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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENCORE LTD.,

Defendant and Counterclaim Plaintiff Below, Appellant,

v.

ST. CROIX ALUMINA, L.L.C. AND ALCOA WORLD ALUMINA LLC,

Plaintiffs and Counterclaim Defendants Below, Appellees.

No. 171,2016

Case Below:

Superior Court of the
State of Delaware
C.A. No. N15C-08-032 EMD
[CCLD]

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TABLE OF CONTENTS

NATURE OF PROCEEDINGS....1

SUMMARY OF ARGUMENT....3

COUNTERSTATEMENT OF FACTS....4

ARGUMENT....11

I. The Superior Court correctly rejected Glencore's attempt to shift its contractual liability under the guise of the words "responsible for."....11

A. Question Presented....11

B. Scope of Review....11

C. Merits of Argument....11

1. Glencore's "breach of responsibility" claim has no merit.....11

2. The "responsible for" language of Section 8.3 is language of indemnification.....12

3. The structure of the 1995 Agreement further confirms that Section 8.3(3) is nothing more than an indemnity provision.....15

4. The Superior Court did not impermissibly fail to consider any undisputed facts in rejecting the so-called "breach of responsibility" claim.....18

II. The Superior Court properly held that indemnity provisions do not cover contractual liabilities absent unequivocal language doing so.....20

A. Question Presented....20

B. Scope of Review....20

C. Merits of Argument....20

1. Contractual liability is only covered by an indemnity provision where there is specific language unequivocally covering such contractual liability.....20

2. This prevailing rule of construction applies to Glencore's attempt to obtain indemnification for its *contractual* liability to Lockheed.....24

III. The Superior Court properly held that Section 8.3(3) does not require plaintiffs to indemnify Glencore for its contractual liabilities to Lockheed.....28

A. Question Presented.....28

B. Scope of Review.....28

C. Merits of Argument.....28

1. The 1995 Agreement unambiguously provides that plaintiffs are not responsible for Glencore's indemnity obligation to Lockheed under the 1989 Contract. 28

2. The 1995 Agreement does not contain specific language unequivocally requiring plaintiffs to indemnify Glencore for the 1989 Contract. 30

CONCLUSION.....34

TABLE OF AUTHORITIES

Cases **Page(s)**

Alcoa World Alumina LLC v. *Glencore Ltd.*,
C.A. No. 11110-CB (Del. Ch.) 6-7

Beaver Valley Power Co. v. *Nat'l Eng'g & Contracting Co.*,
883 F.2d 1210 (3d Cir. 1989) 12

Beloit Power Sys., Inc. v. *Hess Oil Virgin Islands Corp.*,
757 F.2d 1431 (3d Cir. 1985) 21, 25, 31, 32, 33

Breaux v. *Halliburton Energy Servs.*,
562 F.3d 358 (5th Cir. 2009) 13

Brozozowski v. *Ingersoll-Rand Co.*,
1985 WL 25724 (Del. Super. Ct. Oct. 24, 1985) 13

City Investing Co. Liquidating Tr. v. *Cont'l Cas. Co.*,
1992 WL 65411 (Del. Ch. Mar. 30, 1992), *aff'd*, 624 A.2d 1191 (Del. 1993) 24

Corbitt v. *Diamond M. Drilling Co.*,
654 F.2d 329 (5th Cir. 1981) 21, 31

DeLucca v. *KKAT Mgmt., L.L.C.*,
2006 WL 224058 (Del. Ch. Jan. 23, 2006) 18

Douzinas v. *Am. Bureau of Shipping, Inc.*,
888 A.2d 1146 (Del. Ch. 2006) 33

Dullard v. *Berkeley Assocs. Co.*,
606 F.2d 890 (2d Cir. 1979) 21, 25, 31

Fountain v. *Colonial Chevrolet Co.*,
1988 WL 40019 (Del. Super. Ct. Apr. 13, 1988) 22

Global Energy Finance LLC v. *Peabody Energy Corp.*,
2010 WL 4056164 (Del. Super. Ct. Oct. 14, 2010) 9, 25, 26

Greenberg v. *City of New York*,
81 A.D.2d 284 (N.Y. 2d Dep't 1981) 27 n.6

Howard, Needles, Tammen & Bergendoff v. *Steers, Perini & Pomeroy*,
312 A.2d 621 (Del. 1973) 24

In re Safety-Kleen Corp.,
380 B.R. 716 (Bankr. D. Del. 2008) 33

In re Walt Disney Co. Derivative Litig.,
906 A.2d 27 (Del. 2006).....18

Ingalls Shipbuilding v. *Fed. Ins. Co.*,
410 F.3d 214 (5th Cir. 2005)..... 21, 31

Jacobs Constructors, Inc. v. *NPS Energy Servs., Inc.*,
264 F.3d 365 (3d Cir. 2001)..... 21, 23, 31, 34

James v. *Getty Oil Co. (E. Operations), Inc.*,
472 A.2d 33 (Del. Super. Ct. 1983) 13, 22 n.3

JFE Steel Corp. v. *ICI Americas, Inc.*,
797 F. Supp. 2d 452 (D. Del. 2011)..... 29 n.7

Kerr-McGee Chem. Corp. v. *Lefton Iron & Metal Co.*,
14 F.3d 321 (7th Cir. 1994) 33-34

Klotz v. *Warner Commc'ns, Inc.*,
1995 WL 293969 (Del. Ch. May 8, 1995), *aff'd*, 674 A.2d 878 (Del. 1995).....17

Kurilko v. *Teletech Holdings, Inc.*,
2009 WL 3517565 (S.D. Cal. Oct. 26, 2009)..... 29 n.7

LaPoint v. *AmerisourceBergen Corp.*,
970 A.2d 185 (Del. 2009) 25

Levy v. *Hayes Lemmerz Int'l, Inc.*,
2006 WL 985361 (Del. Ch. Apr. 5, 2006).....15

Lorillard Tobacco Co. v. *Am. Legacy Found.*,
903 A.2d 728 (Del. 2006)..... 22-23 n.4

Majkowski v. *Am. Imaging Mgmt. Servs., LLC*,
913 A.2d 572 (Del. Ch. 2006)..... 14, 17

MEMC Elec. Materials, Inc. v. *Albemarle Corp.*,
241 S.W.3d 67 (Tex. App. 2007).....34

Morgan v. *Grace*,
2003 WL 22461916 (Del. Ch. Oct. 29, 2003)..... 22 n.4

Pa. R.R. Co. v. *Gulf Oil Corp.*,
223 A.2d 79 (Del. Super. Ct. 1966).....13

Precision Air, Inc. v. *Standard Chlorine of Del., Inc.*,
654 A.2d 403 (Del. 1995) 23

Quadrant Structure Prods. Co. v. *Vertin*,
106 A.3d 992 (Del. 2013) 14

Reserves Dev. Corp. v. *Esham*,
2009 WL 3765497 (Del. Super. Ct. Nov. 10, 2009) 14

Rogers v. *Christina Sch. Dist.*,
73 A.3d 1 (Del. 2013) 10

Seaford Golf & Country Club v. *E.I. DuPont de Nemours & Co.*,
925 A.2d 1255 (Del. 2007) 18

Senior Hous. Capital, LLC v. *SHP Senior Hous. Fund, LLC*,
2013 WL 1955012 (Del. Ch. May 13, 2013) 23

Sloan & Co. v. *Liberty Mut. Ins. Co.*,
2009 WL 4591906 (E.D. Pa. Dec. 3, 2009) 21, 31

Sumrall v. *Ensco Offshore Co.*,
291 F.3d 316 (5th Cir. 2002) 32-33

United States v. *Atl. Research Corp.*,
551 U.S. 128 (2007) 26

VLIW Tech., LLC v. *Hewlett-Packard Co.*,
840 A.2d 606 (Del. 2003) 13-14

W. Coast Opportunity Fund, LLC v. *Credit Suisse Sec. (USA), LLC*,
12 A.3d 1128 (Del. 2010) 11

Winshall v. *Viacom Int'l Inc.*,
76 A.3d 808 (Del. 2013) ..... 22 & n.3, 23

Other Authorities

Black's Law Dictionary (10th ed. 2014) 14-15

NATURE OF PROCEEDINGS

This contractual dispute concerns an asset purchase agreement (the "1995 Agreement") under which appellees (together, "plaintiffs") acquired an alumina refinery, and only a limited and specific set of related liabilities, from an affiliate of appellant Glencore. Under an implausible reading of the 1995 Agreement, Glencore has sought to transfer to plaintiffs certain *contractual* liabilities it owes to a third party, Lockheed Martin Corporation ("Lockheed"), under a separate contract between those parties (the "1989 Contract").

As the Superior Court recognized, the issues in this case are "very straightforward." A001490. The 1995 Agreement contains a core boldfaced provision specifying that *no* liabilities — whether actual, contingent, or otherwise — were being transferred to plaintiffs *except* for those set forth on Exhibit B thereto:

> **EXCEPT AS SET FORTH ON *EXHIBIT B*, NO LIABILITIES, ACTUAL, CONTINGENT OR OTHERWISE, ARE BEING TRANSFERRED BY SELLER TO BUYER.**
>
> — A000033 (1995 Agreement, § 2.1).

The 1989 Contract between Glencore and Lockheed was *not* "set forth on Exhibit B."

This central provision now goes wholly unmentioned in Glencore's appellate brief. In the court below, however, Glencore attempted to argue that its contractual liability to Lockheed *was* covered by this provision. The Superior Court rejected that argument as a matter of law, and Glencore has now abandoned it on appeal. So Glencore proceeds in this Court entirely by misdirection, seeking instead to divine a transfer of its contractual liability from an indemnity provision in the 1995

Agreement. The short answer is that, as the Superior Court held, that indemnity provision does not cover contractual liabilities.

* * *

This lawsuit stems from Glencore's explicit demand, contrary to the terms of the 1995 Agreement, that plaintiffs defend and indemnify it from Lockheed's contractual claims. In August 2015, plaintiffs sought declaratory relief to establish that they had no such obligations. Glencore responded with a hodgepodge of counterclaims, asserting that plaintiffs *were* so obligated (Glencore also asserted certain other counterclaims, unrelated to Lockheed, that are not the subject of this appeal). In September 2015, plaintiffs moved for judgment on the pleadings on their claims and on Glencore's Lockheed-related counterclaims. Glencore cross-moved for judgment on the pleadings on plaintiffs' claims and on *all* of the counterclaims.

On February 8, 2016, the Superior Court granted plaintiffs' motion and denied Glencore's in its entirety. The court then denied Glencore's application for certification of interlocutory review and granted plaintiffs' request for final judgment under Rule 54(b) on the resolved claims and counterclaims. Glencore appeals.

While Glencore seeks to obscure it on this appeal, Glencore's *sole* liability to Lockheed is *contractual*. The 1989 Contract between Lockheed and Glencore is the exclusive source of any liability that Lockheed has claimed, or *could* claim, against Glencore. If, as the Superior Court held, the indemnity provision of the 1995 Agreement upon which Glencore seeks to rely does not cover contractual liability, that is the end of the matter. It does not, and therefore the judgment should be affirmed.

SUMMARY OF ARGUMENT

1. **Denied**. The Superior Court properly concluded that Section 8.3(3) of the 1995 Agreement is what it is: an indemnity provision. When used with the words "indemnify" and "hold harmless," the phrase "responsible for" is a term of art that expresses an indemnity obligation. This is clear from the plain language and structure of the 1995 Agreement.

2. **Denied**. The Superior Court correctly held, under settled rules of contract law, that an indemnity provision does not cover an indemnitee's contractual liability unless it contains specific, unequivocal language doing so. This rule squares with bedrock principles of Delaware law. Glencore seeks indemnification from plaintiffs for its own *contractual* liability to Lockheed. The sole source of Glencore's liability to Lockheed is the 1989 Contract. That contractual liability is not covered by the 1995 Agreement. The nature of Lockheed's *underlying* liability is beside the point.

3. **Denied**. Under the unambiguous language of the 1995 Agreement, plaintiffs have no duty to indemnify Glencore for its contractual liabilities to Lockheed. The only contracts that fall within any indemnity obligation of plaintiffs are those set forth on Exhibit B to the 1995 Agreement. The 1989 Contract was not included on Exhibit B. And Section 8.3(3), which requires plaintiffs to indemnify Glencore for certain environmental conditions, does not contain *any* language covering Glencore's contractual liability to Lockheed — let alone the required specific, unequivocal language so stating.

COUNTERSTATEMENT OF FACTS

A. The 1989 Contract between Lockheed and Glencore's Affiliate

Under the 1989 Contract, Glencore's affiliate Vialco purchased an alumina refinery in St. Croix (the "Refinery") from a predecessor of Lockheed. A000092-163; A000195, ¶ 7. As part of that transaction, Vialco provided contractual indemnities to Lockheed's predecessor for certain environmental conditions. *Id.* The parties to the 1989 Contract also waived any applicable statutory right of contribution with respect to each other under CERCLA. A000122. Glencore agreed to guarantee its affiliate Vialco's contractual obligations to Lockheed. A000164-66; A000196, ¶ 9.

B. The 1995 Agreement between Glencore's Affiliate and Plaintiffs

Six years later, pursuant to the 1995 Agreement, plaintiffs agreed to purchase from Vialco assets of the Refinery, and to assume specified liabilities. A000031-68. The 1995 Agreement stated, in boldface and all caps:

> **EXCEPT AS SET FORTH ON *EXHIBIT B*, NO LIABILITIES, ACTUAL, CONTINGENT OR OTHERWISE, ARE BEING TRANSFERRED BY SELLER TO BUYER.**
>
> — A000033 (1995 Agreement, § 2.1).

The 1989 Contract was not "set forth on Exhibit B." The 1995 Agreement also contained a section titled "Indemnification by Buyer for Environmental Conditions." A000045 (*Id.* § 8.3). That section contains no language covering contractual liabilities.

C. The Virgin Islands Litigation and Settlements

In 2005 and 2007, the Government of the Virgin Islands commenced two related suits against Lockheed, Glencore, plaintiffs, and others concerning

environmental matters at the Refinery. A000207. There are two areas at the Refinery where bauxite residue created by the refining process was stored. The first, known as Area B, was used by Lockheed and its predecessors until 1972. A000193, ¶ 3. As the Virgin Islands Government set forth in a joint brief, Area B "was closed and covered more than 20 years prior to [plaintiffs'] ownership," and plaintiffs never "disposed of bauxite residue to Area B." A000517. These facts are not disputed. A000193, ¶ 3.

The second area, known as Area A, was opened in 1972. *Id.* The bauxite residue created after that date — *e.g.*, by plaintiffs for the brief period that they operated the refinery from 1998 until 2000 — was deposited only in Area A. *Id.*

The Virgin Islands litigation was ultimately settled by each defendant thereto. In February 2012, plaintiffs agreed to remediate Area A in a consent decree with the Virgin Islands. A000210, ¶ 74; A001067-1138. Plaintiffs did so even though, as the court that approved the settlement as "substantively fair" recognized, they had "contributed only a small fraction of the [bauxite residue] in Area A." A001161.

As for Area B, as to which it is undisputed that Lockheed was the sole polluter (A000193, ¶ 3), Lockheed then entered into a separate settlement with the Virgin Islands in which it agreed to pay $20.75 million and to remediate that area. A000214-15, ¶¶ 95-98; A001330-99.

D. The New York Action

On May 11, 2015, Lockheed sued Glencore in New York (the "New York Action"), seeking indemnification under the 1989 Contract for its liabilities to the Virgin Islands. A000073-166. Lockheed's sole claims against Glencore are for breach of the indemnity provisions in the 1989 Contract between those parties (and

the related guarantee). A000086-89, ¶¶ 63-85. There is no environmental-law claim in the New York Action; nor could there be. And Lockheed brought no claim at all against plaintiffs (nor could it have).

E. The Procedural History of This Delaware Action

The day after Lockheed sued Glencore in New York for breach of contract, Glencore asserted in a letter to plaintiffs that they were somehow obligated to "defend" and "indemnify Glencore from the results of the [New York] Action." A000071. Glencore further wrote that it would "claim over against" plaintiffs. *Id.*[1]

Because there was no such defense or indemnity obligation in the 1995 Agreement, plaintiffs promptly commenced suit against Glencore in June 2015. In view of Glencore's threat to "claim over" against plaintiffs in the New York Action, plaintiffs brought their suit in the Court of Chancery seeking injunctive relief to enforce the exclusive Delaware forum provision in the 1995 Agreement.

Six weeks later, Glencore responded that (contrary to its letter) it would *not* "claim over" in New York — mooting the need for an injunction, and stripping the Court of Chancery of jurisdiction. *Alcoa World Alumina LLC* v. *Glencore Ltd.*, C.A. No. 11110-CB (Del. Ch. July 20, 2015), Trans. ID 57577605, at 3.

To avoid further delay, plaintiffs voluntarily dismissed their Chancery Court action, *Alcoa World Alumina LLC* v. *Glencore Ltd.*, C.A. No. 11110-CB (Del. Ch.

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[1] Plaintiff St. Croix Alumina, L.L.C. ("SCA") entered into the 1995 Agreement with Glencore's affiliate. Plaintiff Alcoa World Alumina LLC guaranteed certain of SCA's obligations thereunder. Because Glencore made its demand on both plaintiffs, and the difference between the two plaintiffs is not relevant to this appeal, each or both of the plaintiffs are referred to herein simply as "plaintiffs" for ease of reference.

Aug. 6, 2015), Trans. ID 57661458, and thereupon filed a complaint in Superior Court on August 6, 2015. Plaintiffs brought two claims, seeking declarations that: (1) they are not required to defend Glencore in the New York Action; and (2) they are not obligated to indemnify Glencore in connection with the New York Action.

In response to plaintiffs' straightforward complaint, Glencore filed a prolix 74-page answer, with 11 counterclaims falling into two categories. One set was the mirror image of plaintiffs' claims (alleging that plaintiffs *are* required to reimburse Glencore for the contractual claims asserted against it by Lockheed in the New York Action). The second set does not involve the New York Action at all, but rather a separate $625,000 settlement paid directly by Vialco to the Virgin Islands, as to which Glencore sought indemnity and legal fees on different theories.

On September 16, 2015, plaintiffs moved for judgment on the pleadings on both of their claims, and on those of Glencore's counterclaims that were the mirror image. Two weeks later, Glencore cross-moved on *all* claims and counterclaims (including its counterclaims concerning the Vialco settlement).[2]

F. The Superior Court's February 8 Order

After a hearing, the Superior Court on February 8, 2016 granted plaintiffs' motion and denied Glencore's, ruling for plaintiffs on their claims and the mirror-image counterclaims (the "Feb. 8 Order"). The court held that the 1995 Agreement was "unambiguous." *Id.* at 13. It applied the well-settled principles of Delaware law that indemnity agreements must be construed "strictly against the indemnitee," and

[2] Glencore thereafter conceded that plaintiffs have no duty to defend it in the New York Action, notwithstanding its prior unambiguous demand. A000710.

that "the interpretation of indemnification provisions cannot contradict the plain text of the agreement or logic of the transaction." *Id.* at 15.

"Applying these general principles," the court held that "for [plaintiffs] to be liable for the New York Action, [plaintiffs] would have had to specifically assume the liabilities for the 1989 Contract in the 1995 Agreement in Article 2, or the indemnification clause in Article 7.3 or 8.3 should have referenced the assumption of 'contractual liability' or the 1989 Agreement." *Id.*

The Superior Court also relied upon the well-settled body of case law holding that a contract must contain an unequivocal undertaking by an indemnitor to cover contractual liability undertaken by its indemnitee. As the Superior Court recognized, "the plain text of the 1995 Agreement does not contain an unequivocal undertaking of [Glencore's] contractual liability arising from the 1989 Agreement." *Id.* at 16.

Finally, the court denied Glencore's motion for judgment on the pleadings as to the counterclaims relating to the separate $625,000 settlement paid by Vialco. *Id.* at 17. Those claims, which involve issues of fact, are not part of this appeal.

G. The Superior Court's March 10 Orders

On February 17, 2016, Glencore applied for certification under Supreme Court Rule 42(b). A001443-62. In that application, Glencore raised many of the same arguments it now reprises on appeal. Glencore argued, for example, that the Superior Court incorrectly decided a legal issue "of first impression" by holding that the indemnity provisions in the 1995 Agreement did not require plaintiffs to cover Glencore's contractual liability to Lockheed. A001455. Glencore also claimed that the February 8 Order "undermine[d] the allocation of known

prospective liabilities" and conflicted with the decisions of other trial courts in Delaware. A001455, A001457.

In their response, plaintiffs agreed that any appeal of the core dispute between the parties should go forward now. A001463-83. However, because the requirements of Rule 42(b) were not met, plaintiffs pointed out that the sounder course for any appeal would be entry of final judgment on the resolved claims and counterclaims pursuant to Delaware Superior Court Rule of Civil Procedure 54(b).

On March 10, 2016, the Superior Court granted plaintiffs final judgment under Rule 54(b) (the "Judgment"). It entered final judgment for plaintiffs on their claims and on Glencore's various Lockheed-related counterclaims. Judgment at 2.

The Superior Court then denied Glencore's application for certification under Rule 42(b). A001484-88. The court rejected Glencore's argument that the February 8 Order involved a question of first impression in Delaware, noting that its decision was based on "general accepted principles of Delaware indemnification and contract law." A001487. The court also disagreed with Glencore's suggestion that the February 8 Order conflicted with other Delaware cases. The single, unpublished case cited by Glencore, *Global Energy Finance LLC* v. *Peabody Energy Corp.*, 2010 WL 4056164 (Del. Super. Ct. Oct. 14, 2010), did not "involv[e] the type of indemnification provision present" in the 1995 Agreement. A001487.

H. The Scope of Glencore's Appeal

Glencore has abandoned several of its arguments on appeal. First, Glencore's Opening Brief ("OB") does not address the grant of judgment on the pleadings in plaintiffs' favor as to Counterclaim Three, which had alleged that Lockheed's

contractual claims against Glencore were "Losses" that plaintiffs, as the "Buyer" of the Refinery, agreed to assume under Section 2.1 (the core, boldfaced provision) and Exhibit B to the 1995 Agreement. A000171; A000205-06; A000221-22. Counterclaim Three had also alleged that plaintiffs failed to indemnify Glencore for such "Losses" under Article 7 of the 1995 Agreement. *Id.* Glencore's silence is dispositive as to these claims. *See Rogers* v. *Christina Sch. Dist.*, 73 A.3d 1, 8 (Del. 2013) ("Under Delaware Supreme Court Rule 14, an appellant must raise and argue claims of error in both the Summary of Argument and the Argument portions of his Opening Brief.").

Glencore has likewise abandoned any claim that plaintiffs breached their obligation, under Section 8.3(1), to "be responsible for, and [to] indemnify, save and hold [Glencore] harmless with respect to," all "Environmental Conditions at the Refinery which are not Pre-Closing Environmental Conditions." A000361-65. Glencore does not mention Section 8.3(1), in form or substance, in either its Summary of Argument or its Argument section.

This appeal is therefore limited solely to Glencore's argument that its contractual liability to Lockheed is somehow covered by Section 8.3(3) of the 1995 Agreement. That provision, titled "Indemnification by Buyer for Environmental Conditions," states that plaintiffs "shall be responsible for, and shall indemnify, save and hold [Glencore] harmless with respect to," certain "bauxite residue storage facilities." A000045. As the Superior Court held, this provision does not cover Glencore's contractual liability to Lockheed under the 1989 Contract.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY REJECTED GLENCORE'S ATTEMPT TO SHIFT ITS CONTRACTUAL LIABILITY UNDER THE GUISE OF THE WORDS "RESPONSIBLE FOR."

A. Question Presented

Did the Superior Court correctly grant plaintiffs judgment on the pleadings as to Counterclaim Two (the so-called "breach of responsibility" claim) because they had no independent obligation beyond indemnity to Glencore under Section 8.3(3) of the 1995 Agreement? A000772-74.

B. Scope of Review

This Court reviews *de novo* the grant of plaintiffs' motion for judgment on the pleadings. *W. Coast Opportunity Fund, LLC* v. *Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010).

C. Merits of Argument

Glencore asks this Court to reach the unprecedented conclusion that Section 8.3(3), an *indemnity* provision that contains the standard language of *indemnification*, nevertheless creates some separate obligation different from indemnity. The Superior Court properly rejected this argument. Section 8.3(3) is an indemnity provision, period. That conclusion is plain from the language of Section 8.3(3). It is also clear from the structure of the 1995 Agreement. Glencore's criticism of the Superior Court's 18-page decision, issued after full briefing and an hour of oral argument, as "not the result of any orderly and logical reasoning process" (OB 16) is unfounded.

1. Glencore's "breach of responsibility" claim has no merit.

As shown in Points II and III, below, the normal rules applicable to indemnity provisions are fatal to Glencore's claims for indemnification. Perhaps tacitly so

recognizing, Glencore begins its appellate brief by pretending that the indemnity provision of Section 8.3(3) is something else. It is not.

The so-called "breach of responsibility" claim in Glencore's pleading is nothing more than its unsubtle attempt to end-run the settled rules that apply to indemnity provisions. Glencore hypothesizes that the words "responsible for" in Section 8.3(3) are different from an indemnity duty, and that plaintiffs breached that supposedly separate obligation. The Superior Court correctly rejected Glencore's theory. Feb. 8 Order at 17.

2. The "responsible for" language of Section 8.3 is language of indemnification.

"The purpose of an indemnification provision" is "to require the promisor to *be responsible for* claims against either the promisor, the promisee, or both." *Beaver Valley Power Co.* v. *Nat'l Eng'g & Contracting Co.*, 883 F.2d 1210, 1221 n.11 (3d Cir. 1989) (emphasis added). There is therefore nothing remarkable about the indemnification language in Section 8.3(3), which provides in relevant part:

> **Indemnification by Buyer for Environmental Conditions.** [Plaintiffs] shall be responsible for, and shall indemnify, save and hold [Glencore] harmless with respect to . . . (3) the maintenance, operation and management of all bauxite residue storage facilities appurtenant to the Refinery . . . .
>
> — A000045 (1995 Agreement, § 8.3(3)).

According to Glencore, this provision separately required plaintiffs to (i) "be responsible for" bauxite residue *and* (ii) indemnify Glencore with respect to losses from such residue. OB 13-22. Section 8.3(3) creates these separate obligations,

Glencore says, because the provision contains conjunctive language: "be responsible for, *and* . . . indemnify, save and hold [] harmless." OB 17.

Not so. It is of course commonplace for the words "responsible for" to be included in indemnity provisions — these are words of art that express an indemnity obligation. Glencore's own authorities so recognize. In *James* v. *Getty Oil Co. (E. Operations), Inc.*, for example, the court examined an "indemnity clause" requiring a contractor to "be responsible for," and to "indemnify and save harmless [an oil company] from," losses at a refinery. 472 A.2d 33, 34 (Del. Super. Ct. 1983) (OB 24 n.6). The court concluded from the "plain meaning" that "the duty which [the contractor] [was] assuming [was] to *indemnify*" the oil company. *Id.* at 36. Likewise, in *Breaux* v. *Halliburton Energy Services*, the Fifth Circuit noted that a contract "provide[d] the following regarding indemnity: 'Contractor shall at all times be responsible for and hold harmless and indemnify.'" 562 F.3d 358, 367-68 (5th Cir. 2009) (OB 18, 31); *see also Brozozowski* v. *Ingersoll-Rand Co.*, 1985 WL 25724, at *4 (Del. Super. Ct. Oct. 24, 1985) ("operative indemnity clause" provided "contractor shall be responsible for and shall indemnify and save harmless the owner"); *Pa. R.R. Co.* v. *Gulf Oil Corp.*, 223 A.2d 79, 80 (Del. Super. Ct. 1966) ("indemnification agreement": "be responsible for, and to indemnify and save harmless").

Glencore cites no case where the words "responsible for" were joined with the words "indemnify" and "hold harmless" but construed to impose anything beyond an indemnity obligation. The only case involving a conjunctive provision that Glencore *does* cite is about a confidentiality agreement (not an indemnity provision) that used none of the relevant terms. *See VLIW Tech., LLC* v. *Hewlett-Packard Co.*, 840 A.2d

606, 614 (Del. 2003) (OB 14, 17, 18) (company "shall not be obligated to hold in confidence, and shall not be subject to the confidentiality obligations of this Article 6"). Glencore's second case on this subject, *Reserves Development Corp.* v. *Esham*, does not involve a conjunctive provision (or an indemnification provision) at all. 2009 WL 3765497, at *5-6 (Del. Super. Ct. Nov. 10, 2009) (OB 17) (distinct provisions in land-purchase agreement created separate obligations).

Delaware courts have routinely *rejected* similar attempts by litigants to deconstruct indemnity provisions into their subatomic particles in an effort to conjure some different obligation beyond indemnity. As this Court has recognized, indemnity provisions are a common example of the law's "hoary tradition" of using "doublet and triplet phrasing" where "technically one term would suffice." *Quadrant Structure Prods. Co.* v. *Vertin*, 106 A.3d 992, 1024-25 (Del. 2013) (en banc).

Instructive, for example, is then Vice-Chancellor Strine's decision in *Majkowski* v. *American Imaging Management Services, LLC*, 913 A.2d 572 (Del. Ch. 2006). There, the indemnity clause used the terms "indemnify and hold harmless," and a litigant sought to invoke the anti-surplusage maxim to argue that "hold harmless" must mean something beyond "indemnify." The court forcefully rejected that argument, noting that "indemnify" and "hold harmless" were "legal jargon" used together to express the same concept, and that "Black's Law Dictionary in fact defines 'hold harmless' by using the word 'indemnify.'" *Id.* at 589, 591.

So too with "responsible for." Black's Law Dictionary defines "hold harmless" in terms of "responsibility for": "**hold harmless** *vb.* (18c) To absolve (another party) from any responsibility for damage or other liability arising from the

transaction; indemnify. — Also termed *save harmless*." *Hold Harmless*, Black's Law Dictionary (10th ed. 2014) (emphasis in original).

3. The structure of the 1995 Agreement further confirms that Section 8.3(3) is nothing more than an indemnity provision.

Adjacent provisions further confirm that Section 8.3(3) is an indemnity provision, no more. The same phrase "responsible for" is used in the immediately adjacent Section 8.2(a) ("Indemnification by Seller for Pre-Closing Environmental Conditions"). It states that Vialco "shall *be responsible for*, and shall indemnify, save and hold [plaintiffs] harmless against, any *amount* arising [from certain conditions] not to exceed $18 million." (Emphases added.) Thus, as used with the words "indemnify" and "hold harmless" in Section 8.2(a), the phrase "responsible for" refers exclusively to a sum of money — plainly connoting indemnity. *See Levy* v. *Hayes Lemmerz Int'l, Inc.*, 2006 WL 985361, at *11 (Del. Ch. Apr. 5, 2006) (demand that company cover monetary payments was "paradigmatic example" of indemnification).

Glencore ignores this adjacent provision. Instead, it now proffers an argument — not even raised in its briefs below — about Section 8.3(2). But that provision only further undermines, rather than supports, Glencore's position. Section 8.3(2) shares its prefatory, operative language with Section 8.3(3). But whereas Section 8.3(3) applies to bauxite, Section 8.3(2) concerns asbestos:

> **Indemnification by Buyer for Environmental Conditions.** [Plaintiffs] shall be responsible for, and shall indemnify, save and hold [Glencore] harmless with respect to . . . (2) the removal or encasing of asbestos in or on Assets *as contemplated by Section 8.6 of this Agreement.*
>
> — A000045 (1995 Agreement, § 8.3(2)) (emphasis added).

Plaintiffs may well have (as Glencore asserts) been "obligated . . . to take a specific action after [they] acquired the Refinery: remove or encase the asbestos at the Refinery." OB 20. But that affirmative obligation does not arise from the "be responsible for" language that Section 8.3(2) shares with Section 8.3(3). Rather, it arises from a *separate provision altogether*, Section 8.6:

> **Asbestos.** [Plaintiffs] *shall be responsible for* the removal or encasing of asbestos in or on equipment or enclosed within any of the improvements or other Assets, other than asbestos waste material accumulated for disposal by or on behalf of [Glencore] prior to the Closing Date.
>
> — A000047 (*Id.* § 8.6 (emphasis added)).

There is no parallel separate provision as to bauxite.

If Section 8.3(2) created an affirmative "responsibility" to remove asbestos, the "responsible for" language in Section 8.6 would be rendered meaningless. The only reasonable way to reconcile these provisions is to conclude that Section 8.3, which joins "be responsible for" with "indemnify, save and hold [] harmless," creates an *indemnity* obligation and nothing more. And regardless of whether it is applied to asbestos or bauxite, the shared, operative language in Section 8.3 must have the same effect. Because Section 8.3(2) is an *indemnity* provision, Section 8.3(3) must be too.

Glencore also attempts to seize upon a linguistic difference between Sections 8.3 and 7.3. Glencore notes that Section 8.3 includes the words "responsible for," but Section 7.3, which is also an indemnity provision, does not. Thus, according to Glencore, in order to avoid treating this extra language as surplusage, the phrase "responsible for" must create more than an indemnity obligation in Section 8.3.

That argument too is unavailing. Delaware courts have recognized that "different words" used in different "subsections" of a text nevertheless may "have the same common sense meaning." *Klotz* v. *Warner Commc'ns, Inc.*, 1995 WL 293969, at *4 (Del. Ch. May 8, 1995), *aff'd*, 674 A.2d 878 (Del. 1995).

This concept applies with particular force to indemnity provisions, which are not subjected to the normal anti-surplusage maxim. As noted, in *Majkowski*, then-Vice Chancellor Strine held that the phrase "hold harmless" is consonant with the word "indemnify." 913 A.2d 572. Acknowledging that independent meaning generally should be given to each word in a contract, the *Majkowski* court nonetheless explained that this maxim is "not a technical rule of law designed to trap a careless draftsperson into including a contract right that he did not mean to include." *Id.* at 588.

The reasoning in *Majkowski* applies squarely to indemnity provisions containing the words "indemnify," "hold harmless," and "responsible for." Indeed, it may further be pointed out that the language in Section 8.3 is not identical to Section 7.3 in another respect — it also has the word "save" ("*save and* hold harmless"). This does not mean that plaintiffs breached some separate "Save Obligation." Rather, the point is that there are multiple similar legal formulations that express the same indemnity obligation. As compared with Section 7.3, Section 8.3 simply contains an extra word or two expressing the same basic legal duty of indemnity. In light of the plain language and structure of the 1995 Agreement, that fact is of no moment.

4. The Superior Court did not impermissibly fail to consider any undisputed facts in rejecting the so-called "breach of responsibility" claim.

Finally, Glencore complains about the Superior Court's "reasoning process" (OB 16), claiming the court supposedly ignored certain "undisputed facts" bearing upon its so-called "breach of responsibility" claim, including "facts that speak to 'why specific contract language was (or was not) chosen.'" OB 14. Citing this Court's decisions in *Seaford Golf & Country Club* v. *E.I. DuPont de Nemours & Co.*, 925 A.2d 1255, 1264 (Del. 2007), and *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 48 (Del. 2006), Glencore then concludes that the Superior Court committed reversible error by failing to "set forth reasons why the equally reasonable contrary inference permitted by those facts should be rejected." OB 14.

Glencore's position misconstrues the cases on which it relies. The decisions in *Seaford* and *Walt Disney* arose in the context of summary judgment motions that required the court to resolve "material ambiguit[ies]" by weighing extrinsic evidence. *Seaford Golf*, 925 A.2d at 1264. This case, by contrast, involves competing cross-motions for judgment on the pleadings, in which posture the court's review is circumscribed by the four corners of the pleadings and exhibits thereto. *DeLucca* v. *KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *6 (Del. Ch. Jan. 23, 2006). From the unambiguous language and structure of the 1995 Agreement, it is clear that plaintiffs' only "responsibility" for bauxite residue was a limited *indemnification* obligation. The pleadings do not permit any other "equally reasonable contrary inference." *Seaford Golf*, 925 A.2d at 1264.

* * *

In context, when the Superior Court in conclusion noted that the "breach of responsibility" claim (like the rest of Glencore's variously-worded Lockheed-related claims) was "related to the indemnification of the New York Action," what it was saying was the obvious: Section 8.3(3) is an indemnity provision. Glencore's attempt to pass Section 8.3(3) off as something else fails as a matter of law. And as shown in Points II and III, *infra*, the normal rules that apply to indemnity provisions doom Glencore's claims.

II. THE SUPERIOR COURT PROPERLY HELD THAT INDEMNITY PROVISIONS DO NOT COVER CONTRACTUAL LIABILITIES ABSENT UNEQUIVOCAL LANGUAGE DOING SO.

A. Question Presented

Did the Superior Court properly conclude that plaintiffs have no obligation to indemnify Glencore for its contractual liabilities to Lockheed absent specific, unequivocal language covering those contractual liabilities? A000766-82.

B. Scope of Review

This Court's review is *de novo*. *See* Section I.B, *supra.*

C. Merits of Argument

The Superior Court correctly held, under prevailing rules of contract law, that an indemnity provision does not cover "contractual liability undertaken by [an] indemnitee" unless that indemnity provision "clearly and unambiguously express[es] such an intention." Feb. 8 Order at 15. Glencore makes two arguments seeking to avoid this conclusion. *First*, Glencore argues that the prevailing rule applied by the Superior Court is somehow contrary to Delaware law. OB 23. *Second*, it hypothesizes that the well-known rule should have an environmental-law exception. OB 25. Neither argument has merit.

1. Contractual liability is only covered by an indemnity provision where there is specific language unequivocally covering such contractual liability.

It is a well-settled rule of law that a purported indemnitor is not deemed to have indemnified a would-be indemnitee for a "contractual liability" of the indemnitee unless the indemnity provision contains "specific language that clearly manifest[s] such an intent" — language "demonstrat[ing] an unequivocal

undertaking by an indemnitor to assume *contractual* liability undertaken by its indemnitee." *Beloit Power Sys., Inc.* v. *Hess Oil Virgin Islands Corp.*, 757 F.2d 1431, 1434 (3d Cir. 1985) (emphasis added); *see, e.g.*, *Jacobs Constructors, Inc.* v. *NPS Energy Servs., Inc.*, 264 F.3d 365, 372 (3d Cir. 2001) ("[A]n agreement to indemnify another for his contractual liability to a third party . . . must be stated plainly, in clear and unequivocal language."); *Ingalls Shipbuilding* v. *Fed. Ins. Co.*, 410 F.3d 214, 221 (5th Cir. 2005) (rejecting argument "that indemnity agreements encompass claims made by third parties against the indemnitee for the indemnitee's own contractual indemnity obligations absent clear expression in the contract that such coverage is intended to be included"); *Corbitt* v. *Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981) ("[E]xpress notice is required where a party seeks to shift his contractual liability to indemnify a third party."); *Dullard* v. *Berkeley Assocs. Co.*, 606 F.2d 890, 894 (2d Cir. 1979) (indemnity provision does not include putative indemnitee's "[c]ontractual liability to indemnify a third party" unless there is "specific language . . . inserted to manifest that intent clearly"); *Sloan & Co.* v. *Liberty Mut. Ins. Co.*, 2009 WL 4591906, at *3 (E.D. Pa. Dec. 3, 2009) ("For an indemnity agreement to cover an indemnitee's contractual liability to a third party, the parties must use clear and unequivocal language indicating as much.").

Glencore argues that this pervasive and well-known legal principle somehow does not apply in Delaware. OB 23. But as the Superior Court correctly recognized, this prevailing rule is founded upon broader "general principles" (which Glencore's brief ignores) that are well settled under Delaware law. Feb. 8 Order at 15.

First, as the Third Circuit explained in *Jacobs*, this prevailing rule of law squares with "the well-established principle . . . that an indemnity clause is to be construed against the party seeking indemnification." 264 F.3d at 373. That indemnity provisions are to be construed strictly against putative indemnitees is likewise well established under Delaware law. *See, e.g.*, *Winshall* v. *Viacom Int'l Inc.*, 76 A.3d 808, 824 n.42 (Del. 2013) ("[U]nder Delaware law, indemnity provisions are to be construed strictly, rather than expansively."); *Fountain* v. *Colonial Chevrolet Co.*, 1988 WL 40019, at *11 (Del. Super. Ct. Apr. 13, 1988) ("Delaware courts construe indemnity agreements strictly against the indemnitee.").[3] Thus, Glencore's contrary suggestion — that Delaware "rules for interpreting indemnity provisions" are "no different" from the rules applicable to other contractual language — is simply wrong. OB 23-25.[4]

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[3] In a footnote, Glencore cites *James*, 472 A.2d at 37, to argue that an indemnity provision is strictly construed "only" if it is "ambiguous." OB 24. But, again, Glencore confuses the issues. In this case, as discussed *infra* in Point III, the Superior Court properly held, based on the *unambiguous* language of the 1995 Agreement, that plaintiffs had no duty to indemnify Glencore for its separate contractual liability to Lockheed. If this Court agrees with that conclusion, there is nothing more to say. But even if the 1995 Agreement *were* ambiguous, plaintiffs still would prevail. *See Winshall*, 76 A.3d at 824 n.42 (putative indemnitee could "not claim that the [indemnity provision] [was] even ambiguous" because "indemnity provisions are to be construed strictly rather than expansively").

[4] None of the cases cited by Glencore support its argument. For example, partially quoting *Morgan* v. *Grace*, 2003 WL 22461916, at *2 n.14 (Del. Ch. Oct. 29, 2003), Glencore opines that "an indemnity provision . . . will be honored using the standard concept of contract interpretation." OB 24. But the full text of that sentence makes clear that the "standard concept" at issue was merely "that the intent of the parties must be ascertained from the language of the contract." 2003 WL 22461916, at *2 n.14. Likewise, in *Lorillard Tobacco Co.* v. *American*

Furthermore, as the Third Circuit noted in *Jacobs*, the prevailing rule reflects the sensible point that an indemnitor should not lightly be deemed to have taken on the "unusual and extraordinary obligation" of covering an "uncertain and indefinite" liability that is "entirely in the hands of the indemnitee." 264 F.3d at 372. This common-sense principle, which the Third Circuit recognized also animates the rule that one party must expressly agree to indemnify another party for that second party's negligence, is also well recognized under Delaware law. *See Precision Air, Inc.* v. *Standard Chlorine of Del., Inc.*, 654 A.2d 403, 409 (Del. 1995) ("[U]nless expressly and clearly indicated in contractual language, an indemnitee cannot indemnify itself for its own negligence.").

Delaware courts have consistently invoked these general principles to limit the scope of claimed indemnity obligations in multiple contexts. *See, e.g.*, *Winshall*, 76 A.3d at 824 (buyer could not obtain indemnification from selling shareholders for sellers' alleged breach of "unusual" warranty in merger agreement; such an indemnification obligation "would need to be clear and unambiguous"); *Senior Hous. Capital, LLC* v. *SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *44 (Del. Ch. May 13, 2013) (indemnity provision does not cover attorneys' fees from litigation

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Legacy Foundation, (OB 23-24), a case that did not involve indemnification, this Court explained that judges "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*." 903 A.2d 728, 740 (Del. 2006). Plaintiffs agree that the parties' intent should be ascertained from the plain language of the 1995 Agreement. As the Superior Court correctly held, the plain language of the 1995 Agreement does not require plaintiffs to indemnify Glencore for its contractual liabilities under the 1989 Contract. *See* Point III, *infra*.

between contracting parties "absent a clear and unequivocal articulation of that intent"); *see also Howard, Needles, Tammen & Bergendoff* v. *Steers, Perini & Pomeroy*, 312 A.2d 621, 624 (Del. 1973) ("[W]hen the parties to a contract have entered into a written agreement, expressly setting forth one party's indemnity liability, there is no room for any enlargement of that obligation by implication.").

These principles of Delaware law apply with equal force to an indemnitee's claim for indemnification of *contractual* liability. Indeed, Delaware courts already require "express" language to manifest "an assignee's *assumption* of liabilities under an assigned contract." *City Investing Co. Liquidating Tr.* v. *Cont'l Cas. Co.*, 1992 WL 65411, at *10 (Del. Ch. Mar. 30, 1992) (emphasis added), *aff'd*, 624 A.2d 1191 (Del. 1993).

Accordingly, there is no cogent reason why this Court should depart from the prevailing rule as recognized in the decisions of the United States Courts of Appeals for the Second, Third, and Fifth Circuits (and other courts) discussed above. An indemnity provision does not cover *contractual* liabilities of a putative indemnitee absent specific language that clearly and unequivocally does so.

2. This prevailing rule of construction applies to Glencore's attempt to obtain indemnification for its *contractual* liability to Lockheed.

Glencore also posits that there should be an environmental-law exception to the governing legal rule of general applicability. But, again, no authorities support Glencore's position. So Glencore proceeds by indirection, noting that courts have drawn an analogy between (i) the rule governing indemnification for contractual liabilities and (ii) the rule limiting an indemnitor's responsibility for an indemnitee's

negligence. OB 25-27. According to Glencore, this link shows that the prevailing rule does not apply where the *underlying* liability is "no-fault" (as under CERCLA).

This argument is without merit. Glencore seeks indemnification for its *contractual* obligation to indemnify Lockheed. There is no claim in the New York Action under CERCLA (nor could there be, *see* pp. 26-27, *infra*). Nor is there (or could there be) a CERCLA claim (or any other claim) by Lockheed against plaintiffs (*see id*.). Lockheed's *indemnity* claim against Glencore, for which Glencore is seeking indemnification from plaintiffs, is a "separate cause of action" from any underlying CERCLA claim against Lockheed. *LaPoint* v. *AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009). Whatever is required for exculpation of CERCLA liability has nothing to do with any issue here. The *only* liability that Glencore seeks to transfer to plaintiffs is a *contractual* one.

In any event, contrary to Glencore's suggestion, the case law shows that the governing rule applies regardless of whose "fault" caused the underlying liability. For example, in *Beloit*, the Third Circuit held that, absent specific language, an indemnity provision did not cover an indemnitee's contractual obligation to indemnify a third party for liability not caused by the indemnitor *or* the indemnitee. 757 F.2d 1431; *Dullard*, 606 F.2d at 894 (same). In other words, the indemnity claims that were barred in *Beloit* and similar cases were claims for indemnification of *contractual* liability, not for the indemnitees' "own negligence," as Glencore suggests.

The Superior Court decision in *Global Energy*, cited by Glencore, is not on point. 2010 WL 4056164 (OB 7, 25). Rather, as the Superior Court here itself recognized, *Global Energy* "is not a case involving the type of indemnification

provision present here." A001487. The clause in *Global Energy* covered "[a]ll environmental claims and liabilities resulting from *any activities or operations*." 2010 WL 4056164, at *7 (emphasis added). The court stated that the phrase "activities or operations" encompassed "virtually all actions related to the functioning of the business," *including* "entering into contracts, [and] including contracts for indemnity." *Id.* at *21. Unlike the broad language at issue in *Global Energy*, the indemnity provision in the 1995 Agreement applies only "with respect to . . . the maintenance, operation and management of all bauxite residue storage facilities" — not, more generally, to *any* activities and operations including entering into contracts. A000045 (1995 Agreement, § 8.3).

Glencore also suggests that applying the prevailing rule in this case would unjustly permit plaintiffs to evade liability. OB at 27. Again, not so.

While CERCLA liability is no-fault, as well as joint-and-several, contribution claims are generally available among defendants. And in a CERCLA contribution action, recovery is based on each defendant's *proportionate* share of the harm it caused. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 138 (2007). Here, as discussed above, plaintiffs agreed to remediate all of Area A — even though they had contributed only a "small fraction" of the bauxite residue there — in a consent decree that was approved as "substantively fair" (over Glencore's affiliate's objection) by the federal court presiding over the Virgin Islands litigation. A001161. Indeed, in the Virgin Islands litigation, even *Glencore's own expert* conceded that plaintiffs had deposited barely *one-tenth* of the bauxite residue in Area A — yet plaintiffs agreed to remediate *all* of Area A, which was the only area in which plaintiffs deposited any

bauxite residue. A000561; A000193, ¶ 3. So (putting aside that no such claim was ever asserted) it is unfathomable that plaintiffs could have incurred any further liability on a CERCLA contribution claim anyway.

Moreover, because Lockheed's settlement was as to Area B, and Glencore (like plaintiffs) contributed no bauxite residue in that area, Glencore too would have been largely (if not entirely) insulated from any liability to Lockheed in any hypothetical CERCLA contribution action — even without the express CERCLA contribution bar in the 1989 Contract. The *only* reason that Glencore may be liable to Lockheed is the 1989 Contract — a contract to which plaintiffs were strangers.[5] Application of the normal prevailing rule to the plain language in the 1995 Agreement is in no way inconsistent with anything in CERCLA.[6]

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[5] As Glencore notes, CERCLA explicitly allows parties to agree to apportion *environmental* liability differently than the statute would otherwise provide. That is what Lockheed and Glencore did in the 1989 Contract. But that CERCLA principle is not inconsistent with the prevailing rule, which requires specific, unequivocal language to transfer an indemnitee's *contractual* obligation to indemnify a third party.

[6] Glencore also cites *Greenberg* v. *City of New York*, 81 A.D.2d 284, 287 (N.Y. 2d Dep't 1981), a case having nothing to do with CERCLA, to argue the prevailing rule should not apply where the indemnitor had "notice of" and "exposure to" the underlying liability. OB 23. That argument misses the mark entirely. The question is not whether the indemnitor is *aware* of the underlying liability, but whether it agreed by specific and unequivocal language to indemnify a separate contractual obligation of the indemnitee to cover that liability. Here, it did not. Moreover, in *Greenberg*, the court declined to apply the prevailing rule in an action brought by an intermediate indemnitee (*i.e.*, the party in the position of Glencore) against its alleged indemnitor (*i.e.*, plaintiffs) because the ultimate indemnitee (*i.e.*, Lockheed) could have recovered *directly* in tort from the alleged indemnitor (*i.e.*, plaintiffs), but chose instead to recover from the intermediate indemnitee (*i.e.*, Glencore) via contract. Whatever *Greenberg*'s merits, here, by contrast, Lockheed has (and could have) no claim against plaintiffs. Its only claims are against Glencore — under the 1989 Contract.

III. THE SUPERIOR COURT PROPERLY HELD THAT SECTION 8.3(3) DOES NOT REQUIRE PLAINTIFFS TO INDEMNIFY GLENCORE FOR ITS CONTRACTUAL LIABILITIES TO LOCKHEED.

A. Question Presented

Did the Superior Court properly conclude that Section 8.3(3) does not require plaintiffs to indemnify Glencore for its contractual liabilities to Lockheed, because the unambiguous 1995 Agreement contains no specific, unequivocal language covering those contractual liabilities? A000766-82.

B. Scope of Review

This Court's review is *de novo*. *See* Section I.B, *supra.*

C. Merits of Argument

The core of the Superior Court's ruling, which Glencore's brief puts last, is that the 1995 Agreement contains no provision requiring plaintiffs to indemnify Glencore for its separate indemnity obligation to Lockheed. Feb. 8 Order at 13, 15-17. The Superior Court correctly recognized that only an "unequivocal undertaking" by plaintiffs would be sufficient to create such an obligation, and it correctly found no such "unequivocal undertaking" in the 1995 Agreement. *Id.* at 16. By contrast, Glencore's interpretation of the 1995 Agreement conflicts with the core, boldfaced provision in Section 2.1 (which goes entirely unmentioned in Glencore's brief). And Glencore's overbroad reading of Section 8.3(3) is *ipse dixit*.

1. The 1995 Agreement unambiguously provides that plaintiffs are not responsible for Glencore's indemnity obligation to Lockheed under the 1989 Contract.

As noted above (p. 1), the 1995 Agreement unambiguously provides that *no* liabilities — whether actual, contingent, or otherwise — were being transferred from

Vialco to plaintiffs, *except* for those set forth on Exhibit B to the 1995 Agreement:

> **EXCEPT AS SET FORTH ON *EXHIBIT B*, NO LIABILITIES, ACTUAL, CONTINGENT OR OTHERWISE, ARE BEING TRANSFERRED BY SELLER TO BUYER.**
>
> — A000033 (1995 Agreement, § 2.1).

Among the contingent liabilities set forth on Exhibit B were the "liabilities and obligations of [Glencore] under the executory portion of any assigned contract or agreement referred to on Exhibit A to the Agreement." A000063 (*Id.* at Ex. B). The 1989 Contract is not "set forth on Exhibit B" or "referred to on Exhibit A." A000053-62 (*Id.* at Ex. A). So plaintiffs have no obligation with respect thereto.

According to Glencore, it "is of no consequence" that the 1989 Agreement was not an assumed liability set forth on Exhibit B (as Glencore now concedes on this appeal, *see* p. 1, *supra*), because a duty to indemnify is distinct from a duty to assume liabilities. OB 33-34. But that indemnity is conceptually distinct from assumption of liability does nothing to change the facts that: (i) the 1989 Contract was not assumed; and (ii) the indemnity provisions in the 1995 Agreement do not cover contractual liability under the 1989 Contract.

Under Section 7.3 of the 1995 Agreement, there is no practical difference between the contractual liabilities of Glencore that plaintiffs agreed to assume and those which they agreed to indemnify.[7] Section 7.3 provides that plaintiffs "shall

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[7] The observation in *JFE Steel Corp.* v. *ICI Americas, Inc.*, 797 F. Supp. 2d 452 (D. Del. 2011), and *Kurilko* v. *Teletech Holdings, Inc.*, 2009 WL 3517565 (S.D. Cal. Oct. 26, 2009), that assumption of liability is conceptually distinct from indemnity is thus beside the point.

indemnify" Vialco for Losses arising out of or related to the "Assumed Liabilities," which are explicitly defined in Section 1.1 to "mean[] those liabilities of [Vialco] that [plaintiffs] agree[ ] to assume as specifically described on Exhibit B to this agreement." A000031-32 (1995 Agreement, § 1.1); A000041-42 (*id.* § 7.3). Any number of other contracts are "on Exhibit B," but, as noted, the 1989 Contract, in whole or in part, is *not* among them. Therefore, contingent liability under the 1989 Contract is not covered by any indemnification obligation under Section 7.3.[8]

This explicit language is clear and dispositive. These sophisticated parties, represented by counsel, well knew how to transfer *contractual* liabilities, and how to create indemnification obligations with respect to such *contractual* liabilities, when that was their intent. It is clear from the core boldfaced provision in Section 2.1, and from the indemnification language in Section 7.3, that the *only* contractual liabilities for which plaintiffs would have an indemnification obligation were the contracts set forth on Exhibit B. The 1989 Contract is not set forth on Exhibit B.

2. The 1995 Agreement does not contain specific language unequivocally requiring plaintiffs to indemnify Glencore for the 1989 Contract.

Lastly, Glencore argues that there is language in the indemnity provision in Section 8.3(3) that is sufficiently specific to demonstrate — unambiguously — that plaintiffs agreed to indemnify Glencore for its separate *contractual* liability to Lockheed under the 1989 Contract. But the language to which Glencore points

[8] As noted *supra* at pp. 9-10, Glencore's brief does not address the Superior Court's determination that Glencore's contractual liability to Lockheed was not covered by Section 2.1 or by Section 7.3. Any contrary argument is waived.

(indemnification "with respect to . . . the maintenance, operation and management of all bauxite residue storage facilities") says nothing about contracts.

The cases are legion in rejecting similar attempts by would-be indemnitees to obtain indemnification for contractual liabilities based upon contract language that speaks only to the underlying conditions relating to the contractual liability. *See, e.g.*, *Beloit Power Sys., Inc.* v. *Hess Oil Virgin Islands Corp.*, 757 F.2d 1431, 1434 (3d Cir. 1985); *Jacobs Constructors, Inc.* v. *NPS Energy Servs., Inc.*, 264 F.3d 365, 372 (3d Cir. 2001); *Ingalls Shipbuilding* v. *Fed. Ins. Co.*, 410 F.3d 214, 221 (5th Cir. 2005); *Corbitt* v. *Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981); *Dullard* v. *Berkeley Assocs. Co.*, 606 F.2d 890, 894 (2d Cir. 1979); *Sloan & Co.* v. *Liberty Mut. Ins. Co.*, 2009 WL 4591906, at *3 (E.D. Pa. Dec. 3, 2009). There is no reason to deviate from those authorities here.

Instructive, for example, is *Beloit*, 757 F.2d 1431, which likewise involved a refinery in St. Croix. Hess had a contractual duty to indemnify a manufacturer for damages paid by that manufacturer to a worker who was injured while installing the manufacturer's part. The injured worker was an employee of a Hess subcontractor, and the subcontractor had agreed to indemnify Hess "from and against any and all loss, damage, injury liability and claims." *Id.* at 1433 (internal quotations omitted). Hess sought under this provision to shift its *contractual* indemnity obligation to the manufacturer over to the subcontractor.

The Third Circuit rejected as a matter of law Hess's attempt to transfer its *contractual* liability to the manufacturer over to the subcontractor, applying the doctrine that *contractual* obligations are only deemed covered by an indemnity

provision when there is "specific language" that incorporates such *contractual* liability — "demonstrat[ing] an unequivocal undertaking by an indemnitor to assume *contractual* liability undertaken by its indemnitee." *Id.* at 1434 (emphasis added). The court reasoned:

> Under the indemnity agreement, [subcontractor] agreed to hold Hess harmless from and against any and all loss, damage, injury liability and claims against Hess, *but there is no provision by which [subcontractor] assumed any contractual liability* that Hess may have undertaken. Before imposing such liability on [subcontractor], there would have to be *specific language* that clearly manifested such an intent.

Id. (emphases added). Because there was no language "demonstrat[ing] an unequivocal undertaking by an indemnitor to assume *contractual* liability undertaken by its indemnitee," Hess's attempt to transfer its *contractual* liability was held barred as a matter of law. *Id.* (emphasis added).

So too here. Nowhere in the 1995 Agreement is there *any* language transferring to plaintiffs Glencore's contractual liabilities under the 1989 Contract — let alone "specific" language that "unequivocally" does so. Indeed, the core, boldfaced language in Section 2.1 of the 1995 Agreement is precisely to the contrary.

Glencore's further assertion that there is no single formulation required for an indemnity provision to cover contractual liability is beside the point: As the case law makes clear, *whatever* formulation is chosen, language explicitly covering contractual liability is necessary. Indeed, the very case that Glencore cites, *Sumrall* v. *Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002) (OB 29), explicitly *included* liability "arising out of contract":

> [Premiere] agrees to protect, defend, indemnify, hold, and save [Santa Fe] and its . . . employees . . . contractors and subcontractors, and all their . . . employees . . . harmless from and against all claims, losses, costs demands, damages, suits, . . . and *causes of action of whatsoever nature or character . . . and whether arising out of contract*, tort, strict liability, unseaworthiness of any vessel, misrepresentation, violation of any applicable law and/or any cause whatsoever . . . .

Id. at 318 n.4 (emphasis added). That clause is, indeed, the kind of "specific language" that "demonstrates an unequivocal undertaking" to "assume contractual liability." *Beloit*, 757 F.2d at 1434. Such language is entirely absent from the indemnity provision here. And by excluding the 1989 Contract from Exhibit B to the 1995 Agreement, the parties here demonstrated exactly the opposite intent.

Finally, Glencore's argument that the mere words "with respect to" in Section 8.3(3) are sufficiently specific to cover contractual liability utterly fails to come to terms with what is required. OB 30-33. None of the cases it cites support any such theory. In *In re Safety-Kleen Corp.*, for example, the purchaser of a bankrupt corporation was *directly* responsible for environmental remediation under a consent decree. 380 B.R. 716, 725 (Bankr. D. Del. 2008) (OB 32). Indeed, the *Safety-Kleen* court specifically held that the remediation payments were *not* "the product of contractual indemnification rights." *Id.* The provisions in the other cases cited by Glencore on this subject do not even include the phrase "with respect to." *See Douzinas* v. *Am. Bureau of Shipping, Inc.*, 888 A.2d 1146, 1148 (Del. Ch. 2006) (OB 32) ("arising under or related to" in arbitration provision); *Kerr-McGee Chem. Corp.* v. *Lefton Iron & Metal Co.*, 14 F.3d 321, 327 (7th Cir.

1994) (OB 31-32) ("arising out of or resulting from, directly or indirectly"; no issue whether any contractual obligation was encompassed by indemnity clause).

There is no support for the notion that the words "with respect to," without any reference to contractual indemnity obligations, suffice to meet the requirements of the prevailing rule. To the contrary, several courts have rejected that very assertion. *See, e.g.*, *Jacobs*, 264 F.3d at 373 (provision covering "litigation brought *with respect to* any such injury, death, loss, or damage" did not encompass contract claims (emphasis added)); *MEMC Elec. Materials, Inc.* v. *Albemarle Corp.*, 241 S.W.3d 67, 70 (Tex. App. 2007) (provision covering "damages incurred . . . directly or indirectly . . . from liabilities, obligations or claims, *with respect to* the plant arising out of the operations of the plant," did not encompass contract claims (emphasis added)).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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