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Case Number 171,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENCORE LTD.,	)	
	)	
Defendant and Counterclaim Plaintiff Below, Appellant,	)	No.: 171,2016
	)	(Appeal from Superior Court
	)	C.A. No. N15C-08-032 EMD [CCLD])
v.	)	
	)	
ST. CROIX ALUMINA L.L.C. AND ALCOA WORLD ALUMINA, LLC.,	)	
	)	
Plaintiffs and Counterclaim Defendants Below, Appellee.	)	

APPELLANT GLENCORE LTD.'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant, defendant and counterclaim plaintiff below Glencore Ltd. ("Glencore") appeals from the Superior Court's order entering final judgment: (i) dismissing Glencore's contract claims; and (ii) granting Appellees, plaintiffs and counterclaim defendants below St. Croix Alumina L.L.C. ("SCA") and Alcoa World Alumina, LLC ("AWA," and with SCA, "Alcoa") judgment on their claims seeking declaratory judgment.

Alcoa acquired an alumina refinery in the U.S. Virgin Islands (the "Refinery") from a Glencore affiliate, Virgin Islands Alumina Corporation ("Vialco"), via an Acquisition Agreement dated July 19, 1995 (the "1995 Agreement"). The Refinery generated bauxite residue, which was placed in two storage facilities: ponds known as "Area B," and giant hills known as "Area A."

Under Article 8.3(3) of the 1995 Agreement, Alcoa expressly contracted to maintain, operate, and manage all of the bauxite residue storage facilities, and took full responsibility for all environmental conditions relating to bauxite residue storage and disposal, including those caused by Vialco and other prior operators.

Alcoa failed to maintain and manage the bauxite residue storage facilities, which began to leak contaminants. In turn, the government of the Virgin Islands (the "Government") brought two actions (the "Virgin Islands Actions")[1] under the

[1] The Virgin Islands Actions are captioned *Comm'r, Dep't of Planning & Nat. Res. v. Century Alumina Co.*, Civil Action No. 1:05-cv-00062-HB (the "NRD Action") and *United*

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") against, *inter alia*, Alcoa, Vialco and Lockheed Martin Corporation ("Lockheed"), seeking damages plus costs required to remediate the storage facilities. The Government alleged all defendants were jointly and severally liable.

Vialco demanded that Alcoa perform under the 1995 Agreement and take the lead defending the claims and remediating the storage facilities. Instead, Alcoa privately settled, took responsibility for only Area A, and left Lockheed and Vialco exposed to claims for damages and the remediation of Area B.

In 2014, Lockheed settled with the Government by agreeing to: (i) pay $20.75 million to the Government for damages; and (ii) remediate Area B. Lockheed then filed suit against Glencore in the United States District Court for the Southern District of New York (the "New York Action"), seeking indemnity under a 1989 Asset Purchase Agreement (the "1989 Agreement"). Glencore notified Alcoa and demanded that Alcoa take responsibility for the bauxite residue storage facilities and hold Glencore harmless from Lockheed's claims.

On August 6, 2015, Alcoa filed this action seeking a declaratory judgment that it is not obligated to indemnify Glencore in the New York Action. On August 27, 2015, Glencore filed its Answer and Counterclaims. Glencore asserted two categories of contractual breaches that are at issue on this appeal.

States Virgin Islands Dep't of Planning & Nat. Res. v. St. Croix Renaissance Group, L.L.L.P., Civil Action No. 07-cv-00114-HB (the "Cost Recovery Action").

First, Alcoa breached its agreement to be responsible for the maintenance, operation, and management of all bauxite residue storage facilities appurtenant to the Refinery by failing to properly maintain and manage Areas A and B, and then refusing to remediate Area B (the "Breach of Responsibility Claim").[2]

Second, Alcoa breached its agreement to indemnify Glencore with respect to ***any*** environmental condition related to bauxite residue (the "Indemnity Claims").[3]

For each of these breaches, Glencore sought compensatory damages as well as declaratory relief. Glencore also asserted claims that its Affiliates had assigned to it that were connected to the Virgin Islands Actions.

The parties filed and briefed competing motions for judgment on the pleadings pursuant to Superior Court Civil Rule 12(c). The Superior Court held a hearing on the motions on December 7, 2015. On February 8, 2016, the Superior Court issued its opinion granting Alcoa's motion for judgment on the pleadings, dismissing Glencore's Breach of Responsibility Claim and Indemnity Claims, and denying Glencore's motion for judgment on the pleadings with respect to the Affiliates' claims (the "Opinion," attached as Exhibit A).[4] Relying on the Third Circuit's reasoning in Beloit Power Sys., Inc. v. Hess Oil Virgin Islands Corp., 757 F.2d 1431 (3d Cir. 1985), the Superior Court held that the 1995 Agreement does

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[2] See Counterclaim 2.

[3] See Counterclaims Nos. 4-6 and 8-11.

[4] The claims assigned to Glencore by its Affiliates are still pending before the Superior Court.

not require Alcoa to indemnify Glencore in the New York Action because the "plain text of the 1995 Agreement does not contain an unequivocal undertaking of the contractual liability arising from the 1989 Agreement." (Op. at 16.)

The Superior Court granted Alcoa's motion to dismiss the Breach of Responsibility Claim, without analysis or explanation, by stating that the claim was "related to the indemnification of the New York Action," and that "Alcoa does not have a duty to indemnify Glencore under the 1995 Agreement for the New York Action." (Op. at 17.) The Superior Court did not address Glencore's claim that Alcoa's failure to maintain and manage the bauxite residue storage facilities caused the damages sued for in the New York Action. The Superior Court also did not explain why its observation that "Count[] 2" was "related" to indemnification eliminated Alcoa's separate, explicit obligation to maintain, operate, and manage the bauxite residue storage facilities.

On February 17, 2016, Glencore applied for certification of interlocutory review of the Opinion. (A001443-62.) On March 10, 2016, the Superior Court denied Glencore's application for interlocutory review (A001484-88), and directed entry of final judgment pursuant to Superior Court Rule 54(b) in favor of Alcoa and against Glencore on Glencore's Breach of Responsibility and Indemnification Claims (the "Judgment," attached as Exhibit B). This appeal followed.

SUMMARY OF ARGUMENT

1. The Superior Court Erred by Failing to Even Consider Glencore's Distinct Breach of Responsibility Claim

The Superior Court erred in dismissing Glencore's Breach of Responsibility Claim by observing it was "related to indemnification of the New York Action." (Op. at 17.)[5] The Superior Court did not explain, in any way, why its observation justified dismissal of Glencore's well-pleaded breach of contract claim that sought to recover foreseeable damages, including costs Glencore will spend defending the New York Action, arising from Alcoa's failure to maintain, operate, and manage the bauxite residue storage facilities. The Superior Court's failure necessitates reversal of the Judgment, and a remand for further proceedings regarding the Breach of Responsibility Claim.

2. The Superior Court Erred in Applying Beloit to Glencore's Claims Arising from Strict, Joint, and Several Liability

The Superior Court also erred in applying Beloit to Glencore's Indemnification Claims and holding that in order for Glencore to be entitled to indemnification for Lockheed's contractual claims, the 1995 Agreement must "clearly and unambiguously" obligate Alcoa to do so. (Op. at 15.)

The Superior Court's application of the heightened Beloit standard is

5 In the Opinion, the Superior Court did not even describe the substance of the Breach of Responsibility Claim, stating only that "Count[] 2" was "related to the indemnification of the New York Action." (Op. at 17.)

unprecedented and conflicts with Delaware's well-established rule that an indemnification provision should be interpreted according to its plain meaning. Alcoa agreed to hold Glencore harmless with respect to all of the bauxite residue, without limitation. Nothing in the 1995 Agreement limits Glencore's indemnity rights to a type of liability that Glencore may face. Instead, the indemnification provision is unlimited and by its plain meaning covers any claim, including contractual claims, concerning the bauxite residue storage facilities.

There is also no basis to apply Beloit to these facts. The Beloit standard assumes that an indemnitor should not be liable for an indemnitee's contractual liability (absent explicit language) because the indemnitor could not know what contractual liabilities the indemnitee may have. Here, not only was Alcoa aware of Vialco's potential liability to the Government and Lockheed; Alcoa shared that same liability, jointly and severally, under CERCLA. Alcoa contracted to indemnify Vialco for all such liability. That the Government pursued Lockheed, instead of Alcoa, to remediate Area B is mere happenstance. It is similarly fortuitous for Alcoa that Lockheed is pursuing Vialco *via* contract rather than the environmental statutes. Applying Beloit to these facts undermines the allocation of known prospective liabilities negotiated by sophisticated parties when they bought and sold an active refinery. It is thus unsurprising that no other court has applied Beloit to contractually allocated environmental liabilities. Meanwhile, at least one

court has held that an environmental indemnification provision covers contractually allocated environmental liabilities, despite failing to specifically reference "contractual liability." See Global Energy Fin. LLC v. Peabody Energy Corp., 2010 WL 4056164, at *20-21 (Del. Super. Ct. Oct. 14, 2010) (broad indemnity provision that did not specifically reference contractual liabilities covered environmental claims asserted against indemnitee under a contract). The Superior Court's application of the Beloit standard to Glencore's Indemnification Claims was in error, and should therefore be reversed.

3. The 1995 Agreement Contains Specific Language Clearly Manifesting Alcoa's Obligation to Indemnify Glencore

Finally, the Superior Court misapplied the Beloit standard by holding that in order for the 1995 Agreement's indemnification provisions to cover contractual liabilities, the provisions must expressly reference "the assumption of 'contractual liability' or the 1989 Agreement." (Op. at 15.)

Beloit requires only that an indemnity provision clearly manifest the parties' intent to transfer contractual liability to the indemnitor. The 1995 Agreement contains numerous indicia clearly manifesting the bargained-for delegation, to Alcoa, of any and all expenses relating to the bauxite residue, including the future cleanup of the bauxite residue, no matter the theory of legal liability underlying those claims. The Superior Court improperly applied the Beloit standard, and the Judgment should be reversed.

STATEMENT OF FACTS

The Refinery was built in 1965 in order to extract alumina, the intermediate product used in making aluminum, from bauxite ore. (A00193, ¶ 1.) The alumina extraction process produces two primary residual substances: sand and bauxite residue. (A00193, ¶ 2.) Because the bauxite residue, also known as "red mud," contained concentrations of heavy metals and other potential contaminants, the Refinery's owners and operators disposed of the bauxite residue in the storage facilities currently known as Areas A and B. (A000193, ¶ 3.)

On April 26, 1989, pursuant to the 1989 Agreement, Vialco purchased the Refinery from Martin Marietta Aluminum, Inc., Lockheed's predecessor. (A000091-163.) Glencore, then known as Clarendon Ltd., guaranteed Vialco's obligations under the 1989 Agreement. (A000195-96, ¶¶ 7-10.)

The 1995 Agreement

On July 19, 1995, Alcoa executed the 1995 Agreement and purchased the Refinery from Vialco. (A000031-68.) As part of the acquisition consideration, Alcoa made two concessions relevant here. First, in Article 8.3, Alcoa agreed to be responsible for, *inter alia*, "the removal or encasing of asbestos in or on Assets . . . [and] the maintenance, operation and management of all bauxite residue storage facilities appurtenant to the Refinery, including, but not limited to Pre-Closing Environmental Conditions relating to bauxite residue storage or disposal but not

including any improper storage of disposal of other materials in bauxite residue storage facilities . . . ." (A000045.)

Second, Alcoa agreed to provide Vialco with indemnity rights in Articles 7.3 and 8.3. In Article 7.3, Alcoa agreed that it would:

> indemnify and hold [Vialco] harmless from and against any and all Losses arising out of or related to: (1) activities or transactions occurring or entered into by [SCA] after the Closing date; (2) any failure to perform or breach by buyer of any representation, warranty, covenant, obligation or undertaking made or assumed by [SCA] in or pursuant to this Agreement which survives Closing; and (3) the Assumed Liabilities.

(A000041.)

In Article 8.3, Alcoa further agreed to "indemnify, save, and hold [Vialco] harmless with respect to . . .

> (1) all Environmental Conditions at the Refinery which are not Pre-Closing Environmental Conditions as to which [Vialco] has agreed to indemnify [SCA] pursuant to this Article VIII . . . and
>
> (3) the maintenance, operation and management of all bauxite residue storage facilities appurtenant to the Refinery, including, but not limited to Pre-Closing Environmental Conditions relating to bauxite residue storage or disposal but not including any improper storage or disposal of other materials in bauxite residue storage facilities, the storage or disposal of which materials created a Pre-Closing Environmental Condition."

Alcoa's Failure to Perform

Alcoa failed to perform its obligation to maintain, operate, and manage the bauxite residue storage facilities. Instead, Alcoa allowed "[p]ortions of the red mud piles [to] collapse[,] allowing large quantities of red mud and high pH liquid to escape from the disposal area and spread over the southern portions of the property into a drainage ditch." (A000476, ¶ 53.) In March 2002, Alcoa's improper maintenance, operation, and management of the bauxite residue storage facilities caused a large release of red mud into the Alucroix channel, causing damage to the marine life and mangrove trees. (A000562.) The Government was wholly dissatisfied by Alcoa's response. (A000529, n.15.)

The Virgin Islands Actions

Because of Alcoa's failures, the Government initiated the Virgin Islands Actions, naming Alcoa, Lockheed, Vialco, and Century as defendants. (See, A000207-08, ¶¶ 60-66; A000267-69, ¶¶ 60-66.) The Government sought to recover damages resulting from releases of red mud into the environment, and to recover costs it would incur conducting remedial investigation and activities associated with the bauxite residue storage facilities. (A000496-97, ¶¶ 13-16.) In both of the Virgin Islands Actions, the Government alleged that the defendants were jointly and severally liable. (A000207-08, ¶¶ 63, 66; A000268-69, ¶¶ 63, 66; A000486, ¶ 111; A000498, ¶ 25.)

In November 2011, over the objections of Vialco, Century, and Lockheed, Alcoa entered into a consent decree (the "Alcoa Consent Decree") with the Government. Under the Alcoa Consent Decree, Alcoa agreed to remediate only Area A, leaving future remediation of Area B to the remaining defendants. (A000210, ¶ 73-74; A000271-73, ¶ 73-74; A000516-17.) In its memorandum approving the Alcoa Consent Decree, the Court noted that "nothing in the [Alcoa Consent Decree] would limit the ability of Vialco to enforce any contractual rights, such as a right to indemnity, that may exist under its contract with [Alcoa]." (A000211, ¶ 77; A000274, ¶ 77; A000580.) The Court further made clear that the Government's claims against Alcoa, Lockheed, and Vialco were "limited to allegations that erosion from the red mud contaminated the groundwater at the alumina refinery and that the release of red mud in March 2002 caused damage to natural resources in the Alucroix Channel." (A000211, ¶ 78; A000581.)

Lockheed settled the Virgin Islands Actions with the Government via a Consent Decree so-ordered on July 21, 2014, wherein Lockheed agreed to: (i) pay the Government $20.75 million dollars in order to compensate the Government for damages arising from the bauxite residue; and (ii) remediate Area B. (A000214, ¶¶ 95-96; A000279-80, ¶¶ 95-96; A000631-54.)

In July 2014, Vialco also settled its liability under the Virgin Islands Actions. Vialco assigned its claims against Alcoa relating to the Virgin Islands

Actions to Glencore. Glencore maintains those claims before the Superior Court and, as such, they are not subject to this appeal.

The New York Action

Lockheed filed the New York Action on May 11, 2015. (A000215, ¶ 100; A000281, ¶ 100.) Lockheed seeks indemnity from Vialco, guaranteed by Glencore, for the $20.75 million it paid in damages to the Government, plus any past, current, and future costs and expenses related to the remediation of the bauxite residue storage facilities (the "Lockheed Claims"). (A000074-81, ¶¶ 27-29, 40-42; A000215, ¶ 101; A000281-82, ¶ 101.) The New York Action is based on an indemnification provision in the 1989 Agreement, which allocated liability for environmental conditions at the Refinery, including liability under CERCLA, between Lockheed and Vialco. Lockheed asserts that the liabilities for which it is seeking indemnity are related to the soil and groundwater contamination from the bauxite residue storage facilities. (A000074-81, ¶¶ 27-29, 40-42; A000216, ¶ 102; A000282, ¶ 102.)

By letter dated May 12, 2015, Glencore notified Alcoa of the New York Action and Alcoa's duty to take responsibility for, and to indemnify and hold Glencore harmless with respect to, the bauxite residue storage facilities under the 1995 Agreement. (A000070-71; A000216, ¶ 104; A000283, ¶ 104.) This lawsuit followed.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DISMISSING GLENCORE'S BREACH OF RESPONSIBILITY CLAIM

A. Question Presented

Did the Superior Court err by dismissing Glencore's Breach of Responsibility Claim on the unexplained ground that the claim was "related to the indemnification of the New York Action?" (A000219-20; A000375-80; A000683-86; A001424-26.)

B. Standard and Scope of Review

This Court reviews the grant of a motion for judgment on the pleadings de novo. See W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC, 12 A.3d 1128, 1131 (Del. 2010). The court's standard of review is to determine whether the court committed legal error in formulating or applying legal precepts. Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, LP, 624 A.2d 1199, 1204 (Del. 1993). In so doing, this Court applies the standard for determining a motion for judgment on the pleadings as well as the applicable substantive law. Brooks-McCollum v. Emerald Ridge Bd. of Dirs., 2011 WL 4609900, at *2 (Del. Oct. 5, 2011). Thus, when reviewing the Superior Court's decision to dismiss Glencore's Breach of Responsibility Claim on the pleadings, this Court must accept as true all of Glencore's well pleaded factual allegations,

and grant Glencore the benefit of any inferences that one may fairly draw from the allegations. Desert Equities, 624 A.2d at 1204 n.7.

C. Merits of Argument

Under Delaware law, a plaintiff alleging a breach of contract must plead: (i) the existence of the contract, (ii) the breach of an obligation imposed by that contract; and (iii) the resultant damage to the plaintiff. VLIW Tech., L.L.C. v. Hewlett-Packard Co., 840 A.2d 606, 612 (Del. 2003). Before the trial court can dismiss a party's claim for breach of contract on the pleadings, the trial court must conduct an orderly and logical reasoning process based on the record presented and the applicable law. In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 48 (Del. 2006). A trial court cannot simply elect to apply one interpretation of a contract over another without explaining the basis for its decision. Rather, when interpreting a contract, the trial court must "address the undisputed facts that . . . undercut[] the conclusion that the court ultimately reached," and "set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected." Seaford Golf & Country Club v. E. I. duPont de Nemours & Co., 925 A.2d 1255, 1264 (Del. 2007). This requires the trial court to consider facts that speak to "why specific contract language was (or was not) chosen." Id. Failure to consider such facts constitutes reversible error as a matter of law. Id.

Here, the Superior Court failed to consider the undisputed facts that supported Glencore's Breach of Responsibility Claim, and failed to address any of Glencore's contentions regarding it. The Superior Court did not even consider whether Glencore stated a claim for breach of contract separate and apart from Glencore's Indemnification Claims. Such analytical failure warrants reversal.

1. The Superior Court Failed to Analyze the Breach of Responsibility Claim

The Superior Court committed reversible error by failing to conduct any analysis of Glencore's Breach of Responsibility Claim. Had the Superior Court conducted such an analysis, Glencore's Breach of Responsibility Claim would have survived dismissal because Glencore adequately alleged: (i) the existence of the contract, (ii) the breach of an obligation imposed by that contract; and (iii) the resultant damage to the plaintiff.

The 1995 Agreement is plainly a contract. Moreover, Glencore's Breach of Responsibility Claim pleaded that Alcoa breached its obligation to be responsible for the maintenance, operation, and management of ***all*** the bauxite residue storage facilities by:

(i) allowing portions of the red mud piles to collapse and improperly responding to the releases of red mud and high pH liquid (A000476-77, ¶ 53; A000562) ; and

(ii) agreeing to remediate only one, but not <u>all</u>, of the bauxite residue storage facilities appurtenant to the Refinery. (A000517.)

The Breach of Responsibility Claim also allege that the Virgin Islands Actions and the New York Action were the foreseeable, probable result of Alcoa's breach of its obligation to be responsible for the maintenance, operation, and management of all bauxite residue storage facilities. (A000228, ¶ 160.) These allegations are sufficient, wholly and apart from any claim for contractual indemnification, to state a claim for recoverable damages under a breach of contract theory. RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. c (1981).

Rather than consider any of these allegations, the Superior Court simply dismissed Glencore's Breach of Responsibility Claim. Such dismissal was not the result of any orderly and logical reasoning process. Accordingly, the Judgment should be reversed.

2. The Superior Court Ignored Facts Establishing that Alcoa's Responsibility was in Addition to Alcoa's Obligation to Indemnify

Alcoa moved to dismiss the Breach of Responsibility Claim by arguing that: (i) the claims were based on Alcoa's obligations under Article 8.3 of the 1995 Agreement; and (ii) Article 8.3 was only an indemnification provision. (See A000772.) The Superior Court dismissed the Breach of Responsibility Claim by stating that it was "related to indemnification." (Op. at 17.) But, the Superior Court's statement that the claim was "related" to indemnification does not, in any way, establish that Article 8.3 was ***only*** an indemnification provision. And the Opinion ignored the undisputed facts that establish that Article 8.3 was primarily a

contractual undertaking by Alcoa to maintain, operate, and manage the bauxite residue storage facilities, which also attached secondary obligations on Alcoa to indemnify Vialco and its Affiliates.

a) Article 8.3 Uses the Word "And"

First, the Superior Court ignored the undisputed fact that Article 8.3 requires that Alcoa "be responsible for, and shall indemnify, save and hold [Vialco] and its Affiliates harmless with respect to . . . the maintenance, operation, and management of all bauxite residue storage facilities appurtenant to the Refinery." (A000045 (emphasis added).) Article 8.3's use of the word "and" indicates that Alcoa's responsibility obligation is additive to any obligation Alcoa had to indemnify. See VLIW Tech, 840 A.2d at 613-614 (reversing dismissal of plaintiff's claim for breach of confidentiality agreement where trial court "fail[ed] to consider another reasonable reading of the scope of the confidentiality provision," namely, that a comma in the provision "separate[d] two distinct confidentiality obligations"); see also Reserves Dev. Corp. v. Esham, 2009 WL 3765497, at *5-6 (Del. Super. Ct. Nov. 10, 2009) (concluding that although one provision in a land purchase agreement stating that the purchaser agreed to be "bound by" the restrictive covenants burdening the lot did not confer obligations beyond those in the restrictions, a different provision did create an independent obligation "even though its subject matter overlap[ped] with the restrictions").

The Opinion focused exclusively on Article 8.3's use of the word "indemnify," to the detriment of the provision's plainly operative portion requiring Alcoa to "be responsible for . . . the maintenance, operation, and management of the bauxite residue storage facilities." And the fact that Alcoa's "responsibility" and "indemnification" obligations appear in the same contractual provision does not preclude a finding that that provision imposes two separate obligations. See VLIW Tech., 840 A.2d at 614 n. 13 (reversing trial court's dismissal of breach of contract claim where trial court failed to consider that comma before the conjunction "and" separated independent clauses in a compound sentence, reflecting two distinct contractual obligations).

b) Article 8.3 Does Not Limit Its Applicability to Any Loss

The Superior Court also ignored the fact that Article 8.3 is not limited to covering "claims," "losses," or "liabilities." In a standard indemnity provision, the indemnitor will agree to be responsible for a particular set of losses, such as claims, demands, or penalties. For instance, in Breaux v. Halliburton Energy Servs., 562 F.3d 358, 362 (5th Cir. 2009), two parties agreed that the phrase "be responsible for and hold harmless and indemnify," would mean "that the indemnifying party shall release, indemnify, hold harmless and defend the indemnified party from and against any and all claims, demands, fines, penalties,

causes of action, damages, attorney's fees, cost of litigation, court costs, judgments and awards of any kind or character."

Unlike the indemnification provision analyzed in Breaux, Alcoa's responsibilities under Article 8.3 are not limited to "claims, demands, fines, or penalties" that Vialco might face. Article 8.3 does not even mention claims, demands, fines, or penalties of any sort. Instead, the provision imposes on Alcoa the obligation to be responsible for "the maintenance, operation, and management of all bauxite residue storage facilities appurtenant to the Refinery." This structure demonstrates that the phrase "be responsible for" was not just adjunct to Alcoa's indemnification obligations, but rather a completely separate obligation regarding the bauxite residue storage facilities.

c) Article 8.3 Uses the Active Phrase "Be Responsible"

The Superior Court also ignored that the phrase "be responsible" connotes an agreement to undertake proactive obligations. To be "responsible for" a thing means to "have control and authority over [something] and the duty of taking care of [it.]" *Responsible*, CAMBRIDGE DICTIONARIES ONLINE, http://dictionary.cambridge.org/us/dictionary/english/responsible (last visited May 20, 2016). In contrast, the word "indemnify" is reactive, and means "to protect someone or something against possible damage or loss by paying an indemnity to cover the costs." *Indemnify*, CAMBRIDGE DICTIONARIES ONLINE,

http://dictionary.cambridge.org/us/dictionary/english/indemnify (last visited May 20, 2016). Therefore, Alcoa's agreement to be responsible for the conditions listed in Article 8.3 imposed proactive obligations relating to the conditions.

Consider, for instance, Article 8.3(2), which requires Alcoa to be responsible for, and to indemnify, save, and hold Vialco harmless with respect to "the removal or encasing of asbestos in or on Assets." That section, while also providing Glencore with indemnity rights, plainly obligated Alcoa to take a specific action after it acquired the Refinery: remove or encase the asbestos at the Refinery.

The same is true of Alcoa's agreement to be responsible for the "maintenance, operation, and management" of the bauxite residue storage facilities. The terms "maintenance," "operation," and "management" each reflect Alcoa's proactive agreement to ensure the effective storage of the bauxite residue after Alcoa acquired the Refinery. Alcoa utterly failed to meet that obligation. Glencore is entitled to recover damages on account of Alcoa's failure, and the Superior Court erred in simply dismissing this claim.

d) Article 7.3 Omits the Phrase "Be Responsible"

Finally, the Superior Court ignored that in Article 7.3, Alcoa agreed to indemnify, but not be responsible for, certain liabilities that Vialco would face.

In Article 7.3, Alcoa agreed to "indemnify and hold [Vialco] harmless from and against any and all Losses arising out of or related to: (1) activities or

transactions occurring or entered into by Buyer after the Closing Date; (2) any failure to perform or breach by Buyer of any representation, warranty, covenant, obligation or undertaking made or assumed by Buyer in or pursuant to this Agreement which survives Closing; (3) the Assumed Liabilities." Article 7.3, just like each and every indemnification provision cited by Alcoa below, is a pure indemnification clause, limited in application to certain "claims," "liabilities," or "damages," that the indemnitee may face. See, e.g., Jacobs Constructors, Inc. v. NPS Energy Servs., Inc., 264 F.3d 365, 373 (3d Cir. 2001) (indemnitor agreed to defend and indemnify against "[a]ll claims, liabilities, damages . . ."); Beloit, 757 F.2d at 1433 (indemnity provision covered "any and all loss, damage, injury liability and claims thereof"); Dullard v. Berkeley Assocs., 606 F.2d 890, 894 (2d Cir. 1979) (indemnity provision covered "any and all claims, losses, suits, damages . . .").

Article 8.3 is very different. Unlike Article 7.3, Article 8.3 contains not only an agreement to indemnify Vialco and its Affiliates, but also an obligation that Alcoa "be responsible for" the specified conditions. Moreover, unlike Article 7.3, Article 8.3 is not limited in its applicability to any "loss," "claim," or "liability" that Vialco or its Affiliates might face. Instead, Article 8.3 requires Alcoa to be responsible for, and to indemnify, save, and hold Vialco harmless with respect to environmental conditions relating to bauxite residue storage and disposal, without

limitation. The parties' deliberate choice to use distinct language describing Alcoa's obligations under Article 7.3 and Article 8.3 is strong evidence that Article 8.3 provides far more than just indemnity rights to Glencore. See, e.g., Great Am. Ins. Co. v. Norwin Sch. Dist., 544 F.3d 229, 246 (3d Cir. 2008) ("[T]he use of different language to address the same or similar issue . . . implies that a different meaning was intended," and that "the choice of different words was deliberate").

Under Seaford Golf, the Superior Court's failure to consider each of these undisputed fact constitutes reversible error as a matter of law. 925 A.2d at 1264.

II. THE STANDARD ARTICULATED IN BELOIT IS INAPPLICABLE TO GLENCORE'S INDEMNITY CLAIMS WHICH ALLOCATE JOINT AND SEVERAL CERCLA LIABILITIES

A. Question Presented

Did the Superior Court err as a matter of law by applying the Beloit standard to Glencore's indemnity claims, which seek to contractually allocate known, strict, and joint and several liabilities arising under CERCLA? (A000701-707; A001426-31.)

B. Standard and Scope of Review

This Court reviews the grant of a motion for judgment on the pleadings *de novo*. See W. Coast Opportunity Fund, LLC, 12 A.3d at 1131. This Court also reviews *de novo* the application of law to uncontroverted or established facts. See B.F. Rich & Co., Inc. v. Gray, 933 A.2d 1231, 1241 n.13 (Del. 2007).

C. Merits of Argument

The Superior Court erred in holding that the Beloit standard, which has not been applied in Delaware, applies to the Indemnity Claims. Applying Beloit to this case is illogical, as Alcoa was aware of Vialco's joint and several liability for the CERCLA liabilities underlying Lockheed's claims.

1. Application of the Beloit Standard Conflicts with Delaware Law

The rule articulated in Beloit departs from Delaware's firmly established rules for interpreting indemnity provisions. Under Delaware law, courts "must accept and apply the plain meaning of an unambiguous term in the context of the

contract language and circumstances insofar as the parties themselves would have agreed *ex ante*." Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 740 (Del. 2006) (citations omitted). Indemnification agreements are no different, and must be interpreted and enforced according to their plain meaning. See, e.g., Morgan v. Grace, 2003 WL 22461916, at *2 n.14 (Del. Ch. Oct. 29, 2003) ("an indemnity provision of an agreement will be honored using the standard concept of contract interpretation") (citing Citadel Holding Corp. v. Roven, 603 A.2d 818, 822 (Del. 1992)).[6]

Under Article 8.3(3), Alcoa agreed to indemnify Glencore with respect to all of the bauxite residue storage facilities, without limitation, including any environmental conditions caused by Vialco relating to bauxite residue storage or disposal. The contract unambiguously requires Alcoa to indemnify Glencore for any and all claims relating to bauxite residue, whether in contract, statute, or tort.

The Superior Court's decision to apply the heightened standard articulated in Beloit to Glencore's Indemnity Claims is a clear departure from Delaware's ordinary rules of contract interpretation that govern Alcoa's indemnification

[6] The Superior Court stated that Delaware courts construe indemnification agreements strictly against the indemnitee, and do not permit enforcement of broad or ambiguous indemnity provisions, citing James v. Getty Oil Co., 472 A.2d 33, 37 (Del. Super. Ct. 1983). However, James only applies if the indemnification provision is ambiguous. Here, there is no ambiguity that Alcoa: (i) agreed to indemnify Glencore with respect to all of the bauxite residue storage facilities, and (ii) did not exclude from its indemnification obligations any type of liability (such as liability arising in tort, under statute, or via contract). Furthermore, James involved contractual indemnification for the indemnitee's own negligence in a personal injury case, unlike the strict, joint and several environmental liability underlying the indemnification at issue in this case. See Argument 2.c.2, infra.

obligations. Under those rules, the plain meaning of Article 8.3(3) governs, and requires Alcoa to indemnify Glencore for the Lockheed Claims, which are "with respect to" the maintenance, operation, and management of the bauxite residue storage facilities. See, e.g., Global Energy Fin. LLC, 2010 WL 4056164, at *20-21 (indemnity provision that did not specifically reference contractual liabilities still covered environmental claims asserted under a contract).

2. The Beloit Cases Have No Applicability to Contractually Allocated CERCLA Liabilities

Even assuming this Court determines that Beloit's reasoning should be adopted in Delaware, it should not apply to this case involving the contractual allocation of known, strict, and joint and several CERCLA liabilities.

a) CERCLA Liabilities are Not Based on Fault

The courts that have applied the Beloit standard to preclude indemnification of contractual liability have done so because, much like an agreement to indemnify a party for its own negligence, an agreement to indemnify a party for its "contractual liability to a third party imposes an obligation, regardless of the fault of the indemnitor." Jacobs, 264 F.3d at 372.

But unlike the negligence-based principles at issue in Beloit, the environmental liabilities at issue here are divorced from the concept of fault. Lockheed's, Vialco's, and Alcoa's liability with respect to the bauxite residue was and is strict, joint and several, based solely on their status as owners and operators

of the Refinery. Requiring a heightened level of specificity in indemnity contracts with respect to CERCLA liabilities does "not serve the deterrent purpose of the [own negligence rule]" because "CERCLA liability is not premised on identifying particularized harm caused by certain parties, but instead is imposed upon classes of parties based on their status, typically as owners of the contaminated premises." Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 763 S.E.2d 19, 21 (S.C. 2014). See also Celanese Ltd. v. Essex County Imp. Authority, 962 A.2d 591, 601 (N.J. Super. Ct. App. Div. 2009) ("question[ing] the applicability of [own negligence rule] to . . . [an] indemnity agreement with respect to obligations imposed by environmental laws, an area in which fault is not material").

b) Alcoa Shared the Underlying CERCLA Liabilities

The Beloit line of cases also relies heavily on the concept that the purported indemnitor would otherwise have no notice of potential liability, and no exposure to such liability, but for the underlying contract. Indeed, the "major reason for the result in" the Beloit line of cases is that the intermediate indemnitee (here, Vialco) "would truly not be liable to [the first level indemnitee] but for their indemnity agreement, and there would be no liability to pass on to the [ultimate indemnitor]." Greenberg v. City of N.Y., 81 A.D.2d 284, 287 (N.Y. App. Div. 1981). However, when the ultimate indemnitor (here, Alcoa) was otherwise liable to the initial plaintiff (here, the Government) or the first level indemnitee (Lockheed), the

reasoning of Beloit does not apply. To hold otherwise would excuse the indemnitor from its agreement based solely on the fortuitous method through which the other parties resolved their liabilities. Id. at 288.

Here, the underlying CERCLA liabilities were joint and several among Lockheed, Vialco, and Alcoa. As encouraged by CERCLA, Alcoa divided its CERCLA liability with Vialco via the 1995 Agreement. Compare A000045, Art. 8.2(c) (waiving Alcoa's rights under CERCLA in exchange for indemnities)) with Horsehead Indus. v. Paramount Commc'ns, Inc., 258 F.3d 132, 135 (3d Cir. 2001) ("While the parties remain jointly and severally liable for cleanup responsibility, the statute permits, inter alia, the allocation of the costs for cleanup via indemnification agreements.").

Alcoa cannot claim that the CERCLA liabilities were unknown to it, because Alcoa was subject to the exact same liabilities. Had the Government brought its claims against only Vialco and Alcoa, Alcoa would be obligated to indemnify Vialco irrespective of Beloit. Alcoa should not be permitted to evade its agreement to indemnify Glencore through its carefully engineered settlement, which conveniently excused Alcoa of its shared liabilities and exposed Glencore to contractual claims from Lockheed. By applying Beloit to these facts, the Superior Court sanctioned that very conduct. The Superior Court should be reversed.

III. THE SUPERIOR COURT ERRED IN CONCLUDING THAT THE BELOIT RULE BARS GLENCORE'S INDEMNITY CLAIMS

A. Question Presented

Did the Superior Court err as a matter of law in its application of the Beloit standard by concluding that the 1995 Agreement does not obligate Alcoa to indemnify Glencore in the New York Action? (A000690-701.)

B. Standard and Scope of Review

This Court reviews the grant of a motion for judgment on the pleadings *de novo*. See W. Coast Opportunity Fund, LLC, 12 A.3d at 1131. This Court also reviews *de novo* the proper interpretation of contractual language. See Rohn Indus., Inc. v. Platinum Equity LLC, 911 A.2d 379, 382 (Del. 2006).

C. Merits of Argument

Even if this Court determines that Beloit is applicable to this case, the Superior Court improperly applied Beloit by holding that in order for the 1995 Agreement's indemnification provisions to cover the Lockheed Claims, the provisions must expressly reference the assumption of "contractual liability" or "the 1989 Agreement." Applying the proper standard set forth in Beloit, the 1995 Agreement's indemnity provisions clearly obligate Alcoa to indemnify Glencore in the New York Action.

1. Beloit Does Not Require Use of Any Special Words

In applying Beloit, the Superior Court held that "for Alcoa to be liable for the Lockheed Claims, Alcoa would have had to specifically assume the liabilities for the 1989 Agreement in the 1995 Agreement in Article 2, or the indemnification clause in Articles 7.3 or 8.3 should have referenced the assumption of 'contractual liability' or the 1989 Agreement." (Op. at 15.)

In so holding, the Superior Court improperly applied the standard set forth in Beloit. Beloit and its predecessors have held, contrary to the Opinion, there is no requirement that an indemnification provision "contain any special words to evince an intention to create a right of indemnity for independent contractual liabilities." Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 334 (5th Cir. 1981). Instead, an indemnification provision will cover an indemnitee's contractual liability so long as the agreement "clearly express[es] such a purpose." Id. Thus, each of the Beloit cases interpreted the plain meaning of the indemnification provisions at issue and held that the provisions were narrowly tailored to exclude coverage for contractual liability. See Sumrall v. Ensco Offshore Co., 291 F.3d 316, 318 (5th Cir. 2002). See also Jacobs, 264 F.3d at 373 (holding that "plain meaning" of indemnity agreement to "defend any lawsuit or litigation brought against any of the Indemnitees with respect to any such injury, death, loss or damage" referred only to "allegations relating to injury, death, loss, or damage," and not "contractual

duties"); Beloit, 757 F.2d at 1433 (indemnity provision was limited to "all loss, damage, injury liability and claims thereof") (emphasis added); Dullard, 606 F.2d at 894 ("[T]he plain terms of the contract indicate that Castle is liable to indemnify only for 400 Concrete's tort liability to third parties.").

2. The 1995 Agreement Clearly Manifests Alcoa's Intent to Indemnify Glencore for the Lockheed Claims

In stark contrast to the indemnification provisions at issue in the Beloit cases, the 1995 Agreement's indemnification provisions are not limited as to the type of liability for which Alcoa would indemnify Glencore. Rather, they apply "with respect to" the bauxite residue, without any limitation. The 1995 Agreement contains no language indicating that the liabilities that Alcoa agreed to indemnify Glencore for would be limited to any type of claim. Instead, Alcoa agreed to indemnify and hold Vialco and its Affiliates harmless with respect to an observable, existing, and specific environmental condition at the Refinery: all bauxite residue storage facilities appurtenant to the Refinery, and the bauxite residue stored and disposed of at the Refinery. (A000045.) This provision clearly manifests an intent by the parties that Alcoa would cover any and all matters relating to bauxite residue, including claims by Lockheed, the Government, or others, without regard to the type of claim asserted: *i.e.*, whether a contract, statutory, negligence, or contribution claim. Indeed, because "nothing in the [provision] indicates an intent on the parties to exclude contractual liability," or

any other type of liability, Alcoa was agreeing to indemnify Vialco and its affiliates for contractual liability relating to such conditions as well. Breaux, 562 F.3d at 364-65.

a) The Lockheed Claims are With Respect to the Bauxite Residue Storage Facilities

Although its reasoning is unstated, the Superior Court apparently decided that because the Lockheed Claims were asserted in a "civil action to enforce contractual rights under the 1989 Agreement," (Op. at 11,) they are not "with respect to" the bauxite residue. That conclusion is belied by the facts and the law.

Article 8.3 of 1995 Agreement requires Alcoa to indemnify and hold Vialco and its Affiliates harmless with respect to an observable, known, and specific environmental condition at the Refinery: all bauxite residue storage facilities appurtenant to the Refinery, and the bauxite residue stored and disposed of at the Refinery. It contains no limitation as to the type of liability for which Alcoa would indemnify Vialco and its Affiliates. Such language clearly manifests the bargained-for delegation, to Alcoa, of any and all expenses that could arise from environmental claims relating to the bauxite residue, no matter the theory of legal liability underlying those claims. Indeed, when Alcoa agreed to indemnify and hold Vialco and its Affiliates harmless with respect to the bauxite residue, Alcoa "agreed to assume future costs resulting from the presence of the [bauxite residue] on the property," without limitation. Kerr-McGee Chem. Corp. v. Lefton Iron &

Metal Co., 14 F.3d 321, 328 (7th Cir. 1994). Or, in other words, when Alcoa "bought the [Refinery], it bought the [bauxite residue] then on the site and the future liabilities that went with [it]." Id.

In the New York Action, Lockheed specifically demands that Glencore compensate it for the costs of the red mud contamination. (See A000079, 83.) That Lockheed seeks compensation pursuant to its contractual rights, rather than rights arising from CERCLA's statutory scheme or the common law of torts, does not alter the fact that the Lockheed Claims are claims "with respect to" the bauxite residue facilities by virtue of the environmental nature of the underlying claims. Therefore the costs of the red mud contamination are indeed at issue in this action. See, e.g., Clean Harbors, Inc. v. Arkema, Inc. (In re Safety-Kleen Corp.), 380 B.R. 716, 725 (Bankr. D. Del. 2008) ("Even if the [payments] were the product of contractual indemnification rights . . . they would have also arisen out of environmental liabilities to governmental agencies. The result would be the same. The [payment] obligations would still be (i) 'liabilities and obligations . . . that relate to violations of Environmental Laws.'"); Douzinas v. Am. Bureau of Shipping, Inc., 888 A.2d 1146, 1152 n. 32, 1150 (Del. Ch. 2006) (observing that "words like 'relate to' are to be read broadly," and rejecting defendants' attempt to argue that the provision only covered claims "arising under" the agreement because doing so would "read[] the broad term 'related to' out of the contract").

b) Alcoa's Indemnification Obligations are Distinct from its Obligation to Assume Liabilities

The Superior Court also erred in holding that "[b]ecause the 1989 Agreement is not specifically assumed, the Court cannot find that Alcoa has a duty to indemnify Glencore in the New York Action." (Op. at 16.)

It is of no consequence to Glencore's Indemnity Claims that the 1995 Agreement does not list the 1989 Agreement as an "Assumed Liability." The Indemnity Claims arise from Alcoa's breach of its obligation to indemnify Glencore under Article 8.3, not Alcoa's failure to assume liabilities. Therefore, whether the 1989 Agreement is listed as an assumed liability is irrelevant to assessing the Indemnity Claims. See, e.g., Kurilko v. Teletech Holdings, Inc., 2009 WL 3517565, at *4 (S.D. Cal. Oct. 26, 2009) ("although [the seller] may not have actively assumed liability for severance claims . . . [the seller] may still have to indemnify [the purchaser] for such claims" if they fell within the scope of an indemnification provision); JFE Steel Corp. v. ICI Ams., Inc., 797 F. Supp. 2d 452, 470 (D. Del. 2011) (granting plaintiff summary judgment on claim for breach of agreement to assume liability, while holding that similar claim for indemnity was time barred).

Moreover, assuming liability for the 1989 Agreement was but one way Alcoa could have taken on the duty to indemnify Glencore for the Lockheed Claims. Corbitt makes clear that the use of special words, such as "assuming

liabilities," is not the only way Alcoa could obligate itself to indemnify Glencore for contractual liabilities. 654 F.2d at 333. In this case, it is undisputed that Alcoa did not assume all liabilities under the 1989 Agreement. However, the extraordinary breadth of Article 8.3(3), which provides indemnification rights to Glencore regarding an entire environmental condition unlimited to any category of loss, manifests Alcoa's clear agreement to indemnify Glencore for all types of claims relating to the bauxite residue, including contractual liability. (See § III(C)(1), (2)(a), supra.)

CONCLUSION

For the foregoing reasons, Glencore respectfully requests that this Court reverse the Superior Court's Judgment dismissing Glencore's Breach of Responsibility and Indemnity Claims, and remand those claims for further proceedings.

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