly or indirectly through its Subsidiaries) on or prior to the closing date at any location other than the facility located in King of Prussia, Pennsylvania**.

(A046 "Purchased Business") (emphasis added).

In connection with Ricerca's acquisition of the Purchased Business, Ricerca assumed certain liabilities related to the Discovery and Pre-Clinical Business under Section 2.6(a) of the SAPA. The definition of "Assumed Liabilities" provided that Ricerca also became responsible for all tort liabilities arising out of the Purchased Business, regardless of the time at which the liability arose:

> "Assumed Liabilities" means **any and all Liabilities** other than Retained Liabilities, **whether arising before, on or after the Closing Date**, of the Asset Seller or any of its predecessor companies or businesses, to the extent **arising out of the present, past or future operation or conduct of the Discovery and Pre-Clinical Business**. . . . including the following:
>
> (a) [. . .] **all Liabilities relating to**, arising out of or resulting from all **torts** and personal injury Actions to the extent they are related to, result from **or arise out of the operations or conduct of the Discovery and Pre-Clinical Business or the ownership or use of the Purchased Assets in the Discovery or Pre-Clinical Business whether arising before, on or after** the Closing Date . . .

(A026-27 "Assumed Liabilities") (emphasis added).

The SAPA provided that the Excluded Businesses would be retained by Nordion, together with any liabilities associated with those businesses. (A037 "Excluded Businesses;" A135 § 10.2(a)(v)). The Excluded Businesses included "the business, activities and operations of Parent's late stage Pharma Services

business delivering Phase II-IV contract research services, the Phase I-II Business, as well as the Parent Nordion and Parent Analytical Technologies Business . . ." (A037 "Excluded Businesses"). The Excluded Businesses were entirely unrelated to the Discovery and Pre-Clinical Business and the Biopharmaceuticals Unit. (*See* B0956-57; B0915).

Under Section 10.3(a)(i) of the SAPA, Ricerca agreed to defend, indemnify, and hold harmless MDS Inc., MDS Pharma Services (US) Inc., their subsidiaries, affiliates and successors from and against any damages directly arising or resulting from any Assumed Liabilities. (A136 § 10.3(a)(i)). Ricerca's obligation to assume and indemnify Nordion and Nordion US for the Assumed Liabilities survives indefinitely. (A134 § 10.1(ii)). As a result, Ricerca agreed to defend, indemnify and hold harmless Nordion from "all Liabilities relating to, arising out of or resulting from **all torts** and personal injury Actions to the extent they are related to, result from or **arise out of the operations or conduct of the Discovery and Pre-Clinical Business or the ownership or use of the Purchased Assets in the Discovery and Pre-Clinical Business, whether arising before, on or after the Closing Date**." (A027 "Assumed Liabilities;" A136 § 10.3(a)(i)) (emphasis added).

Following the closing of the SAPA, the parties acknowledged that the transaction was a "heavily negotiated, arms-length transaction." (B0081). The

parties further acknowledged that the acquisition "constituted the sale of a **going concern** and included the sale by MDS, through its indirect subsidiaries, to Ricerca of (i) all of the outstanding stock of MDS Taiwan, (ii) all of the outstanding stock of MDS Pharma Services SAS . . . , and (iii) substantially all of the assets of MDS US located in Bothell, Washington, USA. . . ." (*Id.*) (emphasis added).

The BioAxone Litigation

On April 26, 2012, BioAxone filed a complaint (the "BioAxone Complaint") in the United States District Court for the Southern District of Florida, naming Nordion and Ricerca as defendants. (Op. at 4; A166-84). BioAxone sued both Nordion and Ricerca as defendants because Nordion provided the "discovery, pre-clinical studies and clinical trial services" to BioAxone (Op. at 4; A169 ¶ 11), while Ricerca became Nordion's successor-in-interest, "having acquired the discovery and preclinical business of MDS Pharma from MDS/Nordion . . . ." (A169 ¶ 12).

The BioAxone Complaint sought damages in tort for negligence in connection with Nordion's provision of cell banking services. (Op. at 5). BioAxone had retained Nordion's Discovery and Pre-Clinical Business to prepare a Bacterial Master Cell Bank (the "Master Cell Bank") in connection with BioAxone's development of and research into a new drug known as Cethrin. (Op. at 3; A166-67 ¶ 1; A170 ¶ 15). BioAxone alleged that the Master Cell Bank was

contaminated. (Op. at 4-5; A172 ¶ 25). According to BioAxone, the alleged adulteration of the Master Cell Bank created the risk that the FDA would deem Cethrin, or any other drug derived from the Master Cell Bank, unfit for investigational testing or eventual use. (Op. at 5; A171-72 ¶ 22).

On May 3, 2012, Nordion made a timely demand on Ricerca to defend, indemnify and hold Nordion US harmless from the BioAxone Litigation on the grounds that the Master Cell Bank work had been performed by the Discovery and Pre-Clinical Business sold to Ricerca pursuant to the SAPA, which provided that Ricerca had assumed going concern tort liabilities arising out of the conduct of that business, even if the conduct occurred before the closing of the SAPA. (Op. at 5; A295-98). Nordion's demand was based on Section 10.3(a) of the SAPA and was made consistent with Section 10.4 of the SAPA.

On May 8, 2012, Ricerca made a cross-demand for indemnification under the SAPA, arguing that the Biopharmaceuticals Unit, even though it had been a division of the purchased Discovery and Pre-Clinical Business, was not purchased by Ricerca. (Op. at 5; B1114). On May 29, 2012, Ricerca refused Nordion's demand for indemnification. (Op. at 5; A300-01). Ricerca claimed that it did not assume this liability because the BioAxone Litigation "[arose] from an unrelated function that was discontinued in 2006 and **of which Ricerca was not even aware**." (B1123) (emphasis added). Ricerca's claim rings hollow given Lennox's

"strong inside knowledge" from "when he ran all of MDS Pharma." (B0267). On June 8, 2012, Nordion refused Ricerca's demand for indemnification. (Op. at 5; B1117-18). The parties, however, agreed that the issue was not a question of who was a proper party to the BioAxone Litigation, but rather, who should indemnify whom. (B1121).

As a result of Ricerca's failure and refusal to defend, indemnify and hold Nordion harmless from the BioAxone Litigation Nordion was forced to engage its own legal counsel to defend itself against the BioAxone Litigation. Given the expense of litigation, Nordion settled the BioAxone Litigation for $200,000. (Op. at 5). Ricerca also settled with BioAxone for $150,000. (Op. at 5).

This Action

On October 23, 2013, Ricerca instituted this action claiming that Nordion breached the SAPA by refusing to indemnify Ricerca for its costs and expenses incurred defending the BioAxone Litigation in the approximate amount of $350,000. (Op. at 2; A10-184). Nordion filed a counterclaim alleging that Ricerca breached the SAPA by refusing to indemnify Nordion for its expenses incurred defending the BioAxone Litigation in the approximate amount of $488,951.93. (Op. at 2-3; A186-302).

The parties agreed that the claims in this action would be decided "on the papers," with competing summary judgment motions. (B0031; B0018-19). On September 26, 2014, the parties filed their Motions for Summary Judgment.

Oral argument was held before the Superior Court on November 20, 2014. (A525-75). The Superior Court entered its Opinion on January 23, 2015, and held that the unambiguous language of the SAPA provided that Ricerca assumed liability for tort claims arising from the operation of the Discovery and Pre-Clinical Business, including the activities of the Biopharmaceuticals Unit. (*Id*. at 13-14). The Superior Court additionally held that the term "Purchased Business" in the SAPA included the Biopharmaceuticals Unit. (*Id*. at 13).

The Superior Court entered a Final Order and Judgment (the "Final Order") awarding Nordion its costs and expenses related to the BioAxone Litigation.[6] In accordance with Sections 10.2 and 10.3 of the SAPA, the Court also awarded Nordion its costs and expenses relating to this action. (Final Order at 2-3).

[6] The Final Order is attached as Exhibit B to the Opening Brief.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE UNAMBIGUOUS TERMS OF THE SAPA PROVIDE THAT RICERCA ASSUMED PRESENT, PAST AND FUTURE TORT LIABILITIES OF THE DISCOVERY AND PRE-CLINICAL BUSINESS

A. Question Presented

Did the Superior Court correctly find that the unambiguous language of the SAPA provides that Ricerca assumed the present, past and future tort liabilities of the Discovery and Pre-Clinical Business?

Nordion preserved its position in its Opening Brief in support of its Motion for Summary Judgment (B0051-58), in its Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment (B1132-35) and its Reply Brief in support of its Motion for Summary Judgment (B1228-36).

B. Scope of Review

This Court reviews the Superior Court's interpretation of contracts *de novo*. *H.P. Layton P'ship, Inc. v. Mfrs. & Traders Trust Co.*, 62 A.3d 1223 (Del. 2013) (Table). In so doing, this Court has "long upheld awards of summary judgment in contract disputes where the language at issue is clear and unambiguous." *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012).

C. Merits of Argument

The Superior Court properly held that the plain language of the SAPA provides that Ricerca purchased the Discovery and Pre-Clinical Business as a whole, and assumed all liabilities arising out of the operation of that business, even if the liability arose before the closing of the SAPA. (Op. at 10-14). Based on that holding, the Superior Court properly found that Nordion is entitled to indemnification of the expenses Nordion incurred defending the BioAxone Litigation. (*Id*. at 14).

Delaware law adheres to an objective theory of contracts, meaning a contract's construction should be that which would be understood by an objective, reasonable third party. *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). When interpreting a contract, this Court "will give priority to the parties' intentions as reflected in the four corners of the agreement," construing the agreement as a whole and giving effect to all its provisions. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). "Under standard rules of contract interpretation, a court must determine the intent of the parties

from the language of the contract." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003).

The SAPA sets forth Ricerca's Assumed Liabilities related to the purchase of the Discovery and Pre-Clinical Business. Specifically, Ricerca assumed all liabilities relating to "all torts and personal injury Actions to the extent they are related to, result from or arise out of the operations or conduct of the Discovery and Pre-Clinical Business . . . whether arising before, on or after the Closing Date." (A027 "Assumed Liabilities"(i)). Ricerca agreed to defend, indemnify, and hold Nordion harmless from and against any damages arising directly or resulting from the Assumed Liabilities. (A136 § 10.3(a)(i)). That obligation survives indefinitely. (A134 § 10.1(ii)).

Therefore, in order for Nordion to be entitled to indemnification under the SAPA, the loss must (1) be a claim made in tort or personal injury, and (2) result from or arise out of the operations or conduct of the Discovery and Pre-Clinical Business. The BioAxone Litigation meets both criteria. First, BioAxone asserted a claim of negligence against Nordion. (A179). A claim of negligence is a tort. *Vichi v. Koninklijke Philips Elec., N.V.*, 85 A.3d 725, 778 (Del. Ch. 2014).

Second, the BioAxone Litigation arose out of the operations of the Biopharmaceuticals Unit, which, as the parties agree, was part of the Discovery and Pre-Clinical Business. (OB at 5). The SAPA defines "Discovery and Pre-

Clinical Business" as "the Purchased Business." (A033 "Discovery and Pre-Clinical Business"). The "Purchased Business," in turn, is defined to include all aspects of the Pharma Services Discovery and Pre-Clinical contract research services business that were conducted on or before the Closing Date. Specifically, "Purchased Business" is defined by the SAPA as:

> **the discovery and pre-clinical contract research services business** delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch . . . **as conducted by Parent . . . on or prior to the closing date** at any location other than the facility located at King of Prussia."

(A046 "Purchased Business") (emphasis added). The Biopharmaceuticals Unit was part of the Discovery and Pre-Clinical Business as conducted by Nordion prior to the closing date. Ricerca does not dispute this fact. (OB at 5).

Ricerca incorrectly asserts that the definition of "Purchased Business" "expressly includes three of the four Discovery and Pre-Clinical Business units. . . and excludes one: Biopharmaceuticals," which Ricerca maintains demonstrates that liabilities of the Biopharmaceuticals Unit were not transferred. (OB at 17-18). This assertion is incorrect for two reasons. First, the definition of Purchased Business does not expressly identify any business unit by name. The term "unit" is found nowhere in the definition. Rather, the definition of the Purchased Business functions within the contract as a description of the Discovery and Pre-Clinical Business. This is evidenced not only by the brief definition of the Discovery and

Pre-Clinical Business (which refers the reader to the definition of Purchased Business), but also by the language used in the definition of Purchased Business ("delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch. . . .)."

Second, if the definition of "Purchased Business" does not include the Biopharmaceuticals Unit, as Ricerca suggests, one would expect the Biopharmaceuticals Unit to be expressly named as an "Excluded Business." But it was not. Rather, the definition of "Excluded Businesses" states:

> "Excluded Businesses" means all of the current or former businesses of Parent and its Subsidiaries, **other than the Discovery and Pre-Clinical Business**. For the avoidance of doubt, the Excluded Businesses include the business, activities and operations of Parent's **late stage Pharma Services business delivering Phase II-IV contract research services, the Phase I-II Business, as well as the Parent Nordion and Parent Analytical Technologies businesses**, each as described in the Form 40-F.

(A037 "Excluded Businesses") (emphasis added). Indeed, the parties agree that the Biopharmaceuticals Unit was part of the Discovery and Pre-Clinical Business. (OB at 5).

Moreover, the Biopharmaceuticals Unit cannot be considered an Excluded Asset because the definition of Excluded Assets cannot be reasonably understood to include the Biopharmaceutical Unit. The Excluded Assets are defined as, *inter alia*, "Assets constituting ownership interests in . . . the Excluded Businesses" and

things such as "intercompany receivables." (A036-37 "Excluded Assets"). By contrast, the Purchased Business expressly includes the Discovery and Pre-Clinical Business of which the Biopharmaceuticals Unit was a part. (A046 "Discovery and Pre-Clinical Business"). Furthermore, a "liability" associated with the acquired business cannot be considered an "asset" under a plain reading of the SAPA, because "Assumed Liabilities" and "Purchased Assets" are defined separately and discussed in separate sections of the SAPA. Thus, the Excluded Assets cannot reasonably be considered to include the Biopharmaceuticals Unit.

Ricerca makes much of the fact that the Biopharmaceuticals Unit is not specifically named in the SAPA. (OB at 20). But this does not negate the specific contractual terms of the SAPA under which Ricerca assumed:

> **all Liabilities** relating to, arising out of or **resulting from all torts** and personal injury Actions **to the extent they** are related to, result from or **arise out of the operations or conduct of the Discovery and Pre-Clinical Business, whether arising before, on or after the Closing Date**. . . .

(A027 "Assumed Liabilities"(i)). Thus, pursuant to the plain language of the Assumed Liabilities provision, Ricerca assumed all tort liabilities that arise out of the operations or conduct of the Discovery and Pre-Clinical Business, even if the conduct arose before the Closing Date of the SAPA. The BioAxone Litigation, having arisen out of the operations of the Discovery and Pre-Clinical Business by

way of the Biopharmaceuticals Unit, meets this criteria and, accordingly, Nordion is entitled to indemnification.

The Superior Court's Opinion properly held that the plain terms of the SAPA reflected that what was sold and purchased was the **Discovery and Pre-Clinical Business**, not independent portions of the business. As the Opinion demonstrates, the SAPA repeatedly refers to the **Discovery and Pre-Clinical Business**. (Op. at 10-12). The Superior Court further held that the language of "Purchased Business" describes the discovery and pre-clinical contract research services that were provided by the Discovery and Pre-Clinical Business, which included the Biopharmaceuticals Unit. (*Id*. at 12-13). More importantly, however, the Superior Court correctly noted that Ricerca assumed all tort liabilities arising out of the **Discovery and Pre-Clinical Business**. (*Id*. at 13). There is no language in the SAPA to suggest that Ricerca assumed only tort liabilities relating to a portion of the Discovery and Pre-Clinical Business. The Superior Court's well-reasoned Opinion should be affirmed.

II. THE EXTRINSIC EVIDENCE REFLECTS THAT THE PARTIES INTENDED TO TRANSFER ALL TORT LIABILITIES OF THE DISCOVERY AND PRE-CLINICAL BUSINESS TO RICERCA

A. Question Presented

If this Court finds the SAPA terms are ambiguous, does the extrinsic evidence reflect the intent of the parties to transfer all tort liabilities of the Discovery and Pre-Clinical Business, including the Biopharmaceuticals Unit, to Ricerca?

Nordion preserved its position in its Opening Brief in support of its Motion for Summary Judgment (B0058-64), in its Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment (B1136-44) and its Reply Brief in support of its Motion for Summary Judgment (B1236-45).

B. Scope of Review

This Court reviews a lower court's interpretation of contracts *de novo*. *H.P. Layton*, 62 A.3d at 1223.

C. Merits of the Argument

While the plain language of the SAPA entitles Nordion to indemnification, the extrinsic evidence related to the negotiation of the SAPA reflects that the parties intended that all tort liabilities arising out of the operation of the Discovery and Pre-Clinical Business be transferred to Ricerca. A contract is ambiguous when it is "reasonably or fairly susceptible of different interpretations or may have two

or more different meanings." *Rhone-Poulenc Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). A court may not look to extrinsic evidence to create an ambiguity in a contract, but must instead confine itself to an examination of the contract itself to determine whether an ambiguity exists. *KFC Nat'l Council & Adver. Co-op, Inc. v. KFC Corp.*, 2011 WL 350415, *10 (Del. Ch.). Once a contract is deemed ambiguous, the court may consider the history of negotiations, earlier drafts of the contract, trade custom, or course of performance. *In re Westech Cap. Corp.*, 2014 WL 2211612, *9 (Del. Ch.).

In this case, the SAPA was, by the parties' own admission, "heavily negotiated." (B0081). Those negotiations show that Ricerca assumed the liabilities in connection with the BioAxone Litigation. Ricerca's President and CEO, Lennox, was keenly aware that Nordion was very "concerned about the parent company liabilities. . . ." (B0401). Lennox even noted that the issue of liabilities was one of the "most contentious issues" during the negotiations. (*Id*.). Lennox was also crystal clear about the nature of the parties' differing positions: "(MDS moving us toward broad acceptance with noted carve outs like legal suits, Montreal, KOP, FDA) rather than our version of included liabilities. [Ropes (Buyside)] told us our position was very Buyer friendly – and a moderate ground position would be the result." (B0413). Moreover, the Letter of Intent executed by the parties indicated an intent to transfer "the 'Business'" as a going concern "less

assets to be retained by the Seller." (B0407). This is consistent with the fact that, ultimately, certain assets were not transferred, including a portion of the Bothell lease, while liabilities were treated on a going-concern basis.

While changes were made to the Assumed Liabilities provision in each draft of the SAPA, Nordion never agreed to remove the provision in favor of scheduled liabilities. For example, the First Draft, which was provided by Nordion to Ricerca in June 2009, contained an Assumed Liabilities provision that largely remained intact when the parties concluded their negotiations in January 2010:

> "Assumed Liabilities" means any and all Liabilities (other than Retained Liabilities of the type described in clauses (i) through (v) of the definition thereof), whether arising before, on or after the Closing Date, of Parent or any of its predecessor companies or businesses, or any of its Affiliates, Subsidiaries or divisions, relating to, resulting from or arising out of the present, past or future operation or conduct of the Early Stage Business . . . including the following:
>
> (a) [. . .] all Liabilities relating to, arising out of or resulting from all other Actions which are related to, result from or arise out of the operations or conduct of the Early Stage Business . . . whether arising before, on or after the Closing Date . . .

(B0290-91 "Assumed Liabilities"). Thus, the First Draft contained an Assumed Liabilities provision which provided that Ricerca, in purchasing the Discovery and Pre-Clinical Business, would assume all going concern liabilities related to that business, whether the liabilities arose "**before, on or after the Closing Date**." (*Id*.). The corollary provision, Retained Liabilities, provided that Nordion would retain all liabilities related to businesses not sold (including the Late Stage

Businesses and the Analytical Technologies business). (B0307 "Retained Liabilities").

After Ricerca attempted to eliminate the transfer of going concern liabilities in its draft of the SAPA (B0429-30), Nordion circulated a draft of the SAPA that contained only minimal revisions to the Assumed Liabilities provision:

> "Assumed Liabilities" means any and all Liabilities, ~~(~~other than Retained Liabilities ~~of the type described in clauses (i) through (v) of the definition thereof),~~, whether arising before, on or after the Closing Date, of Parent or any of its predecessor companies or businesses, ~~or any of its Affilities, Subsidiaries or divisions,~~ relating to, resulting from or arising out of the present, past or future operation or conduct of the Early Stage Business . . . including the following:
>
> (a) [. . .] all Liabilities relating to, arising out of or resulting from all ~~other~~ Actions which are related to, result from or arise out of the operations or conduct of the Early Stage Business . . . whether arising before, on or after the Closing Date . . .

(B0601 "Assumed Liabilities") (blacklining added). Thus, Nordion agreed to narrow the transfer of the going concern liabilities to be clear that only those associated directly with the Early Stage Business[7] (which included the Discovery and Pre-Clinical Business) would be assumed. Although the revision added clarity, the definition of Assumed Liabilities still provided that Ricerca would assume all liabilities related to the conduct of the Purchased Business "whether **arising before, on or after the Closing Date**." (*Id*.).

[7] At this stage of the negotiations, Ricerca was still contemplating a joint venture with Icon and the purchase of all the Early Stage Businesses, not just the Discovery and Pre-Clinical Business.

Following extensive negotiation, Ricerca and Nordion agreed that Ricerca would assume pre-closing liabilities with respect to torts and personal injury, violations of contracts and environmental claims while Nordion would retain pre-closing liabilities with respect to criminal matters and violations of law. (B0972). That agreement was born out in the final version of the SAPA, which changed the Assumed Liabilities definition as follows:

> "Assumed Liabilities" means any and all Liabilities other than Retained Liabilities, whether arising **before, on or after the Closing Date**, of ~~Parent~~ the Asset Seller or any of its predecessor companies or businesses, to the extent **arising out of the present, past or future operation or conduct** of the ~~Early Stage Business~~ Discovery and Pre-Clinical Business . . . including the following:
>
> (a) [. . .] all Liabilities relating to, arising out of or resulting from all **torts** and personal injury Actions ~~which~~ to the extent they are related to, result from or arise out of the operations or conduct of the ~~Early Stage Business~~ Discovery and Pre-Clinical Business . . . whether arising **before, on or after** the Closing Date . . .

(A026-27 "Assumed Liabilities") (emphasis added, blacklining added).

Finally, Ricerca should not now be heard to complain that the existence of the Biopharmaceuticals Unit came as a complete surprise. As one of Ricerca's business partners put it during the SAPA negotiations: "[We] have some strong inside knowledge." (B0267). And indeed they did: Lennox (who signed the SAPA on behalf of Ricerca) served in executive positions with Nordion for four years and was even President and CEO of Pharma Services -- the business umbrella that held the Discovery and Pre-Clinical Business and, thereby, the

Biopharmaceuticals Unit, which were ultimately purchased by Ricerca. (A202, A204, A206, A211-13, A216). He was an executive at Nordion when the expansion of the Pharma Services biopharmaceuticals capabilities was announced. (A206, A211-13). He was also frequently on location at the Bothell facility where the Biopharmaceuticals Unit was located, as evidenced by the fact that Nordion did not want him to attend site visits while the SAPA was being negotiated. (B0267).

As such, the parol evidence associated with the negotiation and drafting history of the SAPA demonstrates that the parties intended that Ricerca assume, *inter alia*, going-concern tort liabilities of the Discovery and Pre-Clinical Business, such as the BioAxone Litigation, while Nordion would retain pre-closing liabilities only with respect to criminal matters and violations of law. (B0972). As a result, if the SAPA is ambiguous, Nordion is entitled to indemnification because the negotiation history shows that the parties agreed that Ricerca would assume the liabilities arising out of the BioAxone Litigation.

Ricerca ignores the negotiation history and focuses on isolated post-contractual actions that do not constitute course of performance. There are limits on the parol evidence a court may consider when construing an ambiguous contract. Only agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible. *Scott v. Land Lords, Inc.*, 1992 WL 276429, *3 (Del. 1992). On the other hand, course of performance may modify the terms

of a contract. *Honeywell Int'l Inc. v. Air Prods. & Chems., Inc.*, 872 A.2d 944, 951 (Del. 2005). Course of performance is a sequence of conduct where: (1) the agreement of the parties involves repeated occasions for performance by a party; and (2) the other party knowingly accepts the performance or acquiesces in it without objection. *Motors Liquidation Co. v. Allianz Ins. Co.*, 2013 WL 7095859, *5 (Del.). The isolated incidents Ricerca relies on do not constitute course of performance.

Following the execution of the SAPA, Ricerca and Nordion employees attempted to determine which records should be transferred to Ricerca and which should remain with Nordion. (A491). None of the employees involved in the records division were involved in the SAPA negotiations, and all professed little knowledge on the subject. (A491-92). Ultimately, therefore, none of these employees could have known the intricacies of the SAPA's terms.

Moreover, the records division exercise is not "course of performance" because it fails to meet the first standard set forward by the court in *Motors Liquidation*. Instead of being "repeated occasions for performance by a party," the division of the Discovery and Pre-Clinical Business records was a single post-contract exercise. A singular act following the execution of the SAPA is inadmissible evidence of the parties' intent. Accordingly, the low-level actions of

administrative employees cannot modify the terms of the SAPA or even shed light onto what was intended by those who negotiated it.

Even if the records division were admissible parol evidence of the meaning of the SAPA's terms, however, the evidence reflects that, ultimately, Ricerca remained in possession and exercised dominion over the Biopharmaceuticals Unit's records. When contacted by BioAxone, Ricerca searched for the records BioAxone requested and provided what they could locate. (A287). In providing the documents to BioAxone, Ricerca noted that the Biopharmaceuticals Unit was part of the Discovery and Pre-Clinical Business, which it had acquired. (*Id*.).

In a convenient, belated attempt to disclaim the foregoing actions, Ricerca later sent an email to BioAxone disclaiming liability for "any discontinued MDS Pharma Services operations." (A494-95). This cannot alter the terms of the SAPA, because the "unilateral expression of one party's post-contractual subjective understanding of the terms of the agreement . . . [is] not probative as an aid to the interpretation of the contract." *DiGiulio v. City of Buffalo*, 655 N.Y.S.2d 215, 217 (N.Y. App. Div. 1997). The Affidavits of Robert Beland (A482-84), Timothy Tinkler (A476-78) and Ian Lennox (A498-500) are similarly post-contractual unilateral expressions of one party's subjective understanding and cannot modify the unambiguous terms of the SAPA. Nor can such self-serving affidavits establish such a contested fact when there is documentary evidence to

the contrary. *See Abacus Sports Installations, Ltd. v. Casale Constr., LLC*, 2011 WL 5288866, *2 (Del. Super.).

Likewise, the sale of the lab equipment is also not probative evidence of the meaning of the SAPA's terms. (OB at 12-13). The sale of the lab equipment cannot be considered "course of performance" because the liquidation of the equipment was a single post-contractual act. Once the sale of the equipment was completed, there was no further performance necessary.

Additionally, despite Ricerca's claims to the contrary, some of Biopharmaceuticals Unit's lab equipment **was** included in the asset sale transaction. (*See* B1151; B1154; B1157). In fact, Ricerca negotiated which machinery it wanted included in the sale, and it purchased machinery that was used by the Biopharmaceuticals Unit, which was stored in the "decommissioned" Biopharmaceuticals Unit lab space.[8] (B1151; B1154; B1157). When Nordion began liquidating the lab equipment Ricerca did not want, it had to take care not to accidentally sell machines that had been transferred to Ricerca pursuant to the SAPA. (B1157). Ricerca subsequently decided it wanted to purchase additional machinery that had been used by the Biopharmaceuticals Unit. (*Id.*).

[8] Ricerca maintains that "none of the lab equipment of the closed Biopharmaceuticals Unit is reflected in the schedules." (OB at 10 n.1). It is unclear how Ricerca reached this conclusion and it cites no evidence to support it. The schedules reflect a large amount of laboratory equipment but they do not reflect where in the Discovery and Pre-Clinical Business each piece of equipment was used. (B1157-221).

Ultimately, the issue of the lab equipment proves nothing more than that Ricerca did not want to deal with purchasing and liquidating equipment it did not plan to use and therefore picked and chose which lab equipment it wanted transferred in the sale. This singular action does not constitute course of performance and cannot alter the negotiated terms of the SAPA. As a result, the Court should disregard the single acts of the records division and the sale of equipment as post-contractual acts that are insufficient to modify the SAPA. As set forth above, the parties' intent is reflected in the negotiation history of the relevant terms, and the parties intended that Ricerca would all going-concern tort liabilities of the Biopharmaceuticals Unit, which includes the BioAxone Litigation.

CONCLUSION

For the foregoing reasons, the Superior Court's Opinion and the Summary Judgment Order should be AFFIRMED.

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DATED: August 27, 2015

CERTIFICATE OF SERVICE

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