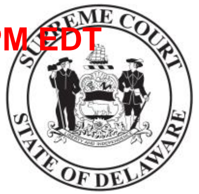
EFiled: Oct 19 2018 03:13PM EDT
Filing ID 62571338
Case Number 370,2018



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 C.A. No. 2017-0437-AGB

REPLY BRIEF OF APPELLANTS US ECOLOGY, INC.
AND EQ INDUSTRIAL SERVICES, INC.

OF COUNSEL:

David B. Hennes
Lisa H. Bebchick
Jonathan R. Ference-Burke
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036
(212) 596-9000

POTTER ANDERSON & CORROON LLP
Stephen C. Norman (#2686)
Jaclyn C. Levy (#5631)
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Appellants US Ecology, Inc. and EQ Industrial Services, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 5

I. EQIS Was Not Required to Identify a Specific Provision in the SPA to State a Claim for Breach of Contract 5

A. Under Black-Letter Delaware Law Governing Stock Sales, Holdings Acquired All of ASPV's Assets and Liabilities 5

B. Defendants' Reliance on Other SPA Provisions Is Misplaced 11

II. Plaintiffs Were Not Required to Identify a Contract with ASPV to Establish a Pre-Closing Liability on the Part of ASPV 12

III. The Release Does Not Bar Plaintiffs' Claims 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

AM General Holdings LLC v. Renco Group, Inc.,
2016 WL 4440476 (Del. Ch. Aug. 22, 2016) 20

Allied Capital Corp. v. GC-Sun Holdings, LP,
910 A.2d 1020 (Del. Ch. 2006) 10

Braddock v. Zimmerman,
906 A.2d 776 (Del. 2006) 11

Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC,
27 A.3d 531 (Del. 2011) 14

Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC,
166 A.3d 912 (Del. 2017) 15

Corp. Prop. Assocs. 6 v. Hallwood Group Inc.,
817 A.2d 777 (Del. 2003) 19

Delmarva Health Plan, Inc. v. Aceto,
750 A.2d 1213 (Del. Ch. 1999) 12

Intel Corp. v. Am. Guarantee & Liability Insurance Co.,
51 A.3d 442 (Del. 2012) 19

TrueBlue, Inc. v. Leeds Equity Partners IV, LP,
2015 WL 5968726 (Del. Super. Ct. Sept. 25, 2015) .... *passim*

Vichi v. Koninklijke Philips Electronics, N.V.,
62 A.3d 26 (Del. 2012) 20

Viking Pump, Inc. v. Century Indemnity Co.,
2 A.3d 76 (Del. Ch. 2009) 2, 8, 9

Other Authorities

Ch. Ct. R. 15(aaa)..11

Supr. Ct. R. 8..12

PRELIMINARY STATEMENT

By this action, Plaintiffs seek to recover a windfall wrongly retained by Defendants as a result of their refusal to pay the costs of insurance benefits that they are currently utilizing. Defendants even went so far as to use the liabilities at issue to obtain a reduction in the purchase price, but now claim that those very same liabilities have vanished from the business they acquired. In their Answering Brief, Defendants repeatedly concede that they "do not take issue with" the well-established principle under Delaware law that "all assets and liabilities are transferred in the sale of a company effected by a sale of stock." *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *3 (Del. Super. Ct. Sept. 25, 2015) (internal quotation marks and citation omitted). *See* Ans. Br. 2, 21, 23. Instead, just as the lower court did below, they simply ignore that rule's application, insisting that EQIS' breach of contract claim fails because EQIS is unable to point to any SPA provision expressly obligating Holdings to reimburse USE for the Non-Covered Payments.[1] But this applies Delaware law precisely backwards and would convert a stock sale—like EQIS' sale of ASPV to Holdings—into an asset sale: no such SPA provision was required to transfer the liabilities to Holdings *in a stock sale* as a matter of Delaware law; a specific provision would only be needed if the liabilities were carved *out* of the transaction, which they were not.

[1] Capitalized terms not defined have the meanings set forth in the Opening Brief.

To avoid the result clearly compelled by Delaware law, Defendants advance an argument not made below and adopt the lower court's flawed application of another principle of Delaware law with no bearing on the outcome here, that the separate legal existence of corporate entities should be respected. Relying on this doctrine, Defendants claim that the "*transfer*" of assets and liabilities in a stock sale differs from whether "the purchaser *separately and directly assumes* those liabilities." Ans. Br. 21. Yet, in the few pages they devote to this argument, they cite no cases in support of this contention, other than cases that stand for the general proposition regarding the separateness of discrete corporate entities. Moreover, Defendants' assertion that ASPV (not Holdings) is the proper party to sue for breach of contract (even though, as they know, there is no contract between any Plaintiff and ASPV relating to the Non-Covered Payments) deflects focus from the fact that the breach of contract claim arises from *Holdings'* breach of the SPA by its failure to accept responsibility for ASPV's liabilities, which transferred in the stock sale.

Not only do Defendants fail to meaningfully address the application of the "familiar default rule" that all assets and liabilities transfer automatically in a stock sale unless carved out, but they likewise fail to meaningfully address the cases Plaintiffs cite that are directly on point, *TrueBlue* and *Viking Pump, Inc. v. Century Indemnity Co.*, 2 A.3d 76 (Del. Ch. 2009). Consistent with the "familiar default rule," those cases confirm that no specific contractual provision was required to

transfer liability for the Non-Covered Payments to Holdings. Similarly, Defendants' reliance on SPA provisions that require Holdings to reimburse USE for going-forward, insurance-related services to argue that the absence of the Non-Covered Payments from those sections was intentional is an irrelevant red herring. Those provisions covered Transition Services that EQIS agreed to provide post-Closing, and they do not bear on whether Holdings acquired the liabilities of ASPV as of Closing. To avoid the transfer of these liabilities, Holdings was required to negotiate a provision that expressly excluded them, which it admittedly did not do despite being represented by sophisticated counsel.

Defendants' position that ASPV never had a pre-Closing obligation to reimburse USE for the Non-Covered Payments is at the very least an issue of fact not properly decided on a motion to dismiss. Indeed, the lower court's finding that no payment obligation existed violated Delaware law by failing to accept as true all well-pleaded allegations and draw all reasonable inferences in favor of the non-moving party. Defendants concede that the Non-Covered Payments arose from ASPV's own lawsuits and worker's compensation claims, that ASPV had always reimbursed USE for the Non-Covered Payments related to these claims pre-Closing, and that the Non-Covered Payments were clearly reflected as liabilities on ASPV's financial statements incorporated into the SPA. Nevertheless, Defendants ask this Court to ignore those undisputed financial statements as merely reflecting a "pre-

Closing accounting practice" (Ans. Br. 25) and find that the Non-Covered Payments were a liability that "never existed." *Id.* at 1. Moreover, Defendants fail to overcome the undisputed fact that they relied upon the Non-Covered Payments in the Working Capital Dispute as ASPV liabilities to obtain a substantial purchase price reduction. These undisputed facts plainly demonstrate that the Non-Covered Payments were a liability of ASPV pre-Closing.

Finally, Defendants rehash their misplaced contention that the Release in Section 8.08 of the SPA bars USE's unjust enrichment claim against ASPV, as well as Plaintiffs' other claims. In doing so, Defendants mischaracterize the Release as a broad, forward-looking "General Release," and, like the lower court, can only make this argument by ignoring the Release's plain language. Defendants ignore that the dispositive event for claim accrual is when the alleged wrong takes place, and the alleged wrong here is Holdings' post-Closing failure to reimburse USE for the Non-Covered Payments USE made post-Closing, not the underlying accidents. These claims simply did not exist pre-Closing and the Release does not apply according to its terms to post-Closing events.

Ultimately, the core facts compelling judgment in Plaintiffs' favor are undisputed, as are the equities: Holdings acquired all of ASPV's stock in a stock sale; it did *not* carve out liability for the Non-Covered Payments; and USE paid Non-Covered Payments post-Closing that benefitted ASPV. Defendants assert that

Plaintiffs complain that ASPV has received a windfall because it "may still benefit" (*id.* at 4) from USE's insurance policies without an obligation to pay for the Non-Covered Payments. But there is no "may" involved: Defendants have historically paid for and continue to accept the benefits of the Non-Covered Payments. Yet, they refuse to continue to pay for them based on a series of shifting and unpersuasive arguments. The lower court failed to acknowledge these well-pleaded facts in the complaint and left Plaintiffs wronged but with no remedy to recover this improper windfall. This Court should reverse and enter judgment in favor of Defendants.

ARGUMENT

I. EQIS Was Not Required to Identify a Specific Provision in the SPA to State a Claim for Breach of Contract

A. Under Black-Letter Delaware Law Governing Stock Sales, Holdings Acquired All of ASPV's Assets and Liabilities

Despite clear Delaware law that all liabilities are transferred in a stock sale, Defendants claim that this case turns on "whether any provision in the SPA created an obligation that Holdings allegedly breached by not paying for ASPV's purported liabilities." Ans. Br. 2. This argument—limited to a few pages and without the benefit of any supporting authority—is wrong as a matter of law.

Pursuant to black-letter Delaware law governing stock sales, EQIS was not required to identify a specific SPA provision that transferred liability for the Non-Covered Payments to Holdings. As they must, Defendants repeatedly acknowledge

the black-letter principle of law upon which Plaintiffs rely: "There is no dispute that, as a matter of Delaware law, both the assets and liabilities of a company *transfer* in a stock sale." *Id.* at 21.[2] The straightforward application of this principle controls the result here, not, as Defendants contend, the lack of a specific provision in the SPA. Because the transaction at issue was structured as a stock sale, the parties did not need to enumerate every asset and liability transferred, as they would have had to do in an asset sale.[3]

For precisely that reason, the decision in *TrueBlue*—which Defendants did not meaningfully address and the lower court did not even mention in its opinion—recognized that all assets and liabilities were transferred automatically, even though they were not catalogued in the SPA, because the purchaser agreed to buy all of the stock of the acquired subsidiary. *See* 2015 WL 5968726 at *3. In *TrueBlue*, the parties' failure to *expressly* carve out a particular liability in a stock sale demonstrated that they "did not intend to" retain it. *Id.* The same is true here:

[2] *See also id.* at 2 ("Defendants do not take issue with this statement of law . . . ."); *id.* at 23 ("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.'") (quoting Opening Br. 21)).

[3] That Plaintiffs did not allege a breach of any of the literal terms of Section 1.01 or another SPA provision is irrelevant. Plaintiffs rely upon Section 1.01, the provision that structures the transaction as a stock sale, and the operation of Delaware law. Neither the lower court nor Defendants has cited any case to support the position that there must be a breach of a specific provision to pursue a contract claim based on the transfer of assets and liabilities in a stock sale by operation of law. And, as discussed below, the cases cited by Plaintiffs show none is necessary.

because the liability for the Non-Covered Payments was not expressly carved out, the parties intended for that liability to transfer in the stock sale.

Unable to distinguish *TrueBlue*'s clear application to the facts of this case, Defendants wrongly claim that Plaintiffs misread the case. But Defendants' attempt to distinguish *TrueBlue* on grounds that "the question in *TrueBlue* was simply whether the *seller* retained the liability" and "[t]he court did not address whether the purchaser became directly liable for the target company's liabilities by virtue of a stock sale" (Ans. Br. 22) is no distinction at all. It is precisely the same question presented here, except the suit was brought by the purchaser to avoid the liability transferred in the sale.

In *TrueBlue*, the purchaser (TrueBlue) brought suit seeking to establish that the seller (Leeds) was still responsible for certain liabilities of Leeds' subsidiary, Staffing Solutions, when Leeds sold the stock of Staffing Solutions to TrueBlue. *See* 2015 WL 5968726, at *1.[4] The court rejected that argument and held that Leeds was not responsible for the payment because TrueBlue, as the purchaser, should have "understood that it was required to set forth in the SPA any liabilities for which

[4] Under Defendants' theory, the purchaser in *TrueBlue* would have no standing to sue because the liabilities would not have transferred to the purchaser but would have stayed with the subsidiary. No such argument was made, and the court did not dismiss on those novel grounds.

Leeds would retain responsibility." *Id.* at *3. Thus, *TrueBlue* demonstrates that all liabilities transfer to the purchaser unless expressly excluded in the contract.[5]

Similarly, Defendants attempt to bury their unconvincing discussion of *Viking Pump* at the end of their brief. As Plaintiffs explained in their Opening Brief, the lower court focused on the wrong transaction in *Viking Pump*. Defendants double down on this error, contending that the dispositive transaction in *Viking Pump* is the first in a 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." Ans. Br. 31.[6] But the assignment agreement in *Viking Pump* was entirely unrelated to the

---

[5] In a footnote, Defendants also claim that Plaintiffs "selectively" quote *TrueBlue*'s statement that "the obligations of a company whose stock is sold . . . would become obligations of the purchasing company absent an express agreement to the contrary." Ans. Br. 22 n.3. According to Defendants, "[t]he only way to read this statement consistent with Delaware law is that the court intended simply to convey that Staffing Solutions' obligations *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." *Id*. Defendants' deflection makes no sense, and they do not explain how the quotation is misleading or how the court's clear holding (which is consistent with fundamental principles of corporate law) was "intended . . . to convey" a different rule.

[6] Directly contrary to the lower court's conclusion and Defendants' position that there needed to be an express provision in the SPA, in *Viking Pump*, then Vice-Chancellor Strine held that although there was a term in the stock purchase agreement that confirmed the outcome, the provision was a redundant "catchall" that the court did "not believe . . . ha[d] any material effect on the proper outcome." 2 A.3d at 100-01.

later, separate stock sale in that case, and the fact that the parent assigned the coverage right to the subsidiary did not bear on whether the obligation to pay for that coverage—the liability at issue—transferred when the parent later sold the stock of the subsidiary. The court's analysis in connection with the *later* transaction is what is relevant here: for that transaction, the court recognized that the same "familiar default rule"[7] relied upon in *TrueBlue* meant that the purchaser "retained liability for the [contested insurance claims] and kept the accompanying Insurance Rights." 2 A.3d at 99.[8]

Because they do not dispute the fundamental principle of law that governs here, Defendants pivot to a different argument: they assert that the "*transfer*" of assets and liabilities in a stock sale is somehow a different question from whether "the purchaser *separately and directly assumes* those liabilities." Ans. Br. 21.

---

[7] As Vice-Chancellor Strine explained: "The familiar default rule in stock sales is that a change in the ownership of a company does not affect the rights or liabilities of the company. Absent a contrary agreement, [the purchaser] would have retained liability for [pre-existing] Claims and kept the accompanying Insurance Rights [under its former parent's policies]." *Id.* at 99. Neither Defendants nor the lower court have ever explained why this rule does not apply here.

[8] In yet another irrelevant distinction, Defendants also claim that *Viking Pump* "was not a dispute between parent and former subsidiary over who should pay insurance charges under the parent's insurance program." Ans. Br. 31-32. Nor is that the case here. Both *TrueBlue* and *Viking Pump* involved disputes between purchasers and sellers over the liabilities that transferred in stock sales, and *Viking Pump* demonstrates the "familiar default rule" that assets and liabilities transfer automatically in a stock sale unless expressly carved out of the sale. That rule applies directly to this case.

Defendants do not explain what "separate and direct assumption" of liabilities means and how it is different from the "transfer" of assets of liabilities, and they do not quote from, much less cite to, a single case drawing such a distinction. Although Defendants do not say so explicitly, they appear to be suggesting that the liabilities did transfer, but are the liabilities of ASPV, not Holdings, and therefore EQIS should have sued ASPV for breach of contract, as the lower court erroneously reasoned. *See id.*

This confusing argument merely compounds the lower court's error. First, there is no issue of veil piercing in this case. Indeed, Defendants did not mention this principle below, let alone argue that veil piercing controlled the outcome.[9] Second, this argument focuses on the wrong issue. The question is whether the Non-Covered Payments were ASPV's liabilities that *Holdings became responsible for by operation of Delaware law in the stock sale*—and, therefore, the breach of contract at issue is whether Holdings breached the SPA by refusing to take responsibility for them. There is no issue of corporate separateness presented by EQIS's breach of contract claim. And, finally, to the extent that the Court concludes that the liabilities

[9] Defendants only cited one of the three cases upon which they now rely for this point in their answering brief in their briefing below, and they cited that case (*Allied Capital Corporation v. GC-Sun Holdings, LP*, 910 A.2d 1020 (Del. Ch. 2006)) for other general principles of contract law (A54, A66, A685, A698). *See* Ans. Br. 21-22.

at issue are really those of ASPV, that only confirms that the lower court erred in dismissing USE's unjust enrichment claim against ASPV. *See* Section III *infra.*

Moreover, Defendants' failure to raise this argument below, and their decision to adopt it only after the lower court embraced it *sua sponte*, deprived Plaintiffs of their right to amend the complaint. By not raising this argument about corporate separateness in their motion to dismiss, Defendants deprived Plaintiffs of their right to respond to the argument. *See, e.g.,* Ct. Ch. R. 15(aaa) (permitting party to "respond to a motion to dismiss . . . by amending its pleading"); *Braddock v. Zimmerman*, 906 A.2d 776, 782-83 (Del. 2006).

B. Defendants' Reliance on Other SPA Provisions Is Misplaced

There is no merit to Defendants' claim that, post-Closing and going-forward SPA obligations, for which Defendants are required to affirmatively pay, is evidence that the liabilities at issue were not intended to be assumed. Ans. Br. 19. This contention, which has only superficial appeal, mischaracterizes the sections of the SPA upon which Defendants rely.

Section 8.09 does concern insurance, but it does not bear in any way on the parties' intent to transfer liability for the Non-Covered Payments. Defendants are correct that "certain medical and dental insurance plans" for "Continuing Employees" were among the "Transition Services" that EQIS expressly agreed to

provide. *Id.* at 10 (quoting A120 § 8.07, A145-46 § 8.09(f)).[10] But whether the parties expressly agreed for EQIS to provide specific Transition Services post-Closing, including providing insurance coverage, does not bear on whether, by operation of Delaware law, Holdings acquired all of ASPV's assets and liabilities, including the liability for the Non-Covered Payments.[11]

II. Plaintiffs Were Not Required to Identify a Contract with ASPV to Establish a Pre-Closing Liability on the Part of ASPV

Likewise, there is no merit to Defendants' primary argument for seeking affirmance of the lower court's decision that, even assuming that Holdings would have assumed liability for the Non-Covered Payments in the stock sale, "EQIS cannot show that the reimbursement obligation it alleges was a pre-Closing obligation of ASPV" because there was no contract as between the parent (USE) and

---

[10] Other post-Closing Transition Services listed in Section 8.09 include non-insurance matters, such as services relating to information technology, human resources, and accounting.

[11] In arguing that the parties' express reference to insurance in one section means that they did not intend for the Non-Covered Payments to transfer to Holdings in the stock sale, Defendants cite *Delmarva Health Plan, Inc. v. Aceto*, 750 A.2d 1213, 1216 (Del. Ch. 1999), for the "interpretative maxim" that "the expression of one thing is the exclusion of another." Ans. Br. 19. This argument was not made below and is therefore not properly raised on appeal. *See* Supr. Ct. R. 8. In any event, that doctrine, principally a rule of statutory interpretation where a court must choose between two possible reasonable meanings, is inapplicable since the two types of "insurance" at issue are not comparable. Moreover, even the court in *Delmarva* recognized that the "expressio unius" doctrine applies "only as an aid in arriving at intention, and not to defeat the apparent intention" of the contract, and declined to apply it. 750 A.2d at 1217 n.23.

its subsidiary (ASPV) stating that ASPV was responsible for the Non-Covered Payments related to its own lawsuits and workers' compensation claims. Ans. Br. 23. Because at the very least this was an issue of fact, the lower court erred in deciding it as a matter of law.

Indeed, the lower court's ruling cannot be sustained in light of the well-pleaded, undisputed facts regarding ASPV's liability for the Non-Covered Payments. Defendants place undue emphasis on the fact that the policies were USE's umbrella policies (*id.* at 1, 8), and seek to minimize the far more salient facts—which they cannot dispute and have never disputed—that the Non-Covered Payments arise from lawsuits and workers' compensation claims to which ASPV was subject (A23-24 ¶¶ 14-16). Nor have Defendants disputed that ASPV always reimbursed USE for the Non-Covered Payments pre-Closing. *Id.* ¶ 15. Instead, Defendants argue, contrary to the well-pleaded facts, that the Non-Covered Payments "are, and have always been" USE's liabilities, and that ASPV never paid and was never obligated to pay the Non-Covered Payments directly to the insurers. Ans. Br. 24. Moreover, although they contest it now, Defendants conceded this point below, admitting that "ASPV reimbursed [USE] for these insurance charges *before* the Closing," that "[USE] claimed reimbursement from ASPV to cover [USE] Policy payments before the Closing," and that "those payments were reflected as ASPV's liabilities on pre-Closing financial statements." A57-58.

Defendants' position that ASPV had no pre-Closing obligation is wrong for two reasons. First, Defendants ignore the clear allegations in the Complaint, which must be accepted as true: "While ASPV was USE's indirect subsidiary, USE passed [the Non-Covered Payment] bills along to ASPV, which paid them as it would any other expense" (A23-24 ¶ 15); the "[p]olicies were at all relevant times reflected as liabilities on ASPV's financial statements" (A23 ¶ 14); "USE recorded all Non-Covered Payments . . . as liabilities on ASPV's financial statements" (A24 ¶ 17); and "senior management [of ASPV] was at all relevant times aware that ASPV was responsible for these Non-Covered Payments (*id.*). The lower court should have accepted these allegations as true and afforded them all favorable inferences. It erred in not doing so in evaluating Defendants' motion to dismiss. *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 536 (Del. 2011). Second, it makes no sense for Defendants to insist on a formalistic and unrealistic approach that would require contracts documenting every payment and obligation between a parent and a subsidiary. This is particularly so in a case where the Non-Covered Payments were undisputedly considered and documented as ASPV's liabilities in the SPA. Nothing more was needed.

There is likewise no merit to Defendants' unsupported claim that the financial statements merely reflect a "pre-Closing accounting practice . . . of making intercompany payments to [USE] as reimbursement for insurance charges [USE]

incurred." Ans. Br. 25; *see also id.* at 28. Without explaining why it would be relevant, Defendants further contend that the SPA does not "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." *Id.* at 13.

Here, again, Defendants focus on the wrong SPA provision. It is undisputed that the Seller Disclosure Schedule set forth ASPV's "net assets" and described "in all material respects the consolidated financial condition and results of operations of" ASPV. A92-93 § 4.07. "Accrued Insurance Reserve" and "Workers Comp Insurance Accruals" were listed as liabilities on the financial statements, just like all of ASPV's other liabilities. Thus, Defendants' arguments about accounting policies are wrong; the Non-Covered Payments were listed in the financial statements alongside all of ASPV's liabilities, and the SPA does not distinguish them from any other pre-Closing ASPV liability.[12] This fact is undisputed and dispositive.

---

[12] The language Defendants cite from *Chicago Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*, 166 A.3d 912, 929 (Del. 2017) (Ans. Br. 28), establishes simply the Court's recognition in that case that the parties intended to use a consistent accounting approach pre-closing when calculating net capital adjustments. Likewise, the fact that a court in another case found the word "liabilities" was used "as a loose term" in schedules to a different merger agreement in a different context proves nothing about the SPA's clear meaning here. Ans. Br. 28 (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 58 (Del. Ch. 2001)).

Defendants make the nonsensical argument that the financial statements are not relevant because the Seller Disclosure Schedules reflect "two distinct pre-Closing dates" and, therefore, Section 4.07 cannot be "a comprehensive listing of ASPV's *post-Closing* liabilities." Ans. Br. 26. Yet, Defendants do not explain why the fact that the financial statements reflecting the Non-Covered Payments that were prepared prior to Closing somehow implied that the Non-Covered Payments would not remain as ASPV's liability, given that those financial statements establish that the Non-Covered Payments were, in fact, an existing liability of ASPV.[13] While the schedules definitely establish ASPV's liabilities, they are in no way an exclusive or exhaustive list. Nor do Defendants suggest any other document that the parties could or should look to in order to determine ASPV's assets and liabilities other than the financial statements.

Defendants' response to Plaintiffs' argument that the Working Capital Adjustment shows that the parties took the Non-Covered Payments into consideration and treated them as ASPV's "current liabilities" (A85 § 2.02(c)), has even less support. There is no "extrinsic evidence" at issue (Ans. Br. 30);

[13] Defendants claim that the financial statements were not complete, and thus did not incorporate the Non-Covered Payments, because "the financial statements referenced in the SPA attributed certain assets to ASPV that indisputably remained with [USE] after the sale." Ans. Br. 27. Of course, those assets are not at issue here, and how, why, or if they allegedly "remained with [USE]" has no bearing on the fact that, per the SPA, the Financial Statement "sets forth . . . [the] net assets" of ASPV. A92-93 § 4.07.

Defendants' argument contravenes the SPA's plain text and the incorporated financial statements, and Defendants offer no reason why the Non-Covered Payments should be written off as "pre-Closing assumptions" instead of treated as what they are, "liabilities." Indeed, the Working Capital Adjustment only makes sense if the Non-Covered Payments were ASPV's liabilities. The purchase price Holdings paid was reduced to account for the increase in the liabilities for Non-Covered Payments that were being transferred to it. Defendants seek to have this Court ignore the fact that they used the Non-Covered Payments to their benefit to obtain a lower price, which demonstrates that they understood the Non-Covered Payments to be liabilities that would transfer to Holdings. *See* A30-31 ¶¶ 34-35.[14]

The financial and disclosure schedules to the SPA are conclusive evidence that the Non-Covered Payments were ASPV liabilities that transferred to Holdings. The lower court erred in holding otherwise.

---

[14] There is no merit to Defendants' argument that EQIS could have "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." Ans. Br. 29. As detailed above, this has it exactly backward and would convert the transaction into an asset sale. Because this was a stock sale, an express provision was only required in the SPA to *carve out* a liability. The cases cited by Defendants (*id.* at 32) do not discuss the automatic transfer of assets and liabilities in a stock sale and are inapposite.

III. The Release Does Not Bar Plaintiffs' Claims

In claiming that the Release in Section 8.08 of the SPA bars USE's unjust enrichment claim against ASPV, Defendants, as they did below, attempt to transform the Release into a "general release" by simply labeling it as such, despite the fact that it neither is called a general release in the SPA nor contains language that makes it so.[15] Defendants, like the lower court, gloss over the key language of the Release, and they misapply the limited provisions that they do rely on.

The SPA does not refer to the release as a general release, and more importantly, the Release is *not* an unrestricted release that covers present and future claims. Instead, it is limited to "any and all claims . . . that any Seller Releasing Party *ever had or may now have* . . . 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." A121-22 § 8.08 (emphasis added). Indeed, Defendants concede that the Release is "a *backwards-looking provision* designed to release all claims as of the date of the Closing that relate to pre-Closing events." A485; Ans. Br. 42 n.7. Had the parties, represented

[15] The arguments in this section apply equally to EQIS' breach of contract claim, should the Court determine that Plaintiffs are correct that dismissal of that claim on the grounds discussed above was in error. Additionally, for the reasons discussed below, even if the Court were to find that the Release was a general release (which it is not), the Release's "carve-out" provision undisputedly applies to EQIS' breach of contract claim.

by sophisticated counsel, intended for the Release to cover post-Closing claims, they could easily have added language applying the Release to "future claims," as is typical in general releases. *See, e.g.,* A396 n.4 (collecting sample forward-looking releases drafted by Defendants' counsel). Because the Release must be interpreted in accordance with its actual language, it cannot be construed as a general release. *See Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2003) ("In construing a release, the intent of the parties as to its scope and effect are controlling, and the court will attempt to ascertain their intent from the overall language of the document.") (internal quotation marks and citation omitted).

Misconstruing its actual text, Defendants claim that the Release is not limited to claims that existed at Closing because the Release includes "claims 'that accrue at or *after* the Closing.'" Ans. Br. 39. Despite the fact that the Release plainly only applies to claims that the Releasing Party "ever had or may now have" at Closing, Defendants claim that this contractual text is trumped by the fact that the Release contemplates a claim accruing after Closing. But such an interpretation gives the "ever had or may now have" clause no meaning at all, in violation of established Delaware law. *See Intel Corp. v. Am. Guarantee & Liab. Ins. Co.*, 51 A.3d 442, 451 (Del. 2012) ("[N]o part of an agreement should be rendered superfluous."). By its express terms, the Release *only* bars claims that Plaintiffs "ever *had*" or, as of the date of the SPA, "may *now* have against any Buyer Release Party[.]" A121-22

§ 8.08 (emphases added). To fall within the Release, a claim *could* accrue after Closing, but it must have existed no later than the date of the SPA.

Defendants' incorrectly claim that the events that gave rise to Plaintiffs' claim are the underlying accidents. Ans. Br. 40. But the underlying accidents are not the relevant events, as Defendants concede by failing to address Plaintiffs' citation to the fundamental principle that a claim accrues "when the alleged wrong takes place." Opening Br. 38 (quoting *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *11 (Del. Ch. Nov. 27, 2013)).[16] The "wrong" here is Holdings' *post-Closing* failure to reimburse USE for the Non-Covered Payments. A31-32 ¶¶ 37-40 (alleging, *e.g.*, that: "ASPV's insurers continue to bill USE for Non-Covered Payments that the insurers have paid under the Auto/GL Policies since closing"). It is undisputed that, as of Closing, ASPV was current on its obligations to reimburse USE for the Non-Covered Payments. USE did not have, and could not have had, an unjust enrichment claim until Defendants reneged on their obligation to pay after Closing.

[16] One of Defendants' cases supports Plaintiffs' position. In *Vichi v. Koninklijke Philips Electronics, N.V.*, the court held that the "wrongful act" for purposes of an unjust enrichment claim was the date that the defendant allegedly wrongly obtained the benefit at issue. 62 A.3d 26, 43 (Del. Ch. 2012). *AM General Holdings LLC v. Renco Group, Inc.*, is inapposite; that case analyzed the "continuing breach exception" to the statute of limitations, which is inapplicable here. 2016 WL 4440476, at *11-12 (Del. Ch. Aug. 22, 2016).

Finally, while the Release does not bar any of Plaintiffs' claims for the reasons discussed above, the Release's carve-out preserves EQIS' breach of contract claim, and thus the Release is not a "separate basis" to affirm dismissal of that claim, as Defendants contend. Ans. Br. 33. Defendants, who fail to quote the SPA's actual language, incorrectly claim that the carve-out "is drafted narrowly." *Id.* at 36. But its plain text unambiguously covers EQIS's breach of contract claim by preserving any claim brought "pursuant to and subject to the terms of this [SPA]" (A121-22 § 8.08), which that claim clearly is.[17]

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief, this Court should reverse the judgment of the Court of Chancery and enter judgment in favor of EQIS and USE.

[17] Because the lower court dismissed on related grounds Plaintiffs' remaining claims for breach of the implied covenant of good faith and fair dealing and declaratory relief, the dismissal of those claims should be reversed for the same reasons as Plaintiffs' breach of contract and unjust enrichment claims.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

David B. Hennes
Lisa H. Bebchick
Jonathan R. Ference-Burke
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036
(212) 596-9000

By: */s/ Stephen C. Norman*
Stephen C. Norman (#2686)
Jaclyn C. Levy (#5631)
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Attorneys for Appellants US Ecology, Inc. and EQ Industrial Services, Inc.

October 19, 2018

5968035

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018, the foregoing document was served electronically by *File&ServeXpress* on the following counsel of record:

Jon E. Abramczyk, Esquire
D. McKinley Measley, Esquire
Alexandra M. Cumings, Esquire
MORRIS, NICHOLS, ARSHT & TUNNELL LLP
1201 N. Market Street
Wilmington, Delaware 19801

/s/ Jaclyn C. Levy
Jaclyn C. Levy (#5431)