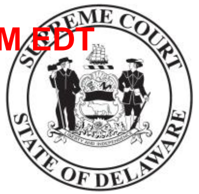
EFiled: Jul 29 2014 01:02PM EDT
Filing ID 55800677
Case Number 204,2014



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TEXTRON INC., Plaintiff Below- Appellant, vs. ACUMENT GLOBAL TECHNOLOGIES, INC., Defendant Below- Appellee.	REDACTED – PUBLIC VERSION JULY 29, 2014 No. 204, 2014 Appeal from the March 25, 2014 Decision After Trial Verdict For Defendant of the Superior Court Of the State of Delaware in and For New Castle County in C.A. No. N10C-07-103 JRJ CCLD

CORRECTED ANSWERING BRIEF OF DEFENDANT BELOW - APPELLEE ACUMENT GLOBAL TECHNOLOGIES, INC.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

C. Barr Flinn (No. 4092)
Tammy L. Mercer (No. 4957)
Benjamin Z. Grossberg (No. 5615)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorney for Defendant Below - Appellee Acument Global Technologies, Inc.

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PRELIMINARY STATEMENT

Following a multi-day bench trial, in which the Superior Court heard from numerous witnesses, considered multiple designated deposition transcripts and reviewed hundreds of documents, the Superior Court issued a thoroughly reasoned, 65-page opinion, in which it rejected all the arguments presented by appellant Textron, Inc. ("Textron") and awarded damages to appellee Acument Global Technologies, Inc. ("Acument") on its counterclaims. The Court's opinion addresses the Purchase Agreement (the "Agreement"), by which Textron sold to Acument several dozen foreign and domestic entities that made up Textron's fastening systems business. It more specifically addresses Textron's obligation, under the Agreement, to indemnify Acument for certain contingent liabilities that were caused by Textron's pre-closing management of the business but have come due after closing. Most specifically, the opinion addresses a common-sense provision, by which Textron's indemnity obligation is reduced by any Tax Benefit to which Acument is entitled (the "Tax Benefit Offset" provision).

There is no merit to Textron's appeal. In ruling that Acument is "not entitled to a Tax deduction," for the United States losses (the "Losses"), the Court adhered to the tax law and results to which Textron had agreed. Textron agrees, as it has long agreed, that for the indemnified contingent liabilities, Acument has both an increase in basis from the contingent liability and an equal decrease in basis from the indemnification and that Acument therefore has no net increase in basis and no right to a deduction or other reduction in taxes. The Court accordingly concluded that

Acument was not entitled to a Tax Benefit and Textron therefore was not entitled to a Tax Benefit Offset.

Before the Superior Court, Textron primarily argued that it does not matter whether Acument is entitled to a reduction in taxes. According to Textron, the Tax Benefit Offset is "automatic;" the parties intended to "share" the indemnified losses; and Textron therefore was required to provide only "partial" indemnification. The Court rejected this argument, and Textron does not appeal this portion of the Court's decision.

Textron also introduced a second argument in its post-trial briefing, which it now presses on this appeal. Textron argued that "any basis increase resulting from Textron's payment of an assumed pre-closing contingent liability obligation would constitute a 'Tax Benefit,' triggering a Tax Benefit Reduction." According to Textron, the offsetting decrease in basis should just be ignored. This argument is substantially the same as Textron's primary argument because, if accepted, it would require Acument to provide a Tax Benefit Offset when it has no right to a reduction in taxes. The effect would be to require Acument to "share" the indemnified losses with Textron—precisely the theory of Textron's primary argument rejected by the Superior Court.

Textron contends that the Superior Court erred by "ignoring" the argument. But this is not so. The Court expressly addressed and rejected the argument, concluding that the decrease in basis from the indemnification payment must also be considered. (Op. 48-50 ("[T]he Court concludes that the Tax Benefit Offset applies only if Acument is entitled to a 'deduction' upon the making of an indemnification

payment."); Op. 49-50 (There is "no express language within the [Agreement] to support Textron's position that an increase in basis is what the [Agreement] drafters intended to satisfy the Tax Benefit Offset."); Op. 50 (The "language within the [Agreement] further belies that the parties intended for an increase in basis to satisfy the Offset.")

The Superior Court's rejection of the argument is entitled to deference because it constitutes a contractual interpretation based upon extrinsic evidence that is well supported and logical. The Court interpreted the agreement to mean that (a) the parties had not agreed to "share" the indemnified Losses, (b) Acument must be entitled to a deduction or reduction in taxes for an Offset to apply, and (c) an increase in basis standing alone did not require a Tax Benefit Offset. The Court based this interpretation upon all the evidence, including the testimony of Acument's witnesses and the numerous documentary admissions by Textron's representatives. The Court also considered testimony from Textron's witnesses to the contrary, but did not find such testimony credible.

In an effort to obtain *de novo* review, Textron contends that the Court's determination violated the tax law. Textron however concedes that, under the tax law, the decrease in basis affects Acument's tax position (*i.e.*, its ability to reduce its taxes). Although Textron argues that the Court should have treated the increase in basis and decrease in basis separately, the Court did precisely that, as detailed herein. In any event, Textron does not contend that such separate treatment prevents the decrease in basis from affecting Acument's tax position. Indeed, the tax authorities that Textron references for its separate treatment argument confirm that the decrease

in basis must be considered and further confirm that, due to the decrease in basis, an indemnified party has no right to a reduction in taxes. Since Textron's argument raises no issue of tax law, *de novo* review is inapplicable.

As its second ground for appeal, Textron contends that the Superior Court held that only a tax "deduction" would suffice for a Tax Benefit Offset to apply and that another form of tax "reduction" would not suffice. In fact, the Court squarely held that either a deduction or another form of tax reduction would suffice. In the Court's words, a "Tax Benefit Offset only applies if Acument is entitled to a deduction or reduction." (Op. 53) The Court's decision to use the terms deduction and reduction interchangeably in its opinion is entitled to deference because it is well supported by the record evidence that the parties had consistently referred to the required reduction as a deduction. It was also logical as Textron has never argued that Acument is entitled to some form of reduction other than a deduction. Textron attempts to make an appeal issue out of an immaterial use of terminology that makes no difference to the outcome of this case.[1]

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[1] Textron attempts to disparage Acument by stating that Acument agreed with Textron's interpretation for two years. (Textron 1) The Superior Court found to the contrary: It found that Acument did not agree with Textron's interpretation, but rather mistakenly allowed Textron to take Offsets for the first losses in the United States because Acument mistakenly believed that it was entitled to deduct them. Textron's assertion is irrelevant because Textron does not appeal this portion of the Court's decision.

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NATURE OF THE PROCEEDINGS

In July 2010, Textron filed a complaint asserting that the Tax Benefit Offset was a "hypothetical tax benefit [that] would be applied to reduce any indemnity payments made by Textron." (B9 at ¶ 13) Acument answered and filed counterclaims regarding Textron's refusal to remit several Tax Benefit Offsets that Acument had paid under the mistaken impression that the Losses were deductible. On January 14, 2011, Textron moved for judgment on the pleadings, arguing that the parties had agreed that irrespective of deductibility, an Offset "applies to all indemnification payments made by Textron." (B33) The Superior Court denied Textron's motion, finding the provisions in question to be ambiguous.

After conducting vigorous fact discovery focused on the question of whether the Tax Benefit Offset was an automatic sharing provision, the Parties conducted a four-day trial in April and May of 2013, at which Textron's main argument was that the Offset "operated as an automatic reduction to Textron's indemnity obligations." (B97 (Textron Pre-Trial Br)) After the documentary and testimonial evidence at trial substantially weakened Textron's main arguments, Textron articulated in its first *post*-trial brief the arguments it addresses in this appeal. On March 25, 2014, the Court expressly rejected both Textron's main contractual argument *and* the new argument that is the primary subject of this appeal and instead found for Acument on all counts. Textron filed notice of appeal on April 24, 2014.

SUMMARY OF THE ARGUMENT

1. **Denied.** As detailed below, the Superior Court applied the agreed tax law and tax results, including the "separate treatment" tax law that Textron urges on this appeal. Textron concedes that, *under such tax law*, the decrease in basis affects Acument's tax position. Textron therefore does *not* contend that, *under such tax law*, the decrease in basis may be ignored, such that the increase in basis alone affects Acument's tax position. Textron concedes that both affect Acument's tax position. Textron's argument that only the increase in basis should be considered therefore does not actually raise an issue of tax law. It therefore does not raise an issue for *de novo* review, as Textron contends. Since the decrease in basis exists under the tax law and affects Acument's tax position, if it is to be ignored at all in determining whether Acument has a "Tax Benefit," it could be ignored only by the contractual meaning of that defined term.

Textron therefore actually challenges on appeal only the Court's contractual determination that the increase in basis standing alone does not constitute a Tax Benefit under the Agreement. As this determination was purely a matter of contract interpretation, based upon the Agreement and the extrinsic evidence, it is entitled to deference and should be affirmed because, as detailed herein, it was well supported by the record evidence and the product of an orderly and logical deductive process.

2. **Denied.** The Superior Court did not read the word "reduction" out of the contract. It expressly ruled that "a Tax Benefit Offset only applies if Acument is entitled to a Tax deduction *or reduction*." (Op. 53 (emphasis added)) However, it was permissible and appropriate for the Superior Court to use the terms

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interchangeably in determining whether a right to a reduction exists because (a) Textron has never argued that Acument is entitled to any form of reduction other than what it describes as a deduction, and (b) the parties used the terms interchangeably in their course of conduct.

COUNTER-STATEMENT OF THE FACTS

During a four day trial, the Court heard testimony from eleven witnesses, considered designated deposition testimony from eleven witnesses and admitted 266 trial exhibits, consisting largely of correspondence between the parties. Following trial, the Superior Court rejected Textron's arguments. It therefore entered judgment for Acument on all claims, including both (a) Textron's claims for Tax Benefit Offsets from Acument for indemnification payments made by Textron and (b) Acument's counterclaims for return of the few Tax Benefit Offsets that Acument had mistakenly provided or allowed before it determined that it was not entitled to a tax reduction.

In its 65-page opinion, the Superior Court made detailed factual findings, summarized the parties' arguments and explained the rationale of its rulings. The Court's rulings and the bases for them are described below.

I. The Superior Court's Interchangeable Use of the Terms Deduction and Reduction

Textron contends that the Superior Court ruled that only a tax deduction would suffice for a Tax Benefit Offset to apply and that another form of tax reduction would not suffice. This is not correct. The Court expressly held that a "Tax Benefit Offset only applies if Acument is entitled to a deduction ***or reduction***." (Op. 53 (emphasis added)) The Court also provided examples of reductions that might suffice that are not produced by deductions, specifically a tax "credit and/or refund." (Op. 49 n.243)

The Court used the terms deduction and reduction interchangeably because the parties had done so "throughout their negotiations and up to the filing of this lawsuit." (Op. 49) The Court cited the voluminous correspondence between the parties in which they consistently referred to the event required to trigger a Tax Benefit Offset

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as a "deduction." *See infra* 16-18, 34 & n.8. Consistent with the correspondence between the parties, on which the Court relied, Textron has never argued that Acument is entitled to any "reduction" other than a "deduction." As detailed below, Textron's arguments rely upon the proposition that Acument is entitled to deductions.

II. The Superior Court's Determination that Acument Is Not Entitled To Deductions

The Superior Court ruled that Acument "is not entitled to a tax deduction" for the Losses. In so ruling, the Court adhered to the evidence and the agreement of the parties on the tax law and results. The ruling was consistent with the parties' historic tax treatment: To the extent that Textron complied with its full indemnification obligations, Acument did not add the indemnified Losses to its tax basis, did not deduct them and did not receive any other reduction in taxes from them. (B157:22-158:12 (Trial Tr. of Acument's D. Modrycki)) Pursuant to its indemnity obligations, Textron paid the Losses. Textron therefore deducted the Losses on its own tax returns, deducting more than $23.4 million in Losses from the commencement of the Agreement through December of 2011. (B161:1-16 (Trial Tr. of Textron's P. Elmer))

The parties have always agreed on the tax law and results that prevent Acument from obtaining any sort of tax reduction. If the Losses had *not* been indemnified by Textron, Acument would have been entitled to add the amount of the liability to its tax basis in the acquired assets. (B134:11-22 (Trial Tr. of Textron tax expert S. Gertzman)) As a result of such a higher basis, Acument would have had a right to reduce its taxable income over time by the amount of the increase in basis (and only that amount), through increased depreciation or amortization adjustments or, if and when Acument's assets are sold, a smaller gain (or larger loss) on sale. (B160:16-21

(Trial Tr. of Acument Tax Expert R. Wellen)) Both of these types of tax savings can occur only if Acument has a higher net basis, and Textron describes both as deductions. (B140:16-141:2 (Gertzman Trial Tr.))

However, in the actual circumstances, in which Textron was required to indemnify Acument for 100% of the amount of the Losses in the United States, the tax analysis was different. Acument has both a basis increase from the assumed contingent liability and an equal basis decrease from the indemnity obligations, with the result that Acument has no net increase in basis from which it may obtain any sort of tax reduction (deductions or otherwise).

Textron has long agreed with this analysis. Its tax law expert explained at trial:

> Q. [I]sn't it also true that in an instance where the seller indemnifies the buyer for 100 percent of the losses arising from the liability, there would be an increase in the basis in the amount of the loss, and a decrease in the basis in the same amount.
>
> A. That's exactly correct.
>
> Q. So, in other words, the buyer would have no increase in basis correct?
>
> A. That would be no net increase in basis. (B144:23-145:9)

Textron's expert further testified as follows concerning an example ("Example 5") from his own report which assumed that Textron had complied with its obligation to provide full indemnification for the Losses:

> Q. It says buyer has paid one hundred. So that's the purchase price for tax purposes; right?
>
> A. That's the initial purchase price is one hundred. What I am showing in that is the way you get to a hundred is, I've started with a hundred, I've added ten, and I've subtracted ten.

> Q. Right. So this second one hundred then would be the starting purchase price . . . . Then it goes up ten to reflect the liability, down ten to reflect indemnification, and then it ends up at a hundred, correct?
>
> A. Right.
>
> Q. Okay. And so, as you said, there's no net increase in basis in this situation?
>
> A. What I've said, which I think we're having some difficulty understanding, perhaps, so let me state it again. I think when you say there's no net increase, you are hoping to demonstrate that the basis is a hundred, and that's what the basis is. And what I keep pointing out, which for tax purposes is very significant, and it's required by the tax law, is that you are required to say a hundred, plus ten, minus ten in this example.

(B146:19-147:19; *see also* B68 (Gertzman Rep. Example 5); B159:2-5 (Wellen Trial Tr.) (both parties' experts agree that the purchaser cannot deduct Losses)).

Textron has also made clear its agreement with this analysis both at trial and on this appeal. As Textron acknowledged *in its own opening post-trial brief*, if "Textron ultimately provides an indemnification payment in the full amount, [*it*] *thus nets out any increase in Acument's basis with a corresponding decrease*." (A244 (emphasis added); *see also* Textron 21-22 ("Acument's basis in the acquired assets increases upon the fixing of an assumed contingent liability [the Loss]. This is undisputed by the parties . . . . It is also undisputed that when Textron makes an indemnity payment, Acument's tax basis is reduced."))[2]

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[2] All of Textron's examples involving a net increase in basis assume that Textron does not fully indemnify Acument. These examples are irrelevant because the Superior Court held that Textron was required to fully indemnify Acument, and Textron does not challenge this determination on appeal. Tellingly, Textron's expert could only testify that there would be a tax reduction *when there is less than complete indemnification*. (*See, e.g.*, B143:4-7 ("*Assuming that the indemnification that is to be made is **going to be something less** than the amount of the liability assumed*, there will always be a net increase [in deductions].") (emphasis added); *id*. at 16-22 ("[T]hat liability will be taken into account and is an increase in the purchase price, and then if you have simultaneous[ly] a reduction in the purchase price, because of the indemnification[,] then [] *to*

At times, Textron speaks as if the increase in basis and decrease in basis may occur at different times, but Textron has never seriously disputed that they occur simultaneously. At trial, Textron's expert confirmed that they occur simultaneously. (B142:2-13) This is especially unsurprising given that Textron pays the vast majority of the Losses directly to the environmental vendors, collapsing the liability and indemnification tax events into a single transaction. (B131:13-18 (Trial Tr. of Textron's J. Curran)) As a matter of tax law, Textron agrees that Acument is not entitled to a reduction in taxes.

III. Textron's Arguments that It Is Nonetheless Entitled to a Tax Benefit Offset

Despite Textron's agreement that Acument is not entitled to any reduction in taxes, under the tax law, and that Textron is entitled to deduct the Losses, Textron seeks Tax Benefit Offsets from Acument. In an effort to achieve this result, Textron argued, before the Superior Court, that it did not matter that Acument was not entitled to tax reductions under the tax law. As its primary argument, Textron contended that the Offset was simply "hypothetical" and thus "automatic," with the result that all indemnification payments were to be "partial." According to Textron, the parties were to "share" the indemnified Losses. (*See, e.g.*, B97 (Textron Pretrial Br.) (arguing that Offset "operated as an automatic reduction to Textron's indemnity obligations."))

In its post-trial briefing, Textron also asserted the argument that it now presses on this appeal: that the increase in basis standing alone, even though offset by the

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the extent the indemnification ***is less*** *than the amount of the assumed liability*, you're going to have a net increase [in deductions].") (emphasis added))

decrease in basis for tax purposes, constitutes a Tax Benefit under the Agreement. (*See* A242 ("[A]n increase in Acument's basis constitutes a Tax Benefit (or right to a Tax Benefit) . . . ."); Textron 20 ("Textron is entitled to a Tax Benefit Reduction because Acument receives a tax basis increase when an assumed, pre-closing contingent liability fixes.")) According to Textron, the decrease in basis should be ignored. (A244 (arguing that under the Agreement "whether Textron ultimately provides an indemnification payment in the full amount, and thus nets out any increase in Acument's basis with a corresponding decrease, is a separate and distinct adjustment to Acument's basis and therefore irrelevant"); Textron 23 ("Any corresponding decrease in tax basis (step 2) as a result of Textron's indemnity payment is irrelevant . . . ."))

This new argument is substantially similar to Textron's primary argument because, if accepted, it would require Acument to share the Losses with Textron. By ignoring Acument's decrease in basis and inability to obtain any tax reduction, the argument would require Acument to provide a Tax Benefit Offset that is not warranted by any right to a reduction in taxes. Acument then would not be fully indemnified by the combination of indemnification and tax reductions. It therefore would bear a substantial portion of the Loss. Meanwhile, Textron would indemnify less than the entirety of the Loss, and its indemnification would be partial.

IV. The Court's Determination that the Increase in Basis Does Not Constitute a Tax Benefit

Due to their similarity, the Superior Court addressed both of Textron's arguments together and rejected them for substantially the same reasons: *First*, the relevant provisions of the Agreement did not mention that the Tax Benefit Offset was

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automatic or triggered by a basis increase alone. (Op. 49-51) Section 6.1(d)(iii)(c), the Tax Benefit Offset provision, when read in context indicated that, for an Offset to apply, Acument must be entitled to some amount that would reduce its Loss. (*Id.*) *Second*, the provisions of the Agreement therefore did not suggest that the indemnification was to be partial or that the Losses were to be shared. (Op. 49-53) *Third*, the testimony of the negotiators for both sides supported the conclusion that the Losses were not to be shared. (Op. 53-60, 63-64) *And finally*, the conduct and correspondence of the parties made clear that an Offset was owed only if Acument was entitled to a deduction or other reduction in taxes. (Op. 58-64)

The Court expressly addressed Textron's contractual argument that Acument receives a Tax Benefit based on the increase in basis from the payment of the contingent liability standing alone and that the decrease in basis from the indemnification should be ignored. And the Court ruled, based on consideration of the Agreement and extrinsic evidence, that the indemnification payment may not be ignored; Textron is entitled to a Tax Benefit Offset only if Acument is entitled to a deduction *after considering the indemnification payment*:

> Textron also argues that . . . Acument receives a "tax reduction" based upon an increase in basis *following Textron's Loss payment for each contingent liability*. . . . [A]fter carefully considering all the documentary evidence, the parties' positions during negotiations, and the parties' conduct after executing the PSA and Letter Agreement, the Court concludes that the Tax Benefit Offset applies only if Acument is entitled to a "deduction" *upon the making of an indemnification payment*. (Op. 48-49 (emphasis added))

In explaining this ruling, the Court first reviewed the terms of the Agreement, including the Tax Benefit Offset provision in Section 6.1(d)(iii) and the definition of Tax Benefit, which are as follows:

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> Section 6.1(d)(iii):
>
> Each Loss […] shall be reduced by (A) the amount of any insurance proceeds received by the Indemnified Party, (B) any indemnification, contribution or other similar payment paid to the Indemnified Party by any third party with respect to such Loss and (C) any Tax Benefit of the Indemnified Party or any of its Affiliates attributable to such Loss. (A123)
>
> The definition of Tax Benefit:
>
> "Tax Benefit" shall mean the present value of any refund, credit or reduction in otherwise required Tax payments, including any interest payable thereon, which present value shall be computed as of the Closing Date or the first date on which the right to the refund, credit or other Tax reduction arises or otherwise becomes available to be utilized, whichever is later, (i) using the Tax rate applicable . . . , (ii) using the interest rate . . ., and (iii) assuming that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party). (A142)

The Court explained that the Agreement "does not contain the words 'hypothetical' or 'automatic.'" (Op. 48) The Court similarly explained that there is "no express language within the [Agreement] to support Textron's position that an increase in basis is what the [Agreement] drafters intended to satisfy the Tax Benefit Offset." (Op. 49-50)

The Court also concluded that the "language of the [Agreement] further belies that the parties intended for an increase in basis to satisfy the Offset." (Op. 50) As support, the Court cited the subsections of Section 6.1(d)(iii), and explained, "None of the clauses have language indicating a 'sharing' or partial indemnification." (*Id.*) They rather reduce Textron's indemnity obligation only if Acument's Loss is reduced by amounts that Acument is entitled to receive on account of the Loss, such as "insurance proceeds" and "third-party contributions." The Court concluded that the

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three subsections of 6.1(d)(iii) only allow offsets if it is possible for Acument to reduce its loss: "Considering the entire 6.1(d)(iii) clause, it reads as *possible* reductions in the amount of the Loss Textron is required to indemnify." (Op. 50-51)

The Court later turned to the extrinsic evidence, first considering the testimony of the negotiators of the relevant provisions. The Court found that the testimony of the negotiators for both sides did not support the conclusion that the parties intended to share the Losses, but rather indicated that Acument was only required to provide an Offset if it was entitled to a deduction or a reduction in taxes. The Court cited the testimony of Marc Yassinger of Acument's parent, Platinum Equity, who negotiated the Agreement's tax provisions. As the Court explained, "Yassinger testified that the Tax Benefit Offset is a 'typical provision' designed to limit indemnification payments and prevent 'a windfall' to the indemnified party." (Op. 53) In the absence of such a provision, a windfall might occur because, if the losses are deductible (as they are in the foreign countries also covered by the Agreement), the indemnified party could combine a 100% indemnification with a tax deduction and end up more than whole. The Court also cited the testimony of David Stonestreet, Textron's negotiator of the tax provisions, stating that Yassinger's testimony "correlates with Stonestreet's testimony regarding the purpose of Section 6.1(d) in the [Agreement]." (Op. 53) In the cited testimony, Stonestreet testified, "that might be part of the rationale that you would say we won't give a party a windfall." (B48 at 97:19-B49 at 98:1)

Finally, the Court carefully considered the evidence submitted by both sides concerning the conduct and correspondence of the parties, both before and after the Agreement was signed. The Court found, "As explained below, based upon the

parties' conduct and correspondence, a Tax Benefit Offset only applies if Acument is entitled to a Tax deduction or reduction." (Op. 53)

As support for this finding, the Court found credible the testimony of Acument's witnesses. Specifically, it found credible, the testimony of Marc Yassinger, including that Section 6.1(d)(iii) exists "so that Acument is not more than 100% reimbursed." (Op. 55) It also found credible the testimony of Platinum Equity's Dan Krasner, including that the purpose of Section 6.1(d)(iii)(C) is that "if there's a loss for which [Acument is] indemnified, and Acument can deduct that loss, and, therefore, get a tax benefit, then it's fair that the amount that Textron would indemnify Acument would be reduced by the amount of that benefit." (B154:22-155:5 *cited at* Op. n.274). It also found credible the testimony of David Stonestreet, who negotiated the relevant provisions for Textron, that "there is no offset for an item that is not deductible, and there would be no tax benefit attributable to a nondeductible loss." (B50 at 117:25-B51 at 118:2 *cited at* Op. n.294)

By contrast, the Court did not find credible the testimony of the only witnesses supporting Textron's position. Specifically, the Court did not find credible the testimony of Textron's Andrew Spacone on the ground that it "mostly contradicts the documentary evidence." (Op. 60) The Court did not credit the testimony of Textron's Jack Curran that he intended the Tax Benefit Offset to effect a "sharing" of the liabilities because Curran was the "only witness involved in the [Agreement] negotiations to use the term 'sharing'" and it is "extremely difficult for the Court to reconcile [his position] with his testimony that he was unable to recall any discussions with [Platinum Equity] on this point." (Op. 57) As the Court explained, "Curran's

testimony regarding his intention that the Tax Benefit Offset work as a 'sharing' mechanism, thereby creating a partial indemnification, is unpersuasive because there is no evidence supporting that position and his subjective intent is irrelevant because that intent is not expressed in the terms of the [Agreement]." (Op. 50 n.253)

As additional grounds for its finding that the Tax Benefit Offset only applies if Acument is entitled to a deduction or other reduction, the Court cited the documentary evidence. Such evidence included emails by Textron's Stonestreet, in which "Stonestreet consistently addressed Acument's ability to deduct Losses" in discussing whether a Tax Benefit Offset applied to foreign Losses. (Op. 60) The Court also cited emails authored by Textron's Spacone, explaining that "for months after his January 25 letter, Spacone either advised both Textron and Acument employees that Losses are reduced 'by any benefit [Acument] receives,' or tacitly agreed that the Offset is [determined] by Acument's ability to deduct a Loss payment." (Op. 61) The Court cited Spacone's November 2007 email, in which he explained to Acument's John Clark that the "hypothetical tax benefit offset applies to tax payments [to the extent they are deductible] as well as retained litigation." (Op. 62 (brackets in original Spacone email)) The Court cited Spacone's January 2010 letter to Clark, in which he wrote that "the fact that Acument at some time in the future (or in the past) may be entitled (for whatever reason) to a tax deduction attributable to the United States claims that are indemnified by Textron […] is enough to trigger the reduction in Textron's [] payments." (Op. 62) (modifications in original). With regard to this email, the Court commented, "If the Offset was in fact 'hypothetical,' it would not require a trigger." (*Id.*)

ARGUMENT

I. THE SUPERIOR COURT'S DETERMINATION THAT ACUMENT IS NOT ENTITLED TO A TAX BENEFIT WAS LOGICAL AND WELL SUPPORTED BY THE RECORD AND THEREFORE SHOULD BE AFFIRMED.

A. Question Presented

Whether the Superior Court erred in supposedly failing to consider and analyze tax law and finding, supposedly contrary to such law, that Acument is not entitled to a tax deduction (or reduction), and that a Tax Benefit Offset was not required?

B. Scope of Review

Since, as detailed below, the Superior Court applied the agreed tax law, including the "separate treatment" tax law advocated by Textron, Textron's appeal does not actually challenge the Court's determination of tax law and therefore does not raise an issue for *de novo* review.

Since Textron's appeal does not actually challenge the Court's determination of tax law, it could challenge only the Superior Court's contractual interpretation that the increase in basis standing alone does not constitute a Tax Benefit under the Agreement. This determination is entitled to deference if it is well supported by the record and the product of an orderly and logical deductive process. *AT&T Corp. v. Lillis*, 970 A.2d 166, 170 (Del. 2009) (To "the extent the trial court's interpretation of the contract rests upon findings extrinsic to the contract, or upon inferences drawn from those findings, [this Court's] review *requires* [*it*] *to defer to the trial court's findings*, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive process." (emphasis added)). This is the standard that this Court applies to findings of

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fact. *Gamles Corp. v. Gibson*, 939 A.2d 1269, 1274 (Del. 2007). Under this standard, this Court "will accept the findings of the trial [court] . . . even though [this Court] might have independently reached different conclusions," *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1278 (Del. 1989), and will substitute its own judgment for that of the trial court only if the trial court's findings are "clearly wrong," *Lank v. Steiner*, 224 A.2d 242, 245 (Del. 1966).

C. Merits of the Argument

Textron's first argument on appeal challenges only the Superior Court's interpretation of the Agreement, based upon the extrinsic evidence. That interpretation is entitled to deference and should be affirmed because it is well supported by the record and the product of an orderly and logical deductive process.

1. Textron's First Argument Challenges Only The Court's Contractual Interpretation.

Although Textron contends that its first argument—that the basis increase standing alone constitutes a Tax Benefit—concerns the supposed failure of the Superior Court to consider and apply tax law, the argument actually challenges only the Court's contractual interpretation. In its Question Presented, Textron suggests that the Superior Court's determination that Acument was not entitled to a Tax Benefit violated tax law. Textron argues that only the increase in basis may be considered in determining whether Acument is entitled to a Tax Benefit and that, if only the increase is considered, Acument is entitled to a Tax Benefit. As detailed below, in rejecting this argument, the Superior Court could not have violated any tax law because it applied the very same tax law to which Textron had agreed and the only tax law that Textron cites. The "separate treatment" tax law cited by Textron does not require that

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only the increase in basis be considered. While it may require that the increase in basis and decrease in basis be considered separately, it nonetheless requires that both be considered. The Court, therefore, correctly recognized that Textron's contention that only the increase in basis may be considered was a contractual argument.

a. The Superior Court Applied the Agreed Tax Law.

The Superior Court applied the tax law and results to which Textron had agreed. Textron had specifically agreed (as it does on this appeal) that, under the tax law, Acument has both an increase in basis and an equal decrease in basis, with the result that it does not have any net increase in basis. *See supra* 10-11. Textron has further agreed that, under the tax law, the absence of any net increase in basis prevents Acument from having anything to deduct or with which to reduce taxes, with the result that, under the tax law, Acument is not entitled to a deduction or other reduction in taxes. *See supra* 10-12 & n.2; *infra* 22-23, 29-30. The Court's determination that Acument was not entitled to a deduction (or other reduction) was therefore completely consistent with the tax law and results to which Textron agreed.

In its opening appeal brief, Textron provides an example along with other citations showing that there would be a net increase in basis if Textron indemnified only 60% of the Loss. (Textron 13) The example and citations are irrelevant because the Superior Court determined that Textron is required to provide 100% indemnity (Op. 55-57) , and Textron does not challenge that determination on appeal.[3] (Textron

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[3] Similarly, Textron takes an out of context quotation from its expert in an attempt to show that the type of immediately-eliminated increase in basis that Acument receives can result in a tax deduction (Textron 16), but the testimony it cites addressed a hypothetical scenario with no indemnification obligation whatsoever, in which the increase in basis is never eliminated by a decrease. (B139:17-141:2) Relatedly, Textron's false (and wholly illogical) claim that a buyer "retains" a right to tax reductions associated with an increase in basis even if that increase is

n.4) As detailed above, when Textron provides 100% indemnity, the increase and decrease in basis are equal and the decrease eliminates the increase. *See supra* 10-11; *infra* 22-23.

In arguing that the Superior Court should have considered only the increase in Acument's basis, and that the decrease in basis must be ignored, Textron does not actually say that the decrease in basis does not affect Acument's tax position. The tax law does not ignore the decrease in basis. As Textron concedes, the tax law *requires* the decrease in basis, and the decrease in basis does affect Acument's tax position. The tax law could not possibly be said to ignore that which it requires.

b. Textron Concedes that "Separate Treatment" Is Not to the Contrary.

Textron argues only that, under the tax law, the decrease in basis should be considered "separately." But considering something separately is not the same as not considering it. Whether the decrease in basis is considered separately or together with the increase in basis, the tax result is the same: Acument is not entitled to a reduction in taxes. Textron's tax law expert agrees. He testified, "I am not aware of any difference in tax treatment arising from the increase and the decrease, whether you were to do it separately or just net it." (A202 at 224:9-A203 at 226:15) Similarly, he acknowledged that the "separate treatment" analysis described in his report "achieves the same result" as treating both the increase and decrease in basis as completely "ignored for tax purposes." (B150:4-11; *see also* n.2 *supra* (Gertzman acknowledges

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eliminated by a decrease (Textron 15) is not even remotely supported by the testimony Textron cites, in which Textron's expert actually agreed that the economic effect of the indemnification is an elimination of the increase in basis. (B137:16-138:6)

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that Acument only receives deductions if Textron provides less than full indemnity)) Whether the decrease is considered separately or together with the increase in basis, Acument is not entitled to a deduction (or reduction) in taxes under the agreed tax law and results.

Not surprisingly, the very same IRS memorandum referenced by Textron as support for its "separate treatment" argument confirms that the decrease in basis must be considered. (Textron 16) It further establishes that the decrease in basis eliminates the increase in basis, with the result that the indemnified party has no net increase in basis. And it establishes that the indemnified party is thus not entitled to any deduction. The IRS explained,

> With regard to basis adjustments, [the indemnified party] *makes an upward adjustment in the basis of its assets* in the amount of the contingent liabilities and pre-acquisition interest as of the time those amounts become fixed and determinable. Further, [the indemnified party] *makes an offsetting downward adjustment in the basis of its assets* in the amount of the contingent liabilities and pre-acquisition interest as of Dates C and D, when Seller paid those amounts pursuant to the indemnity agreement that was entered into in connection with the stock purchase agreement. (IRS FSA 200048006, Aug. 14, 2000 (emphasis added) (attached as Ex. A)).

Because the decrease in basis eliminates any increase, the IRS concludes that the indemnified party "***may not deduct the [pre-acquisition contingent liabilities] paid by the Seller.***" *Id.* (emphasis added). (*See also* Textron 21; B135:10-136:5 (Gertzman Trial Tr.) ("[T]he tax law is fairly clear that you *have to take the separate steps into account* separately, the increase and the decrease." (emphasis added)) Similarly, in explaining the treatise that Textron claims supports its position, Textron's tax expert wrote, "***Basis will be unchanged*** if it is assumed that the amount of the indemnity equals the amount of the liability assumed . . . ." (B87 (emphasis added))

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Since the tax law requires Acument to consider the decrease in basis in determining its tax position, the Superior Court's determination could not have violated such law by taking into account the decrease in basis in determining whether Acument is entitled to a reduction in taxes. Since the decrease in basis is not ignored by the tax law, the decrease in basis could be ignored only by contract, if it is to be ignored at all. For this reason, the Court was correct to address, as purely a matter of contractual interpretation, Textron's argument that only the increase in basis may be considered. The Court's treatment of this issue as an interpretation of the Agreement was also consistent with Textron's argumentation before the Superior Court. When Textron introduced this argument in its post-trial brief, it cited tax law for the proposition that the increase and decrease are treated *separately*, but cited the Agreement for the supposed proposition that the decrease is irrelevant. (A244)

c. The Superior Court Applied Separate Treatment.

In any event, the Superior Court applied the very same "separate treatment" tax law that Textron contends the Court failed to consider. Textron submitted testimony from its expert concerning "separate treatment." Textron argued that, under "separate treatment," Acument is entitled to an increase in basis, but Textron also acknowledged that the increase is eliminated by a decrease, with the result that Acument has no net increase in basis. Acument's expert discussed a second analysis: the "no assumption" analysis. Under the "no assumption" analysis, due to Textron's indemnification, Acument is treated as never having assumed the indemnified contingent liabilities, with the result that Acument has neither an increase in basis nor a decrease.

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In an effort to obtain *de novo* review, Textron contends that the above represented an important dispute that was never resolved by the Court. In fact, there was no real dispute, and the Court did resolve the issue by applying the very same "separate treatment" analysis advocated by Textron. There was no real dispute because Acument invited the Court to apply "separate treatment." (A292 (Acument Post-Trial Br.)) It did so because Acument's own expert agreed that "separate treatment" was not incorrect. Acument did so also because the dispute was wholly unnecessary. As Textron's expert conceded in the material quoted above, the tax result is the same whether "separate treatment" or "no assumption" is applied. Either way, Acument is not entitled to a deduction (or any other reduction) in taxes.

It is clear that the Court applied "separate treatment" because the Court addressed Textron's argument that only the increase in basis should be considered in determining whether Acument is entitled to a Tax Benefit. Under the "no assumption" analysis, there would not have been any increase in basis for the Court to have considered. Acument would have been treated as never having assumed the indemnified liabilities that produce the increase in basis (and the decrease) and therefore as not having an increase in basis (or a decrease). (A291 n.15 (Acument Post Trial Br.)) Textron's first argument is based upon the Court's supposed failure to apply tax law that the Court *did indeed apply*.[4] Since Textron does not cite any tax

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[4] Furthermore, since the Superior Court was able to rule that even under Separate Treatment, there was no Tax Benefit, it was proper and prudent for the Superior Court to pass over the difficult and unsettled federal tax question of whether separate treatment is the *only* permissible tax analysis. *See Crown Emak Partners, LLC v. Kurz*, 992 A.2d 377, 398 (Del. 2010) (noting that, for issue whose resolution would not alter outcome of case, "a gratuitous statutory interpretation resolving this difficult issue [would not] be prudent").

law that the Court's determination might have violated, Textron actually challenges only the Court's contractual interpretation to the effect that the basis increase alone does not constitute a Tax Benefit under the Agreement.

2. The Superior Court's Contractual Interpretation Should Be Affirmed.

The Superior Court interpreted the Agreement to reject Textron's argument that the increase in basis standing alone constitutes a Tax Benefit. This ruling is entitled to deference and should be affirmed. It was well supported by the record and was the product of an orderly and logical deductive process. Textron's only argument to the contrary is meritless.

a. The Court's Interpretation Was Both Well Supported by the Record and Logical.

The Superior Court determined that, under the Agreement, both the increase in basis from the contingent liability and the decrease in basis from the indemnification must be considered in determining whether Acument is entitled to a Tax Benefit. Based upon the terms of the Agreement and the extrinsic evidence, the Court expressly held that Acument is not required to provide a Tax Benefit Offset unless it is entitled to tax deductions after consideration of the indemnification:

> Textron also argues that . . . Acument receives a "tax reduction" based upon an increase in basis following Textron's Loss payment for each contingent liability. . . . [A]fter carefully considering all the documentary evidence, the parties' positions during negotiations, and the parties' conduct . . . the Court concludes that the Tax Benefit Offset applies only if Acument is entitled to a "deduction" upon the making of an indemnification payment. (Op. 48-49)

The Court's interpretation was supported by four findings. *First*, the Court found that the interpretation was supported by the text of the Agreement. The Court

explained that "there is no express language within the [Agreement] to support Textron's position that an increase in basis is what the [Agreement] drafters intended to satisfy the Tax Benefit Offset." (Op. 49-50) This is logical. Neither Section 6.1(d)(iii) nor the Tax Benefit definition refer to an increase in basis. Section 6.1(d)(iii) requires a Tax Benefit, and the Tax Benefit definition defines Tax Benefit as the "present value of any refund, credit or reduction in otherwise required Tax payments" and it requires a "right to the refund, credit or other Tax reduction."

Second, the Court found that the "language within the [Agreement] further belies that the parties intended for an increase in basis to satisfy the Offset," referring to Section 6.1(d)(iii). (Op. 50) According to the Court, "Considering the entire 6.1(d)(iii) clause, it reads as *possible* reductions to the amount of Loss Textron is required to indemnify." (Op. 50-51) This reasoning also is logical. Subsections (A) and (B) of Section 6.1(d)(iii) provide offsets only for amounts to which Acument is entitled on account of the indemnified Losses, such as insurance proceeds and third party contributions. They require that Acument be entitled to an amount that would reduce its Loss, thereby warranting a reduction in the indemnity. Taken in context, it is logical that subsection (C), which provides the Tax Benefit Offset, should be similarly construed and therefore should not be construed as encompassing an increase in basis that does not reduce Acument's Loss because the increase is eliminated by an equal decrease in basis.[5]

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[5] This is consistent with Delaware law. *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 Del. Ch. LEXIS 125, at *12-13, n. 24 (Del. Ch. May 28, 2010) (Contractual terms are read "within the context of the contract surrounding that language in order to best elicit the most appropriate meaning."); *see also Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 2013 Del. LEXIS 29, at *13 (Del. Jan. 16, 2013) (explaining that, under *noscitur a sociis*, "words grouped in a list should be given related meaning").

Third, the Court found that the interpretation was supported by the testimony of the negotiators of the tax provisions from both sides concerning the purpose of the Tax Benefit Offset. Acument's Mr. Yassinger testified that the purpose was to prevent Acument from obtaining the windfall that might result if Acument could combine a 100% indemnification with tax deductions. (Op. 53) Similarly, Textron's "Stonestreet testified that Textron would indemnify Acument 100%, less any 'deductible' Offset." (Op. 59) The testimony that deductibility was required directly refuted Textron's position that the decrease in basis (which precludes deductibility) is irrelevant and that only an increase in basis was required. It was logical for the Court to consider the negotiators' agreed understanding of the purpose for the provision they negotiated, and their testimony clearly supports the conclusion that a right to a reduction in taxes was required.

Finally, the Court found that the "parties' conduct and correspondence" indicated that a right to a deduction or reduction was required. (Op. 53) In so finding, the Court relied upon the voluminous correspondence between the parties, in which Textron referred to whether Acument was entitled to a deduction in determining whether Textron was entitled to an Offset. *Supra* 16-17; *infra* 34 & n.8. The Court also relied upon correspondence in which Textron's witnesses admitted that deductibility was a prerequisite to a Tax Benefit Offset. *Id*. The Court further relied upon the testimony of Acument's witnesses, who testified that (a) they understood that a Tax Benefit Offset did not apply unless Acument had a right to a reduction in taxes, (b) the provision was designed to achieve fairness and (c) the Offset was not a "sharing" provision. *Supra* 16-17. Finally, the Court found not credible the testimony

of Textron's witnesses that the Tax Benefit Offset was a "sharing" provision or that the Offset was hypothetical on the logical grounds that the witnesses either had not disclosed their supposed views during the negotiation of the Agreement or were contradicted by documents they had themselves authored. *Supra* 17-18. The Court's determination was amply supported and logical. It should be upheld.

The Court's determination should be upheld for the additional reason that it is further supported by ample additional evidence not specifically referenced in the Court's opinion. Because this evidence was fairly presented to the trial Court, it can serve as an independent basis for affirmance even though not included in the Court's opinion. *See Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 367, 374 (Del. 2011) (affirming a Court of Chancery decision on other grounds not discussed or relied upon by the Court of Chancery in its opinion).[6]

First, Textron did not once mention, in all its voluminous correspondence both before and after the Agreement was signed, the notion that an Offset would be triggered by an increase in basis alone, and none of Textron's fact witnesses testified that this was so. *Second*, Textron's own tax personnel analyzed *identical language* in the draft purchase agreement for another Textron deal and determined that there would be no benefit to Textron from insisting on this language over the counterparty's objection because the decrease in basis (i.e., "purchase price") associated with the indemnity payment would prevent there being any Tax Benefits in the United States:

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[6] This is consistent with the rule in other jurisdictions. *See* 19 James Wm. Moore et al., *Moore's Federal Practice* ¶ 205.05[1], at 205-59 (3d ed. 1999) ("A prevailing party may support its judgment on any ground that is found in the record, even if that ground was not the basis of the decision below; provided that an affirmance on that ground would not alter the rights of the parties as established in the judgment.") (attached as Ex. B).

(B1; *see also* B132:2-21 (Curran Trial Tr.)) *Finally*, immediately before trial, in an effort to confine the effect of damaging evidence as to one type of Loss, tax Losses, Textron conceded that deductibility was required for such Losses. (B108 (Textron Pre-Trial Br.)) Accordingly, Textron agreed that it would return to Acument the Offsets that Acument had mistakenly allowed for such Losses. (A097 at ¶ 35 (Pretrial Order)) But the tax Losses are not deductible for the same reason that all of the other Losses (i.e., environmental and retained litigation) are not deductible: the basis decrease eliminates the increase. (B152:15-153:7) Thus, Textron conceded that an increase in basis alone did not create a right to a deduction.

b. Textron's Only Counter-Argument Is Meritless.

The only argument presented by Textron for reversal of the Court's contractual interpretation is meritless. Textron states that the definition of Tax Benefit "applies the increase in basis as though the benefit were available immediately, and it does so *without regard to the actual tax position of Acument*." (Textron 23 (emphasis in original)) Textron however does not spell out the argument nor cite or quote the relevant provision. Doing so makes clear that the assertion is not correct.

Textron apparently contends that the definition applies the increase in basis immediately and disregards the decrease in basis. Textron is presumably referring to romanette (iii) of the definition, which provides that the present value of the reduction, which is the Tax Benefit, is to be computed,

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> (iii) assuming that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party). (A142)

As the provision itself makes clear, the effect of the provision is, for purposes of calculating the present value, to treat any *reduction* in taxes to which Acument is in fact entitled, as if Acument could use the *reduction* in the earliest possible taxable period. This is so even if, due to other losses, etc., Acument did not have sufficient taxable income to use it in the earliest possible period, but rather could use it only in a later taxable period when it did have sufficient taxable income. The purpose of the provision was—for jurisdictions in which Acument was entitled to a reduction in taxes—to obviate any need for the indemnifying party to review the indemnified party's tax returns to determine when the indemnified party had used the reduction. Since the reduction would be treated as occurring in the first taxable period, regardless of whether the indemnified party had yet used it, there would be no need for an audit.[7]

Romanette (iii) does not treat an *"increase in basis"* as if it occurred in the earliest possible taxable period for purposes of *determining whether Acument is entitled to a "reduction."* It rather expressly states that it treats only a "reduction" in taxes as if it occurred the earliest possible period. It also states that it treats the reduction as occurring in the earliest possible period for the purpose of computing the reduction's present value. Since Acument does not have a "reduction," romanette (iii)

[7] Due to the effect of romanette (iii), Acument has always conceded in this litigation, as Textron repeatedly mentions, that it need not actually save taxes for a Tax Benefit Offset to apply. But, as the Superior Court expressly found, this does not mean that a Tax Benefit Offset applies, even if Acument does not even have a right to a reduction in taxes. (Op. 64 ("Yassinger claimed PE 'caved' because it did not continue to demand language requiring an 'actual' tax savings. The 'Captain Cavemannnnnn!!!' email does not support Textron's argument that the Tax Benefit Offset was hypothetical."))

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has no application. The provision certainly does not ignore the decrease in basis for the purpose of calculating the reduction's present value, much less in determining whether Acument is entitled to a reduction. It does not mention a decrease in basis.

Based upon the text of romanette (iii) and the extrinsic evidence, the Superior Court found that Acument's romanette (iii) interpretation was correct. (Op. 52 n.259 (pointing out that Textron's Curran failed to deny that the provision "instructs that the *reduction* 'shall be computed' by romanette 'one, two, and three.'") (emphasis added); Op. 51 ("Romanette (iii), however, is a requirement to determining the present value calculation.")) Textron does not challenge the Superior Court's determination. Its assertion should be rejected for this reason alone. Del. Supr. Ct. R. 14(b)(vi)(A)(3).

In any event, the Superior Court's determination was amply supported by the record. Textron has never cited any testimony or evidence to support its interpretation. The Court cited the testimony of Textron's Curran that romanette (iii) "sets forth calculation mechanisms" and calculated the present value of the "reduction." (Op. 52 & n.259) The Court also cited testimony from the parties concerning the purpose of the Tax Benefit definition in making the "process convenient because it would not necessitate a review of Acument's tax records." (Op. 59) The Court cited evidence concerning the provision's effect in Brazil, where the parties agreed that Acument was required to provide an Offset because it had a right to tax deductions, even though it could not use the deductions immediately because it had large net operating losses. (Op. 20-21, 24-25). Finally, the Court's determination was supported by all the other evidence cited above for its determination that an increase in basis standing alone does not constitute a Tax Benefit. *See supra* 26-29.

II. THE SUPERIOR COURT DID NOT HOLD THAT ONLY A DEDUCTION WOULD TRIGGER A TAX BENEFIT OFFSET AND ITS INTERCHANGEABLE USE OF THE TERMS DEDUCTION AND REDUCTION WAS SUPPORTED BY THE RECORD AND LOGICAL.

A. Question Presented

Whether, as Textron contends, the Superior Court effectively replaced the word "reduction" with "deduction" in the definition of "Tax Benefit" and required that Acument have a right to a "deduction" in order to trigger a Tax Benefit Offset and, to the extent that the Court did so, whether the decision was the product of an orderly and logical deductive process?

B. Scope of Review

The parties agree that the applicable review standard "requires [this Court] to defer to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive process." *AT&T*, 970 A.2d at 170.

C. Merits of the Argument

The Superior Court did not hold that only a "deduction" would suffice for a Tax Benefit Offset to apply. It expressly held that either a deduction or a reduction would suffice. In the words of the Court, a "Tax Benefit Offset only applies if Acument is entitled to a deduction ***or reduction***." (Op. 53 (emphasis added)) The Court also provided examples of reductions that might suffice that are not produced by deductions, specifically a tax "credit and/or refund." (Op. n.248)

The Court used the terms "deduction" and "reduction" interchangeably, and its decision to do so is entitled to deference. It is both well supported by the record and logical. The Court explained that it "intentionally uses the term 'deduction,'" because

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the parties did so "throughout their negotiations and up to the filing of this lawsuit." (Op. 49) This determination was well supported by the record. The parties consistently referred to the event required to trigger a Tax Benefit Offset as a deduction. (*See, e.g.*, Op. 59-60 ("Importantly, [Textron's] Stonestreet testified that Textron would indemnify Acument 100%, less any 'deductible' Offset, and that the Tax Benefit Offset language was inserted into the PSA in order to reduce Textron's liability. That is consistent with the documentary evidence in which Stonestreet consistently addressed Acument's ability to deduct Losses."))[8]

The Court's decision to use the terms interchangeably was also logical. There was no reason to distinguish between the two terms for purposes of this case. Textron has never suggested, even on this appeal, that Acument is entitled to any type of reduction other than what it describes as a "deduction." Textron rather contends that, if the decrease in basis is ignored so that only the increase in basis may be considered, the increase in basis will then entitle Acument to "deductions," whether in the form of increased depreciation and amortization "deductions" or, if Acument's assets are sold, increased "deductions" on the sale. This is made clear in the following testimony of Textron's expert, which Textron cites repeatedly in its brief: "[t]he increase in tax basis always gives rise to either immediate ***deductions***, ***deductions*** over time, or ***deductions*** when the property is sold." (Textron 22-23 (emphasis removed/added))[9]

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[8] (*See also* Op. at 61 (noting that Spacone "tacitly agreed that the Offset is [determined] by Acument's ability to deduct a Loss payment"); *id*. (observing that Spacone wrote that Offsets applied to tax liability payments "which are tax deductible to Acument"); Op. 62 (explaining that "Spacone again emailed [Acument's] Clark and expressed that 'the hypothetical tax benefit offset applies to tax payments [to the extent they are deductible]") (second brackets in original Spacone email))

[9] The Superior Court's interchangeable use of the terms "deduction" and "reduction" played no role in the Court's rejection of Textron's specific argument that an increase in basis would give

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Even if the Court erred in using the terms interchangeably, the error was harmless—it did not affect the outcome of the case and thus is not a basis for reversal.[10]

CONCLUSION

For the foregoing reasons, the Superior Court's ruling should be AFFIRMED.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ C. Barr Flinn
C. Barr Flinn (No. 4092)
Tammy L. Mercer (No. 4957)
Benjamin Z. Grossberg (No. 5615)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Attorneys for Defendant Below-Appellee
Acument Global Technologies, Inc.

Dated: July 16, 2014

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rise to a Tax Benefit *upon a sale of Acument's assets*. Textron has not argued that it did. If it were to make such an argument now, it would be waived. Del. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."). It also would not be correct. Textron and its expert had not taken the position that the use of an increase in basis to reduce gain on a sale of assets constitutes some form of "reduction" other than a "deduction." They rather had taken the position that it constituted a "deduction," and Acument did not disagree. The Superior Court therefore could not have rejected and did not reject the argument on the ground that the use of an increase in basis to reduce gain on sale did not constitute a "deduction" (and that only a "deduction" could constitute a Tax Benefit). As detailed above, *see supra* 26-29, the Superior Court rather rejected the argument on the same ground that it rejected the entirety of Textron's "increase in basis" argument: an increase in basis standing alone does not constitute a Tax Benefit and that the decrease in basis resulting from the indemnification must also be considered. As detailed above, the parties agreed that, when the decrease in basis is also considered, there is no increase in basis with which to reduce taxes, whether through depreciation and amortization or reduced gain on sale.

[10] *See, e.g.*, *Edmisten v. Greyhound Lines, Inc.*, 49 A.3d 1192 (Del. 2012) (affirming case where possible error by trial Court would not have made difference in light of case's factual record because "any error by the Superior Court was harmless"); *accord Hoffecker v. Lexus of Wilm.*, 36 A.3d 349 (Del. 2012); *see also Perry v. Alexander*, 21 A.3d 597 (Del. 2011) (misstatement was "harmless error" when it "did not weigh significantly" in the trial court's analysis).