IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

I/M[X] INFORMATION MANAGEMENT SOLUTIONS, INC., a Delaware corporation,	)	
Plaintiff,	)	C.A. No. 7786-VCP
v.	)	
MULTIPLAN, INC., a New York corporation, and HMA ACQUISITION CORPORATION, a Delaware corporation,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: March 20, 2013
Date Decided: June 28, 2013

Cathy L. Reese, Esq., Joseph B. Warden, Esq., FISH & RICHARDSON P.C., Wilmington, Delaware; *Attorneys for Plaintiff*.

Srinivas M. Raju, Esq., Robert L. Burns, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Allen M. Gardner, Esq., Christopher J. Fawal, Esq., LATHAM & WATKINS LLP, Washington, D.C.; *Attorneys for Defendants*.

PARSONS, Vice Chancellor.

This action is before me on a motion to dismiss the plaintiff's declaratory judgment claims related to the release of funds in an escrow account. In 2011, the defendants acquired several of the plaintiff's now-former subsidiaries. As part of that transaction, the plaintiff made a number of representations and warranties, including that no material contracts were in material breach or default. The parties also executed an escrow agreement under which claims for indemnification could be pursued.

Less than a month before the escrowed funds were scheduled to be released, the defendants notified the plaintiff and the escrow agent that they had a pending claim resulting from the purported material breach of a material contract by one of the acquired companies. The plaintiff disagreed with that characterization and filed this action seeking, among other things, a declaration that the defendants were not entitled to indemnification and an injunction requiring the defendants to participate in giving joint instructions for release of the escrowed funds. That complaint was based on the plaintiff's allegations that: (1) the defendants' claim is not indemnifiable; (2) the defendants failed properly to assert their claim; and (3) the defendants' claim is now moot. The defendants dispute those allegations and filed a motion to dismiss the entirety of the plaintiff's action for failure to state a claim.

Having considered the parties' briefs and heard oral argument on the defendants' motion to dismiss, I conclude that as to at least some parts of the complaint, the plaintiff has stated a claim upon which relief can be granted. Accordingly, I deny the defendants' motion to dismiss.

I. BACKGROUND

A. The Parties

Plaintiff, i/m[x] Information Management Solutions, Inc. ("IMX" or "Plaintiff"), is a Delaware corporation that provides development, management, and advisory services for employee health plans.

Defendant MultiPlan, Inc. ("MultiPlan") is a New York corporation that develops and operates healthcare provider networks and offers related cost management services to insurance companies and other health benefit payors. Defendant HMA Acquisition Corporation ("HMA Acquisition" and, together with MultiPlan, the "Defendants") is a Delaware corporation that was formed to acquire several IMX subsidiaries.

B. Facts[1]

In April 2011, HMA Acquisition acquired two former subsidiaries of IMX, namely HMA, Inc. and HMN, Inc. HMN, Inc. negotiates with hospitals and other healthcare providers to get preferred rates, which can be accessed through HMN, Inc.'s member plans.

The acquisition of those companies was memorialized in a Stock Purchase Agreement (the "SPA") dated April 29, 2011 between HMA Acquisition and IMX.[2] As part of that agreement, IMX agreed to indemnify the "Purchaser Indemnified Parties"—

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[1] The facts recited herein are drawn from the well-pled allegations of IMX's Amended and Supplemental Verified Complaint (the "Complaint"), together with the attached exhibits, and are presumed true for purposes of Defendants' motion to dismiss.

[2] Compl. Ex. A, SPA.

which include both HMA Acquisition and MultiPlan—for any and all damages that are based upon, arise out of, or are related to, among other things, "any [a]ction or claim asserted, commenced, filed, or threatened with respect to the operations of [IMX] or any of its Subsidiaries (excluding the Acquired Companies and their Subsidiaries . . .)."[3] HMA, Inc. is defined in the SPA as one of three "Acquired Companies."[4] Pursuant to the SPA, IMX also agreed to indemnify the Purchaser Indemnified Parties from any breaches of any representation or warranty made by IMX in the SPA.[5]

In section 4.12(b) of the SPA, IMX represented and warranted that:

> Except as set forth on Schedule 4.12(b), all of the Material Contracts (i) are in full force and effect, (ii) represent the legal, valid and binding obligations of a Target Company or a Subsidiary of a Target Company, and (iii) to the knowledge of Seller, are enforceable by a Target Company or a Subsidiary of a Target Company in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting creditors' rights generally and subject to general principles of equity. Except as set forth on Schedule 4.12(b), (A) neither the Target Companies nor any of their Subsidiaries nor, *to the knowledge of Seller*, any other party thereto *is in material breach of or default under any provision of any Material Contract*, (B) neither the Target Companies nor any of their Subsidiaries have received any written claim or notice of material breach of or default under any Material Contract, (C) *to the knowledge of Seller*, no event has occurred which individually or together with other events, would reasonably be expected to result in a material

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3 *Id.* § 8.2.

4 *Id.* at 1, art. I.

5 *Id.* § 8.2(a).

> breach of or a default under any Material Contract (in each case, with or without notice or lapse of time or both).[6]

The parties also executed an escrow agreement (the "Escrow Agreement") that provided that $1,800,000 of the purchase price (the "Escrowed Funds") was to be withheld and deposited with an escrow agent (the "Escrow Agent").[7] In the event that a party was entitled to indemnification under the SPA, those claims could be pursued against the Escrowed Funds.[8] The Escrow Agreement also provides that the funds were to be held until fifteen months after the date of the agreement (the "Survival Expiration Date"), at which time the Escrow Agent was to release the Escrowed Funds minus the "Disputed Amount" as of the Survival Expiration Date.[9] "Disputed Amount" is defined as "the aggregate amount of all Damages alleged to be incurred by any Purchaser Indemnified Party pursuant to any Pending Claim that remains unpaid as of such date."[10]

On June 25, 2012, within the fifteen-month indemnification window, MultiPlan submitted a notice of claim (the "Notice of Claim") informing IMX that Queens Medical Center ("QMC") had asserted that HMN, Inc. may have permitted payor entities,

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6 *Id.* § 4.12(b) (emphasis added).

7 Compl. Ex. B, Escrow Agreement, at 1, § 1.

8 *Id.* § 3(a).

9 *Id.* § 3(a)(iv).

10 *Id.* Pending Claim is defined as "any claim pursuant to Section 8.2 of the [SPA that] shall have been properly asserted by Purchaser on or prior to the Survival Expiration Date and shall remain pending on the Survival Expiration Date." *Id.*

including the Veteran's Administration (the "VA"), inappropriate access to preferred rates.[11]

Traditionally, the VA had a policy of reimbursing health care providers at the Medicare allowed amounts. The VA had contracted with Electronic Technology Services ("ETS") and other "claims re-pricing providers," however, to obtain better rates, with the claims re-pricing providers retaining a portion of the cost savings. The claims re-pricing providers, in turn, subcontracted with organizations, such as HMN, Inc., to negotiate for better rates. According to the Complaint, Defendants have asserted that QMC has a claim against HMN, Inc. based on HMN, Inc. having provided the VA access to HMN, Inc.'s preferred rates despite the fact that the VA's contract with HMN, Inc. did not give the VA access to those rates.

On July 19, 2012, IMX submitted a letter enclosing proposed joint instructions to the Escrow Agent to disburse $1,683,491 of the Escrowed Funds to IMX and $116,509 to HMA Acquisition, the latter amount reflecting a net working capital adjustment.[12] On July 26, 2012, HMA Acquisition responded, proposing that the Escrow Agent withhold all the Escrowed Funds, except the $116,509 net working capital adjustment.[13] HMA Acquisition based that proposal on its position that it had a "Pending Claim" with respect to QMC. Specifically, HMA Acquisition's letter stated that:

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11 Compl. Ex. C, Notice of Claim.

12 *Id.* Ex. D.

13 *Id.* Ex. E.

> [QMC] is claiming that it received incorrect reimbursement amounts in breach of their contract, which is a Material Contract pursuant to Section 4.12 of the [SPA]. [QMC] contends that the breach is material and that it occurred prior to the execution of the [SPA]. [QMC]'s claims may well implicate other provisions of the [SPA] and HMA will notify you of any other potential breaches as it learns more.[14]

On July 29, 2012, *i.e.*, the Survival Expiration Date, the Escrow Agent did not make a disbursement of the Escrowed Funds to either party and instead directed that a disbursement would be made only after receipt of joint written instructions or a final order of a court. The parties engaged in further correspondence concerning the Escrow, with IMX noting deficiencies in HMA Acquisition's claims and HMA Acquisition defending their sufficiency.

On August 20, 2012, the VA's Office of Inspector General issued a report (the "Inspector General's Report") recommending, among other things, that the VA: (1) terminate its contracts with ETS and other claims re-pricing providers; (2) determine whether claims re-pricing provides access to prices lower than Medicare prices; and (3) evaluate whether claims re-pricing contracts are necessary.[15]

C. Procedural History

On August 15, 2012, IMX commenced this action. The initial complaint sought, among other things, a declaration that Defendants were not entitled to indemnification under the SPA and an injunction requiring Defendants to give joint instructions to the

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14 *Id.*

15 *Id.* Ex. K, the Inspector General's Report.

Escrow Agent to disburse the $1,683,491 of Escrowed Funds to IMX. On September 25, 2012, Defendants moved to dismiss that complaint. On November 6, IMX filed an amended complaint, *i.e.*, the Complaint, seeking fundamentally the same relief. Thereafter, Defendants again moved to dismiss the Complaint in its entirety. After full briefing on that motion, I heard argument on March 20, 2013.

On April 26, 2013, Defendants moved to stay discovery pending resolution of their motion to dismiss. I granted Defendants' motion to stay discovery subject to a limited carve-out requiring Defendants to disclose certain facts that they had represented they would produce at the March 20, 2013 argument. This Memorandum Opinion constitutes my ruling on Defendants' motion to dismiss.

D. Parties' Contentions

IMX seeks a declaratory judgment on essentially four grounds. First, IMX asserts that it lacked the requisite "knowledge" to have breached Section 4.12(b) of the SPA. Second, IMX argues that Defendants have not alleged a "material" breach or default of a Material Contract. Third, IMX contends that Defendants did not establish a Disputed Amount to be held in escrow. Finally, IMX argues that the Inspector General's Report has mooted Defendants' claim.[16]

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[16] In its Complaint, IMX also asserted that it was entitled to declaratory relief because HMA, Inc. was an Acquired Company, and as such was excluded from IMX's indemnification obligations under Section 8.3(c) of the SPA. In IMX's Answering Brief, however, IMX acknowledged that "Defendants seek indemnification solely under Section 8.2(a)" and, accordingly, IMX has restricted its arguments to Section 8.2(a). Pl.'s Answering Br. 16 n.3.

Defendants disagree with IMX's contentions that it failed to assert an indemnifiable claim and that its claim is moot. Specifically, Defendants assert that there is no "knowledge" requirement in the relevant part of Section 4.12(b) of the SPA. In addition, Defendants argue that QMC's claims for breach of contract are material, as defined by the SPA. Defendants also maintain that they complied with the requirements of Section 3(a)(iv) of the Escrow Agreement, thereby establishing a Disputed Amount. Finally, Defendants aver that the Inspector General's Report has not mooted their claim because the report's recommendations have not been implemented and the report does not apply to claims for past damages.

At oral argument, Defendants changed the relief requested through their motion from a dismissal with prejudice to a dismissal without prejudice.[17] That modification apparently sought to take into account the possibility that QMC's claims might disappear through, for example, the passing of a statute of limitations or QMC voluntarily releasing its claims.[18]

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17 Tr. 9–10.

18 *Id.* (Defendants' Counsel) ("What we believe the Court ought to do with this case – I know we ask in our papers for the matter to be dismissed with prejudice. I actually don't think that made sense. I know that's what we asked. Because I can imagine situations if there are factual developments that in the future make the threat no longer a threat – passing of the statute of limitations, [QMC] releasing the claims they've threatened, a change in the law or the facts that would make the claims not compensable, not likely to be brought, not indemnifiable in some way. There are several situations that I could imagine that would make their demand for the indemnification – for the release of the escrow, despite the presence of this threatened claim, go away. So I don't believe the Court ought to dismiss the claims with prejudice.").

II. ANALYSIS

A. Standard

This is a motion to dismiss under Court of Chancery Rule 12(b)(6). Therefore, I assume the truthfulness of the well-pled allegations in the Complaint and afford IMX "the benefit of all reasonable inferences."[19] If the well-pled allegations in the Complaint would entitle IMX to relief under any "reasonably conceivable" set of circumstances, the Court must deny the motion to dismiss.[20] But, the Court need not accept inferences or factual conclusions unsupported by specific allegations of fact.[21] Furthermore, "a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations."[22]

In deciding this motion, I also apply familiar principles of contract interpretation. Under Delaware law, the proper interpretation of language in a contract is a question of law. "Accordingly, a motion to dismiss is a proper framework for determining the

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19 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).

20 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

21 *Norton v. K-Sea Transp. P'rs L.P.*, – A.3d –, –, 2013 WL 2316550, at *3 (Del. May 28, 2013).

22 *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

meaning of contract language."[23] When the language of a contract is plain and unambiguous, binding effect should be given to its evident meaning.[24] Only where there are ambiguities may a court look to collateral circumstances; otherwise, only the language of the contract itself is considered in determining the intentions of the parties.[25]

B. Knowledge of Sellers

In its Complaint, IMX asserts that its representation and warranty regarding the absence of any material breach or default of any Material Contract contains the qualification that such representation and warranty was made "to the knowledge of the Seller."[26] In that regard, IMX argues that if, as it claims, it did not have knowledge of the alleged breach, it cannot be responsible for indemnifying Defendants. Defendants, on the other hand, contend that the knowledge requirement only qualifies IMX's representations with respect to whether "any other party" is in material breach or default and does not limit IMX's representations regarding the companies it owned.

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23 *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006) (citing *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006)).

24 *Id.* (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

25 *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *Citadel Hldg. Corp., v. Roven*, 603 A.2d 818, 822 (Del. 1992).

26 *See* Compl. ¶ 23 ("Th[e] claim [relied upon by Defendants] also does not implicate a breach of IMX's representation that, *to IMX's knowledge*, neither the Acquired Companies or any other party was in material breach or default of any material contract, and, as a result, is not indemnifiable under Section 8.2(a)" (emphasis added)).

The relevant part of Section 4.12(b) of the SPA is as follows:

> Except as set forth on Schedule 4.12(b), all of the Material Contracts (i) are in full force and effect, (ii) represent the legal, valid and binding obligations of a Target Company or a Subsidiary of a Target Company, and (iii) *to the knowledge of Seller*, are enforceable by a Target Company or a Subsidiary of a Target Company in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting creditors' rights generally and subject to general principles of equity. Except as set forth on Schedule 4.12(b), (A) neither the Target Companies nor any of their Subsidiaries nor, *to the knowledge of Seller*, any other party thereto is in material breach of or default under any provision of any Material Contract, (B) neither the Target Companies nor any of their Subsidiaries have received any written claim or notice of material breach of or default under any Material Contract, (C) *to the knowledge of Seller*, no event has occurred which individually or together with other events, would reasonably be expected to result in a material breach of or a default under any Material Contract (in each case, with or without notice or lapse of time or both).[27]

While the language of Section 4.12(b) could have been drafted more clearly, I hold that it unambiguously conveys to the reader that the phrase "to the knowledge of Seller" does not modify IMX's representation that none of the Target Companies or their Subsidiaries are in material breach of or default under a provision of a Material Contract.

IMX argues that the "to the knowledge of Seller" limitation qualifies all representations and warranties contained in Section 4.12(b)(iii), including what it calls subpart 4.12(b)(iii)(A). IMX's interpretation, however, would render superfluous the second use of the phrase "to the knowledge of Seller," which appears in the middle of

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[27] SPA § 4.12(b) (emphasis added).

clause A in the second sentence of Section 4.12(b). "In interpreting contractual language, there is a presumption that the parties intended every part of the agreement to mean something and that 'an interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage.'"[28] Here, there is an alternative interpretation that avoids the anomaly in IMX's interpretation. That is, the subparts denominated 4.12(b)(iii)(A)–(C) reasonably can be read as not imputing into each subpart the knowledge requirement of 4.12(b)(iii). This interpretation gives independent meaning to the later qualifications and circumvents the surplusage issue altogether.

With that in mind, I conclude that the proper interpretation of subpart (A) of the second sentence of Section 4.12(b)(iii) is that the phrase "to the knowledge of Seller" modifies only IMX's representation that "any other party thereto" is not in material breach of or default under any provision of any Material Contract. Any other interpretation would ignore the placement and order of words. As the Supreme Court of the United States observed long ago, "[t]o get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural significa[nce] of the words, *in the order of grammatical arrangement* in which the framers of the instrument have placed them."[29]

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[28] *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 1838608, at *6 (Del. Ch. Apr. 28, 2010) (quoting E. Allen Farnsworth, Contracts § 7.11 (4th ed. 2004)).

[29] *Lake Cty. v. Rollins*, 130 U.S. 662, 670 (1889) (emphasis added).

In sum, IMX's interpretation of the SPA as attaching a "to the knowledge of Seller" qualifier to IMX's representation regarding whether any Target Company or its Subsidiary materially breached or defaulted under a Material Contract is unreasonable and contrary to the plain language of the SPA. Accordingly, IMX has not stated a claim for its requested declaratory and injunctive relief based on its construction of the purported knowledge qualifier.

C. Material Breach

IMX also seeks a declaratory judgment that Defendants' claim is not indemnifiable because none of the Target Companies are in "material breach or default of any [M]aterial [C]ontract."[30] In response, Defendants contend that it is undisputed that the QMC contract is a Material Contract and that QMC's threatened claim would far exceed the materiality threshold of $100,000 purportedly expressed in Section 8.4(b) of the SPA.[31]

"Material breach" is not defined in the SPA. To give that term meaning, IMX relies on Delaware cases that define "materiality" for purposes of repudiating a contract. Under those cases, "a 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the

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[30] *See* Compl. ¶ 23. Although Paragraph 23 of the Complaint refers to Acquired Companies, it is clear from the Complaint as a whole and the documents integral to the Complaint that this reference applies to the Target Companies.

[31] IMX concedes that the QMC contract is a Material Contract. *See* Pl.'s Answering Br. 14.

contract and makes it impossible for the other party to perform under the contract."[32] IMX alleges that QMC's allegations regarding the VA do not meet that standard, characterizing them as "a small fraction of the total services performed by QMC for which HMN, Inc.'s thousands of plan members accessed HMN, Inc.'s negotiated rates."[33]

Defendants argue that IMX need not rely on Delaware cases because the parties to the SPA defined materiality in terms of "baskets." "Baskets" are often used in stock purchase agreements to recognize that all "representations concerning an ongoing business are unlikely to be perfectly accurate and to avoid disputes over smaller amounts."[34] "Baskets" refers to either a "threshold" that, once crossed, entitles the indemnified party to recover all damages or a "deductible" that entitles the indemnified party to the excess damages over the stated amount.[35] As described below, baskets also can be used to resolve the question of "materiality."

> Even worse, the parties may not attempt to define the slippery and subjective concept of materiality. As a result, the term "materiality" may become an issue after the closing of the acquisition and the acquirer may demand indemnification for an allegedly "material" breach of warranty, omission, or

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32 *Shore Invs., Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *5 (Del. Super. Nov. 28, 2011); *see also BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003) (noting that one of several factors to consider when determining whether a failure to render performance is material is whether a party was "deprived of the benefit which [it] reasonably expected").

33 Compl. ¶ 12.

34 American Bar Ass'n, Model Stock Purchase Agreement with Commentary 329 (2d ed. 2010).

35 *Id.*

> misrepresentation. The target will, of course, insist that the term is not "material" and the issue will need to be decided by a court.
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> The usefulness of the materiality concept can be salvaged, however, by means of defining materiality in terms of a "basket" or "cushion" provision. Such a provision would state that a breach of warranty, an omission, or a misrepresentation is material (either individually or in the aggregate) only if it causes a specified amount of damage to the acquiring corporation. This will prevent the acquirer from using a minor breach of warranty, an omission, or a misrepresentation as a pretext for refusing to close. It will also protect the acquirer from being forced to accept numerous warranty breaches, omissions, or misrepresentations that, in the aggregate, are clearly material if none, by themselves, reaches the specified amount of materiality.[36]

Here, the parties included a "claims basket" in the SPA. Specifically, Section 8.4(b) of the SPA provides:

> Claims Basket. Notwithstanding any provision hereof to the contrary, an Indemnified Party shall only be entitled to indemnification pursuant to Section 8.2(a) or Section 8.3(a) for breach of representation or warranty to the extent the aggregate amount of all Damages incurred by such Indemnified Party for which such Indemnified Party is entitled to indemnification pursuant to such section exceeds $100,000 (the "Basket Amount"), at which point an Indemnified Party shall be entitled to indemnification for all Damages (including all Damages incurred prior to exceeding the Basket Amount); provided that no such limitation shall apply in respect of Damages as a result of, arising out of or relating to breaches or misrepresentations of the Fundamental Representation or Damages for which indemnification is provided in Section 7.1.

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[36] Aaron Rachelson, Corporate Acquisitions, Mergers and Divestitures § 4.41 (2013).

The "Claims Basket" in Section 8.4(b) arguably defines "materiality" for purposes of the SPA, but does not define what a "material breach" of a Material Contract would be. In that regard, it would seem reasonable to consider the materiality concept of Section 8.4(b) in interpreting Section 4.12.

One conceivable interpretation, for example, is that the parties intended any breach of a Material Contract that involved a loss of $100,000 or more to a party to that contract to constitute a "material breach." Such an interpretation would recognize that the parties to the SPA probably intended some relationship to exist between "material breach" as it relates to Section 4.12(b)(iii)(A) of the SPA and the Claims Basket in Section 8.4(b).

Even assuming the Claims Basket effectively established that any breach of $100,000 or more was "material," it is conceivable that QMC's claim does not involve damages greater than that amount. In its Complaint, IMX alleges that the "services performed for VA members constituted only a small fraction of the total services performed by QMC for which HMN, Inc.'s thousands of plan members accessed HMN, Inc.'s negotiated rates."[37] IMX also avers that QMC did not seek a monetary remedy.[38]

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[37] Compl. ¶ 12.

[38] *Id.* ¶ 15 ("The parties engaged in additional correspondence, leading up to an August 6, 2012 letter from MultiPlan, in which IMX discovered that QMC sought only to have HMN, Inc., 'stop providing network access to third parties who are not covered under the Agreement,' and *did not seek any monetary remedy*." (bold omitted)).

Based on those allegations, it is reasonably conceivable that IMX could prove that QMC's threatened claim is for an amount less than $100,000. In that event, even under the arguably lower standard for "material breach" derived from the basket provisions, IMX conceivably could succeed in showing that HMN, Inc. was not in material breach of a Material Contract and that Defendants do not have an indemnifiable claim. Accordingly, I conclude that IMX has stated a claim for the declaratory and injunctive relief it seeks, and that Defendants' motion to dismiss should be denied.

D. Disputed Amount

IMX next argues that it is entitled to release of the Escrowed Funds, because Defendants have not adequately established a Disputed Amount as required by Section 3(a)(iv) of the Escrow Agreement. Defendants, on the other hand, assert that they provided a Disputed Amount in their July 26, 2012 letter, which contained proposed joint written instructions for the Escrow Agent to retain the remaining Escrowed Funds.[39]

Section 3(a)(iv) does not contain a notice provision. Instead it directs that, on the Survival Expiration Date, the Escrow Agent should release the Escrowed Funds minus the Disputed Amount. The section then goes on to define Disputed Amount as the

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[39] Defendants also posit that they satisfied the minimal notice requirements of Section 8.6 of the SPA. In that regard, IMX stated that it "takes no position on whether Defendants properly complied with the notice provision of the SPA because . . . Defendants do not have an indemnifiable claim for which notice could be given." Pl.'s Answering Br. 19. Accordingly, I assume, without deciding, that Defendants satisfied the notice requirements of Section 8.6 of the SPA.

"aggregate amount of all Damages alleged to be incurred by any Purchaser Indemnified Party pursuant to any Pending Claim that remains unpaid as of such date."[40]

Where the Disputed Amount is less than the Escrowed Funds, a party would need to specify that amount so as to enable the Escrow Agent to release the difference between the Escrowed Funds and the Disputed Amount. But, where the Disputed Amount is greater than or equal to the Escrowed Funds, a party could so state that without assigning an exact number to the Disputed Amount. And, where a party proposes that the Escrow Agent withhold *all* of the Escrowed Funds, one reasonably would infer that the Disputed Amount was greater than the Escrowed Funds.

Here, Defendants proposed in their July 26 letter, that the Escrow Agent should "hold the remaining Escrow[ed] Funds in the Escrow Account pursuant to Section 3(a)(iv) of the Escrow Agreement until a Pending Claim relating to [QMC] is resolved."[41] In doing so, Defendants communicated their view that the Disputed Amount exceeded the Escrowed Funds. Accordingly, I conclude that Defendants satisfied their obligations under the Escrow Agreement to provide a Disputed Amount and find unpersuasive IMX's general allegation that "MultiPlan alleged no damages arising from the QMC's allegations prior to July 29, 2012 and, as a result, as of that date, there was no Disputed Amount."[42] Thus, IMX has failed to state a claim for either declaratory or injunctive

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40 Escrow Agreement § 3(a)(iv).

41 Compl. Ex. E.

42 *See* Compl. ¶ 24.

relief based on its allegation that Defendants failed to comply with a contractual requirement to state a Disputed Amount.

E. The Inspector General's Report

Finally, IMX's Complaint seeks a declaratory judgment that "any claim arising from QMC's allegations is now moot."[43] One basis for that conclusion is that the Inspector General's Report eliminates any threatened claim by QMC, thereby mooting Defendants' claim for indemnification. Defendants counter that the Inspector General's Report is irrelevant because: (1) it merely provided a set of recommendations; (2) it did not apply retroactively; and (3) QMC's purported claims are based on "third parties" other than the VA.

IMX asks the Court to ignore Defendants' arguments and, instead, accept its allegation on information and belief in the Amended Complaint that "this change [in policy] has resulted in QMC no longer pursuing any claims against Defendants related to the VA, including any claim for retroactive relief."[44] But, "[i]t is well established that "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."[45] Here, the Inspector

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43 *Id.* ¶ 29.

44 Pl.'s Answering Br. 21 (citing Compl. ¶ 20).

45 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006); *see also H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003) ("Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations.").

General's Report upon which IMX relies undermines its suggestion that the report itself is conclusive evidence of mootness.[46]

As an initial matter, the Inspector General's Report merely provides a set of recommendations to the Chief Procurement and Logistics Officer and the Under Secretary for Health.[47] Until those officials and the VA actually adopt and implement these recommendations, the report does not moot Defendants' claims. Indeed, the evidence before me, including an "Action Plan" at the end of the Inspector General's Report, indicates that the recommendations have not been implemented. The Action Plan states that the VA *will* work with the Chief Procurement and Logistics Officer to "determine the availability of re-pricing contract opportunities that would be beneficial to the [VA]" and "*will* perform a cost benefit ratio in order to determine if continued use of re-pricing continues to be beneficial with the use of Medicare rates."[48]

That forward-looking language also indicates that the report's recommendations will not apply retroactively. Importantly, however, QMC's threatened claims appear to include matters that arose before the Inspector General's Report.[49] Thus, even if the VA were to implement the policies stated in the Inspector General's Report, the implementation would not necessarily affect QMC's past claims and Defendants'

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46 The Inspector General's Report is Exhibit K to the Complaint.

47 Inspector General's Report 15.

48 *Id.* at 22, 23 (emphasis added).

49 Compl. Ex. H ("[Y]our assertion that the Agreement limits retrospective review of claims to two years is misplaced.").

indemnification claims would not be mooted. For these reasons, I conclude that IMX's position that the Inspector General's Report moots Defendants' claims is without merit.

Nevertheless, Defendants' claim conceivably could be mooted for reasons alluded to in the Inspector General's Report or otherwise. For example, the statute of limitations may run on QMC's purported claim. Or, the existence of the Inspector General's Report may cause QMC to reconsider its purported claim. Having concluded that Defendants are not entitled to dismissal of IMX's Complaint, and based on IMX's allegation that "any claim arising from QMC's allegations is now moot," I find it appropriate to deny this aspect of Defendants' motion to dismiss and allow discovery to go forward.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Defendants' motion to dismiss the Complaint. I also hereby vacate the stay entered on May 23, 2013.

IT IS SO ORDERED.