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Case No. 5120-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CLUBCORP, INC. and FILLMORE CCA HOLDINGS, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 5120-VCP
PINEHURST, LLC and PUTTERBOY, LTD.,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: July 25, 2011
Decided: November 15, 2011

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PARSONS, Vice Chancellor.

This case concerns a contractual dispute among the parties to an indemnification agreement (the "Indemnification Agreement") incident to a merger. The plaintiffs have asserted claims for indemnification, and the defendants dispute whether the Indemnification Agreement covers those claims. Thus, the parties call upon the Court to interpret the contractual language and to determine whether the Indemnification Agreement provides indemnity for any of the plaintiffs' claims, in whole or in part.

Complicating the matter somewhat is the fact that the plaintiffs engaged in a corporate restructuring after they filed this action. Each of the original named plaintiffs has merged with and into a new corporate entity, and the successors seek to continue to assert the original plaintiffs' contractual rights in this action. The defendants maintain, however, that the mergers violated an anti-assignment provision of the Indemnification Agreement such that, regardless of whether the original plaintiffs' claims are indemnifiable, the successor entities cannot enforce their predecessors' rights under the Indemnification Agreement.

This matter is before me on two motions by the plaintiffs. The first motion seeks a substitution of parties under Court of Chancery Rule 25(c), and the second is for summary judgment under Rule 56. For the reasons discussed below, I grant in part and deny in part, without prejudice, the motion for substitution. As to the plaintiffs' motion for summary judgment, I find that the Indemnification Agreement is ambiguous in certain important respects and that there are genuine issues of material fact regarding the parties' intent as to the relevant indemnification clauses. Therefore, I deny plaintiffs' motion for

summary judgment, but grant limited relief under Rule 56(d) regarding defendants' laches argument.

I. BACKGROUND

A. The Parties

When filed in December 2009, the Verified Complaint (the "Complaint") named two plaintiffs: ClubCorp, Inc. ("ClubCorp") and Fillmore CCA Holdings, Inc. ("Fillmore"), both of which were Delaware corporations. ClubCorp owns and operates various golf, country, and other clubs located throughout the United States.

On November 30, 2010, ClubCorp merged with and into ClubCorp USA, Inc. ("ClubCorp USA"), with ClubCorp USA as the surviving entity. Also on November 30, Fillmore merged with and into ClubCorp Holdings, Inc. ("Holdings"), with Holdings as the surviving entity. ClubCorp USA is a Delaware corporation, and Holdings is a Nevada corporation. ClubCorp and Fillmore have moved to substitute their successors-in-interest, ClubCorp USA and Holdings, respectively, as the plaintiffs in this action. For convenience, ClubCorp, Fillmore, ClubCorp USA, and Holdings are referred to collectively herein as "Plaintiffs."

Defendant Pinehurst, LLC ("Pinehurst") is a Delaware limited liability company. Pinehurst is the owner and operator of the Pinehurst Resort and Country Club, located in Pinehurst, North Carolina (the "Pinehurst Resort"). Defendant Putterboy, Ltd. ("Putterboy") is a Texas limited partnership. Putterboy purchased Pinehurst from ClubCorp in 2006. The Indemnification Agreement to which ClubCorp, Fillmore,

Pinehurst, and Putterboy are parties relates to that purchase by Putterboy of Pinehurst. Pinehurst and Putterboy are referred to collectively herein as "Defendants."

B. Facts[1]

1. Fillmore acquires ClubCorp, but Putterboy keeps Pinehurst

Before 2006, ClubCorp owned Pinehurst and thus, indirectly, the Pinehurst Resort. Sometime in 2006, Fillmore agreed to acquire ClubCorp. ClubCorp's founders, however, wanted to retain ownership and management of the Pinehurst Resort. To effect the acquisition of ClubCorp while carving out the Pinehurst Resort from that acquisition, the parties entered into two separate transactions. First, by an interest purchase agreement dated September 12, 2006 (the "Purchase Agreement"), ClubCorb sold its interest in Pinehurst to Putterboy, an entity affiliated with ClubCorp's founders. Second, by an agreement and plan of merger dated October 9, 2006 (the "Merger Agreement"), ClubCorp merged into a wholly-owned subsidiary of Fillmore.

The spinoff of Pinehurst from ClubCorp gave rise to certain potential issues regarding tax and insurance matters, among other things. For example, the possibility existed that the IRS might characterize the initial sale of Pinehurst to Putterboy as a related-party transaction at a favorable price, in which case the tax liability associated with the sale likely would increase. Additionally, until 2006, Pinehurst was covered under ClubCorp's automobile, general liability, workers' compensation, and health

[1] Unless otherwise noted, the facts set forth in this Memorandum Opinion are undisputed and taken from the pleadings, admissions, and affidavits submitted to the Court.

insurance policies. Thus, ClubCorp might continue to incur costs under those policies from claims made against Pinehurst. To address such concerns, the parties agreed in December 2006 to indemnify each other as to certain, delineated losses that might arise. The terms of that Indemnification Agreement are at the heart of this dispute.

2. The Indemnification Agreement[2]

Both Plaintiffs' claims for indemnification and Defendants' opposition to the motion for substitution depend on provisions of the Indemnification Agreement, but those provisions do not overlap. At least four provisions of the Indemnification Agreement relate to Plaintiffs' claim that they have suffered indemnifiable losses. They are Sections 1, 3, 4, and 12.

Section 1 of the Indemnification Agreement is a general loss provision. It requires Pinehurst and Putterboy to "indemnify and hold harmless the ClubCorp Indemnified Parties [a defined term that includes ClubCorp and Fillmore, among others] against any and all Losses from, or included in, . . . (ii) the Pinehurst Transaction Claims and (iii) Pinehurst Excess Insurance Claims." As defined in Section 12, "Pinehurst Transaction Claims" include, among other things, actions or proceedings brought by governmental entities related, in whole or in part, to the spinoff of Pinehurst from ClubCorp.

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[2] The Indemnification Agreement contains a number of provisions relevant to matters in dispute here. Many of those provisions contain defined terms and additional defined terms within those terms. Therefore, this Background presents the principal terms of the Indemnification Agreement in some generality. Where relevant, I discuss those same terms with greater specificity in the Analysis section *infra*. A copy of the executed Indemnification Agreement is attached to the Affidavit of Todd Dupuis as Exhibit B.

"Pinehurst Excess Insurance Claims" are defined as claims against ClubCorp's insurance policies "arising solely out of, or resulting solely from, the operations, management, or activities of Pinehurst" before Fillmore's acquisition of ClubCorp. That definition also contains a proviso excluding the first $1.4 million of such claims. Hence, Pinehurst and Putterboy must indemnify ClubCorp and Fillmore for insurance claims only to the extent those claims exceed $1.4 million.

Section 3 of the Indemnification Agreement specifically concerns tax matters. In particular, Section 3(a) requires Pinehurst and Putterboy to indemnify ClubCorp and Fillmore for taxes "imposed as a result of . . . the amount realized on the Pinehurst Transaction determined to be in excess of [the Adjusted sale price of $320.6 million] as set forth on . . . Annex A to the Merger Agreement . . . ."[3] Section 3(d) provides further that Pinehurst and Putterboy must indemnify ClubCorp and Fillmore for taxes imposed on the "Pinehurst Entities" except for those entities' federal income taxes. Although neither the Indemnification Agreement nor the Merger Agreement defines the "Pinehurst Entities," that term is defined by the Purchase Agreement as including eight specific business entities, none of which is ClubCorp or Fillmore.

Section 4 prescribes the procedures each party must follow when submitting a claim for indemnification. In pertinent part, Section 4(a) requires any party seeking indemnification to provide "notice (a 'Claim Notice') of any matter which [that party] has determined has given or could reasonably be expected to give rise to a right of

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[3] *See* Compl. ¶ 16; Answer ¶ 16.

indemnification under this Indemnification Agreement, within 30 days following such determination . . . ." Notwithstanding this 30-day notice period, Section 4(a) provides further that failure to comply with the specified claims procedure does not constitute a release "except to the extent the Indemnifying Party is materially prejudiced by such failure, and then only to the extent of such prejudice."

Turning to the motion for substitution, Defendants base their opposition to that motion on two allegedly improper mergers involving ClubCorp and Fillmore. The parties' arguments as to the propriety of those mergers involve four different provisions of the Indemnification Agreement. Those are Sections 7, 8, 16, and 17, which provide as follows:

> 7. *Survival of Protection*. This Indemnification Agreement shall continue to afford protection to each indemnified party regardless of whether such indemnified party remains in the position or capacity pursuant to which such indemnified party became entitled to indemnification under this Indemnification Agreement . . . .
>
> 8. *Rights Cumulative*. The right of any indemnified party to the indemnification provided herein . . . shall extend to such indemnified party's successors, assigns, heirs, and legal representatives.
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> 16. *Assignment*. None of this Indemnification Agreement or any of the rights, interests or obligations hereunder shall be assigned by any of the parties hereto, in whole or in part, by operation of Law or otherwise, without the prior written consent of the other parties, and any attempt to make such assignment without such consent shall be null and void.
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> 17. *Parties in Interest*. Except as otherwise specifically provided herein, this Indemnification Agreement shall be binding upon and inure solely to the benefit of each party hereto and their respective successors and assigns . . . .

Defendants rely almost exclusively on Section 16 in arguing that the ClubCorp and Fillmore mergers are void. Plaintiffs contend that, when properly considered in the context of all of the above-quoted sections, Section 16 supports a contrary conclusion.

3. ClubCorp submits Claim Notices to Defendants

On February 21, 2008, ClubCorp sent a Claim Notice to Putterboy and Pinehurst seeking "indemnification for $1,167,380 relating to the payment of Taxes to the State of California stemming from the Pinehurst Transaction under the Purchase Agreement"[4] (the "Tax Claim"). In that letter, ClubCorp sought indemnification for a portion of its 2006 taxes pursuant to Sections 3(a) and 3(d) of the Indemnification Agreement. Defendants replied through counsel on March 10, 2008, disputing that they had any liability for the Tax Claim and challenging its timeliness under Section 4(a). Defendants' reply did not identify further their grounds for disputing liability under the Indemnification Agreement or identify any prejudice they suffered as a result of ClubCorp's delay in making the Tax Claim. The parties corresponded intermittently over the next year,[5] but their respective positions did not change: ClubCorp continued to assert that the Tax Claim related to capital gains realized on the spinoff of Pinehurst and

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[4] Compl. Ex. B, at 1.

[5] Indeed, the parties corresponded about the disputed Tax Claim until at least June 2009, nearly a year and a half after ClubCorp's initial Claim Notice. Bracegirdle Aff. Ex. E.

therefore was indemnified under Section 3(a) or 3(d),[6] and Defendants continued to dispute the Tax Claim as unrelated to the Pinehurst Transaction and, in any event, untimely.

Meanwhile, on November 7, 2008, ClubCorp sent a second Claim Notice seeking "indemnification for $108,242, which represents the amount of Pinehurst Excess Covered Insurance Claims" provided for under Section 1 of the Indemnification Agreement (the "Insurance Claim").[7] Enclosed with that letter was a spreadsheet itemizing the dollar amounts of various health, dental, workers' compensation, and general liability claims for incidents that occurred before Fillmore acquired ClubCorp but were paid afterward.[8] On November 13, Defendants disputed the Insurance Claim on two grounds. First, Defendants claimed that the enclosed spreadsheet provided insufficient information to substantiate each of the component costs comprising the $108,428 Insurance Claim. Second, Defendants argued that the claim appeared to include approximately $178,000 of costs associated with a lawsuit styled *John Cottam and Linda Cottam v. ClubCorp, Inc., et al*. (the "Cottam Lawsuit"). Defendants denied that that lawsuit resulted in a loss

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6 Additionally, the Complaint asserts the Tax Claim also is covered under Section 1 of the Indemnification Agreement. Compl. ¶ 20.

7 Compl. Ex. C, at 1.

8 The total payments made for those claims amounted to $1,508,428. *Id.* at Attach. 1. Thus, ClubCorp's claim for indemnification of $108,428 represented the amount by which the Pinehurst Excess Covered Insurance Claims exceeded the $1.4 million threshold.

"arising *solely* out of, or resulting *solely* from, the operations, management, or activities of Pinehurst."[9]

As with the Tax Claim, the parties corresponded about the Insurance Claim for several months, but failed to resolve it. For example, on February 13, 2009, ClubCorp revised the dollar amount of its Insurance Claim to $114,457.69 and submitted approximately 300 pages of documentation regarding it. On March 11, Defendants replied that those documents still did not explain why losses related to the Cottam Lawsuit arose solely out of the operations, management, or activities of Pinehurst. Additionally, Defendants questioned the inclusion of certain workers' compensation claims dating back as far as 1993.

Some additional background regarding the Cottam Lawsuit may be useful because the inclusion in or exclusion from the Insurance Claim of the costs associated with that lawsuit may determine whether the predicate $1.4 million threshold has been exceeded.[10]

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[9] Indemnification Agreement § 12 (emphasis added).

[10] Unfortunately, the record on this point is not entirely clear. The Complaint alleges that Plaintiffs have incurred $1,637,093.06 of insurance-related costs. Compl. ¶ 23. In their opening brief, Plaintiffs assert that they submitted insurance-related claims of only $1,514,457.69, but in their reply brief they return to the $1,637,093.06 figure alleged in the Complaint. Pls.' Op. Br. 9-10 (citing Dupuis Aff. Ex. G Attach. at 2 [ClubCorb's Feb. 13, 2009 letter]); Pls.' Reply Br. 9 (citing Dupuis Aff. Ex. E [ClubCorp's Nov. 7, 2008 letter]). The discrepancy is important because if, on the one hand, aggregate insurance-related costs total $1,637,093.69, then Plaintiffs' Pinehurst Excess Covered Insurance Claims will exceed the indemnification threshold by $237,093.06. Thus, Plaintiffs would be entitled to at least some indemnification on its Insurance Claim even if the approximately $178,000 of costs associated with the Cottam Lawsuit were excluded. But the result would be different if, on the other hand, aggregate

That suit, commenced in North Carolina state court in November 2006, involved a personal injury claim by a golfer, John Cottam, who was struck by a golf ball at the Pinehurst Resort in 2003. Cottam named eight defendants, including ClubCorp, Pinehurst, and the individual who hit the golf ball. The latter was alleged to be acting as the "borrowed servant" of both ClubCorp and Pinehurst.[11] Although ClubCorp's letters of November 7, 2008 and February 13, 2009 assert that ClubCorp incurred losses to defend itself, Pinehurst, and others in the Cottam Lawsuit, they do not indicate whether the approximately $178,000 ClubCorp claimed for indemnification represents the costs of defending all eight defendants or only the apportioned cost attributable to Pinehurst alone.[12]

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insurance-related costs total only $1,514.457.69, which is less than $178,000 above the $1.4 million threshold. The record as it currently stands is too confused on this issue to permit it to be resolved on summary judgment.

11 McKinley Aff. Ex. C ¶ 10. More specifically, the complaint in the Cottam Lawsuit alleges that the individual who hit the ball was a golf professional employed by ClubCorp North Lakes, Pty Ltd, itself a co-defendant in that action, but that he was acting on behalf of, among others, ClubCorp, ClubCorp USA, and Pinehurst at the time of the incident. *Id.* ¶¶ 8-10. A "borrowed servant" or "borrowed employee" is "[a]n employee whose services are, with the employee's consent, lent to another employer who temporarily assumes control over the employee's work. Under the doctrine of respondeat superior, the borrowing employer is vicariously liable for the borrowed employee's acts." *Black's Law Dictionary* 564 (8th ed. 2004).

12 Similarly, at argument, Plaintiffs' counsel also could not say whether the $178,000 figure represented the litigation costs of all eight defendants or only Pinehurst. Tr. 41-42.

The parties tried to resolve their differences as to these claims under the Indemnification Agreement for nearly two years. After those efforts failed, ClubCorp and Fillmore initiated this action in December 2009.

C. Procedural History

The Complaint, filed on December 3, 2009, contains two counts which seek specific performance of the Indemnification Agreement regarding (1) the Tax Claim and (2) the Insurance Claim. Defendants filed their Answer on January 15, 2010 denying liability as to both counts. Thereafter, on December 17, 2010, Plaintiffs moved for substitution of parties under Court of Chancery Rule 25(c)[13] and for summary judgment under Rule 56. Defendants opposed both motions and, after full briefing, the Court heard oral argument on July 25, 2011. This Memorandum Opinion constitutes the Court's rulings on Plaintiffs' motions.

D. Parties' Contentions

Regarding their motion for substitution, Plaintiffs contended initially that, by virtue of the November 2010 mergers, ClubCorp USA and Holdings are the successors-

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[13] Although Plaintiffs initially moved only to substitute ClubCorp USA for ClubCorp, they later requested in their reply brief to substitute Holdings for Fillmore as well. Pls.' Reply Br. 14 n.6. Plaintiffs' counsel confirmed at argument that their failure to include Holdings in their initial motion was an oversight. Tr. 61-62. Because (1) the requested substitution for either Plaintiff raises the same set of issues, (2) Defendants had notice of the likely substitution of Holdings for Fillmore, *see* Defs.' Ans. Br. 11 n.13, and (3) the limited relief granted herein as to substitution is not likely to prejudice Defendants, the Court will deem Plaintiffs' motion to be seeking to substitute both ClubCorp USA and Holdings for the original Plaintiffs.

in-interest to ClubCorp and Fillmore, respectively, and therefore should be substituted as the plaintiffs in this action. The Indemnification Agreement, however, contains an anti-assignment provision, which Defendants argue precludes ClubCorp USA and Holdings from enforcing their respective predecessors' rights. In response, Plaintiffs aver that: (1) the Indemnification Agreement unambiguously permits parties to merge without triggering the anti-assignment provision; (2) even if the Indemnification Agreement is ambiguous, the Court should rule as a matter of law that the anti-assignment provision does not preclude these particular mergers; and (3) as a matter of equity, the Court should not countenance a forfeiture of Plaintiffs' rights under the Indemnification Agreement as a result of the mergers.

Turning to Plaintiffs' summary judgment motion, Plaintiffs seek entry of a judgment in their favor because (1) there is no dispute that Plaintiffs incurred the costs associated with the Tax and Insurance Claims, (2) the Indemnification Agreement unambiguously provides for indemnification of those claims, and (3) they have complied with the claims procedure prescribed by Section 4 of the Indemnification Agreement. For those reasons, Plaintiffs contend they are entitled to specific performance of Defendants' contractual obligations. Moreover, to the extent there is any uncertainty as to the precise dollar amount of indemnity to which they are entitled, Plaintiffs ask the

Court to enter judgment in their favor on the issue of liability, pursuant to rule 56(c), and then hold an evidentiary hearing on the amount of damages.[14]

For their part, Defendants oppose summary judgment on the grounds that the terms of the Indemnification Agreement are ambiguous and genuine issues of fact exist as to both the Tax and Insurance Claims. Regarding the Tax Claim, Defendants contend that Plaintiffs have no right to indemnification because (1) Plaintiffs did not timely submit the requisite Claim Notice and (2) the Indemnification Agreement does not unambiguously provide indemnification for the specific taxes ClubCorp incurred. As to the Insurance Claim, Defendants deny that Plaintiffs' costs related to the Cottam Lawsuit are recoverable and argue that without those costs Plaintiffs' Insurance Claim would not exceed the prerequisite $1.4 million threshold for indemnification.

II. ANALYSIS

A. Plaintiffs' Motion for Substitution of Parties

Substitution of a party under Rule 25(c) is committed to the discretion of the Court.[15] Where there has been a transfer of interest during the course of an action, Rule

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[14] Rule 56(c) provides in pertinent part: "A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages, or some other matter."

[15] *First Am. Fin. Mgmt. Co. v. Royal Sovereign Gp., L.L.C.*, 2010 WL 2734226, at *1 n.1 (Del. Ch. July 9, 2010) (citation omitted); *Stornawaye Capital LLC v. Smithers*, 2010 WL 673291, at *2 (Del. Ch. Feb. 12, 2010) ("The substitution of a proper party plaintiff may be committed to the Court's discretion under Court of Chancery Rule 25(c)"); *see also* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1958 (3d ed. 2008) (discussing the discretionary character of the comparable Fed. R. Civ. P. 25(c)). In this

25(c) provides that "the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." "A 'transfer of interest' in the corporate context takes place when one corporation becomes the successor, typically by merger, to the interest the original corporate party had in the proceeding."[16]

Here, there is no dispute that ClubCorp merged into ClubCorp USA and Fillmore merged into Holdings. But, the parties emphatically disagree over whether those mergers violated the anti-assignment provision of the Indemnification Agreement and, therefore, whether the successor entities can enforce their respective predecessors' rights. That disagreement, however, involves a question of substantive law—*i.e.*, whether the attempted assignment was effective or, put another way, whether the successor entities can obtain the relief they seek—whereas Rule 25 speaks to procedural matters.[17] Nevertheless, it is not surprising that the parties raise their substantive arguments in the context of Plaintiffs' procedural motion for substitution. This Court has considered similar arguments regarding the effect of an anti-assignment provision on a merger in at

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regard, I note that the language in Court of Chancery Rule 25(c) closely tracks the language of Federal Rule 25(c).

16 *First Am. Fin. Mgmt. Co.*, 2010 WL 2734226, at *1 n.1 (citation omitted); *see also* 7C Wright, Miller & Kane, *supra*, § 1958 ("The rule applies to ordinary transfers and assignments, as well as to corporate mergers.").

17 *See* 7C Wright, Miller & Kane, *supra*, § 1952 ("Rule 25 is procedural. It does not provide for the survival of rights or liabilities but merely describes the method by which the original action may proceed if the right of action survives.").

least two instances, once on a motion for substitution under Rule 25(c)[18] and once on a motion for summary judgment.[19]

Be that as it may, Rule 25(c) provides a court considerable discretion either to substitute the successors or merely to join them as plaintiffs. Consequently, unless Defendants can persuade me that, as a matter of law, ClubCorp USA and Holdings cannot under any circumstances enforce their predecessors' rights under the Indemnification Agreement, I see no harm in joining these successor entities and addressing at a later stage of the proceedings, with the benefit of a more fully developed record, the substantive question of whether the mergers necessarily preclude Plaintiffs from obtaining the relief they seek.

Defendants argue that the mergers of ClubCorp and Fillmore into ClubCorp USA and Holdings, respectively, constitute assignments "by operation of law" of rights under the Indemnification Agreement. Section 16 of the Indemnification Agreement, however, prohibits assignments, including explicitly by operation of law, without prior consent of the other parties. Because ClubCorp and Fillmore did not seek Defendants' consent before merging, Defendants assert that the successor entities cannot enforce the rights of the original parties to the contract. Plaintiffs respond to this argument on essentially three fronts: (1) they urge the Court to reject Defendants' reading of Section 16 as

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18 *Tenneco Auto. Inc. v. El Paso Corp.*, 2002 WL 453930 (Del. Ch. Mar. 20, 2002).

19 *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, 1993 WL 294847 (Del. Ch. Aug. 2, 1993).

inconsistent with Sections 7, 8, and 17 of the Indemnification Agreement; (2) they contend that, even if the Indemnification Agreement is ambiguous in that regard, the ambiguity should be resolved in Plaintiffs' favor as a matter of law under *Star Cellular Telephone Co. v. Baton Rouge CGSA, Inc.*;[20] and (3), as a matter of equity, Plaintiffs claim the Court should not countenance a forfeiture of their rights under the Indemnification Agreement as a result of the mergers.

The facts of this case relating to the anti-assignment issue here are similar to those in *Tenneco Automotive Inc. v. El Paso Corp*.[21] The substantive dispute there involved enforcement of an insurance agreement, but the original plaintiff merged into a successor entity during the pendency of the action. Moreover, in *Tenneco*, the insurance agreement at issue contained an anti-assignment provision, the first sentence of which prohibited assignments "whether by operation of law or otherwise" without the written consent of the other party. The third sentence of that very same provision, however, stated that all of the parties' rights and obligations "will be binding upon and enforceable against the respective successors and permitted assigns of [each] party . . . ."[22]

In determining the effect of the merger on the insurance agreement, Vice Chancellor Noble first concluded, "[a]s a general matter in the corporate context, the phrase 'assignment by operation of law' would be commonly understood to include a

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[20] 1993 WL 294847 (Del. Ch. Aug. 2, 1993).

[21] 2002 WL 453930 (Del. Ch. Mar. 20, 2002).

[22] *Id.* at *1.

merger."[23] Accordingly, the first sentence of the anti-assignment provision, when read in isolation, purported "to preclude a transfer of rights under the Insurance Agreement by merger absent prior consent from the other parties to the Insurance Agreement."[24] At the same time, the third sentence's reference to "successors," if read in isolation, appeared to permit a successor entity to continue to assert its predecessor's rights under the contract. Furthermore, because both sentences began with the clause "[e]xcept as otherwise expressly provided herein," neither sentence was clearly subordinate to the other. Thus, the court found that an ambiguity existed "between the relatively clear language of both the first and third sentences [that could not] be resolved based exclusively on the wording of either the Insurance Agreement as a whole or the text of [the anti-assignment provision]."[25]

Having determined that the anti-assignment provision was ambiguous and, therefore, did not clearly prohibit mergers, the *Tenneco* Court turned to *Star Cellular*, which held that

> where an antitransfer clause in a contract does not explicitly prohibit a transfer of property rights by a merger, and where performance by the original contracting party is not a material condition and the transfer itself creates no unreasonable risks

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23 *Id.* at *2.

24 *Id.*

25 *Id.* at *3.

> for the other contracting parties, the court should not presume that the parties intended to prohibit the merger.[26]

That is, because the anti-assignment provision in *Star Cellular* was ambiguous regarding the effect of a merger, then-Vice Chancellor, now Justice Jacobs ultimately "attempt[ed] to determine the contracting parties' likely intent by resorting to an interpretation of [the anti-assignment provision] grounded on principles fundamental to the law of assignments."[27] The court only employed that approach as a last resort, however, after it first considered the other provisions of the contract and, critically, extrinsic evidence submitted by the parties regarding the context and circumstances of the contract's formation.[28] Only when that extrinsic evidence failed to reveal the parties' intended meaning did the court turn to "the objectives that parties to an assignment clause are generally *presumed* to be seeking to achieve."[29]

Turning to the facts of this case, I start with the plain language of the anti-assignment provision, Section 16 of the Indemnification Agreement. It reads in full:

> 16. *Assignment*. None of this Indemnification Agreement or any of the rights, interests or obligations hereunder shall be assigned by any of the parties hereto, in whole or in part, by

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26 *Star Cellular Tel. Co. v. Baton Rouge CGSA*, 1993 WL 294847, at *8 (Del. Ch. Aug. 2, 1993).

27 *Id.* at *5.

28 *Id.* at *4-5, *7.

29 *Id.* at *8 (emphasis added). I also note that the *Tenneco* court addressed this question after a week-long trial on the merits. *Tenneco*, 2002 WL 453930, at *1. The court, therefore, had the benefit of whatever extrinsic evidence the parties introduced at trial.

> operation of Law or otherwise, without the prior written consent of the other parties, and any attempt to make such assignment without such consent shall be null and void.

Section 16's prohibition on assignments, "by operation of Law or otherwise, without the prior written consent of the other parties" substantially mirrors the first sentence of the anti-assignment provision at issue in *Tenneco*. As in both *Tenneco* and *Star Cellular*, this language, taken in isolation, reasonably could be read as proscribing mergers absent prior written consent of the parties.[30] In addition, Section 8 of the Indemnification Agreement mirrors the problematic third sentence of the anti-assignment provision in *Tenneco*.[31] Section 8 provides that each party's rights to indemnification "shall extend to such indemnified party's successors . . . ." If read in isolation, Section 8 appears to allow

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[30] *See also Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *13 (Del. Ch. Apr. 8, 2011) (stating that *Tenneco* and *Star Cellular* are "instructive," but not "controlling," regarding whether a reverse triangular merger triggers an anti-assignment provision).

[31] Because Section 8 appears to present a direct conflict with Section 16, I need not consider Section 7 or 17 in much depth. I note, however, that I do not find either Section 7 or 17 to conflict with the anti-assignment language of Section 16 as clearly as Plaintiffs contend. "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins.*, 616 A.2d 1192, 1196 (Del. 1992) (citation omitted). Nevertheless, it is debatable whether the reference in Section 7 to changes in "position or capacity" was intended to encompass a merger. As to Section 17, the introductory clause "[e]xcept as otherwise specifically provided herein" explicitly subordinates it to Section 16. Thus, as between those two sections, Section 16 controls.

successor entities of a merger to continue to enforce the original parties' rights under the Indemnification Agreement, thus presenting a direct conflict with Section 16.[32]

Based on this tension between the relatively clear language of Sections 8 and 16, the Indemnification Agreement, read as a whole, is fairly susceptible to different interpretations regarding the effect of a merger on a party's rights thereunder. Because the contract reasonably may be construed as having two or more meanings in this regard, this Court ordinarily would attempt to resolve the ambiguity by considering extrinsic evidence of the parties' intended meaning.[33] Neither party, however, submitted such evidence. Furthermore, if, as in *Star Cellular*, the parties had submitted extrinsic evidence regarding the context and circumstances of the parties' intended meaning, but the Court still could not resolve the ambiguity, then the Court might have had occasion to "resort" to the *Star Cellular* analysis. Procedurally, however, this case is at an earlier stage.

Consequently, before considering evidence of the parties' presumptive intent as in *Star Cellular*, the Court would prefer the opportunity to consider evidence of their actual intent as reflected in, for example, overt acts and statements pertaining to, or the context

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[32] Neither Section 8 nor 16 of the Indemnification Agreement contains any subordinating language like the clause "except as otherwise expressly provided herein" present in *Tenneco*. Thus, whereas in *Tenneco* the two apparently conflicting terms were equally subordinate, the two apparently conflicting terms here are equally controlling.

[33] *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

of, the contract's formation.[34] Stated differently, Defendants' opposition to Plaintiffs' motion to substitute raises factual and legal questions that would benefit from further development of the record.[35] Under these circumstances, the Court will exercise its discretion under Rule 25(c) to allow this action to proceed and permit the record to be developed accordingly without prejudice to any party's ability to argue at a later stage of the proceedings what effect, if any, the mergers have had on the ability of a particular Plaintiff to pursue its claims for indemnification. To do so, I grant in part and deny in part, without prejudice, Plaintiffs' motion for substitution of parties such that ClubCorp USA and Holdings shall be joined or added, rather than substituted, as Plaintiffs in this action.[36]

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[34] *See Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (providing examples of extrinsic evidence of parties' intent), *aff'd*, 7 A.3d 486 (Del. 2010) (TABLE).

[35] It also appears that the Court would benefit from further development of the law and the facts relating to Plaintiffs' argument that, as a matter of equity, the Court should not countenance a forfeiture of their rights under the Indemnification Agreement based on Defendants' invocation of the anti-assignment provision. That provision states that "any attempt to make [an assignment by operation of Law or otherwise] without [Defendants'] consent shall be null and void." Indemnification Agreement § 16. None of the parties has addressed, for example, the operation of that clause in the context of this case, if the Court were to agree that the mergers involved violated the anti-assignment provision.

[36] *See* Ct. Ch. R. 25(c) ("[T]he Court [may] direct[] the person to whom the interest is transferred to be substituted in the action *or joined* with the original party." (emphasis added)).

B. Plaintiffs' Motion for Summary Judgment

1. Standard

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[38] "A party opposing summary judgment, however, may not merely deny the factual allegations adduced by the movant."[39] Under Court of Chancery Rule 56(e), if the moving party puts facts into the record supporting its motion, "the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight."[40] Moreover, the Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[41]

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[37] *Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

[38] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

[39] *Bank of N.Y. Mellon v. Realogy Corp.*, 979 A.2d 1113, 1119 (Del. Ch. 2008) (quoting *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979)).

[40] *Id.* (quoting *Tanzer*, 402 A.2d at 385).

[41] *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie,* 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

The pending motion requires the interpretation of several provisions of the Indemnification Agreement. "When interpreting a contract, the role of a court is to effectuate the parties' intent,"[42] taking the contract as a whole and "giving effect to each and every term."[43] As mentioned above, the Court must give effect to the plain meaning of clear and unambiguous contractual provisions, but the parties' intent is ambiguous where contractual provisions reasonably may be construed as having more than one meaning.[44] If ambiguity exists and extrinsic evidence does not definitively resolve the parties' intent, then summary judgment is inappropriate.[45]

Plaintiffs contend that the Indemnification Agreement unambiguously provides for indemnification of the Tax and Insurance Claims. More specifically, they argue that the Tax Claim is indemnified by Section 1, 3(a), or 3(d) of the Indemnification Agreement and that the Insurance Claim, including the costs associated with the Cottam Lawsuit, is a Pinehurst Excess Insurance Claim indemnified by Section 1. For their part, Defendants argue that the Tax Claim is barred under Section 4(a) as untimely and, in any event, Sections 1, 3(a), and 3(d) of the Indemnification Agreement do not unambiguously provide for indemnification of the specific taxes ClubCorp incurred. Additionally,

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42 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

43 *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011).

44 *See supra* notes 31 & 33 and accompanying text.

45 *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

Defendants assert that there is a genuine issue of fact regarding whether costs associated with the Cottam Lawsuit are Pinehurst Excess Covered Insurance Claims covered under Section 1. I address first the parties' arguments concerning the Tax Claim and then turn to the Insurance Claim.

2. The Tax Claim

a. Is the Tax Claim barred under Section 4(a) as untimely?

Defendants assert as a threshold matter that Plaintiffs are not entitled to indemnification of the Tax Claim because ClubCorp failed to comply with the claims procedure prescribed by Section 4(a) of the Indemnification Agreement. Section 4(a) requires the party seeking indemnification to submit a Claim Notice "of any matter which [that party] has determined has given or could reasonably be expected to give rise to a right of indemnification under this Indemnification Agreement, within 30 days following such determination . . . ." In this case, ClubCorp seeks indemnification for a portion of its 2006 taxes, but did not submit a Claim Notice to Defendants until February 21, 2008. Since their initial receipt of that Claim Notice, Defendants have argued that Plaintiffs failed to comply with the thirty-day notice requirement of Section 4(a).[46]

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[46] The record does not indicate conclusively whether ClubCorp's February 21, 2008 Claim Notice regarding the Tax Claim actually was untimely. Section 4(a) requires a claim notice to be made within thirty days of the indemnified party's *determination* that a right of indemnification has arisen or reasonably could arise. Although there is no dispute that ClubCorp submitted its Claim Notice more than thirty days after October 2007, when it filed its 2006 tax return, *see* Tr. 22-23, the record does not reflect when ClubCorp *determined* that it was entitled to indemnification for the claimed taxes. Nevertheless, the parties have not raised this issue, but have focused instead on whether the alleged delay has materially

Section 4(a), however, contains a proviso that failure to comply with the specified claims procedure does not constitute a release "except to the extent the Indemnifying Party is materially prejudiced by such failure, and then only to the extent of such prejudice." Therefore, for Defendants to defeat as untimely an otherwise valid claim for indemnification, Defendants must demonstrate that ClubCorp's delay caused them prejudice in some material respect. Defendants have made no such showing.

In this regard, Defendants' argument that their ability to show prejudice "awaits discovery" is not persuasive.[47] Whether *Defendants* have suffered prejudice is an issue that *Defendants* are in a unique position to know without resort to discovery. Defendants would know, for example, if they committed resources to other endeavors in reliance on the apparent absence of any need to continue maintaining reserves for potential indemnification claims. In any event, more than a year elapsed between the time Plaintiffs filed the Complaint and when they moved for summary judgment, and at no time during that year was discovery stayed. Thus, both parties had ample opportunity to pursue discovery and gather the requisite evidence necessary to support a claim, assert a defense, or show that there is a genuine issue of fact for trial.[48] On the issue of whether Defendants were materially prejudiced by the alleged untimeliness of Plaintiffs' Tax

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prejudiced Defendants. As discussed more fully below, the issue regarding material prejudice ultimately moots any factual uncertainty as to the timeliness of ClubCorp's Claim Notice regarding the Tax Claim.

[47] Tr. 60.

[48] *See* Ct. Ch. R. 56(e).

Claim, Defendants did not pursue that opportunity. Accordingly, pursuant to Rule 56(c), I find that there is no substantial controversy that Defendants were not materially prejudiced by the manner in which Plaintiffs asserted their Tax Claim. The untimeliness of ClubCorp's February 21, 2008 Claim Notice, therefore, does not bar Plaintiffs' Tax Claim.

b. Is the Tax Claim covered under Section 1?

Plaintiffs' argue first that Section 1 of the Indemnification Agreement unambiguously provides for indemnification of the Tax Claim. As stated above, Section 1 is a general loss provision requiring Pinehurst and Putterboy to indemnify ClubCorp "from and against any and all Losses from, or included in, . . . the Pinehurst Transaction Claims . . . ." Section 12 of the Indemnification Agreement defines "Losses" to include, among other things, costs, liabilities, or expenses, but the definition does not include "taxes" specifically. At least arguably, therefore, a tax liability falls within the contractual definition of a "Loss." Additionally, the Indemnification Agreement defines "Pinehurst Transaction Claims" to include "Actions" by "Governmental Entities" related to the initial spinoff of Pinehurst from ClubCorp. "Actions," moreover, include claims and charges by "Governmental Entities," which include the State of California.[49] Considering each of these defined terms in the aggregate, Plaintiffs argue, results in an unambiguous provision for indemnification of ClubCorp's 2006 California taxes. That

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[49] Bracegirdle Aff. Ex. B ("Merger Agreement") Art. 1 at 6; Indemnification Agreement § 12 (capitalized terms not otherwise defined have the meanings ascribed to them by the Merger Agreement).

is, California (a Governmental Entity) charged taxes (an Action), resulting in a tax liability (a Loss) to ClubCorp, arising from the spinoff of Pinehurst from ClubCorp (a Pinehurst Transaction Claim).

This Russian matryoshka doll of defined terms, however, is not as clear as Plaintiffs contend. Contractual interpretation requires considering the agreement as a whole rather than piecemeal by isolated term.[50] In that regard, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[51] In this case, Plaintiffs' argument that the general loss provision of Section 1 applies to California state taxes is undercut by the presence of a more specific provision in the Indemnification Agreement, such as Section 3, captioned "Indemnification of Tax Matters," which expressly provides for indemnification of taxes. Additionally, as discussed more fully below, Section 3 provides for indemnification of taxes on a more limited basis than would Section 1. Thus, to whatever extent Sections 1 and 3 might conflict if Section 1 applied equally to tax matters, Section 3 would be the narrower of the two provisions and, therefore, control.

Giving effect to the specific over the general also sheds light on the string of definitions Plaintiffs contend support their broad interpretation of Section 1. For

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50 *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) (citation omitted).

51 *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (citing *Katell v. Morgan Stanley Gp., Inc.*, 1993 WL 205033, at *4 (Del. Ch. June 8, 1993)).

example, although "Loss" includes costs, liabilities, and expenses and, thus, arguably encompasses taxes, the Indemnification Agreement provides an explicit definition for "Taxes." Thus, if the parties intended to include taxes among the various costs encompassed within the term "Loss" for purposes of Section 1, they easily could have inserted the defined term "Taxes" into the definition of "Loss" or into the operative section itself.[52] Similarly, while the definition of "Action" includes any claim or charge and, thus, again arguably includes tax assessments, the reference in the remainder of that definition to, among other things, any "suit, hearing, . . . *or other proceeding*"[53] makes that conclusion dubious. Thus contextualized, the words "claim" and "charge" as used in the Indemnification Agreement may refer only to formal civil claims, criminal charges, or other proceedings before a governmental authority.

Accordingly, Plaintiffs have not shown that Section 1 of the Indemnification Agreement unambiguously provides for indemnification of their Tax Claim. Therefore, Plaintiffs are not entitled to summary judgment that their Tax Claim is covered by Section 1.

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[52] *See, e.g.,* Indemnification Agreement § 3(a) (providing for indemnification "from and against any and all Losses arising out of . . . any and all Taxes . . . .").

[53] *Id.* § 12 (emphasis added).

c. Is the Tax Claim covered under Section 3(a)?

Plaintiffs argue in the alternative that Section 3(a) of the Indemnification Agreement provides for indemnification of the Tax Claim. That section provides, in pertinent part, as follows:

> Pinehurst and Putterboy shall . . . indemnify and hold harmless [ClubCorp, among others,] from and against any and all Losses arising out of or resulting from, or included in . . . any and all Taxes (as defined in Section 12 below) imposed as a result of . . . the amount realized on the Pinehurst Transaction determined to be in excess of [the Adjusted sale price of $320.6 million] as set forth on the Pinehurst Sale Detail of the Sources and Uses in Annex A to the Merger Agreement . . . .[54]

Unlike Section 1, there is no dispute that Section 3(a) may apply to taxes ClubCorp paid to California. Furthermore, California state taxes are not mentioned on Annex A to the Merger Agreement. Plaintiffs seem to contend that, as a result, ClubCorp's 2006 California taxes are necessarily in "excess" of the amounts set forth on Annex A, and therefore, Section 3(a) obligates Defendants to indemnify ClubCorp for those taxes.

Plaintiffs' interpretation, however, may overemphasize the clause "as set forth on . . . Annex A . . . ." Section 3(a) applies to the Tax Claims only if the specific taxes ClubCorp incurred were "imposed *as a result of* . . . the amount realized on the Pinehurst Transaction" in excess of $320.6 million.[55] Focusing on the words "as a result of," Section 3(a) arguably requires a showing that the taxes were imposed *because* California,

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[54] *Id.* § 3(a).

[55] *Id.* (emphasis added).

or some other taxing authority, deemed the amount realized on the spinoff of Pinehurst from ClubCorp to exceed $320.6 million. Construed in this manner, Section 3(a) would require a causal connection between the taxes incurred and the dollar value assigned to the gains realized on the Pinehurst Transaction. Plaintiffs' briefs do not squarely address this issue and none of Plaintiffs' affidavits, viewed in the light most favorable to Defendants, definitively demonstrate that the Tax Claim resulted from California's determination that ClubCorp realized more than $320.6 million on the spinoff of Pinehurst. Therefore, assuming Section 3(a) does require a causal connection between the taxes incurred and the amount of gains realized, Plaintiffs have failed to satisfy their initial burden of showing that they are entitled to a judgment as a matter of law.

Alternatively, to the extent Plaintiffs disagree with the interpretation of Section 3(a) to require such a causal connection, I find that the contract is fairly susceptible to multiple meanings. In that sense, the Indemnification Agreement would be ambiguous, and the Court would need to consider any relevant extrinsic evidence. Because Plaintiffs have not submitted any such evidence, they have not shown that Section 3(a) unambiguously entitles them to a favorable judgment on their Tax Claim.

d. Is the Tax Claim covered under Section 3(d)?

Lastly, Plaintiffs assert in relatively conclusory fashion that Section 3(d) also provides an alternative basis for indemnification of the Tax Claim. Section 3(d) requires Pinehurst and Putterboy to indemnify ClubCorp from any Losses resulting from "any and all Taxes imposed or assessed on the Pinehurst Entities . . . ." As with Section 3(a), the

Tax Claim falls within the contractual definition of Taxes. The parties dispute, however, whether Plaintiffs meet the definition of "Pinehurst Entities."

The capitalized term "Pinehurst Entities" is not defined in the Indemnification Agreement. Pursuant to Section 12, such terms "are given the meaning ascribed to them in the Merger Agreement," but there is no definition of "Pinehurst Entities" in the Merger Agreement. Although "[a] term is not ambiguous simply because it is not defined,"[56] there obviously is no dictionary or common usage definition of "Pinehurst Entities" either.[57] Thus, because its operative term is undefined entirely, Section 3(d) is at least arguably ambiguous, and the Court must look beyond the Indemnification Agreement itself to construe it. The Court notes, however, that a third document, the Purchase Agreement, does define "Pinehurst Entities," and the interrelationship between the Merger, Purchase, and Indemnification Agreements strongly suggests that the parties likely intended the Purchase Agreement's definition to apply.[58] That suggestion, however, is not confirmed by any affidavit, party admission, or documentary evidence

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56 *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 468 n.86 (Del. Ch. 2008) (citations omitted).

57 *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").

58 The first recital of the Purchase Agreement defines "Pinehurst Entities" as the following eight entities: (1) Pinehurst; (2) Pinehurst Championship Management, Inc.; (3) Pinehurst Country Club, Inc.; (4) ClubCorp Realty East, Inc.; (5) PCC Realty Corp.; (6) Pinehurst Acquisition Corp.; (7) Pinehurst Realty Corp.; and (8) Pinehurst No. VII, Inc. Dupuis Aff. Ex. A, at 1.

identified by Plaintiffs. Therefore, drawing all inferences in favor of Defendants, there is a genuine issue of fact regarding, at least, the definition of the "Pinehurst Entities" for purposes of Section 3(d) of the Indemnification Agreement. Hence, Plaintiffs have not shown that Section 3(d) unambiguously provides for indemnification of the Tax Claim.

In sum, because Defendants have not presented any evidence of material prejudice from ClubCorp's failure to comply with the thirty-day notice requirement of Section 4(a) of the Indemnification Agreement, I hold, as a matter of law, that Section 4(a) does not bar Plaintiffs' Tax Claim. At the same time, however, Plaintiffs have failed to demonstrate that they are entitled to a judgment in their favor. By its unambiguous terms, Section 1 does not appear to indemnify the Tax Claim, and Sections 3(a) and 3(d) either are ambiguous or raise issues of fact that cannot be resolved on the current record. Therefore, Plaintiffs are not entitled to summary judgment on the Tax Claim.

3. The Insurance Claim

Evaluating Plaintiffs' asserted entitlement to summary judgment on the Insurance Claim involves considering even more factual issues than on the Tax Claim. Section 1 of the Indemnification Agreement requires Defendants to indemnify ClubCorp against any Losses resulting from Pinehurst Excess Covered Insurance Claims, *i.e.*, claims against ClubCorp's insurance policies "arising solely out of, or resulting solely from, the operations, management, or activities of Pinehurst" before Fillmore acquired ClubCorp, but only to the extent those claims exceed $1.4 million. Thus, the relevant inquiries include: (1) whether the claimed insurance-related Losses arose *solely* out of the

operations, management, or activities of Pinehurst before it was purchased; (2) whether the total of those Losses exceed $1.4 million; and (3) if so, by how much.

I note at the threshold that, while Plaintiffs undeniably claim that they have incurred insurance-related Losses attributable to Pinehurst in excess of $1.4 million, the amount of the claimed excess Losses is not yet clear. At various times, Plaintiffs have asserted that the total amount of their insurance-related Losses are either $1,637,093.06 or $1,514,457.69. Viewing the evidence in the light most favorable to Defendants obliges me to give credence to the lesser amount of $1,514,457.69 for purposes of Plaintiffs' motion for summary judgment.[59] Furthermore, the total amount of claimed insurance-related Losses includes approximately $178,000 in expenses associated with the Cottam Lawsuit. As mentioned previously, Defendants contest whether any of those expenses arose *solely* out of the operations, management, or activities of Pinehurst. Thus, if Plaintiffs fail to show that those $178,000 in expenses are attributable solely to Pinehurst, there will be a genuine issue of material fact regarding whether Plaintiffs' insurance-related Losses exceed the $1.4 million threshold, which would require denial of summary judgment on this aspect of Plaintiffs' claim.

Ultimately, a more thorough development of the facts and the record generally would clarify the relevant indemnification provisions and their application to the Cottam Lawsuit. None of Plaintiffs' affidavits establish, for example, whether the $178,000 figure corresponds to ClubCorp's expenses to defend Pinehurst alone or to defend all of

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[59] *See Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

the defendants in the Cottam Lawsuit. Nor could Plaintiffs' counsel affirmatively represent at argument whether $178,000 represents the apportioned cost of defending Pinehurst or the aggregate litigation costs incurred.

Although Plaintiffs argue that, in any event, the total $178,000 amount is attributable solely to Pinehurst in that the lawsuit concerns a personal injury claim alleged to have occurred at the Pinehurst Resort, and that argument ultimately may succeed, the Court cannot resolve that issue with confidence on the current record. If $178,000 represents the apportioned cost of defending *solely* Pinehurst *and* the Cottam Lawsuit arose solely from conduct that occurred at the Pinehurst Resort, then the Pinehurst Excess Covered Insurance Claims probably would include the full expense of $178,000. But, if that figure represents the aggregate cost of defending the Cottam Lawsuit, additional evidence concerning proper apportionment of that cost and, arguably, the parties' intent regarding the term "Losses arising *solely* out of," would clarify matters as to this critical aspect of Plaintiffs' Insurance Claim. As the record currently stands, however, the Court is not in a position to assess how best to resolve the effect of the Cottam Lawsuit on the parties' rights and liabilities under the Indemnification Agreement.

In addition, the parties' briefing also raised a genuine issue of material fact regarding certain health insurance and workers' compensation claims in Plaintiffs' Insurance Claim. For all of these reasons, I also decline Plaintiffs' invitation to consider entering judgment in Plaintiffs' favor on the issue of liability as to the Insurance Claim

and directing further proceedings on the extent of damages under Court of Chancery Rule 56(c). Thus, Plaintiffs are not entitled to summary judgment on their Insurance Claim.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for substitution of parties pursuant to Rule 25(c) is granted in part and denied in part, without prejudice, such that ClubCorp USA and Holdings shall be joined, rather than substituted, as plaintiffs in this action. Additionally, Plaintiffs' motion for summary judgment under Rule 56 is denied, except that certain limited relief is granted under Rule 56(d) on Defendants' laches defense to Plaintiffs' Tax Claim. An order implementing these rulings is being entered concurrently with this Memorandum Opinion.