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IN THE SUPREME COURT OF THE STATE OF DELAWARE

US ECOLOGY, INC. and EQ INDUSTRIAL SERVICES, INC. Plaintiffs-Below, Appellants, v. ALLSTATE POWER VAC, INC. and ASPV HOLDINGS, INC., Defendants-Below, Appellees.	No. 370, 2018 Court below: Court of Chancery C.A. No. 2017-0437-AGB

OPENING BRIEF OF APPELLANTS US ECOLOGY, INC. AND EQ INDUSTRIAL SERVICES, INC.

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NATURE OF THE PROCEEDINGS

Plaintiffs EQ Industrial Services, Inc. ("EQIS") and US Ecology, Inc. ("USE") appeal from a judgment of the Court of Chancery granting the motion to dismiss filed by Defendants Allstate Power Vac, Inc. ("ASPV") and ASPV Holdings ("Holdings"). The dismissal conferred a windfall on defendants by allowing them to retain the benefit of USE's insurance coverage following a sale of stock of ASPV, but refusing to require them to compensate Plaintiffs for the required costs of the coverage. Such a result turns equity on its head, as it violates the maxim of equity that equity will not suffer a wrong without a remedy. Here, there was a wrong, but Plaintiffs were precluded from pursuing their remedies.

In dismissing Plaintiffs' breach of contract and unjust enrichment claims,[1] the lower court rejected the well-established principle of Delaware law that, in a transaction structured as a sale of stock, all of the purchased company's assets and liabilities transfer by operation of law with the ownership of stock of the purchased company and become the post-closing responsibility of the purchaser unless they are expressly excluded from the transaction. Contrary to the lower court's decision, no further act of contracting is necessary to effectuate the transfer. *See, e.g.*, *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *3 (Del. Super. Ct. Sept.

[1] As described further below, EQIS asserted a breach of contract claim against Holdings and USE asserted an unjust enrichment claim against ASPV.

25, 2015) ("[I]t is a general principle of corporate law that all assets and liabilities are transferred in the sale of a company effected by a sale of stock.") (quoting *In re KB Toys Inc.*, 340 B.R. 726, 728 (D. Del. 2006) (alteration in original)). The lower court's opinion is in direct conflict with this black-letter Delaware law concerning stock sales, and should be reversed.

The core of this dispute is simple. EQIS sold ASPV to Holdings pursuant to the terms of a stock purchase agreement ("SPA") entered into by sophisticated parties represented by sophisticated counsel.[2] At the time of the closing in November 2015, ASPV was subject to certain pending and potential third-party lawsuits and workers' compensation claims relating to ASPV employees' workplace and automobile accidents that were—and still are—covered by insurance policies of USE, ASPV's then-parent. Years prior to closing, USE purchased these policies to cover all of its then-existing subsidiaries (of which ASPV was one) and received the bills for certain expenses and fees that were not covered in full by the policies (the "Non-Covered Payments").

At all times prior to the closing, ASPV reimbursed USE for the payments that it made on ASPV's behalf for these Non-Covered Payments, which were recognized as ASPV's liabilities. The fact that the Non-Covered Payments were ASPV's

[2] EQIS is a wholly-owned subsidiary of USE. Prior to the sale to Holdings, ASPV was a wholly-owned subsidiary of EQIS.

liabilities was known to Holdings in connection with the stock sale as they were reflected as ASPV liabilities in the SPA and in the schedules that were incorporated therein. And yet after the closing, Defendants refused to recognize the Non-Covered Payments as ASPV's liabilities, offering a series of shifting rationales for their unjustifiable attempt to shirk their responsibility for the Non-Covered Payments, all while keeping the benefit of the insurance policies. This lawsuit is the result of that refusal.

The lower court's dismissal of Plaintiffs' claims is wrong as a matter of law and, if left undisturbed, will upend established rules governing stock sales. The lower court, for reasons never explained in its decision, implicitly treated the sale of ASPV as an asset sale by *sua sponte* holding that there was no provision in the SPA that expressly transferred the Non-Covered Payments to Holdings. That position, which was never advanced by Defendants, infects the lower court's opinion, and warrants reversal.

In addition to the lower court's clear error in its treatment of the stock sale, the lower court also mischaracterized the Non-Covered Payments themselves. It inexplicably conflated the pre-closing underlying insurance claims relating to worker's compensation claims and third-party lawsuits against ASPV with the Non-Covered Payments that were *all* incurred—and for which Defendants refused to pay—post-closing. Building on that initial mischaracterization of the claims at issue

here, the lower court also improperly ignored ASPV's financial statements, which explicitly identify the Non-Covered Payments as ASPV's liabilities. Throughout its analysis, the lower court failed to take well-pleaded allegations as true, as it was required to do on a motion to dismiss, which compounded its errors. Because there can be no reasonable dispute that the Non-Covered Payments are ASPV liabilities, it is clear not only that the lower court erred in dismissing EQIS's breach of contract claim, but also that judgment should be entered in favor of Plaintiffs.

In addition, the lower court misread and misapplied the release provision (the "Release") in the SPA in dismissing USE's unjust enrichment claim. The lower court's ruling on the unjust enrichment claim is the product of a clear error in its interpretation of the Release and the application of that provision to the relevant facts. The lower court incorrectly concluded that USE's unjust enrichment claim—which arose *entirely* post-closing as a result of Holdings' refusal to pay for the specified Non-Covered Payments—somehow was grounded in pre-closing events and was thus barred by the Release. This conclusion misinterprets the nature of the unjust enrichment claim and is at odds with the fact that the Release does not bar claims that did not or could not have existed prior to closing.

These errors will, if left uncorrected, result in the grant of an inequitable and unjustifiable windfall to ASPV, as Defendants will retain the benefit of USE's insurance coverage (the asset) while having no obligation to cover the costs of that

coverage (the liabilities). The lower court's multiple errors here require reversal, and summary judgment should be granted in favor of Plaintiffs on EQIS's breach of contract claim, or, in the alternative, on USE's unjust enrichment claim.

SUMMARY OF ARGUMENT

I. The lower court committed legal error in dismissing EQIS's breach of contract claim on the ground that Plaintiffs failed to identify a specific provision of the SPA that affirmatively obligated Holdings to pay for the post-closing Non-Covered Payments. The lower court improperly ignored black-letter Delaware law holding that, in a stock sale, all of the purchased-companies' assets and liabilities transfer unless they are carved *out* of the transaction. Because the Non-Covered Payments are plainly liabilities of ASPV, they were transferred to Holdings by operation of Delaware law. No further act of contracting was necessary to effect the transfer. The lower court's analysis implicitly treated the transaction as an asset sale, and thus erroneously placed the burden on the seller to expressly provide in the SPA that the Non-Covered Payments would transfer to the buyer as part of the stock sale. This analysis is incorrect as a matter of law, and reversal is warranted.

II. The lower court also erred in concluding that the Release found in the SPA barred USE's unjust enrichment claim against ASPV. The unjust enrichment claim is based on the unfair windfall that ASPV has obtained by receiving the benefit of coverage from USE's insurance policies (and the defense of the claims and lawsuits against ASPV) while refusing to pay for the Non-Covered Payments incurred post-closing. The failure to take responsibility for these payments only came into existence post-closing and thus does not fall within the express terms of the Release,

which does not bar future claims and only bars claims that Plaintiffs had or may have had up *until* the closing. The lower court also erred in reaching the overbroad conclusion that the unjust enrichment claim results from and is somehow "inextricably linked" (Op. 21) with the pre-closing underlying insurance claims. To the contrary, USE's claim is based entirely on a post-closing dispute over Defendants' refusal to take responsibility for the Non-Covered Payments, and the nature of the underlying insurance claims is irrelevant to the analysis as to whether the Release applies. The lower court's dismissal of this claim was also in error.

STATEMENT OF FACTS

A. The Insurance Policies

USE is a major North American provider of environmental services to commercial and governmental entities. A21-22 ¶ 8. EQIS, which provides turnkey environmental services, including industrial cleaning and maintenance, waste transportation, and environmental management services, is one of USE's wholly-owned subsidiaries. A22 ¶ 9. Until November 2015, EQIS owned all of the outstanding and issued stock of ASPV, which is an environmental services and waste management organization. *Id*. ASPV was acquired by Holdings in a stock sale in November 2015. *Id.* ¶ 11.

In each year prior to the sale of ASPV, USE purchased automobile and general liability insurance policies ("Auto/GL Policies") and workers' compensation policies (the "WC Policies," and together with the Auto/GL Policies, the "Insurance Policies"), which provided coverage for, among other then-existing subsidiaries, ASPV. A23 ¶ 14. The Insurance Policies covered accidents involving ASPV personnel and equipment that were the subject of third-party litigation and workers' compensation claims and that occurred during the time that ASPV was USE's subsidiary (the "Underlying Claims"). Claims made under the Insurance Policies are covered on an "occurrence" basis: ASPV is covered for costs arising from events that occur during a particular policy period, even if a claim and the associated costs

and expenses incurred defending and resolving the claim come due years later. In connection with the Underlying Claims, litigation and other costs are generated on an ongoing basis until each claim is fully resolved. A23-24 ¶ 15.

While the Insurance Policies provide substantial coverage related to the Underlying Claims for ASPV's benefit, both pre- and post-closing, there remain certain payments and expenses associated with the defense of the Underlying Claims that are not reimbursable by the relevant insurers (the "Non-Covered Payments") and must be paid by the insureds. It is undisputed that during the time that ASPV was USE's subsidiary, USE, as the owner of the Insurance Policies, would pay the Non-Covered Payments. ASPV would, in turn, then become liable to reimburse USE for those payments. *Id.* ¶¶ 15-17.[3] At all times prior to the sale, the Non-Covered Payments relating to the Underlying Claims were reflected as liabilities on ASPV's financial statements and, as described in greater detail below, up until the transaction closed in November 2015, ASPV was current in its obligation to reimburse those costs. As such, USE had no claims for repayment from ASPV at closing. A24, A32 ¶¶ 17, 38-39.

[3] The specific mechanism of reimbursement and billing varied between the Auto/GL Policies and the WC Policies. *See* A23-24 ¶¶ 15-16 (describing payment system for each set of policies). These distinctions are not relevant to the present dispute over the Non-Covered Payments.

B. The Stock Sale and the SPA

On August 4, 2015, with both parties represented by sophisticated counsel, EQIS entered into the SPA with Holdings. Pursuant to Section 1.01 of the SPA, EQIS agreed to transfer all of ASPV's issued and outstanding stock to Holdings in exchange for $58,000,000.

The SPA reflected the parties' agreement and understanding of the financial condition of ASPV. The Seller Disclosure Schedule that accompanied and was incorporated into, and made part of, the SPA included financial statements that reflected the "net assets" of ASPV as of certain dates. *See* A92-93 § 4.07; *see also* A132 § 15.07 ("The Seller Disclosure Schedule and all Exhibits, Annexes and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein."). Among the liabilities listed on the financial statements were two line items: Accrued Insurance Reserve and Workers Comp Insurance Accruals (together, the "Insurance Reserves"). These two items represented the aggregate projected Non-Covered Payments that ASPV expected to pay going forward in relation to then-outstanding claims against the Insurance Policies. The Insurance Reserves were listed in the same fashion as any other ordinary liability on the financial statements, and these financial statements were integrated into the SPA.

That was not the only place in the SPA where the Non-Covered Payments were taken into consideration and plainly agreed to by the parties as ASPV's liabilities. The parties recognized that the Insurance Reserves (and other assets and liabilities not at issue here) were subject to change and, as a result, provided for a Working Capital Adjustment, pursuant to which the parties could, under certain specified circumstances, adjust the purchase price after the transaction closed. If, at the closing, the Insurance Reserves (and other line items not relevant here) differed materially from their averages over the twelve months prior to closing, the purchase price would be subject to either an upward or downward adjustment. *See* A83-86 § 2.02 (detailing the price-adjustment procedure).

The SPA was specific as to which line items were to be considered in the Working Capital Adjustment. Included in the calculation were "those current assets of [ASPV and its subsidiaries] . . . that are included in the line item categories of current assets specifically identified on Annex III [of the SPA], *less* those current liabilities of [ASPV] . . . that are included in the line item categories of current liabilities specifically identified on Annex III[.]" *Id*. § 2.02(c) (underlined emphasis added). Annex III, which was also attached to and integrated into the SPA, included the Non-Covered Payments on its list of working capital liabilities in the form of line items for "Accrued Insurance Reserve" and "APV/Taylor Workers comp liability." A674; *see also* A27-28 ¶¶ 25-27. Thus, the Non-Covered Payments were,

by the plain terms of the SPA (and the schedules incorporated into the SPA), among the ASPV liabilities that were part of the Working Capital Adjustment mechanism.

Finally, the SPA also contained a release provision (the "Release"), which provided that the seller and its affiliates (which include USE) released the buyer and its affiliates (which include ASPV and Holdings) from:

> any and all claims . . . whether in law or equity that any Seller Releasing Party *ever had or may now have* against any Buyer Released Party to the extent related to the Company or any Company Subsidiary . . . whether known or unknown, suspected or unsuspected, that have accrued prior to the Closing or that accrue at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date, whether based on Contract or any Applicable Law in any jurisdiction[.]

A121-22 § 8.08 (emphasis added). The Release does not cover future claims and contains a carve-out expressly for claims made "pursuant to and subject to the terms of [the SPA]." *Id.*

C. The Post-Closing Working Capital Dispute

The stock sale transaction closed on November 1, 2015. In the months following the closing, all parties understood that the Insurance Reserves were ASPV's liabilities prior to closing. To that end, Holdings used the ASPV liabilities to its advantage by obtaining a reduction in the purchase price. On December 30, 2015, EQIS prepared and sent to Holdings a statement as contemplated by Section 2.02(a)(i) of the SPA (the "Post-Closing Statement"), setting forth EQIS's calculation of ASPV's working capital at the closing. A29-30 ¶ 32. EQIS's Post-

Closing Statement calculated the portion of the working capital balance attributable to the Insurance Reserves at $128,913 *less* than the twelve month average that was calculated by an accounting firm prior to the closing. A30 ¶ 33. Had that calculation been accepted by Holdings, the purchase price for ASPV's stock would have been *increased*. *Id.*

Holdings, however, disputed EQIS's calculation of the working capital balance. Notably, Holdings did not challenge the fact that the Insurance Reserves were ASPV's liabilities, but instead embraced them. Consistent with its understanding that the Insurance Reserves were ASPV's liabilities, Holdings took the position—to its substantial benefit—that the Insurance Reserves associated with the Auto/GL Policies in particular were far *higher* than the twelve-month average. A30-31 ¶ 34. Based on its calculations, Holdings argued that ASPV's working capital liabilities were higher than anticipated at the closing and that Holdings should accordingly receive the benefit of a downward adjustment of the purchase price. A31 ¶ 35. EQIS ultimately agreed, and pursuant to the Working Capital Adjustment mechanism, the purchase price was reduced substantially. *Id.* Notably, while the lower court acknowledged the Working Capital Adjustment in its recitation of the facts (Op. 8-9), the Opinion otherwise ignores Holdings' recognition that the Non-Covered Payments were ASPV liabilities in connection with the Working Capital Adjustment.

D. Defendants' Refusal to Acknowledge Responsibility for the Non-Covered Payments

After the closing, ASPV continued to be covered by—and receive the substantial benefit of—the Insurance Policies for the Underlying Claims. Accordingly, USE continued to receive bills for Non-Covered Payments that related to the Underlying Claims against ASPV but that were *incurred* post-closing. A196-97 ¶ 13; A32 ¶¶ 38-39. Pursuant to the SPA, Holdings became responsible for those ASPV liabilities (along with the rest of ASPV's assets and other liabilities) post-closing by virtue of its ownership of all of ASPV's capital stock.

Because the liabilities of ASPV followed the transfer of ASPV's capital stock to Holdings under the SPA, following receipt of those bills, Plaintiffs sought repayment of the Non-Covered Payments from Defendants. Defendants, however, refused to honor their payment obligation, adopting a series of changing justifications for their refusal to accept responsibility for the Non-Covered Payments—each one worse than the prior. In an email response to Plaintiffs' February 7, 2017 demand for payment, Defendants took the position that they had no obligation to repay these Non-Covered Payments because they were "pre-closing incurrences." A368. Plaintiffs rejected that excuse and explained that the payments at issue were incurred after closing, and because the Non-Covered Payments were an ongoing liability of ASPV's that transferred to Holdings in the stock sale, it was in any event irrelevant when the events giving rise to the Underlying Claims

occurred. A367. In response, Defendants changed their position. This time, Defendants claimed they had no responsibility for the Non-Covered Payments because they were "never liabilities of ASPV—other than perhaps an intercompany allocation USE may have put in practice and which would have been released in the SPA anyway." *Id.*

Responding by letter, Plaintiffs again explained their straightforward position that the Non-Covered Payments represent ASPV liabilities that were Holdings' responsibility following the stock sale. A373. Defendants continued to claim—without any consistent justification—that the Non-Covered Payments were not ASPV's liabilities, notwithstanding their embrace of these same liabilities to obtain a purchase price reduction. *See* A376-78.

E. Procedural History and the Court of Chancery's Decision

Faced with Defendants' continued refusal to accept responsibility for the Non-Covered Payments incurred post-closing, Plaintiffs filed a verified complaint against ASPV and Holdings in the Court of Chancery on June 8, 2017 (the "Complaint"), seeking to recover the amounts paid by USE for the benefit of ASPV after the closing of the stock sale. At the time of the Complaint, the Non-Covered Payments in dispute totaled approximately $1.5 million. A34 ¶ 43.

The Complaint asserts four claims: *First*, Holdings breached the SPA by disclaiming its obligation, by virtue of its ownership of all of the capital stock of

ASPV, to be responsible for assets and liabilities of ASPV. *Second*, Holdings breached the implied covenant of good faith and fair dealing by, among other things, using ASPV's liabilities to obtain a price reduction and then wrongly disclaiming its obligation to pay for those liabilities. *Third*, EQIS and USE are entitled to a declaratory judgment that Holdings and ASPV are responsible for the post-closing Non-Covered Payments. *Fourth*, ASPV has been unjustly enriched at USE's expense by Holdings' continued refusal to acknowledge the responsibility for the expenses associated with the Non-Covered Payments.

On July 3, 2017, Defendants filed a motion to dismiss the Complaint for failure to state a claim for relief pursuant to Court of Chancery Rule 12(b)(6), which Plaintiffs opposed. On August 4, 2017, Plaintiffs filed a cross-motion for partial summary judgment on the breach of contract, unjust enrichment, and declaratory judgment claims (claims one, three, and four) pursuant to Court of Chancery Rule 56.

In a Memorandum Opinion, dated June 18, 2018 (the "Opinion"), the lower court granted Defendants' motion to dismiss in its entirety.[4] As to the breach of

[4] While the lower court heard both Defendants' motion to dismiss and Plaintiffs' motion for partial summary judgment at a single hearing, the Opinion primarily addressed the motion to dismiss, only denying the motion for partial summary judgment as the logical consequence of the ruling on the motion to dismiss. However, the undisputed facts and operation of law make clear that a grant of Plaintiffs' summary judgment motion is appropriate here.

contract claim, the lower court held it to be "dispositive" that there was no provision in the SPA that specifically "obligates Holdings to reimburse [EQIS] for Non-Covered Payments." Op. 11. In reaching a conclusion based on a position that was never advanced by Defendants, the Opinion rejected bedrock Delaware law that the Non-Covered Payments were liabilities of ASPV that were transferred *to Holdings* in the stock sale. The court even went so far as to find that it was "unclear from the record whether *[ASPV]* ever owed a legal obligation" to pay the Non-Covered Payments, and even if it had, "[ASPV], *not* Holdings, would be the correct entity" from which Plaintiffs should seek recovery. *Id*. at 13, 14 (emphases in original). The lower court then incorrectly concluded that Holdings only could have breached the SPA by refusing to pay the Non-Covered Payments if the SPA "independently creat[ed] a contractual reimbursement obligation." *Id*. at 14.[5]

The lower court's dismissal of USE's unjust enrichment claim against ASPV was grounded primarily in its holding that the claim was barred by the Release found in Section 8.08 of the SPA. The Opinion concluded that the Non-Covered Payments at issue—which were *all* incurred post-closing—were nonetheless barred by the

[5] The Opinion dismissed the claim for breach of the implied covenant of good faith and fair dealing on related grounds, ultimately concluding that the claim was an "impermissible rehashing" of the breach of contract claim. *Id*. at 18. The lower court also dismissed Plaintiffs' claim for declaratory relief, holding without explanation that this claim was also duplicative of the breach of contract and unjust enrichment claims. *Id*. at 23.

Release on the grounds that they "accrue[d] at or after the Closing *as a result* of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date." *Id*. at 20 (quoting A121-22 § 8.08) (emphasis added). The lower court's analysis on this point failed to properly characterize the unjust enrichment claim as arising *in toto* from Defendants' post-closing refusal to take responsibility for the post-closing Non-Covered Payments; instead, the lower court incorrectly concluded the claim arose directly from the Underlying Claims covered by the Insurance Policies and was thus barred by the Release. *Id.* at 21.

Finally, the lower court offered a critique of Plaintiffs' equitable arguments, remarking that Plaintiffs' "attempt to seize the equitable high ground in this case is open to question." *Id.* at 22. The lower court speculated that USE, presumably in an effort not to disrupt the broader umbrella insurance policies of which the Insurance Policies are but one component, had not terminated ASPV's insurance coverage after the closing. *Id.* at 22-23. But the Opinion's speculative and non-factual equitable analysis stopped there, and failed to even consider the compounded, unfair benefit ASPV received as a result of Defendants' refusal to pay the Non-Covered Payments: it received the benefit of continued insurance coverage for the Underlying Claims while failing to pay the costs associated with that coverage. USE's reasons for continuing the already-paid-for coverage, which

transferred in the stock sale, are irrelevant to the inequity of the outcome reached by the lower court.

ARGUMENT

I. The Lower Court's Dismissal of EQIS's Breach of Contract Claim Is in Conflict with Black-Letter Delaware Law

A. Question Presented

Whether the lower court erred as a matter of law when—based on an argument Defendants never advanced—it dismissed Plaintiffs' breach of contract claim on the grounds that Plaintiffs did not cite a specific contract provision that Holdings violated, wholly disregarding the bedrock principle of Delaware law that all assets and liabilities of a company being sold in a stock sale become the post-closing responsibility of the buyer by virtue of its ownership of the stock of the company sold. This issue was preserved for appeal. *See* A174-77; A484-86; A708-12.

B. Scope of Review

The Court of Chancery's dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed *de novo*. *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

C. Merits of the Argument

The lower court's analysis of EQIS's breach of contract claim is inconsistent with well-established principles of Delaware law. This litigation is governed by a simple, black-letter principle: by operation of Delaware law, in a transaction structured as a sale of stock, all assets and liabilities of a company being sold become the post-closing responsibility of the buyer by virtue of its ownership of the stock of the company sold *unless* they are expressly carved out of the transaction. That

principle dictates the outcome in this case. Because the Non-Covered Payments were ASPV liabilities and were *not* carved out of the SPA, they became the responsibility of Holdings at the close of the transaction. In disclaiming its obligations to assume ASPV liabilities, Holdings breached the SPA. The lower court misapprehended both the nature of the stock sale and the character of the Non-Covered Payments as ASPV liabilities, and those flaws produced clear legal error in its analysis.

1. The Lower Court's Conclusion that Holdings Can Disclaim Responsibility for the Non-Covered Payments Turns Delaware Law Regarding Stock Sales on its Head

The SPA obligated Holdings to purchase ASPV as an intact corporate entity, *i.e.*, with all of its assets and all of its liabilities. The SPA, which by its terms is governed by Delaware law (*see* A141-42 § 15.12), sets forth Holdings' obligation to purchase "*all* of the issued and outstanding capital stock of" ASPV. A78 § 1.01 (emphasis added). Under Delaware law, "all assets and liabilities are transferred in the sale of a company effected by a sale of stock." *TrueBlue,* 2015 WL 5968726, at *3 (quoting *KB Toys*, 340 B.R. at 728); *see also* 18A Am. Jur. 2d Corporations § 585 ("In the context of a stock sale agreement, the law presumes that all assets and liabilities transfer with the stock."); Vincent Di Lorenzo & Clifford Ennico, *Basic Legal Transactions* § 26.11 (2010) ("In a stock sale transaction, the liabilities of the corporation follow the corporate entity. Thus the purchaser, as its new shareholder,

acquires the entity subject to all of its liabilities."). The necessary corollary of that rule is that "the obligations of the company whose stock is sold, in this case [ASPV], would become obligations of the purchasing company *absent an express agreement to the contrary*." *TrueBlue*, 2015 WL 5968726, at *3 (emphasis added). Because there is no express provision carving out the Non-Covered Payments from the sale, Holdings' refusal to accept responsibility for the Non-Covered Payments incurred post-closing constitutes a breach of the SPA.

a. The Non-Covered Payments Were ASPV Liabilities and Thus Transferred to Holdings in the Stock Sale

The Non-Covered Payments were liabilities of ASPV, and the lower court erred in construing them as some type of a free-floating "legal obligation to reimburse [EQIS]" of dubious validity. Op. 13. Nothing in the record supports that conclusion. To the contrary, the governing transactional documents themselves make clear that the Non-Covered Payments were ASPV's liabilities, and nothing in the record suggested that would change following the closing. The financial statements that accompanied and were incorporated into the SPA (*see* A132-40 § 15.07) included the Insurance Reserves as liabilities of ASPV. This is confirmed by the SPA's clear statement that the financial statements depict the "*net*

assets of [ASPV]." A92-93 § 4.07 (emphasis added).[6] Thus, there can be no doubt on this record that the Non-Covered Payments were ASPV's liabilities.

Because the Non-Covered Payments are ASPV's liabilities, the unavoidable conclusion under Delaware law is that Holdings is responsible for them by virtue of its ownership of all of the capital stock of ASPV after the closing *unless* the SPA specifically carved them out. *See TrueBlue*, 2015 WL 5968726, at *3. There is no such carve-out here that would apply to the Non-Covered Payments, and tellingly, Defendants never argued otherwise before the lower court in briefing or at oral argument. That should end the inquiry.

The decision in *TrueBlue*, a decision relied upon by Plaintiffs below (and which the Opinion failed to address), illustrates this principle. In that case, TrueBlue purchased Staffing Solutions from Leeds Equity Partners, and the dispute concerned which party bore responsibility for an earn-out payment owed by a Staffing Solutions subsidiary to a third party. *Id.* at *1. TrueBlue, believing that the liability

[6] The Complaint alleges that the financial statements "clearly reflect the understanding of Holdings and EQIS that the Insurance Reserves [*i.e.*, the Non-Covered Payments] were ASPV's liabilities." A26 ¶ 23. The lower court appears to have ignored these well-pled allegations. In doing so, the lower court erred in the legal standard it applied in its evaluation of Defendants' motion to dismiss. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011) ("When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true . . . ."). Instead of accepting all well-pleaded allegations as true and drawing all reasonable inferences in favor of Plaintiffs, the lower court did the opposite.

had not transferred and therefore Leeds retained responsibility for the payment, filed suit alleging, among other things, that Leeds breached the SPA in refusing to pay the earn-out. *Id.* The trial court dismissed the claim, citing the general principle of Delaware corporate law "that all assets and liabilities are transferred in the sale of a company effected by a sale of stock." *Id.* at *3 (quoting *KB Toys*, 340 B.R. at 728).

That court concluded that when TrueBlue signed the stock purchase agreement, it "agreed to purchase and acquire all of the assets and liabilities of Staffing Solutions" and, as a sophisticated purchaser, TrueBlue "would have understood that it was required to set forth in the SPA any liabilities for which Leeds would retain responsibility." *Id.* Because there was no such carve-out, TrueBlue was responsible for the payment, which was a liability of one of Staffing Solutions' subsidiaries (and which subsidiary was not a party to the relevant SPA). The same principle applies here.[7] Because the SPA did not carve out the Non-Covered Payments, they were transferred to Holdings as a matter of law.

In apparent recognition of the application of this straightforward principle of Delaware law regarding stock sales, Defendants focused their attention on their

[7] In *TrueBlue*, the fact that the relevant "liability" at issue was in the form of a payment to a third party did not change the court's analysis, nor should it have affected the lower court's analysis here. The dispositive question in *TrueBlue* was whether the earn-out payment at issue was a liability of the entity that was sold in the stock sale. Because it was, it transferred in the sale and became the responsibility of the purchaser. So too here.

argument that the Non-Covered Payments were not liabilities of ASPV in the first place. *See, e.g.*, A56-57. Those arguments, which the lower court appears to have credited, are contrived at best, and in any case reflect the court's failure to afford Plaintiffs' well-pled allegations the deference required on a motion to dismiss. This failure alone warrants reversal. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 613 (Del. 2003) (reversing grant of motion to dismiss where Court of Chancery "did not resolve in favor of the plaintiff all reasonable inferences from the facts alleged in the complaint").

For example, among Defendants' arguments was the assertion that the financial statements, which identified the Insurance Reserves (representing the Non-Covered Payments) as ASPV liabilities, were merely a snapshot of ASPV's accounting practices prior to closing and thus did not accurately depict ASPV's post-closing liabilities. *See, e.g.*, A60-61. There is, of course, nothing in either the SPA or the financial statements themselves that suggests that any assets or liabilities identified in the financial statements would somehow forfeit that designation following the closing.[8]

[8] The logical consequences of Defendants' argument with respect to the financial statements illustrate its absurdity. Defendants claim that the fact that the Non-Covered Payments were included in ASPV's pre-closing liabilities says nothing about ASPV's post-closing liabilities. If that were true, it would open the door to

Defendants' mischaracterization of ASPV's pre-closing payment of the Non-Covered Payments as an "inter-company payment practice" rather than as liabilities of ASPV (A684) is likewise incompatible with both the financial statements and the plain language of the SPA. Section 4.07 expressly states that the financial statements appended to the SPA "do not include allocations for . . . inter-company revenue items," putting the lie to the notion that the Non-Covered Payments should be considered any differently from ASPV's other operational liabilities. A93.[9] And the financial statements themselves are wholly consistent with this view. The record is clear that the Non-Covered Payments were ASPV liabilities and thus transferred in the sale to Holdings.

Moreover, Defendants' position during the working capital dispute—that the purchase price should be lowered *because* ASPV's working capital liabilities (including the Insurance Reserves) were higher than anticipated—illustrates that,

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purchasers and sellers alike post-closing disclaiming disfavored liabilities or claiming favored assets, under the theory that pre-closing financial statements were just a snapshot of past accounting practices and not a representation of assets and liabilities transferred in the sale. Obviously, stock sales do not function in this way.

[9] The SPA's description of the items to be included in the Working Capital Adjustment mechanism echoes this point: that calculation was to include certain of ASPV's "current liabilities," including the line items that reflected the Non-Covered Payments. A85 § 2.02(c). Defendants cannot offer any reasoned explanation for why these line items would be described as "liabilities" in the SPA if they were not, in fact, ASPV liabilities as a general matter.

when beneficial to Defendants, they considered the Non-Covered Payments to be ASPV liabilities. It is only now, when Defendants are called upon to honor their payment obligations, that they claim the Non-Covered Payments are not their liabilities. The lower court's analysis ignored these well-plead and undisputed facts entirely.

The lower court committed legal error by relying on the incorrect premise that in order for Holdings to be responsible for the post-closing Non-Covered Payments, the SPA must contain a specific provision contractually obligating Holdings to pay these sums. *See* Op. 13. The lower court followed that premise to build a confusing argument regarding the various entities at issue here: it reasoned that if ASPV was contractually obligated to cover the Non-Covered Payments, then USE or EQIS could have brought a breach of contract suit against ASPV to recover the Non-Covered Payments. *Id.* at 13-14. This argument, which also was not raised by Defendants, focused on the wrong issue. Instead, the question at issue is whether the Non-Covered Payments were *liabilities* of ASPV that, absent a provision to the contrary in the SPA, became Holdings' responsibility in the stock sale by operation of Delaware law. As discussed above, it is plain from the SPA that the Non-Covered Payments were considered ASPV liabilities, and Holdings' refusal to take responsibility for them after the stock sale is a breach of the SPA. An express contractual agreement between USE and ASPV was not necessary to establish the

character of the Non-Covered Payments, and the lower court's attempt to imply that it was reflects a fundamental misunderstanding of the nature of the breach of contract claim.

b. The Lower Court's Conclusion that the Breach of Contract Claim Required that the SPA Create a "Contractual Reimbursement Obligation" Is Wrong and in Conflict with Delaware Law

At the heart of the lower court's error is its conclusion that the breach of contract claim could only be "legally coherent" if the SPA "independently creat[ed] a contractual reimbursement obligation." Op. 14. This premise has it exactly backwards, and treats the transaction as an asset sale (rather than a stock sale), and cannot be reconciled with the undisputed fact that ASPV was sold in a stock sale.[10] The lower court, for reasons that the Opinion does not make clear, improperly placed the burden on the seller to enumerate the assets and liabilities that *would* transfer in the stock sale. This approach turns Delaware law regarding stock sales on its head, and the lower court's analysis cannot stand.

The lower court's error is illustrated by its mischaracterization of Section 8.09 of the SPA, which addresses post-closing "Transition Services." By its terms, that section provides that, for a period of time after the closing, EQIS would affirmatively

[10] Defendants incorrectly and improperly urged the lower court towards this interpretation, arguing, for example, that where "the parties intended" for Holdings to assume assets or liabilities post-closing, "they expressly stated so." A58. In a stock sale, however, that is not the correct analysis.

provide certain specified "transition services" on a going-forward basis (including the administration of certain employee medical and dental insurance plans that were active at the time) that it had previously been providing to ASPV, and that Holdings would pay EQIS for those future services. Op. 14. The Transition Services provision has nothing to do with the scope of ASPV's assets and liabilities, and indeed is wholly irrelevant to the core question of whether the Non-Covered Payments are ASPV liabilities that transferred in the stock sale.

That this provision happened also to address insurance is a red herring: it mandated the going-forward provision of *services* and imposed a standalone, affirmative obligation on EQIS after closing. But the lower court seized on the superficial fact that the transition services concerned insurance and mischaracterized the provision as proof that the parties to the SPA "agreed to impose on Holdings certain other post-Closing insurance reimbursement obligations concerning [ASPV]." *Id*. at 15. That conclusion is wrong: it misapprehends the obligations imposed by the Transition Services provision and flows from the flawed premise that Holdings would only be responsible for the Non-Covered Payments if they were expressly carved *in* to the SPA.

Finally, the lower court misapplied the holding in *Viking Pump, Inc. v. Century Indemnity Co.*, 2 A.3d 76 (Del. Ch. 2009), and even focused on the wrong transaction addressed in that case. In that case, there was a dispute over whether

Viking Pump, Inc. ("Viking Pump"), which had been sold in a stock sale, retained insurance rights under certain policies purchased by its former corporate parent prior to the sale. *Id.* at 91. While there was no dispute that ownership of the *policies* providing the coverage at issue remained with the former parent, the question was whether the *coverage* under those policies had been transferred in the sale. Then-Vice-Chancellor Strine found that Viking Pump would have retained liability for the accrued claims and kept the accompanying insurance coverage:

> Had the parties simply sold off New Viking in the Stock Agreement, then the question of whether New Viking possesses the [contested insurance rights] would be a simple one. The familiar default rule in stock sales is that a change in the ownership of a company does not affect the rights and liabilities of the company. Absent a contrary agreement, New Viking would have retained liability for the [contested insurance claims] and kept the accompanying Insurance Rights.

Id. at 99. That is exactly the result that should have been found in this case. But instead, ASPV kept the insurance coverage but not the liabilities.

While there was a term in the stock purchase agreement that provided that the seller of Viking Pump would retain liability for claims "to the extent of insurance coverage available" to the extent that the purchaser of Viking Pump reimbursed the seller for the relevant deductible (*id.*), then-Vice Chancellor Strine held that this provision was, in practice, a redundant "catchall" that he "d[id] not believe . . . ha[d] any material effect on the proper outcome." *Id.* at 100, 101. That, of course, is because the assets and liabilities transferred as a matter of law. So too here. Under

Viking Pump, the fact that the SPA did not expressly assign the Non-Covered Payments to Holdings is irrelevant in light of the "familiar default rule" that governs stock sales under Delaware law.

The lower court ignored the portion of *Viking Pump* that addressed the stock purchase agreement, instead focusing on an assignment agreement putting into effect a corporate restructuring that occurred *before* the sale of Viking Pump. Op. 16. In that assignment agreement, Viking Pump's corporate parent expressly assigned the insurance rights to its wholly-owned subsidiary, Viking Pump. *See* 2 A.3d at 97-98. That assignment agreement, however, had nothing to do with the subsequent transaction, which was implemented through a stock sale and is governed by different rules.[11] The lower court's conclusion that this assignment "reinforces the point that the parties here were fully capable of contractually allocating to Holdings obligations concerning [ASPV]," Op. 16, confuses the two agreements at issue in *Viking Pump*. By contrast, and as described above, the undisputed facts here make clear that the Non-Covered Payments were, in fact, ASPV liabilities; they therefore

[11] *Viking Pump*'s consideration of this assignment agreement, in contrast to the later stock sale, illustrates the distinction between asset and stock sales. In evaluating the asset transfer agreement, the court in *Viking Pump* considered the presence or absence of an express assignment, while for the stock sale it concluded that such an express assignment was unnecessary as a matter of law. *See* 2 A.3d at 97-101. The lower court here erred in muddling the way that the law treats these two types of transactions, and in implicitly treating the transaction at issue here as an asset sale.

became the post-closing responsibility of Holdings pursuant to Delaware law. *Viking Pump* does not and cannot undermine that threshold fact.

2. The Lower Court's Reliance on EQIS's Purported Failure to Allege the Breach of a Specific Provision of the SPA Is Based on a Rationale Never Argued by Defendants That Reflects its Erroneous Treatment of the Stock Sale

As described above, the lower court's ruling on the breach of contract claim cannot be reconciled with black-letter Delaware law, and its primary rationale was, in fact, never asserted by Defendants. The Opinion states that "[s]omewhat astonishingly," Plaintiffs did not identify a "specific provision" in the SPA that Holdings breached, and found the "lack of any provision in the [SPA] that obligates Holdings to reimburse [EQIS] for Non-Covered Payments" to be "dispositive" of the contract claim. *Id.* at 11. This holding both improperly disregarded the provision in which the contract claim was grounded and, more fundamentally, reflects the lower court's failure to apply the law governing stock sales to this transaction.[12]

As counsel for Plaintiffs explained at oral argument, EQIS's breach of contract claim arises from Section 1.01 of the SPA and the operation of Delaware

[12] Similar analytical errors plague the lower court's dismissal of the implied covenant claim, which was properly pled as an alternative claim for relief. The lower court's dismissal of that claim on the grounds that it is merely a "rehashing" of the contract claim (*id.* at 18), rests on the same errors of law as its ruling on the contract claim.

law governing stock sales.[13] The lower court rejected the argument that the breach of contract claim "allegedly emanates" from Section 1.01 (*id.* at 11), but its search for an express provision in the SPA obligating Holdings to assume one of ASPV's many liabilities following the sale misapprehends the nature of the transaction entirely: because this was a stock sale there was, by definition, no need for the parties to enumerate each of the assets and liabilities that *would* transfer in the sale. All of the assets and liabilities of ASPV were transferred unless they were expressly carved out.

Indeed, in the stock purchase agreement in *TrueBlue*, there was no express provision that made clear that the relevant payment to a third party transferred in the sale. In fact, the nearly identical provision was found to have transferred the earn-out liability to the buyer in *TrueBlue*. *See* 2015 WL 5968726 at *3 (finding that all assets and liabilities transferred where the agreement stated that the buyer agreed to purchase all of "[t]he authorized capital stock of [Staffing Solution]"). The absence of a specific provision addressing the earn-out payment did not prevent the court

[13] Section 1.01 of the SPA reflects the nature of the transaction as a stock sale: "On the terms and subject to the conditions of [the SPA], Seller will sell, transfer, assign, convey and deliver . . . to Buyer, and Buyer will purchase from Seller, the Shares, free and clear of all Liens, for an aggregate purchase price equal to $58,000,000.00 . . . payable and subject to adjustment as set forth in Article II." A78.

from finding a breach. *See id.*[14] Nor should the absence of a provision in the SPA addressing the Non-Covered Payments affect this Court's analysis of Plaintiffs' claims.

The parties to the SPA were, as the lower court noted, sophisticated parties (Op. 14), and they were represented by sophisticated counsel; all were undoubtedly well aware of the governing principles of Delaware law concerning stock sales, and the agreement was drafted accordingly. The lower court was wrong to conclude that the sophisticated parties should have known that "independently creating a contractual reimbursement" (*id.*) was required for the Non-Covered Payments (an ASPV liability) to transfer in the sale. Just the opposite is true. *See TrueBlue*, 2015 WL 5968726, at *3 (sophisticated counsel could have carved a liability owed to a third party *out* of a stock sale if they so desired, and concluding that the failure to do so either showed that they "did not intend to do so" or a "lack of diligence").[15]

[14] The plaintiff in *TrueBlue* was the buyer in the stock sale seeking to avoid paying the acquired-company's liability, so the court in that case *dismissed* the breach of contract claim; however, its conclusion did not rely in any respect on the presence or absence of a specific provision in the contract allocating responsibility for the payment at issue. *See* 2015 WL 5968726, at *3-4. Though the posture of the parties is reversed in this case, the rationale of *TrueBlue* applies here.

[15] Further, given the general and common understanding of the operation of a stock sale, the parties to the sale would not create a list of enumerated liabilities that were intended to transfer with the subsidiary being sold; such conduct would by nature call into question the status of any liability that was not included on the list and

As noted above, Defendants did not raise this argument in any of the extensive briefing before the lower court or at oral argument.[16] Not only is this an indication of the weakness of the lower court's rationale, but it also denied Plaintiffs an adequate opportunity to respond to the argument. *Cf. Vincent v. E. Shore Mkts.*, 970 A.2d 160, 164 (Del. 2009) ("[D]ue process entails providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting . . . every material fact which bears on the question of right in the matter involved . . . ."). Both as a substantive and procedural matter, the lower court's primary rationale for dismissing the contract claim was in error.

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would undermine the very structure and purpose of a sale designed as a stock purchase.

[16] In addressing one of Defendants' arguments relating to the unjust enrichment claim, the lower court found that since an argument was not made by USE in its briefing, USE waived the argument. *See* Op. 22 n.60. The lower court did not explain why that standard did not likewise apply to Defendants' silence with regard to this argument.

II. The Lower Court's Dismissal of USE's Unjust Enrichment Claim Rests on an Incorrect Application of the SPA's Terms

A. Question Presented

Whether the lower court erred in concluding that Plaintiffs' unjust enrichment claim was barred by the Release in the SPA, and in misapprehending the fact that the claims for Non-Covered Payments arose post-closing. This issue was preserved for appeal. *See* A181-83; A393-95; A719-25.

B. Standard of Review

The Court of Chancery's dismissal of a complaint under Rule 12(b)(6) is reviewed *de novo*. *See Malpiede*, 780 A.2d at 1082.

C. Merits of the Argument

The lower court's dismissal of USE's unjust enrichment claim rested primarily on its incorrect conclusion that the claim "result[ed] from a pre-Closing event" and thus was barred by the Release contained in Section 8.08 of the SPA. Op. 20. That conclusion is based on both an inaccurate characterization of the claim itself and a misreading of the SPA. Reversal is warranted.[17]

As an initial matter, Defendants' argument that the unjust enrichment claim is barred by the Release is an affirmative defense, on which Defendants' bear the

[17] Further, because this claim can be resolved entirely on the basis of the plain language of the Release and on other undisputed facts, summary judgment should be granted in favor of USE on this claim.

burden of proof. *See First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, 2005 WL 2173993, at *10 (Del. Ch. Sept. 6, 2005) ("Because the purported release is an affirmative defense of [the defendant], it bears the burden of proof on that issue."). Thus, it is "inappropriate" to dismiss on the basis of an affirmative defense unless "plaintiff can prove no set of facts to avoid it." *Solak v. Sarowitz*, 153 A.3d 729, 746 (Del. Ch. 2016) (internal quotation marks and citation omitted). Defendants did not and cannot meet this standard, and the lower court erred in failing to apply this standard to USE's unjust enrichment claim.

1. The Release Does Not Bar USE's Unjust Enrichment Claim

The lower court's interpretation of USE's unjust enrichment claim, and its conclusion that it is barred by the Release, is in error. Pursuant to the Release, Holdings and its affiliates are released from:

> [A]ny and all claims . . . that [EQIS and its affiliates] ever had or *may now have* against any [of Holdings or its affiliates] to the extent related to [ASPV] or any [ASPV] subsidiary, . . . whether known or unknown, suspected or unsuspected, that have accrued prior to the Closing *or that accrue at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing.*

A121 § 8.08 (emphasis added).[18] Based on the plain language of this provision, in order to be barred by the Release, a claim must have (i) been one that EQIS or its

[18] Surprisingly, the Opinion selectively quotes from the Release, omitting via a single ellipsis the crucial "ever had or may now have" clause. *Compare* A121 § 8.08

affiliates either had *or could have had* at the time of closing; and (ii) if it accrued at or after the closing, arisen as a result of an event that occurred prior to the closing. The unjust enrichment claim does not fall within either category, and thus is not barred by the Release.[19]

First, the unjust enrichment claim arose only *after* Holdings and ASPV refused to reimburse Plaintiffs for the Non-Covered Payments *incurred* after the closing, resulting in ASPV unjustly keeping the benefit of the insurance coverage without paying for it. It is black-letter law that a claim accrues "when the alleged wrong takes place." *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *11 (Del. Ch. Nov. 27, 2013). Here, that moment was post-closing, when both the demand for payment and failure to reimburse occurred.[20]

Thus, USE did not have (and could not have had) an unjust enrichment claim against ASPV until after the closing. The lower court erred in conflating the Non-

with Op. 20. This omission is critical because the Release only released claims that were in existence as of closing and did not apply to post-closing claims.

[19] Plaintiffs did not argue below and do not dispute that the Release applies to USE as an affiliate of EQIS; rather, Plaintiffs have maintained throughout the litigation that the Release does not bar *the claims in the Complaint*. Thus, the lower court's lengthy footnote concluding that Plaintiffs waived any argument that USE is not covered by the Release is confounding. *See* Op. 22 n.60.

[20] It is undisputed that as of the closing, ASPV was current with respect to its reimbursement of the Non-Covered Payments. The present dispute concerns *only* charges that were incurred and billed after the closing.

Covered Payments giving rise to the unjust enrichment claim with the underlying *insurance* claims that had been noticed as a result of claims by third parties against ASPV (which the parties agree relate to pre-closing events, *i.e.*, automobile and ASPV employee accidents). Op. 21. That the underlying events giving rise to the *existence* of outstanding claims on the Insurance Policies occurred prior to closing is irrelevant to the present analysis.

Second, the unjust enrichment claim did not accrue "as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date" (A121 § 8.08), and the lower court erred in concluding otherwise. The Opinion's conclusion was based on a faulty three-step logical leap: because the "underlying insurance claims and plaintiff's claims for reimbursement are inextricably linked" and the Underlying Claims are the result of pre-closing events, the unjust enrichment claim was also the result of pre-closing events. Op. 21. This conclusion reflects a fundamental misunderstanding of the unjust enrichment claim, which arose only *as a result of* Defendants' post-closing refusal to reimburse USE for the post-closing Non-Covered Payments. That refusal is wholly untethered from the timing of the Underlying Claims; the lower court's logical chain breaks at its first link.[21]

[21] In the briefing below, Defendants broadened their argument regarding the Release to assert that it barred all of Plaintiffs' claims. For the reasons discussed in this

In addition, adopting the lower court's rationale on this point would expand the Release beyond any reasonable limitation. Under the Opinion's reasoning, nearly every conceivable claim between any of these parties would have at least *some* tie to events or circumstances that originated prior to closing and thus would be barred. More specifically, if the lower court's conclusion was correct, then ASPV and Holdings could decline to pay *any* ASPV post-closing liabilities due to third parties (where the relationship with the third party pre-dated closing), saddling Plaintiffs with the bills; they could then claim that any ensuing suit filed by Plaintiffs was barred by the Release on the grounds that the post-closing liability *resulted from* a pre-closing business relationship. The parties plainly did not intend such a result, and the language of the Release does not compel it.[22]

Section, that argument fails as to the unjust enrichment claim. As to the breach of contract and declaratory judgment claims, even if they were generally barred by the Release (they are not), they plainly fall within the Release's "carve-out." A121-22 § 8.08. The carve-out provides that the Release does not bar claims brought "pursuant to and subject to the terms of this [SPA]." A122. Both the breach of contract and declaratory judgment claims are brought directly pursuant to the terms of the SPA, which obligated Holdings to purchase ASPV as an intact corporate entity. The Release does not bar either claim and the lower court did not so find.

[22] To the extent the lower court's broad reading of the "resulting from" clause of the Release would result in a complete bar on post-closing claims as described above, it cannot be squared with general principles of contract law. "[C]ontracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'" *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) (quoting *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001)). Here, the SPA's specific performance clause plainly contemplated post-

Finally, the lower court's weighing of the equities here was myopic to the point of meaninglessness: in focusing entirely on the fact that USE had not terminated ASPV's coverage under its umbrella policy as of the date of the Complaint (Op. 23), the lower court ignored how ASPV has been unjustly enriched by Defendants' position. Indeed, the court's beliefs about USE's conduct concerning its insurance policies is nothing but pure speculation and is not supported by a single fact in the record.[23] Thus, the lower court failed to consider the undisputed fact that ASPV has obtained an undeserved windfall and instead speculated about USE's motive in order to justify dismissal.

This litigation resulted from the undisputed fact that ASPV's refusal to pay the Non-Covered Payments has resulted in it keeping the amounts it otherwise owed while *simultaneously benefitting from the insurance coverage funded by USE* (not to mention the purchase price reduction Holdings obtained by taking precisely the opposite position with respect to the Non-Covered Payments). Put differently, as a result of Defendants' refusal to pay for the Non-Covered Payments, "[ASPV is]

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closing claims "if any of the provisions" of the SPA "were not performed in accordance with their specific terms" at any point in time. A130 § 15.04. The lower court's reading of the Release would render the specific performance clause illusory, and thus cannot stand.

[23] And to the extent cancelling the Insurance Policies would have had a follow-on adverse effect on USE, the lower court gave no reason—nor can it—why USE should be forced to incur further harm because of Holdings' failure to take responsibility for liabilities it incurred in the stock sale.

unjustly retaining benefits, money and property that [it] would not otherwise have," and that is sufficient to sustain an unjust enrichment claim. *Smith v. Smitty McGee's Inc.*, 1998 WL 246681, at *4 (Del. Ch. May 8, 1998); *cf.* 30A C.J.S. Equity § 130 ("Equity will not suffer a wrong . . . to be without a remedy. This maxim . . . affords relief wherever a right exists and no adequate remedy at law is available."). To the extent the lower court engaged in an equitable analysis at all, it ignored or placed little to no weight on these compelling facts.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Chancery and enter judgment in favor of USE and EQIS.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, the foregoing document was served electronically by *File&ServeXpress* on the following counsel of record:

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