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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ASHLAND INC., a Kentucky Corporation,	:	**REDACTED PUBLIC VERSION FILED ON SEPTEMBER 19, 2017**
Plaintiff Below, Appellant,	:	No. 293, 2017
v.	:	Court Below: Superior Court of the State of Delaware
NEXEO SOLUTIONS, LLC, f/k/a TPG ACCOLADE, LLC, a Delaware Limited Liability Company,	:	C.A. No. N14C-07-243 EMD CCLD
Defendant Below, Appellee.	:	

APPELLANT'S OPENING BRIEF

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Dated: September 5, 2017

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NATURE OF THE PROCEEDINGS

Although a complex contract is at the heart of this dispute, this is a straightforward contract interpretation matter. Specifically, this dispute involves the interpretation of certain provisions related to the allocation of portions of environmental remediation liabilities in an Agreement of Purchase and Sale (the "APS") between Ashland LLC f/k/a/ Ashland Inc. ("Ashland") and Nexeo Solutions, LLC f/k/a/ TPG Accolade, LLC ("Nexeo"). In this matter, the Superior Court erred when it failed to harmonize the provisions of the contract as a whole in contravention of long-standing Delaware principles of contract interpretation and contrary to the parties' intentions.

Ashland filed its complaint in July 2014 seeking indemnification for remediation costs it incurred and may incur at two Superfund sites and a declaratory judgment that Nexeo is responsible for the first $5 million of liability for claims arising from these costs. In July 2015, the Superior Court granted Nexeo's motion to dismiss with respect to Ashland's claim for breach of the covenant of good faith and fair dealing, but denied Nexeo's motion with respect to Ashland's claims for breach of contract and declaratory judgment. The parties subsequently engaged in targeted discovery for the purpose of filing cross-motions for summary judgment, including deposing party representatives and each party's principle lawyer responsible for negotiating the environmental liabilities sections

of the APS. The parties filed cross-motions for summary judgment in December 2017. The Superior Court held argument in March, and issued its Opinion on June 21, 2017. The Superior Court erred when it held that Ashland bore responsibility for a portion of remediation liabilities at two Superfund sites for which the plain language of the APS expresses that the parties' intended to allocate responsibility to Nexeo. Therefore, the Superior Court's Opinion and Order granting summary judgment in favor of Nexeo should be reversed and judgment should be entered in favor of Ashland.

SUMMARY OF ARGUMENT

1. The Superior Court erred in granting Nexeo's motion for summary judgment and denying Ashland's motion for summary judgment when it failed to read the APS as a harmonious whole giving effect to each clause and in a manner at odds with the parties' shared intent. Article 2 of the APS must be read in harmony with Articles 9 and 10. Since Article 9 provides that Ashland is not responsible for the first $5 million of the Business's remediation expenses incurred at the USOR Superfund Site and the Arivec Chemical Superfund Site, they are Nexeo's responsibility.

2. The Superior Court erred in interpreting the word "terminate" as used in Section 9.2(d) of the APS too narrowly in light of the contractual context in which the term was used and in such a manner as to contravene the parties' shared intent.

3. The Superior Court erred in interpreting the applicability of the $5 million deductible provision of the APS in such a way as to make its applicability contingent on which party suffers the loss first, which is contrary to the parties' intentions of providing for each and every liability and that the allocation of liability not be left to chances. Instead, the decision provides a windfall to Nexeo based on which party first suffers a "Loss."

4. Accepting the Superior Court's interpretation of the APS as true, the Superior Court erred in finding that Nexeo had not suffered a "Loss" and it is not seeking indemnification from Ashland despite finding, as a factual matter, that Nexeo first received the claim related to the USOR Superfund Site. Accordingly, under the Superior Court's interpretation of the APS, Nexeo would be responsible for the first $5 million in remediation expenses at the USOR Superfund site.

STATEMENT OF FACTS

I. ASHLAND SOLD NEXEO ITS CHEMICAL DISTRIBUTION AND ENVIRONMENTAL SERVICES BUSINESS AS AN ON-GOING BUSINESS.

Ashland and Nexeo entered the APS on November 5, 2010. A182. Pursuant to the APS, Ashland agreed to sell, and Nexeo agreed to buy Ashland's entire chemical distribution and environmental services business (the "Business") for $930 million. A182; A200-201; A207. Ashland did not own or operate the Business in a separately-incorporated subsidiary; therefore, the parties accomplished the transfer by a sale of the assets and assumption of the liabilities related to the Business. A136. Thus, in the absence of a stock transaction, in order to sell an on-going business Ashland needed to transfer the tangible and intangible assets necessary to continue operations of the Business from day one. A554-55 (Nettles 16:6-17:4); A673 (Woods 27:18-28:5). The sale closed on March 31, 2011 ("Closing" or the "Closing Date"). A17.

As defined in the APS, the "Business" was "the business conducted by the segment of Ashland known as 'Ashland Distribution'" and included "distribution, blending and marketing of specialty and industrial chemicals, additives and solvents, to industrial users." A184; A550-51 (Nettles 12:24-13:16). The "Business" included "[t]he collection, recovery, recycling and disposal of hazardous and non-hazardous waste." A184. The APS identifies the assets

conveyed in the transaction (the "Conveyed Assets"), which include, *inter alia*, the Owned Real Property and Leased Real Property, Contracts with customers of the Business, etc. A185; A200 (APS §2.2).[1] Ashland also conveyed all "intangible rights and property relating exclusively to the Business. . . " including "value as a going concern … ." A201 (APS §2.2(h)). Nexeo obtained a representation from Ashland that, subject to certain exceptions, the Conveyed Assets constitute "all the assets which are necessary for the conduct of the Business immediately following the Closing in all material respects as it is presently conducted. . . ." A221 (APS §5.12).

II. ASHLAND AND NEXEO WERE EXPOSED TO ENVIRONMENTAL REMEDIATION LIABILITIES.

Ashland and Nexeo intended to allocate between themselves all environmental remediation-related liabilities in the APS to leave nothing to chance. A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9). This was necessary because environmental laws, particularly the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq*. ("CERCLA"), potentially exposed Ashland and Nexeo, as former and current owners, to the Business's remediation liabilities. A572 (Nettles 34:16-23). Particularly, CERCLA imposes

[1] Capitalized terms not defined herein have the meaning ascribed to those terms in the APS.

liability on a wide range of parties, and courts have held the liability is strict, retroactive, and joint and several. A573-74 (Nettles 35:4-36:1).[2]

The distribution component of the Business involved purchasing and reselling chemicals. A550-51 (Nettles 12:24-13:16). The environmental services component involved taking chemical waste from customers and arranging for disposal at licensed, third-party waste recycling treatment or disposal sites. A556 (Nettles 18:14-23). Releases (spills) of these chemicals create potential liabilities for the Business to which both parties could be exposed. A556-58 (Nettles 18:24-20:9). As the former owner/operator of the Business, Ashland remains subject to liability to governmental authorities and third-parties even after conveying the assets and liabilities associated with the Business. A556-58 (Nettles 18:14-20:9); A576-77 (Nettles 38:15-39:11).

Nexeo, however, also became exposed to environmental liabilities by virtue of acquiring the Business. By acquiring all the Business's assets and assuming various customer contracts (including indemnity obligations), Nexeo became

[2] As one example, CERCLA imposes liability for response costs incurred by the United States to clean up a site upon the current owner of the property (subject to certain defenses) and all those prior owners during times when disposal of "hazardous substances" occurred. *See* 42 U.S.C. § 9607(a). Unless the current owner can establish an affirmative defense, it is subject, along with prior owners, to joint and several liability for all cleanup costs, including costs to address wholly past releases of "hazardous substances," even if the current owner did not cause the releases, as liability under CERCLA exists without regard to fault. *Id*; *see also* 42 U.S.C. § 9607(b).

exposed to potential liability as a legal successor to Ashland and/or as an indemnitor of customers for sites at which wastes generated or managed in the operation of the Business were sent for disposal. A555-57 (Nettles 17:13-19:6). Nexeo was also exposed by stepping into the chain of title of the owned real estate or becoming a tenant/operator of the leased real estate, thereby succeeding to obligations under environmental laws and various leases to bear responsibility for spills occurring from the past operation of the Business. A572; A574-76 (Nettles 34:12-23; 36:6-38:7). Finally, the continuing operation of the Business after transfer of ownership could give rise to new or additional liabilities, including liabilities at the same owned and leased properties or off-site disposal locations used in the Business prior to the transfer. A572; A573 (Nettles 34:16-23; 35:9-15).

Accordingly, the parties needed a comprehensive agreement concerning responsibility for environmental liabilities. A560-61 (Nettles 22:15-23:3). The APS addresses allocation of three types of remediation liabilities (discussed *infra*).

III. THE APS DETERMINES WHICH PARTY IS RESPONSIBLE FOR DIFFERENT CATEGORIES OF ENVIRONMENTAL REMEDIATION LIABILITIES

A. Nexeo Assumed All Liabilities Unless Expressly Retained By Ashland.

A foundational element of the APS is that that Nexeo assumed the liabilities of the Business except those Ashland expressly retained. A204 (APS §2.5). Section 2.5 states that "[u]pon the terms and subject to the conditions of this

Agreement…" Nexeo assumes "any and all Liabilities to the extent relating to the Business or the Conveyed Assets…but excluding…Retained Liabilities…." A204. Section 2.5(n) serves as a "catch-all" provision pursuant to which Nexeo assumes all liabilities (or portions thereof) not otherwise allocated and specifically provides Nexeo assumes:

> [A]ll other Liabilities of whatever kind or nature, primary or secondary, direct or indirect, whether accrued or fixed, known or unknown, absolute or contingent, matured or unmatured or determined or determinable to the extent arising out of or relating to the operation or conduct of the Business or any Conveyed Asset, or the ownership, sale or lease of any of Conveyed Asset, in each case whether arising before, on or after the Closing Date.

A206; A590 (Nettles 52:6-23 ([redacted])).

B. The APS Allocates Liability for Three Categories of Remediation Liabilities.

The parties intended a comprehensive allocation of all remediation liabilities. Nexeo's attorney principally responsible for negotiating the environmental terms, Larry Nettles ("Nettles"), confirmed the parties' intention to affect a complete allocation of all remediation liabilities of the Business, leaving nothing to chance. A580 (Nettles 42:6-17). Section 2.5(e) provides that Nexeo would assume remediation liabilities "to the extent relating to the Business or any Conveyed Asset, whether arising before, on or after the Closing Date", other than "Retained Remediation Liabilities." A204.

The first division of remediation liabilities is between liabilities arising from events occurring after Closing and those occurring before Closing. A204-05. Under Section 2.5(e), Nexeo assumed responsibility for liabilities arising from post-Closing operation of the Business. A205.

Environmental remediation liabilities arising due to pre-Closing operation of the Business are divided into two categories: (1) arising from pre-Closing operations and identified on Schedule 1.1(d) (the "Schedule"); and (2) arising from pre-Closing operations and not identified on the Schedule. A192; A194. The APS defines these two categories of pre-Closing remediation liabilities as "Retained Specified Remediation Liabilities" ("RSRLs") and "Other Retained Remediation Liabilities" ("ORRLs"). A194; A192. Articles 2, 9, and 10, then further clarify how responsibility for these liabilities is allocated between Nexeo and Ashland.

RSRLs are liabilities specifically identified in the Schedule. A194. The Schedule and its Exhibit A list sites at which Ashland was paying all or part of the cost of performing remediation at the time of Closing or sites as to which Ashland had received a written notice of potential liability, and describing the specific Releases of Hazardous Materials from which such liabilities arose. A524-25; A221-22 (APS §5.14). In contrast, ORRLs are remediation liabilities that are not

described on the Schedule or in the written notices for the sites listed on Exhibit A. A192-93.

Ashland retains liability for RSRLs subject to the terms and conditions of the APS. A206 (APS §2.6(d)). With respect to ORRLs, Ashland retains liability if Ashland receives written notice of the ORRL during the period of five years after the Closing Date (*i.e.*, prior to March 31, 2016), *subject to the terms and conditions of the APS*. A192; A205. Nexeo expressly assumes any ORRL for which Ashland did not receive written notice during the first five years after the Closing Date. A205 (APS §2.5(k)) ; A590 (Nettles 52:1-5).

Neither the classification of liabilities as RSRLs or ORRLs in the definitions section—nor the designation in Article 2 of a RSRL or ORRL as "Retained" or assumed—results in the unconditional assignment of that liability to a particular party. The general assignment of responsibility is limited and qualified by other provisions of the APS. Indeed, Section 2.5 begins with providing that Nexeo assumes Liabilities relating to the Business "[u]pon the terms and subject to the conditions of this Agreement…." A204. Provisions in Articles 9 and 10 divide responsibility for remediation liabilities into tranches based on dollar amount or other circumstances, defining the extent to which such liabilities (or portions thereof) are assumed by Nexeo or retained by Ashland.

C. Articles 9 and 10 Limit the Extent to Which Ashland Retains RSRLs or ORRLs.

Article 9 establishes the parties' obligations to indemnify each other for Retained and Assumed Liabilities. A256-63. Through Article 9, the obligation to bear the costs of remediation for a specific site or matter may shift from one party to the other upon the occurrence of certain events or when the amount of exposure reaches certain monetary thresholds. A256-63.

Section 9.1(c) establishes Ashland's obligation to indemnify Nexeo for Retained Liabilities. A257. Yet Sections 9.5 and 9.6 expressly limit the scope of that obligation and shift liability to Nexeo for Retained Liabilities, including RSRLs and ORRLs, in certain circumstances. A259-61. For example, Ashland is not responsible to indemnify Nexeo for the cost of remediation at a site or for a release that falls within the category of RSRLs or ORRLs in those circumstances in which Ashland "[A]ddresses the Release giving rise to such Losses as necessary to comply with Environmental Law . . . including meeting an applicable clean-up standards or obtaining a No Further Action Letter, Letter of Completion or other written communication of similar import from any Government Authority." A260 (APS §9.5(c)(v)). Upon receipt of a "No Further Action Letter" ("NFA Letter") or other comparable approval, Nexeo "shall pay, perform and discharge all Liabilities, obligations or commitments relating to such Losses." A260. Nettles acknowledged this Section [redacted] liability from Nexeo and Ashland and reflects

Ashland's insistence that [redacted], because Ashland was seeking to [redacted] the business. A600 (Nettles 61:5-14); A599 (Nettles 61:17-62:22).

Section 9.6 establishes various monetary limitations on RSRLs and ORRLs, each of which shift from Ashland to Nexeo a portion of such liabilities in certain circumstances. A260-61. For example, Section 9.6(c)(i) imposes an outside monetary limit of $75 million on Ashland's obligations to indemnify Nexeo for "any Retained Remediation Liabilities" (other than Off-Site Liabilities). A260; A600 (Nettles 62:2-9). The APS defines "Retained Remediation Liabilities" to mean both RSRLs and ORRLs. A194. Thus, if Ashland were to spend $75 million satisfying the liabilities listed on Schedule 1.1(d), responsibility for the remaining liabilities would then shift to Nexeo. A260 (APS §9.6(c)(i)).

Similarly, Sections 9.6(d) and 9.6(e) impose monetary limits on various retained liabilities, including RSRLs and ORRLs. A260-61. For instance, Section 9.6(d) imposes an aggregate limit of $139.2 million on Ashland's obligations in relation to various retained liabilities, including all RSRLs and ORRLs. A260-61. Thus, if Ashland expended $139.2 million to satisfy these liabilities, the obligation to address all remaining remediation liabilities shifts to Nexeo.

Sections 9.2(c) and 9.2(d), in turn, obligate Nexeo to indemnify Ashland for those remediation liabilities that the parties allocated to Nexeo. A257. First,

Section 9.2(c) requires Nexeo to indemnify Ashland for Assumed Liabilities. A257. Because Nexeo assumes all liabilities if and to the extent not retained, whenever Ashland's retention of a RSRL or ORRL is subject to a limitation or qualification, Nexeo must bear and assume such liability to the extent of such limitation or qualification. A204-06 (APS §§2.5, 2.5(e), 2.5(n)).

Second, Section 9.2(d) obligates Nexeo to indemnify Ashland for all losses for which Ashland's "obligation to indemnify [Nexeo] has terminated in accordance with Section 2.5(k), (l) and (m) … or the terms of Section 9.5 or 9.6." A257; A596 (Nettles 58:5-12). As a result of the operation of any one or more of the provisions of Sections 9.5 and 9.6, liability is allocated to Nexeo in any circumstance under which Ashland is not obligated to indemnify Nexeo – notwithstanding its classification as a "Retained" liability. Thus, when Ashland achieves a NFA Letter, per Section 9.5(c)(v), or incurs costs for one or more sites or matters that exceed the monetary limitations of Section 9.6, any additional or remaining liability shifts to Nexeo and Nexeo must indemnify Ashland. A260. Nettles agreed that the effect of this provision is to [redacted] liability to Nexeo. A600 (Nettles 62:2-22).

Article 10 contains specific provisions that divide responsibility for RSRLs and ORRLs. A264-66. Article 10 is directed exclusively to environmental matters and contains multiple provisions establishing that, in a variety of circumstances,

liabilities are shared in layers – retained for some portion by Ashland and then assumed for some portion by Nexeo. A264-66. Section 10.2(ii) provides that Ashland is not obligated to indemnify Nexeo for RSRLs or ORRLs upon a change in environmental law after transfer of the Business. A264. Thus, if a change in law adopted after Closing, such as a more stringent cleanup standard, were to give rise to an obligation to remediate a release when there would not previously have been one, or if such change increased the remediation cost, the parties agreed that Nexeo would bear that liability (or portion of it) attributable to the changes in obligations. A264. Nettles acknowledged that [REDACTED] A605 (Nettles 67:2-14).

Other sub-sections of Section 10 shift liability to Nexeo in similar fashion. A264-65 (APS §§10.2(i), (iii), (iv)). Section 10.2(i) limits Ashland's obligation for remediation at any of the Conveyed Real Properties if the liability arises from a business decision by Nexeo to close or change the use of an owned or leased site. A264 (APS §10.2(i)). In such circumstances, the parties agreed that Nexeo would bear responsibility for the cost (or incremental cost) of remediation. Once again, [REDACTED] A603-04 (Nettles 65:6-66:12). The remaining sections shift liability to Nexeo if it performs sampling at a site that is not required by law or if it exacerbates an existing pollution condition.

Section 9.6(c)(ii) limits Ashland's obligation to indemnify Nexeo for ORRLs, which the initial notice of liability is received within five years of Closing. A264. Specifically, Ashland has no liability to indemnify Nexeo for ORRLs:

> For any individual Loss (or series of connected Losses) hereunder unless such individual Loss (or series of connected Losses) exceeds U.S. $175,000 and, unless the aggregate of all such Losses for which Ashland would, but for this provision, be liable exceeds on a cumulative basis, U.S. $5,000,000, and if such amount is exceeded, Ashland shall be required to pay only the amount of such Losses which exceeds U.S. $5,000,000.

A260 (APS §9.6(c)(ii)). Since Ashland has no obligation to indemnify for this liability tranche, it is assumed by Nexeo. A204 (APS §2.5). Nexeo—not Ashland—has responsibility for the first $5 million in liability for ORRLs for which notice is received within the first five years after Closing. A260. Unless and until such amount is expended, Nexeo must bear and assume the costs to satisfy those liabilities. Nexeo is required to indemnify Ashland for the same through the operation of Sections 9.2(c) and 9.2(d) – as costs or expenses that are Assumed Liabilities and are costs for which Ashland is not obligated to indemnify Nexeo as a result of a provision contained within Section 9.6. A257; A260.

D. Section 9.8 Reflects the Parties' Intention to Share Liability for RSRLs and ORRLs.

Section 9.8 explicitly provides that the "sole and exclusive remedy" that Nexeo has against Ashland in relation to a Loss, such as RSRLs and ORRLs, is "pursuant to the indemnification provisions" of Article 9 (with exception for fraud

or certain equitable relief). A262. Section 9.8(a) limits Nexeo's rights to pursue "any and all claims" against Ashland in connection with the APS, with the noted exceptions, to the exercise of rights it may have pursuant to the indemnification provisions. A262. Reciprocal provisions of Section 9.8(d) similarly limit Ashland's recourse to indemnification. A263. Thus, the only way that either party can enforce the provisions establishing and allocating RSRLs and ORRLs is via the provisions of Article 9. A262-63.

Through Section 9.8, the APS requires that the allocation of liability for any particular Loss be determined by applying the provisions of Article 9 in their entirety. A262-63. Section 9.1(a)—affording a right of indemnification to Nexeo—is expressly "[s]ubject to the limitations" of the APS. A256. This includes in all such cases the various provisions of Article 9 (and Article 10)—and specifically Section 9.6(c)(ii)—by which the parties divided liability into segments based on amount or other circumstances. *See* A256.

IV. ENVIRONMENTAL REMEDIATION LIABILITIES AT THE USOR AND ARIVEC SITES

After the Closing Date, Ashland received from Nexeo notification of a claim for potential remediation costs associated with the Business at the United States Oil Recovery site in Harris County, Texas (the "USOR Site"). It also received a direct claim related to the Arivec Chemical Company in Douglasville, Georgia (the "Arivec Site", collectively "Sites"). A19-21. Despite demand from Ashland,

Nexeo refuses to acknowledge its obligation to indemnify Ashland for certain amounts related to the Sites. A21.

A. The USOR Site

In or prior to 2007, the Business sent waste materials on behalf of various customers to the USOR Site. A148. Beginning in May 2011, after Closing, the United States Environmental Protection Agency ("EPA") sent notice letters to various (former) Ashland customers advising them of their potential liability under CERCLA for costs required to remediate the USOR Site. A19. Nexeo's customers that received the notice are former customers of Ashland, whose contracts with Ashland were transferred to Nexeo as part of the purchase and sale of the Business under a general assignment agreement executed by both companies at Closing. A19.

The first customer to receive a notice letter from the EPA and seek recourse was Continental Airlines. A406. That party notified Nexeo—not Ashland—that it received a "PRP Notice" from the EPA relating to the USOR Site. A406. Continental Airlines was asking Nexeo to honor the obligations of the contract providing an indemnity in its favor. A406.

After receiving this notice from Continental Airlines, Nexeo determined that the liability was [redacted] and should be tendered to Ashland. A405. A Nexeo attorney contacted a counterpart at Ashland to convey this tender, [redacted]

A408. Subsequently, several other customers of the Business contacted Nexeo to advise of their receipt of similar notices from the EPA. A408. Nexeo likewise tendered these notices to Ashland. A408.

On or about October 4, 2011, Ashland made the first of a continuing series of payments on behalf of the Distribution Business, including Nexeo's customers, for the Business's share of costs at the USOR Site. A19. As of the date of the Complaint, Ashland paid approximately $694,000 on behalf of the Business, including Nexeo's customers, for liability at the USOR Site. A20.

Neither the USOR Site—nor any release relating to it—is listed or described on the Schedule; thus, it is an ORRL. A530 (noting that the parties agree that the "liabilities at issue are ORRL[s]").

B. The Arivec Site

On or about March 17, 2013, Ashland received notice of potential liability relating to transactions between the Business and the Arivec Site. A20; A419. On January 6, 2014, Ashland formally tendered its demand to Nexeo for indemnification under the APS with regard to the Arivec Site. A20; A419.

The remediation expenses of the Business at the Arivec Site to date is estimated at $35,000, and is expected to increase as environmental remediation progresses. A20.

Neither the Arivec Site—nor any release relating to it—is listed or described on the Schedule; thus, it is an ORRL. A530.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING NEXEO'S MOTION FOR SUMMARY JUDGMENT AND DENYING ASHLAND'S MOTION FOR SUMMARY JUDGMENT IN FAILING TO INTERPRET THE APS TO GIVE HARMONIOUS EFFECT TO THE APS AS A WHOLE.

A. Question Presented

Whether the Superior Court erred in granting Nexeo's motion for summary judgment and denying Ashland's motion for summary judgment in holding that Ashland is responsible for the entirety of the remediation expenses incurred at the Sites because, pursuant to Article 2 of the APS, Ashland retained 100% of any ORRLs where notice was received within five years of Closing and, therefore, is not entitled to indemnification for the first $5.0 million in remediation expenses incurred at the Sites. A150-61; A474-87; A501-17; A528.

B. Standard of Review

This Court reviews the Superior Court's "decision on cross-motions for summary judgment *de novo* both as to the facts and the law to determine whether or not the undisputed material facts entitle either movant to judgment as a matter of law." *Reserves Mgmt. Corp. v. R.T. Properties, LLC*, 80 A.3d 952, 955 (Del. 2013) (internal citations, quotation and modifications omitted).

Further, "[t]he interpretation of contract language is reviewed by this Court *de novo*." *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

C. Merits of Argument

The Superior Court erred when it interpreted Article 2 as not being modified by Article 9 and thus, failed to read the APS as a whole, give effect to its provisions, and construe the APS in a manner consistent with the parties' intentions. The plain language of the APS demonstrates that Nexeo contracted to assume liability and indemnify Ashland against the first $5 million for ORRLs, including at the Sites.

1. The APS must be interpreted using accepted principles.

The Court must determine contracting parties' shared intent by interpreting the words of the contract "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise." *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005). It is a "cardinal rule" of Delaware contract construction that a court should give effect to all pertinent contract provisions. *Sonitrol*, 607 A.2d at 1184. Interpreting courts must examine all relevant provisions and their relationship to each other and apply "the cannon of construction that requires all contract provisions to be harmonized and given effect where possible." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012); *Alta Berkeley VI CV v. Omeon, Inc*., 41 A.3d 381 (Del. 2011). Delaware courts are required "to 'read a contract as a whole' and 'give each provision and term effect,

so as not to render any part of the contract mere surplusage.'" *JFE Steel Corp. v. ICI Americas, Inc.*, 797 F. Supp. 2d 452, 469 (D. Del. 2011) (citing *Estate of Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del. 2010)). "[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *E.I. du Pont de Nemours and Co., Inc. v. Shell Oil Co*., 498 A.2d 1113 (Del. 1985). Indeed, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

2. The Superior Court erred in interpreting the APS because the parties expressly allocated the first $5 million of ORRLs to Nexeo.

When interpreted in accordance with Delaware law, the APS provides that Nexeo assumed and agreed to indemnify Ashland for ORRLs up to $5 million (in the aggregate). Such a conclusion harmonizes and gives full effect to all of the relevant provisions of the APS and comports with Delaware's principles of contract interpretation. *Martin Marietta*, 68 A.3d at 1225. Any other reading fails to reconcile Article 2 with Articles 9 and 10. *See Alta Berkeley*, 41 A.3d at 385-86 (internal quotations omitted) ("[A] court … must … if possible, reconcile all the provisions of the instrument."). To the extent the Superior Court determined they were in conflict, it erred in choosing the more general provisions contained in

Article 2 over the more specific contained in Articles 9 and 10. *DCV Holdings*, 889 A.2d at 961("where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

The APS provides that Nexeo assumed all liabilities of the Business, except as specifically retained by Ashland. A204 (APS §2.5). This is consistent with the parties' commercial objective of effecting the sale and purchase of an on-going business. A553 (Nettles 15:4-7). Indeed, Nexeo's assumption of the liabilities was an important component of the consideration Nexeo agreed to provide for the Business and this central principle also applies to environmental remediation liabilities. A205 (APS §2.5(e)). While Article 2 addresses liabilities, including ORRLs, it cannot be read in isolation; assessing whether Nexeo assumed or Ashland retained a liability does not end there. The limitations to liabilities that Nexeo assumed in Section 2.5, are, in turn, limited by Article 9.

When read together, Articles 2, 9, and 10 establish limitations on Ashland's retained liability, resulting in the transfer to Nexeo of responsibility for ORRLs up to $5 million. Indeed, numerous provisions of the APS determine the extent to which Ashland retains RSRLs and ORRLs. For example, although Ashland agreed to perform remediation at each of the scheduled owned or leased properties conveyed to Nexeo—part of the RSRLs—that undertaking extends only up to the point at which Ashland achieves a NFA Letter (or other evidence of completion).

A260 (APS §9.5(c)(v)); A598 (Nettles 60:13-23). The effect of Section 9.5(c)(v) is to establish that Nexeo assumes responsibility for all additional requirements under environmental laws relating to that release once Ashland has completed the required remediation work and obtained the NFA Letter. A260. Thus, if a governmental authority requires additional remedial steps after Ashland receives a NFA Letter, the APS shifts to Nexeo the obligation to satisfy that liability and Nexeo is obligated to assume that liability and indemnify Ashland for the cost of all such additional remedial actions. A260; A598-99 (Nettles 60:19-61:14). Section 9.5(c)(v) explicitly provides that "Nexeo shall pay, perform and discharge" all "obligations and commitments" for such actions. A260.

Provisions of Section 9.6 and Article 10 establish additional limitations on Ashland's retained liabilities. When any of the monetary caps set forth in Section 9.6 are reached (*e.g.*, the $75 million cap established by Section 9.6(c)(i) for certain RSRLs), the remaining remediation liabilities subject to such cap shift to Nexeo. A260 (APS §9.6(c)(i)). This is regardless of the fact that, until such events occur, such liabilities are categorized as "Retained" in Article 2.

As an additional example, Section 10.2(ii) provides that, when a post-Closing change in law creates a remediation liability or increases the cost of addressing it, Nexeo must step in and assume responsibility for that site or incremental cost. A264; A604-05 (Nettles 66:13-67:1). Other provisions of

Section 10.2—relating to post-Closing decisions by Nexeo to change the use of an owned or leased property, voluntary sampling undertaken by Nexeo at a site, exacerbation of pre-existing contamination by Nexeo—shift such remediation liabilities from Ashland to Nexeo. A264-65 (APS §§10.2(i), (ii), (iv)).

Accordingly, it is not possible to ascertain the allocation of a particular tranche of liability by consulting Article 2 in isolation. For example, Article 2.6, categorizing the Retained Liabilities, does not provide that RSRLs (for Owned and Leased Real Properties) are only those remediation liabilities described or listed in the Schedule up to an aggregate amount of $75 million. Nevertheless, that is precisely what the parties agreed upon, as Section 9.6(c)(i) makes clear.

Thus, provisions in Article 2 to the effect that a RSRL or ORRL is "Retained" do not establish that the parties intended to allocate to Ashland exclusive responsibility for the liabilities falling within such classification at all times, in all circumstances and for all amounts. To the contrary, Article 2 provisions must be read as a starting point for analysis and examined together with other provisions of the APS establishing that Nexeo agreed to bear responsibility—and, therefore, assume liability—for sites and releases falling within either category of RSRLs or ORRLs at certain times and circumstances. By examining all relevant provisions of the APS, determining how they relate to each other, and giving them full effect, it is evident that the APS requires Nexeo to assume the

RSRLs and ORRLs whenever a provision of Article 9 or 10 shifts that liability to Nexeo. Nexeo's own lawyer testified that the APS operates in this manner. A600 (Nettles 62:2-18 ([REDACTED] [REDACTED]).

Section 9.6(c)(ii)—the liability-shifting provision of the APS of direct relevance here—operates in the same way. It provides that Ashland is not obligated to indemnify Nexeo for the first $5 million of ORRLs. A260. In other words, the parties intended to allocate to Nexeo and for Nexeo to bear that $5 million portion of such liabilities. To the extent a new site or matter (not described on the Schedule) arose in the first five years after the Closing Date, liability for that site did not become Ashland's obligation until the amount expended for all such ORRLs exceeds $5 million. Instead, by operation of Section 9.6(c)(ii), this liability is allocated to Nexeo. This section excludes this tranche of liability from that retained by Ashland. Since Nexeo assumes all liabilities not retained by Ashland, as provided in Section 2.5, such ORRLs up to the $5 million amount are Assumed Liabilities (and are indemnified by Nexeo).

The delineation of Retained Liabilities in Article 2.6 does not categorize ORRLs as those in excess of $5 million. Nevertheless, it is clear from examination of the APS as a whole that the parties intended for Nexeo to be responsible for such liabilities up to that amount. Any other interpretation would read Section

9.6(c)(ii) out of the APS, and would result in a $5 million gap in the APS – a result contrary to the parties' shared intent. A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9).

It is undisputed that the Sites are ORRLs asserted within the first five years of Closing and are not RSRLs. A531. As provided in Section 9.6(c)(ii), the parties allocated the first $5 million of ORRLs to Nexeo. A260. Liabilities for such matters are, therefore, assumed by Nexeo up to that amount. Because the liabilities for these Sites are Assumed Liabilities, Nexeo is required to indemnify Ashland with respect to both of them, pursuant to Section 9.2(c). To construe the APS otherwise would render Articles 9 and 10 surplusage. Accordingly, the Superior Court erred when it held that the first $5 million in remediation costs at the Sites are Ashland's retained liabilities.

3. The Superior Court erred in interpreting Article 2 in isolation rather than in harmony with Articles 9 and 10.

The Superior Court's interpretation of the APS conflicts with the plain language of the APS and frustrates the parties' intent. The Superior Court begins its discussion by providing that, with respect to "where and how liability is apportioned in the [APS,] Nexeo relies on Article 2, and Ashland relies on Article 9." A530. At the outset, this misconstrues Ashland's position. Ashland has consistently maintained that Article 2 is the starting point with respect to determining whether a liability, or specific layer thereof, is assumed by Nexeo or

retained by Ashland. A154 ("To the contrary, Article 2 provisions must be read as a starting point…."); A151-59; A501-02 ("It is undisputed that Article 2 remains the starting point for any analysis[.]") (internal quotations omitted); A476-78; A480 ("Article 2 remains the starting point…."). Contrary to the Superior Court's holding that "Ashland's interpretation would … read out the express allocation of liability for ORRL[s] in Sections 2.5 and 2.6[,]" (A534), Ashland's interpretation starts with Sections 2.5 and 2.6, and specifically the unambiguous text of Section 2.5, which requires that Nexeo assume *all Liabilities except to the extent that Ashland specifically retained them*. However, other Articles, namely 9 and 10, must be construed in connection with this assessment and further define the parties' liabilities.

Moreover, the Superior Court's interpretation of the APS severely limits the language used in, and the purpose of, Article 9. The Superior Court determined that Article 9 is inapplicable to liability "in the first instance." A533. In so holding, the Superior Court reasoned that Articles 2 and 9 were separate and distinct such that Article 9 was inapplicable. A533-34. This interpretation contravenes well-settled Delaware law requiring contracts to be interpreted as a whole. *See Martin Marietta*, 68 A.3d at 1225 (noting "the canon of construction that requires all contract provisions to be harmonized and given effect where possible."); *Alta Berkeley*, 41 A.3d at 385-86 (internal quotations omitted) ("[I]t is

well established that a court … must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."). To the extent there is a conflict between provisions, the specific prevails over the general. *DCV Holdings*, 889 A.2d at 961 ("[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

Article 9 is integral to the determination of which party bears responsibility for remediation costs in the first instance, or in other words, be liable. For example, pursuant to Section 9.5(c)(v), Ashland is no longer responsible to indemnify Nexeo for the cost of remediation at a site or for a release that falls within the category of RSRLs or ORRLs in those circumstances in which Ashland: "[A]ddresses the Release giving rise to such Losses as necessary to comply with Environmental Law … including meeting an applicable clean-up standards or obtaining a" NFA Letter. A260 (APS §9.5(c)(v)). Upon receipt of such a NFA Letter or other comparable approval, Nexeo "shall pay, perform and discharge all Liabilities, obligations or commitments relating to such Losses." A260. Nettles acknowledged this Section [redacted] liability from Nexeo and Ashland (A599-600 (Nettles 61:17-62:22)) and reflects Ashland's insistence that [redacted]

A599 (Nettles 61:5-14).

The Superior Court's interpretation is also inconsistent with the parties' intentions. The text of Article 9 demonstrates the parties' intent for "indemnity" to be interpreted in the broadest sense. Indeed, had the parties intended for "indemnity" or "indemnification" to mean "reimburse"—as the Superior Court seems to interpret the words—they would not have defined "Loss" so broadly. A256 (APS §9.1). Rather, the definition of "Loss" to include "any and all claims, actions, causes of actions, judgments, awards, Liabilities, losses, costs, expenses (including reasonable legal fees and expenses), fines or damages" (A256) indicates that the parties intended "indemnity" to be equivalent to "assume responsibility for." If Nexeo and Ashland intended Article 9 to be a "reimbursement" provision, the parties would not have defined "Loss" in Section 9.1 so broadly.

This interpretation, *i.e.* that "indemnity" as used in Article 9 does not simply mean "reimburse," is supported by Delaware law. The Court of Chancery in *Certainteed Corp v. Celotex Corp.*, 2005 WL 217032, at *3 (Del. Ch. Jan. 24, 2005) recognized that the term "indemnification" as used in the context of mergers or asset purchase agreements means more than "common law indemnity." Rather, it is a "term of art" used to "provide[] a contractual remedy for Losses sustained" by the parties to such types of agreements. *Id.* ("In the context of a merger or asset

acquisition, the term 'indemnification' refers generally to the responsibility retained by the seller to make the buyer whole for liabilities related to the assets sold or for breaches of representations and warranties.").

Further, the Superior Court's interpretation misconstrues the fundamental issue by finding that "the principal issue before the Court is one of liability, not indemnification." A533. Determining which party is financially responsible for the remediation costs at the Sites is the ultimate issue. However, the Superior Court errs in suggesting that "indemnification" under the APS is irrelevant to determining financial responsibility. Article 9 does not simply provide a reimbursement mechanism; it defines which party assumes or retains various tranches of remediation liabilities. Thus, the Superior Court erred in assigning to Article 2 the sole function of allocating liabilities, without reference to other provisions of the APS and in limiting the meaning of "indemnify" to "reimburse," when a reasonable reading under the circumstances would include the meaning "take responsibility for" or "assume liability for."

The Superior Court improperly judges the APS based upon what it believes would have been better drafting choices, rather than applying principles of contract interpretation to the document as written. By so doing, the decision below renders various provisions of the APS illusory. For instance, the Superior Court held: "Had the parties intended Nexeo to assume the first $5 million for ORRL[s], the

parties could have specified that condition in Section 2.5." A534. With the benefit of 20/20 hindsight, the parties "could have" taken a different approach so that certain issues were addressed more directly. While the parties "could have" specified in Article 2 that Nexeo must assume the first $5 million for ORRLs, the absence thereof is irrelevant given Section 2.5's broad, catch-all provision, which unambiguously requires Nexeo to assume "all other Liabilities of whatever kind and nature, primary or secondary, direct or indirect …." A206 (APS §2.5(n)). It is not drafting that makes the APS complex; it is the fact that the parties entered into a complex and nuanced agreement. Had all the specific limitations relating to allocation of liability currently in Article 9 been transferred to Article 2, that Article would substantially increase in size and complexity and, no doubt, be vulnerable to criticism as well. Article 9 cannot be ignored solely because Article 2—standing alone—would provide a simpler, but inaccurate interpretation of the deal the parties made.

Further, the Superior Court held: "At the very least, had the parties intended Sections 9.2(d) and 9.6 to modify Nexeo's liability under Section 2.5, the parties could have included a cross-reference to those Sections in Section 2.5. Instead, the [APS] is devoid of any language that would support the theory that Article 9 modifies the clear allocation of liability in Article 2." A534. This finding ignores the introductory language of Section 2.5, which specifically contemplates that it is

subject to other terms and conditions of the APS. A204. In addition, while the parties "could have" included cross-references to Article 9 within Section 2.5, such cross-references are not necessary in light of principles of contract construction. The Superior Court's interpretation failed to appreciate that the APS *does* include language that supports Ashland's interpretation, and, when read together, comports with the parties' intentions.

Finally, the Superior Court's reliance on where the provisions lie within the APS is immaterial to construction of the APS as a whole. A534; A534 n. 65 (noting the "difficulty with Ashland's argument is where it's put, it's put in the indemnification section….") (internal quotations omitted)). The fact that Articles 2 and 9 are separate is inconsequential. Such an interpretation contravenes basic principles of contract interpretation and the plain language of the APS, which unambiguously provides that "heading references … are for convenience purposes only, do not constitute a part of [the APS], and shall not be deemed to limit or affect any of the provisions hereof." A270 (APS §11.13).

II. THE SUPERIOR COURT ERRED IN NARROWLY INTERPRETING "TERMINATED" IN SECTION 9.2(d) OF THE APS.

A. Question Presented

Whether the Superior Court erred in narrowly interpreting the word "terminated" in Section 9.2(d) of the APS in contravention of the parties' intentions. A143-44; A156-59; A485-87; A533.

B. Standard of Review

See p. 21, *supra*.

C. Merits of Argument

The Superior Court misinterpreted the meaning of "terminated" within Section 9.2. A533. Rather than interpret "terminated" broadly in accord with the parties' intentions, the Superior Court's interpretation of "terminated" renders the reference to Sections 9.5 and 9.6 (in their entirety) within Section 9.2 as mere surplusage. *See JFE Steel Corp.*, 797 F. Supp. 2d at 469 (providing that Delaware law "require[s] the court to read a contract as a whole and give each provision and term effect, so as not to render any part of the contract mere surplusage.") (internal citations and quotations omitted).

Section 9.2(d) specifically obligates Nexeo to indemnify Ashland for all losses for which Ashland's "obligation to indemnify [Nexeo] has terminated in accordance with Section 2.5(k), (l) and (m) (as applicable) or the terms of Section 9.5 or 9.6." A257; A596 (Nettles 58:5-12)

Section 9.2(d) refers to Sections 9.5 and 9.6 in their entirety. Therefore, Section 9.2(d) must be read to encompass the entirety of Sections 9.5 and 9.6 for the simple reason that that is what the plain text of the APS provides. A257 (APS §9.2(d)("…or the terms and conditions of Sections 9.5 or 9.6.")); *Alta Berkeley*, 41 A.3d at 385 ("Delaware courts interpret contract terms according to their plain, ordinary meaning."). Had the parties intended to limit the scope of Section 9.2(d) only to certain provisions within Sections 9.5 or 9.6, they could and would have done so with appropriate cross-references. Moreover, none of Sections 2.5(k), (l) or (m), to which Section 9.6(d) also explicitly refers, "terminates" an obligation to indemnify for a liability in its entirety – indeed such provisions do not refer at all to the obligation to indemnify (as this can only be determined by reference to Article 9). A205-06; A260-61. Nor do any of the referenced sections use the word "terminate."

Sections 2.5(k), (l) and (m), like Section 9.6(c)(ii), operate to limit Ashland's obligations to indemnify Nexeo and effectively terminate Ashland's responsibility for various tranches of liability. Used in the context of an agreement intended to allocate liabilities, like the APS, the word "terminate" is best interpreted as meaning: to limit, or establish a dividing or boundary line with respect to, a party's responsibility. *See Webster's Third New International Dictionary*, p. 2359 (*Merriam-Webster* 3d ed. 1986) (defining "terminate" to

include "secur[ing] as an ending, boundary, limit, dividing line"). Just as Section 2.5(k) creates a "boundary" for liability according to when notice of a claim is given, Section 9.6(c)(ii) similarly creates a "boundary" or "dividing line" for liability in terms of the monetary amount of those obligations. Both sections create a boundary, *i.e.* when one party's responsibility ends and another's begins, or in other words, terminate the liability for one party and initiates it for the other party.

In *BLGH Holding LLC v. ENVCO LFG Holding, LLC*, 41 A.3d 410 (Del. 2012), this Court addressed the question of how broadly to read the meaning of language used in a contract. There, parties to an acquisition contract agreed that the seller would receive an additional bonus if it entered into a gas supply contract with a third-party. *Id.* at 412. The clause at issue granted the bonus if the transaction "outlined" in another section of the agreement was consummated. *Id.* The latter provision referred to a Letter of Intent with the third-party. *Id.* When the seller sought the bonus, the buyer asserted the terms of the actual third-party supply contract were different from those in the Letter of Intent and, therefore, not as "outlined" in the parties' agreement. *Id.* at 414-15.

This Court found that "[t]he meaning that [buyer] ascribes to 'outlined' burdens that term with far more precision than it can reasonably bear when read in context." *Id.* at 415. Rather, the term "outlined," fairly read, did not refer to

specific terms of the underlying transaction, but simply meant the transaction "referenced in" the letter of intent. *Id.*

Read as a whole and taking into account the parties' commercial objectives and intent, Section 9.2(d) imposes an obligation on Nexeo to indemnify Ashland in any circumstance which Ashland is not obligated to indemnify Nexeo as a result of the operation of Sections 2.5(k), (l) or (m) or any component of Sections 9.5 or 9.6. Accordingly, in those circumstances which, as here, Ashland's obligations to retain and indemnify for a matter are limited by Section 9.6(c)(ii), Section 9.2(d) requires Nexeo to step in and indemnify Ashland.

III. THE SUPERIOR COURT ERRED IN INTERPRETING THE $5 MILLION DEDUCTIBLE PROVISION.

A. Question Presented

Whether the Superior Court erred in interpreting the $5 million deductible provision in such a way to make the deductible contingent upon which party suffers a Loss first. A508-10; A481-82; A533.

B. Standard of Review

See p. 21, *supra*.

C. Merits of Argument

1. The Superior Court's interpretation of the $5 Million deductible provision in Section 9.6(c) is inconsistent with the parties' intentions and interpreting the APS as a whole.

The purpose of Articles 2, 9, and 10, read together, is to establish a division of the Business's remediation liabilities in a comprehensive fashion that applies to each and every scheduled and unscheduled liability, regardless of how that liability first arises and irrespective of which party first suffers it. Yet the Superior Court's opinion essentially makes the applicability of the $5 million deductible provision in Section 9.6(c) contingent on which party suffers the Loss first and seeks indemnity under Article 9. Such an interpretation would mean that while the parties crafted a comprehensive set of contract provisions dividing liability for RSRLs and ORRLs they really intended this one provision to have limited, episodic—and perhaps random—application, where chance determines whether

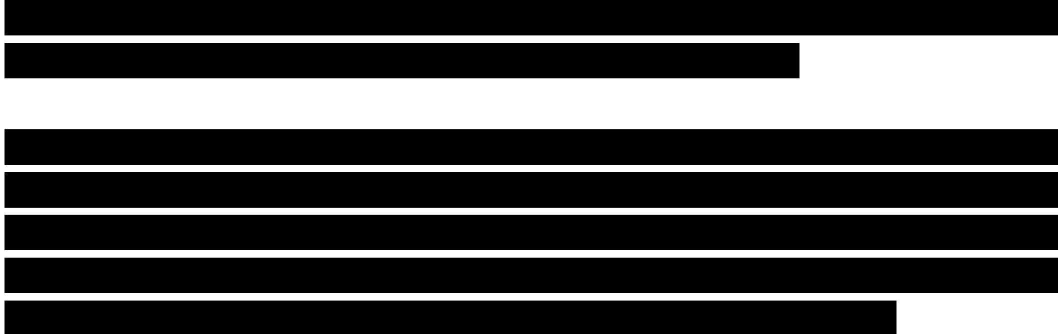
the $5 million deductible provision applies. This is contrary to the parties' intent to leave nothing to chance with respect to the allocation of environmental liabilities. A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9).

Additionally, if the liability-shifting provisions of Articles 9 and 10 only apply in those situations where Nexeo first incurs a cost in relation to an RSRL or ORRL and invokes Article 9 indemnification to recover that cost, then the costs incurred by Ashland to satisfy all other RSRLs or ORRLs prior to any such demand, and as to which Nexeo made no specific demand for indemnification, would not erode the monetary limits established in Section 9.6(c). A164-65. This is so because such provisions, including Sections 9.5(c), 9.6(c), and 9.6(d), by their terms apply to *limit* Ashland's obligation to indemnify Nexeo. Additionally, as discussed *infra* the concept of incurring a cost as the sole trigger of an indemnity obligation ignores the language of Article 9, which makes a "Loss" the trigger of that obligation for both parties.

If such provisions only come into play where Nexeo specifically seeks indemnification for a cost it incurred then, for example, the $75 million cap on Retained Remediation Liabilities, *i.e.* both RSRLs and ORRLs, in Section 9.6(c) becomes illusory. The $75 million cap applies to Ashland's payments for Nexeo's remediation liabilities because Article 2 of the APS shifts Nexeo's CERCLA liabilities to Ashland subject to the terms and conditions of the entire APS. The

presence of the $75 million cap in Section 9.6(c)(v) demonstrates that Ashland's payments are on behalf of Nexeo because "Off-Site Locations" is defined to mean "any location other than any Conveyed Real Property …." A192. The $75 million cap, by definition, can only apply to properties Nexeo owns and, thus, would be subject to CERCLA liability. A572-73 (Nettles 34:12-35:15).

Therefore, costs Ashland incurs to meet those remediation liabilities erode that $75 million cap. Once that cap is reached, the remediation liabilities then "shift" back to Nexeo. Nexeo's 30(b)(6) witness, Michael Farnell, testified that the $75 million cap operated in exactly this manner:



A745-46 (Farnell 108:25-109:14, 109:24-110:16; 110:7-16). Under the Superior Court's interpretation, however, none of those costs would erode the cap unless Nexeo first incurred the costs and sought indemnification. Yet, this would be unlikely to occur because, by definition, RSRLs are those remediation sites that Ashland had notice of and was actively remediating. A194. Accordingly, Ashland would be required to bear all costs of RSRLs without regard to the $75 million cap, contrary to the APS and the parties' intent.

2. The Superior Court's interpretation of the $5 million deductible provision confers a windfall upon Nexeo.

The Superior Court's interpretation of the APS to make the applicability of the $5 million deductible provision contingent on which party suffers the Loss first confers upon Nexeo a windfall of up to $5 million. The parties agreed that the allocation of liabilities would not be left to chance. A535; A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9). Yet, under the Superior Court's interpretation, Section 9.6(c)(ii) is only implicated in the event of a specific invocation of indemnity rights by Nexeo. The intent of the parties that allocation of liabilities not be left up to chance is supported by Section 7.10(b), which provides in relevant part:

> To the extent that Ashland, any Asset Selling Corporation or any of their Affiliates on the one hand, and Buyer, any Buyer Corporation or any of their Affiliates, on the other… (ii) makes a payment to a third-party on behalf of the other party… each of Buyer and Ashland agrees to promptly reimburse Ashland or the Buyer, as applicable … .

A250. The Superior Court's interpretation ignores both the parties' intent as discerned from the language of the APS and the testimony of both parties' representatives to the effect that the parties wanted certainty as between each other as to which one would pay specific liabilities (or portions thereof) and these obligations not be determined by chance or actions of third parties. A535; A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9). The Superior Court's interpretation provides a windfall to Nexeo of up to $5 million if Nexeo, by chance,

does not receive a remediation claim first. This is inconsistent with both Delaware law and the parties' intent.

IV. THE SUPERIOR COURT ERRED IN HOLDING THAT NEXEO IS NOT SEEKING INDEMNIFICATION.

A. Question Presented

Whether the Superior Court erred in determining that Ashland is not entitled to indemnification under Article 9 for the first $5 million in remediation costs incurred at the USOR Site despite finding, as a factual matter, that Nexeo first received the third-party claim related to the USOR Site and "referred" that claim to Ashland. A161-67; A487-89; A527; A537.

B. Standard of Review

See p. 21, *supra*.

C. Merits of Argument

1. Under the plain language of the APS, Nexeo suffered a "Loss."

The Superior Court found, as a factual matter, that a customer of the Business, *i.e.* Continental Airlines, first "notified Nexeo of the remediation liabilities" at the USOR Site and that "Nexeo then referred the claim to Ashland for remediation." A527. Accordingly, when Continental Airlines notified Nexeo that it had been named as a potentially responsible party for the USOR Site, thereby seeking indemnity from Nexeo pursuant to its contract as a customer of the Business, Nexeo undeniably suffered an indemnifiable "Loss" under the plain language of the APS. Section 9.1 defines "Loss" broadly to include "all claims, actions, causes of action, judgments, awards, Liabilities, losses, costs, expenses

(including reasonable legal fees and expenses), fines or damages." A256. "Liabilities" is equally broadly defined – explicitly extending to "debts, liabilities and obligations." A190. This text encompasses "claims", "liabilities" and "obligations", in addition to out-of-pocket costs or expenses, incurred by a putative indemnitee. A256. Thus, Nexeo incurred an indemnifiable "Loss" within the contemplation of Article 9 when it received the communication from Continental Airlines concerning the "claim," "liability" or "obligation" with respect to the USOR Site.

2. When Nexeo "referred" the USOR Site claim to Ashland, it was seeking indemnification for a "Loss."

In response to receiving Continental Airlines notification, Nexeo tendered the matter to Ashland, thereby seeking to place the Business's potential liability for the USOR Site on Ashland pursuant to the APS. A408. While the Superior Court used the verb "referred" rather than "tendered," (A527) the result of Nexeo's conduct is the same – it sent the claim to Ashland seeking to have Ashland pay for the remediation expenses. The fact that Nexeo did not accompany its tender with an explicit demand for indemnification is inconsequential because under the express terms of Section 9.1, Nexeo was seeking to have Ashland step in and satisfy the claim at the USOR Site.

Additionally, the fact that Nexeo's "referral" of Continental's request to Ashland did not strictly follow the procedures of Article 9 does not mean that

Nexeo was not seeking indemnification under the APS. Specifically, Section 9.3(a) provides that the "failure to give notice in a timely manner pursuant to this Section 9.3(a) shall not limit the obligation of the Indemnifying Party … ." A257. Therefore, regardless of whether Nexeo precisely followed the procedure defined in Article 9, Nexeo's failure to do so cannot limit the indemnity obligations or change the fact that Nexeo "was seeking to have Ashland step in and satisfy the claim or obligation—*i.e.*, the 'Loss'—suffered by Nexeo." A256 (APS §9.1). Any holding to the contrary elevates substance over form.

3. Accepting the Superior Court's interpretation as correct, Nexeo sought indemnity from Ashland by referring the USOR Site claim to Ashland.

Assuming *arguendo* that the Superior Court's interpretation of the APS that the allocation of liability is determined by which party first suffers the loss is the proper interpretation (which Ashland does not), the Superior Court erred in holding that Ashland is not entitled to indemnity for the USOR Site in light of the fact that Nexeo was seeking indemnity from Ashland when it tendered Continental's USOR Site claim to Ashland. According to the Superior Court:

> For purposes of ORRL[s], Ashland's obligation to indemnify triggers after the liabilities exceed $5 million and terminates after the liabilities exceed $75 million. Therefore, in the event that Nexeo would seek indemnification from Ashland for Retained Remediation Liabilities under Section 9.1(c), the indemnity caps referenced in Section 9.6 would apply to Nexeo's claim.

A523. Therefore, according to the Superior Court's interpretation of the APS (which Ashland disputes), the $5 million deductible provision only applies in instances where Nexeo is seeking indemnity from Ashland. The Superior Court further held that because "Nexeo is not seeking indemnification from Ashland under Section 9.1(c) … Ashland's indemnity caps in Section 9.6 … are not implicated under the facts of this case." A535-36. This holding amounts to error because, as noted above, Nexeo was seeking indemnification for a "Loss" associated with the USOR Site by tendering Continental's claim to Ashland in the first place. Accordingly, because Ashland's obligation to indemnify was "triggered in the first instance by a claim for indemnification by Nexeo" (A536) the provisions of Section 9.6 and 9.2(d) apply. And, Ashland is not required to incur any of the Business's remediation expenses for the USOR Site until those expenses exceed the $5 million deductible provision in Section 9.6(c).

CONCLUSION

For all the foregoing reasons, this Court should reverse the Superior Court's opinion and order granting Nexeo's Motion for Summary Judgment and denying Ashland's Motion for Summary Judgment and enter judgment in favor of Ashland.

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CERTIFICATE OF SERVICE

I, Daniel J. Brown, do hereby certify on this 19th day of September, 2017 that I caused a copy of the REDACTED PUBLIC VERSION OF APPELLANT'S OPENING BRIEF to be served via File & ServeXPress upon the following counsel of record:

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