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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

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NATURE OF THE PROCEEDINGS

This appeal asks only a narrow question: Will the Delaware Courts enforce a contractual "delegation clause" requiring that arbitrators resolve any dispute about arbitrability? The Court of Chancery correctly held that a "rather straightforward application of settled law" requires enforcement of the delegation clause, divesting the Court of subject matter jurisdiction. (Opinion 2)[1]

In 2015, E.I. du Pont de Nemours and Company ("DuPont") spun off The Chemours Company ("Chemours") by distributing the shares of Chemours stock to DuPont stockholders. DuPont did so under a contract (the "Separation Agreement") it entered into with Chemours while Chemours was its wholly owned subsidiary.

The Separation Agreement provides for mandatory arbitration of any disputes relating to the Separation Agreement, and contains a delegation clause providing that a panel of neutral arbitrators will resolve any disputes about arbitrability (the "Delegation Clause"). Though Chemours now attacks the Separation Agreement as "unconscionable," in the years after the spin-off, an independent Chemours embraced it – repeatedly amending and reaffirming the Separation Agreement, including in 2017 when Chemours unambiguously agreed that "[e]xcept as

[1] The Court of Chancery's Memorandum Opinion ("Opinion"), attached as Exhibit A to Appellant's Opening Brief, is cited as "(Opinion __)."

specifically amended by this Amendment, all of the terms of the Separation Agreement shall remain in full force and effect." (A712 § 2.3)

Chemours has been a tremendous success. Chemours has paid a dividend every quarter of its independent existence and returned nearly $1.5 billion to its stockholders through dividends and stock repurchases, and yet still has an equity market capitalization of more than $3 billion. Chemours admits it is solvent and indeed thriving. No creditor is before the Court claiming otherwise.

Nevertheless, Chemours would like more money. Specifically, it would like to keep the enormously valuable business lines it obtained from DuPont pursuant to the Separation Agreement, but shed or limit its indemnification obligations under the Separation Agreement. So, almost four years after the spin-off, Chemours filed a lawsuit in the Court of Chancery seeking to rewrite the terms of the Separation Agreement to limit its indemnification obligations.

By filing in the Court of Chancery rather than arbitration, Chemours breached the Separation Agreement. Accordingly, DuPont and certain current or former affiliates moved to dismiss the suit in favor of the mandatory confidential arbitration required by the Separation Agreement.[2] In response, Chemours argued that the

[2] Chemours also sued DowDuPont Inc. and Corteva, Inc. neither of which existed at the time of the Chemours spin-off, but are DuPont Indemnitees (as that term is defined in the Separation Agreement) and entitled to indemnification under the

arbitration provision of the Separation Agreement is invalid because DuPont, as Chemours' parent, dictated the terms of the Separation Agreement, and the Chemours directors and officers who manifested consent were also DuPont employees. Chemours also argued that the arbitration provision was unconscionable because it was not negotiated at arm's-length by independent parties and because it had common and ordinary terms that Chemours now wishes it did not have.

None of this raised any novel questions of law. Under the severability doctrine and the United States Supreme Court's controlling opinion in *Rent-A-Center*, the Delegation Clause must be enforced unless Chemours presents a challenge that is specific to the Delegation Clause. Chemours does not meet this test because all of its complaints apply generally to the Separation Agreement or generally to the arbitration provisions of the Separation Agreement.

Moreover, Chemours' attack on the enforceability of parent-subsidiary contracts is dead wrong. More than thirty years ago, in *Anadarko*, the Court of Chancery dismissed claims that were subject to mandatory arbitration provisions under a pre-spin parent-subsidiary contract, and this Court affirmed. A decade later, in *Aviall*, the Southern District of New York likewise enforced mandatory arbitration provisions in a pre-spin parent-subsidiary contract, and the Second Circuit affirmed.

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contract provisions that Chemours is trying to avoid. (*See, e.g.*, A370-72 §§ 6.4(a), (e), (g))

No court has ever refused to enforce an arbitration agreement on the ground that it was imposed upon a subsidiary by its parent.

Accordingly, the Court of Chancery granted the motion to dismiss. It first rejected Chemours' argument that it did not consent to the Separation Agreement or the arbitration provisions. (Opinion 22-29) The Court of Chancery held that Chemours' unanimous board resolution approving the spin-off and the duly authorized signature of a Chemours officer on the Separation Agreement "evidence[d] Chemours' overt manifestation of assent – and, therefore, Chemours' consent – to the Separation Agreement." (Opinion 28) The Court explained that "[s]imply because the parent dictates terms to its wholly-owned subsidiary is *not* a grounds under Delaware law to infer lack of consent such that the contract would not be enforceable." (Opinion 27 (emphasis in original)) The Court of Chancery also rejected Chemours' argument that arbitration agreements require some special manifestation of "real world" consent, holding that the Federal Arbitration Act prohibits treating arbitration agreements differently from other contracts and pre-empts any state law that purports to do so. (Opinion 29)

Finally, the Court of Chancery rejected Chemours' argument that the Delegation Clause is unconscionable. (Opinion 30-38) The Court explained that, "[e]ven if the Delegation Clause was the product of procedural unfairness, it cannot be procedurally unconscionable because such a finding cannot be squared with

settled Delaware law that '[w]holly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are created.'" (Opinion 37) The Court further explained why it would be "nonsensical" to find a parent-subsidiary contract unenforceable based on procedural unconscionability:

> [Parent-subsidiary] 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." Delaware law enforces these admittedly non-consensual contracts because they allow the corporate machinery to run smoothly – ***to find such a contract unenforceable based on procedural unconscionability would be nonsensical, because their presumptive validity acknowledges that they are not the product of fair bargaining.*** Therefore, to the extent Chemours has directly challenged the procedural unconscionability of the Delegation Clause, its challenge fails as a matter of law.

(Opinion 37-38 (emphasis added) (citations omitted))

The Court found that "Chemours does not articulate a substantive unconscionability argument specific to the Delegation Clause," and therefore did not address Chemours' argument that other parts of the arbitration agreement are substantively unconscionable, but noted that Chemours could raise that argument before the Arbitral Tribunal. (Opinion 36) This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. Chemours argues that it "consented to no part of the arbitration provisions of the Separation Agreement." (OB 22)[3] This argument fails, first, because it attacks the Separation Agreement and its arbitration provisions as a whole, and does not raise a challenge "specific to the delegation provision," as required by *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 73 (2010). (Opinion 30-31)

Second, Chemours consented to the Separation Agreement. The fact that Chemours' current managers preferred other terms is irrelevant. Under Delaware law, "'overt manifestation of assent – not subjective intent – controls the formation of a contract.'" (Opinion 24 (citation omitted)) "Chemours concedes that a duly appointed board of directors approved the Spin-Off and the Separation Agreement, and that a duly appointed executive of Chemours, Nigel Pond, Chemours' then-Vice President, executed the Separation Agreement on behalf of Chemours." (Opinion 25) That ends the discussion; the Separation Agreement is a valid contract.

Controlling Delaware law, *Anadarko*, addressed and rejected the same argument Chemours advances here – that parent-subsidiary contracts are unenforceable because the parent dictates the terms. In addition, in applying the Federal Arbitration Act ("FAA"), the United States Supreme Court has

[3] Citations to Appellant's Opening Brief are in the form "(OB __)."

unequivocally held that courts "must place arbitration agreements on an equal footing with other contracts" and "enforce them according to their terms." (Opinion 20, 23 n.112 (citations omitted)) Accepting Chemours' argument would violate the FAA's equal treatment principle because it would require the Court to apply a special standard of consent to arbitration provisions. (Opinion 29)

2. Denied. Chemours argues that Mr. Pond's consent to the Separation Agreement is invalid because it was given in breach of fiduciary duty. (A990-91; OB 29-32) First, *Rent-A-Center* bars this claim because it is not specific to the Delegation Clause. Second, even if this Court were to consider Chemours' argument, it too fails because Chemours' "fiduciary duty" claim is not a cognizable cause of action under Delaware law, and Chemours failed to plead it in any event.

3. Denied. First, *Rent-A-Center* bars Chemours' procedural unconscionability claim because it is not specific to the Delegation Clause. Second, the Delegation Clause is not procedurally unconscionable. "Wholly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are created." *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 173 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (TABLE). And, "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its

shareholders." *Anadarko Petroleum Corp. v. Panhandle E. Corp.* ("*Anadarko*"), 545 A.2d 1171, 1174 (Del. 1988). As a result, the Separation Agreement, including the Delegation Clause, cannot be procedurally unconscionable.

4. Denied. As the Court of Chancery explained, "Chemours does not articulate a substantive unconscionability argument specific to the Delegation Clause" (Opinion 36), and under *Rent-A-Center*, Chemours cannot avoid enforcement of the Delegation Clause by arguing that other parts of the Separation Agreement are substantively unconscionable. Even if this Court were to consider Chemours' substantive unconscionability arguments, the Delegation Clause is not substantively unconscionable.

5. All of Chemours' complaints about the process that led to the Separation Agreement were mooted when a fully independent Chemours reaffirmed it by entering into an amendment that preserved its arbitration provisions. Under Delaware law, Chemours' post-spin reaffirmation of the Separation Agreement cured any supposed defect based on lack of consent, breach of fiduciary duty or unconscionability.

COUNTERSTATEMENT OF FACTS

A. The Chemours Spin-Off And Separation Agreement.

On June 26, 2015, DuPont and Chemours entered into the Separation Agreement to govern the anticipated spin-off of Chemours and the parties' subsequent relationship. Unsurprisingly, the DuPont employees slated to be Chemours executives post-spin wanted DuPont to give Chemours more money and fewer obligations. But as with every spin-off, the parent company had the final say. Chemours' board of directors (consisting, unsurprisingly, of DuPont employees) approved the Separation Agreement, and Chemours' Vice President, Nigel Pond (also, unsurprisingly, a DuPont employee), executed it. (A399 at 84; Opinion 25-26)

Pursuant to the Separation Agreement, DuPont contributed billions of dollars of assets to Chemours (principally those associated with its performance chemicals business). The Separation Agreement also provided that Chemours would indemnify DuPont for certain liabilities. (A370 § 6.3, A326-37 § 1.1(34))

In Article VIII, the Separation Agreement establishes a standard two-step process for the resolution of "Disputes," broadly defined to include any dispute arising out of or relating "in any way" to the Separation Agreement. (A387 § 8.1) Section 8.1 requires the parties to first attempt to resolve their Dispute consensually. If that does not succeed, "such Dispute shall be submitted to final and binding

arbitration…." (A387 § 8.2) For the avoidance of doubt, the Separation Agreement reiterates that arbitration of Disputes is mandatory: "Arbitration under this Article VIII shall be the sole and exclusive remedy for any Dispute…." (A389 § 8.2(g))

Article VIII of the Separation Agreement also has a clear, unambiguous Delegation Clause that requires the Arbitral Tribunal to resolve any questions of arbitrability:

> For the avoidance of doubt, by submitting their dispute to arbitration under the Rules, the Parties expressly agree that ***all issues of arbitrability***, including all issues concerning the propriety and timeliness of the commencement of the arbitration (including any defense based on a statute of limitation, if applicable), ***the jurisdiction of the Arbitral Tribunal***, and the procedural conditions for arbitration, ***shall be finally and solely determined by the Arbitral Tribunal***.

(A388 § 8.2(c) (emphasis added))

B. Chemours Reaffirms The Arbitration Provisions After The Spin-Off.

The spin-off took place on July 1, 2015, at which point Chemours began operating as an independent public company. (A244 ¶ 27)

More than two years later, on August 24, 2017, an independent Chemours and DuPont entered into "Amendment Number 1 to Separation Agreement" (the "Amendment"). (A712 § 2.3) Chemours' Senior Vice President and General Counsel executed the Amendment on behalf of Chemours. (A713) In executing the Amendment, Chemours unambiguously agreed that "[e]xcept as specifically amended by this Amendment, ***all of the terms of the Separation Agreement shall***

remain in full force and effect." (A712 § 2.3 (emphasis added); *see also* Opinion 17 n.85 (noting that "no changes were made to the specific provisions" regarding arbitration)) Chemours does not (and could not) contest its consent to the Amendment, or argue that the Amendment was unconscionable or the result of a breach of fiduciary duty.

C. Chemours Is Not And Has Never Been Unable To Meet Its Obligations, And The Illegitimate Outcome It Seeks Would Harm, Not Help, Creditors.

Chemours recognizes that the sight of a $3 billion company asking a court to overturn settled law to give it more money is unlikely to generate judicial sympathy. So Chemours goes to great lengths (as it did below) to cloak itself in the mantle of a defrauded creditor. But there are no defrauded creditors here; Chemours is solvent. Moreover, if a third-party claimant had a claim against DuPont before the spin-off, it still has exactly the same claim. Chemours argues that permitting parent corporations to impose uncapped indemnification obligations on their spun-off subsidiaries somehow allows those parent corporations to avoid their creditors. But the truth is just the opposite: Because Chemours' obligations to indemnify DuPont are uncapped, all of the assets of DuPont and Chemours remain available to satisfy legacy claims, just as they were before the spin-off. It is Chemours' position – that its obligation to indemnify DuPont should be capped – that would put assets beyond the reach of legacy DuPont's creditors.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ENFORCED THE DELEGATION CLAUSE.

A. Question Presented.

Did the Court of Chancery correctly enforce the Delegation Clause in the Separation Agreement, which was approved and executed by Chemours' duly authorized directors and officer, respectively? (Opinion 22-29; A583-85, A1061-69)

B. Scope Of Review.

"On questions of subject matter jurisdiction, the applicable standard of review by this Court is whether the trial court correctly *formulated* and applied legal principles. The scope of our review is *de novo.*" *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

C. Merits Of Argument.

Chemours argues that the arbitration provisions should not be enforced because "Chemours's designated management team" (OB 2) did not consent to the Separation Agreement. (OB 21-22) Under the severability doctrine and the United States Supreme Court's opinion in *Rent-A-Center*, the Court of Chancery need not have reached the merits of this argument because it is not addressed specifically to the Delegation Clause. Nevertheless, having reached the issue, the Court of Chancery correctly held that Chemours consented to the Separation Agreement.

1. Chemours' Consent Argument Fails Because It Is Not Specific To The Delegation Clause.

The parties agree that whether they agreed to arbitrate is governed by the FAA. (Opinion 19 n.94 ("The parties agree that the FAA controls this matter."))[4] Under the FAA, the United States Supreme Court has long held that, as a matter of substantive federal law, arbitration provisions are "'severable from the remainder of the contract'" and, thus, "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Ctr.*, 561 U.S. at 70-71 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006)); *see also Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 380 (Del. 2013) ("[A] party cannot escape a valid forum selection clause, or its analogue, an arbitration clause, by arguing that the *underlying contract* was invalid for a reason unrelated to the forum selection or arbitration clause itself….") (emphasis in original). (*See also* Opinion 30-31)

Applying this same reasoning to a delegation clause, in *Rent-A-Center* the United States Supreme Court held that where the arbitration provision contains both

[4] The FAA applies here because the Separation Agreement involves interstate commerce, calls for arbitration in New York (SA § 8.2(b)), and is not subject to the Delaware Uniform Arbitration Act. *See McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. 2008); 10 *Del. C.* § 5702(c).

an agreement to arbitrate disputes "arising out of" an agreement and an agreement to delegate all issues of arbitrability to the arbitral tribunal, the party opposing arbitration must make its challenge "specific to the delegation provision." 561 U.S. at 65, 73. If a party fails to make a challenge that is specific to the delegation clause, the court "must treat it as valid" and "must enforce it," "leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72.

Rent-A-Center is dispositive. In that case, as here, the question before the United States Supreme Court was "whether the delegation provision [wa]s valid." *Id.* at 70. Plaintiff argued (as Chemours does) that "he could not meaningfully assent to the agreement." *Id.* at 67. There, as here, plaintiff did not specifically challenge the delegation provision, but argued that the entire arbitration agreement was unenforceable because "it 'was imposed as a condition…and was non-negotiable.'" *Id.* at 73-74 (citation omitted). The United States Supreme Court held that the "agreement to arbitrate a gateway issue [*i.e.*, arbitrability] is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," which is severable from the other arbitration provisions and, if challenged, must be challenged specifically. *Id.* at 70. Because plaintiff's challenges applied to the arbitration agreement as a whole rather than to the delegation provision specifically, the Court held that the dispute should have been submitted to arbitration. *See id.* at 72-76.

In this case, as in *Rent-A-Center*, it is only the Separation Agreement's Delegation Clause that must be enforced to divest the Court of Chancery of jurisdiction. Chemours' amended complaint never mentions the Delegation Clause, let alone raises any challenge that is specific to the Delegation Clause. (Am. Compl. ¶¶ 60-69) Similarly, in its opposition brief below, Chemours mentioned the Delegation Clause just once, in a footnote, conceding that its attack on the Delegation Clause was just a part of its general attack on the arbitration agreement. (A993-94 n.6 ("Chemours no more consented to delegation than it did to any other feature of the arbitration regime that DuPont unilaterally imposed.")) Chemours' generalized attacks are unchanged on appeal, and it again concedes that its challenge to the Delegation Clause is the same as its challenge to the arbitration agreement generally. (*See, e.g.*, OB 21 ("Like the rest of the Separation Agreement, the arbitration provisions – including the delegation provision – were conceived, drafted, and executed by DuPont alone."))

Cases Chemours cites, including *In re Paragon Offshore PLC*, agree that "'[w]ithout a specific challenge to a delegation provision, the court must treat that provision as valid and enforce it according to FAA § 4.'" 588 B.R. 735, 757 (Bankr. D. Del. 2018) (citation omitted). As compelled by *Rent-A-Center*, courts routinely enforce delegation provisions, rejecting arguments directed at an agreement or arbitration provision as a whole. *See Frazier v. W. Union Co.*, 377 F. Supp. 3d 1248,

1268 (D. Colo. 2019); *Santich v. VCG Holding Corp*., 2017 WL 4251944, at *5-7 (D. Colo. Sept. 26, 2017), *report and recommendation adopted in pertinent part*, 2018 WL 3968879 (D. Colo. Aug. 20, 2018); *McGrew v. VCG Holding Corp*., 244 F. Supp. 3d 580, 592 (W.D. Ky. 2017), *aff'd,* 735 F. App'x 210 (6th Cir. 2018); *Colon v. Conchetta, Inc*., 2017 WL 2572517, at *4 (E.D. Pa. June 14, 2017).

Recognizing that the law is against it, Chemours attempts to reframe its challenge to the validity of the Separation Agreement (including the arbitration provisions) as a "formation" argument. (A1489; OB 18, 21, 24) But the kinds of disputes that go to the "formation" of a contract – and that a court can decide as a gateway question before enforcing a delegation clause – are extremely limited, typically involving situations where a party contends that it did not actually sign the alleged contract. *See, e.g., Mullinax v. United Mktg. Grp., LLC*, 2011 WL 4085933, at *8 (N.D. Ga. Sept. 13, 2011) (addressing plaintiff's argument that he did not electronically sign agreement that contained arbitration provision); *see also Taylor v. Pilot Corp.,* 955 F.3d 572, 576 (6th Cir. 2020) (explaining that whether plaintiffs signed arbitration agreements "is an issue of contract formation"). By contrast, arguments that go to the validity of an agreement (such as coercion, unconscionability, fraud-in-the-inducement, or lack of meaningful consent) are subject to the severability doctrine and *Rent-A-Center*. *See Moran v. Svete*, 366 F. App'x 624, 630-32 (6th Cir. 2010) (holding that plaintiff's argument that an

agreement containing an arbitration clause was the "result of fraud or coercion" challenged the "validity" of the agreement and was therefore arbitrable); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) (holding that arbitrator had to decide whether plaintiff lacked the mental capacity to execute a contract containing an arbitration provision).

For example, in *McGrew*, the plaintiffs were exotic dancers who had signed agreements in which they agreed that they were independent contractors rather than employees, and in which they promised that any disputes would be arbitrated. 244 F. Supp. 3d at 584-85. They claimed that they had been coerced with alcohol into signing the agreements. *Id.* at 591-92. The court nevertheless held that "the overwhelming weight of authority holds that the arbitration agreements Plaintiffs signed are valid and enforceable" and that the dancers' claim that they were too drunk to meaningfully consent when they signed the agreements had to be presented to the arbitrator:

> Plaintiffs do not contend that Defendants encouraged them to drink only when they were considering the arbitration clauses. … Rather, Plaintiffs allege that their lease agreements are procedurally unconscionable *in their entirety* because of the suggestive circumstances surrounding their execution. If Plaintiffs' allegations prove true, they may very well be entitled to have the agreements set aside. But that is for the arbitrator, not this Court, to decide in the first instance.

Id. at 587, 592 (emphasis in original).

So too here. Chemours admits that a Chemours officer, as directed and authorized by the Chemours board, executed the Separation Agreement for Chemours. Its argument that the actions of Chemours' board and a Chemours' executive should not count as "consent" because they were DuPont employees is not a "formation" argument akin to a claim that the contract was never signed. Rather, it is a validity argument akin to a claim that the contract was coerced, unconscionable, or against public policy. *Rent-A-Center* therefore controls and requires enforcement of the Delegation Clause.[5]

2. Chemours Consented To The Separation Agreement.

Even if this Court were to reach the merits of Chemours' "consent" argument, settled law requires affirmance.

Under Delaware law, "'overt manifestation of assent – not subjective intent – controls the formation of a contract.'" (Opinion 24 (citation omitted)) "Whether

[5] In a footnote, the Court of Chancery explained that it considered Chemours' procedural unconscionability argument because Chemours argued that "its lack-of-consent argument 'undermines the provisions of the Separation Agreement that purport to delegate the issue of arbitrability to arbitration, mooting DuPont's reliance on the severability of these delegation provisions.'" (Opinion 36 n.162 (quoting A993-94 n.6)) But, a challenge to the Separation Agreement or its arbitration provisions that *includes* the Delegation Clause is not enough under the severability doctrine. The challenge must be specific to the Delegation Clause itself. *Rent-A-Ctr.*, 561 U.S. at 74 (enforcing delegation provision because plaintiff failed to argue that the challenge rendered unconscionable the arbitration *of enforceability*, rather than of "more complex and fact-related aspects" of the underlying claim).

both of the parties manifested an intent to be bound is to be determined objectively based upon their expressed words and deeds as manifested at the time rather than by their after-the-fact professed subjective intent." (Opinion 24-25 (quotation marks and citation omitted)) Chemours' objective manifestation of assent is indisputably present here.

Under Delaware law, corporations execute contracts through duly authorized agents. *See Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 60 (Del. Ch. 2015) ("'[B]ecause it lacks a body and mind, a corporation only can act through human agents.'"). (*See also* Opinion 25) "Chemours concedes that a duly appointed board of directors approved the Spin-Off and the Separation Agreement, and that a duly appointed executive of Chemours, Nigel Pond, Chemours' then-Vice President, executed the Separation Agreement on behalf of Chemours." (Opinion 25) "There is *no dispute* whether Nigel Pond signed the Separation Agreement in his capacity as Vice President of Chemours." (Opinion 25-26 (emphasis in original)) That ends the discussion; the Separation Agreement is a valid contract. *See Prairie Capital III*, 132 A.3d at 60. (Opinion 26 ("Delaware law views such a signature as 'the most powerful and persuasive evidence' of Chemours' intent to be bound by the Separation Agreement, and, consequently, its consent to arbitration.") (citation omitted))

Nonetheless, Chemours insists that it "consented to no part of the arbitration provisions of the Separation Agreement." (OB 22) Chemours says (without support) that "[t]o 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." (OB 24) Chemours is wrong. Under controlling precedent from this Court and the United States Supreme Court, Chemours consented to the Separation Agreement (including the Delegation Clause).

(a) Under controlling Delaware Supreme Court authority, Chemours is bound by the actions of its pre-spin directors and officers.

This Court already addressed and rejected Chemours' argument in *Anadarko*. 545 A.2d at 1174. In *Anadarko*, the spun-off company filed suit seeking to rescind pre-spin contracts claiming "lack of consideration and gross unfairness." *Anadarko Petroleum Corp. v. Panhandle E. Corp.* ("*Anadarko Chancery*"), 1987 WL 16508, at *4 (Del. Ch. Sept. 8, 1987), *aff'd*, 545 A.2d 1171 (Del. 1988). The Court of Chancery dismissed these claims, explaining that the parent-subsidiary relationship meant "that there need be no consideration for a transfer of assets between the companies." *Id.* According to the Court, "when the parties to a spin-off have continuing contractual relations," those contracts need not be the product of arm's-

length negotiations. *Id.* The Court then ***enforced contractual arbitration provisions*** in the parties' pre-spin contracts and spin-off agreement. *See id.*

This Court affirmed the dismissal. It held that Delaware law does not require a parent to "demonstrate the entire fairness of the disputed agreements" because "a parent does not owe a fiduciary duty to its wholly owned subsidiary," and subsidiary-directors "are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko*, 545 A.2d at 1174; *see also Abex Inc. v. Koll Real Estate Grp., Inc.*, 1994 WL 728827, at *17 (Del. Ch. Dec. 22, 1994) ("Where a parent corporation contracts with its wholly owned subsidiary (as occurred here), the 'entire fairness' mode of analysis is inapplicable. Under *Anadarko*, the only relevant inquiry is whether the contract is in the best interests of the parent and its shareholders.").

The Second Circuit reached the same conclusion in *Aviall, Inc. v. Ryder System, Inc.* ("*Aviall II*"), 110 F.3d 892, 893 (2d Cir. 1997).[6] There, the parent company, Ryder, spun off its wholly owned subsidiary, Aviall. After the spin-off, Aviall disputed the separation agreement's allocation of assets and liabilities between itself and Ryder. After Ryder sought arbitration under the separation

[6] In both *Anadarko* and *Aviall*, the court reached the merits of arbitrability because the agreements at issue in those cases did not contain delegation clauses. (*See* B2); *Aviall, Inc. v. Ryder Sys., Inc.* ("*Aviall I*"), 913 F. Supp. 826, 829 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997).

agreement, Aviall sued for reformation because the agreement designated Ryder's auditor as the arbitrator. *Id.* at 895. It alleged that the terms were unconscionable because (1) they were dictated by Ryder, and Aviall was not able to negotiate them; (2) Ryder did not provide Aviall with independent counsel; (3) Ryder's counsel (Chemours' counsel here) drafted the entire agreement; and (4) a Ryder official signed the agreement on Aviall's behalf. *Aviall I*, 913 F. Supp. 826, 832 (S.D.N.Y. 1996).

Relying on *Anadarko*, the district court rejected any infirmity in the contracting process, including Aviall's unconscionability argument, warning that such a finding "would establish a principle that would render every clause of every spin-off agreement potentially voidable." *Aviall I*, 913 F. Supp. at 832-33. The Second Circuit affirmed. Citing *Anadarko*, it concluded:

> Admittedly, as a wholly-owned subsidiary, Aviall played no role in the drafting of the Distribution Agreement and had no power to bargain over its terms. ***But that in no way points to any infirmity in the contracting process***, for Ryder was obligated to draft those terms in the manner most advantageous to its shareholders, who would also be the shareholders of Aviall immediately following the spin-off. … Thus, Aviall can hardly object to the Distribution Agreement being enforced according to its terms.

Aviall II, 110 F.3d at 896 (emphasis added).

These principles are the foundation of spin-offs. As Chemours' counsel publicly states in its Spin-Off Guide: "[I]t is the duty of the parent's board to establish the terms of the separation in a manner that serves the best interests of the

parent shareholders (who, of course, will also be the initial shareholders of the spin-off company)." (A625) "There is no duty of 'fairness' as between the parent and the spin-off company." (A632) "[T]he spin-off company's directors and officers typically will primarily consist of a small number of personnel of the parent company, which facilitates obtaining the necessary approvals and signing documents on behalf of the spin-off company." (A634) Under this structure, "*contractual relationships can be established*" between the parent and subsidiary. (A624 (emphasis added)) Indeed, "[a] parent typically enters into a number of agreements with the spin-off company to implement the spin-off and establish a framework for their relationship following completion of the spin-off." (A645)

Thus, under controlling Delaware authority, confirmed by the Second Circuit, and recognized by practitioners, Chemours is bound by its duly authorized contracts, and all of the terms and provisions therein, even if Chemours' current management wishes it were otherwise.

(b) Controlling federal authority mandates enforcement of the Delegation Clause.

Chemours' argument also fails because it would violate controlling federal law in another respect. The FAA was enacted in response to judicial hostility to arbitration agreements and evidences a "'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion* ("*Concepcion*"), 563 U.S. 333, 346 (2011)

(citation omitted).[7] Under Section 2 of the FAA:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

In applying the FAA, the United States Supreme Court has unequivocally held that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion,* 563 U.S. at 339. (Opinion 20) Thus, a court "may not construe consent uniquely simply because an arbitration agreement is at issue." (Opinion 27-28) *See also Concepcion*, 563 U.S. at 341. Indeed, "[b]y enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs., Inc. v. Casarotto,* 116 S. Ct. 1652, 1656 (1996) (citation omitted). Chemours conceded this below, admitting at argument that "you can't discriminate against arbitration provisions." (A1561)

[7] Indeed, Chemours' brief evidences the very hostility toward arbitration that the United States Supreme Court has repeatedly declared impermissible, repeatedly suggesting that the issues raised by its complaint are too important to be left to arbitrators. (*See* OB 5, 30-31)

Yet here, Chemours asks the Court to do exactly that: apply a special standard of consent to arbitration provisions. Chemours does not deny that it consented to at least some portions of the Separation Agreement. (A1005 ("Chemours is disputing the extent of [its] indemnification burden – not the existence of any indemnification burden."); A1562 ("There are reasons well beyond the law of contract why a document like [the Separation Agreement] is, will be, and should be enforceable."); OB 26 ("[T]his does not mean that spin-off agreements generally, or even aspects of the Separation Agreement, are unenforceable.")) Of course, Chemours does not want the Separation Agreement – pursuant to which it received billions of dollars of DuPont's assets – to be declared void and unwound in its entirety. Instead, Chemours wants to selectively rewrite the parts of the Separation Agreement having to do with indemnification and arbitration. But as the Court of Chancery correctly held, "accepting Chemours' argument would violate the FAA's equal treatment principle because it would permit me to search for a form of consent other than contractual consent …." (Opinion 28-29) And in any event, "[s]imply because the parent dictates terms to its wholly-owned subsidiary is *not* a grounds under Delaware law to infer lack of consent such that the contract would not be enforceable." (Opinion 27 (emphasis in original))

3. Chemours' Other Extreme Arguments Also Fail.

Faced with this controlling authority, Chemours asks the Court to overturn established law and erect a fundamentally different legal regime based upon a single-sentence analogy in *Aviall I*. In *Aviall I*, the district court analogized the separation agreement there to a corporate charter (but nevertheless clearly enforced it as a contract). From that single-sentence analogy, Chemours tries to bring forth the novel argument that parent-subsidiary contracts are not actually contracts, but "creatures of corporation law, not contract law." (OB 23) Chemours thus says that "[t]he question regarding 'consent' before this Court thus reduces to this: Does Delaware enforce parent-subsidiary agreements 'as contracts' …?" (OB 24)

The answer is a resounding "Yes." Courts regularly enforce such agreements, not because they are "charters" or "corporate governance documents," but because they are valid and binding contracts. *See, e.g.*, *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 13520, at *6-7 (Del. Ch. July 7, 1987) (enforcing gas purchase contracts entered pre-spin between former parent and subsidiary); *In re AbbVie Inc. Stockholder Derivative Litig.*, 2015 WL 4464505, at *5 (Del. Ch. July, 21, 2015) (dismissing challenge to mutual release provisions in separation agreement). If parent-subsidiary agreements were not binding contracts, all such agreements, including supply or service agreements, intercompany loans,

intellectual property cross-licenses, management agreements, cash management agreements, and subsidiary guarantees, would be called into doubt.

Chemours' argument is also inconsistent with its counsel's Spin-Off Guide, which has multiple sections devoted to the various kinds of agreements that can be entered into between parents and subsidiaries. (*See, e.g.*, A645-50) Chemours' own counsel recognizes that "*contractual relationships can be established*" between the parent and subsidiary (A624 (emphasis added)) and observes that "[a] parent typically enters into a number of agreements with the spin-off company to implement the spin-off and establish a framework for their relationship following completion of the spin-off" (A645), without ever suggesting that these "contractual relationships" and "agreements" are somehow not actually contracts.

Tellingly, Chemours cannot identify a *single* case supporting its attempt to re-write Delaware law to hold that parent-subsidiary agreements are not, in fact, "contracts." In the only case upon which Chemours relies, *Aviall I* (OB 23), the district court *analogized* the separation agreement there to a charter document (A996), but clearly enforced it as a contract. *See Aviall I*, 913 F. Supp. at 828, 831-32 (applying New York law). And in *Aviall II*, the Second Circuit affirmed on the grounds that there was "no … infirmity in the *contracting* process." *Avial II*, 110 F.3d at 896 (emphasis added).

Chemours implausibly threatens that, if DuPont is right, and Delaware law continues to enforce parent-subsidiary agreements as it has for the thirty-three years since *Anadarko*, then a long-delayed parade of horribles will suddenly ensue. Among them, Chemours claims, Section 115 of the Delaware General Corporation Law (which provides that no bylaw or charter may restrict a plaintiff from filing "'internal corporate claims'" in the Delaware courts) would be unenforceable. (OB 27) But this case has nothing to do with Section 115 (or corporate bylaws or charters). Hypothetical questions about how the FAA's principles might apply in a different context, in a different case, involving different litigants are irrelevant. The sole question before this Court is whether the Delegation Clause in the Separation Agreement is enforceable. As the Court of Chancery held, "[t]he Delegation Clause properly assigns arbitrability to the Arbitral Tribunal. I may not override the contract …." (Opinion 38)

II. THE COURT OF CHANCERY PROPERLY CONCLUDED THAT CHEMOURS AGREED TO ARBITRATE THE THRESHOLD ISSUE OF ARBITRABILITY.

A. Question Presented.

Did the Court of Chancery properly conclude that Chemours agreed to arbitrate the threshold issue of arbitrability, notwithstanding Chemours' allegations regarding fiduciary duty? (Opinion 29-38; A1066-68; A1595-1600)

B. Scope Of Review.

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

C. Merits Of Argument.

The Court of Chancery correctly held that Chemours agreed to arbitrate the threshold issue of arbitrability and enforced the Delegation Clause.

On appeal, Chemours argues that "[t]he 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." (OB 5) Chemours claims that its "'consent' was given in violation of fiduciary duties" (OB 29) and therefore must be voided on equitable grounds. (OB 31) The basis for Chemours' "fiduciary duty" claim is that, when Chemours' duly authorized executive executed the Separation Agreement on Chemours' behalf, he "caus[ed] Chemours" to issue a dividend "at a time when the company would have been insolvent," thereby causing "Chemours to act in violation of Sections 170, 173, and 174 of the DGCL …." (OB 30) Allegedly

this violated a fiduciary duty to creditors (none of whom are complaining) supposedly recognized by the Court of Chancery in *Trenwick*.

To begin, Chemours' criticism of the Court of Chancery is unfair.[8] The Court of Chancery expressly acknowledged Chemours' fiduciary duty claim in the Opinion. (Opinion 18 n.88) Chemours' argument that its consent to the Separation Agreement was given in violation of a fiduciary duty supposedly created in *Trenwick* was dispatched by the same reasoning and controlling authority that addressed Chemours' other claims.

Chemours' further assertion that DuPont waived any opposition by failing to respond (OB 31) goes beyond the unfair to the blatantly false. At oral argument, DuPont's counsel discussed *Trenwick* extensively, resulting in more than six pages of transcript specifically rebutting Chemours' fiduciary duty argument. (A1595-1600; *see also* A1466-69, A1481, A1507-09, A1516, A1603-04)

In any event, Chemours' "fiduciary duty" argument fails as a matter of law for several reasons. First, it fails under *Rent-A-Center* because it does not raise a

[8] On appeal, Chemours relies on three cases that it did not cite below. (*Compare* OB 29 (citing *In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208 (Del. 2017), *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994); *Sample v. Morgan*, 914 A.2d 647 (Del. Ch. 2007)), *with* A990-92 *and* A957-61 (Table of Authorities)) None has any bearing on the narrow issue presented in this appeal.

challenge specific to the Delegation Clause. Second, it fails because Chemours did not plead a cognizable cause of action under Delaware law.

1. Chemours' "Fiduciary Duty" Argument Fails To Challenge The Delegation Clause Specifically.

At the threshold, Chemours' "fiduciary duty" argument must be rejected under *Rent-A-Center* because it is a general attack on the Separation Agreement that turns on allegations about insolvency; it has nothing specifically to do with the arbitration provisions, let alone the Delegation Clause itself. (A287-89 ¶¶ 136-45 (alleging fiduciary duty claim related solely to "legality of this dividend" and "unlimited responsibility for … potential maximum liabilities" and seeking "declarations as to the liability maximums"); *see also* OB 30 (complaining about dividend and "unlimited responsibility for the liabilities transferred to it in the spin-off"); OB 31 ("Because the Separation Agreement provided for … a massive value transfer …, the Chemours directors breached their fiduciary duties by consenting.")) As a result, the Delegation Clause stands and must be enforced.

2. Chemours' "Fiduciary Duty" Claim Is Not A Cognizable Cause Of Action Under Delaware Law, And In Any Event, Chemours Failed To Plead It.

Even if it were necessary for this Court to consider Chemours' "fiduciary duty" challenge (and it is not), it would still fail as a matter of Delaware law. Citing only *Trenwick*, Chemours claimed in the Court of Chancery that "wholly owned subsidiary directors *may* '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 ….'" (A990 (emphasis added) (quoting *Trenwick*, 906 A.2d at 203)) But as DuPont's counsel explained at argument, in *Trenwick*, then-Vice Chancellor Strine expressly did *not* hold that such a duty exists under Delaware law, but merely hypothesized, in dicta, that directors of a wholly owned subsidiary "***might***" owe fiduciary duties to a wholly owned subsidiary, if at all, in circumstances far more limited than Chemours suggests:[9]

> If there is conceptual room for equity in this context, that room is quite narrow. ***At most, one might conceive*** that the directors of a wholly-owned subsidiary owe a duty to the subsidiary not to take action benefiting a parent corporation that they ***know*** will render the subsidiary unable to meet its legal obligations. Any lesser standard would undercut the utility of the business judgment rule by permitting creditors to second-guess good faith action simply because the subsidiary ultimately became insolvent. Even the recognition of a cause of action along stringent lines requires careful consideration.

906 A.2d at 203 (emphasis added). (A1595-97) The Court of Chancery then made clear that "there is no need to hold that such a cause of action does or does not exist under our law" because "[t]he complaint does not plead facts supporting an inference that [the wholly owned subsidiary] was rendered insolvent by the challenged

[9] On appeal, Chemours attempts to further broaden the dicta in *Trenwick* to encompass in its "fiduciary duty" claim acts taken by a subsidiary board that "'support a parent's business strategy'" if "'it believes pursuit of that strategy will cause the subsidiary to violate its legal obligations.'" (OB 30) That attempt likewise fails.

transaction, much less that the [subsidiary's] board knew that was the case." *Id.* at 203-04.

Thus, even if Delaware law recognized such a cause of action, the *Trenwick* court made clear that it would require the subsidiary fiduciary to actually "know" that the action will "render the subsidiary unable to meet its legal obligations." *Id.* Here, Chemours never alleged either element of that test. Chemours has never alleged that it was ever unable to meet its legal obligations or that it will be unable to meet them in the future. And Chemours has also never alleged that Mr. Pond (or any Chemours director) somehow "knew" that any of their actions would cause something that has never happened.

III. THE DELEGATION CLAUSE IS NOT UNCONSCIONABLE.

A. Question Presented.

Did the Court of Chancery properly conclude that the Delegation Clause is not unconscionable as a matter of law? (Opinion 30-38; A592-602)

B. Scope Of Review.

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

C. Merits Of Argument.

Under *Rent-A-Center*, the Court of Chancery need not have reached any of Chemours' unconscionability arguments. Nevertheless, the Court of Chancery correctly held that, to the extent Chemours challenged the Delegation Clause as procedurally unconscionable, its challenge fails as a matter of law. (Opinion 38) The Court of Chancery also correctly concluded that "Chemours does not articulate a substantive unconscionability argument specific to the Delegation Clause" and properly declined to address Chemours' substantive unconscionability arguments.

1. This Court Need Not Reach Chemours' Unconscionability Arguments.

As explained in Section I above, under *Rent-A-Center*, general attacks on the Separation Agreement and arbitration provisions cannot affect the validity of the Delegation Clause. Chemours' unconscionability arguments, which are directed at

the Separation Agreement as a whole, not specifically to the Delegation Clause, must therefore be decided by the Arbitral Tribunal in the first instance.

Again, *Rent-A-Center* is instructive. Here, as in *Rent-A-Center*, it is the Separation Agreement's Delegation Clause that DuPont seeks to enforce. Chemours' amended complaint does not allege that the Delegation Clause itself is unconscionable, invalid or unenforceable. (A259-63 ¶¶ 60-69) Even now, Chemours does not argue that it specifically challenged the Delegation Clause, instead arguing only that it has "challenged the Separation Agreement's delegation provision by identifying its unconscionable interaction with other arbitration provisions." (OB 40)

Because Chemours has not specifically challenged the Delegation Clause, this Court need go no further. Chemours must present its arbitrability arguments to the Arbitral Tribunal.

2. The Delegation Clause Is Not Unconscionable.

Unconscionability is measured at the time of contract formation. *See, e.g.*, *Standard Gen. L.P. v. Charney*, 2017 WL 6498063, at *17 (Del. Ch. Dec. 19, 2017), *aff'd*, 195 A.3d 16 (Del. 2018) (TABLE); *James v. Nat'l Fin., LLC*, 132 A.3d 799, 814 (Del. Ch. 2016) ("[W]hether a contract is unconscionable is determined at the time it was made."). (Opinion 37 n.163) An unconscionable contract is one that "'no man in his senses and not under delusion would make on the one hand, and as

no honest or fair man would accept, on the other.'" *Tulowitzki v. Atl. Richfield Co*., 396 A.2d 956, 960 (Del. 1978) (citation omitted). "[T]o set aside an agreement as unconscionable, the burden is on a petitioner to show both that the terms of the contract are oppressive and that the oppressed party was deprived of meaningful choice; in other words, the agreement must be manifestly and fundamentally unfair." *In re M.M*., 2013 WL 1415837, at *3 (Del. Ch. Apr. 4, 2013).

As Chemours concedes, an agreement cannot be invalidated as unconscionable unless a plaintiff establishes both procedural and substantive unconscionability. (OB 33-34); *Aviall I*, 913 F. Supp. at 834; *Standard Gen.*, 2017 WL 6498063, at *17. Chemours can establish neither here.

(a) The Delegation Clause Is Not Procedurally Unconscionable.

More than thirty years ago, the Delaware Supreme Court in *Anadarko* confirmed that "a parent does not owe a fiduciary duty to its wholly owned subsidiary." 545 A.2d at 1174. This holding is a "settled principle[] of Delaware law." *Trenwick*, 906 A.2d at 191. Thus, "[w]holly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are created." *Id.* at 173. And "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko*, 545 A.2d at 1174.

As a result, a contract between a parent and wholly owned subsidiary cannot be unconscionable. In *Aviall I,* the Southern District of New York enforced an arbitration provision executed in connection with a spin-off, despite the fact that the terms of the contract were entirely dictated by the parent company and the subsidiary was not represented by separate counsel. 913 F. Supp. at 831-33. The *Aviall I* court noted that attempting to apply the doctrine of unconscionability to spin-off transactions "would establish a principle that would render every clause of every spin-off agreement potentially voidable." *Id.* at 833.

Here, Chemours alleges that the Separation Agreement was procedurally unconscionable because "Chemours had no ability to make a meaningful choice," and Chemours did not have bargaining and economic power. (OB 35) Similar allegations failed in *Aviall I,* 913 F. Supp. at 832-33, and should be rejected here.

Chemours does not deny that wholly owned subsidiaries exist to benefit their parents or that directors and officers of wholly owned subsidiaries owe their duties to the stockholders of the parent. Chemours cannot explain what sense it would make to permit a subsidiary, which exists only to serve its parent, to "choose" whether it wished to be spun off and on what terms. (A1537-43)

Parent-subsidiary 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.'" (Opinion 37 (quoting *Anadarko*, 545 A.2d at 1174) (emphasis in original)) To find these contracts unenforceable "would be nonsensical, because their presumptive validity acknowledges that they are *not* the product of fair bargaining." (Opinion 38 (emphasis in original)) This is and must be Delaware law. Otherwise, the validity of all parent-subsidiary contracts would be called into question. And, because parent-subsidiary contracts by definition do not reflect arm's-length bargaining, it would be impossible to determine which parent-subsidiary contracts are procedurally unconscionable and which are not. Certainly Chemours offers no suggestions. Indeed, at oral argument below, Chemours' counsel conceded that, on Chemours' theory of the law, "[p]rocedural unconscionability … is going to be found in most spin-offs." (A1583)

Faced with a wall of contrary Delaware authority, Chemours turns to unpersuasive decisions from "other jurisdictions" (OB 37), including a 2017 split-decision by the West Virginia Supreme Court, *Blackrock Capital Investment Corp. v. Fish*, 799 S.E.2d 520 (W. Va. 2017). But the *Blackrock* case was about piercing the corporate veil, not arbitrability. It also dealt with materially different facts, the court only heard one side of the argument and the majority ignored the broader legal ramifications of its decision. *See Blackrock*, 799 S.E.2d at 523-25,

538-40. Much like Chemours does now, the *Blackrock* majority dismissed the *Anadarko* decision with a single sentence, wrongly stating that *Anadarko* "did not consider the doctrine of unconscionability." *Id.* at 530.[10] In *Anadarko Chancery*, however, the Court of Chancery did in fact dismiss claims alleging that spin-related contracts were unfair. *See Anadarko Chancery*, 1987 WL 16508, at *4. (The *Blackrock* court mistakenly cited an earlier decision in *Anadarko* where the Court did not rule on the fairness of the contracts.)

(b) The Delegation Clause Is Not Substantively Unconscionable.

The Court of Chancery correctly concluded that "Chemours does not articulate a substantive unconscionability argument specific to the Delegation Clause" and declined to consider this issue under *Rent-A-Center*. (Opinion 30-36) And Chemours' counsel conceded at argument that "[t]he delegation clause isn't contrary to Delaware law." (A1560) Accordingly, the Court of Chancery properly held that the Delegation Clause is not unconscionable. (Opinion 30, 38) Chemours can make its arguments about the rest of the arbitration provisions to the arbitrators.

Even if this Court were to reach Chemours' allegations about the supposed unfairness of the arbitration provisions, the provisions that Chemours complains

[10] The *Blackrock* court did not address *Aviall* other than to acknowledge its existence in a footnote. *Blackrock*, 799 S.E.2d at 530 n.32.

about are common, bilateral, and fair. In assessing substantive unconscionability, Delaware courts consider whether the disputed contract is wildly out of step with common practice – in other words, "'so extreme as to appear unconscionable according to the mores and business practices of the time and place.'" *James*, 132 A.3d at 815 (citation omitted). Chemours does not meet this standard.

The lone argument that Chemours raises on appeal relates to the limitation of remedies provision in Article VIII. Chemours' other arguments are waived. *See* Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal."); *Harris v. State*, 99 A.3d 227, 2014 WL 3883433, at *2 (Del. 2014) (TABLE) ("An appellant must state the merits of an argument in his opening brief or that argument will be waived.").

Chemours objects to the arbitration provision that limits the arbitrators' power to grant certain relief, including the power to invalidate, modify, limit, suspend or reform the Separation Agreement, or to award punitive, exemplary, or treble damages. (A259-60 ¶ 61) But limitations on the arbitrators' power to grant certain remedies are so common as to be virtually standard. For example, the AAA's drafting guide for dispute resolution clauses lists model provisions that limit otherwise available remedies. These include limitations on the power to award "punitive or other damages not measured by the prevailing party's actual damages,"

damages in excess of a fixed amount, consequential damages, and injunctive relief. (*AAA Model Clauses* at 29-30)

Chemours' own counsel has included virtually identical limitations on remedies in separation agreements they have drafted. For example, in 2015, Babcock & Wilcox was represented by Chemours' counsel in spinning off a business unit, and the separation agreement included a mandatory arbitration provision with the same limitations on remedies that Chemours now characterizes as beyond the pale: "The arbitrators ... will have no authority or power to limit, expand, alter, amend, modify, revoke or suspend any condition or provision of this Agreement or any Ancillary Agreement."[11] Similarly, in 2016, Chemours' counsel represented Hewlett Packard in spinning off a business unit, and again included the same limitation on remedies Chemours complains of here.[12]

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[11] (*See* Master Separation Agreement between The Babcock & Wilcox Company and Babcock & Wilcox Enterprises, Inc. (June 8, 2015), Art. V https://www.sec.gov/Archives/edgar/data/1630805/000119312515276710/d43214dex21.htm; *see also* B&W Press Release (noting Wachtell, Lipton, Rosen & Katz and Jones Day were legal counsel to B&W on spin-off) https://www.babcock.com/news/bw-announces-intention-to-spin-off-its-power-generation-business)

[12] (*See, e.g.*, Separation and Distribution Agreement by and between Hewlett Packard Enterprise Company and Seattle Spinco, Inc., (Sept. 7, 2016), § 8.4(a)(ii) (limiting the arbitrator's authority to "to limit, expand, alter, amend, modify, revoke or suspend any condition or provision of this Agreement or other Transaction Document"), https://www.sec.gov/Archives/edgar/data/1645590/000119312516703457/d251902dex22.htm)

Moreover, courts routinely enforce arbitration agreements even where the arbitrator lacks the power to grant the plaintiff's requested relief. *See, e.g.*, *Medtronic Vascular, Inc. v. NanoMedSystems, Inc.*, 2014 WL 795077, at *3 (Del. Ch. Jan. 27, 2014) (enforcing arbitration of claim for specific performance despite a provision prohibiting the arbitrator from awarding equitable relief).

IV. CHEMOURS REPEATEDLY REAFFIRMED THE SEPARATION AGREEMENT AFTER IT WAS INDEPENDENT.

A. Question Presented.

Did Chemours reaffirm the Separation Agreement after it was independent of DuPont, mooting Chemours' complaints about the circumstances of the initial adoption of the Separation Agreement? (A585-92)

B. Scope Of Review.

This Court "may rest its appellate decision on any issue that was fairly presented to the Court of Chancery" and, accordingly, "may affirm the judgment of the Court of Chancery on the basis of a different rationale." *Cent. Laborers Pension Fund v. News Corp*., 45 A.3d 139, 141 (Del. 2012); Supr. Ct. R. 8.

C. Merits Of Argument.

Even if the Court were for some reason inclined to overturn *Anadarko* and ignore *Rent-A-Center*, *Aviall*, and *Concepcion*, it would still have to affirm because all of Chemours' complaints about the process that led to the Separation Agreement were mooted when a fully independent Chemours entered into an amendment that reaffirmed its arbitration provisions. Under Delaware law, Chemours' post-spin reaffirmation of the Separation Agreement cured any supposed defect in the original contract.

1. Chemours Explicitly Reaffirmed The Separation Agreement And Traded Away Any Argument That It Is Not Bound By Its Terms.

In 2017, long after the spin-off, Chemours signed "Amendment Number 1 to Separation Agreement," which provided that DuPont would pay over $300 million to help settle the personal injury claims in the Ohio PFOA MDL. Chemours' General Counsel personally executed that agreement, which reaffirmed the Separation Agreement (the "2017 Amendment"). The 2017 Amendment explicitly provided that "all of the terms of the Separation Agreement shall remain in full force and effect." (*See* A712 § 2.3)

By entering into the 2017 Amendment reaffirming the terms of the Separation Agreement, Chemours traded away any argument it was not bound. (A712 § 2.3) A promise to be bound by an antecedent contract is binding even if the earlier contract was otherwise voidable. *See* Restatement (Second) of Contracts § 85 (Am. Law Inst. 1981); *Foss-Hughes Co. v. Norman*, 119 A. 854, 855 (Del. Super. Ct. 1923); *WSFS v. Swanson*, 2016 WL 6948454, at *7 (Del. Super. Ct. Nov. 21, 2016) ("The plain, clear and express language of the [subsequent] Agreement provides that the [antecedent agreement] remain[s] in full force and effect."); *see also Ellipso, Inc. v. Mann*, 541 F. Supp. 2d 365, 372 (D.D.C. 2008).

Moreover, amending a contract – let alone agreeing that such contract "shall remain in full force and effect" – is fatally inconsistent with repudiating the contract

as unauthorized or unconscionable. *See Lee Builders, Inc. v. Wells*, 92 A.2d 710, 713 (Del. Ch. 1952) ("I do not see how defendants can now contend that there was any over-reaching or improper action on the part of the purchaser when later they executed an agreement containing substantially the same terms and conditions."), *rev'd on other grounds*, 99 A.2d 620 (Del. 1953); *Camferdam v. Ernst & Young Int'l, Inc.*, 2004 WL 307292, at *3 n.3 (S.D.N.Y. Feb. 13, 2004) (rejecting argument that arbitration provisions were unconscionable in part because "at least one of the Plaintiffs signed subsequent agreements that contained a substantially similar arbitration provision"); *see also Standard Gen.*, 2017 WL 6498063, at *17 n.130 (citing *Lee Builders*, 92 A.2d at 713).

Because a fully independent Chemours agreed in the 2017 Amendment (in exchange for substantial consideration) that all of the terms (including the arbitration terms) of the Separation Agreement remained in full force and effect, Chemours is barred from attempting to void or repudiate the arbitration provision based on its supposed unfairness or lack of consent at the time the Separation Agreement was originally signed.

2. Chemours Implicitly Ratified The Separation Agreement.

Implied ratification occurs when a party receives and retains the benefit of a transaction without objection, thereby ratifying an allegedly unauthorized act and estopping itself from repudiating it. *Genger v. TR Invs., LLC*, 26 A.3d 180, 195 n.62

(Del. 2011) (citing *Hannigan v. Italo Petrol. Corp. of Am.*, 47 A.2d 169, 172-73 (Del. 1945)). Put another way, "[a] party to a contract cannot silently accept its benefits and then object to its perceived disadvantages." *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989).

Chemours alleges that, before the spin-off, its future executives "did not support arbitration at all," and "did not consent to any aspect of the arbitration provisions" or "approve any aspect of the arbitration provisions." (A262-63 ¶ 68) Yet, after the spin-off, Chemours did not promptly repudiate the Separation Agreement or the arbitration provisions (let alone the specific Delegation Clause DuPont is seeking to enforce). Far from it: Over the ensuing four years, and as recently as 2019, Chemours consistently reiterated in its SEC filings that the Separation Agreement and related agreements "govern the relationship between us and DuPont following the Separation...." (A1212) Chemours admitted "we are required to indemnify DuPont with regard to liabilities allocated to, or assumed by us under … the separation agreement ...." (A1213) Chemours has indicated that it has performed its indemnification obligations under the Separation Agreement for four years. (A1213 ("[I]ndemnification obligations to date have included defense costs[,]… certain damages awards, settlements, and penalties."))

Chemours' express ratification, public filings, history of performance under the Separation Agreement, and retention of benefits under the Separation Agreement

are inconsistent with repudiation of the agreement as unauthorized and, thus, constitute ratification.

CONCLUSION

For all of the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

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