IN THE SUPREME COURT OF THE STATE OF DELAWARE

DCV HOLDINGS, INC.,	§	
	§	No. 550, 2002
Plaintiff Below,	§	
Appellant,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	C.A. No. 98C-06-301
CONAGRA, INC., E.I. DU PONT	§	
DE NEMOURS AND COMPANY,	§	
and DU PONT CHEMICAL &	§	
ENERGY OPERATIONS, INC.,	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: February 4, 2003
Decided: April 29, 2003

Before **HOLLAND**, **BERGER** and **STEELE**, Justices

ORDER

This 29th day of April, 2003, upon consideration of the briefs and arguments presented by the parties, it appears to the Court that:

1) This is an appeal from a final judgment entered on September 5, 2002. The Superior Court granted summary judgment in favor of defendants ConAgra, Inc. ("ConAgra"), E.I. du Pont de Nemours and Company and DuPont Chemical & Energy Operations, Inc. (collectively, "DuPont" and together with ConAgra, the "Sellers") and against plaintiff DCV Holdings, Inc. ("DCV Holdings"). The Sellers previously owned

DCV, which in turn controlled a series of joint ventures that ConAgra and DuPont had established. In 1997, the management of DCV joined together with an investment-banking firm, Windward Capital Partners, L.P. ("Windward"), to purchase DCV and its subsidiaries from the Sellers, using the newly formed DCV Holdings. The purchase price was in excess of $100 million.

2) DCV Holdings sued the Sellers for fraud and breach of contract. On April 1, 2002, upon cross-motions for partial summary judgment, the Superior Court granted partial summary judgment to the defendants. After unsuccessfully seeking entry of final judgment and interlocutory appeal on the dismissed claims, DCV Holdings moved for a voluntary dismissal of its remaining claims. That motion was granted on September 5, 2002. This appeal followed the entry of that final judgment.

3) In the parties' Purchase Agreement dated as of August 12, 1997, the Sellers represented and warranted to DCV Holdings that DCV's 1996 audited financial statements complied with Generally Accepted Accounting Principles ("GAAP") and fairly presented DCV's financial condition. The Sellers acknowledged that in 1996, DuPont falsely confirmed a non-existent rebate (the "TMA Rebate") in a letter to one of the DCV Companies. The Sellers also acknowledge the management of that

company included the non-existent TMA Rebate in the financial statements in order to inflate revenue and income artificially and thereby misappropriate over $400,000 in unearned bonuses.

4) The Sellers also represented and warranted in Section 3.9 of the Purchase Agreement that the DCV Companies had no undisclosed "liabilities or obligations of any nature (whether absolute, accrued, contingent, unasserted, determined, determinable or otherwise)." As of the closing, the record suggests that DCV had accrued nine years of unasserted, treble-damage antitrust liability arising from its affiliate's participation in a criminal price fixing conspiracy.

5) DCV Holdings has raised two issues on appeal. First, it argues that the "bogus" nature of the TMA rebate was never properly disclosed to DCV Holdings. The rebate was admittedly improperly obtained from DuPont by the management of DuCoa, L.P. ("DuCoa"), one of DCV's subsidiaries. Second, DCV Holdings argues that DuPont and ConAgra should have to indemnify it under Section 3.9 of the Purchase Agreement for liabilities stemming from their participation in an antitrust conspiracy, even if it was unknown at the time of the closing of the transaction.

6) DCV Holdings first argument is that the Sellers did not disclose that the TMA Rebate was "bogus" and the financial statements were

falsified. With regard to the TMA rebate issue, the Sellers contend that all of the "material factual disputes" presented by DCV Holdings to the Superior Court and on appeal were disclosed by DuPont to representative of DCV. In support of this, they refer to statements made by DCV's CEO, CFO and an accounting expert retained for this litigation. According to the Sellers, those statements demonstrate that the Sellers' written disclosure of the TMA rebate should have been sufficient to reveal that DuCoa management had intentionally booked a false rebate in order to increase their management bonus compensation.

7) Moreover, the Sellers assert that this written disclosure led Windward to express concern that the DuCoa finances had been intentionally manipulated. The Sellers also claim that, after discussing the validity of the TMA rebate with DuPont and with the President of DCV, who was slated to become the President of DCV Holdings, Windward considered withdrawing from the transaction or re-auditing DCV's books and records. Instead, the Sellers submit that Windward demanded and obtained a substantial price reduction and closed the transaction. DCV Holdings sharply disputes the Sellers' factual allegations.

8) On the second issue, DCV Holdings argues the Superior Court erred in ruling that the all-inclusive representation and warranty of the

Sellers in Section 3.9 was "inherently ambiguous" and did not encompass the accrued antitrust liability of DCV that existed at the time of the closing. The Sellers argue that there was no agreement for indemnification of potential liabilities stemming from an antitrust conspiracy that was unknown to all relevant parties at the time the transaction closed. According to the Sellers, Section 3.9 of the parties' Purchase Agreement, a provision the Sellers describe as "all-inclusive, boilerplate" should not be interpreted to mandate such indemnification.

9) DCV Holdings disagrees. According to DCV Holdings, the antitrust conspiracy was an "accrued" or "contingent" liability that was required to be disclosed pursuant to Section 3.9. The Sellers claim that during the negotiation of Section 3.9 the parties agreed to delete from its coverage any "existing condition or situation" that could reasonably be expected to result in any liability or obligation. The Sellers submit that this deletion shows that there was no obligation to disclose the unknown antitrust conspiracy pursuant to Section 3.9. According to the Sellers, Section 3.13, a different, more specific contractual representation, addressed to "Compliance with Law" and requiring the "Knowledge of Sellers," governed this issue. The Sellers submit that unless the unknown antitrust conspiracy was governed by Section 3.13 and not by Section 3.9, the

"Knowledge of Sellers" requirement in Section 3.13 would become surplusage.

10) A grant of denial of summary judgment by the Superior Court is reviewed *de novo* on appeal as to facts and law.[1] A moving party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[2] Conversely, if there is a genuine issue of material fact, or if the moving party is not entitled to judgment as a matter of law, summary judgment should be denied.

11) The record in this case reflects material disputes of fact on both issues. There are material disputes of fact between the parties as to whether there was adequate disclosure of the "bogus" nature of the TMA rebate, which was admittedly improperly obtained from DuPont by the management of DuCoa.

12) The record also reflects material disputes of fact as to the intent of the parties in negotiating Section 3.9 of the Purchase Agreement. After ruling that Section 3.9 was ambiguous, the Superior Court examined extrinsic evidence presented in the cross motions for summary judgment.

---

[1] *Newtowne Village Serv. Corp. v. Newtowne Road Dev. Co.,* 772 A.2d 172, 174-75 (Del. 2001).

[2] *Fleer Corp. v. Topps Chewing Gum, Inc.,* 539 A.2d 1060, 1061-62 (Del. 1988) (citation omitted).

Although we agree that Section 3.9 is ambiguous in the context of the entire Purchase Agreement, the extrinsic evidence reflects that intent of the parties is in material dispute. A resolution of that intent must be made by the trier of fact prior to determining whether DuPont and ConAgra are liable to indemnify DCV Holdings under Section 3.9 of the Purchase Agreement for charges stemming from the antitrust conspiracy.

13) The Superior Court should not have granted DuPont's motion for summary judgment regarding either the TMA rebate issue or the indemnification issue. The material facts that are in dispute with regard to both issues must be resolved by the trier of fact.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is reversed. This matter is remanded for a trial on the material issues of fact that are in dispute between the parties.

BY THE COURT:

/s/ Randy J. Holland
Justice