IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RICERCA BIOSCIENCES, LLC, a Delaware limited liability company,	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	C.A. No. N13C-10-280 MMJ CCLD
NORDION INC., fka MDS Inc., a Canadian Corporation, and NORDION (US) INC., fka MDS PHARMA SERVICES (US) INC., a Delaware corporation	)	
Defendants/Counterclaim Plaintiffs.		

Submitted: November 20, 2014
Decided: January 23, 2015

On Plaintiff's Motion for Summary Judgment
DENIED
On Defendants' Motion for Summary Judgment
GRANTED

OPINION

Michael J. Barrie, Esquire, Stephen M. Ferguson, Esquire (Argued), David W. Mellot, Esquire, Benesch Friedlander Coplan & Aronoff LLP, Attorneys for Plaintiff/Counterclaim Defendant

Patricia L. Enerio, Esquire, Melissa N. Donimirski, Esquire (Argued), Proctor Heyman LLP, Attorneys for Defendants/Counterclaim Plaintiffs

JOHNSTON, J.

PROCEDURAL CONTEXT

Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC ("Ricerca") is a Delaware limited liability company with its principal place of business in Concord, Ohio. Ricerca is a contract research organization that is engaged in the business of providing pre-clinical discovery support and research and development services to pharmaceutical and biotech companies for drug development.

Defendant/Counterclaim Plaintiff Nordion Inc. ("Nordion") is a Canadian corporation with its principal place of business in Ottawa, Canada.[1] Nordion is a global health science company that manufactures products to be used for the prevention, diagnosis, and treatment of disease.

Ricerca instituted this action on October 23, 2013. Ricerca alleges that Nordion breached the parties' Stock Asset Purchase Agreement ("SAPA") by failing and refusing to defend and indemnify Ricerca during litigation with BioAxone Biosciences, Inc. ("BioAxone"). Ricerca seeks to recover $350,000 in damages for its costs and expenses in defending and settling the BioAxone lawsuit.

Nordion filed a counterclaim, alleging that Ricerca breached the SAPA by failing and refusing to defend and indemnify Nordion for the same BioAxone

[1] Nordion was formerly known as MDS Inc., but changed its name to Nordion in 2010. Nordion US is a wholly-owned subsidiary of Nordion. Nordion US is a Delaware corporation with its principal place of business in Ottawa, Canada and is the successor-in-interest to MDS Pharma Services (US) Inc. For purposes of this Opinion all aforementioned entities will be referred to as Nordion.

litigation. Nordion seeks to recover $488,951.93 in damages for its costs and expenses in defending and settling the BioAxone lawsuit.

On September 26, 2014, Ricerca and Nordion filed cross Motions for Summary Judgment. Oral argument was heard on November 20, 2014.

UNDISPUTED FACTS

In 2000, Nordion launched a full-service contract research organization comprised of drug discovery and development companies. The organization was divided into five business groups: (1) Discovery and Pre-Clinical; (2) Early Clinical Research; (3) Bioanalytical; (4) Clinical Research; and (5) Central Lab. The focus of this litigation is the Discovery and Pre-Clinical business group.

In 2003, the Discovery and Pre-Clinical business group opened a new biopharmaceutical facility in Bothell, Washington. Simultaneously, the Discovery and Pre-Clinical group established a Biopharmaceuticals Unit to be operated out of the Bothell, Washington facility. The Biopharmaceuticals Unit manufactured, among other things, bacterial cell banks.

In March 2003, BioAxone retained Nordion to manufacture a Bacterial Master Cell Bank to assist BioAxone in the production of a new drug. The cell bank subsequently was manufactured by the Biopharmaceuticals Unit of the Discovery and Pre-Clinical group at the Bothell, Washington facility.

In 2006, Nordion closed the Biopharmaceuticals Unit. The other units of the Discovery and Pre-Clinical group continued to work out of the Bothell, Washington facility.

The SAPA

In 2009, Nordion announced that it would be selling its various business groups, including the Discovery and Pre-Clinical group. In late 2009, Nordion and Ricerca began negotiating the SAPA. In February 2010, Ricerca and Nordion executed the SAPA. Under the SAPA, Ricerca agreed to purchase all the assets of Nordion's Discovery and Pre-Clinical group.

Included in the SAPA were provisions that required certain liabilities to be retained by Nordion, and other liabilities to be assumed by Ricerca. The SAPA also contained indemnification provisions for the benefit of both Nordion and Ricerca. Under these provisions, the right to indemnification was dependent on whether the damages related to a retained or an assumed liability. The closed Biopharmaceuticals Unit was not specifically addressed in the SAPA.

BioAxone Litigation

In April 2012, BioAxone initiated litigation in the United States District Court for the Southern District of Florida, naming both Nordion and Ricerca as defendants ("BioAxone Litigation"). BioAxone alleged that the cell bank Nordion

manufactured in 2003 was contaminated with animal origin products, which created the risk that the FDA could find any drug BioAxone derived from the cell bank to be unfit for testing or use. BioAxone sought damages in tort from both Nordion and Ricerca.

During the BioAxone Litigation, Ricerca and Nordion each made a demand on the other to defend, indemnify, and hold harmless, as provided by the SAPA. Both parties refused the other's demand. Subsequently, Ricerca independently settled the BioAxone Litigation for $150,000. Similarly, Nordion independently settled the BioAxone Litigation for $200,000.

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If

[2] Super. Ct. Civ. R. 56(c).
[3] *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991).
[4] Super. Ct. Civ. R. 56(c).
[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

Where the parties have filed cross motions for summary judgment and have not argued that there are genuine issues of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[7] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[8]

ANALYSIS

Parties Contentions

Ricerca contends that Nordion breached the SAPA by refusing to defend and indemnify Ricerca during the BioAxone Litigation. Ricerca alleges that the language of the SAPA is unambiguous in providing that the liability of the BioAxone Litigation was retained by Nordion because the Biopharmaceuticals Unit was never the subject of negotiation under the SAPA. Ricerca argues

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[7] Super. Ct. Civ. R. 56(h).
[8] *E.I. DuPont de Nemours and Co. v. Medtronic Vascular, Inc.*, 2013 WL 261415, at *10 (Del. Super.).

Nordion must indemnify Ricerca for the damages it suffered relating to settlement of the BioAxone Litigation.

Conversely, Nordion contends that Ricerca breached the SAPA by refusing to defend and indemnify Nordion during the BioAxone Litigation. Nordion alleges that the SAPA is unambiguous in that Ricerca assumed *all* liabilities arising out of the operation of the Discovery and Pre-Clinical Business group, which included liabilities of the Biopharmaceuticals Unit. Nordion argues it is entitled to indemnification by Ricerca for the damages Nordion suffered in connection with settling the BioAxone Litigation.

Contract Interpretation

Section 11.4 of the SAPA states: "This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York." However, the Court finds no meaningful substantive difference between New York and Delaware contract law on the issues presented in this case.[9] In addition, at oral argument Ricerca's and Nordion's counsel agreed that there was no meaningful substantive difference between New York and Delaware law relating to the issues

[9] *See ION Geophysical Corp. v. Fletcher Intern., Ltd.*, 2010 WL 4378400, at *6 (Del. Ch.) (citing *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *5 (Del. Ch.) ("Under New York law, as in Delaware, the construction and interpretation of an unambiguous written contract is an issue of law within the province of the court.") (internal quotations omitted).

in these motions. Therefore, the Court will apply Delaware law in reaching its conclusions.[10]

Contract terms are interpreted according to their plain, ordinary meaning, unless there is an ambiguity.[11] "Contract language is not ambiguous merely because the parties dispute what it means."[12] Rather, contract language is ambiguous only if it is reasonably susceptible of two or more interpretations, or can have two or more different meanings.[13]

However, if the Court concludes that contract language is unambiguous, the Court's interpretation must be confined to the contract's "four corners."[14] Extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.[15] Instead, the Court will interpret the contract's terms using a reasonable third party standard.[16]

---

[10] *See Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 4880659, at *3 n.16 (Del. Ch.) (applying Delaware law where plaintiff's counsel's research did not identify any meaningful distinction between New York and Delaware law on the legal issues presented in the case).
[11] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).
[12] *Id.*
[13] *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992); *see also Omneon* 41 A.3d at 385 ("To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning.").
[14] *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *5 (Del. Super.).
[15] *Eagle Indus., Inc. v. DeVilbliss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[16] *Cedars Acad.*, 2010 WL 5825343, at *5.

Central Issue Governing Disposition

Ricerca and Nordion set forth several arguments to advance their opposing claims for indemnification under the SAPA. However, the Court finds that there is one central issue that governs the disposition of this case—whether under the plain language of the SAPA, Ricerca assumed the liability, or Nordion retained the liability. The liability in question is the Bacterial Master Cell Bank manufactured by the Biopharmaceuticals Unit for BioAxone.

If the Court finds that Nordion retained the liability, then Ricerca is entitled to indemnification by Nordion for their damages associated with the BioAxone Litigation. Alternatively, if the Court finds that Ricerca assumed the liability, then Nordion is entitled to indemnification by Ricerca for their damages associated with the BioAxone Litigation.

Relevant Terms of the SAPA

The parties did not specifically address the Biopharmaceuticals Unit in the SAPA. This is most likely due to the fact that the Biopharmaceuticals Unit closed in 2006, three years prior to when negotiations for the SAPA began in late 2009. Therefore, the Court must look to relevant terms of the SAPA to determine whether the Biopharmaceuticals Unit was intended to be part of the Discovery and Pre-Clinical business group at the time of closing.

Section 11.9 of the SAPA is an integration clause, which provides in relevant part: "This Agreement...constitute[s] the entire agreement among the parties hereto with respect to the matters covered by this Agreement and thereby, and supersede[s] all previous written, oral or implied understandings among [the parties] with respect to such matters."

Sections 10.2 and 10.3 of the SAPA contain the indemnification provisions for Nordion and Ricerca, respectively. Section 10.2 obligates Nordion to defend, indemnify, and hold harmless Ricerca for reasonable costs and expenses, including attorney's fees, and damages resulting from a "Retained Liability" from and after the closing date. Similarly, Section 10.3 requires Ricerca to defend, indemnify, and hold harmless Nordion for damages arising or resulting from any "Assumed Liability" from and after the closing date. Section 10.3 also allows Nordion to recover its attorney's fees in connection with defending an assumed liability.

Section 1.1 of the SAPA, titled "Certain Definitions," provides the definitions for the relevant, and disputed, terms. Section 1.1 provides:

> "Assumed Liabilities" means any and **all Liabilities other than Retained liabilities**, whether arising before, on or after the Closing Date, of the Asset Seller or any of its predecessor companies or businesses, to the extent arising out of the present, past or future operation or conduct of the Discovery and Pre-Clinical Business, or the present, past, or future ownership or use of any Purchased Assets **in the Discovery and Pre-Clinical Business** (including the ownership or use of the

Discovery and Pre-Clinical Assets), including the following:

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

* * *

"Excluded Assets" means all right, title, and interest of [Nordion] in all of its Subsidiaries, the Excluded Businesses and all Assets (**excluding the Discovery and Pre-Clinical Companies, the Discovery and Pre-Clinical Business, and the Discovery and Pre-Clinical Assets**)...

* * *

"Excluded Businesses" means all of the current or former businesses of [Nordion] and its Subsidiaries, **other than the Discovery and Pre-Clinical Business**....

* * *

"Retained Liabilities" means any and all Liabilities, whether arising before or after the Closing Date, of [Nordion] or any of its predecessor or successor companies or businesses...to the extent relating to, resulting from or arising out of the present, past or future operations or conduct of the **Excluded Businesses**, or ownership or use of any **Excluded Assets**...provided, however, that **Retained Liabilities shall...in no event include the Assumed Liabilities**....

* * *

> "Purchased Business" means the discovery and pre-clinical contract research service business delivering pharmacology, drug metabolism and pharmacokinetics and drug safety assessment (including any products and services, research, development, design, drug discovery and bioresearch, as well as the related training, equipment installation, repair, maintenance, customer support and application consulting services directed to or involving discovery and pre-clinical contract research services) as conducted by [Nordion]…on or prior to the Closing Date at any location other than the facility located in King of Prussia, Pennsylvania.

(Emphasis added).

The Court's Interpretation of the SAPA

The Court must look to the plain language of the SAPA to determine whether the contract language is ambiguous. The following chart highlights the most important aspects of the relevant SAPA terms:

Assumed Liabilities	• **all** liabilities **except** Retained Liabilities • **includes** torts and personal injuries resulting from Discovery & Pre-Clinical Business
Excluded Assets	• equals Excluded Business • **not** Discovery & Pre-Clinical Business/Assets • specifically lists the excluded businesses
Excluded Business	• **not** Discovery &Pre-Clinical Business/Assets
Retained Liability	• includes **all** Excluded Businesses and Excluded Assets • does **not** include Assumed Liabilities
Purchased Business	• describes the discovery and pre-clinical contract research services

Based on the totality of the relevant contract terms, the Court finds that the SAPA is unambiguous because it is only reasonably susceptible of one interpretation. The Court finds that the SAPA unambiguously provides that the Biopharmaceuticals Unit was intended to be included as part of the Discovery and Pre-Clinical group at the time of closing. Therefore, the liability of the Biopharmaceuticals Unit was assumed by Ricerca. The Court need not consider extrinsic evidence to determine the parties' intent.

While the Biopharmaceuticals Unit is not specifically mentioned by name in the SAPA, the Court finds that the Biopharmaceuticals Unit fully fits within the description contained in the Purchased Business definition. The Purchased Business definition accurately reflects the type of work and services that were offered by the Biopharmaceuticals Unit, particularly the work and services provided to BioAxone in 2003.

Moreover, the language of the SAPA makes it clear that all liabilities arising from the Discovery and Pre-Clinical Business were assumed by Ricerca. The SAPA language also specifies that the activities described in the definition of Purchased Business were intended to be transferred to Ricerca as part of the Discovery and Pre-Clinical Business. Therefore, the Biopharmaceuticals Unit—as described in the Purchased Business definition—was included as part of the Discovery and Pre-Clinical Business. As a result, the tort liability arising from the

BioAxone Litigation was assumed by Ricerca. Accordingly, Ricerca is obligated to indemnify Nordion for the costs Nordion incurred in defending and settling the BioAxone Litigation.

CONCLUSION

The Court finds that no genuine issue of material fact exists to prevent the Court from granting summary judgment. The contract language of the SAPA is unambiguous. The Court finds as a matter of law that the liabilities of the Biopharmaceuticals Unit were part of the Discovery and Pre-Clinical business group, and were assumed by Ricerca. Under the SAPA, and as a matter of law, Ricerca is obligated to indemnify Nordion for the costs Nordion incurred during the BioAxone Litigation.

THEREFORE, Plaintiff/Counterclaim Defendant Ricerca Biosciences, LLC's Motion for Summary Judgment is hereby **DENIED**, and Defendants/Counterclaim Plaintiffs Nordion Inc.'s and Nordion (US) Inc.'s Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/
The Honorable Mary M. Johnston