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IN THE

# Supreme Court of the State of Delaware

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| THE CHEMOURS COMPANY,<br><br>Plaintiff-Below,<br>Appellant,<br><br>v.<br><br>DOWDUPONT INC.; CORTEVA, INC.; and E. I. DU PONT DE NEMOURS AND COMPANY,<br><br>Defendants-Below,<br>Appellees. | **No. 147, 2020**<br><br>CASE BELOW:<br><br>COURT OF CHANCERY OF THE STATE OF DELAWARE,<br>C.A. No. 2019-0351-SG |

## APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

This appeal turns on the legal categorization of a spin-off separation agreement.

For purposes of evaluating the element of consent necessary to sustain an order compelling arbitration, DuPont argues, the Separation Agreement is a conventional, consent-based contract.[1] DuPont does not dispute that it dictated and unilaterally approved all the terms of that document in its own interest. DuPont nevertheless points to the signature of a nominal Chemours official on the Separation Agreement and declares satisfied the requirement of contractual consent mandated by the Federal Arbitration Act (FAA).

For purposes of evaluating Chemours's claim of unconscionability, however, DuPont argues that this well-established contractual defense cannot be available because the Separation Agreement "by definition do[es] not reflect arm's-length bargaining." Appellees' Answering Brief ("AB") 38. Here, DuPont adopts the Court of Chancery's holding that the Separation Agreement cannot be procedurally unconscionable because it is "non-consensual." Op. 37.

These two positions are in conflict. If documents like the Separation Agreement are properly viewed as contracts, founded on the informed and free consent of both parties, they should be subject to traditional contract defenses—including, as multiple courts have found, the defense of unconscionability. But if such intra-corporate documents are viewed as analogous to charters, enforceable

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[1] Abbreviations and capitalized terms not otherwise defined in this submission have the meaning assigned in Appellant's Opening Brief ("OB").

not as the product of offer-acceptance-consideration, but rather as equitably appropriate and necessary to "allow the corporate machinery to run smoothly," Op. 37-38, then the element of consent required for any order of arbitration is lacking under federal law.

Recognizing the tension between these positions, Chemours argued them in the alternative. The better view, Chemours submits, is that while separation agreements are properly analogized to contracts, they are not founded on the consent the FAA requires to trigger an order compelling arbitration. That is because (as in this case) such contracts are entirely unilateral in their negotiation and execution and no party acting in interest for the party being subjected to the arbitration order exercised any agency in agreeing to arbitration. OB 20-28.

Alternatively, though, if the courts decide to credit the form of a parent's signature as legal consent for the subsidiary, and a separation agreement *is* a contract founded on consent, then contract defenses should be available. OB 33-41. What makes little sense is that a separation agreement could be held at the pleading stage to be a consent-based contract for FAA purposes, but to be a non-consent-based non-contract for contract defense purposes. Yet that is the result reached below and which DuPont sponsors again in this Court.

This appeal will resolve the doctrinal question whether unilaterally imposed spin-off separation agreements are true consent-based contracts. DuPont insists that the question has previously been answered, but the precedents do not permit the argument. This Court's last foray into this area was *Anadarko Petrol. Corp.* v. *Panhandle E. Corp.*, 545 A.2d 1171 (Del. 1988). That case, decided over 30 years

ago, established that a parent company generally owes no fiduciary duties to its wholly owned subsidiaries. That principle is not at issue on this appeal. Nor has any other case been faced with the interpretive question raised on this appeal: Should courts view spin-off separation agreements as contracts, founded in the offer-acceptance-consideration model, or rather as corporate instruments designed to permit the equitable and efficient operation of corporate enterprise? Only one case addresses this determinative question, even in dictum—the *Aviall* decision, which recognized that spin-off agreements cannot be viewed as true consent-based contracts and are more sensibly analogized to corporate charters. *Aviall, Inc.* v. *Ryder System, Inc.*, 913 F. Supp. 826, 832 (S.D.N.Y. 1996).

DuPont also insists that Chemours cannot raise the question of consent at all, because it has not "specifically" challenged the "delegation" provision of the Separation Agreement. AB 12. But Chemours pleaded (in its complaint) and then specifically argued (in its briefing) that it never consented to any part of the Separation Agreement—including, specifically, the delegation provision. DuPont appears to claim that Chemours's specific contract-formation challenge to the delegation provision is inadequate because Chemours also disputes formation as to *other* provisions of the Separation Agreement. This contention replaces the requirement of "specificity" with a requirement of "exclusivity" and for that reason makes little sense and fails under the case law.

The parties' briefing has likewise narrowed and crystallized other issues before the Court. The appeal will thus permit the Court to resolve whether the Court of Chancery erred when it declined to take up whether DuPont breached its

fiduciary duties by extracting value from a subsidiary that was, in DuPont's contemplation, insolvent. Chemours argued the point below, but DuPont briefed no response and the court issued no decision. Allowing this error to stand would approve DuPont's improper effort to insulate itself from remedy for its breach.

Finally, the appeal raises the question whether Delaware will follow federal precedent in holding that a delegation provision will be unenforceable in court against a claim of unconscionability where it purports to deprive the arbitrator of the power to address unconscionability. Numerous federal courts have found provisions like this to be substantively unconscionable—since they operate as a waiver of unconscionability. The Court of Chancery concluded it lacked jurisdiction to resolve this issue. That was error because federal law *requires* judicial resolution where "common [arbitration] procedures *as applied* to [a] delegation provision render[] that provision unconscionable." *Rent-A-Center, Inc.* v. *Jackson*, 561 U.S. 63, 74 (2010). Instead of reckoning with that precedent, DuPont attempts to excuse the unconscionable by asserting—without basis in the pleading and contrary to fact—that the provisions it inserted into the contract are "common, bilateral, and fair." AB 40.

In its opposition, DuPont seeks to raise an issue that is not ripe for resolution, asking this Court to conclude that Chemours ratified the Separation Agreement after it became an independent company. As the Court of Chancery recognized, DuPont's affirmative defense of ratification raises factual disputes that cannot be resolved on a pleadings motion in the absence of discovery. DuPont's effort to smuggle that issue into this appeal should be rejected.

## ARGUMENT

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

This much is beyond dispute: Arbitration agreements are unenforceable absent consent. *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 297-99 & n.6 (2010). The Separation Agreement's arbitration provisions were conceived by DuPont, drafted by DuPont, and executed by DuPont's CFO and its in-house counsel. ¶¶ 35, 68-69. DuPont's own CEO and board Chair swore out an affidavit confirming that her company "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).

"[A]dmittedly non-consensual"—taking the pleaded facts into consideration, that is how the Court of Chancery characterized the Separation Agreement. Op. 37. And it is an apt description. As Chemours explained in its opening brief, there can be no consent where a party agrees with itself to bind another, as DuPont did here. OB 22-24 (citing *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) (holding that "there was (legally speaking) no 'other' contracting party" in a spin-off agreement, because the spinco "had no input into negotiating or drafting")). Reflecting the reality that parent-subsidiary "contracts" are non-consensual, Delaware law recognizes that such arrangements are not subject to black-letter doctrines of contractual formation and validity. *See, e.g.*, *Anadarko Petrol. Corp.*

v. *Panhandle E. Corp.*, 1987 WL 16508, at *4 (Del. Ch. Sept. 8, 1987) (holding that parent-subsidiary agreements do not require consideration); *Highlands Ins.*, 2001 WL 287485, at *8 (holding the doctrine of mutual mistake inapplicable to parent-subsidiary agreements). Instead, as the Court of Chancery acknowledged in the decision on appeal, parent-subsidiary arrangements are given effect "because they allow the corporate machinery to run smoothly." Op. 37-38. That is a sufficient and appropriate basis for enforcement of corporate instruments such as charters, bylaws, and spin agreements. But because a spin agreement like the Separation Agreement is not founded on consent—because it is "non-consensual"—it cannot support enforcement of arbitration provisions under the FAA. *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) ("Consent is essential under the FAA.")

Rather than address this interpretive challenge, DuPont responds with the kitchen sink, arguing that the Court of Chancery erred by even considering the question of consent (AB 13-18), that this Court has already rejected it (AB 20-22), that federal law bars it (AB 23-25), and that it would cast doubt on all parent-subsidiary agreements (AB 26-28). None of that has any merit.

DuPont's first argument is that the Court of Chancery lacked jurisdiction to address consent. Its authority is *Rent-A-Center, Inc.* v. *Jackson*, 561 U.S. 63 (2010), where the U.S. Supreme Court held that if a contract has a delegation provision, the courts only have jurisdiction to consider arguments that are "specific" to that provision. *Id.* at 70 (cited at AB 14). DuPont says that Chemours's "attack on the Delegation Clause was just a part of its general attack

on the arbitration agreement." AB 15. But as DuPont concedes, *Rent-A-Center* only governs challenges to the "validity" of arbitration provisions. AB 16. The decision does not address arguments addressing contractual "formation"—which must be resolved by the courts. *See Granite Rock*, 561 U.S. at 297. *Rent-A-Center* is thus irrelevant to Chemours's argument on consent, because consent is an essential ingredient of contract formation. *Eagle Force Holdings, LLC* v. *Campbell*, 187 A.3d 1209, 1212 (Del. 2018). The decision below recognized this black-letter principle. *See* Op. 24 ("In Chemours' view, it did not consent to arbitration as required under the FAA because that foundational requirement of contract formation—mutual assent—is absent."); *id.* at 36 n.162. And DuPont cites no contrary authority. Instead, it relies upon inapposite cases in which parties argued that arbitration provisions were invalid due to fraud, coercion, lack of mental capacity, or unconscionability. AB 16-17.

Moreover, even if DuPont were correct that consent is not an element of contract formation, it would make no difference. *Rent-A-Center* requires that challenges to delegation be "specific[]." 561 U.S. at 71. But "[i]n specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." *MacDonald* v. *CashCall, Inc*, 883 F.3d 220, 226 (3d Cir. 2018); *see Gibbs* v. *Haynes Investments, LLC*, 2020 WL 4118239, at *3 (4th Cir. July 21, 2020) (same). When Chemours opposed DuPont's motion to dismiss, it argued that it did not consent to the Separation Agreement, that it did not consent to its arbitration

provisions, and that it did not consent to the delegation provisions. A993 & n.6. That was enough. *MacDonald*, 883 F.3d at 226.

Turning to the merits, DuPont says that this Court "already addressed and rejected Chemours' argument" on consent in *Anadarko Petrol. Corp.* v. *Panhandle E. Corp.*, 545 A.2d 1171 (Del. 1988). AB 20. But even by DuPont's account, *Anadarko* held only that a spin-off agreement was enforceable without consideration, and that it was inappropriate to conduct an "entire fairness" analysis because the parent owed no fiduciary duty to its wholly owned subsidiary. AB 21. Contractual consent did not feature in the decision at all.

Having identified no precedent supporting its position, DuPont attacks a position Chemours never adopted. Claiming that Chemours "does not deny that it consented to at least some portions of the Separation Agreement," DuPont says Chemours's position would violate the FAA by "apply[ing] a special standard of consent to arbitration provisions," AB 25, and that Chemours has "called into doubt" the enforceability of all parent-subsidiary agreements, AB 26-27.

That is not remotely Chemours's position. As Chemours has repeatedly explained, it consented to "no part" of the Separation Agreement—delegation provision or otherwise. OB 22. Moreover, because "[p]arent-subsidiary agreements are not founded on consent . . . their enforcement is premised not on traditional contract-law principles but rather on corporate law considerations of practicality and efficiency." OB 25. Thus, while Delaware courts "generally enforce spin-off and similar transactions," that enforcement does not involve the

"bargained-for consent federal law requires to enforce an agreement to arbitrate." OB 24, 26.

Nothing in that analysis requires application of a "special standard of consent." Instead, it recognizes that arrangements like the Separation Agreement are not "enforced as consent-based 'contracts' entitled to the FAA's protection" OB 26. For much the same reason, provisions in corporate charters or bylaws foreclosing mandatory arbitration are likewise not subject to the FAA. OB 26-28. And Chemours's position does not "call into doubt" parent-subsidiary agreements. Instead, it rests on the common-sense principle endorsed below: "Delaware law enforces th[o]se admittedly non-consensual contracts because they allow the corporate machinery to run smoothly," Op. 37-38. This principle does not "call into doubt" parent-subsidiary agreements any more than the rule that contracts in breach of fiduciary duty are unenforceable "calls into doubt" contracts generally, or recognizing that corporate charters are not pure creatures of "consent" would "call into doubt" their enforceability.

## 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.

While Delaware law provides that "[a] wholly-owned subsidiary is to be operated for the benefit of its parent," 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 an "agreement" providing for a dividend and a massive liability transfer at a time when the company was insolvent by DuPont's own understanding, DuPont and its employees caused Chemours to act in violation of Delaware statute—and by causing Chemours to adopt an arbitration regime that purports to bar any remedy for that violation, they impermissibly sought to block future Chemours directors from taking steps to remedy it. OB 29-32. Chemours pleaded this claim and the facts supporting it, ¶¶ 10, 119, 187-94, and argued it as a basis to sustain the claim below, A990-92; A1567-72.

The Court of Chancery declined to address the issue. Pointing this Court to a footnote in the Background section of the decision on appeal, DuPont asserts that the court below considered and rejected this argument "by the same reasoning . . . that addressed Chemours' other claims." AB 30 (citing Op. 18 n.88). Neither that footnote nor anything else in the court's opinion even purported to address Chemours's fiduciary breach claim. Tacitly acknowledging as much, DuPont fails to identify a single relevant holding from the decision below. *See* AB 31-33.

Somewhat paradoxically, DuPont then contends that the Court of Chancery lacked jurisdiction to consider the fiduciary issue that it (inaccurately) claims the decision below resolved. DuPont never raised this argument below and it is accordingly waived. *Shawe* v. *Elting*, 157 A.3d 152, 162 & n.31 (Del. 2017). Indeed, DuPont has waived any response to Chemours's fiduciary duty claim. In its answering brief, DuPont called this claim of waiver "blatantly false." AB 30. To demonstrate this "falsity," DuPont then cited a passage from the end of oral argument below to show where it claims to have preserved the argument. Notably, DuPont did not cite anything to show where it preserved the issue in its briefing—because it failed to address the issue in its briefing below. That is waiver: "Issues not briefed are deemed waived." *Emerald P'rs* v. *Berlin*, 726 A.2d 1215, 1224 (Del. 1999). (Indeed, DuPont only mentioned the issue at oral argument to address Chemours's observation that it was waived below. A1595-1600.)

To support its waived jurisdictional objection to Chemours's fiduciary argument, DuPont again claims that Chemours did not "specifically" challenge the delegation provision as void for breach of duty. AB 31. DuPont misinterprets Chemours's position. The Complaint alleges that DuPont breached its fiduciary duties by directing its employees to authorize, on Chemours's behalf, the Separation Agreement and its massive dividend that rendered Chemours insolvent as of the spin by DuPont's understanding. ¶¶ 187-94. Chemours cannot obtain effective review of that breach, because DuPont committed all claims to arbitration and then purported to strip the arbitrators of any "authority or power to limit, expand, alter, amend, modify, revoke, or suspend" any provision of the Separation

Agreement. § 8.2(e). And Chemours cannot even correct that improper waiver of DuPont's fiduciary duties, because DuPont has purported to delegate any such challenge to arbitration—where the same limitation on relief blocks any remedy. DuPont thus invokes the delegation provision to eliminate Chemours's claim for breach of fiduciary duty. Chemours challenges that invocation as legally impermissible. OB 31. And that challenge is "specific" to delegation, because it involves a breach of fiduciary duty arising out of entry into the delegation provision itself.

In the alternative, DuPont argues that Delaware companies do not owe fiduciary duties to their insolvent subsidiaries. AB 31-33. That would come as a surprise to the many courts within and without Delaware that have held otherwise. *See, e.g.*, *Quadrant Structured Prods. Co.* v. *Vertin*, 102 A.3d 155, 184 (Del. Ch. 2014); *In re Scott Acquisition Corp.*, 344 B.R. 283, 290 (Bankr. D. Del. 2006) (under Delaware law, "upon insolvency directors of a wholly-owned subsidiary owe fiduciary duties to the subsidiary"); *In re RSL Com PrimeCall, Inc.*, 2003 WL 22989669, at *13 (Bankr. S.D.N.Y. Dec. 11, 2003) (same). All these cases point to the same conclusion: While *Anadarko* generally insulates parent corporations from fiduciary claims, "transfers from an insolvent subsidiary to its controller" can constitute a "breach of fiduciary duty," *Quadrant*, 102 A.3d at 184, because "creditors take the place of the shareholders as residual beneficiaries" upon insolvency. *N. Am. Catholic Educ. Prog. Found., Inc.* v. *Gheewalla*, 930 A.2d 92, 101 (Del. 2007).

Lastly, DuPont claims that none of this precedent matters because Chemours has not alleged that it was insolvent at the time of the spin-off or that DuPont "knew" of that insolvency. AB 33. The Court of Chancery declined to address Chemours's allegations of solvency, reasoning that it "will be revisited under a 12(b)(6) motion." A1611. In equivalent circumstances, this Court has concluded that the "better course is for the Court of Chancery" to conduct such allegation-based inquiry in the "first instance" upon remand. *City of Fort Myers Gen. Emps.' Pension Fund* v. *Haley*, 2020 WL 3529586, at *17 (Del. June 30, 2020) (reversing and remanding for the Court of Chancery to consider for the first time the sufficiency of plaintiff's allegations). Chemours respectfully submits that the same approach would be appropriate here.

Should the Court entertain DuPont's attack on the pleadings, it will find it misplaced. DuPont calls Chemours a "tremendous success," AB 2, and asserts that "[n]o creditor is before the Court claiming" that Chemours is currently insolvent, *id.*, and from these self-serving pronouncements concludes that Chemours has failed to plead insolvency in July 2015.

Even were DuPont's unpleaded assertions sound—they are not[2]—in considering a motion to dismiss, the allegations of the complaint "must be accepted as true," *Orix LF, LP* v. *Inscap Asset Mgmt., LLC*, 2010 WL 1463404, at *5 (Del.

[2] For example, both DuPont and Chemours have been named defendants in a range of fraudulent transfer actions by creditors attacking the spin-off. *See, e.g.*, ¶ 105 (noting that New Jersey has characterized the $3.91 billion dividend, the environmental liabilities, and the spin-off itself as a fraudulent transfer that DuPont extracted from Chemours through an abuse of its "control and dominat[ion]").

Ch. Apr. 13, 2010) (quoting *Elf Atochem N. Am., Inc.* v. *Jaffari*, 727 A.2d 286, 287 n.1 (Del. 1999)), and "all inferences therefrom should be construed in the non-moving party's favor," *de Adler* v. *Upper N.Y. Inv. Co. LLC*, 2013 WL 5874645, at *7 (Del. Ch. Oct. 31, 2013). Chemours alleged that "[i]f the liability maximums DuPont certified do not cap the transferred historical liabilities and the Indemnification Provisions, then *Chemours was insolvent* at the time of the spin-off." ¶ 119 (emphasis added). It further alleged that DuPont "knew that the Chemours balance sheet was close to the edge," but that it nevertheless "engineered" its certification of Chemours's "maximum" liabilities "in a way that would massively understate the real potential maximum exposure." ¶¶ 51, 56. These allegations support the inference that, under DuPont's undisclosed plan to impose upon Chemours unlimited indemnification liability, Chemours was insolvent at the time of the spin-off and DuPont knew it.

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

The Court of Chancery also erred when it failed to recognize that the Separation Agreement's arbitration provisions are unconscionable. Those provisions are procedurally unconscionable because, as Chemours pleaded and DuPont's CEO and board Chair confirmed, "DuPont unilaterally determined the terms of the Separation Agreement, including its arbitration provisions, and unilaterally consummated the Separation Agreement." Kullman Aff. ¶ 2 (A1028). And the delegation provision in particular was substantively unconscionable because it purports to operate as a waiver of unconscionability.

Once again, DuPont argues that the Delaware courts lack jurisdiction to consider Chemours's arguments and that they are meritless. Once again, DuPont has it wrong on the law and the facts.

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

In the decision below, the Court of Chancery held that parent-subsidiary agreements cannot ever be void for procedural unconscionability because "the spirit of procedural unconscionability . . . is wholly inconsistent with the routine enforcement of parent-subsidiary contracts." Op. 37. DuPont says this conclusion was correct, but the court lacked jurisdiction to deliver it because Chemours did not "specifically" argue that the delegation provision is unconscionable, as required by *Rent-A-Center*. AB 34-35.

As explained above, DuPont misunderstands *Rent-A-Center*; "specific" does not mean "unique." *See supra* pp. 7-8. For that reason, courts applying *Rent-A-Center* frequently conclude that they have jurisdiction to review challenges that expressly target delegation provisions, even if those challenges "may be equally applicable" to all the other provisions of the contract. *Johnson* v. *Wells Fargo Bank, N.A.*, 2015 WL 12591792, at *2 (N.D. Ga. June 17, 2015); *see also Pinela* v. *Neiman Marcus Group, Inc.*, 238 Cal. App. 4th 227, 243 (Cal. Ct. App. 2015).

On the merits, DuPont claims that a "wall of contrary Delaware authority" blocks parent-subsidiary agreements from being held procedurally unconscionable. AB 38. It cites two Delaware cases: *Anadarko* and the decision below. AB 37-38. But *Anadarko* did not consider procedural unconscionability. And its holding that parent companies typically owe no fiduciary duties to their subsidiaries is irrelevant to the question of unconscionability—which does not turn on the existence of any such special relationship.

DuPont also cites *Aviall, Inc.* v. *Ryder System, Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996), where a court enforced the arbitration provisions of a spin-off agreement under New York law. In that case, the former subsidiary Aviall argued that its spin-off agreement was unenforceable as a contract of adhesion. *Id.* at 831. The court rejected Aviall's argument. Reasoning that spin-off separation agreements are akin to "charter document[s] that create[] the subsidiary as an independent entity," *id.* at 832, the Court worried than an expansive view of Aviall's position could "render every clause of every spin-off agreement potentially voidable," *id.* at 833. The *Aviall* case thus turns on the interpretive

puzzle at issue here—and resolved not to permit unconscionability in spin-off documents precisely because such documents are like charters and bylaws rather than consent-based contracts. Put otherwise: Had the *Aviall* court been forced to view the spin document before it as a consent-based contract, its holding as to unconscionability would not have logically or doctrinally followed.

DuPont nevertheless insists that Delaware should adopt a rule under which contracts cannot be unconscionable precisely because their "negotiation" was oppressive. AB 37-38. But the purpose of the unconscionability doctrine is to invalidate such contracts, in which "the party with superior bargaining power used it to take unfair advantage of his weaker counterpart." *James* v. *Nat'l Fin., LLC*, 132 A.3d 799, 814 (Del. Ch. 2016). Nothing in Delaware law shields spin-off provisions from being "render[ed] potentially voidable" when facts show that they are thus unconscionable. *See id.* at 812-15 (discussing the policy underpinning of the doctrine of unconscionability); A1443-45 (Declaration of Prof. Steven Shavell) (noting that the economic rationale for the routine enforcement of contracts fails in the spin-off context).

Moreover, *Aviall* is questionable even as a statement of New York law. In *In re Paragon Offshore PLC*, for example, the U.S. Bankruptcy Court for the District of Delaware recently held that a spinco had demonstrated procedural unconscionability under New York law, based on the allegation that its parent company had "absolutely and completely dominated [the spinco] at all times through [the] execution" of a purported contract. 588 B.R. 735, 758 (Bankr. D. Del. 2018). *See also Blackrock Capital Inv. Corp.* v. *Fish*, 799 S.E.2d 520, 530-31

(W. Va. 2017) (rejecting *Aviall* and upholding spin-off unconscionability claim under New York law). DuPont derides Chemours's citation of non-Delaware authority, AB 38-39, but offers no explanation why Delaware law should be more permissive of unconscionable spin-off agreements than these other jurisdictions.

### B. The Court of Chancery erred when it held that it lacked jurisdiction to consider the substantive unconscionability of the Separation Agreement's delegation provision.

The Court of Chancery also erred when it declined to consider the substantive unconscionability of the Separation Agreement's delegation provision. Chemours has challenged several of the Separation Agreement's arbitration provisions as unconscionable. *See* Op. 33 (summarizing arguments). According to DuPont, the Separation Agreement's delegation provision requires Chemours to make those unconscionability arguments to the arbitrators—who are in turn per DuPont powerless to credit those arguments because DuPont inserted a provision into the Separation Agreement stripping the arbitrators of any power to invalidate, modify, or suspend any of its terms. § 8.2(e).

The Court of Chancery concluded that it lacked jurisdiction to consider this defect because it "is not really a direct challenge to the Delegation Clause." Op. 35. As Chemours demonstrated in its opening brief, however, the court's conclusion was at odds with federal law. OB 40-41. *Rent-A-Center* itself recognized that it is for the courts to resolve whether "common procedures *as applied* to [a] delegation provision render[] that provision unconscionable." 561 U.S. at 74. Taking up that invitation, courts across the country have invalidated

delegation clauses when—just as here—their interaction with other arbitration provisions effected an improper waiver of unconscionability. *See* OB 41 (collecting cases).

DuPont does not even attempt to explain how the Court of Chancery's decision can be reconciled with that federal precedent—because there is no explanation. Instead, DuPont argues that its limitation on arbitral relief is "so common as to be virtually standard," pointing to a AAA drafting guide and two precedent spin-off agreements. AB 40-41. Neither DuPont's say-so, nor its cherry-picked examples from practice, are authority capable of overriding federal law. Nor, moreover, is any of what DuPont cites even helpful to its position. The drafting guide contains nothing close to the blanket ban that DuPont inserted into the Separation Agreement. *See* American Arbitration Association, Drafting Dispute Resolution Clauses: A Practical Guide, at 29-30 (Oct. 1, 2013). And unlike the Separation Agreement, both of DuPont's precedent agreements explicitly endowed arbitrators with "full power and authority to determine issues of arbitrability." *See* Separation and Distribution Agreement by and between Hewlett Packard Enterprise Company and Seattle Spinco, Inc. (Sept. 7, 2016) § 8.4(a)(ii); Master Separation Agreement between The Babcock & Wilcox Company and Babcock & Wilcox Enterprises, Inc. (June 8, 2015) § 5.6(b). Thus, while those agreements "otherwise" imposed limitations on arbitral relief, neither functioned as an unlawful waiver of unconscionability because neither constrained the arbitrators' ability to invalidate unconscionable arbitration terms.

## IV. THIS COURT SHOULD NOT CONSIDER DUPONT'S AFFIRMATIVE DEFENSE OF RATIFICATION.

As an alternative ground for affirmance, DuPont asks this Court to resolve yet another question that the Court of Chancery did not reach: Whether Chemours explicitly or implicitly ratified the Separation Agreement's delegation provision following the spin-off. AB 43-47.

Ratification is an affirmative defense for which DuPont bears the burden of proof. *ASB Allegiance Real Estate Fund* v. *Scion Breckenridge Managing Member, LLC*, 2012 WL 1869416, at *15, 17 (Del. Ch. May 16, 2012), *aff'd in relevant part*, 68 A.3d 665 (Del. 2013). DuPont's defense thus implicates issues of disputed fact that are not suitable for resolution on appeal of a motion to dismiss. *See* A1641 (summarizing factual disputes). The Court of Chancery expressly declined to take up those disputes. A1547. Instead, it held that "if [it] were to deny the motion to dismiss, then evidence could be generated that . . . there was a ratification of the arbitration provisions and, therefore, on summary judgment, the matter should be dismissed and sent to arbitration." A1555. DuPont neglects any mention of that holding, and instead urges this Court to resolve the factual question of ratification in its favor on an empty evidentiary record. Chemours respectfully submits that DuPont's proposal is inappropriate. *See supra* p.13.

In any event, DuPont has not carried its burden of establishing ratification:

*First*, DuPont contends that Chemours explicitly ratified the Separation Agreement's delegation provision in early 2017, when the parties amended the Separation Agreement to resolve a dispute over the allocation of liability for

historical emissions of the chemical PFOA (the "PFOA Amendment"). AB 44-45. In the amendment, DuPont abandoned its position on unlimited indemnification with respect to a defined set of "PFOA Costs." ¶¶ 81, 89-91. Correspondingly, Chemours agreed only to "waive [its] defenses as to PFOA Costs"—not its defenses to any other types of costs supposedly indemnifiable under the Separation Agreement. PFOA Amendment § 1.5 (titled "Waiver of Certain Ostensible Defenses") (A711).

DuPont perceives in these facts Chemours's determination to ratify all the unamended terms of the Separation Agreement—including the arbitration provisions that constrained its ability to seek effective remedies from DuPont—by agreeing to the part of the PFOA Amendment that provides, "[e]xcept as specifically amended by this Amendment, all of the terms of the Separation Agreement shall remain in full force and effect." PFOA Amendment § 2.3 (titled "No Other Changes; Effect of Amendment") (A712). But that provision was designed only to clarify that the parties had agreed only to resolve their PFOA liability dispute. That is why, after the PFOA Amendment, Chemours continued to oppose DuPont's "claimed indemnification in excess of the applicable limits under the Separation Agreement." A1034.

DuPont's reading of the "No Other Changes" clause cannot be reconciled with the limited waiver of Chemours's defenses. Were that provision a ratification, then Chemours effectively waived defenses to all of the unamended terms of the Separation Agreement, not just "as to PFOA Costs," as the waiver specified. Interpretations like this, which fail to harmonize contractual provisions,

are disfavored. *Stockman* v. *Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *6 (Del. Ch. July 14, 2009). Moreover, where there is a conflict between specific and general contractual provisions, the specific provision prevails. *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 62 (Del. 2019). Here, it is the limited waiver of § 1.5, not the general language DuPont relies on, that identifies the extent of the defenses Chemours agreed to waive.

*Second*, DuPont argues that Chemours "implicitly" ratified the Separation Agreement because "[a] party to a contract cannot silently accept its benefits and then object to its perceived disadvantages." AB 46 (quoting *Graham* v. *State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989)).

Chemours has never been silent. Chemours has consistently objected to the Separation Agreement, both before and after it became an independent company, both before and after filing the Complaint. If permitted to present evidence on remand, Chemours will conclusively demonstrate that pattern of objection. For that reason among others, cases like *Graham* are no help to DuPont. Moreover, to the extent DuPont is suggesting that Chemours is seeking to retain the benefits of the Separation Agreement but not its burdens, DuPont misapprehends Chemours's position. Chemours has in fact already borne hundreds of millions of dollars in costs to indemnify liabilities assigned to it under the Separation Agreement. Again, Chemours is disputing the extent of that indemnification burden—not the existence of any indemnification burden. It does not seek a windfall in this litigation, but rather to enforce the terms of the transaction that DuPont engineered and its board approved.

## 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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## CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2020, I caused a copy of the foregoing **Appellant's Reply Brief** to be served upon the following counsel of record by File & Serve*Xpress*:

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