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IN THE

Supreme Court of the State of Delaware

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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

As demonstrated in AccentCare's Opening Brief ("AB"),[1] the Court of Chancery improperly dismissed AccentCare's recoupment defense and counterclaims by misapplying, or failing to apply, Delaware law concerning recoupment, acquiescence in modification of the statute of limitations, and interpretation of ambiguous contract terms. FFL only reiterates much of the Court of Chancery's flawed analysis or ignores its errors altogether.

As to recoupment, the decision below must be reversed because it relied upon a misapplication of the concept of affirmative recovery that is inconsistent with long-established jurisprudence concerning recoupment. FFL simply repeats the erroneous concept of "affirmative" recovery that the court below misapplied. FFL's other arguments, such as its concern with risk-allocation, have no precedent to support them and would altogether eliminate this defense.

As to acquiescence, FFL fails to explain the error of the court below in using an inference that actually favored AccentCare to justify dismissal. FFL even compounds that error by asking this Court to adopt what it deems to be "[n]umerous more reasonable explanations." FB 24. However, as is well-established, inferences that favor the moving party have no place in adjudication of

[1] FFL's answering brief is referred to as "FB". All other capitalized terms have the same meaning as defined in AccentCare's Opening Brief.

a motion to dismiss. Giving AccentCare the benefit of all reasonable inferences as the non-moving party, this Court should find that FFL's failure to demand release of the Escrow Funds for three years past the limitations date, its participation in the Hospice Billing Actions, and its multiple communications contesting the amount of indemnification without any assertion of untimeliness, are sufficient for inferring FFL's acquiescence in extending the limitations period.

Next, FFL misreads Section 11.3(a) and seeks to avoid its liability for settlement payments by claiming there must be an "admitted or adjudicated breach of a Representation" to support indemnification. However, the SPA does not include words such as "adjudicated breach" or "demonstrated breach" or any of the other extra modifiers that FFL seeks to erect as barriers to its liability for indemnification. The litigation-related terms in Section 11.3(a) would have no meaning if it did not come into play until an "actual breach" is "established".

Finally, FFL cannot deny that significant terms in the SPA demonstrate an intent to separate defense cost liability from indemnification liability. The use of the term "Sellers", rather than "Indemnifying Persons", to define responsibility for defense costs has significance that cannot be wished away. The underlying agreement in this case has many significant provisions that were not present in the *Winshall* decision on which FFL relies.

ARGUMENT

I. FFL FAILED TO DEMONSTRATE THAT A RECOUPMENT DEFENSE IS UNAVAILABLE.

FFL seeks to escape the recoupment defense in multiple ways. It seeks to perpetuate the legal error made by the court below concerning the meaning of an "affirmative recovery". It reiterates the specious argument that the Escrow Funds should be viewed as "property" belonging to the Sellers. It cites a case involving Indian tribe sovereignty. It even argues that the very statute of limitations to which recoupment is a recognized defense is a reason to deny the defense.

Like the court below, FFL relies heavily on the idea that a recovery from the Escrow Fund should be considered an "affirmative" claim rather than a "defensive" one because – on a mechanical level – it would involve a flow of money to AccentCare. However, under longstanding law applicable to recoupment, the terms "affirmative" and "defensive" have nothing to do with the source or flow of money. Case authority (which FFL does not attempt to distinguish) holds that "defensive" denotes a defense that can only reduce, but not exceed, the recovery plaintiff seeks. *See W. J. Kroeger Co. v. Travelers Indem. Co.*, 541 P.2d 385, 388 (Az. 1975) ("Recoupment is an equitable doctrine and, therefore, the claim of the defendant can be used to reduce or to eliminate a judgment, but it cannot be used for purposes of affirmative relief"); *Billingsley v. Kelly*, 274 A.2d 113, 117 (Md. 1971) (same); *Household Consumer Discount Co.*

v. Vespaziani, 415 A.2d 689, 694 n.8 (Pa. 1980) (same). Since AccentCare's recoupment defense would only reduce the amount of FFL's recovery, it is not an "affirmative" claim.

Equally meritless is FFL's contention that the Escrow Funds should be viewed as "property" of the Sellers. FB 17. This is a blatant distortion of the meaning of property. "An important incident of the ownership of property is its transferability." *Tracey v. Franklin*, 67 A.2d 56, 58 (Del. 1949). The Escrow Agreement does not permit the Sellers to transfer or dispose of the Escrow Funds. Indeed, some or all of the Escrow Funds can go to the Buyer. The Sellers do not have a property interest in these monies just because they hope that – after summing up the liabilities for which the Escrow Account was created – some of the Escrow Funds may go to them.

Moreover, the relief sought by AccentCare cannot be "affirmative" if the monies in the Escrow Account are a form of property. To the extent that AccentCare has a right to some of the Escrow Funds, it too has a property interest under FFL's view of property. By pleading the defense of recoupment, AccentCare is *defending* its own property against FFL's potential recovery.[2]

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[2] As noted by FFL in its Answering Brief (FB 17), AccentCare's Opening Brief (AB 26) states that recoupment would be "a recovery from the plaintiff". It should have said that recoupment would reduce the recovery by the plaintiff – the normal consequence of recoupment.

FFL also asserts that recoupment cannot apply to funds in a third-party escrow account. Its putative case authority is limited to *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F. Supp. 3d 888 (D.S.D. 2016). However, the question in *Gerlach* was whether the plaintiff Indian tribe had waived sovereign immunity in a case about sales tax money that had been paid into an escrow account *pendente lite*. The court held that, in the absence of such a waiver, recoupment could not be applied. It did not hold that recoupment is unavailable in any dispute involving a third-party escrow account. *Gerlach*, 162 F. Supp. 3d at 897.

Equally erroneous is FFL's contention that the claim for injunctive relief makes recoupment inapplicable. FB 16. The parties' pleadings show that they are both making monetary claims and that an injunction is only a backstop in case the opposing party does not provide the necessary approval documents *See* A37 (Compl. ¶¶ 82-83) (after reciting FFL's demand for declaratory relief, FFL's complaint states that "FFL also seeks an injunction ordering AccentCare to give all necessary approvals . . ."); A264 (FAC ¶ 48) (after reciting AccentCare's demand for declaratory relief, AccentCare's counterclaims state that "AccentCare also seeks an injunction ordering FFL to give all necessary approvals . . ."). These backstops do not change the nature of the parties' dispute: it remains a dispute over competing claims for money due.

Next, in a masterpiece of circular reasoning, FFL contends that it has no cross-obligations under the SPA because of the two-year limitations period in the SPA. FB 18-19. In other words, the recoupment exception cannot be applied because it is barred by the very limitation period at issue. If this were the law, recoupment would never be the exception to the statute of limitations that has been recognized by numerous courts, including this one. FFL also asserts that it has no cross obligations to AccentCare under the SPA – *i.e.,* that it will defeat AccentCare's recoupment defense. FB 19. However, the availability of recoupment does not turn on the plaintiff's belief that it will be able to defeat the defense.

FFL further contends that a recoupment defense would change the parties' allocation of risk. This argument goes too far, as every recoupment defense undercuts the risk allocation that existed when a contract was entered into. Moreover, these parties did not allocate all the risks related to indemnification. Neither the SPA nor the Escrow Agreement allocates the risks arising if the Escrow Agent fails to release funds at the Final Release Date as provided for in ¶3(b) of the Escrow Agreement. A138.

FFL's own conduct evidenced disregard of any risk-allocation mechanism it now perceives. By failing to demand that the Escrow Agent release the remaining Escrow Funds at any time after the Final Release Date, FFL knowingly assumed

risks that were not provided for in the SPA or the Escrow Agreement. This case does not have the clear allocation of risk in the case cited by FFL. *See Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 147 (2d Cir. 2002) ("underlying contract . . . established separate and distinct remedies for discrete portions of that transaction . . . .").

Finally, FFL asserts that there was "gamesmanship" because AccentCare "refuse[d] to permit the release of escrowed funds". It asserts that AccentCare "violated the agreements". FB 20. But there is no provision in either document that imposed an obligation on AccentCare to consent to release of the Escrowed Funds – and FFL cites none. AccentCare was well within its rights not to volunteer to release the Escrow Funds when the parties could not reach agreement on indemnification. This is particularly so because the SPA limits indemnification claims to the funds in the Escrow Account and forecloses any recourse against the Sellers for indemnification. A95.

FFL cites the policy of "preventing a plaintiff from waiting to assert a claim until after a defendant's counterclaim is barred." FB 20. This policy applies here. FFL waited to seek a declaratory judgment until long after the limitations period for AccentCare's indemnification counterclaim expired. Whether it did so consciously is not at issue. Rather, the "substantial justice" principle set forth in

the case cited by FFL is at issue. In *Collard v. Nagle Const., Inc.*, 57 P.3d 603 (Ct. App. Utah 2002), the court held:

> offset and recoupment are merely mechanisms that may be used to ensure substantial justice if a party asserts a counterclaim that is barred by the statute of limitations, ...

Id. at 609 (citation omitted). Substantial justice requires that AccentCare be able to assert a claim for FFL to honor its indemnification obligations before receiving the balance of the Escrow Funds. A party to a single integrated transaction should not "enjoy the benefits of the transaction without meeting its obligations." 31 Williston on Contracts § 78:106 (4th Ed. 2007) (citations omitted).

II. FFL'S CLAIMS OF COMPETING INFERENCES DO NOT CURE THE LOWER COURT'S ERROR IN REJECTING THE INFERENCES THAT SUPPORT ACQUIESCENCE.

FFL ignored any limitations issue for three years while participating in the defense of the Hospice Billing Actions, contesting the amount of indemnification owed, and ignoring the Final Release Date for the Escrow Funds. This conduct is inconsistent with FFL's current attempt to invoke a limitations bar. It is more than reasonably conceivable that the Sellers acquiesced in an extension of the limitations period pending the resolution of the Hospice Billing Actions. Yet, the court below dismissed AccentCare's acquiescence defense, at the motion to dismiss stage, by relying on factual inferences *that actually favored AccentCare.* FFL compounds that error by asking this Court to affirm based on competing inferences.

The court below opined that AccentCare's acquiescence allegations demonstrated the parties' desire not to litigate their indemnification liability immediately. Order 12; AB 31. This postulated desire fully supports AccentCare's view that Sellers acquiesced in extending the limitations period. Yet, the court below curiously found these facts to support an inference against AccentCare. Order 12; AB 31. FFL fails to explain this plain error.

Rather, FFL tries to bootstrap around the "reasonably conceivable" standard. First, it ignores controlling Supreme Court precedent and relies on the Court of

Chancery's use of the word "unequivocal" to claim a standard that effectively requires AccentCare to disprove all other reasonable explanations. FB 22 (applying standard from Court of Chancery's decision in *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012), rather than this Court's decision in *Klaassen v. Allegro Development Corp.*, 106 A.3d 1035, 1047 (Del. 2014)); *see also* FB 22-25 ("unequivocal" used six times). This Court does not require that a party against whom acquiescence is asserted act in an "unequivocal" manner. *Klaassen*, 106 A.3d at 1047. Moreover, the standard on a motion dismiss remains: all reasonable inferences are drawn in the non-movant's favor. FFL should not be permitted to alter this pleading standard by contorting the applicable case law, especially given its concession that the *Celera* and *Klaassen* acquiescence standards are "substantially" similar. FB 22.[3]

Second, FFL attempts to argue for a higher pleading burden by referencing the SPA. FB 26. Nothing in the SPA or the case law changes the pleading

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[3] FFL falsely claims that AccentCare "relied" on *Celera* below. FB 22 (citing A347-48). AccentCare merely indicated that, using the "FFL cite[d] case authorities," including *Celera*, AccentCare properly pled acquiescence, a position AccentCare still advocates. A347; *see also* AB n.9. FFL does not address AccentCare's claim that *Celera* does not affect the applicable pleading standard but does argue *Celera* articulates the more "useful" standard because it stresses the "voluntary" nature of the repudiation. FB n.13. Because *Klaassen* teaches that "conscious intent to approve the act is not required", emphasis on the "voluntary" nature of the reputation is misplaced. 106 A.3d at 1047.

standard on a motion to dismiss.[4] Moreover, as FFL does not seem to contest, Sections 13.16 and 13.21 do not preclude a claim of post-closing acquiescence by conduct. *See, e.g., Good v. Moyer*, 2012 WL 4857367, at *6 (Del. Super. Oct. 10, 2012) ("[A] non-waiver clause in a contract may itself be waived through knowledge, coupled with silence and conduct inconsistent with the terms of the contract"). FFL's assertion that the no modification clause would be rendered a nullity also fails. *See* FB 28. If FFL's argument were sustained, acquiescence could never be recognized, which is contrary to Delaware law.

FFL then relies improperly on competing inferences that do not favor AccentCare. *See* FB 24-25 (raising "additional explanations" to AccentCare's proffered inferences and arguing that "[n]umerous more reasonable explanations exist."). It argues that its conduct was consistent with receiving a full release and determining whether HHS was likely to bring claims against FFL. FB 25; *see also id.* at 31-33.[5] Even if the Court could consider these contrary inferences at this

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[4] FFL cites two summary judgment decisions – *Reeder v. Sanford Sch., Inc.*, 397 A.2d 139, 141 (Del. Super. 1979) and *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1231 (Del. Ch. 2000). Neither addressed the pleading standard and neither dealt with acquiescence. *In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2013), also cited by FFL, did not adjudicate the acquiescence claim, yet alone pronounce a higher pleading standard.

[5] In raising these "additional explanations," FFL impermissibly cites its own allegations. *See* FB at 25. AccentCare may rely on FFL's admissions but FFL may not. *See, e.g., Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201-02 (Del. (cont'd.)

point (which it cannot), neither of these claimed rationalizations explains FFL's failure to demand release of the Escrowed Funds. A reasonable inference from this conduct is that FFL viewed the Escrow Funds as remaining available to meet its indemnification obligations.[6]

Although FFL claims otherwise (FB 28, 30), acquiescence was an issue raised and preserved below (even though FFL only first addressed it in a footnote). B42-43. AccentCare also has not asserted facts in its brief without support; it has marshalled those facts from allegations already in the record. *See infra*, n.5.

FFL's reliance on *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011), is also misplaced. *See* FB 29-31. That case, as FFL admits (FB n.17), addressed equitable tolling and the discovery rule. 2011 WL 2682898, at *7. Neither is at issue here. Moreover, the *GRT* court's

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(cont'd.)
2008) (judicial admissions in pleadings binding against party upon whom they operate); *Krauss v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889, at *4 (Del. Super. Apr. 9, 2014) (motion to dismiss decision holding that a "party may at any and all times invoke the language of his opponent's pleading on that particular issue as rendering certain facts indisputable") (citation omitted).

[6] The assertion that FFL might only have been trying to secure a full release is not viable since the SPA required AccentCare to secure such a release. A92-93 (SPA § 11.3(a)). FFL also relies on its January 28, 2015 e-mail, which is not in the record. FB 25 & 32 (citing A212, a 2016 letter that refers to this e-mail). It is entirely conceivable that FFL had already acquiesced to a modification of the time to bring suit by the time this e-mail was sent. Even if this e-mail were to signify an end of FFL's acquiescence, AccentCare's counterclaim was timely filed.

discussion was dicta as the Court noted that plaintiff could have argued that those doctrines applied but did not. *Id.*

FFL's Complaint alleges that it "attempted to participate in the defense of the Hospice Litigation . . . consistent with AccentCare's notification that such claims may be the basis for indemnification." A20-21 (Compl. ¶ 22); *see also* A212. FFL admits that such participation "was consistent with the understanding that FFL's interest in the matter—and Seller's exposure," was tied to its possible "indemnification obligation." A21 (Compl. ¶ 24). Yet, FFL argues in its brief that AccentCare is wrong to infer from this quoted language that FFL may have participated in the Hospice Billing Actions out of "concern" for indemnification. FB 31 (citing AB 32). AccentCare is allowed inferences in its favor on a motion to dismiss and is not confined to FFL's crabbed interpretation. Moreover, FFL's contention that such participation may "also" have served another purpose (FB 31) is an issue for discovery, not a basis to dismiss the Counterclaims.[7]

[7] FFL's reliance on *Salerno v. Servpro of Hockessin/Elsmere, Inc.*, 2003 WL 21350541, at *4 (Del. Super. May 19, 2003), to assert that only pre-release date conduct is relevant, is misplaced. FB n.4. Here, AccentCare pled allegations demonstrating Sellers' acquiescence *prior* to the Release Date. Moreover, *Servepro* did not involve acquiescence and the issue addressed presumably was whether detrimental reliance or prejudice existed. *Id.* Prejudice or detrimental reliance are not required elements for acquiescence. *Klaassen*, 106 A.3d at 1047.

FFL claims *Oakview Treatment Centers of Kansas, Inc. v. Garrett*, 53 F. Supp. 2d 1196, 1204-05 (D. Kan. 1999), is distinguishable because it involves the issue of accrual. FB n.20. That is a distinction without difference. *Oakview* held that a similar fact pattern, including participation in defense of an action consistent with duties under an indemnification agreement and otherwise remaining non-committal about intent to honor those duties, supported a reasonable conclusion defendant did not want to address the issue of indemnification during the pendency of the underlying action. Likewise, the Court should find FFL's actions inconsistent with subsequently invoking a limitations bar.

Finally, FFL wrongfully claims that AccentCare failed to address 10 *Del. C.* § 8106(a), which negates acquiescence. FB 33-34. Not so. *See* AB at 28, 31, 34 (referring to acquiescence overcoming the "statute of limitations"); *see also id.* at 33 (arguing that Sellers' actions were inconsistent with invoking a limitations bar). Acquiescence is equally applicable whether the limitation is found in a contract or a statute.

* * *

The facts alleged here, including Sellers' failure to demand release of the Escrowed Funds at the end of the two-years covered by the Escrow Agreement (inferring they would be available later for indemnification and defense costs), participation in the Hospice Billing Actions (inferring a concern for

indemnification obligations), and months of communications contesting the amount of indemnification without mention of a timeliness issue (inferring that some indemnification would be paid regardless of the timeliness of the demand), are more than sufficient to demonstrate acquiescence at the pleading stage. Moreover, the inferences that the Court of Chancery articulated support AccentCare's view that Sellers acquiesced in extending the limitations period so that the allocation of the Escrowed Funds could be litigated after the Hospice Billing Actions were resolved. The Court of Chancery's decision to reject the allegations of acquiescence was in error and should be reversed.

III. FFL MISREADS SECTION 11.3(a) OF THE SPA IN ORDER TO AVOID ITS RESPONSIBILITY FOR SETTLEMENTS OF THIRD PARTY CLAIMS.

Since Section 11.3(a) provides for Third Party Claims to be settled without Seller consent or with Seller consent, it is logical to infer that the Sellers reserved a Seller-approval requirement for settlements for which they accepted indemnification liability. FFL does not claim that this is an unreasonable interpretation. Instead, it contends that Section 11.3(a) does not apply unless AccentCare demonstrates an actual breach of a Representation . . . ." FB 39. Quite to the contrary, however, Section 11.3(a) applies to numerous circumstances that do not require any breach of a Representation, let alone an "actual breach".

Section 11.3(a) applies whenever AccentCare gives FFL notice of an "Action". A92-93. An "Action" includes a demand or investigation; it is not defined as a verdict or judgment. A97. Upon receiving notice of a demand, investigation or suit by a third party for which AccentCare "may seek indemnification", the parties must determine whether FFL or AccentCare will assume the defense of the Action. A93. This obligation applies far before any breach of a Representation is established by the third party claimant and indeed, before any case is filed.

Section 11.3(a) continues to apply after defense responsibility is determined. It provides for Seller participation in the defense of a Third Party Claim when the

defense is assumed by the Buyer, a role which by definition does not require establishing a breach. A93. It also limits the manner in which either the Seller or the Buyer may settle a Third Party Claim. A93. Again, Section 11.3(a) applies whether or not a breach has been established. None of these provisions could appear in Section 11.3(a) if that Section only applied after an "actual breach" of a representation was established.

Ignoring all of these provisions in Section 11.3(a), FFL posits that Section 11.1(a) makes Section 11.3(a) inapplicable unless there is a "finally determined breach of a Representation." FB 36. As we have just shown, however, Section 11.3(a) is not so limited. No matter how many times FFL makes an assertion that a breach must be "demonstrated", the words "finally determined breach", "proven breach", or "demonstrated actual breach", do not appear in Section 11.1(a). Instead, Section 11.1(a) twice states that mere "claims" relating to or arising from a breach are indemnifiable. Since a claim can be a cause of action or a demand for payment under cases decided by this Court,[8] Section 11.1(a) cannot be limited to cases in which an "actual breach" of a representation has been established.

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[8] *Citigroup Inc. v. AHW Inv. Partnership*, 140 A.3d 1125, 1132 (Del. 2016) (cause of action a claim); *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1109 (Del. 2007) (demand for payment as well as cause of action treated as synonymous with claim).

FFL's insistence upon an "actual breach" limitation would nullify the multiple terms in Section 11.3(a) concerning litigation incidents and would violate the well-established rule that all terms in a contract are to be given meaning. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will . . . give each provision and term effect, so as not to render any part of the contract mere surplusage. . . ."). The existence of provisions concerning settlement approval are further evidence that the parties did not intend Section 11.3(a) to apply only to a "finally determined breach" of a Representation.

FFL's citation to the *GRT* decision concerning breach does not help its argument. The parties' contractual arrangement in *GRT* was patently different from the provisions at issue here:

> The contract unambiguously sets forth a three-step liability scheme, the first of which requires that the investor sue and prove a breach of the operator's Design Representations. That first step is essential and cannot be skipped. . . . If, after the investor has proven that the operator has breached its Design Representations (step one), the operator's contractual remedial obligation to close the design gap is triggered (step two), but the operator then fails to comply with a court's remedial order, step three of the contract's liability scheme is traversed, at which point the investor can sue the operator for a second breach of contract and seek an order of specific performance.

2011 WL 2682898 at *2. Here, there is no multi-step liability scheme and, at most, there is an ambiguous relationship between Sections 11.1(a) and 11.3(a).

FFL's contention (FB n.21) that AccentCare relied on a lower court statement about acquiescence to support its argument concerning competing contract interpretations and settlement consent is incorrect. Unfortunately, at page 37, the Opening Brief incorrectly cited page 12 of the Order instead of page 10. It was entirely apparent, however, that AccentCare's reference was to page 10 of the Order, particularly because AccentCare accurately summarized the Court of Chancery's settlement consent-holding.

As noted above, FFL does not dispute AccentCare's observation that Section 11.3(a)'s consent requirement for settlements would be irrelevant if the parties did not expect the Sellers to be liable for consented-to settlements. Instead, FFL notes the obvious point that it would have an interest in obtaining a release if there has been "an admitted or adjudged breach of a Representation." FB 37. This is irrelevant because it does not pertain to Seller approval for settlements.

The Court of Chancery erred by accepting an interpretation of the role of settlement consent that favored the moving party instead of the interpretation that favored the non-moving party. FFL does not attempt to distinguish this Court's holding in *VLIW Tech., LLC v. Hewlett-Packard Co.,* 840 A.2d 606, 615 (Del. 2003), that where contract provisions are "reasonably or fairly susceptible of different interpretations" a motion to dismiss must be denied. That reasoning applies here and requires that the Court of Chancery's decision be reversed.

IV. FFL HAS NOT SHOWN THE SPA'S DEFENSE COST PROVISIONS IN THIS CASE TO BE INAPPLICABLE OR OVERBROAD.

FFL struggles to deny the import of significant terms in the SPA that demonstrate an intent to separate defense cost liability from indemnification liability. First, Section 11.3(a) of the SPA places defense cost liability on the "Sellers", not on the "Indemnifying Persons". FFL claims that this makes no difference because each Seller is responsible for indemnification under Section 11.1(a). FB 42. It does not follow, however, that the Sellers are merely the equivalent of "Indemnifying Persons". The Sellers are the "equity holders" of Guardian Home Care Holdings, Inc. shares listed in Schedule 11.1 of the SPA. A47, A133. They have multiple responsibilities under the SPA (*e.g.,* A50, A111), including covering certain defense costs under Section 11.3(a)). By providing for "the Sellers" to cover defense costs only when they are disqualified from defending a Third Party Claim, the parties made these defense costs reimbursable without regard to indemnification liability. Had the parties intended the Buyer to be able to recoup these defense costs only under Section 11.1(a), they would have used the term "Indemnifying Person" (defined in Section 11.3(b)), rather than specifying that payment of defense costs was at the expense of "the Sellers." This choice of words matters. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489 at *5 (Del. Ch. June 21, 2012) (use of words "survive" and "expire" in

different parts of agreement "demonstrates that the parties knew the difference between the terms 'survive' and 'expire'. . . .").

Contrary to FFL's contention (FB 42-43), placing liability on the Sellers *qua* Sellers does take this case out of the holding in *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). In *Winshall*, the Court held that the defendants were "not 'applicable indemnifying parties' unless they had a duty to indemnify." *Id.* at 821. In contrast, Section 11.3(a) of the SPA imposes defense cost liability on "the Sellers" whether or not they have a duty to indemnify. As noted above, this choice of words cannot be disregarded. The parties could readily have used the term "Indemnifying Person" had they intended the defense cost responsibility in Section 11.3(a) to be contingent on a right to indemnification for the underlying claim.

Second, FFL seeks to rely on the two words "indemnifiable Damages" in the parenthetical clause in Section 11.3(a):

> [If FFL] is not entitled to assume the defense of such Third Party Claim in accordance with the second sentence of this Section 11.3(a), 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) . . . . (emphasis supplied).

By isolating the two words "indemnifiable Damages" in the parenthetical phrase and ignoring the rest of the sentence (FB 41), FFL seeks to give these two words far more weight than they can bear. The parenthetical phrase containing the words "indemnifiable Damages" does not qualify the promise to pay defense costs that

precedes it. Instead, it adds to that promise with the conjunction "and". FFL's interpretation would require replacing the word "and" at the beginning of the parenthetical phrase with this: "but only if such expenses constitute indemnifiable damages recoverable under Section 11.1(a)." However, the parenthetical does not say that Section 11.3(a) defense costs are only recoverable in an indemnification action under Section 11.1(a). The drafters of the SPA gave the Buyer a right to treat Section 11.3(a) defense costs as "indemnifiable Damages", but did not impose any obligation to do so.

At a minimum, the juxtaposition of the parenthetical phrase and the language that precedes it results in two competing interpretations. "Contract language is ambiguous if it is reasonably susceptible of two or more interpretations or may have two or more different meanings." *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003) (citations omitted). FFL asserts that this clause limits recovery of defense costs to cases where those costs themselves are "indemnifiable Damages". AccentCare has shown that the more natural reading is that the parenthetical added a right to have defense costs treated as "indemnifiable Damages" but not an obligation to do so. Because this provision is open to more than one reasonable interpretation, dismissal is not warranted. *VLIW Tech.*, 840 A.2d at 614-15.

FFL claims that the fee reimbursement that Section 11.3(b) calls for constitutes advancement, which *Winshall* disallowed. FB 44. This argument rings hollow because AccentCare is not seeking advancement of its defense costs from the Sellers subject to a potential right of repayment.

FFL returns once again to the claim that "a finally determined breach of a Representation" is a prerequisite to any liability under Section 11.3(a). FB 41. This insistence is misplaced for the reasons shown above: there is no clause that contains the "finally determined breach" limitation that FFL seeks to add. Rather, as shown in Part III, Section 11.3(a) is replete with provisions that apply at the outset of litigation by third parties – whether or not a breach of a representation has been "finally determined". Even assuming Section 11.3(a) is qualified by Section 11.1(a), the indemnification responsibility in Section 11.1(a) applies to "claims", a term that includes "demands" and investigations. FFL never explains how indemnification liability with respect to demands and investigations can be squared with its "finally determined breach" theory.

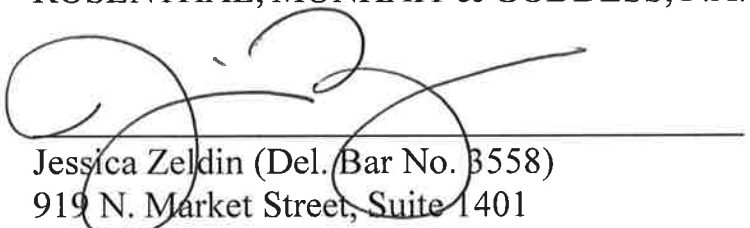
Finally, unlike the agreement in *Winshall,* the SPA does not present the specter of "untethered" liability for defending against all third-party claims. In this case this responsibility is limited to claims that could result in criminal liability or equitable relief and relate to a breach of a representation. Given that the investigation by HHS in this case concerned a false billing allegation that fell

squarely within the scope of the applicable representation, in this case it is more than "reasonably conceivable that the underlying claim was indemnifiable." *Cf.* Order at 9 (suggesting this standard). That is sufficient to invoke defense cost liability under Section 11.3(a) without regard to what issues might arise under other agreements, such as the agreement in *Winshall.*

CONCLUSION

The Order Granting Motion to Dismiss First Amended Counterclaims, dated November 29, 2016, should be reversed and the matter remanded for further proceedings.

ROSENTHAL, MONHAIT & GODDESS, P.A.



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