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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ACCENTCARE, INC., | ) | |
| | ) | |
| Defendant and Counterclaim | ) | |
| Plaintiff Below, Appellant | ) | |
| | ) | No. 67,2017 |
| v. | ) | |
| | ) | COURT BELOW: |
| FRIEDMAN FLEISCHER & LOWE, | ) | COURT OF CHANCERY OF |
| LLC, | ) | THE STATE OF DELAWARE |
| | ) | C.A. NO. 12026-VCL |
| Plaintiff and Counterclaim | ) | |
| Defendant Below, Appellee | ) | |

# APPELLEE'S ANSWERING BRIEF

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## NATURE OF PROCEEDINGS

This appeal challenges the Court of Chancery's well-reasoned and well-supported order dated November 29, 2016 (the "Order")[1] dismissing AccentCare, Inc.'s ("AccentCare" or "Buyer") First Amended Counterclaims and Setoffs (the "Amended Counterclaims") and purported "recoupment defense." The Court of Chancery correctly held that AccentCare's last ditch attempt to circumvent the clear and unambiguous contractual statute of limitations bar by invoking the concededly narrow "equitable doctrine" of recoupment had no basis under Delaware law. *See* Order ¶ 24; *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450, 454 (Del. 2016) (quoting *TIFD III-X LLC v. Fruehauf Prod. Co., L.L.C.*, 883 A.2d 854, 865 (Del. Ch. 2004) (Strine, V.C.)).

The Order held that the Amended Counterclaims failed to state a claim for contractual indemnification based on a December 14, 2010 stock purchase agreement (the "SPA")[2] by which AccentCare acquired all outstanding shares of the Company from the Sellers. A041−133. The parties agreed that $20.5 million of the $215 million purchase price held in a third-party escrow account (the

[1] A copy of the Order appears as Exhibit B to Appellant's Opening Brief filed on March 30, 2017 ("AccentCare's Brief" or "AB").

[2] Capitalized terms used but not defined herein have the meanings provided in the SPA. The parties to the SPA were AccentCare; Guardian Home Care Holdings, Inc. ("Guardian" or the "Company"); the then-owners of the Company, the "Sellers"; and Friedman Fleischer & Lowe LLC, as the representative of the Sellers ("FFL" or the "Seller Representative").

"Escrowed Funds") would be released in accordance with the terms of the SPA and a December 22, 2010 escrow agreement between AccentCare, FFL, and the escrow agent (the "Escrow Agreement"). A047, A136.

The Order was straightforward and followed well-reasoned decisions from the Court of Chancery. The SPA requires the Sellers to indemnify AccentCare only in the event certain representations, warranties, or covenants in the SPA (collectively, the "Representations") are breached. The SPA also establishes the survival periods for the Representations, which under persuasive authority from the Court of Chancery and the leading treatises, *see Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *6−15 (Del. Ch. Nov. 27, 2013); *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *10−17 (Del. Ch. July 11, 2011) (Strine, V.C.), create contractual statutes of limitation for actions based on purported breaches of the Representations. Failure to establish a breach of a Representation (or file suit to establish a breach of a Representation) before the expiration of the contractual limitations period—December 22, 2012—prevents a successful claim for indemnification because a breached Representation is a prerequisite to a successful indemnification claim. Despite being on notice of this clear Delaware law, AccentCare, represented by sophisticated and experienced counsel, did not bring any lawsuit, nor did it even seek a tolling agreement. AccentCare's refusal to consent to release of the escrowed funds because of its

affirmative claim over the escrowed monies forced the Sellers to sue to get a declaration that they were entitled to the proceeds of sale.

It is undisputed that AccentCare neither filed suit to establish a breach of a Representation, nor otherwise established such a breach, within the relevant contractual and statutory limitations periods. It is further undisputed that no breach of a Representation has ever been established. Indeed, AccentCare made a conscious and strategic decision not to plead that a Representation was breached in the Amended Counterclaims. Accordingly, the Order correctly held that the SPA unambiguously barred the Amended Counterclaims. Order ¶¶ 15−17. The Order also correctly rejected AccentCare's arguments that (i) Section 11.3(a) of the SPA creates independent reimbursement rights regarding defense costs and settlement payments for Third Party Claims and (ii) the defense of recoupment allowed AccentCare to ignore any statute of limitation bars to its affirmative claim over the Escrowed funds. *Id.* ¶¶ 18−24.

## SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly held that AccentCare's purported "affirmative defense" for "recoupment" was in reality an affirmative claim. Because true recoupment may be used only defensively, AccentCare's attempts to obtain the remaining Escrowed Funds for itself in support of its indemnification claim cannot be recoupment. Moreover, recoupment is available only to reduce one party's claim against another party and AccentCare's purported "recoupment" arguments were not presented to reduce damages that FFL sought to recover from AccentCare. Thus, recoupment's general exclusion from a statute of limitations bar is inapplicable to AccentCare. To hold otherwise would eviscerate contractual limitations periods for claims against funds held in third-party escrow accounts, contrary to the parties' intent in agreeing to such limitations. If AccentCare is correct, untimely claims could be resurrected simply by one party's wrongful refusal to approve the release of escrowed funds and then claim "recoupment" to avoid the express statute of limitations bar. The narrow equitable doctrine of recoupment was never contemplated to allow such abuse.

2. Denied. The Court of Chancery properly held that AccentCare had failed to plead facts creating a reasonable inference that Sellers' actions demonstrated unequivocal waiver of the contractual limitations period, particularly in light of the no waiver and written modification provisions of the SPA. Although

AccentCare now presents new facts not argued before the Court of Chancery, even these new facts are insufficient to plead acquiescence adequately. Moreover, AccentCare never argues that its acquiescence defense applies to the statute of limitations under 10 *Del. C.* § 8106(a), which provides an independent basis to dismiss the Amended Counterclaims.

3. Denied. The Court of Chancery properly interpreted the unambiguous SPA as a matter of law. Section 11.3(a) of the SPA is a procedural provision that applies *only if* AccentCare is entitled to indemnification under Section 11.1(a). The unambiguous terms of the SPA required AccentCare to file suit to establish a breached Representation by December 22, 2012 before indemnification was available. Because AccentCare failed to file suit within the contractual and statutory limitations periods, AccentCare has not established and cannot establish the prerequisite breach.

4. Denied. Again, Section 11.3(a) of the SPA applies only in the event indemnification is available under Section 11.1(a). Moreover, Section 11.3(a) defense costs "shall constitute indemnifiable Damages"—an obvious reference to Section 11.1(a). AccentCare's argument that Section 11.3(a) creates a "separate covenant" on the part of the Sellers to reimburse defense costs for post-closing actions brought by third parties not only is inconsistent with the language and

structure of the SPA but also directly contradicts controlling precedent from this Court.

## COUNTERSTATEMENT OF FACTS[3]

The parties entered into the SPA on December 14, 2010. The SPA contained numerous Representations and established indemnification obligations regarding: (i) former officers and directors of the Company under Section 9.2 (A078−79); (ii) certain tax matters under Section 9.7 (A082−87); and (iii) breaches of a Representation under Section 11 (A092−97). This litigation arises out of Section 3.20 of the SPA, where the Company represented, among other things, that its operations and reimbursement practices complied with all applicable laws, rules, regulations, policies, and procedures (the "Healthcare Law Representations"). A062–63 §§ 3.20(a)–(b).

Section 11.5 of the SPA provides that "the representations and warranties set forth in . . . Section 3.20 . . . shall survive until the date that is twenty-four (24) months following the Closing Date." A096 § 11.5. The Closing Date was December 22, 2010. A051 § 2.1. Accordingly, the Healthcare Law Representations terminated on December 22, 2012. Section 11.5 of the SPA refers to this date as the "Release Date" of the Healthcare Law Representations. A096 § 11.5.

[3] AccentCare treats facts pleaded in its answer to FFL's February 19, 2016 complaint (the "Complaint") as properly before the Court. *See, e.g.*, AB at 4 (citing AccentCare's answer at A233). FFL thus relies on admitted/affirmatively alleged facts from AccentCare's answer.

December 22, 2012 was also the "Final Release Date" under the Escrow Agreement, at which time all Escrowed Funds were to be released to the Sellers unless there was a pending claim for indemnification under the SPA. A138 § 3(b). The Escrow Agreement further requires that any claim against the Escrowed Funds must (i) be for a specific amount and (ii) arise out of an indemnification obligation of the Sellers under the SPA. *Id.* § 3(d)(i) (requiring "a written notice requesting distribution to the Buyer of a *specified amount* of the Escrowed Funds in full or partial payment *of the indemnification obligations . . . pursuant to the terms of the [SPA]*") (emphases added).

On June 28, 2012, AccentCare informed FFL that the Company's billing practices and certifications for hospice care were under investigation by the United States Department of Health and Human Services ("HHS"). A160; A227. AccentCare did not claim indemnification for a specific amount in its letter and instead asserted that it could not "assess the amount of Damages that could result" from the HHS investigation. A161; A252.

*Importantly*, AccentCare's June 28, 2012 letter claimed indemnification under Section 11.1(a) of the SPA in the event it was determined there was a breach of the Healthcare Law Representations. A161 ("Pursuant to Section 11(a) of the Agreement, Buyer and its Affiliates are entitled to indemnification for all Damages that are suffered by Buyer or any of its Affiliates *arising out of any breach* of any

representation or warranty made by the Company.") (emphasis added); *see also id.* ("[A]ny *findings of [HHS] that are adverse* to the Company with respect to actions taken prior to the Closing as a result of the review *would constitute a breach* of the representations and warranties of the Company set forth in the [SPA.]") (emphases added); A228; A252. In October 2013, AccentCare purportedly learned for the first time that a civil whistleblower action had been filed eighteen months earlier in February 2012. A228; A251−53. AccentCare unilaterally assumed the defense of these proceedings (together, the "Hospice Billing Actions") and thwarted FFL's attempts to have substantive involvement. A188−90; A192; AB at 15.

December 22, 2012 came and went with no determination that the Healthcare Law Representations were breached or the commencement of any litigation, nor the execution of any tolling agreement. Indeed, at no time has it been established (or even asserted by AccentCare) that the Healthcare Law Representations were breached. AccentCare adamantly denied any wrongdoing in the Hospice Billing Actions and settled those actions without admitting any wrongdoing. *See, e.g.*, AB at 32 n.10 (AccentCare "vigorously" denied any wrongdoing by the Company); B2 ¶ E. The Amended Counterclaims contain no allegations that the Company breached the Healthcare Law Representations.[4]

[4] It is now too late for AccentCare to allege that the Healthcare Law Representations were breached. Del. Ct. Ch. R. 15(aaa).

B45−47; B72−73; A333−34. During oral argument below, AccentCare's counsel admitted that AccentCare strategically chose not to allege in the Amended Counterclaims that the Company violated the Healthcare Law Representations. A365−66. Despite AccentCare's failure to seek a determination prior to December 22, 2012 (or at any time) that the Healthcare Law Representations had been breached, or file a claim under the Escrow Agreement (AB at 15), AccentCare failed to arrange for the Release of the Escrowed Funds to the Sellers.

On April 20, 2015, AccentCare for the first time demanded indemnification in a specific amount. A194−95. AccentCare renewed its claims for indemnification on May 6, 2015, December 18, 2015, and February 2, 2016. A197−204; A206−08; A218. AccentCare's methodologies, and the amount of indemnification ultimately demanded, shifted dramatically over time. *See* A212−15.

Sellers never agreed that AccentCare was entitled to indemnification and so informed AccentCare, even before AccentCare demanded a sum certain. A212 (referencing 1/28/15 email stating that FFL "is not supporting any contribution from the escrow" to settle the Hospice Billing Actions). Despite the Sellers' repeated demonstration that AccentCare was entitled to no indemnification payment, even assuming that AccentCare's claims were timely, AccentCare

refused to agree to the release of the Escrowed Funds to the Sellers and claimed entitlement to those sums in support of its indemnification claims.

On February 19, 2016, FFL filed the Complaint seeking, among other things, a declaration that AccentCare was not entitled to indemnification and ordering AccentCare to provide all necessary approvals for the immediate release of the Escrowed Funds to the Sellers. A012−38. On March 31, 2016, AccentCare filed its original counterclaims. After FFL moved to dismiss those counterclaims and filed an opening brief in support thereof, AccentCare filed the Amended Counterclaims on June 10, 2016. A219−68. On July 22, 2016, FFL moved to dismiss the Amended Counterclaims and filed an opening brief. B18−50. Following full briefing and oral argument, the Court of Chancery entered an order dated November 29, 2016, dismissing the Amended Counterclaims and rejecting AccentCare's purported "recoupment defense." A269−310; B51−76; A311−67. Specifically, the Court of Chancery held that the contractual limitations bar required any such claims to have been brought by December 22, 2012 and that the recoupment "defense" could not resuscitate such claims.

## ARGUMENT

## I. ACCENTCARE'S PUPORTED "RECOUPMENT DEFENSE" WAS PROPERLY DISMISSED

### A. Question Presented

Whether the Court of Chancery properly determined that AccentCare's so-called "recoupment defense" was not actually recoupment such that this "affirmative defense" was properly dismissed. B68−70; A332–33; A364.

### B. Scope of Review

This Court reviews *de novo* the Court of Chancery's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6). *See, e.g.*, *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011). Although this Court must accept AccentCare's well-pleaded allegations as true, *see Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008), it need not "accept as true conclusory allegations 'without specific supporting factual allegations' . . . [nor] 'every strained interpretation of the allegations proposed by [AccentCare],'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (footnotes omitted).

### C. Merits of the Argument

#### 1. The Amended Counterclaims are Time-Barred

Section 11 of the SPA establishes a straightforward indemnification regime. A092−97. Sections 11.1 and 11.2 establish when indemnification is available, who

is eligible for indemnification, and what Damages are indemnifiable. Any claim for indemnification arising out of the Company's purported breach of the Healthcare Law Representations would have to arise under Section 11.1(a), entitled "Indemnification of the Buyer,"[5] which obligates "each Seller" to indemnify AccentCare if there is a breach of "any representation or warranty made by the Company in Article 3[.]" A092 § 11.1(a). Importantly, Section 11.1(a) requires a breach of the Healthcare Law Representations before indemnification is available. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 820 & n.28 (Del. 2013), *as corrected* (Oct. 8, 2013) (contractual duty to "indemnify and hold harmless" required breach of representation); *see also GRT*, 2011 WL 2682898, at *2 (contract required breached representation before remedy was available); B36−39; B58−65; B66−68; A323.

Section 11.3, entitled "Indemnification Procedures," is a procedural provision that applies "[i]n the event that any Buyer Indemnitee (an 'Indemnified Person') desires to make a claim for indemnification against any of the Sellers *under Section 11.1(a)* in connection with any Action by any third party for which

[5] Headings in the SPA are for reference only and do not control interpretation. A111 § 13.6. Unsurprisingly, however, the headings in the SPA correspond to the substance of the provisions.

the Buyer may seek indemnification hereunder (a 'Third Party Claim')[.]"[6] A092−93 § 11.3(a) (italics added). In other words, a "Third Party Claim" under Section 11.3(a) exists only where indemnification is available under Section 11.1(a) (i.e. where a Representation has been breached). Subsequent language in Section 11.3(a) confirms this point by reiterating that defense costs for any Third Party Claim "shall constitute indemnifiable Damages." A093 § 11.3(a).

The default statute of limitations for a breach of contract claim is three years. *See* 10 *Del. C.* § 8106(a). "Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made, a breach occurs on the date of the contract's closing and hence the cause of action accrues on that date." *GRT*, 2011 WL 2682898, at *6. Accordingly, a claim alleging the breach of a contractual representation or warranty typically must be brought within three years of the contract's closing.

It is well-established that the survival period for a representation establishes a contractual statute of limitations. *See* Order ¶ 15; *ENI Holdings*, 2013 WL 6186326, at *6−9; *GRT*, 2011 WL 2682898, at *12 (discussing treatises); B33−35. AccentCare does not contest this point. *See* AB at 5 (referencing contractual limitations period in SPA).

[6] The word "hereunder" refers to the SPA "as a whole and not to any particular provision of" the SPA. A116 § 13.18.

Section 11.5 of the SPA provides that the Healthcare Law Representations survive until 24 months after Closing—December 22, 2012. A096 § 11.5.[7] Section 11.4(c) reiterates and extends this point and provides that "[n]o action or claim for Damages pursuant to Section 11.1 . . . may be brought or asserted after the applicable Release Date." A095 § 11.4(c).

AccentCare failed to establish the breach of a Representation within the contractual or statutory limitations periods. Because any claim that the Company breached the Healthcare Law Representations is time-barred, the Court of Chancery properly dismissed the Amended Counterclaims.

### 2. AccentCare Cannot Assert an Offensive "Recoupment" Claim to Revive its Time-Barred Claims

AccentCare's first attempt to avoid the untimeliness of its indemnification claims purportedly invokes the equitable defense of recoupment. In Delaware, a claim for recoupment will not be subject to a statute of limitations if the claim (i) is defensive and (ii) arises out of the same transaction underlying plaintiff's claims. *See, e.g.*, *TIFD II-X LLC*, 883 A.2d at 860 ("To the extent a valid recoupment claim is asserted defensively, it is not subject to statutes of limitations.").[8]

[7] Section 11.5 also, with limited exceptions, makes the indemnification provisions of the SPA the exclusive remedy for matters arising post-closing. Sections 11.4−11.8 of the SPA establish further limits on indemnification less relevant here.

[8] This Court cited *Fruehauf* approvingly in *Finger Lakes*, 151 A.3d at 454.

Recoupment is a "narrow equitable doctrine" that is tailored to avoid injustice in limited circumstances. *See id.* at 865 (recoupment is "a narrow equitable doctrine designed to permit a summing up of liabilities in a tightly connected factual dispute"); *infra* at 19−21.

AccentCare seeks the same relief through its "recoupment defense" that is sought in its untimely counterclaims. Indeed, AccentCare designates the entire Amended Counterclaims as "[i]n the alternative, . . . the Affirmative Defense of recoupment." *See* A249 n.3. Thus, the affirmative relief AccentCare seeks through its recoupment "defense" includes "an injunction ordering FFL to give all necessary approvals for the immediate release to it of escrowed funds in the amount of the total Damages that AccentCare has incurred, plus the legal fees and disbursements that AccentCare has incurred and will incur in obtaining indemnification through this litigation, plus applicable interest." A265 ¶ 50; *see also* A257 ¶ 23; A264 ¶ 48.

AccentCare asks this Court to overlook the defensive nature of recoupment and argues that recoupment is available so long as the transactional nexus is met. *See* AB at 22−23. Nevertheless, recoupment may be used only as a defense to offset the damages plaintiff seeks from the defendant. *See, e.g.*, *Finger Lakes*, 151 A.3d at 453 ("Setoff and recoupment are related but different defenses."); *Fruehauf*, 883 A.2d at 862 (rejecting recoupment defense because defendant was

not seeking "to have a court mitigate a potential monetary award against it by taking into account damages that it itself suffered at the hands of the plaintiff").

The Escrow Agreement describes the Escrowed Funds as "a portion of the consideration payable to the Sellers and holders of Options" in connection with AccentCare's acquisition of the Company. A136. The SPA also provides that the Sellers may use the Escrowed Funds to meet their indemnification obligations but does not permit AccentCare to use the Escrowed Funds to meet its indemnification obligations to the Sellers. A095 § 11.4(b), (f). Thus, the Escrowed Funds are properly viewed as the property of the Sellers, unless and until AccentCare meets the requirements for a return of the consideration it paid for the Company. *See* Order ¶ 24; AB at 26; *see also Am. Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597, 604 (S.D.N.Y. 1971) ($1.2 million of the purchase price held in escrow belonged to the seller and thus seller generally would be entitled to interest on those funds). Tellingly, AccentCare admits that "a reduction in the amount of Escrowed Funds available to the Sellers in the Escrow Account is a recovery from the Sellers." AB at 26. This cannot be recoupment because recoupment "'is purely a defensive set-off and does not seek an affirmative recovery from the plaintiff.'"[9] Order ¶ 24 (quoting *Fruehauf*, 883 A.2d at 859).

[9] Even if the Escrowed Funds are viewed as belonging to neither party, AccentCare's claim for such third party funds would still be affirmative.

AccentCare asserts that recoupment is available to defeat a plaintiff's claim even if plaintiff is not seeking damages from the defendant. Importantly, however, the authorities cited by AccentCare all apply recoupment in the context of a claim by plaintiff for damages against the defendant. *See* AB at 24–25. AccentCare cites no authority for the proposition that a defendant can use recoupment to obtain funds belonging to a contractual counterparty held in a third-party escrow account. *See Flandreau Santee Sioux Tribe v. Gerlach*, 162 F. Supp. 3d 888, 897 (D.S.D. 2016) (defendant's request for escrowed funds was affirmative and did "not sound in recoupment"); A332−33.

### 3. Applying "Recoupment" Here Would Be Contrary to the Express Language of the Contract, the Parties' Intent, and Common Sense

Recoupment reduces plaintiff's damages only if plaintiff has not complied with its own obligations.[10] In the SPA, the parties agreed to shorten the default limitations period for claims related to the Representations and affirmatively barred any claims or actions beyond the relevant survival periods. *See supra* at 14−15. These agreements allocated the risk between the parties regarding post-

[10] *See, e.g.*, *Finger Lakes*, 151 A.3d at 453 ("[T]he defense of recoupment goes to the reduction of the plaintiff's damages for the reason that he, himself, has not complied with the cross obligations arising under the same contract.") (citation omitted); *see also* 80 C.J.S. *Set-off and Counterclaim* § 28 (2010) ("In a . . . recoupment action to recover damages for breach of contract, the burden of proof is on the party claiming damages, to prove that the damages were caused by the default of the party to be charged . . . and the burden must be sustained by a preponderance of the evidence.").

closing claims and rationally provided that indemnification would be available only for claims that arose (and breaches of the SPA that were proved) soon after Closing.[11] Because the requirements for the Sellers' narrowly-circumscribed indemnification obligations were never met, no "cross obligations" under the SPA ever arose, and recoupment is inapplicable.[12] *See Finger Lakes*, 151 A.3d at 454 (recoupment permits the "'summing up of liabilities in a tightly connected factual dispute'") (quoting *Fruehauf*, 883 A.2d at 865).

Recoupment is grounded in equity, *see, e.g.*, *Finger Lakes*, 151 A.3d at 454, and should not be used to defeat the allocation of risk to which a party expressly agreed. *See Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 146–49 (2d Cir. 2002) (rejecting facially valid recoupment claim because applying recoupment would be inequitable and defeat the intent of the parties). Nevertheless, AccentCare would invoke recoupment to nullify the parties' allocation of risk and create a new, eternal indemnification obligation to which the Sellers never agreed.

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[11] The fact that AccentCare purportedly did not learn of the whistleblower action until after the Healthcare Law Representations expired simply reflects the allocation of risk the parties agreed to.

[12] AccentCare argues that it would have been "highly problematic" for AccentCare to file suit against the Sellers within the survival period of the Healthcare Law Representations. *See* AB at 32 n.10. However, that is what AccentCare agreed to in the SPA. AccentCare could have negotiated for a notice-only indemnification regime such as the parties agreed to for tax indemnification matters. A082 § 9.7(a)(i); A324. Moreover, AccentCare could have requested a tolling agreement from the Sellers prior to the expiration of the limitations periods. A334.

The inapplicability of the general statute of limitations to a recoupment defense "is based on a sound policy of preventing a plaintiff from waiting to assert a claim until after a defendant's counterclaim is barred." *Collard v. Nagle Constr., Inc.*, 57 P.3d 603, 609 (Utah Ct. App. 2002); *see also, e.g.*, *Bull v. United States*, 295 U.S. 247, 261−62 (1935) (applying recoupment as a matter of "natural justice and equity" where tax commissioner taxed the same funds as principle in one year and as income four years later); 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 492 (1906) (discussing need for set-off doctrines to avoid hardship in bankruptcy proceedings); AB at 22−23 (citing bankruptcy section of *Williston on Contracts*).

Applying recoupment here would not advance the policy goals of recoupment and would create perverse incentives. The Sellers *could not have* strategically waited to seek release of the Escrowed Funds until after the contractual limitations period expired because the Final Release Date fell on the same day the contractual limitations period expired. By contrast, AccentCare's interpretation promotes the very gamesmanship recoupment is intended to avoid. B70; A361−62. If a party fails to bring timely indemnification claims, AccentCare believes that party should violate the parties' agreements and refuse to permit the release of escrowed funds. Under AccentCare's approach, if the counterparty ever sues to enforce the parties' agreements, the previously time-barred indemnification

claims are immediately resurrected as a "recoupment defense." Such a regime would be absurd. *See Fruehauf*, 883 A.2d at 865 (explaining that recoupment is not "a wide-ranging license to revive a relationship's worth of stale grievances").

## II. ACCENTCARE FAILED TO PLEAD ACQUIESCENCE ADEQUATELY

### A. Question Presented

Whether the Court of Chancery properly determined that the Amended Counterclaims failed to plead acquiescence adequately. A328–32; B42−43; B70−72.

### B. Scope of Review

*See* Argument § I.B above.

### C. Merits of the Argument

Acquiescence requires the plaintiff to: "(1) have full knowledge of his [or her] rights and all material facts; (2) possess a meaningful choice in determining how to act; and (3) act voluntarily in a manner show[ing] unequivocal approval of the challenged conduct." *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012) (internal quotations and citations omitted) (alteration in original), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012).

In *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014), this Court recited a slightly different formulation of acquiescence. Because (i) the *Klaassen* and *Celera* formulations are substantially similar, (ii) AccentCare relied on the *Celera* formulation before the Court of Chancery (A347−48), (iii) the Order relies on the *Celera* formulation (Order ¶ 23), and (iv) AccentCare relies on the

*Celera* formulation in Appellant's Opening Brief (*see* AB at 29−31), FFL relies on the *Celera* formulation here.[13]

### 1. Court of Chancery's Ruling

Before the Court of Chancery, AccentCare identified two purported facts in support of its claim that the Sellers had acquiesced in an extension of the contractual limitations period: (1) Sellers did not demand release of all Escrowed Funds immediately after the Final Release Date of December 22, 2012 (A255 ¶ 17; A259 ¶ 34; A308; A348−49); and (2) Sellers purportedly participated in the defense of the Hospice Billing Actions (A255 ¶ 17; A259 ¶ 34; A348−49). The Court of Chancery determined that the alleged facts did not create a reasonable inference that the Sellers unequivocally consented to a modification of the contractual limitations period. Order ¶ 23(b). The Court of Chancery properly recognized that the no waiver provision in Section 13.16 of the SPA heightened the standard for finding unequivocal action. *Id.*; A115 ¶ 13.16; B42−43; B70−72. The Court of Chancery also was correct that the Sellers' decision not to demand the

[13] If there is a difference between the *Celera* and *Klassen* formulations of acquiescence (AB at 31 n.9), FFL respectfully suggests that the *Celera* formulation is a more useful summary of Delaware law. *Klassen*'s third example of acquiescence does not emphasize that certain actions which are facially inconsistent with subsequent repudiation may not be considered voluntary for purposes of acquiescence. *See, e.g.*, *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1075−82 (Del. Ch. 2001).

release of the Escrowed Funds was "equally consistent" with explanations that did not constitute acquiescence. Order ¶ 23(b).

### 2. AccentCare's Repeat Arguments Should Be Rejected for the Same Reasons Provided by the Court of Chancery

On appeal, AccentCare again attributes "unequivocal approval" of AccentCare's time-barred claims to the Sellers' (i) attempts to participate in the Hospice Billing Actions (AB at 29−31) and (ii) waiting to demand the Escrowed Funds until after it was clear that AccentCare was not entitled to any payment even if its claims were timely (*id.* at 32).[14] Black's Law Dictionary defines "unequivocal" as "[u]nambiguous; clear; free from uncertainty." *Unambiguous*, BLACK'S LAW DICTIONARY (10th ed. 2014). The facts alleged in the Amended Counterclaims simply do not create a pleading stage inference that the Sellers' actions constituted unequivocal, unambiguous approval of a modification of the SPA and Escrow Agreement. Numerous more reasonable explanations exist. The Court of Chancery identified two—"a desire on the part of the Seller[s] (i) not to fight about the issue until after the Hospice Billing Actions were resolved and (ii) to litigate over the allocation of Escrowed Funds only after a consensual resolution could not be achieved." Order ¶ 23(b). Additional explanations include the

[14] Nearly all of the actions purportedly showing the Sellers' acquiescence occurred after the contractual limitations period already had expired. *See Salerno v. Servpro of Hockessin/Elsmere, Inc.*, 2003 WL 21350541, at *4 (Del. Super. May 19, 2003) (rejecting argument regarding waiver of statute of limitations because actions occurred after the limitations period had expired); A330−31; A336−37.

Sellers' desire to (i) learn whether HHS was likely to bring claims against them for their operation of the Company pre-Closing (*see* A160 (informing Sellers that the HHS subpoenas sought information beginning on January 1, 2005)) and (ii) ensure that they received a full release in any settlement (*see* A192 (referencing the Sellers' desire to participate in settlement negotiations); A330).

When these explanations are coupled with: (i) AccentCare's two-year delay to demand a sum certain (A194−95); (ii) the Sellers' informing AccentCare that they opposed a settlement payment involving the Escrowed Funds prior to AccentCare requesting a sum certain (A212 (FFL "is not supporting any contribution from the escrow" to settle the Hospice Billing Actions)); (iii) the Sellers' demonstration that AccentCare was not entitled to an indemnification payment even if its claims were timely (A210−16); (iv) the Sellers' informing AccentCare that its claims were time-barred only nine months after receiving a demand for a sum certain (A210−12); and (v) the Sellers' filing of the Complaint to enforce the limitations periods only ten months after receiving a demand for a sum certain (A012−A038)—AccentCare's allegations are clearly insufficient to plead acquiescence.[15] A335−36.

[15] The Court of Chancery did not make any inferences in the Sellers' favor and simply recognized that AccentCare's barebones allegations did not create a reasonable inference of unequivocal waiver of the contractual limitations period. *See* AB at 31−32.

AccentCare's burden to plead acquiescence was greatly increased by two provisions in the SPA. *See* Order ¶ 23(b); B42−43; B70−72. Section 13.16 of the SPA (the "No Waiver Provision") provides that "[n]o failure on the part of any party to exercise or delay in exercising any right hereunder shall be deemed a waiver thereof, nor shall any single or partial exercise preclude any further or other exercise of such right or any other right." A115 § 13.16. Section 13.21 of the SPA (the "Written Modification Provision") further provides that the SPA "may not be amended except by an instrument in writing signed on behalf of the Buyer, the Company and the Seller Representative." A117 § 13.21.

In response to these provisions, AccentCare first argues that acquiescence may be found through conduct even where a contract has a no waiver provision and a written modification provision, but AccentCare has not come close to pleading facts sufficient to meet the exacting standard for such a finding. *See* AB at 30 n.8. "[A]n oral contract changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document." *Reeder v. Sanford Sch., Inc.*, 397 A.2d 139, 141 (Del. Super. Ct. 1979); *see also Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1231 (Del. Ch. 2000) (requiring an "unambiguous and specific discussion of a modification"); B43−44.

The opinions cited by AccentCare bear no resemblance to this case. A336. In *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 29 (Del. 1972), acquiescence was found despite the presence of a written modification provision because plaintiff had purchased products under the revised pricing procedure without objection for 18 years. *See id.* at 29, 33−34. In *Good v. Moyer*, 2012 WL 4857367, at *5−6 (Del. Super. Ct. Oct. 10, 2012), the Superior Court denied a motion to dismiss an implied contract theory, despite the existence of a written agreement containing written modification and no waiver provisions, because plaintiff alleged (i) partial performance of the allegedly modified contract and (ii) the individual defendant "repeatedly represented" that the corporate defendant would fund the purchase price. *Id.* at *5−6. In contrast to those cases, the Sellers never indemnified AccentCare, nor did the Sellers or anyone else ever promise to do so.[16]

Second, AccentCare argues that the No Waiver Provision and Written Modification Provision do not increase AccentCare's burden to plead acquiescence. AB at 31 n.8. This argument violates the "cardinal rule" of contract interpretation that "a court should give effect to *all* contract provisions[.]" *See,*

[16] A third opinion cited by AccentCare, *Norberg v. Sec. Storage Co. of Washington*, 2000 WL 1375868 (Del. Ch. Sept. 19, 2000), did not involve a contractual relationship at all. In *Norberg*, acquiescence and waiver were found where plaintiff tendered his shares and accepted the merger consideration 17 months after he filed his complaint. *Id.* at *4–7.

*e.g.*, *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221 (Del. 2012), *as corrected* (July 12, 2012) (emphasis in original) (internal quotation marks and footnote omitted). However, AccentCare's interpretation gives the No Waiver Provision and Written Modification Provision no effect whatsoever on the parties' ability to modify the SPA and waive their rights and thus reads them out of the agreement. This Court will not adopt an interpretation that makes portions of the contract a "nullity." *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2017 WL 1046224, at *10 (Del. Mar. 20, 2017), *as revised* (Mar. 28, 2017). The Court of Chancery properly concluded that the parties intended these provisions to have effect and held that the Amended Counterclaims were devoid of "particularly plain and obvious" facts in support of acquiescence. Order ¶ 23(b); *see also In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2013) (rejecting acquiescence defense in part because the contract contained a no waiver provision).

### 3. AccentCare's New Arguments and Facts on Appeal Should Be Rejected

AccentCare now improperly argues for the first time (*see* Del. S. Ct. R. 8) that acquiescence is a fact-intensive inquiry that should not be decided on a motion to dismiss. AB at 29, 33–34 (citing *Julin v. Julin*, 787 A.2d 82, 84 (Del. 2001)). AccentCare's belated citation to a general principle in a post-trial decision that did not involve contractual indemnification or a statute of limitation does not provide

useful guidance here. Much more applicable is the Court of Chancery's decision in *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011). In *GRT*, plaintiff sought to enforce the provisions of a joint venture contract and require defendant to make modifications to a facility. The Court of Chancery dismissed the action because plaintiff did not file suit to establish a breach of a representation or warranty within the contractual limitations period. Importantly, the dismissal occurred despite plaintiff's allegation that defendant led plaintiff to believe during the contractual limitations period that defendant would modify the facility to comply with the joint venture contract.[17] *Id.* at *17; *see also id*. at *5; A328–32.

AccentCare's allegations in support of its argument that the contractual limitations period should be disregarded or tolled are much weaker than in *GRT*. Additionally, even fact-intensive equitable defenses can be resolved on a motion to dismiss in appropriate circumstances. *See, e.g.*, *In re Coca-Cola Enters., Inc.*, 2007 WL 3122370, at *4 n.30, *6 (Del. Ch. Oct. 17, 2007), *aff'd sub nom. Int'l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008) (granting motion to dismiss despite the "intensely factual" nature of laches).

[17] The *GRT* court addressed plaintiff's allegations in the context of equitable tolling and laches. The Amended Counterclaims likewise allege that the Sellers' purported acquiescence tolled the contractual limitations period. A255 ¶ 17; A259 ¶ 34. Thus, *GRT* is directly applicable on this point. *See* A328−29.

AccentCare also attempts to expand the allegations in the Amended Counterclaims through its opening brief on appeal by arguing that "the record fully supports the inference that the parties treated the indemnification claim as viable and not time-barred well after the Release Date." AB at 32. Even if this Court overlooks AccentCare's improper attempt to plead new facts in its brief,[18] the additional facts identified by AccentCare do not create a reasonable inference that the Sellers unequivocally approved of AccentCare's time-barred claims.

First, AccentCare selectively quotes from *FFL's Complaint* to argue that FFL "'attempted to participate in the defense of the Hospice [Billing Actions]' precisely because it was concerned that 'such claims may be the basis for indemnification.'"[19] AB at 32. FFL's Complaint actually alleges that "FFL attempted to participate in the defense of the Hospice Litigation—particularly with respect to allegations relating to conduct that occurred prior to the Closing of the SPA, *consistent with Accentcare's notification* that such claims *may be* the basis for indemnification." A020–21 (emphases added). FFL's Complaint nowhere

[18] This Court recently emphasized that it is "problematic" when a party attempts to expand its pleading on appeal and that "[u]ltimately, the allegations of the [party's pleading] are what are relevant to [this Court's] analysis[.]" *City of Miami Gen. Employees' & Sanitation Emps.' Ret. Trust v. Comstock*, 2017 WL 1093185, at *1 (Del. Mar. 23, 2017).

[19] AccentCare denied this allegation in its answer and fails to explain why this Court should consider disputed allegations in FFL's Complaint in evaluating the sufficiency of the Amended Counterclaims. *See* A229.

alleges that FFL supposedly "was concerned" that AccentCare was entitled to indemnification. Moreover, when AccentCare notified FFL on June 28, 2012 of the HHS investigation, it was possible that AccentCare would file suit to attempt to establish a breach of the Healthcare Law Representations before the expiration of the survival period on December 22, 2012. Monitoring the Hospice Billing Actions regarding challenges to the Company's pre-Closing activities also allowed FFL to know whether the Sellers might face claims in those proceedings for the actions they took pre-closing. The allegation of FFL's Complaint that AccentCare misquotes in its brief is simply insufficient to create a reasonable inference that "the parties treated the indemnification claim as viable and not time-barred well after the Release Date." AB at 32.

Second, AccentCare points to the Sellers' attempted participation in the settlement negotiations in October 2013 (well after the contractual limitations period had run). *See* AB at 32. However, the Sellers' desire to be involved in settlement negotiations does not create a reasonable inference that the Sellers would permit time-barred indemnification claims. Participation in settlement negotiations would allow them to advocate for a full release for any actions taken by the Sellers post-closing. Sellers also would be in a better position to communicate their belief that indemnification from the Escrowed Funds was unavailable. Since AccentCare did not permit the Sellers to participate in the

settlement negotiations, the Sellers were forced to communicate their position after the fact. *See* A212 (referencing 1/28/15 email stating that FFL "is not supporting any contribution from the escrow" to settle the Hospice Billing Actions).

Third, AccentCare argues that the parties' communications following March 2015 demonstrated acquiescence. AB at 32–33. Not so. AccentCare did not demand indemnification for a specified amount until April 2015. *See* A194–95. The Sellers already had informed AccentCare that they did not agree to the release of Escrowed Funds for the settlement of the Hospice Billing Actions. *See* A212. FFL informed AccentCare that its claim was time-barred by letter dated January 18, 2016 and filed the Complaint on February 19, 2016. *See* A038; A211. During the nine months between AccentCare's demand for indemnification in April 2015 and FFL's January 2016 letter, there were a handful of written and oral communications between the parties where the Sellers informed AccentCare that any amounts properly claimed by AccentCare would not exceed the indemnification deductible and requested more information regarding AccentCare's claims. A212–15. The Sellers' response was hindered by the material alterations AccentCare made to its calculations and theories of recovery. *Compare* A194–95, *with* A197–204, *with* A206–208. In any event, the parties' communications hardly reflect the Sellers' unequivocal approval for untimely indemnification claims, nor are they "wholly inconsistent" with the Sellers'

invocation of the contractual statute of limitation in January 2016.[20] Delaware courts are properly hesitant to allow legal claims to be brought after the relevant statute of limitation has run and there are no extraordinary circumstances here to permit the Amended Counterclaims to go forward. *See, e.g.*, *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 979–83 (Del. Ch. 2016) (summarizing the relationship between laches and statutes of limitations in the context of legal claims that seek equitable remedies).

#### 4. AccentCare Ignores the Statute of Limitations Found in 10 *Del. C.* § 8106(a)

On appeal, AccentCare makes its acquiescence arguments only in the context of the contractual limitations period. *See, e.g.*, AB at 28. AccentCare does not argue that the Sellers' purported acquiescence applies to the time limits under 10 *Del. C.* § 8106(a), which independently bars the Amended Counterclaims. B35;

[20] AccentCare's citation to *Oakview Treatment Ctrs. of Kansas, Inc. v. Garrett*, 53 F. Supp. 2d 1196, 1204–05 (D. Kan. 1999), (AB at 33), is inapposite and unpersuasive. *Oakview* addresses the accrual of an indemnification claim under Kansas law—holding that, at least for indemnification agreements such as the one at issue in that case, a cause of action for indemnification does not accrue until the indemnifying party refuses a particular payment that has become due. *Id.* at 1202. Delaware law is clear that a claim for breach of a Representation accrues at closing and a lawsuit alleging a breach of a Representation must be brought within the survival period for the Representation. *See, e.g.*, *GRT*, 2011 WL 2682898, at *6, *12. Because AccentCare never filed suit to establish a breach of a Representation during the survival period of the Healthcare Law Representations, AccentCare cannot meet that condition precedent for indemnification under the SPA.

B72. Delaware courts discuss the release of limitations periods created by statute in terms of waiver, and FFL is unaware of any Delaware decision applying acquiescence to 10 *Del. C.* § 8106(a). *See Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984), *on reargument* (Feb. 15, 1985) ("The statute of limitations is therefore a procedural mechanism, which may be waived."). Unlike acquiescence, waiver requires *intent* to waive. *See, e.g.*, *Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982). The facts identified by AccentCare certainly do not give rise to an inference that the Sellers *intended* to waive 10 *Del. C.* § 8106(a).

## III. THE SETTLEMENT CONSENT REQUIREMENTS IN SECTION 11.3(A) OF THE SPA DO NOT CREATE AMBIGUITY OR REQUIRE A RESORT TO EXTRINSIC EVIDENCE

### A. Question Presented

Whether the provisions in Section 11.3(a) of the SPA addressing the settlement of Third Party Claims create ambiguity in the SPA that precludes resolution on a motion to dismiss. B66−68; *see also* B36−37; A324−26.

### B. Scope of Review

See Argument § I.B above.

### C. Merits of the Argument

As explained above, Section 11.3(a) is a procedural provision that applies only if indemnification is available under Section 11.1(a). *See supra* at 13−14. Because AccentCare cannot meet the requirements for indemnification under Section 11.1(a), AccentCare attempts to transform Section 11.3(a) into an independent source of rights, or at least muddle the clear provisions of the SPA in the hopes of creating ambiguity.[21] One way AccentCare attempts to obfuscate the

[21] AccentCare asserts that the Court of Chancery found two "'equally' valid interpretations" of the SPA yet nevertheless ruled in favor of the Sellers. AB at 37 (citing Order at 12). The cited language is wrenched from Paragraph 23(b) of the Order, where the Court of Chancery determined that "the Seller's decision to permit $10,000,000 to remain in escrow after the Release Date" did not support a finding of acquiescence because that action was "equally consistent with a desire on the part of the Seller (i) not to fight about the issue until after the Hospice Billing Actions were resolved and (ii) to litigate over the allocation of Escrowed Funds only after a consensual resolution could not be achieved." AccentCare's bending of the facts to assert that the Order's "equally consistent" language had

plain meaning of the SPA is by arguing that the settlement provisions in Section 11.3(a) do not make sense under the Sellers' interpretation. AB at 36−37. Not so.

Throughout its brief, AccentCare conflates the term "Third Party Claim," as defined and used in Section 11.3(a) of the SPA, with "any claim brought by a third party." In so doing, AccentCare seeks to avoid the reality that a "Third Party Claim" under Section 11.3(a) arises only if indemnification is available under Section 11.1(a), which requires a finally determined breach of a Representation. *See supra* at 13−14; A325−26. When "Third Party Claim" is used appropriately, however, the purported inconsistencies regarding the settlement provisions in Section 11.3(a) are resolved.

Because a Third Party Claim results only after there has been a finally determined breach of a Representation, it is no surprise that the Sellers are responsible for funding the defense of such claims (through the Escrowed Funds that otherwise would go to the Sellers)—whether the actions are defended by the Seller Representative or AccentCare. *See* A093−94 § 11.3(a); A327−28. Similarly, it is no surprise that settlement of Third Party Claims defended by AccentCare requires the consent of, and a full and complete release for, the

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anything to do with the settlement consent requirement discussed in Section 11.3(a) of the SPA should significantly undermine AccentCare's credibility before this Court. *Compare* AB at 37, *with* Order ¶ 23(b).

Sellers.[22] If there has been an admitted or adjudged breach of a Representation, such consent and release rights are of obvious importance for the Sellers. Nevertheless, the Hospice Billing Actions are not "Third Party Claims" and the settlement provisions of Section 11.3(a) do not even apply.[23]

A second way AccentCare attempts to obfuscate the plain meaning of the SPA is by creatively speculating about the Court of Chancery's ruling that the procedures of Section 11.3(a) of the SPA do not operate unless there is an "indemnifiable claim" under Section 11.1(a). AB at 38−39. The end result of this speculation is AccentCare's brand new assertion that the Hospice Billing Actions qualify for indemnification under Section 11.1(a). AB at 39. Of course, AccentCare's position is directly contrary to its position before the Court of Chancery, where AccentCare asserted that Section 11.3(a) was unrelated to Section

[22] Although not dispositive for purposes of this action, the Sellers' position is that Section 11.3(a) requires *both* Seller consent *and* a full release before settlement of a Third Party Claim. *Compare* AB at 36−37, *with* A093 § 11.3(a).

[23] The parties have disputed whether the Sellers' consent was required for the settlement of the Hospice Billing Actions and whether such consent was ever given. FFL's Complaint alleges that, even if AccentCare otherwise was entitled to indemnification, it breached the SPA by failing to obtain the Sellers' consent for the settlement of the Hospice Billing Actions. *See* A025 ¶¶ 34−35; Del. Ct. Ch. R. 8(e)(2). AccentCare has affirmatively pleaded that the Sellers' consent was not required for the settlement of the Hospice Billing Actions. *See* A233 ¶ 34. This Court need address this dispute because the Court of Chancery properly held that no breach of the Healthcare Law Representations was established under Section 11.1(a) and the provisions of Section 11.3(a) never came into play.

11.1(a) and created independent rights. *See* A291; A324−25; A343; A363. AccentCare's argument fails on the merits as well.

As discussed above, Section 11.1(a) of the SPA creates indemnification obligations for the Sellers only with respect to Damages "related to or arising out of [ ] any breach of any representation or warranty made by the Company in Article 3[.]" A092 § 11.1(a); *see supra* at 13. The threshold question under Section 11.1(a) is whether there has been "any breach" of a Representation—not the scope of Damages that are indemnifiable following such breach.[24] *See* AB at 38−39. Importantly, indemnification is not available whenever a third-party claim is related to or arises out of any "purported breach," "asserted breach," or "potential breach" of a Representation.[25] Delaware law is clear that the mere assertion of breach by a party, or even government regulators, does not establish a breach of a representation. *See Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 560 (Del. Super. Ct. 2005) ("Plaintiffs appear to assume that the cost

[24] Thus, AccentCare's digression into the meaning of "claims" and "Liabilities" misses the point. *See* AB at 38−39. Similarly, AccentCare's argument that no statute of limitations condition applies to (i) Section 11.3(a) or (ii) the definition of Damages under Section 11.1(a), is misguided. *See* AB at 39−40. The statute of limitations governs the time by which AccentCare must establish a breach of a Representation, which is a prerequisite to indemnification under Section 11.1(a) and its accompanying procedures under Section 11.3(a). *See* A328.

[25] Contrary to AccentCare's assertion, it is AccentCare and not the Sellers who are attempting to rewrite the SPA. *See* AB at 40.

reports were prepared illegally because [the regulators] said they were prepared illegally during the audit and post-audit meetings. The statements and conclusions of the regulators, however, are not dispositive of the issue."); *aff'd*, 886 A.2d 1278 (Del. 2005); *GRT*, 2011 WL 2682898, at *5 (dismissing complaint for failure to establish a breached Representation despite plaintiff's assertion to defendant of breach). Therefore, indemnification under Section 11.1(a) is not available unless AccentCare demonstrates an actual breach of a Representation within the relevant limitations period, which AccentCare cannot do here.

## IV. DEFENSE COSTS ARE NOT SEPARATELY REIMBURSABLE ABSENT A PROVED BREACH OF A REPRESENTATION

### A. Question Presented

Whether the Court of Chancery properly held that Sellers are not obligated to reimburse AccentCare for the defense costs AccentCare incurred in the Hospice Billing Actions because no breach of a Representation was established within the contractual limitations period. B36−39; B58−65; A324–28.

### B. Scope of Review

*See* Argument § I.B above.

### C. Merits of the Argument

Buried deep within Section 11.3(a) of the SPA is the following sentence:

> If the Seller Representative (i) fails to notify the Buyer in writing or fails to assume the defense of the Third Party Claim on the terms provided above, in either case within thirty (30) days after receipt of the Buyer's notice of a Third Party Claim or (ii) is not entitled to assume the defense of such Third Party Claim in accordance with the second sentence of this Section 11.3(a),[26] the Buyer shall be entitled to assume the defense of such Third Party Claim at the expense of the Sellers (and such expenses shall constitute indemnifiable Damages)[.]

A093 § 11.3(a).

[26] Section 11.3(a) establishes three scenarios where FFL is not entitled to assume the defense of a Third Party Claim: (a) the claim could result in criminal liability for, or equitable remedies against, AccentCare; (b) AccentCare reasonably believes there is a conflict of interest between FFL and AccentCare with respect to the claim; or (c) the claim could result in Damages exceeding the Escrowed Funds available for indemnification. A093 § 11.3(a).

AccentCare asserts that the foregoing sentence is a "separate covenant" by the Sellers to reimburse AccentCare for its costs and expenses in defending claims like the Hospice Billing Actions, regardless whether there has been an established breach of a Representation. *See* AB at 41. However, this sentence explicitly references the reimbursement triggered by the defense of a "Third Party Claim," which as discussed above does not arise unless there has been a finally determined breach of a Representation. *See supra* at 36−37. The sentence also directs that these defense costs "shall constitute indemnifiable Damages"—a clear reference to the indemnification obligations created by Section 11.1(a). Order ¶ 20(c); B37. Moreover, this sentence is sandwiched in the procedural provision that applies only when indemnification is available under Section 11.1(a). *See supra* at 13−14; B36−37; B57−58.

If that were not enough, this Court rejected a substantially identical argument in *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 819–825 (Del. 2013). *See* B37−38; B62−64. In that case, the party seeking reimbursement of defense costs argued that a procedural provision of a merger agreement "impose[d] an independent duty to pay defense costs that [was] separate from and broader than the duty to indemnify." *Winshall*, 76 A.3d at 820 (quotation marks and footnote omitted); *see also Winshall*, 76 A.3d at 821. This Court rejected the argument for three reasons: (1) the plain language of the merger agreement demonstrated that

payment of defense costs was dependent on the right to indemnification for breach of a representation; (2) untethering the payment defense costs from indemnification would put the indemnifying party on the hook for all claims, even frivolous ones; and (3) the proposed interpretation conflated the concepts of indemnification and advancement. *See id.* at 821–22. AccentCare utterly fails in its attempts to distinguish *Winshall*.

This Court's first, plain language rationale for rejecting the defense costs argument in *Winshall* was based on two provisions. First, the procedural paragraph at issue in *Winshall* was limited to claims for which the buyer "may request indemnification pursuant to [the indemnification provision]." *Id.* at 821. Section 11.3(a) of the SPA contains nearly identical language and limits itself to claims "for which the Buyer may seek indemnification hereunder." A093 § 11.3(a). AccentCare does not even attempt to argue that there is a meaningful difference between these formulations. Second, the procedural provision in the *Winshall* merger agreement provided that defense costs or settlement payments would be "at the expense of the applicable indemnifying parties." *Winshall*, 76 A.3d at 821. AccentCare argues that the SPA is materially different by making the defense of Third Party Claims "at the expense of the *Sellers*" rather than "at the expense of the applicable *indemnifying parties*." *See* AB at 42. However, Section 11.1(a) provides that "each Seller" is responsible for indemnification in the event

of a breached Representation, so the reference to "the Sellers" in Section 11.3(a) is the equivalent of the *Winshall* merger agreement's reference to the "applicable indemnifying parties." B60−62; A326−17. Furthermore, immediately after stating that defense costs for a Third Party Claim are the responsibility of "the Sellers," Section 11.3(a) explicitly ties defense costs to Section 11.1(a) by stating that these costs "shall constitute indemnifiable Damages." A093 § 11.3(a); *see also* A363.

AccentCare also fails to distinguish the second rationale of *Winshall*—that divorcing defense costs from a breach of a Representation would put the sellers on the hook for defense costs for all claims brought by third parties, including frivolous claims or claims unrelated to the condition of the company at the time of closing. *See Winshall*, 76 A.3d at 821. AccentCare weakly argues that its interpretation of the SPA requires the Sellers to reimburse defense costs only in "defined and limited circumstances" (AB at 43), but there is nothing limited about the payment obligations under AccentCare's proposed interpretation. FFL is not entitled to assume the defense of a Third Party Claim if the claim simply "could result" in equitable remedies against the Company. A093 § 11.3(a). Thus, in AccentCare's world, the Sellers are required to pay AccentCare's defense costs in any action where a third party requests an injunction or other equitable remedy. Like the merger agreement in *Winshall*, there is no requirement that these claims be non-frivolous and cases seeking equitable remedies are often frivolous. *See In*

*re Trulia, Inc. S'holder Litig*., 129 A.3d 884, 891−92 (Del. Ch. Jan 22, 2016) (litigation seeking injunctive relief "far too often . . . serves no useful purpose for stockholders [and] serves only to generate fees for certain lawyers"). FFL also is not entitled to assume the defense of a Third Party Claim if *AccentCare* determines there is a conflict of interest between AccentCare and FFL. A093 § 11.3(a). Accordingly, AccentCare's interpretation is sweeping and would subject the Sellers to broad reimbursement obligations untethered to any established wrongdoing by the Sellers. "If the parties intended to require the [Sellers] to reimburse [AccentCare] for the costs of defending every [ ] claim regardless of its merit, they could have used appropriate language to accomplish that result." *Winshall*, 76 A.3d at 821–22. The parties did not do so here.

AccentCare also fails to address the third rationale of *Winshall*—that divorcing defense costs from the requirements for indemnification would create an independent advancement right that finds no place in the language of the parties' agreement. *See id.* at 822. Because Damages under the SPA are "indemnifiable" rather than "advanced," those costs may be recovered only if AccentCare satisfies the prerequisites for an indemnification claim. *See id.* (an "indemnify and hold harmless" clause "does not confer a right of advancement"); B36−39; B57−58.

AccentCare's final argument is that it would be "absurd" to withhold reimbursement of defense costs if AccentCare succeeded in defending a third-party

suit. AB at 43–44. Not so. In the SPA, the Sellers agreed to indemnify AccentCare only if (i) the Sellers or the Company breached a Representation and (ii) breach was established before the Representation expired. The Sellers did not agree to indemnify AccentCare against all third party claims brought post-Closing. Accordingly, it is completely reasonable that the Sellers would not accept responsibility for defense costs in a third-party proceeding where it is determined that there was no wrongdoing.[27] It likewise is completely reasonable that the Sellers would not accept responsibility for defense costs in any third-party proceeding brought beyond the survival period of the relevant Representation because that was the allocation of risk agreed to by the parties. *See supra* at 18−20. The Sellers are not AccentCare's insurer.

[27] AccentCare misunderstands the Court of Chancery's reference to indemnification claims being "reasonably conceivable." *Compare* AB at 44, *with* Order ¶ 21(a). The Court of Chancery was referencing well-established Delaware law that a complaint will survive a motion to dismiss if it sets forth claims that are "reasonably conceivable." *See, e.g.*, *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

## CONCLUSION

For the foregoing reasons, FFL respectfully requests that this Court affirm the Order of the Court of Chancery dismissing the Amended Counterclaims and AccentCare's purported "recoupment defense."

*/s/ Kevin G. Abrams*
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