IN THE

Supreme Court of the State of Delaware

THE CHEMOURS COMPANY,

Plaintiff-Below,
Appellant,

v.

DOWDUPONT INC.; CORTEVA, INC.; and E. I. DU PONT DE NEMOURS AND COMPANY,

Defendants-Below,
Appellees.

No. 147, 2020

CASE BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 2019-0351-SG

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This appeal concerns DuPont's 2015 spin-off of its performance chemical business into a new company called Chemours. Because the spin-off assigned to Chemours an outsized proportion of DuPont's legacy environmental liabilities, DuPont's board relied upon its management to certify the maximum potential value of those liabilities—to cap Chemours's potential exposure and thus ensure its solvency. On the basis of these certified maximums, DuPont determined that Chemours's assets would exceed its liabilities, albeit barely.

In the years since the spin-off, it has become clear that DuPont's certified liability maximums were radically inaccurate and systematically underestimated the maximum exposure that DuPont was assigning to the new company. The extent to which DuPont undercounted the maximums is astonishing, going to the many hundreds of millions of dollars. Moreover, the allegations of the complaint demonstrate that DuPont's methodology for calculating those maximums was designed to understate the exposure. But DuPont contends that it bears no responsibility for these liabilities and is not bound in any way by the liability maximums it certified, and on which its board's approval of the spin-off rested.

On the merits, then, this lawsuit concerns whether Delaware law permits DuPont, a Delaware company, to create a new Delaware company, Chemours, on the basis of certified liability maximums that were calculated to underestimate the maximum environmental exposure assigned to the new company, and then walk away from the very liabilities it systematically undervalued.

This appeal, however, presents the threshold question whether that important issue of Delaware law may be adjudicated in the Court of Chancery or whether, as the trial court held, it must be dismissed in favor of DuPont-sponsored arbitration.

The well-pleaded facts of the complaint establish:

(a) The DuPont board approved the Chemours spin-off on the basis of liability maximums that by design undervalued the liabilities DuPont was seeking to shed.

(b) The certified liability maximums have proven to be too low, systematically and spectacularly.

(c) The spin-off DuPont engineered was an extreme outlier, in terms of its substantive and procedural terms. As detailed below, the Separation Agreement defining the terms of the spin-off assigned to Chemours enormous liabilities unrelated to its business operations, saddled Chemours with a massive and unprecedented debt load, and deprived Chemours of procedural rights and recourse customary in Delaware spin-off practice.

(d) DuPont did not seek or receive the consent of Chemours's designated management team to any terms of the Separation Agreement, including its arbitration provisions, even though those executives were in place before the spin-off was achieved and sought to negotiate those terms with DuPont.

(e) If, as DuPont claims, Chemours is responsible for all of the liabilities DuPont purports to have assigned to Chemours, unlimited by the certified liability maximums, then Chemours was insolvent as of the time of the spin-off.

The Court of Chancery accepted these allegations as true but nevertheless dismissed the action. The court rested its decision on two holdings:

First, the court held that because a DuPont lawyer signed the spin-off agreement before the spin was completed, Chemours "consented" to all its terms, including its arbitration provisions, as a matter of Delaware and federal law.

Second, the court held that parent-subsidiary contracts cannot ever be challenged as procedurally unconscionable, as a matter of Delaware law.

As explained below, these holdings are not consistent with Delaware and federal law, and are at odds with one another. The first holding rests on the conclusion that Chemours consented to the arbitration provisions of the Separation Agreement. The second holding rests on the conclusion that those same provisions cannot be procedurally unconscionable because they were "admittedly non-consensual." These two issues are before the Court on this appeal.

Also before the Court are two issues the Court of Chancery declined to address. Chemours argued below that its purported consent to the Separation Agreement's arbitration provisions is invalid because it was the product of a breach of fiduciary duty by the DuPont-designated directors who approved them. The Opinion below did not address this contention. The Court of Chancery also declined to address Chemours's claim of substantive unconscionability, on the ground that federal statute stripped it of jurisdiction to consider the issue. As set out below, this holding conflicts with Delaware and United States Supreme Court authority.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by enforcing the Separation Agreement's "admittedly non-consensual" arbitration provisions as consensual. The Court of Chancery held that the Separation Agreement is "admittedly non-consensual," Op. 37, and it recognized that non-consensual arbitration provisions are not enforceable. Op. 22-23. But the court nevertheless enforced an arbitration provision in the Separation Agreement to dismiss the Complaint.[1] The court reasoned that the Federal Arbitration Act (FAA) required that result because it bars state courts from imposing stricter consent requirements for arbitration agreements than other contracts—and so if any part of the Separation Agreement is enforceable, then its arbitration provisions must be equally enforceable. Op. 27-29. This was a misapplication of both Delaware and federal law, because contract law is not—and cannot be—the basis for the enforceability of the Separation Agreement. Instead, as the Court of Chancery acknowledged, "admittedly non-consensual" arrangements like the Separation Agreement are enforced only "because they allow the corporate machinery to run smoothly." Op. 37-38. While that justification generally supports the enforcement of spin-off agreements, it does not satisfy the requirement of specific contractual consent that the U.S. Supreme Court has established for the enforcement of arbitration provisions.

[1] Citations in the form "¶ __" refer to Plaintiff's Verified First Amended Complaint (the "Complaint"), A231-304; "§ __" refers to provisions of the Separation Agreement, A308-99.

2. The Court of Chancery erred by failing to address whether Chemours's consent to the arbitration provisions is invalid as authorized in derogation of fiduciary duty. Directors of wholly owned subsidiaries—and directors of their parent corporations—"owe a duty to the subsidiary not to take action benefitting a parent corporation that they know will render the subsidiary unable to meet its legal obligations." *Trenwick Am. Litig. Tr.* v. *Ernst & Young, L.L.P.*, 906 A.2d 168, 174 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007). Chemours pleaded that it was legally insolvent at the time of the spin-off if it bore uncapped liabilities like DuPont now says. ¶¶ 10, 119. Further, Chemours contended below that DuPont's orchestration of a multibillion-dollar dividend payment by Chemours and its unilateral adoption of the arbitration provisions to shield the dividend from review are void for breach of fiduciary duty, rendering its purported consent invalid. A990-92; A1567-72. The court's Opinion omitted any discussion of fiduciary duty and otherwise failed to subject DuPont to the equitable scrutiny required by Delaware law. The Opinion thus permits Delaware companies to spin off insolvent Delaware newcos free from judicial scrutiny.

3. The Court of Chancery erred in holding that parent-subsidiary agreements cannot ever be invalidated as procedurally unconscionable. The court erred by holding that parent-subsidiary arrangements cannot be procedurally unconscionable because they are "not the product of fair bargaining." Op. 37-38. If sustained, this novel proposition would foreclose judicial scrutiny of contracts precisely *because* they are formed through oppressive, one-sided negotiation. It would also set Delaware on a course for weaker review of parent-subsidiary

transactions than applied in other jurisdictions—which have specifically recognized that spin-off agreements can be reviewed for procedural unconscionability.

4. The Court of Chancery erred by holding that it lacked jurisdiction to consider the substantive unconscionability of the Separation Agreement's arbitration provisions. The Separation Agreement purports to strip the arbitrator of any power to "amend, modify, revoke or suspend any condition or provision" of the agreement. § 8.2(e). Enforced in accordance with the trial court's decision, the delegation provision in the Separation Agreement assigns any unconscionability challenge to an arbitrator who is—according to DuPont—barred from considering or remedying unconscionability. This arrangement, as Chemours argued below, constitutes a legally impermissible waiver of unconscionability. The Court of Chancery held that it lacked jurisdiction to resolve this argument. Op. 35-36. That conclusion is contrary to the U.S. Supreme Court's decision in *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 74 (2010), and many other federal decisions.

STATEMENT OF FACTS

This Statement of Facts is drawn from the well-pleaded allegations of the Complaint, which must be accepted as true in this appeal from the grant of a motion to dismiss.

A. DuPont orchestrates the Chemours spin-off.

Defendant DuPont is a Delaware corporation that has manufactured industrial chemicals since the beginning of the nineteenth century. ¶ 1. Its legacy of chemical emissions gave rise to substantial environmental, tort, and regulatory liability, threatening the company's cash position. ¶¶ 15, 16, 81, 93-116. In 2013, looking to reduce its exposure, DuPont explored selling a business segment that manufactured and sold industrial and specialty chemicals. ¶¶ 15-17. However, it concluded that no one would buy this "Performance Chemicals" unit because the associated liabilities were so great. ¶ 17. DuPont therefore began to explore a spin-off of what would become Chemours. *Id.*

Over the next two years, DuPont prepared the Chemours spin-off. Throughout the process, DuPont managers controlled every aspect of the transaction. DuPont continued in this unilateral control even after Chemours's prospective management team had been identified, even after Chemours was formally incorporated in April 2015, and at all times while the framework of the new company was under construction. ¶¶ 25-36.

Thus, when Chemours's prospective management team asked to retain independent counsel to represent the to-be company's interests, DuPont said no. ¶ 26. When the Chemours team asked to see and comment on the "Separation

Agreement" that would define Chemours's rights and obligations, DuPont said no. ¶ 27. When DuPont finally permitted Chemours to review a partial draft, it made clear that its own lawyers had prepared it "at the request and on behalf of DuPont alone" and that Chemours could not rely on any counsel "to advocate for [Chemours] or to protect its interests in connection therewith." ¶ 28. DuPont then rejected all the suggestions of the Chemours team, explaining that "this was not a negotiation," but rather a "calibration session." ¶¶ 30-31. And when Chemours's CFO-elect pleaded with DuPont to leave more cash in the new company, he was turned down—and then chastised for creating an email record of the request. ¶ 32.

B. The one-sided terms of the spin-off reflect DuPont's control and self-interest.

The result of this process was a spin-off whose terms were unusually unfavorable to the new company. As a first step, in May 2015, DuPont caused Chemours to assume $4 billion in debt and to use the proceeds to pay DuPont a $3.91 billion dividend. ¶ 35(a).

Soon after, DuPont revealed the spin-off's other economic terms. DuPont assigned to Chemours only 19% of the company's business lines, but approximately 67% of its environmental liabilities and 90% of its pending volume of lawsuits. ¶ 38. Those environmental liabilities included liabilities from sites that were never owned by DuPont, no longer owned by DuPont, or inoperative—liabilities that were completely unrelated to the Performance Chemicals business, from asbestos to explosives. ¶¶ 39-40. DuPont also included indemnification provisions that purport to require Chemours to indemnify DuPont for these liabilities (and all related defense costs) and to bar Chemours from seeking contribution or other reimbursement from DuPont. ¶¶ 45-46 (citing §§ 6.1(c), 6.3).

The non-economic terms of the spin-off were equally one-sided. The Separation Agreement includes provisions that seek to severely constrain Chemours's rights in any arbitration. Thus, for example, DuPont's arbitration provisions would strip the arbitrator of any "authority or power to limit, expand, alter, amend, modify, revoke or suspend any condition or provision of" the Separation Agreement. § 8.2(e). DuPont's arbitration provisions would bar Chemours from challenging DuPont's allocation of liabilities by schedule. § 1.1(19)(ii). They say that DuPont's after-the-fact determination that various environmental liabilities belong to Chemours is presumptively valid. *Id.* And they say that the losing party in arbitration must bear "all costs" following any challenge to the allocation of environmental liabilities—but only if the losing party is Chemours. § 8.2(f).

The structure and terms of arbitration were conceived and drafted exclusively by DuPont and its lawyers. No member of Chemours's prospective management, and no person who would have any continuing role with Chemours, assented to arbitration. ¶ 68. The Chemours team specifically objected to the arbitration provisions of the Separation Agreement, but DuPont wrote them into the Separation Agreement anyway. ¶¶ 68-69.

Everyone understood that arbitration was forced on Chemours by DuPont without Chemours's consent, including DuPont's then-Chief Executive Officer and board Chair, Ellen Kullman. In a sworn affidavit, she confirmed: "The terms of the Separation Agreement . . . including the arbitration provisions in it, were not the product of negotiation between DuPont and Chemours and do not reflect an agreement between DuPont and Chemours." A1028 (Sept. 25, 2019 Affidavit of Ellen J. Kullman, hereinafter "Kullman Aff.") ¶ 2. To the contrary, Ms. Kullman averred, "DuPont unilaterally determined the terms of the Separation Agreement, including its arbitration provisions, and unilaterally consummated the Separation Agreement without any consent by Chemours." *Id.*

C. DuPont's board approves the spin-off on the basis of understated "High End (Maximum) Realistic Exposure" for transferred liabilities.

The Separation Agreement and spin-off required the formal approval of the boards of DuPont and Chemours. DuPont's board retained advisors to assist its review. They cautioned that discovery of new environmental liabilities and imposition of new environmental cleanup costs had bankrupted prior spin-offs. ¶ 44. And the debt load DuPont planned to inflict on Chemours was so extreme that its financial advisors had to use leveraged buy-outs, not spin-offs, as precedents for their analysis. *Id.* This raised concerns about the spin-off's propriety under Delaware law—which, among other things, requires that a spun company be solvent. ¶¶ 47-48.

To address these concerns, DuPont hired Houlihan Lokey to issue a solvency opinion upon which the DuPont board could rely. ¶ 49. Houlihan was not permitted to, and did not, conduct an independent valuation of the liabilities. ¶ 50. Instead, DuPont itself certified the "DuPont Maximums"—that is the "High

End (Maximum) Realistic Exposure" for each of the liabilities DuPont proposed to transfer to Chemours. DuPont represented that the DuPont Maximums reflected its "best judgment" of the "maximum realistic exposure range of each such contingent liability" and that there were no "facts known to [DuPont] which could give rise to . . . other contingent liabilities." ¶¶ 50, 55.

DuPont's methodology was not reasonably calculated to assess this maximum exposure. ¶ 59. DuPont calculated the DuPont Maximums for environmental remediation liabilities by copying the figures from its accounting reserves—figures that necessarily understated maximum realistic exposure by excluding liabilities unless they were both "probable" and "estimable." ¶ 57.[2] Thus, DuPont excluded liabilities that were "possible" but not deemed "probable"—no matter how vast, imminent, or possible the potential liability was, and even where DuPont knew that higher cleanup costs may be coming. *Id.* The DuPont Maximums also excluded even *probable* liabilities that DuPont had not yet assessed. *Id.* The methodology for formulating "maximum" litigation exposure was equally suspect. DuPont derived these by extrapolating from its historical litigation costs—figures that DuPont's own advisors cautioned did not reflect "worst case scenarios" and were not based on a claims analysis or value assessment of individual lawsuits. ¶ 58.

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[2] These reserves thus conformed to relevant accounting guidelines but shed no light on the "High End (Maximum) Realistic Exposure" to which they were applied. ¶ 57.

Nevertheless, relying on the DuPont Maximums, Houlihan issued an opinion that Chemours's pro forma assets would slightly exceed its pro forma liabilities. Based on that opinion, DuPont's board approved the transaction. ¶¶ 59, 70. But it did so with the understanding that Chemours would not face unlimited exposure for DuPont's historical liabilities. As Ms. Kullman averred, "[t]he position of DuPont's current management that Chemours faces unlimited exposure for historical DuPont liabilities is not consistent with my intent or the intent of DuPont's Board in approving the terms of the spin-off and Separation Agreement." Kullman Aff. ¶ 3 (A1029).

D. The spin-off DuPont engineered departs substantially in its one-sidedness from precedent transactions and governance norms.

As the allegations of the Complaint establish, the Chemours spin-off is unusual among such transactions in both its economic and dispute-resolution terms and in many ways unprecedented.

As to the economic terms: Chemours was spun off with a debt-to-EBITDA ratio of 7.3—meaning that its liabilities exceeded its unadjusted earnings by a multiple of 7.3—and debt netting out to 76.1% of its total enterprise value. These are exceptionally high ratios—three times worse than the average of the 59 comparably large spin-offs consummated in the five years before Chemours filed suit. ¶¶ 41-42. This capital structure left Chemours with virtually no cushion for liquidity, necessary capital expenditures, or adverse developments—even assuming DuPont's certified "maximums" were realistic. ¶ 44.

As to the arbitration-related terms: Among the 59 large spin-offs consummated in the five years before this proceeding began, many do not require arbitration at all. And not a single one purports to bar the new company from challenging the allocation of historical liabilities; not a single one purports to provide that the parent's post-spin allocation of liabilities is presumptively valid; not a single one contains punitive cost-shifting provisions that operate effectively to burden only one party; and only four agreements impose any limits on the arbitrator's authority to limit or modify the terms of the spin agreement. ¶ 65. Each arbitration-related term of the Chemours spin-off is unusual, standing alone. The unprecedented combination of these terms operates to burden the new company's rights, and insulate the incumbent company's actions from review, in a manner that far exceeds what previous transaction planners have ever viewed as appropriate. ¶ 66.

E. DuPont causes Chemours to adopt the spin-off.

To complete the spin-off, DuPont appointed three of its own employees—an in-house lawyer, a Treasury Manager, and an M&A Manager—as the Chemours board of directors. None of these individuals had or ever would have any relationship or affiliation with Chemours. ¶ 35(a). All were acting on the instruction and in the interest of DuPont. ¶¶ 35, 36.

These directors took "notice" that "DuPont, as the sole stockholder of [Chemours], ha[d] communicated" that the spin-off was "in DuPont's best interests," and then "approv[ed]" the Separation Agreement. ¶ 35(c). No

Chemours representative was invited to the brief meeting at which this took place, and none attended. *Id.*

Shortly thereafter, the DuPont-installed directors resigned and one of them—Nigel Pond, the internal DuPont lawyer—was redesignated "Vice President" of Chemours. ¶ 35(c)-(d). In that capacity, at the direction of DuPont, Mr. Pond signed the Separation Agreement, purporting to enter Chemours into a contract. He then immediately resigned from Chemours. ¶ 35(d).

F. Chemours craters following the spin-off.

The spin-off took effect on July 1, 2015. ¶ 11. Chemours quickly announced it was cutting its future dividends to almost zero, becoming the first comparably sized spinco within the past five years to do so. ¶¶ 74-75. It also laid off 1,000 employees, shuttered plants or production lines in Delaware and Tennessee, sold off business lines, and undertook multiple corporate restructurings and amendments to its credit agreements. ¶ 76. Recognizing how difficult Chemours's capital situation was, DuPont stepped in with a $190 million advance payment to Chemours for future goods and services. ¶ 77.

These measures kept Chemours afloat but did not insulate it from a looming threat: the historical liabilities DuPont had transferred. Houlihan had concluded that Chemours would be solvent only on the basis of the DuPont Maximums. ¶ 50. But those "maximums" proved wildly inaccurate, ¶ 59, and DuPont took the position that they were of no effect—that Chemours is "contractually obligated to indemnify DuPont for any and all" liability "without limitation." ¶ 87. This would mean that Chemours had been saddled with unlimited exposure for DuPont's liabilities. That position is in conflict with the sworn statement of DuPont's board chair (*see* Kullman Aff. ¶ 3 (A1029)), and would mean that Chemours's liabilities exceeded its assets at the time of the spin-off—an outcome barred by Delaware law. ¶ 10. Accordingly, Chemours consistently asserted that the DuPont Maximums capped its obligations, while publicly acknowledging DuPont's contrary position. ¶¶ 86, 98, 107.

G. Chemours is inundated with huge legacy claims that reveal the inaccuracy of the DuPont Maximums.

It became clear soon after the spin-off that the DuPont Maximums were radically inaccurate. An early exemplar was multi-district litigation involving 3,500 plaintiffs seeking damages for cancer and other diseases allegedly caused by the chemical PFOA. DuPont had certified a $128 million "maximum" for this liability. ¶ 84. The maximum was not even close. DuPont lost three bellwether cases at a cost of $19.7 million in damages—all billed to Chemours and just for 3 of 3,500 cases—leading market observers to conclude that liability "could easily skyrocket into the billions." ¶ 85; A1036-39.

Other examples followed. DuPont certified "maximum" remediation liability of $2.09 million for one of its sites in North Carolina, but the cost to Chemours of implementing a recent consent order with the State will exceed $200 million for emissions from that plant alone. ¶¶ 96, 99. DuPont certified a $17 million maximum for its historical benzene liability, but now estimates that same liability at over $111 million. ¶ 108. The State of New Jersey has filed suit to recover what it alleges are "staggeringly expensive" remediation costs that run into the "hundreds of millions of dollars"—far higher than the "maximums" that DuPont certified for the sites in that State. ¶¶ 7, 101. And equivalent lawsuits have been filed by the States of New Hampshire, Ohio, Vermont, and New York. ¶¶ 112-116.

Meanwhile, DuPont has continued to split itself up to shed liability. In August 2017, DuPont merged with The Dow Chemical Company ("Dow"), creating DowDuPont Inc. ("DowDuPont"). ¶¶ 12-13. And that entity then splintered into:

- Dow Inc., spun off on April 1, 2019, which contains DowDuPont's materials sciences businesses, along with all financial assets and liabilities of the historical Dow not related to its agriculture, specialty products, or materials sciences businesses;

- Corteva, Inc. ("Corteva"), spun off on June 1, 2019, which contains DowDuPont's agriculture and nutritional businesses, along with all of the outstanding common stock of the historical DuPont exclusive of its subsidiaries and 29% of all financial assets and liabilities of historical DuPont not related to the agriculture, specialty products, or materials sciences businesses; and

- DuPont de Nemours, Inc., the new name for the surviving entity, which contains DowDuPont's specialty products business, along with the balance of the financial assets and liabilities of historical DuPont not assumed by Corteva.

¶ 72.

DuPont claims to share its alleged right to unlimited indemnification from Chemours with these far-flung corporate offspring. On March 19, 2019, DowDuPont disclosed that Corteva anticipated indemnification from Chemours of hundreds of millions of dollars. Shortly after this disclosure, Chemours asked DuPont to confirm that the follow-on spin-offs would not result in an increase in Chemours's purported obligations or reduce the assets available to satisfy any obligations owed to Chemours. DuPont refused to provide this confirmation. ¶ 73. DuPont thus holds open the real possibility that its reorganization (and future reorganizations) may reduce the funds available to respond to ongoing public and private claims to redress and remediate harms resulting from DuPont's long history of chemical emissions.

H. Chemours sues to force DuPont to honor its certified maximums.

Chemours filed suit in the Court of Chancery on May 13, 2019. A23-182. The Complaint seeks declarations that Defendants are not entitled to indemnification for historical DuPont liabilities that exceed the DuPont Maximums and may not preclude Chemours from seeking contribution for historical DuPont liabilities that exceed those maximums. In the alternative, Chemours seeks return of the $3.91 billion dividend. ¶¶ 120-201. As explained in the Complaint, if the DuPont Maximums do not cap Chemours's liabilities and indemnification obligations, then Chemours was insolvent at the time of the spin-off and so the dividend paid to DuPont was unlawful. ¶¶ 10, 119.

DuPont moved to dismiss, arguing that litigation should be terminated in favor of confidential arbitration.

I. The Court of Chancery dismisses Chemours's complaint for lack of subject matter jurisdiction.

The Court of Chancery granted DuPont's motion. The court first held that Chemours had consented to the Separation Agreement, because DuPont's internal lawyer Nigel Pond signed the document while nominally working for Chemours. Op. 25-26. That signature bound Chemours because "overt manifestation of assent—not subjective intent—controls the formation of a contract." Op. 24. While the court recognized that DuPont dominated the contracting process, it held that irrelevant because Chemours had identified no precedent rejecting an agreement "[s]imply because the parent dictates terms to its wholly-owned subsidiary." Op. 27. Accordingly, because the FAA requires state courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the court held that Mr. Pond's signature is dispositive on the issue of consent. Op. 28.

The court next held that it lacked jurisdiction even to consider whether any of the Separation Agreement's arbitration provisions are substantively unconscionable. Citing the U.S. Supreme Court's decision in *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63 (2010), the court observed that it could only consider arguments that "refer to the unconscionability of [the delegation] clause and not the broader contractual provisions regarding arbitration." Op. 30-31.

Lastly, the court held that parent-subsidiary arrangements like the Separation Agreement cannot *ever* be procedurally unconscionable, because "the spirit of procedural unconscionability . . . is wholly inconsistent with the routine enforcement of parent-subsidiary contracts." Op. 37. The court noted that while such agreements do not "reflect arms'-length bargaining between the parent and its subsidiary," Delaware law nevertheless "enforces these admittedly non-consensual contracts because they allow the corporate machinery to run smoothly." Op. 37-38. "[T]o find such a contract unenforceable based on procedural unconscionability," the court reasoned, "would be nonsensical, because their presumptive validity acknowledges that they are *not* the product of fair bargaining." Op. 38.

The Court declined without comment to address Chemours's remaining contentions.

ARGUMENT

I. THE COURT OF CHANCERY ERRED WHEN IT ENFORCED THE SEPARATION AGREEMENT'S "ADMITTEDLY NON-CONSENSUAL" ARBITRATION PROVISIONS AS CONSENSUAL.

A. Question Presented

Whether the Separation Agreement's arbitration provisions are unenforceable as non-consensual arrangements under Delaware corporate law. This issue was preserved at A984-89.

B. Scope of Review

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *Asbestos Workers Local Union No. 42 Welfare Fund* v. *Brewster*, 940 A.2d 935, 940 (Del. 2007).

C. Merits of Argument

"[A]rbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681-84 (2010). Agreements to arbitrate can therefore be enforced only upon mutual consent of the parties to resolve their disputes in an arbitral rather than judicial forum. *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 297-99 & n.6 (2010) (arbitration is "a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration"); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). This requirement applies equally to delegation clauses that assign the question of arbitrability to arbitration. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943-45 (1995).

Thus, the threshold inquiry whenever a litigant invokes arbitration is whether the parties consented to arbitrate. That question is controlled here by Delaware contract law. *Stolt-Nielsen*, 559 U.S. at 681. And under Delaware law the basic ingredient of consent is lacking.

"One of the first things first-year law students learn in their basic contracts course is that, in general, the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . . ." *Eagle Force Holdings, LLC* v. *Campbell*, 187 A.3d 1209, 1212 (Del. 2018). Precisely because there can be no contract without bargained-for mutual assent, "[w]here one party is under the domination of another by virtue of the relationship between them . . . the law may refuse to recognize the formation of a contract," because "[f]ull and free consent, a deliberate and free act of the mind only, will bind a party in contract." *Dervaes* v. *H.W. Booker Constr. Co.*, 1980 WL 333053, at *10 (Del. Super. May 28, 1980). To be enforceable, consent to an agreement to arbitrate must be "given voluntarily." *Janiga* v. *Questar Capital Corp.*, 615 F.3d 735, 743 (7th Cir. 2010).

Nothing about the so-called agreement to arbitrate between Chemours and DuPont satisfies these requirements: Like the rest of the Separation Agreement, the arbitration provisions—including the delegation provision—were conceived, drafted, and executed by DuPont alone. ¶¶ 68-69. Chemours was excluded from every aspect of the "agreement's" conception and design, every aspect of its substantive and procedural terms. Chemours asked for, and was denied, the opportunity to bargain with DuPont regarding the terms of the Separation

Agreement. ¶¶ 29-31. Chemours asked for, and was denied, the ability to retain counsel. ¶¶ 26, 28. Chemours exercised no agency and DuPont tolerated no input.

Chemours thus consented to no part of the arbitration provisions of the Separation Agreement. To the contrary, the Chemours team objected to DuPont's proposed arbitration scheme on the grounds that it was one-sided and contrary to Chemours's interest. ¶¶ 65-68. Chemours was not permitted to, and did not, negotiate any aspect of the arbitration provisions, and Chemours did not approve any aspect of those provisions either. ¶ 68.

This is not in question. DuPont's own CEO and Chair offered an affidavit to swear that "the arbitration provisions in" the Separation Agreement "were not the product of negotiation between DuPont and Chemours and do not reflect an agreement between DuPont and Chemours," because "DuPont unilaterally determined the terms of the Separation Agreement, including its arbitration provisions, and unilaterally consummated the Separation Agreement without any consent by Chemours." Kullman Aff. ¶ 2 (A1028). And the Court of Chancery itself expressly held that the Separation Agreement was "admittedly non-consensual." Op. 37.

Usually, however, in the parent-subsidiary context, the lack of consent makes no difference. Because parent corporations like DuPont can control everything about their wholly owned subsidiaries (if they choose to), any agreement between them is essentially an agreement between the parent and itself. As Delaware courts have recognized, such "contracts" are not founded on mutual assent. *See Highlands Ins. Grp., Inc.* v. *Halliburton Co.*, 2001 WL 287485, at *8

(Del. Ch. Mar. 21, 2001), *aff'd*, 801 A.2d 10 (Del. 2002) (explaining "there was (legally speaking) no 'other' contracting party" in the spin-off agreement, because the spinco "had no input into negotiating or drafting"); *see also Blackrock Capital Inv. Corp.* v. *Fish*, 799 S.E.2d 520, 529 (W. Va. 2017) (contract between parent and wholly owned subsidiary involved "no real and voluntary meeting of the minds").

For this reason, the law recognizes and enforces agreements between a parent and its wholly owned subsidiary as creatures of corporation law, not contract law. *See, e.g.*, *Aviall, Inc.* v. *Ryder System, Inc.*, 913 F. Supp. 826, 832 (S.D.N.Y. 1996) (a separation agreement "is less like a contract between two different parties . . . and more like a charter document that creates the subsidiary as an independent entity"). The Opinion below recognized much the same, observing that "Delaware law enforces these admittedly non-consensual contracts because they allow the corporate machinery to run smoothly." Op. 37-38.

While the Court of Chancery recognized it could not grant dismissal "unless Chemours consented to arbitration," Op. 23, it concluded that Chemours consented to the "admittedly non-consensual" Separation Agreement, Op. 37. The court reached this contradictory result because it believed that the FAA required it. Given that "consent to arbitration under the FAA is contractual consent under state law," the court reasoned, it could "not construe consent uniquely simply because an arbitration agreement is at issue." Op. 27-28. Accordingly, Chemours could not prevail because it had identified "no case that ha[d] declined to enforce a parent-subsidiary contract because the subsidiary could not manifest assent due to its domination by the parent." Op. 27. Absent any such precedent, the court concluded that "Delaware law enforces such agreements as contracts, and searches for the requisite contractual manifestation of assent by reference to foundational contractual principles—rendering Mr. Pond's signature near ironclad." Op. 29.

The question regarding "consent" before this Court thus reduces to this: Does Delaware enforce parent-subsidiary agreements "as contracts"—as the product of the bargained-for consent federal law requires to enforce an agreement to arbitrate? Nothing in Delaware law requires that result:

(1) Consent is at the core of the elementary framework of contract law: offer, acceptance, consideration. *James J. Gory Mech. Contracting, Inc.* v. *BPG Residential Partners V, LLC*, 2011 WL 6935279, at *2 (Del. Ch. Dec. 30, 2011). And for good reason—the requirement of mutual acceptance gives each party the power to veto a proposed bargain if it concludes that the burdens outweigh the benefits. There can be no such acceptance—no consent—when a party is agreeing with itself to bind another, as DuPont has done here, which is why black-letter law teaches that contracts between a party and itself give rise to no remedies. *See* Restatement (Second) of Contracts § 9 cmt. a. To designate the signature of a DuPont employee on the Separation Agreement as Chemours's "consent" does not correspond to the idea of bargained-for exchange upon which the law of contract is founded and thus unnecessarily venerates form over substance.

(2) Reflecting the reality that the normal doctrines of contract law cannot sensibly be applied to arrangements between parent and subsidiary, Delaware law does *not* apply those doctrines to the formation and interpretation of parent-

subsidiary agreements. The Court of Chancery has thus held that no consideration is necessary to render a parent-subsidiary contract enforceable. *Anadarko Petrol. Corp.* v. *Panhandle E. Corp.*, 1987 WL 16508, at *4 (Del. Ch. Sept. 8, 1987). Similarly, the Court of Chancery has held that the doctrine of mutual mistake does not apply to parent-subsidiary contracts. *Highlands Ins.*, 2001 WL 287485, at *8. These decisions reflect the courts' recognition that parent-subsidiary contracts are not a product of offer-acceptance-consideration, and that, therefore, remedies reflecting their absence have no place in this jurisprudence.

(3) To the contrary—and exactly as the Court of Chancery observed in holding the doctrine of unconscionability likewise inapplicable in the parent-subsidiary context—agreements between parents and subsidiaries are not consent-based contracts at all, but rather "non-consensual" arrangements that are generally enforced "because they allow the corporate machinery to run smoothly." Op. 37-38.

These considerations confirm what common sense makes clear: Parent-subsidiary agreements are not founded on consent and their enforcement is premised not on traditional contract-law principles but rather on corporate law considerations of practicality and efficiency. Delaware law does not say that DuPont causing Chemours, through a DuPont employee, to "consent" to arbitration, for DuPont's sole benefit, constitutes contractual consent sufficient to trigger the FAA.

Nor does the FAA compel a different result. That statute places arbitration agreements on an equal footing with other contracts by preempting "any state rule discriminating on its face against arbitration" or "disfavoring contracts that . . . have the defining features of arbitration agreements," *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). It does not "alter background principles of state contract law." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009). It is a nondiscrimination principle designed to preempt any state laws that treat contractual arbitration provisions as different from other contractual provisions.

Chemours does not ask the court to discriminate against arbitration or otherwise "construe consent uniquely simply because an arbitration agreement is at issue." Op. 28. Instead, because a subsidiary cannot consent—and because the ground rules of contracting are otherwise generally inoperable in the parent-subsidiary context—arrangements like the Separation Agreement are *never* enforced as consent-based "contracts" entitled to the FAA's protection.

But this does not mean that spin-off agreements generally, or even aspects of the Separation Agreement, are unenforceable. What it means, rather, is that the question of enforceability cannot be found in the exchange of informed, mutual assent that underlays the law of contracts and that the U.S. Supreme Court has imposed as a requirement for arbitration. As the Court of Chancery itself recognized, to facilitate appropriate corporate reorganizations, and consistent with the broadly enabling character of our law, Delaware will generally enforce spin-off and similar transactions, provided they are legally and equitably permissible.

The logic and limits of this principle are illustrated by Delaware's treatment of equivalent intracorporate "agreements" like corporate bylaws and charters.

Those arrangements are often analogized to contracts between "managers and stockholders" in that they "structure their relations," *Salzberg* v. *Sciabacucchi*, 227 A.3d 102, 116 (Del. 2020), and are frequently construed according to the canons of contract interpretation. But that does not mean such documents are consent-based "contracts." To the contrary. If a Delaware company put a provision in its bylaws or charter saying that stockholder suits had to be brought in arbitration, that provision would be properly held unenforceable under Section 115 of the Delaware General Corporation Law ("DGCL"), which states that no bylaw or charter may restrict a plaintiff from filing "internal corporate claims" in the Delaware courts. 8 *Del. C.* § 115.

But the only reason a bylaw provision mandating arbitration of internal affairs claims would be unenforceable—the only reason such a provision *could* be held unenforceable under the FAA—is the absence of contract-law consent between the stockholders and the company. That is because, if such documents are founded on consent, they are subject to the FAA and may not be enforced so as to disfavor arbitration. Put otherwise, if intracorporate agreements like bylaws, charters and (as here) spin-off documents are held to be consent-based contracts, then a company would be free to require arbitration of internal affairs claims and Section 115 would be unenforceable as discriminating against arbitration in violation of the FAA. Thus, to avoid putting Section 115 on a collision course with federal law, arbitration provisions in corporate documents are properly understood as resting on equitable principles other than contract-law assent (even if they might be properly interpreted according to contract-law principles). As this

Court recently suggested, the contractual analogy is thus limited in the charter and bylaws context to cases in which "the logic underlying" the enforcement of "traditional contract[s]" has "force." *Salzberg*, 227 A.3d at 133.

So too for the "admittedly non-consensual" Separation Agreement, where the Court of Chancery strained to find consent when it was plainly lacking as a matter of common sense. This Court should reject that result, which would encourage Delaware corporations to use spin-offs as a dumping ground, free from judicial oversight.

II. THE COURT OF CHANCERY ERRED WHEN IT IGNORED CHEMOURS'S ALLEGATIONS THAT THE ARBITRATION PROVISIONS ARE INVALID BECAUSE AUTHORIZED IN DEROGATION OF FIDUCIARY DUTY.

A. Question Presented

Whether the Court of Chancery erred by failing to hold that there was no valid agreement to arbitrate where the purported "consent" was given in violation of fiduciary duties. This issue was raised by Chemours, A990-92, but it was not addressed by the court.

B. Scope of Review

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *See supra* Part I.B.

C. Merits of Argument

Even if the artifice of contractual "consent" to arbitration here were credited, that consent would nevertheless be invalid because it was inequitable. Under our law, the actions of fiduciaries are "'twice-tested,' first for legal authorization, and second by equity." *In re Investors Bancorp, Inc. Stockholder Litig.*, 177 A.3d 1208, 1222 (Del. 2017) (quoting *Sample* v. *Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007)). Accordingly, where a board of directors causes a corporation to enter into a contract that is in breach of its fiduciary duties, the contract is "invalid and unenforceable." *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 51 (Del. 1994); *see also Sample*, 914 A.2d at 672 (where a contract "is premised upon a breach of fiduciary duty, the contract may be unenforceable on equitable grounds").

The Complaint alleged that the Separation Agreement—and its arbitration scheme in particular—was designed to facilitate and shield from review a $3.91 billion dividend from Chemours to DuPont and the transfer of most legacy environmental and litigation liabilities from DuPont to Chemours. It alleged that the Separation Agreement was approved on behalf of Chemours by a board of directors comprising three DuPont employees acting entirely at DuPont's direction. And it alleged that if Chemours bore unlimited responsibility for the liabilities transferred to it in the spin-off—as DuPont now contends—Chemours would have been insolvent at the time of the dividend payment to DuPont. ¶¶ 136-45.

These allegations state a claim for breach of fiduciary duty. Generally, Delaware law recognizes that "[a] wholly-owned subsidiary is to be operated for the benefit of its parent," but the subsidiary's board may not "support a parent's business strategy" if "it believes pursuit of that strategy will cause the subsidiary to violate its legal obligations." *Trenwick Am. Litig. Tr.* v. *Ernst & Young, L.L.P.*, 906 A.2d 168, 174 (Del. Ch. 2006). By causing Chemours to enter into the Separation Agreement providing for a dividend at a time when the company would have been insolvent by DuPont's own understanding, the DuPont-appointed directors caused Chemours to act in violation of Sections 170, 173, and 174 of the DGCL — and by causing Chemours to submit to an arbitration regime that purports to block any remedy for that violation, they impermissibly sought to constrain future Chemours directors from taking steps to remedy it.

Moreover, "[w]hen a corporation is insolvent," as DuPont necessarily must accept that Chemours was at the time of the spin-off given its claim that Chemours bore uncapped liability, "its creditors take the place of the shareholders as the residual beneficiaries." *N. Am. Catholic Educ. Prog. Found., Inc.* v. *Gheewalla*, 930 A.2d 92, 101 (Del. 2007).

In these circumstances, the directors of an insolvent wholly owned subsidiary may not act for the sole benefit of the parent. "Directors continue to have an obligation to maximize the value of the firm, but now a transfer of value to the sole stockholder does not inure to the ratable benefit of all of the residual claimants." *Quadrant Structured Prods. Co.* v. *Vertin*, 102 A.3d 155, 184 (Del. Ch. 2014). Instead, "[t]he payment now transfers value previously owned beneficially and indirectly by all of the residual claimants to the party in control of the corporation." *Id.* As a result, Delaware courts have long held that "transfers from an insolvent subsidiary to its controller" can constitute a "breach of fiduciary duty." *Id.* Because the Separation Agreement provided for and shielded from effective review a massive value transfer from Chemours to DuPont at a time when Chemours would have been insolvent under DuPont's interpretation of the Separation Agreement, the Chemours directors breached their fiduciary duties by consenting. As such, their consent is inequitable, invalid, and insufficient to strip the Delaware courts of jurisdiction.

Chemours pressed these points to the Court of Chancery in briefing and at argument. DuPont offered no response—waiving any rebuttal. *See Shawe* v. *Elting*, 157 A.3d 152, 162 & n.31 (Del. 2017). Yet the Court of Chancery did not take up the issue. This was error. In like circumstances, this Court has held that where the Court of Chancery overlooked arguments raised below for which "resolution . . . could change the outcome," the appropriate remedy is reversal and remand. *CompoSecure, L.L.C.* v. *CardUX, LLC*, 206 A.3d 807, 819 (Del. 2018); *see also City of Fort Myers Gen. Emps.' Pension Fund* v. *Haley*, 2020 WL 3529586, at *17 (Del. June 30, 2020) ("Although the Court of Chancery did not consider the other elements of the claim, Plaintiffs suggest that this Court should rule on them in this appeal. We think the better course is for the Court of Chancery to consider those elements in the first instance. Accordingly, we direct the Court of Chancery to consider the aiding and abetting issues on remand.").

III. THE COURT OF CHANCERY ERRED WHEN IT FAILED TO HOLD THAT THE SEPARATION AGREEMENT'S ARBITRATION PROVISIONS ARE UNCONSCIONABLE.

A. Questions Presented

The Court of Chancery's decision on unconscionability presents two questions: (1) whether parent-subsidiary agreements can be invalidated as procedurally unconscionable, preserved at A1007-09; and (2) whether the Separation Agreement's delegation provision is substantively unconscionable as a waiver of unconscionability, preserved at A1009-14.

B. Scope of Review

Dismissal for lack of subject matter jurisdiction is reviewed *de novo*. *See supra* Part I.B.

C. Merits of Argument

It is well settled under both state and federal law that unconscionable arbitration provisions are unenforceable. *See, e.g.*, *Fritz* v. *Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *4 (Del. Ch. Nov. 26, 1990). This rule extends to delegation provisions that purport to direct the question of arbitrability to arbitration. *See, e.g.*, *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 72 (2010).

Here, Delaware law supplies the standard for unconscionability. *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). Under Delaware law, a contractual provision will be held unconscionable and therefore invalidated when a plaintiff alleges "procedural unconscionability" and "substantive unconscionability." *James* v. *Nat'l Fin., LLC*, 132 A.3d 799, 815 (Del. Ch. 2015). However, substantive and procedural unconscionability do not present "separate elements of a two prong test"; instead, Delaware law requires a "unitary" analysis in which the greater the showing of one kind of unconscionability, the less is required of the other. *Id.*

The Court of Chancery did not take up Chemours's well-pleaded allegations of unconscionability. Instead the court concluded that it lacked jurisdiction to consider whether the Separation Agreement's arbitration provisions are substantively unconscionable, Op. 32-36, and that the provisions cannot be procedurally unconscionable as a matter of Delaware law, Op. 37-38. Both decisions were incorrect, and given that unconscionability doctrine involves a "unitary" analysis, *James*, 132 A.3d at 815, each provides an independent basis for reversal.

1. The Court of Chancery erred by holding that parent-subsidiary agreements cannot ever be invalidated as procedurally unconscionable.

Under Delaware law, a provision is void as procedurally unconscionable where the weaker party was deprived of a "meaningful choice," due to factors such as inequality of bargaining or economic power and the circumstances surrounding the contract, including its commercial setting, its purpose and its effect. *James*, 132 A.3d at 815.

Chemours's showing of procedural unconscionability was overwhelming. For starters, Ms. Kullman—DuPont's CEO—submitted an affidavit admitting that the "Separation Agreement . . . including the arbitration provisions in it, were not the product of negotiation between DuPont and Chemours." Kullman Aff. ¶ 2 (A1028). This is because, as Ms. Kullman has averred, "DuPont unilaterally determined the terms of the Separation Agreement, including its arbitration provisions, and unilaterally consummated the Separation Agreement." *Id.* Here then we had the chief executive of the party on the other side of the table saying that Chemours had no ability to make a meaningful choice. To reject a claim of procedural unconscionability in the face of these facts—at the pleading stage—is out of step with precedent. *See, e.g.*, *In re Paragon Offshore PLC*, 588 B.R. 735, 758 (Bankr. D. Del. 2018).

The allegations of the Complaint powerfully confirm Ms. Kullman's sworn statement. The bargaining and economic power was not just unequal; Chemours had none at all. *See supra* pp. 7-10, 12. Just as in *Paragon Offshore*, DuPont "absolutely and completely dominated" the process leading to the spin-off, and Chemours "had no capacity to agree" to any of its terms. 588 B.R. at 758. These are the kinds of extreme circumstances in which courts find procedural unconscionability to be at a maximum. *See, e.g.*, *id.* (concluding that spin-off agreement's arbitration and delegation terms were procedurally unconscionable); *Blackrock Capital Inv. Corp.* v. *Fish*, 799 S.E.2d 520, 529 (W. Va. 2017) (holding indemnification provisions unconscionable due to absence of "real and voluntary meeting of the minds" where parent corporation drafted agreement, subsidiary was denied legal representation, and agreement was then approved by parent-controlled board and signed on subsidiary's behalf by employee of parent).

The Court of Chancery did not consider any of that. Instead, it reasoned that "the spirit of procedural unconscionability . . . is wholly inconsistent with the routine enforcement of parent-subsidiary contracts." Op. 37. According to the court, "[s]uch contracts are routinely enforced *not* because they reflect arms'-length bargaining between a parent and its subsidiary—which of course they do not—but because the parent determines they are desirable *for the parent*, and subsidiary fiduciaries are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." Op. 37. The court went on to announce a new proposition of Delaware law: Parent-subsidiary agreements *cannot ever* be void for procedural unconscionability. Op. 37-38.

The court's rule runs directly counter to the purpose of unconscionability doctrine. *See James*, 132 A.3d at 813-14. That black-letter defense against contractual overreach exists to interpose judicial review of contracts where the normal check against inefficiency and unfairness—arm's-length bargaining—has been disabled. *Id.* at 813 (citing *Ryan* v. *Weiner*, 610 A.2d 1377, 1380-81 (Del. Ch. 1992)). The court's holding would eliminate the protection of unconscionability precisely because the "negotiation" of the arbitration provisions was completely one-sided, a result contrary to equity and public policy. *Id.* at 812-15 (discussing the policies underpinning of the doctrine of unconscionability).

The central Delaware precedent offered in support of the court's holding was *Anadarko Petrol. Corp.* v. *Panhandle E. Corp.*, 545 A.2d 1171 (Del. 1988), where this Court held that parent companies typically owe no fiduciary duties to their subsidiaries. But nothing in *Anadarko* would permit a Delaware court to blot out the doctrine of unconscionability. Indeed, this Court's prior holding is simply irrelevant to the question of unconscionability—which does not turn on the existence of any duty or special relationship between the parties.

Moreover, if ratified by this Court, the new rule announced by the Court of Chancery would commit Delaware to a laxer review of spin-off transactions than applied by other jurisdictions. In *Paragon Offshore*, for example, Chief Judge Sontchi of the United States Bankruptcy Court for the District of Delaware held that a spun company could (and easily had) demonstrated procedural unconscionability under New York law, based solely on allegations that its parent company had "absolutely and completely dominated [the spinco] at all times through [the] execution" of a purported contract. 588 B.R. at 758. Similarly, the West Virginia Supreme Court, applying New York law, upheld a spin-off's unconscionability claim with the observation that *Anadarko* "did not consider the doctrine of unconscionability." *Blackrock*, 799 S.E.2d at 530. For good measure, the *Blackrock* court noted that while contractual cram-downs on subsidiaries "may be routine in the business world . . . that does not make [them] fair and conscionable." *Id.* at 531.

Spin-offs do not merit the hands-off-at-all-times approach suggested by the Court of Chancery. As demonstrated by the allegations in the Complaint, such transactions pose unique risks for the stakeholders of Delaware corporations—presenting an opportunity for parent companies to use and abuse the tools of corporate law to obscure and shed their liabilities. Indeed, the blueprint DuPont followed here—offloading its historical liabilities onto a spinco; undervaluing those liabilities to escape fraudulent conveyance exposure; and then scattering its own assets into other far-flung newcos—is readily replicable and will impair and perhaps defeat the ability of third parties and the public to be made whole. Put more directly: The DuPont spin scheme at issue in this lawsuit creates the risk that transactional engineering undertaken under the auspices of Delaware's corporate law will foreseeably create substantial public-facing negative externalities. *See* A1443-45 (Declaration of Prof. Steven Shavell). What DuPont seeks in this litigation is a rule that such a scheme can be implemented without judicial review or any remedy. Allowing DuPont to unilaterally opt out of judicial oversight—by agreeing with itself to narrowly circumscribed private arbitration—will not only undermine that foundational policy, but also provide a roadmap for other companies seeking to avoid accountability for historical liabilities.

2. The Court of Chancery erred when it held that it lacked jurisdiction to consider the substantive unconscionability of the Separation Agreement's arbitration provisions.

In contrast to procedural unconscionability (which addresses the bargaining power of contracting parties), substantive unconscionability addresses the fairness of the contract. The analysis turns on whether an agreement's terms are "unreasonably favorable" to the dominant party. *Progressive Int'l Corp.* v. *E.I. Du Pont de Nemours & Co.*, 2002 WL 1558382, at *11 n.46 (Del. Ch. July 9, 2002). Relevant factors include whether the contract denies "basic rights and remedies," whether it reflects an "overall imbalance in rights and obligations," and whether it contains unfair "penalty clauses." *James*, 132 A.3d at 815-16.

The delegation provision that DuPont inserted into the Separation Agreement fails this standard by seeking to deny Chemours basic rights and remedies available under Delaware law and in the Delaware courts—including the right to raise an unconscionability challenge.

If enforced, DuPont's agreement would deprive the arbitrator of any "authority or power to limit, expand, alter, amend, modify, revoke or suspend any condition or provision" of the Separation Agreement. § 8.2(e). Of course, Delaware law permits courts to limit, modify, revoke, or suspend unconscionable contractual provisions. And as the Court of Chancery recognized, Chemours has challenged several of the Separation Agreement's arbitration provisions as unconscionable. Op. 33. DuPont, however, sought to foreclose those challenges by invoking the arbitration provisions themselves. According to DuPont, the Separation Agreement's delegation provision requires Chemours to make all of its unconscionability arguments to the arbitrators—who cannot resolve them, because that would involve invalidating, modifying, or suspending the arbitration provisions. The Separation Agreement's delegation provision, by DuPont's telling, thus operates as an unenforceable waiver of unconscionability, and so is itself unconscionable.

In the proceedings before the Court of Chancery, DuPont did not deny this perverse interaction between the Separation Agreement's arbitration provisions. To the contrary, it embraced the ability of a parent company to craft an arbitral regime that is hermetically insulated from challenge. At argument, the court asked DuPont's counsel whether arbitration terms would be enforceable even if they included "a provision that the arbitrator could only come to a conclusion in favor of DuPont and against Chemours and could not award any relief to Chemours." A1478. DuPont's response: "[Y]es, that is enforceable." A1479.

The Court of Chancery did not reach the merits of DuPont's extreme position. Instead, the court held that it lacked jurisdiction to consider the question, because it "is not really a direct challenge to the Delegation Clause." Op. 35. In support of that conclusion, the court noted that the Separation Agreement does not "prevent Chemours from *arguing* to the Arbitral Tribunal that the Separation Agreement's arbitration provisions (including those restricting the powers of the Arbitral Tribunal) are inconsistent with Delaware law." Op. 35 (emphasis added). As such, the court concluded that Chemours's argument was actually "a challenge to the Separation Agreement's other arbitration provisions, namely those concerning the powers of the Arbitral Tribunal and its ability to grant Chemours the relief it seeks." Op. 35-36.

But Chemours's challenge was directed to precisely the type of contractual defect that the U.S. Supreme Court has reserved for *judicial* review, because it involves circumstances where the arbitration agreement's "common procedures *as applied* to the delegation provision render[] that provision unconscionable." *Rent-A-Center*, 561 U.S. at 74. Thus, Chemours has specifically challenged the Separation Agreement's delegation provision by identifying its unconscionable interaction with other arbitration provisions. As the federal courts have recognized, one cannot insulate a delegation clause from review by scattering its unconscionable terms throughout an arbitration agreement. *Id.*

Nor is it enough that Chemours retains the right to allege unconscionability before an arbitrator that, by DuPont's telling, lacks any power to remedy unconscionability. Over and over again, courts have invalidated similar delegation provisions that would effect an improper waiver of unconscionability. *See, e.g.*, *Pinela* v. *Neiman Marcus Grp., Inc.*, 238 Cal. App. 4th 227, 246-48 (Cal. Ct. App. 2015) (delegation clause was substantively unconscionable where choice-of-law clause "prohibit[ed] the arbitrator from applying California unconscionability standards" in weighing challenge to enforceability of arbitration provision); *Attia* v. *Neiman Marcus Grp., Inc.*, 2016 WL 8902584, at *7 (C.D. Cal. June 27, 2016) (same), *vacated on other grounds*, 2016 WL 9150570 (C.D. Cal. Oct. 18, 2016); *Ryan* v. *Delbert Servs. Corp.*, 2016 WL 4702352, at *5 (E.D. Pa. Sept. 8, 2016) (delegation clause unenforceable because choice-of-law provision would "prevent [plaintiff] from challenging the validity of an arbitration agreement"); *see also* *Papa John's Int'l Inc.* v. *Rezko*, 2006 WL 1697134, at *5 n.3 (N.D. Ill. June 14, 2006) ("Parties to a contract cannot waive their objections to unconscionability, especially where one party enters into negotiations with unequal bargaining power."). The same result should obtain here.

CONCLUSION

This Court should reverse the Court of Chancery's decision dismissing the Complaint for lack of subject matter jurisdiction and remand for further proceedings.

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