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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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

# REPLY BRIEF OF APPELLANT ITG BRANDS, LLC

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## INTRODUCTION

Reynolds' response rests on a concocted reading of the Asset Purchase Agreement (APA) that finds no support in the APA's text or structure. On Reynolds' telling, the APA was written with only one objective: to protect Reynolds from making certain payments under its settlement with Florida (the FSA). But the parties did not draft the APA to ensure that every provision—no matter how specific or general, and regardless of whether it is qualified by other provisions—worked "hand in glove" and as "belt and suspenders" to hold ITG liable for Reynolds' FSA liabilities. Rather, they drafted one specific assumption-of-liability provision—Section 2.01(c)(vii)—that exclusively governs all such liabilities and incorporates other provisions that outline how ITG can assume them. Reynolds' distorted and ever-changing interpretation of Section 2.01(c)(vii) and other APA provisions should be rejected, and Reynolds should be held to the bargain it struck.

Reynolds' lead argument, that ITG assumed FSA liabilities under Section 2.01(c)(vii) itself, is one Reynolds did not raise until 2022—five years into this litigation. It is unsurprising that Reynolds only backed into this argument. In Section 2.01(c)(vii), ITG agreed to assume FSA liabilities "subject to" the Agreed Assumption Terms, which provide that ITG must use its reasonable best efforts to reach agreement with Florida to join the FSA. The plain text of this provision shows that if ITG does not reach agreement with Florida, it does not join the FSA, and it

does not assume Reynolds' FSA liabilities. Reynolds' made-for-litigation narrative about this provision is unavailing. Reynolds reads the "subject to" clause out of Section 2.01(c)(vii) and attempts to cast the Agreed Assumption Terms as entirely unrelated. That is wrong. Tellingly, Chancellor Bouchard in 2019 and the Florida court both concluded that Section 2.01(c)(vii) means exactly the opposite of what Reynolds now argues. And *Reynolds* itself argued in favor of that opposite meaning in 2019 and in the Florida litigation. The contention that Reynolds' late-discovered reading is the *only* reasonable reading (*i.e.*, unambiguous) is disingenuous.

Reynolds defends the trial court's core holding—that ITG assumed FSA liabilities under Section 2.01(c)(iv)—only as an afterthought. Unsurprisingly, its arguments fare no better. Reynolds effectively concedes that on the trial court's reading of that provision, the words "use of the Transferred Assets" capture any liability arising in any way out of any aspect of ITG's post-closing operations related to the acquired brands, rendering the APA's other assumption-of-liability provisions meaningless. That reading flies in the face of established Delaware law, including the canon against superfluity. Reynolds also disregards other canons of interpretation, claiming that regardless of Section 2.01(c)(vii)'s specific treatment of FSA liabilities, Section 2.01(c)(iv)'s general language simultaneously governs those liabilities as well. This "belt and suspenders" theory about the fourth and seventh

provisions in a list of assumption-of-liability provisions only makes sense if one's driving objective is to cobble together a way for Reynolds to escape liability.

Reynolds' reading should be rejected. At minimum, the APA's text and structure, the multiple decisions discarding Reynolds' arguments, and Reynolds' own changing theories show that the trial court erred in concluding that the APA *unambiguously* supports Reynolds. The trial court likewise erred in its calculation of damages. Reynolds spends much of its brief complaining that ITG's liability position will give *ITG* a supposed windfall as to the FSA—a risk that Reynolds assumed in the APA. Yet, allowing Reynolds not only to recoup its direct outlays from the Florida judgment but also to keep its substantial savings from that judgment would clearly grant *Reynolds* an impermissible windfall. Allowing Reynolds to keep that windfall would contravene settled Delaware indemnification law.

This Court should reverse.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN CONCLUDING THAT ITG ASSUMED LIABILITY FOR THE FLORIDA JUDGMENT

The APA includes only one assumption-of-liability provision that addresses state settlements: Section 2.01(c)(vii). That provision makes clear that ITG agreed to assume Reynolds' FSA liabilities "subject to" the Agreed Assumption Terms, which, in turn, specify that ITG must use its "reasonable best efforts" to reach agreement with Florida to assume those liabilities. A253; A378 (§ 2.2). As ITG explained, the trial court's contrary holding that ITG assumed FSA liabilities under Section 2.01(c)(iv)—which makes no mention of state settlements and instead covers "use" of an enumerated list of particular assets—is meritless. A252; Opening-Br.29-45. Rather than lead by defending the trial court's Section 2.01(c)(iv) holding, Reynolds primarily argues that ITG assumed FSA liabilities under Section 2.01(c)(vii) *itself*. Neither that argument, nor Reynolds' half-hearted defense of the trial court's Section 2.01(c)(iv) holding, withstands scrutiny.

#### A. Section 2.01(c)(vii) And The Incorporated Agreed Assumption Terms Exclusively Govern Whether ITG Assumed Liability For Florida Settlement Payments And Require Only That ITG Use Its Reasonable Best Efforts To Do So

Reynolds' lead argument on appeal is that ITG assumed liability for the Florida judgment under Section 2.01(c)(vii)—an argument that Reynolds did not deem fit to raise at the pleadings stage and raised only as an afterthought at summary

judgment *five years* after the start of this litigation. Reynolds' delay in raising the argument is understandable; it is based on a reading of Section 2.01(c)(vii) that multiple courts, including Chancellor Bouchard in 2019, rejected. A820-30.

Reynolds does not deny that only Section 2.01(c)(vii) expressly addresses the assumption of "all Liabilities under the State Settlements." A253. Under that provision, ITG agreed to assume, "subject to the Agreed Assumption Terms," all state settlement "Liabilities of the Sellers," *i.e.*, Reynolds. A244; A252-53. For the FSA, the Agreed Assumption Terms require that ITG—"with the assistance and cooperation" of Reynolds—"use its reasonable best efforts to reach agreement[] with" Florida to "assume, as of the Closing, the obligations of a Settling Defendant under the [FSA]" for the acquired brands. A378 (§ 2.2). Accordingly, ITG agreed to assume Reynolds' FSA liabilities for the acquired brands, subject to its ability to do so by using its reasonable best efforts to reach agreement with Florida. Put differently—as Chancellor Bouchard explained in 2019—if ITG "failed to join [the FSA] after using its 'reasonable best efforts' to do so," ITG would "not assume Reynolds' obligations under the [FSA] under Section 2.01(c)(vii)." Ex. H at 19-20; *see* Opening-Br.26-29.

Although Section 2.01(c)(vii) is expressly made "subject to" the Agreed Assumption Terms, Reynolds refuses to read these provisions together, insisting (at 18) the Agreed Assumption Terms and Section 2.01(c)(vii) address entirely different

liabilities and provide "alternative path[s]" by which ITG must assume responsibility for FSA payments. In Reynolds' view, regardless of what happens under the Agreed-Assumption-Terms pathway, ITG is liable for the Florida judgment under Section 2.01(c)(vii). That is wrong.

1. Reynolds' Section 2.01(c)(vii) argument hinges on the contention (at 22) that the phrase "subject to the Agreed Assumption Terms" has no impact on ITG's assumption of Reynolds' FSA liabilities under that provision's main clause. This attempt to erase the "subject to" clause is unavailing.

Reynolds argues that a "subject to" clause has a role to play only "in the event of a clash" with the main clause. Reynolds-Br.22 (citation omitted). But as ITG explained, a "clash" is not necessary for a "subject to" clause to have meaning. Opening-Br.27-28, 33-34. A "subject to" clause can also provide a condition precedent for the main clause, or signal that the main clause is "affected by" or "dependent on" it. Opening-Br.27-28 (citation omitted). Here, Section 2.01(c)(vii) is dependent on the Agreed Assumption Terms because, while the main clause provides for ITG's assumption of Reynolds' FSA liabilities, the incorporated Agreed Assumption Terms provide the pathway through which that assumption can occur. *Infra* at 10.

Notably, as ITG explained (and Reynolds ignores), Chancellor Bouchard in 2019 interpreted Section 2.01(c)(vii) exactly as ITG proposes, concluding 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* Opening-Br.28-29. And the Florida court interpreted the provision in the same way, describing this reading as "clear." A1591.

That is also how *Reynolds* interpreted Section 2.01(c)(vii) in the Florida litigation and earlier in this litigation. Reynolds argued in Florida that "the *only way*" ITG could make FSA payments for the acquired brands was through reaching agreement with Florida to join the FSA. A928 n.31 (emphasis added); *see* Ex. F at 7 (noting that "[b]oth" ITG and Reynolds "dispute[d] Florida's argument that § 2.01(c) of the APA created an assumption of liability by ITG for payments under the [FSA]" (citation omitted)). And Reynolds argued in this litigation in 2019 that Section 2.01(c)(vii)'s "subject to" clause "sets the scope" of the main clause, and the provision as a whole "addresses contractual obligations that one party to the APA agrees with the other to take on through a separate agreement with a third party." AR21-22 (emphasis omitted); *see also* AR20 (Reynolds representing that Section 2.01(c)(vii) "does not apply" if ITG cannot join the FSA); Ex. H at 19 (trial court citing Reynolds' acknowledgment that ITG "may not incur [liability for the Florida judgment] under Section 2.01(c)(vii)"). Reynolds' opportunistic new gloss cannot rewrite the plain meaning of Section 2.01(c)(vii).

In any event, there is a plain clash between the "subject to" and main clauses here. While the main clause of Section 2.01(c)(vii) requires ITG to assume "all Liabilities under the State Settlements," the Agreed Assumption Terms incorporated by the "subject to" clause provide that ITG must only "use its reasonable best efforts to reach agreements with" the States to do so. A253; A378 (§ 2.2). If ITG is unable to reach such agreements—as it has been with Florida—Section 2.01(c)(vii)'s two clauses will clash: ITG will not have assumed state settlement liabilities under the "subject to" clause, but it will have under the plain terms of the main clause. Opening-Br.34-35. In this situation, the "subject to" clause must "trump" the main clause. *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997).

2. To resist this straightforward conclusion, Reynolds draws (at 17-20, 26) a false distinction between the liabilities addressed in Section 2.01(c)(vii) and the obligations addressed in the Agreed Assumption Terms. Reynolds insists (at 19) that those provisions address different liabilities because the Agreed Assumption Terms concern only "ITG's assuming obligations *to Florida*," while Section 2.01(c)(vii) concerns "ITG's paying *Reynolds*." This is nonsense.[1]

[1] Reynolds' attempt to muster support for this distinction by parsing (at 18-19) ITG's response brief in Philip Morris USA Inc.'s dismissed intervention appeal is meritless. ITG distinguished there between "obligations owed between ITG and Reynolds under the APA" and those "due from Philip Morris and Reynolds to Florida under the FSA." ITG-Br.31, *Philip Morris, USA Inc. v. ITG Brands, LLC*, No. 175,2025 (July 10, 2025). ITG did so to underscore the obvious fact that Philip Morris' claim arose under a "separate and distinct" contract—the FSA—rather than

Both Section 2.01(c)(vii) and the Agreed Assumption Terms describe only obligations ITG and Reynolds owe *to each other*. Florida is not a party or even a third-party beneficiary to the APA, and thus is owed no obligations under the APA. A237; A324 (§ 12.09). The obligation to exercise "reasonable best efforts" in the Agreed Assumption Terms is an obligation ITG owes *to Reynolds*, A378 (§ 2.2), as confirmed by the APA provision requiring ITG to indemnify Reynolds for breaching the Agreed Assumption Terms, A316 (§ 11.02(a)(v)). And the liabilities ITG would assume through satisfying that obligation would replace Reynolds' FSA liabilities that it would owe Florida for the acquired brands absent that assumption. The fact that ITG would pay the liabilities directly to Florida does not change that they were previously *Reynolds'* liabilities assumed by ITG.

Reynolds' claim that Section 2.01(c)(vii) is about "ITG's paying Reynolds" is likewise incorrect. Reynolds-Br.19 (emphasis omitted). Section 2.01(c) is an *assumption* provision, not an *indemnification* provision. It does not require ITG to *pay Reynolds*, as opposed to a third party, to assume Reynolds' liabilities. Indeed, Section 2.01(c) expressly contemplates that assuming liabilities could involve "pay[ing], discharg[ing], and perform[ing]" those liabilities "in accordance with their terms." A252. For instance, assumption of liabilities arising under an assumed

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the APA. *Id.* That distinction has no bearing on the claims here because they arise only under the APA.

contract of Reynolds might involve performing obligations to the contractual counterparty, which presumably would not be Reynolds. *Id.* (§ 2.01(c)(i)). Likewise, assuming state settlement liabilities might involve—and indeed does involve, Opening-Br.26-29—making settlement payments to the States. The Agreed Assumption Terms' specification that ITG assumes Reynolds' FSA liabilities through joining the FSA and directly making FSA payments to Florida does not mean that the payments are not *Reynolds'* liabilities paid or discharged by ITG.

The APA's text also readily refutes Reynolds' argument (at 19) that Section 2.01(c)(vii) and the Agreed Assumption Terms do not "address 'th[e] same liability.'" The phrase "subject to the Agreed Assumption Terms" in Section 2.01(c)(vii) shows that ITG's assumption of Reynolds' "Liabilities under the State Settlements" is connected to the Agreed Assumption Terms. A253. If it were not, there would be no reason to include the "subject to" phrase in Section 2.01(c)(vii). The APA expressly confirms that conclusion, defining the "Agreed Assumption Terms" as the parties' "agreed treatment of the Acquired Tobacco Cigarette Brands . . . under the State Settlements." A330. With respect to the FSA, Section 2.01(c)(vii) thus provides that subject to the parties' agreed treatment of the acquired brands under the FSA, ITG assumes Reynolds' FSA liabilities, and the Agreed Assumption Terms provide the parties' agreed pathway for their assumption.

Section 2.01(c)(vii) and the Agreed Assumption Terms thus address the same liabilities.

3. The fact that Section 2.01(c)(vii)'s "subject to" and main clauses address the same liability does not render the main clause superfluous, as Reynolds suggests (at 24). The main clause is the operative assumption-of-liability provision that governs all state settlement liabilities, and it is included in a comprehensive list of the liabilities ITG agreed to assume. Opening-Br.26-27. The parties' decision to make that provision subject to other APA provisions means only that Section 2.01(c)(vii) may be overridden or qualified by those provisions, not that it is superfluous. Indeed, in situations where ITG has reached agreements with States to assume Reynolds' state settlement liabilities—as ITG has with Mississippi, Minnesota, and Texas—there is no conflict, and the main clause operates by its terms.[2]

On the other hand, Reynolds' view *does* render the "subject to" clause entirely superfluous. Reynolds does not explain why the parties drafted that clause—or what particular role it plays in Section 2.01(c)(vii)—if, as Reynolds contends, that clause

[2] Likewise, the main clause operates by its terms with respect to ITG's assumption of Master Settlement Agreement liabilities, for which the Agreed Assumption Terms require that ITG "shall assume" liabilities for the acquired brands. A378 (§ 2.1). By doing so, ITG fulfills its assumption obligation under Section 2.01(c)(vii).

addresses only ITG's obligations to Florida. Reynolds suggests (at 25-26) that the "subject to" clause simply ensures that "related provisions are read together," but all provisions in a contract must be read together. *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (contract must be "read as a whole"). And if the provisions address "entirely different issues," it is not clear why the parties would care whether those provisions are read together anyway. Reynolds-Br.23 (quoting Ex. E at 39). It is Reynolds' interpretation, not ITG's, that renders the "subject to" clause "merely a cross-reference." Reynolds-Br.24.

Reynolds' interpretation of Section 2.01(c)(vii) should be rejected.

### B. Section 2.01(c)(iv) Does Not Apply To The Florida Judgment

The trial court "conclude[d] that the Florida Judgment Liability is an Assumed Liability under § 2.01(c)(iv) of the APA," and granted summary judgment to Reynolds on that basis. Ex. E at 49. Yet Reynolds' response brief devotes only a few pages to defending the court's Section 2.01(c)(iv) holding. That is unsurprising. As ITG explained, the trial court's unbounded interpretation of that provision to cover liabilities associated with virtually every post-closing aspect of ITG's operations conflicts with the text and structure of Section 2.01(c). Opening-Br.29-45. It also violates two venerable canons of contract construction: rendering numerous assumption-of-liability provisions superfluous, in violation of the canon against superfluities, and directly conflicting with the only APA provision that

specifically mentions state settlements (Section 2.01(c)(vii)), in violation of the specific-controls-the-general canon. *Id.*

1. Reynolds erroneously embraces the trial court's expansive interpretation of Section 2.01(c)(iv), contending (at 30) that in this provision, the parties "provided that ITG was assuming all liabilities arising out of what was transferred." On Reynolds' reading, Section 2.01(c)(iv) is not just "broad," it is all-encompassing. Reynolds-Br.31. But the text of Section 2.01(c) shows that the parties did not intend the words "arising, directly or indirectly, out of . . . the use of the Transferred Assets" in Section 2.01(c)(iv) to sweep so broadly, A252, or to encompass the Florida judgment—a liability arising under the FSA and calculated based on sales of acquired brands cigarettes, A1600-02.

Indeed, when the parties intended to cover liabilities related to the acquired brands, they said so expressly. *See* A252-53 (Sections 2.01(c)(v) and (c)(vii) covering liabilities related to "the Acquired Tobacco Cigarette Brands"). They also differentiated between liabilities arising "under" assumed contracts, *id.* (§ 2.01(c)(i), (ii), (vii)), "out of the operation or conduct" of assumed businesses, A252 (§ 2.01(c)(iii)-(iv)), from the "use" of assumed assets, *id.* (§ 2.01(c)(iv)), and "out of or in connection with any Action" relating to "the development, manufacture, packaging, labeling, production, delivery, sale, resale, distribution, marketing,

promotion, use or consumption of, or exposure to" acquired brands cigarettes, A252-53 (§ 2.01(c)(v)).

Reynolds tries to collapse these textual distinctions rather than "give[] meaning to each term" of the APA. *Sunline*, 206 A.3d at 846. Reynolds argues (at 30) that the term "Transferred Assets" encompasses the "Acquired Tobacco Cigarette Brands," and "use" is no different than "operation or conduct" or the other terms used in Section 2.01(c).[3] But the APA's specific use of "Acquired Tobacco Cigarette Brands" and verbs like "sale" in other provisions cannot be ignored or equated with "Transferred Assets" and "use" in Section 2.01(c)(iv). Those differences in terminology show that the parties intended Section 2.01(c)(iv) to uniquely cover specific liabilities arising from the use of the specific Transferred Assets listed in Section 2.01(a)—real properties, raw materials, intellectual property, environmental permits, etc. Opening-Br.38-39; A246-50. They did not intend that provision to cover liabilities arising from every downstream activity—"operation or conduct" of businesses, "manufacture, packaging, labeling, production, delivery, sale," etc. of cigarettes—that may result from ITG's operations related to the

[3] Reynolds says (at 30) that "use" is not "narrower than" "operation or conduct," and suggests that Section 2.01(c)(iv) employed "use" with respect to the Transferred Assets merely because not all assets can be operated or conducted. But Section 2.01(c)'s implementation of "use" when referring to *assets* and "operation or conduct" when referring to *businesses* shows that the scope of the latter phrase is necessarily broader.

acquired brands. A252-53. Shoehorning those liabilities expressly covered by other assumption-of-liability provisions into Section 2.01(c)(iv) would read the phrase "arising, directly or indirectly," far too broadly. Opening-Br.39-40.

It would also render the other assumption-of-liability provisions superfluous. Section 2.01(c) contains seven separate assumption-of-liability provisions, each describing liabilities ITG agreed to assume for a specific category of assets. For instance, Section 2.01(c)(i) describes liabilities related to "the Assumed Contracts," while Section 2.01(c)(vi) covers liabilities related to "the Transferred Employees." A252-53. If Section 2.01(c)(iv), which covers liabilities related to "use" of "the Transferred Assets," A252, generally included "all liabilities arising out of what was transferred," Reynolds-Br.30, it makes little sense that the parties bothered to negotiate any other assumption-of-liability provision, or to list the specific assets to which each provision relates. Instead, they would have just negotiated Section 2.01(c)(iv) and a list of liabilities excluded from that provision. That they did not do so shows that they did not intend Section 2.01(c)(iv) to serve as a catch-all provision.

Section 2.01(c)(iv)'s placement as the fourth out of seven assumption-of-liability provisions reinforces that point. Opening-Br.40-41. Reynolds does not dispute that given this placement, Section 2.01(c)(iv) cannot serve as a catch-all. Reynolds-Br.31. Yet Reynolds, like the trial court in 2022, reads Section 2.01(c)(iv)

in exactly that manner, thereby rendering the remaining provisions of Section 2.01(c) largely illusory despite this Court's admonition that contract interpretation should avoid "render[ing] *any term* 'mere surplusage.'" *Sunline*, 206 A.3d at 846 (emphasis added) (citation omitted).

Finally, Reynolds resorts (at 29) to arguing that ITG waived the argument that the trial court read Section 2.01(c)(iv) too broadly. But ITG explained to the trial court that Reynolds' expansive reading of this provision was wrong, noting that "arise" means "to originate from" or "stem from," and Reynolds' view that FSA liabilities arise from the use of Transferred Assets—when in fact they arise from the deal Reynolds agreed to in the FSA—would read "arise" too broadly. B154-61 (citing case explaining that "arise" does not "encompass all claims that have some possible relationship with" the subject); Opening-Br.38-39 (making same argument). Nothing prevents this Court from affording the plain terms of Section 2.01(c)(iv) their proper scope.

2. Even assuming Section 2.01(c)(iv) could apply to the Florida judgment, Reynolds' argument still fails under basic canons of contract interpretation because Section 2.01(c)(vii)—the more specific provision with respect to the FSA—trumps.

It is well-settled that "[s]pecific language in a contract controls over general language." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005). Reynolds does not dispute that Section 2.01(c)(vii) is the more specific provision

here, as it is the only provision that expressly addresses state settlement liabilities. Indeed, even the trial court recognized that Section 2.01(c)(iv) addresses those liabilities only "indirectly." Ex. E at 32-33. Under the specific-over-general canon, because Sections 2.01(c)(iv) and (c)(vii) conflict, Section 2.01(c)(vii) alone dictates ITG's assumption of Reynolds' FSA liabilities.

Reynolds resists this conflict, contending (at 32) that even if ITG can assume FSA liabilities only through exercising its reasonable best efforts to reach agreement with Florida, Section 2.01(c)(vii) is "*silent*" as to the assumption of Reynolds' FSA liabilities if ITG cannot reach such agreement. That is wrong. As Reynolds argued and Chancellor Bouchard recognized in 2019, if ITG cannot reach agreement with Florida, there is no assumption of FSA liabilities because the pathway for that assumption set out in the Agreed Assumption Terms is unsatisfied. *Supra* at 6-7. At the same time, under Reynolds' view of Section 2.01(c)(iv), ITG assumes Reynolds' FSA liabilities embodied in the Florida judgment no matter what. Given that ITG simultaneously does not assume those liabilities under Section 2.01(c)(vii) but does under Section 2.01(c)(iv), the provisions are in direct conflict.

Reynolds further attempts to avoid the specific-over-general canon by arguing (at 33) that Sections 2.01(c)(iv) and (c)(vii) together provide a "belt and suspenders" approach to ensure that ITG is liable under either one. While the parties certainly could have negotiated an express provision allocating the risk of FSA payments to

ITG in the event that ITG is unable to join the FSA, they didn't. *See, e.g.*, A379 (§ 3.4 (allocating risk of pre-closing MSA payments)); A382 (§ 5.3 (allocating risk of payment called "NPM Adjustment")). Instead, they agreed to the opposite in Section 2.01(c)(vii)—specifying that ITG assumes FSA liabilities only *subject to* the Agreed Assumption Terms, not *regardless of* those Terms. Reynolds cannot now contort Section 2.01(c)(iv)—a provision that does not cover state settlement liabilities at all—to rewrite the parties' deal and obtain a benefit it could not through negotiation. *See* Opening-Br.44 n.3.

Moreover, if Reynolds' belt-and-suspenders theory were right, Section 2.01(c)(vii) and its associated indemnification provision would be entirely superfluous. Opening-Br.41-42. Reynolds asserts (at 34) this is not true because Sections 2.01(c)(iv) and (c)(vii) "address different scenarios." But while they do "address different scenarios" under ITG's interpretation of those provisions, it is not the case under Reynolds' interpretation. On Reynolds' view, FSA liabilities are an assumed liability under Section 2.01(c)(vii)—no matter what—*and* under Section 2.01(c)(iv). Reynolds' ipse dixit that Section 2.01(c)(vii) nevertheless "serve[s] a purpose" is not true. Reynolds-Br.34. Regardless of what happens under Section 2.01(c)(vii) and the incorporated Agreed Assumption Terms, in Reynolds' view ITG would always be liable to Reynolds for FSA payments under Section 2.01(c)(iv). That is the essence of superfluity and directly contravenes this Court's admonition

that contract interpretation should not render provisions "meaningless or illusory," *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citation omitted).

Reynolds' interpretation of Section 2.01(c)(iv) also renders the APA's other assumption-of-liability provisions superfluous. *Supra* at 15. Reynolds does not even try to dispute this. Reynolds-Br.35 ("[T]here is no problem with multiple Assumed Liabilities provisions' applying."). But Reynolds' convenient view that any number of assumption-of-liability provisions require ITG to assume Reynolds' FSA liabilities ceases to resemble its own misguided belt-and-suspenders theory, resulting in a contract that is simply riddled with redundancies. No Delaware court has upheld such an unreasonable interpretation. *SeaWorld Entertainment, Inc. v. Andrews*—Reynolds' only authority (at 35)—underscores the fallacy of Reynolds' position. 2023 WL 3563047 (Del. Ch. May 19, 2023), *aff'd*, 314 A.3d 662 (Del. 2024). There, the court recognized that "parties *occasionally* use redundancy," in particular by including "[p]arentheticals," "to ensure their intent is fully understood." *Id.* at *8 (emphasis added). But a superfluous *parenthetical* is a far cry from the many provisions Reynolds seeks to make superfluous here.

Finally, Reynolds, like the trial court, argues (at 35-36) that ITG's position "yields absurd results." As ITG explained, there is nothing absurd about Reynolds' decision to assume the risk that it may remain liable for some state settlement payments when it needed to enter into the APA to consummate its merger agreement

with Lorillard. Opening-Br.43. And even in assuming that risk, Reynolds still obtained a meaningful—and enforceable—commitment from ITG to exercise its reasonable best efforts to assume liability for those payments.

Moreover, Reynolds' assumption of that risk does not mean, as Reynolds repeatedly suggests (*e.g.*, at 18, 36), that Reynolds agreed to make "payments on its competitor's sales." Settlement payments under the FSA are due because Florida sued *Reynolds* and other tobacco companies—but not ITG—in the 1990s for misrepresenting the addictiveness and dangers of smoking. A445. The ongoing payments are the result of *Reynolds'* choice to settle that litigation in exchange for a release, and the payments remedy Florida's healthcare costs from Reynolds' and other defendants' allegedly "deceptive practices in the marketing of their cigarettes." A1584. Although the ongoing payments are calculated, in part, based on the ongoing sales of cigarette brands owned by Reynolds at the time it entered into the FSA, Opening-Br.12, 18, those payments remedy Reynolds' past misconduct. There is nothing absurd about Reynolds remaining liable for those payments.

The trial court erred in interpreting Section 2.01(c)(iv) to cover the Florida judgment. Its grant of summary judgment to Reynolds should be reversed.

## II. AT MINIMUM, THE TRIAL COURT ERRED IN CONCLUDING THAT THE APA'S ASSUMPTION-OF-LIABILITY PROVISIONS ARE UNAMBIGUOUS IN REYNOLDS' FAVOR

At minimum, given the numerous problems with Reynolds' and the trial court's interpretation of the APA's assumption-of-liability provisions, the trial court was wrong to conclude that its interpretation was "unambiguous." Ex. E at 2. Indeed, it is difficult to see how that could be true when Chancellor Bouchard adopted exactly the *opposite* reading of Section 2.01(c)(vii), found a conflict among Section 2.01(c) provisions, and concluded the contract was ambiguous. Ex. H at 19-23; Opening-Br.47. And the Florida court interpreted Section 2.01(c)(vii) in the same way as Chancellor Bouchard, deeming that reading "clear." A1591. Even if this Court is not convinced that ITG's interpretation is the only reasonable reading, it should reverse on the ground that the APA is at least "reasonably or fairly susceptible of different interpretations" and therefore ambiguous. *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, 2013 WL 5787958, at *4 (Del. Ch. Oct. 25, 2013) (citation omitted).

Reynolds incorrectly contends (at 37) that ITG's "ambiguity argument . . . is not based on the APA's text." But every argument detailed above and in ITG's opening brief shows that the APA's text and structure reasonably support the conclusion that ITG agreed only to use its "reasonable best efforts" to join the

separate state settlements. *Supra* at 4-20; Opening-Br.46-47 (making same argument based on the APA's "plain text and structure").

Other rulings adopting ITG's interpretation of Section 2.01(c)(vii) confirm as much. Reynolds dismisses the trial court's 2019 ruling, contending (at 38) there was "nothing improper about the Court of Chancery's revisiting the Assumed Liabilities question" in 2022. But Reynolds does not ultimately dispute the trial court's "earlier determination" of a conflict among Section 2.01(c) provisions. Reynolds-Br.37. Nor does Reynolds dispute that the trial court previously concluded that because Section 2.01(c)(vii) is "subject to" the Agreed Assumption Terms, "ITG Brands ultimately may not assume Reynolds' obligations under the [FSA]." Ex. H at 19-20. Indeed, Reynolds itself supported that reading in 2019. *Supra* at 7. The trial court erred by reversing course in 2022, contrary to law of the case. Opening-Br.47-48.[4] And, at minimum, the trial court was wrong to view its conflicting interpretation of Section 2.01(c) as *unambiguous* against that backdrop.

Reynolds also tries to discredit the Florida court's decision, suggesting (at 40) it did not pass on any relevant issue. But the Florida court analyzed Section

[4] Reynolds' assertion (at 37-38) that ITG waived its law-of-the-case argument is wrong. At summary judgment, ITG discussed the APA's plain text to "provide[] valuable context for the extrinsic evidence" presented to resolve the ambiguity the trial court found in 2019. A756 n.12; *see also Meyers v. Quiz-Dia LLC*, 2017 WL 76997, at *7 (Del. Ch. Jan. 9, 2017) (recognizing that pleadings-stage holdings are "law of the case").

2.01(c)(vii) and found it "clear" that ITG was "relieve[d] . . . of liability" for FSA payments "unless, with the assistance of Reynolds, [ITG] can persuade Florida" to let ITG join the FSA. A1591. In assessing collateral estoppel, the trial court here confirmed that the Florida court decided "whether ITG assumed Liabilities under the [FSA] pursuant to § 2.01(c)(vii)"—and that this issue was a "'critical and necessary'" part of the Florida decision. Ex. E at 24-25 (finding collateral estoppel's identical-issue requirement satisfied).[5] The trial court's 2022 opinion concluding that ITG assumed liability for these payments—regardless of the Agreed Assumption Terms—directly contradicts the Florida court's holding.

Reynolds attempts to explain away this contradiction, arguing (at 40-41) the Florida court "merely held that the APA did not make ITG directly liable to *Florida*." This argument, again, is based on Reynolds' failed distinction between ITG's obligations to Florida and ITG's obligations to Reynolds. *Supra* at 8-11. And while the Florida court rightly did not purport to determine the effect of Section 2.01(c)(vii) and the Agreed Assumption Terms on the "overall series of transactions between Reynolds and [ITG]," it certainly interpreted Section 2.01(c)(vii) to

[5] The trial court found collateral estoppel inapplicable only because there was insufficient adversity between Reynolds and ITG. Ex. E at 26-29; Ex. F at 6-7. That finding underscores Reynolds' argument in Florida that ITG had *not* assumed FSA liabilities under Section 2.01(c)(vii).

conclude, unlike the trial court below, that ITG had not unconditionally assumed Reynolds' FSA liabilities under that provision. A1591.

Contrary to Reynolds' contention (at 39), the ambiguity question does not "lead[] nowhere." If this Court deems the contract ambiguous, it should remand the case to the trial court to consider the parties' extensive parol evidence. *Sunline*, 206 A.3d at 847 (if a "contract is ambiguous," "courts must resort to extrinsic evidence to determine the parties' contractual intent"). Reynolds' self-serving recitation (at 41-42) of select parol evidence in its favor highlights only that there is an issue of fact for the trial court to resolve. Opening-Br.49-50.

## III. EVEN IF ITG MUST INDEMNIFY REYNOLDS FOR THE FLORIDA JUDGMENT, THE TRIAL COURT ERRED IN GRANTING REYNOLDS A WINDFALL

Even if the trial court were right that ITG must indemnify Reynolds for the Florida judgment, the trial court's calculation of indemnification damages cannot stand because it affords Reynolds an impermissible windfall, allowing Reynolds to recoup its higher payments on one component of FSA payments, but ignoring the other component on which Reynolds realizes substantial savings as a result of the Florida judgment.

Reynolds does not contest that indemnification is designed to make the indemnitee whole, but not to permit a windfall. Opening-Br.52; Reynolds-Br.44-45. Indeed, although Reynolds purports (at 47) to fault ITG for relying on dictionary definitions to elucidate the APA's definition of "Losses," Reynolds ultimately concedes (at 46) that the APA "fully aligns with Delaware indemnity law." Under Delaware law, a "windfall" is "antithetical to the concept of indemnification." *Hill v. LW Buyer, LLC*, 2019 WL 3492165, at *10 (Del. Ch. July 31, 2019). Reynolds thus cannot recover more than its true losses.

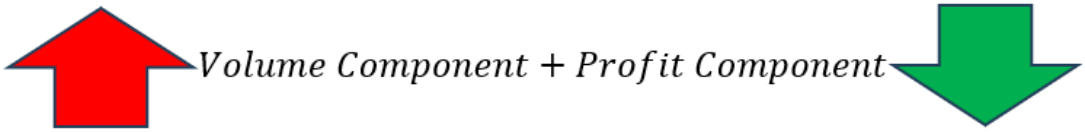
Reynolds disputes the calculation of its losses only by ignoring ITG's actual argument and the full scope of the Florida judgment. First, Reynolds contends that ITG asks this Court to consider a "hypothetical world" in which ITG joined the FSA to calculate indemnification damages. Reynolds-Br.45 (citation omitted). That

caricature of ITG's argument is wrong. As ITG explained—and Reynolds ignores—Reynolds incurred payments and received savings as a result of the Florida judgment, both of which "stem directly from the FSA's settlement payment calculation enshrined *in the Florida judgment*." Opening-Br.55. Any indemnification damages for the Florida judgment thus must consider the payments Reynolds incurred and reduce them by the savings. Doing so does not require consideration of any "hypothetical world." Reynolds' savings are real and undisputed. Ex. B at 23-24.

Second, Reynolds tries to obfuscate its actual loss from the Florida judgment. It argues (at 44) that "ITG must restore Reynolds to its *status quo ante*—its position before the Florida Judgment was entered." But Reynolds, like the trial court, limits consideration of its position before and after the judgment to a single component of FSA payments—the volume-based component that increased because of the Florida judgment's attribution of the acquired brands to Reynolds. That is wrong.

Reynolds does not dispute that FSA payments comprise two components: (1) a volume-based component that is allocated among the settling companies in proportion to their relative market share of U.S. cigarette sales, and (2) a profit-based component that is generally allocated in proportion to the amount by which each company's profits exceed its inflation-adjusted profits from 1996. Opening-Br.12. If the acquired brands are not attributed to Reynolds, then Reynolds' allocations of

the volume and profit components would be based only on the sales and profits of its *own* brands. Because the Florida judgment requires Reynolds to make FSA payments for the acquired brands, however, Reynolds' allocations of both components are based on acquired brands' sales and profits as well. This has a negative and a positive impact on Reynolds' FSA payments:




Reynolds' payments on the volume component of FSA payments are *higher* after the Florida judgment because Reynolds' allocation for that component includes sales for the acquired brands in addition to its own brands. But Reynolds' share of payments on the profit component of FSA payments are *lower* after the Florida judgment because the profits earned on the acquired brands in 1996 were high, thus reducing the amount of the profit adjustment that is allocated to Reynolds, and *lowering* Reynolds' profit adjustment payments. A1406 ("[T]he higher a Settling Defendant's profits are for the 1996 base year, the smaller its potential share of any applicable profit adjustment will be."); Opening-Br.53-54.

It is undisputed that since entry of the Florida judgment through 2023, Reynolds has paid at least $112.8 million less as a result of the inclusion of the acquired brands in the profit component of the equation than it would have absent the Florida judgment. Ex. B at 23-24. If ITG has to compensate Reynolds for the

increased payments created under the volume component as a result of the inclusion of the acquired brands, there is no reason why Reynolds should also enjoy the *benefit* that results from the inclusion of the acquired brands in the profit component. Put differently, to avoid an improper windfall, the indemnification award must account for the amount that the inclusion of the acquired brands *reduces* the amount Reynolds ultimately owes under the Florida judgment. Currently, the Delaware judgment compensates Reynolds for the increased payments for the volume component, but allows it to pocket the *savings* it enjoys in connection with the profit component.[6]

Reynolds resorts to arguing (at 45 n.9, 47) that its savings on the profit component should be ignored because they would be hard to calculate. But that is no reason to provide Reynolds a windfall. "Although quantifying any losses may be challenging," it is a task Delaware courts routinely perform. *Mudrick Cap. Mgmt. L.P. v. QuarterNorth Energy Inc.*, 2024 WL 807137, at *9 (Del. Ch. Feb. 26, 2024). Indeed, the trial court held a two-day trial to calculate damages and then forwent the calculation based on its view that Reynolds' savings were irrelevant—not that they

[6] Reynolds claims (at 48) that "ITG collaterally attacks the Florida Judgment." But there is no reason why calculating the amount ITG must indemnify Reynolds for the Florida judgment under the APA would require this Court to "hold that the Florida court was wrong in calculating payments under the Florida Settlement." Reynolds-Br.48.

were too difficult to quantify. Ex. B at 13-14. In any event, Reynolds stipulated before trial that it has realized at least $112.8 million in savings through 2023. *Id.* at 23-24. Reynolds has no explanation why damages may not be reduced by at least that amount. Ultimately, Reynolds bears the burden of proving its damages "with reasonable certainty." *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1110 (Del. 2015). Reynolds' argument that its failure to do so should entitle it to *more* damages is unsupported by any principle of law.

Finally, Reynolds contends (at 48-49) that if its damages are reduced, ITG will have no incentive to "try joining" the FSA. This is another attempt to rewrite the APA. The only commitment ITG made to Reynolds regarding joinder to the FSA was that ITG would use its reasonable best efforts to join—which it did. The damages issue is based on the assumption that even though ITG was unable to join the FSA, it is nevertheless liable for Reynolds' FSA payments (which, as explained above, ITG is not). In that situation, the only relevant question is the extent of Reynolds' actual losses. ITG's non-joinder is no basis to calculate those losses in a manner that awards Reynolds a windfall. This Court should remand for a determination of the amount by which damages should be reduced.

## CONCLUSION

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

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