EFiled: Oct 30 2017 02:59PM EDT
Filing ID 61297585
Case Number 293,2017

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.	:	**REDACTED PUBLIC VERSION FILED ON OCTOBER 30, 2017** No. 293, 2017 Court Below: Superior Court of the State of Delaware C.A. No. N14C-07-243 EMD CCLD

APPELLANT'S REPLY BRIEF

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Dated: October 20, 2017

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ASHLAND INC., a Kentucky Corporation,	:	
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
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 5

I. THE SUPERIOR COURT'S INTERPRETATION OF THE APS FAILS TO READ THE APS AS A WHOLE 5

A. Ashland's interpretation gives effect to all provisions of the APS 5

B. Ashland's interpretation of the APS does not create a conflict between Article 2 and Articles 9 and 10 12

C. Section 9.5 supports Ashland's interpretation of the APS 14

II. THE SUPERIOR COURT ERRED IN NARROWLY INTERPRETING THE WORD "TERMINATED." 16

III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE $5 MILLION DEDUCTIBLE PROVISION DOES NOT APPLY TO THE REMEDIATION LIABILITIES AT THE SITES 19

IV. UNDER THE PLAN TERMS OF THE APS, NEXEO SUFFERED A LOSS ONCE IT RECEIVED THE USOR SITE NOTICE AND SOUGHT INDEMNITY WHEN IT SENT THE NOTICE TO ASHLAND 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Axis Reinsurance Co. v. HLTH Corp.,
993 A.2d 1057 (Del. 2010) 13

Certainteed Corp. v. Celotex Corp.,
2005 WL 217032 (Del. Ch. Jan. 24, 2005)....................2, 16

JFE Steel Corp. v. ICI Americas, Inc.,
797 F. Supp. 2d 452 (D. Del. 2011) 5

Martin Marietta Materials, Inc. v. Vulcan Materials Co.,
68 A.3d 1208 (Del. 2012), *as corrected* (July 12, 2012) 18

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010) 22

Sonitrol Holding Co. v. Marceau Investissements,
607 A.2d 1177 (Del. 1992) 5

INTRODUCTION

The fundamental issue presented by this appeal is the parties' disagreement regarding the meaning of "indemnity" as used in Article 9 of the APS.[1] Ashland has argued throughout this litigation that "indemnity" as used in Article 9 is a mechanism to further refine the Article 2 allocation of responsibility between Ashland and Nexeo for the various known, scheduled and unknown, unscheduled environmental remediation liabilities of the Distribution Business. *See* Opening Brief at 31-32; AR003 (Summary Judgment Tr. ("Tr.") at 10:20-11:15). Whereas, Nexeo has maintained that the allocation of liabilities in Article 2 is separate from the parties' "limited obligations … to indemnify one another" under Article 9, which Nexeo argues only applies after a party has incurred costs for a liability it should not have. *See* Answering Brief at 21. The Superior Court adopted Nexeo's argument. Ashland respectfully contends that by so holding, the Superior Court erred in interpreting the APS. As Ashland noted in the Opening Brief, Delaware law recognizes that:

> 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. "Indemnification," as used in [the asset purchase agreement], does not refer to the common law right known as "indemnity."

[1] Capitalized terms not defined herein have the meaning ascribed to them in Ashland's Opening Brief and/or the APS.

Certainteed Corp. v. Celotex Corp., 2005 WL 217032, at *3 (Del. Ch. Jan. 24, 2005); *see* Opening Brief at 31-32. In the Answering Brief, however, Nexeo failed to address *Certainteed* and its recognition that "indemnity" as used in the merger or asset acquisition context means more than simple, common law indemnity. "Indemnity" as used in the APS, therefore, should be construed as Ashland has argued.

In support of its position regarding what the parties meant by "indemnity," Nexeo proffers an interpretation of the APS that is overly simplistic, renders numerous provisions of Articles 9 and 10 superfluous, and produces results inconsistent with the parties' intent. Nexeo's position is that the APS allocates the Business's remediation liabilities based on a simple "your watch" versus "our watch" basis. *See* Answering Brief at 7-8. There is no dispute in the record before the Court that this was not the parties' intent. Nor would a thorough reading of the APS support that position. For example, Nexeo's assumption of liabilities under subsections 2.5(k) and (n) specifically contradict this assertion. *See* A205, A206. Subsection 2.5(k) only involves liabilities that arise because of pre-closing activities. A205. Subsection 2.5(n) applies to other unassigned liabilities "whether arising before, on or after the Closing Date." A206. By ignoring basic principles of contractual interpretation and the plain language of Section 2.5 itself (which begins "Upon the terms and subject to the conditions of this Agreement…"),

Nexeo erroneously interprets the APS so as to treat Article 2 and Article 9 as unconnected silos. This interpretation fails to read the APS as a whole and, thus, violates a basic tenant of Delaware contract law.

Nexeo's failure to harmonize Articles 2 and 9 leads to the wrong conclusion about how the APS operates. The text of the APS, when read as a comprehensive whole (as it must be) demonstrates that the remediation liabilities of the Business were split between Ashland and Nexeo through a series of give and takes. As set forth in Section 2.5, Nexeo assumed all the Business's Liabilities, *subject to the terms and conditions of the entire APS,* except those specifically defined liabilities that Ashland retained, *i.e.* the Retained Liabilities. In other words, Nexeo broadly agreed to assume all the Distribution Business's liabilities; then Ashland agreed to take back certain enumerated liabilities as specifically defined Retained Liabilities subject to the terms and conditions of that retention articulated in the APS; and thereafter, through provisions establishing exceptions to, or qualifications of Ashland's retained liabilities, Nexeo agreed to take back certain of those Retained Liabilities or specific portions, or layers, upon the occurrence of certain events as set for in Articles 9 and 10. Put another way, those exceptions to, and limitations on, liabilities retained by Ashland, were portions of liabilities assumed by Nexeo.

Further, Nexeo seemingly attempts to inject a course of performance argument into this appeal by discussing Ashland's actions related to the USOR Site

in its Statement of Facts. *See* Answering Brief at 12-14. Nexeo's attempt should be rejected. Despite the fact that Nexeo made this argument below, the Superior Court seemingly rejected that argument because it did not rely on those facts and no part of the Superior Court's opinion ruled on or addressed course of performance. This Court should likewise reject Nexeo's effort to inject course of performance into this appeal because it conflicts with the parties' arguments that the APS is unambiguous. Moreover, the record below does not support either Nexeo's argument that the parties' purported course of performance confirms Nexeo's interpretation nor that the purported course of performance in some way modifies the plain terms of the APS.

As Ashland demonstrated in its Opening Brief, this is not a simple allocation based on who owns the assets at what particular time – it could not be due to the complex nature of the Distribution Business itself and the complicated nature of environmental laws and regulations applicable to it. Accordingly, the Superior Court erred in interpreting the APS in a manner that treats Article 2 as separate and unmodified by Articles 9 and 10. Respectfully, Ashland requests that this Court reject Nexeo's entreaty to preserve this error.

ARGUMENT

I. THE SUPERIOR COURT'S INTERPRETATION OF THE APS FAILS TO READ THE APS AS A WHOLE.

Ashland's interpretation reads Article 2 in harmony with Articles 9 and 10 to give full effect to all provisions of the APS as required under well-established Delaware law. *See JFE Steel Corp. v. ICI Americas, Inc.*, 797 F. Supp. 2d 452, 469 (D. Del. 2011) ("Delaware principles of contract interpretation also require 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 surplussage.") (internal quotations omitted); *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992) ("The cardinal rule of contract construction is that, where possible, a court should give effect to *all* contract provisions.") (emphasis in original). Nexeo argues for an interpretation of the APS that fails to accomplish this result and sets forth numerous arguments that fail to refute Ashland's interpretation.

A. Ashland's interpretation gives effect to all provisions of the APS.

First, contrary to Nexeo's assertions, Ashland is not "cherry-picking" provisions of the APS to "ignore" Article 2. *See* Answering Brief at 21. Nor has Ashland ever asserted that Article 9 "overrides" Article 2. *Id.* at 26. Ashland does not and has never ignored Article 2. Ashland has consistently argued that Article 2 is where the analysis begins and Article 2 must be read in conjunction with

Articles 9 and 10. A154; A151-59; A501-02; A476-78; A480; Opening Brief at 28-29. If Ashland were attempting to ignore Article 2, its interpretation would need to ignore the time limitation on when newly noticed ORRLs are retained by it, which is only found in Section 2.5. Ashland has not done so.

The parties agree that Ashland "retains" ORRLs for which notice is received prior to the fifth anniversary of the Closing Date. Ashland admitted this in its Complaint. A18. Yet, as Ashland has explained, simply because a liability is defined as a Retained Remediation Liability does not automatically dictate that Ashland is the responsible party for the entirety of that liability for all time and under all circumstances. *See* Opening Brief at 26-27. However, because it ignores the impact of other provisions of the APS, this is how Nexeo argues the APS should be interpreted. Such an interpretation is not only belied by the plain terms of the APS, but also by Nexeo's own Answering Brief. *See generally* A256-66 (APS Articles 9 and 10); *see also* Answering Brief at 31 (Nexeo agreeing that an NFA letter shifts liability). Nexeo's argument that Ashland bears all responsibility for any Retained Remediation Liability under all circumstances and for all time pursuant to Article 2 rings hollow.

Second, the plain language of the APS contradicts Nexeo's argument that the APS is devoid of any evidence that Nexeo broadly assumed all liabilities in the first instance except those specifically defined Retained Liabilities. *See* Answering

Brief at 25. In making this argument, Nexeo focuses the Court on the words "but excluding in each case the Retained Liabilities …." A204. This focus glosses over important prefatory language in Section 2.5, which explicitly provides: "Upon the terms and subject to the conditions of this Agreement, Buyer and the Buyer Corporations will assume and become responsible for ***any and all*** Liabilities to the extent related to the Business or the Conveyed Assets[.]" *Id.* (emphasis added). That language is crystal clear. There is no ambiguity – both parties intended for Nexeo to assume "***any and all*** Liabilities" of the Business that are not otherwise specifically retained by Ashland. *Id*. (emphasis added).

Accordingly, when a remediation liability is retained by Ashland, such as an ORRL, that remediation liability is retained subject to all the terms and conditions of the APS, including those provisions that limit responsibility for those liabilities. Thus, the provisions of Article 9 that limit or qualify Ashland's responsibility for a retained liability serve to shift responsibility for portions of a remediation liability between the parties. As just one example, with respect to any Retained Remediation Liability, which by definition encompasses both RSRLs and ORRLs, A192 (APS §1.1), Ashland retains the remediation liability until it receives an NFA Letter at which point any future remediation liability for what is still defined as a RSRL or an ORRL will "shift" to Nexeo as per the terms of Section 9.5(c)(v). A259-60.

Section 9.6(c) works in the same manner as Section 9.5(c)(v). Nexeo has failed to demonstrate why these two provisions should be interpreted differently. Nor should they. Thus, with respect to an ORRL where notice has been given in the first five years after Closing, Ashland is only responsible for costs incurred in connection with that remediation liability once the aggregate Losses for all ORRLs exceed the $5 million deductible set forth in Section 9.6(c)(ii) and until all such Retained Remediation Liabilities reach $75 million in the aggregate, with certain exceptions, pursuant to Section 9.6(c)(i).

Rather than address the plain meaning of Sections 9.5 and 9.6 as Ashland has proffered, Nexeo misreads the APS and oversimplifies the deductible and cap issues by arguing that Ashland cannot show that "the parties commercial objective was to transfer all of Ashland's environmental liabilities." Answering Brief at 25-26. Ashland never advanced that argument. Moreover, as both Mr. Nettles and Ms. Woods testified, "[REDACTED]" or [REDACTED]. A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9). This is especially true considering that Ashland sought to [REDACTED] as Mr. Nettles testified. A599 (Nettles 61:9-14).

In this same vein, Nexeo is likewise incorrect when it broadly argues that Ashland was retaining "liability for its own conduct." Answering Brief at 26. The

more nuanced answer is provided by review of the APS. Under Section 2.5(k), Nexeo expressly assumed all such remediation liabilities where Ashland receives written notice of those liabilities after the fifth anniversary of the Closing Date. A205. By definition, an ORRL is a remediation liability "to address a Release of any Hazardous Material *occurring prior to the Closing Date*" and not listed on Schedule 1.1(d). A192 (APS §1.1) (emphasis added). Thus, Nexeo expressly assumed, without limitation or condition of any kind, a category of liabilities that result from Ashland's pre-Closing conduct. However, this is not the end of the story. Pursuant to Section 2.5(e), Nexeo agreed to retain "[a]ll Environmental Liabilities to the extent relating to the Business or any Conveyed Asset, whether arising before, on or after the Closing (other than the Retained Remediation Liabilities….)" A204-05. Therefore, other than the specific RSRLs and ORRLs, Nexeo assumed all pre-closing Environmental Liabilities, which by definition and common sense would have occurred while Ashland owned the Business – and, thus, arguably would be based on Ashland's purported conduct. Nexeo unambiguously assumed liability for certain pre-closing conduct and its claim that Ashland agreed in "Article 2 to retain liability for its own conduct" is demonstrably false. *See* Answering Brief at 26.

Third, Nexeo is incorrect when it contends that Ashland argues that Article 9 "overrides" Article 2 and "re-allocates" the entirety of the Sites' remediation

liabilities back to Nexeo. *See id.* Ashland has consistently taken the position that Ashland retained these liabilities subject to the other terms and conditions of the APS. Specifically, Ashland contends that the terms of Article 9, including Section 9.6(c)(ii), allocate or "shift" to Nexeo the responsibility to pay for portions of certain claims (in this case, the first $5 million layer of ORRLs noticed within 5 years). *See, e.g.*, Opening Brief at 25-27. Moreover, in advancing its argument, Nexeo ignores the plain text of Sections 9.6 and 9.1 by arguing that the alleged lack of a cross-reference to Section 2.6 in Section 9.6(c) is "powerful evidence" that Section 9.6(c) was not intended to limit Article 2. *See* Answering Brief at 26-27. Section 9.6(c) unambiguously references Section 9.1(c), which explicitly governs Ashland's indemnity obligations for "Retained Liabilities." A260. Retained Liabilities are defined in Section 2.6 and, in fact, are the sole focus of that section. Accordingly, there was no need to include a cross-reference to Section 2.6, when Section 9.1(c)—cross-referenced in Section 9.6(c)—directly and exclusively relates to Retained Liabilities. *See* A257. Ironically, the inclusion of the cross-reference Nexeo proposes would actually be redundant.

Fourth, with respect to Article 10, Nexeo mischaracterizes Ashland's argument and the text of Section 10.2. Nexeo claims that Section 10.2 is just another limit on Ashland's indemnity obligations under 9.1, but does not create a liability for Nexeo that corresponds with the limitation of Ashland's liability.

Essentially, Nexeo argues that if one of the events specifically contemplated by Section 10.2 occurs and Ashland's responsibility ends, Nexeo has no responsibility for any remaining liability because the allocation of liabilities is governed exclusively by Article 2. *See* Answering Brief at 27. That reading, however, ignores both the text and intent of Section 10.2. For example, Mr. Nettles testified that the purpose of the change in environmental law provision of Section 10.2(ii) is to put an end to Ashland's liability because Ashland was [REDACTED]

A592 (Nettles 54:12-24); *see also* A599 (Nettles 61:9-14) ([REDACTED]).

While Nexeo is correct that Section 10.2 provides that Ashland "shall have no liability under Section 9.1," Nexeo ignores that Section 10.2 also provides that Ashland shall have "no obligation to indemnify any Buyer Indemnitee for any Environmental Loss" that may arise from the happening of any event covered by Section 10.2. A264. Accordingly, Ashland has no responsibility to Nexeo for any such Environmental Losses whatsoever even though such a change in the law will necessarily affect sites that Nexeo now owns. If this Court accepts Nexeo's

interpretation, as the Superior Court did, and Nexeo has no responsibility for such liabilities, then neither party has responsibility for any such additional liabilities based on a later-occurring change in law that would have been unknown at the time of the APS. Such an interpretation impermissibly leaves a gap in the APS's allocation of liabilities, which contravenes the parties' stated intent. *See* A580 (Nettles 42:6-17); A692 (Woods 104:7-105:9).

Further, Nexeo's argument that Article 10 is inapplicable to the allocation of liabilities is wrong. Ashland's position in this litigation is that the determination of which party has responsibility for certain remediation liabilities cannot be determined by reviewing Article 2 in isolation. *See* Opening Brief at 24-34. As such, Ashland's discussion of Article 10 demonstrates that Article 10 limits in many ways the retention of liabilities under Article 2. The terms of Article 9 work in the same fashion to limit the Article 2 retention of liabilities.

B. Ashland's interpretation of the APS does not create a conflict between Article 2 and Articles 9 and 10.

Nexeo argues that Ashland's interpretation results in a conflict between Section 9.6 and Article 2. Nexeo again over-simplifies Ashland's argument. Ashland is not arguing that Section 9.6 "transfers" the entirety of the USOR Site or Arivec Site Liabilities to Nexeo. Rather, Section 9.6 qualifies and limits the scope of Ashland's retained liability. This results in a shift of responsibility for portions of that liability. Ashland's interpretation reads the terms of the APS together to

make Ashland's retention of those liabilities subject to the $5 million deductible contained in Section 9.6(c)(ii).

Nexeo's reliance on *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057 (Del. 2010), is misplaced. *See* Answering Brief at 28-29. *Axis* involved an insurance contract with an exclusion that operated to bar the policyholder's claim for coverage as to an underlying securities litigation because the litigation related to actions preceding the date specified in the exclusion. *Axis Reinsurance Co.*, 993 A.2d at 1062. The policyholder relied on an endorsement establishing a retention under the policy for the same litigation arguing the endorsement showed the insurer knew about the litigation and must have intended coverage, despite the express exclusion. *Id.* at 1061. The Court held the retention endorsement did not create coverage which was barred by the express exclusion. *Id.* at 1063. The fact that the insurer may have known of the underlying litigation as a potential claim did not conflict with the clear policy language. *Id.* at 1062.

In *Axis*, the Court dealt with an express exclusion; there is no comparable provision in the APS. Moreover, unlike an insurance policy, which typically contains a coverage grant and provisions separately establishing exclusions and retentions, the APS sets forth a comprehensive allocation of liabilities in Articles 2, 9, and 10. Unlike the policy provisions at issue in *Axis*, Articles 2, 9, and 10 are not independent of each other and Nexeo's citation to *Axis* cannot make them so.

C. Section 9.5 supports Ashland's interpretation of the APS.

Nexeo's argument that Section 9.5 serves as a prime example of a provision in the APS that demonstrates that when the "parties meant for Nexeo to assume a liability, they said so explicitly" is equally unavailing for at least two reasons. *See* Answering Brief at 31.

First, Nexeo dedicates pages of its Answering Brief arguing that Articles 9 and 10, including Sections 9.6 and 10.2, do not allocate responsibility for liability because those provisions only reference indemnity and not allocation. *See, e.g.*, Answering Brief at 26-30. Yet Nexeo concedes that Section 9.5(c)(v) does indeed act as "an express *assumption* by Nexeo" of any additional environmental liability that may arise after Ashland has obtained an NFA Letter. *Id.* at 31 (emphasis in original). Despite Nexeo's citation to Section 9.5(c)(v) for this proposition, that section does not use the word "assume."

Moreover, Section 9.5(c)(v) is not found in Article 2, which Nexeo steadfastly argues is the only provision of the APS that controls the determination of assumed versus retained liabilities. Thus, Nexeo appears to have done an about-face (at least with respect to Section 9.5(c)(v)) and now admits that a provision in the APS not found in Article 2 "re-allocates" or shifts a portion of liability from being retained by Ashland to being assumed by Nexeo (*see id.* at 26) – just as

Ashland has argued from the outset of this litigation. A154; A151-59; A501-02; A476-78; A480.

Second, while Sections 9.5 and 9.6 both serve to shift responsibility for Retained Remediation Liabilities upon the occurrence of certain events, those two sections serve different functions. Section 9.5 serves to extinguish a particular indemnity for a certain liability, which in the case of Section 9.5(c)(v) is when Ashland remediates a site to the point of achieving an NFA Letter. Whereas Section 9.6 serves to limit the parties' obligations based on certain monetary layers or deductibles and in certain instances extinguish the indemnity obligations based on aggregate dollar amounts. Accordingly, in light of the different purposes served by Sections 9.5 and 9.6, it only makes sense that the two provisions use different language.

II. THE SUPERIOR COURT ERRED IN NARROWLY INTERPRETING THE WORD "TERMINATED."

Nexeo's interpretation of "terminated" within Section 9.2(d) fails to acknowledge that the concept of indemnification as used in the APS (similar to the manner by which indemnification is used in other asset purchase and merger agreements) is not the same as common law indemnity. Instead, indemnification acts as a method to further modify and refine the allocation of liabilities between the parties. Nexeo's argument, and the Superior Court's interpretation, misconstrues the indemnification remedy provided under Article 9 of the APS "as implicating common law theories of indemnity." *Certainteed Corp.*, 2005 WL 217032, at *5.

Instead, "[a]t issue here is a contractual remedy, termed 'Indemnification,' that has no direct relation to common law indemnification." *Id.* Indeed, given that Section 9.8 of the APS limits the parties "sole and exclusive remedy" for a Loss to the "indemnification provisions[,]" of Article 9 (with minor certain exceptions such as fraud and equitable relief), indemnification cannot be construed in the manner advanced by Nexeo and as found by the Superior Court. *See* A262; *see also Certainteed Corp.*, 2005 WL 217032, at *8 (distinguishing common law indemnity from contractual indemnification in an asset purchase agreement with a sole and exclusive remedy provided in an indemnification provision).

Despite the recognized difference between common law indemnity and contractual indemnity as used the context of asset purchase and merger agreements, Nexeo continues to argue for an interpretation of the APS that advances a narrow reading of the word "terminate" – an interpretation that fails to give effect to the text of Section 9.2(d) and the parties' intent. The "evident" purpose of "terminate" as used in Section 9.2(d) is to set limits on Ashland's indemnity obligations. Whether that be by setting a threshold, a "deductible," or an ending, the result is the same – a division between which party must pay for all or a portion of a certain Loss. Section 9.6(c) creates layers or "boundaries" that shift responsibility for paying for portions of liability depending on the dollar values of those liabilities. *See* A260. This interpretation is consistent with the parties' intent and does not cause Article 9 to be self-defeating. *See* A677 (Woods 44:23-45:1) (█████████ ██ █████████████████████████████). Nor does this interpretation cancel or create any new indemnities.

In the Answering Brief, Nexeo replaces "terminated" in Section 9.2(d) with "has been bounded" as a rhetorical tool to reshape Ashland's argument regarding the interpretation of the phrase "terminate." *See* Answering Brief at 38. This attempt, however, must fail. Ashland has never proposed the use of a synonym to replace the word "terminated" as used in Section 9.2(d). Nor has Ashland argued

that "terminated" is ambiguous. Instead, Ashland's position has been that a dictionary definition of the word terminate, a definition which reflects a boundary or limit, better serves to give effect to the plain terms of the APS as written. *See, e.g.*, Opening Brief at 36-37. Indeed, Ashland's reading of "terminated" to reflect a boundary, limit, or dividing line gives meaning to all provisions of Section 9.6. Whereas, Nexeo's narrow interpretation of "terminate" would render certain portions of 9.6, specifically 9.6(c)(ii), surplusage.

Therefore, the Court should reject Nexeo's invitation to read "terminate" in an overly constrictive fashion. Accepting Nexeo's interpretation would read terms out of the APS in contravention of Delaware law. *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1225 (Del. 2012), *as corrected* (July 12, 2012) ("[A]ll contract provisions [are] to be harmonized and given effect where possible.").

III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE $5 MILLION DEDUCTIBLE PROVISION DOES NOT APPLY TO THE REMEDIATION LIABILITIES AT THE SITES.

Nexeo again misstates Ashland's argument and attempts to redefine Ashland's position in such a manner as to set up straw arguments. *See* Answering Brief at 41. Nowhere has Ashland argued that the purpose of the APS was to ensure that "Ashland never pays more than $75 million to remediate environmental harms it caused." *See id.* The purpose of the APS was to sell the assets of the Distribution Business on such terms and condition that both parties could agree on and to allocate all the liabilities of the Distribution Business in such a manner as to leave no gaps in that allocation. A580 (Nettles 42:6-17; 61:9-14); A692 (Woods 104:7-105:9).

Nexeo argues that if the Superior Court's interpretation is accepted, the determination of remediation liabilities will not be determined by chance. *See* Answering Brief at 41-42. Nexeo's argument fails to acknowledge the text of the APS and the nature of the parties' potential remediation liabilities under environmental law. Nexeo's argument is premised on its failure to acknowledge the broad definition of "Loss" used in the APS. "Loss" is defined to include "claims" and not simply payment for a final determined liability. A256 (APS §9.1). Nexeo's own environmental attorney involved in the negotiation of the APS, Mr. Nettles, agreed that "Loss" is broad and is

including claims. A594-95 (Nettles 56:24-57:9). Further,

See A572-78 (Nettles 34:16-40:15) (addressing the potential large number of implicated parties). If the determination of indemnity were limited only to situations where a party actually needed to pay, as Nexeo argues and the Superior Court determined (A531-36), that would ignore the broad definition of "Loss" and contravene both the plain language of the APS and the parties' intent.

Additionally, Nexeo oversimplifies the nature of the potential environmental liabilities involved and the allocation of those liabilities between the parties. *See* Answering Brief at 42-43. Nexeo is imprecise with respect to the types of environmental liabilities that it assumed. Nexeo assumed environmental remediation liabilities for any ORRLs where notice was received after the five year anniversary of the closing. A192 (APS §1.1). Therefore, Nexeo is responsible for any liability that came in after that time and, under Section 9.2(d), Nexeo is required to indemnify Ashland against any "Losses." A257.

Moreover, Ashland has not argued that Nexeo bears responsibility for all of its historic environmental or remediation liabilities. *See* Answering Brief at 41-42.

Liabilities not associated with the Distribution Business were not assumed by Nexeo per the express terms of the APS. Specifically, the last un-enumerated paragraph of Section 2.6 states that "Ashland…shall retain and be responsible for any Liabilities arising exclusively out of the operation or conduct by Ashland … of any business other than the Business." A207. Accordingly, Ashland has not argued that Nexeo is responsible for "decades of [Ashland] environmental liabilities" unrelated to its purchase of the Distribution Business and it is misleading for Nexeo to suggest otherwise. Answering Brief at 42.

Ashland's interpretation of the $75 million cap in Section 9.6(c)(i) is correct. Nexeo, yet again, oversimplifies and misstates Ashland's argument regarding the interpretation of the $75 million cap and the impact that section has on the interpretation of the APS as a whole. The plain text of Section 9.1(c) demonstrates that Ashland will not have any liability for Retained Remediation Liabilities (which includes RSRLs and ORRLs for on-site locations) in excess of $75 million dollars. A260. Contrary to Nexeo's claim (*see* Answering Brief at 43) Ashland has set forth evidence demonstrating that costs it incurs in remediating environmental liabilities at locations that Nexeo now owns are costs Ashland has incurred indemnifying Nexeo. *See* Opening Brief at 41-42. Specifically, Nexeo's 30(b)(6) witness, Mr. Farnell, agreed that

A745-46 (Farnell 108:25-110:16). Thus, because Nexeo owns these properties, if the remediation costs reach the $75 million cap set forth in Section 9.6(c)(i), Nexeo is responsible for those remediation costs and Ashland owes Nexeo no indemnity for those costs. If the Court were to accept Nexeo's argument, it would render the $75 million cap illusory, which is impermissible under Delaware law. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term meaningless or illusory.") (internal quotations omitted). Accordingly, the presence of the $75 million cap in Article 9—not in Article 2, even though it has the effect of shifting responsibility for payment of a remediation costs from Ashland to Nexeo—demonstrates that the $5 million deductible provision in Section 9.6(c)(ii) operates in the same manner.

IV. UNDER THE PLAIN TERMS OF THE APS, NEXEO SUFFERED A LOSS ONCE IT RECEIVED THE USOR SITE NOTICE AND SOUGHT INDEMNITY WHEN IT SENT THE NOTICE TO ASHLAND.

The Superior Court determined that the "deductible" covering the first $5 million of ORRLs at the Sites would not apply unless Nexeo had suffered a Loss. A532. It reasoned that Ashland had suffered the "Loss" because it was the party that paid the claim. *See* A536-37. Ashland disagrees with this determination. Yet, assuming *arguendo* that the Superior Court's finding is correct, the Superior Court still erred in holding that Nexeo did not suffer a Loss despite finding that Nexeo received the USOR Site claim first. *See* A527, A537.

Nexeo's argument is that the notice it received from Continental Airlines that Continental was named as a potentially responsible party does not result in its incurring of a "Loss" under the APS. *See* Answering Brief at 47. Nexeo argues that it has not suffered a Loss unless it has paid money. However, the Superior Court determined that the notice from Continental was a "*claim*." A527 (emphasis added). The APS definition of "Loss" includes "claims." A256 (APS § 9.1); A594-95 (Nettles 56:24-57:9). In light of the contractual indemnities between the Distribution Business and its customers, there can be no other explanation for why Continental would have sent the notice to Nexeo unless it were making a "claim" against Nexeo. Thus, the notice from Continental to Nexeo caused it to suffer a

"Loss" because it was a claim against Nexeo. Nexeo's argument that the Continental notice was not a Loss, therefore, must fail.

Nexeo also argues that there is no evidence that it made a demand for indemnification. *See* Answering Brief at 48. Yet this too misses the mark because the Superior Court found that Nexeo "referred the claim" to Ashland. A527. In light of the express terms of Section 9.8, the only potential remedy Nexeo has under the APS against Ashland is for indemnity under Article 9. A262. Therefore, in light of the express limit on remedies under the APS, Nexeo was seeking indemnity.

Lastly, Nexeo argues that Ashland's actions in "respond[ing] to its own liability (rather than indemnifying Nexeo)" demonstrate that Ashland understood that the liability was Ashland's alone. Answering Brief at 46. This argument fails.

There are three bases for remediation liabilities that are relevant to the USOR Site: (1) the Distribution Business's indirect indemnification liability to its customers pursuant the customers' contracts, *see* Opening Brief at 7-8; A555-56 (Nettles 17:2-18:2); (2) Ashland's direct liability under CERCLA as the "legal entity…that made those arrangements" for waste disposal by the Distribution Business, AR016-017 (Tr. 64:23-65:11); and (3) Ashland's independent, direct liability as the generator of waste, *see* A557 (Nettles 19:7-12) (generally discussing generator liability). The third type of liability was Ashland's independent liability

distinct from liability associated with the Distribution Business (which is the basis of the parties' present dispute). *See* AR016-017 (Tr. 65:6-10). Ashland's actions in addressing its own liability, as opposed to the potential remediation liabilities of the Distribution Business, cannot be seen as an indication that Ashland believed that it was not entitled to indemnity under the terms of the APS for liabilities related to the Distribution Business.

CONCLUSION

For the reasons set forth in Ashland's Opening Brief and above, Ashland respectfully requests this Court 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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Dated: October 20, 2017

CERTIFICATE OF SERVICE

I, Daniel J. Brown, do hereby certify on this 30th day of October 2017 that I caused a copy of **REDACTED PUBLIC VERSION OF APPELLANT'S REPLY BRIEF** to be served via File & ServeXPress upon the following counsel of record:

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