EFiled: Aug 01 2023 02:05PM EDT
Filing ID 70534934
Case Number 150,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MERCK & CO., INC., Plaintiff Below, Appellant, v. BAYER AG, Defendant Below, Appellee.	No. 150, 2023 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0838-NAC

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INTRODUCTION

"To determine what contractual parties intended, Delaware courts" focus on the agreement's "text." *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019). The text of the Stock and Asset Purchase Agreement between Merck and Bayer could hardly be clearer. Section 10.1's Sunset Provision provides that "all" of Merck's "liability and indemnification obligations with respect to the Section 2.7(d) Liabilities" would "survive" for only seven years after the transaction's closing date. A99 (§ 10.1). Under those words' plain meaning, the Sunset Provision governs ***all***—the whole amount, quantity, and extent—of the ***liability and indemnification*** obligations Merck owed Bayer under Section 2.7(d). Bayer never disputes that. Nor does it offer a competing plain-meaning interpretation. That should end the matter. "When the contract is clear and unambiguous," this Court "give[s] effect to [its] plain-meaning." *Sunline*, 206 A.3d at 846.

Bayer would turn contract interpretation on its head. Bayer repeatedly asks the Court to start with its premises—unsupported by citation, much less by anything in the complaint—about what the parties supposedly intended. Bayer insists the parties intended "a 'my watch, your watch' approach," under which Merck would be responsible in perpetuity for product-liability claims relating to pre-closing conduct of the businesses Bayer acquired. Bayer.Br.1. It then asks the Court to read the provisions of the SAPA to effectuate "that understanding." *Id.* But "the court

should look only to the words of the contract to determine its meaning and the parties' intent." *Freeman Fam. LLC v. Park Ave. Landing LLC*, 2019 WL 1966808, *4 (Del. Ch. Apr. 30, 2019). The ***text*** of the parties' agreement precludes Bayer's "understanding." The words on the page set forth a deal in which the parties ***share*** risk for the Section 2.7(d) Liabilities, with Merck assuming liability for claims filed during the first seven years—a period longer than the limitations period for most run-of-the-mill products claims—and the consumer-care businesses Bayer bought assuming liability for later-filed claims.

Bayer would read Section 2.7's declaration that Merck shall "absolutely and irrevocably assume and be solely liable for" Section 2.7(d) Liabilities as meaning Merck agreed "to retain sole responsibility for ***any*** pre-closing product liability claim" in perpetuity. Bayer.Br.1. But neither "absolutely" nor "irrevocably" mean "perpetually." Nor could they, as Section 10.1 expressly limits that obligation's duration: Under Section 10.1, Merck's responsibility for ***new*** claims under Section 2.7(d) ceased on the Sunset Date.

Bayer assails adherence to plain text because it supposedly yields "implausible" and "commercially unreasonable" results. Bayer fails to show that "no reasonable person would have accepted" that deal—which postponed transfer of Section 2.7(d) Liabilities compared to the default rule—"when entering the contract." *ITG Brands, LLC v. Reynolds Am., Inc.*, 2022 WL 4678868, at *18 (Del. Ch. Sept. 30,

2022). Bayer's arguments regarding "commercial unreasonableness" are hindsight speculation about what the parties might have done had they anticipated a wave of talc cases that might extend past the Sunset Date. But Bayer concedes that the parties did not negotiate the SAPA in the shadow of talc litigation, which emerged years after the closing—or anything other than routine products cases, which ordinarily would be asserted or barred before the Sunset Date.

The Court of Chancery erred in dismissing Merck's complaint. The SAPA unambiguously provides that "all" of Merck's substantive "liability" for the Section 2.7(d) Liabilities—including liability for the talc-based products claims at issue here—sunset after seven years. That is the only interpretation that comports with the plain language of the contract—"***all*** means ***all***." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1234 (Del. 2018). At the very least, Bayer has not met its burden of proving that ***its*** "interpretation is the ***only*** reasonable construction." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003). Reversal is warranted.

ARGUMENT

I. UNDER THE SAPA, MERCK'S SECTION 2.7(d) LIABILITIES SUNSET AFTER SEVEN YEARS

A. Section 10.1's Text and Canons of Construction Alike Confirm That "All" of Merck's "Liability" Regarding the Section 2.7(d) Liabilities Terminated on the Sunset Date

Section 10.1 of the SAPA states: "***All liability and*** indemnification obligations" Merck assumed "with respect to the Section 2.7(d) Liabilities shall survive until . . . the seventh (7th) anniversary of the Closing Date." A99 (§ 10.1) (emphasis added). The meaning of those words is clear: The Sunset Provision governs "all"—the whole amount, quantity, and extent—of Merck's legal obligation to Bayer for liabilities allocated to Merck in Section 2.7(d). *See* Merck.Br.19-21 (citing cases and dictionaries). It covers all "liability" and "indemnification" obligations—all ways in which Merck is legally accountable. *Id.* And it terminates all those obligations after seven years. *Id.* Bayer cannot seriously dispute that the words of Section 10.1 plainly and unambiguously mean precisely that. That is not merely ***a*** reasonable interpretation of the Sunset Provision's text. It is the ***only*** reasonable interpretation.

1. Fundamental canons of construction confirm what the text itself makes clear. The Court of Chancery's interpretation of "all liability and indemnification obligations" to mean ***only*** "contractual indemnification," Op.18-19, or indemnification for "costs incidental to litigation," Op.12, reads the first two words of the

sentence—"all" and "liability"—out of the contract, *see* Merck.Br.22-23, 30-34. "All" means "all," not "some" or a "subset." "[L]iability and indemnification" obligations encompasses both "liability" ***and*** "indemnification" obligations, not just indemnification.

Embracing superfluity, Bayer argues that the "most natural way to read the phrase 'liability and indemnification obligations' would be as a belt-and-suspenders way to refer to" the parties' indemnification obligations "under Section 10.2." Bayer.Br.30. Even apart from Bayer's (telling) omission of the word "all," the argument fails. Courts tolerate "redundancy" in contractual clauses, assuming the parties adopted "a belt-and-suspenders approach," when the parties use "virtually synonymous" words to make their point ***clearer***. *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *12 n.98 (Del. Super. Ct. Sept. 10, 2021). "Liability" and "indemnification" are not "virtually synonymous." "Liability" sweeps in all forms of "legal responsibility." *Liability*, Black's Law Dictionary (11th ed. 2019). If the parties had, as Bayer argues, intended to clarify that the Sunset Provision was ***limited*** to Merck's "indemnification" obligations, they would not have started with the deliberately ***broad*** phrase "all liability."

2. Bayer notes that "'[a] court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage.'" Bayer.Br.30 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 176-77 (2012)). But ordi-

nary meaning and the avoidance of surplusage both point the same way here: "All liability" means what it says—"all liability." And giving those words their ordinary meaning avoids writing them out of the contract.

3. Consistent with ordinary meaning, moreover, the SAPA repeatedly uses the term "liability" to encompass all forms of "liability," not just indemnification. Merck.Br.24-27. And it uses "liability" to contractually allocate liability to third parties. Merck.Br.26-27. Bayer would redefine "all liability" in Section 10.1 to give it a narrower meaning—to exclude any allocation of obligations to third parties—when the word "liability" alone encompasses such obligations throughout the contract. Bayer.Br.24. That effort defies the canon of consistent usage. Merck.Br.24-27. Bayer's half-hearted attempts to distinguish ***one*** use of the term "liability" are not persuasive, *see* p.11, *infra*, and ignore the SAPA's expansive use of "liability" to allocate the parties' obligations to third parties in other provisions.

Bayer's construction also ignores the fact that Section 10.1 treats Section 2.7(d) Liabilities differently from other Retained Liabilities, and provides only two exceptions from the Sunset Provision. Merck.Br.10-11. Bayer seeks to create a further, unstated exception to exclude "substantive" liability from the expansive phrase "all liability." Merck.Br.23-24.

B. Bayer's Efforts To Limit "All Liability" to "Claims for Reimbursement" or "Common-Law Indemnity" Fail

In the Court of Chancery, Bayer urged that "all liability" in Section 10.1 refers only to certain contractual indemnification expenses—specifically, "costs incidental to litigation." Op.12. Recognizing that those costs are already encompassed by "indemnification," rendering the words "all liability" superfluous, Bayer now offers another theory: "[A]ll liability," it urges, was meant to encompass any "reimbursement claim" or "claim for common-law indemnity." Bayer.Br.27-28. That, however, still defies the ordinary meaning of "all liability." It imposes the very superfluity it seeks to avoid. And it conflicts with other SAPA provisions.

1. *The SAPA Forecloses Bayer's Theory That "All Liability" Is Meant To Address Non-Contractual "Claims for Reimbursement"*

Bayer theorizes that the parties included "all liability" in the phrase "all liability and indemnification obligations" to clarify that Section 10.1's Sunset Provision extends to "common-law indemnity," and not just indemnification "obligations spelled out in Section 10.2 of the Purchase Agreement itself." Bayer.Br.27. The phrase "all liability," Bayer claims, ensures the sunset extends to "any reimbursement claim based on some other law or doctrine." Bayer.Br.27-28.

That construction does not merely contradict the ordinary, expansive meaning of "liability," and the SAPA's use of that term to mean "liability"—not just "reimbursement" or "indemnification"—throughout. *See* pp. 4-6, *supra*; Merck.Br.19-21.

It also defies the SAPA's exclusive remedies provision. In Section 10.2(f), the parties agreed that "the indemnification provisions of this Article X shall be the sole and exclusive remedy of the Indemnitees, whether in contract, tort or otherwise, for all matters arising under or in connection with" the SAPA. A103 (§ 10.2(f)). Section 10.1's expansive phrase "all liability" could not reflect the need to ***sunset*** "reimbursement claims based on some other law," because Section 10.2(f) ***forecloses*** them entirely.

By its terms, moreover, Section 10.1 sunsets "[a]ll . . . indemnification obligations." A99 (§ 10.1). Because "***all*** means ***all***," *Eagle Force Holdings*, 187 A.3d at 1234, the phrase "[a]ll . . . indemnification obligations" already encompasses any "common-law indemnification claims," without need for the word "liability." "All . . . indemnification obligations" also encompasses any other theoretical claims for "reimbursement." "Reimbursement" is defined as "[i]ndemnification," *Reimbursement*, Black's Law Dictionary, *supra*, and "indemnify" is defined as "[t]o reimburse," *Indemnify*, Black's Law Dictionary, *supra*. Bayer's theory renders the phrase "liability" doubly superfluous.

If the "sophisticated parties" to the SAPA had been concerned that "all . . . indemnification obligations" did not clearly cover common-law indemnification, Bayer.Br.27, they could have specified "all indemnification obligations, whether contractual or common-law," or "all indemnification obligations, under this agree-

ment or otherwise." By using the broad word "liability" instead, the parties meant what they said—that "all liability" and all "indemnification" obligations Merck had with respect to Section 2.7(d) Liabilities expire after seven years.

Bayer's insistence that "the phrase 'all liability and indemnification obligations' encompasses any reimbursement claim based on some other law or doctrine," Bayer.Br.27-28, is correct. But it is also self-defeating. That same "broad language," Bayer.Br.28, ***also*** encompasses substantive liability for the Section 2.7(d) Liabilities, *see* Merck.Br.19-21.

2. *Bayer's "Textual Clues" Cannot Justify Rewriting Section 10.1's Clear Text*

Bayer invokes "a number" of "textual clues," Bayer.Br.28, as suggesting the parties intended "all liability and indemnification obligations with respect to the Section 2.7(d) Liabilities" to mean ***only*** "Merck's [indemnification] obligations to Bayer ***created under Article X***," Bayer.Br.23. Those "clues" are false leads and cannot overcome the plain meaning of "all liability."

a. Bayer first says that "[t]he heading of Section 10.1"—"Indemnification Obligations"—"strongly suggests that Section 10.1 concerns the parties' obligations to each other, not . . . product-liability claims brought by third-party consumers." Bayer.Br.28-29. Bayer declares that, while the "parties provided in the Purchase Agreement that headings would not be ***dispositive or strictly limiting***," headings may be "relevant contextual evidence of that provision's meaning." *Id.* (emphasis add-

ed). Not so. What the SAPA ***actually*** says is that headings "are not intended to describe, interpret, define or limit the scope, extent or intent" of any SAPA provision. A38 (§ 1.2(e)). Such clauses "***preclude[]*** the Court from looking to a section's title to interpret the contract," ***period***. *MTA Canada Royalty Corp. v. Compania Minera Pangea, S.A. de C.V.*, 2020 WL 5554161, at *5 (Del. Super. Ct. Sept. 16, 2020) (emphasis added); *see also 360 Campaign Consulting, LLC v. Diversity Commc'n, LLC*, 2020 WL 1320909, at *2 n.19 (Del. Ch. Mar. 20, 2020) ("expressly deprives the headings . . . of any interpretive weight"). Neither of Bayer's cited cases—*Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571 (Del. Ch. 1998), or *Capella Holdings, LLC v. Anderson*, 2017 WL 5900077 (Del. Ch. Nov. 29, 2017)—involved a similar clause.

Bayer invokes the fact that "Sections 10.2(a) and (b)—which are titled 'Indemnification By Buyer' and 'Indemnification By Seller'—immediately follow Section 10.1." Bayer.Br.29. But Bayer cites no law suggesting that broad contractual language in one section must be limited when an adjacent section addresses a narrower topic. The Section 2.7(d) Liabilities may be "addressed over fifty pages earlier in Article II," *id.*, but Section 10.1 discusses those liabilities directly, expressly sunsetting "all" of Merck's "liability and indemnification obligations with respect to the Section 2.7(d) Liabilities," A99 (§ 10.1).

b. Bayer also urges that, when Section 10.1 sunsets "'all liability and indemnification obligations with respect to [the] ***representations and warranties***'" in the SAPA, it must "refer[] to liabilities and obligations ***between the parties***." Bayer.Br.28 (quoting A98-99(§10.1) (emphasis altered). True, but that is because Merck's and Bayer's liabilities and obligations for representations and warranties in the SAPA, by definition, ***only*** exist between the contracting parties. The Section 2.7(d) Liabilities are not so limited, and both Sections 2.7(d) and 10.1 merely allocate those liabilities as "between the parties," between Merck and Bayer. Besides, the sentence Bayer invokes also refutes Bayer's position that Section 10.1 is concerned only with indemnification obligations. Merck explained that the provision also sunsets the parties' ***substantive*** liability to one another for breach of representations and warranties. *See* Merck.Br.24-26. Bayer offers no response.

c. Bayer describes certain phrasing—that Merck's Section 2.7(d) Liabilities "shall survive" until the Sunset Date—as "a poor fit for product-liability claims brought by third-party consumers." Bayer.Br.29-30. But Section 10.1 reflects an allocation of responsibility for the Section 2.7(d) Liabilities ***between the parties***. *See* Merck.Br.33. Despite the ordinary rule that stock purchasers acquire liabilities together with the company, Merck agreed to keep responsibility vis-à-vis Bayer for claims within Section 2.7(d) that were asserted before the Sunset Date. Merck.Br.35-36. It makes perfect sense to describe that obligation as "surviving"

only for the period specified. Indeed, the SAPA uses "shall survive" language in other places to refer to Merck's and Bayer's allocation of obligations to third parties, such as "tax authorit[ies]." *See* A94 (§§ 6.10, 6.11).

d. In the end, Bayer overlooks "strong textual clues" refuting its effort to confine Section 10.1's Sunset Provision to indemnification "liabilities and obligations under Section 10.2." Bayer.Br.28-29. Crucially, when the parties intended to limit the scope of "liability" to "liability under Section 10.2," they said so explicitly. *See* A101 (§§ 10.2(d)(i), (d)(ii)(a)) (each referring to "liability ***under this Section 10.2***" (emphasis added)). The parties did not so qualify "liability" in the Sunset Provision. Instead, they sunset "all" of Merck's "liability" for Section 2.7(d) Liabilities.

C. Nothing in Section 2.7 Conflicts with Section 10.1's Sunset of "All" of Merck's "Liability" for the Section 2.7(d) Liabilities

Nor does reading Section 10.1 to sunset Merck's liability for the Section 2.7(d) Liabilities "make[ ] a hash of Section 2.7." Bayer.Br.30. Merck explained precisely how Section 2.7 and Section 10.1 work together to allocate the parties' obligations for Section 2.7(d) Liabilities over time. *See* Merck.Br.34-37.

Bayer repeats Section 2.7's statement that Merck would "absolutely and irrevocably assume" and "be solely liable and responsible for" the Section 2.7(d) Liabilities. Bayer.Br.31. That clause, Bayer says, means that "Merck retains responsibility for any pre-closing product-liability claim no matter what, and those claims

would never become Bayer's problem." *Id.* Bayer overlooks that, in legal and common usage alike, "absolutely" and "irrevocably" do not mean "permanently." Merck.Br.35. Making a contractual obligation "irrevocable does not say anything about the duration" of that obligation. *Hawkins v. Daniel*, 273 A.3d 792, 816 (Del. Ch. 2022). Under Section 2.7, Merck agreed to "absolutely and irrevocably assume" responsibility for Section 2.7(d) Product Claims as they are asserted. Under Section 10.1, however, that obligation to "assume" responsibility for such claims "survive[d]" only until the Sunset Date. Once the Sunset Date passed, Merck's obligation to "absolutely and irrevocably assume" new Section 2.7(d) Liabilities expired. *See* Merck.Br.35-36. Calling that explanation "nonsense," Bayer.Br.31, is no substitute for reasoned response.

Bayer fares no better in repeating the Court of Chancery's statement that, "'[h]ad the parties intended to impose [Section 10.1's] time limits . . . on' Merck's responsibility for pre-closing product liability claims, 'then one would expect explicit language to that effect.'" Bayer.Br.32 (quoting Op.18). Section 10.1 provides just such explicit language: "All liability and indemnification obligations [Merck assumed] with respect to the Section 2.7(d) Liabilities shall survive until" the Sunset Date. A99 (§ 10.1). The fact that there are "many" other "simple ways the parties could have written" the SAPA to make Merck's responsibility for assuming Section 2.7(d) product claims "time-limited," Bayer.Br.32, is not grounds to disregard actual

text doing just that, *see Manti Holdings, LLC v. Authentix Acquisition Co.*, 261 A.3d 1199, 1212-13 (Del. 2021).

Nor is it persuasive to argue that "Section 2.7" should have specified that "Merck's obligations under that provision were subject to the seven-year time limit in Article X," as "Section 2.7 ***already*** refers to Article X." Bayer.Br.32. The reverse is also true. If the parties had intended to exclude Merck's substantive liability for Section 2.7(d) Liabilities from the phrase "all liability" in Section 10.1, it would have been "perfectly natural for the parties to say" that in Section 10.1, which "***already*** refers" to Section 2.7(d). *Id.* They did not. Regardless, Bayer cannot explain how Section 2.7's ***silence*** regarding Section 10.1 overcomes Section 10.1's ***express language*** terminating "all liability" for the Section 2.7(d) Liabilities on the Sunset Date. Merck.Br.40.

Far from "conflict[ing]," Bayer.Br.31, Section 10.1 and Section 2.7(d) work in harmony; one allocates liability while the other sets duration, *see* Merck.Br.34-37. Nor did Merck "acknowledge[]" a conflict below. Bayer.Br.31. Before the Court of Chancery, as now, Merck urged that "Sections 2.7 and 10.1 can be read in harmony." A272. Merck merely noted that the rule "that specific language in a contract controls over the general" supports its interpretation. A271. That canon, too, demonstrates that the phrase "[a]ll liability" means just that—all liability.

II. THE PARTIES' AGREEMENT TO SUNSET MERCK'S LIABILITY FOR THE SECTION 2.7(d) LIABILITIES AFTER SEVEN YEARS IS COMMERCIALLY REASONABLE

A. Sunsetting Merck's Liability for the Section 2.7(d) Liabilities After Seven Years Reflects a Commercially Reasonable Allocation of Risk Between Buyer and Seller

Bayer does not come close to proving Merck's interpretation of the SAPA is "commercially unreasonable" as a matter of law. *See* Bayer.Br.33-40. The Sunset Provision's ordinary meaning—which sunsets Merck's liability for the Section 2.7(d) Liabilities after seven years—reasonably allocates risk consistent with settled principles. *See* Merck.Br.27-28.

1. The ordinary rule is that, in "a stock transaction, the Company" sold "remains liable for its obligations and the Buyer de facto bears the economic risk of such obligations by virtue of its ownership." *White v. Curo Tex. Holdings, LLC*, 2016 WL 6091692, at *11 (Del. Ch. Sept. 9, 2016) (quoting Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries, & Divisions* § 15.01, at 15-3 to -4 (2016)). Bayer thus cannot seriously argue that it would have been commercially unreasonable for it to bear the risk of Section 2.7(d) Liabilities immediately upon sale. Nor can Bayer seriously challenge the SAPA's time-limited departure from that rule (to Bayer's benefit). Under the SAPA, Merck retained responsibility for the Section 2.7(d) Product Claims for seven years—a period longer than the statute of limitations for run-of-the-mill product-liability claims in almost

all States. *See* Merck.Br.28. Only at that point would "***[a]ll liability***" Merck had for those "Section 2.7(d) Liabilities" sunset, A99(§10.1) (emphasis added), making Bayer (as owner of the consumer-care business) liable—as it would have been from the outset absent Sections 2.7(d) and 10.1.

Rather than challenge the actual allocation of Section 2.7(d) Liabilities as "commercially unreasonable," Bayer alludes (without citation) to the specter of "long tail" claims, where an injury "might not manifest . . . for years or even decades." Bayer.Br.18. But the default rule, that liability follows the acquired company, applies to those claims as well. Moreover, nothing suggests the parties contemplated such claims in connection with the business (for staple consumer goods) that Bayer acquired. *See* Merck.Br.43. Bayer essentially posits a problem and asks the Court to rewrite the agreement in view of the supposed problem—a pattern it repeats throughout its brief. *See, e.g.*, Bayer.Br.1 (positing "'my watch, your watch' approach" to liability, and urging Court to interpret contract to achieve that "understanding"); Bayer.Br.10 (positing possible "incidental losses relating to" Section 2.7(d) Product Claims, and asking Court to limit "liability" to such losses). But contract interpretation starts with text, not supposition about purposes.

Had the parties contemplated potential talc litigation in negotiating the SAPA, Bayer might have insisted on departing from the default rule in favor of a perpetual "'my watch, your watch' approach" (and Merck might have resisted). Bayer.Br.1.

But as Bayer concedes, the parties at that time had no reason to "foresee an avalanche of asbestos-related talc claims for ***foot products***." Bayer.Br.38 (emphasis added). It cannot be said that, "when" the parties "enter[ed] the contract," "no reasonable person would have accepted" a seven-year Sunset Provision for Merck's substantive liability for pre-closing product claims. *ITG Brands,* 2022 WL 4678868, at *18.

B. The Transfer of the Section 2.7(d) Liabilities to Bayer Did Not Require a Separate Assumption Agreement

With little refuge in text, Bayer quibbles over form. In its view, Merck's Section 2.7(d) Liabilities cannot terminate because there is "no legal instrument" that transfers responsibility for the Section 2.7(d) Liabilities to Bayer on the Sunset Date. Bayer.Br.33-36. But no separate legal instrument was necessary. The Section 2.7(d) Liabilities transferred as a matter of law with the businesses and the stock Bayer purchased from Merck. *See* Merck.Br.27-28, 43-44.

1. Bayer does not dispute the general rule that, when a company is sold via stock transfer, the company's liabilities and assets transfer together with the company as a matter of law. *See White*, 2016 WL 6091692, at *11; Kling & Nugent, *supra*, § 15.01, at 15-3 to -4. Bayer instead argues "that the parties did not rely on default stock-purchase law," because the parties "explicitly defined Bayer's Assumed Liabilities" in the SAPA and "executed a separate Assumption Agreement to transfer ***only*** the Assumed Liabilities to Bayer." Bayer.Br.35 (emphasis added).

But the SAPA did not so limit the transfer of liability. In Section 2.6, the parties expressly "acknowledged and agreed that" "***any*** liabilities or obligations of the Companies" being sold "(other than Retained Liabilities) ***shall remain the liabilities or obligations . . . of the Companies***" after the transaction's close, consistent with stock-purchase law. A44(§2.6) (emphasis added); *see also* A39(§2.3(a)) ("acknowledg[ing] and agree[ing] that," "***by virtue of its purchase of the Company Common Stock***," "Buyer shall obtain indirect ownership of" "any assets that are owned, leased or licensed by the Companies" (emphasis added)). The "Assumed Liabilities" are itemized liabilities of Merck's consumer-care business ***other than*** the "liabilities or obligations of the [sold] Companies" that Bayer automatically assumed in the transaction. *See* A44-45(§2.6). An "Assumption Agreement" was required for ***those*** liabilities because they would not otherwise have transferred to Bayer with the purchase of the companies' stock. *See* A97-98(§§8.6, 9.3). Merck explained all that. *See* Merck.Br.41-42. Bayer has no substantive response.

Section 2.7 provided that Merck would remain responsible for certain "Retained Liabilities," which otherwise would transfer with company ownership, such as responsibilities relating to the "Retained Assets." A45(§2.7(a)).[1] But the Sunset Provision time-limited Merck's contractual responsibility for the Section 2.7(d)

[1] If the SAPA had transferred "only" the itemized "Assumed Liabilities" to Bayer, Bayer.Br.35, there would have been no need to include a provision for "Retained Liabilities."

Liabilities, providing that "all" of Merck's "liability" for them would "survive" only for seven years. After that, they were Bayer's by operation of law: As the parties "acknowledged and agreed," "any liabilities or obligations of the Companies" being sold "shall remain the liabilities or obligations . . . of the Companies," except as otherwise provided. A44(§2.6). Here, the relevant exception lasted only seven years. The transfer of liabilities thus was explicit, not "implicit" or "'implied.'" Bayer.Br.35 (quoting A108(§12.13)). There was thus no need for "any additional instrument to effect a pre-closing assumption by Bayer of pre-closing product-liability claims." Bayer.Br.36.

2. According to Bayer, Merck's proposal of a "Claim Transition and Settlement Agreement" in September 2021 shows a separate legal instrument was needed. Bayer.Br.13, 34, 43. Absent contractual ambiguity, however, such "extrinsic evidence may not be used to interpret the intent of the parties [or] vary the terms of the contract." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Nor is speculation about Merck's reasons for its proposal appropriate on a motion to dismiss. It was reasonable for Merck—in hopes of avoiding this very litigation—to seek Bayer's written acknowledgement that Bayer would not contest responsibility for Section 2.7(d) Liabilities arising after the Sunset Date. Regardless, nothing about Merck's offer could nullify the transition of liabilities to

Bayer that was effectuated as a matter of law as a result of Bayer purchasing the companies' stock.

Bayer contends in passing that, if liability transferred, "one would expect the Purchase Agreement to provide Merck with at least some indemnification rights relating to those claims." Bayer.Br.36. But it is the SAPA's text, not speculation concerning how the contract might have been written, that controls. *See Sunline*, 206 A.3d at 846; *Manti Holdings*, 261 A.3d at 1212-13 n.89. Regardless, it was commercially reasonable for Merck to forgo indemnification for any Section 2.7(d) Product Claims asserted more than seven years after closing for the same reasons it was commercially reasonable for Bayer to allow Merck's responsibility to terminate at that time: There is no indication the parties expected there would be a significant amount of new litigation over Section 2.7(d) Liabilities asserted more than seven years after the closing. *See* pp. 16-17, 22, *supra*.

3. Bayer invokes forfeiture. According to Bayer, Merck's briefs did not argue that the Section 2.7(d) Liabilities transferred to Bayer as a matter of law on the Sunset Date, and Merck raised the issue "only obliquely during oral argument." Bayer.Br.34. But Bayer "waive[d] [its] waiver argument by not making" it "below" at the hearing. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 250 (3d Cir. 2013). And the Court of Chancery made no waiver finding. Nor could it. Bayer's argument that the phrase "liability" in Section 10.1 should be limited to "Bayer's

costs incidental to litigation" was raised only at oral argument. A333; *see* A326-327; Merck.Br.31. But the Court of Chancery made that theory the linchpin of its decision, citing counsel's oral argument in support. *See* Op.12 nn.19 & 20 (citing A326); Merck.Br.30-34. Forfeiture cannot apply in one instance but not the other.

The Court of Chancery did not find forfeiture because none occurred. Under this Court's Rule 8, an issue is considered "fairly presented" and preserved, as here, if it was "sufficiently raised in the Court of Chancery during . . . oral argument." *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014). Merck's briefing below explained that, because the transfer of Section 2.7(d) Liabilities was "expressly set forth" in the SAPA, the transfer need not be addressed in a separate assumption agreement. A270-271. Merck elaborated at argument by explaining that "the parties didn't need a mechanism to impose further liability on Bayer[,] because Bayer bought the stock," and the Section 2.7(d) Liabilities thus transferred "[b]y operation of law." A356. There was nothing "oblique[]" about that argument, Bayer.Br.34, which was repeated and responded directly to the Court of Chancery's questioning. *See* A356-359; A392-394. No forfeiture occurred.

C. Litigation Considerations Do Not Render the Transfer of the Section 2.7(d) Liabilities Commercially Unreasonable

Finally, Bayer complains that making it responsible for Section 2.7(d) Product Claims asserted after the Sunset Date is "commercially unreasonable" because, before that time, Merck would have made "all strategic and other decisions about

how to litigate or settle those claims" without Bayer's "input." Bayer.Br.37. Earlier decisions, Bayer says, could "have a profound impact on all talc-related cases . . . , regardless of whether the case was filed before or after" the Sunset Date. Bayer.Br.38. Bayer contends that "[n]o reasonable party" would assume responsibility for a "body of litigation" under such circumstances. *Id.*

Bayer's conduct disproves its theory. When Bayer acquired Monsanto in 2018, it assumed liability for Monsanto's losses, even though Monsanto had been "embroiled in litigation" alleging that its Roundup product causes cancer "[b]efore, during, and after the acquisition." *Sheet Metal Workers Nat'l Pension Fund v. Bayer Aktiengesellschaft*, 2021 WL 4864421, at *1 (N.D. Cal. Oct. 19, 2021). That Roundup litigation had been going for years without Bayer's input did not stop Bayer from agreeing to enter the fray.

Nor are such choices uncommon. In stock-purchase transactions or mergers involving the acquisition of an entire company, it is the rule, not the exception, that the acquirer assumes responsibility, mid-stream, for all the target's pending litigation. *See* Kling & Nugent, *supra*, §§ 1.02, at 1-3, 15.01, at 15-3 to -4.

Here, moreover, there is nothing to suggest the parties contemplated "a complex line of product-liability cases" with respect to ***any*** product for Merck to "hand off" to Bayer at the Sunset Date. Bayer.Br.36. The parties' public disclosures suggest the opposite. *See* Merck.Br.43. Bayer concedes that, when the SAPA was

negotiated, "the parties did not specifically foresee an avalanche of asbestos-related talc claims for foot products." Bayer.Br.38.

Bayer's argument lacks substance for another reason: Bayer does not explain how assuming responsibility for Section 2.7(d) Product Claims asserted after the Sunset Date would "saddle[]" Bayer "with Merck's" prior "litigation choices" in any significant way. Bayer.Br.37. Bayer does not identify any reason it would not be free to implement its own legal strategies to defend new product-liability cases, regardless of how Merck defended past cases. Bayer's hand-wringing in no way ***proves*** that it would be objectively "absurd" for a party to accept responsibility for a category of products-liability litigation, potentially mid-stream, when acquiring a business target. *ITG Brands*, 2022 WL 4678868, at *18. In acquiring Monsanto, Bayer did just that.

III. COURSE-OF-PERFORMANCE EVIDENCE IS RELEVANT ON REMAND IF THE SAPA IS DEEMED AMBIGUOUS

Despite Bayer's contrary assertion, Bayer.Br.40, Merck agrees that extrinsic evidence is irrelevant if the contract is clear, Merck.Br.42. Merck instead raises a different legal issue. The Court of Chancery held that, if it ***were*** to consider extrinsic evidence, it would not consider Merck's post-closing course-of-performance evidence because only evidence "regarding the negotiation and drafting of the SAPA is relevant." Op.25. That is not correct. *See* Merck.Br.46-47. Course-of-performance evidence may be highly relevant in construing an ambiguous contract, because the parties' "action under it is often the strongest evidence of their meaning." *Trexler v. Billingsley*, 166 A.3d 101, *4 n.23 (Del. 2017) (TABLE) (quoting Restatement (Second) of Contracts § 202 cmt. g). If this Court finds the contract ambiguous and further proceedings are necessary, that error warrants correction.

Bayer demands that course-of-performance evidence "show[] repeated performance under a contract—without objection from the counterparty and before the dispute arose." Bayer.Br.41-42 (emphasis omitted). But that describes Merck's course-of-performance evidence exactly: The complaint alleges that, in January 2021, Merck notified Bayer that Merck's responsibility for the Section 2.7(d) Liabilities would terminate on the Sunset Date. A139-140; A149 (¶5); A158-159 (¶¶27-28, 30). Merck alleges that, over the next eight months, Merck and Bayer repeatedly interacted regarding the termination of Merck's responsibility for the Section 2.7(d)

Liabilities. A158-162 (¶¶27-40). And Merck alleges that, during those interactions, Bayer acted consistent with the understanding that Merck's responsibility for the Section 2.7(d) Liabilities would sunset, requesting information to help facilitate transition of responsibility for litigation. *Id*.

Only after 8 months of cooperation did Bayer, at the eleventh hour, change positions. A149 (¶5); A162 (¶41). Bayer states that its "M&A counsel immediately rejected" Merck's proposed Claim Transition Agreement in September 2021. Bayer.Br.42. But Merck had included Bayer's M&A counsel (at Sullivan & Cromwell) in its original January correspondence notifying Bayer of the impending transfer. A140. Neither Bayer's M&A counsel, nor anyone else, objected to Merck's notice; and Bayer proceeded consistent with it for eight months thereafter.

Bayer's argument that the "facts pleaded by Merck do not remotely show that Bayer agreed with Merck's interpretation," mostly reflects that Merck honored its obligations to defend the Product Claims up to the Sunset Date. Bayer.Br.42-43. Merck had no real reason to raise the Sunset Provision for the first six years after closing. Regardless, deciding what the facts "show" would be a question for the trier of fact, on another day. On a motion to dismiss, the "complaint is viewed in the light most favorable to the non-moving party, and all well-pled allegations and the reasonable inferences flowing from those allegations are accepted as true." *Valley Joist BD Holdings, LLC v. EBSCO Indus., Inc.*, 269 A.3d 984, 988 (Del. 2021)

(quotation marks omitted). Given the clarity of the SAPA's text, Merck is entitled to prevail. Bayer certainly has not met its burden of showing that it has the ***only*** reasonable interpretation. Dismissal was unwarranted.

CONCLUSION

This Court should reverse the Court of Chancery's decision granting Bayer's motion to dismiss.

Dated: August 1, 2023
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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 Court Below: Court of Chancery of the State of Delaware C.A. No. 2021-0838-NAC

MERCK & CO., INC'S CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATIONS

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,497 words, which were counted using Microsoft Word.

Dated: August 1, 2023
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