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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ITG BRANDS, LLC, Plaintiff and Counterclaim-Defendant Below/Appellant, v. REYNOLDS AMERICAN INC. and R.J. REYNOLDS TOBACCO COMPANY, Defendants and Counterclaim-Plaintiffs Below/Appellees.	No. 204,2025 Court Below: Court of Chancery of the State of Delaware C.A. No. 2017-0129-LWW

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NATURE OF PROCEEDINGS

This case involves a contract dispute between two sophisticated companies: ITG Brands, LLC (ITG) and Reynolds American Inc., together with its wholly-owned affiliate R.J. Reynolds Tobacco Company (collectively, Reynolds). In 2014, ITG and Reynolds entered into an Asset Purchase Agreement (APA) in which ITG agreed to purchase four tobacco brands from Reynolds for about $7.1 billion. As part of that purchase, ITG acquired a particularized list of assets and assumed a particularized list of liabilities, including those pertaining to certain state tobacco settlements. The trial court held that Reynolds was entitled to indemnification from ITG for a state settlement liability that ITG never agreed to assume. In doing so, the trial court misinterpreted the APA's assumption-of-liability provisions, impermissibly rendered portions of the APA meaningless, and, on top of that, held that the agreement *unambiguously* called for this result—even though the trial court in an earlier ruling and the Florida courts in a predecessor case considering the same contract reached conflicting interpretations from the trial court below. The trial court then compounded those errors, granting Reynolds a windfall in calculating damages for ITG's supposed breach by failing to account for Reynolds' savings from the relevant settlement formula. The trial court's decision should be reversed.

In the 1990s, numerous States sued Reynolds and other major U.S. cigarette manufacturers (but not ITG) to recover healthcare costs of treating patients with

smoking-related illnesses. To settle that litigation, Reynolds entered into the Florida Settlement Agreement (FSA), in which Reynolds agreed to pay Florida an annual sum in perpetuity, based on its U.S. cigarette sales each year. Reynolds also entered into separate settlement agreements with three other states, as well as a Master Settlement Agreement (MSA) with the remaining 46 states.

Nearly two decades later—when Reynolds was forced to divest four tobacco brands to close its $27.4 billion merger with another tobacco company—Reynolds and ITG entered into the APA to effectuate ITG's purchase of those brands. At the time, Reynolds was, of course, well aware of its annual obligations under the FSA and other state settlements, as well as the different ways those settlements treated transferred brands. In particular, the MSA specifically precluded parties to the settlement from transferring their brands unless the acquiror agreed to assume liability under the settlement, while the FSA included no such provision.

Reynolds and ITG negotiated specific APA provisions to address state settlement liabilities, which reflected these differences between the MSA and the FSA. In Section 2.01(c)(vii) of the APA, ITG agreed to assume, "subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands." A253. The Agreed Assumption Terms then set forth the circumstances under which such assumptions would occur. For the MSA, the Agreed Assumption Terms unequivocally provide that ITG "shall

assume" Reynolds' obligations. A378. For the FSA and the three other separate settlements, by contrast, the Agreed Assumption Terms provide that ITG, "with the assistance and cooperation" of Reynolds, "shall use its reasonable best efforts to reach agreements with each" State, by which ITG would assume Reynolds' obligations under that State's settlement agreement. *Id.* Put differently, ITG agreed to assume all liabilities under the separate settlements to the extent that, through its reasonable best efforts, it could reach agreements with the States—none of which had an obligation to reach agreement with ITG, or even to negotiate in good faith.

After ITG purchased the acquired brands, ITG assumed Reynolds' liabilities for those brands under the MSA and three of the four separate settlements where ITG was able to negotiate agreements with the States. But despite extensive negotiations, ITG was unable to reach agreement with Florida to assume Reynolds' obligations under the FSA. Even though ITG had not promised to unconditionally assume those obligations, as it had with respect to the MSA, Reynolds stopped making annual payments to Florida for the acquired brands.

Florida thus initiated litigation against both Reynolds and ITG. In response, Reynolds argued that neither it nor ITG was required to make payments under the FSA for the acquired brands, emphasizing that ITG had agreed only to use reasonable best efforts to reach agreement with Florida. The Florida trial court agreed that because ITG had not reached agreement with Florida to assume FSA

obligations, and had not otherwise assumed FSA liabilities under the APA, ITG was not required to make payments under the FSA. It further concluded that, under the FSA and Florida law, Reynolds was still required to make annual payments to Florida for the acquired brands. That decision was affirmed on appeal.

While the Florida litigation was ongoing, ITG brought this action in the Court of Chancery seeking a declaration that it had satisfied its reasonable best efforts obligation under the APA and owed no other obligation to Reynolds with respect to the FSA. After the Florida judgment was entered, Reynolds, having lost its gambit to avoid payment in Florida, asserted that ITG was now required to *indemnify* it for the Florida judgment because ITG unequivocally assumed Reynolds' FSA liabilities under several APA provisions. This claim is thus essentially a collateral attack on the Florida court's ruling that ITG did *not* assume FSA liabilities under the APA for the acquired brands. The Court of Chancery nevertheless sided with Reynolds—rejecting the Florida court's conclusion that the APA did not automatically transfer FSA liabilities to ITG, and instead holding that the APA *unambiguously* did so.

Rather than follow the parties' intent as reflected in Section 2.01(c)(vii) and the Agreed Assumption Terms, the trial court granted summary judgment to Reynolds based on a separate assumption-of-liability provision—Section 2.01(c)(iv)—which makes no mention of the state settlements. In doing so, the trial court improperly disregarded Section 2.01(c)(vii), a specific provision on the state

settlements, in favor of a more general provision, and misconstrued the text and structure of Section 2.01(c)(iv), reading it so expansively as to render Section 2.01(c)(vii), the Agreed Assumption Terms, and the corresponding indemnification provision superfluous. The trial court's interpretation of the APA—and especially its conclusion that the APA *unambiguously* provides for this result—does not withstand scrutiny. Indeed, the court's interpretation stands in stark contrast to the interpretation that Reynolds itself argued for—and the Florida courts accepted—in the Florida litigation, as well as the trial court's own prior ruling in this case finding the APA's assumption-of-liability provisions ambiguous.

The trial court separately erred in calculating Reynolds' losses. The court required ITG to pay Reynolds for certain components of the settlement payments due under the Florida judgment. Yet the trial court failed to account for undisputed *savings* that Reynolds enjoyed (and will continue to enjoy even under the trial court's ruling) as a result of the formula used to calculate the settlement payments, under which Reynolds actually paid *less* for other components of the payments—for all of its brands—than it would have absent the Florida judgment. The trial court thus granted Reynolds an impermissible windfall, awarding more than its actual "Losses" from the Florida judgment. *See* A316 (§ 11.02(a)(vi)).

This Court should give effect to the agreement the parties struck. When the APA was negotiated, Reynolds was well aware of its obligations under the state

settlements. Yet it negotiated a provision that required ITG only to use its "reasonable best efforts" to assume Reynolds' liability under the FSA, rather than to assume that liability unconditionally. Reynolds knew the difference. Indeed, it negotiated a provision that required unconditional assumption of its obligations under the MSA. Moreover, Reynolds knew that the FSA, unlike the MSA, did not provide a mechanism by which ITG could unilaterally join that settlement. Yet Reynolds nevertheless agreed to make ITG's assumption of its FSA liabilities contingent on ITG reaching an agreement with Florida. The plain text of the APA thus shows that Reynolds assumed the risk that ITG and Florida would not reach the requisite agreement. And that is unsurprising: Reynolds secured ITG's commitment to try to join the FSA and was highly motivated to sign the APA to secure regulatory approval of its $27.4 billion merger agreement, a much larger and more significant transaction than the divestiture of the acquired brands to ITG.

This Court should hold Reynolds to the bargain it struck.

SUMMARY OF ARGUMENT

The trial court fundamentally rewrote the agreement that the parties reached in the APA by declaring that ITG unambiguously assumed liability under the FSA for the acquired brands. That ruling conflicts with the Florida courts' reading of the same contract provisions, contravenes numerous principles of contract interpretation, and should be reversed by this Court.

1. The text and structure of the APA make clear that ITG is not required to indemnify Reynolds for the payments Reynolds owes to Florida under the FSA, whether embodied in the Florida judgment or elsewhere. Only one APA provision—Section 2.01(c)(vii)—expressly addresses allocation of liabilities under state settlements like the FSA. In that provision, ITG agreed to assume, "subject to the Agreed Assumption Terms, all Liabilities under the State Settlements." The Agreed Assumption Terms provide, in turn, that ITG "shall use its reasonable best efforts to reach agreements with" the States to assume liabilities under the state settlements, including the FSA. Under these Terms, Reynolds assumed the risk that, if ITG used its reasonable best efforts but was unable to reach agreement with a State to assume settlement liability, then ITG would not assume that liability.

Resisting this straightforward reading of the only contractual provision concerning liabilities under the state settlements, the trial court relied on Section 2.01(c)(iv), a more general provision that does not mention the state settlements, to

hold that ITG unambiguously assumed liability for the Florida judgment requiring Reynolds to make settlement payments under the FSA for the acquired brands. But Section 2.01(c)(iv) covers liabilities arising from "the use of the Transferred Assets." It does not reach liabilities arising from the state settlements, like the Florida judgment here. The trial court's contrary conclusion violated basic tenets of contract interpretation requiring specific language to control over the general, misinterpreted the text and structure of Section 2.01(c)(iv) and Section 2.01(c)(vii), and impermissibly rendered numerous contract provisions meaningless.

Reynolds should be held to the bargain it struck. Reynolds knew that the "reasonable best efforts" provision did not grant it the same guarantee that it negotiated for the MSA, but it nevertheless agreed to this more limited commitment. In doing so, it still received a meaningful commitment from ITG as to the separate state settlements (as underscored by the fact that ITG ultimately negotiated agreements with three other States as to the acquired brands, even though it was unable to do so with Florida) and was able to consummate its highly valuable merger by reaching an overall agreement with ITG. This Court should set aside the trial court's judgment and remand for resolution of the question whether ITG used its reasonable best efforts to reach agreement with Florida.

2. At minimum, the trial court erred in holding that Section 2.01(c)(iv) *unambiguously* favors Reynolds. The strong textual and structural indicators in

favor of ITG's interpretation render the APA's assumption-of-liability provisions at least ambiguous. Indeed, the Florida courts agreed with ITG's interpretation. In addition, in 2019, when Chancellor Bouchard was the trial judge, he found the APA ambiguous after examining Sections 2.01(c)(v) and (c)(vii), and instructed the parties to develop parol evidence. Yet in 2022, Vice Chancellor Will overruled Chancellor Bouchard and deemed the contract *un*ambiguous based on Section 2.01(c)(iv)—a more general provision than either of the more specific provisions the court previously viewed as ambiguous. In doing so, the court again violated basic principles of contract interpretation, as well as the law of the case doctrine requiring the court to adhere to its past rulings. This Court should, at the very least, reverse the trial court's ruling that the APA unambiguously compels Reynolds' reading and remand for consideration of the parties' parol evidence.

3. Finally, even if the trial court correctly construed the APA's liability provisions, it erred in awarding Reynolds a windfall by requiring ITG to pay Reynolds the costs Reynolds incurred under the Florida judgment, without accounting for the significant savings Reynolds enjoyed under that judgment. Under basic indemnification principles, an indemnitee must not reap a windfall. The trial court recognized the *undisputed* fact that Reynolds enjoyed savings of at least $112.8 million from 2015 through 2023 because of the Florida judgment's annual-payment formula. Yet the trial court inexplicably refused to account for those savings,

resulting in an undeniable windfall, which, if left uncorrected, will continue in perpetuity. This Court should vacate the damages award and remand for a determination of the extent of Reynolds' savings.

STATEMENT OF FACTS

A. Florida Settlement Agreement

In the 1990s, several States sued the four largest American cigarette manufacturers—Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company—claiming they misrepresented the addictiveness and dangers of smoking. *See, e.g.*, A445. The States sought to recover the costs they incurred from treating Medicaid recipients with smoking-related diseases. *See id.* In 1997 and 1998, the tobacco companies entered into a series of agreements with Florida, Minnesota, Mississippi, and Texas settling these actions. *See, e.g.*, A479. And the companies subsequently entered into a Master Settlement Agreement (MSA) with the remaining 46 states, the District of Columbia, and several territories.[1]

The Florida Settlement Agreement (FSA) is at the heart of this dispute. Reynolds entered into the FSA in 1997 and agreed to pay Florida an initial payment of $750 million and annual payments thereafter in perpetuity. A486-87. In exchange, Florida agreed to dismiss its claims and to release Reynolds from all such future claims. A489-90.

[1] MSA (Jan. 2019 printing), https://www.naag.org/wp-content/uploads/2020/09/2019-01-MSA-and-Exhibits-Final.pdf.

Calculation of annual payments under the FSA begins with a base amount due in the aggregate from the settling companies—including Reynolds—for the year. A487. That amount is adjusted upwards for inflation, and is then subject to a two-part adjustment based on volumes and profits. A570. The volume component of the adjustment decreases the total amount owed if, in that year, the settling companies' aggregate volume of domestic cigarette shipments is lower than it was in 1997. *Id*. The profit component then increases the total amount owed if the settling companies' aggregate net operating profits from domestic cigarette sales for that year are greater than their inflation-adjusted profits from 1997. *Id*. Together, the two components of the adjustment produce the total aggregate amount owed for a particular year.

Once that total aggregate amount is calculated, responsibility for the payments is allocated among the settling companies. First, the volume-adjusted base amount is allocated in proportion to the companies' relative market share of U.S. cigarette sales. A487. Second, if a profit adjustment must be paid to Florida in a particular year, the adjustment is allocated in proportion to the amount by which each company's profits for that year exceed its inflation-adjusted profits from 1996. *See* A1461-80. As a result, the higher a company's profits are for 1996, the smaller its potential share of any profit adjustment will be.

The state settlements handle the issue of tobacco brand transfers differently. The FSA does not contain a provision specifying what happens if a settling company

sells its tobacco brands to another company that is not party to the agreement. Nor does it contain a mechanism by which an acquiror of tobacco brands can unilaterally join the FSA. In contrast, the MSA contains an express provision governing transfer of tobacco brands. MSA § XVIII(c). That provision prevents settling companies from selling their tobacco brands unless the acquiror agrees to sign onto the MSA and assume the seller's obligations. *Id.*; *see also id.* § II(tt).

B. Asset Purchase Agreement

In 2014, Reynolds sought to acquire Lorillard, one of the few remaining competitors in the U.S. cigarette market. As a condition of approving this $27.4 billion acquisition, the Federal Trade Commission required Reynolds and Lorillard to divest four tobacco brands—Winston, Kool, Salem, and Maverick—to ITG.[2] Accordingly, on the same day that Reynolds signed its merger agreement with Lorillard, it entered into an Asset Purchase Agreement (APA) with ITG, selling the four brands to ITG for about $7.1 billion. A244, A256. Because Reynolds had to

[2] Press Release, Federal Trade Commission, *FTC Requires Reynolds and Lorillard to Divest Four Cigarette Brands as a Condition of $27.4 Billion Merger* (May 26, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-requires-reynolds-lorillard-divest-four-cigarette-brands-condition-274-billion-merger.

divest the four brands to secure regulatory approval of its merger, Reynolds had a strong incentive to reach an agreement with ITG.

The APA specified that "[s]ubject to the consummation of the Merger," ITG would purchase "certain of the assets," and assume "certain liabilities," of Reynolds and Lorillard "relating to the Acquired Tobacco Cigarette Brands" and to other "Transferred Assets." A244-45. The "Acquired Tobacco Cigarette Brands"—the relevant assets here—include the Winston, Salem, Kool, and Maverick brands. A329. The "Transferred Assets" include 18 categories of specific assets set forth in Section 2.01(a) of the APA, ranging from certain parcels of real property, to intellectual property licenses, to governmental permits. A246-50.

Following the list of Transferred Assets, the APA specifies lists of "Excluded Assets," "Assumed Liabilities," and "Excluded Liabilities." A250-54 (§§ 2.01(b)-(d)). The Assumed Liabilities, delineated in Section 2.01(c), include seven categories of specific liabilities of the sellers that ITG agreed to assume:

- Sections 2.01(c)(i) and (ii) cover "all Liabilities" arising under certain "Assumed Contracts" and "Assumed CBAs." A252.

- Section 2.01(c)(iii) covers "all Liabilities" "arising, directly or indirectly, out of the operation or the conduct of the blu Brand Business." *Id.*

- Section 2.01(c)(iv) covers "all Liabilities" "arising, directly or indirectly, out of the operation or conduct of the PR Business or the use of the Transferred Assets." *Id*.

- Section 2.01(c)(v) covers "all Liabilities," "other than Straddle Tobacco Action Liabilities," "arising out of or in connection with any Action" concerning "the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing, promotion, use or consumption of, or exposure to, tobacco products . . . related to one or more of the Acquired Tobacco Cigarette Brands." A252-53.

- Section 2.01(c)(vi) covers "any Liability arising out of, or related to, the Transferred Employees." A253.

- Finally, Section 2.01(c)(vii) covers, "subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands." *Id.*

The "State Settlements" referenced in Section 2.01(c)(vii) encompass the MSA and the settlements with Florida, Minnesota, Mississippi, and Texas. A344-45. ITG agreed to assume all liabilities under those settlements "subject to the Agreed Assumption Terms," which contain "the agreed treatment of the Acquired Tobacco Cigarette Brands from and after the Closing under the State Settlements as set out in Exhibit F" of the APA. A253, A330. The Agreed Assumption Terms were negotiated separately from the remainder of the APA by a specialized team of lawyers experienced in the complexities and payment calculations of the state settlements. *See, e.g.*, A1160 (18:8-19:3), A1170 (57:18-58:4).

The Agreed Assumption Terms provide that for the MSA, ITG "shall assume, as of the Closing," Reynolds' "obligations . . . with respect to all of the Acquired Tobacco Cigarette Brands." A378 (§ 2.1). By contrast, for the four separate settlements, the Terms specify that ITG "shall use its reasonable best efforts to reach

agreements with" each State, by which ITG "will assume, as of the Closing, the obligations of a Settling Defendant" under those agreements "with respect to the Acquired Tobacco Cigarette Brands." *Id.* (§ 2.2). The APA further provides that the parties shall take all steps necessary to "obtaining the agreement as necessary of the States . . . to the Agreed Assumption Terms." A302 (§ 6.19).

Upon the APA's closing on June 12, 2015, ITG assumed obligations under the MSA with respect to the acquired brands, as required by the Agreed Assumption Terms. A877. After successful negotiations between ITG, Reynolds, and Mississippi, ITG also joined the settlement agreement with Mississippi and assumed the relevant obligations under that agreement. A576. In Minnesota and Texas, ITG was unable to join the States' settlements at the closing of the APA, but it began making payments with respect to the acquired brands under those States' statutes imposing fees on sales of non-settlement cigarettes. A212-13, A221, A959 (citing Minn. Stat. § 297F.24), A979 (citing Tex. Health & Safety Code § 161.601, *et seq.*). In 2021, following litigation, ITG reached agreements with Minnesota and Texas and joined those States' settlements. A956, A977.

As for Florida, ITG informed the State of its intended purchase of the acquired brands on the day the parties signed the APA, but Florida ignored that communication for months. A1201-02. ITG later provided Florida a draft assumption agreement and made clear that it was willing to assume FSA obligations

immediately or to negotiate. A1055 (210:3-213:18). Florida did not provide comments on the draft. Just before the acquired brands were transferred under the APA, ITG wrote to the Florida Attorney General, reiterating that ITG remained willing to join the FSA. A1224. Yet Florida remained silent until December 2015, when it finally provided revisions to ITG's proposed assumption agreement. A914-15. Florida, ITG, and Reynolds then exchanged multiple drafts until, suddenly, Florida broke off all negotiations without providing any reason, after receiving a call from Philip Morris. *Id.*; A743. ITG was thus unable to join the FSA. And unlike Minnesota and Texas, Florida lacked a fee statute requiring ITG to make payments for the acquired brands. So ITG made no payments to Florida after the closing of the APA.

C. Florida Litigation

Even though ITG had not joined the FSA, Reynolds ceased making settlement payments to Florida for the acquired brands after the APA's closing.

In January 2017, Florida and Philip Morris sued Reynolds and ITG to recover payments owed to Florida under the FSA for the acquired brands. *See* A587, A611. The question before the Florida trial court was "whether Reynolds, [ITG], either or both is-or-are obligated to make payments to Florida for" the acquired brands. A1585. Reynolds argued that it had no obligation to pay under the FSA and that ITG had likewise agreed in the APA only to "use its reasonable best efforts to join

the [FSA]." A906-07, A928. Reynolds explained that, while it intended for ITG to make future FSA payments for the acquired brands, "the *only way* that could happen in Florida was for the State and ITG to work together so that ITG could become a party to the [FSA]"—something that never occurred. A928 (emphasis added).

After analyzing the text of the FSA and APA, the court agreed with Reynolds and ITG that "the terms of the [APA] make it crystal clear that [ITG] has not expressly or impliedly assumed the liabilities under the Florida Agreement. Instead, it has expressly assumed the duty to employ 'reasonable best efforts' to enter into an agreement with Florida to assume the liabilities imposed by the Florida Agreement." A1593. The court held, however, that "Reynolds is still obligated to make the payments pursuant to the Florida Agreement" for the acquired brands. A1597.

The Florida trial court thus ruled that "unless and until ITG becomes a Settling Defendant," Reynolds must continue making settlement payments to Florida for the acquired brands, and those payments "must be calculated as if the transaction with ITG Brands had not occurred." A1601-02. In other words, sales, shipments, and profits related to the acquired brands must be attributed to Reynolds in calculating all components of the annual payments due to Florida, and "[n]o separate calculation is to be performed for ITG." A1602.

It is undisputed that because the acquired brands' net operating profits from 1996 continue to be assigned to Reynolds under the Florida judgment, any increase

in its net operating profits each year is lower (or zero), and it therefore pays a smaller portion of the profit adjustment than it would if the acquired brands were not assigned to it. *See* Ex. B at 22-23. As a result, although Reynolds remains liable under the FSA for the acquired brands, Reynolds enjoys substantial savings on the profit adjustment component of the settlement formula under the Florida judgment.

The Florida appellate court affirmed, noting that its decision was consistent with those reached by courts in Texas and Minnesota interpreting those States' settlement agreements and the APA. *R.J. Reynolds Tobacco Co. v. Florida*, 301 So. 3d 269, 275-76 (Ct. App. Fla. 4th Dist. 2020). In Minnesota, a state trial court had similarly held that ITG's liability for the acquired brands under Minnesota's settlement agreement depended on whether ITG had "expended its reasonable best efforts at joining the Minnesota Settlement Agreement as a matter of law." A1576. And in Texas, a federal district court likewise held that Reynolds remained liable for the acquired brands under Texas's settlement agreement, and that ITG's liability depended on "construction of 'reasonable best efforts,' [which was] presently before the Delaware Chancery Court." *Texas v. American Tobacco Co.*, 441 F. Supp. 3d 397, 459 (E.D. Tex. 2020).

The Florida Supreme Court denied review. *R.J. Reynolds Tobacco Co. v. Florida*, No. SC20-1506, 2020 WL 7419535, at *1 (Fla. Dec. 18, 2020).

D. This Litigation

ITG filed this action shortly after the Florida litigation began in 2017 to ensure that Delaware courts would resolve the parties' claims under the APA, in accordance with the APA's forum-selection clause. *See* A325 (§ 12.12); A228-29. ITG sought a declaratory judgment that it had satisfied its "reasonable best efforts" obligation to reach agreement with Florida concerning the FSA, and that it had no other obligations related to the FSA. A229-33. Reynolds counterclaimed, seeking a declaratory judgment that ITG had breached this obligation and that ITG was responsible for any post-closing FSA payments. A704-13.

Both ITG and Reynolds moved for partial judgment on the pleadings in 2019. The trial court, in an opinion by Chancellor Bouchard, denied judgment on the pleadings. The court concluded that while Reynolds had "articulated a reasonable interpretation" of Section 2.01(c)(v)—which covers certain "Actions" related to sales and consumption of tobacco products—as requiring ITG to "indemnify Reynolds for the amount of the Florida Judgment," Section 2.01(c)(vii) was "more specific than Section 2.01(c)(v)" and directly addressed the state settlements. Ex. H at 16, 22. The court explained that "subsection (vii) is expressly made 'subject' to the Agreed Assumption Terms, Section 2.2 of which provides that ITG Brands 'shall use its reasonable best efforts' to assume Reynolds' obligations" under the FSA. *Id.* at 19.

It thus found that there was "potential for conflict" between Sections 2.01(c)(v) and (c)(vii), because, as Reynolds conceded at oral argument, subsection (vii) allowed the possibility that ITG "ultimately may not assume Reynolds' obligations under the [FSA]" if it "failed to join that agreement after using its 'reasonable best efforts' to do so." *Id.* at 19-20 & n.63. Although the court accepted that under Delaware law, "'the specific provision ordinarily qualifies the meaning of the general one' in situations 'where specific and general provisions conflict,'" *id.* at 18 (citation omitted), it held that Section 2.01(c) was ambiguous, and "judgment on the pleadings [was] not appropriate." *Id.* at 23. The court explained that it would need to "examine" parol evidence "before determining which of the parties' competing interpretations represents their shared intent." *Id.*

Following the trial court's 2019 decision, ITG and Reynolds engaged in extensive discovery on parol evidence. Both parties then moved for summary judgment, briefing at length the APA's drafting history and other extrinsic evidence. A761-75, A830-48.

In September 2022, newly appointed Vice Chancellor Will granted summary judgment to Reynolds. Rather than review the parties' parol evidence, the court held that ITG *un*ambiguously "assumed the Florida Judgment Liability under § 2.01(c)(iv) regardless of whether it used reasonable best efforts to join the [FSA]." Ex. E at 22. The court reasoned that "the Florida Judgment Liability 'aris[es],' at

least 'indirectly,' from 'the use of the Transferred Assets'" because it requires Reynolds to make "settlement payments 'for the sales of cigarettes under the [Acquired Brands] it transferred to ITG,'" and "ITG sells Acquired Brands cigarettes by using the[] Transferred Assets." *Id.* at 33 (alterations in original) (citation omitted).

The trial court concluded that its reading of Section 2.01(c)(iv) was permissible, even though Section 2.01(c)(vii) was a "more specific" provision, because the two provisions did not conflict. *Id.* at 41. The court reasoned that the main clause of Section 2.01(c)(vii)—stating that ITG assumed "all Liabilities under the State Settlements"—was consistent with its view that ITG assumed liability for the Florida judgment under Section 2.01(c)(iv). *Id.* at 36. The court determined that the phrase "'subject to the Agreed Assumption Terms,'" did not "'nullify the operative language in the main clause'" because it addressed an "entirely different issue[]." *Id.* at 38-39. The court did not explain, however, in what sense the main clause was "subject to" the Agreed Assumption Terms if those Terms had no impact on that clause. Finally, the trial court further explained that its interpretation was necessary to avoid an "unreasonable outcome"—namely, that Reynolds would "make annual payments to Florida in connection with" ITG's sales. *Id.* at 46.

The parties then filed cross-motions for summary judgment on remedies. In resolving those motions, the trial court first reiterated that its holding that ITG had

assumed Reynolds' liabilities "avoided" an "absurd result where ITG would own and profit from the brands while Reynolds" made FSA payments based on those brands. Ex. D at 1-2. As to damages, it considered ITG's argument that "Reynolds' damages must be reduced because of [the] favorable Profit Adjustment allocation" but deferred ruling on that issue until after trial "given the factual disputes" involved in its resolution. *Id.* at 42-44.

In March 2025, after a two-day trial, the court determined that the issue it had previously reserved for factual development—whether Reynolds' damages "should be reduced by the amount Reynolds saved due to ITG's non-joinder to the [FSA]"—was "ultimately irrelevant" as a matter of law. Ex. B at 1-2. The court agreed that "ITG's non-joinder to the [FSA] has meant that Reynolds pays comparatively less to Florida than if ITG had joined." *Id.* at 15. Reynolds, too, "acknowledge[d] that it has enjoyed savings," stipulating to "savings" of at least "$112,818,991.76 from 2015 through 2023." *Id.* at 23-24. These savings result from inclusion of the acquired brands' 1996 profits in the profit adjustment component of Reynolds' FSA payments, which ultimately means Reynolds "pays a smaller proportion of the Profit Adjustment." *Id.* at 22.

The court held however, that even though ITG's arguments complied with "settled notions of expectation damages," *id.* at 26, Reynolds' savings were legally irrelevant. In its view, the savings did not flow from the relevant breach, because

they were tied to what Reynolds would have received had ITG joined the FSA, but "ITG breached the APA by failing to assume the Florida Judgment Liability as an Assumed Liability," not by failing to join the FSA. *Id.* at 25. The court did not address the fact that the Florida judgment itself enshrined those savings by adopting the FSA's payment formula and specifically providing that all aspects of the acquired brands would be attributed to Reynolds, including for purposes of allocating the profit adjustment. The court thus entered judgment for Reynolds without accounting for its savings of at least $112 million.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT ITG ASSUMED LIABILITY FOR FLORIDA SETTLEMENT PAYMENTS UNDER THE ASSET PURCHASE AGREEMENT

A. Question Presented

Whether the trial court erred in holding that ITG assumed liability for FSA payments under Section 2.01(c)(iv) of the APA, when Section 2.01(c)(vii) specifically addresses all liabilities under the state settlements and requires only that ITG use its "reasonable best efforts" to assume those liabilities. *See* A753, A776.

B. Scope Of Review

This Court reviews "questions of contract interpretation *de novo*." *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits Of Argument

Delaware is a "contractarian" state. *Cantor Fitzgerald, L.P. v. Ainslie,* 312 A.3d 674, 685 (Del. 2024). Its courts accordingly "uphold[] the freedom of contract and enforce[] as a matter of *fundamental public policy* the voluntary agreements of sophisticated parties." *Id*. at 688-89 (alterations in original). In doing so, the courts follow Delaware law, which "adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014) (citation omitted). This Court likewise gives "'priority to the parties' intentions as

reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions." *Id*. at 368 (citation omitted). The trial court departed from those cardinal principles here and effectively rewrote the parties' agreement in holding that ITG unambiguously assumed Reynolds' FSA liabilities under Section 2.01(c)(iv).

1. Section 2.01(c)(vii) Exclusively Governs Whether ITG Assumed Liability For Florida Settlement Payments And Requires Only That ITG Use "Reasonable Best Efforts" To Do So

The plain text of the APA reflects the parties' intentions with respect to liabilities owed under the state settlements by including only one assumption-of-liability provision addressing those liabilities: Section 2.01(c)(vii).

Under that provision, ITG agreed to assume, "subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date." A253. Section 2.01(c)(vii) comprehensively covers "all," and not just some, liabilities under the state settlements. *Id*. And the covered "Liabilities" broadly include "liabilities, claims, demands, expenses, commitments, Losses, costs or obligations of every kind and description." A336. That includes Reynolds' obligations under the FSA as set out in the Florida judgment, which is a liability, cost, or obligation "under the State Settlements in respect of the Acquired Tobacco Cigarette Brands." A1590. Indeed, the Florida court expressly stated that it was

imposing no new liability, but merely holding that "Reynolds' liability for payments under the Florida Agreement continues." A1594; *see also* A1601 (specifying that liability is the same as that imposed "under the [FSA]" for the acquired brands).

ITG's agreement to assume the liabilities described in Section 2.01(c)(vii) was limited and conditional: It agreed to assume those liabilities only "subject to the Agreed Assumption Terms." For the FSA, those terms require only that ITG—"with the assistance and cooperation" of Reynolds—"use its *reasonable best efforts* to reach agreement[] with" Florida "by which [ITG] will assume, as of the Closing, the obligations of a Settling Defendant under the [FSA], with respect to the Acquired Tobacco Cigarette Brands." A378 (§ 2.2) (emphasis added). That stands in stark contrast to the MSA, for which the Agreed Assumption Terms unconditionally provide that ITG "*shall assume*, as of the Closing, the obligations of [Reynolds] with respect to all of the Acquired Tobacco Cigarette Brands." *Id.* (§ 2.1) (emphasis added). Accordingly, unlike for the MSA, for the FSA, the Terms do not obligate ITG to automatically assume liabilities; they obligate ITG to use its reasonable best efforts to reach an agreement with Florida.

The Agreed Assumption Terms therefore "sublimate"—or "'trump'"—Section 2.01(c)(vii)'s assumption of state settlement liabilities by setting forth conditions precedent to ITG's assumption of those liabilities. *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997). That use of "subject to" to

"impose a hierarchy among provisions" is common-place and consistent with the plain meaning of the term. *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 833 (Del. Ch. 2007); *Merriam Webster*, https://www.merriam-webster.com/dictionary/subject%20to (last visited June 23, 2025) (defining "subject to" as "affected by" or "dependent on"); *Black's Law Dictionary* (12th ed. 2024) (defining "subject" in context of "subject to" as "[d]ependent on or exposed to (some contingency)"); *Faustin v. Remy*, 388 So. 3d 49, 49 (Ct. App. Fla. 3d Dist. 2023) (explaining that "the phrase 'subject to' is very commonly used to signal subordination" and establish "the hierarchical effect of overlapping provisions").

Indeed, Reynolds *itself* advanced this reading of the provision in the Florida litigation, arguing that "the *only way*" ITG could make FSA payments "in Florida was for the State and ITG to work together so that ITG could become a party to the [FSA]." A928 (emphasis added). And multiple courts and judges, including Chancellor Bouchard in 2019, have read Section 2.01(c)(vii) in precisely this way too—to provide that ITG would "not assume Reynolds' obligations under the [FSA] . . . if ITG Brands failed to join that agreement after using its 'reasonable best efforts' to do so." Ex. H at 19-20; *see also* A1591 (describing this reading as "clear"); *American Tobacco Co.*, 441 F. Supp. 3d at 459 (determining whether ITG assumed liability under the state settlements required interpretation of the "reasonable best efforts" provision); A1575-77 (similar). That reading is the only one that makes

sense in the context of the APA, which specifies that the Agreed Assumption Terms reflect the parties' "agreed treatment of the Acquired Tobacco Cigarette Brands from and after the Closing under the State Settlements." A330; *see also* A905 (explaining that the "mechanism by which" ITG would make FSA payments was "set forth in the Agreed Assumption Terms").

Accordingly, under the APA's plain terms, the only pertinent question in this case is whether ITG used its reasonable best efforts to reach agreement with Florida to assume FSA obligations with respect to the acquired brands. If it did, then ITG owes no further obligation to Reynolds regarding the FSA, whether embodied in the Florida judgment or elsewhere. ITG *did* use its reasonable best efforts, but that question has yet to be resolved and will be addressed on remand.

2. The Trial Court Erred In Holding That ITG Assumed Liability For Florida Settlement Payments Under Section 2.01(c)(iv)

Rather than adopt this plain reading of the APA, the trial court held that ITG unambiguously assumed Reynolds' FSA obligations under Section 2.01(c)(iv), a provision that does not mention the state settlements at all. Under Section 2.01(c)(iv), ITG agreed to assume "all Liabilities . . . arising, directly or indirectly" from "use" of an enumerated list of "Transferred Assets." A252. Reading this text broadly, the trial court deemed Section 2.01(c)(iv) the "most encompassing provision" and interpreted it to reach liabilities associated with virtually every post-

closing aspect of ITG's operations—including Reynolds' liabilities under the FSA. Ex. E at 7.

That interpretation is wrong many times over. It flatly violates the specific-over-general canon by overriding Section 2.01(c)(vii)'s far more specific language directly addressing the state settlements. It affords Section 2.01(c)(iv) an unbounded interpretation inconsistent with its plain terms and the structure of Section 2.01(c). It produces impermissible superfluities. And, ultimately, it adopts an unsupported reading of the APA simply to save Reynolds from its own deal.

a. The Trial Court's Interpretation Violates The Specific-Over-General Canon And Misreads Section 2.01(c)(vii)

The trial court's holding that ITG assumed Reynolds' FSA liabilities by assuming liabilities arising out of "use" of certain enumerated "Transferred Assets" runs afoul of the well-settled rule that "[s]pecific language in a contract controls over general language." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005); *see also* 11 Williston on Contracts § 32:10 (4th ed. 2025, Westlaw) ("When general and specific clauses conflict, the specific clause governs the meaning of the contract."). As explained, only Section 2.01(c)(vii) specifically refers to the state settlements, and it encompasses "*all* Liabilities" under those settlements. *See supra* at 26. It is therefore "more specific" than the other assumption-of-liability provisions as to the state settlements, as both Chancellor Bouchard and Vice

Chancellor Will recognized. Ex. H at 22; Ex. E. at 41. And, because Sections 2.01(c)(iv) and (vii) conflict, Section 2.01(c)(vii)'s greater specificity should end the inquiry as to which provision governs ITG's assumption of FSA liabilities.

As the trial court explained in its 2019 decision, and "as Reynolds acknowledge[d]," ITG may *not* assume FSA liabilities under Section 2.01(c)(vii) if it is unable to reach agreement with Florida to do so after using its reasonable best efforts. Ex. H at 19. By contrast, under the trial court's reading of Section 2.01(c)(iv), ITG assumed FSA liabilities *regardless of* its efforts to reach agreement with Florida. Such an unconditional assumption clearly conflicts with Section 2.01(c)(vii)'s conditional language. *See DCV Holdings*, 889 A.2d at 960-62 (concluding that because a "more general provision" lacking a knowledge qualifier conflicted with "the more specific provisions that contained a knowledge qualifier," the more specific provisions governed to avoid "render[ing] that qualifier meaningless").

The trial court flouted basic principles of contract interpretation by holding that ITG nevertheless assumed FSA liabilities under a provision the trial court itself recognized was far more general. And the trial court's interpretation also conflicts with the plain text of Section 2.01(c)(vii), which is "subject to" only the Agreed Assumption Terms, not to Section 2.01(c)(iv). By making reference to only one other set of provisions in connection with (c)(vii), the text of the APA reflects the

parties' understanding that *only* the Agreed Assumption Terms and (c)(vii) addressed the state settlement liabilities. *Cf. Seidensticker v. Gasparilla Inn, Inc.*, No. 2555-C, 2007 WL 1930428, at *5 (Del. Ch. June 19, 2007) ("A court will not write conditions into the contract that are not present, especially where the language is clear and such terms easily could have been included."); *Gulf & S. Transp. Co. v. Jordan*, 257 F.2d 361, 363 (5th Cir. 1958) (the rule of "expressio unius est exclusio alterius" applies when a provision is "subject to" one thing but not another).

The trial court rested its departure from the specific-over-general canon and the natural reading of the APA on two grounds. Neither withstands scrutiny.

1. The trial court asserted that there was no conflict between its reading of Section 2.01(c)(iv) and Section 2.01(c)(vii) because ITG *also* assumed "all Liabilities under the State Settlements" under Section 2.01(c)(vii). Although that provision is preceded by the phrase "'subject to the Agreed Assumption Terms,'" the trial court concluded that phrase has no meaningful impact on the main clause of Section 2.01(c)(vii), rendering it superfluous. Ex. E at 8-9.

The trial court reached that conclusion—which is contrary to both Chancellor Bouchard's and the Florida, Texas, and Minnesota courts' reading of Section 2.01(c)(vii) to require only *reasonable best efforts* to assume state settlement liabilities—by invoking the "subordinating language canon." *Id.* at 38-39. It understood that canon to mean that the "subject to" clause has no effect unless the

main clause "'interferes with' the operation of the provision to which the subject-to phrase refers." *Id.* at 38. And, because in its view the "main clause" of Section 2.01(c)(vii) and the Agreed Assumption Terms "address entirely different issues," the court found that the main clause did not "interfere" with the Agreed Assumption Terms. That is incorrect for two reasons.

First, even accepting the trial court's flawed premise that the two clauses do not interfere with one another, the subordinating language canon does not provide license to wholly disregard the "subject to" clause. Rather, as the trial court made clear, "Delaware courts 'will not read a contract to render a provision or term 'meaningless or illusory.'" Ex. D at 33 (citation omitted); *see also NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (courts must strive to give "meaning and effect" to "each word" of an agreement). Here, Section 2.01(c)(vii) makes clear that ITG's assumption of state settlement liabilities is "subject to"—*i.e.*, "dependent on"—the Agreed Assumption Terms. *Supra* at 27-29. And, as the trial court's own cited source—Scalia and Garner—explains, in order to afford "subject to" full meaning, the clause it qualifies may be understood as becoming enforceable "[o]nly after" the "subject to" phrase is satisfied. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Text* 127 (2012) (quoting *Weinstock v. Holden*, 995 S.W.2d 411, 418 (Mo. 1999)); *see also Osborn ex rel. Osborn v. Kemp*, 991 A.2d

1153, 1159 (Del. 2010) (contracts should not be read to render provisions "meaningless or illusory"). Section 2.01(c)(vii) therefore means that ITG will assume FSA liabilities for the acquired brands *only after* the conditions of the Agreed Assumption Terms are satisfied.

Second, to the extent the clauses must "interfere" with one another in order for "subject to" to have meaning, that is plainly the case here. The "subject to" clause contemplates ITG's assumption of liabilities only if it succeeds in reaching agreement with Florida, while the main clause—read in isolation—contemplates ITG's assumption of those same liabilities on day one, *regardless of* whether ITG reaches such agreement. In those circumstances, the "'subject to'" clause "'trumps.'" *See Oglesby*, 695 A.2d at 1150.

The trial court asserted that the clauses were not "inconsistent" because Section 2.01(c)(vii) addresses the allocation of liabilities under the state settlements "as between ITG and Reynolds," while Section 2.2 of the Agreed Assumption Terms "concerns ITG taking on an obligation to a third party (e.g., Florida)." Ex. E at 39-40. The trial court further asserted that ITG's obligation "to endeavor to join the [FSA]" under the Agreed Assumption Terms was "a contractual obligation existing outside of the APA." *Id.* at 43.

The court was wrong on both counts. First, the Agreed Assumption Terms do not exist "outside" the APA. Rather, as Chancellor Bouchard explained, they are

"part of the APA." Ex. H at 6; *see also, e.g.*, Ex. J at 6-7 (same); A330 (defining the "Agreement" to include "the Exhibits"); A302 (§ 6.20). Second, both Section 2.01(c)(vii) and the Agreed Assumption Terms describe obligations that ITG *owes to Reynolds* under the APA with respect to the state settlements. The trial court's assertion that Section 2.2 of the Agreed Assumption Terms "does not mention Liabilities, much less a Liability of a Reynolds entity," Ex. E at 39-40, is incorrect: The provision expressly states that ITG must use reasonable best efforts to "assume, as of the Closing, *the obligations of a Settling Defendant*," *i.e.*, Reynolds, "under the [state settlements]." A378 (§ 2.2) (emphasis added); *see* A336 ("Liabilities" includes "obligations of every kind and description"); *see also Black's Law Dictionary*, *supra* (defining "liabilit[ies]" as a "financial or pecuniary *obligation* in a specified amount" (emphasis added)).

The trial court also attempted to distinguish "the 'obligations' imposed by the Agreed Assumption Terms" and "the 'Liabilities' allocated by the APA," reasoning that "ITG's obligations would presumably be different from Reynolds' . . . under whatever bespoke set of terms it negotiated with Florida." Ex. E at 39 n.176. But, again, the plain text of the Agreed Assumption Terms belies that. As Chancellor Bouchard explained, the Terms specifically state that ITG must assume obligations "*on the same basis as the Settling Defendant* prior to the Closing." A378 (§ 2.2) (emphasis added); Ex. H at 24-25. And Section 11.01(c)(v), the indemnification

provision specifying ITG's liability to Reynolds for breaching the Agreed Assumption Terms, further confirms that those terms describe obligations ITG owes *to Reynolds.*

The trial court's view that the Agreed Assumption Terms pertain only to "entirely different" transactions between ITG and third parties also makes no sense. If that were true, why would the parties have included those Terms in the APA at all? And why would they have mentioned them specifically in Section 2.01(c), discussing ITG's assumption of Reynolds' liabilities? The trial court failed to give effect to the parties' intent in adding the words "subject to the Agreed Assumption Terms" to Section 2.01(c)(vii), or to give those words any meaning in the context in which they appear, rendering them superfluous. *Osborn*, 991 A.2d at 1159 (contracts should not be read to render provisions "meaningless or illusory").

Nor does Section 5.5 of the Agreed Assumption Terms justify the court's interpretation. That provision broadly states that the entire "Exhibit" containing the Terms "is subject to and entered into in connection with execution of the APA . . ." A382. The court asserted that, under ITG's interpretation of "subject to," that phrase in "§ 5.5 would indicate that the APA trumps the Agreed Assumption Terms." Ex. E at 40. But Section 5.5's broad language, in the final provision of the Agreed Assumption Terms, simply clarifies that the Agreed Assumption Terms have no force independent of the APA—they are "subject to" and exist only "in connection

with execution of the APA." And that makes sense, because their sole purpose is to set forth terms governing treatment of, and joinder to, the state settlements for the brands transferred through the APA. By contrast, Section 2.01(c)(vii) makes a *specific* assumption-of-liability provision "subject to" the Agreed Assumption Terms, which then speak directly to that same liability. The trial court could not simply ignore that language to avoid the stark conflict its reading creates between Sections 2.01(c)(iv) and (c)(vii).

2. The trial court also asserted that even if Section 2.01(c)(vii) only requires ITG to use reasonable best efforts, that provision *still* would not conflict with Section 2.01(c)(iv), and the specific-over-general canon thus did not apply. But its only basis for that assertion was the same artificial distinction discussed above—that the Agreed Assumption Terms address a "contractual obligation existing outside of the APA" and related to ITG's relationship with Florida, whereas Section 2.01(c)(iv) allocates the FSA liabilities "as between ITG and Reynolds." Ex. E at 43. As discussed, that rationale overlooks the fact that Section 2.01(c)(vii), like Section 2.01(c)(iv), unquestionably allocates liabilities "as between ITG and Reynolds." Indeed, that is the sole purpose of Section 2.01(c). Recognizing this fatal flaw in its interpretation, the trial court adopted Reynolds' "'belt and suspenders'" theory, observing that there is nothing inherently inconsistent in making "something an Assumed Liability" under one provision but not another. *Id.*

at 43-44 (citation omitted). But that misses the point. The problem is that on the trial court's view, Section 2.01(c)(iv) makes Reynolds' FSA liabilities an Assumed Liability, whereas Section 2.01(c)(vii) and the Agreed Assumption Terms provide that Reynolds' FSA liabilities are *not* an Assumed Liability—"unless and until," in the words of the Florida court, ITG reaches agreement with Florida to assume them. A1601. On that reading, the provisions are inconsistent, and Section 2.01(c)(vii), the assumption-of-liability provision that expressly addresses the state settlements, must govern. *See DCV Holdings*, 889 A.2d at 960-62.

b. The Trial Court's Interpretation Conflicts With The Text And Structure Of Section 2.01(c)(iv)

Even setting aside Section 2.01(c)(vii), the trial court erred in holding that ITG assumed Reynolds' FSA liabilities under Section 2.01(c)(iv). Neither the text nor the structure of that provision supports the trial court's expansive interpretation.

Reynolds' liabilities under the state settlements are not "Liabilities . . . arising, directly or indirectly, out of . . . the use of the Transferred Assets." A252 (§ 2.01(c)(iv)). Section 2.01(a) defines "Transferred Assets" as 18 categories of specific assets that ITG purchased along with the "Acquired Tobacco Cigarette Brands," the "Lorillard Business," and the "PR Business." A246-50. The "Transferred Assets" include a variety of specific items, such as real properties, raw materials, rights under particular contracts, intellectual property, environmental permits, books and records, insurance benefits, employee benefit plans, and

software. *Id*. But liabilities under the state settlement agreements do not arise out of the use of any such assets; they arise out of the agreements themselves, which calculate payments based on *sales* of the *acquired brands*, not use of any particular Transferred Asset.

The trial court obfuscated this distinction, reasoning that "[t]he purpose of the APA was for ITG to acquire assets that would allow it to sell Acquired Brands cigarettes," and that ITG must use the Transferred Assets to sell those brands. Ex. E at 32. So on the trial court's view, "use of the Transferred Assets" indirectly leads to sales of cigarettes, which lead to liabilities under the FSA, thereby placing those liabilities within Section 2.01(c)(iv). That extended chain of logic reads the phrase "arising, directly or indirectly," far too broadly, allowing Section 2.01(c)(iv) to capture virtually all liabilities from ITG's operations, because all such liabilities "in a sense" arise from ITG's use of the assets it purchased. *Id.* at 34. As this Court has previously cautioned, "'arising'" should not be interpreted so broadly as to extend to "just about anything remotely connected" to the subject of the clause. *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 348 (Del. 2023).

Furthermore, the trial court's interpretation eviscerates the textual distinction the APA draws between "Transferred Assets" and the "Acquired Tobacco Cigarette Brands," as well as between general "operation" and "conduct" of a business and "use" specifically. *See* A252 (§ 2.01(c)(iv)) (referring broadly to "operation or

conduct of the PR Business" and then narrowly to "use of the Transferred Assets"). Indeed, the court effectively acknowledged it was conflating "'use of the Transferred Assets'" with "use of the Acquired Tobacco Cigarette Brands" when it wrote that Sections 2.01(c)(iv) and (c)(vii) "ensure [that] ITG (not Reynolds) is responsible for the use of the Acquired Brands post-Closing." Ex. E at 44. That reading ignores the plain terms of the contract.

The structure of Section 2.01(c) underscores that the trial court erred in its interpretation of Section 2.01(c)(iv). Nothing in Section 2.01(c)'s structure indicates that the parties intended Section 2.01(c)(iv)—situated fourth in a list of seven assumption-of-liability provisions—to serve as a catchall provision. *See Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 217 (2024) (A "catchall phrase" is one that is "tacked on at the end of a long and detailed list of specific directions."); *Texas Pac. Land Corp. v. Horizon Kinetics LLC*, 306 A.3d 530, 559 (Del. Ch. 2023) (viewing a contract provision enumerated at the end of a list as a catchall), *aff'd*, 314 A.3D 685 (Del. 2024). In fact, the trial court expressly *disclaimed* the notion that Section 2.01(c)(iv) was a "catch-all." Ex. E at 41-42 n.182. In nevertheless proceeding to read the provision in precisely that way—to sweep in all manner of liabilities associated with ITG's operations related to the acquired brands—the court erred. Just like the other assumption-of-liability provisions, the parties intended Section 2.01(c)(iv) to cover particular types of liabilities—those associated with use of

particular Transferred Assets. Even assuming some overlap between the assumption provisions, the trial court's interpretation, which subsumes virtually *all* liabilities under Section 2.01(c)(iv), disregards the structure of Section 2.01(c).

c. The Trial Court's Interpretation Produces Impermissible Superfluities

The trial court's interpretation of Section 2.01(c)(iv) is also untenable because it produces a host of impermissible superfluities. This Court has repeatedly cautioned that it "will not read a contract to render a provision or term 'meaningless or illusory.'" *Osborn*, 991 A.2d at 1159 (citation omitted). An "interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 891 n.45 (Del. 2015) (quoting Restatement (Second) of Contracts § 203 (1981)); *NAMA*, 948 A.2d at 419 ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.").

The trial court's broad interpretation of Section 2.01(c)(iv) renders numerous other provisions of the APA "of no effect." Start with Section 2.01(c)(vii), the Agreed Assumption Terms, and the corresponding indemnification provision in Section 11.02(a)(v). On the trial court's view, the inclusion of these provisions makes no difference: ITG would be liable for settlement payments to Florida under

Section 2.01(c)(iv), regardless of the more specific Section 2.01(c)(vii), and regardless of any efforts ITG does or does not undertake under the Agreed Assumption Terms to reach agreement with Florida. In other words, on the trial court's overbroad reading, there is no circumstance in which ITG would owe Reynolds indemnification under Section 2.01(c)(vii) for "Liabilities under the State Settlements" but *not* under Section 2.01(c)(iv), rendering the former meaningless.

The trial court's interpretation also renders other assumption-of-liability provisions illusory. For instance, a separate assumption-of-liability provision covers "the operation or the conduct of the blu Brand Business," A252 (§ 2.01(c)(i)-(iii)), but on the trial court's view, that provision is superfluous, because operation of the blu Brand Business necessarily requires, "in a sense," use of blu Brand intellectual property—a Transferred Asset. *See* Ex. E at 41. The fact that the trial court's expansive reading of Section 2.01(c)(iv) renders numerous contractual provisions "mere surplusage" confirms it is erroneous and should be set aside. *See Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 851 (Del. 1998) (declining to interpret contract in a way that would have rendered a word "mere surplusage").

d. The Trial Court's Reliance On "Absurd Results" Was Misplaced

The trial court repeatedly noted that its interpretation of the APA avoided an "absurd" result, Ex. D at 2, 31-32, or "unreasonable outcome," Ex. E at 46. In the court's view, a reasonable cigarette manufacturer would not have agreed to place

itself in a situation where it might continue making annual settlement payments for tobacco brands it no longer owns. *See* Ex. E at 46. But that logic improperly elevates the trial court's incomplete view of the equities over the text of the contract, while overlooking the circumstances here.

There is nothing "absurd" about what Reynolds agreed to. *See Osborn*, 991 A.2d at 1160 (an interpretation is "absurd" only if it produces a result "that no reasonable person would have accepted when entering the contract"). As noted, Reynolds was highly motivated to sign the APA in 2014 in conjunction with its merger agreement with Lorillard in order to obtain regulatory approval of that merger. *See supra* at 13-14. And, in the event that ITG was unable to join the FSA, Reynolds "would be placed in a better financial position" regardless, because it would at the very least enjoy a more favorable profit adjustment allocation—potentially saving it tens of millions of dollars a year. Ex. E at 45. Under those circumstances, it is not unreasonable that Reynolds—a sophisticated party represented by sophisticated lawyers—agreed to assume the risk that it may remain liable for some state settlement payments for brands it no longer owns.

Moreover, the record confirms that Reynolds knowingly assumed just that risk. The parties were well aware that, unlike the MSA, the FSA lacked any provision governing the transfer of tobacco brands. They could have insisted on a provision expressly stating that ITG would assume Reynolds' state settlement

payments *regardless of* whether ITG joined the state settlements or reached an agreement with the States. *See Nationwide Emerging Managers*, 112 A.3d at 897 (Courts "'should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it.'" (citation omitted)). Indeed, they did just that for the MSA, by including unequivocal language regarding the assumption of MSA liabilities.[3] Yet they agreed to nothing of the sort for the FSA. Instead, even though Reynolds was aware that ITG might *not* reach agreement with Florida, it agreed that ITG would assume liabilities *only if* it did reach such an agreement after using its reasonable best efforts. Reynolds thus "assumed the risk" of that event. *See Ainslie*, 312 A.3d at 677 (explaining that "parties have a right to enter into good and bad contracts; the law enforces both" (brackets and citation omitted)).

Reynolds cannot now ask this Court to reallocate the risk it accepted by shoehorning it into contractual provisions that plainly do not apply. The trial court's decision countenancing that request undermines the "freedom of contract" Delaware law so vigorously defends and would send the wrong message to parties considering whether to apply Delaware law. *ev3, Inc. v. Lesh*, 114 A.3d 527, 530 & n.3 (Del.

[3] Initially, Reynolds proposed similar language for the FSA and other separate settlement agreements, but it ultimately agreed that ITG was only required to use "reasonable best efforts" to reach agreement with those States because ITG could not guarantee that they would agree. *See* A1194.

2014), *as revised* (Apr. 30, 2015); *see also Libeau v. Fox*, 880 A.2d 1049, 1056-57 (Del. Ch. 2005) ("[T]he wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations."), *aff'd in relevant part*, 892 A.2d 1068 (Del. 2006).

II. THE TRIAL COURT ERRED IN HOLDING THAT THE ASSET PURCHASE AGREEMENT'S ASSUMPTION-OF-LIABILITY PROVISIONS UNAMBIGUOUSLY COMPEL THIS RESULT

A. Question Presented

Whether the trial court erred in concluding, contrary to its 2019 opinion, that ITG unambiguously assumed Reynolds' liabilities under the FSA when, at minimum, the APA's assumption of liability provisions are fairly susceptible of different interpretations. *See* A756-61, A1234-35, A1241.

B. Scope Of Review

This Court reviews "questions of contract interpretation *de novo*." *GMG Cap. Invs.*, 36 A.3d at 779.

C. Merits Of Argument

As explained above, the trial court's interpretation of the APA was contrary to the plain text and structure of the contract. But at minimum, its holding that ITG *unambiguously* assumed Reynolds' FSA liabilities was wrong and warrants a remand for consideration of the parties' parol evidence.

"'[C]ontracts are ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, No. 8980–VCG, 2013 WL 5787958, at *4 (Del. Ch. Oct. 25, 2013) (citation omitted). The features of the APA discussed above demonstrate that it is,

at least, reasonable to conclude that ITG agreed only to use its "reasonable best efforts" to join the separate state settlements—as Chancellor Bouchard initially concluded in this case and the Florida courts concluded in the predecessor action.

The trial court's contrary holding—that ITG *unambiguously* assumed Reynolds' FSA liabilities under Section 2.01(c)(iv), regardless of (c)(vii)—is untenable. Indeed, that holding contradicts a prior ruling in this case. In 2019, Chancellor Bouchard held that the APA was *ambiguous*, explaining that Section 2.01(c)(vii) is "more specific than Section 2.01(c)(v)," and that these provisions would "conflict" if ITG were "liable for the Florida Judgment . . . under subsection (v)," "but would not necessarily be liable for the Florida Judgment under subsection (vii)." Ex. H at 22-23. But then, in 2022, Vice Chancellor Will overruled Chancellor Bouchard and deemed the contract *un*ambiguous based on Section 2.01(c)(iv) and a conflicting reading of Section 2.01(c)(vii). This disagreement alone refutes the trial court's holding that the APA unambiguously requires ITG to indemnify Reynolds for the Florida judgment.

In fact, the trial court erred in revisiting the ambiguity question at all in 2022, after Chancellor Bouchard had already held that Section 2.01(c) was ambiguous and parol evidence was required to determine its application. This Court takes "a dim view of a successor judge in a single case overruling a decision of his predecessor," including because such changes risk disadvantaging parties who have relied on the

court's prior decisions. *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718-19 (Del. 1983); *see also Sciabacucchi v. Malone*, No. 11418-VCG, 2021 WL 3662394, at *4 (Del. Ch. Aug. 18, 2021) (explaining that law of the case may be disregarded only for "clear error, injustice, or a change in circumstances"). That is precisely what happened here—the parties developed extensive parol evidence for multiple years, and ITG focused its briefing and argument at summary judgment on that evidence, in reliance on Chancellor Bouchard's 2019 ruling. The trial court's sudden departure from that ruling, and its contradictory interpretation of Section 2.01(c)(vii), not only disadvantaged ITG but also produced a flawed result. The trial court thus erred twice over in holding that the APA unambiguously favored Reynolds.

Moreover, the trial court's reading of the APA flatly conflicts with that of the Florida, Texas, and Minnesota courts—underscoring that the contract, at the very least, does not *unambiguously* compel the trial court's reading. As the Florida court explained, for example, "[t]he plain language of [Section 2.01(c)(vii)] ma[de] clear that ITG did not agree to assume" FSA liabilities, and instead "agreed only to use its 'reasonable best efforts' to try to reach an agreement with Florida to become a party to the FSA." *R.J. Reynolds*, 301 So. 3d at 277; *see also* A1576 (Minnesota decision); *American Tobacco Co.*, 441 F. Supp. 3d at 459.

At a minimum, the fact that the trial court's conclusion directly contradicted those of multiple other judges interpreting the APA confirms that the APA does not

unambiguously favor Reynolds. *Cf. Petersen v. Magna Corp.*, 773 N.W.2d 564, 575 (Mich. 2009) ("[T]he mere fact that different justices of this Court, judges of the Court of Appeals, and trial judges disagree on the meaning of statutory language suggests that ambiguity exists."); *accord Jones v. State Farm Mut. Auto. Ins. Co.*, 610 A.2d 1352, 1353 n.2 (Del. 1992) (recognizing that a split of authority on an issue indicates that it is "hardly unambiguous"); *see also, e.g.*, *Lincoln Sav. Bank, S.A. v. Wisconsin Dep't of Revenue*, 573 N.W.2d 522, 531 (Wis. 1998) ("[W]hen courts or judges disagree about the interpretation of a law, the law is, by definition, capable of being understood in two or more different senses.").

Accordingly, this Court should, at minimum, vacate the judgment and remand for consideration of the parties' parol evidence. As ITG showed at summary judgment, extrinsic evidence confirms that the parties intended only Section 2.01(c)(vii) to govern assumption of state settlement liabilities. A761-75. Indeed, Reynolds' own corporate designee, who was one of the specialists involved in negotiating the APA's state-settlement-related terms, testified that "[t]he settlement agreements are dealt with in Section (7)," which "deals very specifically with . . . how ITG was prepared to assume liabilities under the state settlements." A1023-25 (84:19-86:7, 89:6-90:8). And the state-settlement-related provisions were negotiated by a small team of specialized attorneys experienced in the settlements. A1013 (45:7-20). Sections 2.01(c)(iv) and (c)(v) were not included in those

negotiations and, in fact, were negotiated by a separate set of attorneys and businesspeople, none of whom ever read the FSA. *See* A1023 (84:19-86:7). That is because at the time of the APA's negotiation and drafting, the parties did not intend those provisions to have anything to do with the state settlements.

III. EVEN IF ITG IS LIABLE TO INDEMNIFY REYNOLDS FOR THE FLORIDA JUDGMENT, THE TRIAL COURT ERRED BY AWARDING REYNOLDS A WINDFALL IN ASSESSING DAMAGES

A. Question Presented

Whether the trial court erred as a matter of law in calculating Reynolds' damages by failing to account for the substantial savings that Reynolds enjoyed under the Florida judgment when calculating Reynolds' losses under that judgment. *See* A1344-53, A1511-23, A1629-40.

B. Scope Of Review

"[T]his Court reviews an award of damages for an abuse of discretion," but its "'review of embedded legal issues is *de novo.*'" *Holifield v. XRI Investment Holdings LLC*, 304 A.3d 896, 937 (Del. 2023).

C. Merits Of Argument

Even if the trial court's liability ruling were correct, the judgment must still be vacated, because the trial court erred in calculating Reynolds' damages in an amount—$275.7 million for 2015-2024, and additional annual amounts in perpetuity—that grants Reynolds an impermissible windfall.

1. In Section 11.02(a)(vi), ITG agreed to indemnify Reynolds against "all Losses" suffered as a result of "any Assumed Liability." The term "Losses" includes "all losses, . . . damages, deficiencies, fines, penalties, costs, expenses, commitments, judgments, [and] orders." A338. In both ordinary and legal parlance,

a "loss" is incurred when a party's costs exceed its benefits. *See, e.g.*, *Black's Law Dictionary*, *supra* (defining "loss" as "the amount by which a thing's original cost exceeds its later selling price"); *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/loss (last visited June 23, 2025) (defining "loss" as "a situation in which a business spends more money that it earns").

That understanding is reflected in Delaware law, which views indemnification as "repaying a loss to make the indemnitee whole." *Hill v. LW Buyer, LLC*, No. 2017-0591-MTZ, 2019 WL 3492165, at *10 (Del. Ch. July 31, 2019). Delaware courts have cautioned, however, that allowing the indemnitee to "reap a windfall" for losses "it never actually suffered" is "antithetical to the concept of indemnification." *Id.*; *cf. Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1452 (3d Cir. 1996) (noting that the "principle of indemnity . . . bar[s] recoveries greater than losses"). And they have ordered that a plaintiff's losses be calculated so as to avoid awarding a windfall. *See, e.g., O'Brien v. IAC/Interactive Corp.*, No. 3892-VCP, 2010 WL 3385798, at *18 (Del. Ch. Aug. 27, 2010). Accordingly, to determine Reynolds' "Losses" from the Florida judgment, the costs Reynolds incurred as a result of that judgment must be reduced by the benefits—both of which are plainly evident on the face of the judgment.

On one hand, Reynolds must continue to pay Florida for the volume of the acquired brands in addition to its other brands—a cost. A1599-1602. On the other hand, because the FSA payment formula enshrined in the Florida judgment dictates that the acquired brands' current and 1996 profits must continue to be assigned to Reynolds for purposes of annual-payment calculations, A1602, it is *undisputed* that Reynolds pays a much lower share of the profit adjustment than it would otherwise—a benefit from which Reynolds realizes substantial savings each year. *See supra* at 12 (explaining that higher 1996 profits result in lower profit-adjustment payments); A1406 (¶ 17).

To illustrate Reynolds' savings, consider, for instance, 2020: Under the Florida judgment, Reynolds paid Florida about $26.9 million for the acquired brands' volume-based component of the annual payment. Ex. B at 7. And, with both the acquired brands and its other brands included, it paid a profit adjustment of about $25.7 million. A1406-07 (¶ 21). Absent the Florida judgment, Reynolds would not have paid the $26.9 million volume-based component for the acquired brands, but it *would* have paid a *greater* profit-based component of at least $32.2 million based on its own brands. *See* A1408-09 (¶ 24). So Reynolds saved at least $6.5 million in profit adjustment because of the Florida judgment's inclusion of the acquired brands' profits in Reynolds' numbers. Taking into account that benefit, Reynolds' net "loss" from the Florida judgment in 2020 was $20.4 million—not

$26.9 million, as the trial court held. Paying Reynolds $26.9 million for 2020 would grant it a $6.5 million windfall.

In other years, Reynolds has realized even higher savings: at least $20.7 million in 2017, $35.6 million in 2018, $10.3 million in 2019, and so on. A1409-10 (¶ 25). As Reynolds stipulated, it has saved at least $112.8 million from 2015 through 2023 because of the Florida judgment. Ex. B at 24. And it will continue to receive such savings in perpetuity given the Florida judgment's mandate that all acquired brands' profits must be assigned to Reynolds, and "[n]o separate calculation is to be performed for ITG." A1602.

2. The trial court nevertheless disregarded these substantial savings and required ITG to indemnify Reynolds for the volume-based component of its FSA payments for the acquired brands—without any reduction for Reynolds' benefits under the Florida judgment with respect to the profit-based component. That was error. Under settled principles of Delaware law, "damages should not act as a windfall." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009) (citation omitted). Yet the trial court's decision grants Reynolds exactly that. By recognizing only the *costs* of the Florida judgment without its offsetting *benefits*, the court compensated Reynolds beyond its "loss," thereby violating basic damages principles as well as the parties' agreement in Section 11.02(a)(vi).

To justify this result, the trial court reasoned that ITG's damages argument would apply only if "the relevant breach [were] its non-joinder to the [FSA]." Ex. B at 25. Because the trial court had "held that ITG breached the APA by failing to assume the Florida Judgment Liability as an Assumed Liability," it concluded that ITG's damages argument had "no relevance" as a matter of law—even though it was based on "settled notions of expectation damages." *Id.* at 25-26.

The trial court misunderstood ITG's arguments. As ITG explained below, Reynolds' savings from the Florida judgment are the same in amount as those Reynolds reaps from ITG's non-joinder to the FSA because "Reynolds' continued settlement payments are an alternative to ITG joining the [FSA]." A1514. But those savings stem directly from the FSA's settlement payment calculation enshrined *in the Florida judgment*—the "Assumed Liability" for which ITG must indemnify Reynolds' "Losses." *See* A1636. Indeed, as ITG noted below, once the Florida court held that Reynolds remained liable for FSA payments, Reynolds took steps to ensure that the court's judgment would expressly memorialize these savings. *See* A1353, A1512. Reynolds vigorously opposed efforts to remove the acquired brands' 1996 profits from its base year. *See* A1353, A1482-99. And it prevailed when the Florida court ruled that "the Acquired Brands shall be included in . . . Reynolds's Net Operating Profits for the 1996 and 1997 Base Years." A1602. In this regard, Reynolds thereby secured a substantial *benefit* from the Florida

judgment, even though it also incurred additional costs. Netting those costs and benefits yields Reynolds' true "Losses," and ITG agreed to indemnify Reynolds only for its losses. Any other conclusion would permit Reynolds to reap an impermissible windfall by securing indemnification of an amount far greater than the loss it actually incurred from the Florida judgment.

Finally, to the extent that the trial court's decision-making was driven by a desire to avoid granting ITG "an unfair advantage," or to give it an "incentive[]" to join the FSA, that was wrong. Ex. B at 26. As Reynolds itself argued in the Florida litigation, ITG had an incentive to join the FSA because it could not benefit from Florida's release of claims in the FSA if it was not party to the settlement. A931-32. And regardless, the trial court's notions of "absurd" results or what a hypothetical "reasonable person would have accepted," Ex. B at 26-27 n.80 (citation omitted), granted it no license to depart from the parties' agreement or well-established principles of Delaware law. *See AG Mobile Holdings, L.P. v. H.I.G. Mobile, L.P.*, No. 2023-1103 MAA, 2025 WL 501088, at *8 (Del. Ch. Feb. 13, 2025) ("The Court will not use the absurdity doctrine to depart from the text of the Partnership Agreement, drafted by sophisticated parties.").

The damages award should be vacated and the case remanded to determine the amount of the windfall that must be subtracted from the award.

CONCLUSION

The trial court's judgment should be reversed and the case remanded for further proceedings.

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