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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDING

This brief is submitted in opposition to Union Pacific Corporation's ("UPC") appeal from a judgment entered on December 21, 2017 for Clean Harbors, Inc. ("Clean Harbors") after a three-week jury trial conducted in May, 2017, and in opposition to UPC's appeal of various subsidiary orders. It also supports Clean Harbors' cross appeal.

Clean Harbors initiated this action in 2015 to enforce an environmental indemnification provision in a stock purchase agreement ("SPA"), pursuant to which UPC agreed to hold Clean Harbors harmless for certain environmental liabilities at a hazardous waste facility located in Wichita, Kansas (the "Facility"). Clean Harbors incurred several million dollars of costs remediating contamination at the Facility, but UPC declined to honor its obligation to indemnify. Accordingly, Clean Harbors asserted claims for breach of contract and violation of the covenant of good faith and fair dealing. UPC reciprocally asserted the same causes of action through counterclaims.

In October 2016, UPC moved for summary judgment arguing that the remediation that Clean Harbors performed at the Facility was not "attributable to a Third Party Claim," a predicate to indemnification.[1] Clean Harbors opposed and

[1] The trial court also ruled in its summary judgment decision that Clean Harbors was not entitled to include a profit on charges to UPC for cleanup work Clean Harbors self-performed. Clean Harbors maintains that decision was incorrect, and

asked the trial court to determine that the remediation Clean Harbors performed was the result of regulatory demands that were Third Party Claim[s] under the SPA. On March 28, 2017, the trial court denied UPC's motion and determined the regulatory demands were Third Party Claims.

Trial commenced on May 8, 2017. The jury was asked to determine whether either party breached the SPA, and if UPC breached, to determine the reasonable cost of a cleanup of the Facility—a number that would permit the calculation of damages by applying arithmetic dictated by the SPA. The jury determined UPC breached and the reasonable cost of cleanup to be $9,180,445.76, an amount approximately $1,500,000 less than Clean Harbors' claim. The jury found that Clean Harbors also breached the SPA, but found that its breach resulted in no damages to UPC.

Post trial, UPC moved for a new trial and Clean Harbors moved for an award of fees and costs under controlling authority mandating such an award for proceedings commenced to enforce a hold harmless indemnification. The trial court denied both motions. Thereafter, the parties agreed to entry of a judgment that applied the SPA arithmetic to the amount determined by the jury, with each

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the trial court acknowledged it was a close call. (B540). It did not appeal this ruling because reversal would result in a new trial.

party reserving its rights. On December 21, 2017, the trial court entered judgment in the amount of $5,661,351.53 for Clean Harbors.

SUMMARY OF ARGUMENT

I. RESPONSE TO APPELLANT'S ARGUMENT

1. DENIED. The trial court correctly determined that the remediation at the Facility was attributable to a Third Party Claim.

2. DENIED. The trial court's jury instructions and verdict form correctly and cogently stated the law.

3. DENIED. The trial court did not abuse its discretion by excluding speculative, non-probative and prejudicial evidence.

4. DENIED. Substantial evidence supports the verdict.

5. DENIED. The trial court did not abuse its discretion by denying the motion for a new trial.

II. SUMMARY OF ARGUMENT ON CROSS-APPEAL

1. This Court has twice held that a party entitled to be "held harmless," but who is forced to sue to enforce its indemnification, is not held harmless unless it recovers its fees and costs incurred to enforce the indemnification. Those authorities control this matter. The trial court erred in denying Clean Harbors an award of legal fees and costs.

STATEMENT OF FACTS

The SPA

On December 31, 1994, in exchange for $225,000,000, and pursuant to the SPA, UPC sold several subsidiaries to Laidlaw, Inc. ("Laidlaw"), Clean Harbors' predecessor. (*A52-53).*[2] The UPC subsidiaries owned and operated a number of environmental services facilities, including the Facility. (*A98-99*). In 2002, Clean Harbors became the owner of the Facility and succeeded to the SPA's environmental indemnification, under which UPC was obligated to hold Clean Harbors harmless for a broad range of environmental liabilities. (*A110; A414).*[3]

Environmental Liabilities

Prior to 1995, the land on which the Facility sits had been used for decades for industrial purposes, including hazardous waste storage and disposal. (*B91-94;* B390). These uses caused substantial site contamination that imposed legal liability on the owner of the site. (B390; B95-99; B442; *see* 42 U.S.C. § 9601, *et seq.*).

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[2] Citations to the Appendix in italics identify materials that were before the trial court at summary judgment. *See* Clean Harbors' Appendix Vol. I, Table A.

[3] The indemnification holds Clean Harbors harmless for 80 percent of money spent on environmental liabilities associated with the Facility that arose from acts or omissions that occurred prior to December 31, 1994, after the first $2,000,000 of such expenses. Applicable liabilities must arise from "Third Party Claim[s]" and sums must be spent within 20 years of the closing of the SPA transaction. (A98-99, § 8.10).

On January 1, 1995, when Laidlaw took the keys to the Facility, two imperatives to address contamination at the Facility were on the immediate horizon. First, the Facility operated pursuant to a Part II Permit (the "Permit") issued by the United States Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act ("RCRA"). (*B103-104).* The Permit identified corrective actions that Laidlaw or its successors would be required to undertake to investigate and cleanup contamination at the Facility. (*B119-136).* Second, the Facility was part of a broader area of land in northern Wichita initially known as the 29th and Mead Street Superfund Site[4] and later as the Northern Industrial Corridor Site (the "NIC"). Under the direction of the Kansas Department of Health and Environment ("KDHE"), a landowner within the NIC whose property was contaminated and contributing to the contamination of groundwater within the NIC boundaries, could be deemed a Potentially Responsible Party ("PRP") and if so designated, would be required to address the contamination at its property. (*A295*; *B25-28*; *B73*; B586-97).

[4] In 1990 the NIC was a Superfund Site. In 1995, as part of a settlement with the United States, the City of Wichita and the State of Kansas took over responsibility for investigating and selecting a remedy for the NIC. (*B183).*

Governmental Demands And Notices Of Claims.

On April 2, 1998, the EPA demanded, under the Permit, that Laidlaw submit an RFI work plan[5] within 120 days ("EPA Demand"). (*A260-61).* Both Laidlaw and UPC understood this was the first step on a path that would inexorably end with the requirement that Laidlaw address contamination found at the Facility. (*B25-28; B73;* B586-97). On May 28, 1998, counsel for Laidlaw provided written notice to UPC that Laidlaw had received the demand from the EPA and tendered to UPC the opportunity to undertake the RFI and subsequent actions ("EPA Tender"). (*A258-59).* Laidlaw specifically stated that it was giving notice pursuant to Section 8.10(a)(iii) of the indemnification provision of the SPA. Laidlaw stated:

> Under the agreement, Union Pacific has the right, at its option, to elect to implement and complete Remediation, with respect to this Environmental Liability, which may, or will require, remediation, removal or other corrective actions. ("Remediation")

(A258). Jeffrey McDermott ("McDermott") of UPC, after expressly acknowledging that Laidlaw's letter was a claim for indemnification, replied:

> The Union Pacific Railroad acknowledges receipt of the letter and wishes to express our intention to not exercise our right to implement and complete the RCRA Facility Investigation *and remediation, if any*.

(A291) (emphasis added).

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[5] RFI stands for "RCRA Facility Investigation." It is an initial step to identify the nature and extent of contamination located on a subject property. (A112).

The second shoe dropped on October 1, 1998, when KDHE notified Laidlaw, then doing business as Safety Kleen,[6] that it was a PRP with respect to the NIC ("PRP Demand"). (*A295-96)*. On October 30, 1998, Safety Kleen's counsel, again invoking Section 8.10(a)(iii), notified UPC of its designation as PRP and again tendered to UPC the option of conducting the investigation and remediation that would follow from its PRP status ("PRP Tender"). (*A292-93)*. UPC replied, as it had to the EPA Tender, declining to do the investigation or remediation. (*A305)*.[7]

According to James Levy ("Levy"), UPC's designated 30(b)(6)[8] witness, and UPC's Director of Environmental Site Remediation (*B2*), a PRP is an individual or entity who may have legal responsibility under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[9] to cleanup or pay for the cleanup of contaminated property. Unless the PRP can show no basis for the liability, the PRP status will be resolved by the PRP paying for, or

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[6] In late 1998, as the result of a reverse merger, Laidlaw became Safety Kleen. (*A414)*.

[7] There were two other tenders for indemnification not in issue for this appeal.

[8] The deposition testimony was part of the summary judgment record.

[9] CERCLA imposes liability on parties who generate contamination disposed of at a site or own the contaminated site. 42 U.S.C. §§ 9607, 9613.

performing, its share of the required cleanup. (*B25-28*; *B39-42*; *B73)*. As to what may motivate a PRP to satisfy its obligation, Levy testified:

> Q. The underlying hammer behind all that is that if you don't do something, the EPA or other party paying will bring suit.
>
> A. Potentially, yes.

(B41-42). Similarly, McDermott, a UPC employee with more than 25 years' experience conducting environmental remediation, in his deposition, described PRP status as liability that arises from either contributing contamination to a site or owning the contaminated property. (*B73).* When asked how someone ceases to be a PRP, McDermott said: "They prove they have no connection to the property." *Id.* If the PRP is unable to make that showing they "wind up being tagged with financial responsibility or taking on the work." *Id.* And that, he added, occurs as a matter of government compulsion. *Id.* At trial, McDermott delivered the same message noting that Clean Harbors was "under force of law to investigate and clean up" both as a result of its permit obligations and its PRP status and that such cleanup was not voluntary. (B588; B592).

The Investigation Phase

For several years following the receipt of the EPA Demand and PRP Demand, Clean Harbors engaged in the investigative process, presenting multiple investigative reports to the regulators and responding to multiple requests for more and different data. (*B155-70*; *B227-29*; A114-17). As it did so, Clean Harbors

periodically advised UPC as to the status, the expenses being incurred and the purpose for those expenses. (*B155-70; B227-29).* Each report to UPC noted that it was an update with respect to the EPA Tender and PRP Tender and each identified the NIC and RFI obligations as the reasons for the cost expended. *Id.* UPC never contemporaneously stated that the listed costs were not covered by UPC's indemnification obligations or that the NIC and RFI obligations did not constitute Third Party Claims. (*B76).* To the contrary, UPC asked for additional updates, asserting an entitlement based on the "Claim Notice and Indemnification Tender associated with the December 5, 1994 Stock Purchase Agreement." (*B155-70; B227-29).* In each instance, UPC noted that the prior report was "very useful as it provided a good cost summary to date." (*B166-68).*

The KDHE NIC Remedy Decision

KDHE was the lead agency addressing the groundwater contamination within the NIC. (*B182-183).* For KDHE the primary concern was that chemicals in the contaminated soil at properties within the NIC continuously leached into the groundwater. **(**B612-13). KDHE concluded that the owners of contaminated parcels within the NIC were PRPs and issued demands, like the PRP Demand, to those owners, pending KDHE's investigation to determine the appropriate remedy. (*A297-304).*

In March 2012, after years of conducting studies of the contamination within the NIC and evaluating remedies, KDHE issued its Declaration of Corrective Action Decision ("Declaration") and Final Corrective Action Decision For Interim Groundwater Remediation ("NIC Decision"). (*B171-225)*. In the NIC Decision, KDHE declared that, to satisfy KDHE, Clean Harbors and other property owners within the NIC boundaries had to abate the source of groundwater contamination at their respective facilities so that groundwater contamination would decline to concentrations that complied with KDHE's published Tier 2 levels[10] for groundwater. (*Id.*; *B.283-330*; B618).[11] The contaminant of concern was a chemical referred to as PCE. (B555). To comply with the Tier 2 groundwater standards, PCE contamination in the groundwater had to be reduced to 5 parts per billion ("PPB") or less. (*Id.*; B315).

The NIC Decision regarded"[i]ndividual source abatement [a]s central to the overall success of any site-wide remedial action."[12] (*B203)*. "KDHE's general

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[10] KDHE, through its Bureau of Environmental Remediation ("BER"), determined and published, for various chemicals, cleanup values presented in a table designated "KDHE Tier 2 Risk-Based Summary Table" ("Tier 2 Values"). (B283-330; B617-18).

[11] The NIC Decision speaks of source abatement and monitored natural attenuation as a preferred remedy, but it was in fact the final remedy selected in the Declaration. (*B173-74*; B616).

[12] The properties within the NIC were grouped by KDHE into "groundwater units" treating properties affecting the same portion of the groundwater as part of the

expectation for source area remedial actions is that they address all contamination at the subject property and address contamination which has migrated away from the facility that remains at concentrations well in excess of applicable thresholds." (*B186).* On its face, the NIC Decision instructed Clean Harbors, and the other PRPs in the NIC, that they were obligated to abate the contamination on their properties so as to bring associated groundwater to Tier 2 Value quality.

With the standard articulated in the NIC Decision, Clean Harbors could determine how much contaminated soil had to be addressed. Because the regulators had tied the RCRA and CERCLA obligations together, and because each reserved the right to insist that any cleanup be done to its satisfaction, Clean Harbors had to satisfy whichever of the agencies insisted on the most stringent standards. (*A297-298*; *A260*; B232; B615). The NIC Decision defined what Clean Harbors had to achieve to satisfy KDHE (but not how to achieve it) and set a minimum threshold for satisfying the EPA. (*B195*; *B203-04*; *B279*; B254; B230-34).

There is a correlation between the amount of contamination in soil and the amount of contamination in adjacent groundwater. If the concentration in soil is reduced to a certain level, contaminated groundwater, in time, will cease to exceed

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same GWU and proscribing remedy bases on the GWU. The Facility was part of GWU 1. (*B188-89*; B611).

Tier 2 Values. There are also Tier 2 Values for soil contamination levels which will enable impacted groundwater to achieve or maintain Tier 2 Values. This value is referred to as the soil to groundwater Tier 2 standard. (B315; B620-21). For PCE, the 5 PPB Tier 2 Value for groundwater will be achieved if the PCE in the soil does not exceed 121 PPB, the Tier 2 Value for the soil to ground water pathway. (*Id.)* Thus, if contamination in soil is abated to the Tier 2 soil to groundwater value the remediation will presumptively achieve the Tier 2 groundwater level mandated by the NIC Decision. (B617-21).

In April 2013, Clean Harbors, KDHE and EPA conducted a conference call in which Christopher Carey of KDHE stated that KDHE would require Clean Harbors to address the groundwater contamination by satisfying the Tier 2 soil to groundwater value. Although the EPA initially considered a more stringent cleanup standard, it later recommended that Clean Harbors submit a cleanup plan for EPA approval using the Tier 2 Values. (*B279*; B400-01; B501-08; B549). Clean Harbors, therefore, incorporated KDHE's standard when it sought approval for a work plan to conduct the remediation. (*Id.*; B508-09).

The Interim Remedial Measure Process

The SPA indemnification provision had a 20-year sunset. To benefit from UPC's contribution to remediation, Clean Harbors had to expend funds remediating before December 31, 2014. *(A99).* Before Clean Harbors could do

anything, it had to obtain EPA approval. Under the Permit, EPA approval to conduct remedial measures could be obtained in multiple ways, including through a process known as an Interim Remedial Measure ("IRM"). *(A191)*. In late 2013, the EPA official responsible for the Wichita Facility told Clean Harbors that the IRM process was an appropriate approach that would permit expeditious approval. (*B86-89*; B378; B404-05; B517-19). With that guidance, Clean Harbors sought approval for an IRM to abate source contaminants mandated by the NIC Decision and its Permit obligations. (*Id.*; *B281-28*; *B278-79)*.

UPC was informed early that Clean Harbors was following an IRM path for EPA approval. During a call on January 23, 2014, Smith and Norman Nelhuebel of Clean Harbors explained to McDermott that the IRM process was being employed to procure agency approval. Martin Smith, of Clean Harbors, recapped the call in an e-mail sent to McDermott the following day:

> In addition to those items requested, we gave a brief description of the various regulatory processes governing our site work at present. I mentioned that we are pursuing an Interim Remedial Measures submittal to the EPA (Chris Jump) and we will be submitting a workplan for the sampling and general project engineering details within the next couple of months.

(B274; *B78-80*; B603-04). McDermott confirmed that he was so advised. (*B78-80;* B603-04). Levy and McDermott both had extensive experience with environmental remediation and certainly understood what this meant. (*B25-32*;

B73; B571-72). If UPC's current screed against the IRM were genuine, one would have expected contemporaneous protest by UPC's sophisticated environmental professionals when the January 23rd disclosure was made. There was none. (*B78-80*; B57-59; B603-04).

Remedy Selection

After the NIC Decision, Clean Harbors began the process of analyzing alternative remedial solutions. Initially, it concluded that a thermal remedy, which involved heating the soils to vaporize the contaminants, was the most cost effective solution. Clean Harbors discussed two thermal option technologies with UPC beginning June 2013 and in early 2014. (*B279*; *B274)*.

While Clean Harbors was expecting to proceed with a thermal remedy in early 2014, new information, generated by additional testing, determined that the volume of contaminated soil at the Facility was considerably greater than original estimates, ballooning the cost of the thermal remediation. Also, uncertainties about the efficacy of a thermal approach surfaced. (B413-17; B331-369; B470; *A414-16)*. On March 4, 2014, Clean Harbors notified UPC of its decision to proceed with an excavation and off-site disposal of contaminated soils as the remedial approach, rather than the previously discussed thermal method. (*A414-16)*. Shortly thereafter, Clean Harbors submitted an IRM work plan to the EPA and, on July 31, 2014, Clean Harbors received EPA's approval. *(B281)*. Upon written

approval by EPA of an IRM work plan, Clean Harbors became required to perform the work described in it. (B424-26; *B131-32*; *A180-82)*. With the EPA approval in hand, Clean Harbors was able to conduct the remediation mandated by the NIC Decision and its Permit obligations.[13]

UPC Refusal To Pay

After making an indemnification payment of $63,005.08 on January 31, 2014, (B270-273; *B276-77*), UPC refused to make subsequent payments, citing an ever changing list of excuses. (B371-373; B374-378). After a dozen years of recognizing Clean Harbors as the successor indemnitee, in early 2014 UPC declared Clean Harbors was entitled to no indemnification because it had not acquired the rights when it acquired the Facility through a bankruptcy proceeding. (B373). By mid-2014, UPC added the excuses that it was not clear that any of the contamination was the product of pre-1995 events; that the expenses were the product of a change of law; that the claims were not Third Party Claims; and that UPC was only liable for contamination caused by its subsidiaries. (B374-378). By the time of trial, UPC had abandoned all of these excuses, except the no Third Party Claim excuse, which it had lost as the result of its own summary judgment motion. (Opening Br., Ex. A; *Id.* at Ex. B at 15-16; B390; B686).

[13] The SPA provided that if UPC undertook the remediation, Clean Harbors had the right to participate in the design and selection of remediation. Importantly, it did not give UPC reciprocal rights if it declined to do the remediation. (*A99)*.

Through December 31, 2014, with full knowledge that UPC had disavowed its indemnification obligations, Clean Harbors conducted the necessary clean up in conformity with requirements of the regulators. Its actions were reviewed and approved by the regulators every step of the way. (B547-48). Clean Harbors spent nearly $11,000,000 conducting the remediation. (B560-70).

ARGUMENT ON UNION PACIFIC'S APPEAL

I. THE TRIAL COURT PROPERLY CONCLUDED THAT CLEAN HARBORS REMEDIATION OF THE FACILITY WAS "ATTRIBUTABLE TO A THIRD PARTY CLAIM."

A. Question Presented.

Did the Superior Court properly conclude that Clean Harbors' cleanup of the Facility was compelled by obligations arising from the EPA Demand and the PRP Demand and, thus, "attributable to a Third Party Claim" as defined in the SPA?

B. Scope 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 The Argument.

1. UPC Has Now Conceded The Relevant Regulatory Demands Are Third Party Claims.

Before the trial court, Clean Harbors argued, and the trial court accepted, that the EPA Demand and PRP Demand each constituted Third Party Claims as contemplated by the SPA. The EPA Demand initiated an obligation to investigate contamination at the Facility that culminated with remediation. (*A260-61*; *B39-41*; *B73).* The PRP Demand notified Clean Harbors' predecessor that it was a likely source of groundwater contamination and that it would be held accountable to

identify and abate contamination at its site.[14] (*A297-98)*. In its summary judgment motion, UPC denied either demand constituted a Third Party Claim, but in its Opening Brief on appeal, on no less than three occasions, UPC now admits the contrary. *See* Opening Br. at 7, 18. UPC's concession acknowledges what the trial court determined and the plain language of the SPA mandated; that cleanup activity required by the EPA Demand and the PRP Demand are Third Party Claims.

As a result of UPC's current concessions, the Third Party issue has now been reduced to UPC's contention that the remediation efforts, ultimately mandated by the processes commenced with each demand, were not "attributable to a Third Party Claim" because the obligation to clean up the contamination (revealed through investigation) was a separate matter to be addressed in isolation and as a separate claim. UPC also argues that because Clean Harbors chose the manner in which it satisfied its obligations, the remediation was voluntary, and therefore "not attributable to a Third Party Claim." Both arguments are untenable and refuted by the SPA language and the words and deeds of UPC personnel.

[14] When KDHE issued its decision in March 2012, KDHE identified the Facility as a confirmed source. (*B186)*.

2. The Investigation And Cleanup Are Both Part Of A Unitary Process.

UPC's argument that the investigation of the Facility and the cleanup obligations that flowed from it were separate processes, not generated by the same third party demands, is a contrivance born in 2014 when UPC was looking for excuses to avoid its indemnification obligation. Before that, UPC recognized and acknowledged that remediation was the last chapter of the regulatory demands, and not a new book.

It is clear beyond question that EPA, KDHE, Laidlaw, and UPC, all understood in 1998—and at all times since—that the EPA Demand and the PRP Demand kicked off processes that would result in active cleanup measures. UPC knew, when it declined to take responsibility for the actions called for by those demands, that it was not entitled to a further "notice of claim" when the manner of remediation was selected and, indeed, declared it was leaving remediation to Laidlaw and its successors. When Laidlaw sent the EPA Tender, it informed UPC that those obligations "may, or will require, remediation, removal or other corrective action." (*A258).* UPC responded that it was its "intention to not exercise our right to implement and complete the RCRA Facility Investigation *and remediation* if any." (*A291)* (emphasis added).

Likewise, that remedial activity was part of the PRP Tender was clear from the PRP Demand. KDHE stated that it required Source Control Measures and

spelled out in a Statement of Work ("SOW"), attached to the PRP Demand, that "*Source Control Measures can be defined as a response action that eliminates or mitigates a release or threat of release of contamination from a known source.*" (*A299)* (emphasis in original). UPC gave Clean Harbors the same response to the PRP Tender as it gave for the EPA Tender, leaving it to Clean Harbors to satisfy the regulators. (*A305).*

The SOW also made it clear that implementing a remedy, if remediation was necessary, was part and parcel of KDHE's demand and the NIC process. It listed seven steps of the process, the last of which was "[i]mplementation of the KDHE approved remedial action including a monitoring and verification plan." (*A300).*

UPC repeatedly manifested that it understood the Tenders included remediation. It did so in responding to the Tenders and again, 15 years later, in a May 7, 2013, email exchange in which McDermott advised Levy:

> Clean Harbors wishes to meet with us to discuss the work they have completed to date and the remediation and site restoration that will be performed over the next two years…. The Closing was December 30, 1994, therefore December 30, 2014, is the termination date for Union Pacific's responsibilities.

(B235). Levy replied:

> If we pay 80% of everything over $2M until the end of 2014, what role do we get to play in choosing a remedy? Clean Harbors will want to spend as much as possible next year even if it is a more expensive remedy. Whereas, we will want the most cost effective remedy.

> We need to understand quickly. We do not want Clean Harbors to advocate a remedy to the state that could be detrimental to UP.

Id. UPC knew it was on the hook for the remedy and that Clean Harbors was required to perform one.[15]

3. Voluntarily Resolving A Third Party Claim Does Not Deprive It Of Its Third Party Status.

The heart and soul of UPC's efforts to sever the remediation obligations from the investigative ones, is its assertions that Clean Harbors "voluntarily" excavated large amounts of soil. The remediation phase, by its account, was no longer a matter of compulsion and therefore, no longer a Third Party Claim.

The underlying factual premise is wrong. The unrefuted record at the summary judgment phase was that Clean Harbors had to clean soil at the Facility to comply with the KDHE Tier 2 cleanup values. (*A278-80; B195; B202-03).* That dictated how much abatement it had to do. The method of achieving that end

[15] The trial court's file reveals that the assertion that the remediation was something separate from the investigation was a post-pleading contrivance. UPC's original counterclaim states in paragraph 4: "In February 2014, only 10 months before the indemnity provision of the SPA terminated by their own terms, Clean Harbors unilaterally—and without notifying UPC—switched courses and decided to abandon *the remedy acceptable to UPC* and, apparently, to the regulators." (*B62).* The switch referenced in this allegation is from a thermal remedy to excavation and the estimated cost was between $10 and $11 million (a sum fully-known to UPI at the time). (B275). If, as UPC now tries to assert, the remedy process was separate from the investigative one, the thermal remedy would have been equally objectionable.

was not dictated (regulators do not tell parties how to accomplish their requirements), and excavation was not mandated, but Clean Harbors did not have the option of doing nothing and had been told the cleanup target it had to meet. (*A278-80*; *B73*; *B39-43)*.

Moreover, responding to either the PRP Demand or the EPA Demand was hardly "voluntary." McDermott conceded at trial that a party who cleans up a facility because of permit obligations or because it is a PRP is not acting voluntarily.[16] (B588; B592). In *Anderson Dev. Co. v. Travelers Indemnity Co.*, 49 F.3d 1128 (6th Cir. 1995) the court stated that "[t]he significant authority given to the EPA in such matters …" may be viewed as "coercing the voluntary participation of PRP's." *Id.* at 1132. The observation applies equally to KDHE within its own jurisdiction. As one court noted, after observing that the EPA's enforcement has moved from lawsuits to seeking participation in remedial activities, "[i]t would be naive to characterize the EPA [PRP] letter as a request for voluntary action. [Plaintiff] had no practical choice other than to respond actively to the letter." *Hazen Paper Co. v. U.S. Fidelity and Guar. Co.*, 555 N.E.2d 576, 581-82 (Mass. 1990).

[16] This Court may consider trial evidence consistent with the summary judgment record in evaluating a summary judgment decision. *See Handler Corp. v. Tlapechco*, 901 A.2d 737, 748 n.39 (Del. 2006).

In any event, no words in the SPA makes the voluntary or involuntary nature of action a factor in defining what is a Third Party Claim, and taking voluntary action to resolve a legal obligation would hardly render a Third Party Claim something else. Settlements of litigation, by way of example, are voluntary actions. If the underlying claim was insurable as a Third Party Claim, it would not cease to be a Third Party Claim by virtue of the voluntary act of resolution. The SPA includes "settlement costs" in the definition of "Claim," recognizing voluntary action is indemnifiable. *(A104)*. A settlement might raise other issues, but it would not strip the claim of its third party character.

4. Clean Harbors' Remediation Expenses Were Irrefutably Attributable To A Third Party Claim.

Accepting UPC's definition of "attributable to" as "regarded as being caused by," the cleanup in the present case was unquestionably caused by the two 1998 regulatory demand letters UPC has admitted are Third Party Claims.

That this is true is clearly demonstrated by the PRP Demand and its attachments. (*A297-304)*. In that demand, KDHE informed Safety Kleen that it was a PRP required to satisfy KDHE Source Control Measures described in the SOW, which defined Source Control Measures as those that "eliminate or mitigate a threat of release of contamination from a known source area." *Id.* The SOW listed as among its objectives "implementation of the KDHE approved remedial action." *Id*. In March 2012, KDHE, the same party that authored the PRP

Demand, issued the NIC Decision and thereby informed Clean Harbors that it must abate contamination to comply with Tier 2 Values. *(B185)*. Clean Harbors effectuated this directive by using the Tier 2 Values for soil to groundwater. (*A414-16*; *B278-80*; B508-20; B532-33). There is no dispute this is the responsive action Clean Harbors performed. Indeed, it is a key complaint of UPC that Clean Harbors adhered to that standard. *See* Opening Br. at 11.

It is also clear that the cleanup performed was "attributable to" the 1998 EPA demand letter, which initiated the corrective action process of Clean Harbors' Permit by requiring an RFI. That process, as reflected in the Permit, included remedial action warranted by the contamination identified in the investigative phase. (*B119-36)*. Documentation submitted as part of the summary judgment record directly linked the work performed to the contamination identified in the investigative process. (*A414-16*; *B278-80*; *B274-75)*.

The summary judgment record was clear that the remediation Clean Harbors conducted at the Facility in 2014 was directly caused by the demands articulated in the EPA Demand and the PRP Demand. UPC's Third Party Claim argument is really a back door argument that the selected remedy was unduly expensive and, therefore, not reasonable. UPC was able to fully litigate the reasonableness issue and the jury did not accept its view. Even if it had, selecting a remedy that was too costly would not deprive the claim of its third party character under the SPA.

5. The 1998 Regulator Demands Were Irrefutably Third Party Claims.

Even without UPC's concessions, the conclusion that the 1998 regulator demands were Third Party Claims is inescapable.

a. The Definition Of Third Party Claim Is Broad.

"Third Party Claim" is defined somewhat circularly in the SPA as "a Claim …that involves a third party claim." *(A94, § 8.4(b))*. That definition indicates (and it appears the parties agree) that a Third Party Claim is a Claim not between the parties to the SPA. *See, e.g., Textileather Corp. v. GenCorp Inc.*, 697 F.3d 378, 382 (6th Cir. 2012); BLACK'S LAW DICTIONARY (Second Pocket Ed. 2001); Opening Br. at 14. Because the definition uses the defined term "Claim," the definition of Third Party Claim is derivative of "Claim," which is defined in the SPA. *Neither* EPA nor KDHE are parties to the SPA, so any "Claim" held or asserted by either is a Third Party Claim.[17]

A "Claim" is broadly defined in the SPA to include "…judgments, claims, causes of action, demands, lawsuits, suits, proceedings, governmental investigations or audits, losses, assessments, fines, penalties, administrative orders, obligations, costs, expenses, liabilities…" and "… settlement costs… ."

[17] *See Textileather Corp.*, 697 F.3d at 385 (ruling that a state environmental agency was a "third party" for purposes of an indemnification agreement).

(A104, § 11.8). Thus, under the SPA, a defined "Claim" includes any lowercase "claim" as well as causes of action (listed separately from "lawsuit") obligations, liability and demands." If any of these "Claims" belongs to or is asserted by a third party, the claim is a Third Party Claim.

b. The PRP Demand Is A Third Party Claim.

KDHE is clearly a third party. The PRP Demand asserted that the Facility was a "probable source of groundwater contamination" and demanded that Clean Harbors address that source. It was, therefore, a Third Party Claim in favor of KDHE as a "claim, cause of action, demand or…liability." Court decisions underscore this conclusion. In fact, at least eleven state supreme courts "have held that PRP letters or a letter from the state's environmental agency equivalent of the EPA constitutes a 'suit.'" *See Travelers Cas. & Sur. Co. v. Alabama Gas Corp.*, 117 So.3d 695, 702 n.2 (Ala. 2012) (citing cases in support); s*ee also Textileather Corp*., 697 F.3d at 383.

On March 28, 2012, the NIC Decision and the KDHE Declaration defined what Clean Harbors had to do to satisfy the claim asserted in the PRP Demand by determining it had to abate the source of groundwater contamination at the Facility so that groundwater would cleanse to Tier 2 Values. *(B195*; *B203-04)*.[18]

[18] Based on trial testimony, and not the summary judgment records, UPC argues that the NIC Decision was not binding on Clean Harbors, only on the City of Wichita. It is an argument not advanced in the summary judgment motion. The

c. The Permit Obligations Are Third Party Claims.

Independently, the EPA Demand constitutes a Third Party Claim. The *Textileather Corp.* case is instructive on this point. There, the buyer of a RCRA licensed facility determined, for business reasons, to close a portion of the operations. 697 F.3d at 381. That triggered state-mandated closure procedures, which resulted in the State of Ohio imposing certain cleanup obligations on plaintiff. *Id*. As in this case, the seller in *Textileather* was obliged to indemnify third party claims. *Id*. at 380-81. The seller argued that an obligation incurred as the result of the indemnitees' voluntary action to avail itself of a permit, cannot be a third party claim. *Id*. at 382. The district court embraced that argument, but the Sixth Circuit reversed, stating that the obligation arising from the closure were third party claims even though the indemnitee voluntarily complied with the regulatory agency's directives. *Id.* at 383; s*ee also Danbury Bldgs., Inc. v. Union Carbidge Corp.*, 963 F. Supp.2d 96, 103 (D. Conn. 2013).

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face of the NIC Decision expressly addressed what KDHE determined Clean Harbors had to do. (*B195*; *B 203-04).* Whether the decision in and of itself was binding is a form over substance argument. In its PRP Demand, KDHE made it clear that Clean Harbors would have to abate the source of ground water contamination at its site to KDHE's satisfaction. (*A300).* KDHE allowed the abatement process to go forward under EPA supervision, but absent conformity with what it mandated, KDHE declared the EPA resolution would not be acceptable to KDHE.

The Permit imposed corrective measures "obligations" owed to a governmental third party,[19] and therefore the corrective measure obligations asserted in the EPA Demand and presented to UPC through the EPA Tender, constituted a Third Party Claim.

[19] The SPA specifically includes costs arising from "…requirements embodied in Environmental Laws…" as indemnifiable Environmental Liabilities and the term Environmental Laws is defined in the SPA to include permits. *(A64).*

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

A. Question Presented.

Were the trial court's instructions proper and cogent statements of Delaware law?

B. Scope Of Review.

A challenge to the instruction given by the trial court, including verdict forms used, is reviewed *de novo*. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006). When the appellant failed to raise the objection below the instruction is reviewed for plain error. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1255 (Del. 2011). Refusal to give an instruction is reviewed for abuse of discretion. *Coles v. Spence*, 202 A.2d 569, 570 (Del. 1964); *Carter v. State*, 873 A.2d 1086, 1088 (Del. 2005). The decision to give a curative instruction is reviewed for abuse of discretion. *Sammons*, 913 A.2d at 539.

C. Merits Of The Argument.

This Court has set a high bar for challenges to jury instructions. Instructions need not be flawless and will support a reversal "only if such deficiency undermined the ability of the jury 'to intelligently perform its duty in returning a verdict.'" *Probst v. Delaware*, 547 A.2d 114, 119 (Del. 1988) (citations omitted). It is enough that an instruction is "reasonably informative and not misleading, judged by common practices and standards of verbal communication." *Id.*

Moreover, a trial judge, in her sound discretion, may properly decline to give a requested instruction where the evidence does not warrant the instruction. *Coles*, 202 A.2d at 570; s*ee also Dunning v. Barnes*, 2002 WL 31814525 (Del. Super. Nov. 4, 2002).

1. Verdict Form Question 3 (Reasonable Cleanup Costs) Is Neither Confusing Nor Prejudicial, And Does Not Constitute A Comment On The Evidence.

UPC argues that Question 3 on the verdict form, by asking the jury to determine "the total reasonable cost of the environmental clean-up," directed the jury to consider only the reasonableness of the cost of the work Clean Harbors actually performed, "preventing the jury from considering whether CH should have done the work in the first instance." Opening Br. at 22. UPC's contention is an extraordinary contortion of the words used. Because the jury was called upon to assess reasonableness, its assessment necessarily included assessing whether any of the work was unnecessary at all, or could have been performed more cost effectively. The cost of unnecessary work would not be part of the "total reasonable cost[s]".[20]

Moreover, two other instructions insured that the jury would not limit its deliberation to the cleanup actually performed. Instruction 8 stated that Clean

[20] UPC did not contend at trial that Clean Harbors could have done nothing to address the contamination, only that Clean Harbors could have done less.

Harbors was obligated to make reasonable efforts to reduce the costs and if it failed to do so, the damages it could recover had to be reduced. (B686). The trial court also instructed that "[t]he duty to act reasonably is a duty to take a reasonable course of action under the circumstances presented at the time… ." *Id.* This, too, communicated to the jury that it had to consider the evidence of alternate approaches to determine if Clean Harbors followed a reasonable course of action. "[T]he jury instructions must be viewed as a whole." *Probst*, 547 A.2d at 119. When Question 3 is considered in light of these other instructions, it is clear it did not convey to the jury a message that it was to consider only the cleanup actually performed.[21]

Furthermore, the verdict form and instructions are not considered in a vacuum and the presentations of the parties during the trial are to be considered in evaluating the risk that the jury misunderstood its mission. In *Haas v. United Techs., Corp.*, 450 A.2d 1173 (Del. 1982), a disappointed plaintiff argued that a faulty charge had withdrawn an issue from the jury. In rejecting the argument this Court noted:

> The jurors were reminded repeatedly in the opening arguments of counsel, through the presentation of evidence..., in the closing arguments of counsel and in the charge itself that cockpit BIM was to be taken into

[21] The trial court instructed the jury that it was to consider all instructions in conducting its deliberations. (B687).

> account in deciding whether defendant's helicopter was defective. Hence we stand convinced that the instructions did not mislead nor withdraw the issue from the jury.

Id. at 1180. In the present case, there was extensive evidence offered by UPC criticizing the path Clean Harbors chose as excessive and extensive evidence of other approaches UPC argued were more cost effective. (B624-64). Those matters were fully addressed by counsel in opening and closing arguments. (B386-87; B391-96; B690-97). As it was in the *Haas* case, it is clear here "the instructions did not mislead nor withdraw the issue from the jury." *Id.*[22]

It is also clear that Question 3 was not an improper comment on the evidence. As UPC has said, an improper comment on the evidence involves "an 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." *Hall v. State*, 473 A.2d 352, 356 (Del. 1984). The words of Question 3 do neither, but even if one could tease-out a comment on the evidence from the question, a general directive to the jury that nothing said by the judge should be regarded as expressing an opinion in favor of either party, would cure the problem. *Seeney v.*

[22] Plaintiff's counsel in closing also informed the jury that in answering Question 3 they were to determine "the reasonable amount that *should have been spent*"—a formulation that clearly told the jury they were entitled to consider UPC's proffered options. (B682) (emphasis added).

State, 211 A.2d 908, 909 (Del. 1965). The trial court gave such an instruction here. (B687).

Lastly, UPC is wrong in asserting that there was no reason for wording the two damage questions differently. Clean Harbors' damage claim was subject to arithmetic mandated by the SPA. UPC's was not. The measure of damages for Clean Harbors was the total cost reasonably incurred during the indemnification period, less (a) the first $2,000,000, (b) 20% of the balance, and (c) amounts paid by UPC against the balance so determined. These arithmetic adjustments were mandated by the SPA and were not in dispute. The judge decided to have the jury determine the only part of Clean Harbors' damages that was in dispute and to apply the uncontroverted arithmetic to the number so determined. (B688). It was an appropriate approach aimed at reducing the risk of juror error.

2. The Court's Speculation Instruction (No.4) Correctly States The Law.

Instruction 4 was a curative instruction rendered necessary by UPC contravening the trial court's determination on a Motion *In Limine*, that UPC could not offer speculative expert testimony as to what a regulator might have done based on facts that never existed. It is clear that such testimony would have been speculative. In support of the Motion *In Limine*, Clean Harbors submitted deposition testimony of UPC expert Jennifer Uhland in which she said:

> Q. And so what I am really trying to get to is, because I understand it is one of the foundations of your opinion that, you know, Clean Harbors could have gone to the regulators and tried to make an alternate case, is that correct?
>
> A. Yes.
>
> Q. And none of us know the outcome of that effort, is that correct?
>
> A. The final outcome, no. But I think there is [sic] plenty of examples where you could have still been protective and done something less.

(B10). Uhland, thus, acknowledged that testimony as to what a regulator would do is conjecture.

Notwithstanding the trial court's ruling, in the course of direct testimony, Uhland shared with the jury her speculation that Clean Harbors "could have easily gotten approval for" an alternative soil disposal approach that was never presented or considered by the regulator. (B641-45).

The trial court's ruling on the Motion *In Limine* and its determination to give Instruction 4 were both correct. The Trial Court did not preclude UPC's experts from testifying about many alternatives that could have been pursued. (B624-64). The trial court limited the expert from stating that such alternatives would have been approved by the government regulators, something Uhland acknowledged she did not know.

It is well settled that speculation is not proper evidence. *See O'Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013) (medical expert could not base his medical opinion on "speculation or conjecture. … a doctor's testimony that a certain thing is possible is no evidence at all"); *Price v. Blood Bank of Del.*, 790 A.2d 1203, 1210 (Del. 2002) (expert's testimony "must be based on the methods and procedures of science, rather than subjective belief or speculation"); *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014) (a lay opinion witness "may not testify based on speculation…"); *Washington v. Dep't of Transp.*, 8 F.3d 296, 300 (5th Cir. 1993) (witness' speculative testimony about what he would have done had he seen a product warning was properly excluded); *Malik & Sons, LLC v. Circle K Stores, Inc.*, 2017 WL 367662, at *3 (E.D. La. Jan. 25, 2017) (witness could not give speculative testimony as to what she would have done had she been aware the parties disagreed). Indeed, the Delaware Pattern Jury Instructions expressly state that an expert may not testify based on their speculation as to what might occur. *See* DEL. P.J.I. CIV. § 23.11 (2000).

UPC tries to justify its objection to the exclusion of speculative testimony by pointing to cases that permit experts to testify about hypothetical fact patterns. That is a very different matter. When an expert testifies on hypothetical facts, he or she is applying known principles to the hypothetical. What UPC sought to do in the present case was to offer speculation as to what a human being, with

independent judgment and considerable discretion, would have done with respect to facts that never existed. That does not involve the application of principles to hypothetical facts; it simply involves guesswork.[23]

Instruction 4 was proper and rendered necessary by UPC's defiance of a court ruling.

3. The Court Properly Declined To Give Material Breach And Substantial Performance Instructions.

A trial judge may properly decline to give a requested instruction where the evidence does not warrant the instruction. *Coles*, 202 A.2d at 570. "Whether there is any evidence in the case to which a requested instruction applied is a question for the court, and, where allegations of the petition may be said to be supported inferentially by the evidence, the giving of an instruction thereon is discretionary with the court." *Id.* (citing 88 C.J.S. Trial § 383, at 1017 (1955)). The decision will be reversed only for an abuse of discretion. *Id.*; *see also Dunning*, 2002 WL 31814525 at *1. "A trial judge has abused [her] discretion where the judge has exceeded the bounds of reason in view of the circumstances and has so ignored

[23] UPC points to *City of Wichita v. Trustees of APCO Oil Corp Liquidating Trust.*, 306 F. Supp. 2d 1040, 1086 (D. Kan. 2003), to argue that speculation about what a regulator would do is admissible. However, that case reflects that such testimony was admitted, but it is not a legal ruling that such testimony is admissible and contains no analysis that suggests the issue of admissibility was ever raised.

recognized rules of law or practice so as to produce injustice." *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006).

The judge's decision was in conformity with recognized authority on material breach. Moreover, it could not have been an abuse of discretion for the trial judge in the present case to conclude that the evidence did not warrant a material breach instruction where the jury found that Clean Harbors had breached the SPA but awarded "zero" damages.[24]

UPC has continuously diluted the requirements necessary to establish a material breach. In its Opening Brief, UPC incorrectly states that a material breach may occur when the "breach involves a relatively small portion of the contract value…" Opening Br. at 10 (citing *DeMarie v. Neff*, 2005 WL 89403 (Del. Ch. Jan. 12, 2005)). *DeMarie* involved a real estate purchase and sale agreement which expressly provided that in the event plaintiff failed to provide a $1,000 deposit by a certain date, the seller could void the agreement. *DeMarie*, 2005 WL 89403, at *4. It was, thus, an interpretation of specific language in the contract

[24] The jury could have come to "zero" damages for a breach in multiple ways. For example, UPC maintained Clean Harbors breached the agreement by failing to give proper notice. (B685). Failure to square the corners on notice could be seen to be a breach, but one without damages. Also, UPC asserted Clean Harbors breached the contract by charging profits. Clean Harbors presented evidence that all profit amounts were backed out of the claims presented at trial. (B560-70).

that was at issue in that case and not a pronouncement that a breach of little value could be material.

A material breach is "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *2009 Caiola Family Trust v. PWA, LLC*, 2015 WL 6007596, at *18 (Del. Ch. Oct. 14, 2015). "[F]or a breach of contract to be material, it must 'go to the root' or 'essence' of the agreement between the parties." *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc*., 2013 WL 3934992, at *11 (Del. Ch. July 24, 2013); *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860, at *28 (Del. Ch. June 26, 2017).[25]

Moreover, the provision as to which a breach is asserted cannot be considered in isolation; rather, the analysis is guided by the contract as a whole and the non-breaching party's reasonable expectation in entering the contract. *See* Restatement (Second) of Contracts § 241, Cmt. b ("If the consideration given by either party consists partly of some performance and only partly of a promise, . . . regard must be had to the entirety of exchange, including that performance, in

[25] Even if the *de novo* standard advocated by UPC applied, based on the authority cited herein, it is clear as a matter of law the no breach alleged by UPC would amount to a material breach.

applying this criterion].") (citing § 232, Cmt. a) (providing "loss of benefit to injured party" as one factor of the restatement analysis).

The expectation that UPC had under the SPA was to receive $225,000,000. It did in 1994. Because there was no evidence that could have been construed as a breach that went to "the 'root' or 'essence' of the agreement between the parties" there was no basis to give a material breach instruction.

The trial judge also declined to give a definition instruction for substantial performance and rejected the argument that the absence of a substantial performance instruction warranted a new trial, noting that substantial performance was the inverse of material breach and not warranted for the same reasons the material breach instruction was not warranted. Curiously enough, UPC sees fit to criticize the trial judge for stating that material breach and substantial performance are the inverse of each other and for "incomplete analysis of cases construing foreign law." Opening Br. at 30. The trial court's holding on substantial performance is a wholesale acceptance of the legal principal UPC proffered in its proposed instruction in which it stated: "Substantial performance is performance without a material breach." (B17, B23). The lead "foreign" case on the issue in the judge's decision denying a new trial, *General Motors Corp. v. Emelio Capaldi Developer Inc.*, 263 F.3d 296 (3d Cir. 2001), is the case UPC relied on to support the instruction. It states that material breach and substantial performance are the

converse of each other. *Id.* at 317. The formulation has now become inconvenient for UPC, so it blames the judge for accepting UPC's position.[26]

There was no record that warranted a substantial performance instruction and no error in the failure to give one.

4. The Answer To Question 3 Permitted The Court To Properly Compute Damages Based On The Application Of Simple Arithmetic Uncontestably Required By The SPA.

a. The Jury Form, Viewed In The Context Of The Entire Charge And The Trial Record Clearly Limit Question 3 To The Reasonable Amount Expended Within The Indemnification Period.

UPC argues that because there were two instances of peripheral testimony about amounts spent in 2015 by Clean Harbors, the jury may have been confused and included such numbers in the total remediation number reflected as the answer to Question 3. This, it argues, precluded the court from doing its calculation because it would have to subtract out 2015 amounts from the verdict and there is no certain number for 2015. The argument is sophistry that shrivels when confronted with the trial record.

[26] UPC received a breach of contract instruction that was more favorable than that to which it was entitled; one that required Clean Harbors to show substantial performance. (B685). Substantial performance is not a *prima facia* element of a breach of contract case. DEL. P.J.I., CIV. § 19.20; *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1279 n.28 (Del. 2016) (citing *VLIW Tech., LLC v. Hewlett–Packard Co.*, 840 A.2d 606, 612 (Del. 2003)); *see also Vituli v. Carrols Corp.*, 2015 WL 5157215, at *3 (Del. Super. May 1, 2015).

First, Instruction 5 expressly informed the jury that a party who proves a breach was entitled to compensation that put it in the same position as if no breach had occurred. The SPA, which was in evidence, limited the indemnification to expenses incurred through December 31, 2014. (A99). That point was repeatedly made to the jury. (*See, e.g.*, B382; B389; B394; B672; B674; B678). The instructions, thereby excluded post-2014 expenses.

Furthermore, the verdict form and instructions are not considered in a vacuum. The presentations of the parties during the trial are to be considered:

> Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial. 'Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial.

U.S. v. Park, 421 U.S. 658, 674-75 (1975); *U.S. v. Birnbaum*, 373 F.2d 250, 257 (2d. Cir. 1967). In *Park*, the defendant complained that a jury instruction left the improper impression that the defendant could be held criminally responsible based on the position he held, rather than for personal responsibility for criminal conduct. *Park*, 412 U.S. at 674-75. Recognizing that the instructions alone could lead to that conclusion, the court noted:

> The record in this case reveals that the jury could not have failed to be aware that the main issue for determination was not respondent's position in the corporate hierarchy, but rather his accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him.

Id. at 675. Significantly, in *Park*, the court pointed to the fact that the prosecutor's closing made clear that it was responsibility and not position that mattered for guilt. *Id.* at n.16. As other courts have further explained, "In other words, even if the jury instructions in this case were erroneous, if the applicable principles of law were communicated to the jury—through the arguments or evidence, for example—then [defendant] does not deserve a new trial." *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001); *see also Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Farley v. Bissinnette*, 544 F.3d 344, 347 (1st Cir. 2008); *Green v. St. Francis Hospital, Inc.*, 791 A.2d 731, 741 (Del. 2002); *Haas*, 450 A.2d at 1180.

Here, neither party introduced any evidence suggesting that any 2015 expenditures were part of Clean Harbors' claims or the "reasonable costs of environmental clean-up" analysis. Indeed, during the three-week trial, there was less than five minutes of testimony about post 2014 costs and all of it in a context which made clear that those costs were not part of the indemnification claim. (B437; B657). Witnesses on both sides who addressed the cost of remediation and its reasonableness, limited their testimony to costs incurred prior to December 31, 2014. (*See, e.g.*, B560-70; B558; B629-30; B632-33; B636; B640; B654-55). Moreover, Clean Harbors' counsel in closing argument stated for the jurors that in answering Question 3 it was to determine the "total reasonable amount of

expenditures from the beginning, from 1998 when they got the notices until December 31, 2014… ." (B682). He reiterated that point:

> Your job is to give us the whole picture: What was the reasonable amount that should have been spent from January of 1998 until---well, from notice in 1998 until December 31, 2014.

Id. UPC's counsel did not contradict that explanation, which was consistent with the Court's instruction. (B708-09; B711). "Indeed, both parties' opening and closing arguments reminded the jury only to consider damages within the indemnification period." *See* Ex. A, at 5.

It was clear from both parties' presentations that only pre-December 31, 2014 expenditures were part of the claim. On Clean Harbors' side, John Beals presented the cost of remediation that formed the basis for the recovery Clean Harbors sought. His testimony was expressly limited to pre-December 31, 2014. (B560-70). Similarly, Clean Harbors' expert, Steve Cullen, offered his expert opinion about the reasonableness of charges issued to UPC, but only through December 31, 2014. (B558).

UPC expert Jennifer Uhland offered the only testimony UPC presented with respect to the reasonableness of costs of remediation and each of her opinions were limited to December 31, 2014 and earlier, either by express reference to that date

or by reference to the amounts charged to UPC, which was in all instances on or before December 31, 2014. (B629-30; B632-33; B636; B640; B654-55).[27]

The openings, the evidence at trial, and the closings, coupled with a consideration of the jury instructions as a whole, eliminated any possibility that the fleeting reference to 2015 expenses played any part in the jury's answers to Question 3. Throughout the trial, both sides made it clear that only expenses through December 31, 2014 were in issue.

UPC also argues that the jury may have failed to account for amounts that UPC paid, and amounts for contamination caused by post-1994 events. As to the former, the trial judge expressly told the jury to not subtract the amounts paid by UPC, an amount not in dispute, because she would do so. (B711). If the jury deducted the sum notwithstanding the instruction, UPC received double credit because the sum was deducted to arrive at the judgment entered. As to the latter, the jury was expressly instructed that Clean Harbors was not entitled to be indemnified for expenses arising from post-1994 events. (B708).

Moreover, UPC waived the argument that the trial court cannot calculate damages from the answer to Question 3 by failing to specifically object on that ground at trial. Delaware Superior Court Civil Rule 51 prevents a party from

[27] The testimony of Martin Smith referenced in the Oepning Brief was expressly qualified as outside of the indemnification claim. (B437). The testimony of Uhland, addressed the reasonableness of remedy selection, not costs. (B657).

arguing the trial court erred by any instruction unless the party has objected to the instruction "stating distinctly the matter to which the party objects and the grounds of the party's objection." Like the former Rule 51 of the Federal Rules of Civil Procedure, the purpose of the rule is to "allow the trial court an opportunity to cure any defects in the instructions before sending the jury to deliberate." *Fogarty v. Near N. Ins. Brokerage, Inc.*, 162 F.3d 74, 79 (2d Cir. 1998); *see generally Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002).

The rule's "stat[e] distinctly" criteria requires a party to make an objection that is "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). "Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." *Id.* Objections to a verdict form are treated the same as objections to jury instructions. *Wolhar v. Gen. Motors Corp.*, 1998 WL 472785, at *3 (Del. Super. July 1, 1998), *aff'd*, 734 A.2d 161 (Del. 1999).

At no point during the trial did UPC ever object to the verdict form on the basis that it prevents the trial court from calculating damages (as the trial court long stated it intended to do) or on the ground that the form, and accompanying instructions did not limit the verdict to costs recoverable under the SPA. UPC's argument that the verdict form is improper and cannot be used to calculate

damages is waived because failure to ever "stat[e] distinctly" any objection on this ground constitutes a waiver. *Palmer*, 318 U.S. at 119; *Lesende v. Borrero*, 752 F.3d 324, 335 (3d Cir. 2014) ("Such an objection must be both cogent and specific to the alleged error.").

In addition, UPC waived any objection to the verdict form by (1) affirmatively advocating, in response to the two juror notes, that the trial court should simply direct the jury to follow the instructions on the verdict form; (2) by subsequently assenting to the trial court's proposed instruction that the jury follow the verdict form; and (3) by then not objecting to the trial court's instruction that the jury follow the verdict form. Any one of these three acts would be sufficient to constitute a waiver of objections to the verdict form. *United States v. Smith*, 818 F.3d 299, 302 (7th Cir. 2016); *United States v. Hansen*, 434 F.3d 92, 105-06 (1st Cir. 2006); *United States v. Jones*, 542 F.2d 186, 212 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). Here, UPC engaged in all three and, having done so, waived any objection to verdict form. (B713-14; B718).

The plain error standard applies when the objection is not presented below. *Sheehan*, 15 A.3d at 1255. "When reviewing for plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017); *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012) (quoting *Wainwright*

v. State, 504 A.2d 1096, 1100 (Del. 1986)). UPC cannot satisfy the plain error standard.

b. The Jury Questions Do Not Reflect Any Confusion.

UPC also argues that the jurors were confused about the damage calculation and bases that assertion on the two jury questions. Jury confusion arguments are regarded with skepticism. *Reinco, Inc. v. Thompson*, 906 A.2d 103, 110-11 (Del. 2006). In that case, this Court noted that where a verdict is "clearly" the result of confusion, a new trial may be warranted but cases supporting that proposition are limited. Indeed, the Court was "unable to find a case in any jurisdiction affirming a trial judge's decision to grant a new trial based on her speculative conclusion that the jury was confused." *Id.*, at n.15. In the present case, the questions to which UPC points do not reflect any confusion whatsoever about calculating damages or the answer to Question 3. The jury with both questions was inquiring about the procedural significance of addressing cross assertions of contract breaches. (B715-16; B719).

With two misstatements of the trial record, UPC argues that the judge confused the jury by answering the jury's questions with instructions that contradicted the instructions on the verdict form. First, UPC incorrectly represents that the verdict form told the jury "If you answered 'no' to Question 1, call the Bailiff." Opening Br. at 34. The form actually instructs the jurors to call the

Bailiff "when you have completed this form." UPC then incorrectly states that, in responding to their questions, the trial judge instructed the jurors to "answer *all* of "'the *questions*'" on the Verdict Form. *Id.* UPC even italicized "all." What the judge told the jury was: "There are four very specific questions, your job is to follow the instructions and answer the questions ... ." (A514). UPC could not have made its contradiction argument from the record correctly stated. Rather than contradicting the verdict form instructions, the judge's comments direct the jury back to them.

There is no basis to conclude that the jurors did not clearly understand what they had to do to determine the reasonable cost of an environmental cleanup of the Facility or to properly fill out the form.

5. The Instructions And Verdict Form Did Not Cumulatively Result In An Incorrect Charge.

Perhaps recognizing that its one-by-one criticisms of the various instructions rings hollow, UPC tried a *gestalt* approach, suggesting several of them together created prejudice. Instruction 4, a corrective instruction issued as the result of UPC disregard of a trial court ruling, did not preclude the jury from considering the days of UPC evidence asserting Clean Harbors adopted an excessively expensive remedy. The jury was clearly informed that Clean Harbors was not entitled to include profits in its claim and Clean Harbors' witness painstakingly went through

each of the claims backing out profits.[28] Instruction 7 made it clear that clean up caused by post-1994 contamination events were not to be included in the award. (B709). The suggestion that the jury had to be further told to subtract that which they were instructed not to include is an insult to a jury that showed itself up to the task of navigating a complicated case. Moreover, it is clear that the jury took its responsibilities seriously as it awarded approximately $1,500,000 less than Clean Harbors claimed.

UPC's argument comes down to "all of the apples in the bushel, individually, might be good, but collectively the bushel is rotten." It is folly.

[28] The profit instruction (No. 6) was also a corrective instruction given because UPC distorted the trial court's ruling to suggest Clean Harbors, in bad faith, secretly charged profits, to which it knew it was not entitled. (B534-45). UPC tried to turn a good faith, close call, contractual dispute into evidence of larceny. That this gambit was disingenuous was demonstrated by McDermott's testimony that UPC believed at the outset Clean Harbors could charge profits. (B581-82).

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROPERLY EXCLUDING SPECULATIVE EVIDENCE AND EVIDENCE WITH RESPECT TO REMEDIATION ON SITES THAT WERE NOT SHOWN TO BE SUBSTANTIALLY SIMILAR TO THE FACILITY.

A. Question Presented.

Did the trial court abuse its discretion by excluding speculative testimony and irrelevant, prejudicial evidence of activity on other properties with different characteristics?

B. Scope Of Review.

A trial court's decision 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 The Argument.

1. Speculative Evidence Is Not Admissible And Was Properly Excluded.

The arguments advanced with respect to Instruction 4 (*see supra* at pp. 32-35) also address UPC's complaint that such evidence was excluded. Under Delaware law, neither an expert nor lay witness may offer speculative testimony and predicting what another human being would have done with facts that never existed is quintessential speculation. The evidence was properly excluded.

2. Evidence Of Remediation Undertaken At Other Sites That UPC Acknowledged To Be Different From The Facility Was Properly Excluded.

UPC complains that the trial court should not have excluded testimony as to what was done on other properties in northern Wichita to address contamination. It is correct that in certain circumstances, matters extraneous to the trial at hand can be admitted to address an issue, "as a standard against which can be tested the reasonableness of the [party's] conduct." *Moon v. Advanced Med. Optics, Inc.*, 2010 WL 11500832, at *4-5 (N.D. Ga. Dec. 10, 2010). But, the touchstone that must be first satisfied is that the circumstances surrounding the other event must be substantially similar to the circumstances of the matter on trial. *Id.*; *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1195 (D.C. Cir.), *cert. denied*, 479 U.S. 853 (1986) (citing *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981)); *Slicer v. Hill*, 2012 WL 1435014, at *6 (Del. Super. Apr. 20, 2012).

It is clear that the required substantial similarity was lacking here. When UPC pressed for admission of evidence of remediation at other sites, the skeptical trial judge stated that she could not imagine how remediation at another site could bear on the choice of remediation at the Facility where water flow and geology was in issue and it "varies from yard to yard, let alone acre to acre, let alone mile to

mile to mile." (B601.11).[29] In response, UPC's counsel conceded: "Of course, he [the witness] will know and would say all sites are different, I don't think anybody disputes that." *Id.* Different, of course, is not substantially similar.

A trial judge has broad discretion to manage the conduct of a trial. *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008). Even where there is substantial similarity between a comparator and the event in issue at trial, the trial court may exclude the comparative evidence under D.R.E 403, where confusion and prejudice outweighs probative value. *Brooks*, 786 F.2d at 1195. The trial may properly exclude evidence of dubious relevance, which would require a "trial within a trial" because a "trial within a trial, based entirely on extrinsic evidence, invariably will lead to jury confusion." *Hoey v. State*, 689 A.2d 1177, 1180 (Del. 1997). It is obvious from common sense, the evidence presented at trial, and the colloquy on the issue that what remedial effort might be appropriate at a given site would depend on facts specific to each site: nature of the contamination, extent and location of the contamination, soil type, proximity to groundwater, business needs of the owner, etc. (B554-55). Therefore, the relevance of other cleanup sites is dubious, at best, and well within the discretion of the trial judge to exclude. *See, e.g.*, *Slicer*, 2012 WL 1435014, at *6. Even in the context of the information needed to support an

[29] B601.11 follows after B601 and includes a decimal point due to a copying error in Clean Harbors' Appendix.

alternative cleanup standard, UPC's witness and former KDHE regulator, Chris Carey, stated "It really varies on a site specific basis, and what the parties we were working with were trying to accomplish." (B614).

Moreover, error may not be predicated on exclusion of evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." D.R.E. 103. An offer is not adequate to preserve appellate rights if it does nothing more than describe the intended evidence. "[C]ounsel must explain the basis for admission or exclusion of evidence." *Weber v. State*, 457 A.2d 674, 680 n.7 (Del. 1983). A party offering evidence of other incidents has the burden of showing similarity between the two incidents. *Reddin v. Robinson Prop. Group Ltd. P'ship*, 239 F.3d 756, 760 (5th Cir. 2001). "The burden is on the proponent of the evidence to structure an offer of proof demonstrating the relevance of the evidence." *Woodstock v. Wolf Creek Surgeons, P.A.*, 2017 WL 3727019, at *3 (Del. Super. Aug. 30, 2017).

UPC made an offer of proof with respect to evidence regarding other sites it intended to adduce from Christopher Carey (a lay witness). Its offer did not include detail establishing that the characteristics of the properties or contamination was sufficiently similar to render testimony about those sites relevant. (B610.1). Indeed, in light of UPC's counsel's statement, it could not.

The trial court's decision to exclude evidence is reviewed for abuse of discretion. The trial court appropriately excluded evidence that would have significantly expanded the scope of the trial while offering nothing of probative worth, but likely creating confusion and prejudice. There was no abuse.

IV. THE EVIDENCE SUPPORTS THE JURY VERDICT.

A. Question Presented.

Is the jury verdict supported by the evidence?

B. Scope Of Review.

A jury verdict is presumed to be correct and will be upheld unless it is against the great weight of the evidence. *Mitchell v. Haldar*, 883 A.2d 32, 43 (Del. 2005).

C. Merits Of The Argument.

UPC argues that there was insufficient evidence to support the jury's conclusion that the reasonable cost of the clean-up was $9,180,445.76. The thrust of its argument is that the jury should have believed UPC's evidence instead of that adduced by Clean Harbors. That is decidedly a losing hand. A party seeking to overturn a verdict on a weight of evidence argument must show "the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result." *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *see also Himes v. Gabriel*, 972 A.2d 312 (Del. 2009).

UPC cannot come close to meeting that standard. Clean Harbors offered evidence of the amount spent, excluding profits, from 1998 through the end of 2014. (B560-70). It offered expert testimony of the reasonableness of the expenditures and approach. (B550; B558). It offered the evidence to explain the

remediation Clean Harbors conducted, the reasons for selecting the approaches it selected, the standards mandated by the government and the role the government standards played in defining the scope and cost of the remediation. *(B155-70*; *B227-29*; A114-17; B424-26; *B131-132*; *A180-82)*. It offered evidence to establish that the contamination it remediated occurred prior to December 31, 1994. (B442-43). "[T]he jury heard and considered a classic battle of the experts and verdict demonstrates that the jury found Clean Harbors' evidence more persuasive." *See* Ex. A at 4. Ample evidence supports the jury's verdict.

V. THE TRIAL COURT DID NOTABUSE ITS DISCRETION BY PROPERLY DENYING THE MOTION FOR A NEW TRIAL.

A. Question Presented.

Did the trial court abuse its discretion by properly denying UPC's motion for a new trial?

B. Scope Of Review.

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

C. Merits Of The Argument.

"'A new trial is warranted only if the jury's verdict is 'clearly the result of passion, prejudice, partiality, corruption,' [or confusion,] or the evidence 'preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.'" *Reinco, Inc.*, 906 A.2d at 111 (citations omitted). "On a motion to grant a new trial the verdict must be manifestly and palpably against the weight of the evidence or for some reason, or a combination of reasons, justice would miscarry if it were allowed to stand." *McClosky v. McKelvy*, 174 A.2d 691, 693 (Del. Super. 1961). As demonstrated above, the jury instructions passed muster, the challenged evidentiary decisions were proper and there was ample evidence to support the verdict. There was no abuse of discretion in denying a new trial.

ARGUMENT ON CLEAN HARBORS' CROSS-APPEAL

VI. THE TRIAL COURT IMPROPERLY DENIED CLEAN HARBOR'S APPLICATION FOR AN AWARD OF FEES AND COSTS.

A. Question Presented.

Did the trial court err in failing to award Clean Harbors its cost and fees incurred in this litigation? *See* Ex. B.

B. Scope Of Review.

Errors of law are reviewed *de novo*. *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 426 (Del. 2012).

C. Merits Of The Argument.

The nearly month-long trial below occurred because UPC, employing a string of ever-changing excuses, refused to honor its contractual obligation to hold Clean Harbors "harmless" as expressly required by the SPA. Under Delaware law, a party forced to litigate in order to enjoy the benefits of a contractual indemnification promising to hold the indemnitee harmless, is entitled to have its fees and costs so incurred reimbursed by the indemnitor:

> Our case law recognizes that where, as here, a party… is contractually entitled to be held harmless, that party is entitled to its costs and attorneys' fees incurred to enforce the contractual indemnity provision. Any other outcome would not result in [the indemnitee] being held harmless.

Delle Donne & Associates, LLP v. Millar Elevator Serv. Co., 840 A.2d 1244, 1256 (Del. 2004). The *Delle Donne* decision reaffirmed this Court's holding in *Pike*

Creek Chiropractic Ctr. v. Robinson, 637 A. 2d 418 (Del. 1994), where the court also noted that an indemnitee is not held harmless if it must incur cost and attorney's fees to enforce the indemnification. *Id.* at 422.

The holdings in both *Pike Creek* and *Delle Donne requires* the award of fees and costs in favor of an indemnitee entitled to be held harmless. *Id.* The underlying rationale of the *Pike-Delle Donne* mandate is irrefutable. "To hold otherwise … will create perverse economic incentives for indemnitors, and potentially vitiate the value of indemnification agreements to indemnitees." *Chamison v. Healthtrust, Inc.*, 735 A. 2d 912, 927 n.57 (Del. Ch. 1999).[30] The indemnitor can "avoid such costs and attorney's fees by paying the amount due without the necessity of suit." *Pike Creek*, 637 A.2d at 422-23 (quotation marks and citations omitted).

[30] This Court came to a similar conclusion with respect to indemnification of directors under Section 145 of the DGCL, holding that "…without an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561-62 (Del. 2002). The same applies to advancement. *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 183 (Del. Ch. 2003). "[G]iving full effect to § 145 prevents a corporation from using its 'deep pockets' to wear down a former director, with a valid claim to indemnification, through expensive litigation." *Stifel*, 809 A.2d at 561.

While it is not clear that "breadth" in the context of the *Pike Creek-Delle Donne* doctrine means anything more than the obligation of the indemnitor to hold the indemnitee harmless, the trial court correctly found the indemnification in the present case to contain "broad 'any and all' language similar to the clauses in *Pike Creek* and *Delle Donne*…." *See* Ex. A at 17. As in those authorities, the SPA indemnification, in addition to the "any and all" language used to define which environmental liabilities were subject to the indemnification, contained the other indicator of breadth to which this Court pointed in *Pike Creek* and *Delle Donne*; the right to recover fees and expenses for indemnified claims. Indeed, the indemnification provision in the present case goes beyond those in the *Pike Creek* and *Delle Donne* cases because the SPA required UPC to hold Clean Harbors harmless for any environmental liability that arose as the result of any event that occurred prior to UPC divesting itself of the subject property, irrespective of whether UPC was the "guilty party" causing the contamination. (A64; A98-99). The indemnitors in *Pike Creek* and *Delle Donne* only indemnified against injury arising from their actions. *Pike Creek*, 637 A.2d at 419-20; *Delle Donne*, 840 A.2d at 1249.

Moreover, the third party claim limitation on which the trial judge built her justification for denying fees and costs necessarily existed in the indemnification in *Delle Donne* that gave rise to the fee award there. The indemnification ran

between two entities and was for bodily injury claims. *Delle Donne*, 840 A.2d at 1249. Since the entities have no bodies to injure, the only claims that could have triggered an obligation to indemnify were third party claims asserted by natural persons.

Relying on *Home Ins. Group v. Am. Ins. Group*, 2003 WL 22683008 (Del. Super. Oct. 30, 2003),[31] the trial judge reasoned that under the SPA, "attorneys' fees may only be recovered in a particular type of action, which does not include the one at issue here." *See* Ex. A at 18. The particular type of action she had in mind, was third party claims. One need look no further than *Delle Donne* to see the fault lines in that reasoning. In *Delle Donne*, the indemnification expressly provided for the recovery of fees only in bodily injury actions, but this Court, nonetheless, ruled that the indemnitee was entitled to recover fees and costs in the enforcement suit which was decidedly not a bodily injury matter and therefore not the "particular type of action" for which fees were contemplated by the *Delle Donne* indemnification agreement. Moreover, because bodily injury claims between Delle Donne and Millar were not possible, the only fees expressly covered by the indemnification were third party claims. That did not preclude the award of fees and costs in the *inter se* enforcement action.

[31] The *Home Insurance* decision appears to be based on the faulty assumption that the contract in *Pike Creek* expressly provided for fees in actions to enforce the indemnification. 2003 WL 22683008, at *5.

The trial judge's reasoning fundamentally misses the point of *Pike Creek* and *Delle Donne*. In both of those cases, the contract in issue was silent on fees incurred to enforce the indemnification. This Court ruled that the indemnitees in those cases were entitled to fees and costs for its enforcement effort because to do otherwise "would not result in [the indemnitee] being held harmless." *Delle Donne*, 840 A.2d at 1256.[32] That observation inescapably applies to Clean Harbors. An award of fees and costs in the present case is mandated by *Pike Creek* and *Delle Donne*.

[32] The court equated silence as to fees for an enforcement action, coupled with an express provision for fees in other types of actions as an expression of an intent not to provide for enforcement action fees. That reasoning would have precluded the fees awarded in *Pike Creek* and *Delle Donne*, both of which addressed indemnifications that were silent on fees for enforcement actions.

CONCLUSION

This Court should affirm the trial court's summary judgment decision and the judgment entered on the jury verdict. This Court should reverse the trial court's decision with respect to fees and costs and remand to the trial court for a determination as to the amount of fees to be awarded to Clean Harbors, which should include the fees and cost of this appeal.

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