IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PPG INDUSTRIES, INC., Plaintiff, v. WESTLAKE CORPORATION, AXIALL CORPORATION, WESTLAKE US 2 LLC (f/k/a EAGLE US 2 LLC), and EAGLE SPINCO INC., Defendants.	C.A. No. 2024-0648-NAC

POST-TRIAL MEMORANDUM OPINION

Date Submitted: August 4, 2026
Date Decided: November 18, 2026

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COOK, V.C.

In 1998, cargo ship *DG Harmony* caught fire off the coast of Brazil. After attempting to fight the flames, the crew abandoned ship, and the fire destroyed the vessel and most of its cargo. A flurry of lawsuits followed. In a consolidated action, the United States District Court for the Southern District of New York found that calcium hypochlorite manufactured by PPG Industries, Inc. caused the fire. PPG settled the claims for $81.5 million, with insurance contributing $56.5 million after PPG satisfied a $25 million self-insured retention amount.

In 2006, Di Gregório Navegação Ltda. ("Di Gregorio")—a Brazilian cargo transportation company that sub-chartered the *DG Harmony*—filed a lawsuit against PPG in Brazil. Despite being named in the consolidated New York action, Di Gregorio never appeared. In 2009, the New York court entered an order of default judgment against Di Gregorio, specifically enjoining the Brazil lawsuit. Notwithstanding the New York court's order, the Di Gregorio litigation in Brazil continued, and, in 2010, the Brazil court found PPG liable against Di Gregorio.

In 2013, PPG spun off its commodity chemicals business through a transaction involving Georgia Gulf Corporation, later renamed Axiall Corporation. The transaction was governed by a series of agreements, including a Separation Agreement and a Contribution Agreement. Those agreements addressed the transfer of assets and assumption of liabilities, the parties' indemnification rights and obligations, and their rights and responsibilities concerning insurance. As relevant here, the Separation Agreement allocated responsibility for the Di Gregorio litigation

to entities in the spun-off business. And PPG retained the insurance policies potentially covering the Di Gregorio litigation.

For years after the transaction, the spun-off entities defended the Di Gregorio litigation and communicated with PPG's insurers, including submitting invoices for defense costs. In 2023 and 2024, the Di Gregorio litigation was coming to a head. A decision on damages was imminent, and everyone started taking positions. Despite years of communication—including about strategy and settlement—the insurers refused to engage with the spun-off entities without an assignment from PPG, and they denied coverage for the Di Gregorio litigation. PPG refused to assign any rights to the insurance until any judgment in the Di Gregorio litigation was satisfied. The spun-off entities demanded an assignment before they would pay anything in the Di Gregorio litigation.

In May 2024, the Brazil court entered a substantial damages award against PPG. The next month, PPG filed this action asking the Court to order the spun-off entities and their subsequent acquirer (collectively, Defendants here) to substitute PPG out of the Di Gregorio litigation and post a bond or satisfy the judgment. Defendants countered, asking the Court to order PPG to assign insurance rights to them.

This decision denies PPG's requests for specific performance and grants Defendants' in part. Even assuming PPG has proven a breach of contract, it has not shown, by clear and convincing evidence, that specific performance is appropriate. PPG waited to request substitution for 11 years after the spinoff, and it would violate

principles of comity for this Court to order Defendants to take any action in the Di Gregorio litigation when that litigation was specifically enjoined by the New York court's 2009 order. Defendants are entitled to an assignment of insurance proceeds, but, under the Separation Agreement's terms, only for the costs of defending PPG in the Di Gregorio litigation that they have already incurred and paid.

The parties agree that the spun-off entities are ultimately responsible for any enforceable judgment and related losses. And Defendants continue to defend the Di Gregorio litigation and have committed to hold PPG harmless against any attempts to enforce the Di Gregorio judgment. The parties also agree that the spun-off entities are entitled to an assignment of insurance proceeds at some point. Boiled down, the parties tussle over the logistics of their contractual obligations, with the crux of the dispute concerning sequencing and timing. Like colleagues arriving at the entrance to the office, PPG and Defendants are dancing over who goes first and who will hold the door. In the end, they'll both make it inside.

I. FACTUAL BACKGROUND

The following facts were stipulated to by the parties or proven by a preponderance of the evidence at trial.[1]

[1] *See* Dkt. 147, Pre-Trial Stipulation and Order ("PTO"). The trial record includes live testimony from two fact witnesses and four experts, 234 joint exhibits, and three deposition transcripts. Trial testimony is cited as "TT [Page]:[Lines] (Name)." *See* Dkts. 179–80. Exhibits are cited by the numbers provided on the parties' joint exhibit list as "JX ___," unless otherwise defined. *See* Dkt. 170. Pincites refer to pagination stamped with the parties' joint exhibit numbers. Deposition transcripts are cited as "[Name] Dep. [Page]:[Lines]."

A. The Parties

Plaintiff PPG Industries, Inc. is an industrial conglomerate based in Pittsburgh, Pennsylvania. Through a Separation Agreement dated July 18, 2012,[2] PPG agreed to spin off its commodity chemicals business in a transaction (the "Spinoff") with Georgia Gulf Corporation, which was subsequently renamed Axiall Corporation.

Defendant Eagle Spinco Inc. was PPG's counterparty to the Separation Agreement and is a wholly owned subsidiary of Axiall.[3]

Defendant Eagle US 2 LLC (now Westlake US 2 LLC) is a subsidiary of Eagle Spinco.[4] Eagle US 2 was a party to the Contribution Agreement dated January 22, 2013, with PPG as its counterparty.[5] The purpose of the Contribution Agreement was "solely to effect the transfer of" assets and liabilities contemplated by the Separation Agreement.[6]

Defendant Axiall Corporation is Eagle Spinco's parent company. Axiall acquired Eagle Spinco in 2013. This decision refers to Axiall, Eagle US 2, and Eagle Spinco as the "Spinco Group."

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[2] JX 23.

[3] PTO ¶ 2.

[4] *Id.* ¶ 3.

[5] JX 41.

[6] *Id.* § 1.2.

Defendant Westlake Corporation is Axiall's, Eagle Spinco's, and Eagle US 2's ultimate parent company.[7] Westlake acquired Axiall in 2016.[8] Westlake is not a party to the Separation or Contribution Agreements. This decision refers to Westlake and the Spinco Group as "Defendants."[9]

B. The *DG Harmony* Fire and Ensuing Litigation

In November 1998, an explosion occurred aboard the container ship *DG Harmony* off the coast of Brazil.[10] The explosion caused a total loss of the ship and its cargo. Among *DG Harmony*'s cargo was PPG-manufactured calcium hypochlorite.[11] Following the *DG Harmony* fire, numerous parties sued PPG, alleging that its calcium hypochlorite caused the explosion and subsequent fire. The claims were consolidated in the United States District Court for the Southern District of New York. In 2009, the court entered a judgment, finding PPG liable for the

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[7] PTO ¶ 5.

[8] JX 92; JX 98.

[9] As explained below, however, the Court concludes that Westlake is not a proper defendant in this action.

[10] PTO ¶ 15.

[11] *Id.* ¶ 16.

explosion and the resulting fire.[12] PPG eventually settled the lawsuits for approximately $81.5 million.[13]

C. The Di Gregorio Litigation

On January 11, 2006, Di Gregório Navegação Ltda ("Di Gregorio")—a Brazilian cargo transportation company that sub-chartered the *DG Harmony*—filed a lawsuit against PPG in the 13th Civil and Work Accident Court of the District of Manaus, State of Amazonas, Brazil (the "Di Gregorio Litigation").[14] PPG hired the Brazilian law firm Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados ("Mattos Filho") as defense counsel in the Di Gregorio Litigation.[15]

Di Gregorio was a named party in the consolidated New York litigation but did not appear.[16] In June 2006, PPG filed a lawsuit against Di Gregorio in the Southern District of New York, seeking to enjoin the Di Gregorio Litigation.[17] On October 28, 2009, the New York court entered a default judgment in PPG's favor, declaring that PPG was not liable to Di Gregorio and enjoining Di Gregorio from pursuing any

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[12] PTO ¶¶ 17–18. For a comprehensive recitation of these facts, *see In re M/V DG Harmony*, 394 F. Supp. 2d 649 (S.D.N.Y. 2005), *opinion clarified*, 2007 WL 895251 (S.D.N.Y. Mar. 16, 2007), and *aff'd in part*, *vacated in part*, *rev'd in part*, 533 F.3d 83 (2d Cir. 2008).

[13] TT 162:2–10 (Bloch).

[14] PTO ¶¶ 19, 21.

[15] *Id.* ¶ 22; JX 10.

[16] PTO ¶ 20.

[17] JX 11.

claims against PPG for losses arising from the *DG Harmony* fire (the "SDNY Order").[18] The SDNY Order expressly enjoined the Di Gregorio Litigation.[19]

Notwithstanding the SDNY Order, the Brazil court allowed the Di Gregorio Litigation to proceed and, in January 2010, entered judgment against PPG in the liability phase of the litigation.[20] PPG appealed the liability finding but was unsuccessful.[21]

At the time of the *DG Harmony* fire, PPG maintained an insurance tower worth $350 million, subject to a $25 million self-insured retention.[22] PPG notified its insurers about the *DG Harmony* fire and submitted insurance claims for liabilities arising from it, including the Di Gregorio Litigation.[23] Before the Separation Agreement was executed in 2012, PPG had received about $56.5 million in reimbursement from its insurance for *DG Harmony*-related losses.[24] Just under $300

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[18] JX 12.

[19] *Id.*

[20] PTO ¶ 24.

[21] *Id.* ¶¶ 25–28.

[22] JX 1–9; JX 147; TT 135:12-18, 161:6-22 (Bloch).

[23] TT 131:1–10 (Bloch).

[24] *Id.* 162:2–10 (Bloch); *see also* JX 13; JX 14; JX 73.

million of insurance remains available under PPG's applicable insurance policy. And the Di Gregorio Litigation is the only remaining open claim under that policy.[25]

D. The Spinoff

In 2012, while the Di Gregorio Litigation was proceeding, PPG agreed to spin off and sell its chlor-alkali, derivatives, and other commodity chemicals business to Georgia Gulf (now Axiall) through a series of agreements, including, as relevant here, the Separation Agreement and the Contribution Agreement.

Through the Separation Agreement, PPG agreed to transfer certain assets to Eagle Spinco, and Eagle Spinco agreed to assume certain liabilities, with the remaining assets and liabilities to be retained by PPG.[26] The Contribution Agreement effectuated the transfer of the assets and liabilities to Eagle US 2 (an Eagle Spinco subsidiary) in accordance with the terms of the Separation Agreement.[27]

Among the liabilities Eagle US 2 assumed under the Separation Agreement was the Di Gregorio Litigation (the "Di Gregorio Liability").[28] According to the

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[25] TT 162:17–24 (Bloch); *id.* 383:4–7 (Posner); *id.* 539:3–15 (Baker); McClain Dep. 162:17–165:9.

[26] *See* JX 23 at 6.

[27] JX 41 § 1.2.

[28] *See* JX 23 §§ 2.5(a)(i), (ix), (xi). The Di Gregorio Litigation is also included in the list of transferred "Spinco Assets." JX 23 § 2.4(a)(xiii) ("all rights to causes of Action, lawsuits, judgments, claims and demands that are, in each case, related primarily to the Eagle Business, including those listed or described on Schedule 2.4(a)(xiii)[.]"); JX 24.12 (listing the Di Gregorio Litigation in the schedule of open matters); *see also* Dkt. 184, Defendants Post-Trial Opening Brief ("Defs. PTOB") at 56 ("Defendants have admitted, during discovery and

insurance experts who testified at trial, the industry norm is that the rights to insurance policies follow the liabilities they cover.[29] The Separation Agreement departed from this norm. Instead of following the Di Gregorio Liability, the insurance policy covering the Di Gregorio Liability remained with PPG as an excluded asset under the Separation Agreement.[30]

Although PPG retained its rights to insurance policies, the parties negotiated a carve-out that imposed on PPG the obligation to pursue coverage under relevant policies using commercially reasonable efforts.[31] The parties also separately addressed the interplay between indemnification and insurance, providing that the potential availability of insurance not permit delay of indemnification.[32] Further to this concept, the parties agreed that an indemnifying party would be entitled to an assignment of PPG's claim for insurance proceeds upon payment of indemnification and expressed an overarching intent that no provision of the Separation Agreement result in a "windfall" for insurers or relieve insurers of the obligation to provide coverage.[33]

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then at trial, that Eagle US 2 assumed the *Di Gregorio* liability, subject to the terms and conditions of the Separation Agreement.").

[29] TT 378:12–19, 379:12–17 (Posner); *id.* 563:10–17 (Baker).

[30] JX 23 § 2.4(b)(iv).

[31] *Id.* § 6.11(a); *accord id.* § 5.4(b).

[32] *Id.* § 5.4(b).

[33] *Id.*

On December 14, 2012, in anticipation of the Spinoff, PPG's in-house counsel informed PPG's insurers that the Di Gregorio Litigation "will become the responsibility of [Eagle Spinco]" and explained that PPG "envision[s] that the carriers will continue to reimburse or pay directly defense and indemnity costs in the open matters."[34] The Spinoff closed on January 28, 2013.[35] Diana Reed—the in-house attorney who had been overseeing the Di Gregorio Litigation at PPG—moved to Axiall and continued to manage the defense of the Di Gregorio Litigation.[36] PPG did not ask Axiall to substitute itself or one of its subsidiaries as the named defendant in the Di Gregorio Litigation.

In August 2016, Westlake acquired Axiall and its subsidiaries through a reverse triangular merger.[37] Reed moved to Westlake and continued managing the defense of the Di Gregorio Litigation.[38] Mattos Filho continued to represent PPG in Brazil at Westlake's direction.[39] PPG still did not request substitution of Westlake or one of its subsidiaries as the named defendant in the Di Gregorio Litigation.

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[34] JX 37.

[35] PTO ¶ 6.

[36] TT 242:22–243:16; 248:4–21 (Kroger).

[37] PTO ¶ 13; JX 92; JX 97.

[38] TT 242:22–243:16; 248:4–21 (Kroger).

[39] *Id.* 316:13–16 (Kroger).

E. Westlake and Mattos Filho Discuss Potential Substitution of PPG as the Defendant in the Di Gregorio Litigation

On April 20, 2021, Mattos Filho emailed Richard Kroger, assistant general counsel at Westlake, seeking clarification about "the nature of the succession, from PPG, to Axiall and [then] to Westlake."[40] "More specifically," Mattos Filho asked "whether it is correct that the proceedings should continue to be conducted in the name of PPG?"[41] The answer to this question was "of particular relevance [to Mattos Filho] in the event that an award of damages is made in favor of Di Gregorio, as PPG would be the company obliged to satisfy that award[.]"[42] Mattos Filho also noted that "any assets [PPG] has in Brazil" could be at risk and flagged that "PPG has a Brazilian subsidiary, PPG Industrial do Brasil Ltda."[43]

The next day, Eva Gregory of Westlake responded to Mattos Filho, explaining the 2013 Spinoff and Westlake's acquisition of Axiall in 2016. Gregory confirmed that "liability for the claims asserted against PPG [in the Di Gregorio Litigation] rests with Axiall/Westlake."[44] While leaving the ultimate decision on substitution to Kroger, Gregory stated that "[w]e [Westlake] still have active lawsuits in the name

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[40] JX 124.

[41] *Id.* (emphasis removed).

[42] *Id.*

[43] *Id.* As explained below, the level of risk to PPG's Brazilian subsidiary is speculative and was not established by the evidence and testimony presented at trial.

[44] *Id.*

of PPG[,] and we are keeping them in the name of PPG until they are resolved."[45] Kroger followed up:

> Eva is correct in her explanation. I think the lawsuit should continue in PPG's name. Even though Westlake is the ultimate successor in interest to the liability, it seems to me that PPG is still the correct entity to be party to the proceeding. They were the responsible party then, and this suit (along with many others we have) are continuing in their name, even though Westlake is overseeing the action and is responsible for resolving at the end of the day.[46]

Mattos Filho responded: "[i]n light of these [explanations], we agree that the proceedings should continue in the name of PPG (and, indeed, that will save unnecessary disruption in the proceedings)."[47] Neither Westlake nor Mattos Filho consulted PPG about potential substitution.

F. The Insurers Refuse to Consider Westlake's Submissions Absent an Assignment

From its acquisition of Axiall in 2016, Westlake regularly communicated with PPG's insurers about the Di Gregorio Litigation.[48] Kroger testified that the insurers were "heavily involved" in the Di Gregorio Litigation, including strategy discussions and settlement negotiations.[49] And Westlake had been sending the insurers invoices

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] TT 244:1–23, 246:5–23 (Kroger).

[49] *Id.* 244: 1–23 (Kroger); JX 70; JX 99–102; JX 109; JX 110.

for defense costs in the Di Gregorio Litigation.[50] At the time of trial in this action, Defendants had incurred over $2 million in attorneys' fees in the Di Gregorio Litigation following the Spinoff.[51]

On January 12, 2023, the insurers sent Westlake a letter, asserting they would not consider Westlake's submissions of invoices in part because PPG—not Westlake—was the named insured under the policy.[52] The insurers indicated that "if Westlake shall present an assignment of PPG's rights to the recovery of damages under the policy to Insurers for their consent, . . . Insurers would duly consider the request and would not unreasonably withhold consent."[53]

Westlake forwarded the insurers' letter to PPG and asked "whether PPG would be agreeable to assigning its pertinent policy rights to Westlake, so that Westlake could pursue its claims related to the *Di Gregorio* matter directly with the insurers[.]"[54] In response, PPG stated that "no insurance rights [] transferred to Spinco" under the Separation Agreement.[55] PPG indicated its willingness "to assign

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[50] TT 246:24–247:13 (Kroger); JX 104–106; JX 113; JX 118; JX 121; JX 126; JX 132.

[51] TT 251:17–252:4 (Kroger).

[52] JX 130. The insurers also took the position that there was no payment obligation under the policy until a settlement or final judgment was paid. Both the insurance experts who testified at trial disagreed with this position and opined that defense costs are typically reimbursed as they are incurred. TT 383:8–384:3 (Posner); *id.* 539:8–11 (Baker).

[53] JX 130.

[54] JX 133.

[55] JX 135.

narrowly tailored rights under the triggered policy" on the condition that "Westlake agree[] to reimburse PPG its proportionate share of the" $25 million self-insured retention it had previously paid in connection with the other *DG Harmony*-related claims by paying PPG 30 percent of any insurance proceeds recovered by Westlake.[56]

On December 8, 2023, Kroger emailed Evan Bloch, PPG's assistant general counsel, asking for "a few minutes" to discuss "new developments with respect to our 1998 ship fire, Harmony, and the Di Gregorio lawsuit in Brazil."[57] Kroger explained that "[t]hings have not gotten better on that front[,] and the insurance issues are more critical than ever given recent developments."[58] Kroger and Bloch had a call the following Monday, December 11. And on December 13, Bloch emailed Kroger regarding "the various outstanding matters between our companies, including the Di Gregorio/Harmony matter."[59] Bloch indicated that "PPG [was] willing to include Westlake's request for an assignment of insurance rights as part of a comprehensive settlement dialogue to resolve all outstanding issues between our companies."[60] Bloch proposed a two-step process, including discussion about "a proposed

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[56] JX 145. The parties dispute whether these discussions can be relied on as evidence of liability. The Court is not relying on this correspondence and only includes it here to give context to the parties' insurance dispute.

[57] JX 137.

[58] *Id.*

[59] JX 139.

[60] *Id.*

assignment of insurance rights specific to the Di Gregorio/Harmony claim that would be acceptable/consented to by the insurers."[61]

Discussions between the two companies were apparently unsuccessful. On January 22, 2024, Westlake's outside counsel sent a letter to PPG, claiming that PPG was in breach of the Separation Agreement and demanding that PPG "seek as much coverage as possible in connection with the *Di Gregorio* litigation and any judgment that may be entered or assign its rights to proceeds from the 1998-1999 policy year to Westlake."[62] The letter explained that the Brazil court "could issue a final judgment" on damages of up to $2.6 billion "against PPG," that "PPG will have to post a bond" if a stay is not granted, that "Westlake is not a party to the litigation," and that "[i]t is in our mutual interest to pursue the maximum insurance coverage available."[63] In an email the next day, Bloch told Kroger "[t]his letter was not well received at PPG" and asserted that "PPG has fully complied with its obligations under the Separation Agreement[.]"[64]

On January 31, 2024, Westlake sent another letter to PPG, "request[ing] that PPG work with Eagle Spinco to pursue insurance coverage for the *Di Gregorio*

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[61] *Id.*

[62] JX 145.

[63] *Id.*

[64] JX 146.

matter."[65] Westlake asked PPG to "assign to Eagle Spinco (in a manner that is satisfactory to the insurers) all rights to make claims for and to receive insurance proceeds in connection with the *Di Gregorio* matter."[66] "Alternatively," Westlake asked PPG to "confirm that PPG will pursue insurance coverage for any adverse judgment and for the cost of an appeal bond, if necessary[.]"[67]

G. PPG Demands Substitution in the Di Gregorio Litigation

On March 12, 2024, PPG sent a notice to Westlake, demanding that "Westlake take immediate steps to substitute itself for PPG" in the Di Gregorio Litigation.[68] Westlake "disagree[d] with PPG's substitution request, largely because substitution is infeasible and impractical at this juncture."[69] Westlake said it was "not refusing to 'endeavor to substitute' in for PPG," but would only do so if PPG would "cooperat[e] with Westlake in pursuing claims against the insurers and assign[] PPG's policy rights to Westlake[.]"[70]

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[65] JX 149.

[66] *Id.*

[67] *Id.*

[68] JX 152.

[69] JX 153.

[70] *Id.*

H. The Brazil Court Issues Its Damages Decision in the Di Gregorio Litigation

The first phase of the Di Gregorio Litigation—referred to as the "liability phase"—ended with the June 15, 2019, final and non-appealable certification holding PPG liable.[71] The Di Gregorio Litigation then entered the second—or "liquidation"—phase in 2020, to determine the amount of damages.[72] Both parties, along with court-appointed experts, submitted accounting reports to the Brazil court, and final argument on damages was held in January 2024.[73]

On May 21, 2024, the Brazil court issued its damages decision, concluding that Di Gregorio was entitled to damages of $90,423,764, plus an additional $93,283,196 in monetary corrections and interest.[74] The Brazil court also ordered PPG to pay Di Gregorio's legal fees of 20 percent of the damages and a 1 percent procedural fine. Both PPG and Di Gregorio filed subsequent appeals.[75]

The day after the Brazil court issued its damages decision, Mattos Filho told Westlake's attorneys at Susman Godfrey LLP that "the amount of the award is surprising to say the least."[76] Mattos Filho also explained that "the time period for

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[71] TT 400:13 – 401:2 (Carmona); *id.* 479:1–12 (Sica).

[72] PTO ¶ 24; TT 401:3–9 (Carmona); *id.* 479:17–480:12 (Sica).

[73] PTO ¶¶ 29–35.

[74] *Id.* ¶ 36.

[75] *Id.* ¶¶ 38–43.

[76] JX 162.

making payment has not yet begun to run[,] and there are a number of different options available to PPG at this stage in terms of next steps, which we are also considering."[77]

The following week, Westlake emailed PPG about the damages decision, providing its estimated total damages amount of $703.85 million.[78] Westlake explained it "believe[d] the decision to be flawed" and laid out next steps, including "preparing an appeal" and requesting "a suspension of the effect of the Decision (i.e., so that no order can be made against PPG to effect payment of the award) until there has been a final and binding decision."[79]

Before payment of the judgment is required, the Brazil court's accounting clerk must calculate interest and monetary corrections to the damages award.[80] Following this process—including any challenges to the calculations—the Brazil court will issue an order to pay at Di Gregorio's request.[81] Once an order to pay issues, the judgment must be paid within 15 days. Otherwise, the Brazil court will tack on a penalty amount of 10 percent of the judgment plus additional legal fees of 10 percent.[82] At trial, PPG's Brazilian law expert, Professor Carmona, testified that this process

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[77] *Id.*

[78] JX 163.

[79] *Id.*

[80] PTO ¶ 44.

[81] *Id.* ¶¶ 45–47.

[82] *Id.* ¶ 11.

should take "a matter of days," that he was unsure why it had not happened yet, and that the delay is "unusual."[83]

Professor Carmona also testified that neither posting a bond nor depositing the full judgment amount into the Brazilian court registry would stay enforcement under Brazil's procedural rules.[84] But for Di Gregorio to enforce an order to pay against PPG's Brazilian subsidiary would require a request to pierce PPG's corporate veil. Such a request would stay enforcement proceedings in Brazil and proceed as a separate action, subject to all available challenges and appeals.[85]

I. This Litigation

On June 18, 2024, PPG filed this action against Defendants.[86] Two days later, PPG filed a Motion for Temporary Restraining Order (the "TRO"), asking the Court to (1) require Defendants to substitute into the Di Gregorio Litigation and remove PPG entirely; (2) failing substitution, enter an order preventing Westlake from abandoning defense in the Di Gregorio Litigation; and (3) compel Westlake to "post any bond, amount in escrow, and/or Court fees necessary to secure the $706+ million award."[87]

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[83] TT 406:1–16, 408:13–18 (Carmona). As of the date of this decision, no order to pay has issued in the Di Gregorio Litigation.

[84] *Id.* 455:9–15; 461:5–8 (Carmona).

[85] *Id.* 469:5–16, 495:14–496:12 (Sica).

[86] Dkt. 1.

[87] Dkt. 9.

Following a telephonic hearing, the Court denied PPG's request for a TRO and ordered the parties to file a stipulation agreeing that Defendants would continue to defend and pay all necessary defense fees in the Di Gregorio Litigation, and provide notice to PPG's counsel of any material developments.[88]

The Court held a two-day trial on May 6 and 7, 2025, and heard post-trial argument on July 25, 2025. On December 18, 2025, the Court held a telephonic status conference and requested supplemental briefing.[89] Following the parties' submission of supplemental briefs, the Court heard argument on August 4, 2026, and took the matter under advisement.[90]

II. LEGAL ANALYSIS

Both sides seek declaratory judgments and specific performance based on provisions of the Separation Agreement. The parties' requests for relief thus present questions of contract interpretation.

"Under Delaware law, the role of a court when interpreting a contract is 'to effectuate the parties' intent.'"[91] In doing so, the Court "must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all

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[88] *See* Dkt. 29.

[89] Dkts. 200, 201.

[90] Dkts. 212, 214.

[91] *Meteora Cap. P'rs, LP v. Roadzen Inc.*, 2026 WL 2530118, at *20 (Del. Ch. Aug. 27, 2026) (quoting *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006)).

the provisions of the instrument."[92] "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning."[93] "Contract language is not ambiguous merely because the parties dispute what it means."[94] "To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning." "Delaware courts will not destroy or twist language under the guise of construing it."[95] "If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent."[96]

A. PPG's Requests for Declaratory Judgment

"Parties to a contract may seek a declaratory judgment to determine 'any question of construction or validity' and may seek a declaration of 'rights, status or other legal relations thereunder.'"[97] "Declaratory relief is in the discretion of the Court and not available as a matter of right."[98] "The court may not exercise that

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[92] *Lorillard*, 903 A.2d at 739.

[93] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (citations omitted).

[94] *Id.*

[95] *Id.*

[96] *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[97] *Those Certain Underwriters at Lloyd's London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 4554453, at *6 (Del. Ch. Dec. 21, 2007) (quoting 10 Del. C. § 6502).

[98] *Id.* (citing 10 *Del. C.* § 6506).

discretion, however, unless the action presents an 'actual controversy.'"[99] The party seeking a declaratory judgment bears the burden of proof.[100]

PPG seeks declaratory judgment as to three issues.

First, PPG seeks a declaration that Eagle US 2 assumed the Di Gregorio Liability.[101] Defendants do not dispute this.[102] Accordingly, there does not appear to be a justiciable controversy as to this issue warranting a declaratory judgment.[103]

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[99] *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216 (Del. 2014).

[100] *State Farm Mut. Automobile Ins. Co. v. Spine Care Del., LLC*, 238 A.3d 850, 860 n.55 (Del. 2020) ("We observe that there is some debate on the burden of proof in declaratory judgment actions. . . . The *Rhone-Poulenc* court concluded that, '[t]he better view is that a plaintiff in a declaratory judgment action should always have the burden going forward.' . . . We agree that this is the better view."); *see also San Antonio Fire & Police Pension Fund v. Amylin Pharm., Inc.*, 983 A.2d 304, 316 n.38 (Del. Ch. 2009) ("Because Amylin seeks a declaratory judgment as to its right to approve, it bears the burden of proof here."), *aff'd* 981 A.2d 1173 (Del. 2009); *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) ("[I]n determining the allocation of the burden of proof in suits for declaratory judgment, 'the better view is that a plaintiff in a declaratory judgment action should always have the burden of going forward.'") (quoting *Lloyd's London*, 2007 WL 4554453, at *6).

[101] Dkt. 183, PPG's Post-Trial Opening Brief ("Pl. PTOB") at 57.

[102] Dkt. 188, Defendants' Post-Trial Answering Brief ("Defs. PTAB") at 31 ("The first declaration that PPG seeks—that Eagle US 2 'assumed liability for the Di Gregorio action,' PPG Br. 57—is undisputed.").

[103] The Court is relying on Defendants' representation in concluding there is no justiciable controversy. Defendants are thus judicially estopped from taking a contrary position in the future. *See Hermelin v. K-V Pharm. Co.*, 2011 WL 6225377, at *1 (Del. Ch. Dec. 13, 2011) (finding request for declaratory judgment moot based on representations that defendant had paid indemnification and would not seek to claw back the amounts paid, and concluding that "[h]aving waived its right to contest indemnification . . . , and having specifically waived the right to claw back amounts paid, the Defendant and its assigns are barred from further actions inconsistent with such waiver. Moreover, I have relied specifically on the Defendant's waivers in reaching my decision here, and thus the Defendant and its assigns are judicially estopped from litigating the issue in this or any court in a manner inconsistent with its representations here").

Second, PPG seeks a declaration that Eagle US 2 is responsible for all liabilities and defense costs associated with the Di Gregorio Litigation.[104] This also appears to be undisputed. Indeed, Defendants seek their own declaration that they "must indemnify and hold PPG harmless, which will protect PPG in the event of a *Di Gregorio*-related Loss[.]"[105] To the extent this request for declaratory judgment includes PPG's request for damages in the amount of its attorneys' fees incurred in this action and the Di Gregorio Litigation, that is addressed separately below.

Finally, PPG seeks a declaration that "in the event Eagle US 2 cannot satisfy any provision of the [Di Gregorio] judgment, for whatever reason, the provisions of the judgment shall apply equally to Westlake, Axiall, and [Eagle] Spinco."[106] This is addressed in the section below regarding Defendants' competing request for a declaration that "Westlake is not a proper defendant in this action."[107]

B. PPG's Requests for Specific Performance

PPG seeks an award of specific performance ordering Defendants to:

- "take all necessary steps to substitute Westlake into the Di Gregorio action, remove PPG as the nominal defendant or obligor, and instruct the Mattos Filho law firm to terminate or withdraw its Power of Attorney with PPG; or, if the Court in the Di Gregorio Action does not permit substitution, Westlake must join in the Di Gregorio Action as an additional defendant;"

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[104] Pl. PTOB at 57.

[105] Defs. PTOB at 2.

[106] Pl. PTOB at 57.

[107] Defs. PTOB at 2.

- "defend the Di Gregorio Action without interruption (including but not limited to, posting any bond and court costs required to preserve all rights of appeal and prevent any efforts to enforce the judgment against PPG's or its affiliates' interests); and"

- "[t]ake all steps necessary to protect PPG and its affiliates from any enforcement action or other harm arising out of the Di Gregorio Action, including, if necessary, satisfying the judgment issued in the Di Gregorio Action."[108]

There appears to be no dispute that Defendants have been defending the Di Gregorio Litigation. And Defendants have repeatedly committed—under oath at trial and in documents filed with the Court—to continue defending the Di Gregorio Litigation, including defending PPG against any attempts at enforcing any order to pay.[109] Defendants have likewise conceded that, having assumed the Di Gregorio Liability, Eagle US 2 will ultimately be the party responsible for any final, non-appealable judgment in the Di Gregorio Litigation and any losses that arise from any such judgment.[110] The Court expressly relies on these representations in concluding there is no live controversy on these issues. Defendants are thus judicially estopped from taking a contrary position later.[111]

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[108] Pl. PTOB at 57–58.

[109] TT 240:19–242:3, 327:22–328:8, 345:22–346:1 (Kroger); Defs. Supp. Br. at 5–6 ("Westlake has confirmed—in briefing, to the Court, and in sworn testimony—that it will hold PPG harmless, consistent with Article V.") (collecting citations).

[110] *See, e.g.,* Defs. PTAB at 6 ("Defendants have consistently acknowledged their obligations.") (collecting citations); *id.* at 7 ("PPG was protected because, as Kroger explained, Defendants held ultimate responsibility.").

[111] *See Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018) (TABLE) (affirming trial court's application of judicial estoppel to bar arguments contrary to representations made in prior litigation).

Thus, PPG's live requests for specific performance boil down to (1) an order requiring substitution or addition in the Di Gregorio Litigation and (2) an order requiring Defendants to post a bond or to satisfy any judgment that issues in that action before the conclusion of all appeals and without regard to the judgment's enforceability.

1. PPG's Request for an Order of Specific Performance Requiring Substitution or Addition in the Di Gregorio Litigation

"Specific performance is a remedy for a *proven* breach of contract."[112] "Ultimately, the party seeking specific performance must make a clear and convincing showing that the remedy is warranted."[113] "That remains true even if a contract provides for specific performance. Delaware is strongly contractarian, and the presence of a provision calling for specific performance in the event of breach is sufficient to support such a decree."[114] "But a court is not required to enforce a specific performance provision."[115] "When determining whether to award equitable relief," including specific performance, "the court always considers the balance of the

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[112] *26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 464 (Del. Ch. 2023) (emphasis in original).

[113] *Id.*

[114] *Id.* at 465.

[115] *Id.*

equities."[116] "For a decree of specific performance to issue, the equities must favor the outcome clearly and convincingly."[117]

Because "[s]pecific performance is a remedy for a *proven* breach of contract,"[118] the first question is whether PPG has proven a breach.

a. Has PPG Proven a Breach of Contract?

PPG claims that Defendants were required, and failed, to substitute Eagle Spinco or Eagle US 2 for PPG as the named defendant in the Di Gregorio Litigation. As a remedy, PPG asks the Court to order them to do so.

The parties disagree over the source of the substitution requirement. Citing to Section 2.10(a) of the Separation Agreement, PPG argues that "[t]he Separation Agreement requires Spinco to use its reasonable best efforts to cause PPG to be removed as an obligor for any Spinco Liability assumed by Eagle US 2."[119] PPG claims that Defendants breached this obligation because "[n]either Eagle US 2 nor [Eagle] Spinco took any steps to comply with these obligations, leaving PPG as the named defendant in that case."[120]

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[116] *Id.* at 473.

[117] *Id.*

[118] *Id.* at 464 (emphasis in original).

[119] Pl. PTOB at 9.

[120] *Id.*

Defendants argue that Section 5.6(c) governs any substitution requirement. As Defendants point out, Section 5.6(c) specifically refers to "substitution" with respect to "Actions," while Section 2.10 refers to PPG's "removal" with respect to "guarantees" or other commercial contracts. The Separation Agreement defines "Action" as "any demand, charge, claim, action, suit, countersuit, arbitration, hearing, inquiry, proceeding, audit, review, complaint, litigation, or investigation or proceeding of any nature whether administrative, civil, criminal, regulatory or otherwise, by or before any federal, state, foreign or international Governmental Authority or arbitration or mediation tribunal."[121] Section 2.10(a) does not use the term "Action" at all. Moreover, Section 2.10(a) requires the "removal" of PPG as a "guarantor" or "obligor," not "substitution" of one party for another in a litigation. A comparison of the two provisions' plain language thus appears to support Defendants' argument that Section 5.6(c), as opposed to Section 2.10, governs substitution.

Even accepting PPG's interpretation that Section 2.10 applies, PPG has failed to prove a breach of that provision. Defendants argue in their post-trial briefing that a claim for breach of contract under Section 2.10—according to PPG's interpretation of the self-effectuating nature of that provision—would have accrued in 2013 and

[121] JX 23 § 1.3.

would be time-barred.[122] PPG does not address this argument in its briefing and has thus waived any argument to the contrary.[123]

In its post-trial supplemental brief, PPG pivoted to argue that "Section 5.6(c) requires Defendants to substitute [Eagle] Spinco for PPG as the defendant in the Di Gregorio [Litigation]."[124] Section 5.6(c) provides:

> In the event of an Action that involves solely matters that are indemnifiable and in which the Indemnifying Party is not a named defendant, if either the Indemnitee or the Indemnifying Party so requests, the Parties will endeavor to substitute the Indemnifying Party for the named defendant. If such substitution or addition cannot be achieved for any reason or is not requested, the rights and obligations of the Parties regarding indemnification and the management of the defense of claims as set forth in this Article V will not be affected."[125]

In other words, this provision requires "the Parties" to "endeavor to substitute the Indemnifying Party [here, Eagle Spinco or Eagle US 2] for the named defendant [here, PPG]" in an "Action that involves solely matters that are indemnifiable [here,

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[122] Defs. PTOB at 49; Defs. PTAB at 23.

[123] *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *In re Dow Chem. Co. Deriv. Litig.*, 2010 WL 66769, at *14 (Del. Ch. Jan. 11, 2010) ("Plaintiffs quietly abandoned these arguments when they failed to respond to defendants' arguments . . . .").

[124] Dkt. 206, PPG's Post-Trial Supplemental Brief ("Pl. Supp. Br.") at 15.

[125] JX 23 § 5.6(c) (emphasis in original).

the Di Gregorio Litigation]."[126] And that obligation arises "if either the Indemnitee or the Indemnifying Party so requests[.]"[127]

The parties agree that PPG requested substitution in 2024.[128] And Defendants concede that Section 5.6(c)'s obligation to "endeavor to substitute" is "enforceable via specific performance."[129] The question then becomes whether Defendants failed to "endeavor" to substitute Eagle Spinco or Eagle US 2 for PPG following PPG's 2024 request.

Defendants do not appear to dispute that they did not do so. Instead, Defendants argue that an order requiring substitution would be futile and increase liability.[130] Whether Defendants' inaction constitutes a breach is an interesting

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[126] Somewhat strangely, PPG took great pains at the outset of this litigation to argue indemnification is unavailable to it for the Di Gregorio Litigation, insisting that only the assumption-of-liability provisions applied to the Di Gregorio Litigation. Although this line of argument seemed somewhat short-sighted and self-defeating in the long-run, PPG seems to have viewed it as improving PPG's chances of obtaining specific performance. Not until the Court suggested specific performance may be unavailable did PPG pivot to argue that the indemnification provisions applied in its favor.

[127] PPG also argued that if substitution was unavailable, Defendants should be required to add Eagle Spinco or Eagle US 2 as a defendant in the Di Gregorio Litigation. PPG bases that argument on Section 5.6(c)'s language addressing the scenario where "substitution *or addition* cannot be achieved for any reason or is not requested[.]" JX 23 § 5.6(c) (emphasis added). But Section 5.6(c)'s mandate says nothing about addition. It only requires that the parties "endeavor to substitute[.]" *Id.*

[128] Defs. PTAB at 7; Dkt. 207, Defendants' Supplemental Post-Trial Brief ("Defs. Supp. Br.") at 24 ("Westlake acknowledges that PPG requested substitution in 2024[.]"); TT 207:23-208:5 (Bloch).

[129] Defs. Supp. Br. at 24.

[130] *Id.* at 24–25.

question. On the one hand, Defendants concede they have not taken any steps to substitute Eagle Spinco or Eagle US 2 for PPG in the Di Gregorio Litigation. On the other hand, Defendants' arguments that substitution would be futile and could result in increased liability are not without merit. The same goes for Defendants' arguments that substitution is not required given, among other things, PPG's delay in requesting substitution (discussed below) and the potential inconsistency between PPG's request and the parties' express contractual obligation to "cooperate fully . . . to minimize" liabilities and defense costs associated with them.[131] Moreover, the evidence in the record shows that, after some discussion (albeit not with PPG), Mattos Filho "agree[d] that the proceedings should continue in the name of PPG (and, indeed, that will save unnecessary disruption in the proceedings)."[132]

Though interesting, the Court need not answer this question because, as explained below, even assuming breach, PPG has failed to show that the balance of the equities favors an award of specific performance.

b. Is PPG Entitled to Specific Performance?

Even assuming a breach of the obligation to "endeavor to substitute" in the Di Gregorio Litigation under Section 5.6(c), PPG still has the burden of showing, by clear and convincing evidence, that the balance of the equities favors specific

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[131] Defs. PTOB at 48–53; *see also* JX 23 § 5.6(a).

[132] JX 124.

performance.[133] As explained below, PPG has failed to do so. Consequently, PPG is not entitled to an order of specific performance requiring Defendants to take steps to substitute or add Eagle Spinco or Eagle US 2 as a defendant in the Di Gregorio Litigation.

This conclusion is driven primarily by two factors: (1) the 2009 SDNY Order holding that "PPG has no liability to Di Gregorio" and enjoining the Di Gregorio Litigation[134]; and (2) PPG's delay in making the substitution request. Additionally, the relevant trial testimony of the parties' Brazilian law experts was inconclusive, and PPG failed to present clear and convincing evidence of the factors it identified as supporting its requested relief.

i. The SDNY Order

The SDNY Order implicates issues of comity and weighs heavily against an award of specific performance in these circumstances. The SDNY Order provides:

> PPG has no liability to Di Gregorio, nor any of Di Gregorio's servants, employees, agents, or persons acting in concert with Di Gregorio or on Di Gregorio's behalf, for economic losses or economic damages allegedly arising out of the November 9, 1998 fire onboard the DG Harmony on the high seas off the coast of Brazil[.][135]

The order goes on to provide:

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[133] *BAE Sys.*, 2009 WL 264088, at *7 ("Under Delaware law, a party seeking specific performance must establish, by clear and convincing evidence, that . . . a balancing of the equities favors an order of specific performance.").

[134] JX 12.

[135] *Id.*

> "Di Gregorio, and any of Di Gregorio's servants, employees, agents, and any persons acting in concert with Di Gregorio or on Di Gregorio's behalf, are hereby enjoined from seeking economic losses or economic damages from PPG as a result of the DG Harmony fire, including in the action against PPG on January 10, 2006 in the Civil Court for the District of Manaus, Amazonas, Brazil."[136]

The SDNY Order provides unequivocally that PPG has no liability to Di Gregorio and enjoins Di Gregorio from seeking damages "from PPG" in an action "against PPG." An order requiring Eagle Spinco or Eagle US 2 to substitute for PPG or to join as an additional defendant could give Di Gregorio an avenue to circumvent the SDNY Order. Indeed, such an order would, if anything, risk facilitating Di Gregorio's continuing violation of the SDNY Order and legitimizing the Di Gregorio Litigation while it is on appeal. Considering principles of equity, it seems plain that a court of equity should be exceedingly loath to order specific performance when such an order requires entangling the court—indeed, risks making the court complicit—in an ongoing violation of a federal court injunction. Specific performance in these circumstances would be inconsistent with the SDNY Order and violate principles of comity. The balance of equities thus weighs decidedly against specific performance.

ii. PPG's Delay in Requesting Substitution

PPG's delay in making the substitution request also weighs against PPG's request for an order of specific performance.

As Defendants point out, PPG could have requested substitution immediately following the Spinoff. And PPG did so with respect to at least one other litigation

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[136] *Id.*

that was, like the Di Gregorio Litigation, an assumed liability under the Separation Agreement.[137] PPG also requested substitution in another lawsuit in 2021.[138] But PPG waited until 2024—11 years after the Spinoff (and 19 years after the Di Gregorio Litigation commenced)—to request substitution. "Equity aids the vigilant, not those who slumber on their rights."[139] PPG could have requested substitution immediately following the Spinoff or any time in the 11 years that followed, instead of waiting until after the Brazil court determined liability and awarded damages.

iii. Testimony from Brazilian Law Experts

Both sides presented Brazilian law experts at trial. Those experts testified a lot about what might happen in the Di Gregorio Litigation. They specifically speculated as to what might happen if PPG sought substitution. When asked his opinion "as to whether or not substitution could have been completed in 2013," PPG's expert, Professor Carmona, testified: "[c]ould be."[140] Professor Carmona said he "think[s]" Di Gregorio "would have consented" to substitution in 2013 and "even today."[141] Professor Carmona also testified that adding—instead of substituting—

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[137] JX 47.

[138] JX 125.

[139] 2 *Pomeroy's Equity Jurisprudence* § 418 (5th ed. 1941).

[140] TT 424:2–4 (Carmona).

[141] *Id.* 424:21–425:1 (Carmona).

Eagle Spinco or Eagle US 2 as a defendant "[c]ould have occurred and would be easier."[142]

On the other hand, Defendants' expert, Professor Sica, testified that if presented with a request for substitution at this late stage, a Brazilian court "would be at least suspicious," and that he "wouldn't allow a party that [he] sued . . . to be substituted by someone else."[143] When asked what would be "more likely to happen if PPG submitted a request for substitution," Sica testified that he agreed with Carmona: "[t]he more likely scenario is Di Gregorio agrees with the . . . inclusion of a third party," *i.e.*, the addition of a Eagle Spinco or Eagle US 2 as another defendant, as opposed to substitution of PPG.[144]

The Court does not ultimately consider the experts' competing speculations on whether substitution is feasible sufficiently conclusive. Where the Brazilian law experts do agree is that the addition of Eagle Spinco or Eagle US 2 as an additional defendant is more likely and that, as a result, Di Gregorio would have "an extra pocket" from which to attempt to collect any damages award.[145] The likelihood of this result weighs against an order of specific performance. Equity does not favor this Court issuing an order that is, according to the parties' experts, unlikely to

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[142] *Id.* 425:7–13 (Carmona).

[143] *Id.* 470:22–471:24 (Sica).

[144] *Id.* 473:6–22 (Sica).

[145] *Id.* 422:3–7 (Carmona); *id.* 473:6–22 (Sica).

accomplish substitution and instead likely to facilitate an additional party being subject to litigation and liability that the SDNY Order enjoined.

iv. PPG's Identified Factors Supporting Specific Performance

The factors PPG points to in support of its request for specific performance are (1) the risk of enforcement proceedings against PPG's subsidiary in Brazil, (2) PPG's inability to do business in Brazil due to the risk of its assets being seized, and (3) the risk of reputational harm to PPG. The evidence presented on these identified factors is not clear and convincing.

As to the first factor—enforcement against PPG's Brazilian subsidiary—Professor Carmona could only testify to a "theoretical" possibility that the Brazilian court would pierce the corporate veil to seize the assets of PPG's Brazilian subsidiary. Professor Carmona admitted he was not aware of the details of PPG's corporate structure or of any circumstances that would warrant piercing the corporate veil.[146] And, even if Di Gregorio sought to pierce PPG's corporate veil to enforce a judgment against its Brazilian subsidiary, such a request would stay any enforcement proceedings in Brazil and proceed as a separate action, subject to all available challenges and appeals.[147]

Moreover, as mentioned above, the Brazilian law experts agree that intervention (or addition), rather than substitution, is more likely. In that case, PPG

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[146] *Id.* 452:1–15 (Carmona).

[147] *Id.* 469:5–16, 495:14–496:12 (Sica).

would remain a defendant in the Di Gregorio Litigation, which would not mitigate the risks PPG identifies.

The second and third factors—that PPG will not be able to access markets in Brazil due to the risk of asset seizure and faces reputational harm—are speculative. PPG has not presented any clear and convincing evidence of any imminent threat. Nor has PPG presented any evidence of an actual plan, however remote or tentative, to access the Brazilian market in a way that might be impeded. And Defendants have committed to "hold PPG harmless" if it suffers a loss and to "step up" and "take whatever legal steps [they] could to prevent" any enforcement efforts against PPG, "includ[ing] making a payment[.]"[148]

PPG failed to present clear and convincing evidence that the balance of the equities favors its request for specific performance. Accordingly, PPG's request for an order requiring Defendants to take steps to substitute or add Eagle Spinco or Eagle US 2 as a defendant in the Di Gregorio Litigation is denied.

2. PPG's Request for an Order of Specific Performance Requiring Defendants to Post a Bond or Satisfy a Judgment in the Di Gregorio Litigation

PPG also requests an order of specific performance requiring Defendants to post a bond or satisfy a judgment in the Di Gregorio Litigation. To be entitled to

[148] *Id.* 240:19–242:3, 327:22–328:8, 345:22–346:1 (Kroger).

specific performance, PPG must first prove a breach of contract and then show, by clear and convincing evidence, that the balance of the equities favors that remedy.[149]

a. Has PPG Proven a Breach of Contract?

PPG argues that the assumption-of-liability provisions in the Separation Agreement require Eagle US 2 to post a bond or satisfy the judgment upon issuance of an order to pay.

Section 2.1(b) of the Separation Agreement addresses the "Assumption of Spinco Liabilities":

> [PPG] will Convey (or will cause any applicable Subsidiary to Convey) to a Spinco Entity other than [Eagle] Spinco, and such Spinco Entity will assume, discharge and fulfill when due and, to the extent applicable, comply with all of the Spinco Liabilities, in accordance with their respective terms (other than any Spinco Liabilities that as of the Business Transfer Time are already Liabilities of a Spinco Entity, which Spinco Liabilities will continue to be Liabilities of such Spinco Entity).[150]

Defendants do not dispute the application of this provision. Indeed, Defendants recognize that the Di Gregorio Litigation "is a 'Spinco Liability' that PPG conveyed to [Eagle] Spinco subsidiary Eagle US 2 via the Contribution Agreement."[151] Defendants acknowledge that "Eagle US 2 assumed and challenged but did not discharge the" Di Gregorio Liability, reasoning that "discharging" the Di Gregorio

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[149] *26 Cap.*, 309 A.3d at 464.

[150] JX 23 § 2.1(b).

[151] Defs. PTOB at 20 (citing JX 41).

Liability "would have meant confessing judgment or settling with Di Gregorio."[152] Defendants conclude that "[b]ecause the [Di Gregorio Liability] was not discharged, [the Di Gregorio Litigation] is indemnifiable under Article V."[153]

At first blush, one might imagine that, having conceded that they have failed to discharge the Di Gregorio Liability and have no plans to post a bond or pay the judgment following issuance of an order to pay, Defendants must also have conceded a breach of Section 2.1(b) of the Separation Agreement. But Defendants argue that "'failure to discharge' a liability is [not] necessarily a breach" based on "the interplay between subsections (a) and (b) of Section 5.2."[154] Section 5.2(a) provides indemnification for "any failure of [Eagle] Spinco or any other member of the Spinco Group or any other Person to pay, perform, fulfill, discharge and, to the extent applicable, comply with, in due course and in full, any Spinco Liabilities."[155] And Section 5.2(b) provides indemnification for "any breach by [Eagle] Spinco or any other member of the Spinco Group of any agreement or obligation to be performed by such Persons pursuant to this [Separation] Agreement or any Ancillary Agreement . . . ."[156]

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[152] Defs. PTOB at 20.

[153] *Id.*

[154] Defs. Supp. Br. at 22–23.

[155] JX 23 § 5.2(a).

[156] *Id.*

Defendants argue that "[s]ubsection (b)'s explicit reference to 'breach[es]' means that subsection (a)'s reference to a 'failure to discharge' must be something other than a breach," citing as support the canon that contracts must be read "to give each provision and term effect and not render any terms meaningless or illusory."[157] It is hard to say Defendants' reading is unreasonable. Yet, the drafters of Section 5.2 provided for indemnification "result[ing] from, relat[ing] to or aris[ing] . . . out of" subsections (a), (b), and (c) "without duplication."[158] "Delaware courts have recognized that contract parties occasionally use redundancy as a 'belt-and-suspenders' device to ensure their intent is fully understood."[159] Section 5.2's "without duplication" reference suggests the parties understood there could be overlap among the indemnification triggers.

On the other hand, "Delaware courts follow the maxim that the general does not detract from the specific": "where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[160] Put differently, "general terms of the contract must yield to more specific terms."[161]

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[157] Defs. Supp. Br. at 23 (quoting *Thompson St. Cap. P'rs IV, L.P. v. Sonova U.S. H'rg Instruments*, 340 A.3d 1151, 1167, 1171 (Del. 2025)).

[158] JX 23 § 5.2.

[159] *SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *8 (Del. Ch. May 19, 2023).

[160] *Thompson St. Cap. P'rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 340 A.3d 1151, 1166 (Del. 2025) (internal quotation marks and citations omitted).

[161] *Id.*

Under this principle, one might conclude, as Defendants assert, that Section 5.2(a)'s express reference to a failure to discharge liability means such a failure is different from, or an exception to, the "breach[es]" referenced in Section 5.2(b) and that the parties did not thus consider a failure to discharge necessarily to constitute a breach.[162]

That reading might have some semi-intuitive appeal at first. But it also seems strange to conclude that although Eagle US 2 has an obligation under Section 2.1(b) to discharge liabilities, failing to do so is not a breach of that obligation. This strangeness is arguably compounded by the interplay between Sections 5.7 and 7.15.

PPG bases its entitlement to specific performance on Section 7.15 of the Separation Agreement, which provides:

> In the event of any actual or threatened fault in, or breach of, any of the terms, conditions and provisions of this Agreement or any other Ancillary Agreement, the Party who is, or is to be, thereby aggrieved will have the right to specific performance and injunctive or other equitable relief in respect of its rights under this Agreement or such Ancillary Agreement, in addition to any and all other rights and remedies at law or in equity, subject to Section 5.7.[163]

As explained above, "Delaware is strongly contractarian, and the presence of a provision calling for specific performance in the event of breach is sufficient to support

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[162] *See id.* ("This principle 'can be thought of as reading the specific as an exception to the general, which allows a harmonizing of otherwise conflicting provision[s].'") (citation omitted).

[163] JX 23 § 7.15.

such a decree."[164] "Even with a contractual stipulation, specific performance remains a matter of equitable discretion."[165]

Following the stipulation to specific performance in Section 7.15, the parties also expressly agreed "that the remedies at law for any breach or threatened breach, including monetary damages, are inadequate compensation for any loss and that any defense in any Action for specific performance that a remedy at law would be adequate is waived."[166] "The Delaware Supreme Court has confirmed that such a

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[164] *26 Cap.*, 309 A.3d at 465.

[165] *Fortis Advisors, LLC v. Krafton, Inc.*, 354 A.3d 906, 948 (Del. Ch. 2026). The Court noted at the December 18, 2025, status conference that PPG is "basically asking for specific performance of a money damages payment," and "this Court has scads of case law holding that we don't order specific performance of the payment of money." Dkt. 201, Transcript of December 18, 2025, Telephonic Status Conference at 6:4–9. *See, e.g., P-5 GRA, LLC v. Ivankovich*, 2025 WL 1483625, at *3 (Del. Ch. May 23, 2025) (holding that specific performance "is unavailable here because [plaintiff] seeks money damages in the form of distributions"). That said, the request seeks the payment of money to a third-party. Further, with the availability of indemnification, one might argue that could serve as an adequate money damages remedy. And yet, the parties stipulated to irreparable harm and the availability of specific performance. JX 23 § 7.15. The Court need not ultimately resolve whether money damages would be adequate to reach the conclusion that specific performance is unavailable here. It is also difficult to state a hard-and-fast rule in any event because complex transactions, like the Spinoff, frequently implicate complex future scenarios, and the availability of specific performance depends on the specific circumstances of each case. *See ATP III GP, Ltd. v. Rigmora Biotech Inv. One LP*, 2025 WL 3496987, at *27 (Del. Ch. Dec. 5, 2025) (ordering specific performance of capital call under partnership agreement after finding that "[m]oney damages [were] inadequate" based on timing requirements and the "negative impacts" if capital calls were not funded and noting as further support the parties' stipulation to specific performance and the inability to estimate damages with reasonable accuracy).

[166] JX 23 § 7.15.

provision should be honored unless a defendant can provide a 'persuasive reason' to disregard it."[167]

The conclusion that a failure to discharge is a breach would seem uncontroversial if, as Defendants argue, indemnification were the exclusive remedy. Defendants argue that Section 7.15 is expressly "subject to Section 5.7," which "sets forth the exclusive remedy and rights of the Parties . . . in respect of the matters indemnified under this Article V[.]"[168] But, in making this argument, Defendants ignore the contract text that follows: "except that nothing contained in this Section 5.7 will impair any right of any Person . . . to specific performance under this Agreement; and . . . to equitable relief as provided in Section 7.15 hereof."

Defendants focus on the language in Section 5.7 providing that "each of the Parties hereto hereby waives . . . any and all rights, claims and causes of action it may have against the other Party in connection herewith, . . . other than the right to seek indemnity pursuant to this Article V[.]" But, again, the sentence goes on: "and the right to seek the relief described in clauses (a), (b), and (c) of the preceding sentence." Those clauses carve out the right to seek specific performance and

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[167] *Krafton*, 354 A.3d at 949 (quoting *Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 68 A.3d 1208, 1226–27 (Del. 2012)); *see also Anthem, Inc. v. Cigna Corp.*, C.A. No. 2017-0114-JTL, at 42 (Del. Ch. Feb. 15, 2017) (TRANSCRIPT) ("It's credibility impairing to say there's no irreparable harm when there is a provision in the agreement where you stipulated that there is irreparable harm."); *ATP*, 2025 WL 3496987, at *27.

[168] JX 23 § 5.7; Defs. PTOB at 30; Defs. PTAB at 28. By contrast, as mentioned above, Defendants concede that Section 5.6(c)'s obligation to "endeavor to substitute" is "enforceable via specific performance." Defs. Supp. Br. at 24.

equitable relief under Section 7.15 as express, bargained-for exceptions to the exclusivity of the indemnification remedy.

Accordingly, contrary to Defendants' argument, the exclusive remedies provision in Section 5.7 does not, itself, preclude a request for specific performance, even for indemnifiable matters. The plain language of both Sections 5.7 and 7.15 allows the parties to pursue the remedy of specific performance.[169]

As to posting a bond, PPG asserts that obligation also arises under Section 2.1(b) once an order to pay issues.[170] Specifically, as an alternative to satisfying the judgment, PPG argues Eagle US 2 must post a bond or deposit the judgment amount into the Brazil court to prevent enforcement while Eagle US 2 pursues any appeal.[171]

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[169] It is worth noting that the Court asked the parties on *multiple* occasions to identify any general market or transactional-practice views concerning how standard assumption-of-liability provisions are understood to operate vis-à-vis specific performance and indemnification and what, if any, meaningful differences might exist between standard contract terms and the specific text bargained-for here. Despite repeated requests, neither side could provide the requested information. *See, e.g.,* Dkt. 197, July 25, 2025, Transcript of Post-Trial Oral Argument at 3–11; Supp. Post-Trial Tr. at 76–79. The parties' failure to supply useful guidance or authority complicated the Court's task.

[170] Pl. PTOB at 16–17, 23–24. Interestingly, however, at the supplemental post-trial hearing, when asked what contractual provision required Eagle US 2 to post a bond, Defendants' counsel pointed to Sections 5.2 and 5.4 of the Separation Agreement. Dkt. 214, August 4, 2026, Transcript of Oral Argument on Supplemental Post-Trial Briefing ("Supp. Post-Trial Tr.") at 40–41 (THE COURT: "On specific performance, walk me through analytically where the duty to post a bond arises from in the contract, please. [PPG's COUNSEL]: "So under the terms of the contract, if we look at 'Indemnification,' the provisions of indemnification provide, under Section 5.2, that PPG has a right to indemnification, for the 'failure of Spinco or any other member of the Spinco Group . . . to pay, perform, fulfill, discharge [] to the extent applicable, comply with, in due course and in full, any Spinco Liabilities.' That's what we have here. This is a direct indemnification claim as against Spinco.").

[171] Pl. PTOB at 23–25.

Yet, PPG's Brazilian law expert, Professor Carmona, testified that neither posting a bond nor depositing the full judgment amount into the Brazilian court registry stays enforcement under Brazil's procedural rules.[172] Defendants' Brazilian law expert, Professor Sica, agreed.[173] And while posting a bond or depositing the judgment amount would not stay enforcement, any effort by Di Gregorio to pierce the corporate veil to pursue enforcement against PPG's Brazilian subsidiary would.[174]

Further, Professor Sica testified that he would advise PPG not to post a bond or deposit any funds into the Brazilian court registry, consistent with Mattos Filho's advice.[175] He explained that posting a bond or depositing the judgment amount would give the Brazilian court jurisdiction over, and Di Gregorio access to, those funds when PPG's assets would otherwise be out of reach in Brazil.[176] Professor Carmona agreed.[177] According to Professor Sica, Di Gregorio could withdraw the funds with or without collateral,[178] "and the case w[ould] be ended before all the

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[172] TT 455:9–15; 461:5–8 (Carmona).

[173] *Id.* 492:22–493:5 (Sica).

[174] *Id.* 469:2–16 (Sica).

[175] *Id.* 489:19–490:7 (Sica).

[176] *Id.* 491:3–492:4 (Sica).

[177] *Id.* 453:14–20, 454:7–455:8 (Carmona).

[178] Although there was some disagreement between the Brazilian law experts over the precise scope of exceptions under Brazilian procedural rules to the requirement that Di Gregorio post a counterbond to withdraw the amount of any bond or judgment deposit, both experts agreed there was some risk that the Brazilian court would allow Di Gregorio to withdraw the funds without posting a counterbond. *Id.* 458:5–10 (Carmona); *id.* 494:4–495:1

appeals were exhausted."[179] Professor Sica further testified that "PPG has solid grounds for appeal" and that the judgment amount "is way higher than" "it should be" "according to Brazilian law[.]"[180] Indeed, "pursuing appeals is something that" Professor Sica believes is "absolutely necessary[.]"[181]

Further complicating the breach analysis is Section 5.6(a) of the Separation Agreement. Section 5.6(a) provides that "[w]ith respect to any Third-Party Claim[182] for which [Eagle] Spinco, on the one hand, and [PPG], on the other hand, may have Liability under this Agreement or any of the Ancillary Agreements, the Parties agree to cooperate fully and maintain a joint defense . . . so as to seek to minimize such Liabilities and defense costs associated therewith."[183] In light of the testimony from

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(Sica). Professor Sica also pointed out that, unlike a judgment debtor, a judgment creditor in Brazil has the option to post collateral other than money or a bank bond, adding additional risk for any funds deposited. *Id.* 495:2–13 (Sica).

[179] TT 491:11–19 (Sica).

[180] *Id.* 491:20–492:4 (Sica).

[181] *Id.* 492:3–4 (Sica).

[182] PPG argues that the Di Gregorio Litigation is not a Third-Party Claim under Section 5.5(b)(i) of the Separation Agreement. Pl. PTOB at 8. According to PPG, Third-Party Claims are only those that arise after the Spinoff closed, and the Di Gregorio Litigation existed at the time of the Spinoff. But to make this argument, PPG relies on the "Notice of Claims" provision in Section 5.5(b)(i). The Court in *LPPAS Representative v. ATH Holding Company, LLC* rejected an identical argument. 2023 WL 3197819, at *10 (Del. Ch. May 2, 2023). The Court in *LPPAS* reasoned that "[a]lthough [the contractual provision] mentions notice, it does not include notice in the definition of Third-Party Claim." *Id.* Rather, the Court continued, "[t]he parenthetical containing the defined term Third-Party Claim follows the phrase 'any matter,' and the phrase 'any matter' exists independent of notice. Put differently, a Third-Party Claim is the 'matter'; it exists irrespective of whether the third party has provided notice." *Id.* The same reasoning applies here.

[183] JX 23 § 5.6(a).

the Brazilian law experts discussed above, one could conclude that posting a bond or depositing the judgment amount would actually risk increasing ultimate liability exposure in contravention of the parties' obligation to "cooperate fully . . . so as to seek to minimize such Liabilities and defense costs associated" with the defense of the Di Gregorio Litigation. The parties did not, however, meaningfully argue the interpretation and application of this provision until late in these proceedings—and only after the Court raised the provision.[184]

Despite the Court making repeated requests for authority addressing how these provisions were meant to operate together, none was provided. In these circumstances, it does not seem prudent to resolve these thorny questions—with potentially broad implications for complex commercial transactions—unless it is necessary to do so. Here, it is not necessary given the Court's conclusion below as to specific performance.[185]

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[184] To the uninitiated, it may seem odd that neither party addressed Section 5.6(a)'s cooperation requirement in the context of the obligation to discharge the Di Gregorio Liability. Considering the parties' competing positions sheds some light. PPG argued vehemently throughout this case that only the assumption-of-liability provisions were relevant and that Article V's indemnification provisions were inapplicable. Defendants, on the other hand, advanced the competing contention that Article V indemnification was PPG's exclusive remedy and that specific performance for the assumption-of-liability provisions was unavailable. These two antipodal positions left a gaping hole that Section 5.6(a) seems ready-made to fill. But the parties did not address that provision until the Court raised it, further complicating the Court's task in deciphering the parties' competing interpretations.

[185] It is also worth noting that the text used in Section 5.2(a) and Section 2.1(b) differs in a potentially significant respect: Section 2.1(b) requires the discharge of liabilities "when due," while Section 5.2(a) provides indemnification for the failure to discharge liabilities "in due course and in full[.]" JX 23 §§ 2.1(b), 5.2(a). The parties do not meaningfully engage on Section 2.1(b)'s reference to "when due[.]" JX 23 § 2.1(b). For its part, however, PPG argues the Di Gregorio Liability is due when the order to pay issues in the Di Gregorio Litigation.

b. Is PPG Entitled to Specific Performance?

Even if the Court were to adopt PPG's interpretation that discharge of the Di Gregorio Liability by Eagle US 2 is due when an order to pay issues, and even assuming PPG's anticipatory repudiation could serve as a basis for an order of specific performance, that remedy would be inappropriate here. The Di Gregorio Litigation should not exist—it was specifically enjoined by the SDNY Order.[186] An order from this Court requiring Eagle US 2 to post a bond or satisfy a judgment issued in that case would risk legitimizing the lawsuit in direct contradiction of the SDNY Order. As explained above, such an order would violate principles of comity and could unnecessarily expose Eagle US 2 to liability or give Di Gregorio avenues to circumvent the SDNY Order.

At least as things presently stand,[187] the balance of the equities weighs strongly against an order of specific performance. Accordingly, PPG's request for an

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This raises another issue: no order to pay has come down yet, so under PPG's interpretation, Defendants cannot have breached. PPG's request for specific performance could thus be viewed as premature in seeking specific performance based on anticipatory repudiation. Indeed, Chancellor Allen explained in *Carteret Bancorp, Inc. v. HomeGroup, Inc.* that "an anticipatory repudiation theory will not support specific performance relief prior to the time the parties themselves agreed that the performance was due." 1988 WL 3010, at *5 (Del. Ch. Jan. 13, 1988). One might conclude that PPG's request for specific performance could perhaps be denied on that basis alone. But I also recognize the practicalities at play—in particular the 15-day deadline to satisfy an order to pay once issued—and thus proceed with the analysis. Although these are interesting questions, the parties did not adequately address them. In any event, I need not resolve them to conclude that PPG is not entitled to specific performance.

[186] JX 12.

[187] This decision addresses the facts as they currently stand. Defendants have argued that there are a host of variables and divergent future scenarios that are, at this point,

order requiring Eagle US 2 to post a bond or satisfy a judgment in the Di Gregorio Litigation is denied.[188]

C. Defendants' Requests for Declaratory Judgment

1. Defendants' Request for Declaration that Article V Exclusively Governs the Di Gregorio Liability

Defendants seek a declaratory judgment "that Article V governs the *Di Gregorio* obligations[.]"[189] According to Defendants, "[i]f Article V applies, indemnification is PPG's exclusive remedy under Section 5.7."[190] This decision already addressed this issue and concluded that Section 5.7's "exclusive remedy"

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difficult if not impossible to predict. Defendants argue that, in many ways, PPG essentially seeks an advisory decision from this Court concerning how the bargained-for contract operates in multiple hypothetical futures that may or may not come to pass. In this, Defendants are correct. The parties' Brazilian law experts acknowledge unusual doings. It is possible that the facts on the ground may change in a host of very material ways and that, in some of those possible futures, the balance of equities could shift. This decision does not attempt to speculate about the outcome based on such hypothetical future scenarios.

[188] It is important to note that PPG is not without recourse. This case illustrates the wisdom in indemnity provisions. Counsel representing PPG in negotiating the Separation Agreement (*see* JX 23 §§ 3.1(c), 7.4) articulated this well: "the parent and the spin-off company may need to allocate liabilities through assumption-of-liability provisions. Liability allocations may also be *reinforced* through indemnities from one business to the other in the separation and distribution agreement or other transaction documents." Wachtell, Lipton, Rosen & Katz, Spin-Off Guide 17 (2026) (emphasis added). As discussed above, Section 5.2(a) of the Separation Agreement gives PPG a right to indemnification from "Spinco, and each member of the Spinco Group" for losses relating to or arising out of any failure to discharge the Spinco Liabilities. JX 23 § 5.2(a). Defendants do not deny this. They have repeatedly committed to defend PPG against any efforts to enforce an order to pay in the Di Gregorio Litigation and to hold PPG harmless. The Court expressly relies on those representations in making its decision. Defendants are thus judicially estopped from taking a contrary position later. *See Motors Liquidation*, 191 A.3d 1109.

[189] Defs. PTAB at 8.

[190] *Id.* at 11.

language does not preclude specific performance and, indeed, expressly preserves it. And, as explained above, although PPG is not, in these circumstances, entitled to specific performance requiring payment of a judgment or bond in the Di Gregorio Litigation, the indemnification provisions in Article V provide PPG with reinforcing protection.

2. Defendants' Request for a Declaration that Westlake Is Not a Proper Defendant

Both sides seek competing declarations about whether Westlake is a proper defendant in this action. PPG argues Westlake is a proper defendant based on three theories: (1) adoption; (2) alter-ego; and (3) equitable estoppel. As explained below, each theory fails.

a. PPG's Adoption Arguments

Because Westlake is not a signatory to the Separation or Contribution Agreements, PPG argues Westlake assumed Eagle US 2's obligations under the Contribution and Separation Agreements by adoption.[191] "There is no doubt that a fundamental principal of contract law provides that only parties to a contract are bound by that contract."[192] "One does not have to be a signatory to a contract, however, to become bound by it. Third parties to an agreement may become parties to it, and thus bound by it, by either expressly or implicitly adopting the

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[191] Pl. PTOB at 21.

[192] *Lorillard*, 831 A.2d at 343.

agreement."[193] "The contract itself, however, must contemplate that non-signatories may adopt it."[194]

Section 7.8 of the Separation Agreement provides that the Separation Agreement "is binding upon and is for the benefit of the Parties hereto and their respective successors and permitted assigns."[195]

Westlake is not a "successor" to Eagle US 2. Westlake acquired Axiall through a reverse triangular merger.[196] The same is true of Axiall's prior acquisition of Eagle Spinco.[197] In a reverse triangular merger, the acquiring company forms a wholly owned subsidiary and, as the sole stockholder of the subsidiary, votes in favor of the merger with the target company. This results in the subsidiary being merged into the target company, with the target company surviving the transaction.[198] "The advantage of this type of merger is that [the target company] will become a wholly[]owned subsidiary of [the acquiring company] without any change in its

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[193] *Id.* at 343–44.

[194] *Id.* at 344.

[195] JX 23 § 7.8. That provision also states that the Separation Agreement "is not made for the benefit of any Person not a Party hereto, and no Person other than the Parties hereto or their respective successors and permitted assigns will acquire or have any benefit, right, remedy or claim under or by reason of this Agreement[.]" *Id.*

[196] JX 92 § 1.1.

[197] JX 25 § 2.1.

[198] *See* Balotti & Finkelstein, Delaware Law of Corporations & Business Organizations, §§ 9.7–9.8 (4th ed. 2026).

corporate existence. Thus, the rights and obligations of [the target company] are not transferred, assumed[,] or affected."[199]

PPG does not argue that Westlake is a "permitted assign[]" or that the Separation Agreement effected or contemplated any assignment to Westlake. To support its adoption argument, PPG cites *American Legacy Foundation v. Lorillard Tobacco Company* and *OrbiMed Advisors LLC v. Symbiomix Therpeutics, LLC*. Neither case supports PPG's position.

In *Lorillard*, the Court addressed, on cross-motions for summary judgment, whether a non-signatory (ALF) could be bound by a Master Settlement Agreement ("MSA"). The Court held that ALF was bound by the MSA through adoption, reasoning that, among other things, "the nature of ALF and its relationship to the [MSA] is discussed in significant detail throughout that contract," "there are several express provisions of the [MSA] that manifest the MSA's signatories' expectation that ALF would ultimately adopt it," and "there are no provisions in the [MSA] that foreclose adoption, ratification, or assumption of the [MSA] by third parties or by ALF."[200] The Court found that ALF's adoption of the MSA was both express and implied. ALF's bylaws expressly recognized that it was bound by the MSA; ALF barred itself from changing its charter to be inconsistent with the MSA; and ALF's

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[199] *Id.* § 9.8. *Cf. Castle Tire Disposal, LLC v. Liberty Tire Servs. of Ohio, LLC*, 2026 WL 2873192, at *4 (Del. Ch. Sept. 24, 2026) ("The sale of a parent company's stock is not a transfer of its downstream subsidiary's assets.").

[200] 831 A.2d at 344–47.

president and chairperson had made public statements suggesting ALF believed it was restricted and had to comply with the MSA.[201]

OrbiMed involved an Omnibus Acquisition Agreement ("OAA") through which Lupin, Inc. purchased all the equity of Symbiomix Therapeutics, LLC. The Court held post-trial that Lupin had assumed Symbiomix's obligations under certain indemnification agreements. The indemnification agreements at issue "contemplate[d] that a nonsignatory may adopt them."[202] And "Lupin became a successor to all or substantially all of Symbiomix's business or assets" when it bought Symbiomix's equity, closed Symbiomix's bank account and deposited the funds into an account controlled by Lupin, and acquired "'Symbiomix's right, title and interest in its patents' and trademarks."[203]

As in *Lorillard*, the Court in *OrbiMed* found that Lupin had "implicitly and explicitly adopted" the indemnification agreements.[204] Symbiomix had provided Lupin with the indemnification agreements before the OAA was signed. Lupin acknowledged the indemnification agreements expressly in the OAA. Lupin continued to acknowledge the indemnitees' rights under the indemnification agreements after the OAA closed and after Lupin had dissolved and liquidated

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[201] *Id.* at 348.

[202] 2024 WL 747567, at *7.

[203] *Id.* at *8.

[204] *Id.*

Symbiomix. And Lupin had required the indemnitees to submit undertakings under the indemnification agreements.[205]

Here, the Separation Agreement expressly provides that only successors and assigns are bound by it. PPG relies primarily on Westlake's management of the Di Gregorio Litigation to argue that Westlake assumed Eagle US 2's obligations under the Separation and Contribution Agreements. Even assuming the Separation Agreement contemplated that a non-successor or assign could adopt it, this would still not be enough to show that Westlake had done so.

Westlake is not a "successor" or "assign" to Eagle US 2 or Axiall. Both companies maintained their separate existence through the reverse triangular mergers. Westlake is thus separated from the liabilities and obligations of Eagle US 2 by multiple entity layers.[206] Eagle US 2 is a subsidiary of Eagle Spinco, which is a subsidiary of Axiall, which is a subsidiary of Westlake.

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[205] *Id.*

[206] *See Chamison v. HealthTrust, Inc.—Hospital Co.*, 735 A.2d 912, 919 (Del. Ch. June 30, 1999) ("Chamison . . . cannot recover from HealthTrust . . . because HealthTrust is not a successor-in-interest to EPIC. EPIC still exists and is a subsidiary of HealthTrust."). In its pre-trial brief, PPG cited to *Boudreaux v. Axiall Corp.*, 2022 WL 1431968 (W.D. La. May 4, 2022), to argue that Defendants' arguments regarding assumption of liability and indemnification had been rejected. Dkt. 140 at 32–33. In *Boudreaux*, the United States District Court for the Western District of Louisiana—interpreting the same Separation Agreement at issue here—held that Axiall was not a successor to Eagle Spinco based on the reverse triangular structure of the merger. *See id.* at *4 ("Applying the reverse triangular merger concepts to this case, Axiall Corporation (formerly Georgia Gulf), is shielded from the liabilities and obligations of Eagle Spinco because it formed and used Grizzly Acquisition Sub to effectuate the merger.").

b. PPG's Alter-Ego Theory

PPG argues Westlake does not operate Eagle US 2 as a separate entity, citing various actions it says were directed by Westlake.[207] In other words, PPG argues that Eagle US 2 is Westlake's alter ego. In response, Defendants argue that PPG has failed to make the requisite showing to warrant piercing the corporate veil.[208]

"Delaware 'corporation law is largely built on the idea that the separate legal existence of corporate entities should be respected.'"[209] "[T]he principle of corporate separateness recognizes that 'because a subsidiary is a separate entity, a parent and its subsidiary are not regarded as a single economic unit.'"[210] "Delaware courts depart from this general rule only in exceptional circumstances."[211] "[T]o pierce the

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[207] Pl. PTOB at 17–21.

[208] Defs. PTAB at 32.

[209] *Castle Tire Disposal*, 2026 WL 2873192, at *3 (quoting *Allied Cap. Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006)).

[210] *Castle Tire Disposal*, 2026 WL 2873192, at *4 (quoting *NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *20 (Del. Ch. Nov. 17, 2014)).

[211] *Cleveland-Cliffs Burns Harbor LLC v. Boomerang Tube, LLC*, 2023 WL 5688392, at *4 (Del. Ch. Sept. 5, 2023); *see also Paul Elton, LLC v. Rommel Del., LLC*, 2020 WL 2203708, at *14 (Del. Ch. May 7, 2020) ("Delaware public policy disfavors disregarding the separate legal existence of business entities."); *Wallace v. Wood*, 752 A.2d 1175, 1183 (Del. Ch. 1999) ("Persuading a Delaware court to disregard the corporate entity is a difficult task."); *Verdantus Advisors, LLC v. Parker Infrastructure P'rs, LLC*, 2022 WL 611274, at *2 (Del. Ch. Mar. 2, 2022) ("Veil piercing is a tough thing to plead and a tougher thing to get, and for good reason.").

corporate veil based on an agency or 'alter ego' theory, 'the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.'"[212]

PPG does not argue that Eagle US 2 is a "sham" or "exist[s] for no other purpose than as a vehicle for fraud," let alone make that requisite showing.[213] This would be a daunting task considering PPG specifically created Eagle US 2 to facilitate the Spinoff under the Separation Agreement—a bargained-for aspect of the transaction's structure.[214] Instead, PPG argues that Westlake was running the Di Gregorio Litigation. That is not enough to warrant piercing the corporate veil.

> Delaware courts consider various factors in assessing whether to disregard the corporate form, including "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5)

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[212] *In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) (quoting *Wallace*, 752 A.2d at 1184).

[213] *See Hash Asset Mgmt. Ltd. v. Dma Labs, Inc.*, 2026 WL 352706, at *7 (Del. Ch. Feb. 9, 2026) (dismissing veil-piercing claim because "[t]he Amended Complaint fails to allege any facts concerning the capitalization or solvency of DMA or the Foundation," and "[t]h[e] allegations fall short of showing DMA is a 'sham' that exists for no purpose other than to commit fraud"); *see also Cleveland-Cliffs*, 2023 WL 5688392, at *5 (explaining that "[p]iercing the corporate veil under [the alter-ego doctrine] 'requires that the corporate structure cause fraud or similar injustice," and "[t]he subsidiary 'must be a sham and exist for no other purpose than as a vehicle for fraud'") (quoting *Wallace*, 752 A.2d at 1184).

[214] *See* JX 23.6 ("[PPG] has caused Spinco, which currently conducts no business operations and has no assets or liabilities other than in connection with its formation, to be formed in order to facilitate such separation."); JX 41.1 ("[PPG] has concurrently entered into that certain Separation Agreement . . . pursuant to which [PPG] intends to assign, transfer or convey, either directly or through a series of internal reorganizations, certain assets and liabilities related to the Eagle Business to Spinco or Spinco's wholly-owned subsidiaries prior to the Merger . . . ."); *id.* ("[PPG] is the sole Member of [Eagle US 2].").

whether, in general, the company simply functioned as a façade for the dominant shareholder."[215]

PPG does not even attempt to assert its alter-ego theory based on these factors. Thus, that theory fails as a matter of law.[216]

c. PPG's Equitable Estoppel Theory

PPG asks the Court to apply the principle of equitable estoppel to hold Westlake responsible for Eagle US 2's obligations under the Separation and Contribution Agreements.[217] "This Court does not lightly turn to equitable estoppel to enforce contract rights which cannot be vindicated as the contract is written."[218] As this Court explained in *Hallisey v. Artic Intermediate, LLC*, "[i]n a dispute about enforcement of a bargained-for contract right, equitable estoppel is not the proper remedy."[219]

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[215] *Cleveland-Cliffs*, 2023 WL 5688392, at *5 (quoting *Manichaean Cap., LLC v. Exela Techs., Inc.*, 251 A.3d 694, 706 (Del. Ch. 2021)). *See also Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003) ("To state a 'veil-piercing claim,' the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors.").

[216] *See, e.g., Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *15 (Del. Ch. July 6, 2018) ("The Complaint does not allege—or even suggest—that BB GP exists solely as a vehicle for fraud. Accordingly, Plaintiffs' veil-piercing theory of liability fails as a matter of law.").

[217] Pl. PTOB at 22–23.

[218] *Vintage Rodeo Parent, LLC v. Rent-a-Center, Inc.*, 2019 WL 1223026, at *23 (Del. Ch. Mar. 14, 2019) (citing *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 12 (Del. 2000)).

[219] 2020 WL 6438990, at *4 (Del. Ch. Oct. 29, 2020) (citing *Genencor Int'l*, 766 A.2d at 12); *see also Alchemy LTD LLC v. Franchise League Co., LLC*, 2023 WL 4670954, at *8 (Del. Ch. July 20, 2023) ("New Alchemy's equitable estoppel argument may well be misplaced since it concerns a bargained-for contract right.") (citing *Hallisey*, 2020 WL 6438990, at *4).

In this case, PPG seeks to enforce its rights under the Separation and Contribution Agreements. Defendants thus argue that equitable estoppel is not a proper remedy, citing *Hallisey*. PPG argues that the principle described in *Hallisey* does not apply.[220] But, even if equitable estoppel might be available, PPG fails to show a basis for that remedy.

"[E]quitable estoppel is invoked 'when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.'" [221] To succeed on its equitable estoppel theory, PPG "must demonstrate that: (i) [it] lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) [it] reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) [it] suffered a prejudicial change of positions as a result of [its] reliance."[222] The burden of proof is clear and convincing evidence.[223]

As support for its equitable estoppel theory, PPG argues that "Westlake controlled the defense of the Di Gregorio [Litigation] and acknowledged its

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[220] PPG distinguishes *Hallisey* by arguing that, there, "equitable estoppel was sought against a party to the contract in question." Pl. PTAB at 12–13 n.5. PPG's argued-for application of equitable estoppel seems, if anything, intended to end-run the Court's rejection of PPG's veil-piercing theory and to provide an alternative route for ignoring the corporate form. In any event, as explained below, PPG's arguments in support of equitable estoppel fail to provide an adequate basis for that remedy.

[221] *Nevins v. Bryan*, 885 A.2d 233, 249 (Del. Ch. 2005) (quoting *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1965)).

[222] *Id.*

[223] *Id.*

responsibility for that Action."[224] PPG also argues that "Westlake engaged in conduct to protect its own interests without regard to the interests of PPG" in the Di Gregorio Litigation, including "instruct[ing] Mattos Filho in 2021 to leave PPG as the named defendant," "us[ing] the fact that PPG remained the named defendant to disclaim Westlake's responsibility for any judgment entered," and failing to notify PPG when the damages award was issued.[225]

PPG's equitable estoppel theory fails at the first element: that it "lacked knowledge or the means of obtaining knowledge of the truth of the facts in question."[226] Westlake's strategic decision to keep PPG as the named defendant and the issuance of the damages award are facts about which PPG not only had "the means of obtaining knowledge," but also had the right to know "upon reasonable request" under Section 5.6(a) of the Separation Agreement.[227] That same provision gives PPG the right to "retain counsel to monitor or assist in the defense of such claims . . . ."[228]

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[224] Pl. PTOB at 22.

[225] *Id.* at 22–23.

[226] *Nevins*, 885 A.2d at 249.

[227] JX 23 § 5.6(a) ("The Party that is not responsible for managing the defense of such Third-Party Claims will, upon reasonable request, be consulted with respect to significant matters relating thereto . . . .").

[228] *Id.*

PPG also fails to satisfy the second element of equitable estoppel: that it "reasonably relied on the conduct of the party against whom estoppel is claimed."[229] PPG contends that "[a]fter transferring the Di Gregorio liability to Eagle US 2, PPG reasonably expected Eagle US 2, [Eagle] Spinco, Axiall, and subsequent purchasers of these entities, like Westlake, would comply with the terms of the Contribution and Separation Agreements."[230] The conduct PPG points to is Westlake's purchase of Axiall (and, by extension, Eagle US 2). PPG does not cite any authority to support the proposition that Westlake's purchase through a reverse triangular merger supports a reasonable expectation beyond that Eagle US 2 and the other members of the Spinco Group would continue to comply with their obligations under the Contribution and Separation Agreements.

Even assuming that PPG was able to satisfy the first two elements of its equitable estoppel theory, it fails to satisfy the third: that it "suffered a prejudicial change of position as a result of [its] reliance."[231] PPG argues that it was "deprived of any opportunity to protect itself, including by commencing an earlier action in this Court to enforce its rights against Defendants under the Separation and Contribution Agreements."[232] As explained above, PPG had the opportunity to protect itself.

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[229] *Nevins*, 885 A.2d at 249.

[230] Pl. PTOB at 23.

[231] *Id.*

[232] *Id.*

Section 5.6(a) of the Separation Agreement provides that opportunity. PPG chose not to request updates in the Di Gregorio Litigation and chose not to hire separate counsel to monitor the litigation prior to the damages award being issued. PPG also failed to request substitution for over a decade after the Spinoff. Regardless, PPG has not proven that it suffered any harm. PPG acknowledges that Defendants have been defending the Di Gregorio Litigation, and Defendants have committed to continue doing so and to hold PPG harmless.

PPG has thus failed to prove its equitable estoppel theory.

D. Defendants' Request for Specific Performance

Defendants ask the Court to "order PPG to assign [its] relevant insurance rights to the Spinco Entities immediately so that they can seek coverage for (a) the defense costs that Defendants have already incurred and (b) a *Di Gregorio* settlement or judgment."[233] The first question is whether Defendants have proven a breach.[234]

a. Have Defendants Proven a Breach of Contract?

Both sides appear to agree that Defendants are entitled to an assignment of the right to insurance proceeds covering the Di Gregorio Liability. The parties disagree on *when* PPG is required to provide the assignment.[235] Defendants argue that the Separation Agreement "require[s] an immediate assignment of PPG's

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[233] Defs. PTOB at 31.

[234] *See 26 Cap.*, 309 A.3d at 464.

[235] *See* Pl. Supp. Br. at 30

insurance rights for the" Di Gregorio Liability.[236] PPG argues that Defendants must first satisfy any judgment in the Di Gregorio Litigation before requesting that PPG pursue insurance.[237]

As a starting point, PPG's insurance policy covering the Di Gregorio Litigation is an excluded asset under the Separation Agreement. Section 2.4(b)(iv) specifically excludes "insurance policies, binders and claims and rights thereunder and all prepaid insurance premiums" from the assets transferred to Eagle US 2.[238] Under that provision, insurance policies are excluded assets "except to the extent provided in Section 6.11[.]"[239]

Section 6.11, in turn, confirms that "none of Spinco nor any other members of the Spinco Group will have any rights whatsoever with respect to any Policies," with one exception: PPG

> will, if requested by Spinco, use commercially reasonable efforts (as set forth in Section 5.4 above) to pursue Insurance Proceeds under Claims-

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[236] Defs. PTOB at 31.

[237] Pl. Supp. Br. at 30.

[238] JX 23 § 2.4(b)(iv).

[239] *Id.*

> Made Policies[240] for any liabilities for which indemnification is sought from Spinco pursuant to this Agreement[.][241]
>
> Section 5.4(b) is entitled "Insurance Proceeds" and provides:
>
> The amount that any Indemnifying Party is or may be required to provide indemnification to or on behalf of any Indemnitee pursuant to Section 5.2 or Section 5.3 as applicable, will be reduced (retroactively or prospectively) by any Insurance Proceeds or other amounts actually recovered from unaffiliated third parties . . . by or on behalf of such Indemnitee in respect of the related Loss . . . .[242]

Section 5.4(b) also addresses the timing and manner of indemnification payments when insurance may be available:

> The existence of a claim by an Indemnitee for monies from an insurer or against a third party in respect of any indemnifiable Loss will not, however, delay any payment pursuant to the indemnification provisions contained herein and otherwise determined to be due and owing by an Indemnifying Party. Rather, the Indemnifying Party will make payment in full of the amount determined to be due and owing by it against an assignment by the Indemnitee to the Indemnifying Party of the entire claim of the Indemnitee for Insurance Proceeds or against such third party.[243]

In other words, an indemnifying party cannot wait to see if insurance pays a claim when an indemnification sum is due and owing. But payment of that sum

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[240] The Separation Agreement defines "Claims-Made Policies" as "policies issued to [PPG] or its Affiliates by insurers on or after July 1, 1986, on a 'claims made' or 'occurrence reported' basis, that actually or potentially covers claims, lawsuits, or liabilities for which [PPG] seeks indemnification under this Agreement." JX 23 § 1.17. PPG admits that Claims-Made Policies, as defined by the Separation Agreement, "include[s] PPG's occurrence reported 1998-1999 insurance tower[.]" Pl. Supp. Br. at 27 n.18.

[241] JX 23 § 6.11(a).

[242] *Id.* § 5.4(b).

[243] *Id.*

contractually entitles the indemnifying party to an assignment of the claim so that the indemnifying party can be reimbursed directly and, if necessary, undertake efforts to pursue the insurance claim itself.

This leads to the next issue concerning the scope of the required assignment. As set out above, Section 5.4(b) provides that indemnification payments are made "against an assignment . . . of the entire claim . . . for Insurance Proceeds[.]" Yet, the Separation Agreement does not define "entire claim." Nor did the parties present the Court with argument on this point. One might read "entire claim" to refer to PPG's claim against the insurers for coverage of the Di Gregorio Liability broadly. But the contract is more specific, referring to the "entire claim of the Indemnitee for Insurance Proceeds[.]" And "Insurance Proceeds" is defined as "those monies (i) received by an insured from an insurance carrier; or (ii) paid by an insurance carrier on behalf of the insured."[244] Ultimately, to determine what constitutes the "entire claim of [PPG] for Insurance Proceeds" requires an understanding of PPG's rights under the relevant insurance policy.

The insurance policy at issue does define what a claim is and, in doing so, seems to supply the answer for what constitutes an "entire claim[.]" The policy covers "liability . . . for Damages . . . encompassed by an Occurrence[.]"[245] In this case, the

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[244] *Id.* § 1.39.

[245] JX 1 at 5.

DG Harmony fire is the covered "Occurrence."[246] The policy defines "Claim," in relevant part, as "an oral or written demand against an Insured for Damages[.]"[247] PPG is the "Insured" under the policy.[248] And "Damages" is defined to include "Defense Costs," which in turn means "reasonable legal costs and other expenses incurred by or on behalf of the Insured in connection with the defense of any actual or anticipated Claim[.]"[249]

Based on these definitions, one could argue that "entire claim" means the Di Gregorio Litigation broadly because it is a "Claim," *i.e.*, a "demand [by Di Gregorio] against an Insured [PPG] for Damages" arising from an "Occurrence" (*i.e.*, the *DG Harmony* fire). One could also argue that "entire claim" should be read more narrowly to refer to any "Claim" arising out of an "Occurrence," including claims for defense costs. Applied here, for example, each Mattos Filho invoice would be a "demand [from Mattos Filho] against an Insured [PPG] for Damages," which, to reiterate, specifically includes "Defense Costs[.]" PPG might protest (though it did

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[246] *See* JX 1 at 7. The Court recognizes there is a dispute among the parties and the insurers about whether the Di Gregorio Liability is covered by the policy. The Court is not making any determination with respect to that, as it is not a dispute before the Court. But, certainly, all parties to this action are of the view—the vehement view—that the Di Gregorio Liability is covered by the policy. Indeed, PPG wrote a joint letter with Westlake to the insurers in December 2024, pushing back on the insurers' coverage denial and asserting that the Di Gregorio Liability is covered by the policy. JX 201.

[247] JX 1 at 7.

[248] *Id.* at 2. The definition also includes PPG's subsidiaries and other affiliates. *Id.* at 9–10.

[249] *Id.* at 7–8.

not here) that Mattos Filho's invoices were not sent to PPG and were paid by Westlake, so they cannot be considered a "demand against [PPG]." But, importantly, the insurance policy's definition of "Defense Costs" includes "reasonable legal costs and other expenses incurred by ***or on behalf of*** the Insured[.]"[250] The evidence clearly shows that Westlake incurred the defense costs in the Di Gregorio Litigation on behalf of PPG—the named defendant in the case. And Mattos Filho was operating under a power of attorney from PPG, which, to the Court's knowledge, has not been withdrawn.

The narrower reading is supported by Section 5.4(b)'s plain language, which requires "payment in full of the amount determined to be due and owing" to trigger the right to an assignment. There is no damages amount "due and owing" in the Di Gregorio Litigation as of the date of this decision. No order to pay has issued. Nor has Westlake or any of the other Defendants made any liability payment. It is undisputed, however, that Westlake has been paying all amounts "due and owing" to Mattos Filho, PPG's defense counsel in Brazil.

This leads to the conclusion that payment of those defense costs gave rise to an entitlement to an assignment of PPG's right to insurance proceeds for those amounts, *i.e.*, PPG's "entire claim . . . for Insurance Proceeds" covering "Defense Costs" paid by

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[250] *Id.* at 7 (emphasis added).

Westlake on behalf of PPG "in connection with the defense of" the Di Gregorio Litigation.[251]

Such an assignment is consistent with PPG's retention of insurance policies as excluded assets under the Separation Agreement. Both parties argue for a distinction—based on testimony from both insurance experts—between rights to insurance *policies* and rights to insurance *proceeds*.[252] The Separation Agreement's plain language supports this distinction: Section 6.11(a) provides that "none of Spinco nor any other member of the Spinco Group will have any rights whatsoever with respect to any ***Policies***."[253] Section 6.11(a) goes on to carve out PPG's obligation to use commercially reasonable efforts to pursue "Insurance ***Proceeds***" in accordance with Section 5.4.[254]

At the supplemental post-trial hearing, PPG argued—for the first time, and without any explanation—that the attorneys' fees incurred by Defendants in the Di Gregorio Litigation are not a PPG loss that would give rise to insurance rights under

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[251] JX 23 § 5.4(b); JX 1 at 7–8.

[252] *See* Defs. PTAB at 32 ("The Separation Agreement did not give Defendants an assignment of PPG's 'Policies' contemporaneous with the 2013 Business Transfer. But Sections 5.4 and 6.11 gave Defendants rights to 'an assignment by the Indemnitee to the Indemnifying Party of the entire claim of the Indemnitee for Insurance Proceeds[.]'"); Pl. PTOB at 33 ("The witnesses at trial who addressed insurance issues all distinguished between a right to PPG's insurance policies (which are PPG's assets), versus a right to ask PPG to pursue potential insurance proceeds.") (emphasis in original).

[253] JX 23 § 6.11(a) (emphasis added).

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

the Separation Agreement.[255] But PPG did not brief this argument, nor did it ever address this point in response to Defendants' repeated contentions that the attorneys' fees incurred in the Di Gregorio Litigation give rise to insurance rights and obligations under the Separation Agreement.

To the contrary, PPG asserts that "Defendants *can* request PPG to seek Insurance Proceeds related to the Di Gregorio [Litigation.]"[256] As it relates to defense costs specifically, PPG does not argue that Defendants have no right to insurance proceeds covering those costs. PPG argues the opposite: "If a Westlake entity extinguishes the Di Gregorio liability, then PPG's insurers will be obligated to consider a claim by PPG for insurance proceeds (including reimbursement of underlying defense costs)."[257] Any alternative argument on this point is therefore waived.[258]

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[255] Supp. Post-Trial Tr. at 58:6–15 (PPG's counsel arguing that it "boggles the mind how [Defendants'] payment of monies defending an obligation that's their liability would constitute a PPG loss that gives rise to a right to them receiving an assignment of PPG's insurance policies" and "[t]here's just no way to get there under this contract").

[256] Pl. Supp. Br. at 30; *see also id.* at 32 ("[T]he Separation Agreement . . . does not give Spinco any rights to the Policies, but permit it to request PPG pursue 'Insurance Proceeds' if it first satisfies the liability that may be covered under the Policies.")

[257] Pl. PTAB at 1.

[258] *Emerald P'rs*, 726 A.2d at 1224; *see also Roca v. E.I. du Pont de Nemours and Co.*, 842 A.2d 1238, 1243 n.12 (Del. 2004) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work. . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.").

Regardless, Section 5.4(b)'s anti-windfall language serves as a bargained-for override:

> Notwithstanding any other provisions of this Agreement, it is the intention of the parties that no insurer or any other third party will be (i) entitled to a "windfall" or other benefit it would not be entitled to receive in the absence of the foregoing indemnification provisions or otherwise have any subrogation rights with respect thereto, or (ii) relieved of the responsibility to pay any claims for which it is obligated.[259]

Generally, "[t]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."[260]

Section 5.4(b)'s "notwithstanding" clause sets forth the parties' express, overarching intention that "no insurer . . . will be (i) entitled to a 'windfall' or other benefit it would not be entitled to receive in the absence of the foregoing indemnification provisions . . . or (ii) relieved of the responsibility to pay any claims for which it is obligated."[261] According to PPG, "[t]his means regardless of any other provision in the Separation Agreement, no insurer can escape responsibility for pending claims."[262] And PPG's assistant general counsel, Evan Bloch, testified that

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[259] JX 23 § 5.4(b).

[260] *In re Estate of Crist.*, 863 A.2d 255, 258 (Del. Ch. 2004), *aff'd*, 876 A.2d 602 (Del. 2005).

[261] JX 23 § 5.4(b).

[262] Pl. PTAB at 20.

Defendants "have a contractual entitlement to PPG's relevant insurance proceeds" "[u]nder the anti-windfall concept[.]"[263]

Thus, read together, Section 5.4(b)'s language providing that indemnification payments are made "against an assignment . . . of the entire claim . . . for Insurance Proceeds" and the anti-windfall language support Defendants' argument that PPG was required, and failed, to provide an assignment of its right to insurance proceeds for the defense costs paid by Defendants in the Di Gregorio Litigation. The Court thus finds that PPG breached this obligation.[264]

b. Are Defendants Entitled to Specific Performance?

The Court's finding that PPG breached its obligation to provide an assignment does not end the inquiry. "When determining whether to award equitable relief," including an award of specific performance, "the court always considers the balance

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[263] TT 190:2–11 (Bloch).

[264] Following the anti-windfall language, Section 5.4(b) provides that "[t]he Indemnitee will use and will cause its Affiliates to use commercially reasonable efforts to pursue claims against applicable insurers for coverage of such Loss under such policies, subject to Section 6.11." JX 23 § 5.4(b). Defendants argue that PPG was required, and failed, to use commercially reasonable efforts to pursue insurance coverage for the Di Gregorio Liability. The record shows that Defendants asked PPG to pursue coverage in at least two letters in January 2024. *See* JX 145; JX 149. And the insurers informed Defendants that they would not communicate with Defendants absent an assignment under the insurance policy. JX 157; *see also* JX 130; JX 200. PPG was copied on that correspondence. Notwithstanding Defendants' request and this clear indication from the insurers, PPG has not taken any further action to pursue coverage other than a joint letter to the insurers in December 2024. PPG could have (1) provided the assignment requested by the insurers or (2) commenced arbitration against the insurers at Defendants' expense. PPG did neither. This failure to act is inconsistent with PPG's efforts obligation under Section 5.4(b) and thus could serve as a basis for a separate breach of the Separation Agreement that, in turn, supports an equitable order for an assignment in these circumstances. As it is unnecessary to do so, this decision does not address this alternative analysis further.

of the equities."[265] "For a decree of specific performance to issue, the equities must favor that outcome clearly and convincingly."[266] Here, the balance of the equities favors Defendants' request for an order of specific performance.

The insurance experts agree that defense costs should be covered under the policy applicable to the Di Gregorio Litigation.[267] And PPG's insurance expert testified that, in his view, there is no need to wait for a judgment to be satisfied before pursuing reimbursement of those defense costs.[268]

Additionally, as Defendants put it, "PPG is not doing anything to pursue insurance coverage[,] and it has no incentive to do so."[269] PPG has also taken positions in this litigation that "align with the insurers' positions," making PPG a less-than-ideal candidate to pursue coverage.[270] For example, PPG's position that it cannot pursue coverage further before a judgment is satisfied aligns with the insurers' position (but not with the position of PPG's own insurance expert).[271]

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[265] *26 Cap.*, 309 A.3d at 473.

[266] *Id.*

[267] TT 383:17–20 (Posner); *id.* 539:8–11 (Baker).

[268] *Id.* 383:21–384:3 (Posner).

[269] Defs. PTOB at 36.

[270] TT 553:8–554:11 (Baker).

[271] *See* Pl. PTOB at 38; Pl. PTAB at 20.

PPG witness Evan Bloch testified that Defendants have a contractual right to insurance proceeds for defense costs incurred in the Di Gregorio Litigation.[272] And, according to PPG's insurance expert, it would be commercially reasonable for PPG to provide a limited assignment to Defendants for those defense costs.[273]

Finally, the insurers proposed an assignment and agreed to not unreasonably withhold their consent to it.[274] The Court concludes that Defendants have shown, by clear and convincing evidence, that the balance of the equities favors an order of specific performance.

Accordingly, Defendants' request for specific performance is granted in part. PPG must provide an assignment to Defendants[275] of the right to insurance proceeds for the amounts they have paid in defense of the Di Gregorio Litigation.[276]

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[272] TT 190:2–11 (Bloch).

[273] *Id.* 384:4–12 (Posner).

[274] JX130.

[275] The parties' briefing and argument leave unclear precisely which Defendant entity should be granted the ultimate assignment. Section 5.4(b) refers to an "Indemnifying Party," which the Separation Agreement defines as "any Party that may be obligated to provide indemnification to an Indemnitee pursuant to Article V hereof or any other section of this Agreement or any Ancillary Agreement." JX 23 § 1.36. Section 5.2 provides for indemnification by "[Eagle] Spinco, and each member of the Spinco Group . . . on a joint and several basis[.]" *Id.* § 5.2. The parties will address this via their proposed form of implementing order.

[276] There seems to be some dispute about whether the insurers' prior approval is required for this type of limited assignment. The insurance policy provides that an "[a]ssignment of interest under this Policy shall not bind the Insurer unless and until its consent is endorsed herein." JX 1 at 23. And the insurers claimed a consent right for any assignment in their letter to Westlake. JX 130. On the other hand, Defendants' insurance expert testified that an assignment would not require consent. TT 548:13–23 (Baker).

Defendants are not, however, entitled to an assignment of *all* rights to insurance proceeds under the relevant policy. Such an assignment would be inconsistent with the plain language of Section 5.4(b), which, as explained above, requires payment before the right to an assignment is triggered. It would also contravene PPG's bargained-for rights to its insurance policies.[277]

E. PPG's Request for Fees and Expenses

PPG seeks its fees and expenses incurred in the Di Gregorio Litigation and in this action. As explained below, neither award is warranted here.

Regardless, the insurers indicated they would not unreasonably withhold consent to an assignment. JX 130. To the extent the insurers' prior consent is required, PPG must act to effect an assignment consistent with this decision.

[277] Although PPG's breach of the obligation to provide an assignment is the most directly related to the relief provided, a finding that PPG breached its separate obligation under Section 5.4(b) to use commercially reasonable efforts to pursue insurance coverage (*see* note 264) would lead to the same result. "An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised." *L-5 Healthcare P'rs, LLC v. Alphatec Hldgs., Inc.*, 2024 WL 3888696, at *11 (quoting Restatement (Second) of Contracts § 357 cmt. a) (internal quotation marks omitted). "An order of specific performance . . . will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires." *Id.* (quoting Restatement (Second) of Contracts § 358(1)) (internal quotation marks omitted). But "[i]t need not be absolute in form and the performance that it requires need not be identical with that due under the contract." *Id.* (quoting Restatement (Second) of Contracts § 358(1)) (internal quotation marks omitted). The limited assignment contemplated by this decision is consistent with the purpose of the commercially reasonable efforts obligation. Indeed, PPG's own insurance expert testified that such an assignment would be commercially reasonable. TT 384:4–12 (Posner).

1. PPG's Request for Fees and Expenses Incurred in the Di Gregorio Litigation

PPG argues it "was forced to retain Brazilian counsel [other than Mattos Filho] 'to make sure that PPG was fully protected should it need to go in on its own behalf or on behalf of its Brazilian subsidiary and protect its interests.'"[278] According to PPG, its "outside litigation costs in Brazil were caused by Defendants' failure to assume full responsibility for Di Gregorio."[279] As Defendants point out, however, Sections 5.5 and 5.6 of the Separation Agreement preclude PPG from recovering its fees incurred in monitoring the Di Gregorio Litigation.[280]

Section 5.5 of the Separation Agreement provides that "the Indemnifying Party will not be liable for any legal expenses subsequently incurred by the Indemnitee in connection with the defense of the Third-Party Claim."[281] Section 5.6(a) provides:

> the Parties agree to cooperate fully and maintain a joint defense . . . so as to seek to minimize [] Liabilities and defense costs . . . . The Party that is not responsible[282] for managing the defense of such Third-Party

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[278] Pl. PTOB at 48 (quoting TT 102:7-14).

[279] *Id.*

[280] Defs. PTAB at 31.

[281] JX 23 § 5.5.

[282] Section 5.5(b)(ii) provides that "[t]he Indemnifying Party shall have the right, exercisable by written notice to the Indemnitee within 30 days after receipt of a Claims Notice from the Indemnitee of the commencement or assertion of any Third-Party Claim in respect of which indemnity may be sought under this Article V, to assume and conduct the defense of such Third-Party Claim in accordance with the limits set forth in this Agreement with counsel selected by the Indemnifying Party and reasonably acceptable to the Indemnitee[.]" *Id.* § 5.5(b)(ii). That section further provides that "[i]f the Indemnifying Party does not assume the defense of a Third-Party Claim in accordance with this Section 5.5, the Indemnitee may continue to defend the Third-Party Claim." *Id.* There appears to be no

> Claim will, upon reasonable request, be consulted with respect to significant matters relating thereto and may retain counsel to monitor or assist in the defense of such claims *at its own cost*.[283]

Perhaps in recognition of the above limitations, PPG does not invoke the indemnification provisions in the Separation Agreement as a basis for its request for damages. PPG is not entitled to recover fees it incurred in monitoring the Di Gregorio Litigation.

2. PPG's Request for Fees Incurred in This Action

As for PPG's fees and costs incurred in this action, PPG does not identify any fee-shifting provision, so it would need to rely on the bad faith exception to the American rule to shift fees.

"Delaware follows the 'American Rule,' whereby a prevailing party is generally expected to pay its own attorney's fees and costs."[284] This rule is subject to "limited equitable exceptions," "including the exception for 'bad faith' conduct during the litigation."[285] "The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process."[286] "[T]his Court does not lightly award attorneys' fees under this exception, and has

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dispute here that Defendants are responsible for managing the defense of the Di Gregorio Litigation and that PPG has not opted to continue defending that action.

[283] *Id.* § 5.6(a) (emphasis added).

[284] *Montgomery Cellular Hldg. Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

[285] *Id.*

[286] *Id.*

limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons."[287] "The party seeking a fee award bears the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct."[288]

PPG argues that fee-shifting under the bad faith exception is warranted based on a laundry list of actions set out in its post-trial opening brief.[289] PPG summarizes its argument as follows:

> Defendants litigated all the way to trial on defenses they knew from the start lack any basis in fact. They took these positions not for any principled reason, but because they learned the judgment in the Di Gregorio [Litigation] will exceed $325 million and are desperate to get PPG on the hook for this obligation. In the process, Defendants repudiated contractual obligations at the direction of Westlake, exposed PPG to a judgment that could grow to $470 million, and sought to hijack PPG's insurance rights.[290]

As PPG recognizes, "[t]he Court has the discretion, as matter of equity to award attorneys' fees" based on the bad faith exception. The Court declines to exercise its discretion to make such an award here. This case represents a legitimate disagreement between the parties—in concededly unusual circumstances—about their respective rights and obligations under the Separation and Contribution Agreements. Indeed, the Court has agreed with multiple positions taken by

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[287] *Sloan v. Segal*, 2009 WL 1204494, at *18 (Del. Ch. Apr. 24, 2009) (internal quotation marks and citations omitted).

[288] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).

[289] *See* Pl. PTOB at 49–56.

[290] *Id.* at 56.

Defendants in this post-trial decision. PPG's request for fee-shifting under the bad faith exception to the American Rule is thus denied.

III. CONCLUSION

In summary, the Court concludes after trial that PPG is not entitled to its requested awards of specific performance and damages. Defendants will continue defending the Di Gregorio Litigation and hold PPG harmless, as they have committed to do. And Defendants are entitled to an order of specific performance requiring PPG to assign its rights to insurance proceeds for defense costs incurred and paid by Defendants in the Di Gregorio Litigation. But Westlake is not a proper defendant in this action.

The parties will confer and submit a joint form of implementing order consistent with this decision within ten business days. The parties will also advise the Court if there are any outstanding issues that need to be decided.