IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ITG BRANDS, LLC, Plaintiff, v. REYNOLDS AMERICAN, INC. and R.J. REYNOLDS TOBACCO COMPANY, Defendants.	)	C.A. No. 2017-0129-LWW
REYNOLDS AMERICAN, INC. and R.J. REYNOLDS TOBACCO COMPANY, Counter-Plaintiffs, v. ITG BRANDS, LLC, Counter-Defendant.	)	

MEMORANDUM OPINION

Date Submitted: August 22, 2022
Date Decided: September 30, 2022

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WILL, Vice Chancellor

In 2014, defendant Reynolds American, Inc. sold four cigarette brands to plaintiff ITG Brands, LLC pursuant to an asset purchase agreement. Before the closing of this sale, Reynolds American's affiliate, R.J. Reynolds Tobacco Company, was making payments under a preexisting settlement agreement with the State of Florida based on its annual sales of those cigarette brands. After closing, Reynolds stopped making payments for the brands it no longer owned.

The asset purchase agreement requires ITG to use reasonable best efforts to join the Florida settlement. ITG's joinder would require ITG to make annual payments to Florida based on the sales of the cigarette brands it acquired from Reynolds. Seven years later, ITG has not yet joined that settlement agreement or made any payments to Florida in connection with ITG's sales of the acquired cigarette brands.

Florida sued Reynolds and ITG over the lack of payments and obtained a judgment that Reynolds must continue to make settlement payments based on ITG's sales of the brands ITG had acquired (unless and until ITG joins the Florida settlement agreement). That judgment on Reynolds amounts to over $170 million to date and tens of millions of dollars more each year into perpetuity.

Litigation in this court between Reynolds and ITG concerns which party bears the responsibility for the Florida judgment. The parties have cross-moved for summary judgment regarding whether ITG's assumption of liabilities in the asset

purchase agreement includes the Florida judgment liability imposed on Reynolds. After considering the plain language of the asset purchase agreement, I conclude that the agreement's unambiguous terms support the interpretation advanced by Reynolds. ITG agreed to assume the type of liability imposed by the Florida judgment and it must indemnify Reynolds for losses due to that assumed liability.

Reynolds' motion for summary judgment is granted on the question of contract interpretation. ITG's motion for summary judgment is denied. The extent of ITG's indemnification obligation to Reynolds is left to be determined.

I. FACTUAL BACKGROUND

The background of this action is described in two Memorandum Opinions issued by the Court of Chancery on November 30, 2017 (the "2017 Opinion") and September 23, 2019 (the "2019 Opinion").[1] This opinion recites only the facts necessary to resolve the present summary judgment motions regarding contract interpretation. Unless otherwise noted, the description that follows draws from the undisputed facts in the 2017 Opinion, the 2019 Opinion, the pleadings, and documentary exhibits submitted by the parties.[2]

A. The Tobacco Lawsuits and Settlement Agreements

In the mid-1990s, multiple states sued R.J. Reynolds Tobacco Company ("Reynolds Tobacco"), Lorillard Tobacco Company, and other major tobacco manufacturers for misrepresenting the addictiveness and health risks of their products.[3] The states sought reimbursement for healthcare costs caused by

[1] *ITG Brands, LLC v. Reynolds Am., Inc.*, 2017 WL 5903355, at *1-5 (Del. Ch. Nov. 30, 2017) ("2017 Op."); *ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *1-3 (Del. Ch. Sept. 23, 2019) ("2019 Op.").

[2] Citations in the form of "ITG's Opening Br. Ex. __" refer to exhibits to the Transmittal Declaration of Evan Mannering to ITG Brands, LLC's Brief in Support of Motion for Summary Judgment (Dkts. 226-38, 249). Citations in the form of "Reynolds' Opening Br. Ex. __" refer to exhibits to the Transmittal Declaration of Matthew D. Perri in Support of Defendants' Opening Brief in Support of Motion for Summary Judgment (Dkt. 225).

[3] 2017 Op. at *2.

smoking.[4] The State of Florida filed a lawsuit against the major tobacco companies in 1995 (the "Florida Litigation").[5]

Between 1997 and 1998, Reynolds Tobacco and other manufacturers (the "Settling Defendants") entered into separate settlement agreements (the "State Settlements") with each of Florida, Minnesota, Mississippi, and Texas (the "Previously Settled States").[6] In November 1998, the Settling Defendants reached a "Master Settlement Agreement" with the other 46 states.[7]

In the various settlements, the Settling Defendants agreed to make annual payments based on their annual volume of tobacco product sales and to change their marketing practices in return for a release from past and future liability.[8] For example, in their settlement agreement with Florida (the "Florida Settlement Agreement"), the Settling Defendants agreed to make an initial payment of $750 million and annual payments in perpetuity totaling $440 million.[9] Each Settling

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[4] *Id.*

[5] ITG's Opening Br. Ex. 9 at 2, 4-7; ITG's Opening Br. Ex. 7 ¶¶ 19, 25, 94-102.

[6] 2017 Op. at *2.

[7] *See* ITG Brands, LLC's Verified Compl. (Dkt. 1) ("Compl.") Ex. 5 (excerpt of the Master Settlement Agreement, "MSA"); ITG Brands, LLC's Br. Supp. Mot. Summ. J. (Dkt. 222) ("ITG's Opening Br.") 6 n.4 ("The full MSA is available at https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/.").

[8] *E.g.*, ITG's Opening Br. Ex. 3 ("Fla. Settlement Agreement") § II; *see* 2017 Op. at *1; Defs.' Answer and Suppl. and Am. Verified Countercls. (Dkt. 136) ("Countercls.") ¶ 26.

[9] Fla. Settlement Agreement § II(B)(1)-(3).

Defendant is obligated to pay a pro rata share of the annual aggregate perpetuity payment based on its respective market share of annual tobacco product sales in the United States.[10]

B. The Merger and the Divestiture of the Acquired Brands

On July 15, 2014, defendant Reynolds American, Inc. (the indirect parent of Reynolds Tobacco, together referred to as "Reynolds"), entered into a $27.4 billion agreement to acquire all of the shares of Lorillard Inc. (the parent of Lorillard Tobacco Company) through a merger.[11] As a condition to allowing the merger to close, the Federal Trade Commission required the divestiture of four cigarette brands: Winston, Salem, Kool, and Maverick (together, the "Acquired Brands").[12] Reynolds and Lorillard agreed to sell the Acquired Brands to ITG Brands, LLC, the plaintiff in this action.[13]

Reynolds American and ITG entered into an Asset Purchase Agreement (the "APA") on July 15, 2014.[14] Article II ("Purchase and Sale") of the APA sets the purchase price for the divestiture at $7.1 billion plus ITG's assumption of

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[10] *E.g.*, *id.*; MSA § IX(b)-(c).

[11] 2017 Op. at *3; Countercls. ¶¶ 12, 14.

[12] 2017 Op. at *3; Countercls. ¶¶ 15-16.

[13] ITG Brands, LLC's Answer to Reynolds' Second Suppl. and Am. Verified Countercls. (Dkt. 139) ("Answer to Countercls.") ¶ 102; Countercls. ¶ 14.

[14] ITG's Opening Br. Ex. 1 (the "APA") Preamble.

"Assumed Liabilities," including certain "Liabilities" associated with the Acquired Brands.[15] Section 2.01 ("Purchase and Sale of the Assets") enumerates the "Assumed Liabilities" in § 2.01(c), which includes seven subsections addressing "Liabilities of the Seller [Reynolds[16]]" that the "Acquiror [ITG[17]]" agreed to "assume [from Reynolds] and thereafter to pay, discharge and perform in accordance with their terms."[18]

Generally speaking, ITG would bear the Liabilities associated with the Acquired Brands after "Closing,"[19] but not those associated with the period before Closing when Reynolds (or Lorillard) owned the brands. For example, § 2.01(c)(i) addresses Liabilities "arising . . . under" certain "Assumed Contracts," providing

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[15] APA § 2.04(a). "Liabilities" are defined as "liabilities, claims, demands, expenses, commitments, Losses, costs or obligations of every kind and description." APA Ex. A at A-8. "Losses" are defined to include "all losses, demands, claims, Actions, assessments, Liabilities, damages, deficiencies, fines, penalties, costs, expenses, commitments, judgments, orders, decrees or settlements." *Id.* at A-10.

[16] APA Preliminary Statement ¶ B (defining "Sellers" as "RAI Parties" and "Lorillard Asset Owners"). Pursuant to the Reynolds-Lorillard merger, Reynolds would "own 100% of the outstanding capital stock of Lorillard and, through Lorillard, the other Lorillard Asset Owners." *Id.* ¶ C.

[17] *Id.* Preamble (defining "Acquiror" as "LIGNUM-2, L.L.C., a Texas limited liability company and wholly owned subsidiary of [ITG]").

[18] *Id.* § 2.01(c).

[19] The APA defines "Closing" as when "the sale and purchase of the Transferred Assets and the assumption of the Assumed Liabilities contemplated by this Agreement [] take place." *Id.* § 2.03. The "Closing Date" is defined as the "date on which the Closing takes place." *Id.* The Closing Date is June 12, 2015. *See* 2017 Op. at *2.

that ITG would assume after Closing the responsibility for a series of contracts.[20] The most encompassing provision is found in § 2.01(c)(iv). There, ITG assumed:

> all Liabilities (other than Excluded Liabilities) to the extent arising, directly or indirectly, out of the operation or conduct of the PR Business or the use of the Transferred Assets, in each case from and after the Closing.[21]

In using the term "Transferred Assets," § 2.01(c)(iv) incorporated a lengthy list of assets ITG needed to manufacture and sell the Acquired Brands.[22] The "Excluded Liabilities" that ITG expressly did not assume are set forth in § 2.01(d)[23]—the "reciprocal provision" to § 2.01(c).[24]

Two subsections of § 2.01(c) expressly identify instances where ITG did not agree to assume post-Closing Liabilities.[25]

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[20] *See* APA § 2.01(c)(i); *see also id.* § 2.01(a)(iii) (defining "Assumed Contracts").

[21] *Id.* § 2.01(c)(iv); *see also* APA Ex. A at A-13 (defining "PR Business" to mean "the distribution, marketing, advertising, sale and service in Puerto Rico of [Winston, Kool, and Salem]").

[22] "Transferred Assets" include all intellectual property in the Acquired Brands and all goodwill arising out of the sale and marketing of the Acquired Brands. APA § 2.01(a)(vii), (xii).

[23] *Id.* § 2.01(d).

[24] 2019 Op. at *5.

[25] Three other subsections of § 2.01(c) allocate to ITG Liabilities stemming from specified pre-Closing conduct: "all Liabilities" under collective-bargaining agreements and other contracts "related to the blu Brand Business," which involved an e-cigarette brand owned by a Lorillard affiliate that also was sold to ITG (APA § 2.01(c)(ii); *id.* Preliminary Statement ¶ D; APA Ex. A at A-2)); "all Liabilities arising . . . out of the operation or the conduct of the blu Brand Business prior to, on or after the Closing" (APA § 2.01(c)(iii)); and "any Liability arising out of, or related to, the Transferred Employees (including

First, § 2.01(c)(v) identifies a carve-out for "Straddle Tobacco Action Liabilities," which cover Liabilities arising from smoking and health-related actions filed within eight years after the Closing Date, and which § 2.01(d)(v) makes Excluded Liabilities.[26] Section 2.01(c)(v) clarifies that this carve-out does not exclude (i.e., ITG otherwise assumes) "all Liabilities arising out of or in connection with any Action" "relating to," among other things, the "sale, . . . use or consumption of . . . tobacco products," "to the extent relating to the period commencing after the Closing Date and related to . . . [an Acquired Brand]."[27]

Second, § 2.01(c)(vii) identifies a carve-out for attorneys' fees—"Seller Plaintiff Fees"—which Reynolds and Lorillard paid under specified State Settlements and which § 2.01(d)(ix) makes Excluded Liabilities.[28] Section 2.01(c)(vii) provides that "subject to the Agreed Assumption Terms," ITG otherwise

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Liabilities arising prior to the Closing)" or associated employee-benefit plans (*id.* § 2.01(c)(vi)).

[26] *Id.* § 2.01(c)(v), (d)(v); APA Ex. A at A-17 (defining "Straddle Tobacco Liabilities" to mean "all Liabilities arising out of or in connection with any smoking and health-related Action filed in the Straddle Tobacco Action Period arising out of, in connection with or relating to . . . [certain uses of the Acquired Brands]" and defining "Straddle Tobacco Action Period" to mean "the period commencing on the Closing Date and ending on the date that is eight years from the Closing Date").

[27] APA § 2.01(c)(v).

[28] *Id.* § 2.01(c)(vii), (d)(ix); APA Ex. A at A-16 (defining "Seller Plaintiff Fees" to mean "all plaintiffs' attorneys' fees and other legal costs in relation to the State Settlements in respect of the [Acquired Brands], relating to any periods, whether before, on or after the Closing Date excluding, for the avoidance of doubt, Assumed Plaintiff Fees").

assumes "all Liabilities under the State Settlements in respect of the [Acquired Brands] that relate to" the post-Closing period.[29]

The full text of § 2.01(c)(vii) states:

> subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the [Acquired Brands] that relate to the period after the Closing Date, including (A) any recalculation or redetermination of amounts due in respect of the [Acquired Brands] that relate to the period after the Closing Date, and (B) all plaintiffs' attorneys' fees attributable to any post-Closing increases in volume of sales (determined in accordance with Section 11.08) of any of the [Acquired Brands], but excluding, for the avoidance of doubt, Seller Plaintiff Fees (collectively, the "Assumed Plaintiff Fees").[30]

The Agreed Assumption Terms referenced in § 2.01(c)(vii) are set forth in Exhibit F to the APA.[31] Section 2.2 of the Agreed Assumption Terms imposes an obligation on ITG to use its "reasonable best efforts" to reach agreements with the Previously Settled States to assume the obligations of Reynolds under each State Settlement:

> [ITG], with the assistance and cooperation of [Reynolds American] and Lorillard in communications and negotiations as required by the Agreement, shall use its reasonable best efforts to reach agreements with each of the Previously Settled States, by which [ITG] will assume, as of the Closing, the obligations of a Settling Defendant under the [State Settlement] with each such State, with

[29] APA § 2.01(c)(vii).

[30] *Id.*

[31] APA Ex. F ("Agreed Assumption Terms") § 2.2.

> respect to the [Acquired Brands], on the same basis as the Settling Defendants prior to the Closing. Provided, however, that such agreements shall include terms providing either that any direct-pay statute (also known as an equity-fee law or NPM-fee law) of a Previously Settled State does not apply to the [Acquired Brands] or that, if the Acquiror is required to make payments with respect to [Acquired Brands] under a direct-pay statute (or any distributor or other party is required to make such payments with respect to the [Acquired Brands]), the Acquiror will receive a credit against otherwise due payments under the [Previously Settled State] settlement equal to the full payments made.[32]

In § 11.02(a), ITG agreed to indemnify Reynolds against "Losses"[33] that Reynolds suffers as a result of any breach by ITG of the Agreed Assumption Terms in subsection (a)(v) and in connection with an Assumed Liability in subsection (a)(vi).[34]

The Reynolds-Lorillard merger and ITG's purchase of the Acquired Brands closed simultaneously on June 12, 2015.[35] Since the Closing, Reynolds has not sold any Acquired Brands cigarettes; now ITG solely and exclusively markets and sells those brands.[36]

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[32] *Id.*

[33] *See supra* note 15 (definition of "Losses").

[34] APA § 11.02(a)(v), (vi).

[35] 2017 Op. at *3; APA § 2.03 (providing that the Closing is "the same day as the date on which the Effective Time of the [Reynolds-Lorillard] Merger occurs").

[36] Answer to Countercls. ¶¶ 102-04.

Reynolds stopped making annual settlement payments to the Previously Settled States based on sales of the Acquired Brands at that time.[37] ITG also did not make annual settlement payments to three of the four Previously Settled States (Florida, Minnesota, and Texas) for post-Closing sales of the Acquired Brands.[38] Nor did ITG (at least initially) join those three State Settlements.[39]

C. The Florida Litigation

Eventually, Florida, Minnesota, and Texas each sought judicial redress for post-Closing settlement payments owed for the Acquired Brands.[40] The disputes with Minnesota and Texas were resolved, and ITG joined those respective State Settlements.[41]

On January 18, 2017, Florida and Philip Morris, USA Inc.—another cigarette manufacturer and a Settling Defendant under the Florida Settlement Agreement—filed motions to enforce the Florida Settlement Agreement against ITG and Reynolds Tobacco.[42] Florida and Philip Morris maintained that Reynolds Tobacco's

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[37] *Id.* ¶ 102.

[38] 2017 Op. at *4-5; Answer to Countercls. ¶¶ 103-04; *see* ITG's Opening Br. Ex. 18 ("Fla. Order") at 2-3.

[39] Answer to Countercls. ¶ 103. ITG joined the Mississippi settlement on June 12, 2015. *Id.*

[40] *Id.* ¶¶ 104-05, 115, 117.

[41] *Id.* ¶¶ 116, 118.

[42] ITG's Opening Br. Ex. 9 at 17; ITG's Opening Br. Ex. 10 at 28.

settlement obligations continued post-Closing.[43] Florida and Philip Morris also argued that ITG had assumed Reynolds Tobacco's liabilities for the Acquired Brands under the Florida Settlement Agreement pursuant to the APA.[44] Reynolds Tobacco and ITG opposed the motions.[45]

On December 27, 2017, the Florida court entered an order granting in part Florida and Philip Morris's motions to enforce (the "Florida Order").[46] The court held that Reynolds Tobacco's settlement obligations to Florida were not extinguished when it sold the Acquired Brands.[47] The court explained that, absent joinder by ITG, Reynolds Tobacco remained "obligated to make the payments [on the Acquired Brands] pursuant to the Florida Agreement."[48]

In determining whether ITG had assumed Reynolds Tobacco's obligations under the Florida Settlement Agreement, the Florida court observed that APA § 2.01(c)(vii) provides that ITG assumed, "subject to the Agreed Assumption Terms, all Liabilities under the [State Settlements] in respect of the [Acquired Brands] that

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[43] ITG's Opening Br. Ex. 9 at 9-11; ITG's Opening Br. Ex. 10 at 26-27.

[44] ITG's Opening Br. Ex. 9 at 11-12; ITG's Opening Br. Ex. 10 at 26-27.

[45] *See* ITG's Opening Br. Ex. 14; *see also* ITG Brands, LLC's Suppl. Submission Regarding Issue Preclusion Supp. Mot. Summ. J. (Dkt. 281) ("ITG's Suppl. Br.").

[46] Fla. Order at 1.

[47] *Id.* at 12-15.

[48] *Id.* at 15.

relate to the period after the Closing Date."[49] After describing that the Agreed Assumption Terms imposed on ITG an obligation to "use its reasonable best efforts to reach agreement with each of the Previously Settled States,"[50] the Florida court opined that "the [APA] merely established conditions for [ITG]'s presumed, eventual assumption of financial and other obligations under the Florida [Settlement] Agreement."[51] It stressed, however, that all questions under the APA concerning the allocation of liabilities between Reynolds and ITG are "for the Delaware Court, not [the Florida] Court" to decide.[52]

The Florida court subsequently entered a final judgment on August 15, 2018 (the "Florida Judgment").[53] In it, the court declared that "unless and until ITG becomes a Settling Defendant, . . . Reynolds is liable to make [a]nnual [p]ayments to the State . . . for the sales of cigarettes under the [Acquired Brands], with respect to the [post-Closing] period . . . , in perpetuity."[54] Specifically, the court ordered Reynolds Tobacco to pay past-due "principal" and "prejudgment interest" for then-

[49] *Id.* at 8 (quoting APA § 2.01(c)(vii)).

[50] *Id.* (quoting Agreed Assumption Terms § 2.2).

[51] *Id.* at 9.

[52] *Id.* at 12; *see also id*. at 9 ("[D]etermination of the effect this provision may have on the overall series of transactions between Reynolds and [ITG] is to be determined by the Delaware Chancery Court.").

[53] Countercls. Ex. 2 ("Fla. J.").

[54] *Id.* ¶ 4.

outstanding settlement payments predating the Florida Judgment, future annual settlement payments for the Acquired Brands going forward (absent joinder by ITG), and Florida's "reasonable attorneys' fees and costs" (collectively, the "Florida Judgment Liability").[55] A Florida appellate court affirmed the Florida Judgment on July 29, 2020.[56] The Florida Supreme Court refused further appeals on December 18, 2020.[57]

D. This Court's Prior Rulings

On February 17, 2017, ITG filed the present action in this court seeking, among other things, a declaration that it used reasonable best efforts to join the Florida Settlement Agreement, did not assume obligations under the Florida Settlement Agreement, and had no obligation to indemnify Reynolds.[58] Reynolds filed reciprocal counterclaims on March 24, 2017.[59]

Early in the litigation, ITG moved to enjoin Reynolds from litigating the issue of reasonable best efforts in Florida given the Delaware forum selection provision

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[55] *Id.* ¶¶ 1, 4, 7. The Florida Judgment also required Reynolds Tobacco to pay $9.8 million to Philip Morris for "principal" payments due for the period June 12, 2015 through April 30, 2018 and "prejudgment interest" thereon. *Id.* ¶ 2. Reynolds does not appear to seek indemnification from ITG for this payment to Philip Morris. *See* Countercls. ¶ 153.

[56] *R.J. Reynolds Tobacco Co. v. State*, 301 So. 3d 269, 277 (Fla. Dist. Ct. App. 2020).

[57] *R.J. Reynolds Tobacco Co. v. State*, 2020 WL 7419535, at *1 (Fla. Dec. 18, 2020).

[58] Compl. ¶¶ 74-87, 95-101.

[59] Defs.' Answer and Verified Countercls. (Dkt. 30) ¶¶ 116-34. Reynolds amended its counterclaims on September 28, 2018 and filed a supplement to its amended counterclaims on August 3, 2021. Dkts. 72, 137.

in the APA.[60] The court granted a limited temporary restraining order that barred Reynolds from affirmatively litigating APA-related issues in Florida but permitted Reynolds to raise the APA defensively in response to arguments made by Florida and Philip Morris.[61]

Two rounds of cross-motions for judgment on the pleadings ensued, leading to the 2017 Opinion and 2019 Opinion.

First, in the 2017 Opinion (issued a month before the Florida Order), the court considered whether ITG's obligation to use reasonable best efforts to join the State Settlements terminated at Closing.[62] The court held that it had not and lasted until reasonable best efforts had been expended.[63]

After Reynolds amended its counterclaims and moved for partial judgment on the pleadings, the court addressed whether ITG was obligated to indemnify Reynolds for liability imposed on Reynolds Tobacco for post-Closing settlement payments on the Acquired Brands—in particular, the Florida Judgment Liability.[64] Reynolds

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[60] ITG Brands, LLC's Mem. Supp. Mot. Expedite and TRO (Dkt. 4).

[61] Mar. 13, 2017 Order (Dkt. 25) ¶¶ 2-3.

[62] 2017 Op. at *13.

[63] *Id.* at *9, *13.

[64] 2019 Op. at *4-9. Reynolds also sought a declaration that § 2.2 of the Agreed Assumption Terms does not entitle ITG to demand protection from a hypothetical equity fee statute as a condition of joining the Florida Agreement. *Id.* at *9. In the 2019 Opinion, the court held that ITG was not entitled to make such a demand and granted Reynolds' motion regarding the declaration. *Id.* at *12.

asserted that ITG assumed the Florida Judgment Liability pursuant to APA § 2.01(c)(iv) and (c)(v) and was required to indemnify Reynolds regardless of whether ITG used reasonable best efforts to join the Florida Settlement Agreement.[65] ITG cross-moved, countering that § 2.01(c)(vii), along with the Agreed Assumption Terms it referenced, exclusively governs the assumption of Liabilities related to State Settlements and that ITG was not obligated to indemnify Reynolds.[66]

Second, in the 2019 Opinion, the court recognized that Reynolds' reading of § 2.01(c)(v) was reasonable and noted that it was not necessary to assess Reynolds' argument under § 2.01(c)(iv).[67] The court determined that, at the pleading stage, Reynolds and ITG "both . . . advanced reasonable interpretations of the APA that could lead to different outcomes concerning whether [ITG] would be required to indemnify Reynolds for the Florida Judgment [Liabilities]."[68]

The court further observed that "Sections 2.01(c)(v) and 2.01(c)(vii) have the potential to conflict" due to two factors.[69] First, the court described § 2.01(c)(vii) as "specifically address[ing] the Florida Settlement Agreement from which the

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[65] *Id.* at *4-5.

[66] *Id.* at *5.

[67] *Id.* at *6-7 & n.42 ("Because the court finds that Reynolds' construction of Section 2.01(c)(v) is reasonable, it is not necessary to address Reynolds' alternative argument under Section 2.01(c)(iv).").

[68] *Id.* at *6.

[69] *Id.* at *9.

obligation to make settlement payments to Florida for post-Closing sales of the [Acquired Brands] arises" and § 2.01(c)(v) as more general by comparison.[70] Second, the court read § 2.01(c)(vii)'s preface, "subject to the Agreed Assumption Terms," as implicating the requirement in § 2.2 of the Agreed Assumption Terms that ITG use reasonable best efforts to pursue joinder, reasoning that ITG "would not necessarily be liable for the Florida Judgment" under § 2.01(c)(vii) if it "failed to join [the Florida Settlement] after using its 'reasonable best efforts' to do so."[71] The court therefore concluded that a "potential" conflict rendered § 2.01(c) ambiguous, making "judgment on the pleadings . . . not appropriate."[72] Both parties' motions for judgment on the pleadings were denied.[73]

E. Subsequent Developments

On July 29, 2021, Reynolds asked ITG to indemnify Reynolds Tobacco for all amounts it has paid and will pay due to the Florida Judgment.[74] A few weeks later, ITG refused.[75] Reynolds proceeded to file a supplement to its amended counterclaims, adding a counterclaim for indemnification from ITG for the Florida

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[70] *Id.*

[71] *Id.* at *8-9.

[72] *Id.* at *9.

[73] *Id.*

[74] Countercls. Ex. 3.

[75] Countercls. Ex. 4.

Judgment Liability.[76] Meanwhile, discovery proceeded—including about ITG's efforts to join the Florida Settlement Agreement and parol evidence concerning whether ITG assumed the Florida Judgment Liability through the APA.

In November 2021, the parties requested (and were granted) authorization to move for summary judgment.[77] ITG and Reynolds cross-moved for summary judgment on March 14, 2022.[78] Reynolds' motion seeks summary judgment on legal questions of contract interpretation, which, if resolved in its favor, would eliminate the need for trial on the adequacy of ITG's joinder efforts.[79] ITG's motion asks that the court decide the matters of contract interpretation in its favor and find, as a matter of law, that ITG fulfilled its reasonable best efforts obligation.[80]

II. LEGAL ANALYSIS

Under Court of Chancery Rule 56, summary judgment is granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[81] Rule 56 authorizes summary judgment on "liability

[76] Dkt. 137; Countercls. ¶¶ 140-57.

[77] Dkt. 153.

[78] Dkts. 222, 223.

[79] Dkt. 223.

[80] Dkt. 222.

[81] Ct. Ch. R. 56(c).

alone" without a concurrent resolution of damages.[82] "[T]he facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[83]

The Delaware Supreme Court "'has described pure matters of contractual interpretation as readily amenable to summary judgment,' because 'proper interpretation of language in a contract . . . is treated as a question of law.'"[84] "In cases involving questions of contract interpretation, . . . courts will grant summary judgment in two scenarios: (1) when the contract is unambiguous, or (2) when the extrinsic evidence fails to create a triable issue of material fact."[85]

Reynolds argues that there are two matters of contract interpretation regarding the APA that are appropriate for summary judgment.[86] First, whether ITG assumed the Florida Judgment Liability imposed on Reynolds Tobacco regardless of whether

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[82] *Id.*

[83] *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldgs. Co.*, 853 A.2d 124, 126 (Del. Ch. 2004).

[84] *Tetragon Fin. Grp. Ltd. v. Ripple Labs Inc.*, 2021 WL 1053835, at *3 (Del. Ch. Mar. 19, 2021) (first quoting *Barton v. Club Ventures Invs. LLC*, 2013 WL 6072249, at *5 (Del. Ch. Nov. 7, 2013); and then quoting *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991)).

[85] *Julius v. Accurus Aerospace Corp.*, 2019 WL 5681610, at *7 (Del. Ch. Oct. 31, 2019), *aff'd*, 241 A.3d 220 (Del. 2020); *see GMG Cap. Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 783 (Del. 2012) ("[I]n a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation.").

[86] Defs.' Opening Br. Supp. Mot. Summ. J. (Dkt. 224) ("Reynolds' Opening Br.") 18.

ITG fulfilled its duty to use reasonable best efforts to join the Florida Settlement Agreement.[87] And second, whether ITG has a corresponding obligation to indemnify Reynolds.[88]

On the first argument, Reynolds contends that the Florida Judgment Liability is an Assumed Liability under the APA because it satisfies the terms of § 2.01(c)(iv), (c)(v), and (c)(vii), and that this Liability falls on ITG regardless of whether ITG used reasonable best efforts to join the Florida Settlement Agreement.[89] On the second argument, Reynolds asserts that because the Florida Judgment created an Assumed Liability, ITG must indemnify Reynolds under § 11.02(a)(vi) of the APA for Reynolds' full Losses, unless and until ITG joins the Florida Settlement Agreement.[90]

ITG, for its part, argues that it is entitled to summary judgment in its favor on the question of whether it is obligated to indemnify Reynolds for the Florida Judgment Liability.[91] ITG contends that § 2.01(c)(vii) exclusively governs the

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[87] *Id.* at 18-38.

[88] *Id.* at 56-59.

[89] *Id.* at 28-38.

[90] *Id.* at 56-59. Reynolds also argues that extrinsic evidence supports its reading of the APA to the extent such evidence is necessary to resolve the interpretation question. *Id.* at 48-56.

[91] ITG's Opening Br. 29-37.

assumption of Liabilities under the State Settlements.[92] And ITG maintains that the Florida Order's interpretation of § 2.01(c)(vii) is binding on this court as a matter of issue preclusion.[93] Alternatively, ITG argues that this court should apply the subordinating language canon to read § 2.01(c)(vii) consistent with the Florida court's interpretation.[94]

ITG further argues that even if the Florida Judgment Liability could be viewed as an Assumed Liability under § 2.01(c)(iv) or (c)(v), § 2.01(c)(vii) governs whether ITG assumed the Florida Judgment Liability pursuant to the specific-over-the-general rule of contract interpretation.[95] Under that approach, ITG's obligation to indemnify Reynolds for the Florida Judgment Liability depends on whether ITG used reasonable best efforts to join the Florida Settlement Agreement.[96] ITG asserts that the court should find as a matter of law that ITG discharged its reasonable best efforts obligation.[97]

For the reasons explained below, I conclude that this court is not bound by the Florida court's determination that ITG did not assume Liabilities under the Florida

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[92] *Id.* at 32-37.

[93] *Id.* at 29-32.

[94] *Id.* at 33-34. ITG also points to extrinsic evidence to argue that § 2.01(c)(vii) (and § 11.02(a)(v)) govern. *Id.* at 37-51.

[95] *Id.* at 29-37.

[96] *Id.* at 35.

[97] *Id.* at 55-59.

Settlement Agreement in § 2.01(c)(vii). After reviewing the APA, I determine that ITG assumed the Florida Judgment Liability under § 2.01(c)(iv) regardless of whether it used reasonable best efforts to join the Florida Settlement Agreement. Therefore, ITG must indemnify Reynolds for the Florida Judgment Liability under § 11.02(a)(vi). The amount to which Reynolds is entitled remains to be resolved.

A. Issue Preclusion Does Not Apply.

I begin by considering the threshold issue of whether the Florida court's reading of § 2.01(c)(vii) is binding on this court. ITG argues that issue preclusion requires this court to follow the Florida court's determination that § 2.01(c)(vii) indicates ITG "has not expressly or impliedly assumed the [Florida Judgment Liability]" but rather "assumed the duty to employ 'reasonable best efforts' to enter into an agreement with Florida to assume the liabilities imposed by the Florida [Settlement] Agreement."[98] Reynolds contests the application of issue preclusion.[99]

"The doctrine of collateral estoppel," also called issue preclusion, "is designed to provide repose and put a definite end to litigation."[100] "[I]t is settled law in

[98] Fla. Order at 11; *see* ITG's Suppl. Br. 2; ITG's Opening Br. 29-30.

[99] Defs.' Suppl. Br. Supp. Mot. Summ. J. (Dkt. 282) ("Reynolds' Suppl. Br.") 4; Defs.' Br. in Opp'n to ITG Brands, LLC's Mot. Summ. J. (Dkt. 246) ("Reynolds' Answering Br.") 11-13.

[100] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991); *see also Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (explaining that "the doctrine of collateral estoppel bars relitigation of the same issues between the same parties in connection with a different cause of action"). "[I]ssue preclusion encompasses the doctrines once known as

[Delaware] that . . . the doctrine[] of . . . collateral estoppel require[s] that the same effect be given a foreign judgment rendered upon adequate jurisdiction as the foreign court itself would accord such a judgment."[101] In other words, when a court evaluates whether a party is estopped from relitigating an issue, it must do so under the laws of the state where the earlier case was decided. Thus, issue preclusion must be decided under Florida law.[102]

Issue preclusion under Florida law requires:

> (1) the identical issue was presented in a prior proceeding; (2) the issue was a critical and necessary part of the prior determination; (3) there was a full and fair opportunity to litigate the issue; (4) the parties to the prior action were identical to the parties of the current proceeding; and (5) the issue was actually litigated.[103]

'collateral estoppel' and 'direct estoppel.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).

[101] *Columbia Cas. Co.*, 584 A.2d at 1217 (holding that Kansas law governed the question of whether a party was collaterally estopped due to a determination made by the United States District Court for the District of Kansas).

[102] Because the parties initially briefed this issue under Delaware law, I requested supplemental briefing about the analysis under Florida law. Dkt. 275. Supplemental briefing was completed on August 22, 2022. *See* Dkts. 281, 282, 291.

[103] *Marquardt v. State*, 156 So. 3d 464, 481 (Fla. 2015); *see also Goodman v. Aldrich & Ramsey Enters., Inc.*, 804 So. 2d 544, 546 (Fla. Dist. Ct. App. 2002); Restatement (Second) of Judgments § 27 (1982) ("Issue Preclusion—General Rule[:] When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

The party invoking issue preclusion bears the burden of demonstrating "with sufficient certainty" that it applies.[104]

Here, ITG has demonstrated that the first, second, third, and fifth factors of issue preclusion under Florida law are met. It cannot, however, show that the fourth factor is satisfied. Issue preclusion does not apply as a result.

1. Four of the Five Requirements of Issue Preclusion Are Met.

Regarding the first factor, the issue for which ITG seeks preclusion is identical to the issue presented in the Florida Litigation. The claims in the two actions are different: the Florida Litigation concerned Reynolds Tobacco's and ITG's obligations to Florida under the Florida Settlement Agreement; this action involves the allocation of Liabilities under the APA. But the same issue—whether ITG assumed Liabilities under the Florida Settlement Agreement pursuant to § 2.01(c)(vii) of the APA—was raised in both proceedings.[105] Issue preclusion "does not require prior litigation of an entire claim, only a particular issue."[106]

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[104] *Meyer v. Shore Indus.*, 597 So. 2d 345, 346 (Fla. Dist. Ct. App. 1992); *see also, e.g.*, *deCancino v. E. Airlines, Inc.*, 283 So. 2d 97, 99 (Fla. 1973) ("[T]he burden of establishing the certainty of the matter formerly adjudicated is on the party claiming the benefit of it.").

[105] Fla. Order at 7-9; ITG's Opening Br. 32-52; Reynolds' Opening Br. 28-56.

[106] *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1131 (Fla. Dist. Ct. App. 2003).

That issue was a "critical and necessary" part of the Florida Order, as the second factor requires.[107] The Florida court addressed whether ITG was liable for settlement payments to Florida under Florida successor liability law, which provides that a buyer acquiring assets does not assume the seller's liabilities unless the buyer expressly or impliedly assumes them.[108] The Florida court explained that this question of successor liability required it to examine the APA and determine whether ITG had assumed liability for the settlement payments in that agreement.[109] The court's application of Florida successor liability law turned on its interpretation of the APA.[110]

Regarding the third factor, the parties had a "full and fair opportunity to litigate the issue" in Florida.[111] Both Reynolds and ITG were parties to the Florida litigation.[112] When the court granted in part and denied in part ITG's motion for temporary injunctive relief, it stated that Reynolds, in the Florida Litigation, was "free to make whatever arguments it wishes in response to claims asserted by . . .

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[107] *Marquardt*, 156 So. 3d at 481.

[108] Fla. Order at 7-12.

[109] *Id.* at 7-8 ("To determine whether [ITG] assumed Reynolds' liabilities under the Florida [Settlement] Agreement by buying four brands from Reynolds, it is appropriate to examine the [APA].").

[110] *Id.* at 7-9.

[111] *Marquardt*, 156 So. 3d at 481.

[112] Fla. Order at 1; Answer to Countercls. ¶¶ 105-06.

Florida and Philip Morris, including arguments concerning the import of the [APA]."[113] Reynolds and ITG were thus able to—and did—dispute Florida's argument that § 2.01(c) of the APA created an assumption of liability by ITG for payments under the Florida Settlement Agreement.[114]

Finally, the fifth factor is satisfied because the issue was "actually litigated" in Florida.[115] "For an issue to have been 'fully litigated,' a 'court of competent jurisdiction' must enter a final decision."[116] The Florida Order and subsequent Florida Judgment were final and valid decisions upheld on appeal.[117]

2. The Parties Are Not Identical.

The fourth factor, however, is not met as the parties in the Florida litigation are not "identical to the parties of the current proceeding."[118] Under Florida law,

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[113] Mar. 1, 2017 Tr. (Dkt. 29) 96-97.

[114] *See, e.g.*, ITG's Opening Br. Ex. 14 at 42 (Reynolds arguing, at the trial court level, that "neither the APA nor the Agreed Assumption Terms nor any Closing Document purports to assign [Reynolds'] settlement obligations to ITG. Rather, ITG agreed to use its reasonable best efforts to join the Florida Settlement Agreement"); ITG's Opening Br. Ex. 127 at 42 (Reynolds arguing, at the appellate court level, that "ITG did not directly assume to make annual payments on the Acquired Brands under the [Florida Settlement Agreement] and . . . in the Asset Purchase Agreement it contracted with Reynolds, with respect to the [Florida Settlement Agreement], only to attempt to join that agreement"); ITG's Suppl. Br. 2.

[115] *Marquardt,* 156 So. 3d at 481.

[116] *Lucky Nation, LLC v. Al-Maghazchi,* 186 So. 3d 12, 14-15 (Fla. Dist. Ct. App. 2016) (quoting *Mobil Oil Corp. v. Shevin,* 354 So. 2d 372, 374 (Fla. 1977)).

[117] *Supra* notes 56-57 and accompanying text.

[118] *Marquardt,* 156 So. 3d at 481. Florida, unlike Delaware, requires "mutuality of parties." *Compare Stogniew v. McQueen*, 656 So. 2d 917, 919-20 (Fla. 1995) ("[W]e are unwilling

this element requires that the parties be situated as adversaries in both actions. "It is a prerequisite . . . that the issue which is sought to be foreclosed by the result of earlier litigation has been decided in an action 'between' the parties in the later case."[119] "[E]stoppel must be predicated on a judgment between adversaries."[120]

ITG cannot meet this requirement because Reynolds and ITG were not adversaries in the Florida Litigation. They were aligned as co-defendants and opposed to Florida and Philip Morris. When parties "were aligned on the same side of the case in the previous . . . action but are adversaries for the first time in the instant case," "[u]nless they were in such an adversarial position to fully litigate the issue between them to a full conclusion, the outcome of the earlier litigation could have no effect in the subsequent case to provide a bar on the ground of collateral estoppel."[121]

ITG cites the Florida Supreme Court's decision in *Tuz v. Edward M. Chadbourne* in support of its position that issue preclusion under Florida law does

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to follow the lead of certain other states and of the federal courts in abandoning the requirements of mutuality . . . .") *with Columbia Cas. Co.*, 584 A.2d at 1217 ("Delaware, like many jurisdictions, has abandoned the requirement of mutuality . . . .").

[119] *S. Bell Tel. & Tel. Co. v. Robinson*, 389 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980) (citation omitted).

[120] *Id.* (quoting *Rader v. Otis Elevator Co.*, 327 So.2d 857, 858 (Fla. Dist. Ct. App. 1976)).

[121] *Argerenon v. St. Andrews Cove I Condo. Ass'n, Inc.*, 507 So. 2d 709, 710 (Fla. Dist. Ct. App. 1987).

not require adversity between the parties.[122] In *Tuz*, the Florida Supreme Court was asked to consider the application of issue preclusion in a situation where the litigants were aligned as co-defendants in the prior case.[123] *Tuz* is not, however, controlling authority. There, the Florida Supreme Court granted "tentative certiorari" to determine whether the lower court's decision conflicted with other Florida precedent.[124] Upon finding that the matter was "factually distinguishable" from such precedent, the Florida Supreme Court held that it had "no jurisdiction" and dismissed the "writ of certiorari [as] improvidently issued."[125] In this posture, "any statements beyond the simple finding of no jurisdiction were obiter dicta."[126]

No Florida court has cited *Tuz* in the more than 50 years since it was issued to suggest that adversity is unnecessary for issue preclusion to apply. Florida District Courts of Appeal have, however, required adversity post-*Tuz*.[127] The Third District,

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[122] ITG Brands, LLC's Reply to Defs.' Suppl. Br. Further Supp. Mot. Summ. J. (Dkt. 291) 1-2 (citing *Tuz v. Edward M. Chadbourne, Inc.*, 310 So. 2d 8, 9-10 (Fla. 1975)).

[123] *Tuz*, 310 So. 2d at 10.

[124] *Id.* ("Petitioner Tuz sought a writ of certiorari in this Court alleging that the instant case was in direct conflict with the decision of this Court in the case of *Youngblood v. Taylor*, 89 So.2d 503 (Fla. 1956). [The Florida Supreme] Court granted tentative certiorari.").

[125] *Id.*

[126] *Cont'l Assur. Co. v. Carroll*, 485 So. 2d 406, 408 (Fla. 1986).

[127] *See Argerenon v. St. Andrews Cove I Condo. Ass'n, Inc*., 507 So. 2d 709, 710 (Fla. 2d Dist. Ct. App. 1987); *Gonzalez v. Gonzalez*, 413 So. 2d 97 (Fla. 3d Dist. Ct. App. 1982); *S. Bell Tel. & Tel. Co. v. Robinson*, 389 So. 2d 1084, 1085 (Fla. 3d Dist. Ct. App. 1980); *Rader v. Otis Elevator Co.*, 327 So. 2d 857, 858 (Fla. 1st Dist. Ct. App. 1976).

for example, relied on a post-*Tuz* Florida Supreme Court decision holding that issue preclusion "prevents identical parties from relitigating issues that have been previously decided 'between' them."[128] ITG cites no case where a Florida court has rejected the adversity requirement.

Issue preclusion does not apply because the mutuality requirement is unmet given the lack of adversity between ITG and Reynolds in the Florida Litigation.

B. Whether ITG Assumed the Florida Judgment Liability Pursuant to the APA

Section 2.01(c)'s seven subsections encompass all of the "Liabilities of the Seller" (Reynolds) that the Acquiror (ITG) "agrees . . . as of the Closing . . . to assume and thereafter to pay, discharge and perform in accordance with their terms."[129] The APA distinguishes between "Assumed Liabilities" (enumerated in § 2.01(c)) and "Excluded Liabilities" (enumerated in § 2.01(d)).[130] The Excluded Liabilities "shall be paid, performed and discharged" by Reynolds

[128] *Robinson*, 389 So. 2d at 1085 (citing *Mobil Oil Corp.*, 354 So. 2d at 374); *Gonzalez*, 413 So. 2d at 98 (same).

[129] APA § 2.01(c); *see supra* notes 15-32 and accompanying text.

[130] *See* 2019 Op. at *5 ("Section 2.01(d) is a reciprocal provision to Section 2.01(c) that specifies certain Liabilities that [ITG] did not assume, which are defined as the 'Excluded Liabilities.'").

"[n]otwithstanding any other provision" of the APA.[131] The Assumed Liabilities are correspondingly "subject to" the Excluded Liabilities.[132]

A Liability is an Assumed Liability if it satisfies one of the seven subsections of § 2.01(c) and is not an Excluded Liability.[133] The parties focus on § 2.01(c)(iv), (c)(v), and (c)(vii). Because the 2019 Opinion did not address the reading of § 2.01(c)(iv),[134] I begin with that provision. I then consider how § 2.01(c)(iv) interacts with § 2.01(c)(vii). I conclude that the plain language of § 2.01(c)(iv) provides that ITG assumed the Florida Judgment Liability at issue and that § 2.01(c)(iv) is not in conflict with § 2.01(c)(vii). I therefore need not address the parties' arguments about § 2.01(c)(v).

1. Applicable Principles of Contract Interpretation

The standard rules of contract interpretation are well established under Delaware law, which governs the APA.[135] "Delaware law adheres to the objective theory of contracts," meaning that "a contract's construction should be that which would be understood by an objective, reasonable third party."[136] "When interpreting

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[131] APA § 2.01(d).

[132] *Id.* § 2.01(c).

[133] *Id.*

[134] 2019 Op. at *6-7 & n.42; *supra* note 67 and accompanying text.

[135] APA § 12.12(a) (providing that Delaware law governs the APA).

[136] *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

a contract, [the] Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement.'"[137] The court must construe the contract "as a whole and . . . will give each provision and term effect, so as not to render any part of the contract mere surplusage."[138]

A court will not look beyond the four corners on an agreement if a contract is unambiguous.[139] Ambiguity exists if "the provisions in controversy are fairly susceptible of different interpretations."[140] "The parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous. The determination of ambiguity lies within the sole province of the court."[141]

2. The Florida Judgment Liability is an Assumed Liability Under § 2.01(c)(iv).

In § 2.01(c)(iv) of the APA, ITG agreed to assume "all Liabilities" arising out of its post-Closing use of the assets it acquired through the APA.[142] A Liability must

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[137] *Id.* at 368 (quoting *GMG Cap. Invs., LLC*, 36 A.3d at 779).

[138] *Osborn*, 991 A.2d at 1159 (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 2010 WL 779992, at *2 (Del. Mar. 8, 2010)).

[139] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."); 2019 Op. at *4 ("Clear and unambiguous language . . . should be given its ordinary and usual meaning." (quoting *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006))).

[140] *Eagle Indus.*, 702 A.2d at 1232.

[141] *Osborn*, 991 A.2d at 1160 (citation omitted).

[142] APA § 2.01(c)(iv).

meet three requirements to satisfy the terms of § 2.01(c)(iv): (1) it must "aris[e], directly or indirectly, out of . . . the use of the Transferred Assets"; (2) the use of the "Transferred Asset" must have occurred "from and after the Closing"; and (3) the Liability must not be an Excluded Liability.[143] The Florida Judgment Liability meets each of these requirements.

First, the Florida Judgment Liability "aris[es]," at least "indirectly," from "the use of the Transferred Assets."[144] "Arise" means "to originate from a source."[145] The purpose of the APA was for ITG to acquire assets that would allow it to sell Acquired Brands cigarettes.[146] Section 2.01(a) catalogues eighteen categories of "Transferred Assets," including: finished goods and inventories related to the Acquired Brands; intellectual property in those brands; books, records, and files primarily related to those brands; and goodwill arising out of the sale and marketing

[143] *Id.*

[144] *Id.*

[145] *Arise*, Merriam-Webster, https://www.merriam-webster.com/dictionary/arise (last visited Sept. 28, 2022); *see also Arise*, *Black's Law Dictionary* (11th ed. 2019) (defining "arise" as "to originate," "to stem (from)," or "to result (from)"); *Lorillard Tobacco*, 903 A.2d at 738 ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."); *Fla. Chem. Co. v. Flotek Indus., Inc.*, 262 A.3d 1066, 1082 (Del. Ch. 2021) (stating that "arise" means "to originate from; stem from" (quoting from *Arise*, *Black's Law Dictionary* (11th ed. 2019))).

[146] *See* APA Preliminary Statement ¶¶ D, E.

of those brands.[147] ITG sells Acquired Brands cigarettes by using these Transferred Assets; it cannot do the former without doing the latter. Indeed, the Florida Judgment describes Reynolds Tobacco's liability as making settlement payments "for the sales of cigarettes under the [Acquired Brands] it transferred to ITG."[148]

Second, the use of the Transferred Assets giving rise to the Florida Judgment Liability occurred after the June 12, 2015 Closing.[149] The Florida Judgment ordered Reynolds Tobacco to make settlement payments under the Florida Settlement Agreement "for the sales of cigarettes under the" Acquired Brands Reynolds transferred to ITG "with respect to the period after June 12, 2015, in perpetuity."[150] ITG only began using the Transferred Assets to produce, market, or sell Acquired Brands cigarettes after Closing.[151]

If ITG stopped using the Transferred Assets, it would not be able to sell Acquired Brands cigarettes. And if ITG sold no Acquired Brands cigarettes in a post-Closing year, Reynolds Tobacco would have no liability to Florida under the

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[147] *Id.* § 2.01(a)(ii), (vii), (ix), (xii).

[148] Fla. J. ¶ 4.

[149] 2019 Op. at *7 (recognizing that "the plain terms of the Florida Judgment" expressly provide that "the liability pertains only to sales of the [Acquired Brands cigarettes] made during the post-Closing period"); *id.* (rejecting ITG's argument that the Florida Judgment Liability "relates to Reynolds' own pre-closing conduct and to [Reynolds'] pre-closing decision to enter into the settlements requiring the payments at issue").

[150] Fla. J. ¶ 4.

[151] *Id.*; *see supra* notes 35-36 and accompanying text.

Florida Judgment for that year.[152] But if ITG uses the Transferred Assets and sells Acquired Brands cigarettes, the liability imposed on Reynolds Tobacco by the Florida Judgment would be based on those annual sales. That is, the existence and extent of ITG's "use of the Transferred Assets" to sell Acquired Brands cigarettes "from and after closing" is the basis for (and measure of) Reynolds Tobacco's liability under the Florida Judgment.[153]

ITG refutes this interpretation, arguing that the Florida Judgment Liability arises from the 1997 Florida Settlement Agreement—not from use of the Transferred Assets.[154] But ITG's approach would effectively read the term "indirectly" out of § 2.01(c)(iv). ITG's reading is also overly restrictive. Section 2.01(c)(iv) does not require that the liabilities arise *solely* out of the use of the Transferred Assets.[155] The term "arising" in that provision lacks any such qualification.[156] The Florida Judgment Liability originates, in a sense, from both the Florida Settlement Agreement and the use of the Transferred Assets.

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[152] The same logic applies to the $92.6 million dollar payment Reynolds was ordered to pay in the Florida Judgment. Fla. J. ¶ 1. That settlement payment is for ITG's sales of Acquired Brands cigarettes from June 12, 2015 to April 30, 2018. *Id.* ITG would not have been able to make those sales without using the Transferred Assets.

[153] APA § 2.01(c)(iv).

[154] ITG Brands, LLC's Opp'n to Defs.' Mot. Summ. J. (Dkt. 249) ("ITG's Answering Br.") 19-20 (quoting Fla. J. ¶ 4).

[155] *Contra id.* at 13-20.

[156] APA § 2.01(c)(iv).

Finally, the Liability at issue is not an Excluded Liability. The term "Excluded Liabilities," which is defined through twelve subsections of § 2.01(d), does not include any Liability involving the *post*-Closing use of Transferred Assets.[157] Section 2.01(d) references "Transferred Assets" three times but each mention is inapposite and excludes only *pre*-Closing conduct from the Liabilities otherwise assumed by ITG:

- § 2.01(d)(iii)(B) excludes tax Liabilities arising out of or relating to the Transferred Assets "for any Pre-Closing Tax Period";[158]
- § 2.01(d)(vi)(B)(2) excludes Liabilities arising from the Transferred Assets and Assumed Liabilities "during the period ending on the Closing Date";[159] and
- § 2.01(d)(xii) is a catch-all exclusion of Liabilities that (among other things) do not arise out of the operation or conduct of "the Transferred Assets following the Closing."[160]

In addition, § 2.01(d)(iv) excludes "any Liability associated with any Excluded Asset," but the Excluded Assets do not include the Acquired Brands.[161]

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[157] *Id.* § 2.01(d).

[158] *Id.* § 2.01(d)(iii)(B).

[159] *Id.* § 2.01(d)(vi)(B)(2).

[160] *Id.* § 2.01(d)(xii).

[161] *Id.* § 2.01(d)(iv). The Excluded Assets encompass "the Retained Lorillard Brands" (which do not include the Acquired Brands) and "any other tobacco cigarette brands . . . other than the Acquired Brands." *Id.* § 2.01(b)(i); *see also* APA Ex. A at A-15 (defining "Retained Lorillard Brands" as "all Lorillard tobacco cigarette brands, including the Newport Brand, but excluding the Maverick Brand"). The other three Acquired Brands (Winston, Kool, and Salem) are not Retained Lorillard Brands. *See id.* Preliminary Statement ¶ D (defining "RAI Brands" to mean Winston, Kool, and Salem and stating that

3. Section 2.01(c)(vii) Does Not Affect the Applicability of § 2.01(c)(iv).

The main clause of § 2.01(c)(vii) of the APA provides that ITG agreed to assume "all Liabilities under the State Settlements in respect of the [Acquired Brands] that relate to the period after the Closing Date . . . ."[162] That main clause of § 2.01(c)(vii) is "subject to the Agreed Assumption Terms."[163]

The parties largely agree that the Florida Judgment Liability falls within the plain language of the main clause of § 2.01(c)(vii).[164] The Florida Judgment Liability is covered by the APA's definition of Liabilities, which includes "Actions

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the RAI Brands are owned by the RAI Asset Owners (as opposed to the Lorillard Asset Owners)); Countercls. ¶ 15 ("ITG Brands would purchase the Winston, Salem, Kool and Maverick Brands . . . .").

[162] APA § 2.01(c)(vii).

[163] *Id.*

[164] *See* ITG's Opening Br. 33 ("[A]ll conceivable liabilities under the settlements are included in Section 2.01(c)(vii), including Reynolds' current claim for indemnification for its settlement payments to Florida."); Reynolds' Opening Br. 30 ("Initially considering the directly operative language of § 2.01(c)(vii) by itself, it is straightforward that it makes the Florida Judgment an Assumed Liability.").

Section 2.01(c)(vii)(B) excludes from the Assumed Liabilities "Seller Plaintiff Fees," which Reynolds and Lorillard paid under "State Settlements." APA § 2.01(c)(vii)(B); *see* APA Ex. A at A-16 (defining "Seller Plaintiff Fees" to mean "all plaintiffs' attorneys' fees and other legal costs in relation to the State Settlements in respect of the [Acquired Brands], relating to any periods, whether before, on or after the Closing Date excluding, for the avoidance of doubt, Assumed Plaintiff Fees"); APA § 2.01(c)(vii)(B) (defining "Assumed Plaintiff Fees" to mean "all plaintiffs' attorneys' fees attributable to any post-Closing increases in volume of sales . . . of any of the [Acquired Brands], but excluding, for the avoidance of doubt, Seller Plaintiff Fees"). The parties did not brief whether the attorneys' fees and costs portion of the Florida Judgment Liability falls within the definition of Seller Plaintiff Fees.

. . . judgments, orders, [and] decrees."[165] The Florida Judgment Liability consists of payments "under the Florida Settlement Agreement," which is a State Settlement.[166] And the Florida Judgment Liability relates to the period after Closing.[167]

The parties disagree about how the phrase "subject to the Agreed Assumption Terms" in § 2.01(c)(vii) should be read in view of § 2.2 of the Agreed Assumption Terms, which places an obligation on ITG to use "reasonable best efforts" to join the State Settlements. Under Reynolds' interpretation, ITG assumed the Florida Judgment Liability regardless of whether ITG used reasonable best efforts to join the Florida Settlement Agreement.[168] ITG, however, argues that § 2.2 of the Agreed Assumption Terms trumps the main clause of § 2.01(c)(vii).[169] According to ITG, it agreed only to use reasonable best efforts to join the State Settlements and assume the settlement obligations thereunder.[170]

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[165] *Supra* note 15 (defining "Liabilities").

[166] Fla. J. ¶ 4. As noted above, the Florida Judgment also imposed a liability for Florida's reasonable attorneys' fees and costs. *See supra* note 55. Whether these fees and costs are excluded Seller Plaintiff Fees is not being decided in this opinion. *See supra* note 164.

[167] *See supra* notes 149-51 and accompanying text.

[168] Reynolds' Opening Br. 28-38.

[169] ITG's Opening Br. 32-52.

[170] ITG's Answering Br. 1.

a. Whether the "Subject To" Phrase in § 2.01(c)(vii) Overrides its Directly Operative Language

The phrase "subject to the Agreed Assumption Terms" in § 2.01(c)(vii) does not nullify the operative language in the main clause that follows, as ITG insists. Under the subordinating language canon, "[a] dependent phrase that begins with *subject to* indicates that the main clause it introduces or follows does not derogate from the provision to which it refers."[171] "Subject to" signals that the main clause it qualifies operates by its terms, "unless" doing so "interferes with" the operation of the provision to which the subject-to phrase refers.[172] If the application of the main clause would be "inconsistent with" the provision to which the subject-to phrase refers, the latter "trump[s]."[173]

The main clause of § 2.01(c)(vii) allocates to Reynolds, as between ITG and Reynolds, "Liabilities under the State Settlements."[174] Section 2.2 of the Agreed Assumption Terms, in turn, requires ITG to "use its reasonable best efforts to reach

[171] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012) (emphasis in original).

[172] *In re Shorenstein Hays-Nederlander Theaters LLC Appeals*, 213 A.3d 39, 62 (Del. 2019).

[173] *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997).

[174] APA § 2.01(c)(vii).

[an] agreement[] with [Florida]" to "assume . . . the obligations of [Reynolds] under" the Florida Settlement Agreement.[175]

These provisions are not inconsistent—they address entirely different issues.[176] The main clause of § 2.01(c)(vii) of the APA allocates to ITG, as between ITG and Reynolds, Liability under the State Settlements. Section 2.2 of the Agreed Assumption Terms imposes an obligation on ITG to join the State Settlements, which are agreements independent of the APA through which ITG would take on the obligations of a Settling Defendant by joining the relevant State Settlement as a new party. Section 2.2 does not mention Liabilities, much less a Liability of a

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[175] Agreed Assumption Terms § 2.2.

[176] In ITG's view, if § 2.01(c)(vii) allocates Liabilities under the State Settlements to ITG regardless of ITG's fulfillment of the reasonable best efforts requirement in § 2.2 of the Agreed Assumption Terms, § 2.2 would be superfluous. ITG's Answering Br. 34-35. Not so.

If ITG successfully joined the Florida Settlement Agreement and assumed Reynolds' obligations thereunder, ITG's obligations would presumably be different from Reynolds'. ITG's obligations under whatever bespoke set of terms it negotiated with Florida would arise from its fulfillment of the reasonable best efforts obligation imposed by the *Agreed Assumption Terms*. By contrast, Reynolds' obligations under the original 1997 Florida Settlement Agreement are the Liabilities allocated to ITG by the *APA*. Thus, the "obligations" imposed by the Agreed Assumption Terms are distinct from the "Liabilities" allocated by the APA.

On the other hand, if ITG failed to join the Florida Settlement Agreement, regardless of whether it discharged its reasonable best efforts obligations—as purportedly occurred here—§ 2.01(c)(vii) of the APA ensures ITG, not Reynolds, is liable for any Liabilities arising from the 1997 Florida Settlement Agreement. Again, § 2.01(c)(vii) of the APA has a different operative effect from § 2.2 of the Agreed Assumption Terms.

Reynolds entity. Rather, it concerns ITG taking on an obligation to a third party (e.g., Florida).

My reading of § 2.01(c)(vii) is also in harmony with the Agreed Assumption Terms more broadly. Section 2.01(c)(vii) is "subject to" the Agreed Assumption Terms as a whole and does not signal out § 2.2 (as ITG does).[177] Section 5.5 of the Agreed Assumption Terms makes the Agreed Assumption Terms "subject to . . . the APA, including, without limitation, . . . the provisions regarding liabilities in APA §§ 2.01(c) and 2.01(d)."[178] These circular "subject to" cross-references suggest the Agreed Assumption Terms and APA should be read together to avoid conflict. If, as ITG argues, § 2.2 and the main clause of § 2.01(c)(vii) conflicted, the "subject to" phrase in § 5.5 would indicate that the APA trumps the Agreed Assumption Terms.[179]

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[177] APA § 2.01(c)(vii).

[178] Agreed Assumption Terms § 5.5.

[179] ITG argues that Reynolds' interpretation of the phrase "subject to" is inconsistent with what this court and other courts have found it to mean. *See* ITG's Answering Br. 11-12.

This court's 2019 Opinion did not address the specific meaning and effect of the "subject to" phrase beyond remarking that "the assumption of liabilities under [§ 2.01(c)(vii)] is expressly made 'subject' to the Agreed Assumption Terms." 2019 Op. at *8.

The Florida court's interpretation is not binding on this court, as addressed above. *See supra* Section II.A. ITG does not argue that the Texas or Minnesota courts' decisions are binding on this court. More importantly, neither the Texas nor Minnesota court opined on the meaning of "subject to." *See Texas v. Am. Tobacco Co.*, 441 F. Supp. 3d 397, 459 (E.D. Tex. 2020) ("[T]his Court exercises judicial restraint to leave the issues between Reynolds and [ITG] within the capable hands of the Delaware Court. Such issues include

b. Whether § 2.01(c)(vii) Conflicts with § 2.01(c)(iv)

Even if the reasonable best efforts requirement of § 2.2 of the Agreed Assumption Terms could be read into § 2.01(c)(vii)'s operative language, subsection (c)(vii) would not conflict with—and trump—subsection (c)(iv)'s allocation of the Florida Judgment Liability to ITG.[180] ITG contends otherwise, arguing that the more specific § 2.01(c)(vii) (with its reasonable best efforts requirement) overrides the more general § 2.01(c)(iv) based on the canon of construction that "specific terms and exact terms are given greater weight than general language."[181]

Although it is not necessarily "general,"[182] the language of § 2.01(c)(iv) is admittedly more encompassing than § 2.01(c)(vii). Reynolds argues that

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the scope and nature of the obligations undertaken by [ITG] pursuant to the APA, and whether [ITG] expressly assumed liability under the Texas Settlement by virtue of the APA."); *In re Pet. of Minnesota for an Ord. Compelling Payment of Settlement Proceeds Related to ITG Brands, LLC*, No.: 62-CV-18-1912 (Minn. Dist. Ct. September 24, 2019), Mem. Op. at 18-23 (available at https://publicaccess.courts.state.mn.us/DocumentSearch).

[180] In other words, this section assumes for the sake of thoroughness that ITG's interpretation of the interplay between § 2.01(c)(vii) of the APA and § 2.2 of the Agreed Assumption Terms is the correct reading. I do not adopt that interpretation, as described in the previous section. *Supra* Section II.B.3.a.

[181] Restatement (Second) of Contracts § 203 (1981). By ITG's logic, even if the Florida Judgment Liability is an Assumed Liability under § 2.01(c)(iv) (or (c)(v)), § 2.01(c)(vii) applies instead and ITG would not have assumed the Florida Judgment Liability so long as it discharged its reasonable best efforts obligation. *See* ITG's Opening Br. 35-36.

[182] Section 2.01(c)(iv) is not necessarily less exact in covering liabilities arising out of various types of Actions than the other subsections of § 2.01(c). It is far from a catch-all provision. *Cf. Julius*, 2019 WL 5681610, at *15 (holding that sellers did not breach a broad

§ 2.01(c)(iv) is not more general than other subsections of § 2.01(c) just because its terms are more far-reaching.[183] As the 2019 Opinion explained, however, it is "reasonable to focus . . . on the underlying financial obligation itself" in applying the specific-over-the-general rule of contract interpretation.[184] Section 2.01(c)(vii) concerns only the "Liabilities under the State Settlements in respect of the [Acquired Brands]" for the post-Closing period.[185] Section 2.01(c)(iv) more broadly concerns "all Liabilities (other than Excluded Liabilities)" arising out of the "use of the Transferred Assets" post-closing.[186] Thus, § 2.01(c)(vii) could be read as more specific than § 2.01(c)(iv).

Nonetheless, the specific-over-the-general canon of construction does not support ITG's textual argument. The requisite inconsistency between the so-called specific (§ 2.01(c)(vii)) and general (§ 2.01(c)(iv)) provisions is not present. The Delaware Supreme Court has explained that "where specific and general provisions

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catch-all provision, which confirmed the accuracy of representations and warranties in other provisions, where they did not breach the more specific, substantive provisions).

[183] Reynolds' Answering Br. 20-21.

[184] 2019 Op. at *8.

[185] APA § 2.01(c)(vii).

[186] *Id.* § 2.01(c)(iv).

conflict, the specific provision ordinarily qualifies the meaning of the general one."[187] This court recognized as much in the 2019 Opinion.[188]

There is not an inconsistency if § 2.01(c)(iv) makes the Florida Judgment Liability an Assumed Liability that ITG owes to Reynolds but § 2.01(c)(vii) does not (so long as ITG exercised reasonable best efforts).[189] The two provisions address different situations.[190] Section 2.01(c)(iv) allocates to ITG, as between ITG and Reynolds, the Florida Judgment Liability. Section 2.01(c)(vii) imposes an obligation on ITG to endeavor to join the Florida State Settlement—a contractual obligation existing outside of the APA. The fact that one subsection of § 2.01(c) *does not* make something an Assumed Liability does not mean that it *cannot* be an

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[187] *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (emphasis added); *see also* 11 Williston on Contracts § 32:10, Westlaw (database updated May 2022) ("When general and specific clauses conflict, the specific clause governs the meaning of the contract.").

[188] *See* 2019 Op. at *7 & n.60.

[189] This court's view "at the pleadings stage" that § 2.01(c)(vii) could conflict with § 2.01(c)(v), creating ambiguity, does not foreclose it from now concluding that § 2.01(c)(iv) and (c)(vii) unambiguously support Reynolds' interpretation because the 2019 Opinion did not address § 2.01(c)(iv). *See id.* at *8; *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017) (discussing that the "law of the case" doctrine applies to give effect to "decisions rendered by a court that arise again later in the same court, in the same proceedings" (quoting *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015))); *see also Capella Hldgs., LLC v. Anderson*, 2017 WL 5900077, at *4, *7 (Del. Ch. Nov. 29, 2017) (concluding on summary judgment that "[t]here is no ambiguity . . . because only [one party's] construction [wa]s reasonable" despite finding at the pleadings stage that both sides' interpretations of contract provision were reasonable (citation omitted)).

[190] *See supra* note 176 and accompanying text.

Assumed Liability under another subsection. "Even agreements tailored to particular transactions" include "overlapping or redundant or meaningless provisions."[191]

Together, § 2.01(c)(vii) of the APA and § 2.2 of the Agreed Assumption Terms, along with § 2.01(c)(iv) (and potentially other subsections of § 2.01(c)), provide a "belt and suspenders" approach.[192] Section 2.2 requires ITG to use reasonable best efforts to join the Florida Settlement Agreement. If it succeeded, ITG would owe obligations directly to Florida. But if ITG failed to join the Florida Settlement Agreement and the state sued Reynolds for payments in connection with ITG's sales of the Acquired Brands, then § 2.01(c)(iv) would protect Reynolds and allow Reynolds to look to ITG for indemnification. These provisions thus work together to achieve the same result: to ensure ITG (not Reynolds) is responsible for the use of the Acquired Brands post-Closing.

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[191] Restatement (Second) of Contracts § 203 cmt. b (1981); *see also Lorenzo v. SEC*, 139 S. Ct. 1094, 1102 (2019) ("[A]lternative provisions [may be] adopted with the purpose of affording added safeguards." (quoting *U.S. v. Gilliland*, 312 U.S. 86, 93 (1941))).

[192] *Tygon Peak Cap. Mgmt., LLC v. Mobile Invs. Investco, LLC*, 2022 WL 34688, at *18 & n.176 (Del. Ch. Jan. 4, 2022) ("That certain transactions may be covered by multiple provisions of [one section of a contract] is not dispositive and suggests that the parties took a 'belt and suspenders' approach to drafting this [section]." (citing *Lillis v. AT&T Corp.*, 2007 WL 2110587, at *15 (Del. Ch. July 20, 2007))); *see Sycamore P'rs Mgmt. L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *12 & n.98 (Del. Super. Sept. 10, 2021) (collecting cases on appropriateness of "some redundancy" for "additional comfort").

4. Reynolds' Construction is Reasonable.

Finally, interpreting the Florida Judgment Liability to be an Assumed Liability is not only consistent with the plain meaning of the APA but also provides for a logical outcome. "An unreasonable interpretation [is one] produc[ing] an absurd result or one that no reasonable person would have accepted when entering the contract."[193] The interpretation of § 2.01(c) Reynolds advances is not unreasonable. It provides that ITG assumed Liabilities arising from its post-Closing use of the Acquired Brands, including those that Reynolds faces in perpetuity under the Florida Judgment, unless and until ITG joins the Florida Settlement Agreement.

ITG takes the opposite view. It argues that under Reynolds' reading of § 2.01(c), ITG could face liability to Reynolds if ITG failed to join a State Settlement despite ITG's exercise of reasonable best efforts.[194] Meanwhile, ITG maintains, Reynolds would be placed in a better financial position due to a post-closing profit adjustment calculation than it would have been if ITG had initially assumed the settlement obligations.[195] Whether ITG's indemnification obligation should be

[193] *Osborn*, 991 A.2d at 1160.

[194] ITG's Opening Br. 37; ITG's Answering Br. 36-37.

[195] ITG's Opening Br. 37; ITG's Answering Br. 36-37. Under the Florida Settlement Agreement, if the Settling Defendants' aggregate profits in the current year exceed their aggregate inflation-adjusted profits in a base year, the aggregate settlement payments under the Florida Settlement Agreement increase. ITG's Opening Br. 22-25. Those aggregate settlement payments are allocated among the Settling Defendants according to the proportion by which their individual profits in the current year exceed their individual inflation-adjusted profits in the base year. *Id.* Because the profits for the Acquired Brands

offset by the alleged profit adjustment cost is better addressed at the next stage of this proceeding. It does not render Reynolds' interpretation of the plain language of § 2.01(c) absurd.

If anything, it is ITG's interpretation that would lead to an unreasonable outcome. Under ITG's reading of § 2.01(c), ITG owns, sells products under, and derives the full benefit from the Acquired Brands—yet Reynolds would be obligated to make annual payments to Florida in connection with ITG's sales without indemnification from ITG. In effect, Reynolds would subsidize the business of ITG, a competitor. Each time ITG sells a product under the Acquired Brands, the Florida Judgment requires Reynolds to make a payment to Florida. "[N]o reasonable tobacco manufacturer would have agreed to expose itself to the prospect of making annual payments to a Previously Settled State for cigarette product revenues it no longer receives by incentivizing an acquiror [to avoid joining the State Settlements]."[196]

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remained in Reynolds' base year calculation, a substantial portion of the profit adjustment cost shifted to other settling tobacco companies, such as Philip Morris. *Id.* According to ITG, had ITG joined the Florida Settlement Agreement from the beginning, Reynolds would not have been able to inflate its base year and shift the profit adjustment cost. *Id.* at 37; ITG's Answering Br. 36-37.

[196] 2017 Op. at *12.

For the reasons explained above, Reynolds' interpretation of the plain meaning of § 2.01(c)(iv) is the only reasonable reading. That provision is not ambiguous. Further, § 2.01(c)(vii)'s directly operative terms, by which ITG assumed all Liabilities under the State Settlements involving the Acquired Brands post-Closing, does not conflict with § 2.01(c)(iv).[197] Accordingly, it is unnecessary to examine parol evidence.[198] Because the Florida Judgment Liability is an Assumed Liability under § 2.01(c)(iv) of the APA, ITG assumed that Liability regardless of whether it discharged its reasonable best efforts obligation under § 2.2 of the Agreed Assumption Terms.

C. Reynolds is Entitled to Indemnification Under § 11.02(a)(vi).

Under § 11.02(a)(vi) of the APA, ITG

> shall indemnify, defend and hold harmless RAI and its Affiliates . . . (collectively, the 'RAI Indemnified Parties') against all Losses that such RAI Indemnified Party may suffer or incur, or become subject to, as a result of . . . (vi) any Assumed Liability (including the failure of [ITG] to perform or in due course pay and discharge any such Assumed Liability).[199]

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[197] *See supra* Section II.A (explaining that this court is not bound by the Florida court's interpretation of § 2.01(c)(vii)).

[198] *Cf.* 2019 Op. at *9 (determining at the "pleadings stage" that the court would need to examine parol evidence on the "interplay" between § 2.01(c)(v) and (c)(vii) due to a "potential" conflict between those two provisions); *supra* note 67 and accompanying text.

[199] "Affiliate" means "any other Person that, at the time of determination, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with such specified Person." APA Ex. A at A-1. "Control" means "the power to direct or cause the direction of the management and policies of such Person,

Reynolds seeks indemnification under this provision for the Losses Reynolds Tobacco incurred from the Florida Judgment Liability. Reynolds Tobacco is among RAI's Affiliates and thus one of the RAI Indemnified Parties.[200] And, as discussed above, the Florida Judgment Liability is an Assumed Liability under § 2.01(a)(iv) of the APA.[201] Thus, the amounts Reynolds Tobacco has paid (and will pay) due to the Florida Judgment are Losses for which ITG must indemnify Reynolds.[202]

The parties dispute the amount of Losses that would be owed to Reynolds under §11.02(a)(vi). As described above, ITG maintains that Reynolds manipulated the profit adjustment allocation in the Florida Settlement Agreement such that Reynolds paid less than it would have compared to if ITG had joined the Florida Settlement Agreement from the start.[203] ITG estimates this adjustment saved Reynolds approximately $77 million.[204] Reynolds, conversely, avers that it is

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whether through the ownership of voting securities, by contract or otherwise." *Id.* at A-3. "Losses" are broadly defined. *See supra* note 15.

[200] *See* Countercls. ¶¶ 12-13 (RAI is an "indirect parent" of Reynolds Tobacco.); APA Ex. A at A-15 (defining "RJRT" as "R.J. Reynolds Tobacco Company, a wholly owned Subsidiary of RAI"); APA Preamble (defining "RAI" as Reynolds American Inc.).

[201] *See supra* Section II.B.2. ITG's contention that § 11.02(a)(v) is the exclusive remedy for breach of the Agreed Assumption Terms is irrelevant because Reynolds does not seek indemnification for a breach of the Agreed Assumption Terms. *See* ITG's Opening Br. 32-37.

[202] *See* Countercls. ¶¶ 140-57.

[203] *See* ITG's Answering Br. 36-37, 61-62; ITG's Opening Br. 22-25.

[204] ITG's Opening Br. 37.

entitled to the full amount owed to Florida under the Florida Judgment, including past-due payments plus prejudgment interest, annual payments owed in perpetuity unless and until ITG becomes a Settling Defendant under the Florida Settlement Agreement, and Florida's attorneys' fees and costs.[205] Further proceedings to address any damages owed to Reynolds and whether Reynolds is entitled to equitable or injunctive relief concerning ITG's ongoing obligations.[206]

III. CONCLUSION

For the reasons stated above, I conclude that the Florida Judgment Liability is an Assumed Liability under § 2.01(c)(iv) of the APA. Accordingly, Reynolds is entitled to indemnification from ITG pursuant to § 11.02(a)(vi) of the APA.

ITG's motion for summary judgment is therefore denied and Reynolds' motion for summary judgment is granted. The parties are directed to prepare an implementing order within ten days of this decision and to provide the court with a joint letter detailing their respective positions on the subsequent proceedings necessary to address the outstanding issues in this action, including whether the dates reserved for trial should be reserved for further proceedings.

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[205] *See* Countercls. ¶ 153; Fla. J. ¶¶ 1, 4, 7.

[206] *See* APA §§ 11.04, 12.13.