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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MERCK & CO., INC., Plaintiff Below, Appellant, v. BAYER AG, Defendant Below, Appellee.	No. 150, 2023 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0838-NAC

APPELLANT'S OPENING BRIEF

OF COUNSEL:

Jeffrey A. Lamken
Michael G. Pattillo Jr.
Robert Y. Chen
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000

Joshua D. Bloom
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8156

James D. Taylor, Jr. (#4009)
SAUL EWING LLP
1201 N. Market Street #2300
Wilmington, DE 19801
(302) 421-6800

David E. Ross (#5228)
ROSS ARONSTAM & MORITZ LLP
1313 N. Market Street #1001
Wilmington, DE 19801
(302) 576-1600

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Counsel for Plaintiff Below, Appellant Merck & Co., Inc.

(Additional Counsel Listed on Inside Cover)

Amy S. Kline
SAUL EWING LLP
1500 Market Street
Centre Square West, 38th Floor
Philadelphia, PA 19102
(215) 972-8567

Joseph D. Lipchitz
SAUL EWING LLP
131 Dartmouth Street
Suite 501
Boston, MA 02116
(617) 912-0916

Counsel for Plaintiff Below,
Appellant Merck & Co., Inc.

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NATURE OF PROCEEDINGS

This case is about applying an agreement in accordance with its text. In 2014, Merck & Co., Inc. sold its consumer-care business to Bayer AG. Under the Stock and Asset Purchase Agreement ("SAPA" or "agreement"), Bayer became the owner of all the consumer-care business's stock and assets, together with most associated liabilities. Section 2.7 of the agreement, however, carved out certain liabilities that Merck would retain. Some of those "retained liabilities" would be Merck's indefinitely, such as specified tax matters. But the agreement treated one category of retained liabilities—"Section 2.7(d) Liabilities" such as product-liability claims from pre-closing conduct—differently. For those liabilities, the agreement included a "sunset provision": Under Section 10.1, "***all***" of Merck's "***liability and*** indemnification obligations with respect to the Section 2.7(d) Liabilities" would "survive" for only seven years after the transaction's closing date. After that, the liabilities would revert to the consumer-care business Bayer had acquired.

Years after the transaction closed, the health-products industry saw an explosion of litigation concerning the alleged health effects of talc-containing products. Merck and Bayer affiliates were not exempt. Consumers filed lawsuits alleging injuries from talc in Dr. Scholl's and Lotrimin foot powders, both produced by companies Bayer acquired from Merck in the SAPA. Merck honored its obligations with respect to those claims, which everyone agreed were Section 2.7(d) Liabilities.

As the seven-year anniversary of the closing date approached, Merck contacted Bayer to remind it of the sunset provision and to begin preparing Bayer for the transfer of responsibility. For nine months, Bayer worked with Merck—without objection—on the transition. Two weeks before the sunset date, however, Bayer took the position that Merck was responsible for Section 2.7(d) Liabilities in perpetuity, notwithstanding Section 10.1's sunset provision.

Merck filed this action to compel Bayer to honor its SAPA obligations and accept responsibility for Section 2.7(d) Liabilities going forward. Dismissing the complaint, the Court of Chancery ruled that Section 10.1's termination of "[a]ll" of Merck's "liability . . . with respect to the Section 2.7(d) Liabilities" after seven years did not actually terminate all of Merck's liabilities. In the court's view, giving effect to Section 10.1's sunset for "all" of Merck's Section 2.7(d) Liabilities would be "an implausibly circuitous and tortured means of implementing the SAPA"—"the contractual equivalent of a Rube Goldberg machine."

The Court of Chancery posited that the agreement concerned "two distinct forms of liability." The court held that Section 10.1's sunset for "***all*** liability ***and*** indemnification obligations"—"with respect to Section 2.7(d) Liabilities" in particular—should be read to encompass ***only*** Merck's indemnification obligations, and exclude substantive liability for Section 2.7(d) claims. The court reasoned that it "would expect" contractual sunset provisions to be written differently, and that

transferring talc liability based on pre-closing conduct would be "commercially unreasonable." The court did not address the fact that such liability ordinarily transfers with company ownership in the first instance; it never explained why transfer after seven years is less reasonable. Nor did the court acknowledge that potential talc liability was not a meaningful issue at the time the deal was negotiated. It held that reading the agreement to sunset "all liability and indemnification obligations" for Section 2.7(d) Liabilities to mean just that—"***all***" such "liability ***and*** indemnification obligations"—would be unreasonable as a matter of law.

SUMMARY OF ARGUMENT

I. Section 10.1 of the SAPA is clear: "All liability and indemnification obligations" Merck assumed "with respect to the Section 2.7(d) Liabilities shall survive until . . . the seventh (7th) anniversary of the Closing Date." That text says what it means and means what it says. All of Merck's obligation for the Section 2.7(d) Liabilities, ***and*** all of its obligation to indemnify Bayer for losses incurred with respect to those claims, terminated seven years after the closing. Product-liability claims encompassed within Section 2.7(d) thus ceased to be Merck's obligation on October 1, 2021.

Fundamental canons of contract construction confirm that interpretation. First, Section 10.1 refers to sunsetting ***both*** Merck's "liability" ***and*** its "indemnification obligations." The rule against superfluity prohibits applying the sunset provision ***only*** to indemnification obligations. Second, Section 10.1 includes express exceptions to the seven-year sunset provision. The principle of *expressio unius est exclusio alterius* prohibits reading additional, unstated exceptions into the broad phrase "all liability." Finally, the SAPA consistently uses the term "liability" to refer not just to indemnification obligations but to substantive liabilities. "Liability" should be given the same meaning in Section 10.1's sunset provision.

Giving the sunset provision its ordinary meaning, and sunsetting Merck's liability for the Section 2.7(d) Liabilities, makes perfect sense. It reflects a reasonable, bargained-for allocation of risk. Ordinarily, those liability risks would have transferred with the consumer-products companies Bayer purchased. Section 2.7 provides that Merck would initially retain responsibility for the Section 2.7(d) Liabilities nonetheless. But Section 10.1 makes clear that Merck's responsibility was limited in duration. Merck would retain liability for seven years. At that point, Merck's responsibility would sunset, and Bayer, as the companies' new owner, would directly or indirectly bear the risk of any residual liability.

II. The Court of Chancery refused to accept that, when Section 10.1 provides for the termination of "all" Merck's liability after seven years, it means exactly that. Accepting Bayer's argument that the SAPA was concerned with "two distinct forms of liability," the court held that Section 10.1's explicit reference to "***all*** liability and indemnification obligations" means that ***only*** Merck's indemnification obligations—and not substantive liability—for the Section 2.7(d) Liabilities would terminate. But Section 10.1 expressly sunsets "all" of Merck's liability. And reading the agreement as a whole, it is clear that Section 10.1 addresses substantive liability for judgments, and not, as the court found, merely indemnification for legal costs.

The Court of Chancery deemed it all but dispositive that another provision, Section 2.7, states that Merck will "absolutely and irrevocably assume and be solely liable and responsible for" the Section 2.7 Liabilities. In its view, that meant Merck agreed to assume the Section 2.7 Liabilities "indefinitely." But "absolutely" and "irrevocably" do not necessarily mean "permanently" (much less in contradiction of another express provision). Section 2.7's language merely means that Merck could not unilaterally rescind those obligations. Properly read, Section 2.7 and Section 10.1 work together to allocate the parties' risk with respect to the Section 2.7 Liabilities over time, transferring some indefinitely (*e.g.*, obligations relating to the "Retained Assets" and certain tax matters) and others for a limited period (*e.g.*, obligations relating to Product Claims).

The court erred in rejecting what Section 10.1 ***actually*** says as "commercially unreasonable" based on its view that one "would expect" the provisions to be written differently. The court never explained what was "commercially unreasonable" about the parties sharing risk for the Section 2.7(d) Liabilities, with Merck assuming liability for the first seven years—a period exceeding the general statute of limitations for product claims in most States—and with Bayer, as the owner of the consumer-care business, assuming liability for any later-filed claims.

Finally, the court erred in holding post-closing course-of-performance evidence irrelevant when construing an ambiguous contractual provision. If the

SAPA is ambiguous, Merck's course-of-conduct evidence—which shows the parties understood that Merck's obligations with respect to the Section 2.7(d) Liabilities sunset after seven years—should be considered in any remand proceedings.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. Merck Sells Its Consumer-Care Business to Bayer Pursuant to the Stock and Asset Purchase Agreement

Merck is a research-intensive biopharmaceutical company. A151. Before October 2014, Merck operated a consumer-care business that sold a range of products under well-known brands, including Dr. Scholl's and Lotrimin. A147-148; A152. In 2014, Merck decided to divest its consumer-care business as part of a "multi-year initiative to sharpen its commercial and research and development focus." Merck & Co., Inc., Annual Report, 36 (Form 10-K) (Feb. 27, 2015). Ultimately, Merck sold its consumer-care business to Bayer.

1. *The Stock and Asset Purchase Agreement*

On May 5, 2014, Merck and Bayer executed the Stock and Asset Purchase Agreement or "SAPA" memorializing the deal. A147. In the stock-sale component, Bayer agreed to acquire the common stock of five Merck subsidiaries. A24; A38 (§ 2.2); A146. That included MSD Consumer Care, Inc., which held Merck's North American consumer-care business. A146. By purchasing those subsidiaries' stock, Bayer acquired "indirect ownership" of "any assets that are owned, leased or licensed by" those companies as well as "any liabilities or obligations" they had. A39 (§ 2.3); A44 (§ 2.6).

A few elements of Merck's consumer-care business were not "owned, leased or licensed" by the Merck subsidiaries Bayer was acquiring. The transaction thus included a separate asset-sale component to capture those. Sections 2.3 and 2.6 of the SAPA define the scope of those additional assets and liabilities.

2. *The Provisions for Retained Assets and Liabilities*

Bayer thus acquired Merck's consumer-care subsidiaries lock, stock and barrel. Nonetheless, the SAPA provides that Merck would retain certain assets and liabilities associated with that business. Section 2.5 identifies the "Retained Assets," which include certain trademarks, properties, and accounts receivable. Section 2.7 identifies "Retained Liabilities." It provides that Merck would "absolutely and irrevocably assume and be solely liable and responsible for" the Retained Liabilities, which include certain taxes and other identified matters.

Section 2.7 also refers to a distinct category called "Section 2.7(d) Liabilities." Broadly speaking, those liabilities include: (1) product-liability claims and (2) consumer-protection claims (collectively, "Product Claims"), as well as (3) environmental liability claims ("Premises Claims"), all based on events occurring during Merck's ownership. A45 (§ 2.7(d)); A137.

3. *Article X's Sunset for Section 2.7(d) Liabilities*

Article X of the SAPA generally requires Merck to "indemnify, defend and hold harmless [Bayer] from and against all Losses imposed on, incurred by or

asserted against [Bayer] arising out of or relating to . . . the Retained Assets and/or the Retained Liabilities." A99 (§ 10.2(b)). "Losses" is defined broadly to include "all claims, losses, liabilities, damages, actions, suits, . . . judgments, settlements, . . . [and] costs and expenses." A29 (§ 1.1).

Article X, however, singles out Section 2.7(d) Liabilities—including Product Claims—for different treatment. Unlike other Retained Liabilities, the parties agreed that Merck's responsibility for Section 2.7(d) Liabilities would be limited in at least two respects.

First, Merck's responsibility would have a finite duration. Section 10.1 of the SAPA—the "Sunset Provision"—provides that:

> ***All liability and indemnification obligations*** with respect to the Section 2.7(d) Liabilities ***shall survive until*** . . . the seventh (7th) anniversary of the Closing Date . . . .

A99 (§ 10.1) (emphases added). In other words, seven years after closing, Merck would no longer be responsible for Product Claims going forward.

That seven-year period was subject to express exceptions. The sunset period would apply to any Section 2.7(d) Liability "***except*** to the extent a claim for indemnification has been validly made prior to" seven years after the closing date. A99 (§ 10.1) (emphasis added). Additionally, the parties negotiated a later, 10-year sunset date for Section 2.7(d) Liabilities relating to Premises Claims (which involved sites with asbestos contamination). A99 (§ 10.1); A137.

Second, Merck's pre-sunset responsibility for Section 2.7(d) Liabilities was qualified. Bayer agreed to a per-claim threshold of $250,000 in Losses, and a deductible of $25 million in Losses, before it could seek indemnification from Merck. A100 (§ 10.2(c)). Bayer also agreed to an absolute cap on Merck's indemnification obligation for Section 2.7(d) Liabilities. *Id*.

The transaction closed on October 1, 2014. As a result, the Sunset Date for non-Premises Claims Section 2.7(d) Liabilities was October 1, 2021. A148.

B. Years After the Closing, the Parties Face Talc-Based Product Claims

Years after the closing, consumers began filing lawsuits alleging that talc-containing products caused illnesses, including cancer. For example, in *Ingham v. Johnson & Johnson*, Johnson & Johnson and affiliates were found liable for $2.2 billion for injuries allegedly caused by their talc products. 608 S.W.3d 663, 724 (Mo. Ct. App. 2020).[1] Purchasers of Dr. Scholl's foot powder asserted claims against Bayer and Merck. A152.

There is no dispute that such talc-based claims qualify as Section 2.7(d) Liabilities. Merck and Bayer acted accordingly. From the closing until Section

[1] Johnson & Johnson did not mention talc liability in SEC filings until 2016. *See* Johnson & Johnson, Quarterly Report (Form 10-Q) (May 10, 2016).

10.1's October 1, 2021 Sunset Date, Merck accepted every Product Claim, including talc-based claims, Bayer tendered, and agreed to assume Bayer's defense. A157.

After complying with its Section 2.7(d) obligations for more than six years, Merck began planning for the Sunset Date. On January 4, 2021, Merck sent Bayer a letter reminding it that, under Section 10.1, the Sunset Date was ten months away and that Merck's responsibility for Product Claims would expire. A158.

Between January 2021 and September 2021, Bayer engaged with Merck to ensure Bayer would be prepared to defend further Product Claims after the Sunset Date. That included obtaining information about talc claims, including legal bills, pleadings, discovery, and counsel's analyses of pending claims. A159-162. During that time Bayer never disagreed with, let alone described as commercially unreasonable, Merck's position that its responsibility for the Section 2.7(d) Liabilities would terminate on the Sunset Date. A158; A160; A162.

On September 15, 2021—two weeks before the Sunset Date—Bayer asserted for the first time that Merck was responsible for Section 2.7(d) Liabilities in perpetuity, notwithstanding Section 10.1's Sunset Provision. A141-143; A162.

II. PROCEEDINGS BELOW

A. The Complaint

Merck sued Bayer on September 30, 2021, asserting claims for injunctive relief, specific performance, declaratory judgment, and breach of contract. The

complaint's interpretation of the SAPA is straightforward. Section 10.1 provides that "'**All** liability **and** indemnification obligations with respect to the Section 2.7(d) Liabilities'" will sunset seven years after the Closing Date, A152 (quoting A99 (§ 10.1)), except those claims for which a valid indemnification demand had been submitted. While Merck had agreed to assume responsibility for the Section 2.7(d) Liabilities for a seven-year period, Section 10.1 "very clearly and definitively states the end point at which ***all*** of those liability and indemnification provisions sunset and when Bayer, as the purchaser, becomes responsible going forward for ***all*** the liabilities of the business" identified in Section 2.7(d). A152.

B. The Court of Chancery's Decision

The Court of Chancery granted Bayer's motion to dismiss. Op.2. The court held that "the SAPA clearly and unambiguously provides that Merck ***indefinitely*** retained substantive liability for the product liability claims related to products sold prior to the closing of the transaction." *Id.* (emphasis added). The court rejected Merck's argument that, when Section 10.1 provides that "[a]ll" of Merck's "liability and indemnification obligations with respect to the Section 2.7(d) Liabilities" sunset after seven years, it means what it says—that Merck's substantive liability obligations vis-à-vis Bayer for Section 2.7(d) Liabilities terminate. Op.15-16 (emphasis omitted). That, the court stated, would be "'an implausibly circuitous and

tortured means of implementing the SAPA,'" *id.*—"the contractual equivalent of a Rube Goldberg machine," Op.30.

The Court of Chancery instead viewed Section 2.7, which governs Retained Liabilities generally, as controlling. Section 2.7 states that Merck shall "absolutely and irrevocably assume and be solely liable and responsible for" Retained Liabilities. Op.13 (quoting A45 (§ 2.7)) (emphasis omitted). Given that, the court stated, it "could arguably end [its] analysis." Op.13-14. The court nonetheless addressed why, in its view, Section 10.1's Sunset Provision was inapplicable. A98 (§ 10.1).

The Court of Chancery began with an assumption pressed by Bayer: "[T]he SAPA," it opined, "dealt with two distinct forms of liability." Op.12. "The first is potential substantive liability to third-party consumers, including judgments and settlements." *Id.* "The second is costs incidental to litigation," *id.*, which Bayer described as "motion practice to be dismissed from the case," and "third-party discovery obligations as the owner of the new product," A327. In the court's view, it was "clear that Sections 2.6 and 2.7 deal with the first category of liabilities while Article X provides a separate and distinct right to contractual indemnification." Op.12; *see also* Op.14. Based on that assumption, the court construed Article X's "time limits" as applying only to the "contractual indemnification rights," and as excluding substantive liability for the Section 2.7(d) Liabilities. Op.14. The court

rejected Merck's argument that such a reading of Section 10.1's Sunset Provision would "render the term 'liability' superfluous." Op.16.

In the court's view, Article X could not be read as extinguishing Merck's liability for the Section 2.7(d) Liabilities because "Article X ***cannot***" "extinguish the underlying liability for third-party claims"; Merck and Bayer, it observed, could not contract between themselves to make talc lawsuits "of third-party consumers who are not party to the SAPA" disappear. Op.14-15; *see* Op.17, 29. Merck had not taken the position that they could. Merck argued only that its ***contractual*** responsibility for the Section 2.7(d) Liabilities ***vis-à-vis Bayer*** would expire at the Sunset Date, at which point those liabilities would directly or indirectly "become Bayer's." Op.17.

The Court of Chancery thought that it was "not reasonable" to read Section 10.1 "as unwinding the thoroughly assigned liabilities within Sections 2.6 and 2.7," Op.17, because "one would expect explicit language to that effect," Op.18. The court did not explain why Section 10.1's statement, sunsetting "all" of Merck's "liability . . . with respect to the Section 2.7(d) Liabilities" after seven years, is not "explicit language." The court invoked the fact that Section 2.7 states that "nothing in this Section 2.7 shall affect [Bayer's] rights pursuant to Article X," without also "stating that the time limits in Section 10.1 are applicable to Section 2.7." Op.18.

The Court of Chancery viewed Merck's construction of the SAPA as commercially unreasonable because it "would result in a situation whereby Merck could shift all liability for the products it sold prior to the Closing Date to Bayer." Op.27-28. The court did not address the fact that Bayer purchased all ***the stock*** of the companies that made those products—and that, under ordinary principles, those companies' liabilities transferred together with their assets as a result. *See* A38-39 (§ 2.3(a)); A44 (§ 2.6) (purchase of stock gave Bayer "indirect ownership" of "any assets that are owned, leased or licensed by" the companies along with "any liabilities or obligations"). The court never explained why, if liabilities ordinarily transfer with the purchased company, it is commercially unreasonable for those liabilities to transfer after a seven-year period instead.

The Court of Chancery stated that "[n]othing in the SAPA indicates that the parties intended Bayer to assume liability for all of Merck's actions for the period during which it formulated, marketed, and sold the products that are now subject to the Product Claims." Op.27-28. The court did not address provisions of the SAPA (even apart from the Sunset Provision) under which Bayer assumed various pre-closing liabilities, including thresholds and deductibles. The court found Merck's interpretation unreasonable because "the SAPA contains no mechanism by which Bayer would assume the Section 2.7(d) Liabilities after the Closing Date," and the court "would expect . . . something akin to a 'Form of Assumption Agreement' " to

effectuate transfer of those liabilities. Op.28. The court did not address Merck's argument that the stock-purchase component of the SAPA obviated the need for any separate transfer of the Section 2.7(d) Liabilities; the liabilities (like the assets) follow the companies Bayer acquired (albeit after a seven-year delay).

Finally, the court rejected the Amended Complaint's allegations regarding the parties' course of conduct. For months, Bayer and Merck had proceeded consistent with Merck's understanding of the agreement. For months, they worked toward transitioning responsibility for defending talc cases in particular. A158-161. Extrinsic evidence, the court stated, was not relevant because the SAPA was unambiguous. Op.24-25.

ARGUMENT

I. UNDER THE SAPA, MERCK'S SECTION 2.7(d) LIABILITIES SUNSET AFTER SEVEN YEARS

A. Question Presented

Whether the Court of Chancery erred in dismissing Merck's complaint on the theory that it is unreasonable, as a matter of law, to interpret the SAPA as sunsetting Merck's responsibility for the Section 2.7(d) Liabilities seven years after the Closing Date.

Merck preserved this issue at A268-286; A352-367; A371-375; A390-397.

B. Scope of Review

Decisions granting motions to dismiss are reviewed de novo. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 252 (Del. 2017). "Questions of contract interpretation are also reviewed de novo." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 845 (Del. 2019).

C. Merits of Argument

Section 10.1 of the SAPA is clear: "All liability and indemnification obligations" Merck assumed "with respect to the Section 2.7(d) Liabilities shall survive until . . . the seventh (7th) anniversary of the Closing Date." That text "says . . . what it means and means . . . what it says." *Dodd v. United States*, 545 U.S. 353, 357 (2005). All of Merck's obligation for the Section 2.7(d) Liabilities, ***and*** all of its obligation to indemnify Bayer for losses incurred with respect to those claims,

last only until seven years after the closing. The Product Claims, encompassed within Section 2.7(d), thus ceased to be Merck's obligation on October 1, 2021.

Fundamental canons of contract construction, including the rule against superfluity and the presumption of consistent usage, confirm that interpretation. That interpretation, moreover, reflects the ordinary legal rule that a purchase made by acquiring a company's stock transfers the purchased businesses' assets ***and*** liabilities. Here, the agreement provides that, for a seven-year period, Merck retained the Section 2.7(d) Liabilities despite that rule. Providing for a sunset of such "retained" liabilities after seven years is not a departure from the ordinary rule but its restoration.

At the very least, Merck's construction is "reasonable," and should survive a motion to dismiss. *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010).

1. *The SAPA Plainly Declares that "All" of Merck's "Liability" Regarding the Section 2.7(d) Liabilities Terminated on the Sunset Date*

"To determine what contractual parties intended, Delaware courts start with the text." *Sunline*, 206 A.3d at 846. "When the contract is clear and unambiguous," this Court "give[s] effect to the plain-meaning of the contract's terms and provisions." *Id*. (quotation marks omitted); *see GMG Capital Invs., LLC v. Athenian*

Venture Partners I, L.P., 36 A.3d 776, 780 (Del. 2012) (unambiguous terms "themselves will be controlling").

Here, the SAPA unambiguously provides that Merck would assume responsibility for the Section 2.7(d) Liabilities for a seven-year period after the closing, subject only to limited exceptions. Section 10.1 states that "***[a]ll liability***" Merck assumed "with respect to the Section 2.7(d) Liabilities shall survive until . . . the seventh (7th) anniversary of the Closing Date." A98 (§ 10.1) (emphasis added). Neither "all" nor "liability" is defined in the SAPA, so their "plain and ordinary meaning[s]" control. *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 n.35 (Del. 2008).

"The definition of 'all' is well known, and means 'the whole amount, quantity, or extent of.'" *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 158 (Del. Ch. 2013) (quoting Merriam–Webster Online Dictionary, http://www.merriam-webster.com/dictionary/all). Where a contractual provision uses the word "all," there is nothing "ambiguous" about its scope: "***all*** means ***all***." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1234-35 (Del. 2018). That is particularly clear here: Where the parties embraced exceptions, they provided them expressly in the contract itself (one for indemnification claims submitted before the Sunset Date and another for Premises Claims subject to a longer sunset). *See* pp.23-24, *infra*.

The term "liability" is similarly expansive. It means "[t]he quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment." *Liability*, Black's Law Dictionary (11th ed. 2019); *see also Evraz Claymont Steel, Inc. v. Harleysville Mut. Ins. Co.*, 2011 WL 6000780, at *4 n.31 (Del. Super. Ct. Nov. 30, 2011) (citing Black's to give the undefined term "liability" its "plain and ordinary meaning").

The meaning of Section 10.1 thus could not be clearer. It governs all—the whole amount, quantity, and extent—of Merck's legal obligation to Bayer for liabilities otherwise allocated to Merck in Section 2.7. It encompasses all "liability" and "indemnification" obligations, meaning all ways in which Merck is legally obligated or accountable. And, except as specifically provided, all those obligations to Bayer for Section 2.7(d) Liabilities "survive" only until the Sunset Date. After that, the ordinary rule of stock purchase takes over: Purchase of the company transfers assets and liabilities alike. *Deluxe Entm't Servs. Inc. v. DLX Acquisition Corp.*, 2021 WL 1169905, at *4 (Del. Ch. Mar. 29, 2021), *aff'd sub nom. DSG Entm't Servs. Inc. v. DLX Acquisition Corp.*, 273 A.3d 274 (Del. 2022). At the very least, that is a "reasonable construction" of the SAPA. *Kuhn Constr.*, 990 A.2d at 396.

2. *Fundamental Principles of Contract Construction Confirm Merck's Interpretation*

Because the plain text of Section 10.1's Sunset Provision is clear, this Court's analysis can stop there. But fundamental canons of contract construction confirm that interpretation.

The rule against superfluity. This Court has "consistently held that an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). The Court thus must "give each provision and term effect, so as not to render any part of the contract mere surplusage." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Here, Section 10.1's Sunset Provision specifically refers to "all" of Merck's "liability and indemnification obligations with respect to the Section 2.7(d) Liabilities." A99 (§ 10.1). That language cannot mean that Section 10.1's Sunset Provision applies ***only*** to indemnification obligations or any legal costs, so as to exclude "liabilities." Any other reading renders the reference to "liability" for the Section 2.7(d) Liabilities superfluous.

The SAPA, moreover, makes clear that the words "liability" and "indemnification" are distinct. The SAPA sets forth Merck's substantive liability for the Section 2.7(d) Liabilities in Section 2.7. But the separate "indemnification" obligations for the Section 2.7(d) Liabilities are addressed in Section 10.2(b). The two are

thus distinct, as the Sunset Provision's use of the phrase "liability ***and*** indemnification" reflects. Section 10.1 addresses both, sunsetting both Merck's "liability" and its "indemnification obligations."

The Court of Chancery dismissed that as a "red herring." Op.16. But the court never explained how its interpretation—which read the Sunset Provision to encompass "contractual indemnification" for legal costs but exclude "substantive liability," Op.12; *see* pp.30-34, *infra*—gives effect to Section 10.1's express declaration that ***both*** "liability" and "indemnification obligations" survive only seven years. It does not.

Deliberate inclusion and exclusion. Under the venerable canon of "*expressio unius est exclusio alterius,*" the express inclusion of "one thing implies the exclusion of the other." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 120 n.77 (Del. 2020) (quoting Black's Law Dictionary (11th ed. 2019)); *see also* 5 Corbin on Contracts § 24.28 (rev. ed. 1998); Op.18.

Here, Section 10.1 broadly subjects "all" of Merck's "liability and indemnification obligations with respect to the Section 2.7(d) Liabilities" to the seven-year Sunset Provision, but provides two express exceptions. First, the seven-year Sunset Provision applies to Section 2.7(d) Liabilities "except" those "liability and indemnification obligations with respect to the third item set forth in Section 2.7(d) of the Seller Disclosure Schedule"—*i.e.,* Premises Claims not at issue here—which are

subject to a ten-year sunset provision. Second, Section 10.1 specifies that the Sunset Provision applies "except to the extent a claim for indemnification has been validly made prior to" the Sunset Date. Given that Section 10.1 expressly identifies two "except[ions]" to the seven-year Sunset Provision, it should not be read to encompass other, unstated exceptions to the phrase "all liability," much less rewrite that phrase to mean "all liability except '***substantive*** liability,'" or "all liability 'but ***limited to indemnification***.'"

Consistent usage. Where a term is undefined, courts "look for its use in other contexts in the [contract] to discern its meaning." *Brinckerhoff*, 159 A.3d at 257. "[W]ords 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." *Id.* at 257 n.54 (quotation marks omitted); *see* 28 Richard A. Lord, Williston on Contracts § 32:6. Here, the SAPA uses the phrase "all liability and indemnification obligations" repeatedly to mean not just indemnification obligations or legal costs, but substantive liabilities as well.

For example, in addressing "representations and warranties," Section 10.1 elsewhere provides that "all liability and indemnification obligations" for those sunset at specified times. That unmistakably terminates not just indemnification obligations based on representations and warranties, but liabilities based on them as well. A contract's "representations and warranties . . . provide a mechanism for

allocating between the buyer and the target the risk of the occurrence of the events . . . described therein, whether before or . . . after the signing of the definitive agreement." *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *78 n.761 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (quoting ABA M&A Comm., Model Merger Agreement for the Acquisition of a Public Company, 27 (2011)). Delaware courts have recognized parties may terminate that allocation through "contractual provisions that limit the survival of representations and warranties" because those provisions "evidenc[e] an intent to shorten the period of time in which a claim for breach of those representations and warranties may be brought." *AssuredPartners of Virginia, LLC v. Sheehan*, 2020 WL 2789706, at *14 (Del. Super. Ct. May 29, 2020). And such language has been held to foreclose all forms of liability. "[W]hen the representations and warranties terminate, so does any right to sue on them." *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co.*, 166 A.3d 912, 933 (Del. 2017); *see also N. Am. Leasing, Inc. v. NASDI Holdings, LLC*, 276 A.3d 463, 468 (Del. 2022).

The phrase "all liability and indemnification obligations" in Section 10.1's representations and warranties provision—declaring that they survive only for specified periods—could not possibly mean that substantive liability for representations and warranties claims persists while only indemnification rights (or the obligation to pay legal costs) terminate. Section 10.1's use of the phrase "all liability and

indemnification obligations" with respect to Section 2.7(d) Liabilities likewise cannot be so limited. The phrase "all liability and indemnification obligations" cannot conceivably encompass substantive liabilities with respect to representations and warranties in one part of Section 10.1, yet mean only "costs incidental to litigation" or indemnification elsewhere in that very same section.

Other provisions make that clearer still. Throughout Section 2.7, for example, the parties agreed that Merck would retain various "liabilities." A45 (§ 2.7). Bayer admits that the "liabilities" Merck assumed under Section 2.7(d) go beyond indemnification; they include primary liability "to third-party consumers for their claims." A332. The parties' use of the same word "liabilities" in Section 10.1—when specifically referring to Section 2.7—cannot have a different meaning. *Brinckerhoff*, 159 A.3d at 257 n.54. Liability cannot include substantive liability in Section 2.7 but only legal costs in Section 10.1 when that provision cross-references Section 2.7.

Similarly, in Section 2.6(b), Bayer agreed to assume "all liabilities" regarding a Merck subsidiary's accounts payable. A44 (§ 2.6(b)). An account payable is "[a]n account reflecting a balance owed to a creditor; a debt owed by an enterprise in the normal course of business dealing." *Account*, Black's Law Dictionary (11th ed. 2019). And in Sections 3.20 and 4.7, the parties made reciprocal representations that they had not incurred "any liability" for "any brokerage fees, finders fees, com-

missions or other similar amounts," again using "liability" to refer to a monetary payment obligation, not just legal fees or indemnification. The fact that the SAPA uses "all liability" in its broad, plain meaning in other provisions demonstrates that the phrase "all liability" has the same expansive meaning in Section 10.1.

3. *The Sunset Provision Reflects Settled Legal Principles*

Giving the Sunset Provision its ordinary meaning, and sunsetting Merck's liability for the Section 2.7(d) Liabilities after seven years, also reflects background legal principles.

The ordinary rule is that, in "a stock transaction, the [sold] Company remains liable for its obligations and the Buyer de facto bears the economic risk of such obligations by virtue of its ownership." *White v. Curo Tex. Holdings, LLC*, 2016 WL 6091692, at *11 (Del. Ch. Sept. 9, 2016) (quoting Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries, & Divisions* § 15.01, at 15-3 to -4 (2016)). In other words, "all assets and liabilities" of the acquired company "are transferred" to the purchaser automatically by virtue of the sale of stock. *DLX Acquisition Corp.*, 2021 WL 1169905, at *4.

Here, the parties agreed to a time-limited departure from that rule. Section 2.7 provides that Merck retains responsibility for certain liabilities even though Bayer purchased the consumer-products businesses in their entirety. But Section 10.1 makes clear that Merck's responsibility was limited in duration. Merck would

retain responsibility for the Section 2.7(d) Product Claims for seven years, a period longer than the statute of limitations for run-of-the-mill product-liability claims in the vast majority of States. *See, e.g.*, 10 *Del. C.* § 8119 (two years); Cal. Code Civ. P. § 335.1 (two years); N.Y. C.P.L.R. 214(5) (three years); Tex. Civ. Prac. & Rem. Code § 16.003 (two years). At that point, however, "***[a]ll liability***" Merck had assumed "with respect to the Section 2.7(d) Liabilities" would sunset, A99 (§ 10.1) (emphasis added), and the "familiar default rule in stock sales" would be restored. *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 99 (Del. Ch. 2009). Reverting to the "familiar default rule" after a specified period is a perfectly reasonable choice—it is not a "Rube Goldberg machine." Op. 30. And had the parties intended Merck to remain liable for the Section 2.7(d) Liabilities indefinitely, there would have been no reason to single them out for different treatment from the other Retained Liabilities (such as Merck's ongoing responsibilities relating to the "Retained Assets" and certain tax obligations, A45 (§ 2.7(a), (b))).

II. THE COURT OF CHANCERY ERRED IN FINDING MERCK'S INTERPRETATION OF THE SUNSET PROVISION UNREASONABLE AS A MATTER OF LAW

A. Question Presented

Whether the Court of Chancery erred in dismissing Merck's complaint because, in its view, construing the SAPA as sunsetting Merck's Section 2.7(d) Liabilities after seven years would be unreasonable as a matter of law.

Merck preserved this issue at A268-286; A352-367; A371-375; A390-397.

B. Scope of Review

Review of all issues is de novo. *See* p.18, *supra*.

C. Merits of Argument

Rather than read Section 10.1 to mean what it says, the Court of Chancery instead accepted Bayer's atextual argument that the SAPA addresses "two distinct forms of liability." Op.12. Based on that distinction, the court read Section 10.1's explicit provision for sunsetting "***all*** liability ***and*** indemnification obligations" somehow to sunset ***only*** Merck's indemnification obligations, and not its substantive liability for Section 2.7(d) Liabilities. But the court fundamentally erred in rejecting what Section 10.1 actually says based on how the court "would expect" such provisions to read. The court similarly erred in deeming it "commercially unreasonable" for Bayer to assume liability for talc claims after seven years. Restoring the standard default rule for allocating responsibility in stock-purchase transactions after seven years—a period that exceeds the general statute of limitations for product

claims in most States—is hardly unreasonable. Nothing suggests the parties negotiated with talc liabilities in mind; those became an enormous liability later on. Large and emergent liabilities, however, are governed by the same language as small ones. And nothing in Section 2.7 renders Merck's assumption of Section 2.7(d) Liabilities eternal. To the contrary—and consistent with the common practice of a seller insisting on a fixed end-date for its liability for a divested business—such obligations were bounded in scope and time from the outset.

1. *Bayer's "Two Distinct Forms of Liability" Theory Rewrites the SAPA*

Bayer's construction—adopted by the Court of Chancery—proceeds from a faulty assumption. It began with the premise that "the SAPA dealt with two distinct forms of liability." Op.12; *see also* Op.1-2; A326-327. "The first," the court stated, "is potential substantive liability to third-party consumers, including judgments and settlements." Op.12. "The second is costs incidental to litigation." *Id.* In Bayer's and the court's view, it was "clear that Sections 2.6 and 2.7 deal with the first category of liabilities while Article X provides a separate and distinct right to contractual indemnification." *Id.*; *see also* Op.14. Based on that assumption, the court construed Section 10.1's "time limits"—the Sunset Provision—to apply only to the "contractual indemnification rights," and not to Merck's substantive liability for the claims. Op.14.

The court's "two distinct forms of liability" theory, however, defies the SAPA's plain terms. For one thing, even if the SAPA ***were*** construed as "deal[ing] with two distinct forms of liability," Op.12, Section 10.1 provides that "***[a]ll*** liability . . . with respect to the Section 2.7(d) Liabilities" shall sunset after seven years, A99 (§ 10.1) (emphasis added). The Sunset Provision's plain text thus encompasses ***both*** "forms of liability" the court identified. "***[A]ll*** means ***all***," *Eagle Force Holdings*, 187 A.3d at 1234-35, and plainly encompasses "potential substantive liability to third-party consumers, including judgments and settlements," Op.12; *see* pp.19-21, *supra*.

For another, the assumption that Section 10.1's reference to "liability and indemnification" encompasses only "costs incidental to litigation," Op.12, is demonstrably false. Bayer first pressed that theory at oral argument, urging that Article X does not address who "will ultimately be liable to third-party consumers for product claims." A326. Article X, Bayer insisted, merely concerns indemnification for incidental "fees" Bayer might incur in litigation "in the form of motion practice to be dismissed from the case and in the form of third-party discovery obligations as the new owner of the product." A326-327. The court accepted that theory, citing counsel's argument as support. *See* Op.12 nn.19 & 20 (citing A326).

That defies the SAPA's text. Even as to indemnification, Merck indemnified Bayer "from and against ***all Losses*** imposed on [or] incurred by" Bayer "arising out

of or relating to . . . the Section 2.7(d) Liabilities." A99 (§ 10.2(b)). "Losses" is defined to include "all claims, losses, liabilities, ***damages***, . . . ***judgments***, [and] ***settlements***," in addition to "costs and expenses" Bayer might incur in litigation. A29 (§ 1.1) (emphases added). Indemnification under Section 10.2 thus expressly extends beyond incidental litigation expenses to encompass damages, awards, judgments, and the like—substantive liability. Neither Bayer nor the Court of Chancery explain why the "liability" in Section 10.1 does not as well.

No less than Section 2.7, Article X thus "dealt with" allocating losses for litigation costs ***and*** "potential substantive liability to third-party consumers, including judgments and settlements." Op.12. Far from addressing "wholly separate issues," Op.18, they addressed overlapping issues—which is why Section 10.1 expressly refers to "Section 2.7(d) Liabilities" when establishing an agreed-upon sunset.[2] To say the Sunset Provision has "no bearing on the allocation of third-party tort liability set forth in Section 2.7," Op.17, ignores its express terms.

Confronted with a contractual provision that sunsets "***all*** liability ***and*** indemnification obligations" for Section 2.7(d) Liabilities, the Court of Chancery's opinion ultimately drifts among different limits to make "all" mean something less

[2] The court found it "[q]uite notabl[e]" that Section 10.2(f) states that "'the indemnification provisions of this Article X shall be the sole and exclusive remedy,'" and that the parties carved out from that remedy a right to specific performance. Op.18 & n.41. But neither has any bearing on Section 10.1's limits.

than "all." The decision attempts to read "all liability and indemnification obligations" as meaning only "questions of contractual indemnification" or "indemnification rights," Op.18-19, essentially excising the word "liability" from the provision. The decision later restricts sunsetting "liability" to "costs that Bayer will incur, not in assisting Merck with its litigation, but as a result of having to participate in litigation for Product Claims retained by Merck," Op.32, or "costs incidental to litigation," Op.12. But that limit cannot be found in the agreement, which nowhere redefines "all liability" (or "all liability and indemnification obligations") to mean "costs incidental to litigation."

The Court of Chancery was influenced by the fact that Merck and Bayer could not, by contract, "extinguish[] the underlying liability for third-party claims." Op.14. "Article X ***cannot*** do" that, the court repeatedly urged, because Merck and Bayer's private agreement "has no bearing on the tort claims of third-party consumers who are not party to the SAPA." Op.14-15, 17, 29. But Merck never urged otherwise. The agreement's text, purpose, and effect are directed to allocating respective liabilities ***between Merck and Bayer***. And by agreeing that "[a]ll liability and indemnification obligations" the SAPA imposes on Merck "with respect to the Section 2.7(d) Liabilities" would survive until seven years after the Closing Date, A99 (§ 10.1), the parties agreed that, as between themselves, those liabilities would be Merck's for that express period.

The Court of Chancery correctly acknowledged that Section 10.1's Sunset Provision "sets forth time limits on [the] contractual indemnification rights" created in Article X. Op.14. By its terms, the Sunset Provision extends to ***all*** of Bayer's contractual indemnification rights for Section 2.7(d) Liabilities, not just "costs incidental to litigation." Op.12. For Section 10.1 to sunset Merck's substantive liability for Section 2.7(d) Liabilities, at the same time it terminates Merck's indemnification obligations to Bayer for such liabilities, makes perfect sense. The court's contrary interpretation of Section 10.1 would artificially separate indemnification rights and substantive responsibility for the Section 2.7(d) Liabilities. The result: Bayer would be unable to seek indemnification for "Losses" after the Sunset Date—including Losses associated with judgments—related to Section 2.7(d) Liabilities for which it purportedly lacks any substantive liability. That makes no commercial sense. And it is directly contrary to how the parties treated those Retained Liabilities that Merck ***actually*** agreed to keep in perpetuity. A98-100 (§§ 10.1-10.2(c)(i)).

2. *The Court of Chancery Misconstrued Section 2.7 and Its Interplay with Section 10.1*

The court deemed it all but dispositive that Section 2.7 states that Merck will "absolutely and irrevocably assume and be solely liable and responsible for" the Section 2.7(d) Liabilities. In its view, "[t]his unambiguous language establishes Merck's obligation to retain liability for Product Claims associated with talc products sold prior to the Closing Date indefinitely." Op.13. The court concluded that,

"[w]here a party has agreed to assume or retain certain liabilities indefinitely, it cannot escape its obligations through expiration of related indemnification obligations." Op.22. But the term "indefinitely" is the court's, not the agreement's. Properly read, Section 2.7 and Section 10.1 work together to allocate the parties' risk with respect to the Section 2.7(d) Liabilities over time.

a. The Court of Chancery opined that applying Section 10.1's Sunset Provision "would render Merck's commitment to retain the Section 2.7(d) Liabilities 'absolutely and irrevocably' meaningless." Op.24. As an initial matter, "absolutely" and "irrevocably" do not necessarily mean "permanently." Declaring a contractual obligation "irrevocable" simply means it cannot be rescinded by one party's unilateral action. *Hawkins v. Daniel*, 273 A.3d 792, 816 (Del. Ch. 2022), *aff'd*, *Daniel v. Hawkins*, 289 A.3d 631 (Del. 2023). But making an obligation "irrevocable does not say anything about the duration of" that obligation. *Id.* The term "absolute" similarly means complete or total for the period during which that obligation or authority operates; a despot may exercise absolute power, but it is not eternal, it persists only during their despotism.

More fundamentally, contracts must be read "as a whole," not by reference to adverbs in isolation. *Osborn*, 991 A.2d at 1159. Read together, Section 10.1's Sunset Provision and Section 2.7's requirements work together harmoniously. Critically, the Section 2.7(d) Liabilities at issue in this case—such as a "product liability

or similar claim for injury," A137—do not ***exist*** until a claim is asserted. Once such a claim is asserted prior to the Sunset Date, Section 2.7 requires that Merck "absolutely and irrevocably assume" responsibility for that liability. Consistent with that, Section 10.1 provides an exception to the Sunset Provision: Merck's liability does ***not*** sunset with respect to any claim Bayer tenders to Merck "prior to" the Sunset Date, A99 (§ 10.1)—Merck's liability for those remains not merely "absolute[ ] and irrevocabl[e]," A45 (§ 2.7), but eternal.

Outside of that exception, however, "[a]ll" of Merck's other "liability and indemnification obligations with respect to the Section 2.7 Liabilities . . . survive[d]" only until the Sunset Date. A99 (§ 10.1). Thus, Merck had no obligation to "assume" new Section 2.7(d) Liabilities that came into being after the Sunset Date. A45 (§ 2.7). That does not render Merck's obligations under Section 2.7 "meaningless." Op.24. It just means that Merck's obligation to assume new Section 2.7(d) Liabilities was time-limited.

Rather than read Sections 2.7 and 10.1 together, the Court of Chancery placed them in conflict—and then attempted to reconcile them by rewriting Section 10.1. The court first read Section 2.7 to impose all risks on Merck in perpetuity when Section 2.7 says no such thing. Op.13-14. The court endorsed that construction even though it places Section 2.7 in conflict with Section 10.1's specific declaration that "[a]ll" Merck's "liability and indemnification obligations" for Section 2.7(d)

Liabilities in particular end after seven years. That forced the court to rewrite Section 10.1's reference to "all liability and indemnification obligations" to mean ***only*** "indemnification for litigation costs." Properly read, however, Section 2.7 and 10.1 work together. Section 2.7 provides the ***scope and nature*** of liability obligations, while Section 10.1 provides a ***time frame***. There thus is no conflict to reconcile and no reason to reimagine the meaning of "liability." Even if there were conflict, Section 10.1's specific rule for Section 2.7(d) Liabilities would control over more general language addressing Section 2.7 Retained Liabilities in general. *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

b. Nor is the Court of Chancery's contrary construction "bolstered by case law." Op.19. The two decisions the court invoked involved wholly different contractual provisions.

For example, in *JFE Steel Corp. v. ICI Americas, Inc.*, 797 F. Supp. 2d 452 (D. Del. 2011), the asset purchase agreement provided only that "***claims for indemnification*** based upon the Retained Liabilities . . . may be made up to ten (10) years after the Closing Date." *Id.* at 466 (emphasis added). The seller argued that this language terminated all of its obligations for certain retained environmental liabilities after ten years. The court disagreed because "the phrase 'claims for indemnification' does not automatically include claims for other causes of action that are not indemnification." *Id.* (alterations omitted). Consequently, the court con-

cluded that the agreement "does not contain any clear expression of the parties' intent . . . to limit ***all*** remedies to a ten-year period." *Id.* (emphasis added).

In *Alexander & Baldwin, Inc. v. C&H Sugar Co.*, 2009 WL 10671790, (C.D. Cal. Aug. 3, 2009), the buyer agreed to assume "all liabilities relating to" the assets that were "transferred" to it in the transaction, *id.* at *1. The asset purchase agreement conferred on the buyer a duty to indemnify the seller for "any and all Damages" the seller incurred related to the buyer's "Assumed Liabilities." *Id.* at *2. The agreement included a "'sunset provision'" providing "that the parties' 'representations, warranties, covenants, agreements and obligations'" would "'expire'" two years after the Closing Date. *Id.* The district court held that the sunset provision did not relieve the buyer of its obligation to assume liability, after the sunset date, for a suit filed against the seller. *Id.* at *4. The buyer's "assumption of liability," the court stated, was "separate and distinct from its promise to indemnify" the seller. *Id.* The court refused to "impose an implied two-year limitation on [buyer's] assumption of liability" for the assets it acquired in the transaction. *Id.*

The Court of Chancery took the view that *JFE Steel* and *Alexander & Baldwin* together stand for the broad proposition that, "[w]here a party has agreed to assume or retain certain liabilities indefinitely, it cannot escape its obligations through the expiration of related indemnification provisions." Op.22. But the issue here is not expiration of perpetual indemnification obligations. It is a sunset provision that,

unlike the ones at issue in *JFE Steel* and *Alexander & Baldwin*, explicitly relieves one party of "***[a]ll liability***" in addition to its "indemnification obligations." A99 (§ 10.1) (emphasis added). That different language has a different meaning that yields a different result.

The court dismissed that distinction as "not meaningful" because, in its view, "the language 'all liability' in Section 10.1 was meant to cover all contractual obligations created by Article X rather than reapportion liabilities allocated in Sections 2.6 and 2.7." Op.20. That reasoning is circular. Far from "bolster[ing]" the court's "interpretation," Op.19, it ***assumes*** the court's atextual "two distinct forms of liability" theory is correct—which it is not.

3. *The Court Erred in Rejecting Merck's Interpretation Based on What It "Would Expect" To Have Seen in the SAPA*

When construing agreements, courts must focus on "the text" of the agreement before them. *Sunline*, 206 A.3d at 846. The Court of Chancery, however, ignored the SAPA's plain text in view of what it "would expect" to have seen in the agreement. *See* Op.18, 28, 32. That was error. The ability to posit how the SAPA "could have" been drafted, to make it "clearer" that the reference to "[a]ll liability" in the Sunset Provision means all liability—so as to encompass substantive liability—does not render the contrary interpretation unreasonable. *Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1212-13 n.89 (Del. 2021). And the court's concerns about purported deficiencies in the SAPA are misplaced.

a. The Court of Chancery posited that, "[h]ad the parties intended to impose the time limits set forth in Section 10.1 on the Section 2.7(d) Liabilities, then one would expect explicit language to that effect." Op.18. But Section 10.1 is explicit: "***All***" of Merck's "***liability*** . . . ***with respect to the Section 2.7(d) Liabilities***," it states, survives only for seven years after the Closing Date. A99 (§ 10.1) (emphasis added).

The court deemed ***Section 2.7's*** failure to invoke Section 10.1's Sunset Provision as proof the Sunset Provision does not apply to Section 2.7(d) Liabilities. Section 2.7, the court noted, states that "'nothing in this Section 2.7 shall affect [Bayer's] rights pursuant to Article X,'" without making a similar reference to the time limits in Section 10.1. Op.18. But the court did not explain how Section 2.7's ***silence*** with respect to the applicability of Section 10.1's Sunset Provision could trump Section 10.1's ***express language***, which declares that "[a]ll liability . . . with respect to ***the Section 2.7(d) Liabilities***" survives only seven years. A99 (§ 10.1) (emphasis added). If Section 10.1 had meant to ***exclude*** Merck's substantive liability from the broad scope of the phrase "all liability," then one would have expected Section 10.1 to make that exception explicit—particularly given that it identified other carve-outs to the Sunset Provision. *See* pp.23-24, *supra*. But nothing in Section 10.1 remotely suggests "all liability" was intended to mean "something less than all liability."

b. The Court of Chancery speculated that, "[i]f the parties had intended for Bayer to assume the Section 2.7(d) Liabilities, . . . one would expect the parties to provide for something akin to a 'Form of Assumption Agreement' for the Section 2.7(d) Liabilities as they did with respect to the liabilities assumed by Bayer at closing." Op.28. But Bayer acquired, via stock acquisition, the companies that owned and operated Merck's consumer-care business. A38 (§ 2.2). As explained above, "[i]n a stock transaction, the [sold] Company remains liable for its obligations and the Buyer de facto bears the economic risk of such obligations by virtue of its ownership." *White*, 2016 WL 6091692, at *11 (quoting Kling & Nugent, *supra*, § 15.01, at 15-3 to -4). In other words, when a company is sold via stock transfer, the stock purchaser indirectly assumes the company's assets and liabilities as a matter of law. There is no reason for a "Form of Assumption Agreement" for assets and liabilities that transfer as a matter of law.

The SAPA required a "Form of Assumption Agreement" for the Assumed Liabilities in Section 2.6, *see* A97-98 (§§ 8.6, 9.3), only because they related to assets of Merck's consumer-care business that were ***outside*** of the sold companies, and thus would not have automatically transferred. The agreement excluded "any assets that are owned, leased or licensed by the Companies or any of their Subsidiaries" from the definition of "Transferred Consumer Assets," A39 (§ 2.3); for those assets it was "acknowledged and agreed that Buyer shall obtain indirect ownership of such

assets by virtue of its purchase of the Company Common Stock," *id.* The agreement excluded the Companies' and their Subsidiaries' liabilities from the definition of "Assumed Liabilities" in the form agreement for the same reason. A44 (§ 2.6). The court's subjective "expect[ation]" that the parties would have entered some assumption agreement if they intended the Section 2.7(d) Liabilities to transfer as part of the sale, Op.28, is both irrelevant and unfounded.[3]

The court may have expected different language based on Bayer's insistence that "producers of talcum products potentially face ***billions*** of dollars of liability." Op.1 (emphasis added); *see* A335-336; A342; A345; A351-352 (emphasizing extent of liability). At argument, Bayer's counsel urged that a seven-year sunset would not make sense for the Product Claims because "the latency period between alleged exposure to asbestos in Merck's foot powder products and the development of disease is typically 20 to 50 years." A325.

Those arguments ignore the law and disregard the facts. The law is clear: Where the text is unambiguous, "extrinsic evidence may not be used to interpret the intent of the parties [or] vary the terms of the contract." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

[3] For the same reason, the court erred in giving weight to the fact that the Section 2.7(d) Liabilities are not referenced in Section 2.8, the SAPA's consideration provision. Op. 32-33. Section 2.8 references the companies' stock, A45 (§ 2.8(a)), and the Section 2.7(d) Liabilities transferred with that stock.

Here, moreover, supposed evidence regarding the scope of potential talc liability sheds no "light on the expectations of the parties at the time they entered into the agreement." *Eagle Indus.*, 702 A.2d at 1233. Nothing in the record suggests that, at the time of the 2014 transaction, Merck and Bayer expected substantial product liability relating to Dr. Scholl's or Lotrimin foot powders. Merck raised no product liability issues, much less talc specifically, in connection with the sale. *See* Merck & Co., Inc., Annual Report (Form 10-K) (Feb. 27, 2015). Nor did Bayer. *See* Bayer AG, 2014 Annual Report 261, 322-23 (2014). Industry generally was not focused on it: J&J, now at the epicenter of talc liability, did not mention such liability in its SEC filings until years after the sale. *See* p.11 & n.1, *supra.* And the only potential asbestos-related claims identified in the SAPA related to Premises Claims, not Product Claims. A137.

4. *Merck's Construction Is Sound, Not "Commercially Unreasonable"*

Ultimately, the Court of Chancery saw Merck's interpretation of the Sunset Provision as "commercially unreasonable." Op.26. But a construction is commercially unreasonable as a matter of law only if it "produces an absurd result" or one "that no reasonable person would have accepted when entering the contract." *Manti*, 261 A.3d at 1208. That standard is not remotely met here.

a. The court deemed "Merck's interpretation" commercially unreasonable because it "would result in a situation whereby Merck could shift all liability for the

products it sold prior to the Closing Date to Bayer." Op.27. But that is the effect of the default rule endorsed by Delaware courts. The "familiar default rule in stock sales" is that the buyer of a company, directly or indirectly, assumes all of its liabilities. *Viking Pump*, 2 A.3d at 99. It is perfectly "reasonable for a seller" parting with a business in its entirety to also "rid itself of the risk of these kinds of exposure" as well. Kling & Nugent, *supra*, § 15.02[1][f]. As explained above, the SAPA reflects a bargained-for compromise in which Merck retained responsibility for the Section 2.7(d) Liabilities for seven years despite the usual rule. *See* pp.27-28, *supra*. But there is nothing inherently "absurd" about time-limiting such a departure from the default rule—or with Bayer, as purchaser, becoming the direct or indirect owner of the liabilities after that time elapses. *Manti*, 261 A.3d at 1208. A plain-text reading of Section 10.1 is commercially unremarkable and consistent with a seller's need for finality. Kling & Nugent, *supra*, § 15.02[1][f].

b. Nor does it matter that the scope of Bayer's residual liability in connection with the Section 2.7(d) Liabilities may be greater than the parties anticipated when negotiating the SAPA. It "is not the court's role to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness." *Akorn,* 2018 WL 4719347, at *60-61; *see Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

c. The court's view that "[n]othing in the SAPA indicates that the parties intended Bayer to assume liability" for Merck's pre-closing conduct, Op. 27-28, is also incorrect. For example, the term "Assumed Liabilities" expressly includes liabilities "relating to periods prior to, on, or after the Closing." A44 (§ 2.6); *see also* A213. With respect to the Section 2.7(d) Liabilities specifically, Bayer accepted some liability immediately: It agreed to a per-claim threshold of $250,000 in Losses and a deductible of $25 million in Losses it had to incur before it could seek indemnification. A100 (§ 10.2(c)). Bayer also agreed to an absolute cap on Merck's indemnification obligation for Section 2.7(d) Liabilities. *Id*. There were ample indicia of Bayer's willingness to share risk with respect to Merck's pre-closing conduct, even apart from the Sunset Provision.

d. Finally, the court expressed concern that applying the Sunset Provision to all liability would encourage Merck "to stretch out or stall litigation of the Product Claims with the goal of shifting ultimate liability to Bayer." Op.27. Section 10.1 prevents that. For any claim for indemnification before the Sunset Date, Merck's "liability and indemnification obligations" with respect to the Section 2.7(d) Liabilities do ***not*** sunset. A98 (§ 10.1). Thus, Section 10.1 prohibits Merck from transferring any cases Bayer validly tendered before the Sunset Date back to Bayer, as Merck repeatedly emphasized below. A263; A265; A269; A271; A278. Bayer thus

had no need to exercise "influence" over those cases, because there was no risk that Merck would "dump" them on Bayer after the Sunset Date. Op.26-28.

5. *The Court Misapplied Delaware Law Concerning Course-of-Performance Evidence*

Consistent with the SAPA's terms, the parties cooperated—from January to September 2021—in transferring responsibility for Product Claims as the Sunset Date approached. At no point did Bayer disagree with Merck's repeated explanation that Merck's liability for the talc cases would sunset on October 21, 2021. *See* A158-162; pp.11-12, *supra*. That course of dealing cannot introduce ambiguity where none otherwise exists. In this case, it confirms what the SAPA itself says.

The Court of Chancery ruled that, even if the SAPA were ambiguous, the court would not consider the parties' post-closing course of performance because it "occurred six years after" the SAPA was negotiated. Op.24-26. The court took the erroneous position that only evidence "regarding the negotiation and drafting of the SAPA" is relevant. Op.25. Course-of-performance evidence, however, is highly relevant when construing ambiguous contracts. Because "the parties to an agreement know best what they meant," their "action under it is often the strongest evidence of their meaning." *Trexler v. Billingsley*, 2017 WL 2665059, at *4 n.23 (Del. June 21, 2017) (quoting Restatement (Second) of Contracts § 202 cmt. g); *see, e.g.*, *In re Viking Pump, Inc.*, 148 A.3d 633, 648-49 (Del. 2016) (court "properly" considered the parties' "course of performance following the closing of Viking

Stock Agreement"); *see also Sun-Times Media Grp. v. Black*, 954 A.2d 380, 398 (Del. Ch. 2008). Accordingly, if this Court finds the SAPA ambiguous, Merck's post-closing course-of-conduct evidence should be considered in any remand proceedings.

III. THE COURT OF CHANCERY'S REMAINING RULINGS ARE NOW MOOT

The Court of Chancery also rejected Merck's claims for reimbursement of costs it advanced Bayer in litigating Section 2.7(d) Liabilities, Op.33-35, and for Bayer's breach of contractual cooperation obligations, Op.35-36. Insofar as the court relied on the above reasoning, it erred with respect to those claims as well. In the interest of judicial economy, however, Merck has determined not to proceed with those claims, and any dispute about them is moot as a result.

CONCLUSION

This Court should reverse the Court of Chancery's decision granting Bayer's motion to dismiss.

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Respectfully submitted,

/s/ *James D. Taylor, Jr.*
James D. Taylor, Jr. (#4009)
SAUL EWING LLP
1201 N. Market Street #2300
Wilmington, DE 19801
(302) 421-6800

David E. Ross (#5228)
ROSS ARONSTAM & MORITZ LLP
1313 N. Market Street #1001
Wilmington, DE 19801
(302) 576-1600

OF COUNSEL:

Jeffrey A. Lamken
Michael G. Pattillo Jr.
Robert Y. Chen
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000

Joshua D. Bloom
MOLOLAMKEN LLP
430 Park Avenue
New York, NY 10022
(212) 607-8156

Amy S. Kline
SAUL EWING LLP
1500 Market Street
Centre Square West, 38th Floor
Philadelphia, PA 19102
(215) 972-8567

Joseph D. Lipchitz
SAUL EWING LLP
131 Dartmouth Street
Suite 501
Boston, MA 02116
(617) 912-0916

Attorneys for Plaintiff Below, Appellant Merck & Co., Inc.

CERTIFICATE OF SERVICE

I, James D. Taylor, Jr., hereby certify that on June 16, 2023, I caused a true and correct copy of *Appellant's Opening Brief* to be served through File & Serve*Xpress* on the following counsel of record:

Rudolf Koch, Esquire
Kyle H. Lachmund, Esquire
Kevin M. Kidwell, Esquire
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, Delaware 19801

/s/ James D. Taylor, Jr.
James D. Taylor, Jr. (#4009)