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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.

APPELLANTS' REPLY BRIEF ON APPEAL
AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

MORRIS NICHOLS ARSHT &
TUNNELL LLP
William M. Lafferty (#2755)
John P. DiTomo (#4850)
Thomas P. Will (#6086)
Miranda N. Gilbert (#6662)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200

Attorneys for Appellants/Cross-Appellees

OF COUNSEL:
Robert N. Hochman
Heather Benzmiller Sultanian
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Eamon P. Joyce
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019
(212) 839-5000

Andrew J. Rossman
Jonathan B. Oblak
Nicholas Hoy
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

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INTRODUCTION

Only Section 2(e) of the SPA speaks directly to off-site liabilities, and it leaves no doubt: Ashland assumed all off-site environmental liabilities related to the Linden Property. Ashland cannot square its position with the actual language of Section 2(e), so it does not even try. Instead, Ashland re-writes the provision. According to Ashland, Section 2(e) excepts only "certain off-site obligations" from the liabilities transferred with the property. Ashland-Br. 6. Actually, the defined term "Linden Excluded Liabilities" excepts "*any* off-site" liability. A908 (emphasis added). A few pages later, Ashland erases the exception entirely. Ashland-Br. 10 (claiming Sellers assumed "***all* liabilities**"). Courts do not rewrite contracts after-the-fact at the request of one of the parties. But here, that is the only way Ashland can defend the Superior Court's judgment.

The indemnity that Ashland received confirms that Section 2(e) is the only provision that sets forth how the parties allocated Linden-related liabilities. Section 4 indemnifies Ashland for losses only "to the extent" they arise out of the "Linden Excluded Liabilities." A909. That defined term means only what Section 2(e) says it means; the scope of the indemnity matches the limited scope of the liabilities transferred with the property.

Despite all this, Ashland urges this Court to conclude that Section 2(f) assigns "sole responsibility for the ACO" to the Heyman Parties. Ashland-Br. 6.

To support its view, Ashland must rewrite that provision as well. Section 2(f) does not "assign" anything. It does not use words like "assume all Liabilities," as Section 2(e) does. It talks only in terms of "reasonable best efforts" to amend government agreements "relating to the Linden Excluded Liabilities." When it refers to Linden Excluded Liabilities, it echoes, not modifies, the on-site/off-site divide declared in Section 2(e).

Ashland's rampage through the contract culminates with the Contribution Agreement. Ashland urges this Court to ignore the Contribution Agreement because it supposedly "merely functioned to convey the Linden Property to LPH," while the "liabilities" associated with the property "had already been transferred … in the SPA." Ashland-Br. 33. But the SPA described how environmental liabilities *would be* transferred at closing; it did not transfer anything itself. Section 2(e) says that the assumption of liabilities *would* occur "[i]n connection with" the Linden Property transfer. A908. And the Contribution Agreement was the document that effectuated that transfer. Exactly as the parties agreed to in Section 2(e), the Contribution Agreement states that LPH took the liabilities associated with the Linden Property *except* "any off-site" liability. The Contribution Agreement is entirely inconsistent with Ashland's interpretation.

The Superior Court conjured a conflict between Sections 2(e) and 2(f), which Ashland barely defends, and then declared that Section 2(f) more

specifically addresses ACO liability (HP.Ex.D-p.23),[1] even though it neither mentions the ACO nor any allocation of liability. Ashland does not even respond to the Heyman Parties' argument explaining why, even if there were a conflict, Section 2(e) is the more specific. HP-Br. 29-30. Finally, the Superior Court read Section 2(f) to alter the meaning of Section 2(e)'s defined term "Linden Excluded Liabilities." HP.Ex.D-pp.23-24. Ashland has no defense for that step in the court's reasoning.

Instead of defending the court below, Ashland invites this Court to engage in a series of implausible inferences that contort Section 2(f) into a substantive reassignment of ACO off-site liability to the Heyman Parties. But contracting parties do not clearly declare their intent to avoid doubt about defined contractual terms in one place only to modify them by inference elsewhere.

Because there is no ambiguity regarding Ashland's assumption of off-site liability, this Court need not consider any extrinsic evidence. But if it does, it will find that Ashland contorts the record just as it has the text. No Ashland witness endorses its current view that the ACO was carved out from the agreed-upon on-site/off-site divide. By contrast, the Heyman Parties' witnesses consistently testified that they took liability only on the "four corners" of the Linden Property.

[1] References to "HP" briefs and exhibits refer to the Heyman Parties' opening submissions filed on November 19, 2021. References to "Ashland" briefs and exhibits refer to Ashland's corrected submissions filed on February 1, 2022.

A1353-54. Ashland argues that during the SPA's negotiations it proposed different language for Section 2 than the Heyman Parties had proposed. Ashland-Br. 38-39. But every draft of Section 2, including those proposed by Ashland, reflected a sharp on-site/off-site division; indeed Ashland proposed the language adopted in Section 2(e) from which it now hides. We know Ashland understood that it took off-site ACO liability because its own environmental consultant, EHS, confirmed *after closing* in October of 2011 that "off-site liability came with the acquisition." A1216.

Ashland asserts that, post-closing, the Heyman Parties took actions as to the ACO without Ashland knowing. Ashland-Br. 41 n.20. This is simply incorrect. Ashland's own employees and consultants were part of the Heyman Parties' discussions as they sought to close out the ACO to facilitate the Linden Property's sale. B531-40. And the Heyman Parties did not collect insurance proceeds that included coverage for off-site liabilities. Ashland-Br. 30, 40-41. Instead, as insurance proceeds arrived, Ashland and the Heyman Parties discussed how to allocate them precisely because both parties understood they had agreed to an on-site/off-site division. B328; B512. The extrinsic evidence confirms the on-site/off-site division of liabilities.

This Court need not consider Ashland's cross-appeal if it reverses the judgment. Regardless, the cross-appeal is meritless. The parties agreed upon a

standard indemnification clause, which Ashland asks this Court to read as if it reflects an agreement to override the strong presumption against fee-shifting. The generic reference to attorneys' fees in the SPA's definition of Losses is, on its face, insufficient to entitle Ashland to recover its fees, especially where the SPA includes specific fee-shifting language in a different, inapplicable section. There is no way to distinguish this case from this Court's recent decision considering contract terms like those at issue here. *See Herzog v. Great Hill Equity Partners IV, LP*, 2021 WL 5993508 (Del. Dec. 20, 2021).

SUMMARY OF THE ARGUMENTS ON CROSS-APPEAL

1. **Denied.** For an indemnity to displace the American Rule presumption against fee-shifting, contracting parties must explicitly state that the indemnification provision applies to litigation between the parties. The definition of "Losses" incorporated into both indemnification provisions under which Ashland seeks to recover its attorneys' fees does not clearly and unequivocally do so. Rather, its general reference to attorneys' fees, "whether or not involving a Third Party Claim," indicates only that fees may be recovered for both written third-party claims (falling within the defined term "Third Party Claim") and other types of third-party claims. That term need not be read to include first-party litigation claims to give it meaning. The parties' explicit allowance for fee-shifting in first-party litigation under specific circumstances in a separate provision confirms that they did not intend for such fee-shifting in the indemnification provisions at issue. The Superior Court correctly held that the plain language of the SPA prevents Ashland from recovering attorneys' fees and costs incurred in this litigation.

2. **Denied.** In *Great Hill*, this Court recently affirmed and adopted the reasoning of an order denying a claim for attorneys' fees pursuant to an indemnification claim containing nearly identical language. The Superior Court did not require "magic words" to establish Ashland's entitlement to attorneys' fees;

consistent with the overwhelming body of Delaware law, it merely required explicit language including first-party litigation fees within the scope of the losses for which Ashland could seek recovery. That language was absent here.

STATEMENT OF THE FACTS RELATING TO CROSS-APPEAL

I. The Indemnification Provisions of the SPA

The SPA contains two indemnification clauses: Section 7.2 is the general indemnification clause to recover for "breach of any covenant or agreement of the [Heyman] Parties" and Section 4 of Schedule 5.19 is an indemnification clause to recover for losses to the extent arising out of the Linden Excluded Liabilities. A1075; A909. Both provide for indemnification "against any and all Losses actually suffered or incurred by any of the Buyer Indemnified Parties, to the extent arising out of" the relevant event.

Under the SPA, "Losses" is a defined term. It means:

> [A]ny and all losses, liabilities, claims, obligations, judgments, fines, settlement payments, awards or damages of any kind actually suffered or incurred by such Indemnified Party after Closing (together with all reasonably incurred cash disbursements, costs and expenses, including costs of investigation, defense and appeal and reasonable attorneys' and consultants' fees and expenses), whether or not involving a Third Party Claim.

A1001. The term "Third Party Claim" is also a defined term in the SPA. It means:

> [A]ny written claim or demand for which an [I]ndemnifying [P]arty … may have liability to any Indemnified Party hereunder, other than those relating to Taxes … [which] is asserted against or sought to be collected from any Indemnified Party by a third party."

A1008; A1078.

II. Procedural History

Following the Superior Court's resolution of the parties' cross-motions for partial summary judgment, which is the subject of the Heyman Parties' present appeal, both parties moved for summary judgment regarding Ashland's entitlement to indemnification for attorneys' fees and costs incurred in this litigation. The Superior Court denied Ashland's motion and granted the Heyman Parties' motion, ruling that the relevant indemnification provisions of the SPA "do[] not provide for prevailing party reimbursement of attorneys' fees incurred in connection with direct claims between the parties for breach of the SPA." Ashland.Ex.A-p.2.

The Superior Court decided that, in light of the "American Rule" presumption that each party pays its own attorneys' fees, indemnification provisions should not be interpreted to cover fee-shifting unless they "clearly and unequivocally" show the parties' intent to shift fees. *Id.*-p.12. The indemnification provisions at issue in the SPA did not. First, the definition of "Losses" that animates both indemnification provisions does not "imply clearly and unequivocally that first party claims are included" because it "lacks explicit language applying to first-party claims." *Id.*-p.13. Second, the Superior Court reasoned that the parties explicitly provided for fee-shifting in first party litigation elsewhere in the SPA, and thus "knew how to draft specific language to cover[] fee-shifting." *Id.*-p.15. They did not use such language in the indemnification

provisions at issue. The Superior Court therefore rightly concluded that the plain language of the contract forecloses indemnification of Ashland's fees and costs. *Id.*

ARGUMENT ON APPEAL

I. ASHLAND IGNORES THE PLAIN LANGUAGE OF THE CONTRACTS THAT DIVIDE ON-SITE AND OFF-SITE LIABILITIES.

A. Section 2(e) unambiguously allocates all Linden off-site liabilities to Ashland, and Section 2(f) does not modify that allocation.

Ashland says that in Section 2(e) the Heyman Parties "assumed ***all* liabilities** 'related to or arising from or existing at the Linden Property,' *including* 'Liabilities arising under or relating to … Environmental Laws.'" Ashland-Br. 10 (emphases original). Ashland reaches this extreme position by ignoring the exception at the heart of this case. The exception is not hard to find: That sentence concludes that the Heyman Parties' 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, [or] any natural resources damages or exposure claims relating to operations or discharges prior to Closing.

A908 (emphases added). Even the Superior Court acknowledged that this language is "all-encompassing." HP.Ex.A-pp.10-11. Ashland does not and cannot argue that this definition distinguishes the off-site obligations at issue in this case from any other off-site liabilities.

With no explanation for Section 2(e)'s text, Ashland tries distorting Section 2(f)'s language. Ashland asks this Court to read Section 2(f) as impliedly

conflicting with the express terms of Section 2(e). Ashland-Br. 29. But parties do not specifically define a contractual term in one place only to cryptically modify the term by inference elsewhere. That is why courts will not set aside a clear term in favor of some other, purportedly more specific one, absent a "necessary conflict." *ITG Brands, LLC v. Reynolds Am., Inc.*, 2017 WL 5903355, at *9 (Del. Ch. Nov. 30, 2017). Delaware courts rightly favor harmonizing contractual provisions. *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221 (Del. 2012). Section 2(e)'s declaration that the parties intended to avoid doubt about how they allocated environmental liabilities provides further reason to do so here. Ashland cannot produce a conflict at all, much less a necessary one.

Ashland suggests that the parties must have intended Section 2(f) to be substantive because the first sentence allocates ISRA liability to the Heyman Parties. Ashland-Br. 25. But Section 2(f) requires the Heyman Parties to comply with ISRA's procedural filing requirements "prior to Closing"—and even then, only if ISRA is applicable, which it was not. A908.[2] The sentence has nothing to do with allocating liabilities post-closing or with modifying the on-site/off-site division stated in Section 2(e).

[2] As Ashland acknowledges, whether ISRA applies to this transaction is not at issue in this appeal and played no part in the judgment. Ashland-Br. 26 n.8.

When Ashland turns to the relevant part of Section 2(f)—the second sentence that Ashland claims substantively reallocates ACO off-site liabilities to the Heyman Parties—Ashland reads into it precisely what is missing. Section 2(f) does not address the ACO specifically. Ashland acknowledges that the parties knew how to identify the ACO in other SPA provisions when they wanted to. Ashland-Br. 31; *see also* A908 (Section 2(d) referring explicitly to the "existing administrative consent order with NJDEP"). Yet, inexplicably, in a provision Ashland now says exclusively and comprehensively re-assigns ACO liability, the parties chose not to refer to the ACO directly, or even to the allocation of liabilities generally. This is clearly a *post hoc* effort to rewrite the contract.

Ashland also states that the Heyman Parties agreed to use "reasonable best efforts" to put their designee's name on any government "consent decree or other binding agreement … relating to the Linden Excluded Liabilities." A908. According to Ashland, because the ACO is a "consent decree … relating to the Linden Excluded Liabilities," that requirement "would effectively leave [the Heyman Parties] and their designee as the only parties responsible for the obligations under the ACO," thus "allocating that liability, *in its entirety*, to [the Heyman Parties]." Ashland-Br. 26-27 (emphasis added). But the provision says no such thing.

Section 2(e) says a "Liability" is a "Linden Excluded Liability" only if it does not impose an off-site obligation. That means only on-site obligations can be construed as Linden Excluded Liabilities. So the phrase "consent decree or other binding agreement … relating to the Linden Excluded Liabilities" refers to agreements that concern *only* on-site liabilities. In fact, that is how Ashland's own environmental counsel who drafted the provision understood it. A1292.

But even if the provision applied to agreements with both on-site and off-site components like the ACO, Ashland still cannot explain how that would allow it to escape the ACO's off-site liability allocated to it in Section 2(e). Ashland baselessly asserts that Section 2(f) reflects that the Heyman Parties' designee would be the "only" party on the ACO. Ashland-Br. 27. But that is not correct. Even under Ashland's reading, Section 2(f) says that the Heyman Parties were to use reasonable best efforts to have Ashland/ISP removed from the ACO, but only "if permitted by NJDEP." A908. As the Superior Court recognized, that was inconceivable (A594-95, A598; A783), so it would not have been reasonable to even attempt. In other words, Ashland reverse-engineers a reading of Section 2(f) that puts *both* Ashland's and LPH's names on the ACO, which does nothing to

release Ashland from its express assumption in Section 2(e) of all Linden-related off-site liability.[3]

This problem leads to the final step in Ashland's series of baseless inferences. Ultimately, Ashland needs not just the implausible inferences it draws from the language of Section 2(f), but also an additional inference it draws from rewriting Section 4's indemnity provision. A909. Ashland argues that the "non-reciprocal" indemnity provision means that if both parties' names were on the ACO, then Ashland could just refuse to undertake off-site clean-up in blatant disregard of what Section 2(e) says, *and* if it did so, then LPH (were its name on the ACO) would have no right to receive indemnification from Ashland, *and* that therefore the parties must be understood to have agreed to assign all ACO liability to LPH. Ashland-Br. 31. This head-spinning "reasoning" is nonsensical from a business perspective. Parties do not "agree" to allocate liabilities based on a shared assumption that one of them will breach its obligations.

Moreover, the plain language of Section 4 indemnified Ashland only to "the extent arising out of … the [on-site] Linden Excluded Liabilities," thus invoking

[3] *Green Plains Renewable Energy Inc. v. Ethanol Holding Co.*, 2016 WL 5399699 (Del. Super. Ct. Aug. 19, 2016), merely examined a disclaimer to determine whether, on its face, the disclaimer substantively determined which contracts were to be assumed by the purchasing party. *Id.* at *5. It did not determine that the court could *infer* from that disclaimer a modification of the substantive allocation of liabilities found elsewhere in the contract.

the defined term directly from Section 2(e). A909. It does not incorporate any language from Section 2(f) that Ashland struggles to read as having shifted off-site ACO liability to the Heyman Parties. The scope of Section 4 refutes, rather than supports, Ashland's view.

Beyond that, Ashland reads Section 4 in a manner contrary to how Delaware courts read indemnification agreements. It is backward to look to indemnity provisions to revise substantive obligations clearly articulated elsewhere. Such provisions merely indicate potential consequences for failure to satisfy substantive obligations parceled out in the agreement. The indemnity provision does not dictate how those substantive obligations should be allocated in the first place. *See Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7 (Del. Super. Ct. Feb. 8, 2016) ("[T]he interpretation of indemnification provisions cannot contradict the plain text of the agreement or logic of the transaction."), *aff'd sub nom. Glencore Ltd. v. St. Croix Alumina, LLC*, 150 A.3d 1209 (Del. 2016). Indeed, Ashland concedes it was allocated *non-ACO* off-site liabilities in the SPA for which the Heyman Parties would not have an indemnity. Ashland-Br. 6. Yet nobody (including Ashland) thinks that means the Heyman Parties should be understood to have accepted those off-site liabilities. The lack of an indemnity changes nothing.

Instead of following Ashland's tortured series of inferences, this Court can and should read Sections 2(e) and 2(f) harmoniously. Section 2(f) has a "distinct and independent purpose and function" from Section 2(e). *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010). Far from representing a "nullity" absent the substantive obligations Ashland attempts to graft onto it (Ashland-Br. 30), Section 2(f) required LPH to take procedural steps: substitute its name onto several *on-site* government permits and post financial assurance relating to *on-site* liabilities. There is no dispute that LPH did those things. *See* HP-Br. 17-18. Section 2(f) can and should be understood to accomplish nothing more.

Finally, the Superior Court's judgment hinges on its view that Sections 2(e) and 2(f) conflict *and* that Section 2(f) is the more specific. *See* HP.Ex.D-p.23. But there is nothing in Section 2(f) that implies that the parties reallocated the ACO-related off-site liabilities to the Heyman Parties, in conflict with Section 2(e). So even if there were a conflict, Section 2(e) is the more specific because it expressly addresses allocation of liability. HP-Br. 29-30. Ashland has no response.

B. The Contribution Agreement did not transfer off-site liabilities to LPH.

Ashland's counter-textual reading of Sections 2(e) and 2(f) warrants vacating the judgment. But if there were any lingering doubt, Ashland's failure to offer *any* plausible account of the Contribution Agreement dooms its case.

Ashland concedes that the Contribution Agreement—which "must be read together" with the SPA (HP.Ex.B-pp.11-14)—"functioned to convey the Linden Property to LPH" and that it "did not include the language set forth in Section 2(f)." Ashland-Br. 33. Thus, there is no dispute that the Contribution Agreement, which is the only document to transfer assets and liabilities to LPH, did not transfer off-site liabilities to LPH. That raises the question: if LPH did not get off-site liabilities in the Contribution Agreement, how did it get them?

Ashland offers an absurd answer: the off-site "liabilities and obligations had already been transferred to Sellers in the SPA." *Id.* The SPA says otherwise. The SPA states how assets and liabilities would be divided "immediately following the Closing," when the Linden Transfer would actually take place. A906-08. Ashland's view also contradicts the Contribution Agreement, which precisely describes the liabilities LPH assumed in the transfer. A1206. The parties waited until closing for good reason. When the SPA was executed, LPH, to whom the Linden Property and its on-site liabilities would eventually be conveyed, *did not yet exist*. Ashland's argument thus requires the Court to believe the impossible: that LPH (the "Linden Transferee" expressly referenced in Section 2(f)) took ACO-related off-site liabilities before it existed. A908.

Ashland also tries to dismiss the Contribution Agreement as "between IES and LPH," implying that Ashland was not involved. Ashland-Br. 33. But when the

Contribution Agreement was signed, after Ashland acquired all of ISP's stock, IES (a subsidiary of ISP) *was Ashland*. There is no dispute: *Ashland* signed off on the Contribution Agreement's language with full knowledge that it reflected a clean on-site/off-site division of liabilities. A1210.

In sum, the SPA says that liabilities associated with the Linden Property *will be* transferred at closing. The Contribution Agreement says it *is* transferring liabilities associated with the Linden Property from IES (which Ashland had just acquired) to LPH, but not *any* off-site liabilities. Ashland agreed to all of this. Ashland cannot push the Contribution Agreement aside.

C. The remaining provisions of the SPA are consistent with the on-site/off-site division of liabilities.

Ashland also ignores or distorts the language of several other provisions in Schedule 5.19. *See* Ashland-Br. 30-34. But all the SPA's provisions harmonize with a sharp on-site/off-site division of liabilities.

Schedule 5.19 Section 1. Ashland cannot explain why identical language used to address the transfers of the Wayne and Linden Properties would have only procedural consequences with respect to one (Wayne), but substantively change the terms of the deal as to the other (Linden). *See* HP-Br. 31-32. Ashland argues only that the "factual circumstances" were "entirely different" for the Wayne Property. Ashland-Br. 33. But that is precisely the point: The Wayne Property was different because it was not subject to any consent decree or other government

agreements concerning off-site liabilities, including the ACO. Yet the parties used the *exact same language* with respect to both properties. There is no reason the "same words" should somehow invoke the ACO in Section 2(f) but "have different meaning[]" in Section 1(d). *USA Cable v. World Wrestling Fed'n Ent., Inc.*, 2000 WL 875682, at *9 (Del. Ch. June 27, 2000), *aff'd*, 766 A.2d 462 (Del. Super. Ct. 2000).

Schedule 5.19 Section 2(a). Ashland makes much of the basic requirement in Section 2(a) that Ashland transfer the Linden Property to LPH, along with assets relating to the Linden Property itself. But the inference Ashland draws from this provision—that the Heyman Parties therefore accepted liabilities associated with "the entire ACO" (Ashland-Br. 30)—does not follow. Section 2(a) addresses only the transfer of *assets*, identifying those assets that would be transferred to LPH with the defined term "Linden Excluded Assets." A906-07. It says nothing about liabilities, which were separately addressed in Section 2(e). *Compare* A906-07 (defining the "Linden Excluded Assets") *with* A908 (defining the "Linden Excluded Liabilities").

Ashland's assertion that "[t]here is no provision in Section 2 to split the insurance or consultant contract" is also wrong. Ashland-Br. 30. Section 2(a) requires Ashland to transfer (i) proceeds from "insurance policies *covering* the Linden Property," (ii) contracts "*to the extent* related to *operation* of the Linden

Property," and (iii) other assets "*located thereon* [the Linden Property]." A906-07 (emphases added). That is, Section 2(a) contemplates that insurance proceeds and contracts will be transferred to LPH only to the extent they relate to the Linden Property's operations and on-site assets. The language explicitly concerns the four corners of the real property; any items not related to such property (*e.g.*, portions of insurance proceeds and contracts relating to off-site obligations) remained with Ashland.

Schedule 5.19 Section 2(d). Finally, Ashland misreads Section 2(d) as "extend[ing] [the Heyman Parties'] responsibilities to the full reaches of the ACO." Ashland-Br. 31. But Section 2(d) merely ensures that the Heyman Parties take responsibility for expenses associated with "engag[ing] in *conduct at*, and manag[ing] the *operations of*, the Linden Property" (*i.e.*, costs associated with *on-site* activities) during the period between closing and the transfer of the Linden Property to LPH. A907 (emphases added). That is, consistent with the on-site/off-site division of liabilities set out in Section 2(e), Section 2(d) explicitly restricted the ACO-related costs for which the Heyman Parties would be responsible for on-site work "*at* the Linden Property." *Id.* (emphasis added).

D. Ashland's interpretation of the SPA leaves responsibility for off-site liabilities to chance.

The strict on-site/off-site division of liabilities described in Section 2(e), reflected throughout the remaining provisions of Schedule 5.19, and mirrored in

the Contribution Agreement is the only "sensible" reading of this "real-world contract." *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 913-14 (Del. 2017). Under Ashland's view, responsibility for potentially significant but unknown off-site remediation of the Arthur Kill would be left to chance. *See* Ashland-Br. 34-36. It would depend entirely on *which regulator* decided, and under *which enforcement mechanism*, to order cleanup of the Arthur Kill.

Ashland asserts it was "implausible" that NJDEP would address remediation outside the ACO. *Id.* 35 n.16. But in the very Consent Judgment Ashland assumed, NJDEP pursued off-site obligations under *multiple theories*. And Ashland does not deny that it would have been responsible had any *other* regulator, including the New York State Department of Environmental Conservation or the federal EPA, sought the Arthur Kill's remediation. It even concedes that, at the time, the EPA was considered more likely than NJDEP to address remediation of the Arthur Kill. *See id.* 36; *see* HP-Br. 34-36. Ashland's view leaves much to chance, which could not have been the parties intent.

* * *

The text of the agreements leads to only one result: "any off-site" environmental liability was assigned to Ashland. Accordingly, this Court should reverse the judgment and order entry of judgment in favor of the Heyman Parties.

II. ASHLAND IGNORES AND MISCONSTRUES THE EXTRINSIC EVIDENCE CONFIRMING THAT IT RETAINED ACO-RELATED OFF-SITE LIABILITIES.

Ashland's discussion of the extrinsic evidence does the same kind of violence to the record that its reading of the SPA and Contribution Agreement does to the text. Ashland concocts a narrative that the Heyman Parties wanted to assign off-site liability to Ashland, but were rebuffed, and that Ashland never behaved as if it accepted off-site liability. Ashland's tale unravels under scrutiny.

A. All drafts of Section 2 limited the Heyman Parties' responsibility to on-site liabilities.

Ashland grossly distorts the drafting history. According to Ashland, it "explicitly rejected" the Heyman Parties' proposed language "at every turn," and succeeded in supplanting that language with its own. Ashland-Br. 14, 39 (emphasis omitted). But Ashland hides from the language *it* proposed—every version of which reflects the *same* on-site/off-site divide the parties had agreed upon. *See* B781 (Ashland's initial counter-proposal); B871-72; B251. The Heyman Parties accepted Ashland's final language for Section 2(e) because it reflected the parties' agreement: an all-encompassing on-site/off-site division of liability.

The drafting history of the lightly-negotiated Section 2(f) confirms the point. The notion that it was somehow conceived to impose off-site ACO liabilities on the Heyman Parties is absurd given that, when Ashland's environmental counsel first drafted the provision, the parties expected that the Linden Property would be

sold to a third-party—a complete stranger to the SPA—before closing. A947, A948, A951 ("Linden Purchaser"); *see* A1303-04 (counsel's testimony). Section 2(f) of the SPA could not have been trying to reflect the substantive components of the deal between Ashland and the Heyman Parties because, when the parties began discussing its terms, they did not understand they were discussing obligations that would ever be placed upon the Heyman Parties or any related entity. That is why the Heyman Parties, following the lead of Ashland's environmental counsel who drafted Section 2(f) (A1303), refer to Section 2(f) as a "procedural" provision.[4] It addresses the merely procedural obligations of a then unknown entity.

Nor does the Heyman Parties' effort to modify the language of Section 2(f) somehow change the substance of the deal. Under either version, the definition of Linden Excluded Liabilities specified in Section 2(e) defined the scope of the procedural obligations the Heyman Parties undertook in Section 2(f). *Compare* B832 (Heyman Parties' proposal) *with* A908 (final language).

[4] Ashland relies heavily on post-deposition declarations it submitted from this witness and others, rather than the witnesses' testimony and contemporaneous documents. *See, e.g.*, Ashland-Br. 14-15, 27 n.9, 38-39 (declaration of Ashland environmental counsel); *id.* 19-20, 44 (declaration of Ashland remediation manager). But a late-submitted affidavit cannot take back prior testimony. *Cain v. Green Tweed & Co.*, 832 A.2d 737, 741 (Del. 2003) (discussing the sham affidavit doctrine). Moreover, those declarations omit any endorsement of Ashland's current interpretation of Section 2(f).

B. Ashland's conduct, both before and after closing, confirms that it understood it would retain ACO-related off-site liabilities.

Ashland does not contest that the documents provided throughout negotiations revealed potentially substantial off-site Linden liability: the ACO established NJDEP's right to seek remediation of off-site liabilities and the Consent Judgment settled some of those liabilities, but expressly preserved NJDEP's claims concerning the Arthur Kill. A1112-13, *see also* A788 (ACO); A1129 (Consent Judgment). So Ashland's decision to repeat, in a footnote, its suggestion that the Heyman Parties engaged in deception is outrageous. *See* Ashland-Br. 14 n.3. That is especially true given that Ashland does not and cannot dispute that in October 2011, *after* closing, its own environmental consultant confirmed that "[t]he Linden on-site liability was not transferred to Ashland as part of the acquisition. Only the off-site liability came with the acquisition." A1216. To pretend that those documents do not exist is no explanation.

Ashland also confirms the evidence showing that it analyzed, reserved for, and even paid for Linden off-site liabilities after the deal closed—without distinguishing between "ACO" and "non-ACO" liabilities. *See* HP-Br. 16, 39-40. Ashland concedes that it "set appropriate reserves for … the NRD Consent Judgment," which "resolved NJDEP's claims related to [off-site] Piles Creek, including remediation." Ashland-Br. 43, 45 n.23. Although it attempts to bury the admission in a footnote, Ashland also concedes that those Piles Creek remediation

claims arose under the ACO. *Id.* 45 n.23 (admitting that "[b]eyond this" Piles Creek claim, "the NRD Consent Judgment had nothing to do with the ACO"); *see also* A1131 (providing that claims under the ACO were not settled by the Consent Judgment, "*except for* the remediation of the Piles Creek Area") (emphasis added). Thus, Ashland reserved *and paid* for ACO-related off-site liabilities.[5] Ashland did so because it retained those liabilities following closing.

Ashland desperately tries to rewrite history when it claims that it "zeroed out" the O&M reserve the Heyman Parties had maintained because it "related to the ACO." Ashland-Br. 43-44. Ashland canceled the reserve for O&M costs not because they related to the ACO, but because they related solely to the *on-site* obligations that were allocated to LPH. *See* A1216 (characterizing this bucket of the historical reserves as "on-site liability").

Ashland turns to wordplay when it insists that, beyond its reserve for the Piles Creek claims (which, as explained above, *were* ACO off-site liabilities), it did not "set a reserve for any investigation or remediation under the ACO." Ashland-Br. 44 & n.22 Ashland did not set additional *quantifiable* reserves for ACO

[5] Ashland argues that the Consent Judgment should have been "bifurcated" if the Heyman Parties' interpretation of the SPA is correct. Ashland-Br. 44-45. But Ashland does not say that it ever paid for *on-site* liability when it took the obligation to satisfy the Consent Judgment. And with good reason: the outstanding obligations under the Consent Judgment concerned "remediation of the Piles Creek Area" and the "LCP Site" (not the Linden Property). A1131-35.

liabilities because the off-site liability was not reasonably estimable, as is required for an accounting reserve to be set. *See* A1327. But it routinely tracked such liabilities on "radar screens," which documented that Ashland was responsible for "the off-site liability [that] came with the acquisition." *See* A1218; A1221; A1228. Notably, Ashland began analyzing its obligations for off-site liabilities under the ACO even before closing. *See also* A1195 (Ashland's pre-closing reserves sheet indicating that the "[r]egulatory driver[s]" for the "Linden (Offsite)" liability were both the Consent Judgment *and* the ACO).

C. The Heyman Parties' conduct is consistent with the understanding that LPH accepted only on-site liabilities.

There is no dispute that the Heyman Parties understood that they would take liabilities only on the "four corners" of the Linden Property, and that they told Ashland as much. A1353-54; AR9-10; AR4-7 ("the deal from the beginning to the end" was that the "four corners of the property was our touchstone throughout"); *accord* HP-Br. 11, 13, 39 (collecting citations). Ashland's general counsel conceded that the Heyman Parties "likely … said" "they were taking the Linden property and the onsite liabilities only" at the contract drafting meeting. A1320. Consistent with that understanding, the Heyman Parties and LPH never accepted or paid for *any* Linden-related off-site liabilities. Ashland points to three actions that it argues establish that the Heyman Parties accepted off-site liability under the ACO. *See* Ashland-Br. 40-42. They do no such thing.

Insurance Payments. Ashland says that the Heyman Parties "took all Linden-related insurance proceeds," and that "[n]o effort … was ever made by [the Heyman Parties] to split these proceeds with Ashland. *Id.* 41 & n.19. This is blatantly untrue. The emails that Ashland cites clearly show that the Heyman Parties allocated any insurance proceeds between Ashland and LPH consistent with the on-site/off-site division of liabilities. *See* B328 (Heyman Parties' counsel noting that "the on-site recovery would go to [LPH] and the off-site recovery goes to Ashland"); B512 (Heyman Parties' counsel directing "the split between Ashland and [LPH]" on an insurance recovery).

Financial Assurance. Ashland next argues that LPH posted financial assurance and paid surcharges for the ACO that related to off-site remediation as well as on-site maintenance. Ashland-Br. 40-41. This ignores that the "financial assurance" posted after closing matched *exactly* the Heyman Parties' calculations for the reserves needed for ongoing on-site O&M expenses. *See* HP-Br. 40. Ashland even cites evidence that NJDEP concluded that this financial assurance was solely for "O&M under the RAPs" (Ashland-Br. 17), but ignores the necessary implication: that the funds posted by LPH were "Financial Assurance" relating only to on-site O&M and not "Remediation Funding Sources" related to active off-

site remediation.[6] B638 (NJDEP noting that LPH "established Financial Assurance in the amount of $7,744,000.00 as part of a remedial action permit"). NJDEP's contrary interpretation several years later—*after* this dispute arose and both parties were disclaiming any responsibility to post RFS for remediation of the Arthur Kill—is irrelevant to LPH's understanding of its conduct at the time. *See* B699-703.

The surcharge payments do not dictate otherwise. An administrative error caused NJDEP to prompt LPH for surcharge payments. *See, e.g.*, B654, B657; *see also* B638. Ashland brazenly asserts that LPH acknowledged that these funds were to "guarantee[] cleanup work under the ACO." Ashland-Br. 17 (emphasis omitted). But nothing in the correspondence says that. *See* B638 (NJDEP returning the surcharge payment because it was not required for financial assurance); B651 (noting "confusion" as to the surcharge payments); *see also* AR1-2 (submitting

[6] Ashland repeatedly refers to the financial assurance LPH posted as "RFS," as if the parties advised by sophisticated environmental counsel just used the wrong term. Ashland-Br. 15 n.4; *see, e.g.*, *id.* 16-17, 27, 40. But, as Ashland concedes, when the parties were negotiating the SPA, New Jersey law provided for two separate types of financial guarantee: "remediation funding sources" to guarantee ongoing cleanups and "financial assurance" to guarantee the performance of long-term monitoring and maintenance under a RAP. *Id.* 15 n.4. This was well known. So the use of the term "financial assurance" in Section 2(f) further reflects that the parties understood that LPH would be responsible for financial obligations relating *only* to on-site maintenance costs.

letter of credit); B662 (same); A1203 (referring to "Financial Assurance Replacement letters").

Request to Terminate the ACO. Finally, Ashland contends that the Heyman Parties acted as though they were responsible for off-site remediation under the ACO because they requested, at the behest of a potential purchaser of the Linden Property, that NJDEP "terminate the entire ACO," rather than just the on-site portions of it. Ashland-Br. 41-42. This argument, too, fails. The emails Ashland cites show that the Heyman Parties' request to terminate the entire ACO was appropriate because (i) they had completed and received RAPs for all on-site remediation and (ii) they believed that any remaining off-site remediation, which they specifically indicated "went with Ashland," was under the jurisdiction of federal EPA (and potentially other regulators). B548. Thus, they concluded that "it will make things easier for everyone including the DEP if the ACO is terminated." *Id.* NJDEP ultimately disagreed (*see* A1238-39), but the Heyman Parties' request to terminate the ACO remains consistent with their understanding that LPH had accepted only on-site Linden liabilities. Ashland's related assertion that LPH "acknowledged its responsibility for completing all work under the ACO" in connection with its request to terminate also misrepresents the evidence. Ashland-Br. 17. LPH explicitly referred to the work it had *completed* (*i.e.*, the on-site remediation); it said nothing about off-site remediation. A1238-39.

Moreover, Ashland concedes that "Ashland personnel was copied on" emails indicating that the Heyman Parties would be requesting termination of the ACO. Ashland-Br. 41 n.20. The suggestion that the Heyman Parties were proceeding behind Ashland's back is false.

D. In the context of the underlying business deal, the parties could only have reasonably understood that all off-site liabilities were retained by Ashland.

Ashland cannot dispute that, under the final deal struck by the parties, the Linden and Wayne properties were intended to provide value to the Heyman Parties to bridge the reduction in the purchase price that Ashland demanded after resuming negotiations in May 2011. *See* HP-Br. 34. As a practical matter, the properties conveyed that value only if they were unencumbered by unknown but potentially significant off-site liabilities.

The handwritten term sheet provides no help to Ashland. *See* Ashland-Br. 13, 34. Rather, it supports the Heyman Parties by documenting that the Heyman Parties would "retain[] economics and liabilities *of sites*"—that is, the *on-site* assets and liabilities. A930 (emphasis added). That agreement is reflected in Sections 2(a) and 2(e), respectively. The phrase "of sites" cannot mean both on-site *and* off-site, as Ashland now contends; that understanding finds no support in the SPA, and is inconsistent with Ashland's admission that it took only "certain" off-site liabilities. Ashland-Br. 34.

Ashland suggests that, because it was not familiar with real estate development or the ACO, it "lack[ed] interest in owning the [Linden] property," and never would have agreed to accept the property or its liabilities in the first place. Ashland-Br. 35 n.17. This is unbelievable. Under the original deal *Ashland* proposed, Ashland would have purchased *all* of ISP's assets and accepted *all* liabilities, including for the Linden Property. Ashland's environmental counsel and consultants analyzed the ACO, and were aware of those liabilities along with the other liabilities that Ashland would accept in the transaction. And the litigation-driven testimony from Ashland's CEO that it never agreed to take *any* liabilities associated with the Linden Property cannot be squared with the contemporaneous evidence. It is not even consistent with Ashland's position that it assumed all off-site liability, including Linden-related off-site liability, other than under the ACO. *Id.* 11.

Ashland's protest that it "made perfect business sense" for the Heyman Parties to keep the ACO obligations because Ashland lacked experience with the ACO in particular also ignores the deal's real-world implications. *Id.* 35. Ashland is a global chemicals company well-versed in environmental law and liability, including in the Newark Bay and Arthur Kill. It makes sense that the obligation to deal with regulators would pass to Ashland, along with the chemicals business it acquired.

Finally, Ashland contends that the Heyman Parties misconstrued the purpose of the Linden Transfer because Ashland's CEO did not view the Linden Property as having a net value of $100 million. *Id.* 35 n.17. But Ashland itself cites testimony proving that its CEO knew the combined Linden and Wayne properties' development value was $100 million. *Id.* 13 (values of "$40 million [and] $60 million" for the properties). And there is no dispute that the Heyman Parties clearly communicated that they intended to keep those properties to bridge the gap created by Ashland's demanded reduction in the purchase price. A1353-54; A1320.

III. THE HEYMAN PARTIES DID NOT CAUSE ANY LOSSES FOR WHICH ASHLAND IS ENTITLED TO INDEMNIFICATION.

Ashland's defense of its indemnification award is based entirely on its faulty view that the expenses it incurred relating to off-site liabilities under the ACO are "Losses … arising out of … the Linden Excluded Liabilities." A909; *see* Ashland-Br. 48. Ashland claims a right to indemnification under Section 4 of Schedule 5.19 because its payments of off-site liabilities are supposedly "losses" to it. And it claims a right to indemnification under Section 7.2 of the SPA because the Heyman Parties supposedly breached their obligation to bear all ACO liability under Ashland's reading of Section 2(f). Ashland-Br. 48-49. Ashland's brief makes clear that it has suffered "losses" *only if* it did not accept off-site ACO liability. For all the reasons explained above and in the opening brief, Ashland *agreed* to accept all off-site liabilities and Section 2(f) does not state otherwise. This Court need think no further about the indemnity provisions.

Regardless, there was no breach of Section 2(f). There is no dispute that LPH posted financial assurance in an amount sufficient to cover O&M costs for on-site maintenance. A1200-02. Then, when the estimated costs of on-site maintenance were reduced, LPH correspondingly lowered the posted "financial assurance." A1262-63.

Ashland objects to LPH's decision not to make an effort, after closing when LPH came into existence, to add its name to the ACO. It complains that allowing

LPH to decide whether adding its name to the ACO (and asking to take ISP's name off) was reasonable would render the "reasonable best efforts" clause illusory. Ashland-Br. 50. But Ashland never asked to have ISP's name removed from the ACO after closing. And Ashland's problem is that it has no good argument why LPH's decision not to add its name to the ACO was unreasonable, especially since shortly after closing any on-site obligations under the ACO were transferred to RAPs in LPH's name. *See* HP-Br. 18.

LPH had no obligation to add itself to the ACO because by closing NJDEP had issued its final NFA for on-site remediation—the only liability that LPH took—and so there were no obligations under the ACO which belonged to LPH. Ashland is wrong that on-site obligations remained following the NFA in July. It is true that the NFA required LPH to "continue to operate and *maintain*" the groundwater containment system that had been installed as part of the remediation. Ashland-Br. 51 (emphasis added). But, as Ashland concedes, the *maintenance* of such a system is not active remediation. *Id.* 15 n.4. With no remaining ACO obligation, it would have been unreasonable to add LPH's name to the ACO.[7]

[7] This explains why Ashland did not note any failure to add LPH to the ACO when the financial assurance was posted in August 2011, and why the parties did not expend any effort on a side letter. *See* Ashland-Br. 51. When it came time for the "Linden Transferee" to actually take action, Ashland behaved as if it was no longer necessary to amend the ACO.

Further, even if Section 2(f) were breached, Ashland has no right to recovery because its exclusive remedy, Section 4(a), excludes off-site losses. Ashland offers no response to the Heyman Parties' showing that the general indemnity provision in Section 7.2 does not apply at all given the more specific provision in Schedule 5.19 Section 4. HP-Br. 46-47; *cf.* HP-Ex.D-p.31 (suggesting Section 7.2 also was relevant). Any alleged breach of Section 2(f) is irrelevant to the indemnity that Section 4(a) provides because Section 4(a) covers only losses "to the extent arising out of … the Linden Excluded Liabilities," *i.e.*, Section 2(e) alone. A909.

Finally, Ashland cannot explain why any of this would entitle it to damages. Section 7.2 of the SPA indemnifies Ashland only for losses "to the extent arising out of" a breach of the SPA. None of Ashland's losses arose out of the decision not to add LPH to the ACO. That is equally true of LPH's lowering its financial assurance to match updated on-site liability estimates. Likewise, no loss flows from the Heyman Parties' purported failure to *attempt* to remove Ashland's name from the ACO. As the Superior Court recognized, it is all but certain that NJDEP would have refused any such request, and Ashland/ISP would have remained a named party on the ACO. A594-95, A598; A783. Even if LPH's name was added to the ACO, NJDEP could have then held Ashland responsible to the full extent of its off-site remediation obligations, consistent with the on-site/off-site division of liabilities in the SPA. Under such circumstances, Ashland's "unilateral indemnity"

would be of no use. That indemnity applies only to losses to the extent arising out of the "Linden Excluded Liabilities," which, for all the reasons discussed above, does not include the off-site remediation obligations at issue.

The fundamental fact remains: Ashland agreed to pay for all off-site cleanup including under the ACO. Ashland is required to pay for the off-site obligations it accepted and nothing more. So Ashland has not suffered any loss for which any indemnity provision entitles it to compensation.

Summary judgment in favor of Ashland should be reversed, and instead awarded in favor of the Heyman Parties.

ARGUMENT ON CROSS-APPEAL

I. ASHLAND IS NOT ENTITLED TO ITS ATTORNEYS' FEES AND EXPENSES UNDER THE PLAIN LANGUAGE OF THE SPA.

A. Question Presented

Whether the Superior Court correctly found that the SPA's indemnification provisions foreclose Ashland's recovery of its attorneys' fees and costs in this first-party litigation. B93-118.

B. Scope of Review

The Court reviews de novo issues of contract interpretation, including with respect to the interpretation of indemnification provisions. *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1252-53 (Del. 2004).

C. Merits of the Argument

Indemnification provisions should be interpreted narrowly and in accordance with their plain language; "the court should not enlarge the right to indemnification by implication." *Riverside Fund V, L.P. v. Shyamsundar*, 2015 WL 5004924, at *5 (Del. Super. Ct. Aug. 17, 2015). Delaware "courts construe indemnification agreements strictly against the indemnitee, and do not permit enforcement of broad or ambiguous indemnity provisions." *Alcoa World Alumina LLC*, 2016 WL 521193, at *7.

Delaware applies the "American Rule," under which each party is responsible for its own attorneys' fees. *Dover Historical Soc'y, Inc. v. City of*

Dover Planning Comm'n, 902 A.2d 1084, 1089 (Del. 2006). Accordingly, as Ashland concedes (Ashland-Br. 63 n.28), the default rule is that "litigants are responsible for the costs of their own representation, absent statutory or contractual fee-shifting provisions." *Newport Disc, Inc. v. Newport Elecs., Inc.*, 2013 WL 5797350, at *9 (Del. Super. Ct. Oct. 7, 2013); *see Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336, at *4 (Del. Ch. Dec. 31, 2020) ("parties may agree to shift fees contractually" to avoid the American Rule), *aff'd sub nom. Herzog v. Great Hill Equity Partners IV, LP*, 2021 WL 5993508 (Del. Dec. 20, 2021). For a contract to displace the American Rule presumption against fee-shifting, it must "explicitly so provide[]." *Great Hill*, 2020 WL 7861336, at *5; *see also Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *1 (Del. Super. Ct. Nov. 22, 2016).

General references to attorneys' fees are insufficient, as otherwise a typical indemnification clause would "swallow the American Rule." *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *44-45 (Del. Ch. May 13, 2013). Thus, "[t]he indemnification provision must *unequivocally state*" with "*explicit language* that [it] applies to the reimbursement of attorneys' fees and expenses on first-party claims between the parties." *Winshall v. Viacom Int'l Inc.*, 2019 WL 5787989, at *4-5 (Del. Super. Ct. Nov. 6, 2019) (emphases added)

(concluding that provision applicable to "reasonable attorneys' fees and expenses" was insufficient to shift fees), *aff'd*, 237 A.3d 67 (Del. 2020) (Table).

1. The plain language of the SPA does not clearly and unequivocally shift attorneys' fees for first-party litigation.

Both indemnification provisions entitle Ashland to indemnification for "Losses," a term defined to include "reasonable attorneys' and consultants' fees and expenses[], whether or not involving a Third Party Claim." As this Court recently affirmed, that definition "does not provide the 'clear and unequivocal articulation' required to apply an indemnification provision to first-party litigation." *Great Hill,* 2020 WL 7861336, at *6. Nor does it include "any reference to 'prevailing parties,' a hallmark term of fee-shifting provisions." *Nasdi Holdings, LLC v. N. Am. Leasing, Inc.*, 2020 WL 1865747, at *6 (Del. Ch. Apr. 13, 2020); *see also Deere*, 2016 WL 6879525, at *2. In short, this language lacks the type of "specific fee-shifting language" required to interpret it as applying to first-party litigation.[8] *Deere*, 2016 WL 6879525, at *2.

[8] Ashland's string citations to opinions in which courts allowed the recovery of attorneys' fees under indemnification provisions with different, more expansive language or non-analogous indemnification schemes are irrelevant. Ashland-Br. 53-54; *see, e.g.*, *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 352 n.107 (Del. 2013) (broader language indemnifying for losses "of whatever kind or nature"); *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2009 WL 3161643, at *17 (Del. Ch. Sep. 30, 2009) (same); *E*Trade Fin. Corp. v. Deutsche Bank AG*, 374 F. App'x 119, 123-24 (2d Cir. 2010) (language involved "a separate indemnity provision for third-party claims"); *Radiant Sys., Inc. v. Am. Scheduling, Inc.*, 2006 WL 2583266, at *3 (N.D. Tex. Sep. 7, 2006) (language explicitly

This Court, in *Great Hill*, 2020 WL 7861336 (Del. Ch.), *aff'd* 2021 WL 5993508 (Del.), affirmed the rejection of fee-shifting under a provision that Ashland admits contained "similar language" to that here. Ashland-Br. 55. The Chancery Court rejected the argument that "whether or not" language was "a backhanded way of saying 'including legal fees incurred in first party claims.'" 2020 WL 7861336, at *6. The court continued: "[S]ophisticated parties, negotiating at arms-length, would [not] have chosen the phrase 'whether or not arising out of third party claims' to explicitly state that this provision was meant to shift fees in disputes between the parties." *Id.* This Court affirmed, and the circumstances in this case are materially indistinguishable from those in *Great Hill*.[9]

Ashland argues that "the only reasonable interpretation" of the phrase "whether or not involving a Third Party Claim" must include first-party claims because it can refer to "only two kinds of indemnity claims: first party and third party." Ashland-Br. 53, 64. But this is the same "backhanded" argument rejected in *Great Hill*. Moreover, the provision at issue here is even less amenable to

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included claims "by the Purchaser"); *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384, 424 (S.D.N.Y. 2007) (language "specific in its reference to attorneys' fees relating to a contracting party's breach").

[9] Ashland misreads *Great Hill*, asserting that "a separate (and conflicting) prevailing party provision controlled." Ashland-Br. 55. *Great Hill* addressed and rejected arguments based on two separate provisions of the contract; neither "controlled" the court's reasoning.

Ashland's inference than the provision in *Great Hill*. The term "Losses" here does not refer to third-party claims, generically, but rather to a specific defined "Third Party Claim": a "*written* claim or demand" asserted by a third party against the indemnified party, except for such claims "relating to Taxes." A1078 (emphasis added).[10] Thus, there are many answers to the purportedly rhetorical question Ashland poses as to what the "whether or not" language could mean, if not first-party claims. Ashland-Br. 65. Most obviously, it could refer to third-party claims resolved informally, before any *written* claims or demands are made. It also could refer to third-party claims "relating to Taxes," which are categorically exempted from the defined term "Third Party Claim." A1078. There are not just two types of indemnity claims under the SPA, as Ashland argues, and thus no need to interpret the "or not" portion of the phrase as referring to first-party litigation claims to give that phrase meaning.

[10] Ashland points to three cases from other jurisdictions that have found "similar language" adequate to shift fees in first-party actions. Ashland-Br. 54. But all three cases addressed attorneys' fees, whether or not involving a third-party claim, generally. *See Balshe LLC v. Ross*, 625 F. App'x 770, 775 (7th Cir. 2015); *Norwest Fin., Inc. v. Fernandez*, 121 F. Supp. 2d 258, 260 (S.D.N.Y. 2000); *Alki Partners, LP v. DB Fund Servs., LLC*, 4 Cal. App. 5th 574, 603 (2016) (considering such language in dicta, but rejecting fee-shifting under the indemnification clause). To follow them would thus contradict this Court's decision in *Great Hill. See also GRT, Inc. v. Marathon GTF Tech. Ltd*., 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011*)* (rejecting reliance on California and New York law because Delaware law is "more contractarian").

On their face, the indemnification provisions at issue here do not explicitly, clearly, and unequivocally provide for fee-shifting in first-party litigation. Ashland cannot recover its attorneys' fees and costs.

2. The parties explicitly shifted fees for first-party litigation under specific circumstances, but not in the indemnification provisions at issue.

Although the plain language of Section 7.2 and Section 4 of Schedule 5.19 forecloses Ashland's claim, Section 8.2(c), which addresses the consequences of a termination, bolsters that conclusion. The parties explicitly agreed to fee-shifting for a specific type of first-party litigation: claims for fees after termination of the SPA. If the Heyman Parties "commence a suit that results in a judgment against [Ashland]" for a termination fee, Ashland "shall pay to the [Heyman] Parties their costs and expenses (including attorneys' fees) in connection with such suit." A1084. Clearly, the parties knew how to use language to explicitly shift fees for first-party litigation.

That the parties chose to use such language for only one type of first-party litigation, but not in the more generally applicable indemnification provisions, is telling. *Clean Harbors, Inc. v. Union Pac. Corp.*, 2017 WL 5606953, at *7 (Del. Super. Ct. Nov. 15, 2017) (fee-shifting inappropriate where contract "evinces an intent to limit the award of attorneys' fees to specific scenarios"); *Deere*, 2016 WL 6879525, at *2 (the "use of specific fee-shifting language" in one place in an

agreement, along with the "failure to include such language" in an indemnification provision "indicates a lack of intent … to shift fees in first-party actions"); *Great Hill*, 2020 WL 7861336, at *6 (the inclusion of "clear and unequivocal articulation of an intent to shift fees" elsewhere in the agreement "[u]nderscore[d]" that the parties did not intend for a Losses definition to also shift first-party litigation fees).

Indeed, had the parties intended the defined term "Losses" to cover all first-party claims, there would have been no need to separately address fee-shifting in the specific scenario contemplated in Section 8.2(c). The Court should not read the definition of Losses in a way that renders Section 8.2(c) superfluous. *See Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 51 A.3d 442, 451 (Del. 2012); *see also Great Hill*, 2020 WL 7861336, at *6.

Ashland argues that the Court should ignore Section 8.2(c) because it provides "a termination fee, interest, costs and expenses (including attorneys' fees)," rather than entitle a party to "Losses," as defined earlier in the contract. Ashland-Br. 59. But the specific remedies provided by Section 8.2(c) *are* Losses. They fall squarely within the definition of "Losses": "damages of any kind … together with all reasonably incurred cash disbursements, costs and expenses, including … reasonable attorneys' and consultants' fees and expenses." A1001. That they are a subset of the full scope of Losses is immaterial. Both the indemnification provisions Ashland relies on and Section 8.2(c) address the

recovery that will be available to a party when it suffers some type of losses. Section 8.2(c) addresses one very specific set of circumstances when one party would suffer a loss, and explicitly defines the recovery to include attorneys' fees incurred in first-party litigation. That cannot be squared with Ashland's effort to broaden the scope of the indemnification provisions to cover first-party litigation claims as well.

3. Ashland has not identified any other basis for recovering its litigation fees.

Ashland throws two final arguments against the wall, but neither sticks.

First, Ashland argues that this Court's precedent requires fee-shifting because a party that prevails on a claim for indemnification is necessarily entitled to the fees incurred to enforce the provision. Ashland-Br. 55-56. There is a critical flaw in this argument. Ashland did not pursue the underlying litigation to enforce an existing right to an indemnity, but rather to establish breach of the substantive provisions of the contract. *Delle Donne*, 840 A.2d at 1256 (distinguishing between underlying litigation and expenses incurred to enforce the indemnification provision); *see Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 422-23 (Del. 1994) (same). The Superior Court denied Ashland's request for fees incurred in litigating its breach claims, but did not address attorneys' fees that might at some point be incurred in enforcing its claim of a right to indemnification. The Court's precedent on this issue is irrelevant.

Second, Ashland attempts to discredit the Superior Court's opinion by attacking its reliance on *TranSched Systems Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466 (Del. Super. Ct. Mar. 29, 2012). *See* Ashland-Br. 60-65. To start, Ashland's complaints are deeply ironic, given that Ashland repeatedly cited to *TranSched* in its briefing below without once suggesting that it would be inappropriate for the Superior Court to do the same. *See* B83, B88-90. Regardless, the Court need not evaluate Ashland's arguments on this case because *TranSched* is not necessary to find in the Heyman Parties' favor.

As discussed above, a robust body of Delaware law directs that indemnification provisions should be read narrowly, and that indemnification provisions must explicitly reflect the intent to shift fees in first-party litigation to overcome the presumption against fee-shifting. *TranSched* is merely one of the latest in a decade-long line of cases confirming these points. Therefore, Ashland's argument that the Court erred in applying *TranSched*—either because it is factually distinguishable (Ashland-Br. 60-61), or because it purportedly created a "novel presumption" not in place at the time of contracting (*id.* 61-62), or because it is inconsistent with other Delaware law (*id.* 62-65)—(though incorrect) is irrelevant. This Court, reviewing this issue of contract interpretation *de novo*, need not rely on *TranSched* at all to hold that the plain language of the SPA requires affirmance of judgment to the Heyman Parties.

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. In the alternative, if the Court affirms the Superior Court's Order on the merits, it should likewise affirm the portion of the Superior Court's Order entering judgment in favor of the Heyman Parties as to Ashland's request for fees and costs.

MORRIS NICHOLS ARSHT & TUNNELL LLP

/s/ *William M. Lafferty*
William M. Lafferty (#2755)
John P. DiTomo (#4850)
Thomas P. Will (#6086)
Miranda N. Gilbert (#6662)
1201 North Market Street
Wilmington, DE 19801
(302) 658-9200
Attorneys for Appellants/Cross-Appellees

OF COUNSEL:

SIDLEY AUSTIN LLP
Robert N. Hochman
Heather Benzmiller Sultanian
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Eamon P. Joyce
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019
(212) 839-5300

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Andrew J. Rossman
Jonathan B. Oblak
Nicholas Hoy
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, the foregoing ***Appellants' Reply Brief on Appeal and Cross-Appellees' Answering Brief on Cross-Appeal*** was caused to be served upon the following attorneys of record via File & Serve*Xpress*.

Christopher Viceconte
Gibbons P.C.
300 Delaware Avenue, Suite 1015
Wilmington, DE 19801

/s/ Miranda N. Gilbert
Miranda N. Gilbert (#6662)