EFiled: Oct 04 2018 01:37PM EDT
Filing ID 62522058
Case Number 370,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

US ECOLOGY, INC., and EQ INDUSTRIAL SERVICES, INC., Plaintiffs-Below Appellants, v. ALLSTATE POWER VAC, INC., and ASPV HOLDINGS, INC., Defendants-Below, Appellees.	No. 370, 2018 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 2017-0437-AGB

ANSWERING BRIEF OF APPELLEES ALLSTATE POWER VAC, INC., AND ASPV HOLDINGS, INC.

OF COUNSEL:

William T. Pruitt
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654-5108
(312) 862-2000

Warren Haskel
Benjamin Cooper
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022-4611
(212) 446-4800

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jon E. Abramczyk (#2432)
D. McKinley Measley (#5108)
Alexandra M. Cumings (#6146)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200

Attorneys for Defendants Allstate Power Vac, Inc. and ASPV Holdings, Inc.

October 4, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

NATURE OF PROCEEDINGS

This appeal is the latest attempt by Plaintiffs EQ Industrial Services, Inc. ("EQIS") and US Ecology, Inc. to re-write the terms of the parties' 2015 Stock Purchase Agreement (the "SPA") so that it would require Defendants Allstate Power Vac, Inc. ("ASPV") and ASPV Holdings, Inc. ("Holdings") to pay for certain charges incurred by US Ecology under its own umbrella insurance policies. Plaintiffs ask this Court to ignore the plain and unambiguous terms of the SPA—in which EQIS sold all of ASPV's stock to Holdings—and recognize a liability of ASPV that never existed, a breach of the SPA by Holdings that never occurred, and a way out of the SPA's general release provision, which unambiguously bars Plaintiffs' claims. Plaintiffs' brief provides no grounds for setting aside the lower court's order dismissing their Complaint.

By way of background, over a year after ASPV's sale, Plaintiffs demanded that Holdings reimburse US Ecology for post-sale insurance charges related to ASPV's pre-sale business. Holdings refused to do so, and Plaintiffs filed the instant litigation.

Following two rounds of briefing and oral argument in which Defendants repeatedly raised, and Plaintiffs repeatedly admitted, the absence of any pre-sale agreement or provision in the SPA establishing a reimbursement obligation on the part of Holdings or ASPV, the lower court correctly identified the narrow scope of

this dispute: whether any provision in the SPA created an obligation that Holdings allegedly breached by not paying for ASPV's purported liabilities. The lower court properly held that no such provision existed and thus dismissed the breach of contract claim against Holdings.

In Plaintiffs' myopic view of the transaction, the lower court's decision violated the rule of stock sales in Delaware because all of ASPV's liabilities transferred by operation of law. Defendants do not take issue with this statement of law, but that does not mean that *Holdings* (the purchaser and sole defendant to the breach of contract claim) became directly and separately responsible for any such liabilities of ASPV. Black letter Delaware law shows just the opposite. *See Allied Capital Corp. v. GC-Sun Holdings, LP*, 910 A.2d 1020, 1038 (Del. Ch. 2006) ("[O]ur corporation law is largely built on the idea that the separate legal existence of corporate entities should be respected—even when those separate corporate entities are under common ownership and control.").

But even if EQIS could have established that Holdings is separately and directly liable for ASPV's liabilities as a consequence of the stock sale, EQIS's contract claims are still properly dismissed because ASPV was never obligated to reimburse US Ecology for the insurance charges at issue. Despite claiming that ASPV had a post-sale obligation to reimburse US Ecology for charges that US Ecology incurred under US Ecology's own insurance policies, Plaintiffs have

failed to identify any contract, written or otherwise, in which ASPV agreed to this alleged reimbursement obligation to either US Ecology or even to the insurers. As the lower court observed, this may explain why Plaintiffs' only breach of contract claim is an alleged breach of the SPA by Holdings.

The best EQIS can do is point to two pre-closing financial statements incorporated into the SPA that list insurance reserves for US Ecology's insurance policies as ASPV's pre-closing "liabilities." But the SPA makes clear that these statements were not designed to account for, or establish a post-Closing reimbursement liability for, either ASPV or Holdings. Rather, the financial statements were expressly based on EQIS's *pre-closing* accounting policies, which reflected US Ecology's practice, at two specific points in time months before the sale, of having ASPV reimburse US Ecology for ASPV-related insurance charges when ASPV was US Ecology's subsidiary—a relationship that Plaintiffs knew would end with the sale.

Separately, as the lower court recognized, the SPA contains a general release provision (the "General Release") in which EQIS and US Ecology unambiguously released any post-sale claims (including, expressly, claims that "accrued" after the sale) based on "any" "occurrence" or "event" (such as the underlying accidents and workers' injuries) that took place before the sale. Because it found that EQIS had failed to state any breach of contract claim, the lower court did not address whether

those claims were also barred by the General Release, but the court correctly found that the General Release justified dismissal of US Ecology's unjust enrichment claim.

The lower court properly rejected US Ecology's argument that its unjust enrichment claim arose from a post-closing occurrence, which US Ecology viewed as being Holdings' post-Closing refusal to pay the insurance charges. While Holdings' refusal to pay meant that US Ecology's claim *accrued* after closing, the events underlying the reimbursement demand (i.e., the accidents and injuries leading to claims covered under the US Ecology Policies) all occurred before the sale. The same is true of EQIS's breach of contract claims and, thus, the SPA's General Release provides alternative grounds for upholding the lower court's dismissal of those claims.

Plaintiffs are therefore left with a complaint that ASPV has received a windfall because it may still benefit from US Ecology's insurance policies without an obligation to cover certain insurance costs related to its pre-sale business. But as the lower court correctly recognized, Plaintiffs were sophisticated parties represented in the sale transaction by able counsel. If Plaintiffs wanted to make Holdings or ASPV responsible for these trailing costs, they could have negotiated for such a provision and paid the price. Instead, they did the opposite: Plaintiffs released Defendants from any claim Plaintiffs could have had related to these

charges. Plaintiffs received $58 million for ASPV, and there is nothing inherently inequitable with US Ecology retaining liability for insurance charges related to ASPV's business during the period it owned the company.

For the reasons set forth below, Defendants respectfully request that the Court affirm the lower court's holding.

SUMMARY OF ARGUMENT

I. Denied. The lower court properly held that EQIS failed to state a claim for breach of contract against Holdings (the only defendant to the breach of contract claim) where it was unable to identify a specific provision in the SPA requiring Holdings to reimburse EQIS for post-sale insurance charges incurred by US Ecology under its own insurance policies. And contrary to Plaintiffs' assertion, even if ASPV (the company whose stock Holdings acquired) had a pre-closing obligation to reimburse US Ecology for these insurance charges, which it did not, that liability would not separately become a direct liability of Holdings simply because Holdings became ASPV's parent through a stock sale. The lower court's ruling is also properly upheld on the independent grounds that (i) EQIS failed to allege that US Ecology's liability for charges from its own insurers became ASPV's liability post-sale, and thus that liability necessarily remained with US Ecology in the absence of any term to the contrary in the SPA, and (ii) any alleged liabilities associated with US Ecology's insurance policies were released pursuant to the SPA's General Release.

II. Denied. The lower court properly dismissed US Ecology's unjust enrichment claim as released pursuant to the SPA's General Release, which expressly applies to claims that accrue after the SPA's closing so long as they arise from occurrences that took place before the closing. The lower court correctly

recognized the distinction under Delaware law between claim accrual (which here was ASPV's refusal to pay) and the occurrences underlying the claim (which here were the alleged pre-closing injuries that led to covered losses under US Ecology's occurrence-based insurance). US Ecology's arguments conflate the two concepts and contend that ASPV's refusal to reimburse EQIS was the "occurrence" giving rise to its claims. The lower court properly recognized that EQIS's construction would result in nearly all possible claims falling outside the release simply because the refusal to pay took place after closing. The well-reasoned opinion of the court was correct as a matter of law and should be upheld.

STATEMENT OF FACTS

A. US Ecology's Umbrella Insurance Policies And Pre-Closing Intercompany Payment Practice

ASPV is a leading provider of environmental and waste management services in the United States. A49. Before its sale in November 2015, ASPV was a direct subsidiary of EQIS, which owned all of the outstanding and issued stock of ASPV. A22 ¶ 9. EQIS, in turn, is a wholly owned subsidiary of US Ecology. *Id.* Both EQIS and US Ecology provide a variety of environmental services to commercial and governmental entities. *Id.*

In the years preceding ASPV's sale, US Ecology purchased and maintained automobile and general liability insurance (the "Auto/GL Policies") and workers' compensations policies (the "WC Policies," and together with the Auto/GL Policies, the "US Ecology Policies") that provided coverage to US Ecology and several of its subsidiaries, including ASPV. A23 ¶ 14. The US Ecology Policies covered, among other things, accidents involving subsidiaries' personnel and equipment that were the subject of either workers' compensation claims or third-party litigation. *Id.* ¶ 15.

The US Ecology Policies are occurrence-based policies, which means they provide coverage for claims arising from events (or "occurrences") that take place during the policy period, regardless of when the claim is made against the insureds.

Br. at 8. All of the insurance charges at issue in this lawsuit relate to events and alleged injuries that took place while US Ecology owned ASPV. A20 ¶ 2.

The US Ecology Policies have two separate expense and reimbursement structures by which the insurers would bill, and US Ecology would pay, the insurance charges related to ASPV's business while US Ecology indirectly owned the company (the "US Ecology Insurance Charges" or "Insurance Charges"). For the Auto/GL Policies, US Ecology contracted with its insurers for the insurers to directly handle claims and then, to the extent the amounts the insurers paid individually or cumulatively fell within the policy's deductibles or above its limits, US Ecology, as the owner of the policies, would reimburse the insurer. A5-6 ¶¶ 14-15. For the WC Policies, US Ecology would pay the claim and related expenses and then, pursuant to the insurance agreements, the insurers would reimburse US Ecology for the amounts that fell above the policy's deductibles and within its limits. A6 ¶ 16. Before the stock sale, US Ecology would then have ASPV reimburse it for the Insurance Charges. A5. However, at no point in time did US Ecology and ASPV have any contract that created an ongoing obligation on the part of ASPV to reimburse US Ecology for the Insurance Charges. A47-48.

B. Holdings Acquires ASPV's Stock Pursuant To A 2015 Stock Purchase Agreement

On August 4, 2015, Holdings entered into the SPA with US Ecology's subsidiary, EQIS, pursuant to which Holdings purchased all of the issued and

outstanding capital stock in ASPV for $58 million. A25 ¶ 19. Neither US Ecology nor ASPV were parties to the SPA, which was a heavily negotiated agreement in which both parties were represented by sophisticated counsel. *Id.* The transaction closed on November 1, 2015 (the "Closing"). A54.

i. The SPA's Treatment Of Insurance Charges

The SPA does not include any provision specifically addressing the treatment of the US Ecology Policies after the Closing. Nor is there any language in the SPA providing that ASPV or Holdings assumed any ongoing obligation to reimburse US Ecology for the disputed Insurance Charges. The SPA's silence on these points contrasts with portions of the agreement that expressly address post-Closing insurance coverage and related charges under insurance plans other than the US Ecology Policies. Specifically, Section 8.09(f) provides that designated "Continuing Employees" would retain coverage under certain medical and dental insurance plans held by US Ecology and that ASPV would be required to reimburse US Ecology following the Closing for any payments US Ecology made to its insurers for claims related to those employees. A120 § 8.07; A145-46 § 8.09(f). That section of the SPA lays out in painstaking detail the payment collection methods, reimbursement calculations, and time period this coverage for ASPV would remain in place. *Id.*

ii. The SPA's General Release

The SPA also contains a broad General Release in which EQIS and its "Affiliates" (a term that includes US Ecology) released any and all claims they ever had or might have against Holdings and ASPV. A121-22 § 8.08; A132 § 15.07(b). Pursuant to the General Release, US Ecology and EQIS released each and every claim, obligation, or liability that accrued prior to the Closing and those "that accrue at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date":

> SECTION 8.08 Release. Notwithstanding anything contained herein to the contrary, in consideration of the execution, delivery and performance by Seller and Buyer of this Agreement, effective as of the Closing, (i) *Seller on behalf of itself and each of its past, present and future Affiliates . . . hereby RELEASES, WAIVES, ACQUITS AND FOREVER DISCHARGES Buyer, the Company and each Company Subsidiary* and each of Buyer's past present and future Affiliates, beneficiaries, successors and assigns and their respective officers, directors, partners, members, trustees, employees, equityholders, agents, attorneys and representatives (each, a "Buyer Released Party"), *from any and all claims, demands, Proceedings, orders, losses, Liens, causes of action, suits, obligations, Contracts, agreements (express or implied), debts and liabilities, of whatever kind or nature, whether in law or equity, that any Seller Releasing Party ever had or may now have against any Buyer Released Party* to the extent related to the Company or any Company Subsidiary or Seller's ownership of the Shares or equity interests of any Company Subsidiary, whether known or unknown, suspected or unsuspected, *that have accrued prior to the Closing or that accrue at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date*, whether based on Contract or any Applicable Law in any jurisdiction. . . . It is the intention of Seller and Buyer that such release be effective as a bar to

> each and every claim, demand, cause of action, suit or similar action hereinabove specified.

A121-22 § 8.08 (emphasis added).

The General Release includes an express carve-out for claims relating to certain employee and environmental matters (the "Carve-Out"). *Id.* The Carve-Out does not, however, exclude any rights or obligations associated with US Ecology's automobile, general liability, or workers' compensation insurance policies. *Id.*

iii. ASPV's Historical Financial Statements

Failing to identify any contract obligating ASPV or Holdings to reimburse the disputed Insurance Charges, Plaintiffs have resorted to relying on certain provisions of the SPA that they claim evidence such an agreement. Plaintiffs have pointed to the fact that Section 4.07 of the SPA incorporates certain of ASPV's financial statements, which EQIS represented and warranted were ASPV's financial condition as of "the respective [pre-Closing] dates . . . and for the respective [pre-Closing] periods indicated" based on "Seller [EQIS] Accounting Policies," which the SPA defines to mean "solely the principles used by the Company in the Working Capital Accounts." A92-93 § 4.07; A137 § 15.07(b). The term "Working Capital Accounts" is, in turn, defined to "mean the line items of the Working Capital set forth on Annex III." A85 § 2.02(c). The parties agreed to define Working Capital based on EQIS's pre-Closing accounting policies for the

twelve months ending in the last complete fiscal month before the month of the Closing (i.e., October 2015) to determine the working capital adjustment for post-Closing adjustments to the purchase price. *Id.*

However, Section 2.02(c) and Section 4.07 do not, however, provide that the financial statements were to be made current through the date of the Closing or calculated in accordance with the generally accepted accounting practices ("GAAP"). *Id.* Nor does Section 2.02(c) anywhere provide that all assets and liabilities attributed to ASPV for the purpose of calculating working capital would remain ASPV's assets and liabilities post-Closing. *Id.* Instead, the pre-Closing financial statements include certain assets attributed to ASPV that in fact belong to US Ecology, not ASPV, and that ASPV did not take with it in the sale. A494 ¶ 7. For instance, among the ASPV "assets" identified in the the financial statements are amounts for pre-paid insurance coverage (listed as "APV Prepaid In[sur]ance") for insurance policies that US Ecology owned and did not transfer to ASPV or Holdings after the Closing. *Id.* ¶ 8. Similarly, the financial statements include line items that represent payments and expenses related to the defense of claims associated with the US Ecology Policies that were not repayable by the insureds. *Id.*

C. Procedural History

Roughly a year after the Closing, US Ecology—not the insurers—demanded that Holdings reimburse US Ecology for the post-Closing Insurance Charges US Ecology paid arising from ASPV's operations while it was still a subsidiary of US Ecology. A21 ¶ 16-17. Consistent with the clear language of the SPA, which did not allocate these Insurance Charges to ASPV following the sale, Holdings refused to make the demanded payments. *Id.*

Several months later, on June 8, 2017, Plaintiffs filed this lawsuit in the lower court asserting four claims against ASPV and Holdings. In Count I, EQIS asserted a breach of contract claim against Holdings, but not ASPV, alleging that it had breached the SPA by refusing to pay Plaintiffs for the disputed Insurance Charges. A34-35 ¶¶ 44-47. In Count II, EQIS alleged that Holdings—and again, not ASPV—breached the implied covenant of good faith and fair dealing by refusing to assume the liability associated with the US Ecology Insurance Charges despite the express terms of the SPA governing the parties' relationship and releasing ASPV and Holdings from any claims or obligations relating to pre-sale events. A35 ¶¶ 48-51. Count III, brought by both Plaintiffs, asserted a duplicative claim for declaratory judgment seeking a ruling that ASPV and Holdings are responsible for the US Ecology Insurance Charges. A35-36 ¶¶ 52-54. In Count IV, US Ecology asserted an unjust enrichment claim against ASPV, arguing that it

had been unjustly enriched by US Ecology's continued payment of the US Ecology Insurance Charges for claims arising out of ASPV's pre-Closing business. A36-37 ¶¶ 55-59.

D. The Lower Court's Memorandum Opinion

In a Memorandum Opinion dated June 18, 2018 (the "Opinion"), the lower court granted Defendants' motion to dismiss in its entirety and denied Plaintiffs' motion for partial summary judgment. The lower court properly dismissed Plaintiffs' claims for three independent reasons.

First, the lower court noted that, despite asserting a breach of contract claim, EQIS failed to identify any provision of the SPA obligating Holdings to reimburse EQIS or US Ecology for the disputed Insurance Charges. Op. at 12. The lower court recognized that under Delaware law, Holdings did not become directly and separately liable for ASPV's alleged pre-Closing obligations simply by acquiring ASPV, so the only way for Holdings to be liable for the Insurance Charges is "by the [SPA] independently creating a contractual reimbursement obligation." *Id.* at 14. Because no such provision existed, EQIS's breach of contract claim failed.

Second, the lower court was unpersuaded by EQIS's cursory defense of its implied covenant claim and determined there was no gap to fill in the SPA. *Id.* at 16-18. Rather, the lower court recognized that the parties had actually "anticipated that there were circumstances under which Holdings would be obligated to

reimburse EQIS for certain [ASPV]-related insurance payments" following the Closing and that EQIS's claim that the parties to the SPA understood that "*all* of the liability of [ASPV] . . . would be transferred to Holdings" was merely an impermissible repackaging of its breach of contract claim.[1] *Id.* at 18 (emphasis in original).

Finally, the lower court found that the unambiguous language of the SPA's General Release released US Ecology's unjust enrichment claim. *Id.* at 19-23. Specifically, the lower court held that the General Release, which expressly applies to "any and all claims . . . that have accrued prior to the Closing or that accrue at or after the Closing as a result of any, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date," encompassed US Ecology's claim for reimbursement of the disputed Insurance Charges, which the court viewed as "indisputably the result of automobile accidences, workers injuries, and the like that occurred before the Closing." *Id.* at 21.

[1] The court similarly found that Plaintiffs were not entitled to a declaratory judgment that Defendants were responsible for the US Ecology Insurance Charges as that claim was duplicative of Plaintiffs' breach of contract and unjust enrichment claims and thus failed on the same basis. *Id.* at 23 (citing *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980, at *29 (Del. Ch. Nov. 26, 2014)).

ARGUMENT

I. THE LOWER COURT'S RULING THAT EQIS FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT WAS PROPER UNDER DELAWARE LAW

A. Question Presented

Whether the lower court properly dismissed EQIS's breach of contract claim against Holdings when EQIS failed to identify any language in the SPA obligating Holdings to reimburse US Ecology for the disputed Insurance Charges and where it failed to identify any pre-Closing reimbursement obligation on the part of ASPV that would have transferred automatically in the stock sale. Defendants argued this issue in their motion to dismiss and opposition to summary judgment. A52-62; A476-483; A683-688.

B. Scope of Review

This Court reviews *de novo* the grant of a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6). *See Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

C. Merits of Argument

EQIS asserted its breach of contract claims against Holdings, the buyer in the stock sale, as opposed to ASPV, which issued the stock purchased in the transaction. The lower court recognized that to state these claims against Holdings, EQIS would need to identify a provision of the SPA in which Holdings, as the only party to the SPA on the buyer side, expressly agreed to the alleged

reimbursement obligation. The lower court found that EQIS had failed to identify such a provision, and its ruling should be upheld in light of Plaintiffs' continued inability in this appeal to identify such a provision. The lower court also properly rejected EQIS's related argument, repeated here, that a purchaser in a stock sale (here, Holdings) separately and directly assumes the liabilities of the company whose stock it purchased. This contention runs afoul of longstanding and foundational principles in Delaware corporate law and was properly rejected.

The lower court's ruling is also properly upheld on two additional grounds, which the lower court did not need to address given its ruling above: EQIS failed to state any contract claim (1) because EQIS cannot support the assumption underlying its breach claim, which is that ASPV (the subject of the stock sale) ever had an obligation to pay the disputed Insurance Charges, and (2) because, even if such an obligation existed—which it did not—it would have been released under the SPA's General Release.

i. No Provision Of The SPA Obligates Holdings To Reimburse EQIS For The Disputed Insurance Charges

EQIS asserted its breach of contract claim against Holdings only, because EQIS and Holdings were the only parties to the SPA. Op. at 10-11. But as the lower court recognized, EQIS failed to point to any language in the SPA stating that *Holdings* was obligated after the Closing to reimburse Plaintiffs for the US Ecology Insurance Charges. *Id*. at 14.

This silence is in stark contrast to provisions in the SPA that expressly require Holdings to reimburse US Ecology for other insurance coverage that US Ecology owned but that Holdings or ASPV would have access to following the Closing. In particular, Section 8.09(f) of the SPA states that Holdings is required to reimburse US Ecology for the medical and dental insurance of "Continuing Employees," which includes the employees of ASPV and its subsidiaries as of the Closing. A120 § 8.07; A145-46 § 8.09(f). Like the US Ecology Policies, the policies addressed in Section 8.09(f) are umbrella insurance policies purchased by US Ecology on behalf of various subsidiaries, including ASPV, and required US Ecology to make payments on account of claims related to ASPV's pre-sale business. *Id.*

The lower court properly found that the SPA's express language imposing a post-Closing ASPV reimbursement obligation for specific insurance policies owned by US Ecology, but not the policies at issue here, demonstrates that the parties understood how to allocate post-Closing insurance liabilities and that they chose not do so for the disputed Insurance Charges. That ruling was proper under Delaware law. *See Delmarva Health Plan, Inc. v. Aceto*, 750 A.2d 1213, 1216 (Del. Ch. 1999) (applying the "interpretative maxim [that] . . . the expression of one thing is the exclusion of another" to find that a certain medical procedure listed in one section of an agreement necessarily meant that its omission from another

disputed section was purposeful); *iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257, at *5 (Del. Ch. July 29, 2016) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.").

Unable to point to any SPA provision expressly obligating Holdings to reimburse the disputed Insurance Charges, EQIS argued below that this obligation was *implied* by Section 1.01, which simply sets out Holdings' payment obligation in exchange for ASPV's stock and which, as the lower court recognized, was an obligation that Holdings undisputedly fulfilled. Op. at 11-12. Thus, the lower court found that EQIS did not actually argue that Holdings "breached any literal terms of Section 1.01 or any other Provision in the Purchase Agreement." Op. at 12.

EQIS takes issue with that finding on appeal. In addition to arguing, incorrectly, that Holdings never raised this argument below,[2] EQIS contends that,

[2] Defendants repeatedly raised Plaintiffs' failure to point to any contractual obligation of Holdings to reimburse Plaintiffs for the disputed Insurance Charges in its briefs below. *See, e.g.*, A48 ("Plaintiffs do not point to any contractual obligation that ASPV had to make these [insurance payments], nor did the SPA require ASPV or ASPV Holdings to assume such liabilities after the closing."); A56 ("If US Ecology wanted to require ASPV or ASPV Holdings to reimburse US Ecology for post-Closing insurance expenses US Ecology paid to its insurers, it should have provided for such payments in the SPA (as it did with respect to other post-Closing insurance obligations.")); A472 ("Plaintiffs have identified no pre-Closing obligation on the part of ASPV to reimburse US Ecology for these insurance charges and, thus, no such

even in the absence of a provision in the SPA obligating Holdings to pay the disputed Insurance Charges, the lower court should nonetheless have found Holdings liable for breach of the SPA because, as the purchaser in a stock sale, it separately and directly assumed the liabilities of the company whose stock it purchased (ASPV) "by operation of Delaware law." Br. at 20. EQIS's argument conflates two principles.

There is no dispute that, as a matter of Delaware law, both the assets and liabilities of a company *transfer* in a stock sale. But that does not mean that the purchaser *separately and directly assumes* those liabilities, as Plaintiffs contend. As the lower court recognized, accepting EQIS's argument would turn Delaware corporation law on its head—in particular, the longstanding and foundational principle that, absent circumstances justifying veil piercing, a parent is not liable for the liabilities of its subsidiary. *See Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684 (Del. 1959) ("The corporation is an entity, distinct from its stockholders even if the subsidiary's stock is wholly owned by one person or corporation. Of course, the corporate fiction may be disregarded to prevent fraud, and a wholly-owned subsidiary may sometimes be treated as an

---

obligation carried over as part of the stock sale."); A747 ("[P]laintiffs are claiming that ASPV and ASPV Holding should be liable to plaintiffs for these insurance bills[,] . . . but plaintiffs haven't pointed to a single provision in the SPA or any other contract that would make ASPV liable for the bills that US Ecology must pay its insurers.").

instrumentality of the parent. But this principle has no application to this [breach of contract] case.") (citations omitted); *Medi–Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *8 (Del. Ch. Mar. 4, 2004) (holding that a parent company was not liable for its subsidiary's breach of contract where there was no basis for piercing the corporate veil); *Allied Capital*, 910 A.2d at 1038.

EQIS bases its argument on a misreading of the Delaware Superior Court's decision in *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726 (Del. Super. Ct. Sept. 25, 2015), which EQIS reads as establishing that the buyer in a stock sale separately and directly assumes the liabilities of the company whose stock it acquired. Br. at 21-22. But in *TrueBlue*, the buyer brought a claim for breach of a stock purchase agreement, contending that the seller had agreed to retain liability for an admitted contractual obligation of a subsidiary of the acquired company following the sale. *See* 2015 WL 5968726, at *3. Thus, the question in *TrueBlue* was simply whether the *seller* retained the liability. The court did not address whether the purchaser became directly liable for the target company's liabilities by virtue of a stock sale, because that issue was not relevant to the claim before it.[3] Thus, the *TrueBlue* decision does not in any way undermine the lower

[3] EQIS selectively quotes the Superior Court's statement in *TrueBlue* that "the obligations of a company whose stock is sold . . . would become obligations of the purchasing company absent an express agreement to the contrary." *Id.* at *3. The only way to read this statement consistent with Delaware law is that the court intended simply to convey that Staffing Solutions' obligations

court's finding that, under Delaware law, a purchaser in a stock sale does not directly assume the liabilities of the company whose stock it acquires absent an express contractual provision stating so. EQIS admits that the SPA contains no such provision.

ii. ASPV Had No Pre-Closing Obligation to Reimburse US Ecology for the Disputed Insurance Charges That Would Have Transferred in the Stock Sale

Even if EQIS was correct that a buyer in a stock sale directly assumes the liabilities of the company it purchases (thereby making Holdings a proper defendant to EQIS's breach of contract claim)—and it is not—EQIS cannot show that the reimbursement obligation it alleges was a pre-Closing obligation of ASPV. Defendants take no issue with EQIS's statement that Holdings purchased ASPV "as an intact corporate entity . . . with all of its assets and all of its liabilities." Br. at 21. But ASPV never had a pre-Closing obligation to reimburse US Ecology for the disputed Insurance Charges and, thus, no such liability transferred with ASPV as part of the stock sale.

The way in which EQIS pleaded its claims highlights this point. The lower court rightly expressed puzzlement that EQIS did not sue ASPV for breach of contract when it repeatedly alleged that the ASPV is liable for disputed Insurance

---

indirectly became liabilities of the buyer through its ownership interests in the company; not that those obligations would become the buyer's separate and direct obligations.

Charges—the court observed, "If [ASPV] owed such an obligation, presumably EQ Industrial and US Ecology would have asserted a breach of contract claim directly against [ASPV]." Op. at 13. They did not, because at bottom, the disputed Insurance Charges are, and have always been, US Ecology's liabilities.

It is undisputed that US Ecology owns the relevant insurance policies and that US Ecology—not ASPV or Holdings—is contractually obligated to its own insurers to pay the Insurance Charges at issue. *See* Br. at 2 ("Years prior to closing, [US Ecology] purchased these policies to cover all of its then existing subsidiaries (of which ASPV was one) and received certain expenses and fees that were not covered in full by the policies. . . ."). ASPV never paid (and was never obligated to pay) the Insurance Charges directly to the insurers, and Plaintiffs have never contended otherwise. *See Id.* at 9 ("ASPV would, in turn, then become liable to reimburse [US Ecology] for those [insurance] payments.").

Unable to identify any actual contract in which ASPV agreed to reimburse US Ecology for the Insurance Charges, EQIS incorrectly suggests that the SPA *recognizes* that obligation. Specifically, EQIS contends that the inclusion of certain insurance reserves in ASPV's pre-Closing financial statements (Section 4.07) and in the working capital adjustment (Section 2.02) means that Holdings must now (and presumably into perpetuity) reimburse US Ecology for the disputed Insurance Charges on ASPV's behalf.

EQIS's argument misreads the SPA and misapprehends its reference to ASPV's financial statements and calculation of the working capital adjustment. Section 4.07 does not provide that ASPV's pre-Closing financial statements catalogue ASPV's post-Closing liabilities. *See In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 56 (Del. Ch. 2001) (finding merger agreement "use[d] the term 'liabilities' in a broad and imprecise manner that would not be used by an accountant"). Just the opposite: the SPA expressly states that the financial statements were prepared based on "Seller [EQIS] Accounting Policies," which reflected ASPV's pre-Closing accounting practice—instituted at the direction of US Ecology while it was still parent of ASPV—of making intercompany payments to US Ecology as reimbursement for insurance charges US Ecology incurred. A85.

EQIS argues that Defendants' position that the ASPV's pre-Closing payments to US Ecology were an intercompany payment practice is "incompatible" with the language of Section 4.07, which also provides that the financial statements "do not include allocations . . . for . . . inter-company revenue items." Br. at 26 (quoting A93 § 4.07). EQIS misreads this language, which simply provides that intercompany revenue may be included in the financial statements, but would not be *allocated* as intercompany revenue as opposed to from a third party. Regardless, there is nothing inconsistent with an agreement

between the parties that ASPV's financial statements would separately list intercompany payments as liabilities, but not payments from US Ecology or EQIS as intercompany revenue.

Moreover, while EQIS argues that the financial statements and accompanying disclosure schedules were intended to be a static pre- and post-Closing statement of ASPV's "net assets," Br. at 22-23, Section 4.07 of the SPA says differently: it expressly states that the Seller Disclosure Schedules contain "the preliminary estimate of the unaudited consolidated statement of net assets of [ASPV]" as of two distinct pre-Closing dates: (1) the end of the preceding calendar year (December 31, 2014), and (2) approximately five months before the date of the sale (March 31, 2015). *Cf. Alliant Techsystems, Inc. v. MidOcean Bushnell Holdings, L.P.*, 2015 WL 1897659, at *7 (Del. Ch. Apr. 24, 2015) (purchase agreement defined "Net Working Capital" as "the sum of all current assets . . . of the Group Companies less the sum of all current liabilities . . . of the Group Companies . . . as of 12:01 a.m. New York time on the Closing Date. . . ."). That timing contradicts EQIS's claim that Section 4.07 was designed to serve as a comprehensive listing of ASPV's *post-Closing* liabilities.

EQIS is therefore left with nothing but to claim that the lower court ignored its purportedly well-plead allegations concerning the financial statements incorporated into the SPA by Section 4.07. However, EQIS recognized the "plain

language of the SPA" when discussing Section 4.07 and the financial statements in its brief, as it did below. Br. at 26; *see also* A30. The lower court correctly engaged in an objective analysis of the unambiguous language of the SPA and properly determined that EQIS's allegations failed to state a breach of contract claim. *See MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *5 (Del. Ch. Dec. 30, 2010) ("Under Delaware law, the interpretation of a contract is a question of law suitable for determination on a motion to dismiss."); *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011) (same).

Indeed, despite claiming that it alleged sufficient facts to show that ASPV must reimburse US Ecology for the Insurance Charges into perpetuity because it did so for some period *before* the Closing, EQIS never explains why, absent an express agreement, a pre-Closing practice between a parent and subsidiary would continue after the company ceases to be a subsidiary. Nor does EQIS explain why the financial statements referenced in the SPA attributed certain assets to ASPV that indisputably remained with US Ecology after the sale (including prepayments for other insurance policies that US Ecology canceled after the sale) if, as EQIS claims, the financial statements were supposed to contain a complete listing of ASPV's assets and liabilities. A291; A494 ¶ 7.

EQIS's inability to plead even these basic details confirms that ASPV's pre-Closing financial statements do not reflect any agreement that ASPV (or Holdings) would be liable for disputed Insurance Charges after the sale. *See In re IBP*, 789 A.2d at 58 (finding that disputed section of the disclosure schedule "signal[ed] that the word 'liabilities' was being used as a loose term for balance sheet adjustments that might affect prior warranted periods"). Rather, the SPA is clear that ASPV's pre-Closing financial statements were incorporated into the disclosure schedules so that Holdings, as purchaser, could understand the pre-sale financial condition of ASPV, and Section 4.07 was designed to incorporate those financial statements into the SPA so that EQIS could represent and warrant them as accurate and complete based on EQIS's accounting policies at the time. *See Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 922 (Del. 2017, as revised June 28, 2017) (the "whole point" of financial statements is to provide the buyer with an understanding of the target company's pre-closing financial condition so that the parties may "account for changes in [the company's business] from the time when the Purchase Agreement was agreed on *until closing*" and "keeping all other variables constant in terms of accounting is critical") (emphasis added).

EQIS attempts to gloss over these omissions by stating that "the specific mechanism of reimbursement and billing varied between the Auto/GL and WC

Policies . . . [and that those] distinctions are not relevant. . . ." Br. at 9. Not so. Had EQIS wanted this "specific mechanism of reimbursement and billing" to continue, it easily could have included that term in the SPA—a routine practice in drafting agreements—or included other language providing that the line items listed on the financial statements or in the working capital would become obligations of ASPV after the sale. *Cf. Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *11 (Del. Ch. Nov. 19, 2013) (stock purchase agreement expressly defined "liability" to include "any Debt, obligation, duty or liability of any nature, including . . . costs and expenses" for purposes of representations and warranties of sellers' balance sheet).[4] EQIS also could have included an express provision in the SPA indicating that ASPV or Holdings would be responsible for paying the Insurance Charges after the Closing, as it did in

[4] EQIS claims that the "logical consequences of Defendants' argument with respect to the financial statements . . . would open the door to purchasers and sellers alike post-closing disclaiming disfavored liabilities or claiming favored assets." Br. at 25, n.8. In reality, however, finding for Defendants would simply signal that, if a party wishes for pre-Closing financial statements based on pre-Closing accounting policies to serve as a representation of the target company's assets and liabilities, the party should include the necessary language to do so, as EQIS could have done. Instead, the parties included both "assets" (the "ASPV Prepaid In[sur]ance") and "liabilities" (the US Ecology Insurance Charges) in the financial statements that remained with US Ecology after the Closing. A494 ¶¶ 7-8. ASPV did not pick and choose its assets and liabilities, but simply assumed responsibility for those that actually transferred in the sale.

Section 8.09(f) for charges related to health insurance policies that covered ASPV employees post-Closing. *See supra* Sec. I.C.i. They did none of these things.

With the clear language of the SPA refuting its claims, EQIS attempts to inject extrinsic evidence into the otherwise unambiguous working capital provision (Section 2.02(c)) by focusing on the parties' purported understanding of the financial statements and negotiation over the working capital adjustment after the sale. *See* Br. at 26-27. As explained above, however, the SPA is clear with respect to this provision: the working capital adjustment was based on EQIS's pre-Closing accounting policies for the twelve months ending in the last complete fiscal month before the Closing. A84-85 § 2.02(b). Like ASPV's pre-Closing financial statements, that working capital provision was not designed to delineate every asset and liability attributable to ASPV post-Closing, but instead—as is clear from the face of the SPA—reflected the parties' methodology for negotiating adjustments to the purchase price based on pre-Closing assumptions. *See Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996) ("Courts consider extrinsic evidence to interpret the agreement *only* if there is an ambiguity in the contract.") (emphasis added).

Finally, EQIS is incorrect that the Court of Chancery's decision in *Viking Pump, Inc. v. Century Indemnity Co.*, 2 A.3d 76 (Del. Ch. 2009), supports its claims. EQIS focuses on the stock transaction in that case, in which the court

found a subsidiary's right to coverage and corresponding liabilities under an insurance policy owned by its parent remained the subsidiary's assets and liabilities even after its parent sold the subsidiary. *Id.* at 82. But EQIS skips the first step in a complicated series of transactions in which, pursuant to a separate earlier agreement, the parent had already expressly assigned the right to coverage under the disputed insurance policies and liability for certain existing claims to its subsidiary, which both parties agreed the subsidiary would pay directly when due to the insurer. *Id.* Having found that the insurance rights that the parent assigned covered the insurance claims at issue, the court held that those rights and liabilities transferred with the subsidiary as part of a subsequent stock sale. *Id.* at 96-99.

Thus, contrary to Plaintiffs' claim that the lower court here focused "on the wrong transaction" and "confuse[d] the two agreements at issue" in *Viking Pump*, Br. at 29-31, the Opinion merely recognized that, unlike in *Viking Pump*, "there was no ***analogous*** assignment and assumption agreement between US Ecology and [ASPV] regarding insurance rights and obligations" preceding the SPA to make clear that ASPV had actually assumed those rights and obligations. Op. at 16 (emphasis added). The lower court properly found that *Viking Pump* "actually supports defendants." Op. at 15.

Viking Pump is also distinguishable because it was not a dispute between parent and former subsidiary over who should pay insurance charges under the

parent's insurance program. The question of who was liable for insurance charges associated with the asbestos claims at issue in the case was never before the court and was never decided. *See* 2 A.3d at 97.

* * *

At bottom, nothing prevented EQIS, which was represented by able, sophisticated counsel, from negotiating to transform US Ecology's pre-sale intercompany accounting practice into a post-Closing reimbursement obligation of ASPV. Had it done so, Holdings, in turn, would have sought a commensurate reduction in the $58 million purchase price. *See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006) ("[S]ophisticated businesses . . . make their own judgments about the risk they should bear . . . , recognizing that such parties are able to price factors such as limits on liability."). Neither of those things happened, and the lower court properly rejected EQIS and US Ecology's attempts to re-write history and the SPA. *See RAA Mgmt., LLC v. Savage Sports Holdings Inc.*, 45 A.3d 107, 118 (Del. 2012) ("[W]here parties, particularly sophisticated ones . . . have undertaken certain obligations—and at the same time expressly limited those obligations—the courts should not normally interfere with those choices.").

Accordingly, for the reasons described above, the lower court properly found that EQIS's failure to identify a pre-sale obligation or negotiate a provision

requiring ASPV or Holdings to make reimbursement payments for the disputed Insurance Charges necessarily meant that those liabilities, which US Ecology knowingly assumed to its own insurers, remained with US Ecology following the sale. Op. at 16; *Allied Capital*, 910 A.2d at 1030 ("When the language of a contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create new contract rights, liabilities and duties to which the parties had not assented.").

iii. Even If A Pre-Closing ASPV Liability Existed, It Was Released Under The SPA's General Release

Because it found that the contract claims against Holdings failed under the plain terms of the SPA, the lower court found it "unnecessary" to address Plaintiffs' argument that the SPA's General Release bars EQIS's breach of contract claims. Op. at 16. However, the General Release provides a separate basis for this Court to uphold the lower court's ruling, because even if ASPV or Holdings was somehow liable to reimburse US Ecology for the disputed Insurance Charges—they are not—any such obligation was released pursuant to the SPA's General Release.[5]

[5] The General Release applies equally to Plaintiffs' breach of contract and unjust enrichment claims, but because Plaintiffs only briefed this issue with respect to the unjust enrichment claim, Defendants address those arguments in more detail in Section II below.

US Ecology and EQIS contend that ASPV and Holdings owe them reimbursement for payments US Ecology allegedly made to its own insurers. The liability alleged in the Complaint is one purportedly of ASPV and Holdings to EQIS and US Ecology (as opposed to, for instance, some other third party). Pursuant to the General Release, however, US Ecology and EQIS broadly released ASPV and Holdings for (i) any claims that accrued before the Closing *and* (ii) claims "that accrued at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing Date." A121-22 § 8.08. Plaintiffs have never denied that the events underlying the disputed Insurance Charges—specifically, the alleged injuries resulting in claims covered by US Ecology's insurance—occurred before Closing and while US Ecology still owned the ASPV business. *See* Br. at 39. Indeed, the fact that the pre-Closing insurance policies in question were "occurrence-based" policies (meaning that, for coverage to apply, the occurrence giving rise to the claim must have taken place during the policy period) means that the Insurance Charges associated with those claims also arose from occurrences before the Closing.

Plaintiffs try to escape the General Release by conflating the events giving rise to the disputed Insurance Charges with the accrual of EQIS's breach of contract claim. *Id.* Their contention that ASPV's and Holdings' refusal to pay was the occurrence giving rise to their claims fails for two reasons.

First, the SPA itself recognizes a distinction between (and separately addresses) claims that existed as of the Closing, on the one hand, and claims, like those asserted here, that accrue after the Closing "as a result of any . . . occurrence" or "event . . . prior to the Closing Date"—and both are released under the SPA.

Second, Plaintiffs' argument that their claims arose solely from Holdings' refusal to pay the Insurance Charges is at odds with Delaware law, which holds that while a breach of contract claim "accrues" when the contract is allegedly breached, the factual elements of the claim may still occur earlier. *See AM Gen. Holdings LLC v. The Renco Grp., Inc.*, 2016 WL 4440476, at *11 (Del. Ch. Aug. 22, 2016) ("In the context of breach of contract claims, *the date of breach typically supplies the accrual date* as the elements of the claim can be linked to the act constituting the breach.") (emphasis added). Thus, just as the lower court decided with respect to US Ecology's unjust enrichment claim, this Court should find that EQIS's contract claims arise from pre-Closing occurrences and fall squarely within the scope of this release. *See Corp. Prop. Assocs. v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2003) ("[A] general release . . . is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind.").

Attempting to escape the plain terms of the General Release, Plaintiffs argue, incorrectly, that their claims fall within the scope of the release's Carve-Out.

Br. at 39-40, n.21. The Carve-Out is drafted narrowly and is designed only to preserve claims based on post-Closing obligations (i) that the SPA expressly created, (ii) that are purportedly breached, and (iii) that fall outside the scope of the General Release based on the delineated categories in the Carve-Out. Here, EQIS does not claim that the SPA created any obligation for Holdings to assume responsibility for reimbursing the disputed Insurance Charges. Thus, the Carve-Out is inapplicable to EQIS's contract claims.

II. THE LOWER COURT CORRECTLY DECIDED THAT THE GENERAL RELEASE PRECLUDES US ECOLOGY'S UNJUST ENRICHMENT CLAIM

A. Question Presented

Whether the lower court properly dismissed US Ecology's unjust enrichment claim on the grounds it falls squarely within the General Release of the SPA, because the claim arose from occurrences that took place before the Closing. Defendants argued this issue in their motion to dismiss and opposition to summary judgment. A66-68; A483-A488; A688-A696.

B. Scope Of Review

This Court reviews the grant of a motion to dismiss *de novo*. *See Deuley*, 8 A.3d at 1160.

C. Merits Of Argument

The lower court correctly determined that US Ecology's unjust enrichment claim and related Insurance Charges are "indisputably the result of automobile accidents, worker injuries, and the like that occurred before the Closing." Op. at 20. Thus, the lower court, in a well-reasoned analysis, found that US Ecology's unjust enrichment claim fell squarely within the scope of the plain language of the SPA's General Release and was properly dismissed. *Id.* The lower court's holding should be affirmed.

i. The Lower Court Properly Relied On The General Release On A Rule 12 Motion

US Ecology's argument that the lower court improperly dismissed its unjust enrichment claim on the pleadings because the SPA's General Release is an affirmative defense conflicts with Delaware law. *See Seven Investments, LLC v. AD Capital, LLC*, 32 A.3d 391, 396 (Del. Ch. 2011) ("The General Release nevertheless can be considered on a 12(b)(6) motion because the Complaint incorporates the Termination Agreement by reference."); *Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *2 n.9 (Del. Ch. Feb. 22, 2006) ("The Court may consider the Release in deciding a motion to dismiss because the Complaint makes reference to it."). Indeed, Delaware courts, including this Court, routinely rely on releases to dismiss contract claims on the pleadings. *See, e.g., Deuley*, 8 A.3d at 1163-65 (affirming Rule 12(b)(6) dismissal based on contractual release); *Seven Investments*, 32 A.3d at 396 (granting Rule 12(b)(6) dismissal because "where the language of the release is clear and unambiguous, it will not lightly be set aside"). Accordingly, the lower court properly considered the SPA's General Release in ruling on Defendants' motion to dismiss and, as explained in greater detail below, applied the correct standard in concluding that it unambiguously barred US Ecology's unjust enrichment claim.[6]

[6] Plaintiffs inconsistently claim, on the one hand, that "Defendants did not and cannot meet [the affirmative defense] standard" for dismissal based on the

ii. US Ecology's Unjust Enrichment Claim Falls Squarely Within The General Release

US Ecology's attempts to undermine the lower court's holding that it released its unjust enrichment claim all fail.

First, US Ecology argues that the General Release applies only to claims that existed as of the Closing. Br. at 37-38. But US Ecology's reading rests on a glaring omission: the General Release expressly applies both to claims "that have accrued prior to the Closing, *or that accrue at or after the Closing*." A121-22 § 8.08 (emphasis added). The language in the General Release stating that it covers claims that US Ecology "ever had or may now have" cannot be read in isolation. Instead, as the lower court correctly observed, it must be read within the context of the broader provision, which, in plain and simple terms expands the scope of the release to include claims "that accrue at or *after* the Closing." A121-22 § 8.08 (emphasis added); A132 § 15.07(b); *see Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) ("We will read a contract as a

---

terms of the General Release while also arguing, on the other hand, that this Court should grant summary judgment in their favor for US Ecology's unjust enrichment claim, which they argue "can be resolved entirely on the basis of the language of the [General Release] and on other undisputed facts." Br. at 36. Plaintiffs' concession that the language of the General Release is unambiguous demonstrates that the lower court's dismissal of US Ecology's unjust enrichment claim was appropriate.

whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

Second, US Ecology wrongly argues that the claims at issue did not result from pre-Closing events because "both the demand for payment and failure to reimburse occurred" after the sale. Br. at 38. As an initial matter, while US Ecology may have received bills and sought reimbursement for payments made to its insurers for the US Ecology Insurance Charges after the Closing, Plaintiffs' complaint and briefs are replete with admissions that the events underlying the Insurance Charges occurred *before* Closing. *See*, *e.g.*, Br. at 39 (noting "the parties agree" the underlying insurance claims under the US Ecology Policies "relate to pre-closing events, *i.e.*, automobile and ASPV employee accidents"); *see also* A20 ¶ 2; A23-24 ¶¶ 15-16, 18; A162. These admissions are fatal to US Ecology's theory in light of the language of the General Release, which makes clear that it covers any claims arising from pre-Closing events.

US Ecology seeks to overcome this fact by eliminating any distinction between claim accrual and the events underlying the claim. In collapsing the two, US Ecology asks this Court to eviscerate the General Release: any refusal to pay a pre-sale claim or liability would necessarily occur after the Closing, and by Plaintiffs' reasoning that breach (which they view as being the "occurrence") would therefore remove the claim from the scope of the General Release.

Plaintiffs' reading would remove the General Release from the SPA for everything except claims asserted and rejected before the Closing.

Plaintiffs' construction is also at odds with Delaware law on the difference between the events giving rise to a claim and when that claim "accrues." Similar to breach of contract claims, Delaware courts have recognized that, while an unjust enrichment claim accrues at the time of injury, the elements leading up to the injury will precede it. *See Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 42–43 (Del. Ch. 2012) (holding that the accrual date for unjust enrichment occurs "at the time of the wrongful act" which "stems from" a series of preceding actions); *see also supra* Sec. I.C.iii (citing *AM Gen. Holdings LLC*, 2016 WL 4440476, at *11). As discussed above, the General Release recognizes this distinction and separately addresses (and releases) claims "that accrue at or after the Closing as a result of any act, circumstance, occurrence, transaction, event or omission on or prior to the Closing." A121-22 § 8.08. Thus, the lower court properly rejected US Ecology's argument that its unjust enrichment claim arose from events and occurrences after the Closing.

Third, US Ecology incorrectly claims that, under the lower court's rationale, "nearly every conceivable claim between any of these parties would have at least *some* tie to events or circumstances that originated prior to [C]losing"—the result of which, according to Plaintiffs, is that "ASPV and Holdings could decline to pay

any ASPV post-closing liabilities," including those due to third-parties. Br. at 40. The General Release was given by US Ecology and EQIS and has no effect on possible claims by third parties, who by their very nature are not parties to the SPA or its General Release. So the notion that Defendants' reading of the General Release would logically allow ASPV to avoid all of its liabilities has no merit. In addition, there is no dispute that the release is not unlimited. The General Release includes a specific Carve-Out; however, for the reasons stated above, that Carve-Out does not save the claims Plaintiffs have asserted here.[7]

Finally, US Ecology complains that the lower court inadequately weighed the equities at stake in this litigation. Not so. Having found that neither ASPV nor Holdings had any post-Closing liability for the disputed Insurance Charges, the court concluded that Plaintiffs' argument that ASPV retained an undeserved windfall was hollow and did not justify avoiding dismissal of their claims.[8]

---

[7] US Ecology argues that the lower court's interpretation of the "resulting from" clause of the General Release would result in a complete bar on post-Closing claims, which would render the SPA's specific performance clause meaningless. Br. at 40-41, n.22. That is a red herring. The General Release is a backwards-looking provision designed to release only those post-Closing claims that relate to pre-Closing events. In contrast, the specific performance clause is a strictly forward-looking provision to police any breach of the SPA. A130-31 § 15.04.

[8] US Ecology claims that the lower court improperly inferred that US Ecology chose not to terminate ASPV's insurance coverage post-Closing because US Ecology found it in its economic interest to continue the coverage. Br. at 41. Plaintiffs' counsel themselves suggested that their clients' motivation for

Plaintiffs had every opportunity to negotiate and pay the price for ASPV to assume a post-Closing obligation for Insurance Charges under the US Ecology Policies. *See Feuer v. Dauman*, 2017 WL 4817427, at *5 (Del. Ch. Oct. 25, 2017) (citing *H-M Wexford LLC v. Encorp., Inc.*, 832 A.2d 129, 149 (Del. Ch. 2003)) ("[I]t is more or less universally the case that when a corporation pays value to settle a claim, it demands and receives releases . . . in order to preclude the possibility of having to defend against any additional claims arising out of the matter at issue in the settlement."). Plaintiffs failed to do so, and the Court correctly declined to force ASPV to pay a claim that Plaintiffs knowingly released at the bargaining table. *See Coastal Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 942 (Del. 1979) ("Because the contract is the measure of plaintiffs' right, there can be no recovery under an unjust enrichment theory independent of it.").

---

keeping the coverage in place was that "there would be an adverse impact to [US Ecology] if they canceled" the US Ecology Policies. A763. In any event, this statement merely highlighted the frailty in US Ecology's equitable arguments and did not form any basis for the lower court's holding. Op. at 23 ("In any event, Count IV fails to state a claim for relief because it is barred by the Release.").

CONCLUSION

For all of the foregoing reasons, the order and opinion of the lower court should be affirmed in all respects.

OF COUNSEL:

William T. Pruitt
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654-5108
(312) 862-2000

Warren Haskel
Benjamin Cooper
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022-4611
(212) 446-4800

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Jon E. Abramczyk
Jon E. Abramczyk (#2432)
D. McKinley Measley (#5108)
Alexandra M. Cumings (#6146)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200

Attorneys for Defendants Allstate Power Vac, Inc. and ASPV Holdings, Inc.

October 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, the foregoing document was served by File & Serve*Xpress* on the following attorneys of record:

Stephen C. Norman
Jaclyn C. Levy
POTTER ANDERSON & CORROON
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801

/s/ Alexandra M. Cumings
Alexandra M. Cumings (#6146)