IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GLOBAL ENERGY FINANCE LLC,	)	
	)	
Plaintiff/Counterclaim Defendant	)	
	)	C.A. No. 08C-10-129 RRC
v.	)	
	)	
PEABODY ENERGY CORPORATION,	)	
GOLD FIELDS MINING, LLC,	)	
and BLUE TEE CORP.,	)	
	)	
Defendants/Counterclaimants/	)	
Crossclaimants	)	

Submitted: September 7, 2010
Decided: October 14, 2010

Upon Plaintiff Global Energy Finance LLC's Motion for Summary Judgment against Peabody Energy Corporation and Gold Fields Mining, LLC.
GRANTED.

Upon Defendant Blue Tee Corp.'s Motion for Summary Judgment against Peabody Energy Corporation and Gold Fields Mining, LLC.
GRANTED.

MEMORANDUM OPINION

Frederick L. Cottrell, III, Esquire, Jeffrey L. Moyer, Esquire, Srinivas M. Raju, Esquire, Blake Rohrbacher, Esquire, and Jillian G. Remming, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware; Allan J. Arffa, Esquire, Gaines Gwathmey, Esquire, and Marc Falcone, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, New York, Attorneys *pro hac vice* for Plaintiff Global Energy Finance

Richard L. Horwitz, Esquire, Jennifer Gimler Brady, Esquire, and Michael B. Rush, Esquire, Potter, Anderson, & Corroon, LLP, Wilmington, Delaware; Alan E. Popkin, Esquire, Thomas J. DeGroot, Esquire, Greg G. Gutzler, Esquire, Tamara M. Spicer, Esquire, and Jordan Ault, Esquire, Husch Blackwell Sanders, LLP, Saint Louis, Missouri, Attorneys *pro hac vice* for Defendants Peabody Energy Corporation and Gold Fields Mining, LLC

Seth J. Reidenberg, The Chartwell Law Offices, LLP, Wilmington, Delaware; Gerald P. Greiman, Esquire, and Erik O. Solverud, Esquire, Spencer, Fane, Britt & Browne, LLP, Saint Louis, Missouri, Attorneys *pro hac vice* for Defendant Blue Tee Corp.

COOCH, J.

I. Introduction

These related motions for summary judgment are two of several motions for summary judgment that arise out of a breach of contract claim brought by Plaintiff, Global Energy Finance LLC ("GEF"), alleging that Defendants, Peabody Energy Corporation ("Peabody") and Gold Fields Mining, LLC ("GFML," a Peabody subsidiary) are contractually obligated under indemnity agreements to indemnify GEF for environmental liabilities that arise from GEF's preexisting agreement to indemnify Defendant Blue Tee Corp. ("Blue Tee") for said liabilities. GEF has also moved for summary judgment against Blue Tee, claiming that GEF is no longer contractually obligated to indemnify Blue Tee for these environmental liabilities.

In turn, Blue Tee has moved for summary judgment against GEF, claiming that GEF's indemnity obligations to it continue in full force and effect, and has also moved for summary judgment against Peabody and GFML, seeking to enforce Peabody and GFML's indemnity agreements with GEF under a third party beneficiary theory. To the extent that Peabody and GFML's obligations to provide indemnity for these claims are at issue, GEF and Blue Tee are allied. Peabody and GFML have opposed all motions for summary judgment against them, but have not filed for summary judgment against GEF or Blue Tee. GEF and Blue Tee taken the position that their similar motions for summary judgment should be addressed by this Court as soon as possible and in advance of the decisions on the remaining issues, because Peabody and GFML's responsibility for these liabilities is the supposed "800-pound gorilla in the room" (i.e., being the threshold issue and having the greatest legal and financial consequences, when compared to the other issues) and because resolution of GEF and Blue Tee's similar motions might well facilitate settlement of the entire case.[1] Alternatively, GEF requests that, in the event that the trial now scheduled for December 6, 2010 goes forward, the issue of Peabody and GFML's liability to Blue Tee should be determined first.[2]

[1] Status Report of September 15, 2010 at 3 (Lexis Transaction No. 33258910).
[2] *Id.* The parties have recently filed certain motions *in limine*: "Plaintiff Global Energy Finance LLC's Motion *In Limine* to Preclude Defendants Peabody Energy Corporation

GEF has also moved for summary judgment based on Peabody's alleged liability to GEF under a separate October 1998 Insurance Agreement, wherein GFML received an assignment of GEF's rights under the liability insurance policies covering the Blue Tee liabilities. Further, GEF has moved for summary judgment against Peabody and GFML on the issue of whether Peabody and GFML are required to provide indemnity for attorney's fees and litigation costs incurred in the instant litigation. For its part, Blue Tee has moved for summary judgment against GEF, seeking indemnity to the extent not provided by Peabody and GFML, and seeks to recover its attorney's fees and costs from Peabody, GFML, and GEF. These issues raised in the respective motions are not reached herein, but shall instead be resolved by separate opinion to be issued as promptly as possible.

The factual history of the parties and the relevant agreements is complex. For the purpose of streamlining the necessary analyses, this opinion is limited to the parties' rights and liabilities under the March and May 1998

---

and Gold Fields Mining, LLC From Introducing Evidence of a 'Mistake' at Trial," Lexis Transaction No. 33643015 (Oct. 5, 2010); "Defendant Blue Tee Corp.'s Motion *In Limine* to Exclude Any Argument or Evidence Regarding the Alleged 'Mistake' Pursuant to Which Peabody and/or GFML Made Payments in Respect of the Blue Tee Liabilities," Lexis Transaction No. 33647396 (Oct. 5, 2010); "Plaintiff Global Energy Finance LLC's Motion *In Limine* to Preclude Defendants Peabody Energy Corporation and Gold Fields Mining, LLC From Seeking Trial Testimony from William Curbow, Henry Lentz, or Alan Washkowitz," Lexis Transaction No. 33643015 (Oct. 5, 2010); "Defendant Blue Tee Corp.'s Motion *In Limine* to Preclude Speculative Testimony by GEF Regarding Prejudice from Alleged Lack of Notice Claims," Lexis Transaction No. 33648009 (Oct. 5, 2010).

agreements (the "Participation Agreement" and the "Assumption and Indemnification Agreement"). Consequently, this decision resolves only those counts which seek relief under the March or May 1998 Agreements. Specifically, this decision is limited to Count I of GEF's Amended complaint against Peabody and GFML, Counts I and II of Blue Tee's crossclaims against Peabody and GFML (only to the extent that these claims seek relief under Participation and Assumption and Indemnification Agreements), Counts II through IV of Peabody and GFML's counterclaims against GEF, and Counts I and II of Peabody and GFML's crossclaims against Blue Tee.

This Court holds that, although the parties have proffered different interpretations of the contract language, the above agreements are clear and unambiguous; this dispute can be resolved exclusively by the terms in the agreements. Under the plain meaning of the agreements' language and well-settled rules of contract interpretation, Peabody and GFML must indemnify GEF and Blue Tee for these environmental liabilities.

Alternatively, this Court holds that, even if either or both of the above agreements are ambiguous, the admissible extrinsic evidence supports this Court's interpretation of the agreements at issue, does not raise any genuine issues of material fact, and entitles movants to judgment as a matter of law. The extrinsic evidence shows that Peabody, via its subsidiary GFML, managed and

paid claims on these environmental liabilities for nearly a decade; Peabody and GFML also accepted an assignment of rights under insurance policies for these claims, subsequently receiving the relevant insurance proceeds. Likewise, Peabody indicated these environmental liabilities on its SEC filings and balance sheets. Finally, the testimony and contemporaneous statements of Peabody's then in-house counsel, Jeffrey Klinger, indicates Peabody's longstanding interpretation of the indemnity provisions as requiring indemnity to GEF for these claims.

At bottom, the singular disputed issues of material fact alleged by Peabody and GFML can be distilled into an assertion by them that all of the foregoing extrinsic evidence was the result of a "mistake" on their part. However, after a full and fair opportunity for discovery, Peabody and GFML have adduced no evidence which might raise any issues of fact with regard to this alleged "mistake." Viewing the facts in the light most favorable to Peabody and GFML, their contentions amount to an assertion that they made a mistake of law in misinterpreting the agreements for about ten years and thus erroneously engaged in their protracted course of conduct. Given that contract interpretation is purely a question of law, and this Court has determined that the indemnity agreements' language requires that Peabody and GFML indemnify GEF for the Blue Tee liabilities, there are no remaining genuine issues of material fact with respect to this alleged mistake, or with respect to any of the relevant transactions.

Accordingly, GEF's motion for summary judgment on Count I of its Amended Complaint against Peabody and GFML and on Counts II through IV of Peabody and GFML's counterclaims against GEF is **GRANTED.**

Further, the Court holds that Blue Tee is a third party beneficiary of the 1998 Indemnity agreements. In light of the Court's resolution of GEF's motion for summary judgment against Peabody and GFML, it necessarily follows that the very subject of the indemnity agreements was ultimately Blue Tee's liability on these environmental claims. Consequently, Blue Tee is a third party beneficiary, with standing to enforce the indemnity agreements. To this extent, GEF and Blue Tee's arguments and interests are allied, thus this reasoning of this opinion applies equally to Blue Tee's motion for summary judgment against Peabody and GFML. Accordingly, Blue Tee's motion for summary judgment on Counts I and II of its crossclaim against Peabody and GFML and Counts I and II of Peabody and GFML's crossclaim against Blue Tee is **GRANTED.**

II. Facts and Procedural History

A. Introduction.

The factual history of this case traces its origins back to approximately 1985. The parties, at the Court's request, prepared a Statement of Agreed Facts,

filed on September 29, 2010.[3] The Court appreciates the efforts of the parties' to produce this stipulation of facts. Additional extrinsic evidence is set forth, where pertinent, in the Discussion section, *infra*; all such extrinsic evidence is viewed in the light most favorable to Peabody and GFML.

B. Statement of Agreed Facts.

1. Plaintiff GEF is a Delaware limited liability company. GEF is a successor by merger to Peabody Investments Inc. ("PII"). PII was formerly known as Gold fields American Corporation ("GFAC"). GEF is wholly-owned by its sole member-manager, Energy Holdings (No.2) Limited ("EH2").

2. Defendant PEC, a Delaware corporation, is the successor to P&L Coal Holdings Corporation ("P&L Coal").

3. Defendant GFML is a Delaware limited liability company. GFML converted from Gold Fields Mining Corporation ("GFMC") in 2004. GFML is a wholly-owned, dormant subsidiary of PEC. GFMC became a wholly-owned subsidiary of PEC's predecessor, P&L Coal, on May 19, 1998.

4. Defendant Blue Tee, formerly a Maine corporation, now a Delaware corporation, is the successor to Gold Fields American Industries ("GFAI"). GFAI was the successor by merger to American Zinc, Lead & Smelting Company, later known as American Zinc Company and Azcon Co. (collectively, "American Zinc").

5. As of 1985, GEF's predecessor, GFAC, a Delaware corporation, was a subsidiary of Consolidated Gold Fields plc ("CGF"), an English company. At the time, GFAI and GFMC were subsidiaries of GFAC.

6. In a letter agreement dated July 25, 1985, GFAC agreed to "defend, indemnify and hold harmless GFMC and its wholly-owned subsidiaries from liabilities, obligations and out-of-pocket costs (related to investigation or defense) arising from historic investments or activities of the Group (including Azcon and the pre-1977 Tri-State Zinc, Inc.), except for those arising from interests (specific obligations or liabilities) transferred to

[3] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 23 (Lexis Transaction No. 33532232).

and assumed by GFMC or its wholly-owned subsidiaries during and since 1977."

7. Blue Tee was formed in 1985 through a leveraged buyout transaction by a GFAI management group, which unfolded as follows: GFAI divested itself of certain properties and securities that had been owned by GFAI and its subsidiaries, following which Blue Tee Acquisition Corporation ("BTAC"), a corporation formed by the GFAI management group, merged into GFAI. GFAI, the surviving corporation, changes its name to Blue Tee. In connection with this leveraged buyout, BTAC, GFAC and GFAI entered into a Reorganization Agreement dated December 9, 1985 (the "1985 Reorganization Agreement").

8. The 1985 Reorganization Agreement includes a provision (the "Blue Tee Indemnity") in Section 7.1.3 in which GFAC (now GEF) agreed, subject to certain conditions, to indemnify Blue Tee against "Environmental Claims" which were defined as "any claim based upon, arising out of or otherwise in respect of historical mining operations of GFAI and the Subsidiaries" (the "Blue Tee Liabilities").

9. As a result of the leveraged buyout, GFAI (in approximately early 1986) ceased being a subsidiary of GFAC (predecessor to PII, now known as GEF).

10. On March 11, 1993, GFAC and Blue Tee entered into an agreement (the "Understanding and Agreement") "made as of the 9th day of December, 1985" which provides in paragraphs 2 and 3 that:

> 2. Blue Tee hereby assigns to GFAC (a) all claims that Blue Tee has or hereafter shall have against any of the Insurance Companies, under any of the Insurance Policies or any theory of common law or statutory provision, in respect of any and all Relevant Environmental Claims and Relevant Losses, and (b) all claims that Blue Tee has or hereafter shall have against any third party for contribution in respect of any and all Relevant Environmental Claims and Relevant Losses.
>
> 3. Blue Tee hereby agrees that GFAC shall be, and is, subrogated to (a) any and all claims or rights that Blue Tee has or hereafter shall have against any of the Insurance Companies, under any of the Insurance Policies or any theory of common law or statutory provision, in respect of any Relevant environmental claim that is defended by GFAC, or Relevant Loss that is paid or satisfied by GFAC, pursuant to the terms of the GFAC Indemnity; and (b) any and all claims that Blue Tee has or hereafter shall have against any third party for contribution in respect of any Relevant Environmental Claim that is defended by GFAC, or Relevant loss that is paid or satisfied by GFAC.

In the Understanding and Agreement, GFAC also agreed:

> [T]o indemnify, defend and hold harmless Blue Tee from and against all losses, liabilities, damages, deficiencies, costs or expenses (including interest, penalties and reasonable attorneys' fees and disbursements, it being expressly understood and agreed that such indemnity shall include reasonable attorneys' fees and disbursements incurred by Blue Tee in prosecuting any action in which Blue Tee seeks and obtains a judgment against GFAC awarding indemnity pursuant to this paragraph) based upon, arising out of, or otherwise in respect of. . .any diminution of the insurance coverage available to Blue Tee under the Insurance Policies as a result of the assignment of claims to GFAC, or subrogation of rights and claims to GFAC, as provided in paragraphs 2 and 3 above, including but not limited to, a diminution of the obligations of the Insurance Companies to (i) defend or indemnify Blue Tee in respect of any expense, loss, liability, obligation or claim ("Other Losses"), or (ii) contribute to the satisfaction of Other Losses (hereafter, "Impairment of Coverage").

11. The Appendix to the Understanding and Agreement lists certain "Relevant Environmental claims" then being litigated. That list of claims was expanded by subsequent agreement between GFAC and Blue Tee on March 30, 1998 to include "any and all claims under the Insurance Policies referenced in the Understanding and Agreement herein, dated as of December 9, 1985 ("Agreement"), with respect to all other sites, known or unknown, to the extent coverage under the Insurance Policies has been diminished by any settlement." GFAC and Blue Tee also subsequently agreed that GFAC would indemnify Blue Tee for any "Impairment of Coverage (as defined in the [Understanding and] Agreement)" that Blue Tee suffered as a result of "any subsequent settlements and releases of [Blue Tee's] Insurance Policies."

12. By 1997, GFAC had become an indirect subsidiary of an English company called Hanson plc ("Hanson").

13. During 1997, Hanson consolidated GFAC, GFMC and other entities, including the U.S. coal mining operations of Hanson subsidiary Peabody Holdings Company Inc. ("Peabody Holdings"), into an English company called The Energy Group plc ("TEG"), and then "spun off" TEG to Hanson's shareholders (the "Hanson-TEG Demerger").

14. In 1996, in connection with preparations for the consolidation of GFAC, GFMC and Peabody Holdings into TEG and for the Hanson-TEG Demerger, the management of Peabody Holdings recognized that it would have to manage the Blue Tee Liabilities, responsibility for which then resided with GFAC.

15. Responsibility for the management of the Blue Tee Liabilities was assigned to Peabody Holdings in-house lawyer Jeffrey Klinger.

16. In 1996, in preparation for the Hanson-TEG Demerger, Peabody Holdings and its then-parent TEG commissioned a study by Dames & Moore,

a consulting firm, to estimate the potential costs of certain environmental liabilities (the "Dames & Moore Report"). The Report evaluated liabilities at 17 active sites, eleven of which are expressly described as being owned and/or operated by Blue Tee or its predecessor, American Zinc. American Zinc is described in the Report as "now Blue Tee" and as "Blue Tee's predecessor."

17. The Dames & Moore Report estimated that GFAC's most likely total aggregate share for all of the sites it analyzed was $53,835,241.

18. In connection with the Hanson-TEG Demerger, Hanson provided TEG with reserves of approximately $75 million for these environmental liabilities, which consisted of the Dames & Moore estimate plus approximately $20 million for unknown claims.

19. These accruals subsequently appeared on the audited financial statements of GFAC's successor, PII. The auditor's notes to the PII audited financial statements as of September 30, 1996 and March 31, 1997 show that the obligations of GFAC/PII as a result of the 1985 Blue Tee Indemnity are specifically included in the consolidated liabilities of GFAC/PII:

> Environmental claims have been asserted against the Company [*i.e.* PII] at 17 sites in the U.S. . .The majority of these sites are related to activities of a former subsidiary of the Company. The Company's policy is to accrue environmental cleanup related costs of a noncapital nature when those costs are believed to be probable and can be reasonably estimated. The liabilities from environmental cleanup related costs recorded in the Consolidated Balance Sheets at March 31, 1997 and September 30, 1996 were $73.6 million and $74.9 million, respectively."

20. The auditor's notes to the PII audited financial statement as of March 31, 1998 show that the reserves for environmental liabilities had been reduced to $68.6 million. One of the claims asserted against PII had been settled during the previous year. PII's financial statements for the period ended March 31, 1998 state, with respect to the environmental liabilities reflected in those statements: "Environmental claims have been asserted against the Company [*i.e.* PII] at 17 sites in the U.S. with one being settled in the past year. . . .The majority of these sites are related to activities of a former subsidiary of the Company."

21. In early 1998, TXU offered to buy TEG by tender offer, conditioned upon TEG's divestiture of its mining and natural resources assets.

22. Lehman Brothers Merchant Banking Partners II, L.P. ("Lehman Merchant") stepped forward with a proposal to purchase TEG assets and liabilities that TXU did not want for approximately $2.3 billion through an acquisition vehicle that Lehman Merchant created, P&L Coal.

23. Ultimately the assets acquired by P&L Coal included all of PII's subsidiaries: GFMC (now, Defendant GFML), a power trading company called Citizens Power, and the U.S. coal mining businesses held by PII as a result of the reorganization of GFAC and Peabody Holdings when both were owned by Hanson. P&L Coal also acquired certain Australian assets, not relevant to this litigation.

24. Numerous agreements were executed in connection with the 1998 Transaction, including the following agreements, each of which is governed by Delaware law:

25. In connection with the 1998 Transaction, TXU and Lehman Merchant entered into a written agreement dated March 1, 1998 ("the Participation Agreement").

26. In Paragraph 6 of the Participation Agreement, TXU and Lehman Merchant agreed to enter into-and cause, respectively, TEG and P&L Coal, to enter into-three indemnity agreements:

27. The first of these indemnities (the "Acquired Group Indemnity") provides:

> Effective the TEG Purchase Date, the Purchaser [P&L Coal] agrees to indemnify [TXU], its directors, officers, employees, agents, assigns and successors, together with all affiliates and subsidiaries of [TXU] and of any such assigns and successors, including TEG and its affiliates and subsidiaries, and their assigns and successors, and each of their respective officers, directors, agents and employees (the "Texas Utilities Group"), from and hold them harmless against all claims, demands, suits and liabilities of any kind (including attorneys' fees and litigation costs) arising from or out of the Purchaser or the Acquired Group, and their past, present and future activities, assets, businesses, employees, employees of any signatory parties, or any persons representing or connected with any such employees, including without limitation any environmental claims and liabilities, together with all other claims and liabilities from or out of the Purchaser or the Acquired Group [a defined term meaning the TEG companies that P&L Coal acquired].

28. "Texas Utilities Group" is defined in the Participation Agreement as including "Texas Utilities, its directors, officers, employees, agents, assigns and successors, together with all affiliates and subsidiaries of Texas Utilities and of any such assigns and successors, including TEG and its affiliates and subsidiaries, and their assigns and successors, and each of their respective officers, directors, agents and employees."

29. The second indemnity described in Paragraph 6 of the Participation Agreement (the "PII Indemnity") provides:

> In addition to the foregoing, effective the TEG Purchase Date, [P&L Coal] agrees to indemnify the Texas Utilities Group in regard to all environmental claims and liabilities resulting from any activities or operations prior to the TEG Purchase Date by [PII] or Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively "PII/PGI"), or from conditions on or relating to any property of or controlled by any such entities prior to the TEG Purchase Date, such environmental claims and liabilities being, without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys fees and litigation costs relating thereto (such claims, the "PII/PGI Environmental Claims"), in each case to the extent not insured (provided that to the extent any such insurance does not fully indemnify the Texas Utilities Group, [P&L Coal] shall indemnify the Texas Utilities Group in accordance with the foregoing). In connection with such indemnity, the Parties agree that following the TEG Purchase Date [P&L Coal] shall, and, so long as [P&L Coal] is in compliance with these environmental indemnity obligations, only [P&L Coal] shall be entitled to, (i) assume the defense of, defend, manage, negotiate and settle, (ii) monitor, oversee or implement any injunctive relief (including any investigation or remediation of any kind) with respect to, or (iii) otherwise handle, any PII/PGI Environmental Claim, all such actions to be taken in [P&L Coal's] sole discretion. Texas Utilities, TEG and PII/PGI shall be entitled to participate in any such defense at their own expense. Texas Utilities shall cause PII/PGI to. . .(iii) cooperate fully, at [P&L Coal's] expense, with [P&L Coal] in all other respects (including. . .claims for available insurance, with respect to any PII/PGI Environmental Claim, all the benefit of which shall inure to the benefit of [P&L Coal]). . . .

30. GEF's predecessor, PII, was a subsidiary of TEG at the time of the Participation Agreement. Blue Tee's predecessor, GFAI, was, at that time, a former subsidiary of PII's predecessor. GFAI was not a subsidiary of PII at the time of the Participation Agreement.

31. The third indemnity described in Paragraph 6 of the Participation Agreement (the "TEG Indemnity") provides:

> Similarly, immediately after the TEG Purchase Date, Texas Utilities will cause TEG to indemnify Lehman Merchant, [P&L Coal], its directors, officers, employees, agents, assigns and successors and each of their directors, officers, employees and agents, together with all affiliates and subsidiaries of Lehman Merchant, and of any such assigns and successors, from and hold them harmless against all claims, demands, suits and liabilities of any kind (including attorneys' fees and litigation costs) arising from or out of the TEG Group and their past, present and future activities, assets, businesses, employees, or any persons representing or connected with any such employees, together with all other claims and liabilities from or out of the TEG Group.

32. Paragraph 6 of the Participation Agreement also provides:

> The Parties will cause indemnities in written form containing the foregoing terms and conditions to be delivered by [P&L Coal] to

> [TXU] and by TEG to [P&L Coal], immediately subsequent to the TEG Purchase Date; and to [P&L Coal] or [TXU], as appropriate, immediately subsequent to the TEG Purchase Date, by such of the remaining Acquired Group as TEG may designate and such of the remaining TEG Group as [P&L Coal] may designate. All of the foregoing indemnities will extend for so long as any potential liability with respect thereto remains legally enforceable as to the matters subject thereto.

33. Michael McNally was the lead negotiator of the 1998 Transaction for TXU. Felix Herlihy was one of the principal negotiators of the 1998 Transaction representing Lehman Merchant and defendant PEC's predecessor, P&L Coal.

34. In connection with the 1998 Transaction, Mr. Herlihy reviewed at least one historical document relating to PII's environmental liabilities, a Long Form Report prepared by Ernst & Young LLP for The Energy Group PLC, dated January 1997, Volume IV.

35. Lehman Merchant and TXU were under great time pressure to get the Participation Agreement signed. TXU was competing with a hostile bid for TEG from a company called PacifiCorp. Under U.K. law, the hostile bid created a deadline for TXU to make its tender offer to TEG.

36. Shortly before the parties' execution of the Participation Agreement, the parties discovered that the previously contemplated deal structure, which called for P&L Coal to acquire the U.S. coal mining business it wanted from an English company, would trigger a significant tax liability under the Foreign Investment in Real Property Tax Act of 1980, 26 U.S.C. § 897 ("FIRPTA").

37. As reflected in the draft Participation Agreement circulated by counsel on February 28, 1998, Lehman Merchant and P&L coal proposed to solve the FIRPTA problem by re-structuring the deal so that P&L coal would acquire the Peabody coal business it wanted by buying the shares of PII's subsidiaries directly from PII, a U.S. company. Thus, instead of being acquired by P&L Coal, PII would be left behind with TEG.

38. The draft of the Participation Agreement circulated on Saturday, February 28, 1998-the day before the Participation Agreement was signed-is the first draft in which PII is identified as the seller of shares of the Peabody coal businesses to P&L Coal. It is also the first draft in which the PII Indemnity appears.

39. An early draft of the Participation Agreement, but not the final agreement, contained proposed language stating that "all liabilities relating to the business of the Acquired Group which may have been incurred or created by an entity within the TEG Group other than a member of the Acquired

40. Lehman Merchant commissioned Dames & Moore, the same consulting firm that had prepared the 1996 report, to prepare an updated report estimating the potential costs associated with PII's environmental liabilities (the "1998 Dames & Moore Report"). The 1998 Dames & Moore Report stated, among other things:

> There are 20 active and operated sites in Dames & Moore's Category 1, consisting of mining, smelting and several miscellaneous facilities. Seventeen (one of which is divided into four portions) are active and three are owned. The active sites are not necessarily owned by Gold Fields, but are sites for which Gold Fields may have a liability.

41. In addition to its indemnity provisions in Paragraph 6 of the Participation Agreement, the Participation Agreement provides, in Paragraph 1, that the $2.2874 billion purchase price that P&L Coal was to pay TEG was based on a balance sheet that showed the assets and liabilities P&L coal was to acquire (the "Benchmark Balance Sheet"). The Benchmark Balance Sheet is incorporated by reference into the Participation Agreement, as well as separately agreed to and signed by the parties. The Benchmark Balance Sheet reflects $0 as "Accrued Reclamation" for PII, and $57.5 million in that same category for GFMC.

42. The Benchmark Balance Sheet incorporates by reference a balance sheet faxed from J.D. Roberts of Peabody Holdings to Kevin Kernan of TXU on February 28, 1998 (the "February 28 Balance Sheet"). On the fax cover page, Mr. Roberts wrote: "Attached please find a revised Peabody Group-Peabody Investments Balance Sheet estimate for March 31, 1998 to breakout [PII] and Peabody Global without the Citizens Power earn-out and the environmental liabilities."

43. The attached balance sheet includes a column titled "GFMC plus CP Earnout & Environ. Liab." and a column titled "PII/PGII w/o CP Earnout & Environ. Liab." The entries for the line item "Accrued Reclamation" show zero for PII/PGII, and $57,491,000 for GFMC.

44. On May 19, 1998, P&L coal and TXU executed the "Assumption and Indemnification Agreement," to implement the Acquired Group Indemnity as contemplated by Paragraph 6 of the Participation Agreement.

45. Section 3(a)(i) of the Assumption and Indemnification Agreement provides that the Purchaser (P&L Coal) would indemnify the Texas Utilities Group (as defined in the Participation Agreement) for

> [A]ll claims, demands, suits and liabilities of any kind, including attorneys' fees and litigation costs, arising from or out of Purchaser or

> the Acquired Group, and their past, present and future activities, assets, businesses, employees, employees of any signatory parties, or any persons representing or connected with any such employees, including without limitation any environmental claims and liabilities, together with all other claims and liabilities from or out of the Purchaser or the Acquired Group.

46. Section 3(a)(ii) of the Assumption and Indemnification Agreement states that P&L Coal would indemnify Texas Utilities Group for:

> [A]ll environmental claims and liabilities resulting from any activities or operations prior to the date hereof by Peabody Investments, Inc., Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively, "PII/PGI"), or from conditions of or relating to any property of or controlled by such entities prior to the date hereof, such environmental claims and liabilities, being, without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys' fees and litigation costs relating thereto.

47. Section 3(b) of the Assumption and Indemnification Agreement provides: "[P&L Coal] agrees to indemnify the Texas Utilities Group pursuant to clause (a)(ii) above only to the extent not insured. . .

48. Also on May 19, 1998, TEG and Lehman Merchant executed the "Indemnification Agreement" to implement the TEG Indemnity as contemplated by Paragraph 6 of the Participation Agreement. Section 2 of the Indemnification Agreement states:

> TEG agrees to indemnify Lehman Merchant [and] P&L. . .together with all affiliates and subsidiaries of Lehman Merchant, and of any such assigns and successors, from and hold them harmless against all claims, demands, suits and liabilities of any kind (including attorneys' fees and litigation costs) arising from or out of the TEG Group and their past, present and future activities, assets, businesses, employees, or any persons representing or connected with any such employees, together with all other claims and liabilities from or out of the TEG Group. TEG shall not be required to indemnify any of the foregoing parties with respect to any claims settled without the prior written consent of TEG.

49. Section 6 of the Assumption and Indemnification Agreement requires that, upon the request of TEG, P&L Coal "shall cause such members of the remaining Acquired Group as TEG may designate to execute and deliver a supplemental agreement in the form of Exhibit A binding such members to the terms and conditions of Section 3 hereof."

50. Section 4 of the Indemnification Agreement requires that, upon the request of P&L coal, TEG "shall cause such members of the TEG Group as P&L [Coal] may designate to execute and deliver a supplemental

agreement in the form of Exhibit A binding such members to the terms and conditions of Section 2 hereof."

51. Paragraph 6 of the Participation Agreement requires TXU to cause PII to "cooperate fully" with P&L Coal "in all. . .respects" to facilitate P&L Coal's discharging its duties with respect to "any PII/PGI Environmental Claim," including authorizing claims for insurance that might provide coverage for PII-related environmental claims, and specifies that "all the benefit" of such insurance claims shall "inure to the benefit of [P&L Coal]."

52. On August 6, 1998, Jeffrey Klinger, then Vice President-Legal Services and Secretary of the Peabody Group (which had by then been acquired by P&L Coal) wrote to John McReynolds:

> I am writing in connection with a proposed agreement between [PII], formerly known as GFAC, and [P&L Coal], which John Kazanjian of Anderson Kill & Olick sent you today at my request. The agreement proposes to assign to P&L [Coal] claims that GFAC has against insurance companies that sold liability insurance to the corporate predecessors of GFAC. GFAC is prosecuting some of these claims in the New York insurance coverage litigation. GFRC has the right to assert these claims and prosecute the New York coverage action in its capacity as assignee and subrogee of [Blue Tee]. GFAC had previously agreed to indemnify, defend and hold [Blue Tee] harmless from losses relating to environmental claims as the result of a corporate reorganization. Blue Tee then assigned to GFAC the right to make coverage claims against any of the relevant insurance companies. Because P&L [Coal] now has agreed to indemnify GFAC and other Texas Utilities entities with respect to environmental liabilities and GFAC is being dissolved, we thought it was necessary to assign these insurance claims to P&L [Coal] which essentially will be assuming the environmental liabilities for which coverage is being sought.

53. The proposed agreement to which Mr. Klinger referred in his letter was, as he wrote, conveyed to Mr. McReynolds on August 6, 1998 (the date of Mr. Klinger's letter) by John Kazanjian, an attorney for defendant PEC who worked under the supervision and direction of Mr. Klinger. The agreement Mr. Klinger and Mr. Kazanjian proposed on behalf of P&L Coal states that "pursuant to an agreement dated March 1, 1998, P&L [Coal] agreed to indemnify GFAC and its affiliates in regard to all environmental claims and liabilities from any activities or operations prior to May 19, 1998 by GFAC and its subsidiaries."

54. Subsequently, on October 16, 1998, Mr. Klinger sent a fax to Mr. McReynolds with a revised proposed agreement. Mr. Klinger's fax cover sheet states in part:

> As I discussed with you on the telephone earlier in the week, we have decided to replace the proposed agreement between Peabody

> Investments and P&L Coal Holdings Corporation which was sent to you August 6, 1998 with the attached Agreement.
>
> This agreement differs in the following two principal respects:
> 1. The party is Gold Fields Mining Corporation rather than P&L Coal Holdings.
>
> 2. GFMC is now agreeing to assume all of PII's liabilities to Blue Tee under the Understanding and Agreement (copies of which have been previously given to you). See numerical paragraph 1.

55. The draft agreement appended to Mr. Klinger's October 16, 1998 fax was between GEF (then PII) and GFML (then GFMC). It provides, among other things, that: "GFMC hereby assumes the obligations of GFC to Blue Tee under the Understanding and Agreement and its supplements."

56. Subsequently, a new paragraph 10 was added to the proposed draft agreement, which states: "Exhibit A which is attached hereto and made a part hereof contains an additional provision of this Agreement." Exhibit A stated:

> The execution of this Agreement shall have no effect whatsoever on that certain Assumption and Indemnification Agreement between P&L coal Holdings Corporation and Texas Utilities Corporation ("Texas Utilities") dated as of May 18, 1998, as supplemented ("Indemnification Agreement") and Texas Utilities and its affiliates shall continue to have the same indemnification rights granted by the Indemnification Agreement without regard to GFAC's execution of this Agreement; provided further that such indemnification rights shall also include any new liabilities of GFAC arising from its execution of this Agreement.

57. The revised agreement sent by Mr. Klinger on October 16, 1998 was executed as of October 19, 1998 (the "1998 Insurance Agreement").

58. In that same agreement, GFMC expressly agreed to assume all of PII's obligations to Blue Tee under the Understanding and Agreement and its supplements.

59. Also on October 19, 1998, P&L coal (now defendant PEC) and TXU entered into a Supplement to the Assumption and Indemnification Agreement. The Supplement provides that TXU would cause PII (now GEF) to execute settlement documents in insurance litigation then pending in New York state court, in which GFAC (now GEF) and GFMC (now GFML) sought coverage under policies issued by the defendant insurers in respect of the Blue Tee Liabilities as well as certain environmental liabilities of GFML. The Supplement to the Assumption and Indemnification Agreement provides further that:

> [E]ach of P&L and Texas Utilities, on behalf of itself and each of their respective affiliates, agree that the execution by PII of the referenced

> Settlement Documents shall have no effect whatsoever on the Indemnification Agreement, together with the various agenda thereto, and Texas Utilities and its affiliates shall continue to have the same indemnification rights granted by the Indemnification Agreement without regard to PII's execution of the Settlement Documentation. . .

60. In connection with agreements reflected in the 1998 Insurance Agreement and the Supplement to the Assumption and Indemnification Agreement, PEC and/or GFMC collected approximately $10 million of insurance proceeds in connection with the Blue Tee Liabilities.

61. Paragraph 1 of the Participation Agreement provides for a post-closing price adjustment process.

62. On August 3, 1998, Terry Bethel of PEC sent a packet of supporting documentation to Jerry Pinkerton of TXU with respect to the post-closing price adjustment process. Included in that packet was a request for a $4.25 million reduction in the price P&L Coal was to pay for the acquisition in consideration of an insurance settlement that PII had received in connection with its indemnification of Blue Tee.

63. Additionally, on March 30, 1998, PII, under its prior name GFAC, entered into a "Supplement to the December 5, 1985 Understanding and Agreement" with Blue Tee "as a result of the execution of a Confidential Release and Settlement Agreement (the 'Release'), dated as of March 30, 1998 by and among GFAC, Blue Tee and USF&G. . ."

64. In addition, the packet that Mr. Bethel sent to TXU in order to obtain a purchase price adjustment included a document titled "Detail of PII Balance Sheet at May 19, 1998," the date on which the P&L Coal Acquisition closed. That document reflected, under the column entitled "PII/PGII Consolidated at May 19, 1998," the amount of $60.139 million for "Accrued environmental and related liabilities." The next column, entitled "Accounts remaining with Peabody per Purchase Agreement," shows a negative of $60.139 million for "Accrued environmental and related liabilities." The final column, entitled "PII Consolidated 'Standalone' [sic] Balance Sheet as of May 19, 1998," contains a zero entry for "Accrued environmental and related liabilities."

65. An internal GFMC balance sheet dated as of April 30, 1998-before the May 1998 closing of the 1998 Transaction-does not reflect any reserve for environmental liabilities. By contrast, an internal GFMC balance sheet dated as of January 6, 1999-after the closing of the P&L Coal Acquisition-shows an "Environmental Reserve" of $60,139,298.13. This number matches the $60.139 million sum of environmental liabilities shown moving from the stand-alone balance sheet of PII to the balance sheet of P&L

Coal in the documentation that Peabody submitted to TXU in support of its price adjustment request.

66. Pursuant to Article 2of the Participation Agreement, Lehman Merchant agreed to "procure financing for [P&L Coal], on an unconditional basis drawable at the time specified in the Purchase Agreement of $1.8074 billion." A preliminary offering memorandum for P&L Coal's issuance of $900 million in notes to finance the 1998 Transaction states:

> Gold Fields, its predecessors and its former parent company are or may become parties to environmental proceedings which have commenced or may commence in the United States in relation to certain sites previously owned or operated by those entities or companies associated with them. The Company has agreed to indemnify Gold Fields' former parent company [PII] for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of Gold Fields to the Company.

67. This document was prepared between the signing of the Participation Agreement and the May 19, 1998 Assumption and Indemnification Agreement on behalf of P&L Coal, and approved by Felix Herlihy for P&L Coal.

68. On July 14, 1998, defendant PEC filed a Form S-4 Registration Statement with the SEC to register the $900 million in notes in connection with the financing of the 1998 Transaction. In the Form S-4, PEC describes Hanson's demerger of TEG and the 1998 Transaction, including the Participation Agreement. PEC stated that it had "agreed to indemnify [GFMC's] former parent for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of [GFMC] to the Company."

69. The S-4 repeated verbatim the accruals for environmental liabilities of $73.6 million as of March 31, 1997 and $68.6 million as of March 31, 1998 from the PII financials. The Form S-4 was signed by PEC's then chief legal officer, Jeffrey L. Klinger.

70. Subsequently, each year from 1999 to 2009, in language similar to that in its July 1998 S-4 filing, PEC stated that it had "agreed to indemnify [GFMC's] former parent company for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of [GFMC] to us."

III. Contentions of the Parties

A. GEF's Motion for Summary Judgment Against Peabody and GFML.

GEF argues in support of its motion that the PII Indemnity and § 3(a)(ii) of the Assumption and Indemnification Agreement are clear and unambiguous, requiring Peabody and GFML to indemnify GEF against "all environmental claims and liabilities resulting from any activities or operations prior to the TEG purchase date. . . ."[4] GEF further contends that the definition of environmental claims is sufficiently broad to encompass the instant liabilities, as it was defined in that document to include "without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys fees and litigation costs relating thereto."[5] According to GEF, the instant Blue Tee liabilities arose prior to the purchase date, and the Blue Tee liabilities arose from the "activities or operations" of GFAI, a subsidiary of GFAC, the predecessor to GEF, thereby obligating Peabody and GFML to provide indemnity for the Blue Tee Liabilities.

---

[4] Opening Br. in Supp. of Pl.'s Mot. for Summ. J. at 30.

[5] *Id.* According to Peabody, the juxtaposition of the PII indemnity and the TEG indemnity would make any indemnity by Peabody in favor of GEF "circular." Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 30. In essence, a circular indemnity is created when the indemnitee is ultimately indemnifying the indemnitor for the indemnitee's claims; Peabody contends this should result in GEF's claims for indemnity being defeated. *Id.*

Moreover, GEF contends that the PII Indemnity and § 3(a)(ii) of the Assumption and Indemnification Agreement are specific to the Blue Tee Liabilities, thus they should control the Blue Tee liability indemnity analysis, rather than an allegedly broader TEG indemnity which requires TEG (the parent of GEF) to indemnify Peabody's parent entity against "all claims, demands, suits, and liabilities of any kind. . .arising from or out of the TEG Group and their past, present and future activities, assets, businesses. . .together with all other claims and liabilities from our out of the TEG Group."[6] In short, GEF contends that the § 3(a)(ii) of the Assumption and Indemnification Agreement and the PII indemnity should control this issue, as it is specific to the environmental liabilities in dispute, and general contract principles require that a specific provision prevail over a general provision if the two are in conflict.[7]

In the alternative, GEF contends that, if the language of the agreements is nevertheless ambiguous, the compelling extrinsic evidence that aids in the interpretation of the 1998 Participation Agreement and Assumption and Indemnification Agreement supports its motion for summary judgment. GEF cites the relevant balance sheets, an October 1998 assignment of insurance rights agreement, Peabody's financial and SEC statements, statements made by representatives of Peabody contemporaneously with the 1998 transaction, and,

[6] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 9-10.
[7] Opening Br. in Supp. of Pl.'s Mot. for Summ. J. at 32.

most significantly, a course of dealing that continued for over nine years. To the extent that Peabody and GFML contend GEF is not entitled to the benefit of these agreements due to its disputed status as an affiliate or subsidiary of TXU, GEF maintains that that it is in fact a subsidiary of TXU, that indemnity is required because it is a successor to PII, and indemnity is required because it is an affiliate of TEG's successor.[8] Moreover, GEF argues that it is an assign or successor to PII, itself a TEG subsidiary and, thus, within the scope of the agreements.

GEF also moves for summary judgment with respect to Count II of its amended complaint, seeking a declaration that Peabody and GFML owe indemnity under the October 1998 Insurance Agreement "to the extent they settled out the insurance coverage that was otherwise available for those liabilities."[9] However, as stated above, this Court's decision on this claim is not reached in this opinion, although the language of the 1998 Insurance Agreement will be discussed to the extent necessary to evaluate its effect on the relevant indemnity agreements.[10]

Finally, GEF has moved for summary judgment with respect to Count VII of its amended complaint, relating to Peabody and GFML's alleged

[8] *See* Pl.'s Reply to Defs.' Opp'n. to Mot. for Summ. J. at 4.
[9] Opening Br. in Supp. of Pl.'s Mot. for Summ. J. at 30.
[10] Also, as a practical matter, this claim may ultimately be moot in light of the Court's decision that the March and May 1998 indemnity agreements require Peabody to indemnify GEF for Blue Tee's environmental liabilities, because any potential requirement of indemnity for the Blue Tee liabilities under the October 1998 Insurance Agreements would be redundant.

contractual obligation to indemnify GEF for all attorneys' fees incurred in this litigation, and with respect to all of Peabody and GFML's counterclaims, alleging that GEF's success on its motion would necessarily preclude Peabody and GFML from prevailing on its counterclaims. As noted above, GEF's motion for summary judgment based on Count VII of GEF's Amended Complaint will be decided by separate opinion.

B. Blue Tee's Motion for Summary Judgment Against Peabody and GFML.

Blue Tee has filed a motion for summary judgment as part of its crossclaims against Peabody and GFML, essentially seeking to enforce the same 1998 indemnity agreements, §6 of the Participation Agreement and § 3(a)(ii) of the Assumption and Indemnification Agreement. Although Blue Tee was not a party to these agreements, Blue Tee argues that it is a third party beneficiary and therefore it may properly enforce the agreement against Peabody.

The interests and arguments of Blue Tee and GEF vis-à-vis Peabody and GFML's obligations under the 1998 agreements are basically the same. Accordingly, the reasoning and holding of this opinion apply equally to Blue Tee's motion for summary judgment to the extent that Blue Tee seeks to enforce the Participation Agreement and the Assumption and Indemnification Agreement against Peabody and GFML.

Blue Tee has also moved for summary judgment on Counts IV, V, and VI of GEF's Amended Complaint and on Counts I and II of its counterclaim against GEF. In essence, these claims relate to the extent to which GEF must indemnify Blue Tee, in the event Peabody and GFML fail to fully indemnify Blue Tee. As indicated above, the resolution of these motions is not decided in this opinion; this opinion addresses only the motions for summary judgment as against Peabody and GFML. All remaining motions will be decided as promptly as possible if this case does not resolve.

C. Peabody and GFML's Responses.

In response to GEF's motion for summary judgment, Peabody and GFML argue that, as a threshold matter, GEF's claims are not ripe because there has been no judgment against GEF, and GEF continues to deny any liability to Blue Tee.[11] It is Peabody and GFML's position that GEF's claims against them will not be ripe unless and until GEF's liability to Blue Tee under the 1985 Reorganization Agreement is established because Peabody and GFML, as the putative indemnitors, cannot properly be declared liable to indemnify GEF for obligations that remain in dispute and could, hypothetically, be nonexistent.[12]

[11] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 21.

[12] *Id.* at 22. Peabody also argues that the claims are not ripe because there is no evidence that GEF is not insured and, according to Peabody, § 3(b) of the Assumption and Indemnification Agreement requires that GEF demonstrate it is not insured as a condition of indemnity. *Id.*

Peabody and GFML also take the position that GEF is not entitled to the benefit of the indemnity contained in the Participation Agreement or the Assumption and Indemnification Agreement because the language extends only to "[TXU], its directors, officers, employees, agents, assigns and successors, together with all affiliates and subsidiaries, and their assigns and successors, and each of their respective officers, directors, and employees."[13] According to Peabody and GFML, GEF is not an "affiliate" or "subsidiar[y]" of TXU, thus any interpretation of the language itself would be superfluous as it allegedly does not apply to GEF.[14]

Turning to the interpretation of the agreements, Peabody and GFML do not dispute that the language is plain and unambiguous. However, according to Peabody and GFML, the Blue Tee Liabilities are within the scope of § 2 of the TEG Indemnity, which requires GEF's parent company to indemnify Peabody for "all claims, demands, suits and liabilities of any kind arising from or out of the TEG Group and their past, present and future activities. . .together with all other claims and liabilities from or out of the TEG Group."[15] Peabody and GFML therefore contend that, given the TEG Indemnity, requiring them to indemnify

[13] *Id.* at 10.
[14] *Id.*
[15] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 23.

GEF for the Blue Tee Liabilities would create a "circular" indemnity, thereby defeating GEF's claim.[16]

Peabody and GFML also contend that the contract language does not encompass the Blue Tee liabilities. Peabody and GFML's position is that the putative indemnity would only apply to claims and liabilities "resulting from any activities or operations prior to the date hereof," and GEF's predecessor's contractual assumption of the Blue Tee Liabilities is not an activity or operation.[17] Thus, in addition to denying liability for future indemnification, Count IV of Peabody and GFML's counterclaims seek to recover from GEF for unjust enrichment, arguing that GEF was never entitled to receive any of the indemnification provided from 1998 through the instant litigation.

In the alternative, Peabody and GFML argue that, even if the Blue Tee Liabilities are within the scope of the indemnity agreements, any of their putative indemnity obligations are not implicated unless and until GEF or Blue Tee establishes the absence of insurance coverage for the claim. This assertion is premised on the language of the PII Indemnity, which states that Peabody must provide indemnity to TXU for environmental claims "to the extent not insured."[18]

[16] *Id.* at 30.
[17] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 25.
[18] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 9.

With respect to GEF's alternative reliance on extrinsic evidence, Peabody asserts that material issues of fact remain in dispute, because negotiators from Peabody and GFML's side of the 1998 transaction have indicated that they did not believe the PII indemnity required indemnity of GEF for these claims.[19] Peabody and GFML aver that they did not intend to undertake this indemnity obligation, and that all extrinsic evidence cited by GEF is the product of a "mistake" that was not discovered by Peabody and GFML until 2007.[20]

As confirmed by the Statement of Agreed Facts and Peabody and GFML's counsel's statements at oral argument,[21] Peabody and GFML do not dispute that they accepted the tender of these claims, and managed, defended, and settled the claims until 2007, when they continued to manage, defend, and settle the claims under a reservation of rights. Similarly, Peabody and GFML do not dispute that they accepted and sought insurance proceeds applicable to the environmental liability claims.[22] Peabody's SEC filings and the relevant balance sheets indicating these liabilities are likewise undisputed, although the import and inferences are disputed by Peabody and GFML.[23]

---

[19] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 34.
[20] As with GEF's use of extrinsic evidence, Peabody's alternative contentions based on extrinsic evidence would only be probative in the event that the contract language is deemed ambiguous.
[21] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 20; Tr. at 53-55.
[22] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 20.
[23] Indeed, at oral argument, counsel for Peabody and GFML indicated that it would have been unusual had Peabody not prepared SEC filings and balance sheets to reflect these

Finally, Peabody and GFML have opposed summary judgment on GEF's counterclaims, which counterclaims are grounded on acquiescence, mootness, and unjust enrichment. In short, Peabody and GFML have not moved for summary judgment, but simply maintain that material issues of fact remain in dispute, thereby precluding summary judgment.

IV. The Applicable Legal Standard

A. Legal Standard for Summary Judgment.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[24] A genuine issue of material fact exists when "the parties are in disagreement concerning the factual predicate for the legal principles they advance."[25] The moving party bears the burden of demonstrating that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law.[26]

---

liabilities, given that Peabody honestly believed it was responsible for these claims. *Id.* at 55 ("[I]t would have been stunning if the SEC filings showed anything but that under these circumstances.")

[24] Super. Ct. Civ. R. 56(c).

[25] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

[26] *Sterling v. Beneficial Nat'l Bank, N.A.*, Del. Super., C.A. No. 91C-12-005, Ridgely, P.J. (Apr. 13, 1994) (Mem. Op.).

Once the non-moving party has been afforded the opportunity to show a genuine issue of material fact in dispute, the burden returns to the moving party to demonstrate the absence of such disputes.[27] Disputes regarding immaterial issues of fact will not preclude summary judgment.[28] If the disputed facts could have no bearing on the analysis or resolution of the parties' claims, then any such disputed facts are immaterial.[29] The party opposing summary judgment is "both entitled, and expected, to come forward with admissible evidence showing the existence of a genuine issue of material fact."[30] The Court must view the record in a light most favorable to the non-moving party.[31] However, the opposing party may not merely assert the existence of a disputed issue of fact; the opponent of a motion for summary judgment "must do more than simply show that there is some metaphysical doubt as to material facts."[32] Ultimately, a motion for summary

[27] Super. Ct. Civ. R. 56(e); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986).
[28] *Brzoska v. Olson*, 668 A.2d 1355, 1365 (Del. 1995) *citing State Farm Mut. Auto. Co. v. Mundorf*, 659 A.2d 215, 217 (Del. 1995).
[29] *See, e.g.*, *Mundorf*, 659 A.2d at 217 (holding that the factual dispute as to whether a policyholder received a contractually required renewal premium notice could have no effect on the resolution of the case because the insurer was nonetheless required by law to send a termination notice; accordingly, the dispute was deemed immaterial as a matter of law.)
[30] *Mann*, 517 A.2d at 1060.
[31] *Hammond v. Colt Ind. Op. Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).
[32] *Brzoska*, 668 A.2d at 1364 *quoting Matsushita Elec. Ind.Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

judgment "must be decided on the record presented, and not on evidence potentially possible."[33]

B. Legal Standard for Contract Interpretation.

This litigation is a dispute over the interpretation of the relevant contracts. As stated by the Supreme Court of Delaware, "[t]he proper construction of any contract. . .is purely a question of law."[34] Courts are to interpret clear and unambiguous contract language in accord with its ordinary and usual meaning.[35] Extrinsic evidence may only be introduced if an ambiguity exists in the language of the contract; a contract provision is not ambiguous simply because the parties disagree on its meaning.[36] Rather, the contract language is ambiguous only if it is reasonably or fairly susceptible of two or more different interpretations.[37]

All parties have asserted that the relevant contractual provisions are clear and unambiguous; the parties merely differ in their interpretations. This Court finds the language of § 3(a)(ii) of the Assumption and Indemnification Agreement and § 6 of the Participation Agreement (the "PII Indemnity"), which are agreed upon by all parties pursuant to the Statement of Agreed Facts, to be

[33] *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974).
[34] *Rhone-Poulenc Basic Chem. Co. v. Am. Mot. Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).
[35] *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. 1973).
[36] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1060 (Del. 1997).
[37] *See, e.g. Lamberton v. Traveler's Indem. Co.*, 325 A.2d 104, 106 (Del. Super. 1974).

clear and unambiguous. When the language of these provisions is interpreted consistent with its ordinary and usual meaning, it is clear that the Peabody defendants are contractually obligated to indemnify GEF for the environmental liabilities at issue.

Because the relevant language is unambiguous on its face, the Court need not consider extrinsic evidence. However, assuming *arguendo* that sufficient ambiguity is extant in either or both the Assumption and Indemnification Agreement and the PII Indemnity, a review of the extrinsic evidence discloses that no facts material to the interpretation to this provision are in dispute, and both GEF and Blue Tee are entitled to judgment as a matter of law.

V. Discussion

A. Interpretation of the Agreements' Language.

1. The Clear and Unambiguous Language of the Assumption and Indemnification Agreement and the PII Indemnity Requires that Peabody and GFML Indemnify GEF.

a. The Dispute is Ripe for Adjudication.

GEF has brought this action for declaratory relief pursuant to 10 DEL. C. §§ 6501-6513, Delaware's Declaratory Judgment Act (the "Act"). The Act provides an expedited means for securing judicial relief; by its terms, it is a

remedial statute with the stated purpose "to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations."[38] Consistent with its remedial purpose, the Act is to be liberally construed.[39]

Given that this dispute involves contract interpretation, 10 DEL. C. § 6502 controls herein; it provides, in relevant part:

> Any person interested under a. . .contract or other writings constituting a contract. . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or legal relations thereunder.

Similarly, a contract may be construed "either before or after there has been a breach thereof." [40]

Four additional elements must be present before a controversy is suitable for declaratory judgment: 1) the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; 2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; 3) the conflicting interests must be real and adverse; and 4) the issue must be ripe for judicial determination.[41] A judicial opinion in

[38] DEL. CODE ANN. tit. 10, § 6512 (West).
[39] *Id.*
[40] DEL. CODE ANN. tit. 10, § 6503 (West)
[41] *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973); *see also Weiner v. Selective Way Ins. Co.*, 793 A.2d 434 (Del. Super. 2002).

a matter that is not "ripe for judicial determination" is an impermissible advisory, or hypothetical, opinion.[42]

When balancing the sometimes competing requirements of the Act and the ripeness requirement, courts should exercise discretion that "turn[s] importantly upon a practical evaluation of the circumstances present."[43] As explained by the Court of Chancery:

> [I]n deciding whether a particular declaratory judgment action is ripe for judicial determination, a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.[44]

When construing the Act vis-à-vis the foregoing ripeness considerations, GEF's claims against Peabody are ripe. Peabody and GFML are now handling these claims under a reservation of rights, and Peabody and GFML instituted an action against Blue Tee in a Missouri state court to determine the extent of its obligations to defend and indemnify these claims.[45] In turn, Blue Tee has begun tendering claims to GEF while seeking to enforce the 1998 agreements

---

[42] *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 479 (Del. 1989).
[43] *Schick, Inc. v. Amalgamated Clothing & Textile Worker's Un.*, 533 A.2d 1235, 1238 (Del. Ch. 1987).
[44] *Id.* at 1239.
[45] The Missouri case has been dismissed without prejudice, in light of the Delaware litigation. Gold Fields Mining, LLC v. Blue Tee Corp., No. 08SL-CC02564 (Mo. Cir. Ct. Apr. 29, 2009).

against Peabody, claiming standing as a third party beneficiary. Against this backdrop, GEF necessarily has a legitimate interest in a prompt resolution the contract disputes.

Further, the relief GEF seeks is, to a certain extent, identical with the relief sought by Blue Tee. That is, Blue Tee and GEF are ultimately seeking to enforce the same indemnity agreements. Thus, if GEF did not pursue declaratory relief, the issue would be litigated among Blue Tee, Peabody, and GFML; depending upon the outcome of that litigation, GEF may face significant prejudice and hardship were it to delay or suspend its efforts to obtain judicial relief. If Blue Tee was to be unsuccessful against Peabody and GFML, then Blue Tee would certainly turn to GEF; indeed Blue Tee has already commenced tendering claims to GEF. GEF would then be required to litigate Blue Tee's claims, and initiate litigation against Peabody and GFML premised on the very same contract language that Peabody and GFML would have just finished litigating with Blue Tee in the Missouri case.

Conversely, if Blue Tee were to prevail against Peabody and GFML, Peabody and GFML might then turn to GEF to seek indemnity and/or recover for unjust enrichment, as evidenced by the counterclaims against GEF herein. It is highly likely that GEF will be required to pursue claims for indemnity against Peabody or defend against claims for indemnity made by Blue Tee.

Requiring GEF to delay its efforts to obtain declaratory relief would protract the length of litigation among the parties, result in potentially inconsistent court decisions and party obligations, and deny GEF an opportunity to participate or influence the course of a complex case that will almost inevitably affect its legal rights and duties.

Accordingly, GEF's claims are ripe for decision.

b. Plain Meaning of the Indemnity Agreements.

The relevant indemnity language traces its origins to an Agreement of March 1, 1998 (the "Participation Agreement"). Section 6 of the Participation Agreement is the "PII Indemnity," addressing environmental liabilities; it provides, in pertinent part, as follows:

> In addition to the foregoing, effective the TEG Purchase Date, [P&L Coal] agrees to indemnify the Texas Utilities Group in regard to all environmental claims and liabilities resulting from any activities or operations prior to the TEG Purchase Date by [PII] or Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively "PII/PGI"), or from conditions on or relating to any property of or controlled by any such entities prior to the TEG Purchase Date, such environmental claims and liabilities being, without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys fees and litigation costs relating thereto (such claims, the "PII/PGI Environmental Claims"), in each case to the extent not insured (provided that to the extent any such insurance does not fully indemnify the Texas Utilities Group, [P&L Coal] shall indemnify the Texas Utilities Group in accordance with the foregoing). In connection with such indemnity, the Parties agree that following the TEG Purchase Date [P&L Coal] shall, and,

> so long as [P&L Coal] is in compliance with these environmental indemnity obligations, only [P&L Coal] shall be entitled to, (i) assume the defense of, defend, manage, negotiate and settle, (ii) monitor, oversee or implement any injunctive relief (including any investigation or remediation of any kind) with respect to, or (iii) otherwise handle, any PII/PGI Environmental Claim, all such actions to be taken in [P&L Coal's] sole discretion. Texas Utilities, TEG and PII/PGI shall be entitled to participate in any such defense at their own expense. Texas Utilities shall cause PII/PGI to. . .(iii) cooperate fully, at [P&L Coal's] expense, with [P&L Coal] in all other respects (including. . .claims for available insurance, with respect to any PII/PGI Environmental Claim, all the benefit of which shall inure to the benefit of [P&L Coal]). . . .[46]

It is undisputed that P&L Coal and TXU executed an "Assumption and Indemnification Agreement" on May 19, 1998, as required by § 6 of the Participation Agreement; the language of § 3(a)(ii) of the Assumption and Indemnification Agreement states that P&L Coal (the predecessor to the instant Peabody defendant) will indemnify Texas Utilities Group (the parent entity of GEF) as follows:

> [A]ll environmental claims and liabilities resulting from any activities or operations prior to the date hereof by Peabody Investments, Inc., Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively, "PII/PGI"), or from conditions of or relating to any property of or controlled by such entities prior to the date hereof, such environmental claims and liabilities, being, without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys' fees and litigation costs relating thereto.[47]

[46] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 8-9.
[47] *Id.* at 13.

GEF is a successor by merger to Peabody Investments Inc. ("PII"), which is itself a successor by merger to GFAC.[48] Thus, after tracing the relevant successors and affiliate entities, the unambiguous language of this provision requires Peabody and GFML to indemnify GEF for "all environmental claims and liabilities resulting from any activities or operations prior to the date hereof by [Peabody Investments Inc]." Given that PII has been succeeded by GEF, this agreement plainly requires Peabody to indemnify GEF's parent company, TXU, for the liabilities incurred by GEF's predecessors. It is undisputed that GFAC, the predecessor to PII and, consequently, the once removed predecessor to GEF, incurred liabilities by virtue of the 1985 Reorganization Agreement, wherein it agreed to indemnify Blue Tee for the instant environmental liabilities.[49]

Peabody and GFML's argument that the use of the terms "activities or operations" instead of the broader language requiring TXU to Indemnify Lehman Merchant for "any and all claims, demands, suits and liabilities of any kind. . .arising from or out of the TEG Group and their past, present and future activities, assets, businesses, employees. . .together with all other claims and liabilities from or out of the TEG Group"[50] contained in the TEG indemnity

[48] *Id.* at 1.
[49] *Id.* at 3.
[50] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 9.

removes the Blue Tee liabilities from the scope of the indemnity is unavailing.[51] As noted above, plain and unambiguous language must be interpreted in accordance with its ordinary meaning.[52] Thus, the ordinary meaning of "activities" and "operations" will control herein.

Delaware courts look to dictionaries for assistance in defining terms that are not defined in the contract.[53] The meaning of a contract term must be determined from the standpoint of a reasonable person in the position of the parties at the time of contracting, and dictionaries are a customary reference point for reasonable persons.[54] Black's Law Dictionary broadly defines "activity" as "[a]n occupation or pursuit in which person is active."[55] The term "operation" is similarly given a broad meaning; in relevant part, it is defined as "the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity."[56]

Perhaps more insightful of the parties' understanding of these terms are the definitions contained in a standard reference dictionary. A dictionary reference defines "activity," in relevant part, as "a specific deed, action, function,

[51] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 25-26.
[52] *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. 1973).
[53] *See, e.g. Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).
[54] *Id.* at 738-39.
[55] Black's Law Dictionary 32 (6th ed. 1990).
[56] *Id.* at 1092.

or sphere of action."[57] That dictionary defines "operation," in relevant part, as "the act or an instance, process, or manner of functioning or operating; "a course or procedure of productive or industrial activity;" "a particular process or course;" "a business transaction, especially one of a speculative nature; deal;" and "a business, esp. one run on a large scale."[58]

The operative inquiry thus becomes whether GFAC's execution of the contracts to indemnify Blue Tee qualify as an "activity" or "operation." The foregoing definitions are extremely broad, and this comports with what a reasonable person would have understood the very wide range of actions that could constitute an "activity" or "operation." In light of these definitions, a reasonable person in the parties' positions would have understood "activities or operations" to encompass virtually all actions related to the functioning of the business. This includes the entering into contracts, including contracts for indemnity. The execution of a contract is certainly "a specific deed, action, function, or sphere of action." Similarly, entering into contracts is "a course or procedure of productive or industrial activity," and the execution of a contract or agreement between businesses, as in the context of the 1998 indemnity agreements, is, by definition, "a business transaction" or "deal."

[57] Dictionary.com, Activities, http://dictionary.reference.com/browse/activities(last visited Oct. 11, 2010).
[58] Dictionary.com, Operations, http://dictionary.reference.com/browse/operations (last visited Oct. 11, 2010).

Finally, this Court rejects Peabody and GFML's contention that GEF is not entitled to any benefits under the agreements because GEF is allegedly neither an affiliate nor subsidiary of TXU.[59] It is undisputed that GEF is a successor by merger to PII, and that PII is a successor by merger to GFAC.[60] Further, PII and TEG were acquired by TXU as part of the 1998 transaction.[61] It is undisputed that the Participation Agreement defines the indemnity in favor of TXU to include "[TXU], its directors, officers, employees, agents, assigns and successors, together with all affiliates and subsidiaries of [TXU] and of any such assigns and successors, including TEG and its affiliates and subsidiaries, and their assigns and successors, and each of their respective officers, directors, agents and employees."[62] Thus, GEF is within the scope of the relevant indemnities herein by virtue of its status as a successor by merger to PII, which was undisputedly a subsidiary of TXU. Juxtaposed with the foregoing indemnity language, which provides indemnity to "all affiliates and subsidiaries of [TXU] and any such assigns and successors," it is clear that GEF is within the scope of the agreements and therefore entitled to the agreements' benefits.[63]

---

[59] *See* Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 21.
[60] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 1.
[61] *Id.* at 7.
[62] *Id.* at 8.
[63] At oral argument, Peabody seemed to concede that GEF qualifies as a successor or assign of TXU, but qualified this with the assertion that an assignee is entitled to no greater rights than the assignor. Tr. at 68-69. Of course, this is a correct statement of the law. *See, e.g. Resort Point Custom Homes, LLC v. Tait*, Del. Super., C.A. No. S08C-04-

For the reasons set forth above, the contract language is clear and unambiguous, the Blue Tee liabilities are within the scope of § 3(a)(ii) of the Assumption and Indemnification Agreement and the PII Indemnity, and GEF is entitled to indemnity under the terms of these agreements.

c. The Specific Indemnities Prevail Over the TEG Indemnity.

Similar to the arguments discussed in the preceding section, Peabody and GFML argue that the Blue Tee liabilities are encompassed in the "TEG Indemnity," thereby requiring that GEF's parent entity to indemnify Peabody and GFML's parent entity for the very same Blue Tee liabilities, essentially mooting GEF's putative entitlement to indemnity from Peabody and GFML.[64] The undisputed language of the TEG Indemnity requires TXU/TEG (parent entities of GEF) to indemnify Lehman Merchant (parent entity of Peabody and GFML) as follows:

> Similarly, immediately after the TEG Purchase Date, Texas Utilities will cause TEG to indemnify Lehman Merchant, [P&L Coal], its directors, officers, employees, agents, assigns and successors and each of their directors, officers, employees and agents, together with all affiliates and subsidiaries of Lehman Merchant, and of any such assigns and successors, from and hold them harmless against all claims, demands, suits and liabilities of any kind (including attorneys' fees and litigation costs) arising

---

020, Bradley, J. (Jan. 26, 2010) (Letter. Op.). Nonetheless, this addresses only the threshold question of whether GEF is within the scope of the agreement; the extent of GEF's rights will turn on the terms of the agreement. Given the Court's holding that GEF's predecessor is entitled to indemnity rights under this agreement, GEF's undisputed status as a successor or assignee entitles GEF to indemnity for the Blue Tee liabilities.

[64] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 23.

> from or out of the TEG Group and their past, present and future activities, assets, businesses, employees, or any persons representing or connected with any such employees, together with all other claims and liabilities from or out of the TEG Group. The Parties will cause indemnities in written form containing the foregoing terms and conditions to be delivered by [P&L Coal] to [TXU] and by TEG to [P&L Coal], immediately subsequent to the TEG Purchase Date; and to [P&L Coal] or [TXU], as appropriate, immediately subsequent to the TEG Purchase Date, by such of the remaining Acquired Group as TEG may designate and such of the remaining TEG Group as [P&L Coal] may designate. All of the foregoing indemnities will extend for so long as any potential liability with respect thereto remains legally enforceable as to the matters subject thereto.[65]

Peabody and GFML contend that this indemnity necessarily encompasses the Blue Tee liabilities, because it requires indemnity against "all" claims or liabilities "of any kind," a very broad choice of language.[66] According to Peabody, an interpretation of § 3(a)(ii) of the Assumption and Indemnification Agreement which requires Peabody and GFML to indemnify GEF for these environmental liabilities would "render the TEG Indemnity meaningless and superfluous" because Peabody would be "deprived altogether of the protection [afforded by the TEG Indemnity]."[67]

However, a contract is to be construed as a whole, and specific language in a contract will prevail over general language where the two conflict.[68] Thus, to

[65] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 9.
[66] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 23-24.
[67] *Id.* at 30.
[68] *See, e.g. Stasch v. Underwater Works, Inc.*, 52 Del. 397, 402 (Del. 1960) ("Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.")(quoting

the extent the PII Indemnity and the Assumption and Indemnification Agreement specifically address environmental liabilities and are in conflict with the TEG Indemnity because the TEG Indemnity would impose the directly opposing indemnity obligations for the very same Blue Tee liabilities, the Assumption and Indemnification Agreement (and its predecessor, the virtually identical PII Indemnity) must prevail. As set forth above, the undisputed language of § 3(a)(ii) of the Assumption and Indemnification Agreement provides that Peabody and GFML must indemnify GEF for:

> [A]ll environmental claims and liabilities resulting from any activities or operations prior to the date hereof by Peabody Investments, Inc., Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively, "PII/PGI"), or from conditions of or relating to any property of or controlled by such entities prior to the date hereof, such environmental claims and liabilities, being, without limitation, claims that the environment or the health or safety of any human or animal has been threatened or harmed by contaminants, pollutants or toxic or hazardous materials or substances, and shall include all attorneys' fees and litigation costs relating thereto.[69]

Thus, while § 3(a)(ii) of the Assumption and Indemnification Agreement is specifically addressed to indemnity for "environmental claims," the TEG Indemnity obliges TXU to indemnify Peabody's parent entity for "all" claims and liabilities "from or out of the TEG Group." The conflict between these two obligations is inherent: Peabody must indemnify TXU for claims and liabilities,

---

Restatement of Contracts § 236(c) (1932)); *DCV Holdings v. Conagra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

[69] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 13.

and TXU must indemnify Peabody for claims and liabilities. Thus, the above indicated rules of contract construction must resolve this conflict. Given that the Assumption and Indemnification Agreement is specifically limited by its terms to environmental claims, while the TEG Indemnity could not be more general in its inclusion of "all" claims "arising from or out of the TEG Group," the Assumption and Indemnification Agreement prevails herein. To hold otherwise would render the Assumption and Indemnification Agreement meaningless, as it would be swallowed by the TEG Indemnity and rendered a practical nullity; a contract should not be interpreted so as to render its provisions illusory or meaningless.[70]

Peabody and GFML assert that the rule of construction requiring that specific language prevail of general language is not implicated because there is no conflict between the two provisions.[71] However, this argument rests on the premise that the Blue Tee liabilities are not covered by the Assumption and Indemnification Agreement.[72] Given that this Court holds to the contrary, these two provisions are in direct conflict. Thus, the indemnities are not "circular," as asserted by Peabody and GFML;[73] rather, the specific language contained in the Assumption and Indemnification Agreement represents a specifically drafted

[70] *See, e.g.*, *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).
[71] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 30 n.12.
[72] *Id.*
[73] *Id.* at 31. *See also supra* note 5.

exception to the baseline arrangement that TXU will indemnify Peabody's parent entity for TEG's liabilities.

Finally, the Court rejects Peabody and GFML's contention that the foregoing principle of contract interpretation does not apply because the conflicting provisions are not within the same agreement.[74] It is undisputed that the Assumption and Indemnification Agreement was executed to implement the requirements of § 6 of the Participation Agreement, which was the PII Indemnity.[75] It is further undisputed that the TEG Indemnity is also contained within § 6 of the Participation Agreement.[76] Thus, the origins and language of these indemnities may be traced to the very same section of the same agreement.

d. The Absence of Insurance Coverage is Not a Condition to Indemnity.

Peabody and GFML contend that any obligation to provide indemnity is not implicated unless and until GEF or Blue Tee establishes the absence of insurance coverage for the claim. This issue turns on whether the absence of insurance coverage is a condition precedent to Peabody's Indemnity obligations herein; the parties do not dispute that the PII Indemnity states that Peabody must provide indemnity to TXU for environmental claims "to the extent not insured."[77]

---

[74] *Id.* at 30 n.12.
[75] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 12.
[76] *Id.* at 9.
[77] *Id.* at 9.

Significantly, the language of the PII Indemnity does not state that the duty to indemnify is exclusively triggered by a lack of insurance coverage. Thus, the existence of a condition precedent to performance must be ascertained from the intent of the parties, guided by parties' choice of language.[78]

Conditions precedent describe an act or event that must occur as a prerequisite to the duty to perform.[79] The use of certain language may be indicative that the parties intended to create a condition precedent; as noted by the Superior Court:

> Although no particular words are necessary for the existence of a condition, such terms as 'if,' provided that,' 'on condition that,' or some other phrase that conditions performance usually connote an intent for a condition rather than a promise. While there is no requirement that such phrases be utilized, their absence is probative of the parties' intention that a promise be made rather than a condition imposed, so that the terms will be construed as a covenant.[80]

In this case, none of the above quoted language is present, nor is the language at all suggestive of a condition precedent to indemnity. The language of the PII Indemnity merely offers an exception, or limit, to the indemnities provided by Peabody. Moreover, Peabody and GFML's arguments in this

---

[78] *See, e.g. Am. Original Corp. v. Legend, Inc.*, 689 F. Supp. 372, 378 (D. Del. 1988) ("Whether a term is a condition precedent is determined by the intention of the parties, as shown by the language of the agreement and the circumstances surrounding its performance.") (citation omitted); *SLMSoft.Com, Inc. v. Cross Country Bank*, C.A. No. 00C-09-163, 2003 WL 1769770, Jurden, J. (Apr. 2, 2003) (Mem. Op.).
[79] *See, e.g. Weiss v. N.W. Broadcasting, Inc.*, 140 F. Supp. 2d 336, 343 (D. Del. 2001).
[80] *SLMSoft.Com*, 2003 WL 1769770 at *12 (citing 13 *Williston on Contracts* § 38:7).

respect appear to be limited to the October 1998 agreements;[81] given that this Court holds indemnity is required under the May 1998 Assumption and Indemnification Agreement, the interpretation of this language is of no consequence in interpreting the most direct and relevant indemnity provision, namely § 3(a)(ii) of the Assumption and Indemnification Agreement.

As previously noted, this opinion does not resolve GEF's motion for summary judgment on Count II of its Amended Complaint to the extent that GEF seeks to have the October 1998 Insurance Agreement declared an independent basis for indemnity. The 1998 Insurance Agreement states that it has "no effect whatsoever on that certain Assumption and Indemnification Agreement between P&L Coal Holdings Corporation and Texas Utilities Corporation."[82] Accordingly, analysis of the language of the 1998 Insurance Agreement is not necessary for this opinion, as it is unnecessary to this Court's holding with respect to the PII Indemnity and § 3(a)(ii) of the Assumption and Indemnification Agreement.[83]

[81] Defs.' Opp'n. to Pl.'s Mot. for Summ. J. at 22 ("[A]ny obligations of GFML under the 1998 Insurance Agreement are limited to claims arising from 'insurance impairment.'")
[82] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 16.
[83] However, the October 1998 Insurance Agreement is relevant herein to the extent it comprises the proffered extrinsic evidence, as discussed *infra* pp. 61-62.

2. Blue Tee is a Third Party Beneficiary of the 1998 Indemnity Agreements.

In Counts IV and V of its crossclaim against Peabody and GFML, Blue Tee seeks to enforce the Assumption and Indemnification Agreement as a third party beneficiary. Given the Court's holding with respect to the Assumption and Indemnification Agreement, Blue Tee's rights herein are dependent upon whether it has standing as a third party beneficiary.

A third party beneficiary may recover on a contract made for that third party's benefit.[84] The creation of third party beneficiary rights requires that the contract confer an intended benefit on the third party, and the conferral of such benefit must be a material part of the contract's purpose.[85]

There are generally three categories of third party beneficiary status: creditor beneficiary, donee beneficiary, and incidental beneficiary; of these three, only an incidental beneficiary does not have standing to enforce the contract.[86] Conversely,

> [i]t is universally recognized that where it is the intention of the promisee to secure performance of the promised act for the benefit of another, either as a gift or in satisfaction

[84] *Wilmington Hous. Auth. v. Fid. & Deposit Co. of Md.*, 43 Del. 381, 394 (Del. 1946) ("[A]doption of the principles laid down by the eminent authors of the Restatement of the Law of Contract is the only satisfactory method of resolving the conflict. . . .[T]he promisor owes a duty both to a donee beneficiary and a creditor beneficiary, as well as a duty to the promisee, to perform the promise."); *Royal Indem. Co. v. Alexander Ind., Inc.*, 58 Del. 548, 551 (Del. 1965).
[85] *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 270 (Del. Ch. 1987).
[86] *Id.*

> or partial satisfaction of an obligation to that person, and the promisee makes a valid contract to do so, then such third person has an enforceable right under that contract to require the promisor to perform or respond in damages.[87]

GEF's predecessor, GFAC, sought to secure Peabody and GFML's performance of indemnification for the benefit of Blue Tee, in satisfaction of GFAC's obligation to indemnify Blue Tee, thereby making Blue Tee a creditor beneficiary. Indeed, the inherent purpose of an indemnity provision is to provide a benefit to the indemnitee. Consequently, Blue Tee, as the ultimate indemnitee, is necessarily an intended beneficiary of Peabody's promise to indemnify for these liabilities. Given that GFAC entered into a valid contract requiring Peabody to provide indemnity for the Blue Tee liabilities, Blue Tee has standing to enforce the contract herein.

With regard to this benefit being a material part of the agreements' purpose, Peabody and GFML are correct in their assertion that the instant indemnity provisions are relatively insignificant in the context of such a major transaction. However, that is not the proper inquiry for the instant analysis. The materiality factor must be considered in light of the intentions of the parties in including these specific provisions, rather than requiring that these provisions reflect the paramount intention of the parties for the transaction as a whole.[88] The

---

[87] *Id.* at 268.

[88] *See, e.g.* 9 John E. Murray, Jr., *Corbin on Contracts* § 44.2, at 51 (2007). ("requiring a court to find that the 'primary' or 'paramount' intention of the promisee or both parties is

Blue Tee liabilities (thus, by extension, Blue Tee itself) were the very purpose of § 3(a)(ii) of the Assumption and Indemnification Agreement.[89] Regardless of the extent of the parties' knowledge or familiarity with Blue Tee as a specific entity, it cannot be reasonably disputed that the contracting parties understood that the benefit of this indemnity would flow to a third party.[90] Therein, Blue Tee, as the indemnitee, was the very subject of the indemnity provision, notwithstanding any party's unawareness of the specific identity or nature of Blue Tee.[91] Accordingly, the benefit to Blue Tee was a material purpose of § 3(a)(ii) of the Assumption and Indemnification Agreement.

For the foregoing reasons, Blue Tee is a third party creditor beneficiary of the PII Indemnity and § 3(a)(ii) of the Assumption and Indemnification Agreement. Consequently, Blue Tee has standing to enforce these provisions. For the same reasons set forth in the preceding sections, these provisions require that

---

to benefit a third party, however, could preclude recovery by third parties who are creditors of the promisee.")

[89] *See, e.g. Blair v. Anderson*, 325 A.2d 94, 97 (Del. 1974) (holding that a prisoner who was not a party to the contract but was nonetheless the very subject of the agreement between the state and federal governments providing for his safekeeping and care has a direct interest in the contract and the right to enforce it.)

[90] *See, e.g. Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973) *aff'd at* 336 A.2d 211 (Del. 1975) (holding that the important fact in ascertaining third party status based on the parties intent was the promisor's awareness that his work was to be performed for the benefit of the third party beneficiary.)

[91] *See, e.g.* Restatement (Second) of Contracts § 308 (1981) ("It is not essential to the creation of a right in an intended beneficiary that [the beneficiary] be identified when a contract containing the promise is made.")

Peabody and GFML provide indemnity for the Blue Tee liabilities. Thus, Blue Tee is entitled to Summary Judgment on Counts IV and V of its crossclaim.

B. In the Alternative, the Extrinsic Evidence Discloses That There Are No Issues of Material Fact in Dispute, and that GEF Is Entitled to Judgment as a Matter of Law.

1. Introduction.

Because this Court finds the language of the PII Indemnity and the § 3(a)(ii) of the Assumption and Indemnification Agreement to be clear and unambiguous, extrinsic evidence need not be considered. However, assuming *arguendo* that the operative language of these agreements was ambiguous, this Court holds that its interpretation is corroborated by the parties' intentions, as shown by the submitted extrinsic evidence. Indeed, the extrinsic evidence, even if occasionally slightly contradictory on inconsequential points, does not, in the overall context of this case, create a genuine issue of material fact with respect to the extrinsic evidence herein, and the moving parties are entitled to judgment as a matter of law.

2. Peabody and GFML's Payment and Management of Claims from 1998 through 2007.

a. History of Peabody and GFML's Course of Conduct.

Peabody does not dispute that it managed and paid Blue Tee's referred

environmental liabilities without objection from 1998 through 2007, when, after a new General Counsel to Peabody was hired, it discovered its supposed "mistake" and began paying under a reservation of rights.[92] In 2007, sometime after the new General Counsel took office, Peabody concluded that it was not responsible for these environmental liabilities, and that it had been mistakenly and steadily paying on these claims since 1998.[93]

Peabody and GFML have not proffered any facts that led them to conclude that it had never been responsible for Blue Tee's environmental liabilities under the 1998 Agreements. The briefs revealed little on this score, and, at oral argument, counsel for Peabody stated that the circumstances surrounding Peabody's discovery of this mistake are privileged, explaining "[t]here are some communications about that that we have deemed to be privileged. And the result of that was that Peabody said we don't really owe these liabilities. This has been paid under a mistake."[94]

This Court need not decide whether Peabody and GFML have a valid argument with respect to the privileged status of any such information. Peabody and GFML have introduced no sufficient facts to support their contention that they are not responsible for these liabilities. Based on the information presented

[92] Tr. at 54; Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 20.
[93] Tr. at 54.
[94] Tr. at 53-54.

by Peabody and GFML, the only reasonable inference to be drawn as to the origins of this mistake is that Peabody reviewed the relevant contract language (which was unchanged from 1998) and, beginning in 2007, interprets it in a new way that now does not require them to indemnify GEF for Blue Tee's environmental liabilities.

Peabody and GFML's unsubstantiated assertion that their conduct can be explained by a decade-long "mistake" cannot defeat the instant motions for summary judgment for two reasons. First, any alleged mistake in Peabody and GFML's contract interpretation is irrelevant, as contract interpretation is a question of law, and this Court has already decided that the plain meaning of the contract language requires Peabody and GFML to indemnify GEF for these claims. Second, once a motion for summary judgment is properly supported, the burden shifts to the non-moving party to demonstrate material facts in dispute.[95] As provided by Superior Court Rule of Civil Procedure 56(e), the non-moving party "must set forth specific facts showing that there is a genuine issue for trial."[96] On the other hand, "if the facts permit reasonable persons to draw from them but one inference, the question is ripe for summary judgment."[97] Accordingly, to defeat summary judgment herein, Peabody and GFML were

[95] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. Super. 1970).
[96] Super. Ct. Civ. R. 56(e).
[97] *Brzoska*, 668 A.2d at 1364 citing *Wootten v. Kiger*, 226 A.2d 238 (Del. 1967).

required to "do more than simply show that there is some metaphysical doubt as to material facts."[98]

In this case, Peabody and GFML have introduced no material facts that would explain their extended course of conduct, other than to stand on their assertion of a mistake that was discovered under circumstances deemed privileged. At oral argument, counsel for Peabody and GFML stated that there were some arguably privileged communications between Peabody and its outside counsel, the result of which "was that Peabody said we don't really owe these liabilities."[99] Although Peabody and GFML have obliquely indicated that the testimony of certain Peabody-side negotiators to the 1998 transaction may potentially create disputes of material fact at trial, Peabody and GFML did not develop or support this possibility. For example, during oral argument, counsel for Peabody and GFML initially stated that they had opted not to examine their witness, Mr. Herlihy (a Peabody side negotiator), during his deposition, but represented that Mr. Herlihy might be expected to "testify more extensively about certain issues" at trial.[100] Subsequently, when questioned by the Court as to whether Peabody and GFML had "elected not to ask deponent Felix Herlihy any questions," Peabody and GFML's counsel responded that he had "misspoke[n]

[98] *Id.* citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[99] Tr. at 54.
[100] *Id.* at 58.

about [Peabody and GFML electing not to ask Mr. Herlihy any questions]" and that they in fact "did briefly ask him some questions."[101] The Court followed with the question of whether there is any duty incumbent on parties to develop the factual record during the course of discovery, and Peabody and GFML's counsel responded that this would be a "tactical decision" but that "you run the risk as a litigant that if you don't do that, a judge may say, well, I think I have enough here without that."[102]

Although the question of whether and to what extent a litigant will depose his own witnesses may be a tactical decision, it remains that the burden shifts to the non-moving party once a motion for summary judgment is properly supported, and the non-moving party must do more than merely allege "some metaphysical doubt as to material facts."[103] To the extent that any facts may be disputed, such facts are immaterial as, regardless of the resolution of any remaining factual disputes, the Court's decision would be unchanged.[104] Consequently, Peabody and GFML's failure to develop a factual record (assuming, without deciding, that they could) that could demonstrate any genuine issue of material fact in dispute now precludes it from carrying its burden. Indeed, on the current record, all Peabody and GFML can allege is some

[101] Tr. at 81.
[102] *Id.* at 82.
[103] *Id.* citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[104] *See, e.g. State Farm Mut. Auto. Co. v. Mundorf*, 659 A.2d 215, 217 (Del. 1995).

speculative, or "metaphysical," possibility of a dispute of fact, to potentially emerge at the time of trial, based on what facts its witnesses may or may not testify to at trial.[105] As previously stated, motions for summary judgment must be decided on the current factual record, not on evidence or facts that are "potentially possible."[106]

Also, as a practical matter, a trial of the issues raised by the two motions for summary judgment that are the subject of this opinion would consist in very large part of repetitive and unnecessary testimony given that it will be a nonjury trial, and such a trial would, at most, provide an opportunity for the Court to assess the credibility of witnesses proffering testimony that is immaterial or of minimal importance to the Court's interpretation of these agreements. When asked by the Court what a trial would "look like," counsel for GEF responded:

> [T]he reality is, I don't what we'd do, because the testimony is all on the record. . . .I don't know what we'd do because there isn't really any credibility issue on these claims. On the GEF versus Peabody issues there are, we don't think, any credibility issues. . . .We'd probably put all these same documents into evidence. You've received them all. We'd have the exact same record. We'd give you the same deposition excerpts that we gave you on this motion. The record, I think, would be identical to what you have.[107]

---

[105] Noteworthy, Peabody does not dispute that Mr. Herlihy approved a preliminary offering memorandum on behalf of P&L coal which stated: "The Company has agreed to indemnify Gold Fields' former parent company [PII] for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of Gold Fields to the Company." Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 18-19.

[106] *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974).

[107] *Id.* at 32-33.

Counsel for Peabody and GFML took the opposite position and maintained that a trial is necessary herein. When asked if the chief purpose of a trial would be "to determine the credibility of some of the witnesses who've offered extrinsic evidence to explain their understanding of [the agreements]" and what the Court would "be likely to hear in the way of testimony that would be different than what's now part of the record," counsel for Peabody and GFML replied that Mr. Herlihy is likely to testify, notwithstanding the fact that he is not a resident of Delaware, and that "Mr. Herlihy, Mr. Washkowitz and Mr. Lentz, the three people who were involved on the side of the Lehman folks, and then ultimately Peabody, GFML, those folks all said they never heard of GFML. That's a question of credibility."[108]

Taken together, the only reasonable inference to be drawn from the facts as alleged by Peabody and GFML is that their contract interpretation, a legal rather than factual analysis, lead them to conclude they did not owe indemnity. The Court has already held to the contrary with respect to the contract language at issue. Thus, once GEF successfully demonstrated the absence of material facts in dispute, it became Peabody and GFML's burden to refute this and adduce material factual issues in dispute.

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

b. Legal Significance of Peabody and GFML's Longstanding Course of Conduct.

Peabody and GFML's inability to negate or rebut the import of the foregoing extrinsic evidence must be juxtaposed with Delaware law regarding the significance of the parties' actions and course of conduct in interpreting a contract. Although this dispute is now resolved based on the plain meaning of the contract language, a review of the extrinsic evidence leads to the same result. As stated by the Supreme Court of Delaware, the actions of the parties are "of great weight in determining the meaning and applicability of the contract, and lead the Court to a presumptively correct interpretation."[109] Similarly, the Court of Chancery of Delaware has held that, when using extrinsic evidence to interpret an ambiguous contract, "any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."[110] The Supreme Court of Delaware has stated that the "great weight" afforded to the conduct of the parties is sufficiently probative that, "when reasonable, [the interpretation attributable to the parties' conduct will] be adopted and enforced by the courts."[111]

[109] *Artesian Water Co. v. Dep't of Highways & Transp.*, 330 A.2d 441, 443 (Del. 1974) (citations omitted).
[110] *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 399 (Del. Ch. 2008) citing Restatement (Second) of Contracts § 202; cmt. G (1981).
[111] *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939).

As discussed, there is no dispute that Peabody and GFML managed and paid these claims without objection or qualification for a period of approximately nine years, from 1998 through 2007. No material factual issues that might negate or vitiate this longstanding course of conduct have been presented; at most, Peabody and GFML have presented evidence of a possible reevaluation of the relevant contract language, leading it to a different (and incorrect) interpretation. This is not a factual issue, and Peabody and GFML have failed to demonstrate any material issues of fact in dispute. Indeed, they have barely shown a "metaphysical doubt as to material facts."[112] Instead, the facts set forth above permit "reasonable persons to draw…but one inference."[113] Peabody and GFML's course of conduct over many years must be given "great weight," herein because "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."[114] Accordingly, there are no genuine issues of material facts herein, and movants are entitled to judgment as a matter of law.

[112] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[113] *Id.* citing *Wootten v. Kiger*, 226 A.2d 238 (Del. 1967).
[114] Restatement (Second) of Contracts § 202; cmt. G (1981)

3. Peabody and GFML's Pursuit and Acceptance of Rights Under the Relevant Insurance Policies.

The parties agree that GEF assigned its right to receive indemnity under any applicable policy of insurance covering the Blue Tee Liabilities, and any potential rights of action against the issuing insurers, to GFML, a Peabody subsidiary.[115] This assignment was accomplished via separate agreement dated October 19, 1998 (the "1998 Insurance Agreement").

Although the 1998 Insurance Agreement itself might be classified as singular action limited to its date of execution, its rationale and effect were deeply intertwined with the course of conduct described in the preceding subsection. Insurance policy rights are indisputably related to the management and resolution of the underlying claims covered by said policies. Thus, not only did Peabody and GFML acquiesce and undertake a course of conduct spanning nearly ten years, but they affirmatively agreed to receive rights that facilitated this conduct and benefitted Peabody and GFML by allowing them to attempt to offset or recoup their losses on these liabilities, to the extent insurance proceeds were tendered. Consequently, the reasoning set forth in the preceding subsections also applies to the assignment of these insurance policies; that is, Peabody and GFML's actions in accepting this assignment of rights are entitled "great weight

[115] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 10.

in determining the meaning and applicability of the contract," and it should "lead the Court to a presumptively correct interpretation."[116]

Peabody and GFML have offered no genuine issues of material fact that would permit any reasonable alternative inferences; their only rejoinder to GEF's motion is again an assertion that this conduct is also part of their mistake. Thus, the analysis herein is identical to the analysis in the preceding subsection. Therefore, there are no genuine issues of material facts with respect to this extrinsic evidence, and this evidence is consistent with this Court's holding as to the meaning of the Assumption and Indemnification Agreement. Accordingly, movants are entitled to judgment as a matter of law.

4. Correspondence from Jeffrey Klinger.

On August 6, 1998, Jeffrey Klinger, then Vice President of Legal Services and Secretary of Peabody, sent a letter to Mr. John McReynolds, of GFAC, requesting that GFAC's rights under the relevant insurance policies with respect to Blue Tee Liabilities be assigned to Peabody. In relevant part, the letter reads as follows:

> I am writing in connection with a proposed agreement between [PII], formerly known as GFAC, and [P&L Coal], which John Kazanjian of Anderson Kill & Olick sent you today at my request. This agreement proposes to assign to P&L [Coal] claims that GFAC has against insurance companies that sold liability insurance to the corporate

[116] *Artesian Water Co. v. Dep't of Highways & Transp.*, 330 A.2d 441, 443 (Del. 1974) (citations omitted).

> predecessors of GFAC. GFAC is prosecuting some of these claims in the New York insurance coverage litigation. GFAC has had the right to assert these claims and prosecute the New York coverage action in its capacity as assignee and subrogee of [Blue Tee]. GFAC had previously agreed to indemnify, defend and hold [Blue Tee] harmless from losses relating to environmental claims as the result of a corporate reorganization. Blue Tee then assigned to GFAC the right to make coverage claims against any of the relevant insurance companies. Because P&L [Coal] now has agreed to indemnify GFAC and other Texas Utility entities with respect to environmental liabilities and GFAC is being dissolved, we thought it was necessary to assign these insurance claims to P&L [Coal] which essentially will be assuming the environmental liabilities for which coverage is being sought.[117]

When questioned about this letter during his deposition, Mr. Klinger testified as follows:

> Q. Your argument to Mr. McReynolds is that TXU should cause these insurance claims to be assigned to you because P&L has agreed to indemnify GFAC and other Texas Utilities entities with respect to environmental liabilities, correct?
>
> A. That's what it states. I would agree with that.[118]

It is also undisputed that, on October 16, 1998, Mr. Klinger sent a fax to Mr. McReynolds proposing a revised agreement. The cover sheet to this fax stated:

> As I discussed with you on the telephone earlier in the week, we have decided to replace the proposed agreement between Peabody Investments and P&L Coal Holdings

[117] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 15; Opening Br. in Supp. of Pl.'s Mot. for Summ. J. Ex. A.

[118] Klinger Dep. at 150. This testimony was provided over Peabody's objection that Mr. Klinger's response is privileged. *Id.* at 149.

> Corporation which was sent to you August 6, 1998 with the attached Agreement.
> This agreement differs in the following two principal requests:
>
> 1. The party is Gold Fields Mining Corporation rather than P&L Coal Holdings.
> 2. GFMC is now agreeing to assume all of PII's liabilities to Blue Tee under the Understanding and Agreement (copies of which have been previously given to you. See numerical paragraph 1. . .[119]

The draft agreement included with this fax stated that "GFMC hereby assumes the obligations of GFAC to Blue Tee under the Understanding and Agreement and its supplements."[120]

Although Mr. Klinger's subjective rationale for authoring this letter is asserted to be privileged, and the inferences to be drawn may be disputed, the text of the letter speaks for itself. Separate and apart from any subjective or unique (and perhaps privileged) understanding that Mr. Klinger may have possessed, it remains true that the interpretation of this agreement must be divined from the standpoint of a reasonable person in the position of the parties at the time of contracting.[121] Viewed in this light, the only reasonable interpretation of Mr. Klinger's letter is entirely consistent with the foregoing courses of conduct, including handling claims and accepting the insurance policies relevant to those claims.

---

[119] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 15-16.
[120] *Id.*
[121] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738-39 (Del. 2006).

All facts surrounding Peabody and GFML's conduct, including Mr. Klinger's correspondence, are susceptible to only one reasonable inference, thus summary judgment is appropriate.[122] Peabody and GFML's averments of mistake are equally unavailing herein,[123] for the reasons set forth in the preceding subsections. Accordingly, there are no genuine issues of material facts herein, and movants are entitled to judgment as a matter of law.

5. Financial Statements and SEC Filings.

The balance sheets and Peabody's relevant SEC filings reflect the contracting parties' intent regarding the instant environmental liabilities. Indeed, an internal GFMC balance sheet dated April 30, 1998, prior to the closing of the 1998 transaction, does not reflect a reserve for environmental liabilities, while an internal balance sheet dated January 6, 1999, secondary to the closing of the 1998 transactions, reflects an "Environmental Reserve" of $60,139,298.13; this amount is consistent with the $60.139 million sum of environmental liabilities shifted from PII's stand-alone balance sheet to P&L Coal's balance sheet.[124] A post-

[122] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) citing *Wootten v. Kiger*, 226 A.2d 238 (Del. 1967).
[123] *See* Tr. at 55 (Counsel for Peabody stated at oral argument that "the letters from Klinger, the benchmark balance sheet were all predicated on the fact that we owed those liabilities.")
[124] Statement of Agreed Facts for Purposes of Mot. for Summ. J. at 18.

closing price adjustment, as provided for in the Participation Agreement, reflects these liabilities.[125]

Moreover, Peabody filed a Form S-4 Registration Statement with the SEC in which it states that it "agreed to indemnify [GFMC's former parent for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of [GFMC] to the Company."[126] In its SEC filings from 1999 through 2009, Peabody included language that it had "agreed to indemnify [GFMC's] former parent company for any environmental claims resulting from any activities, operations or conditions that occurred prior to the sale of [GFMC] to us."[127]

Peabody and GFML do not dispute this, but again defer to their overarching assertion of a mistake. At oral argument, counsel for Peabody and GFML explained this evidence as follows:

> [W]e think things like the benchmark balance sheet, while it's referred to in the contract, it is not a-it is not a part of the contract. And there are a number of items such as the benchmark balance sheets and the SEC filings and the ten year history of what we did and how we paid out a lot of money and the Klinger letter and so on. All of those things were done in the belief that we owed those liabilities. There's no question about that. We honestly and forthrightly believed we owed them.
>
> * * *
>
> The SEC were-filings, the letters from Klinger, the benchmark balance sheet were all predicated on the fact

[125] *Id.*
[126] *Id.* at 19.
[127] *Id.*

> that we owed those liabilities. We couldn't have-of course the SEC filings reflected what we believed our liabilities were. We wouldn't have filed something that wasn't-that we didn't believe to be accurate. And it would have been stunning if the SEC filings showed anything but that under these circumstances.[128]

Thus, Peabody and GFML do not dispute the contents of the balance sheets or the SEC filings, but instead dispute the facts giving rise to these documents and, therein, attacks the weight it should be given as extrinsic evidence. For the reasons set forth above, Peabody and GFML's claims of mistake fail to raise a genuine dispute of material fact, and this evidence simply bolsters the foregoing conclusions. Again, these cumulative facts are susceptible to only one reasonable interpretation, and the Court's decision would be identical, whether grounded on the unambiguous contract language or extrinsic evidence. Accordingly, there are no genuine issues of material facts herein, and movants are entitled to judgment as a matter of law.

VI. Conclusion

For the foregoing reasons, the motion for summary judgment of plaintiff, GEF, on Count I of its Amended Complaint, for a declaratory judgment against Peabody and GFML, is **GRANTED.** It follows, as a matter of law, that GEF's motion for summary judgment on Counts II through IV of Peabody and

[128] Tr. at 53-55.

GFML's counterclaims is also **GRANTED** because such potential counterclaims against GEF are extinguished by this disposition.

Likewise, based on the foregoing, the motion for summary judgment of defendant, Blue Tee, on Counts I and II of its crossclaims against Peabody and GFML (to the extent these counts seek relief under the Participation and Assumption and Indemnification Agreements) for a declaratory judgment against GFML and a Declaratory Judgment against Peabody, respectively, is **GRANTED.** It follows, as a matter of law, that Blue Tee's motion for summary judgment on Counts I and II of Peabody and GFML's crossclaims against Blue Tee, for a declaratory judgment and a claim of unjust enrichment against Blue Tee, respectively, is also **GRANTED** because such potential crossclaims against Blue Tee are extinguished by this disposition granting GEF's and Blue Tee's motions for summary judgment against Peabody and GFML.

_____

Richard R. Cooch

oc: Prothonotary