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Case Number 171,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GLENCORE LTD.,	)	
	)	
Defendant and Counterclaim Plaintiff Below, Appellant,	)	No.: 171,2016
	)	(Appeal from Superior Court
	)	C.A. No. N15C-08-032 EMD [CCLD])
v.	)	
	)	
ST. CROIX ALUMINA L.L.C. AND ALCOA WORLD ALUMINA, LLC.,	)	
	)	
Plaintiffs and Counterclaim Defendants Below, Appellee.	)	

APPELLANT GLENCORE LTD.'S REPLY BRIEF ON APPEAL

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PRELIMINARY REPLY STATEMENT[1]

Alcoa's interpretation of Article 8.3 of the 1995 Agreement, accepted by the court below without analysis of Glencore's contrary reading, would render its negotiated, unique structure meaningless. Article 8.3(3) requires Alcoa to maintain, operate, and manage the bauxite residue storage facilities so as to protect Vialco from the environmental consequences of Alcoa's ownership of the Refinery. The ruling below deprives Glencore of the benefit of that contractual bargain, and leaves Glencore to pay up to $75 million to remediate the bauxite residue storage facilities for which Alcoa contractually accepted responsibility.

The unique structure of Article 8.3 demonstrates that it provides both indemnity as well as specific affirmative obligations, depending on context. Article 8.3(1) is a broad indemnity obligation regarding Environmental Conditions at the Refinery. It contains no unique, affirmative verbiage. In contrast, Articles 8.3(2) and 8.3(3) require Alcoa to remove or encase asbestos; maintain, operate, and manage the bauxite residue storage facilities; and indemnify Vialco for all matters relating to asbestos or bauxite residue.

The unique wording of Article 8.3(3), requiring Alcoa to be responsible for the "maintenance, operation, and management" of the bauxite residue storage facilities, would make no sense if it provided Vialco with only indemnity rights. The active language would be entirely superfluous and oddly placed if Article 8.3

[1] Unless otherwise defined, capitalized terms used throughout this brief have the meanings ascribed to them in *Appellant Glencore Ltd.'s Opening Brief* [Dkt. No. 13] ("OB"). Citations to "AB" refer to *Appellees' Answering Brief* [Dkt. No. 29].

were a pure indemnity paragraph. Rather, the parties included Article 8.3(3)'s extra, affirmative language for a purpose: to ensure that Alcoa would maintain, operate, and manage the bauxite residue.

The Superior Court, focused on the application of Beloit Power Sys., Inc. v. Hess Oil Virgin Islands Corp., 757 F.2d 1431 (3d Cir. 1985), ignored Alcoa's affirmative obligations and dismissed Glencore's Breach of Responsibility Claim by making the ambiguous and unsupported statement it was "related to indemnification of the New York Action." (Op. at 17.) This was plain error.

The Superior Court also mistakenly dismissed Glencore's Indemnity Claims.[2] Neither the Superior Court nor Alcoa can cite any case, in Delaware or any other jurisdiction, holding that an agreement to indemnify for a known liability – here the bauxite residue – should be read out of a contract when that liability was incurred via a statutorily authorized contractual allocation of a known liability. See 42 U.S.C. § 9607(e)(1).

Alcoa also fails to cite a single case involving an indemnity provision like Article 8.3(3), which – in contrast to Articles 7.3 and 8.2 – is not limited in application to "losses" or "claims." Article 8.3(3) does not contain any limiting language that other courts have cited to exclude contractual liability from an

[2] In its appellate brief, Alcoa asserts that Glencore has abandoned "any claim that plaintiffs breached their obligation, under [Article] 8.3(1), to 'be responsible for, and to indemnify, save and hold Glencore harmless with respect to,' all 'Environmental Conditions at the Refinery which are not Pre-Closing Environmental Conditions.'" (AB 10 (brackets added).) Not so. Glencore has appealed the Superior Court's judgment dismissing Counterclaims 6 and 8-11, which charge Alcoa with breaches of both Articles 8.3(1) and Article 8.3(3). Therefore, Glencore's claims regarding Article 8.3(1) remain.

indemnity, such as listing types of claims covered by the indemnity. Instead, Article 8.3(3) is unprecedented in its simplicity and its scope. Article 8.3(3) reflects Alcoa's clear agreement to indemnify Glencore for any cost relating to bauxite residue, without regard to how Glencore may incur such costs.

Alcoa's reliance on Article 2.1, which governs Alcoa's assumption of liabilities, is misplaced on this appeal.[3] This appeal concerns Alcoa's agreement to indemnify under Article 8.3, which does not rely on or refer to Article 2.1. In fact, Article 7.3 provides indemnity for the Article 2.1 assumed liabilities, but Glencore does not pursue its Article 7.3 indemnity claims here. Article 2.1 has no bearing on Alcoa's obligation under Article 8.3(3) to indemnify Vialco for the bauxite residue.

Article 8.3(3) is sweeping and applies with respect to the bauxite residue with no limitation as to the type or nature of claim or loss covered. The Court should follow the words of the contract, and enforce the allocation agreement of these two sophisticated parties.

[3] In the Superior Court, Glencore advanced an argument that Alcoa had affirmatively assumed liability for the New York Action. That claim was dismissed, and is not subject to this appeal.

ARGUMENT

I. GLENCORE HAS ASSERTED A VALID BREACH OF RESPONSIBILITY CLAIM

Alcoa does not contest that the amounts Glencore will spend defending the New York Action are the foreseeable result of Alcoa's failure to maintain and manage Areas A and B, and are recoverable as damages for Glencore's Breach of Responsibility Claim.

Instead, Alcoa attempts to divine reasoning from the Superior Court's single-sentence observation that Glencore's Breach of Responsibility claim should be dismissed because it was "related to indemnification of the New York Action." (Op. at 17.) Alcoa focuses solely on Article 8.3's introductory language, which references indemnification, and leaps to the conclusion that Article 8.3 is only an indemnification provision. (AB 11.) The text and structure of Article 8.3, when read with the remainder of the 1995 Agreement, make clear that Article 8.3 serves dual purposes: (i) to impose on Alcoa the affirmative obligation to remove or encase asbestos and maintain, operate, and manage the bauxite residue storage facilities; and (ii) indemnify Vialco for costs relating to the asbestos and bauxite residue.

A. Article 8.3 is Not Exclusively an Indemnity Provision

An ordinary indemnification provision contains two parts: (i) introductory language identifying the indemnity obligation; and (ii) an enumeration of the liabilities that will be covered by the indemnity. For example, in Breaux v.

Halliburton Energy Servs., 562 F.3d 358, 361-62 (5th Cir. 2009), the relevant indemnity provision provided that the indemnitor would "[i] indemnify [the indemnitee] . . . from and against any and all liability arising out of the following: [ii] claims, liabilities, demands, actions, damages, losses, and expenses . . . resulting from [the indemnitor's] ownership, operation, maintenance or use of aircraft under the Contract . . ." The indemnity provisions cited in Alcoa's Answering Brief follow this same structure. See, e.g., James v. Getty Oil Co. (E. Operations), 472 A.2d 33, 34 (Del. Super. 1983); Brozozowski v. Ingersoll-Rand Co., 1985 WL 25724, at *4 (Del. Super. Oct. 24, 1985). Such provisions are reactionary, protecting the indemnitee from enumerated claims that might arise, without reference to an affirmative action.

The typical indemnity structure was used in other parts of the 1995 Agreement. For instance, Article 7.3 provides for indemnity for a defined set of claims: all "Losses" arising out of or related to certain subject matters. Article 8.2's indemnity is also limited by the definition of Pre-Closing Environmental Conditions (Art. 8.1(a)), which applies "to the extent and only to the extent," that conditions give rise to certain suits or damages. (A000042.) Neither provision speaks to affirmative actions – such as the "removal or encasing" of asbestos or the "maintenance, operation, and management" of the bauxite residue storage facilities.

Article 8.3 of the 1995 Agreement is very different. The provision reads:

> [Alcoa] shall be responsible for, and shall indemnify, save and hold [Vialco] and its Affiliates harmless with respect to (1) all Environmental Conditions at the Refinery which are not Pre-Closing Environmental Conditions as to which [Vialco] has agreed to indemnify Buyer pursuant to this Article VIII; (2) the removal or encasing of asbestos in or on Assets as contemplated by Section 8.6 of this Agreement; and (3) the maintenance, operation and management of all bauxite residue storage facilities appurtenant to the Refinery, including, but not limited to Pre-Closing Environmental Conditions relating to bauxite residue storage and disposal but not including any improper storage or disposal of other materials in bauxite residue storage facilities, the storage or disposal of which materials created a Pre-Closing Environmental Condition.

Considering each sub-section of Article 8.3 shows that the Article deals with both indemnity and affirmative obligations. Thus, Article 8.3(1) – which applies only to "Environmental Conditions" – is an indemnity-only provision, lacking additional verbiage. In contrast, Articles 8.3(2) and 8.3(3) tie Alcoa's agreement to be "responsible" to specific, forward-looking actions: the "removal" or "encasing" of asbestos (Art. 8.2); and the "maintenance," the "operation," and the "management" of the bauxite residue storage facilities. (OB 18-19.) No indemnity provision cited by Alcoa is similar, and Alcoa fails to refute the unique meaning of these forward-looking obligations.

Had the parties intended for Article 8.3(3) to be solely an indemnity provision, the active phrase "maintenance, operation, and management" would be

meaningless. This phrase is not a mere redundancy, such as the phrases "indemnify and hold harmless" often are. Instead, the parties included additional, forward-looking language to impose on Alcoa separate, specific proactive obligations. Nor were the terms "maintenance, operation, and management" linked to a potential liability arising from a specified claim, as an ordinary indemnification provision often is. For instance, Article 8.3 does not provide that Alcoa would "indemnify Vialco for all Losses arising out of or related to the maintenance, operation, and management of all bauxite residue storage facilities." Nor does Article 8.3(3) list a set of historic liabilities. Instead, Article 8.3(3)'s wording blends a sweeping indemnity with an affirmative obligation to secure the bauxite residue. Thus, the provision clearly anticipates a forward-looking action independent of the duty to indemnify.

Alcoa points to Articles 8.2 and 8.6, arguing that the existence of these separate provisions demonstrate that Article 8.3 provides only for indemnity.[4] But, a fair reading of Articles 8.2 and 8.6 leads to the distinct conclusion that Article 8.3 provides for both indemnity and additional contractual undertakings.

1. Article 8.2 is a Standard Indemnification Only Provision

First, Alcoa argues that because Article 8.2, which utilizes the term "be responsible," is an ordinary indemnity provision, Article 8.3 must be as well. But

[4] To the extent Alcoa argues that the section heading indicates that Article 8.3 is only an indemnity provision, that argument is prohibited by Article 9.9, which provides that "[t]he headings of the Articles and Sections herein are inserted for convenience of reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement."

Alcoa ignores the deliberate distinction the parties made in determining the obligations undertaken via Article 8.2 and Article 8.3. Article 8.2 lacks any language requiring an affirmative undertaking. Instead, Article 8.2, like other ordinary indemnity provisions, requires Vialco to be responsible for "Pre-Closing Environmental Conditions," which are limited in definition "to the extent, and only to the extent" that those conditions give rise to claims that:

> (1) require (with or without notice or a Judgment with respect thereto) remedial investigation and/or action and/or involve suits, actions or other proceedings for remedial action, study or investigation, and/or;
>
> (2) give rise to Judgments, claims, demands, penalties, costs, and/or other liability of any nature of Buyer.

(A000042-43.)

Article 8.3(3) is different. The provision is not linked to the existence of a suit, action, or a judgment to which an indemnity would respond. Instead, the provision requires Alcoa to be responsible for affirmative, contractual undertakings: the removal of asbestos and the maintenance, operation, and management of the bauxite residue storage facilities. That Article 8.2 was so limited, while Article 8.3 was not, demonstrates the provisions were intended to establish different obligations.

2. Articles 8.3(2) and 8.6 Show Alcoa's Other Affirmative Responsibilities

Reading Articles 8.3(2) and 8.6 together also shows that Alcoa's obligation to be responsible for addressing environmental contaminants at the Refinery, when

not tied to a specific "claim" or "liability," are additive to Alcoa's indemnity obligations. Article 8.3(2) provides that Alcoa would "be responsible for, and [] indemnify, save and hold [Vialco] and its Affiliates harmless with respect to . . . the removal or encasing of asbestos in or on Assets as contemplated by Section 8.6 of this Agreement." Article 8.6 then states that Alcoa would "be responsible for the removal or encasing of asbestos in or on the equipment," re-emphasizing Alcoa's responsibility to actively address an environmental condition at the Refinery. Thus, Article 8.6 demonstrates the distinct value the parties placed on the phrase "responsible for" when that phrase is connected to an affirmative action.

Alcoa then asserts that Article 8.6 is the only source for Alcoa's responsibility to remove or encase the asbestos. Not so. While both Article 8.3(2) and Article 8.6 reference Alcoa's responsibility, Article 8.6 limits Alcoa's responsibility by exempting "asbestos waste material accumulated for disposal by or on behalf of Seller prior to the Closing Date." Thus, while Article 8.6 restates Alcoa's obligation to remove or encase the asbestos, it does so to limit the specific actions required. That there is a minor redundancy between these two provisions does not eliminate the plain, affirmative obligation imposed by Article 8.3(2).

Article 8.3(3) contains a mirror structure: the first portion establishes Alcoa's responsibility to maintain, operate, and manage the bauxite residue storage facilities, while the second portion limits those responsibilities by providing that Alcoa shall not be responsible for the "improper storage or disposal of other

materials in bauxite residue storage facilities." This is just like how Article 8.6 limits the extent to which Alcoa would be responsible for the removal or encasing of asbestos provided for in Article 8.3(2).

B. The Cases Cited by Alcoa are Inapposite

Ignoring these aspects of the 1995 Agreement's structure, Alcoa cites two cases to argue that courts should not accept that a provision concerning indemnity also imposes other obligations on the indemnitor. (AB 14.) But Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572, 586-587 (Del. Ch. 2006), held only that an indemnification provision requiring an indemnitor to "indemnify and hold harmless" did not additionally require the advancement of the indemnitee's legal fees. Here, Article 8.3(3) contains express reference to the affirmative obligations of "maintenance," and "management," words that make sense only if referring to proactive obligations. Quadrant Structured Products Co. v. Vertin, 106 A.3d 992, 1024 (Del. 2013), a decision concerning the meaning of an indenture's no-action provision – without reference to indemnity – is similarly irrelevant. And while "different words used in different subsections of a text nevertheless may have the same common sense meaning," (AB 17,) a reasoned reading makes obvious that the parties intended to tie Alcoa's "responsibility" to affirmative actions in Article 8.3.

II. THE BELOIT STANDARD DOES NOT APPLY

Separately, Alcoa argues that the trial court properly dismissed the Indemnity Claims by relying on the Third Circuit's reasoning in Beloit, asserting that "is a well-settled rule of law that a purported indemnitor is not deemed to have indemnified a would-be indemnitee for a 'contractual liability' . . . unless the indemnity provision contains . . . an unequivocal undertaking by an indemnitor to assume *contractual liability* undertaken by its indemnitee." (AB 20.) This conclusion is wrong. Beloit is neither Delaware law, nor well-settled. And the principles underlying the application of Beloit do not apply to these facts.

A. The Beloit Standard is Not Delaware Law

No Delaware Court had ever before applied the Beloit standard, and at least one Delaware court held, reading the plain meaning of an environmental indemnity agreement, that an indemnitee's contractual environmental liabilities were covered despite not expressly referencing contractual liabilities. See Global Energy Fin. LLC v. Peabody Energy Corp., 2010 WL 4056164, at *20-21 (Del. Super. Oct. 14, 2010) (contractually allocated environmental liabilities covered by indemnity that did not expressly reference "contractual liabilities"). Moreover, a number of other courts have held that contract liabilities can be covered by an indemnity provision, even when the provision does not expressly reference the phrase "contractual liability," so long as the provision is adequately broad. See, e.g., Breaux, 562 F.3d at 364-65 (provision covering "all liability" and lacking indication of "an intent on

the parties to exclude contractual liability" covered contractual claims); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 334 (5th Cir. 1981) (no requirement that an indemnity provision "contain any special words to evince an intention to create a right of indemnity for . . . contractual liabilities"). And indeed, Alcoa agreed to limit Vialco's ultimate liability for any third party's claim – including Lockheed – for "indemnity, contribution, or otherwise" relating to environmental conditions at the Refinery, thereby acknowledging the potential for such liability. (Art. 8.1(a).)

Thus, there is no reason to believe that these highly sophisticated parties, deliberately contracting under Delaware law in 1995, had any reason to believe that a sweepingly broad indemnity provision would – for any reason – exclude contractual indemnity, particularly when Alcoa acknowledged the potential for such indemnity in Article 8.1(a). If there is any doubt as to the parties' intention in drafting an all-encompassing indemnity and the scope of that indemnity, the issue should be resolved at trial – or at least after the parties' intentions and negotiations have been subjected to discovery.

B. There is No Reason to Apply the Beloit Standard to This Action

Alcoa must concede that the cases it cites applying the Beloit standard to exclude contract liabilities from an indemnity rely on two principles, namely that: (i) indemnity provisions are to be strictly construed against putative indemnitees; and (ii) an agreement to indemnify for contractual liability can impose uncertain and indefinite liabilities regardless of the fault of the indemnitor. (AB 23 (citing

Jacobs Constructors, Inc. v. NPS Energy Servs., Inc., 264 F.3d 365, 372-373 (3d Cir. 2001).) When neither principle is at issue, excluding contractual liability from a broad indemnity provision is arbitrary and should be rejected. Here, the concerns justifying application of the Beloit standard are not implicated.

1. The 1995 Agreement is Unambiguous

Delaware law does provide that indemnity provisions are to be construed strictly against the indemnitee. However, "where the language clearly indicates the intention of the parties" to provide for indemnity, the Court should "give effect to such intention despite its inclination to construe the agreement strictly against the indemnitee." James, 472 A.2d at 37. Thus, consistent with Delaware law, courts applying the Beloit standard have done so when the indemnity provisions included language indicating that the provision was limited to direct, tortious liability. For instance, the indemnity in Beloit applied to claims for "injury liability," a clear reference to a claim arising in tort. 757 F.2d at 1433. Similarly, in Jacobs, the indemnity applied to claims and liabilities "arising by reason of personal injury, the death of or bodily injury to persons . . . design defects . . . damages or destruction of property or loss of use thereof." 264 F.3d at 370. When the indemnity is intentionally broad, and lacks any indication of an intent to exclude contractual liability, courts read the indemnity to cover contractual liabilities (notwithstanding the requirement to strictly interpret the provision). Breaux, 562 F.3d at 364-65.

Here, Article 8.3(3) is sweepingly broad, requiring Alcoa to indemnify

Glencore with respect to all claims concerning bauxite residue. The Court should give effect to the parties' intent, manifested through Article 8.3(3), and hold that the indemnity covers Lockheed's contractual claims relating to bauxite residue.

2. The Underlying Liabilities Were Known, Joint, and Several

Moreover, the rationale supporting application of the Beloit standard has no applicability to Glencore's Indemnity Claims, which arise from the contractual allocation of known, strict, and joint and several CERCLA liabilities shared by Alcoa, Vialco, and Lockheed together. (OB 25-27.)[5]

Alcoa tacitly concedes that courts have not applied the Beloit standard when the ultimate indemnitee (Lockheed) could have recovered directly from the alleged indemnitor (Alcoa), but chose instead to recover from the intermediate indemnitee (Vialco) via contract. (AB 27 n.6.) In such a circumstance, there is no concern that an indemnitor will be held liable for "uncertain and indefinite liabilities regardless of the fault of the indemnitor" because the indemnitor could otherwise be held liable to the ultimate indemnitee. Greenberg v. City of N.Y., 81 A.D.2d 284, 287 (N.Y. App. Div. 1981). Indeed, had Vialco agreed to conduct the same remediation Lockheed has agreed to, Alcoa would have no defense under Beloit.

Apparently recognizing this critical flaw, Alcoa advances three arguments to support application of the Beloit standard nonetheless. First, Alcoa hollowly

[5] Alcoa asserts that Glencore is seeking to create a "CERCLA Exception" to the Beloit Standard. Not so. Alcoa's articulation of the Beloit standard only precludes indemnification of an indemnitee's contractual liabilities when such liabilities are unknown to the indemnitor. That circumstance does not exist in this case; Alcoa was aware of – and shared in – the same underlying liabilities.

asserts that Greenberg has "nothing to do with CERCLA." (AB 27 n.6.) But none of the cases cited by Alcoa involve CERCLA liabilities either. And Greenberg's reasoning is applicable to these facts, where Alcoa was jointly and severally liable for the same underlying liabilities now subject to Lockheed's contractual claim.

Second, Alcoa asserts that Greenberg "misses the point," because the question is "not whether the indemnitor is aware of the underlying liability, but whether it agreed by specific and unequivocal language to indemnify a separate contractual obligation." (AB 27 n.6.) But Greenberg rejected a putative indemnitor's argument – identical to the argument made by Alcoa – that an indemnity should not cover contractual liabilities absent specific language referencing contractual liability, reasoning that the indemnitee was aware of and directly liable for the liability covered by the contract. 81 A.D. 2d at 287-88.

Third, Alcoa asserts – with no support – that it is "unfathomable that plaintiffs could have incurred any further liability on a CERCLA contribution claim anyway." (AB 27.) Yet Alcoa concedes that it, and Vialco, were jointly and severally liable for the liability underlying Lockheed's contract claims. And Alcoa could have faced a contribution claim from Lockheed, despite depositing a "small fraction" of the bauxite residue, (AB 26-27,) since a court evaluating Alcoa's proportionate responsibility must consider and weigh many factors, including whether Alcoa contractually agreed to take over the bauxite residue. See Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994)

(trial court committed reversible error in dismissing contribution claim and not considering contract governing environmental conditions).

The reason that neither Lockheed nor Glencore can bring contribution claims against Alcoa is because Alcoa settled with the Government by taking responsibility for only Area A, and then obtained a contribution bar. Alcoa's carefully engineered settlement left Lockheed and Vialco exposed to claims for damages and the remediation of Area B, which the parties had apportioned via contract. Vialco was jointly and severally liable for such costs, and could have passed the liability on to Alcoa directly, who would have no guaranteed contribution claim against any other party. Alcoa cannot explain why it should be permitted to evade a liability, of which it was undoubtedly aware and had agreed to be responsible for, because Lockheed and Vialco allocated their liability via contract instead of the default statutory mechanism.[6] Indeed, even if Alcoa thought Lockheed was responsible for the claims given the amount of bauxite residue Lockheed's predecessors deposited, Alcoa had expressly limited its right to bring contribution claims against Lockheed in order to protect Vialco. (Art. 8.1(a).) None of these arguments was examined by the court below, which noted simply that it was "comfortable" with the reasoning of Beloit.

[6] As discussed above, the 1995 Agreement was designed to ensure that Alcoa would cover any and all costs relating to the bauxite residue storage facilities, without regard to which entity deposited the bauxite residue. Moreover, Alcoa's agreement to hold Vialco harmless is so broad that in Article 8.1(a), Alcoa expressly agreed to cap any contribution claims it may have against other former operators of the Refinery so as to ensure that Vialco's liability to such operators, by indemnity, contribution, or otherwise, was limited. Alcoa was therefore fully aware of the possibility of a claim against Vialco, including a claim pursuant to an "indemnity."

III. ARTICLE 8.3 IS WORDED BROADLY ENOUGH TO COVER GLENCORE'S CONTRACTUAL OBLIGATIONS TO LOCKHEED

Finally, Alcoa argues its Article 8.3 indemnity obligations do not extend to Vialco's contractual liabilities. But Article 8.3 is sweepingly broad and applies to all claims concerning the subject matter referenced, including contractual claims, a point also unexamined by the Superior Court.

A. Article 8.3 is Worded Broadly to Cover Contractual Liabilities

Article 8.3's indemnification provisions are unique. The provisions apply, without limitation, to a known geographic condition: all environmental conditions related to bauxite residue storage and disposal, including, without limitation, bauxite residue disposed by Vialco and Lockheed. The indemnity provision is also exceptionally broad: it does not limit, by listing, any type of liability as to which the indemnity applies. By its plain meaning then, Alcoa's indemnity obligation extends to all claims with respect to bauxite residue storage and disposal, including claims asserted in contract. See, e.g., Breaux, 562 F.3d at 365. A number of courts have made clear that it is of no moment that Lockheed's claims against Glencore arise from contract, since Lockheed's claims are still with respect to the bauxite residue for which Alcoa agreed to indemnify Glencore. See, e.g., In re Safety-Kleen Corp., 380 B.R. 716, 725 (Bankr. D. Del. 2008) (provision would cover plaintiff's indemnity claim, "even if the [remediation payments] were the product of contractual indemnification rights," since they "would have arisen out

of environmental liabilities"); Global Energy Fin. LLC, 2010 WL 4056164, at *20-21 (contractual environmental liabilities covered by indemnity provision that did not expressly reference "contractual liabilities").

Alcoa's attempts to distinguish these authorities are unavailing. Alcoa does not even address Breaux's holding. Then, in response to In re Safety-Kleen Corp., Alcoa notes that the "remediation payments [at issue] were not 'the product of contractual indemnification rights,'" (AB 33,) omitting that court's conclusion that even if the payments *were* the product of a contract, they would be subject to indemnity. 380 B.R. at 725. Finally, Alcoa concedes that the broad indemnity in Global Energy covered contractual liabilities by applying to "activities or operations," (AB 26,) but argues its indemnity obligation relating to the "operation and management" of the bauxite residue storage facilities is more narrow. But Article 8.3(3) – just like the provision in Global Energy – is exceptionally broad, and covers the operation and management of those facilities – including contracts, like the 1989 Agreement, that affect ownership of or relate to those facilities.

B. Article 2.1 Has No Bearing on Glencore's Indemnity Claim

Alcoa instead seeks to limit its indemnity obligations under Article 8.3 by referencing Articles 2.1 and 7; two provisions unrelated to Glencore's Indemnity Claims. Most prominently, Alcoa cites to Article 2.1, which reads: "EXCEPT AS SET FORTH ON EXHIBIT B, NO LIABILITIES, ACTUAL, CONTINGENT, OR OTHERWISE, ARE BEING TRANSFERRED BY SELLER TO BUYER."

Alcoa then argues it can bear no liability to Glencore for any contractual liability if the contract giving rise to liability is not listed on Exhibit B. But whether the 1989 Agreement is an assumed liability is irrelevant to assessing the validity of the Indemnity Claims. Alcoa's obligations to assume a liability or indemnify with respect to that assumed liability are set forth in Articles 2.1 and 7.3; articles wholly independent from Alcoa's obligations concerning environmental conditions. And so while Glencore no longer pursues its claim that Alcoa breached its obligation to assume liabilities listed on Exhibit B, Glencore maintains its Article 8.3 indemnity claim.

That the 1989 Agreement was not assumed by Alcoa in its entirety does not impact the scope of Glencore's Article 8.3 indemnity rights. Limiting Alcoa's Article 8 indemnity obligations to liabilities listed on Exhibit B, as Alcoa proposes, would render Article 8 meaningless, since Alcoa was separately obligated – under Article 7.3 – to indemnify for the assumed liabilities. Article 8.3 reflects the parties' agreement that Alcoa would indemnify Glencore for environmental liabilities notwithstanding Article 2.1's limitations concerning assumed liabilities.

Thus, there was no need to list the 1989 Agreement as an assumed liability (which contained numerous obligations), when Article 8.3 sufficiently covered Vialco's liability for environmental costs. While Alcoa "may not have actively assumed liability" for the 1989 Agreement, it must nevertheless indemnify Glencore for the claims in the New York Action because they fall within the scope

of Article 8.3's indemnity provision. Kurilko v. Teletech Holdings, Inc., 2009 WL 3517565, at *4 (S.D. Cal. Oct. 26, 2009).

CONCLUSION

For the foregoing reasons, Glencore requests that this Court reverse the Superior Court's Judgment dismissing Glencore's Breach of Responsibility and Indemnity Claims, and remand those claims for further proceedings.

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