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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

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.

APPELLEES'/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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INTRODUCTION

Interpreted in accordance with its plain meaning, the SPA entitles Ashland to its first-party attorneys' fees as part of its recoverable "Losses" under the applicable indemnity provisions. Nonetheless, the Superior Court, at the Heyman Parties' insistence, applied *TranSched* and its novel presumption against the recovery of first-party attorneys' fees in indemnity agreements to deny Ashland's claim for fees. In response to the Ashland Parties' Opening Brief on Cross-Appeal challenging the Superior Court's application of *TranSched* and the basis for *TranSched*'s presumption, the Heyman Parties, incredibly, disavow *TranSched* and, with it, the entire foundation for the Superior Court's decision to deny fees.

The Heyman Parties' Answering Brief on Cross-Appeal not only definitively undermines the Superior Court's decision on fees, it ultimately concedes that the "plain language of the SPA" controls. *See* Heyman Parties' Answering Brief on Cross-Appeal ("HP.A.Br.") at 46. Because the Heyman Parties do not – because they cannot – defend the flimsy underpinnings of *TranSched*, this Court should reject the presumption against first-party attorneys' fees created by *TranSched* and reaffirm its long-standing precedent enforcing the plain meaning of contract provisions, including those involving the recovery of attorneys' fees.

Left only with the plain language, the Heyman Parties try mightily to convince the Court that "whether or not involving a Third Party Claim" is *limiting*

language meant to exclude first-party claims from the broadly defined term of "Losses". However, nothing argued by the Heyman Parties – not the *dictum* in *Great Hill*, the completely distinct provision in SPA Section 8.2, or any of their other arguments – can change the plain meaning of this phrase. The definition of "Losses" is an unequivocal expression of *inclusion*, applying not only to "Third Party Claims" but all other claims as well. Ashland is entitled to its attorneys' fees and expenses as part of its recoverable Losses in this first-party indemnity action, through which it seeks to be held harmless from Sellers' breach and Sellers' assumption of the Linden Excluded Liabilities.

ARGUMENT

I. NO AUTHORITATIVE LEGAL FOUNDATION EXISTS FOR THE HEYMAN PARTIES' POSITION OR THE TRIAL COURT'S DECISION.

The Heyman Parties' treatment of two Delaware decisions – *TranSched* and *Great Hill* – in their Answering Brief on Cross-Appeal reveals the ultimate lack of any authoritative legal foundation for their position.

A. The Heyman Parties Disavow *TranSched* and, Thus, Its Progeny and the Only Legal Support for the Trial Court's Decision.

The trial court rejected Ashland's claim for attorneys' fees by finding that Ashland failed to overcome a presumption against fee-shifting first espoused by the Superior Court in *TranSched Systems Ltd. v. Verwyss Transit Solutions, LLC*, 2012 WL 1415466 (Del. Super. Ct. Mar. 29, 2012). As Ashland established in its Opening Brief on Cross-Appeal, *TranSched*'s interpretative presumption is inconsistent with Delaware precedent and fundamentally unsound. *See* Ashland's Opening Brief on Cross-Appeal ("A.O.Br."), at 60-65. The Heyman Parties neither attempt to convince the Court otherwise nor respond to Ashland's arguments that *TranSched* is factually distinguishable and its novel "presumption" could not have informed the contracting parties' intent because it was not decided

until 2012—after the SPA was executed.[1] *See* A.O.Br. at 59-64. Instead, the Heyman Parties declare that *TranSched* is "irrelevant." HP.A.Br. at 46.

The Heyman Parties' understandable desire to distance themselves from *TranSched*, however, goes beyond *TranSched*. Rather, their disavowal necessarily undermines the legitimacy of the other trial court cases on which they explicitly rely (including *Great Hill*). *See* HP.A.Br. at 39-40.[2] Each of these cases mechanically applies the presumption created by *TranSched* without further analysis or consideration of its legal basis. And, none of these cases attempt to reconcile the presumption with the binding, conflicting Supreme Court precedent. Thus, these cases all suffer from the same deficiencies as *TranSched*. *See* A.O.Br. at 60-65.

[1] The Heyman Parties' characterization of *TranSched* as "merely one of the latest in a decade-long line of cases confirming" the "presumption against fee-shifting" is factually incorrect. *See* HP.A.Br. at 46; 39-40. *TranSched* was decided in 2012 and was the first to adopt any presumption against first-party fees under indemnity agreements.

[2] *See Great Hill Equity Partners IV v. SIG Growth Equity Fund I, LLLP*, 2020 WL 7861336 (Del. Ch. Dec. 31, 2020), *aff'd*, 2021 WL 5993508 (Del. Dec. 20, 2021) (ORDER) ("*Great Hill"*); *Winshall v. Viacom Int'l Inc.*, 2019 WL 5787989, at *5 (Del. Super. Ct. Nov. 6, 2019), *aff'd on other grounds*, 237 A.3d 67 (Del. 2020); *Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *1 (Del. Super. Ct. Nov. 22, 2016); *Senior Hous. Cap., LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *44 (Del. Ch. May 13, 2013).

The Heyman Parties' remarkable abandonment of *TranSched* leaves the presumption against fee-shifting underlying the Superior Court's ruling without *any* legal foundation. Indeed, having cavalierly pronounced the sole basis for the Superior Court's ruling "irrelevant," the Heyman Parties make no effort to defend the *TranSched* presumption or its application to the indemnification provisions in the SPA. In fact, having begun their answering brief advocating for a "strong presumption against fee-shifting" (HP.A.Br. at 5), by the end of that brief, the Heyman Parties walk away from the presumption entirely – finally acknowledging that the proper focus is the "plain language of the SPA." *Id.* at 46. Without *TranSched* or its progeny, there is no legal foundation for the Heyman Parties' position or the trial court's decision.

B. The Heyman Parties Misrepresent *Great Hill.*

Perhaps in an attempt to fill the substantial gap created by their disavowal of *TranSched*, the Heyman Parties rely heavily on, but misrepresent, the Court of Chancery's decision in *Great Hill*, which this Court affirmed without an opinion. The Heyman Parties proclaim that "this Court, in [*Great Hill*], affirmed the rejection of fee-shifting under a provision that Ashland admits contained 'similar language' to that here" and that "the circumstances in this case are *materially indistinguishable* from those in *Great Hill.*" HP.A.Br. at 41 (emphasis added). The Heyman Parties are simply wrong on both points.

Great Hill involved claims for attorneys' fees arising from two conflicting provisions in a merger agreement, both of which covered attorneys' fees. The first provision, Section 10.02, broadly required indemnification for "any actual loss…whether or not arising out of third party claims (including…reasonable legal fees and expenses…)" arising out of specified breaches of the merger agreement. *Great Hill*, 2020 WL 7861336, at *2. That same merger agreement had a separate provision—Section 12.10—that also, but far more specifically, addressed the recovery of attorneys' fees in first-party litigation. Section 12.10 provided that the prevailing party in litigation to enforce its rights under the merger agreement was entitled to reasonable attorneys' fees and that any party that only partially prevailed was entitled to an equitable apportionment of its fees. *Id.* at *3.

These two provisions not only addressed the same subject matter (attorneys' fees), but also they were inconsistent and substantively in conflict. Faced with these conflicting provisions, the Court of Chancery concluded that interpreting Section 10.02 to "includ[e] legal fees incurred in first party claims" would "leave[] Section 12.10 little more than surplusage." *Id.* at *6. Accordingly, the *Great Hill* court properly concluded that the more specific provision took precedence and expressly held "that Section 12.10 controls the parties' motions for fees here, not Section

10.02." *Id.* at *6; *see also id.* at *3 ("The controlling provision…is Section 12.10…").[3]

In light of this holding that the prevailing party provision controlled, the Court of Chancery's comments regarding the meaning of "whether or not arising out of third party claims" can only be considered as *dictum*, which "is…not binding as legal precedent." *Humm v. Aetna Cas. & Sur. Co.*, 656 A.2d 712, 716 (Del. 1995) (citations omitted). This Court's affirmance of the Court of Chancery judgment without opinion does not elevate that *dictum* to anything more.

Given what *Great Hill* actually decided, it does not control, or even inform, the proper interpretation of the SPA provision at issue here. First, the language upon which the Heyman Parties rely is *dicta*, as it comments upon the meaning of a provision that the Court of Chancery held did not control the dispute. Second, the Heyman Parties would have this Court apply *Great Hill* even though its interpretation of the indemnity provision was dictated by the conflicting prevailing party provision—to which the SPA has no analog.

[3] Undaunted by, and ignoring, these excerpts from the *Great Hill* opinion, the Heyman Parties assert that Ashland misreads *Great Hill* and that neither provision "'controlled' the court's reasoning." HP.A.Br. at 41 n.9.

II. THE HEYMAN PARTIES' ARGUMENTS UNTETHERED TO THIS COURT'S PRECEDENT CANNOT DEFEAT ASHLAND'S ENTITLEMENT TO ITS FIRST-PARTY ATTORNEYS' FEES UNDER THE PLAIN MEANING OF "LOSSES".

Without *TranSched* (and its progeny) or *Great Hill*, the Heyman Parties are left with their *ipse dixit* and a patchwork of arguments that do not meaningfully respond to, let alone rebut, Ashland's entitlement to its first-party attorneys' fees under the plain meaning of the SPA's defined term "Losses."

A. The Heyman Parties Either Ignore or Fail to Distinguish The Controlling Delaware Supreme Court Precedent.

As shown in Ashland's Opening Brief on Cross-Appeal, this Court has repeatedly affirmed the award of attorneys' fees in first-party litigation by applying the plain meaning of indemnification provisions similar to that contained in the SPA. *See 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 Enters., LLC*, 2007 WL 2142926, at *32 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008); *see also Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 683 (Del. 2013).

The Heyman Parties offer no reasoned response—or no response at all—to this controlling precedent.[4]

In fact, the Heyman Parties wholly ignore *Cobalt Operating*, 2007 WL 2142926, at *31-*32 (awarding fees where indemnity in APA agreed to "hold [Cobalt] harmless against [ ] any breach" and covered "all. . .claims,…costs, and expenses (including, without limitation, reasonable attorneys fees…)"), and *Scion Breckenridge*, 68 A.3d at 683 ("clear and unambiguous contract terms" regarding the recovery of attorneys' fees are interpreted like other contract provision, "according to their plain meaning").

And, the Heyman Parties ask this Court to read the contract language in *SIGA Techs.* and *Concord Steel* as "broader" than the relevant language in the SPA, which it simply is not. Specifically, the Heyman Parties argue that losses "of whatever kind or nature" – which this Court found was sufficiently clear to affirm an award of first-party fees in *SIGA Techs.* and *Concord Steel* – is somehow broader than (and materially different from) "any and all losses, liabilities, claims, obligations, judgments, fines, settlement payments, awards or damages *of any kind*," as provided in the definition of Losses. To be clear, the Heyman Parties'

[4] The Heyman Parties' citation to two trial court decisions disfavoring the implication of indemnification obligations is to no avail. HP.A.Br. at 38. This unremarkable proposition has no application here, where the recovery under the SPA's indemnities explicitly includes reasonable attorneys' fees.

entire response to this Court's precedent is their suggestion that "of whatever kind or nature" is sufficient, but "any and all losses … of any kind" is not. The distinction urged by the Heyman Parties is no distinction at all. *See Whatever*, Oxford University Press (2021), https://www.lexico.com/en/definition/whatever (last visited March 7, 2022) (defining "whatever" to mean "of any kind"). Under a straightforward application of this Court's precedent to the SPA's clear and unambiguous language, this Court should reverse the Superior Court's judgment denying Ashland's claim for its first-party attorneys' fees in this case.

B. The Heyman Parties Either Fail To Address or Meaningfully Distinguish Ashland's Supporting Authority on the Plain Meaning of "Whether or Not Involving a Third Party Claim."

Consistent with legal commentary on the topic, a long line of courts throughout the country, including one court in Delaware, have held that the phrase "whether or not including a third party claim" clearly and unambiguously includes first-party claims.[5] The Heyman Parties fail to meaningfully respond to any of this authority.

[5] *See Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412, at *5 (Del. Super. Ct. Sept. 17, 2019); *Trainum v. Rockwell*, 2018 WL 2229120, at *2 (S.D.N.Y. Apr. 23, 2018); *Alki Partners, LP v. DB Fund Servs., LLC*, 209 Cal. Rptr. 3d 151, 170-71 (Ct. App. 2016); *Trodale Holdings LLC v. Bristol Healthcare Invs., L.P.*, 2017 WL 5905574, at *13 (S.D.N.Y. Nov. 29, 2017); *Norwest Fin., Inc. v. Fernandez*, 121 F. Supp. 2d 258, 260-61 (S.D.N.Y. 2000); *Ellington v. Hayward Baker, Inc.*, 2019 WL 1003139, at *4 (D.S.C. Feb. 28, 2019); *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 556–57 (2004), *as modified*

The Heyman Parties simply ignore Ashland's citation to a commentator's explanation that language such as "whether or not involving a Third Party Claim" is used by drafters "*[t]o avoid confusion about first-party coverage.*" *See* Scott O. Reed, *Understanding the Limits on Indemnity Agreements*, 106 Ill. B.J. 34, 36 (2018) (emphasis added). They also ignore the Superior Court's decision confirming that "whether or not involving a third-party claim" in an arbitration provision clearly and unambiguously included first-party claims. *See Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412, at *5 (Del. Super. Ct. Sept. 17, 2019).

Though the Heyman Parties attempt to distinguish the SPA based upon its use of the defined term "Third Party Claim," the Heyman Parties ignore *Trainum v. Rockwell*, 2018 WL 2229120, at *2 (S.D.N.Y. Apr. 23, 2018), confirming that "whether or not resulting from Third Party Claims" (which uses a defined term) meant whether "the loss is a result of direct litigation between" the parties "or a claim by a third party is [] intended to be irrelevant." Unwilling to address that authority, the Heyman Parties hang their hat on their argument that the use of the defined term "Third-Party Claim," rather than third-party claim, in the definition of "Losses" was intended to exclude first-party claims. In any event, for the reasons

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on denial of reh'g, (Dec. 28, 2004); *Abax Lotus Ltd. v. China Mobile Media Tech. Inc.*, 149 A.D.3d 535, 535 (N.Y. App. Div. 1st Dept. 2017).

explained below, that interpretation is unreasonable and does not provide a legitimate basis to distinguish the case law and commentary upon which Ashland relies.

C. The Heyman Parties' Alternative Interpretations of "Whether Or Not Involving A Third Party Claim" Are Implausible.

Without a response to the substantial legal authority supporting Ashland's position, the Heyman Parties resort to implausible interpretations of the meaning of "whether or not involving a Third Party Claim," which this Court should reject. When forced to confront the question of what "whether or not involving a Third Party Claim" means – if not a first-party claim – the Heyman Parties proclaim that "there are many answers." HP.A.Br. at 42. Yet, they are only able to conjure up *two*, neither of which is reasonable and, therefore, both of which must be rejected as a matter of law. *See Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021).

The Heyman Parties first argue that "whether or not involving a Third Party Claim" could refer to "third party claims resolved informally, before any *written* claims or demands are made," in other words, *oral* third-party claims. HP.A.Br. at 42. However, the parties negotiated for detailed procedural prerequisites to assert a right to indemnification for a "Third Party Claim" – including notice, assumption of the defense, consent to settle, cooperation, *etc*. A1078-80. None of those protections would apply to the hypothetical oral third-party claim that the Heyman

Parties would have the Court believe was the intended meaning of "whether or not involving a Third Party Claim." It makes no business (or even common) sense for the parties to have included substantial procedural protections for the indemnifying party where a claim is in writing, but no protections where the same claim is made orally.[6] No contract should be interpreted to achieve such an absurd result. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

In their second example, the Heyman Parties assert that "whether or not involving a Third Party Claim" was included to make clear that it applies to "third-party claims 'relating to Taxes'…" HP.A.Br. at 42. But this "example" makes no sense either. The term "Losses" appears in Section 5.5(a)(i)(C) under "Tax Matters," which requires Sellers to indemnify Ashland for "Losses…related to any breach of Section 3.12(i)." A1058. Under Section 5.5(a)(i)(C), Ashland would be entitled to its Losses for such a breach, thereby making "whether or not involving a Third Party Claim" in the definition of Losses redundant. The Heyman Parties

[6] The facial absurdity of this argument is evident from a simple hypothetical. If Ashland received a phone call from a third party asserting a claim for which Sellers were responsible and Ashland unilaterally agreed to a settlement on that call, Sellers – under the Heyman Parties' view – would be required to indemnify Ashland. If, however, that same claim was asserted in a letter and Ashland settled the claim unilaterally, under the Heyman Parties' view, Ashland would be barred from seeking indemnification for its failure to provide notice and settling without Sellers' consent. A1078-1080.

provide no reason that this language is necessary to ensure recovery for claims "related to Taxes".

These explanations are unreasonable and should be rejected. The only reasonable interpretation is that the phrase "whether or not involving a Third Party Claim" was intended to make clear its applicability to first-party claims.

D. In Their Effort to Distinguish *Delle Donne* and *Pike Creek*, the Heyman Parties Mischaracterize Ashland's Claim.

As established in its Opening Brief, this Court's precedent in *Pike Creek* and *Delle Donne* supports Ashland's claim, because it establishes that contractual provisions, like the SPA indemnification provisions at issue, that broadly require a party to indemnify and hold harmless another "from and against all expenses, including reasonable attorneys' fees," necessarily include 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); *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 422-23 (Del. 1994). In response, the Heyman Parties simply declare *Pike Creek* and *Delle Donne* "irrelevant," purportedly because *Pike Creek* and *Delle Donne* involved litigation to enforce an indemnity while Ashland's claims merely "establish breach of the substantive provisions of the contract." HP.A.Br. at 45. This is a distinction without a difference, as Ashland's claim under the SPA for "any breach of any covenant or agreement of the Seller Parties" *is* unquestionably a claim for

indemnification, as is Ashland's claim to be held harmless for the Linden Excluded Liabilities. A1075-76; A1082. *Pike Creek* and *Delle Donne* provide even further support for Ashland's claim.

E. The Heyman Parties' Reliance Upon Section 8.2 To Undermine the Plain Meaning of "Losses" Is Misplaced and Should Be Rejected.

Ashland has demonstrated that the Superior Court's reliance upon Section 8.2(c) to alter the plain meaning of "Losses" was erroneous. *See* A.O.Br. at 58-59. Rather than address the separate and distinct applications of Sections 7.2 and 8.2(c) as established in Ashland's Opening Brief, the Heyman Parties merely mimic the language in the Superior Court's opinion and assert that Ashland's reading of the definition of Losses "renders 8.2(c) superfluous." HP.A.Br. at 44. Perhaps because any attempt to explain how these two provisions could ever be superfluous would simply not be credible, the Heyman Parties provide none.

While Section 7.2 is the exclusive remedy for post-Closing breaches, Section 8.2(c) applies "[i]n the event of a termination of" the SPA, rendering it void in its entirety pre-Closing. A1075-76, A1084. There is no scenario in which Sections 7.2 and 8.2(c) conflict or in which either provision is ever superfluous.

Even putting aside the Heyman Parties' fundamental error in this regard, the existence of fee-shifting language in Section 8.2(c) has no impact on the interpretation of the definition of Losses and the ability to recover attorneys' fees in connection with a first-party indemnification claim. The term "Losses" is not

mentioned in Section 8.2(c), making clear that in the event of a termination, the Heyman Parties are not entitled to the full, broad bundle of remedies encompassed by that term. Rather, the recovery is limited only to those remedies specifically enumerated in Section 8.2(c). This demonstrates that 8.2(c) – which applies in a completely different context and entitles Sellers to only a limited subset of remedies – provides no insight into whether the definition of Losses also provides for fee-shifting. The Heyman Parties' emphasis on the fact that the termination remedies recoverable under Section 8.2(c) would be within the definition of "Losses" evades the issue entirely.

Because Section 8.2(c) applies to different circumstances and affords different remedies, the use of different language in that provision to accomplish different results cannot reasonably be read to inform the intended meaning of the broad definition of "Losses". The Heyman Parties' argument to the contrary is based upon cases interpreting agreements with provisions materially different than the SPA, such as *Clean Harbors* and *Great Hill*. *See Clean Harbors, Inc. v. Union Pac. Corp.*, 2017 WL 5606953, at *8 (Del. Super. Ct. Nov. 15, 2017) (holding that plaintiff's claim was not within the definition of "Environmental Liabilities," which included attorneys' fees, because it did not arise out of a claim by the government or an agreement under any environmental law); *Great Hill*, 2020 WL 7861336, at *6 (holding that claim for fees was not controlled by general provision

because it was governed by more specific provision). Neither of these cases stand for the proposition that the Heyman Parties suggest – that the inclusion of particular fee-shifting language in one, non-applicable section of an agreement precludes a finding that different language in the separate, applicable section was intended to include fees.

While relying upon these inapposite cases, the Heyman Parties ignore the authority confirming that the mere existence of fee-shifting language elsewhere in the SPA, applicable in entirely different circumstances, is of no interpretative value to the definition of Losses. As discussed in Ashland's Opening Brief on Cross-Appeal, the Maryland Supreme Court (upon whose law the *TranSched* court relied to create the presumption against fee-shifting), has more recently confirmed that language such as that in the SPA "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). The *Bainbridge* court reached that conclusion even where a separate provision applying to other circumstances used *different language* to shift fees. *Id.* at 980-81 (discussing separate provision allowing "prevailing party" to recover attorneys' fees in arbitration relating to certain disputes). Despite using *different language* to shift fees under *different circumstances*, the Maryland court was unmoved by the argument that a "'prevailing party' fee-shifting clause" elsewhere in the agreement had any impact

on the "express provisions that authorized first-party fee shifting" in the indemnity clause. *Id.* at 983, 989. This Court should reach the same result.

III. THE HEYMAN PARTIES' INTERPRETATION CANNOT BE SQUARED WITH THE PLAIN MEANING OF THE DEFINITION OF LOSSES.

By saying nothing in their Answering Brief on Cross-Appeal, the Heyman Parties continue to concede that the indemnification provisions in the SPA provide for the recovery of "Losses" in first-party claims. Likewise, there is no dispute that the definition of "Losses" includes attorneys' fees. However, in considering the definition of Losses, the Heyman Parties argue that attorneys' fees (but not the other components of "Losses") are only recoverable in connection with third-party claims. In the absence of *TranSched*, or any presumption against the recovery of first-party attorneys' fees, the Heyman Parties can point to nothing in the plain language of the definition of Losses or in the applicable indemnity provisions that justify their position.

Instead, the phrase "whether or not involving a Third Party Claim" concludes the *entire* definition of Losses. It is not part of the parenthetical providing for the recovery of disbursements, costs and expenses (including, among other things, attorneys' fees), but follows the closed parenthesis and is further separated by a comma, establishing that *the phrase modifies the whole definition of Losses* – not just the portion of it related to fees. Thus, the Heyman Parties' interpretation (*i.e.*, that "whether or not involving a Third Party Claim" merely refers to written, oral and tax-related third-party claims, but not first-party claims)

would mean that the SPA does not provide for ***any*** first-party claims at all and that Losses could only be recovered in the event of a third-party claim.

Yet, the Heyman Parties have never argued, nor could they, that the SPA does not provide for the recovery of any Losses for Ashland's first-party indemnity claim. Any such argument would be contrary to the exclusive remedy clause,[7] the separate provision addressing third-party claims[8] and the indemnity for breach[9] – each of which are hallmarks of first-party indemnification.

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[7] *See E*TRADE Fin. Corp. v. Deutsche Bank AG*, 631 F. Supp. 2d 313, 392 (S.D.N.Y. 2009), *aff'd*, 374 F. App'x 119 (2d Cir. 2010) ("[The defendant's] reading of § 9.02 to apply only to indemnification claims for third-party actions, read together with the 'sole and exclusive remedy' clause of § 9.01, would require the absurd result that the parties to the [agreement] could not be held liable for breach of contract and indemnification would be limited only to third party claims.").

[8] *See E*Trade Fin. Corp. v. Deutsche Bank AG*, 374 F. App'x 119, 123-24 (2d Cir. 2010) (finding indemnity provision applied to first-party claims, noting that "the SPA has a separate indemnity provision for third-party claims"); *Dominion Retail, Inc. v. Rogers*, 2013 WL 1149911, at *13-*14 (W.D. Pa. Jan. 30, 2013), *report and recommendation adopted*, 2013 WL 1149928 (W.D. Pa. Mar. 19, 2013) (finding that indemnity covered first-party and third-party claims based on the language in the SPA addressing third-party claims separately).

[9] *See Kilcullen v. Spectro Sci., Inc.*, 2019 WL 3074569, at *1 (Del. Ch. July 15, 2019) (considering indemnification claim against the seller for alleged breaches of representations and warranties in the stock purchase agreement to be "first-party claims"); *Broaddus v. Shields*, 665 F.3d 846, 857 (7th Cir. 2011) (rejecting argument that indemnification applied only to third-party claims where "it expressly contemplates Mr. Broaddus indemnifying Mr. Shields in the case of a breach") (applying Delaware law).

In the absence of any presumption, the Court is left only with the plain meaning of the words contained in the definition of Losses. Ashland is entitled to "*any and all*…damages of any kind" including "reasonable attorneys'…fees," all of which is recoverable "whether or not involving a Third Party Claim." The only reasonable interpretation of this language is that Ashland is entitled to its first-party attorneys' fees and expenses as part of its recoverable Losses.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Ashland's Opening Brief on Cross-Appeal, the Superior Court's judgment denying Ashland's right to the recovery of its attorneys' fees and expenses should be reversed.

Respectfully submitted,

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