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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CLEAN HARBORS, INC., Plaintiff Below, Appellee, v. UNION PACIFIC CORPORATION, Defendant Below, Appellant.	No. 35, 2018 Case Below: Superior Court of the State of Delaware, C.A. No. N15C-07-081-MMJ CCLD

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

Dated: April 26, 2018

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NATURE AND STAGE OF PROCEEDINGS

This appeal arises from an environmental indemnity ("Indemnity") and cleanup related to a site in Wichita, Kansas (the "Facility").[1] Clean Harbors, Inc. ("CH") filed breach of contract and breach of covenant of good faith and fair dealing claims against Union Pacific Corporation ("UPC") on July 9, 2015. UPC counterclaimed, asserting breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment claims.

UPC moved for summary judgment on both CH claims arguing that CH's demand under the Indemnity was not a product of a third party claim. UPC also sought partial summary judgment that CH not be entitled to profit from the cleanup under the Indemnity. CH conceded its good faith claim, and the trial court granted UPC's motion for partial summary judgment. Despite ordering CH to exclude profits from its claim, the trial court denied UPC's motion for summary judgment and found, *sua sponte*, that CH's cleanup was attributable to a third party claim under the Indemnity.

Trial began on May 8, 2017. The jury found that both parties breached the Indemnity and that the total reasonable cost of the cleanup performed was $9,180,445.76. The trial court denied UPC's motion for new trial and CH's motion for attorney's and expert fees and issued its Final Order and Judgment on

[1] References to the Appendix will be cited as (A_).

December 20, 2017, ostensibly applying the Indemnity terms to the jury's cost finding, ordering UPC to pay CH $5,681,351.53, plus prejudgment interest. UPC timely filed a Notice of Appeal on January 19, 2018. This is UPC's Opening Brief.

SUMMARY OF THE ARGUMENT

1. The trial court erred in finding as a matter of law that CH's cleanup was "attributable to a Third Party Claim."

2. The trial court erred in charging the jury in a prejudicial and confusing manner.

3. The trial court erred in excluding relevant evidence.

4. The great weight of the evidence preponderates against the jury's verdict.

5. The trial court abused its discretion by denying a new trial.

STATEMENT OF FACTS

UPC's subsidiary owned and operated the Facility, a treatment, storage and disposal facility, from 1988-1994. (A52.) UPC sold the Facility to CH's predecessors through a stock purchase agreement ("SPA"), which included the Indemnity. (A52-107.) The sale closed on December 31, 1994. (A53; A109.) CH has operated the Facility since 2002. (A110.)

In SPA Section 8.10(a), UPC agreed to indemnify CH for limited "Environmental Liabilities":

> [UPC] shall reimburse, indemnify, defend and hold harmless [CH] . . . from, against and in respect of 80% of all Environmental Liabilities that may be imposed upon, asserted against or incurred by [CH] . . . and *which are (i) attributable to a Third Party Claim*, (ii) arise out of or in connection with acts or omission occurring prior to the . . . Closing Date, (iii) are incurred with respect to the [Facility] . . . and (iv) are not attributable to a change in Environmental Laws occurring after the . . . Closing Date" (emphasis added).

(A98-99.)

Further, UPC only owes indemnification if aggregate covered Environmental Liabilities exceed $2,000,000, and then UPC is only required to reimburse "80% of such excess and only with respect to *amounts spent within 20 years* after the . . . Closing Date." (*Id.*) (emphasis added).

Section 8.7 requires that "[t]he amount of any Claim shall be reduced by any net Tax benefit *or other benefit*" to CH, (A97), and requires CH to reasonably

mitigate UPC's losses from any claim. (*Id*.) UPC also has notice rights and rights to dispute claims and expenses. (A93-94.)

The Facility must have a permit under the Resource Conservation and Recovery Act ("RCRA") in order to operate (the "Permit"). (A110; A169-70.) CH's Permit became effective in 1995. (A258-70.) Two environmental agencies, the Environmental Protection Agency ("EPA") and the Kansas Department of Health and Environment ("KDHE") have been involved with the Facility's environmental issues since before the sale. (A186; A273.)

The Facility is located the Northern Industrial Corridor ("NIC"), above a groundwater regulated by KDHE. (A111.) In 2012, KDHE published the NIC Corrective Action Decision requiring the City of Wichita to address regional groundwater contamination. (*Id.*; A283-84 (binding on Wichita); A286.) KDHE has not ordered CH to perform any cleanup. (A290.)

CH's predecessors sent UPC two letters in 1998 notifying it of third party claims to perform environmental investigation work at the Facility. Claim Notice 1 forwarded an EPA letter requiring CH to begin a RCRA Facility Investigation pursuant to Permit Section VII.4, stating that "[t]his letter constitutes official notification of the requirement to submit the workplan within 120 days of the receipt of this letter." (A258-61.) UPC acknowledged receipt, agreed that as

owner/operator, CH should implement any required work, and requested status updates. (A291.)

Claim Notice 2 forwarded a similar request from KDHE that identified the Facility as a probable source of groundwater contamination in the NIC. (A292-304.) KDHE allowed its requested investigation work "to be conducted as part of the RCRA Corrective Action process" described in the Permit and in EPA's letter. (A297.) UPC again acknowledged receipt. (A305.) Accordingly, CH began the requested investigation work under the Permit, reporting to the EPA. (A111.)

UPC paid for investigation work responsive to the 1998 notices once aggregate expenses exceeded $2,000,000.00, which did not occur until December 2013. (A117.) UPC reserved its rights to object to all future claims. (A117; A306.)

Under the Permit, and in environmental practice generally, an environmental investigation identifies the location and amount of contamination. (A194-95; A307-08.) Other Permit provisions and environmental practices determine the necessity, type and extent of corrective action based on identified risks. (A200-11; A307-08.) An environmental agency can order corrective action based on an environmental investigation, a risk analysis, and a feasibility analysis of available corrective measures. (A200; A307-08.) Neither the Permit nor accepted environmental practice require excavating all soil at industrial facilities that

contains or could contain small levels of contamination. (A315-16 (cleanup not reasonable because 60,000 tons and point by point); A316-19 (describing two basic alternative approaches that do not remove every speck of soil); A200 ("If Director determines that there has been a release or risk, design a plan to clean up"); A320 (hot spot removal is standard).)

The environmental investigation required by the notices was not complete when the Indemnity expired in 2014, or even by 2017. (A321-22; A327.) CH delayed completing the required investigation work (A316) because it did not want to spend money on sampling. It also avoided the expense of closing or investigating under decommissioned CH buildings. (A338-39.) The primary risk was to groundwater, and the groundwater under most of the Facility was improving over time, without active cleanup, due to the scientifically-recognized process of natural attenuation. (A341-42.) In 2005, CH's consultant identified investigative work to support the hot spot removal of some contaminated soils to address risks to groundwater. (A343-349.)

Before 2014, CH told UPC that it would finish its investigation, evaluate remedies based on the investigation, and negotiate with the agencies on cleanup levels if there was required future corrective action. (A350-51.)

Beginning in 2012, CH became increasingly concerned with the Indemnity's expiration. (A353-54; A355-56; A357.) CH knew that EPA would likely order

formal evaluation of corrective action after investigation was complete, but by the end of 2012, CH still had not started over 90% of the environmental sampling necessary for the investigation. (A358-A360.)

EPA told CH what must happen before EPA could select and order any corrective action:

> The Corrective Measures Study (CMS) must be submitted and approved by EPA; the EPA must write a Statement of Basis (SB) which identifies and describes the proposed remedy selected; the SB must be public noticed (and potentially presented in a public meeting); the EPA must prepare a Response to Comments (RTC) decision document identifying the selected remedy tak[i]ng into considerations any comments received during the comment period; and [u]ltimately, the Part 2 permit must be modified to incorporate the RTC.

(A361-62.)

On April 11, 2013, CH told EPA it wanted to voluntarily clean up the Facility to beat the Indemnity expiration date. (A324-30; A363-65; A366.) CH described an "opportunity to advance remediation of the [Facility] under an agreement with the prior landowner." (A366.) On October 31, 2013, EPA confirmed that an overly-conservative, over-inclusive approach to cleanup would likely allow the EPA to approve voluntary work the agency would not require. (A367; A368.) CH would not clean up based on probable risk; rather it would treat or remove any soil that could possibly be contaminated. (A117; A367; A368.)

CH provided UPC written notice of CH's decision to perform the voluntary work, originally designed as a thermal treatment cleanup, on February 7, 2014.

CH requested UPC's concurrence by February 12, 2014, because it intended to start work on February 17, 2014. (A370; A390.)

On February 27, 2014, CH met with EPA without UPC. (A391.) Meeting minutes confirmed that "based on economics, Clean Harbors [had] decided to excavate soils impacted with contaminants that are above the KDHE Tier II Standards." (A329-30; A391-93.) The minutes also stated "Excavation provides the best alternative to meet the 12/15/14 Indemnity deadline imposed by Union Pacific." (A391-93; A324-30.)

KDHE Tier II Standards are standards that only parties with small size and cost cleanup responsibilities agree to use voluntarily. (A309-10; A394-95.) These standards are used as screening levels, as they are based on layers of highly conservative assumptions, not real world conditions. (A396-99; A402; A403-11.) For small contamination areas, the cost of excavation is minimal compared to the cost of preparing a plan based on risk and actual site conditions. (A309-10; A394-95.) By choosing KDHE Tier II Standards, CH jettisoned work spent investigating and evaluating actual risks (A412-13) and adopted default values, guaranteeing an expensive cleanup of the Facility. (A398-99; A403-11.)

On March 4, 2014, CH notified UPC that it had voluntarily changed the cleanup plan to a site-wide *excavation* instead of the *thermal treatment* discussed

in February. (A414.) Unlike the 1998 claims, no third party claim was forwarded with this Claim Notice because no third party had requested the work.

Performing the large excavation allowed CH to perform the work quickly without waiting for a third party to require corrective action. (A449-50; A398-99.) It also enabled CH to realize a profit from the work because in addition to operating the Facility, CH owns landfills and is in the excavation business. (A453; A118)

On February 19, 2014, CH Vice President Nelhuebel described the benefit CH would realize:

> This job is a bit different than most [Discontinued Operations] projects in that any closure and corrective action costs from this time forward are subject to a level of reimbursement from [UPC]. This reimbursement provision is an opportunity to use rates which are above what we would typically exchange on an [Inter-Company] basis. Reimbursement on the higher rates and overall costs put more cash in the Company's pocket. We just need to avoid getting too greedy with this, and make sure the demo, hog & haul costs stay below what we have for the in-situ thermal which is [about] $10 million. Being able to self-perform almost all aspects of this project will be a huge win for the Company.

(A454-56.)

When CH sought expedited approval from the EPA in February 2014, it committed to an expensive cleanup, which it began preparing for immediately. (A391-93.) CH supplied a plan to EPA on March 20, 2014, (A117; A352-53) and began closing down Facility buildings in April. (A450-51.) By the time EPA

provided its rushed approval, CH was entrenched in a project (A352-54; A451-52) that was orders of magnitude larger than any excavation ever performed in the NIC. (A457.) Additionally, Christopher Carey, KDHE's former Remedial Section Chief, was prepared to testify that CH's excavation was the second largest in Kansas history. (A459.)

UPC never agreed to CH's voluntary, unreasonable, and excessively costly cleanup, (A460) and on March 25, 2014, UPC began disputing any associated indemnity obligation (A461-62).

CH could have and should have negotiated reasonable cleanup levels, (A288 (Tier II not required); A289) but instead excavated all soils above the KDHE Tier II screening levels. (A117.) Its own consultant stated that cleaning up an entire site to screening levels was "as bad as it gets" for a paying client. (A403-11; A398-99.) But, CH was not a paying client; rather, CH hired itself to perform the dig to ensure that *any* soil that might cause environmental risk would be excavated (A403-11; A398-99) and hauled to a CH-owned facility, at UPC's expense, complete with a profit for CH. (A463-66.) It did so to beat the Indemnity deadline. (A473-74.)

Reasonable and far less costly approaches were available to CH, acceptable to regulators and actually approved at other NIC sites. (A343-49; A355; A316-18; A399.) No third party ever required CH to perform the costly and excessive

excavation it chose. (A325; A323, (there was not one piece of paper where EPA said they were going to require CH to do the excavation).)

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT CH'S CLEANUP WAS "ATTRIBUTABLE TO A THIRD PARTY CLAIM."

A. Question Presented

Did the trial court err in finding as a matter of law that CH's work was "attributable to a Third Party Claim"? (Ex. A, at 9-10.)

B. Standard of Review

A grant or denial of summary judgment is reviewed *de novo*. *Brown v. United Water Del., Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

1. UPC owes no indemnification if expenses are not "attributable to a Third Party Claim."

The SPA's environmental Indemnity applies only to "Third Party Claims." Section 8.10(a)(i) states:

> From and after the [Closing], and subject to the limitations in this Section 8.10(a), Union Pacific shall reimburse, indemnify, defend and hold harmless [CH] from, against, and in respect of "80% of all Environmental Liabilities that may be imposed upon, asserted against or incurred by [CH] and which (i) are attributable to a Third Party Claim. . . ."

(A98-99.) The SPA defines "Third Party Claim" as "a third party claim that could give rise to a right of indemnification under this Agreement." (A94.)

In accepted legal usage, a "third party claim" is a claim brought by someone other than the parties to the agreement. *See S.C. Johnson & Sons, Inc. v.*

Dowbrands, Inc., 167 F. Supp. 2d 657, 669 (D. Del. 2001) (upholding restriction on indemnity to "third party claims" and defining "third party claim" as a claim brought by someone other than a party to the agreement).

Indemnifiable expenses must also be "attributable to" the "Third Party Claim." (A98) "Attributable" means "regarded as being caused by." *Attributable*, OXFORD ENGLISH DICT., http://en.oxforddictionaries.com/definition/us/attributable. *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (words are given their ordinary meaning in contract interpretation). Accordingly, CH cannot collect expenses that it voluntarily incurs; rather, the expenses must be "caused by" a Third Party Claim.

2. Voluntary soil cleanup expenses are not "attributable to a Third Party Claim."

CH seeks reimbursement for a voluntary soil cleanup but admits that it never received any written order, request, or claim from a third party requiring it. (A325; A323; A475-76; A477; A478-79; A481.) Instead, CH pressed the EPA for permission before the Indemnity expired. (A482-83; A449.) CH attempted to manufacture a Third Party Claim by voluntarily seeking expeditious regulatory approval for cleanup work that was not required. (A473-74.) Because the work was proposed before an ongoing environmental investigation was either completed or properly analyzed, (A484), CH adopted a high-cost, over-inclusive, conservative approach which could be quickly approved (A449-50; A398-99; A450) but which

violated CH's express contractual obligation to "mitigate the losses" of UPC. (A97.) No agency would need to assess risks identified in an investigation or proposals to address those risks based on the science of the risk because CH was going to remove any contaminated soil, regardless of risk. This attempt to manufacture a Third Party Claim to squeeze in work before the Indemnity is not attributable to a third party but is attributable to CH's strategic choices (A473-74; A485-86; A487-89) and does not constitute a Third Party Claim as a matter of law.

3. CH's expenses are not "attributable to a Third Party Claim" because environmental agencies were involved.

The trial court *sua sponte* ruled as a matter of law in favor of CH after denying UPC's motion for summary judgment, erroneously interpreting all factual inferences in favor of CH and equating agency oversight with action mandated by an agency. (Ex. A, at 8; SUPER. CT. CIV. R. 56(c).)

Environmental regulatory agencies were involved with the Facility when the SPA was executed. (A186; A271-82.) Had the parties intended mere agency *involvement* to trigger the Indemnity, they would have drafted the Indemnity accordingly. First, there would have been no need to use conditional language such as "may be," "until," and "except as" or future language such as "from and after" and "shall" in the Indemnity because the SPA would simply note that agency involvement and require UPC to pay CH for certain expenditures. (A98-99.)

The trial court erred by failing to read the SPA as a whole, instead over-relying on, but misconstruing, SPA Section 8.4(b), which describes how CH should notify UPC of a Third Party Claim (something it never did for the cleanup). This section requires CH to transmit a Claim Notice "[i]n the event an Indemnified Party shall have a Claim against any Indemnifying Party hereunder that *involves a third party claim* that could give rise to a right of indemnification. . . ." (A94.) (emphasis original). Juxtaposing its selected language above with its analysis of CH's work, the trial court concluded that work was indemnifiable if third parties were "involved." The trial court determined that CH's "investigation and remediation efforts resulted from the *involvement* of the EPA and the KDHE" and "[t]he remediation work is attributable to a Third Party Claim pursuant to Section 8.10(a) of the SPA because the work resulted from the *involvement* of the EPA and KDHE." (Ex. A, at 9) (emphasis added). The trial court misreads "involves a third party claim" to mean "involves a third party," and also fundamentally misinterpreting the section's import.

Section 8.4(b) simply sets forth procedures should CH have a "Claim" that is or includes a "Third Party Claim." (A94.) "Involve" means "to have or include (someone or something) as part of something." *Involve*, OXFORD ENGLISH DICT., http://en.oxforddictionaries.com/definition/us/involve. If a "Claim" "involves" a "Third Party Claim," Section 8.4(b) provides for a specified time limit for UPC to

dispute a Third Party Claim (30 days or shorter "as is necessary for [CH] to respond to a complaint or summons" from the third party). (A494.) If no "Third Party Claim" is involved, Section 8.4(a) applies, providing UPC 45 days to dispute indemnity coverage. (*Id*.)

Section 8.10(a) contains the required indemnity elements, including expenses that "are attributable to a Third Party Claim." (A98-99.) The trial court's misreading of Section 8.4(b) to clarify Section 8.10(a) is legally incorrect and should be reversed by this Court.

A court must construe the contract as a whole, giving effect to all provisions therein. *E.I. du Pont de Nemours*, 498 A.2d 1108, 1114 (Del. 1985). The trial court's interpretation instead negates critical terms that expressly limit the scope of the indemnifiable expenses and renders much of the Indemnity's language superfluous.

Environmental agencies are "involved" with all environmental activities at the regulated Facility, but not all environmental activities are indemnifiable. The broad term "Environmental Liabilities" includes any type of environmental work imaginable at the Facility, including the voluntary work for which CH sought agency approval. However, the Indemnity does not allow for recovery for "Environmental Liabilities" generally; it only allows for reimbursement for "Environmental Liabilities" that are attributable to "Third Party Claims." (A98-

99.) All environmental work at the Facility requires agency involvement and approval, but only a third party claim from the agency would trigger indemnity from UPC.[2]

The defined term "Third Party Claim" is meaningful. Numerous Indemnity provisions differentiate between the presence or absence of a "Third Party Claim," including provisions concerning the: (1) scope of damages potentially recoverable[3]; (2) notice provisions; and (3) other procedures related to the defense, settlement and payment of claims. (A94-97.) The trial court read those distinctions out of the SPA by wrongly equating "Environmental Liabilities" with "Environmental Liabilities attributable to Third Party Claims."

4. Other "Third Party Claims" do not make CH's voluntary interim action expenses reimbursable.

Two 1998 requests for environmental investigation by the EPA and KDHE, respectively, do not establish that the 2014 voluntary cleanup meets the "attributable to a Third Party Claim" requirement. These are claims for

[2] The Facility is a RCRA facility. A RCRA permit issued by the EPA controls operations, environmental investigations, and cleanup activities, ensuring that all permit activities will "involve" the EPA. (A110-11.) These permit activities count as "Environmental Liabilities," a defined term capturing the costs associated with agreements and directives "attributable to, connected with or arising of or under Environmental Laws." (A63.) "Environmental Laws" expressly includes permits. (*Id*.)

[3] The Indemnity differentiates between a "Third Party Claim" and a "Claim" by stating "consequential damages" and "punitive damages" are only recoverable based on a "Third Party Claim." (A104.)

environmental investigation work. (A258-70.) CH was performing that work under EPA's primary oversight. (*Id.*)

Upon the investigation's completion, EPA almost certainly would have required some corrective action by CH. To do so, the EPA would issue a letter invoking the Permit, as it did in 1998, but pursuant to "corrective action" provisions. (A200; A361-62.) Any future EPA Third Party Claims would follow final investigation ("RFI") and a study of the potential corrective actions (a corrective measures study or "CMS"). (A200-11; A361-62.) But, that did not happen here.

5. The trial court relied on irrelevant facts.

The trial court also erred by placing great weight on a KDHE NIC decision requiring the City of Wichita, not CH, to remediate groundwater two years before CH's voluntary work was approved. (Ex. A, at 8.) The NIC decision is not binding on CH; it only applies to the City of Wichita. (A286.) Neither the NIC decision nor KDHE ever ordered CH to perform any cleanup. (*Id.*; A290.)

Misunderstanding nuances of the region's environmental background contributed to the trial court's failure to resolve factual uncertainties at the summary judgment stage in UPC's favor before granting dispositive relief to CH, which constitutes reversible error.

6. A potential future Third Party Claim for some cleanup is irrelevant.

CH has stated that the Facility would eventually require cleanup, making CH's voluntary cleanup a necessary and predictable consequence of the previous claims for investigation. While no evidence indicates that any agency would have ever required CH's excessively expensive and large excavation, the argument is irrelevant. UPC agreed to pay "Third Party Claims" qualifying for indemnification for a twenty-year period, not for perpetuity. UPC did not agree to indemnify CH based on speculation as to future cleanup orders. The Indemnity's terms are to be strictly construed. *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019 at * 11 (Del. Super. Apr. 13, 1988).

If CH believed that the investigation would trigger an agency claim for cleanup, and it wanted to ensure that cleanup costs were reimbursable, then CH should have finished the environmental investigation started in 1998. Instead, CH delayed that investigation for years. (A333; A337; A343-49; A490.) The Indemnity and CH's duty of good faith and fair dealing do not allow CH to manufacture a Third Party Claim for expediency. CH did not and could not prove that the cleanup it performed was attributable to a Third Party Claim. At a minimum, fact issues existed as to the existence of a Third Party Claim and the causation of claimed expenses.

II. THE TRIAL COURT ERRED IN CHARGING THE JURY IN A PREJUDICIAL AND CONFUSING MANNER.

A. Question Presented

Did the trial court err in instructing and charging the jury in a prejudicial and confusing manner inconsistent with Delaware law? (A491-92.)

B. Standard of Review

The trial court's issuance of challenged jury instructions and questions is reviewed *de novo*. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006); *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002).

C. Merits of Argument

Trial courts must "submit all of the issues, both the cause of action and the defense, affirmatively to the jury, and with such application of the law to the evidence as will enable the jury to intelligently perform its duty." *Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968).

> One party is not entitled to a particular jury instruction but does have the unqualified right to have the jury instructed on a correct statement of the substance of the law. A trial court may not, *sua sponte*, refuse to instruct the jury on claims that have been pleaded and upon which evidence has been presented.

R.T. Vanderbilt Co. v. Galliher, 98 A.3d 122, 125 (Del. 2014) (holding a "trial court must 'submit all the issues affirmatively to the jury' and must not ignore a requested jury instruction applicable to the facts and law of the case.")

1. Verdict Form Question 3 is confusing and prejudicial

Question 3 is a legally inaccurate and unfair comment on the evidence that disregards the Indemnity's terms and determines as a matter of law that CH is entitled to the *total costs of the cleanup actually performed* rather than the *costs of a reasonable cleanup indemnifiable under the SPA.* (A514.) UPC strenuously challenged both the costs of the actual cleanup and the method of cleanup at trial. Question 3's language usurps the jury's fact-finding role and decides that the cleanup method was appropriate, thus limiting the jury's evaluation to the reasonableness of the *cost* of the work CH voluntarily performed—preventing the jury from considering whether CH should have performed the work in the first instance.

Question 3 asks "What was the total reasonable cost of the environmental clean-up?" if UPC breached the SPA. (A514.) Question 4 asks the jury to determine, if CH breached, "What amount would fairly and reasonably compensate Union Pacific for Clean Harbors' breach of contract?" (A514.) Question 3 should have asked for the amount of contractual damages CH incurred. Instead, it asks about the total reasonable cost of CH's cleanup, unfairly defining "total cost" as "damages owed to CH" if the jury finds a UPC breach. Question 3 provides no

guidance as to what amount, if any, UPC owes CH for breach of contract damages.[4]

No reason exists for differently wording the two damages questions. The obvious inconsistency between the questions indicates that CH is entitled to the "total" costs of "the cleanup," while UPC is only entitled to what is fair for UPC to receive as a result of CH's breach of contract, making Question 3 a prohibitively prejudicial commentary by the trial court on the merits of the parties' positions. *See State Highway Dept. v. Buzzuto*, 264 A.2d 347, 351 (Del. 1970) ("Delaware['s] Constitution prohibits a trial judge from commenting on the evidence").

Question 3 also diverges from the pattern verdict question for contractual damages, while Question 4, the damages question associated with CH, more closely tracks the pattern. (A514.) Deviation from pattern questions, if necessary, should clarify issues, not comment on one party's evidence. *See Adams v. Aidoo*, 2012 WL 1408878, at *4 (Del. Super. Ct. Mar. 29, 2012), *aff'd*, 58 A.3d 410 (Del. 2013), as revised (Jan. 3, 2013) ("A court commits reversible legal error if it . . . improperly comments about matters of fact in charging the jury, so as to convey an estimation of truth, falsity, or weight of evidence to the jury . . ."). An improper comment on the evidence is a court's:

[4] In the place of Question 3, UPC proposed: "What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Clean Harbors for its damages, if any, that result from such breach of contract?" (A512.)

> expression of opinion as to the credibility of one witness' testimony as opposed to that of another witness, or the expression of a view that one piece of evidence should be given more weight than is given to specified conflicting evidence. . . . a judge [may] explain the legal significance which the law attaches to a particular factual finding provided that it is clear to the jury that the judge is not expressing an opinion as to the existence or non-existence of the underlying facts.

Hall v. State, 473 A.2d 352, 356 (Del. 1984) (citations omitted).

Here, the precise language discussing the "total" costs in the event UPC breached as opposed to the general question for a CH breach implies that the court expected the jury to find a UPC breach, agree with the method of cleanup, and award CH damages.

2. Instruction 4 is manifest error

Despite overwhelming evidence demonstrating CH had more reasonable alternative cleanup approaches, the trial court usurped the jury's role and disregarded all of that evidence. Instruction 4 renders all expert opinions about other remedial options speculative and even moots factual testimony:

> I have determined, as a matter of law, that it would be speculative for any expert or witness, to testify about what the government regulators would or would not have done with a particular set of facts or circumstances if they had only been asked. Any such testimony that you heard, or think you may have heard, during the course of this trial should be ignored and disregarded. Of course, this does not mean that you should disregard testimony about what government regulators did or did not do.

(A498.)

A primary component of UPC's defense was that CH's chosen cleanup was neither required nor reasonable. The trial court left reasonableness of the cleanup to the jury in its summary judgment ruling. (Ex. A, at 9) ("the Court finds that genuine issues of material fact exist that must be resolved by the finder of fact. These issues include: (1) the reasonableness of the extent of remediation performed by Clean Harbors . . . .").

Without legal or factual justification, Instruction 4 requires the jury to accept only the cleanup that was actually approved by the regulators, not a hot spot removal with a reasonably probable chance of regulatory approval. Hot spot removals is based on commonly-used methods, addressed the relevant risks, had been employed at other sites in the NIC, and is commonly considered and approved by regulators applying alternative cleanup levels. (A515; A402 (KDHE would consider a Tier III analysis), A394-95 (source properties in the NIC were not required to clean up to Tier II and only sites with smaller contamination volumes did so); A359; A289; A516-18 (other properties used hot spot removal).)

All regulated site cleanups must be approved by regulatory agencies, and the Facility is a regulated site. Accordingly, any *alternative* cleanup not proposed by CH constitutes "what the government regulators would have done with a particular set of facts or circumstances if they had only been asked." Approval of a plan CH actually presented (no matter how disadvantageous to UPC) is something the

regulators "did do." Instruction 4 states that what the regulators "did do" is appropriately considered but what regulators "would have done if asked" is not.

The trial court thus erroneously instructed the jury to consider only what was actually approved—not what could and should have been presented—and instructed away the issue of the cleanup's reasonableness.

Testimony as to what could have reasonably been expected from the regulators—and what the regulators have done in similar cases involving similar properties—was both proper and critical to UPC's case. (A289; A515; A394-95.) At least one court found this exact type of testimony regarding what KDHE would have accepted as relevant and admissible. *See City of Wichita, Kan. v. Trustees of APCO Oil Corp.*, 306 F.Supp.2d 1040, 1086 (D. Kan. 2003) (explaining its finding concerning compliance, "Jump, who had ultimate authority over KDHE approval of the remedy, testified that she does not believe the KDHE would have accepted monitored natural attenuation if it had been proposed . . ."). Yet, the trial court here erroneously labeled all such testimony speculative.

Experts offer opinions based on reasonable probability. *Kerr v. Onusko*, 2004 WL 2735456, at *3-4 (Del. Super. Ct. Oct. 20, 2004), *aff'd*, 880 A.2d 1022 (Del. 2005). An expert speculates when she opines that a mere possibility of something could occur or that it is feasible, *i.e.*, not impossible. Experts opine on what could have happened if circumstances were different (*e.g.*, a patient could

have lived longer if diagnosed earlier; a business could profit but for interference; an injured person could have earned more money but for injury). This environmental case is no different. Rules, practices, processes, and science govern cleanups, just as in other fields where expert testimony is appropriate. And, experts offer opinions on hypotheticals. *O'Riley v. Rogers*, 69 A.3d 1007, 1012 (Del. 2013) ("[A]n expert can offer opinions based on hypothetical factual situations."); *Stafford v. Sears, Roebuck & Co.*, 413 A.2d 1238, 1245 (Del. 1980).

Not only does Instruction 4 prevent the jury from crediting expert testimony that hot spot removal was a reasonably probable solution for the Facility, it is also confusing and prejudicial because it instructs the jury to disregard former KDHE regulator Christopher Carey's factual testimony that he considered all alternative cleanup goals presented to him.

Instruction 4 allows consideration of "what government regulators did or did not do" but, ironically, the trial court precluded presentation of what KDHE *actually did* with cleanup requirements and negotiations at other sites in the same geographic area (the NIC) with similar contamination and issues. (A520.) Since the trial court limited the presentation on what regulators had approved at other NIC sites, despite the fact that CH justified its cleanup on allegedly binding NIC site requirements, the evidence on what the government regulators "did do" was

limited to the government regulators' approval of the only cleanup plan CH chose to present.

Here, the facts mandated instructions applicable to UPC's defense and the evidence supporting it.[5] The availability of alternative remedies that both would have likely met with regulatory approval and allowed CH to fulfill its obligation to mitigate UPC's losses was a critical defensive issue. Given Instruction 4's breadth, its broad application, and its prohibition on alternatives supported by reasonably probable expert opinion, UPC's defenses were undermined by the trial court.

3. A material breach and/or substantial performance instruction was required.

Absent an instruction on material breach or substantial performance, the jury could not evaluate whether CH's breaches were material and, therefore, excused UPC's performance.

As stated in *Commonwealth Const. Co. v. Cornerstone Fellowship Baptist Church, Inc.*:

> "[I]n order to recover damages for a breach of contract, the plaintiff must demonstrate substantial compliance with all of the provisions of the contract." Likewise, a party in material breach of the contract

[5] *Beck*, 239 A.2d at 702 (faulting the trial court for failing to provide specific instructions on the defense of contributory negligence, which "was of great importance [to the defendant] throughout this case. . . . In view of the consensus that contributory negligence is such a 'close question' in this case it should have been submitted to the jury with particular care.")

> cannot then complain if the other party fails to perform. Performance under a contract is justifiably excused when the other party to the contract commits a material breach. Whether a breach is material is a fact-sensitive analysis. . . . Although a material breach may allow the non-breaching party to be excused from future performance, a non-material breach does not; instead, the non-breaching party may recover any damages that it can prove.

2006 WL 2567916, at *19 (Del. Super. Ct. Aug. 31, 2006), *amended*, 2006 WL 2901819 (Del. Super. Ct. Oct. 3, 2006) (citations omitted). In short, a breach can be material even if it does not consume the entire contract or prevent the other party's performance or where the breach involves a relatively small portion of the contract value or is one of many covenants in an agreement. *DeMarie v. Neff*, 2005 WL 89403, at *5 (Del. Ch. Jan. 12, 2005) (finding failure to pay $1,000 deposit on $400,000 purchase sufficient to justify termination).

CH breached the Indemnity by: failing to provide UPC with proper notice, seeking reimbursement for amounts not indemnifiable, profiting from the cleanup, violating Section 8.7's obligation to minimize UPC's losses, and acting unreasonably by volunteering to perform an unnecessary excavation. (A97; A325; A323; A711-12.) Each of these breaches is material and excuses UPC's performance; together, they undeniably constitute a material breach.

Here, both parties asserted claims that the other materially breached the Indemnity, and UPC asserted as a defense that any UPC non-performance was excused by CH's earlier material breach. (A531; A533.) UPC also proposed

instructions tracking controlling substantial performance (A562) and material breach law. (A634-35.)[6] Further, the trial court explicitly stated: "Let me just make sure I'm clear about this: Substantial compliance with the contract is a question of fact." (A659.) But, despite the correct pronouncement that substantial compliance was a fact issue, the trial court erred by failing to give instructions on substantial performance or material breach, later wrongly reasoning that "[m]aterial breach and substantial performance are simply the inverse of each other." (Ex. C, at 10.) While this incorrect statement has superficial appeal in the context of a single party claiming breach, here, CH and UPC cross-claimed material breach *and* UPC asserted that its performance was excused as a result.

Further, the trial court's rationale for omitting such instructions relied on an incomplete analysis of cases construing foreign law (New Jersey and Tennessee). (*Id.*) To affirm the court's analysis would abrogate Delaware's established materiality jurisprudence. And, even if substantial performance precludes a material breach of contract, the jury was not instructed on either material breach or substantial performance.

The trial court's error in failing to submit a material breach or substantial performance instruction is underscored by the jury's verdict: due to the erroneous submission, the jury found that both CH and UPC breached the contract and that

[6] CH also proposed an instruction concerning material breach. (*See* A632-33.)

both CH and UPC substantially performed the contract. But, the judgment would require UPC to pay millions for a breach of obligations it was found to substantially perform, making the jury's findings irreconcilable.

4. No basis exists for determining the amount, if any, of damages owed by UPC to CH based on verdict form answers

The jury's answers to the erroneous Verdict Form provide no basis for determining an amount, if any, of damages UPC may owe CH.

Under the Indemnity, CH is not entitled to reimbursement by UPC for the total cost of the cleanup at the Facility. (A97-99.) The SPA does not require UPC to compensate CH for the first $2,000,000 spent at the Facility. (*Id.*) And, any reimbursable amount under the SPA is only subject to 80% reimbursement by UPC. CH is also not entitled to reimbursement for monies expended after December 31, 2014, or for contamination arising out of acts or omissions occurring after December 31, 1994. (A98-99.) UPC presented extensive evidence at trial of post-December 31, 1994 acts and omissions (A660-61; A662-65; A666-69; A670; A401), but the jury was prevented from distinguishing between the costs of cleaning up pre- and post-December 31, 1994 contamination. The Indemnity additionally requires that "[t]he amount of any Claim shall be reduced by any . . . benefit received by [CH] as a result of any Claim" and CH "shall have the obligation to reasonably mitigate the losses to [UPC] from any Claim." (A97.)

Disregarding the Indemnity, the jury instructions, and the parties' agreement on the issue,[7] Question 3 asked the jury to provide the reasonable cost of the cleanup without reference to damages owed to CH under the Indemnity. This is confusing because a "total" cleanup cost included costs not indemnifiable under the SPA. A reasonable cleanup, isolated from the other Indemnity provisions, also does not account for CH's obligation in Section 8.7 to mitigate UPC's losses.

This "total" cleanup cost of $9,180,445.76 includes: (1) amounts spent on cleanup after December 31, 2014 (2) amounts spent to reach the $2,000,000.00 threshold; (3) the $63,005.08 payment UPC already made to CH; and (4) amounts spent to address post-December 31, 1994 acts and omissions. (A514.) It is impossible to determine how the jury understood the question and how the jury arrived at a total cost. It is also unclear whether the jury tried to remove some profits and costs CH improperly included.[8]

The trial court should have asked the jury to determine the total cost of a reasonable cleanup qualifying for reimbursement under the SPA, but "judged by

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[7] In its pretrial proposed Verdict Form, CH proposed the question: "What is the total dollar amount of expenses CH incurred addressing environmental liabilities *covered by the indemnification provision of the SPA*?" (A672-73.) (emphasis added).v.

[8] CH employee John Beals testified that he tried to remove $1.4 million in profits CH made off UPC. (A724-25.) But, Beals admitted that to the extent profits were imbedded in intercompany charges, Beals had not removed those profits from the amount CH sought from UPC. (A723; A726.)

common practices and standards of verbal communication," *Probst v. State*, 547 A.2d 114, 119 (Del. 1998), there is no reading of Question 3 that would have made the jury understand that it should exclude post-2014 expenditures or other non-reimbursable expenditures. Compounding this error, the trial court instructed the jury not to subtract anything from the total amount of the cleanup because the court would "do the math and figure it out." (A674-75.)

The trial court identified no mechanism by which it could reduce amounts beyond the $2,000,000 threshold and the 20% reduction. The trial court should have also accounted for UPC's $63,005.08 payment to CH and amounts spent after 2014, because sufficient evidence was presented to make those reductions. But, there is no way to determine post-verdict whether the jury included such amounts in the total costs and, if so, the exact amounts the jury attributed to those elements. The same reasoning applies to amounts the jury attributed to post-1994 acts and omissions or remaining markups or other benefits, the reimbursement of which the SPA excludes, from the $9,180,445.76 jury finding. The trial court cannot simply "do the math," and certainly cannot do so fairly.

UPC presented evidence that CH's post-2014 expenditures totaled $4,000,000. (A676.) CH employee Smith testified that after 2014, CH spent "[v]ery generally, about $2 million." (A480.) When the initial $2,000,000, UPC's $63,005.08 payment, and the $2,000,000-$4,000,000 worth of post-2014

expenditures are removed from the jury's answer, applying the 20% contractual reduction results in a judgment ranging between $2,493,952.54 and $4,093,952.54. But, this number is still inconsistent with the evidence presented and the SPA because it fails to account for CH's post-1994 acts and omissions and the benefits that must be excluded from CH's claims.

Further, the jury twice requested guidance for answering Verdict Form questions, reflecting confusion as to the connection between damages and the questions it was asked to answer. First, the jury sent the court a note asking: "If both parties breach the contract, can we award damages? If both parties breach the contract will it all be dismissed (null and void!!!)." (A677.) (emphasis original). Then, the jury asked "Can we find one party breached the contract and be hung on the other? Then still rende[r] a judgment amount ($) to one of the parties?" (A678.) Contrary to its instruction providing "If you answered "NO" to Question 1, call the Bailiff," (A514) the court instructed the jury to answer *all* of "the *questions*" on the Verdict Form, (A679) (emphasis added) further confusing the jury, prejudicing UPC, and preventing the jury from being able to intelligently perform its duty in returning a verdict.

After receiving this and other improper instructions undermining its ability to intelligently perform its duty, the jury found that $9,180,445.76 was the total reasonable cost of the cleanup performed. The trial court cannot accurately derive

damages using the jury's finding. The trial court's usurpation of the jury's role as the arbiter of damages reimbursable under the Indemnity is a miscarriage of justice.

5. When read as a whole, the instructions and questions submitted to the jury were incorrect legal statements

Each instruction or question discussed above is manifestly erroneous, but when read in conjunction with the other instructions submitted to the jury, the prejudice to UPC is compounded. Instructions 4, 5, 6, and 7 together with Questions 3 and 4, instruct the jury that the cleanup CH pursued was reasonable and the only issue was the reasonable cost associated with CH's chosen cleanup. (A493-511.)

Instruction 5 states that UPC contended CH breached the SPA because it failed "reasonably to mitigate Union Pacific's indemnity obligations under the contract" (A499) but, as argued, *supra*, Instruction 4 moots evidence related to that allegation because the jury could not consider evidence that CH volunteered for an unreasonable, unnecessary remedy when other approaches were reasonable and acceptable. Instruction 5 further identified seeking "improper benefits under the contract" as a breach allegation. (*Id*.) Yet, Instruction 6 stated that although the trial court concluded that CH was not entitled to include profits (the benefits at issue), the jury could not consider the trial court's ruling in determining whether CH breached the SPA. (A500.) This instruction is both confusing and prejudicial

to UPC in that the jury could have read it to mean that CH's inclusion of profits, not merely the ruling excluding them, could not be considered in its evaluation of whether CH breached the SPA. Additionally, Instruction 7 states that UPC is only obligated to indemnify CH for contamination occurring prior to December 31, 1994, but does not allow the jury to subtract that amount. (A501.)

Taken as a whole, the instructions undermined the jury's ability to intelligently perform its duty to return a verdict. That prejudice was evidenced by the two notes the jury sent indicating that it was confused by the constraints on how it could answer. (*Id*.) *See Reinco, Inc. v. Thompson*, 906 A.2d 103, 110-111, n.15 (Del. 2006) ("where the jury sends a note to the judge expressing confusion or the jury returns an inexplicably inconsistent verdict might be sufficient to warrant granting a motion for a new trial on the basis of jury confusion.").

III. THE TRIAL COURT ERRED IN EXCLUDING RELEVANT EVIDENCE.

A. Question Presented

Did the trial court err in excluding evidence establishing customary environmental practices and standards related to environmental cleanups? (Ex. B, at 65-66; A715-22.)

B. Standard of Review

A trial court's decisions to exclude evidence is reviewed under an abuse of discretion standard. *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000).

C. Merits of Argument

1. Evidence establishing customary practices and standards is relevant to the reasonableness of the CH cleanup.

Section 8.7 required that CH minimize UPC's losses, and as CH acknowledged, the Indemnity only covered reasonable expenses. (A97; A414-48.) Accordingly, CH could not just choose any approvable cleanup method. CH had to behave reasonably and consistently with its Indemnity obligations. UPC demonstrated that other scientifically valid methods of cleanup were available and that CH's chosen approach was unreasonable. (A316-19; A340; A399; A467-71; A518.)

Delaware courts admit evidence of customary practice, including through expert testimony, when the reasonableness of conduct is relevant. *See Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1367 (Del. 1977); *Slicer v. Hill*, 2012 WL

1435014, at *4 (Del. Super. Apr. 20, 2012) (citing Restatement (2d) of Torts § 295A). In *Slicer*, a personal injury case, lay testimony establishing the location, presence, absence, and configurations of crosswalks at fourteen commercial shopping center sites near the subject site was admitted to establish custom. 2012 WL 1435014, *4.

Experts also regularly opine regarding standard practices. A key *Daubert* factor is whether a particular method is accepted in the field. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993).

Evidence of customary practice is especially relevant when the matter is not one of common knowledge. Environmental cleanup science and practices are not commonly understood; the average layperson does not know that cleanups of industrial property do not customarily involve the removal of every speck of contamination or suspected contamination in soil.

2. The trial court erroneously ruled that probable regulatory approval of alternative cleanup methods was speculation rather than critical evidence establishing appropriate and customary environmental practice.

UPC presented expert evidence of alternative cleanup methods for satisfying both environmental regulators and CH's obligation to minimize UPC's losses consistent with Section 8.7 of the Indemnity. The two major alternatives were hot spot removal and the reclassification of "hazardous waste" to "non-hazardous waste" (the "contained-in" approach). (A466-71; A311-19; A340-41; A680-81.)

UPC's witnesses were prevented from testifying that these methods were commonly acceptable to regulators and thus reasonable options for CH. (*Id.*) Instead, the trial court ruled that evidence of probable agency approval was speculation. (Ex. B, at 65-66.)

It is axiomatic that any cleanup plan for any regulated facility must be approvable by the regulatory agency. If expert testimony cannot address the probability of regulatory approval, a discussion of cleanup alternatives is simply meaningless.

Additionally, experts routinely testify as to reasonable probabilities, provided the opinions are supported by a reliable foundation. *See, e.g.*, *Nutt v. A.C. & S. Co., Inc.*, 1986 WL 9013, at *1 (Del. Super. Ct. Aug. 15, 1986) ("while no opinion based on [a statistical] analysis may be stated to an absolute certainty, such an opinion offered by an economist with reasonable probability is acceptable expert testimony"); *Johns v. Council of Del. Ass'n of Prof'l Eng'rs*, 2004 WL 1790119, at *3 (Del. Super. Ct. July 27, 2004) (allowing expert testimony that if a review system had not been in place, negligence would have caused harm and stating "[a]n expert's opinion must be given to a reasonable degree of probability and may not be based on speculation or mere possibilities.").

Delaware courts hold that an expert speculates when she opines that a mere possibility of something could occur or is feasible, *i.e.*, not impossible. UPC's

experts' opinions rose far beyond "mere possibility" (*see, e.g.*, A466-72; A312-15); they satisfied Rule 702's liberal standard of admissibility for expert opinions. CH's recourse was vigorous cross-examination.

Ironically, the trial court allowed for vigorous cross-examination of UPC expert Jennifer Uhland while limiting her logical response. CH emphasized that Uhland could not know with certainty that a regulator would approve a particular alternative. (A682-83; A687-88.) Uhland was prevented from responding, based on her experience and expertise, that *non-approval* of an alternative, although possible, was not reasonably probable. That responsive testimony was speculation (or involved "other sites") pursuant to the trial court's rulings. Consequently, CH counsel was allowed to establish lack of certain approval as a constant refrain. (*See, e.g.*, A309; A466-72; A312-15; A689-94; A682-83; A684-88).

At the charging conference, the trial court compounded the prejudice, as argued, *supra*, by instructing the jury to ignore any evidence of what a regulator might do if presented with different circumstances, rendering a nullity all testimony on alternative cleanup methods.

3. The trial court excluded relevant evidence regarding cleanup alternatives in the NIC.

The trial court excluded probative fact and expert evidence of cleanup practices and alternatives at other NIC sites. (*See, e.g.*, A520; A458; A359.) As customary practice is relevant, customary practice specific "to the actor's locality"

is even more so. *See* RSTMT. (2D) OF TORTS § 295A. Importantly, CH claimed that it chose its cleanup level, which UPC argued was unreasonable, because it needed to comply with its NIC obligations, including Tier II default cleanup standards purportedly required because of CH's status as a NIC source property. (A695; A696-99; A700-01.)

CH's cleanup levels were not required in the NIC. (A288.) Not one site in the entire NIC employed CH's costly and excessive approach. (A457.) The reasonable alternatives proposed by UPC at trial were used at other NIC sites. (A359.) Nonetheless, the trial court excluded evidence of customary practice at other NIC sites. (A703-04 (foreclosing any questioning on the risk posed by CH in relation to other NIC properties); A287-288 (not allowing discussion of other remedial approaches in the NIC); A288.) Consistent with the *Slicer* case cited *supra*, the practices at other industrial sites in the same geographic area with similar regulatory characteristics and constraints were relevant.

The trial court's rulings solely focused on an unfounded concern of mini-trials that would lengthen the trial. (A520.) Notwithstanding that trial length does not control the admissibility of relevant evidence, the concern was unwarranted. UPC was prepared to address a limited number of NIC sites based on a comparability foundation prior to admission of the testimony. (A459.) The trial court refused to address the comparability of any other NIC source site. In a

conclusory fashion, the trial court simply excluded evidence that even hinted at a site other than the Facility.

In addition to Uhland's testimony, UPC offered testimony of NIC practices, cleanup policies and approved cleanups from Christopher Carey, the former Remedial Section Chief of KDHE. Carey was also the regulator who authored the 2012 NIC Corrective Decision that CH claimed was authoritative and required CH to perform the cleanup. (A285.) Carey was foreclosed from providing testimony on NIC source sites even though he knew the reasons for regulatory approval at all of them. He approved other cleanup levels and approaches at other NIC sites. (A287-88.) He also knew first-hand the risk KDHE placed on the Facility and whether or not that risk perception barred consideration of a hot spot removal at the Facility. (A703-04.) Carey's testimony on these issues was erroneously excluded, even though CH testified that it applied the cleanup levels Carey required. (A702.)

IV. THE GREAT WEIGHT OF THE EVIDENCE PREPONDERATES AGAINST THE JURY'S VERDICT

A. Question Presented

Does the jury's verdict go against the great weight of the evidence? (Ex. C.)

B. Standard of Review

A jury's verdict is reviewed to determine whether it is supported by the evidence or whether it is contrary to the great weight of the evidence. *Mitchell v. Haldar*, 883 A.2d 32, 43 (Del. 2005).

C. Merits of Argument

1. Question 3's confusing and prejudicial nature resulted in the answer to Question 3 being against the overwhelming weight of the evidence.

The jury's finding on Question 3, based on erroneous and prejudicial evidentiary rulings, instructions, and questions was against the overwhelming weight of the evidence. No evidence at trial established that $9,180,445.76 was a reasonable cost of cleanup for the Facility. Rather, the overwhelming evidence demonstrated that a reasonable approach should have cost around $4,000,000. (A705.)

By voluntarily cleaning up to a default level, CH performed a more expensive remedy than was necessary. The cleanup involved digging up every ounce of soil that tested above a Tier II default value. The evidence presented indicated that this cleanup method was unnecessary—CH chose it to obtain

approval without negotiating with the relevant regulators to beat the expiration of the Indemnity. Martin Smith testified that CH voluntarily performed the dig and that EPA did not suggest it or require it. (A325; A323.) CH employees testified that the best remedy is chosen through a study of corrective options called at CMS, which CH did not perform. (A350-51; A706; A707-08; A709-110.)

The overwhelming weight of the evidence demonstrated that the cleanup performed in 2014 was unreasonable because the dig was done for expediency, not science or to comply with a Third Party Claim. (A473-74.) Both Uhland and Zemo demonstrated a hot spot removal approach was far more reasonable. And, CH's consultant actually recommended a hot spot approach almost ten years before the Indemnity expired. (A343-49.)

Carey, who regulated NIC source properties, stated that the Tier II cleanup standards used by CH were not required. (A287-88.) CH volunteered to use those values. (A711-12.) Carey also testified that the opportunity to negotiate alternative cleanup values other than Tier II was available to CH, was not used by CH. Though CH did not take advantage of that opportunity, others in the NIC did. (A289.) He also confirmed that using the default Tier II occurred in the NIC only when excavation amounts were small. (A402.) CH did not contradict this evidence.

Zemo further demonstrated that none of the Tier II assumptions matched any of the site specific data that had been collected (and paid for) over almost twenty years. (A399-400.) Witnesses testified that defaults do not apply when site specific data that is more accurate exists. (A341; A289.) Uhland further demonstrated that a more reasonable hot spot approach could have been used *even with the inappropriate Tier II default values*. (A317-18.) But, despite the availability of alternative cleanup standards and approaches, and its express contractual obligation to do so, CH made no effort to mitigate the costs UPC would pay.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A NEW TRIAL

A. Question Presented

Did the trial court abuse its discretion in denying UPC a new trial? (Ex. C.)

B. Standard of Review

A denial of a new trial is reviewed under the abuse of discretion standard. *Emershaw-Andrieux v. Biddle*, 2015 WL 1208374, at *2 (Del. Mar. 16, 2015).

C. Merits of Argument

1. The interests of justice demand a new trial.

The trial court abused its discretion in denying UPC a new trial, as discussed in sections I-IV above, by making erroneous legal and factual findings, excluding critical evidence that went to the heart of UPC's case, and by providing prejudicial, confusing, and improper jury instructions and questions.

CONCLUSION

In light of the foregoing, this Court should reverse the Superior Court's grant of summary judgment and enter judgment for UPC because CH's damages are not the product of a Third Party Claim and fall outside the scope of the Indemnity. In the alternative, the Court should reverse and remand the case for a new trial.

Dated: April 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, a true and correct copy of the foregoing has been served upon the following parties via File & ServeXpress:

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