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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR LAZARUS S. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELEANOR S. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR JENNIFER L. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELIZABETH D. HEYMAN; THE LAZARUS S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE ELEANOR S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE JENNIFER L. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE ELIZABETH D. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE HORIZON HOLDINGS RESIDUAL TRUST; RFH INVESTMENT HOLDINGS LLC; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR LAZARUS S. HEYMAN; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELEANOR HEYMAN PROPP; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR JENNIFER HEYMAN MILLSTONE; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELIZABETH HEYMAN WINTER; THE 2013 LAZARUS S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S.

No. 279, 2021

Case Below:

Superior Court of
the State of Delaware,
C.A. No. N15C-10-176 EMD CCLD

HEYMAN; THE 2013 ELEANOR HEYMAN PROPP AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2013 JENNIFER HEYMAN MILLSTONE AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2013 ELIZABETH HEYMAN WINTER AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR LAZARUS S. HEYMAN; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR ELEANOR HEYMAN PROPP; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR JENNIFER HEYMAN MILLSTONE; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR ELIZABETH HEYMAN WINTER; and LINDEN PROPERTY HOLDINGS LLC,

Defendants Below,
Appellants/Cross-Appellees,

v.

ASHLAND LLC; INTERNATIONAL SPECIALTY PRODUCTS INC.; ISP ENVIRONMENTAL SERVICES INC.; and ISP CHEMCO LLC,

Plaintiffs Below,
Appellees/Cross-Appellants.

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NATURE OF THE PROCEEDINGS

This case presents a straightforward issue of contract interpretation regarding a stock purchase agreement between two sophisticated parties. Ashland is a global specialty chemicals company with a history of acquiring chemicals manufacturing and operations businesses. In 2011, Ashland set its sights on International Specialty Products Inc. ("ISP"), a chemicals business owned by the Heyman Parties. The parties soon had a tentative deal: Ashland would purchase 100% of ISP's stock for $3.3 billion. Ashland knew that acquiring ISP meant taking all of ISP's assets and liabilities, including the known but unquantified environmental liabilities to surrounding waterways stemming from chemical manufacturing operations by ISP's predecessor. Ashland was willing to accept those risks.

The dispute arises from a late-introduced wrinkle to the agreement. Ashland wanted to reduce the purchase price, the Heyman Parties refused, and the parties settled on a trade-off: in return for Ashland paying $100 million less to acquire ISP, the Heyman Parties would receive the development value of two of ISP's properties. One property was a former chemical manufacturing site in Linden, New Jersey (the "Linden Property") that the parties knew was subject to potentially substantial off-site cleanup obligations. The parties expressly agreed that the off-site obligations would stay with ISP and, thereby, become Ashland's.

The parties reduced that agreement to writing in a bespoke provision devoted to defining the limited liabilities that the Heyman Parties would assume; ISP would retain the rest. That provision expressly sought to avoid any doubt: only on-site liabilities within the four corners of the Linden Property (defined as the "Linden Excluded Liabilities") would go to the Heyman Parties' designated entity, Linden Property Holdings LLC ("LPH"). The defined term, in unmistakably clear language, carved out any off-site environmental liabilities from those assigned to LPH. Nothing hints at any exceptions to the on-site/off-site divide. Indeed, the related Contribution Agreement that actually transferred the Linden Property to LPH at closing undeniably stated that LPH assumed only on-site liabilities.

The parties followed this bright-line division of liabilities for years. In the run-up to closing, Ashland accounted for reserves it might need for Linden-related off-site liabilities, and paid for some after closing. The *first* time Ashland ever suggested ISP had not retained liability for off-site remediation stemming from the Linden Property was more than two years after closing, when the New Jersey Department of Environmental Protection ("NJDEP") indicated it would hold ISP responsible for remediating the Arthur Kill under a 1989 Administrative Consent Order ("ACO"). Ashland now advances a made-for-litigation interpretation that the contractual provision expressly devoted to allocating environmental liabilities

between the parties was modified by a separate provision designed to identify only the procedural consequences of LPH taking on-site liabilities.

The Superior Court agreed with Ashland, ruling that the procedural provision fundamentally reallocated potential environmental liabilities between the parties. It reached that conclusion by redefining the term—"Linden Excluded Liabilities"—that the parties specifically defined. According to the Superior Court's interpretation, the parties left Ashland with all off-site liability stemming from the Linden Property, including remediation of the Arthur Kill, under any legal mechanism available to NJDEP or any other government authority, *except* NJDEP's enforcement of the ACO.

That strained reading contorts the contract's language, needlessly puts the contract at odds with itself, disregards the intent of the transaction, and is belied by the parties' actual behavior leading up to, during, and following closing. It also makes no business sense, leaving the allocation of a known potential liability to the happenstance of which government agency demands remediation, and under which legal regime.

The contract clearly reflects the parties' deal: the Heyman Parties did not assume any Linden-related off-site liabilities, including the liabilities at issue here.

SUMMARY OF THE ARGUMENTS

1. Section 2(e) of Schedule 5.19 of the parties' Stock Purchase Agreement ("SPA") expressly allocates environmental liabilities related to the Linden Property. The Superior Court did not deny that, pursuant to that provision's terms, ISP retained all off-site liabilities. However, it read the next provision, Section 2(f), as changing the allocation of liabilities in Section 2(e), and specifically assigning *all* liabilities related to the ACO, including off-site liabilities, to the Heyman Parties.

The Superior Court erred because Section 2(f) does not allocate liabilities, and thus Sections 2(e) and 2(f) do not conflict. A court can and should readily harmonize the provisions by reading Section 2(f) to do what it says: identify procedural obligations that follow from Section 2(e)'s division of liabilities. Furthermore, at closing, the parties executed the Contribution Agreement that actually transferred the Linden Property's rights and liabilities using the language from Section 2(e) standing alone, and not the language from Section 2(f) on which the Superior Court relied. Nobody questions that Section 2(e)'s language leaves all off-site liabilities with ISP/Ashland. No reasonable reading of the contract supports—let alone unambiguously compels—that the Heyman Parties accepted ACO off-site liabilities stemming from the Linden Property. Judgment for Ashland should be reversed, and instead entered in the Heyman Parties' favor.

2. Even if the contract were ambiguous, the extrinsic evidence conclusively demonstrates that ISP/Ashland retained the ACO's off-site liabilities. The Heyman Parties waived attorney-client privilege to ensure there could be no doubt about the parties' intent. The negotiations, various drafts, and course of performance all confirm that the parties mutually understood that only on-site liabilities were transferred to LPH. The clear on-site/off-site division echoes through every draft of the contract, it guided the parties' financial preparations for their obligations after closing, and it is reflected in Ashland's post-closing payment for some ACO off-site liabilities. The extrinsic evidence confirms that judgment in Ashland's favor should be reversed, and instead entered for the Heyman Parties.

3. The relief Ashland obtained, requiring the Heyman Parties to bear off-site environmental obligations associated with the Linden Property, flows through two of the SPA's indemnity provisions: Section 7.2 and Section 4(a) of Schedule 5.19. The Superior Court concluded that both indemnity provisions were triggered for the same reason: it erroneously read Section 2(f) to redefine the term "Linden Excluded Liabilities." Once this Court corrects that error, it should order that the Heyman Parties breached neither indemnity provision. To the extent the Superior Court's judgment in favor of Ashland on its indemnity claims could be read to be based on the Heyman Parties' alleged breach of any procedural step required by Section 2(f), the judgment also should be reversed. The Heyman Parties took all

procedural actions required to ensure that Ashland would not be held liable for any (on-site) Linden Excluded Liabilities. In fact, Ashland knew about those actions and never asked for more. So the Heyman Parties did not breach Section 2(f), and, even if they had, the Superior Court did not and could not identify any losses that Ashland suffered as a result of it. The only losses at issue here concern Ashland's obligation to pay for off-site remediation required by NJDEP under the ACO. Once this Court decides that ISP retained that obligation, Ashland has no claim for indemnification.

STATEMENT OF THE FACTS

I. The Linden Environmental Liabilities

For more than 70 years, the Linden Property was home to chemical manufacturing operations. A785-86. In June 1989, NJDEP entered into the ACO with ISP's predecessor, GAF Chemicals, to address environmental liabilities stemming from the Linden Property. A788. The ACO documented that chemical manufacturing operations on the Linden Property had caused "numerous solid and liquid wastes" to be "disposed of both offsite and onsite," and required GAF Chemicals to remedy "all pollution at the site, emanating from the site, or which has emanated from the site." A790; A794. Chemical operations permanently ceased on the site two years later. A1267.

Although the ACO identified environmental damage both on the Linden Property and off-site in nearby waterways, the NJDEP's priority was remediating on-site contamination. A814. In 2003, the NJDEP approved a "site-wide" Remedial Action Workplan for the Linden Property. A822; A830; A816; A817-21.

Upon completing the Workplan's remediation, ISP applied for and received soil and groundwater "No Further Action" letters ("NFAs") certifying that on-site remediation was complete. A832 (August 2005 NFA for on-site soil); A1169 (July 2011 NFA for on-site groundwater). At that point, ISP had addressed all on-site obligations under the ACO. *See* A1242 (NJDEP: "[t]he only remaining issue was

[off-site] adjacent surface water (Piles Creek and the Arthur Kill)"); A1331 (ISP remediation manager describing NFAs as certifying that ISP was "done with ... remediation on the Linden site"). The NFAs included covenants not to sue that barred any action against ISP and any successors to the Linden Property for the on-site remediation it had completed. A833; A1169; *see* N.J. Rev. Stat. § 58:10B-13.1.

In 2007, NJDEP filed suit against ISP relating to off-site environmental contamination stemming from the Linden Property, including in the Arthur Kill and the Piles Creek estuary (the "NJDEP Complaint"). A838-65. Four years later, ISP entered into a Consent Judgment with NJDEP to resolve that lawsuit. A1129. The Consent Judgment dismissed with prejudice the claims relating to Piles Creek. A1144-45. However, it expressly preserved NJDEP's claims relating to other off-site liabilities, including those concerning the Arthur Kill. A1131. Thus, off-site remediation under the ACO remained an "open" issue post-settlement. A1338. NJDEP had the right under other legal mechanisms, as well as the ACO, to come back to ISP to clean up the Arthur Kill, and federal regulators, who already were active, could also use their mechanisms to require clean-up of the Arthur Kill by ISP or other potentially responsible parties. *See* A1268-69.

II. Ashland's Acquisition of ISP

A. The Original Deal: Ashland Would Acquire All of ISP, Including the Linden Property and Its Liabilities

Overlapping in time with the negotiation and entry of the Consent Judgment, Ashland acquired ISP as part of its strategy to "accelerate [its] transformation" into a leading specialty chemicals company. A875; *see also* A1349; A1307-09. By February 2011, Ashland and the Heyman Parties had a tentative deal under which Ashland would acquire 100% of ISP stock for $3.3 billion. A893. With the stock, Ashland would acquire all assets and liabilities of ISP, including the Linden Property and its liabilities.

In the ensuing months, Ashland conducted extensive due diligence with environmental consultants (EHS Support LLC ("EHS")) and environmental and deal counsel (Cravath, Swaine & Moore LLP). Through a shared data room, Ashland and its advisors could review ISP business and financial records, including the 1989 ACO and an unsigned draft of the 2011 Consent Judgment. A1112-13; *see also* A913. EHS informed Ashland of significant potential environmental liabilities relating to the Linden Property, including off-site liabilities for contamination of the Arthur Kill. A928-29; A932-33; A925-26.

B. The Revised Deal: The Heyman Parties Receive the Linden Property Without Historical Off-Site Liabilities

On May 6, 2011, for reasons unrelated to potential environmental liabilities, Ashland tried to lower the purchase price for ISP from $3.3 billion to $2.75 billion. A1303-04; A935. The Heyman Parties held firm.

Several weeks later, on May 23, 2011, the parties' principals reached agreement: The Heyman parties would accept $3.2 billion, but, to make up for the $100 million shortfall, Ashland would agree to have ISP transfer the development value of the Linden Property and another site in Wayne, New Jersey to the Heyman Parties. A936; A1360-61; A930. To effect this agreement, the parties decided upon a two-step process. First, Ashland would acquire all of ISP's stock and, thereby, assume all of ISP's liabilities, as contemplated in the original proposal. *See* A989; A1011; A906-09. Second, immediately after closing, ISP would transfer the Linden and Wayne properties back to the Heyman Parties' designee. A906; A1205-06.

Critically, as part of the second step, the parties agreed to divide the liabilities associated with the properties. In the property transfer from Ashland to the Heyman Parties' designee, the Heyman designee would acquire on-site liabilities (contamination on the Linden and Wayne properties themselves), but off-site liabilities (contamination of nearby areas, including the Arthur Kill) would remain with Ashland. From the parties' perspective, this bargain made sense. They

knew the approximate cost of on-site remediation: In the case of the Linden Property, on-site liabilities were reflected in the soil and groundwater NFAs (the latter of which had been requested and, as it happened, followed in a matter of weeks). A1169; A1113. But the parties knew that the expected settlement of the 2007 NJDEP Complaint would still leave open off-site liability arising under the ACO. That off-site liability was retained by ISP to avoid diluting the value of the Linden and Wayne properties, which were being transferred to the Heyman Parties in exchange for a discount from the initially agreed-upon price.

The Heyman Parties waived privilege in this litigation to lay bare their consistent understanding regarding this point. A mere three days after the principals meeting, as the parties prepared to meet and reduce the deal to writing, counsel for the Heyman Parties expressly set out that the Heyman Parties "are taking asset and the on-site liabilities" for the Linden Property. A937 (emphasis original). Consistent with that, the Heyman Parties "very clearly stated" at the meeting that they "were taking liabilities on the four corners." A1353-54; A1320.

By May 30, the parties had memorialized the Wayne and Linden transfers in Schedule 5.19 of the SPA. A905-10. Section 2(e) of Schedule 5.19, the specific provision addressing Linden Property liabilities, states:

> In connection with the Linden Transfer, the Seller Parties shall assume all Liabilities to the extent related to or arising from or existing at the Linden Property, including Liabilities arising under or relating to (i) Environmental Laws, provided that such Liabilities ***shall not include any off-site*** migration or disposal of Hazardous Materials from the Linden Property prior to the Closing, ***any claims or damages associated with any off-site*** migration or disposal of Hazardous Material from the Linden Property prior to the Closing, and ***for the avoidance of doubt, any off-site*** contamination of soils, groundwater or sediments, any third party superfund sites including the Newark Bay Complex, any natural resources damages or exposure claims relating to operations or discharges prior to Closing … (the "Linden Excluded Liabilities").

A908 (emphases added). Though the Heyman Parties were receiving the Linden Property, they are the "Seller Parties" because the property transfer is part of the Heyman Parties' broader sale of ISP to Ashland. The entire provision defines the set of liabilities that the Heyman Parties will take with the property as "Linden Excluded Liabilities" because these liabilities are "excluded" from those ISP/Ashland will retain after the broader stock sale closes. The same terminology is used in the corresponding division of Wayne Property liabilities. A905-06.

Substantively, Section 2(e) provides that on-site liabilities are the only existing liabilities the Heyman designee assumed. That is how it defines the term "Linden Excluded Liabilities." As the emphasized language above makes clear, the provision refers to the exclusion of off-site liabilities three separate times, each time in broad, unqualified terms, and the third time specifically for "the avoidance of doubt."

The parties exchanged numerous revisions of Section 2(e). None deviated from the parties' mutual understanding: the Heyman designee would take only on-site liabilities and Ashland would keep all off-site liabilities. *See* A945 (first draft: "the only liabilities the Seller[s] ... shall assume ... shall be liabilities existing *on* [the Linden] Property) (emphasis added); A959 (similar); A951 (Ashland's draft: Heyman Parties without liabilities relating to "any migration or off-site disposal of Hazardous Materials from the Linden Property"); A970-71; A908 (final language). The Heyman Parties' internal communications confirm their understanding that "the point" of Section 2(e) "is that [the Heyman Parties] are only taking liab[ilities] on the four corners." A962; A965 ("We really do not want any confusion, or ambiguity that the Piles Creek and Arthur Kill liabilities are not retained by Seller."); A982 ("We just need to be clear that we take no off sites"). No testimony or document suggests that Ashland ever had a contrary view. *See* A1316-17; A1283 (Ashland in-house lawyers); A1299-1300 (Ashland outside environmental counsel).

Separate provisions identify certain procedural duties the Heyman Parties agreed to undertake as to both the Linden and Wayne properties. Those provisions first refer to potential obligations under the Industrial Site Recovery Act (which are not at issue here). In addition, regarding the Linden Property, Section 2(f) also provides:

> [T]he Seller Parties shall use reasonable best efforts to amend any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities, and to replace or substitute any related financial assurance (including any bond or letter of credit), to include the name of the Linden [designee] following the Linden Transfer and, if permitted by NJDEP, to remove the name of ISP or any of the Companies therefrom.

A905; *see also* A906 (corresponding Wayne Property provision). Section 2(f) and the corresponding section 1(d) concerning the Wayne Property arrived late and were barely negotiated. Nothing in Section 2(f) purports to change the definition or scope of the Linden Excluded Liabilities, which had just been painstakingly defined. Ashland's environmental counsel added Section 2(f) to address the "procedural consequences" of the Linden and Wayne transfers; in particular, the Heyman Parties should ensure that their designee, LPH, is directly responsible under government agreements for the on-site "Linden Excluded Liabilities" it took with the property. A947. As the Ashland lawyer who drafted the provision recognized: the Heyman Parties' obligation was limited to "binding agreements that relate to the [Linden E]xcluded [L]iabilities and *only to* the [Linden E]xcluded [L]iabilities." A1292 (emphasis added); A1294-85. Nothing about what Section 2(f) says or how it came about suggests it had any substantive impact on the deal.

Even though ISP would no longer own the Linden Property, under applicable environmental law, it still faced potential liability for on-site contamination as a prior owner of the Linden Property. Section 4 of Schedule 5.19

accounts for that by requiring the Heyman Parties to indemnify Ashland, but only for losses "to the extent arising out of … the Linden Excluded Liabilities" defined in Section 2(e). A909. By contrast, there was no need for Ashland to indemnify the Heyman Parties against potential off-site liabilities because LPH (a newly created entity) would not be responsible for any off-site liability. The SPA also contains a separate general indemnification provision that applies to losses suffered by Ashland from breaches of the SPA. A1072-73 § 7.2.

III. The Contribution Agreement Executed At Closing Leaves All Off-Site Liability With Ashland

When the deal closed on August 23, 2011, Ashland acquired ISP along with all of its assets and liabilities. At the same time, the parties executed the Contribution Agreement that actually transferred the Linden Property to LPH. A1202.

Pursuant to Section 2 of the Contribution Agreement, which tracks the language of Section 2(e) of Schedule 5.19 (*compare* A1206 *with* A908), LPH did not assume any off-site liabilities existing at the time of closing. The Contribution Agreement, like Section 2(e), seeks "the avoidance of doubt" on this point. A1203. It contains no language paralleling Section 2(f).

IV. The Parties Behave As If Ashland Has All Off-Site Liabilities

A. Ashland's Financial Obligations for Off-Site Liabilities

In the months between executing the SPA and closing, Ashland continued to evaluate potential environmental liabilities related to the Linden Property. *See, e.g.*, A1179 (memorandum entitled "Evaluation of Potential Offsite Liabilities at ... Linden"). Notably, just weeks before closing, Ashland prepared a spreadsheet summarizing the "Linden (Offsite)" liabilities, which noted that the "[r]egulatory driver[s]" of those liabilities included the "[1989] ACO [and 2011] NRD Consent Judgment." A1192.

Post-closing, Ashland established reserves for the settlement of the off-site, ACO-based Piles Creek claims and related claims reflected in the 2011 Consent Judgment. HA1214-17; A1324; *see also* A1237 (accounting record documenting payment on the Linden NRDs); A1245 (same); A1261 (same). Ashland's "reserve valuation" stated that the "onsite eligibility remained" with the Heyman Parties but "off-site liability came with the acquisition." A1214; A1216. Ashland also separately acknowledged off-site liabilities that were not sufficiently "probable and estimable" to include in its reserves. A1327. For those liabilities, Ashland prepared quarterly "radar screens," which consistently noted that the Linden "off-site liability came with the acquisition thus, [Ashland had] responsibility for off-site issues and Piles Creek." A1218; A1221; A1228.

In addition, the SPA called for the parties to jointly appraise the Linden Property after closing for tax purposes. A1191-92; *see* A907. Including the potential off-site ACO liability in the appraisal would have been in the Heyman Parties' interest because it would have reduced the taxable value of what they were receiving. But, confirming that off-site ACO liability did not go to LPH with the property, counsel for the Heyman Parties asserted that the appraiser need not consider the ACO, and Ashland agreed. A1165; *compare* A1178 (final engagement letter) *with* A1164 (Ashland's proposed revisions).

B. The Heyman Parties' Regulatory Obligations

In the months before and shortly after closing, the Heyman Parties completed certain procedural tasks related to on-site Linden liabilities. Each action the Heyman Parties took was designed to eliminate any possibility that Ashland would be asked to bear on-site Linden-related liability.

The Heyman Parties worked with Ashland to transfer several on-site Linden-related permits from ISP to LPH. A1183-84. They also posted a $7.744 million letter of credit on LPH's behalf to replace the "financial assurance" for on-site operation and maintenance costs (O&M) at the Linden Property; the letter of credit covered no potential off-site liabilities.[1] A1200-02; A868; A1356; A1334-35

[1] When LPH's internal estimate of O&M costs decreased several years later, LPH posted a replacement letter of credit that reduced the total financial assurance commensurately. A1262-63.

(ISP's environmental manager confirming that underlying O&M costs related to on-site remediation and were $7.744 million). Finally, following receipt of the groundwater NFA in July 2011, the Heyman Parties began preparing applications for on-site Remedial Action Permits ("RAPs") to submit to NJDEP several weeks after closing. The RAPs would then operate as the governing mechanism for any on-site O&M work at the Linden Property encapsulated in the NFAs and the financial assurance would be transferred to the RAP. *See* NJDEP, *Status of Administrative Consent Orders and Remediation Agreements* (Sept. 10, 2020), https://www.nj.gov/dep/srp/srra/listserv_archives/2020/202009_10_srra.html. The RAPs issued in February 2012. A1230; A1233.

Ashland knew all of this. A1238-40; A834-35; A868 (communications with NJDEP copying ISP/Ashland personnel). Yet Ashland never told LPH that LPH had failed to take any required action. The reason is clear. The Heyman Parties did exactly what they had promised Ashland: they eliminated any possibility that Ashland might be made to pay for on-site remediation of the Linden Property.

V. Ashland Denies It Bears ACO Off-Site Liabilities Only After NJDEP Demands Action

In July 2012, at the request of a potential purchaser, the Heyman Parties attempted to terminate the ACO. Ashland was kept apprised of LPH's efforts, and it never objected. A1238-40; A834-35; A868.

Almost a year and a half later, NJDEP refused to terminate the ACO, explaining that the ACO included "the obligation to remediate discharges to the Arthur Kill" that had not been resolved by the 2011 Consent Judgment. A1248. Even after receiving the NJDEP's letter, Ashland acknowledged to the Heyman Parties that the deal included the off-site/on-site divide of liabilities: "Ashland agreed to take on certain pre closing *off site* migration liabilities, third party liabilities, and certain *off site* NRD liabilities for Piles Creek and the Arthur Kill as it relates to Linden operations. However, I don't believe Ashland undertook or retained any responsibility for any remedial activities for Linden for *on site* pre or post closing environmental liabilities …." A1246 (emphasis added); *see also* A1253.

A month later, having retained litigation counsel, Ashland reversed course, for the first time disclaiming responsibility for off-site liabilities arising under the ACO. A1257.

VI. Procedural History

Ashland commenced this action, asserting that the Heyman Parties breached the SPA by failing to handle off-site remediation under the ACO. A379. The Heyman Parties responded that Ashland had retained all off-site Linden-related liabilities. A422.

In March 2017, the Superior Court, resolving motions on the pleadings, determined that the contract was ambiguous. The Superior Court considered the on-site/off-site "dichotomy" in Section 2(e) "rather straightforward" in that "[t]he contract allocated pre-closing off-site liabilities to Ashland" with "all-encompassing" language. Ex.A-pp.10-11. But the Superior Court perceived a potential conflict between Sections 2(e) and 2(f): "[A]t this stage in the proceedings, the Court is not comfortable that there are not ambiguities in the SPA ..., including the parties' responsibilities under the ACO." Ex.A-p.10; *see* Ex.A-p.11 ("[T]here are ambiguities regarding the Heyman Defendants' duties and liabilities pursuant to SPA Section 2(f).").

Following discovery, both parties moved for partial summary judgment. A661, A720. This time, the Superior Court declared that the SPA was "unambiguous." Ex.D-p.23. It ruled that under Sections 2(e) and 2(f) "the Heyman Defendants retained all liabilities," including off-site liabilities, "relating to the Linden Property under the ACO." *Id.*

The Superior Court did not retreat from its view that Section 2(e)'s definition of "Linden Excluded Liabilities," as written, allocates all off-site liability to Ashland. *See* A591. Instead, the Superior Court decided that "[t]he specific responsibilities and obligations that the Heyman Defendants undertook in Section 2(f) qualifies the meaning of Section 2(e)'s carve-out … and, therefore, the

scope of Linden Excluded Liabilities." Ex.D-pp.23-24. That is, according to the Superior Court, Sections 2(e) and 2(f) "contradict[]" one another and, as the more specific provision, "SPA Section 2(f) qualifies SPA Section 2(e)'s definition of Linden Excluded Liabilities to include certain off-site obligations under the ACO." Ex.D-pp.23, 31.

The Superior Court discussed the specific "responsibilities and obligations" in Section 2(f) that supposedly "qualifie[d] the meaning of Section 2(e)," and thereby shifted off-site ACO obligations to LPH. According to the Superior Court, the ACO was a consent decree "relating to the Linden Excluded Liabilities," and thus Section 2(f) required the Heyman Parties to use "reasonable best efforts" to put LPH's name on the ACO and to remove ISP from it, if NJDEP agreed. Ex.D-p.24. The Superior Court found that LPH took no such efforts, and this constituted a breach of the agreement. *Id.*; Ex.E-pp.5-6. Ultimately, the Superior Court treated the "reasonable best efforts" obligation (efforts the parties expressly anticipated might fail), and the obligation of the Heyman Parties to post financial assurance, as requiring it to read the agreement to mean that the parties had assigned all ACO liability, including off-site, to the Heyman Parties. Ex.D-pp.23-25, 31.

The Superior Court made no effort to reconcile Section 2(e)'s undisputed substantive allocation of liabilities with Section 2(f)'s procedural obligations. Though the Superior Court purported to read Sections 2(e) and (f) in light of "the

entire SPA," Ex.D-p.23, the Superior Court never mentioned the Contribution Agreement, which describes the actual transfer of liabilities in terms that track only Section 2(e); the Contribution Agreement does not use language from Section 2(f) at all. And the Superior Court did not address the overwhelming and uncontradicted evidence that Ashland reserved for off-site Linden liabilities driven by the ACO, and paid for them after closing. Further, it never explained why LPH should be required to try to put its name on or take ISP's name off the ACO in light of the fact that, as Ashland knew, LPH had applied for and received the NFAs that ensured Ashland could not bear any responsibility for on-site remediation under the ACO.

Because it ruled that Section 2(f)'s procedural obligations "qualif[y]" Section 2(e)'s definition of "Linden Excluded Liabilities," the Superior Court declared that the Heyman Parties must indemnify Ashland, pursuant to Section 4(a) of Schedule 5.19, for amounts Ashland has had to pay for off-site contamination stemming from the Linden Property. Ex.D-p.31; Ex.E-p.6. The Court also concluded that the SPA's other indemnity provision, Section 7.2, had been triggered by the same breach: the Heyman Parties' failure to bear the costs of off-site liabilities under the ACO. Ex.D-p.31; Ex.E-p.6.

ARGUMENT

I. THE AGREEMENT UNAMBIGUOUSLY ALLOCATES OFF-SITE LIABILITY TO ASHLAND.

A. Question Presented

Whether the SPA unambiguously allocates all off-site environmental liabilities stemming from the Linden Property to ISP/Ashland.

This issue was preserved. A756-63; A567-81.

B. Scope of Review

This Court reviews *de novo* issues of contract interpretation, including whether a provision is ambiguous. *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033 (Del. 2013).

C. Merits of the Argument

In interpreting contracts, courts "'give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014); *see Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). Courts must "look to harmonize the entire agreement and remain consistent with the objective intent of the parties that drafted the contract." *Land-Lock, LLC v. Paradise Prop., LLC*, 2008 WL 5344062, at *3 (Del. Dec. 23, 2008); *accord Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012). Where a contract's text is reasonably susceptible

to only one meaning, it is facially unambiguous, and must be construed "in accordance with [its] plain meaning." *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012).

1. Section 2 unambiguously leaves ISP/Ashland with all Linden off-site liabilities.

Ashland does not dispute that the parties agreed not to transfer all existing environmental liabilities related to the Linden Property when ISP transferred that property to LPH. The only question is which liabilities the Heyman Parties agreed LPH would assume. There is only one provision in Schedule 5.19 that purports to identify which Linden-related liabilities LPH assumed: Section 2(e). There is no dispute about what that provision says: *all* off-site liability stays with ISP/Ashland. Ashland has never offered any contrary reading of Section 2(e). Ashland persuaded the trial court to read Section 2(f) as though it *also* addressed the substantive division of liabilities, that it did so in a way that contradicts Section 2(e)'s division, and that Section 2(f)'s choice should be given effect. Every step in that reasoning was legal error warranting reversal.

Section 2(e). Section 2(e) explicitly addresses "Liabilities," a defined term in the SPA. LPH assumed only "Linden Excluded Liabilities," a term defined in Section 2(e) itself. A905. That term could not more clearly have excluded off-site liabilities from the transfer to LPH.

Section 2(e) speaks comprehensively about the off-site liabilities that will *not* go to LPH. Those liabilities include "***any*** off-site migration or disposal of Hazardous Materials" and "***any*** claims or damages associated with any off-site migration or disposal of Hazardous Material" stemming from "the Linden Property." A908 (emphases added). It expressly seeks "the avoidance of doubt" on the subject. *Id.*; *see, e.g.*, *DG BF, LLC v. Ray*, 2021 WL 776742, at *3 (Del. Ch. Mar. 1, 2021) (giving "broad" effect to "for avoidance of doubt" clause). That clause identifies an array of common off-site environmental liabilities that ISP/Ashland retains: (i) "any off-site contamination of soils, groundwater or sediments," (ii) "any third party superfund sites including the Newark Bay Complex"; and (iii) "any natural resources damages or exposure claims." A908. Section 2(e) places no limit on the scope of off-site liabilities ISP retained. As the Superior Court previously acknowledged, it is "all-encompassing." Ex.A-pp.10-11. If the parties had intended to create an exception based on, for example, regulatory action, they would have noted it in Section 2(e).

There is no other way to read Section 2(e). If Section 2(e) is treated as what it is—the provision comprehensively dividing "Liabilities" related to the Linden Property between the parties—then this Court should reverse the trial court's judgment.

Section 2(f). Section 2(f), on its face, concerns procedural obligations. First, to the extent the Industrial Site Recovery Act applies to the transfer of the Linden Property, it makes the Heyman Parties responsible for completing required pre-closing paperwork. A908. That is not at issue here. Second, it requires the Heyman Parties to use "reasonable best efforts" to place LPH's name on any binding agreements with the government related to the "Linden Excluded Liabilities," and to remove ISP from the same—*but only* "if permitted" by the appropriate government agencies. A908. It also requires LPH to post any "financial assurance" related to the "Linden Excluded Liabilities." A908. That is all that Section 2(f) requires.

Yet the Superior Court chose to read Section 2(f) as if it, too, allocates liabilities between the parties. The court determined that "SPA Section 2(f) qualifies SPA Section 2(e)'s definition of Linden Excluded Liabilities to include certain off-site obligations under the ACO." Ex.D-p.31. There is no basis for that ruling.

To begin, the provision does not say it addresses "Liabilities." The defined term "Liabilities" does not appear in Section 2(f). Section 2(f) does not purport to add to or subtract from the just-defined term "Linden Excluded Liabilities." That is, Section 2(f) gives no sign that it reopens the work completed in Section 2(e). *See Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 257 n.54 (Del. 2017)

("Words used in one sense in one part of the contract will ordinarily be considered to have been used in the same sense in another part of the same instrument where the contrary is not indicated.") (cleaned up); *Cornell Glasgow, LLC v. La Grange Props., LLC*, 2012 WL 6840625, at *12 (Del. Super. Ct. Dec. 7, 2012) (a court cannot "rewrite [a term] under the guise of interpreting it"). Rather, Section 2(f) expressly tracks—and does not alter—the division of liabilities established in Section 2(e).

The Superior Court's reading inverts the contractual language. It holds that the definition of Linden Excluded Liabilities, which the parties comprehensively, and for the avoidance of doubt, defined one provision earlier, was silently *re*defined in a subsequent provision describing "procedural consequences." *See* A947. When parties highlight that they are seeking "the avoidance of doubt" in a provision, they are expressing how important that term is to their agreement, along with their ability to rely on how it will be understood going forward. *See In re G-I Holdings, Inc.*, 755 F.3d 195, 209 (3d Cir. 2014) ("[f]or the avoidance of doubt" clause "clearly reserve[d]" certain claims); *DG BF*, 2021 WL 776742, at *3.

Courts rightly respect when parties clearly express their intentions as to key terms. Rewriting a defined term long after the deal is done in light of another provision that does *not* purport to define the term would frustrate the essential goal of contract construction: giving effect to the intentions of the parties. *See Radio*

Corp. of Am. v. Phil. Storage Battery Co., 6 A.2d 329, 334 (Del. 1939) ("[W]here the parties define the words or terms which they intend to use, the contract will be interpreted according to such definitions ...."). Contracting parties do not hide elephants in mouseholes. *See White v. Curo Tex. Holdings, LLC*, 2016 WL 6091692, at *27 (Del. Ch. Sept. 9, 2016) (re-allocation of potential losses should be "documented openly, in provisions that explicitly identify it" and not "achieved indirectly"); *In re NextMedia Invs., LLC*, 2009 WL 1228665, at *5 (Del. Ch. May 6, 2009) (rejecting interpretation requiring an "oblique[]" reading of the provision when a provision with that meaning "could have been written very directly if the drafters intended to embrace" it).

The Superior Court's misreading of the contract turns on its head the "cardinal rule" that a court should "give effect to *all* contract provisions." *Martin Marietta*, 68 A.3d at 1221 (citation omitted). The Superior Court did not try to harmonize Sections 2(e) and 2(f). Instead, it declared that they contradict each other. This Court can and should readily harmonize Sections 2(e) and 2(f) by simply restricting them to their respective scopes: Section 2(e) substantively divides liabilities, and Section 2(f) identifies procedural consequences that follow from, but do not alter, that division. *See id.* at 1225; *Axis Reins. Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010) (finding no ambiguity "because each [provision] has a distinct and independent purpose and function").

Without any conflict between Sections 2(e) and 2(f), there is no need to resort to the "specific controls the general" canon. That principle may be used to interpret conceptually related contractual provisions *if* they "pertain[] to the same subject" and are in real and direct conflict. *See DCV Holdings, Inc. v. ConAgra, Inc.*, 2005 WL 698133, at *12 (Del. Super. Ct. Mar. 24, 2005), *aff'd*, 889 A.2d 854 (Del. 2005). But the rule has no role when, as here, the provisions "address different issues and are not in conflict." *Glanden v. Quirk*, 128 A.3d 994, 1000 n.15 (Del. 2015); *see, e.g.*, *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 862-63 (Del. 2008); *In re FBI Wind Down, Inc.*, 252 F. Supp. 3d 405, 422-23 (D. Del. 2017), *aff'd*, 741 F. App'x 104 (3d Cir. 2018); *In re G-I Holdings*, 755 F.3d at 205-07.

Regardless, even if there were a conflict, "[t]he better and apparent majority rule for resolving irreconcilable differences between contract clauses is to enforce the clause relatively more important or principal to the contract." 11 Williston on Contracts § 32:15 (4th ed.); *see E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) (inference from particular provision "cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan"). Section 2(e) declares itself to be specifically about "Liabilities"; Section 2(f) does not. Section 2(e) specifically defines Linden Excluded Liabilities; Section 2(f) does not. Section 2(e) was

heavily negotiated; Section 2(f) was not. *See* Restatement (Second) of Contracts § 203(d) (1981) ("[S]eparately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated."). The fact that the defined term is later used in Section 2(f) plainly indicates that Section 2(f) was intended to track the limits of Section 2(e), not trump them. And had the parties intended to create a special ACO-only assignment of off-site liability, they would have expressly referenced the ACO in Section 2(f), as they had two paragraphs earlier in Section 2(d). A908.

2. Additional terms of the SPA and Contribution Agreement confirm that Ashland took off-site ACO liabilities.

The Superior Court's decision also creates discord among other provisions of the SPA and is irreconcilable with the complementary Contribution Agreement.

Contribution Agreement. Under Delaware law, a contractual provision "must be read in context" with "complementary" agreements that are part of the same transaction. *Activision Blizzard*, 106 A.3d at 1033-34; *see E.I. du Pont de Nemours & Co.*, 498 A.2d at 1115 (two agreements that "work in tandem … in essence, … form one contract and must be examined as such"). Therefore, as the Superior Court recognized (though failed to respect) "the SPA and Contribution Agreement are related, and must be read together" and "in conjunction with [one] another." Ex.B-pp.11-14.

Section 2 of the Contribution Agreement defines a new phrase, "Assumed Liabilities," in a manner that is substantively identical to the SPA's definition of Linden Excluded Liabilities: it divides all Linden liabilities between on-site and off-site, it provides that LPH assumes *only* the on-site liabilities, and, like the SPA, it emphasizes "the avoidance of doubt" regarding that division. A1206. The trial court never suggested that the language in Section 2(e) could be read, *standing alone*, to allocate off-site liabilities for the ACO or anything else to LPH. Yet, when the parties actually executed the property transfer and divided liabilities at closing in the Contribution Agreement, they used the same language from Section 2(e) and left it *standing alone*. It is difficult to imagine more conclusive evidence of the parties mutual understanding and intent regarding the clean on-site/off-site division than that.

Schedule 5.19 Section 1, the Wayne Property. Schedule 5.19 also addresses the transfer of the Wayne Property and its liabilities. As with the Linden transfer, the agreement includes one provision for the substantive allocation of Wayne-related liabilities and one for procedural consequences. Sections 1(c) and 2(e) govern the division of liabilities for the Wayne and Linden Properties, respectively, and Sections 1(d) and 2(f) govern procedural obligations.

Sections 1(d) and 2(f) are substantively identical, despite the fact that there were no government agreements concerning off-site liabilities related to the Wayne

Property. *Compare* A906 *with* A908. That is, there can be no doubt that Section 1(d) did not alter the substantive division of liabilities set forth in Section 1(c). It cannot be that the parties used the language in Section 1(d) to identify procedural consequences only and the *same* language in Section 2(f) to make a critical substantive change to the deal. "It is simply not reasonable to believe that the same words" in two provisions "have different meanings." *USA Cable v. World Wrestling Fed'n Ent., Inc.*, 2000 WL 875682, at *9 (Del. Ch. June 27, 2000) (identical language in a later provision "does not take on a more expansive meaning"), *aff'd*, 766 A.2d 462 (Del. 2000); *accord Brinckerhoff*, 159 A.3d at 257 n.54.

Schedule 5.19 Section 4, Indemnification. Section 4 provides Ashland with an indemnity for losses arising from the transfer of the Linden and Wayne properties. Such "[d]eal-related indemnification provisions" are a common means through which parties "address post-closing risk allocation." *Express Scripts, Inc. v. Bracket Holdings Corp.*, 248 A.3d 824, 831 n.29 (Del. 2021) (alteration in original and citation omitted). Here, when the parties chose to allocate post-closing risks, they did so invoking the terms defined in Section 1(c) and 2(e), respectively: LPH would bear post-closing economic risks "to the extent arising out of … the Wayne Excluded Liabilities and the Linden Excluded Liabilities." A909. Critically, the indemnification provision does *not* indemnify Ashland for risks

"arising out of any *consent decree related to* the Linden Excluded Liabilities." Instead, the language the parties chose—limited to the defined terms Wayne and Linden Excluded Liabilities—fits logically with the harmonizing interpretation of Sections 2(e) and 2(f). Section 4(a) indemnifies Ashland for only on-site liabilities (including those resulting from failure to amend a consent decree covered by Section 2(f)). A909.

3. "Background facts" do not support the Superior Court's interpretation.

The Superior Court's reference to the "background facts" doctrine rests on disputed and improper facts, and cannot save its flawed contract interpretation. Ex.D-p.22. This Court has said that background facts regarding an unambiguous contract include only undisputed facts concerning the commercial context that "place the contractual provision in its historical setting." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997); *see Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 820-21 (Del. 2018). The Superior Court referred primarily to the Heyman Parties' posting of financial assurance in an amount equal to the estimate of on-site O&M for the Linden Property. Ex.D-pp.24-26. But such course of performance evidence does not provide historical context from the time of contract formation, and is not properly considered a background fact. *See Eagle*, 702 A.2d at 1232 n.7. And the inference the Superior

Court drew is undermined by the fact that the amount was limited to anticipated on-site costs.

The undisputed "background facts" confirm that the parties expected predictability with respect to the economic risks related to the properties because they used the property transfers to bridge the $100 million price gap for the sale of ISP's stock. A1342-43; A1345; *see also* A936. Under the Heyman Parties' reading of the contract, LPH bears any on-site liability regardless of the source, which had, at the time, been quantified, while Ashland retained any off-site liability regardless of the source, which was at the time unknown and uncertain to ever materialize, but had long been acceptable to Ashland as part of acquiring ISP for several billion dollars. Such a deal provides a relatively fixed economic value to the transfer and ensures that the Linden Property is a source of value to LPH. The Heyman Parties' view gives "sensible life to [this] real-world contract." *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913-14 (Del. 2017).

Under the Superior Court's analysis, by contrast, the parties left to chance and regulatory whim the value of the Linden Property transfer. Recall, the Superior Court did not conclude that Section 2(f) assigns *all* off-site liability to the Heyman Parties. Rather, it concluded that Section 2(f) assigns off-site liabilities arising under *only* the ACO to LPH because it concluded that the ACO was a known consent order "relating to" on-site liabilities at the time of the agreement. Ex.D-

pp.23-24. Under the Superior Court's construction, then, if the EPA pursued clean-up of the Arthur Kill, Ashland would be financially responsible. If New York (which also borders the Arthur Kill) rather than New Jersey sought remediation, Ashland would be financially responsible. If the NJDEP sought remediation through any mechanism other than the ACO (*e.g.*, through the Spill Compensation and Control Act, which NJDEP commonly employs), Ashland would be financially responsible. In Ashland's view, adopted by the Superior Court, the *only* way the Heyman Parties are financially responsible for remediation of the Arthur Kill just happens to be the one that occurred: the NJDEP pursues remediation under the ACO.

That makes no sense from a deal perspective, and bears all the hallmarks of Ashland concocting an after-the-fact interpretation to evade liability it agreed to accept, and indeed recognized in the years prior to filing this lawsuit. Sophisticated parties to a multi-billion dollar deal cannot reasonably be understood to have left the allocation of a potentially substantial liability to happenstance beyond their control.

* * *

Section 2(e) unambiguously allocates environmental liabilities between the parties, while Section 2(f) addresses the procedural consequences of that allocation. However, if the Court is disinclined to conclude that the SPA

unambiguously leaves ACO off-site liabilities with ISP/Ashland, there is nothing in the text or structure of the contract that forecloses the Heyman Parties' interpretation. Indeed, the Superior Court expressly recognized that the Heyman Parties' interpretation was at least reasonable, before inexplicably reversing course. Ex.A-p.11. Therefore, even if the Court disagrees that the SPA unambiguously assigned ACO off-site liability to Ashland, the Court should turn to the extrinsic evidence to divine the parties' shared intent. *See Sunline Com. Carriers*, 206 A.3d at 847.

II. THE EXTRINSIC EVIDENCE RESOLVES ANY AMBIGUITY IN FAVOR OF THE HEYMAN PARTIES.

A. Question Presented

If the agreement's terms are ambiguous regarding off-site liability, whether the extrinsic evidence compels a factfinder to conclude that the parties understood and intended that ISP/Ashland would retain all off-site liability.

This issue was preserved. A764-67.

B. Scope of Review

Questions of contract interpretation, including the use of extrinsic evidence, are reviewed *de novo*. *Salamone*, 106 A.3d at 367.

C. Merits of the Argument

When a contract is ambiguous, Delaware courts turn to extrinsic evidence surrounding the creation and performance of the contract to resolve the ambiguity. *Salamone*, 106 A.3d at 374. Courts may consider "overt statements and acts of the parties, the business context," and other extrinsic evidence of the parties' negotiations to determine which interpretation is objectively reasonable under the circumstances. *Id.* at 374-75 (citation omitted). "The parties' course of performance under a contract is a powerful indication of what the correct interpretation of that contract is." *Sunline Com. Carriers*, 206 A.3d at 851 n.95 (citation omitted).

Here, the extrinsic evidence all "point[s] in one direction." *Id.* at 849. Until the off-site liabilities arising under the ACO materialized in early 2014, both Ashland and the Heyman Parties behaved as though Ashland was responsible for *all* Linden-related off-site liabilities. No reasonable factfinder could conclude otherwise.

1. The negotiation and drafting history consistently limited the Heyman Parties' liabilities to on-site liability.

The Drafting History. Every version of Section 2(e)—from initial draft through execution—reflected the sharp division between on-site liabilities the Heyman Parties agreed to assume and off-site liabilities retained by ISP. *Compare* A945 (Heyman Parties assume only "liabilities existing on" Linden) *with* A908 (Heyman Parties assume only "Linden Excluded Liabilities," which excepted all off-site liabilities). Indeed, as the drafting progressed, the language became more expansive and explicit. *See* A951; A979; A908.

The extrinsic evidence surrounding Section 2(f)'s addition confirms that neither party understood it as modifying Section 2(e), or otherwise addressing its extensively negotiated division of liabilities. Ashland's counsel admitted that she drafted Section 2(f) to address only the "procedural consequences" of the Linden Property's transfer, which might include "some filings perhaps." A1303. If the parties had intended to substantively change the business deal, there would surely be communications or notes explaining how Section 2(f) changed what was

decided in Section 2(e). No such evidence exists. To the contrary, when the parties executed the related Contribution Agreement months after the SPA to effectuate the Linden Transfer, Ashland agreed to use the language from Section 2(e) alone to complete the deal. Neither the Superior Court nor Ashland can explain away this dispositive evidence. *See Sunline Com. Carriers*, 206 A.3d at 851 n.95.

The Heyman Parties' Privileged Communications. The Heyman Parties' internal communications confirm exactly what the drafts and due diligence reflect: that only on-site liabilities would be transferred to the Heyman Parties, and that Ashland would retain *all* off-site liabilities. *See supra* p.11. At no point during the SPA's negotiation or drafting did the Heyman Parties understand Ashland to reject this clean division of liabilities or even to suggest doing so. There is simply no reason to believe an ACO-only exception to the comprehensive division of liabilities—on-site to LPH, off-site to Ashland—was ever brought up.

2. The parties' conduct confirms that they understood Ashland retained all off-site liabilities, including under the ACO.

Given all of Ashland's planning for off-site liabilities, it is no surprise that in the run-up to and following closing, Ashland explicitly acknowledged that the "[r]egulatory driver" of its Linden reserves was the ACO, and that off-site liabilities arising under the ACO "came with the acquisition." A1195; A1214. That evidence, too, extinguishes any doubt about how Ashland understood the deal.

In the months after executing the SPA, Ashland established financial reserves for Linden off-site liabilities, including for an ecological risk assessment for Piles Creek, which was the next remedial step under the ACO and 2011 Consent Judgment. A1216. After closing, Ashland also began making payments under the Consent Judgment, which imposed natural resource damages to settle certain ACO-related claims. A1324; *see also* A1237; A1245; A1261.

The Heyman Parties, on the other hand, consistently acted as though they would be responsible only for on-site liabilities. In particular, the "financial assurance" the Heyman Parties posted matched calculations for the reserves needed for ongoing *on-site* O&M expenses. A868; A1334-35 (ISP's environmental manager confirming that O&M costs related solely to on-site remediation). The Heyman Parties did not accept or pay for *any* Linden-related off-site liabilities at any time after executing the SPA.

Ashland agreed that an appraisal of the property should disregard the ACO, A1165, which would make no sense (and be contrary to the Heyman Parties' interest) if LPH took off-site ACO liability with the property. When the Heyman Parties transferred five governmental permits, licenses and agreements from ISP to LPH as "consent decree[s] or other binding agreement[s] with any Governmental Entity related to the Linden Excluded Liabilities," Ashland did not add the ACO or question why it was not on the list, which it surely would have done if it was an

essential substantive part of the deal reflecting the parties' agreement that LPH bears full responsibility for the ACO. And even after the NJDEP invoked the ACO to require cleanup of the Arthur Kill, Ashland at first reaffirmed the parties' comprehensive on-site-to-LPH/off-site-to-ISP divide. A1246. Only later did it concoct a theory to deny that was the agreement. A1257.

* * *

The extrinsic evidence "conclusively resolve[s] [any] ambiguity in [the Heyman Parties'] favor," and requires judgment for the Heyman Parties. *Sunline Com. Carriers*, 206 A.3d at 849. However, even if the Court is not inclined to order entry of judgment in the Heyman Parties' favor, there is no basis on which to hold that this record "conclusively resolves the ambiguity in [Ashland's] favor." *Id.* At a minimum, this case should be remanded for trial.

III. ALL RELIEF PROVIDED TO ASHLAND IN THE JUDGMENT SHOULD BE VACATED.

A. Question Presented

Whether the Heyman Parties breached any obligation that triggers Ashland's indemnification rights.

This issue was preserved. A763-64.

B. Scope of Review

The indemnity relief ordered by the Superior Court stems from its view that Section 2(f) allocated to Ashland all off-site liability relating to the ACO. That premise, as well as the construction of the contract's indemnity provisions, is reviewed *de novo*. *Textron Inc. v. Acument Glob. Techs., Inc.*, 108 A.3d 1208, 1218-19 (Del. 2015).

C. Merits of the Argument

The premise for the relief the Superior Court ordered is that Section 2(f) adds "certain off-site liabilities related to the ACO" to the Linden Excluded Liabilities assumed by LPH that Section 2(e) would otherwise exclude. Ex.D-p.31. The Superior Court concluded that the indemnification provisions in Section 4 of Schedule 5.19 and Section 7.2 of the broader SPA were triggered because of this reallocation of ACO off-site liabilities to the Heyman Parties. *Id.*

For all the reasons discussed above, that premise is wrong. This Court should therefore vacate the relief and order on remand that judgment be entered in

favor of the Heyman Parties regarding Ashland's indemnity claims. The reason is simple: each indemnity provision requires Ashland to prove that it suffered some losses "arising out of" "the Linden Excluded Liabilities," A909 (Schedule 5.19, Section 4) or "arising out of" a breach of the SPA, A1075-76 (SPA Section 7.2). Once this Court rules that Section 2(f) does not redefine the term Linden Excluded Liabilities, and that off-site liability related to the ACO was, in fact, left with ISP/Ashland, then being made to cover those liabilities by the NJDEP cannot be a loss to Ashland.

That remains true even if one examines the Superior Court's conclusion that the Heyman Parties breached certain procedural obligations under Section 2(f). The Superior Court said the Heyman Parties breached Section 2(f) because LPH no longer provides any financial assurance under the ACO. Ex.D-p.25. It also said that, under Section 2(f), the Heyman Parties "needed to expend reasonable best efforts to amend the ACO to include LPH and, if NJDEP agreed, remove ISP," and found that LPH did not ask NJDEP to add its name to the ACO or take ISP's name off the ACO. Ex.D-p.24. Those findings cannot save the judgment for several reasons.

To begin, Section 2(f)'s procedural obligations required the Heyman Parties to take steps to shield ISP from liability for on-site remediation. And the Heyman Parties delivered. LPH posted a letter of credit covering the full O&M costs of on-

site remediation. It also received the groundwater NFA and ultimately obtained RAPs, which supersede the ACO with respect to any ongoing on-site obligations and prevent on-site remediation costs being imposed on Ashland. *See supra* pp.17-18. Ashland knew about those steps and, for nearly three years prior to this litigation, never asked the Heyman Parties to do anything further, including with respect to the ACO. The notion that LPH should continue to take any steps, including providing financial assurance under the ACO, even *after* its on-site liabilities have been fully satisfied is inseparable from the error of treating Section 2(f) as assigning off-site ACO liability to LPH.

All of this comports with the view of Ashland's environmental counsel who drafted Section 2(f). She believed it could not be read to impose even procedural duties on the Heyman Parties for obligations embodied in government agreements related to off-site liabilities. A1292. Section 2(e) says a "Liability" is a "Linden Excluded Liability" only if it does not impose an off-site obligation. On her view, Section 2(f) can only require the Heyman Parties to add their name to, and take ISP's name off of, any government agreement if it was a wholly on-site obligation. *Id*. Accordingly, there was never any obligation either to seek to add LPH or remove ISP from the ACO—a "Liability" whose on-site remedial component had been fully satisfied prior to closing by the on-site NFAs, but which still indisputably "cover[ed]" off-site. Ex.D-p.24.

Moreover, even if one reads Section 2(f) to have required the Heyman Parties to "use reasonable best efforts" to ask NJDEP to put LPH's name on and to take ISP's name off the ACO as stand-alone obligations divorced from their purpose, there still would be no breach of Section 2(f). Unless the parties allocated off-site ACO liability to LPH (and they did not), it would have been unreasonable to even ask NJDEP to take ISP's name off the ACO. Likewise, it would have been unreasonable for LPH to ask NJDEP to put its name on the ACO; between signing the SPA and closing, the groundwater NFA issued and resolved onsite liabilities at the Linden Property. Putting LPH's name on the ACO at that point could only serve to unfairly expose LPH to the off-site liability the parties agreed to leave with ISP. Reasonable best efforts do not require acts that fundamentally contradict the substantive agreement between the parties or futile gestures that can produce only harm to one side. *See Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *91 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).

Finally, even if failing to ask NJDEP to put LPH on or take ISP off the ACO were a breach, such a breach still could not trigger any indemnity for two additional reasons. Most broadly, the indemnification provisions are triggered only by Ashland "losses." A909; A1075-76. The only "loss" at issue here is NJDEP's claim requiring ISP to clean up the Arthur Kill through the ACO. That "loss" is one Ashland would have avoided *only if* it would have been reasonable for LPH to

have asked NJDEP to take ISP's name off the ACO, *and* NJDEP would have agreed. The Superior Court never found NJDEP would have agreed and it elsewhere acknowledged that NJDEP would not have done so. *See* A594-95; A598; A783. Similarly, there is no connection between Ashland's loss (the claim it faces to clean up the Arthur Kill) and any supposed failure to add LPH's name to the ACO. Even if LPH's name were *also* on the ACO, Ashland would still face the claim.

More narrowly, as a matter of law, only the specific indemnity in Schedule 5.19 is even potentially applicable here. A909. On their face, Section 7.2's indemnity and the indemnity in Schedule 5.19 overlap. Section 7.2's indemnity applies broadly to "any breach of any … agreement" by the Heyman Parties. Schedule 5.19's indemnity applies only to a breach that causes ISP/Ashland to incur "Linden Excluded Liabilities." A909. So reading Section 7.2's indemnity to apply to breaches of Schedule 5.19 would make the indemnity provision written into Schedule 5.19 surplusage. *See Martin Marietta*, 68 A.3d at 1225 ("[A]ll contract provisions [should] be … given effect where possible."). That is why, when indemnity provisions overlap, courts apply the one more specifically addressing the subject in dispute, especially when the scope of that provision is narrower than the more general provision. *ClubCorp, Inc. v. Pinehurst, LLC*, 2011 WL 5554944 at *10-11 (Del. Ch. Nov. 15, 2011) (tax-specific indemnity prevailed

over a general loss indemnity covering "any and all Losses"); *Glob. Energy Fin. LLC v. Peabody Energy Corp.*, 2010 WL 4056164, at *22 (Del. Super. Ct. Oct. 14, 2010) (indemnity that "specifically address[ed] environmental liabilities" prevailed over general indemnity covering "all" claims). Only by rewriting the defined term "Linden Excluded Liabilities" itself to include off-site liability under the ACO did the Superior Court sweep Ashland's off-site Losses into the scope of Section 4(a). That was error for the reasons described above, and because "Delaware courts construe indemnity agreements strictly against the indemnitee." *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7 (Del. Super. Ct. Feb. 8, 2016), *aff'd sub nom. Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209 (Del. 2016). Once that error is corrected, there is no reasonable interpretation of the SPA that entitles Ashland to indemnification for the off-site liability it agreed to retain.

CONCLUSION

The Superior Court's Order should be reversed, and the case remanded for entry of judgment in the Heyman Parties' favor, or, in the alternative, for a trial on the merits.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, the foregoing Appellants' Opening Brief was caused to be served upon the following attorneys of record via File & Serve*Xpress.*

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