STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 11, 2021)

W&J NEWCO, LLC	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2020-01539**
	:	
AGILENT TECHNOLOGIES, INC.	:	
and ULTRESS REALTY, LLC	:	
***Defendants*.**	:	

DECISION

STERN, J. Before the Court is Plaintiff W&J Newco, LLC's Motion for Summary Judgment on its claims against Defendants Agilent Technologies, Inc. and Ultress Realty, LLC. Defendant Agilent Technologies, Inc. opposes this motion. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14.

I

Facts and Travel

On May 25, 2018, Ultra Scientific, Inc. (Ultra) and Defendant, Agilent Technologies, Inc. (Agilent), entered into an Asset Purchase Agreement (APA). (Pl. Mem. Supp. 1 (Oct. 20, 2020) (Pl. Mem.); *see also* Pl. Mem., Ex. A.) Pursuant to the terms of the APA, Ultra reformed as W&J Newco, LLC (W&J), the named Plaintiff in this action. (Aff. John E. Russo ¶ 5.) Simultaneously with execution of the APA, Agilent entered into a lease agreement with Defendant, Ultress Realty, LLC (Ultress), to occupy the premises previously occupied by Ultra, located at 250 Smith Street, North Kingstown, Rhode Island (Property). (Pl. Mem., Ex. B; Def. Obj., Ex. B (Nov. 24, 2020).)

On May 24, 2018, a day prior to execution of the APA, Ultra received a State Fire Marshal's Inspection Report that cited sixteen fire code "deficiencies found during [a] 02-06-2018 inspection of [the Property]," which required correction in order to comply with the Rhode Island State Fire Safety Code. (Pl. Mem., at 1-2; Pl. Mem., Ex. C, at 1; Def. Obj., Ex. B.) Ultra resolved five of the violations, but eleven violations remained as of the date of the execution of the APA.[1] (Pl. Mem. at 1-2.) On June 7, 2018, Monica Bourgeois, an authorized representative for Ultra, filed an Application for Variance with the Fire Safety Code Board of Appeal and Review (Board) for the remaining eleven fire code violations. (Pl. Mem., Ex. C, at 1.)

Prior to entering into the APA, Agilent conducted due diligence relative to the condition of the Property and came up with a preliminary "compliance plan" (Plan) that was estimated to cost approximately $2.4 to $2.7 million. (Pl. Mem., Exs. E and F.) The list of items on the Plan were gathered following a brief tour of the Property and prior to Agilent's knowledge of "the identity, depth and scope of all of the health and safety issues which ultimately were learned after the transaction closed." (Decl. Cari Goodrich Supp. Def. Obj. (Decl. Cari Goodrich) ¶¶ 11-12.) Correspondence dated July 18, 2018, two days after closing on the APA, suggests that Ultra mentioned to an employee of Agilent that the State Fire Marshal conducted an investigation and "recommended . . . review [of items], such as fire doors and shelving." (Pl. Mem., Ex. G.) There is no evidence to suggest that Agilent had notice of the Fire Marshal Report or the violations on July 16, 2018, the day the parties closed on the APA. (Def. Obj. at 7.)

[1] The fire code violations concerned the following: (1) "sprinkler system signage"; (2) "extension cords being used as temporary wiring"; (3) "sprinkler protection" in "clean rooms"; (4) "shelving for chemical storage"; (5) National Fire Protection Association signage; (6) "hood and exhaust system for use with perchloric acid [HC104] . . . [and] to cease use of this equipment and operation until such time that the repairs or replacement have been completed"; (7) "lab area . . . ventilation"; (8) "lab/office area . . . doors"; (9) "chemical storage"; (10) "lab/business area . . . separation"; and (11) "emergency action plan[.]" (Pl. Mem., Ex. C, at 2-3; Def. Obj., Ex. B.)

On August 21, 2018, the Board conducted a hearing on the Application for Variance. Cari Goodrich and Brian Sullivan, both of Agilent, appeared on behalf of the Applicant, Ultra. (Pl. Mem., Ex. C, at 1.) The Board granted time variances to comply with the fire code violations and to "bring those items into compliance with various provisions of the Rhode Island Fire Code, the Rhode Island Life Safety Code and the code published by the National Fire Protection Association[.]" (Def. Obj. at 7-8.)

Under the APA, $3 million was placed in escrow upon the closing and held for eighteen months for purposes of a claim for indemnification against the Seller, Ultra. (Def. Obj., Ex. A (APA), §§ 10.1, 10.2(c) and Appendix A, Definitions, Escrow Amount.) This Indemnification provision provided that the "Seller shall indemnify, defend and hold harmless [Agilent] . . . [for Losses] . . . incurred . . . [for] any breach of any representation or warranty of Seller[.]" *Id.* § 10.1. Section 10.3, entitled "Escrow," provided that:

> "In the event an Indemnified Party wishes to assert a claim for indemnification under this ARTICLE X, Purchaser shall deliver to Seller a Claim Notice, containing a reasonably specific description of the basis and amount of the Losses incurred by the Indemnified Party, with a copy to the Escrow Agent if there is still any portion of the Escrow Amount in the Escrow Account." *Id.* § 10.3.

Further, Article X, §10.4 of the APA, entitled "Defense of Third Person Claims," stated:

> "If an Indemnified Party is entitled to indemnification hereunder because of a claim asserted by a third party claimant (a "Third Person Claimant"), Purchaser shall give Seller a notice of claim promptly after such assertion is actually known to Purchaser. Seller shall have the right, upon written notice to Purchaser, and using counsel reasonably satisfactory to Purchaser (and the Indemnified Party, if other than Purchaser), to investigate, secure, contest or settle the claim alleged by such Third Person Claimant (a "Third Person Claim") . . . For the avoidance of doubt, a claim or challenge asserted by a Governmental Entity, including, without limitation, the IRS or the U.S. Department of Commerce, against an Indemnified Party shall be considered a Third Person Claim hereunder." *Id.* § 10.4.

One day prior to the expiration of the eighteen months, Agilent sent a letter to the Escrow Agent, Citibank, N.A., and copied Ultra, giving notice of a claim for indemnification against the funds held in escrow, in the amount of $2,832,700, for the costs and expenses incurred to "remediate the [fire code] violations" set forth in the Fire Marshal's Report, as "contrary to certain representations made by Ultra" in the APA.[2] (Def. Obj., Ex. C.)

W&J refused to indemnify Agilent and disputed that Agilent was entitled to indemnification under the APA. On February 17, 2020, W&J filed the instant action and on October 20, 2020 filed a motion for summary judgment. On December 7, 2020, the Court held a hearing on W&J's motion.[3]

II

Standard of Review

"Summary judgment is an extreme remedy and should be granted only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005) (quoting *Wright v. Zielinski*, 824 A.2d 494, 497 (R.I. 2003)). "'Only when a review of the admissible evidence viewed in the light most favorable to the nonmoving party reveals no genuine

[2] Agilent alleges that Ultra's failure to disclose the Fire Marshal's Report and violations therein amounted to breach of several representations and warranties in the APA, which survived the closing for eighteen months according to § 10.3(c). (Def. Obj. at 5-6.) The representations and warranties concern Ultra's known violations of Legal Requirements, such as the fire code violations. *Id.* (citing APA §§ 4.3(b)(iii), 4.8(b), 4.11(a), 4.11(b), 4.11(h), and 4.22).

[3] W&J submitted a post-hearing Supplemental Memorandum, dated December 11, 2020. The Court will not consider the post-hearing filing as part of the record as untimely. In addition, after reviewing the Supplemental Memorandum, the Court determined that its consideration is of no effect to this Court's decision.

issues of material fact, and the moving party is entitled to judgment as a matter of law, will this Court . . . grant . . . summary judgment.'" *National Refrigeration, Inc. v. Standen Contracting Company, Inc.*, 942 A.2d 968, 971 (R.I. 2008) (quoting *Carlson v. Town of Smithfield*, 723 A.2d 1129, 1131 (R.I. 1999)). A party opposing "'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" *Id.* (quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996)).

III

Analysis

W&J asserts that (1) Agilent's claim for indemnification falls under § 10.4 of the APA, requiring that prompt notice be given to W&J in order to preserve W&J's right to investigate, secure, contest, or settle the claim with the Board and (2) Agilent's improvements were part of a larger construction project that incorporated more than fire code remediation, as evidenced by a letter sent to Ultress.[4] In sum, W&J contends that the APA notice was improper and resulted in material prejudice to W&J and that Agilent is not entitled to reimbursement for the improvements; thus, W&J is entitled to judgment as a matter of law.

Agilent contends that genuine issues of material fact remain because it properly gave notice of the claim for indemnification under §§ 10.1 and 10.3 of the APA as the claim is for losses

[4] In addition to the provisions of the APA, Agilent's lease agreement required Agilent to obtain Ultress's consent prior to making any Leasehold Improvements that exceeded $100,000. (Pl. Mem., Ex. B, § 5.1.) Agilent anticipated that its Plan would cost approximately $2.4 million and, thus, on July 22, 2019, sought the consent of Ultress as provided for under the lease provision. (Pl. Mem., Ex. H.) The subject line of the correspondence was titled "Agilent Urals Compliance Project – Landlord Approval Request" and was sent to John Russo, a signatory to the APA on behalf of Ultra, and approved by William Russo, a signatory to the APA on behalf of Ultra and signatory of the lease agreement on behalf of Ultress. (Pl. Mem., Ex. H; J. Russo Aff. ¶ 1; Aff. William R. Russo ¶¶ 1-4.)

incurred for breach of representations and warranties under § 10.1 and not for a third-party claim under § 10.4. (Def. Obj. at 7-8.) As such, notice needed only to be given before the expiration of the eighteen months. *Id.* In addition, Agilent contends that the remediation costs of $2.8 million entirely consisted of remediation for the fire code violations because after learning of the fire code violations, "[Agilent] elected to focus its efforts and resources on those items that were needed to make the facility safe and bring it into legal compliance . . . ." *Id.* at 8; *see also* Decl. Cari Goodrich ¶ 7. As a result, Agilent claims that notice was proper, it is entitled to indemnification for the full amount of its claim, and W&J is not entitled to judgment as a matter of law.

The success of W&J's motion depends upon an absence of genuine issues concerning (1) whether Agilent's claim falls under § 10.4 of the APA; (2) what notice is required under that provision; and (3) whether Agilent gave proper notice under that provision. If § 10.4 governs, as alleged by W&J, and notice was proper, there must be no genuine issue that Agilent's claim consists of costs and expenses not recoverable under an indemnification provision because the costs and expenses were incurred for a larger improvement project unrelated to the fire code violations.

A

Provision of the APA Governing Agilent's Claim for Indemnification and Notice Requirement

The parties contest which provision governs Agilent's claim for indemnification. Such determination rests on the facts surrounding Agilent's claim and the interpretation of the APA.

"[W]hen ruling on a motion for summary judgment, the court is not authorized to try issues. The purpose of summary judgment procedure is issue finding and not issue determination." *Westinghouse Broadcasting Company, Inc. v. Dial Media, Inc.*, 122 R.I. 571, 581, 410 A.2d 986, 992 (1980). The Supreme Court in *Westinghouse* reiterated the rule that an ambiguous contract

"cannot properly be resolved by summary judgment, unless only one reasonable interpretation exists." *Id.* at 579, 410 A.2d at 991 (citing *O'Connor v. McKanna*, 116 R.I. 672, 634-35, 359 A.2d 350, 353-54 (1976)). On the other hand, "the construction of a clear and unambiguous contract presents an issue of law, which may be resolved by summary judgment."[5] *Id.* at 579, n.7, 410 A.2d at 991, n.7 (citing *Cassidy v. Springfield Life Insurance Co.*, 106 R.I. 615, 619, 262 A.2d 378, 380 (1970)). Summary judgment is improper if there exists an ambiguous contract and evidence calls into question the meaning of a term in the contract, which would determine the outcome of an issue at stake in the controversy. *See Westinghouse*, 122 R.I. at 581, 410 A.2d at 991 (finding that a trial justice may not determine an issue by ruling on a meaning of a term in an ambiguous contract, but rather may determine that issues exist as to the meaning of the term which would preclude summary judgment).

"The rules of evidence and civil procedure—not the presence of unambiguous contract provisions—provide parties with the means of proving their claims and defenses" for purposes of summary judgment. *Garden City Treatment Center, Inc. v. Coordinated Health Partners, Inc.*, 852 A.2d 535, 547 (R.I. 2004).

APA, Sections 10.1 and 10.3

Agilent contests W&J's claim that § 10.4 of the APA governs Agilent's indemnification claim and asserts that §§ 10.1 and 10.3 govern the claim. Section 10.1 provides that "[W&J] shall

[5] When "'contract terms are clear and unambiguous, judicial construction is at an end for the terms will be applied as written.'" *Walsh v. Lend Lease (US) Construction*, 155 A.3d 1201, 1205 (R.I. 2017) (quoting *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004)). "To determine whether the contract language is unambiguous the Court will 'view the agreement[] in [its] entirety and give the contractual language its plain, ordinary and usual meaning.'" *Id.* (quoting *A.F. Lusi Construction, Inc. v. Peerless Insurance Co.*, 847 A.2d 254, 258 (R.I. 2004)). "An ambiguity occurs only when the contract term is 'reasonably and clearly susceptible of more than one interpretation.'" *Rivera*, 847 A.2d at 284 (quoting *Rubery v. Downing Corp.*, 760 A.2d 945, 947 (R.I. 2000)).

indemnify . . . [Agilent] . . . [for Losses] . . . incurred . . . [for] any breach of any representation or warranty of [W&J.]" (APA § 10.1.) Furthermore, § 10.3 provides that if Agilent is to "assert a claim for indemnification under this ARTICLE X, [Agilent] shall deliver to [W&J] a Claim Notice, containing a reasonably specific description of the basis and amount of the Losses incurred by [Agilent], with a copy to the Escrow Agent[.]" *Id.* § 10.3.

Claim Notice is defined in the APA, § 3.3(e)(i), which provided that: "[a]t any time, or from time to time, before the Release Date, Purchaser may deliver a written notice of claim to Seller and the Escrow Agent providing the information required under Section 10.3 of this Agreement and requesting a disbursement of the amount of the claim from the Escrow Account (each, a 'Claim Notice')." *Id.* § 3.3(e)(i) (Appendix A of the APA set forth defined terms and provided that Claim Notice was defined in § 3.3(e)(i).) The Release Date is "eighteen (18) months after the Closing Date[.]" *Id.* § 3.3(d).

Agilent offered provisions of the APA, under Article IV, where W&J made representations and warranties with respect to the business assets Agilent purchased, specifically that the business was not subject to any violations of code known to W&J[6]; thus, because W&J knew of fire code violations and failed to disclose them to Agilent, Agilent asserts that Agilent—not a third party—made a claim under §§ 10.1 and 10.3 for indemnification for losses incurred in connection with breach of those representations. (Def. Obj. at 5-7; and APA §§ 4.3(b)(iii), 4.8(b), 4.11(a), 4.11(b), 4.11(h), and 4.22.) Agilent created a genuine issue as to which provision governs its claim for indemnification; specifically, Agilent supported its contention that § 10.4 is not controlling by

[6] For example, the APA, § 4.11(a), stated that: "Seller and each Seller Subsidiary is currently and has been in compliance with all Environmental and Safety Laws and has not received from any Person any . . . notice of violation"; in addition, § 4.3(b)(iii) stated that: "The use and operation of the Real Property in the conduct of the Business do not violate in any material respect any Legal Requirement," which includes a code such as the fire code.

demonstrating that W&J did not disclose the violations until after the deal was closed, that nondisclosure was a breach of representation under the APA under § 10.1, and that it submitted a Claim Notice for Losses, as required in § 10.3. (Def. Obj., Exs. A, B, and C.) In addition, Agilent stated in its Claim Notice that the claim was being made in response to breach of representations relative to these violations. (Def. Obj., Ex. C.)

W&J concedes that there is a dispute as "to exactly when Agilent became aware of the" fire code violations. (Pl. Mem. at 2.) However, under the APA, § 10.7, Agilent's knowledge of whether the assets subject to the APA were in compliance is irrelevant to whether W&J breached representations set forth in the APA and whether Agilent had a valid claim for indemnification due to a breach of representation. (APA § 10.7.)

The issues surrounding the fire code violations and lack of disclosure on the part of W&J are genuine as to material facts because the Court cannot ultimately determine whether W&J is entitled to judgment until the Court first determines whether (a) W&J breached its representations and warranties, (b) Agilent is properly claiming indemnification under §§ 10.1 and 10.3, and (c) Section 10.4 has any relevance to Agilent's claim for indemnification. *See Westinghouse*, 122 R.I. at 581, 410 A.2d at 991. Thus, although the terms of these provisions are clear and unambiguous, there remain questions of fact that will determine whether only §§ 10.1 and 10.3 govern under these circumstances.

In addition, the language of § 10.3 is clear and unambiguous that no matter which provision(s) of Article X govern(s) Agilent's claim against the escrow for indemnification, Agilent's claim for indemnification still must comply with § 10.3. (APA § 10.3.) To make a claim for indemnification against the escrow account, Agilent was to provide W&J and the Escrow Agent with a Claim Notice, defined *supra*. *Id.* ("In the event [Agilent] wishes to assert a claim for

indemnification *under this* ARTICLE X, [Agilent] shall deliver to [W&J] a Claim Notice[.]") (Emphasis added.) Therefore, if § 10.1 governs because Agilent was making a claim due to an alleged breach of representation, Agilent was required to provide a Claim Notice to W&J and the Escrow Agent prior to the expiration of the escrow period, which was eighteen months after closing, or January 16, 2020. Indeed, if *any* Section of Article X governs, Agilent was required to provide a Claim Notice to W&J in accord with § 10.3, and if the claim was for "representations and warranties of Seller contained in ARTICLE IV of [the APA,]" Agilent was required to provide that Claim Notice before January 16, 2020. *Id.* §§ 10.3, 10.2(c).

W&J states that "one (1) day before the escrow was to be released to W&J . . . Agilent notified W&J and the Escrow Agent of Agilent's intention to pursue a claim for indemnification[,]" which W&J asserts is not prompt notice under § 10.4. (Pl. Mem. at 4.) Agilent argues—and W&J does not contest—that the notice provided was proper under § 10.3. Because Agilent creates a genuine issue as to the notice and its sufficiency under §§ 10.1 and 10.3 of the APA, the issue of notice is not ripe for summary judgment.

APA, Section 10.4

W&J claims that the notice of claim falls under the "unambiguous" terms of § 10.4 requiring prompt notice of a claim for indemnification, which Agilent failed to provide. (Pl. Mem. at 5.) "It is settled that, where a contract is clear and unambiguous, the meaning of its terms constitutes a question of law for the court, and it is only when ambiguity exists that construction of the terms becomes one of fact." *Cassidy*, 106 R.I. at 619, 262 A.2d at 380 (citing *Russolino v. A. F. Rotelli & Sons, Inc.*, 85 R.I. 160, 128 A.2d 337 (1957)). The former can be resolved on summary judgment, but the latter cannot. *See Westinghouse*, 122 R.I. at 579, n.7, 410 A.2d at 991, n.7.

Section 10.4 of the APA provides that "[i]f an Indemnified Party is entitled to indemnification hereunder because of a claim asserted by a third party claimant (a "Third Person Claimant"), [Agilent] shall give [W&J] a notice of claim promptly after such assertion is actually known to [Agilent] . . . For the avoidance of doubt, a claim or challenge asserted by a Governmental Entity, including, without limitation, the IRS or the U.S. Department of Commerce, against an Indemnified Party shall be considered a Third Person Claim hereunder." (APA § 10.4.) W&J asserts that the notice of fire code violations constitutes a claim asserted by a Third Person Claimant, i.e. the State Fire Marshal, for which "Agilent was required to provide prompt notice of the claim for indemnity to W&J as soon as Agilent knew of the claim being asserted by the Governmental Agency." (Pl. Mem. at 5 (citing APA § 10.4).) Agilent argues that the claim is from Agilent and not a third-party claim of the Fire Marshal, making § 10.4 immaterial.

In order for W&J's assertion to hold true, the notice of fire code violations issued by the Fire Marshal must be considered a "claim asserted by a third party claimant" under the APA. There are several reasons why W&J's argument fails. First, § 10.4 is not operative in a vacuum. The entirety of Article X of the APA, entitled "Indemnification," is designed to provide indemnity to an "Indemnified Party" for monetary "Losses" sustained in connection with limited matters. (APA § 10.1.) The Indemnified Parties are "[Agilent], its Affiliates, and their respective officers, directors, employees, stockholders, assigns and successors[.]" *Id.* These particular Indemnified Parties can recover for "Losses" imposed upon or incurred by them from "all Liabilities, losses, judgments, actions, damages, fines, awards, penalties, charges, assessments, costs and expenses of whatever kind" in connection with:

> "(i) any breach of any representation or warranty of [W&J] . . . ,
> "(ii) any breach of any covenant of [W&J] . . . ,
> "(iii) any Excluded Liabilities,

> "(iv) any Indemnified Taxes,
> "(v) Distribution Agreement Termination Fees and
> "(vi) the operation, use or possession of the Purchased Assets or the conduct or operation of the Business occurring on or before the Closing." *Id.*

Pursuant to § 10.4, the claim by a third party must be of the sort to which "an Indemnified Party is entitled to indemnification[,]" as delineated in § 10.1. *Id.* § 10.4. In addition, the third party must impose upon an Indemnified Party, such as Agilent, monetary "Losses." However, the notice of violation did not impose upon Agilent monetary losses to which the third party, the State Fire Marshal or Board, was entitled; rather, Agilent itself incurred monetary losses in its efforts to correct the items listed on the notice of violation. Simply, Agilent did not incur losses by handing over something of value to the State Fire Marshal or Board—in connection with a claim made by the State Fire Marshal or Board to any indemnified matter listed above—and then seek indemnification for an amount claimed by and given to the State Fire Marshal or Board.

Second, the meaning of the term "claim" in conjunction with the foregoing matters which entitle an Indemnified Party to indemnity, is telling. The term "claim" under § 10.4 is left undefined by the APA. However, a "claim" concerns a corresponding right and is defined as:

> "1. The aggregate of operative facts giving rise to a right enforceable by a court . . . [;] 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . [; and] 3. A demand for money or property to which one asserts a right . . . ." *Claim*, Black's Law Dictionary 240 (7th ed. 1999).

Considering the plain and ordinary meaning of the phrase "*claim asserted* by a third party claimant[,]" it is clear and unambiguous that § 10.4 refers to a claim that can be attributed some value and that arises out of some third party right for which W&J would be liable, not, as here, a *notice of violation issued* to W&J. (APA § 10.4.) (Emphasis added.)

The notice of violation itself states: (1) that the "deficiencies found during [the Fire Marshal's] inspection" must be either (a) corrected or (b) an appeal or application for variation filed, and (2) failure to apply for a variance or review hearing within thirty days "will cause this notice to become a compliance order and will subject [W&J] to prosecution under the Rhode Island State Fire Safety Code should [W&J] fail to correct all of the violations[.]" (Def. Obj., Ex. B.) Because Ultra's representative, Bourgeois, filed an Application for Variance with the Board within the thirty days, the notice never matured into a compliance order or subjected W&J to prosecution, which could have involved claims against W&J. (Pl. Mem., Ex. C, at 1.) As such, the terms "claim" and "notice of violation" are not synonymous.

Indeed, because the notice of violation did not mature into a compliance order, which could subject W&J to prosecution, the notice of violation was not a claim in the sense of a "right enforceable by a court." The Fire Marshal was not asserting a right in the notice of violation which would give the Fire Marshal something of value—even if in the form of an injunction—and for which an Indemnified Party, under the APA, would be seeking indemnification. Rather, Agilent sought something of value, compensation for the remediation of the fire code violation, to which Agilent had a right by the terms of the APA. Therefore, Agilent's claim for indemnification was not a "claim" by a third party but rather a claim by Agilent.

Furthermore, the meaning of the term "claim" by a third party as a monetary or damages claim pursuant to a right, for which W&J would need prompt notice, is clear when § 10.4 is read as a whole because § 10.4 expressly precludes W&J's involvement in equitable claims. (APA § 10.4 ("Seller shall not have the right to defend, settle or direct the defense or settlement of any Third Person Claim . . . if such Third Person Claim seeks an injunction or other equitable relief against [Agilent] or an Indemnified Party.").) Even if this Court were to determine that "claim"

and "notice" are synonymous, or that the meaning of the term "claim" in § 10.4 is ambiguous, or that the Fire Marshal's notice of violation was a third-party claim—which it does not—the Fire Marshal's notice of violation required W&J to take action on the violations. A claim that seeks to require a party to take a specific action is an equitable claim, and, under the APA, W&J has no "right to defend, settle or direct the defense or settlement of any" equitable claim. *Id.*

Third, even if the Fire Marshal's notice of the fire code violations was considered a third-party claim under § 10.4, as suggested by W&J, W&J was only entitled to prompt notice of the third-party claim, not prompt notice of Agilent's indemnification claim. *Id.* Section 10.4 specifically stated that, "[i]f an Indemnified Party [such as Agilent] is entitled to indemnification hereunder because of a claim asserted by a third party claimant (a "Third Person Claimant"), [Agilent] shall give [W&J] a notice of claim promptly after such assertion is actually known to [Agilent]." *Id.* According to the construction of this provision, the "claim asserted by a third party" in the dependent clause is the same claim that Agilent was to give prompt notice of to W&J, pursuant to the independent clause. Thus, although Agilent would have been required to give notice of the claim asserted by the third party promptly after Agilent became aware of the third-party's assertion of the claim, Agilent did not need to give prompt notice of a claim for indemnification.

If § 10.4 required Agilent to promptly give W&J notice of a claim for indemnification, then § 10.4 would have included a defined Claim Notice, which is specific to a claim for indemnification, and would have required that the Claim Notice be given to W&J promptly. However, when read in conjunction with Article X as a whole, in order to make a claim for indemnification under any section of Article X, Agilent is required to give a Claim Notice—notice of a claim for indemnification—as found in § 10.3, not in § 10.4. *See id.* § 10.3. Agilent asserts

that W&J in fact had, and W&J concedes it had, "prompt notice" of the fire code violations as required under the APA because the notice of violation was issued directly to W&J. In other words, if the fire code violations were considered third-party claims, prompt notice of the fire code violations—not the claim for indemnification—was all that was required, and W&J such had notice.

Finally, § 10.4 provides that the purpose of giving W&J notice of a third-party claim is to give W&J an opportunity "to investigate, secure, contest or settle the claim alleged by such Third Person Claimant." (APA § 10.4.) As supported by the evidence provided by both parties, (1) W&J had notice of the fire code violations because the Fire Marshal's Report was issued to W&J's predecessor, Ultra, prior to closing on the APA, and (2) W&J had an opportunity to investigate, secure, contest or settle the notice of violations because W&J filed the Application for Variance in response to the Fire Marshal's Report citing the fire code violations and allowed Agilent to "t[ake] over the appeal and the request for a variance." (Pl. Mem. at 2.)

In sum, the contract provisions at issue are clear and unambiguous. However, Agilent created a genuine issue as to whether its indemnification claim is a claim of a third party or a claim by Agilent due to a breach of representation by W&J, which would result in § 10.4 being immaterial. Because Agilent has demonstrated that W&J may have breached representations set forth in the APA when it failed to disclose the Fire Marshal's Report to Agilent prior to closing on the APA, Agilent has also demonstrated the existence of a disputed fact that precludes judgment as a matter of law in favor of W&J. In addition, because W&J relied in its Motion for Summary Judgment on the argument that § 10.4 of the APA was unambiguous and governed Agilent's indemnification claim—rather than demonstrating that there was no question that the facts surrounding Agilent's indemnification claim led to the conclusion that only § 10.4 of the APA

applied—W&J is not entitled to judgment as a matter of law. *See Garden City Treatment Center, Inc.*, 852 A.2d at 547 (finding a flaw in reliance on contract-interpretation issues in opposition to summary judgment rather than providing data and conclusions of an expert as allowed by the rules of evidence).

B

Rights Under Section 10.4 of the APA

W&J asserts that due to Agilent's failure to provide prompt notice, W&J was deprived of the ability to protect its interests. Specifically, W&J contends that it was deprived of the ability to review the claim of indemnity, to review the project proposal, to monitor a competitive bidding process and the work that took place on the project, and to monitor and document the costs associated with the project. (Pl. Mem. at 7-8.) Pursuant to § 10.4, when given notice of a third-party claim, "[W&J] shall have the right, upon written notice to [Agilent], and using counsel reasonably satisfactory to [Agilent] . . . to investigate, secure, contest or settle the claim alleged by such Third Person Claimant[.]" (APA § 10.4.)

First, W&J concedes that it was the party that received the Fire Marshal's Report with the fire code violations and filed the Application for Variance with the Board for the remaining eleven fire code violations. (Pl. Mem., Ex. C, at 1.) Thus, not only did W&J have notice, but W&J commenced a proceeding "to investigate, secure, contest or settle the claim" with the Board. (APA § 10.4.)

Second, Agilent disputes that W&J was deprived of the right to review the claim of indemnity because Agilent provided W&J with the claim for indemnification and set forth "a reasonably specific description of the basis and amount of the Losses incurred" as required by § 10.3 of the APA. (Def. Obj., Ex. C.) Agilent provided a Claim Notice and Schedule A, which

provided a basis for its claim—W&J's breach of representations due to nondisclosure of the fire code violations—the amount of the claim, and a breakdown of the costs incurred. *See id.* Thus, a genuine issue exists as to whether W&J was deprived of the right to review the Claim Notice and/or contest the losses claimed by Agilent.

Finally, W&J claims that it was Agilent's failure to provide prompt notice under § 10.4 that resulted in its inability to review the project proposal, to monitor a competitive bidding process and the work that took place on the project, and to monitor and document the costs associated with the project. In order to be actionable, § 10.4 must specifically provide W&J with the right to act upon the foregoing. However, although § 10.4 conferred upon W&J the right to investigate, secure, contest or settle *the third-party claim*, it did not extend to W&J the right to review Agilent's project proposal, to monitor Agilent's competitive bidding process and the work that took place on the project, or to monitor and document Agilent's associated costs. If § 10.4 extended to these rights, as W&J suggests, the phrase "to investigate, secure, contest or settle the claim alleged by" the third party is rendered ambiguous, and an ambiguous provision cannot be properly resolved on summary judgment. *See Westinghouse*, 122 R.I. at 581, 410 A.2d at 992.

C

Prejudice and Waiver

W&J argues that because Agilent knew of its indemnity rights but proceeded anyway with a construction project that incorporated the remediation of the fire code violations without providing prompt notice to W&J, thereby depriving W&J of its ability to monitor the project, Agilent waived its claim for indemnification. However, as discussed previously, W&J knew of the fire code violations. In addition, Agilent raised a question as to whether § 10.4 applies, so there remains a genuine dispute as to whether W&J was entitled to prompt notice under this

section. In other words, the genuine issues applicable to Section III.A., *supra*, apply as well to W&J's claim that it was prejudiced. W&J's claim—that, as a result of said prejudice, Agilent waived its claim to indemnification—cannot stand because the claim of prejudice is dependent upon disputed issues—such as notice—that cannot be resolved in W&J's Motion for Summary Judgment.

D

Costs and Expenses Incurred

W&J alleges that Agilent incorporated the remediation of the eleven fire code violations into a larger construction project that Agilent planned prior to the execution of the APA and designed to equip the Property to handle the unique manufacturing needs of Agilent. (Pl. Mem. at 6-7.) Thus, W&J claims that Agilent is not entitled to indemnification.

Agilent contends that the losses it incurred were due to breach of representations by W&J as to the condition of the Property. Agilent also asserts that it planned to spend approximately $2.4 to $2.7 million on a "compliance plan" but that this plan was created following a brief tour of the Property and prior to Agilent's knowledge of "the identity, depth and scope of all of the health and safety issues which ultimately were learned after the transaction closed." (Decl. Cari Goodrich ¶¶ 11-12.) In addition, after learning of the "extensive compliance and safety issues . . . [Agilent] elected to focus its efforts and resources on those items that were needed to make the facility safe and bring it into legal compliance." *Id.* ¶ 7.

W&J's assertion that "Agilent decided that it was going to include the eleven (11) remaining fire code improvements into the larger construction project immediately after Agilent became aware of the Fire Marshal's Report" does not support the conclusion that Agilent is not entitled to indemnification for remediation of the fire code violations. (Pl. Mem. at 6-7.) If Agilent

is entitled to indemnification, a question of fact remains as to what parts of the construction project, and value thereof, were completed to remediate the fire code violations. Therefore, genuine issues of fact remain as to whether Agilent's costs and expenses were incurred (1) as a result of a larger construction project that was designed to "bring the Subject Property up to the 'Agilent Standard'"; (2) to comply with fire code in response to the notice of violation; or (3) both. *Id.* at 4.

IV

Conclusion

Based on the foregoing, W&J's Motion for Summary Judgment is denied. Genuine issues of material fact remain that will determine which provision(s) of the APA govern(s) Agilent's indemnification claim, corresponding notice requirements, and what part of the claim, if any, consists of losses incurred to remediate the fire code violations.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**W&J Newco, LLC v. Agilent Technologies, Inc., et al.**
CASE NO:	**PC-2020-01539**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 11, 2021**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**William M. Russo, Esq.** **John A. Dorsey, Esq.**
For Defendant:	**John F. Kelleher, Esq.** **Giovanni La Terra Bellina, Esq.**