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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ASHLAND, INC., a Kentucky Corporation, Plaintiff Below, Appellant, v. NEXEO SOLUTIONS, LLC, f/k/a TPG ACCOLADE, LLC, a Delaware Limited Liability Company, Defendant Below, Appellee.	§ § § § § § § § § § § §	No. 293, 2017 Court Below: Superior Court of the State of Delaware Civ. No. N14C-07-243 EMD CCLD [redacted]

[redacted]

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NATURE OF THE PROCEEDINGS

This is a straightforward contract case.

Appellant Ashland, Inc. ("Ashland") sold the assets of its chemical distribution business to Appellee Nexeo Solutions, LLC ("Nexeo") under an Agreement of Purchase and Sale (the "APS"). In the APS, Ashland expressly agreed to retain certain environmental remediation liabilities of the business. In addition, the APS established various indemnities the parties owed one another.

Before the asset sale, Ashland disposed of harmful wastes at the U.S. Oil Recovery site in Pasadena, Texas, and the Arivec site in Douglasville, Georgia (collectively, the "USOR/Arivec Liabilities"), both of which became Superfund sites. After the sale, Ashland undertook remediation efforts at these sites at its own expense.

In the Superior Court, Ashland sought damages and a declaration that Nexeo owed indemnity under the APS for costs Ashland incurred remediating the harms Ashland caused at the USOR site. Nexeo moved to dismiss on the grounds that the liabilities had been retained by Ashland in the APS. After the Superior Court dismissed certain Ashland claims in July 2015, the parties engaged in discovery.

Ashland and Nexeo filed cross-motions for summary judgment in December 2016. The Superior Court granted Nexeo's Motion for Summary Judgment and

denied Ashland's Motion for Partial Summary Judgment. Ashland contends the Superior Court erroneously interpreted the APS.

The Superior Court's rulings were correct. Ashland bore its own loss for conduct occurring on its watch. Under the APS, Ashland expressly agreed it would retain liabilities like the USOR/Arivec Liabilities, and the APS imposes no obligation on Nexeo to indemnify Ashland for those liabilities. Moreover, Ashland's conduct since the APS was executed confirms its understanding that it retained those liabilities. To argue for indemnity, Ashland posits a strained interpretation of the APS that defies the contract's plain language, violates rules of contract construction, and renders the APS internally inconsistent. The Superior Court, rejecting Ashland's unreasonable interpretation, followed the plain text of the APS and gave effect to the entire agreement. The court's judgment should be affirmed.

[redacted]

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly harmonized the provisions of the APS according to their plain language. Section 2.6(e) of the APS unequivocally allocates the USOR/Arivec Liabilities to Ashland. By seeking to override Article 2 with the inapplicable indemnification provisions of Article 9, Ashland would render Article 2 meaningless. The Superior Court correctly rejected Ashland's effort to ignore the division of liabilities in Article 2 and rewrite Article 9 to address the subject of Article 2.

2. Denied. The Superior Court correctly found Ashland's indemnity obligations have not "terminated" (as would require Nexeo to indemnify Ashland under Section 9.2(d)). Ashland judicially admitted that its indemnity obligations have not "terminated," and its interpretation of the word defies the plain text of the APS and Delaware rules of construction.

3. Denied. The Superior Court correctly found the $5 million deductible in Section 9.6(c) inapplicable to this matter. Ashland mischaracterizes the Superior Court's decision, which did not determine that liabilities are to be allocated based on "which party suffers the loss first," as Ashland claims. The Superior Court properly interpreted the $5 million deductible as a limit on Ashland's indemnification of Nexeo, not as a method of reallocating the liabilities Ashland retained under Article 2.

[redacted]

4. Denied. The Superior Court correctly rejected Ashland's argument that Nexeo suffered a "Loss" and obtained indemnification from Ashland. Ashland introduced no evidence that Nexeo demanded indemnity from Ashland for the USOR/Arivec Liabilities or that Ashland conducted itself as if it were indemnifying Nexeo.

STATEMENT OF FACTS

I. The Sale of Ashland's Chemical Distribution Assets to Nexeo Was Premised on Ashland's Retention of Its Own Environmental Liabilities.

Ashland, a producer of chemicals and industrial materials, put the assets of its chemical distribution business up for auction in 2010. It distributed to prospective bidders information about the assets and a detailed contract form setting forth the terms on which Ashland intended to sell. B226. Bidder TPG Capital, an investment fund, set up a special purpose entity, TPG Accolade, LLC, to acquire the assets. Its name was later changed to Nexeo Solutions, LLC. B226; B348.

Ashland intended to sell the distribution assets quickly. B239. Only six days after TPG submitted its final bid, the parties executed the APS on November 5, 2010. B241-242; B54. As a result, there was little time for due diligence, especially considering the $930 million transaction covered a chemical distribution and environmental services business (the "Distribution Business") that, by its nature, included significant environmental and remediation liability risks. B240; B265. Among other things, the Distribution Business bought, repackaged, and resold bulk chemicals, collected hazardous waste chemicals from customers, and transported them for disposal. B249-250. Given Ashland's compressed timeframe, no bidder could have fully examined the potential liabilities, so

Ashland's agreement to retain those liabilities was important to completing the transaction. B237; B265-266; B280-283; B293; B300; B316.

Ashland construes the APS as though the parties intended for Nexeo to assume all liabilities associated with the Distribution Business, but the undisputed evidence was that the transaction was structured as an asset purchase, allowing for negotiation over the specific assets and liabilities to be transferred. B356. TPG did not intend to assume all of Ashland's liabilities or incur costs related to circumstances Ashland created. B356; B379. With respect to environmental liabilities, Ashland's representative testified [redacted]

B430. Thus, TPG requested APS language clarifying Nexeo would not be assuming liabilities relating to pre-closing events. B266; B316. The parties agreed Ashland would retain any known liabilities forever together with any new liabilities for pre-closing events, if identified within five years after closing. B260. Ashland also agreed to indemnify Nexeo for certain environmental remediation matters.

At the time, Ashland recognized that its retention of its existing liabilities and its obligation to indemnify Nexeo were two separate concepts. On the day the APS was signed, Ashland filed an 8-K with the SEC representing to the investing public:

[redacted]

> ***Ashland and TPG have agreed to indemnify each other*** for losses arising from certain breaches of the Agreement and for certain other liabilities. ***In addition, Ashland will retain and has agreed to indemnify TPG for*** certain liabilities of the Business … including certain litigation and environmental liabilities ….

B513 (emphasis added). Ashland plainly understood it had not transferred all its liabilities to Nexeo; it had retained its liabilities and also agreed to indemnify Nexeo if Nexeo should suffer losses arising out of those liabilities.

II. The APS Reflected the Parties' Intention that Ashland Retain Environmental Remediation Liabilities for Conduct Occurring on Its Watch.

In the APS, Ashland agreed to sell and Nexeo agreed to buy certain assets Ashland used in its Distribution Business, defined to include the "distribution, blending, packaging and marketing of specialty and industrial chemicals" as well as the "collection, recovery, recycling, and disposal of hazardous and non-hazardous waste." B72; B56.

A. Section 1.1 Defines Two Categories of Remediation Liabilities.

The disputed liabilities in this case concern "remediation" of environmental harms—specifically, cleaning up the "Release" of "Hazardous Material" into the environment, where those releases occurred prior to the "Closing" of the transaction.[1] A18. Section 1.1 of the APS defines two buckets of environmental

[1] "Release" and "Hazardous Material" are defined in APS § 1.1. B60-61; B65.

[redacted]

liabilities: "Retained Specified Remediation Liabilities" and "Other Retained Remediation Liabilities." B64-66. The "Specified" liabilities relate to disposal sites listed on a schedule to the APS, while the "Other" liabilities include any unscheduled liabilities. *Id.* Together, the terms Retained Specified Remediation Liabilities and Other Retained Remediation Liabilities were intended to capture all remediation liabilities for Releases occurring before Closing (*i.e.*, on Ashland's watch). B258; B358.

The "Specified" liabilities related to certain sites where Ashland was already aware of environmental problems that arose while it ran the Distribution Business. B66. If a site was listed on the schedule as a Retained Specified Remediation Liability, it remained Ashland's responsibility forever. B78.

"Other Retained Remediation Liabilities" were divided between the parties according to when those liabilities become known. *Id.* In Section 2.6(e) of the APS, Ashland agreed to "retain and be responsible for … Other Retained Remediation Liabilities for which written notice has been received by Ashland prior to or on the fifth (5th) anniversary of the Closing Date." Those liabilities of which Ashland received notice within the first five years after closing remained Ashland's responsibility forever. *Id.*

B. Sections 2.5 and 2.6 Allocate the Liabilities Associated with the Distribution Business Between Ashland and Nexeo.

Article 2 of the APS, "Purchase and Sale," identifies the assets and liabilities transferred in the transaction. Nexeo agreed to take on the "Assumed Liabilities," listed in Section 2.5. Ashland kept the "Retained Liabilities," listed in Section 2.6. B76-79. The parties agree that the APS allocates all liabilities associated with the Distribution Business into either the "Assumed Liability" or "Retained Liability" bucket, without gaps and without overlaps. B258; B358; B428-429; B486. The APS makes clear that Nexeo's assumption of liabilities of environmental harms caused by Ashland and occurring on Ashland's watch would be limited, and Nexeo was not assuming any such liabilities retained by Ashland:

> [Nexeo] will assume and become responsible for any and all Liabilities to the extent relating to the Business or the Conveyed Assets … ***but excluding in each case the Retained Liabilities*** …. (B76)
>
> [Nexeo will assume] all Environmental Liabilities to the extent relating to the Business or any Conveyed Asset, whether arising before, on or after the Closing Date (***other than the Retained Remediation Liabilities*** ….) (B77)

The parties agree the USOR/Arivec Liabilities at issue here arose out of Ashland's pre-closing operation of the Distribution Business; Ashland received notice of the USOR/Arivec Liabilities within five years of Closing; and they constitute Other Retained Remediation Liabilities. A19-20; Appellant's Opening

Brief at 18-20. Therefore, the USOR/Arivec Liabilities were retained by Ashland, and Nexeo did not assume them.

C. Article 9 Provides Certain Indemnification Rights to Each Party.

The APS also establishes certain indemnities for each side in Article 9. A109-110. Under Section 9.1(c), Ashland must indemnify Nexeo for "any Retained Liability" when Nexeo suffers a "Loss" relating to those liabilities, defined to include:

> claims, actions, causes of action, judgments, awards, Liabilities, losses, costs, expenses (including reasonable legal fees and expenses), fines or damages (each, a "Loss," collectively the ***"Losses") incurred or suffered*** ….

Id. "Retained Liabilities," again, is defined in Section 2.6 and includes Other Retained Remediation Liabilities.

The Section 9.1 indemnities are limited, however. Section 9.6 sets forth "Limitations on Amount" of the Section 9.1 indemnity and certain deductibles, including a deductible for indemnification owed relating to Losses "incurred or suffered" by Nexeo arising out of Other Retained Remediation Liabilities. A113-114. While Ashland treats this limitation as though it changed Article 2's allocation of liabilities, Section 9.6(c) only operates to limit Ashland's Section 9.1(c) indemnity obligation:

> Ashland shall not have any liability ***under Section 9.1(c)*** … (ii) for any Other Retained Remediation Liabilities 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.

A113. Nothing in Section 9.6 cross-references or purports to modify the lists of Nexeo's Assumed Liabilities or Ashland's Retained Liabilities in Sections 2.5 or 2.6. *Id.*

Article 9 also creates indemnities owed by Nexeo to Ashland. A110. Among these, Section 9.2(d) provides that Nexeo indemnifies Ashland for:

> (d) any Retained Litigation Liability or Retained Remediation Liability for which Ashland's obligation to indemnify Buyer ***has terminated in accordance with*** Section 2.5(k), (l), and (m) (as applicable) or ***the terms and conditions of Sections 9.5 or 9.6***.

Id. Though Ashland seeks to apply this provision to the USOR/Arivec Liabilities, Ashland judicially admitted that Section 9.6 has not "terminated" its obligation to indemnify Nexeo for those liabilities, as required to trigger a Section 9.2 indemnity. Ashland pleaded that, even today, it has a "continuing obligation to indemnify Nexeo" under Article 9 if an indemnifiable Loss occurs. A18. Likewise, Ashland's corporate representative (its sole in-house environmental

[redacted]

lawyer working on the transaction and a veteran of multiple Ashland business sales) could not testify that Ashland's putative obligation to indemnify Nexeo as to the USOR/Arivec Liabilities had been "terminated" by Section 9.6. B424-425; B432. Ashland's outside counsel responsible for negotiating the environmental portions of the APS also conceded Ashland's liability as to a site could not be regarded as [redacted] B490-491.

III. Between Execution and Closing, Ashland Conducted Itself as Though It was Retaining Its Remediation Liabilities, Not Transferring Them.

Between the execution of the APS, on November 5, 2010, and the Closing of the transaction, on March 31, 2011, Nexeo began hiring staff and preparing to commence operations. A17; B357-358. The APS required Ashland to provide information, cooperation, and transition services to Nexeo during this phase. B581-582; B101-103; B114-118. Ashland's actions and communications revealed its understanding that it was retaining environmental responsibility for events occurring on its watch, not transitioning those responsibilities to Nexeo or taking a back-seat indemnification role.

- [redacted]

[redacted]

[redacted] B518.

- [redacted] B589.
- [redacted] B595-599.
- [redacted]

[redacted]

[redacted]

B440-441. [redacted]

[redacted]

B521-523.

Ashland's present position—that Nexeo was supposed to assume all remediation liabilities from Ashland, subject only to a limited indemnity right—is not what Ashland's personnel believed at the time.

IV. Nexeo Did Not Assume Ashland's Environmental Liabilities at Closing.

As to the transfer of liabilities, the APS was not self-executing; the transfer occurred by way of an Assignment and Assumption Agreement executed at Closing. B527-530. That document made clear Nexeo was not assuming the USOR/Arivec Liabilities or any other Retained Liabilities:

[redacted]

[redacted]

B527. Thus, there is no document in the record by which Nexeo even could have assumed the Retained Liabilities.

V. When the USOR Issue Emerged, Ashland Treated It as Its Own Retained Liability.

Almost immediately after Closing, Ashland confirmed through its actions that it understood it had retained the USOR/Arivec Liabilities, rather than having transferred them to Nexeo subject to a deductible indemnity.

[redacted], [redacted], a former Ashland customer, emailed its former contact (by then employed at Nexeo) and reported [redacted] B532-534. [redacted] B233-235. [redacted], an in-house lawyer with Nexeo, accordingly forwarded [redacted] email to [redacted], Senior Environmental Counsel for Ashland. In his email, [redacted] stated [redacted]

[redacted]

B532. In an email back to Nexeo's counsel, [redacted], Ashland's counsel confirmed:

[redacted]

Id. [redacted] *See* B443. [redacted] B532.

Other individuals in Ashland's legal department behaved and communicated as though Ashland was responsible for the USOR site. [redacted], Ashland's Chief Counsel for Environmental Litigation, after highlighting to his team the [redacted] B553; B560; B563. An Ashland paralegal, [redacted], reached out to Nexeo [redacted]

[redacted]

i

B537-538; B542; B547; B550.

As more Ashland customers came forward, Ashland kept treating USOR as its own obligation. When a former Ashland customer,

B566. *Id.* Indeed, Ashland never obtained Nexeo's permission B446. When another former customer, B570. When USOR-related costs were incurred, Ashland paid them. B577-578. There is no evidence of any effort to seek Nexeo's approval, consent, or contribution prior to making these payments. B446-447.

Neither did Ashland handle USOR as though it were a claim against Nexeo. Ashland, which had disposed both its own wastes and the wastes of others at the

USOR site,[2] undertook remediation because it was independently liable for remediating its environmental harm[3] and had retained that liability. Ashland never "defended" any claim against Nexeo, because no such claim was made. Nexeo never used the long-shuttered USOR facility or transported wastes there, and Nexeo assumed no remediation obligations related to Ashland's old contracts. B379 ( ); B76; B527.

Ashland admits its conduct in accepting responsibility for these customer claims is inconsistent with the position it takes today. Ms. Woods, Ashland's in-house environmental counsel, testified:

B446.

[2] B448-449 ( ); B310 ( ).

[3] B234-238; B250-251 ( ).

After a year of conducting itself as the party responsible for USOR, and only as it became clear the site could generate significant liability, Ashland changed course and asserted Nexeo was responsible for those costs. The Arivec liability arose thereafter, in March 2013. A20. Ashland filed this suit in 2014.

ARGUMENT

I. The Superior Court Correctly Construed the APS as a Whole and Gave Effect to Provisions Ashland Disregards.

A. Question Presented

Did the Superior Court correctly hold that Nexeo is not obligated to indemnify Ashland for the first $5 million in remediation expenses incurred at the USOR and Arivec sites where the APS, construed in accordance with its text, provides that Ashland retained Other Retained Remediation Liabilities for which written notice was received by Ashland within 5 years of Closing and the parties agree that (1) the USOR/Arivec Liabilities are Other Retained Remediation Liabilities; and (2) Ashland received such notice within 5 years of Closing? B26-28; B33-35; B607-614; B797-803.

B. Scope of Review

De novo review applies to contractual interpretations and legal conclusions, and clear error review applies to factual findings. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1340-41 (Del. 1987). The Supreme Court exercises *de novo* review over decisions to grant or deny motions for summary judgment. *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010).

C. Merits of the Argument

Though Ashland acknowledges that a contract should be read as a whole, Ashland will not follow that rule. Reading a contract as a whole and giving effect to all its terms means that distinct words and provisions should not be treated as unnecessary, redundant, or surplusage. Each term should be treated as though the parties chose it and intended it to have meaning. But when Ashland advocates reading Articles 2, 9, and 10 of the APS "together," Ashland means for just the opposite to happen.

Under Ashland's reading, Article 2 has no force whatsoever. Ashland urges the Court to ignore it as merely being a "starting point" for an allocation of liabilities that somehow occurs in Article 9, despite the contrary text of both articles. That is not reading as a whole. Reading as a whole means reconciling provisions rather than cherry-picking one and calling the others redundant or ineffective. Article 2 of the APS expressly separates the liabilities of Ashland's old distribution business into those that are retained by Ashland and those that are assumed by Nexeo. Article 9 has a different role: stating the limited obligations of the parties to indemnify one another. Reading these provisions together requires assuming the parties meant what they said in each section and intended for each section to have some function.

1. The Parties Agree that the Court Should Read the APS as a Whole, Harmonize and Give Effect to All Provisions, and Not Render Any Provision Superfluous.

There is no dispute over the general, accepted principles for construing contracts like the APS. "It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992). This Court deems it "the cardinal rule of contract construction that, where possible, a court should give effect to all contract provisions." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985). "In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract." *Chicago Bridge & Iron Co. v. Westinghouse Elec. Co.*, 166 A.3d 912, 2017 WL 2774563, at *1 (Del. June 27, 2017). A construction that harmonizes and reconciles all of the contract's provisions when read as a whole is preferred over any other construction. *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998). A contract should not be construed in a manner that is inconsistent with its evident purpose or that renders its provisions meaningless or superfluous. *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 821 (Del. 2013); *Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 51 A.3d 442, 451 (Del. 2012).

Even if two constructions of an agreement are "possible," a court "necessarily … must accept" the construction that gives effect to all provisions of

the agreement over a construction that denies effect to a provision. *Roffman v. Wilmington Housing Auth.*, 179 A.2d 99, 102 (Del. 1962). Ashland's construction of the APS fails this simple test.

2. The Ashland Construction Robs Article 2 of Any Function.

In Article 2, the parties divided the liabilities of the old Ashland Distribution business into liabilities that were assumed by Nexeo and liabilities that were retained by Ashland.

In Section 2.6, Ashland agreed to "retain and be responsible for" the liabilities listed in that section, which were defined as "Retained Liabilities." B78. Among those were "Other Retained Remediation Liabilities for which written notice has been received by Ashland prior to or on the fifth (5th) anniversary of the Closing Date." *Id.*

Section 2.5, on the other hand, identifies the liabilities Nexeo would assume, which were defined as "Assumed Liabilities." B76. Crucially, Section 2.5 explicitly excludes any of Ashland's "Retained Liabilities" from the set of Nexeo's "Assumed Liabilities," guaranteeing that if Ashland had agreed to retain a remediation liability, Nexeo was not responsible for it. *Id.* Indeed, the APS expressly states at least *four times* that Nexeo is not assuming *any* Retained Remediation Liability. (APS § 2.5(b), (c), (e), (f).)

The parties agree that the USOR/Arivec Liabilities at issue constitute Other Retained Remediation Liabilities. *See* Appellant's Opening Brief at 19-20. Therefore, there is no dispute: Nexeo expressly did not assume the USOR/Arivec Liabilities (per Section 2.5, and per the Assignment & Assumption Agreement), and Ashland expressly agreed to retain the USOR/Arivec Liabilities (per Section 2.6).

Ashland, contending that Nexeo should indemnify Ashland for the USOR/Arivec Liabilities, nevertheless claims that Article 2 is merely "the starting point with respect to determining whether a liability, or specific layer thereof, is assumed by Nexeo or retained by Ashland." Appellant's Opening Brief at 28-29. Article 2, however, is explicit that the liabilities at issue were *retained* by Ashland and that Nexeo, by definition, *did not assume* them. Had the parties intended for Ashland to do something other than *retain* these liabilities, they would have used a different word in Section 2.6(e).

Ashland would instead turn to "Article 9: Indemnity" to allocate all liabilities between Ashland and Nexeo. Before turning to whether Article 9's text will carry that load, the question remains what purpose the "assumed" and "retained" language of Article 2 serves if assumed and retained liabilities are not identified in the sections that expressly define and list them. Ashland never explained, here or below, what its retention of liability in Section 2.6(e) means or

how the word "retain" in Article 2 can be given effect in Ashland's construction. A construction that renders contract language meaningless is not a reasonable construction. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

3. Ashland's Claims Regarding the APS's Purpose are Unsupported by Either the Text or the Circumstances of its Adoption.

Ashland downplays the significance of its agreement to retain its environmental liabilities by arguing Section 2.5 (in its introductory paragraph and subsection (n)) transfers all liability for the Ashland Distribution business to Nexeo, except where expressly retained by Ashland. Not so. The entirety of Section 2.5 is expressly limited: Nexeo assumes the listed liabilities "to the extent relating to the Business or the Conveyed Assets … ***but excluding in each case*** the Retained Liabilities." B76. In other words, the APS does not begin with the proposition that all liabilities are assumed; even the broadest "catch-all" language on which Ashland relies to establish Nexeo's assumption contains an express acknowledgment that Ashland completely retains its Retained Liabilities. B78. That language is consistent with the evidence that the APS represented an asset sale intended to convey specific assets and liabilities under circumstances where a thorough understanding of Ashland's environmental liabilities could not be fully developed. B240; B265. Nowhere in the text or facts can Ashland show the

parties' commercial objective was to transfer all of Ashland's environmental liabilities.

4. Ashland's Arguments About Section 9.6 and Article 10 Ignore the Express Language of the Provisions.

Though Article 2 requires Ashland to retain the USOR/Arivec Liabilities, Ashland argues that Article 9 overrides Article 2 and re-allocates the liabilities back to Nexeo. But Ashland ignores the text of Article 9.

Section 9.1 establishes indemnities in favor of Nexeo for certain "Losses" Nexeo suffers. Some of those indemnity rights are capped or limited by Section 9.6(c) or by Article 10. Ashland argues that if Nexeo's ability to obtain Article 9 indemnity for a specific Loss would be limited, then Ashland must not have retained the liability underlying that Loss in the first place.

Ashland conflates distinct provisions. Section 9.6(c) provides that "Ashland shall not have any liability under Section 9.1(c)"—the Ashland indemnity provision—in excess of certain caps or, in some cases, until a deductible is met. But Section 9.6(c) does not address Ashland's liability to third parties for its own conduct, and it does not purport to limit Ashland's agreement in Article 2 to retain liability for its own conduct. Indeed, the fact that Section 9.6(c) explicitly cross-references (and limits) Ashland's *indemnity* obligation in Section 9.1, while making no cross-reference to Ashland's *retention* of liabilities in Section 2.6, is

powerful evidence that Section 9.6(c) was not intended as a limit on Article 2.[4] B132-133.

Neither does Article 10 provide support for Ashland's position. Ashland claims that Section 10.2(ii) requires Nexeo to "step in and assume responsibility" for any new remediation liability or increased cost caused by a change in law. Appellant's Opening Brief at 25. In fact, no part of Section 10.2, entitled "Limitations," contains any language implying an assumption of liability by Nexeo. Section 10.2 is simply another set of indemnity limits; it sets forth five conditions under which "Ashland shall have no liability under Section 9.1," the indemnity provision. B136-137. Like Section 9.6, Section 10.2 contains no language altering the allocation of liabilities in Article 2.

[4] The presence of an explicitly stated cross-reference in Section 9.6 tends to exclude the possibility that the parties intended a second cross-reference that went unstated. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (explaining that under the rule of *expressio unius est exclusio alterius*, "[i]f one subject is specifically named, or if several subjects of a larger class are specifically enumerated, and there are no general words to show that other subjects of that class are included, it may reasonably be inferred that the subjects not specifically named were intended to be excluded."); *see also Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) (applying the principle of *expressio unius est exclusio alterius* in interpreting a stock purchase agreement).

5. Ashland's Reading of Section 9.6 and Article 10 Would Create a Conflict with Article 2, Despite the Distinct Functions of Those Provisions.

In Ashland's reading, Article 2 and Article 9 of the APS are in conflict—Article 2 requires it to retain the USOR/Arivec Liabilities, but Ashland contends Article 9 transfers those liabilities to Nexeo. Ashland's reading therefore creates an ambiguity that does not exist in the APS, making Ashland's reading unreasonable as a matter of law.

Where two provisions of a contract are allegedly in conflict, the court must whenever possible construe the provisions based on their purpose and function to avoid an ambiguity, resolve the conflict, and harmonize the contract. *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010). In *Axis*, an insured company sought D&O coverage under policies that contained a "prior acts exclusion" denying coverage for acts occurring before a date certain, as well as a "retention endorsement" that imposed a deductible on coverage for a certain category of lawsuits. *Id.* at 1061. The insurer denied coverage for a particular suit because it concerned excluded "prior acts." The insured argued the policy was ambiguous because the deductible endorsement dealt with a category of lawsuits that the parties knew could (at least in part) implicate prior acts, implying that if a deductible was adopted for those suits, the parties must have intended to cover the lawsuits notwithstanding the exclusion. *Id.* This Court found these two provisions

[redacted]

did "not create an ambiguity, because each has a distinct and independent purpose and function." *Id.* at 1062. The prior-acts exclusion addressed the scope of coverage; the deductible addressed the level of spending required before triggering coverage. *See id.* at 1062-63. Reading the deductible broadly to change the scope of coverage would conflict with the prior-acts exclusion and create an ambiguity. But construing the deductible as being only what it explicitly claimed to be—a deductible on whatever coverage was available, not an implicit comment on the scope of coverage—harmonized the clauses. *See id.* Because one *could* reasonably harmonize the clauses, the harmonizing reading was "the only proper interpretation, as a matter of law." *Id.* at 1063.

The same principle applies here. The allocation of liabilities in Article 2 and the establishment of indemnities in Article 9 are distinct functions. Indeed, both Nexeo's and Ashland's outside counsel testified that [redacted] B488; B274-275; B278. And despite Ashland's assertion in its brief, Nexeo's counsel did not testify that Article 9 revised Article 2's allocation of liabilities; he testified that [redacted]

B278.

The Superior Court recognized that reading Articles 9 and 2 "together" did not mean, as Ashland thinks, that Article 2 should be disregarded and Article 9's indemnity text stretched to take over the liability allocation function. Instead, the Superior Court found stretching Article 9 to cover allocation was unreasonable when more specific sections—Section 2.5 and 2.6—allocated liability to Ashland in the first instance. *See, e.g.*, A534. Reading Section 9.6 to re-allocate liabilities is an unnecessary departure from the plain text that renders part of Article 2's text meaningless. Because that result *can* be avoided, it *must* be avoided as a matter of law under *Axis* and similar authorities.

6. Section 9.5 Shows That When the Parties Wanted Nexeo to Assume a Liability, They Did Not Leave It to Implication.

Ashland next argues that Section 9.5 demonstrates how Article 9 provisions can allocate liabilities, rather than only establishing and limiting indemnities. Section 9.5 actually illustrates Nexeo's point. When the parties meant for Nexeo to assume a liability, they said so explicitly; they did not rely on an indemnity limitation to impliedly create an assumption of liability by Nexeo. In Section 9.5(c)(v), the parties provided for a hand-off of liability, and made it explicit:

> the ***obligations of Ashland to indemnify*** the Buyer Indemnitees for any Retained Remediation Liabilities ***shall survive the Closing until*** … Ashland addresses the Release … as necessary to comply with Environmental Law … including … obtaining a No Further Action Letter … from any Governmental Authority with primary jurisdiction over the relevant matter, ***after which such Losses shall no longer be subject to indemnification by Ashland***, notwithstanding that any survival period applicable generally to the Retained Specified Remediation Liabilities or the Other Retained Remediation Liabilities may not have expired, and ***Buyer shall pay, perform and discharge all Liabilities, obligations and commitments relating to such Losses***.

B131-132. This section thus carries out two functions. First, it *limits* Ashland's indemnity obligations by establishing conditions to terminate a particular liability, and then couples it with an express *assumption* by Nexeo of an obligation to "pay, perform and discharge" related liabilities. Compare that with Section 9.6, which

[redacted]

contains no such assumption language. Section 9.5 proves that Ashland's reading of the APS is unreasonable.

7. Ashland's Proposal to Read "Indemnity" Broadly Makes No Sense in the Context of the APS.

Ashland next complains the Superior Court construed the concept of "indemnity" as used in Article 9 too narrowly, but never explains how a broader reading of the word changes the outcome. Even if Ashland were right that the word "indemnify," in the abstract, could be read to mean "assume responsibility for,"[5] Ashland does not explain how it could be so read in *this* agreement—where there is already a Section 2.5 that defines specific liabilities that Nexeo "will assume and become responsible for," and a Section 2.6 that defines liabilities that Ashland "shall retain and be responsible for." Once again, Ashland proposes a reading of Article 9 premised on expunging Article 2. The Superior Court recognized the distinction between liability allocation in Article 2 and the parties' indemnification rights in Article 9, and found it improper to skip Article 2 in determining where liability lies. *See, e.g.*, A530-531; A533.

8. The Remaining Construction Arguments Do Not Apply.

Ashland contends that if Article 2 and Article 9 are in conflict, then the specific provision should prevail over the general provision. Ashland does not

[5] Appellant's Opening Brief at 31.

explain how Article 9 is more specific than Article 2, but more importantly, there is no conflict between them except in Ashland's unreasonable reading of Article 9. As this Court explains, no conflict need be found between different sections of a contract that have different purposes and can work together in a way that is "both intentional and logical." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1223-24 (Del. 2012).

Ashland also claims that recognizing any distinctions between Articles 2, 9, and 10 amounts to giving undue effect to the headings in the APS. Not so. While the headings in the APS describe the functions of each section, the APS's meaning would be unaffected if the headings were ignored. Sections 2.5 and 2.6 define the terms "Assumed Liability" and "Retained Liability" in their text, not in their headings. The text of Sections 9.1 and 9.2, not the headings, use and incorporate the assumed and retained liability terms defined by Sections 2.5 and 2.6. The text of Section 9.6, which makes no reference to changing Article 2's allocation of liabilities, expressly confines its own effect to limiting Ashland's "liability under Section 9.1." Ashland identifies no part of Nexeo's construction that depends on a heading.

Ashland's construction fails to give effect to Article 2 and fails to harmonize Article 2 with Article 9. Ashland therefore violates the contract construction principles that the parties agree apply to the APS.

[redacted]

II. The Superior Court Correctly Interpreted and Applied the Word "Terminated" in Section 9.2(d).

A. Question Presented

Did the Superior Court err when it determined that Nexeo owes no indemnification obligation to Ashland after rejecting Ashland's interpretation of the meaning of the word "terminated" and the effect of Section 9.2(d)? B28-33; B618-620; B803-805.

B. Scope of Review

See supra § I.B.

C. Merits of the Argument

Section 9.2(d)—the only section of the APS under which Ashland claims to be indemnified by Nexeo—provides an indemnity for Ashland when an indemnity running in Nexeo's favor has been "terminated" by Section 9.6. B129. The Superior Court correctly found that this indemnity provision only applies when Ashland's obligation to indemnify Nexeo has "terminated." As a matter of law, Ashland's obligation has not terminated.

1. Ashland's Obligation Has Not Terminated in Accordance with Section 9.6.

Ashland contends that its indemnity obligations have been "terminated" by Section 9.6, but Section 9.6 is not at issue because this is not a case of Nexeo

seeking indemnification, as Nexeo has not incurred or suffered a loss for Ashland to indemnify. Section 9.2 requires Nexeo to indemnify Ashland for:

> (d) any … Retained Remediation Liability for which Ashland's obligation to indemnify Buyer has terminated in accordance with Section 2.5(k), (l), and (m) (as applicable) or the terms and conditions of Sections 9.5 or 9.6.

B129. As explained above, Section 9.6 is an indemnity cap and deductible provision. B132-133. Section 9.5, on which Ashland does not rely, is an expiration provision applicable to other representations not at issue here. B131-132.

The triggering event for Section 9.2(d) indemnity—a Section 9.6 termination of Ashland's obligation to indemnify—must be strictly construed. Under Delaware law, indemnity provisions are to be construed strictly rather than expansively, and Ashland cannot expand or enlarge the indemnity obligations of the Agreement by implication, especially where there is indemnity language present in the contract.[6] In addition, indemnities must be construed narrowly and

[6] *See, e.g.*, *Seither v. Balbec Corp.*, 1995 WL 465187, at *7 (Del. Super. Ct. July 27, 1995), *aff'd sub nom. Seither v. Charles F. Beatty, Inc.*, 676 A.2d 906 (Del. 1996), *abrogated on other grounds*, *Toll Bros., Inc. v. Considine*, 706 A.2d 493 (Del. 1998); *Rock v. Delaware Electric Co-op., Inc.*, 328 A.2d 449, 453 (Del. Super. Ct. 1974) (citing *Howard, Needles, Tammen & Bergendoff v. Steers, Perini & Pomeroy*, 312 A.2d 621, 624 (Del. 1973)) ("When parties to a contract have entered into a written agreement expressly setting forth one party's indemnifying liability, there is no room for any enlargement of that obligation by implication.");

against the party seeking indemnification for its own negligence,[7] and here, it is undisputed that any liability for costs incurred at USOR and Arivec relates to the conduct of Ashland and its subsidiaries. B379; B582. As such, the "has terminated" clause must be strictly construed and applied. Strictly construing Section 9.2(d) means favoring the common and plain reading of the word "terminated." Using everyday language, to "terminate" is "to bring to an end," or to "put an end to."[8]

Ashland argues that because Section 9.2(d) refers to Sections 9.5 and 9.6 in their entirety, Section 9.2(d) must incorporate the entirety of the sections, not just the provisions that "terminate" Ashland's indemnity obligations. But the most natural reading of Section 9.2(d) is that only the "terminat[ing]" provisions of 9.5 and 9.6 are being invoked. After all, not every provision of Sections 9.5 and 9.6 acts to limit indemnity. The parties agreed in Section 9.5(c) that representations

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see also Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co., 840 A.2d 1244, 1251 n.12 (Del. 2004) (citing *Rock*, 328 A.2d at 455) (as party to a written contract with the plaintiff, defendant could not assert a right to implied indemnification).

[7] *See Sweetman v. Strescon Indus., Inc.*, 389 A.2d 1319, 1321 (Del. Super. Ct. 1978) ("[I]n order for a party to be entitled to indemnification for the results of its own negligence the contract language must be crystal clear or sufficiently unequivocal to show that the contracting party intended to indemnify the indemnitee for the indemnitee's own negligence.").

[8] BLACK'S LAW DICTIONARY 1700 (10th ed. 2014); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1959 (1996); *see also* AMERICAN HERITAGE DICTIONARY 1785 (4th ed.); OXFORD AMERICAN DICTIONARY 708 (1980 ed.).

relating to tax liabilities survive indefinitely, as do claims relating to intentional misrepresentation. B131-132. Other provisions clarify that there are no limits for indemnity claims relating to Retained Indebtedness and Taxes. B133. These provisions do not result in a hand-off of liability from Ashland to Nexeo, even though those provisions are part of the sections referenced in Section 9.2(d). Therefore, it is only logical that when Section 9.2(d) refers to the provisions of Section 9.6 that "terminate" indemnity obligations, the word "terminate" was used intentionally to clarify which provisions of Section 9.6 are to be applied in understanding Section 9.2.

Ashland then argues the word "terminated" must not be read literally because Sections 2.5(k), (l), and (m) do not "terminate" indemnification obligations. Appellant's Opening Brief at 36. But the (k)-(l)-(m) sections are easily understood to do just that. These three clauses provide that Nexeo assumes liability for Other Retained Remediation Liabilities, Retained Litigation Product Liabilities, and Retained Litigation Non-Product Liabilities of which notice is first received *after* the fifth anniversary of Closing. B77-78. These three clauses are counterparts to Sections 2.6(e), (f), and (g), by which Ashland retains such liabilities if notices are received *on or before* the fifth anniversary of Closing, and for which Ashland provides indemnity per Section 9.1(c). B78-79. Section 9.2 refers to the manner in which the passage of the five-year window described in the

2.5(k)-(l)-(m) sections "terminates" (brings to an end)[9] Ashland's obligation to indemnify for any additional liabilities in these three categories once Nexeo begins assuming new liabilities in those categories.[10] Thus, the Superior Court properly concluded that Section 9.2(d) does not shift the USOR/Arivec Liabilities to Nexeo.

2. Ashland's Reading of the Word "Terminated" Defies the Word's Plain Meaning and Evident Purpose.

Contending that the word "terminated" means a "dividing or boundary line," Ashland argues that Section 9.2(d)'s use of the word "terminated" means that all of Sections 9.5 and 9.6, including Section 9.6(c)(ii), create a boundary for Ashland's indemnity obligations. The Superior Court appropriately rejected Ashland's strained reading.

As described above, multiple provisions of Sections 9.5 and 9.6 describe unbounded, limitless indemnity obligations. Moreover, in this context, "boundary" or "dividing line" makes no sense as an alternative definition for "terminated." Suppose Section 9.2(d) read: "Nexeo indemnifies for any liability for which Ashland's obligation *has been bounded* in accordance with Sections 9.5 or 9.6." If Section 9.2(d) handed liability off from Ashland to Nexeo whenever Ashland's

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[9] *See supra* note 8 and accompanying text.

[10] B129. Moreover, the word "terminated" appeared in Ashland's original draft with reference to Sections 9.5 and 9.6 alone. The intervening reference to Section 2.5 was added in a subsequent draft. B620 (citing B287-289, B758).

obligation to indemnify was "bounded" (rather than terminated), Article 9 would be self-defeating—because any limit on an obligation "bounds" the obligation, whether the limit has been reached or not. Thus, Article 9's indemnity limit could never be reached; the simple existence of the limit would cancel the Ashland indemnity and create a new Nexeo indemnity.

Ashland then cites *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410 (Del. 2012), which Ashland treats as advocating broad readings of contract language cross-referencing other sections of a contract. In *BLGH*, the seller of a gas supply business was due a bonus if the business buyer later entered into a gas sale "outlined" in the business sale contract. *Id.* at 412. The business buyer entered into the gas sale transaction but refused to pay the bonus, arguing that it entered not into the transaction "outlined" in the business sale contract, but rather a gas sale transaction on slightly different terms. This Court rejected the buyer's reading, pointing out that the business sale contract specifically provided that the terms of the gas sale might be modified; the business sale contract did not condition the payment of a bonus on material or substantial compliance with any specific gas sale terms; and the specified section of the business sale contract (the one that supposedly "outlined" the gas sale) did not actually include an "outline" of any transaction. *Id.* at 414-16.

In *BLGH*, the court held the meaning of a cross-referencing word should be understood based on reading the relevant provisions of the agreement together and giving effect to all contract terms where possible. *Id.* at 415-16. One section of the contract referred to a transaction "outlined" in another section, but there was no "outline" in that other section; therefore, the court construed the words "outlined in" to mean "referenced in" or "defined in" so the word "outlined" would have meaning in the context of the whole agreement. *Id.*

In this case, Section 9.2(d) refers to obligations that have been "terminated" by Section 9.6. Section 9.6 in fact includes provisions that terminate obligations and other provisions that do not. Therefore, the distinctive word "terminate" can be given effect as written. Disregarding the word "terminated" would violate what the *BLGH* court called the "cardinal rule of construction"—that all provisions should be construed to be effective if possible. *Id.* at 416.

III. The Superior Court Correctly Held the Deductible Provision Does Not Apply to Shift the USOR/Arivec Liabilities to Nexeo.

A. Question Presented

Does applying the Section 9.6 deductible only to indemnity, as the text provides, upset the purpose of the APS reflected in its text? B30-31; B610-612; B800-802.

B. Scope of Review

See supra § I.B.

C. Merits of the Argument

Citing no evidence or contract language, Ashland contends that the purpose of the APS is to insure (i) Ashland never pays more than $75 million to remediate environmental harms it caused and (ii) Nexeo contributes $5 million to remediating those harms. Applying the Section 9.6(c) deductible provision as written, Ashland contends, would interfere with these unproven purposes. Ashland simply begs the question. Were these the purposes of the APS, they would be reflected in the contract. Because they are not, the APS can be applied as written.

1. The $5 Million Deductible Applies Based on the Written Terms, Not Based on "Chance."

Ashland argues that if it is not entitled to indemnification for the first $5 million of its own retained remediation liabilities, then its ability to avoid five million dollars of responsibility will depend on chance. Appellant's Opening Brief

at 39-40. Implicit in Ashland's argument is the assumption that Ashland and Nexeo are somehow jointly liable for any environmental harm Ashland caused, and whichever one of them unlucky enough to be sued for Ashland's conduct will be found liable as surely as the other would, such that chance determines which of them will suffer any given environmental loss. Nothing in the APS text or the evidence supports that assumption.

In reality, Ashland bears decades of environmental liabilities as the generator, transporter, or disposer of hazardous waste, and the parties were aware of that when crafting the APS's allocation and indemnification provisions. *See* B234-238; B250-251.[11] Nexeo did not assume these liabilities, and if Nexeo were sued for Ashland-caused contamination at sites to which Nexeo is not connected, Nexeo could easily defend such claims by proving it is not an Ashland successor. It is sensible that the parties would use a deductible to avoid involving the mechanisms of indemnification for Nexeo's routinely incurring modest costs of such defenses, and to limit the shifting of such defense costs, while still protecting Nexeo against the risk of a substantial liability finding. If on the other hand

[11] [redacted] but Ashland can hardly argue the APS presumes Nexeo would naturally succeed to all of Ashland's CERCLA liability. As just one example, the USOR/Arivec Liabilities concern sites where Ashland has CERCLA liability while Nexeo—not having been connected to the facility at all—has none. The APS covers these sites as well as those Nexeo acquired.

[redacted]

Ashland is pursued by a government or a third party for environmental harms, its liability will be determined not based on the APS terms, but on environmental law and Ashland's contracts with its customers. In the case of the USOR/Arivec Liabilities, Ashland is bearing remediation costs because it is independently liable to third parties for those costs. Nexeo is not liable for those costs; no claim has been made against Nexeo for those costs by any government or third party; and Ashland has not attempted to defend the costs as though they were claims against Nexeo. It is not mere chance that differentiates the indemnifiable claims that could be made against Nexeo from the liabilities Ashland retained.

2. The $75 Million Cap Applies to Ashland's Indemnification of Nexeo, Not to Ashland's Independent Liabilities.

Ashland next contends that every remediation cost it incurs must be deemed an act of indemnification under Article 9, because otherwise, Ashland may incur some remediation costs that do not erode one of the caps on its indemnification obligation to Nexeo. That begs the question. The $75 million cap applies to Ashland's indemnification of liabilities suffered by Nexeo, not to costs Ashland incurs remediating environmental harm for its own account. Ashland presents no contract language or evidence that the $75 million cap was intended to limit Ashland's own costs rather than costs Ashland incurred indemnifying Nexeo. Were it so, Section 9.6 would represent Nexeo's guarantee that Ashland would

[redacted]

never have to spend more than $75 million on environmental remediation at two dozen in-progress remediation projects and sixty-five other facilities listed on the APS schedules. *See* B651-670. But the evidence below was that in this fast-track negotiation, Ashland did not even provide Nexeo with information that would allow Nexeo to assess what the likely costs at those sites would have been, and Nexeo never attempted to assess what those remediation liabilities would be. B778-781; B238-241; B248-249. Moreover, if Nexeo were agreeing to backstop all of Ashland's remediation projects, one would expect the APS to provide for Nexeo's constant oversight and involvement in the remediation projects, as it does with indemnification claims[12]—yet there is nothing requiring Ashland to keep Nexeo informed about the retained remediation projects. The text and the parties' conduct showed no one believed Nexeo had paid Ashland $930 million for the privilege of acting as the excess insurer for Ashland's own retained liabilities at dozens of environmental hazard sites.

The cap applies by its terms when Nexeo suffers a liability that Ashland agreed to retain. That did not occur with respect to the USOR/Arivec Liabilities. The Superior Court correctly found Section 9.6 and its limits on Ashland's

[12] *E.g.*, APS §§ 9.4(a), (b). B130-131.

indemnity obligations are irrelevant because, in this instance, Ashland—not Nexeo—is the party seeking indemnification. A537.

IV. The Superior Court Did Not Err In Finding the Indemnification Provisions Inapplicable on These Facts.

A. Question Presented

Did the Superior Court err when it found that Nexeo did not seek indemnification from Ashland where Nexeo suffered no "Loss" within the meaning of Section 9.1 and did not request, in substance or form, indemnification from Ashland? B28-32; B631-635.

B. Scope of Review

See supra § I.B.

C. Merits of the Argument

The Superior Court correctly rejected Ashland's implausible view of the parties' conduct with respect to the USOR site. Ashland has not cited a single Nexeo document or communication indicating that Nexeo had suffered any "Loss" arising out of USOR, or requesting that Ashland indemnify Nexeo against a Loss. Because Ashland has responded to its own liability (rather than indemnifying Nexeo), it has not made any Section 9.1(c) indemnity payments from which a Section 9.6 deductible could be taken, and Section 9.6(c) has not terminated any Ashland indemnity obligation in a manner that would trigger Section 9.2(d) Nexeo indemnities. Ashland's argument fails.

1. Nexeo Did Not Suffer a "Loss" Related to the USOR Site.

Ashland argues that when Continental Airlines contacted Nexeo about USOR, Nexeo "suffered" a "Loss" and "tendered" it to Ashland, such that Ashland has been indemnifying Nexeo since then. But Ashland introduced no evidence that Continental asserted anything against Nexeo constituting a Loss. Under the APS, "Losses" are "claims, actions, causes of action, judgments, awards, Liabilities, losses, costs, expenses (including reasonable legal fees and expenses), fines or damages." B128. As the sole evidence of a Loss suffered by Nexeo, Ashland relies on an email from [redacted] stating as follows:

[redacted]

A409-410. No claim is made; no action or cause of action is asserted; no judgment or award is described; no loss, cost, expense, fine, or damage is mentioned. Reading generously, [redacted] It is telling that Ashland's brief avoids the substance of [redacted] e-mail because that e-mail is no evidence that Nexeo suffered a "Loss."

[redacted]

2. Ashland Can Point to No Support for the Assertion that Nexeo Made an Indemnification Claim to Ashland.

Both Ashland and Nexeo personnel conducted themselves as though the claim was an Ashland-retained liability, and as though Nexeo had no obligation to bear any deductible amount before Ashland became liable.

Ashland cites no action or communication by Nexeo evidencing an intent to make an indemnification claim to Ashland. Section 9.3 of the APS requires indemnification claims to be submitted by a written notice that describes the Loss, its estimated amount, the method of computation, and "a reference to the provisions of his Agreement … in respect of which such Loss shall have occurred." B129-130. Section 11.1 requires all such notices to be given by personal delivery, certified mail, or fax, to Ashland's general counsel, assistant general counsel, and outside counsel. B138-139. Nexeo never sent anything to Ashland that even loosely approximated a Section 9.3 or 11.1 notice. Ashland relies solely on an e-mail that an in-house lawyer from Nexeo sent an in-house lawyer at Ashland that said [redacted] B532. That e-mail contains no reference to the APS; no mention of indemnity; no description of calculating a Loss; and no copies to the designated notice recipients. Far from being an indemnification claim on Nexeo's behalf, the e-mail is an informal

[redacted]

attempt by Nexeo [redacted] In the absence of any mention of indemnification and any effort to comply with the APS's requirements for making an indemnification claim, the Superior Court did not err in rejecting Ashland's effort to mischaracterize the e-mail as an indemnification claim.

In neither substance nor form can Ashland point to any document or communication in which Nexeo sought indemnification from Ashland or treated the USOR Site as its "Loss." At most, Nexeo personnel (i) informed their former colleagues at Ashland that they should be aware of an emerging Ashland-retained liability, and (ii) offered to provide information to assist Ashland in handling Ashland's own retained liability—cooperation that Nexeo was required to provide pursuant to Section 10.5, even as to claims that were not the subject of indemnity. B138. The parties conducted themselves in accordance with the plain text of the APS. It is too late for Ashland to revise either that history or the APS text.

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be affirmed.

[redacted]

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CERTIFICATE OF SERVICE

I, Jason J. Rawnsley, hereby certify that on October 5, 2017, I caused a copy of the foregoing to be served via File & Serve upon all counsel of record.

/s/ Jason J. Rawnsley
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