EFiled: Feb 08 2022 03:14PM EST
Filing ID 67300112
Case Number 279,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR LAZARUS S. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELEANOR S. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR JENNIFER L. HEYMAN; THE SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELIZABETH D. HEYMAN; THE LAZARUS S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE ELEANOR S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE JENNIFER L. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE ELIZABETH D. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE HORIZON HOLDINGS RESIDUAL TRUST; RFH INVESTMENT HOLDINGS LLC; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR LAZARUS S. HEYMAN; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELEANOR HEYMAN PROPP; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR JENNIFER HEYMAN MILLSTONE; THE 2013 SAMUEL J. HEYMAN 1981 CONTINUING TRUST FOR ELIZABETH HEYMAN WINTER; THE 2013 LAZARUS S. HEYMAN AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2013 ELEANOR HEYMAN PROPP AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2013 JENNIFER HEYMAN MILLSTONE AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF

No. 279, 2021

Case Below:

Superior Court of
the State of Delaware
C.A. No. N15C-10-176 EMD
CCLD

PUBLIC VERSION - FILED ON

FEBRUARY 8, 2022

LAZARUS S. HEYMAN; THE 2013 ELIZABETH HEYMAN WINTER AGE 50 TRUST FOR ASSETS APPOINTED UNDER WILL OF LAZARUS S. HEYMAN; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR LAZARUS S. HEYMAN; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR ELEANOR HEYMAN PROPP; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR JENNIFER HEYMAN MILLSTONE; THE 2015 HORIZON HOLDINGS RESIDUAL TRUST FOR ELIZABETH HEYMAN WINTER; and LINDEN PROPERTY HOLDINGS LLC,

Defendants Below,
Appellants/Cross Appellees,

v.

ASHLAND LLC; INTERNATIONAL SPECIALTY PRODUCTS INC.; ISP ENVIRONMENTAL SERVICES INC.; and ISP CHEMCO LLC,

Plaintiffs Below,
Appellees/Cross-Appellants.

ANSWERING BRIEF AND CROSS-APPEAL
OPENING BRIEF OF APPELLEES

GIBBONS P.C.
300 Delaware Avenue, Suite 1015
Wilmington, Delaware 19801
Tel.: (302) 518-6322
Fax: (302) 397-2050
Attorneys for Appellees/ Cross-Appellants

Dated: January 24, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

NATURE OF THE PROCEEDINGS

Until the New Jersey Department of Environmental Protection ("NJDEP") formally rejected Linden Property Holdings LLC's ("LPH") request to terminate the 1989 Administrative Consent Order related to the Linden Property (the "ACO"), there was no dispute as to the party responsible for the ACO. From the moment the International Specialty Products Inc. ("ISP") stock purchase deal was struck until NJDEP's December 23, 2013 letter, it was always understood that the Heyman Parties[1] assumed all obligations under the ACO. Not only does the May 30, 2011 Stock Purchase Agreement ("SPA") clearly and unambiguously place sole responsibility for the ***entire*** ACO on Sellers, but that understanding is confirmed by everything leading up to that agreement and everything that followed – at least until this dispute arose.

Nevertheless, the Heyman Parties argue that their flawed interpretation of the SPA, in which Ashland purportedly assumed the off-site remedial obligations under the ACO, is somehow supported by the plain language of the SPA, the extrinsic evidence and common business sense. But (1) their contract interpretation asks the Court to bifurcate the ACO by viewing Schedule 5.19, Section 2(e) in isolation and adding limitations to Section 2(f) that do not appear in

[1] The Heyman Parties shall mean LPH together with the trusts and successor trusts ("Sellers") that sold the stock of ISP to Ashland, LLC ("Ashland").

the SPA – contrary to a multitude of Delaware contract interpretation principles; (2) the extrinsic evidence identified mischaracterizes documents while ignoring numerous, critical facts showing that Sellers never got the on-site/off-site ACO bifurcation they wanted in negotiations and knew it, as evidenced by their own letters and undisputed conduct after the August 23, 2011 closing ("Closing"); and (3) the deal made sense to Sellers at the time because – as they later told NJDEP – they believed the off-site ACO obligations had been resolved by a 2011 Consent Judgment with NJDEP that settled natural resource damage claims (the "NRD Consent Judgment").

When they learned that they were wrong, the Heyman Parties searched for ways to saddle Ashland with the liability for the off-site requirements under the ACO, which Sellers categorically assumed in the SPA. They ultimately settled on the argument made here, but their contract interpretation makes no sense. The Heyman Parties ask this Court to believe that Ashland took the off-site ACO liability even though the SPA contemplated LPH being the only named party on the ACO and Sellers providing all of the required financial assurance (now known as a Remediation Funding Source ("RFS")) for the cleanup, with no indemnity back to Sellers. In other words, under the Heyman Parties' interpretation, had Ashland failed to perform, NJDEP could have sought enforcement only against the Heyman Parties, who would have ***no indemnity against Ashland***. As the Superior

court found, this is a textbook example of an unreasonable interpretation that produces an absurd result.

The only reasonable interpretation of Sections 2(e) and 2(f) is the one recognized by the Superior Court, which applies the plain language of the SPA and harmonizes the various portions of Schedule 5.19 consistent with recognized principles of contract interpretation.

Though the Superior Court correctly ruled that Ashland was entitled to indemnification under the SPA, which provides for Ashland to recover "any and all Losses," the court later found that Ashland's reasonable attorneys' fees and expenses incurred in this first-party action were not indemnifiable "Losses." In this separate ruling, the Superior Court departed from Delaware's accepted principles of contract interpretation and the plain meaning of "Losses" (which expressly includes reasonable attorneys' fees and expenses "whether or not involving a Third Party Claim") in favor of a presumption against indemnification for first-party attorneys' fees applied in a line of trial court decisions. This ruling ignores the plain meaning of the SPA and is contrary to well-established Delaware law. Particularly as applied by the Superior Court here, the presumption resulted in a requirement for "magic" language to establish a party's contractual right to the recovery of first-party attorneys' fees and expenses. No authority of this Court supports such a rule or result.

For these reasons, and all of the reasons that follow, this Court should affirm the Superior Court's indemnity award in Ashland's favor and reverse the order denying Ashland its attorneys' fees and expenses.

SUMMARY OF THE ARGUMENTS

1. ***Denied.*** Schedule 5.19, Section 2(f) requires, in part, that Sellers "use reasonable best efforts to amend any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities…to include the name of [LPH]…and, if permitted by NJDEP, to remove the name of [IES]," and "to replace or substitute any related financial assurance." A908. While the Heyman Parties argue that Section 2(f) is purely "procedural" and must be narrowly read to avoid encroaching upon the division of liabilities in Section 2(e), they readily admit the substantive effect of Section 2(f): "Putting LPH's name on the ACO…could only serve to…expose LPH to the off-site liability…" Opening Br. ("O.Br.") at 45.

Yet, that is precisely what the parties agreed to in Section 2(f) – which begs the question: why would anyone agree to place itself on the ACO, remove the only other party thereto, and post all of the related financial assurance? The answer is simple. A party would only agree to do this if it had agreed to assume all of the liability for the ACO. No reasonable person – much less a sophisticated party – would have agreed to this provision if it believed Ashland was responsible for addressing the off-site ACO obligations.

The only reasonable interpretation is the one adopted by the Superior Court – that the Heyman Parties agreed to assume responsibility for the entire ACO and

that the SPA did not bifurcate the obligations under the ACO. Section 2(e) sets forth, in general terms, the liabilities assumed by Sellers, defined as the "Linden Excluded Liabilities." The Linden Excluded Liabilities include "*all Liabilities* to the extent related to or arising from or existing at the Linden Property," with the exception of certain off-site obligations. A908 (emphasis added). Section 2(f) then allocates specific liabilities to Sellers, including sole responsibility for the ACO and compliance with the Industrial Site Recovery Act ("ISRA") – both of which have an off-site cleanup component. *Id.* To the extent there is a conflict between these provisions, given that the specific provision (Section 2(f)) controls the general (Section 2(e)), and the context of the SPA as a whole, the only objectively reasonable interpretation is that Sellers are solely responsible for compliance with all obligations of the ACO – on-site and off-site.

2. ***Denied.*** Even if the Court were to find that the SPA is ambiguous, which it is not, the extrinsic evidence confirms that Ashland's interpretation is the only reasonable interpretation of the SPA. From the original business deal, to the drafting of the SPA, and through years of the parties' performance, it was always understood that the ACO was the Heyman Parties' obligation. The original handwritten term sheet for the deal contained an annotation next to "Linden" and "Wayne" that "Seller retains economics and liabilities of sites". A930. The exchange of drafts detail how Sellers' attempts to limit their liability to on-site

obligations were rejected by Ashland. And, while Ashland took no action following the Closing consistent with the notion that it had any obligations under the ACO, the Heyman Parties posted the RFS for both the on-site and off-site components of the ACO, paid annual surcharge payments that were only required for the remaining off-site work, and attempted to terminate the entire ACO (not just the on-site portion). All of the evidence points to the Heyman Parties' assumption of the ACO, until their abrupt about-face in January 2014 that initiated this dispute.

3. ***Denied*.** Should this Court agree with the Superior Court's interpretation of Sections 2(e) and 2(f), the Heyman Parties do not challenge the Superior Court's decision to award indemnity. The Heyman Parties' arguments based on their hypothetical interpretation provides no basis for reversal. This Court should affirm the Superior Court's indemnity award in Ashland's favor.

SUMMARY OF THE ARGUMENTS ON CROSS-APPEAL

1. Like many corporate agreements, the SPA entitles Ashland to "indemnification" for its broadly-defined "Losses" as the exclusive damages remedy for Sellers' breach. This Court has affirmed the recovery of attorneys' fees under similar indemnity provisions. And here, "Losses" are expressly defined to include all costs, including reasonable attorneys' fees and expenses, "*whether or not involving a Third Party Claim*," which other courts have held clearly provides for the recovery of first-party attorneys' fees. The Superior Court's rejection of the plain meaning of the SPA is inconsistent with Delaware law and should be reversed.

2. Rather than enforce the SPA's plain meaning, the Superior Court applied an interpretative presumption that the parties did not intend to provide for first-party attorneys' fees as a component of indemnifiable losses. This presumption finds no support in this Court's precedent. Instead, under well-settled Delaware law, all contract provisions (including those regarding attorneys' fees) are interpreted pursuant to their plain meaning and broad language indemnifying for all costs including attorneys' fees encompasses first-party fees.

Even if this Court agrees that an interpretative presumption against first-party attorneys' fees is appropriate, the Superior Court erred in holding that "whether or not involving a Third Party Claim" did not clearly evidence the parties' intent to provide for the recovery of *all defined Losses* in both first-party and third-party

claims. Though this Court has never required "magic" language to establish a contractual right to attorneys' fees, the Superior Court's denial of Ashland's attorneys' fees has precisely that effect and should be reversed.

STATEMENT OF FACTS

On May 30, 2011, Sellers and Ashland entered into the SPA, pursuant to which Ashland would acquire all of ISP's stock in exchange for $3.2 billion with Sellers retaining the Linden Property and Wayne Property, and certain liabilities associated with each. A983; A905-12. At the Closing of the SPA on August 23, 2011, Ashland acquired ISP and its wholly-owned subsidiaries, ISP Environmental Services Inc. ("IES") and ISP Chemco LLC ("Chemco"), and promptly transferred the Linden Property back to Sellers through their related entity, LPH, which was created just after the consummation of the SPA. A513 (¶19), -526 (¶50).

A. The Stock Purchase Agreement

The post-Closing transfer of the Linden Property to LPH and the allocation of rights and responsibilities related to the Linden Property are addressed in Section 2 of Schedule 5.19 to the SPA. A906-09. Section 2(a) required Ashland to transfer title to LPH immediately following the Closing. A906-07.

In Section 2(e), Sellers assumed ***all* liabilities** "related to or arising from or existing at…the Linden Property," *including* "Liabilities arising under or relating to…Environmental Laws." A908. The liabilities for the Linden Property retained by Sellers were defined as "Linden Excluded Liabilities." *Id.*; B306-07.[2] Section

[2] The parties agreed in a side letter dated August 19, 2011, to amend Sections 2(a) and 2(e), but not Section 2(f), of Schedule 5.19. *Id.*

2(e) excludes from the Linden Excluded Liabilities claims or damages for "any off-site migration or disposal of Hazardous Materials from the Linden Property prior to the Closing". *Id.* Section 2(e) then provides an illustrative list of liabilities that fall outside the Linden Excluded Liabilities, such as "any third party superfund sites including the Newark Bay Complex." *Id.*

Following this general provision, Section 2(f) addresses certain specific environmental liabilities related to the Linden Property:

> [T]he Seller Parties shall be responsible, at their sole cost and expense, for compliance, if applicable, with any requirements of [ISRA] and, if ISRA applies to the Linden Transfer, Seller Parties shall…(ii) use reasonable best efforts to, prior to closing, make all other filings, undertake all other measures, including where required undertaking any site investigation or Remedial Action required by ISRA.

A908 (emphases added). The same section also provides:

> [T]he Seller Parties shall use reasonable best efforts to amend any consent decree or other binding agreement with any Governmental Entity relating to the Linden Excluded Liabilities, and to replace or substitute any related financial assurance (including any bond or letter of credit), to include the name of the Linden Transferee following the Linden Transfer and, if permitted by NJDEP, to remove the name of ISP or any of the Companies therefrom.

Id.

Section 2(a) also transferred to Sellers the rights to any insurance proceeds covering the Linden Property. A906-07. Section 4 requires Sellers to indemnify

Ashland for losses arising from the Linden Excluded Liabilities or from Sellers' obligations under Section 2(d), which specifically requires Sellers to reimburse Ashland for *any* work required to be performed at the Linden Property under the ACO prior to the transfer of the Linden Property to LPH. A907-09. The SPA, however, does not provide any indemnification from Ashland to Sellers relating to the Linden Property, for any work required by the ACO or otherwise.

B. The ACO

In 1989, NJDEP and GAF Chemicals Corporation ("GAF") entered into the ACO for the Linden Property, which required an investigation and remediation of contamination "at the site, emanating from the site, or which has emanated from the site." A788; A794 (¶26); B1095-096 (19:3-13, 23:10-19); B178-79. After ISP, IES and Chemco were incorporated in 1991, IES took over GAF's responsibility for the cleanup under the ACO. B1011 (59:20-60:15); B650. In 2006, the ACO was formally amended to add IES as an ordered party and further required Chemco to provide financial assurance for the remediation costs. B1011 (59:20-61:2); B172-74.

C. Ashland's Purchase of ISP

In 2010, Ashland considered a potential acquisition of ISP. Ashland made an initial, non-binding offer of $3.3 billion in February 2011. A892-94; B221. Shortly thereafter, the parties engaged in due diligence. During due

diligence, Ashland submitted a revised offer for $2.75 billion. B221. After Sellers rejected that offer on May 6, 2011, the parties went "pencils down" until later in May, when Ashland sought to revive negotiations with Sellers. A935; B1048 (192:3-25); B1102 (52:12-24).

1. Deal Negotiations

On May 23, 2011, Ashland's CEO, Jim O'Brien, met with Sellers' representatives in New York. B1049 (194:24-195:2); B1131 (55:3-11); B1103 (61:10-18); B1117-118 (65:15-66:25). Mr. O'Brien testified that, at this meeting, Sellers attempted to convince him to pay $3.3 billion for ISP by touting the value of the Wayne Property and Linden Property, "throwing out values" of "$40 million, $60 million." B1049-050 (197:13-199:19). Because Ashland was not in the real estate development business and had no knowledge of the liabilities associated with these properties, Ashland had no interest in these non-operating properties. Far from any agreement whereby Sellers would "receive the development value" of the properties (as argued by the Heyman Parties (O.Br. at 1, 10)), Mr. O'Brien suggested instead that Sellers "keep those properties *with all the liabilities*" and the purchase price be reduced by $100 million. B1049-050 (197:13-199:19) (emphasis added). At that meeting, the parties memorialized the basic terms of a deal on a signed, handwritten term sheet, with a notation that read "Seller retains economics and liabilities of sites". A930; B1131-134 (56:9-17,

58:15-23, 60:12-18, 69:17-24); B1049-050 (196:17-200:19); B1104 (64:3-65:25); B1106-107 (73:6-74:20).

2. Drafting History

Sellers and their deal counsel, Sullivan & Cromwell ("S&C"), convened at the offices of Cravath, Swaine & Moore ("Cravath"), Ashland's deal counsel, in New York over the course of a week in May 2011 to memorialize the agreement in a final stock purchase agreement. B224; B1058 (80:3-13).

Between May 27th and May 29th, the parties exchanged several drafts of provisions concerning the Linden Property that would ultimately become Schedule 5.19, Section 2.[3] While Sellers' drafts ***attempted*** to limit their liability to Linden on-site liabilities, the drafting history demonstrates those attempts were rejected by Ashland at every turn. *Compare* B762 (S&C's May 27, 2011 draft) *with* B717 (¶5) and B779, -81 (Cravath's May 27, 2011 draft); *compare also* B832 (S&C's May

[3] In the alternative to its breach of contract claim, Ashland asserted a fraud claim against Sellers, which was mooted by Ashland's success on its contract claim but provides context to the SPA's formation and litigation below. For example, after omitting several critical NJDEP documents from the data room and information from written diligence questions, (B1083 (114:25-115:9); B171; B177), (A913-24), Sellers' internal drafts, produced as a result of their privilege waiver, [redacted] *See* B229; B990 (¶4) [redacted]); B237 ([redacted]).

28, 2011 draft) with B871-72 (Cravath's May 29, 2011 draft); B903-04 (Sellers' May 29, 2011 draft) *with* B251 (Cravath's May 29, 2011 draft). [redacted] [4] *Compare* B762with B778, -81. [redacted] B717 (¶6) (emphasis added); B832. That language was rejected, reverting back to Cravath's original language, which is reflected in the final SPA. B717-18 (¶¶7-10); B871-72; B903-04; B251; B890; *see also* A908. Thus, Sellers never secured any carve-outs or bifurcation of cleanup or financial responsibilities under the ACO.

The SPA was executed on May 30, 2011 and closed on August 23, 2011.

[4] In 1989, when the ACO was entered, NJDEP used the term "financial assurance" to describe the guarantee required for ongoing cleanups. By 2011, this was referred to as an RFS, while "financial assurance" was used to refer to the guarantee required to secure the performance of long-term monitoring, maintenance, and inspection under a remedial action permit ("RAP"). *See* N.J.A.C. §§7:26C-2.3(a)5, -5.2(a)2.iii, -7:26C-7.10(a)2. Thus, the "financial assurance" referenced in the ACO (and Section 2(f)) is now referred to as an RFS. B699.

D. The Parties' Post-SPA Conduct

For over three years following the May 2011 execution of the SPA, both parties acted consistent with the understanding that Sellers had assumed responsibility for complying with all ACO obligations – both on-site and off-site.

1. The Heyman Parties' Post-SPA Conduct

a. Sellers Posted Financial Guarantees for the Entire ACO.

As required in Section 2(f), on August 5, 2011, Sellers replaced the entire RFS that Chemco had maintained pursuant to the ACO with a $7,744,000 letter of credit issued on behalf of LPH. B282-86; B1012 (191:25-193:3); B999-1000 (133:23-135:7). The letter of credit covered *all* remediation requirements of the ACO, and Sellers maintained the RFS in its full amount of $7,744,000 until 2015, more than a year after this dispute arose. B703; B1013 (194:13-21). Not only did Sellers post the full RFS for the entire ACO before Closing, but LPH then endeavored to have Chemco's pre-Closing RFS "released" – ensuring that if NJDEP had to draw down on a letter of credit due to a failure to comply with any requirement of the ACO – including any off-site obligations – only the Heyman Parties' letter of credit would be available. *See* B326; *see also* B325; B506; B508.

b. LPH Paid Annual Surcharges

LPH also paid annual 1% surcharges under the ACO to NJDEP in 2011, 2012, 2013 and 2014 – totaling $309,760. A1253-254; B170; B638; B1032

(126:16-128:9, 129:12-24); B519; B699-703; B663-64; B665; B1003 (202:5-14). These surcharges are assessed *only* on amounts established for active, ongoing investigation and remediation work, and *not* on amounts established for the on-site Operation and Maintenance ("O&M"). B699-703; N.J.A.C. §7:26C-5.9. LPH knew that the purpose of these surcharges was for the off-site obligations under the ACO. In 2013, when NJDEP returned a surcharge payment advising LPH that surcharge payments are not required for the O&M under the RAPs, *LPH resubmitted the payment, specifying that it was not for the RAPs, but rather for the letter of credit guaranteeing cleanup work under the ACO*. B638; B651.

c. LPH Attempted to Terminate the Entire ACO.

Following receipt of RAPs for on-site soils and on-site groundwater, LPH attempted to terminate the entire ACO (not just the on-site portion of it). B1037 (163:19-164:3); B1099 (279:1-23); B509; B529-30. In a July 3, 2012 letter to NJDEP, LPH acknowledged its responsibility for completing all work under the ACO by thanking NJDEP for its assistance, which had "allowed us to complete the remediation of the LPH site." A1238-239. In requesting written notice from NJDEP that *all* obligations under the ACO had been satisfied and that NJDEP terminate the ACO, LPH made no mention of Ashland, ISP or IES and did not disclaim any obligations under the ACO by virtue of the SPA. *See id.*

And, while the Heyman Parties maintain that NJDEP refused to terminate the ACO "[a]lmost a year and a half later" (O.Br. at 19), LPH was made aware of NJDEP's decision by July 19, 2012 – *barely two weeks after* it requested termination of the ACO. A1241-243; B541-43. In the immediate aftermath of learning that the ACO would not be terminated because of the outstanding off-site requirements under the ACO, the Heyman Parties began searching for ways to pin the liability on Ashland. B548-49. Meanwhile, the Heyman Parties neither advised Ashland of NJDEP's position that the ACO would not be terminated because of the outstanding off-site requirements nor notified the NJDEP that Ashland or IES was purportedly responsible to complete any such off-site work. B1097 (149:11-17); B1089 (367:14-22). Indeed, at no time until January 2014 did the Heyman Parties ***ever*** advise Ashland or IES that they were required to address any outstanding issues under the ACO, post any RFS or deal in any way with the NJDEP in connection with the ACO. B1036 (158:13-159:14); B1089 (367:13-22); B1097 (149:11-17).

By letter dated December 23, 2013, NJDEP formally rejected LPH's position and advised LPH that "the requirements of the ACO have not been satisfied at this time because remediation has not been completed." A1248. By letter dated January 21, 2014, a month after receiving NJDEP's formal response, LPH first expressed the view that, pursuant to the SPA, it was not responsible for

addressing off-site contamination in the Arthur Kill under the ACO. A1253-256; B1035-036 (154:24-158:24).[5]

2. Ashland's Post-SPA Conduct

In stark contrast, from the time of the Closing until LPH refused to comply with the ACO, Ashland undertook no course of conduct suggesting that it understood that the SPA allocated the off-site requirements under the ACO to it. Ashland did not set a post-Closing reserve for any off-site investigation or cleanup required by the ACO until after this dispute arose. A1212-216; B923 (¶11); B1065-067 (239:22-240:6, 240:22-241:11; 242:19-243:10, 248:1-12); B1043 (370:16-372:11) (testifying that by looking at the reserves, there are no calculations for off-site migration); B1026-027 (256:23-257:12, 260:24-261:12). Nor did it establish any RFS, retain a licensed site remediation professional ("LSRP"), or identify on its "radar screens" any ACO work. B921-923 (¶¶6, 9, 10). Ashland did not begin to perform any investigation or analyses required to comply with NJDEP regulations until 2015 – over a year after this dispute arose and after the Heyman Parties repeatedly refused to comply with the ACO, placing

[5] The Heyman Parties point to Robin Lampkin's January 9, 2014 email as a purported admission, but that correspondence says nothing of the sort. Ms. Lampkin merely states that [redacted] A1246 (emphasis added).

the Linden Property in jeopardy of non-compliance. B922-23 (¶10); B921 (¶6); B927-28; B930-32.

E. Sellers' Breaches of the SPA

The ACO RFS initially established for LPH was in the form of a letter of credit issued in August 2011, which replaced an RFS that had been established by Chemco. B282-86. After receiving NJDEP's December 2013 letter, LPH notified NJDEP of its intent to terminate that letter of credit and attempted to replace it with a smaller amount, a request NJDEP rejected. A1262-264; B531; B663-64; B665; B662; B675; B681-84; B1001-005 (197:14-203:5, 214:17-218:3); B1007-008 (235:21-238:6); B708. To avoid severe penalties threatened by NJDEP (B685-90), IES was forced to establish its own letter of credit to cover the shortfall left by LPH. B704-05; B706; B1006 (232:12-233:18). Thereafter, LPH's letter of credit was terminated. B708.

Sellers have not made *any* effort to amend the ACO to include LPH or to remove IES as a named party. A1355 (177:1-7); B280; B1087 (316:21-317:12); B1030-031 (117:18-118:21).

STATEMENT OF FACTS RELATING TO CROSS-APPEAL

A. Relevant SPA Provisions

As relevant here, the indemnification rights under Article VII and Section 4(a) of Schedule 5.19 set forth the parties' "*sole and exclusive basis for and means of recourse between the parties*[.]" A1082 (emphasis added). Section 7.2 provides, in pertinent part:

> Indemnification by the Seller Parties. …[E]ach Seller Party hereby agrees that from and after the Closing it shall, jointly and severally, indemnify, defend, and hold harmless, without duplication, Buyer, its Affiliates…(the "Buyer Indemnified Parties") from and against any and all Losses actually suffered or incurred by any of the Buyer Indemnified Parties, to the extent arising out of:
>
> …
>
> (b) any breach of any covenant or agreement of the Seller Parties;

A1075-76.

Similarly, in Section 4(a) of Schedule 5.19, Sellers agreed to

> jointly and severally, indemnify, defend and hold harmless, without duplication, the Buyer Indemnified Parties from and against any and all Losses actually suffered or incurred by any of the Buyer Indemnified Parties, to the extent arising out of (i)…the Linden Excluded Liabilities…

A909.

Ashland's recovery under these provisions extends to all "Losses," defined as:

> any and all *losses*, *liabilities*, claims, *obligations*, judgments, fines, settlement payments, awards or *damages of any kind* actually *suffered or incurred* by such Indemnified Party after Closing (together with all

> reasonably incurred cash disbursements, costs and expenses, including costs of investigation, defense and appeal and *reasonable attorneys' and consultants' fees and expenses*), <u>*whether or not involving a Third Party Claim*</u>.

A1001 (emphases added). "Third Party Claim" is defined as "any written claim or demand for which an indemnifying party…may have liability to an Indemnified Party hereunder…asserted against or sought to be collected from an Indemnified Party by a third party." A1008; A1078.

B. <u>Procedural History</u>

Following the Superior Court's summary judgment ruling entitling Ashland to indemnification under Section 7.2 and Section 4(a) of Schedule 5.19, the parties cross-moved for summary judgment on Ashland's entitlement to its first-party attorneys' fees and expenses.[6] Ex. A at 9. In support of its position, Ashland argued that the plain language of the indemnification provisions and the definition of Losses, which include "reasonable attorneys'…fees…whether or not involving a Third Party Claim," unambiguously provides for the recovery of its first-party fees as an indemnifiable loss. B82-88. Relying on a line of trial court decisions, which Ashland contends are distinguishable and contrary to Delaware law, Sellers claimed that a presumption against first-party fees applied and that the language of the SPA

[6] The parties have never argued that expenses should be treated differently from attorneys' fees. The reference to attorneys' fees shall hereinafter also refer to expenses.

was insufficient to overcome that presumption. B107-113. Ultimately, the Superior Court agreed with Sellers, applied the presumption and held that the phrase "whether or not involving a Third Party Claim" did "not show a clear and unequivocal intent to shift fees." Ex. A at 13.

ARGUMENT

I. READ IN CONTEXT WITH THE ENTIRE SPA, SECTION 5.19(2)(F) UNAMBIGUOUSLY ALLOCATES LIABILITY FOR COMPLIANCE WITH THE ENTIRE ACO TO SELLERS.

A. Question Presented

Whether the Superior Court correctly found Ashland's interpretation of Sections 2(e) and 2(f), allocating the ACO – in its entirety – to Sellers, to be the only reasonable interpretation. A691.

B. Scope of Review

This Court reviews the Superior Court's grant of summary judgment, including questions of contract interpretation, *de novo*. *Bathla v. 913 Mkt., LLC*, 200 A.3d 754, 759 (Del. 2018).

C. Merits of the Argument

An unambiguous contract lends itself to only one reasonable interpretation. *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012). And, when the Court considers the plain language, in context, applying well-established principles of contract interpretation, the Superior Court properly concluded that Ashland's interpretation is the only reasonable reading of Sections 2(e) and 2(f).

1. Section 2(f) Is Not Merely Procedural, And Any Procedural Requirements Contained Therein Have Substantive Consequences.

While the Heyman Parties attempt to portray Section 2(e) as the sole provision allocating substantive liability and Section 2(f) as merely a procedural term to implement Section 2(e), such a strained interpretation ignores the plain language of Section 2(f).

Section 2(f) opens by expressly allocating to Sellers all responsibility for compliance with ISRA, a New Jersey environmental statute. N.J.S.A. § 13:1K-6 *et seq.* If triggered, ISRA imposes upon the property owner, as a precondition to the sale or transfer of contaminated property, a "self-executing duty to remediate." *Matter of Cadgene Family P'ship*, 669 A.2d 239, 244 (N.J. Super. App. Div. 1995). ISRA places joint and several liability on property sellers for all contamination at, under or emanating from a property, extending to both on-site and off-site contamination.[7] Sellers' prior counsel [redacted]

[7] Since 1992, New Jersey law has been clear that "site" includes all contamination at the site and that had emanated or was emanating from the site. *In re Adoption of N.J.A.C. 7:26B*, 608 A.2d 288, 293-96 (N.J. 1992); N.J.S.A. §13:1K-8 (defining "remedial action" to include "actions taken…off-site of an industrial establishment" if contamination has migrated); *see also* N.J.A.C. §7:26E-1.8 (defining "contaminated site" to include "any location where contamination is emanating, or which has emanated there from").

[redacted] B270-73.[8] While Sellers claim ISRA did not apply to the SPA, it does not obviate the fact that, if ISRA were applicable – and it was applicable – Sellers would have been responsible, "at their ***sole* cost and expense**, for compliance…with ***any* requirements**" under ISRA "including…Remedial Action," which necessarily includes the off-site cleanup costs. Thus, while the Heyman Parties would brush this substantive allocation of environmental liability aside by claiming it merely required Sellers to complete "pre-closing paperwork," Section 2(f)'s express allocation of all ISRA obligations on Sellers is an allocation of substantive liability.

As with ISRA, Section 2(f) allocates the entire ACO to Sellers. In no uncertain terms, Section 2(f) requires Sellers to (1) replace the entire RFS and (2) use "reasonable best efforts" to place LPH on the ACO and remove IES from the ACO. Contrary to the Heyman Parties' interpretation, nothing in Section 2(f), or elsewhere, bifurcates the ACO or limits the obligations assumed by Sellers to on-site liabilities.

Under the plain language of Section 2(f), Sellers' obligation to use "reasonable best efforts" to place LPH on and remove IES from "any consent decree…with any Governmental Entity ***relating to* the Linden Excluded**

[8] Ashland disputes the Heyman Parties' claim that ISRA was inapplicable for reasons unrelated to this appeal. B47-51.

Liabilities…" Delaware courts "have considered the connector 'relating to' to be 'paradigmatically broad,'" meaning "'to have some relation to' or 'to have bearing or concern [on]; [to] pertain.'" *Fla. Chem. Co., LLC v. Flotek Indus., Inc.*, 2021 WL 3630298, at *10 (Del. Ch. Aug. 17, 2021) (alterations in original) (quoting Black's Law Dictionary (5th ed. 1979)). Because the ACO has "some relation to" the liabilities being assumed by Sellers, Sellers were required to (1) undertake "reasonable best efforts" to place LPH on and remove IES from the ACO, and (2) replace the RFS associated with the ACO.

It cannot be disputed that the consequence of fulfilling the intention of Section 2(f) would effectively leave Sellers and their designee as the only parties responsible for the obligations under the ACO. Regardless of how the Heyman Parties now want to characterize Section 2(f), it is beyond dispute that Section 2(f) has a substantive effect on the obligations of Sellers under the ACO – allocating that liability, in its entirety, to Sellers.[9] *See Green Plains Renewable Energy Inc. v. Ethanol Holding Co., LLC*, 2016 WL 5399699, at *5 (Del. Super. Aug. 19, 2016), as corrected (Jan. 25, 2017) (finding disclaimer provision "had a substantive effect

[9] [redacted] B990 (¶5).

on…the obligations of the parties…").[10] Indeed, the Heyman Parties concede that "[p]utting LPH's name on the ACO…could only serve to…expose LPH to the off-site liability…" O.Br. at 45. Thus, under the SPA's plain and unambiguous language, the parties agreed that Sellers would be solely responsible for the ACO, including all off-site obligations.

2. The Heyman Parties' Request That The Court Read Section 2(e) In Isolation Directly Contravenes Delaware's Rules of Contract Interpretation.

Despite using the requisite buzz words – like "harmonize" and "context" – the Heyman Parties effectively ask the Court to read Section 2(e) in isolation, exalting Section 2(e) over all others because, in the Heyman Parties' view, it was the "more important" provision. In short, they want Section 2(e) to eclipse the substantive terms in Section 2(f).[11] Delaware contract law makes clear that "[a] single clause or paragraph of a contract cannot be read in isolation, but must be read in context." *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d

[10] The Heyman Parties' procedural-versus-substantive argument elevates form over substance. "[A]t some point it becomes necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form." *Textron Inc. v. Acument Glob. Techs., Inc.*, 108 A.3d 1208, 1218 (Del. 2015) (quoting CORBIN ON CONTRACTS (Kaufman Supp. 1984) §570).

[11] The phrase "[f]or avoidance of doubt" in Section 2(e) does not increase the significance of the language that follows. This prefatory phrase indicates only that what follows is "confirmatory" and, generally, "superfluous." *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1059 (Del. Ch. 2015).

1254, 1260 (Del. 2010) (citation omitted). When read in context – with the rest of the SPA – only Ashland's interpretation emerges as reasonable: the Linden Property went to Sellers with the economics (insurance) and liabilities (the entire ACO) of the site.

As the trial court properly recognized, Section 2(e) generally allocated certain off-site liabilities to Ashland, while Section 2(f) allocated the entirety of the ACO and ISRA – both on-site and off-site – to Sellers, giving rise to a conflict between the two sections as applied to the off-site liabilities under the ACO and ISRA. This conflict triggers the contract interpretation principle that "the specific provision," here Section 2(f), "qualifies the meaning of the general one," which is Section 2(e). *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

To avoid the application of the "specific controls the general" cannon, the Heyman Parties attempt to neuter Section 2(f), under the guise of harmonizing it with Section 2(e). The Heyman Parties suggest that 2(e) and 2(f) should be "restrict[ed]…to their respective scopes," a fictitious principle that would expand and give preclusive effect to Section 2(e) while subordinating Section 2(f) as purely procedural and rendering its clear allocation of substantive liabilities illusory – in violation of several well-accepted rules of contract interpretation. *See, e.g., Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010); *Sonitrol*

Holding Co. v. Marceau Investissements, 607 A.2d 1177, 1183 (Del.1992). Sellers' strained interpretation would render Section 2(f) a nullity.

a. When Read in Context, Only Ashland's Interpretation is Reasonable.

Interpreting Sections 2(e) and 2(f) in context – as Delaware law requires – the only reasonable interpretation is that Sellers assumed sole responsibility for compliance with the ACO, as other contract terms support that conclusion.

First, Section 2(a) required Ashland to transfer title to LPH immediately following the Closing, along with the rights to any insurance proceeds covering the Linden Property and contracts (including permits) related to the site operation and cleanup. A906-07. The allocation to Sellers of *all* of the insurance proceeds, reflects the structure of the deal as a whole, namely that Sellers retained both the economic benefits and environmental liabilities of the property, including the entire ACO. Moreover, Sellers' right to all contracts related to the property included the contract with the environmental consultant that had been performing the remediation for years, including the initial off-site investigation under the ACO. B672-73. There is no provision in Section 2 to split the insurance or consultant contract, which would have been expected if there were any bifurcation of the ACO.

Second, placing all ACO obligations on Sellers is also consistent with Section 2(d), which provides for Sellers to pay for any work that Ashland is

requested to perform at the Linden Property after Closing provided that such work does not exceed the requirements of "the existing administrative consent order with NJDEP (as amended in 2006)." A907-08. When the parties had the opportunity to specifically limit Sellers' responsibility for ACO compliance costs in Section 2(d), they did *not* restrict it to on-site work but rather extended Sellers' responsibilities to the full reaches of the ACO – which includes the off-site obligations.

Finally, and most critically, reading Section 2(f) as transferring all ACO obligations, both on-site and off-site, to Sellers is also consistent with the non-reciprocal indemnification provision in Section 4 of Schedule 5.19. In Section 4, Sellers agreed to indemnify Ashland for any losses arising from the Linden Excluded Liabilities (*i.e.*, the broad class of liabilities related to the Linden Property that would remain with Sellers after Closing), and for any losses incurred as a result of the obligation under Section 2(d). By contrast, Ashland has no indemnification obligations to Sellers in connection with the Linden Property.

These provisions make no sense under the Heyman Parties' view and lead to a single conclusion – that Sellers retained all ACO-related liabilities.

b. Sellers' Interpretation Leads To An Absurd Result.

Had Sellers not breached the SPA – and fully complied with the obligations in Section 2(f) that they describe as "procedural" – Sellers would have replaced the

RFS and placed LPH on, and removed IES from, the ACO.[12] Then, if NJDEP moved to enforce the ACO for failure to address off-site issues, it could only look to the Heyman Parties. Indeed, NJDEP would only be able to draw down on a letter of credit posted by Sellers and would only be able to enforce the terms of the ACO against LPH – the only named party on the ACO.

This is where the Heyman Parties' theory falls apart. Schedule 5.19, Section 4 provides a one-way indemnity from Sellers in favor of Ashland. Thus, if – as argued by the Heyman Parties – Ashland took the off-site obligation under the ACO and NJDEP elected to proceed against LPH's letter of credit for the failure to perform the off-site cleanup, *Sellers would have no remedy against Ashland*.[13] Thus, if the Heyman Parties' were correct, Sellers needed an indemnity. *But see* O.Br. at 15.[14]

[12] Because NJDEP must agree to amend the ACO to reflect these requested changes, the SPA obligates Sellers to use "reasonable best efforts" to fulfill this obligation. Regardless, the parties' contemplation was that LPH would be the *sole* named party on the ACO to complete the cleanup.

[13] To avoid this problematic circumstance, the Sellers had to breach the SPA by ignoring its obligation to use reasonable best efforts to put LPH on, and take IES off of, the ACO, and later withdrawing the RFS they posted in 2011 for the ACO cleanup.

[14] Moreover, as a matter of New Jersey statutory law, once LPH took title to the Linden Property, it became directly liable for the off-site contamination. *See* N.J. Stat. Ann. §58:10-23.11 *et seq.*

No reasonable sophisticated party would agree to be the sole named party on an ACO, with only its letter of credit posted as an RFS and no indemnity rights, when the only remaining obligation under the ACO resides with the other party. Yet that is what the Heyman Parties ask this Court to believe. *See Osborn*, 991 A.2d at 1160 (noting that "an absurd result" is "one that no reasonable person would have accepted when entering the contract.").

c. Sellers' Claimed Support is Unavailing.

Outside of viewing Section 2(e) in a vacuum, Sellers point to little in the SPA to support their position. They cite the Contribution Agreement, but it is of no moment that the Contribution Agreement – which was between IES and LPH – did not include the language set forth in Section 2(f). That document merely functioned to convey the Linden Property to LPH as required under the SPA. The Contribution Agreement, which became effective immediately after Closing, did not need to include Section 2(f) (or, for that matter, Section 2(e)), since those liabilities and obligations had already been transferred to Sellers in the SPA, which remained intact and enforceable against Sellers.

Nor is the similarity to language in the SPA section relating to the Wayne Property of any consequence. The factual circumstances concerning the Wayne Property were entirely different from the Linden Property. The absence of an ISRA trigger and/or a consent decree calling for the cleanup of off-site

contamination from the Wayne Property does not detract from the proper interpretation of the SPA as it relates to the Linden Property.

3. The Superior Court Did Not Need Any Background Facts to Support Its Finding That The SPA Unambiguously Allocated All ACO Compliance To Sellers.[15]

As an initial matter, the trial court did not mistakenly rely upon improper "background facts" to interpret the unambiguous language of the SPA. Rather, the Superior Court's references to Sellers' posting, and subsequent termination, of the RFS were made to establish one of Sellers' *breaches* of the SPA, not for purposes of contract interpretation. (O.Br. Ex. D at 24-26).

Nevertheless, the background facts that "place the contractual provision in its historical setting," further confirm Ashland's interpretation. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997). From the very outset, the term sheet executed by the parties' principals made clear that "Seller retains economics and liabilities" of the Linden Property. A930. And while Ashland may have assumed certain potential future off-site liability (*i.e.*, as one of many potentially responsible parties identified by EPA for a potential third-party Superfund site and not under the ACO, where only one party was responsible

[15] The Heyman Parties' argument on the background facts is not properly raised because they "are taking the trial court to task for adopting the very analytical approach that they themselves used in presenting their position." *See In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 55 (Del. 2006); A755-56, A764.

for the cleanup), Ashland never wavered in its position that Sellers would be responsible for the current and known liabilities attached to the Linden Property – under the ACO and ISRA. Throughout the drafting process, Sellers' repeated attempts to limit their obligations to on-site liabilities were rebuffed.

The parties' final agreement is clear about the ACO responsibilities – and it made perfect business sense. There were no elephants hidden in mouse-holes. Sellers were keeping the Linden Property along with the ACO – the obligations of which were well known to Sellers, as they had been dealing with it for decades.[16] The Heyman Parties' argument that retaining off-site liabilities would have diminished the value gap that the Linden Property was supposed to bridge ignores other provisions of the SPA (including that they retained all past and future insurance proceeds related to the Linden Property) and the parties' respective knowledge of the property's liabilities when that deal was struck.[17] Sellers were

[16] Despite the Heyman Parties' suggestion, nothing was "left to chance." The hypotheticals proposed by which NJDEP would use another mechanism to enforce the off-site work are implausible, since NJDEP already has an order in place to require that work – the ACO.

[17] At the time of that meeting, Sellers' representatives neither knew the remediation status of the Linden Property nor were they even familiar with the ACO. B1133-136 (65:15-67:22; 92:14-18; 94:6-96:8); B1108 (82:21-85:12). Moreover, the lack of an understanding of these liabilities was critical to Ashland's lack of interest in owning the property, and Mr. O'Brien flatly rejected the assertion that the $100 million purchase price reduction reflected Ashland's view as to the net value of the Linden Property. B1050 (199:20-200:19); B1105 (68:18-69:2).

willing to take on those ACO liabilities because they believed, at the time, that NJDEP had agreed in the NRD Consent Judgment that "no further remediation would be required in connection with the [Linden] Site – including for off-site impacts to the Arthur Kill." B696; B1122 (87:11-24); B1085-086 (148:3-11, 153:4-23). Alternatively, if any cleanup would be required in the Arthur Kill, Sellers believed that it would addressed as a "regional" issue by EPA under Superfund. B1084-086 (120:10-121:14, 148:3-151:12); B659; B1098 (151:17-152:6); B546 ([redacted]); B1030 (115:9-116:2); B1033-034 (148:25-150:15); B1038 (230:16-231:7); B1077-078 (232:16-233:18, 236:24-237-21); B1124-125 (217:18-218:25, 219:14-20). In short, Sellers agreed to the allocation of risks in the SPA based upon their belief that, while further off-site work could be required under the ACO, EPA would include the Arthur Kill in a Superfund site. That never happened, but Sellers are bound to the agreement in the SPA.

*****

For all of the aforementioned reasons, the only objectively reasonable interpretation is that Sellers are solely responsible for compliance with all obligations of the ACO – on-site and off-site. As such, this Court should affirm the Superior Court's grant of summary judgment in Ashland's favor.

II. THE EXTRINSIC EVIDENCE RESOLVES ANY AMBIGUITY IN FAVOR OF ASHLAND.

A. Question Presented

If the SPA is determined to be ambiguous, whether the parol evidence – including the Heyman Parties' posting of the RFS, payment of annual surcharges and efforts to terminate the entire ACO – conclusively resolves the ambiguity in Ashland's favor as a matter of law. A701.

B. Scope of Review

"Questions of contract interpretation are [] reviewed *de novo*." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 845 (Del. 2019).

C. Merits of the Argument

Even if this Court were to find the Heyman Parties' interpretation to be reasonable, the Superior Court's interpretation of the SPA in Ashland's favor is proper as a matter of law. The actions of the parties, along with the SPA negotiations, leave no doubt that Sellers assumed the entire ACO in the SPA. *Artesian Water Co. v. State, Dep't of Highways & Transp.*, 330 A.2d 441, 443 (Del. 1974); *see also* 11 Williston on Contracts § 32:14 (4th ed.). Because "all the parol evidence point[s] in one direction and conclusively resolve[s] [any] ambiguity" in Ashland's favor, as a matter of law, "this Court may still affirm the Superior Court." *Sunline*, 206 A.3d at 849.

1. The Drafting History Confirms That Sellers' Attempts to Limit Their Liability To On-Site Were Repeatedly Rejected.

The Court "must [] interpret [] contracts as written and not as hoped for by litigation-driven arguments." *Urdan v. WR Capital Partners, LLC*, 244 A.3d 668, 675 (Del. 2020). Yet, Sellers want this Court to interpret that SPA as if Sellers got what they had hoped for – a provision limiting their liability to on-site remediation. The exchange of drafts between the parties definitively establishes that Sellers' efforts to negotiate that limitation failed.

S&C initially proposed that: [redacted] B717 (¶4); B762 (§5.20) (emphases added). Cravath rejected that simple, one-sentence provision. Cravath proposed instead [redacted] B717 (¶5); *compare* B762 *with* B778, -81. S&C's responding draft [redacted]

[redacted] (B903) (emphasis added), which Cravath, again, rejected. B251.

In light of Cravath's rejection of these proposals, [redacted] B717 (¶6); B832. Cravath also rejected [redacted] B717-18 (¶7); B871-72; B890.

Despite this history, Sellers ask this Court to interpret the SPA as if their proposed – and rejected – language had been incorporated into the final SPA. Not only do the phrases "[redacted]" and "[redacted]" not appear in Schedule 5.19, ***they were explicitly rejected by Ashland in the negotiations***. The Heyman Parties seek to obtain through breach and litigation more limited deal terms than they were able to achieve in the SPA negotiations.

This Court has made clear that "[n]o limitations may be read into the clear language of the contract." *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996); *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997). As no limitations appear in the SPA, the Heyman Parties cannot ask this

Court to rewrite the SPA to avoid their obligations. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

2. The Heyman Parties' Post-SPA Conduct Was Consistent With The Understanding That They Were Responsible For The Entire ACO.

Despite numerous opportunities from the May 2011 SPA execution until this dispute arose in January 2014, the Heyman Parties never mentioned – to NJDEP, Ashland or anyone else – that their responsibility for the ACO extended only to the on-site obligations, that the ACO was bifurcated, or that Ashland was responsible for the off-site obligations. *See* A1183-193; A1203-04; A1230-32; A1233-35; A1238-1240; B282-86; B330-37; B349-56. Moreover, contrary to their bold statement that they "did not accept or pay for *any* Linden-related off-site liabilities at any time after executing the SPA" (O.Br. at 40) (emphasis in original), the record reveals just the opposite. The Heyman Parties *accepted insurance payments **and** paid hundreds of thousands in expenses* for Linden ACO-related off-site liabilities.

Sellers replaced the entire RFS for the ACO – which the New Jersey Attorney General's Office found was "for remediation of the entire site, including remediation of off-site contamination" (B703) – never once limiting or distinguishing their RFS as "for on-site…O&M" until after this dispute arose. For years, LPH paid the 1% surcharge – which would *not* have been due and payable

for O&M – verifying that the RFS was, in fact, to secure the outstanding off-site work required under the ACO. B638; B651.[18] And Sellers took all Linden-related insurance proceeds, making clear that there was no on-site/off-site allocation of the insurance. B328; *see also* B512; B525.[19]

Further, in July 2012, LPH asked NJDEP to find it had satisfied all obligations under the ACO and to terminate the entire ACO. A1238-239.[20] Yet, when the Heyman Parties learned, in July 2012, that NJDEP would not terminate the ACO *because of outstanding off-site remediation* (A1242), they did not notify Ashland (B1097 (149:11-17)), demand that Ashland post an RFS or commence the

[18] The NJDEP statement (O.Br. at 18) relied upon by the Heyman Parties actually provides that any ACO remains in effect until remediation of all contamination is complete and RAPs covering all remaining remediation are issued. Here, the ACO remains in effect because neither RAPs nor NFAs cover off-site contamination. *See* A794 (¶ 26).

[19] The Heyman Parties' General Counsel attempted to walk back that position when he testified that "the Linden transferee would entitled [sic] to an allocation of those insurance proceeds to the extent that it related to onsite only." B1123 (164:13-16). No effort, however, was ever made by Sellers to split these proceeds with Ashland.

[20] While the Heyman Parties claim that "Ashland was kept apprised" of LPH's efforts to terminate the ACO, the record reveals that Ashland personnel was copied on some internal e-mails regarding Sellers' interest in terminating the ACO (B531; B533; B534-37; B539), but was not aware of LPH's July 2, 2012 letter to NJDEP or the July 19, 2012 internal NJDEP e-mail thread noting NJDEP's position that the ACO would not be terminated. A1241; B548; B541-43; B544-45; B546; B550; B553; B646; B648; B1076-77 (229:6-10, 230:12-16); B1079-180 (240:6-11; 244:6-12).

off-site cleanup, or advise NJDEP that it should look to Ashland for compliance with that ACO obligation. B1088 (358:9-359:1).

Instead, the day after learning this problem in 2012, the Heyman Parties recognized [redacted] B548. Far from their current claim that the parties always understood that Ashland retained responsibility for the off-site portion of the ACO under Section 2(e), [redacted] *Id.* Only when that approach failed with NJDEP did the Heyman Parties retreat to the strained contractual argument raised in this appeal. A1253-256.

3. Ashland's Conduct Was Consistent With the Understanding That It Was Not Liable for the ACO.

In contrast to all of the aforementioned conduct by the Heyman Parties, Ashland did not set a reserve, establish an RFS, retain an LSRP, conduct an off-site Ecological Risk Assessment ("ERA") or take any steps to perform an off-site remedial investigation after the 2011 Closing. The Heyman Parties identify nothing to indicate otherwise. Rather, the arguments asserted by the Heyman Parties mischaracterize the evidence regarding Ashland's reserves and the pre-Closing appraisal and ignore that the treatment of the NRD Consent Judgment (*i.e.*,

that it was not bifurcated) fails to support their own interpretation of the Sections 2(e) and 2(f).

No Reserve Was Set For the ACO. The Heyman Parties' repeated claim that Ashland reserved for the off-site portion of the ACO misrepresents the documents and ignores the testimony in this case. Following the Closing, Ashland met with a number of ISP employees in order to set reserves for ISP's environmental liabilities that Ashland understood had been acquired pursuant to the SPA. B1018 (382:23-383:9, 383:13-25); B301-03; B1064 (234:18-236:18); B1023-024 (89:10-92:2). Ashland learned that ISP's Linden-related pre-Closing reserve had three components: (1) O&M, (2) a federal National Oceanic and Atmospheric Administration ("NOAA") ERA for an off-site waterbody known as Piles Creek, and (3) the NRD Consent Judgment. A1212-216; B320. Ashland set appropriate reserves for the federal claim related to the ERA of Piles Creek (B1068-072 (287:20-289:7, 296:7-297:21, 302:4-14, 313:4-13, 315:21-316:7); B318-20; *see also* B294; B297-98; B1025 (163:3-15).)[21] and the NRD Consent Judgment (B1061-063 (97:22-98:5, 151:13-23); B318-20; B562-63), but zeroed

[21] Despite the Heyman Parties' claim that the ERA reserve for Piles Creek was related to the ACO (O.Br. at 16, 40), [redacted] B297; B181-82; B184; B188-92.

out the O&M reserve since that related to the ACO for which Sellers were solely responsible. B1064-065 (237:19-238:1); B320; B198.

Notwithstanding the Heyman Parties' unsupported claim to the contrary, Ashland did not set a post-Closing reserve for any investigation or cleanup required by NJDEP under the ACO. A1212-216; B923 (¶11); B1065-067 (239:22-240:6, 240:22-241:11; 242:19-243:10, 248:1-12); B1043 (370:16-372:11) (testifying that by looking at the reserves, there are no calculations for off-site migration). In fact, Ashland did not set an environmental reserve for any off-site ACO work required by the NJDEP until 2015, after the dispute with Sellers arose. B923 (¶11); B986-87.[22]

The NRD Consent Judgment Does Not Support the Heyman Parties' Position. The Superior Court properly recognized the Heyman Parties' reliance on the NRD Consent Judgment as a classic red herring (B66-67 (137:19-140:14)) – because its post-Closing treatment is inconsistent with both parties' interpretation of the SPA. The NRD Consent Judgment resolved NJDEP's 2007 complaint for "natural resource damages" at the Linden Property and an adjacent site –

[22] While the Heyman Parties suggest that a spreadsheet prepared by Ashland's consultant with a column headed "Linden (offsite)" constitutes an admission, they ignore the testimony about this spreadsheet explaining that "Linden (offsite)" meant third-party off-site. *See* B1044 (398:21-400:7). In any event, the evidence is clear that, with the information provided post-Closing by legacy ISP employees, Ashland did not set a reserve for any investigation or remediation under the ACO.

addressing mostly on-site claims.[23] A1129. Yet, the Heyman Parties cannot explain why the NRD Consent Judgment was not bifurcated, requiring Sellers to pay the on-site portion of the NRD Consent Judgment. The NRD Consent Judgment provides no assistance to the Court in interpreting the SPA.

The Heyman Parties Misrepresent the Reason the Appraisal Did Not Consider the ACO. The Heyman Parties suggest that the decision to exclude the ACO in the fair market appraisal of the Linden Property was against their interests for tax purposes. *See* O.Br. at 17. Sellers had other economic motivations, however, for discounting the ACO in that valuation. Internally, Sellers were very concerned that Colliers' appraisal might "uncover more liabilities." B243; A1166-167. [redacted]

[23] The NRD Consent Judgment also resolved NJDEP's claims related to Piles Creek, including remediation. Beyond this, the NRD Consent Judgment had nothing to do with the ACO or remediation of the Linden Property. In fact, the NRD Consent Judgment made clear that the ACO was "outside the scope" of that settlement. A1131 ¶H. Nevertheless, the Heyman Parties seek to hang their hat on the fact that Ashland reserved for the NRD Consent Judgment, a small piece of which resolved the off-site remediation of Piles Creek. The Heyman Parties stretch this to suggest that Ashland somehow assumed the off-site obligations in the Arthur Kill under the ACO, to avoid Section 2(f)'s express terms. The Heyman Parties claim for the first time on appeal that Ashland's post-Closing reserve for the NRD Consent Judgment included a reserve for the ACO.

[redacted] *See* B275 ([redacted]).

The Colliers' appraisal ultimately proceeded on the assumption that all remediation was complete at the Linden Property (which was not accurate, but served Sellers' purposes at the time). B292; B242. Thus, the appraisal process says nothing of the parties' understanding of the allocation of ACO-related liabilities and doesn't alter the plain language and terms of Section 2(f).

4. <u>Sellers' Privileged Communications Are Irrelevant.</u>

Sellers' internal, privileged communications [redacted][24] "[T]he private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning, because the meaning of a properly formed contract must be shared or common." *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007). That shared, common meaning is exhibited in the plain and unambiguous language of

[24] [redacted] B997. This internal draft constitutes an irrelevant communication of unexpressed intent and is properly disregarded. *See Andersen v. State, Dep't of Admin. Servs.*, 612 A.2d 157 (Del. 1992).

the SPA, which makes it abundantly clear that Sellers took sole responsibility for the ACO.

III. THE SUPERIOR COURT PROPERLY DETERMINED THAT SELLERS' BREACHES ENTITLE ASHLAND TO INDEMNITY.

A. Question Presented

Did the Superior Court correctly find that Sellers breached their obligations, triggering Ashland's indemnification rights? A714-18.

B. Scope of Review

The appropriate standard of review is *de novo*. *Bathla*, 200 A.3d at 759.

C. Merits of the Argument

It is undisputed that the Heyman Parties (1) withdrew their RFS for the ACO in 2015 and (2) made no effort, at any time, to "amend [the ACO]…to include the name of [LPH]…and, if permitted by NJDEP, to remove the name of [IES] therefrom." These acts and omissions caused Ashland to incur Losses relating to the Linden Excluded Liabilities and constitute clear breaches of Sellers' contractual obligations under the Schedule 5.19, Section 2(f), which entitle Ashland to indemnity under SPA Section 7.2 and Schedule 5.19, Section 4.

Notably, the Heyman Parties make no argument challenging Ashland's entitlement to indemnity if this Court *agrees* with the Superior Court's interpretation. As such, any argument on this point is deemed waived. *See* Supr. Ct. Rule 14(b)(vi)(A)(3). Rather, the Heyman Parties argue that Ashland should not be entitled to indemnity in the event this Court determines that the Superior Court erred in its interpretation of the SPA. Starting with this faulty premise, the

Heyman Parties assert a series of arguments – based on a hypothetical interpretation – in an attempt to convince the Court that Sellers should not be held to the deal they made in 2011. But the Heyman Parties cannot escape the plain language of the SPA or orchestrate a better deal through litigation. Nevertheless, Ashland will address each of the Heyman Parties' arguments.

The Heyman Parties first claim that Section 2(f) merely required Sellers to "shield [Ashland] from liability for on-site remediation" – again asking the Court to find that Section 2(f) provides for a bifurcation of the ACO – an interpretation that finds no support in the language of Section 2(f). *See* §I.1, *supra*. And the argument that they only needed to add LPH's name to, and take IES's name off of, the ACO "if it was a wholly on-site obligation" ignores the breadth of the "relating to" language of Section 2(f). *See* §II.1, *supra*.

Moreover, the suggestion that Ashland would have only sustained a loss if NJDEP agreed to remove IES from the ACO disregards (1) the essential purpose of the Section 2(f) (*see* n.15), and (2) that LPH, once added to the ACO, would be jointly and severally liable as a named party on the ACO – with a unilateral indemnity, in Ashland's favor, to recover any ACO-related costs that Ashland is forced to incur.

The Heyman Parties also attempt to avoid Sellers' indemnity obligations by confusing the purposes of SPA Section 7.2 and Section 4(a) of Schedule 5.19.

Section 4(a) of Schedule 5.19 provides indemnity to Ashland for any Losses incurred relating to the Linden Excluded Liabilities – without regard to breach – while Section 7.2 provides indemnity in the event of a breach. Here, both sections were triggered because (1) Ashland was, and continues to be, forced to pay for Linden Excluded Liabilities (Section 4(a)); and (2) Ashland sustained Losses arising out of Sellers' breaches of Section 2(f) (Section 7.2). These provisions do not conflict and, as such, the Heyman Parties' case cites on this point are inapplicable. *See* O.Br. 46-47.

Finally, the Heyman Parties' argument that they should not be required to "use reasonable best efforts" to put LPH on, and take IES off of, the ACO is a thinly-veiled request that this Court relieve them of their contract obligations. First, if a "reasonable best efforts" clause can be so easily circumvented – based on one party's subjective belief that any effort would be unreasonable – the contract term is rendered illusory.[25] But also, "the on-site remedial component" had <u>*not*</u> "been fully satisfied prior to closing by the on-site NFAs." O.Br. at 44. The

[25] *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *91 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018), is inapposite. There, the court likened a reasonable best efforts clause to consummate the transaction to a "fiduciary standard, not a contractual one." *Id.* More to the point, the *Akorn* court also considered a "commercially reasonable efforts" clause to "operate in the ordinary course" – a contractual term, which the court found was breached. *Id.* at *86-*90. In so holding, the court also explained that "reasonable best efforts" clauses – like the one in Section 2(f) – "require substantial efforts from a party." *Id.* at *86-*87.

groundwater NFA expressly provides that the property owner "shall continue to operate and maintain [] the groundwater containment/extraction system…" and the Heyman Parties concede that obligations remained by posting the RFS. A1169-172; B282. Further, if the groundwater NFA – issued on July 1, 2011 – resolved all of Sellers' onsite obligations prior to Closing, the Heyman Parties fail to explain why Section 2(f) was not amended, particularly when the parties revisited Schedule 5.19 in an August 19, 2011 side letter that modified Section 2(e) ***but left Section 2(f) fully intact***. B306-07.

Even under their hypothetical misinterpretation of Sections 2(e) and 2(f), the Heyman Parties fail to make a plausible argument supporting their theories. Ultimately, the Superior Court's interpretation of Schedule 5.19 is the only reasonable interpretation of the SPA. For all of these reasons, it is respectfully submitted that this Court should affirm the Superior Court's indemnity award in Ashland's favor.

ARGUMENT ON CROSS APPEAL

I. UNDER DELAWARE LAW AND THE PLAIN LANGUAGE OF THE SPA, ASHLAND IS ENTITLED TO ITS ATTORNEYS' FEES.

A. Question Presented

Did the Superior Court err by failing to interpret the SPA's indemnification provisions and the definition of "Losses" pursuant to their plain meaning? B82-88; B125-130.

B. Scope of Review

This Court reviews the Superior Court's ruling on summary judgment and its interpretation of a contract *de novo*. *Bathla*, 200 A.3d at 759.

C. Merits

Long-settled Delaware law has adhered to the principle that the intent of contracting parties should be enforced in accordance with the plain meaning of the contract's language. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). That same principle applies with equal force to contract terms governing the right to recover attorneys' fees: "clear and unambiguous contract terms" regarding the recovery of attorneys' fees are interpreted like other contract provisions, "according to their plain meaning." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 683 (Del. 2013).

The indemnification provisions, which set forth Ashland's sole and exclusive damages remedy (except in cases of fraud), unambiguously includes

Ashland's recovery of its "reasonable attorneys'…fees" incurred in this first-party action as part of its indemnifiable "Losses".[26] Specifically, the SPA explicitly requires Sellers to "indemnify, defend and hold [Ashland] harmless" "from and against any and all [losses, liabilities, claims, obligations,…or damages of any kind…suffered or incurred … after Closing (together with ***all … reasonable attorneys'*** and consultants' ***fees*** and expenses), ***whether or not involving a Third Party Claim***] to the extent arising out of…any breach of any covenant or agreement" or "the Linden Excluded Liabilities". A909; A1001 (§1.1) (emphases added). The only reasonable interpretation of this provision is that all Losses resulting from Sellers' breach – including "reasonable attorneys'…fees" – are recoverable regardless of whether they are incurred in a first-party claim (as here) or a third-party claim.

Consistent with this plain meaning interpretation, this Court has readily upheld the recovery of attorneys' fees by a party asserting a first-party claim under a provision that provided indemnity for attorneys' fees. *See, e.g., SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 352 & n.107 (Del. 2013); *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2009 WL 3161643, at *17 (Del. Ch. Sept. 30, 2009), aff'd, 7 A.3d 486 (Del. 2010); *Cobalt Operating, LLC v. James Crystal*

[26] It is undisputed that Ashland's claim is a first-party (as distinguished from a third-party) indemnification claim under the SPA. B167-68 (13:5-6; 28:18-21).

Enters., LLC, 2007 WL 2142926, at *32 (Del. Ch. July 20, 2007), aff'd, 945 A.2d 594 (Del. 2008). Courts in other jurisdictions have likewise ordered the recovery of fees in cases involving a first-party indemnification claim, where, like the SPA, attorneys' fees and expenses were expressly included among the indemnifiable costs. *See, e.g., E*Trade Fin. Corp. v. Deutsche Bank AG*, 374 Fed. App'x 119, 123-24 (2d Cir. 2010); *Radiant Sys., Inc. v. Am. Scheduling, Inc.*, 2006 WL 2583266, at *3 (N.D. Tex. Sept. 7, 2006); *CSI Inv. Partners II, L.P. v. Cendant Corp.*, 507 F. Supp. 2d 384, 424 (S.D.N.Y. 2007), *aff'd*, 328 Fed. App'x 56 (2d Cir. 2009); *Dominion Retail, Inc. v. Rogers*, 2013 WL 1149911, at *13 (W.D. Pa. Jan. 30, 2013), *report and recommendation adopted*, 2013 WL 1149928 (W.D. Pa. Mar. 19, 2013).

Of particular relevance to the SPA, non-Delaware courts that have considered indemnification provisions including the recovery of attorneys' fees "whether or not involving a Third Party Claim," or similar language, have consistently upheld the recovery of attorneys' fees in those first-party actions. *See Balshe LLC v. Ross*, 625 Fed. Appx. 770, 774-75 (7th Cir. 2015); *Norwest Fin., Inc. v. Fernandez*, 121 F. Supp. 2d 258, 260 (S.D.N.Y. 2000); *see also Alki Partners, LP v. DB Fund Servs., LLC*, 209 Cal. Rptr. 3d 151, 170-71 (Ct. App. 2016) (denying fees, but noting that "whether or not" language would have sufficiently indicated an intent to shift fees).

In other contexts, Delaware and other courts have likewise interpreted such "whether or not" language to refer to first-party claims. *See Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412 (Del. Super. Sept. 17, 2019); *Trainum v. Rockwell Collins, Inc.*, 2018 WL 2229120, at *2 (S.D.N.Y. Apr. 23, 2018); *Trodale Holdings LLC v. Bristol Healthcare Invs., L.P.*, 2017 WL 5905574, at *13 (S.D.N.Y. Nov. 29, 2017); *Ellington v. Hayward Baker, Inc.*, 2019 WL 1003139, at *4 (D.S.C. Feb. 28, 2019); *Dream Theater, Inc. v. Dream Theater*, 21 Cal. Rptr. 3d 322, 329 (2004), *as modified on denial of reh'g* (Dec. 28, 2004). While this Court has recently affirmed by order, without opinion, a denial of fees under a provision that contained similar language, the underlying decision turned on the fact that a separate (and conflicting) prevailing party provision controlled. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336, at *6 (Del. Ch. Dec. 31, 2020), *aff'd* 2021 WL 5993508 (Del. Dec. 20, 2021).

Ashland's interpretation is also consistent with this Court's precedent holding that provisions that broadly require a party to indemnify and hold harmless another "from and against all expenses, including reasonable attorneys' fees," necessarily includes the "costs and attorneys' fees incurred to enforce the contractual indemnity provision." *Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1256 (Del. 2004); *see also Pike Creek Chiropractic Ctr.*,

P.A. v. Robinson, 637 A.2d 418, 422-23 (Del. 1994). These decisions reflect the common sense policy that "unless [the indemnitee] receives all legal expenses and attorneys' fees it has incurred, including those incurred in enforcing the Indemnification Clause," the indemnitee "will not be held harmless." *Pike Creek*, 637 A.2d at 423; *see also Delle Donne*, 840 A.2d at 1256 (to the same effect). Applying that rationale, a number of Court of Chancery cases have reached the same result in first-party actions to enforce a contractual indemnity for losses arising from a breach, where the recoverable losses and costs expressly included attorneys' fees. *See Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *29 (Del. Ch. Aug. 18, 2016); *Henkel Corp. v. Innovative Brands Holdings, LLC*, 2013 WL 396245, at *3-*4 (Del. Ch. Jan. 31, 2013); *Cobalt Operating*, 2007 WL 2142926, at *32.

****

The Superior Court declined to give effect to the SPA's plain meaning or to the settled Delaware law mandating this result and, as set forth below, its contrary ruling constituted reversible error.

II. THE SUPERIOR COURT'S DENIAL OF ASHLAND'S CLAIM FOR ATTORNEYS' FEES CONSTITUTED REVERSIBLE ERROR.

A. Question Presented

Did the Superior Court err by applying *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC*, 2012 WL 1415466 (Del. Super. Ct. Mar. 29, 2012), and disregarding the SPA's plain language and this Court's precedent? B88-90; B131-43.

B. Scope of Review

This Court reviews the "interpretation of a contractual fee-shifting provision *de novo*." *SIGA Techs*, 67 A.3d at 341.

With respect to argument C.2.b. *infra*., although not raised below, Ashland respectfully submits that this Court should entertain and adjudicate the argument in the interests of justice under Supreme Court Rule 8, for two reasons: (i) the interests of justice will be served in this specific case, because the SPA was entered into substantially before the Superior Court promulgated its decision in *TranSched* setting the legal standard applied here; and (ii) the interests of justice will be served far more broadly because any suggestion that Delaware courts could apply rules that post-date the signing of an agreement to govern the interpretation of the contract would upend the fundamental principle that looks to the parties' shared expectations at the time they contracted.

C. Merits

The Superior Court disregarded this Court's clear precedent requiring that the SPA's indemnification provisions and its definition of "Losses" be interpreted according to their plain meaning and instead applied the Superior Court's ruling in *TranSched*. Because *TranSched* is both factually distinguishable and legally inconsistent with settled Delaware law, the Superior Court's denial of Ashland's claim for attorneys' fees must be reversed.

1. The Superior Court's Ruling Conflicts With Supreme Court Precedent.

The Superior Court's decision disregards the SPA's plain language and departs from this Court's precedent in *Pike Creek* and *Delle Donne*. The hallmarks for attorneys' fee recovery required by this precedent are all unambiguously expressed in the SPA, which includes (1) a "very broad" indemnification right (2) entitling Ashland to be "h[e]ld harmless" and (3) expressly providing for the recovery of attorneys' fees.

The Superior Court acknowledged the applicability of *Pike Creek* and *Delle Donne* unless the contract contains "a provision that 'evinces an intent to limit the attorneys' fees to specific scenarios.'" Ex. A at 14. Although no such limitation exists in the applicable indemnification provisions, the Superior Court turned to a different provision—Section 8.2. Without regard for the material differences in these provisions, the trial court found that Section 8.2 evidenced a contractual

intent to restrict the recovery of attorneys' fees to "specific scenarios" because "the parties knew how to draft explicit fee-shifting language in other provisions." *Id.* at 14.

What the trial court failed to recognize is that these two sections apply to completely different (and mutually exclusive) events and serve different purposes. In the case of a termination, Section 8(c) entitles Sellers to their attorneys' fees in the event they were to succeed in an action to recover a termination fee. Section 8.2(c) does not entitle Sellers to their (broadly defined) "Losses". Instead, Section 8.2 provides Sellers a limited set of remedies (*i.e.*, a termination fee, interest, costs and expenses (including attorneys' fees)). By way of contrast, in the event of an indemnification obligation, Section 7.2 and Schedule 5.19(4)(a) entitle the indemnitee to all "Losses" "suffered or incurred" (*e.g.*, "damages of any kind," "costs and expenses," "reasonable attorneys' and consultants' fees," *etc*., "whether or not involving a Third Party Claim"). The indemnities intentionally cast a much wider recovery net, ensuring that the indemnitee would be held harmless. Given the very different purposes underlying these mutually exclusive provisions, the fact that the parties used different language explicitly to create a different and limited remedy in Section 8.2(c) has no bearing on the proper interpretation of the broadly defined "Losses" occasioned by an indemnification claim. In holding otherwise, the trial court reversibly erred.

2. The Superior Court Erred In Applying *TranSched.*

a. *TranSched* Is Factually Distinguishable.

Unlike the SPA's first-party indemnification provision, the indemnity provision at issue in *TranSched* contained language that reflected the parties' intent to limit recovery to third-party claims. Specifically, the *TranSched* provision explicitly referred to third-party allegations of a breach and required a contracting party to give notice of an indemnity claim to the counterparty—a requirement that would be illogical in the context of a first-party action. Such indicia of the parties' intent to limit recovery to third-party claims are found nowhere in the SPA. To the contrary, the SPA explicitly provides that all Losses (including attorneys' fees) are recoverable "*whether or not involving a Third Party Claim*"—a clear reference to first-party claims.

TranSched does not apply to the SPA's clear and unambiguous first-party indemnification provision that expressly provides for attorneys' fees. Even the Maryland Court of Appeals—upon whose precedent (*Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275 (Md. 2008)) the *TranSched* court primarily relied—has subsequently confirmed that language similar to that in the SPA expressly "authoriz[ed] first-party fee shifting." *Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP*, 164 A.3d 978, 983 (Md. 2017). While the *Nova Research* provision was a clear

third-party indemnity that *nowhere referred to or mentioned attorneys' fees*, the plain language of the indemnity in *Bainbridge* provided expressly for the payment of 'attorney's fees'" and "tie[d] payment of those fees expressly to an action for 'breach' of the contract". *Compare Nova Research*, 952 A.2d at 278-79 *with Bainbridge*, 164 A.3d at 981. This development underscores the material distinction rendering *TranSched* inapplicable to the facts of this case. The court that wrote *Nova Research*—which undergirds *TranSched*—would find a right to recovery of attorneys' fees under the plain meaning of the SPA indemnity.

b. *TranSched* Was Decided After the SPA Was Executed and, Therefore, Cannot Inform the Parties' Intent.

Even to the extent that *TranSched* properly created a presumption against the recovery of attorneys' fees under a first-party indemnification provision, such a novel presumption flowing from that case could not have informed the Court's determination of the parties' intent in the SPA, because that determination "should focus on the parties' shared expectations *at the time they contracted*." *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1267 (Del. 2017) (emphasis added).

At the time the SPA was executed in 2011, Delaware case law provided that: (1) a broad indemnity with "hold harmless" language that expressly includes attorneys' fees encompasses fees incurred in the first-party action, *see Pike Creek*, 637 A.2d at 423; *Delle Donne*, 840 A.2d at 1256, and (2) provisions regarding the

recovery of attorneys' fees must be interpreted in accordance with their plain meaning, *see Scion Breckenridge*, 68 A.3d at 683. Based on those principles, before 2011, Delaware courts had awarded first-party fees under indemnification provisions affording recovery of all losses resulting from a breach, including attorneys' fees. *See, e.g., SIGA Techs*, 67 A.3d at 352 & n.107*; Concord Steel*, 2009 WL 3161643, at *16; *Cobalt Operating*, 2007 WL 2142926, at *32; *see also LaPoint v. AmerisourceBergen*, 970 A.2d 185, 187 (Del. 2009).

Charged with knowledge of *only* the law existing in 2011, *see Ringler v. Paintin*, 1980 WL 332988, at *6 (Del. Super. July 24, 1980), the contracting parties, represented by well-known transactional firms, chose the indemnification language and the definition of "Losses". As neither the parties nor their counsel can be legally clairvoyant, it is legal error to apply *TranSched*—a Superior Court decision decided one year later—to discern the parties' shared intent *at the time the parties signed the SPA.* The plain meaning of the language chosen by the parties, informed only by the law existing in 2011, entitles Ashland to recover the attorneys' fees and expenses it incurred in this first-party action.

c. *TranSched*'s Presumption Against First-Party Attorneys' Fees is Contrary to Delaware Law.

Despite the plain language of the SPA and that this Court has never promulgated any different rule for interpreting fee shifting agreements, the Superior Court applied *TranSched* and, with it, a presumption against first-party

fees. Such a presumption is untethered to any Supreme Court precedent[27] and irreconcilable with this Court's mandate that a legal presumption regarding the meaning of a contract "should be used *only if* examination of all the relevant evidence fails to uncover the parties' intentions as manifested in the writing." *See Klair v. Reese*, 531 A.2d 219, 224 (Del. 1987) (emphasis added). This Court has never imposed a presumption against the contractual recovery of attorneys' fees.[28] Ashland respectfully submits that no such presumption should be adopted.

Nevertheless, even *TranSched* requires only "clear and unequivocal" language to defeat any "presumption" against first-party attorneys' fees. By definition, those words amount only to a requirement that the language be unambiguous. *See* Black's Law Dictionary (defining Unequivocal as "Unambiguous; clear…" and defining Clear as "Unambiguous."). Yet, the trial

---

[27] Below, Ashland contended that *TranSched* and its progeny stand for the proposition that "indemnity clauses are presumed to apply only to third party claims." B131. As such, Ashland argued that the SPA's first-party indemnity overcomes any such presumption and to the extent the Heyman Parties argued that *another* presumption existed, against first-party attorneys' fees (even in the context of a first-party indemnity), Ashland maintained that no such presumption "exists under Delaware law." B133. Accordingly, to the extent there is any concern that a direct challenge to *TranSched* was not raised below, Ashland fairly presented the issue to the Superior Court. Nevertheless, pursuant to Supreme Court Rule 8, the interests of justice will be served by addressing this argument, as lower courts have applied *TranSched* for the last decade and continue to apply a presumption against the recovery of attorneys' fees that does not exist under Delaware law.

[28] The American Rule, while a default rule that can be overcome by contract, is not a presumption or a principle of contract interpretation.

court here went further, requiring that there be "*specific* language in the indemnification provision…that covers fee-shifting." Ex. A at 12-13 ("[t]he definition of Losses also lacks explicit language applying to first-party claims"). Without further explanation,[29] the court then concluded that the reference to "Third Party Claim"—but not first party claim—within the "definition of Losses does not imply clearly and equivocally that first party claims are included." Ex. A at 13. This conclusion amounts to a rule requiring "magic" language to reflect an intent to include the recovery of fees. This Court has never adopted such a rule.

Further, while the Superior Court found that "whether or not involving a Third Party Claim" was insufficient to evidence an intent to include first-party fees, the court did not address what this phrase means. There are only two kinds of indemnity claims: first party and third party. Maxwell Terhar, *American v. British Rule: The Impact of James G. Davis Construction Corp. v. HRGM Corp. on Fee-Shifting Provisions in the Maryland and D.C. Area*, 8 Am. U. Bus. L. Rev. 67, 73 (2019). As one commentator explained, this "whether or not" clause is the very

[29] The reasoning leading to that conclusion is scant. On this issue, the Superior Court relied almost exclusively on a Court of Chancery decision holding that attorneys' fees in first-party claims must be denied unless the contract has no other "conceivable" interpretation. Ex. A at 13-14 (citing *Nasdi Holdings, LLC v. N. Am. Leasing, Inc.*, 2020 WL 1865747, at *6 (Del. Ch. Apr. 13, 2020)). Because there is no Delaware authority that permits the adoption of a "conceivable" contract interpretation, the Superior Court erred to the extent that it applied *Nasdi*'s articulation of the standard.

language that should be used to clearly and unequivocally demonstrate the parties' intent to extend indemnity to first-party claims. Scott O. Reed, Understanding the Limits on Indemnity Agreements, 106 Ill. B.J. 34, 36 (2018). If the language "whether or not involving a Third Party Claim" is not sufficient evidence that the parties intended for attorneys' fees to be recoverable losses in a first-party indemnification claim, then what else could it possibly mean?

The court did not articulate a reasonable, alternative meaning because no such reasonable, alternative meaning exists. To read this language to exclude first-party claims ignores the plain meaning and is contrary to Delaware law.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed, except to the extent that it denied Ashland's right to the recovery of its attorneys' fees and expenses, which should be reversed.

Respectfully submitted,

GIBBONS P.C.

By: /s/ *Christopher Viceconte*
Christopher Viceconte (No. 5568)
300 Delaware Avenue, Suite 1015
Wilmington, Delaware 19801
Tel.: (302) 518-6322
Fax: (302) 397-2050
cviceconte@gibbonslaw.com
Attorneys for Appellees/Cross-Appellants

OF COUNSEL:
GIBBONS P.C.

William S. Hatfield – *pro hac vice*
Camille V. Otero – *pro hac vice*
Jennifer A. Hradil – *pro hac vice*
Joshua Elias – *pro hac vice*
One Gateway Center
Newark, NJ 07102
Tel: (973) 596-4500
Fax: (973) 639-4701

Dated: January 24, 2022