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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MERCK & CO., INC,

Plaintiff Below-Appellant,

v.

BAYER AG,

Defendant Below-Appellee.

No. 150, 2023

Case Below: Court of Chancery of the State of Delaware
C.A. No. 2021-0838-NAC

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NATURE OF PROCEEDINGS

In May 2014, Bayer agreed to acquire Merck's consumer-healthcare business and several related product lines, ranging from Dr. Scholl's to Claritin and Coppertone. The $14.2 billion deal was comprehensively documented in a Stock and Asset Purchase Agreement that runs 90 pages. Given the risk of product-liability litigation, which can be brought years or decades after a consumer's exposure to a product, the parties expressly addressed in the Purchase Agreement how they would handle such claims. They adopted a "my watch, your watch" approach: Merck is responsible for any product-liability claim relating to its pre-closing manufacture or sale of the acquired products, and Bayer is responsible only if the claim does not relate to Merck's pre-closing conduct.

The Purchase Agreement memorializes that understanding. Section 2.7 defines Merck's "Retained Liabilities." It provides that Merck "shall, without any further responsibility or liability of, or recourse to, [Bayer] … absolutely and irrevocably assume and be solely liable and responsible for" "[a]ny product liability or similar claim" concerning "any products at any time manufactured, marketed or sold by" Merck "to the extent arising out of or relating to periods prior to the Closing." A45, A137. Simply put, Merck agreed—absolutely and irrevocably—to retain sole responsibility for *any* pre-closing product-liability claim. Conversely, Section 2.6 of the Purchase Agreement defines Bayer's "Assumed Liabilities" to

exclude all of "the Retained Liabilities." A44. The Purchase Agreement thus draws a line for responsibility that depends on whether a consumer's claim relates to Merck's conduct before the closing date of October 1, 2014. If it does, the claim belongs to Merck; if it does not, the claim belongs to Bayer.

For the next six years, the parties operated consistent with the plain terms of the Purchase Agreement. As relevant here, Bayer tendered to Merck product-liability claims that related to Merck's pre-closing operations, and Merck accepted sole responsibility for those claims. No one so much as hinted that any of the claims would ever pass to Bayer. That changed in 2021. Merck was facing a wave of asbestos-related litigation over foot products with talc (like Dr. Scholl's, Lotrimin, and Tinactin) that were manufactured and sold during the pre-closing period. Desperate to dodge those suits, Merck claimed for the first time in January 2021 that its responsibility for pre-closing product claims would transition to Bayer in October 2021—seven years after the closing. Merck drafted a new "Claim Transition and Settlement Agreement" that would shift to Bayer all of Merck's then-existing or future litigation over pre-closing product-liability claims. When Bayer refused to go along, Merck brought this suit.

The hook for Merck's newfound argument is Article X of the Purchase Agreement, which addresses indemnification—*i.e.*, the parties' liabilities *to each other* to reimburse certain losses. For instance, although Merck retains sole

responsibility for pre-closing product-liability claims, Bayer still could suffer losses with respect to those claims. As the new owner of Merck's former products, Bayer could be mistakenly sued and incur litigation expenses; it could face third-party subpoenas; or it could need to recall, reformulate, or relabel a product based on a pre-closing defect. Article X strikes a compromise: it requires Merck to indemnify Bayer for such losses related to pre-closing product claims, but only for seven years. Section 10.2(b) is titled "Indemnification By Seller," and it requires Merck "to indemnify, defend, and hold harmless" Bayer for "all Losses … arising out of or relating to" pre-closing product claims. A99-100. Section 10.1 places a time limit on that duty: "[a]ll liability and indemnification obligations with respect to" pre-closing claims "shall survive until … the seventh … anniversary of the Closing Date." A98-99.

In 2021, Merck seized on Section 10.1's reference to "*liability* and indemnification obligations." Merck now argues that the provision extinguishes not only Merck's liability *to Bayer* under Article X for losses relating to pre-closing product claims, but also Merck's liability *to third-party consumers* under Article II for the pre-closing claims themselves. As the Court of Chancery explained, Merck is purposely conflating "two distinct forms of liability." Op. 12. It is Section 2.7—not Section 10.1—that addresses Merck's "substantive liability to third-party consumers." Op. 12. And Section 2.7 could not be more clear: Merck "shall,

without any further responsibility or liability of, or *recourse to, [Bayer] … absolutely and irrevocably assume* and *be solely liable and responsible for*" "*[a]ny* [pre-closing] product liability or similar claim." A45, A137 (emphasis added).

Given the unconditional nature of that language, Merck is forced to argue that Section 10.1 implicitly qualifies Section 2.7. Merck maintains that the reference to "liability" must refer to the pre-closing product claims addressed in Article II, because "indemnification" refers to Bayer's right to reimbursement under Article X. OB 4, 18-19. At the outset, Merck's argument is implausible on its face: the parties drafted a 90-page Purchase Agreement that covers in detail what assets and liabilities Merck was retaining, what assets and liabilities Bayer was assuming, and how those assets and liabilities would be transferred. Yet according to Merck, the parties did not clearly address what would have been a hugely significant issue: the transfer of Merck's pre-closing product-liability claims to Bayer seven years after the closing. The parties instead hid that elephant in a true mousehole: a single reference to "liability" more than 50 pages after Section 2.7, in a time-limit provision within Article X, which deals with the parties' indemnification liability to each other.

Not surprisingly, Merck's reading runs headlong into the text of the Purchase Agreement. It is not even a natural reading of Section 10.1 standing alone. The phrase "[a]ll liability and indemnification obligations" refers broadly to any obligation by Merck to reimburse Bayer for losses related to pre-closing

product-liability claims, whatever the legal basis. And of course Merck's reading makes a hash of Section 2.7, which says that Merck's assumption of pre-closing claims is "absolute[] and "irrevocabl[e]," and "without any further responsibility or liability of, or recourse to, [Bayer]." A45. As the Court of Chancery observed, contracting parties do not use words that "encompass the idea of unreserved commitment" when they intend to create only a time-limited obligation. Op. 13. Merck's "interpretation would result in an 'implausibly circuitous and tortured means of implementing' " the Purchase Agreement. Op. 16 (citation omitted).

The real-world results are even more difficult to swallow. The parties did not *explicitly* assign pre-closing product-liability claims solely to Merck, only to *implicitly* dump them on Bayer seven years later. Agreeing that the parties would not indemnify each other for certain monetary losses forever is understandable. But no reasonable buyer would accept delayed responsibility for consumers' product-liability claims concerning a seller's pre-closing business—leaving the seller free to make all decisions about whether and how to litigate those claims for years after the deal closed. Nor is there even a mechanism in the Purchase Agreement or otherwise for Merck to transfer the claims to Bayer, which confirms that these sophisticated parties never contemplated a massive post-closing assumption by Bayer of additional liabilities. The Court of Chancery was correct

that Merck's interpretation not only mangles the text of the Purchase Agreement but leads to "absurd results." Op. 11; *see* Op.17-19. This Court should affirm.

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly dismissed Merck's Amended Complaint because the contract is not ambiguous. As the Court of Chancery held, the Purchase Agreement unambiguously assigns to Merck sole liability and responsibility for any pre-closing product-liability claim.

Under the plain terms of the Purchase Agreement, Merck alone is responsible for any pre-closing product-liability claim brought by a consumer. That is the result of Section 2.7, which states that Merck "absolutely and irrevocably assume[s]" and agrees to "be solely liable and responsible" for those claims, "without any further responsibility or liability of, or recourse to, [Bayer]." A45. Nothing in that provision remotely suggests that Merck's assumption of those liabilities had an expiration date or was limited to a subset of claims that were the subject of litigation as of a fixed date. To be sure, the parties agreed in Section 10.1 that some indemnification claims they could bring against each other—including for Bayer's potential losses "arising out of or relating to" pre-closing product claims—would expire after seven years. But Section 10.1 deals with liability *as between the parties*. It has nothing to do with liability for product-liability claims brought by *third-party consumers*, which is addressed in Sections 2.6 and 2.7.

Merck's argument to the contrary hinges on a single word in Section 10.1. Section 10.1 provides that "[a]ll liability and indemnification obligations with

respect to" pre-closing product-liability claims will expire after seven years. A99. Merck contends that the word "liability" must refer to its obligations under Section 2.7(d), because the word "indemnification" already covers the reimbursement liability created by Section 10.2(b). OB 22-23. The Court of Chancery correctly rejected that "implausibly circuitous and tortured" interpretation of Section 10.1 for several reasons. Op. 16.

First, Merck's position takes the term "liability" in Section 10.1 out of context, and in the process creates a conflict with the plain and categorical language of Section 2.7. Second, it leads to commercially unreasonable and even absurd results: after controlling the litigation of the pre-closing product claims for years, Merck could simply dump a host of cases on Bayer overnight, and Bayer then would have to defend Merck's decades-old conduct and its post-closing litigation strategies. Third, Merck improperly falls back on extrinsic evidence that is legally irrelevant and in any event unhelpful because it confirms that the parties never agreed in 2014 that Bayer would assume pre-closing product-liability claims.

For those reasons, the judgment below should be affirmed.

2. **Denied.** Merck's second question presented is the same as its first: whether the Court of Chancery correctly interpreted the Purchase Agreement. As explained above, it did.

COUNTERSTATEMENT OF FACTS

A. Factual Background

On May 5, 2014, Merck and Bayer entered into a Stock and Asset Purchase Agreement under which Bayer agreed to purchase Merck's consumer-healthcare business and several related product lines, including Dr. Scholl's, Lotrimin, Tinactin, Claritin, and Coppertone. A147. Merck developed, manufactured, and sold some of these products, including Dr. Scholl's, for many years before the 2014 transaction. Because product-liability litigation is a well-known risk in the consumer-healthcare business, the parties expressly addressed how liability and responsibility for consumer claims relating to the time before closing would be handled: Merck would be solely liable and responsible for any claim relating to products made or sold before the closing, and Bayer would be responsible for any product claims arising from its post-closing business. That division—sometimes called "my watch, your watch"—left Merck solely liable and responsible for pre-closing conduct.

1. Article II Of The Purchase Agreement

Article II of the Purchase Agreement sets forth which assets and liabilities Merck would transfer and which it would retain. A38-45. As relevant here, Section 2.7 is titled "Retained Liabilities." It provides that "[Merck] shall, without any further responsibility or liability of, or recourse to, [Bayer] … absolutely and

irrevocably assume and be solely liable and responsible for" "the obligations and liabilities set forth in Section 2.7(d) of the Seller Disclosure Schedule (the 'Section 2.7(d) Liabilities')." A45. Section 2.7(d) of the Seller Disclosure Schedule, which was attached to the Purchase Agreement, defines Merck's Retained Liabilities to include "[a]ny product liability or similar claim" concerning "any products at any time manufactured, marketed or sold by" Merck "arising out of or relating to periods prior to the Closing." A137. Taking those provisions together, Merck agreed—absolutely and irrevocably—to assume sole responsibility for any pre-closing product-liability claim.

2. Article X Of The Purchase Agreement

Although Section 2.7(d) of the Purchase Agreement provided that Merck would be solely liable and responsible for pre-closing product-liability claims, Bayer—as the new owner—might still suffer incidental losses relating to those claims. For example, a product-liability plaintiff might mistakenly name Bayer as the defendant or issue a third-party subpoena to Bayer. Beyond litigation, Bayer might bear losses associated with reformulating, relabeling, or recalling the acquired products because of pre-closing defects.

In part to address those potential losses relating to pre-closing product-liability claims, the parties negotiated separate indemnification provisions that allowed them to bring reimbursement claims against each other for seven years

after closing. Those provisions are in Article X of the Purchase Agreement, which is titled "Indemnification; Survival." Sections 10.2(a) and 10.2(b)—titled "Indemnification By Buyer" and "Indemnification By Seller," respectively—define the liability and indemnification obligations of each party to reimburse the other for certain losses. A99-100. As is common, Section 10.1 imposes time limits on some of those liabilities between the parties. A98-99.

As relevant here, Section 10.2(b)(iv), which is part of the provision that requires Merck to indemnify Bayer, broadly requires Merck "to indemnify, defend, and hold harmless" Bayer for "*all* Losses … *arising out of or relating to*" pre-closing product-liability claims. A99-100 (emphasis added). Section 10.1 provides a time limit on that duty: "[a]ll liability and indemnification obligations with respect to" pre-closing product claims "shall survive until … the seventh … anniversary of the Closing Date." A98-99. In other words, Merck was required to reimburse Bayer for losses relating to pre-closing product-liability claims, but only for seven years after the closing, or until October 2021.

3. The Assumption Agreement

Bayer did not assume any of Merck's historical liabilities under the Purchase Agreement itself. The Purchase Agreement instead provided that Bayer's assumption of liabilities would be "[e]ffective as of the Closing" and required the parties to execute a separate Assumption Agreement at the closing. A17, A44, A97-

98, A135; *see* A213 (Form of Assumption Agreement). As relevant here, the Assumption Agreement states that Bayer would "assume[] and agree[] to pay … the Assumed Liabilities." A213. The Assumption Agreement also acknowledges that Bayer would assume Merck's liabilities only as "*expressly* set forth" in the parties' agreements executed as of October 1, 2014. A213 (emphasis added). That is consistent with the Purchase Agreement, which provides in Section 12.13 that each party's "duties and obligations are as *specifically* set forth in this [Purchase] Agreement, and *no other duties or obligations shall be implied in fact, Law or equity*, or under any principle of fiduciary obligation." A108 (emphasis added). In other words, Bayer would not *implicitly* accept more liabilities than those specifically set forth in the Purchase Agreement and assumed under the Assumption Agreement.

4. The Parties' Course Of Dealing And This Dispute

For more than six years after the closing, the parties stuck to the Purchase Agreement as written. Merck accepted sole responsibility for all pre-closing product-liability claims, and when Bayer received new claims, Merck took them without a fuss pursuant to Section 2.7. A157. Bayer did not submit those claims as ones for indemnification under Article X, A157-158, and Merck never mentioned the deductibles, time limits, or other restrictions provided for indemnification claims under Article X when accepting them. In other words, based on Merck's own

allegations, the parties followed a six-year, uniform course of dealing under which Merck accepted all pre-closing product claims pursuant to Section 2.7, not Article X.

That uniform course of dealing changed in January 2021, when Merck claimed for the first time that Bayer would soon be responsible for all of Merck's pre-closing product-liability claims. Faced with a ballooning number of lawsuits alleging asbestos in talc products sold by Merck during the pre-closing period, A152, Merck asserted that, under Section 10.1 of the Purchase Agreement, its responsibility for those claims would expire on October 1, 2021. Merck communicated its position in a letter to an in-house Bayer attorney, who responded by requesting more information. A159. Merck thereafter continued to accept tenders of pre-closing product claims, but only "conditionally." A159.

In September 2021, Merck drafted a "Claim Transition and Settlement Agreement," which purported to "memorialize[] the proposed process by which transfer of responsibility for the" pre-closing product-liability claims "would occur." A264. Under Merck's proposed new agreement, Bayer would agree to assume, as of October 1, 2021, pre-closing product claims in any then-existing or future litigation. A141-145. After receiving Merck's draft agreement, Bayer rejected Merck's attempt to offload all of the pre-closing product claims. A141-143. As Bayer explained, nothing in the Purchase Agreement "constitutes an undertaking by

Bayer to incur, assume or contribute to Merck's liabilities—especially the … [l]iabilities" for pre-closing product claims. A142.

B. Procedural History

1. Merck's Amended Complaint

After Bayer rejected Merck's proposal in September 2021, Merck sued Bayer. Op. 4. Merck alleged that Bayer had breached the Purchase Agreement by refusing to assume responsibility for both "existing" and "new" litigations involving pre-closing product-liability claims. A152-153. Merck asserted that, under Section 10.1 of the Purchase Agreement, "Bayer, as the purchaser, bec[ame] responsible going forward for *all* the liabilities of the business[es]" as of October 1, 2021. A152. Among other things, Merck requested that the Court of Chancery "enjoin Bayer from tendering" pre-closing product claims after October 1, 2021 and "[c]ompel[] Bayer to specifically perform in accordance with the [Purchase] Agreement by relieving Merck of all" responsibility for existing and future claims. A168-169. Merck also asserted that Bayer was "obligated to repay to Merck all amounts" that Merck had already spent in defending pre-closing product claims between October 2014 and October 2021—claims that Merck had litigated for years without Bayer's substantive input. A149-150.

2. The Court of Chancery's Decision

Bayer moved to dismiss Merck's Amended Complaint on the ground that "the plain and unambiguous terms" of the Purchase Agreement foreclose Merck's claims

as a matter of law. The Court of Chancery agreed. Op. 2, 33-35. As the trial court explained, Section 2.7 of the Purchase Agreement "unambiguous[ly] … establishes Merck's obligation to retain liability" for pre-closing product-liability claims "indefinitely." Op. 13. The trial court rejected Merck's argument that Section 2.7 requires a word like "perpetual" or "forever" to indicate an "indefinite[]" obligation; as the court explained, words like "absolute" and "irrevocable" already "encompass the idea of unreserved commitment." Op. 13 & n.25.

Although the Court of Chancery noted that it "could arguably end [its] analysis" there, it went on to reject each of Merck's other arguments. Op. 13-14. First, with respect to Section 10.1, the trial court explained that "a plain reading" of that provision confirms that it "addresses the separate and distinct issue of … contractual indemnification rights belonging to Merck and Bayer vis-à-vis each other," and thus has no relevance to the parties' allocation of "liability for third-party claims" in Article II. Op. 14. On Merck's reading, the trial court reasoned, Section 10.1 would inexplicably "unwind[] the thoroughly assigned" and carefully negotiated "allocation of liability" in Section 2.7. Op. 17-18.

Second, the Court of Chancery highlighted the unreasonableness of Merck's interpretation, which "would allow Merck to dump all pending but untendered cases" onto Bayer, even though Bayer has had no involvement in litigation strategy and settlements. Op. 26-28. The trial court also noted that, if Merck's reading were

correct, Bayer would implausibly be required to assume potentially massive liability seven years after the closing without the parties ever having agreed on a mechanism for transition of claims. Op. 29-30. The trial court observed that it was especially implausible that Bayer assumed more of Merck's liabilities after the closing without a legal instrument to accomplish the transfer, because the Purchase Agreement required a *separate* Assumption Agreement for Bayer to assume any liabilities. Op. 30; *see* Op. 30 ("[Merck's position] would seemingly turn the Assumption Agreement into the contractual equivalent of a Rube Goldberg machine.").

Third, the Court of Chancery concluded that Merck's extrinsic evidence was not necessary to the interpretation of the Purchase Agreement because the Purchase Agreement was "[un]ambiguous." Op. 24. Nevertheless, the trial court explained that the extrinsic evidence only "reinforce[d] the deficiency of [Merck's] position," because it shed no light on "the negotiation of the [Purchase Agreement]" or "the meaning of the provisions at issue." Op. 25-26. The trial court also dismissed Merck's "minimally briefed" and "difficult to understand" claims that it was entitled to reimbursement for costs already incurred defending pre-closing product-liability claims and for damages caused by an unspecified failure by Bayer to "cooperate" in the defense of litigations before October 1, 2021. Op. 33-36. Merck has abandoned those claims on appeal. OB 48.

ARGUMENT

I. MERCK IS SOLELY RESPONSIBLE FOR ANY PRE-CLOSING PRODUCT-LIABILITY CLAIM.

A. Question Presented

Although Merck presents two questions in its opening brief, there is only one: whether the Court of Chancery correctly dismissed Merck's Amended Complaint because the Purchase Agreement unambiguously assigns to Merck sole liability and responsibility for pre-closing product-liability claims. A190-207. Bayer addresses all of Merck's arguments in the context of that single question.

B. Scope Of Review

The interpretation of contractual language is subject to *de novo* review. *See Schock* v. *Nash*, 732 A.2d 217, 224 (Del. 1999). "To the extent the trial court's interpretation of [an agreement] rests on findings concerning extrinsic evidence, however, this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process." *Id*.

C. Merits Of The Argument

As the Court of Chancery correctly held, the Purchase Agreement is not ambiguous. Article II of that Agreement clearly assigns to Merck sole responsibility for consumers' product-liability claims, depending only on whether the claims relate to Merck's conduct before the closing. Article X of the Agreement does something quite different: it creates liability between Merck and Bayer for losses either party

might suffer, including Bayer's losses relating to Merck's pre-closing product claims. It also imposes time limits on some of those liabilities between the parties. Merck's contrary interpretation of Article X is inconsistent with the text and structure of the Purchase Agreement and would produce unreasonable and even absurd results. Because the contract is clear, Merck cannot rely on extrinsic evidence, but even that evidence is unhelpful to Merck. The Court of Chancery's judgment should be affirmed.

1. The Court Of Chancery Correctly Held That Merck Has Sole Responsibility For Pre-Closing Product-Liability Claims.

For many years, Merck designed, manufactured, marketed, and sold several of the consumer-healthcare products acquired by Bayer. Product-liability claims are common in the consumer-healthcare industry, and in the Purchase Agreement, Merck and Bayer acknowledged that consumers might attempt to bring product-liability claims relating to the lengthy period before the closing when Merck (or its wholly acquired predecessor) had made and sold the products. Such claims can have a "long tail," meaning that a consumer's exposure to a harmful product might not manifest in an alleged injury or disease for years or even decades.

The parties dealt with that risk in Section 2.7 of the Purchase Agreement, which says that Merck "shall, without any further responsibility or liability of, or recourse to, [Bayer] … absolutely and irrevocably assume" sole responsibility for any pre-closing product claim. A45; *see* A137. That obligation is not time-limited,

is not confined to pre-closing product claims in litigation as of a certain date, and does not transfer to Bayer at any time after the closing. By contrast, Sections 10.1 and 10.2 address a different issue: losses Bayer might still suffer relating to the pre-closing product claims. Those provisions state that Merck's liability to reimburse Bayer for those losses existed only for seven years after the deal closed.

a. Section 2.7 makes Merck forever responsible for any pre-closing product-liability claim brought by consumers.

"When [a] contract is clear and unambiguous," this Court "will give effect to the plain-meaning of the contract's terms and provisions." *Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159-1160 (Del. 2010). Here, it would be hard for Section 2.7 to be clearer. Titled "Retained Liabilities," Section 2.7 provides that Merck "shall, without any further responsibility or liability of, or recourse to, [Bayer] … absolutely and irrevocably assume and be solely liable and responsible for … the obligations and liabilities set forth in Section 2.7(d) of the Seller Disclosure Schedule." A45. Section 2.7(d) of the Seller Disclosure Schedule, in turn, defines Merck's Retained Liabilities to include "[a]ny product liability or similar claim" concerning "any products at any time manufactured, marketed or sold by" Merck "to the extent arising out of or relating to periods prior to the Closing." A137. That language leaves no room for doubt about the contract's meaning.

First, Section 2.7 states that Merck's retention of liability and responsibility for pre-closing product-liability claims is "absolute[]" and "irrevocabl[e]." A45.

Those words cannot reasonably be interpreted to suggest that Merck's retention of liability was somehow qualified or time-limited. "Absolute" means "not limited by restrictions or exceptions," American Heritage Dictionary 6 (5th ed. 2011), or "[f]ree from restriction, qualification, or condition," Black's Law Dictionary 5 (9th ed. 2009). "Irrevocable" similarly means "[u]nalterable; committed beyond recall." *Id*. at 699. Those words mean that Merck could not shift its pre-closing liability to Bayer under any circumstance. And the parties' use of those words makes it extremely implausible that, elsewhere in the Purchase Agreement, they provided that Merck's categorical and inalterable responsibility for any pre-closing product claim was somehow limited and would shift to Bayer after seven years.

Second, Section 2.7 states that Merck is "solely liable and responsible" for pre-closing product-liability claims "without any further responsibility or liability of, or recourse to, [Bayer]." A45. That language is clear that only Merck—and never Bayer—is responsible for any of the liabilities listed in Section 2.7 of Merck's Seller Disclosure Schedule, including any pre-closing product claim. A45, A136. The parties' use of that language makes it extremely implausible that, elsewhere in the Purchase Agreement, they provided that Merck and Bayer would share responsibility for such claims—*i.e.*, that Merck would be solely responsible only for seven years, after which Merck would have complete recourse to Bayer.

Third, the Seller Disclosure Schedule attached to the Purchase Agreement broadly defines the pre-closing product-liability claims that Merck would retain: "*Any* product liability or similar claim" concerning "*any* products at *any* time manufactured, marketed or sold by" Merck "to the extent arising out of or relating to periods prior to the Closing." A137 (emphasis added). Other than the requirement that a consumer product-liability claim relate to the time before the closing, that broad definition is not limited. For instance, Merck did not retain only claims in litigation as of a particular date; it expressly retained *any* pre-closing product claim. Read together with Section 2.7, the meaning of the Purchase Agreement is plain: Merck retained sole liability and responsibility for any pre-closing product claim, with no recourse ever to Bayer.

Fourth, the parties also logically specified in Section 2.6 that Bayer would *not* assume Merck's Retained Liabilities, which included all of the pre-closing product-liability claims. A44 (providing that Bayer "shall assume … all liabilities and obligations" related to the consumer care businesses "*other than the Retained Liabilities*") (emphasis added). And they even repeated that rule in Section 2.6(e), which is the contractual provision that addresses litigation. A44 (providing that Bayer would assume "any obligations or liabilities to the extent relating to the Consumer Care Business in connection with any Litigation, *other than Retained*

Liabilities") (emphasis added). In every possible way, the parties specified that Merck, not Bayer, would be solely responsible for any pre-closing product claim.

Reviewing those provisions, the Court of Chancery correctly held that the Purchase Agreement "allocate[s] liabilities in a clear and unambiguous manner." Op. 12. The trial court reasoned that Section 2.7's language is "broad and unambiguous" and "establishes Merck's obligation to retain liability for [pre-closing product-liability claims] indefinitely." Op. 12-13. As the trial court explained, Section 2.7's categorical language cannot reasonably be interpreted to confer on Merck only *time-limited* responsibility for pre-closing product claims or responsibility for only some *subset* of those claims, with responsibility transferring to Bayer at some point after the closing. Section 2.7 says exactly the opposite.

b. Sections 10.1 and 10.2 limit Merck's liability to reimburse Bayer for losses relating to pre-closing product-liability claims.

Merck focuses on Section 10.1 of the Purchase Agreement. As the Court of Chancery correctly recognized, however, Sections 2.7 and 10.1 "deal[] with two distinct forms of liability." Op. 12. Section 2.7(d) addresses "substantive liability to third-party consumers," whereas Section 10.1 addresses Bayer's losses "incidental to" those pre-closing product-liability claims, "even if Bayer is not liable to the third-party consumer that brought the suit." Op. 12. Based on that straightforward reading of the contract's terms, the trial court correctly held that

"Bayer's interpretation" of the Purchase Agreement is "the only reasonable one," and it therefore dismissed Merck's claims. Op. 14.

First, Section 10.2(b), titled "Indemnification By Seller," provides Bayer with the right to seek reimbursement from Merck for losses that Bayer might suffer "arising out of or relating to" pre-closing product-liability claims. A99. For instance, Bayer might incur costs in responding to third-party discovery requests or conducting product changes or recalls. In context, when Section 10.1 says that "liability and indemnification obligations with respect to" pre-closing product claims will not survive after seven years, it means Merck's obligations to Bayer *created under Article X—i.e.,* Merck's liability *to Bayer* for losses relating to pre-closing product claims. Section 10.1 does not extinguish or transfer to Bayer Merck's absolute and irrevocable responsibility for the pre-closing product claims themselves, which is a different issue addressed fully by Section 2.7(d).

Second, Section 10.1's limited role in the contract is reinforced by another clause in Section 2.7, which clarifies that none of Merck's obligations under Section 2.7 "shall affect [Bayer's] rights pursuant to Article X." A45. That text confirms that Article X provides *different and additional* rights to Bayer, unrelated to the allocation of responsibility for pre-closing product-liability claims spelled out in Section 2.7. And it confirms that Merck's responsibility *for third-party consumers' claims* under Section 2.7 is distinct from Merck's reimbursement

liability to Bayer under Article X. Section 10.1's expiration date for liability as between the parties has no effect on Merck's separate responsibility for pre-closing product-liability claims brought by consumers.

The Purchase Agreement is not unique in distinguishing between liability to third parties for certain claims and liability to reimburse the contractual counterparty for losses relating to those claims. Nor is Merck's attempt to collapse that distinction new. In *JFE Steel Corp.* v. *ICI Americas, Inc.*, 797 F. Supp. 2d 452 (D. Del. 2021), the contract was similar to this one. The buyer agreed to take on "Assumed Liabilities," the seller agreed to keep certain "Retained Liabilities," and the parties negotiated separate indemnification provisions for claims that might arise between them. *Id.* at 455-457. When the seller tried to shirk its "Retained Liabilities" by arguing that they were subject to the contract's time limit for indemnification claims, the Delaware district court rejected that argument and held the seller to its separate "agree[ment] to retain and satisfy the Retained Liabilities." *Id.* at 470.

The reverse happened in *Alexander & Baldwin, Inc.* v. *C&H Sugar Co.*, 2009 WL 10671790 (C.D. Cal. Aug. 3, 2009). There, it was the buyer who argued that its obligations for "Assumed Liabilities" had expired because of time limits in the agreement's indemnification provisions. *Id.* at *4. As in *JFE Steel*, the district court rejected that argument, explaining that the seller's "assumption of liability is separate and distinct from its promise to indemnify" the buyer. *Id.*

The reasoning of *JFE Steel* and *Alexander & Baldwin* applies equally here. When parties to a contract negotiate for two different sets of obligations under two different provisions to address two different types of liability, they should not be able to point to the expiration date for one to escape their responsibility for the other. Here, Section 10.1 "address[es] purely contractual rights between Merck and Bayer and has no bearing on the tort claims of third-party consumers who are not party to the [Purchase Agreement]." Op. 15.

2. The Court Of Chancery Correctly Rejected Merck's Contention That Section 10.1 Extinguished Its Obligations Under Section 2.7(d) After Seven Years.

As an initial matter, Merck's interpretation of the Purchase Agreement has been a moving target throughout this litigation. In its Amended Complaint, Merck interpreted the Purchase Agreement to mean that (i) all responsibility transferred to Bayer for *existing* and *future* litigation over pre-closing product claims on October 1, 2021 and (ii) Bayer also had to reimburse all of Merck's costs from the defense and settlement of such claims for the seven-year period between October 1, 2014 and October 1, 2021. A161, A165-166, A169. Responding to Bayer's motion to dismiss, Merck changed course and said that it would remain responsible for *existing* litigations, but that Bayer still had to assume *future* litigation and reimburse all of Merck's litigation and settlement costs for past and existing cases. A269-271, A288-289, A367-369. On appeal, Merck abandons its

reimbursement claim entirely and seeks to shift responsibility to Bayer only for product-liability litigations filed after October 1, 2021. OB 35-36, 48.

Merck's position can be so malleable only because it is not tied to the text of the Purchase Agreement. Op. 18 ("The 'circuitous and tortured' implied time limit that Merck urges contradicts the [Purchase Agreement's] plain meaning and must be rejected.") (citation omitted). Merck's interpretation of the Agreement also leads to unreasonable results, and rests on legally irrelevant extrinsic evidence that actually contradicts Merck's position in any event. For all of those reasons, the Court of Chancery correctly rejected Merck's interpretation and held that Merck retained sole responsibility for any pre-closing product-liability claim.

a. Merck's interpretation of Section 10.1 is inconsistent with the text of the Purchase Agreement.

As explained earlier, Section 10.2 requires Merck "to indemnify, defend and hold harmless" Bayer for "all Losses . . . arising out of or relating to" Merck's Retained Liabilities, including pre-closing product-liability claims. A99-100. Section 10.1 provides that "[a]ll liability and indemnification obligations with respect to" pre-closing product claims survive only for seven years from the closing. A98-99. Merck primarily argues that its interpretation of Section 10.1 is necessary to give independent meaning to the word "liability." OB 21-23, 31. In Merck's view, "liability" must refer to its obligations for pre-closing product claims under

Section 2.7 because "indemnification" already covers its reimbursement obligation to Bayer under Section 10.2(b). That argument is wrong for several reasons.

i. *Text of Section 10.1*. The phrase "[a]ll liability and indemnification obligations" refers broadly to any obligation by Merck to reimburse Bayer for losses relating to pre-closing product-liability claims, whatever the legal basis. To be sure, the most obvious basis is the contractual indemnification provision in Section 10.2. But Delaware, like other States, also recognizes a distinct type of indemnity based on the common law rather than contract. Op. 16 n.34; *Certainteed Corp.* v. *Celotex Corp.*, 2005 WL 217032, at *3, *5 (Del. Ch. Jan. 24, 2005); *see also Hawthorne* v. *S. Bronx Cmty. Corp.*, 78 N.Y.2d 433, 437 (N.Y. 1991) ("[T]he existence of the contract of indemnity did not foreclose the possibility of a common-law right to indemnity; both may exist independent of the other.").

If Section 10.1 referred only to "indemnification obligations," a party or court could read that language to mean only those obligations spelled out in Section 10.2 of the Purchase Agreement itself. These sophisticated parties sought to avoid any uncertainty. By expanding the phrase to cover "[a]ll liability," the parties ensured that a claim for common-law indemnity—which would otherwise have a limitation period measured from the date of the loss, not the date of the closing, *Certainteed Corp.*, 2005 WL 217032, at *5—also would expire seven years after the closing. Moreover, the breadth of the phrase "all liability and indemnification obligations"

encompasses any reimbursement claim based on some other law or doctrine. The broad language of Section 10.1 ensures that the parties cannot evade the agreed-to time limit by styling a reimbursement claim as based on something other than Section 10.2.

Indeed, Merck accepts precisely that reading for the *same* phrase in the *same* contractual provision. The preceding sentence of Section 10.1 acknowledges that the parties have made representations and warranties in the Purchase Agreement, and it states that "*all liability and indemnification obligations* with respect to such representations and warranties" also will expire after certain times. A98-99 (emphasis added). Merck has never disputed that the identical phrase there refers to liabilities and obligations *between the parties* related to representations and warranties, as set forth in Section 10.2. As the Court of Chancery explained, "Merck's position would impose materially different meanings on the first and second appearances of the phrase despite their being used in near-immediate succession in Section 10." Op. 16 n.36.

ii. *Surrounding context of Article X*. There are a number of other strong textual clues that support the Court of Chancery's reading. First, Merck ignores the critical context in which the word "liability" appears. The heading of Section 10.1 is "Indemnification Obligations," indicating that it deals with reimbursement obligations between the parties. As is standard practice, the parties provided in the

Purchase Agreement that headings would not be dispositive or strictly limiting, A38 (Section 1.2(e)), but Section 10.1's heading is still relevant contextual evidence of that provision's meaning. *See, e.g.*, *Cantor Fitzgerald, L.P.* v. *Cantor*, 724 A.2d 571, 581 n.35 (Del. Ch. 1998) (explaining that headings "may be considered as additional evidence tending to support the substantive provisions" of a contract); *Capella Holdings, LLC* v. *Anderson*, 2017 WL 5900077, at *6 n.44 (Del. Ch. Nov. 29, 2017) (same). Here, the header strongly suggests that Section 10.1 concerns the parties' obligations to each other, not Merck's responsibility for pre-closing product-liability claims brought by third-party consumers.

Second, Sections 10.2(a) and (b)—which are titled "Indemnification By Buyer" and "Indemnification By Seller"—immediately follow Section 10.1. Those provisions deal with liabilities between the parties, including Merck's liability to reimburse Bayer for losses related to pre-closing product-liability claims. Given the neighboring provisions, it is logical to read Article X as a whole: Section 10.1 sets a time limit on the liabilities and obligations under Section 10.2. It does not reallocate product liabilities addressed over fifty pages earlier in Article II.

Third, Section 10.1 says that liability and indemnification obligations with respect to pre-closing product-liability claims "*shall survive until*" October 1, 2021. A98 (emphasis added). "[S]hall survive" makes sense when referring to the liabilities between the parties, which they have the legal power to extinguish. But

"shall survive" is a poor fit for responsibility for product-liability claims brought by third-party consumers, which the parties can allocate as between each other but obviously cannot contract away.

iii. *Other provisions of the Purchase Agreement*. As explained above, the term "liability" has an independent role to play in Section 10.1. But even assuming that were wrong, the most natural way to read the phrase "liability and indemnification obligations" would be as a belt-and-suspenders way to refer to the liabilities between the parties under Section 10.2—not an oblique way to recut the deal in Sections 2.6 and 2.7. "[A] court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage," and the canon against surplusage must be applied "with careful regard to context." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 176–177 (2012); *id.* (giving examples of the "common belt-and-suspenders approach" to drafting); *see SeaWorld Entm't, Inc.* v. *Andrews*, 2023 WL 3563047, at *8 (Del. Ch. May 19, 2023) ("Delaware courts have recognized that contract parties occasionally use redundancy as a 'belt-and-suspenders' device to ensure their intent is fully understood. In that setting, a redundant term is 'not superfluous to the extent it provides [the parties] with additional comfort.' ") (citations omitted).

Some redundancy would be the more reasonable reading here because Merck's interpretation of Section 10.1 makes a hash of Section 2.7. Before the Court

of Chancery, Merck candidly acknowledged the conflict that its interpretation creates between Sections 2.7 and 10.1. It argued, however, that Section 10.1 should control as the supposedly more "specific" provision. A254, A271-272. On appeal, in an effort to avoid placing contractual provisions at odds with one another, Merck claims that its interpretation of Section 10.1 is in perfect "harmon[y]" with Section 2.7. OB 35. According to Merck, when Section 2.7 says that Merck shall "absolutely and irrevocably assume" responsibility for pre-closing product-liability claims, it does not mean that Merck permanently retains responsibility for those claims. Rather, according to Merck, those words simply mean that Merck could not *unilaterally* reject its responsibility for those claims for a period of seven years. OB 35.

That is nonsense. The parties did not need to say that Merck's responsibility was absolute and irrevocable to keep Merck from unilaterally rejecting it. Even without that language, Merck could not freely reject its contractual obligation to be liable for pre-closing product claims. Section 2.7's categorical language—Merck "absolutely and irrevocably" agrees to "be solely liable and responsible for" pre-closing product claims, "without any further … recourse to [Bayer]"—makes clear that Merck retains responsibility for any pre-closing product-liability claim no matter what, and those claims would never become Bayer's problem. This lawsuit

brought by Merck is all the proof one needs of why the Purchase Agreement includes such a provision.

Finally, there is no ignoring that "[h]ad the parties intended to impose the time limits set forth in Section 10.1 on" Merck's responsibility for pre-closing product-liability claims, "then one would expect explicit language to that effect." Op. 18. There are many simple ways the parties could have written the Purchase Agreement to shift Merck's liability for pre-closing product claims to Bayer after a certain amount of time. Most obviously, the parties could have said in Sections 2.6 and 2.7 that Merck's responsibility for pre-closing product claims was time-limited and that, after seven years, those claims would become Assumed Liabilities. They also could have said that Merck's responsibility for pre-closing product claims was limited to a subset of claims in litigation as of a particular date.

Indeed, it would have been perfectly natural for the parties to say in Section 2.7 that Merck's obligations under that provision were subject to the seven-year time limit in Article X—because Section 2.7 *already* refers to Article X. *See supra*, pp. 23-24. Specifically, Section 2.7 says that it does not affect Bayer's rights under Article X. A45. Given that the parties already considered and addressed the relationship between Section 2.7 and Article X, it would be exceptionally odd for them to have omitted such a crucial point: that Article X gives Merck the hugely significant right to walk away from pre-closing liability after seven years.

See Fortis Advisors LLC v. *Medicines Co. & Melinta Therapuetics, Inc.*, 2019 WL 7290945, at *4 & n.33 (Del. Ch. Dec. 18, 2019) (holding that the "express inclusion" of one category created "negative implication[s]" for other categories). This is not how sophisticated parties write contracts. Or as the Court of Chancery put it, Merck's interpretation of Section 10.1 is "implausibly circuitous and tortured." Op. 16. Considering the Purchase Agreement "as a whole, there is no circumstance in which it is reasonable to read Section 10.1's reference to 'liability' in Merck's favor." Op. 16.

b. Merck's interpretation produces commercially unreasonable and even absurd results.

"When interpreting a contract, the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co.* v. *American Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). In so doing, this Court places "paramount importance o[n] determining what a reasonable person in the position of the parties would have thought the language of [the] contract means." *Id.* "[I]nterpretations that are commercially unreasonable or that produce absurd results must be rejected." *Manti Holdings, LLC* v. *Authentix Acq. Co.*, 261 A.3d 1199, 1211 (Del. 2021). Merck's interpretation of Section 10.1 produces unreasonable and even absurd results in two ways.

i. *The absence of a legal instrument to transfer the claims*. There is no legal instrument through which Bayer could have assumed pre-closing product-liability claims seven years after the closing. Merck argues that all of its

pre-closing product claims "directly or indirectly" transferred to Bayer by operation of law on October 1, 2021. OB 15; *see* OB 41-42. But that is contrary to how the Purchase Agreement worked. The Purchase Agreement was a commitment by the parties to engage in the sale; it did not itself cause Bayer to assume any liabilities. Rather, the parties executed a separate Assumption Agreement at the closing. A98. The Purchase Agreement does not contemplate—and the parties have never executed—some additional assumption agreement to transfer pre-closing product claims to Bayer at any time after the closing. In September 2021, Merck proposed a new "Claim Transition" agreement, but Bayer rejected what was an obvious effort by Merck to paper over the problem with its interpretation of Section 10.1.

Merck now says that its "Claim Transition" agreement was unnecessary. In Merck's view, its liability for pre-closing product claims *implicitly* transferred to Bayer "as a matter of law" on October 1, 2021 because Bayer acquired stock in the Purchase Agreement. OB 41. That argument is both forfeited and wrong. It is forfeited because Merck did not say a word about an implied legal transfer in its briefing to the Court of Chancery. Merck briefly referenced the argument only obliquely during oral argument, A393-394, which is not sufficient to preserve a theory that is now a critical part of its appeal. *See* Supr. Ct. R. 8; *CBA Collection Servs., Ltd.* v. *Potter, Crosse & Leonard, P.A.*, 687 A.2d 194, at *2 (Del. 1996) (TABLE).

In any event, Merck's new theory is wrong. The agreement was not merely a stock purchase agreement; it was a Stock *and Asset* Purchase Agreement. Section 2.2 makes clear that the acquisition of stock is "[s]ubject to the terms and conditions set forth in this Agreement." A38. And the subsequent provisions in Article II show that the parties did not rely on default stock-purchase law. Sections 2.3 through 2.7 provide the more limited scope of assets, rights, and liabilities that Bayer would acquire and that Merck would retain—notwithstanding the stock purchase under Section 2.2. A38-45. These well-capitalized parties explicitly defined Bayer's Assumed Liabilities and Merck's Retained Liabilities, and then executed a separate Assumption Agreement to transfer only the Assumed Liabilities to Bayer.

Merck identifies nothing in the Purchase Agreement suggesting that the parties intended to rely on default law for an additional and implicit transfer of more liabilities to Bayer after the closing. In fact, the Purchase Agreement expressly rules it out. Section 12.13 states that the only "obligations of the parties under this Agreement are as *specifically* set forth in this Agreement, and *no other duties or obligations shall be implied in fact, Law or equity*, or under any principle of fiduciary obligation." A108 (emphasis added). The Assumption Agreement similarly states that Bayer would assume Merck's liabilities only as "*expressly* set forth in" the transaction documents executed as of the closing. A213 (emphasis added). Merck never attempts to square its implicit transfer theory with Section 12.13.

The absence of a relevant assumption agreement is no minor or technical defect. As an exhibit to the Purchase Agreement, the parties included a "Form of Assumption Agreement" to be executed at the closing. A135, A213-218. The absence of any additional instrument to effect a post-closing assumption by Bayer of pre-closing product-liability claims means that there is no legal mechanism to make that happen, which is obviously a strong indication that the parties never intended it. Similarly, the absence of any terms that address *how* an entire suite of litigation would transition to Bayer further shows that the parties never contemplated any such shift. In Merck's telling, the parties negotiated a 90-page Purchase Agreement with dozens of appendices, but nowhere specified how Merck would hand off a complex line of product-liability cases seven years after the closing.

Likewise, if the parties had intended for claims to move from Merck to Bayer, one would expect the Purchase Agreement to provide Merck with at least some indemnification rights relating to those claims, *e.g.*, a right to be reimbursed for incidental costs for some period after October 1, 2021 (whether a corresponding seven years or some other time period). But only *Bayer* was provided any right to seek reimbursement relating to pre-closing product claims. A99-100. All of this points toward only one reasonable conclusion: the parties did not contemplate or agree that Merck's pre-closing product-liability claims would transition to Bayer seven years after the closing or at any other time.

ii. *The post-closing transfer of current and future cases based on Merck's conduct and litigation strategy*. Merck's interpretation leads to unreasonable results for a second reason. According to Merck, it had sole responsibility for pre-closing product-liability claims for seven years after the closing—making all strategic and other decisions about how to litigate or settle those claims, without substantive input from Bayer. But on October 1, 2021, Merck could foist those decisions onto Bayer, which would take an entire set of product-liability cases—all of which concern Merck's pre-closing business—and be forced to defend the claims saddled with Merck's post-closing litigation choices. No reasonable party would agree to such a scheme.

Merck tries to sidestep that problem on appeal. It argues—contrary to its Amended Complaint, *see supra*, pp. 25-26—that any litigation *already* tendered to Merck as of October 1, 2021 will remain Merck's sole responsibility. OB 45. But Merck's Retained Liabilities are not limited to litigations filed as of a certain date. Merck's Seller Disclosure Schedule broadly defines pre-closing product claims as "[a]ny product liability or similar claim" concerning "any products at any time manufactured, marketed or sold by" Merck "arising out of or relating to periods prior to the Closing." A137. That language is not limited to any subset of pre-closing product claims in litigation as of a fixed date. Merck has presumably devised this

limitation because it is obvious that no reasonable party would agree to step into a counterparty's litigation midstream.

In any event, Merck's new position on appeal does not resolve the unreasonableness problem. Even if Merck retained responsibility for litigations that were active as of October 1, 2021, Merck still set the litigation strategy for all of the talc-related product-liability cases over a period of many years. Those decisions have a profound impact on all talc-related cases concerning Merck's pre-closing business, regardless of whether the case was filed before or after October 1, 2021. No reasonable party would surrender control of a body of litigation for seven years if future litigations in the same line would eventually be dumped on its plate.

iii. *Merck's counterarguments*. Merck offers a grab-bag of arguments for why its interpretation of Section 10.1 is not as unreasonable as it seems. First, Merck says that "[n]othing in the record suggests that, at the time of the 2014 transaction, Merck and Bayer expected substantial product liability relating to" the consumer-healthcare businesses. OB 43. That misses the point. Doubtless the parties did not specifically foresee an avalanche of asbestos-related talc claims for foot products. But they plainly foresaw that there could be third-party claims relating to products that Merck made or sold before the closing. The parties contemplated that risk, addressed it in the Purchase Agreement, and assigned the risk to Merck. A44-45.

Second, Merck argues that the "ordinary" or "usual" rule is that the buyer in a stock transaction assumes all liabilities of the seller. OB 21, 27, 44. That too is irrelevant and wrong for the reasons explained above. *See supra*, pp. 34-35. The parties here did not rely on default stock-purchase law. Instead, in a detailed Purchase Agreement, they defined the Assumed Liabilities and Retained Liabilities to specify exactly which liabilities would transfer to Bayer and which would stay with Merck.

Third, Merck contends that the Court of Chancery improperly rejected Merck's interpretation because it was not what the trial court "'would expect' to have seen in the agreement." OB 39 (quoting Op. 28). That is not a fair characterization of the trial court's decision. In rejecting Merck's "tortured and circuitous interpretation" of the Purchase Agreement, the trial court applied hornbook contract law: it looked to the "plain text," read the contract "as a whole," and considered whether the "commercial context" "reinforce[d] [the] conclusion" compelled by the contract's plain language. Op. 14, 16, 18, 26. Merck's cherry-picked quotation does not undermine the rigor of the Court of Chancery's analysis.

Fourth, Merck argues that there is no problem saddling Bayer with pre-closing product-liability claims because the Purchase Agreement's indemnification provisions include deductibles—and thus Bayer would not be reimbursed for *all* of

its losses relating to pre-closing product claims. OB 45 (citing A100). That is a non sequitur. Section 10.2(b) makes Merck an insurer for certain losses Bayer might suffer, subject to customary deductibles—*i.e.*, an individual claim deductible of $250,000 and an aggregate deductible of $25 million. A100. Those deductibles under Section 10.2 have nothing to do with the question of which company would have liability and responsibility for pre-closing product claims brought by third-party consumers. Again, that is addressed in Sections 2.6 and 2.7. And notably, Merck has expressly abandoned on appeal its reimbursement claim, OB 48, which was based on the notion that Section 10.2's deductibles are relevant to Section 2.7.

c. Merck's extrinsic evidence is legally irrelevant and in any event unhelpful to Merck.

Merck retreats to extrinsic evidence, OB 46-47, but "extrinsic evidence may not be used … to vary the terms of the contract or to create an ambiguity." Op. 25 (quoting *Eagle Indus., Inc.* v. *DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)); *see Glanden* v. *Quirk*, 128 A.3d 994, 1000 (Del. 2015); *O'Brien* v. *Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) ("We have held unequivocally that [e]xtrinsic evidence is not to be used to interpret contract language where that language is plain and clear on its face.") (citations and quotation marks omitted). Here, the Court of Chancery correctly determined that "the relevant provisions of the" Purchase Agreement are "[un]ambiguous," so there is no role for extrinsic evidence to play. Op. 24-25.

The Court of Chancery was also correct that, even considering Merck's extrinsic evidence, none of it is legally relevant, let alone helpful to Merck. Op. 25-26. First, even assuming a contractual ambiguity, extrinsic evidence is relevant only if it sheds light on the "parties' intent *at the time they entered into the contract*." *Eagle Indus.*, 702 A.2d at 1233 n.11 (emphasis in original). Such evidence may arise from statements or acts at the time of contracting, or "business context, prior dealings between the parties, [and] business custom and usage in the industry." *Salamone* v. *Gorman*, 106 A.3d 354, 374 (Del. 2014) (citation omitted). As the Court of Chancery correctly observed, Merck did not allege that kind of evidence. Op. 25-26. The Amended Complaint does not even mention the parties' negotiations or the drafting history in 2014, nor does Merck rely on evidence related to the parties' course of dealing for the first six years after the closing of the transaction, or any kind of trade usage or industry custom.

Merck instead relies on a Bayer lawyer's statements when this dispute started in 2021, and argues that the lawyer did not "disagree" with Merck's interpretation of the Purchase Agreement. OB 46. Merck asserts that these statements are "course-of-conduct evidence," OB 47, but that is wrong both legally and factually. With respect to the law, course-of-conduct evidence is potentially relevant when it shows *repeated performance under a contract*—without objection from the counterparty and before the dispute arose—which tends to show how the parties themselves

understood the contract. *See Glob. Energy Fin. LLC* v. *Peabody Energy Corp.*, 2010 WL 4056164, at *28-29 (Del. Super. Ct. Oct. 14, 2010) (citing *Artesian Water Co.* v. *Dep't of Highways & Transp.*, 330 A.2d 441, 443 (Del.1974)); Restatement (2d) of Contracts § 202 ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement."). A Bayer lawyer's 2021 statements when this dispute started obviously do not fit that mold.

With respect to the facts, Merck badly mischaracterizes them. What Merck's own allegations show is that Bayer's lawyer *did not agree* with Merck's interpretation of the Purchase Agreement. Rather, she acknowledged it and asked Merck to provide more information. A159-160. Then, after Merck sent its proposed "Claim Transition" agreement to Bayer in September 2021, Bayer's M&A counsel immediately rejected it. A161-162. The actual facts pleaded by Merck do not remotely show that Bayer agreed with Merck's interpretation.

Second, even if this Court considers extrinsic evidence, Merck's allegations "reinforce[] the deficiency of its position" by showing the parties' understanding that Merck is absolutely liable for pre-closing product-liability claims. Op. 25; *see Malpiede* v. *Townson*, 780 A.2d 1075, 1083 (Del. 2001) ("[A] claim may be

dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law."). The Amended Complaint acknowledges that (i) Merck spent six years defending against pre-closing product claims pursuant to Section 2.7 (not Article X); (ii) during that time, Merck litigated all pre-closing product claims without *once* mentioning a future transfer to Bayer; (iii) Merck made all strategic decisions about how to litigate those claims, including settlements, without seeking input from Bayer for more than six years; and (iv) when Bayer's M&A counsel learned what Merck was trying to do in September 2021, Bayer immediately rejected Merck's position. A157-158, A161-162. Indeed, Merck had to draft a new "Claim Transition" agreement in September 2021 precisely to achieve what the parties had *not* agreed to in the 2014 Purchase Agreement—*i.e.*, a transition of pre-closing product claims from Merck to Bayer. None of this suggests that, notwithstanding the unambiguous terms of the Purchase Agreement, Bayer agreed to assume pre-closing product claims after seven years. To the contrary, these allegations point squarely in the opposite direction, as the Court of Chancery found. Op. 25-26.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 17, 2023, true and correct copies of the foregoing *Appellee's Answering Brief* were caused to be served by File & Serve*Xpress* on the following counsel of record:

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