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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ITG BRANDS, LLC,

Plaintiff and Counterclaim-Defendant Below, Appellant,

v.

REYNOLDS AMERICAN INC. and **R.J. REYNOLDS TOBACCO COMPANY**,

Defendants and Counterclaim-Plaintiffs Below, Appellees.

No. 204, 2025

Court Below: Court of Chancery of the State of Delaware

C.A. No. 2017-0129-LWW

APPELLEES REYNOLDS AMERICAN INC. AND R.J. REYNOLDS TOBACCO COMPANY'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Under an Asset Purchase Agreement ("APA"), Reynolds American Inc. and R.J. Reynolds Tobacco Co. (collectively, "Reynolds") sold four cigarette brands to ITG Brands, LLC. In the APA, ITG assumed a list of liabilities arising out of its ownership of those "Acquired Brands." The APA also included an exhibit—the Agreed Assumption Terms—addressing state settlements Reynolds had entered into, including with Florida. That "Florida Settlement" requires cigarette manufacturers to make annual payments tied to their own sales, in perpetuity. The Agreed Assumption Terms require ITG to use "reasonable best efforts" to join the Florida Settlement and thereby make annual payments to Florida for the brands ITG now owns.

ITG has not joined the Florida Settlement, and has not made annual payments to Florida. Florida thus sued and won a judgment (the "Florida Judgment") requiring *Reynolds* to make annual payments for *ITG's* sales of its Acquired Brands cigarettes.

Meanwhile, Reynolds and ITG litigated in Delaware their respective rights and duties under the APA. The Court of Chancery held, on summary judgment, that ITG had assumed the Florida Judgment liability imposed on Reynolds and therefore must indemnify Reynolds for the payments it has made under that Judgment. After a two-day trial, the court also rejected ITG's request to slash its indemnification amount, concluding that its argument was contrary to Delaware law, the APA, and the Florida Judgment.

ITG appeals.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery was correct that ITG assumed the Florida Judgment liability. The APA imposes two separate but related requirements on ITG. First, ITG assumed certain liabilities that Reynolds owes to third parties with respect to the Acquired Brands. Second, as to state settlements, ITG must *try* assuming obligations *directly* to those third parties, taking Reynolds out of the mix. Put together, ITG was required to use its "reasonable best efforts" to join the Florida Settlement, in which case it would become a party to that Settlement and thus *directly* liable to Florida. But if it failed to join, and Reynolds was instead required to pay Florida for ITG's sales, ITG assumed that liability and would indemnify Reynolds for those payments. Either way, ITG—not Reynolds—was on the hook for settlement payments on brands that ITG now owns.

ITG's arguments conflate these concepts, and recognizing the distinction undoes its position. ITG assumed the Florida Judgment liability under § 2.01(c)**(vii)**: That liability is plainly one "under [a] State Settlement[]," and nothing in the Agreed Assumption Terms (to which § 2.01(c)**(vii)** is "subject") says otherwise. ITG *also* assumed the liability under § 2.01(c)**(iv)**, covering "all Liabilities … arising, directly or indirectly, out of" its "use of the Transferred Assets." Those assets cover everything ITG needs to sell Acquired Brands cigarettes, and the Florida Judgment liability is based on those sales.

ITG's primary argument is that it could have assumed the Florida Judgment liability *only* under § 2.01(c)**(vii)**, and further, *only* if it failed to use its "reasonable

best efforts" to join the Florida Settlement. But even if ITG were right—it is not—that would not affect its separate assumption under (c)**(iv)**. ITG invokes the specific-over-general canon, but that canon applies only where provisions conflict. And there is no conflict, including because each involves a different counter-party to ITG: Florida (even under ITG's reading of (c)**(vii)**) versus Reynolds (under (c)**(iv)**).

2. Denied. The Court of Chancery was also correct that ITG's assumption of the Florida Judgment liability is unambiguous under the APA. The court reasonably explained why an earlier decision finding "potential" conflict giving rise to ambiguity on that issue was not binding, and why the parties' refined arguments demonstrated that ITG assumed this liability. Nor was that decision inconsistent with rulings by courts in other States, which did not purport to resolve the APA question that is reserved to *the Delaware courts'* jurisdiction.

3. Denied. The Court of Chancery correctly rejected ITG's argument for indemnifying substantially less than Reynolds has paid under the Florida Judgment. Delaware law and the APA require ITG to indemnify what Reynolds *actually* paid Florida—not (as ITG urged) what it *would have paid* Florida *if* ITG had joined the Florida Settlement, which it has not done. And there is no dispute as to what Reynolds has *actually* paid Florida under the Florida Judgment: over $275 million. ITG's position, in contrast, would give it a massive windfall, ensuring it *never* joins the Florida Settlement.

STATEMENT OF FACTS

A. The Florida Settlement's annual payment obligations for signatory tobacco manufacturers

In 1997, Reynolds and other tobacco manufacturers entered into the Florida Settlement. Ex. B at 4. It resolved claims by Florida over smoking-related healthcare costs. *Id.* Under it, Florida released the "Settling Defendants" from all such claims. A489-90 (¶ III.C). In return, the Settling Defendants agreed to make a lump-sum payment to Florida, and significant annual payments in perpetuity. A486-87 (¶¶ II.B.1, II.B.3); A505-06 (¶ 7).

The annual payments are allocated based on each manufacturer's own share of cigarette shipments that year. *Id.* They are subject to two adjustments relevant here. First, if the year's aggregate *volume* of cigarette shipments is *lower* than in the volume base year (1997), a downward "Volume Adjustment" is prorated among Settling Defendants, by market share. A570 (¶ B(i)). Second, if a downward Volume Adjustment applies, but aggregate *profits* are *higher* than in the (inflation-adjusted) base year, an upward "Profit Adjustment" takes back some of the Volume Adjustment. A570-71 (¶ B(ii)). A Profit Adjustment is generally allocated proportionally to the amounts by which the Settling Defendants' current profits respectively exceed their (inflation-adjusted) profits in the profits base year (1996). *Id.*; A1461-80.

B. ITG's acquisition of four cigarette brands from Reynolds, under the Asset Purchase Agreement

In July 2014, RAI entered into a $27-billion merger agreement with Lorillard Inc. A659. To secure the merger's approval, Reynolds and Lorillard were required

to divest the Acquired Brands. A659-60. Among possible suitors, Reynolds chose ITG. A845-46. It thus entered the APA with ITG's parent. A237-443.

1. ITG's assumption (under the APA) of liabilities relating to the Acquired Brands, and its corresponding duty to indemnify Reynolds for all such liabilities

The APA set the price for the Acquired Brands at $7.1 billion plus ITG's assumption of enumerated liabilities. A256 (§ 2.04(a)). Section 2.01(c) lists those Assumed Liabilities: seven "Liabilities of the Sellers" that ITG agreed "to assume and thereafter to pay, discharge and perform in accordance with their terms." A252-53.

As the Court of Chancery explained, § 2.01(c) drew a sensible line: "Generally speaking, ITG would bear the Liabilities associated with the Acquired Brands after 'Closing,' but not those associated with the period before Closing when Reynolds (or Lorillard) owned the brands." Ex. E at 6. That temporal line runs through several of § 2.01(c)'s subsections, including the two that are the focus here.

The first of these provisions is § 2.01(c)**(vii)**, under which ITG assumed:

> subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date ….

A253. The "State Settlements" include the Florida Settlement. A344-45.

Under the second provision, § 2.01(c)**(iv)**, ITG assumed:

> all Liabilities (other than Excluded Liabilities) to the extent arising, directly or indirectly, out of the operation or conduct of the [Puerto Rico] Business or the use of the Transferred Assets, in each case from and after the Closing ….

A252. The "Transferred Assets," listed in § 2.01**(a)** (A246-50), cover the "categories of specific assets" ITG needed to manufacture and sell Acquired Brands cigarettes (Br. 38-39).[1]

Section 11.02(a) of the APA then identifies the circumstances in which ITG must indemnify Reynolds. This includes, under § 11.02(a)(vi), indemnifying "all Losses that [Reynolds] may suffer or incur, or become subject to, as a result of … any Assumed Liability." A315-16.

2. ITG's duty (under the APA's Agreed Assumption Terms) to use its "reasonable best efforts" to join the Florida Settlement

The APA also addresses the state settlements into which Reynolds, Lorillard, and other Settling Defendants (which ITG was not) had entered. It does so in an exhibit, the Agreed Assumption Terms (or "AATs"). A377-82. The relevant settlements include those with Florida and three other States (Minnesota, Mississippi, and Texas). A344-45. Those States are called the Previously Settled States, as their settlements (the "PSS Agreements") predated the Master Settlement Agreement ("MSA") with all other States. *Id.*

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[1] Two other § 2.01(c) subsections similarly draw the line at the closing. *See* A252-53 (§ 2.01(c)**(i)**: liabilities under "Assumed Contracts," "after the Closing Date"; (c)**(v):** subject to carve-outs, liabilities "arising out of or in connection with any Action to the extent relating to," among other things, the "sale" of "tobacco products … to the extent relating to the period commencing after the Closing Date" and to the Acquired Brands). The remaining subsections identify exceptions to that line. *See* A252-53 (§ 2.01(c)**(ii)-(iii)**: liabilities under collective-bargaining agreements and contracts "related to the blu Brand Business," or otherwise arising "out of the operation or the conduct of" that e-cigarette brand; (c)**(vi)**: liabilities relating to certain employees and employee-benefit plans); Ex. E at 7 n.25.

The Agreed Assumption Terms treat the MSA and PSS Agreements differently. Because the MSA allows a signatory manufacturer to transfer brands only if the transferee assumes MSA obligations as a condition of the sale, AAT § 2.1 states that ITG "shall assume, as of the Closing, the obligations of an [Original Participating Manufacturer] with respect to" the Acquired Brands. A378. But the PSS Agreements do not address brand transfers—so ITG could not agree *with Reynolds* to assume obligations under those agreements. Instead, it could assume such obligations only by agreeing *with each State* to join its agreement. Section 2.2 of the Agreed Assumption Terms thus charged ITG with pursuing joinder by using:

> its reasonable best efforts to reach agreements with each of the Previously Settled States, by which [ITG] will assume, as of the Closing, the obligations of a Settling Defendant under the PSS Agreement with each such State, with respect to the [Acquired Brands], on the same basis as the Settling Defendants prior to the Closing.

A378 (AAT § 2.2).

C. ITG's failure to join the Florida Settlement, and the Florida Judgment requiring Reynolds to make annual settlement payments based on ITG's post-closing sales of Acquired Brands cigarettes

Reynolds has not sold any Acquired Brands cigarettes since the divesture closed on June 12, 2015. ITG exclusively markets and sells them. So while Reynolds continued making substantial annual payments to Florida based on sales of the brands it did still own, it stopped making payments based on sales of the Acquired Brands that *ITG* now owns. Ex. E at 11.

ITG, however, also did not make payments to Florida for sales of the Acquired Brands it now owned. *Id.* Nor has it joined the Florida Settlement. *Id.*

So Florida sought relief: In 2017, it moved to add ITG in the still-pending Florida proceeding that gave rise to the Florida Settlement, and to enforce that Settlement against ITG and Reynolds. *Id.* In response, Reynolds argued that it had no payment obligation under the Settlement for brands it no longer owned. A889-90. It also rebutted Florida's argument that Reynolds had, through the APA, assigned its Florida Settlement obligations to ITG. A928. Again, although that is how assignment occurred for the MSA, ITG could become directly liable *to Florida* only if, through its "reasonable best efforts," it agreed with Florida and the other Settling Defendants (Reynolds and Philip Morris USA Inc.) to join the Florida Settlement. A891, A923. Reynolds thus distinguished ITG's "agreement to seek to join the Florida Settlement Agreement as a *new* settling party" from "an assignment of [Reynolds's] *prior* obligations under the agreement." A928.

As for ITG, it agreed that Reynolds had "no ongoing payment obligation" for the Acquired Brands. B43. It similarly explained that the only way *it* could "assume[] any obligations *under the Florida Settlement*"—that is, directly to Florida—would be by joining that settlement. B47 (emphasis added).

In December 2017, the Florida court held that Reynolds is "obligated to make the payments [on the Acquired Brands] pursuant to the Florida Agreement." A1597. The court also considered whether, under the APA, ITG had "assumed Reynolds'

liabilities *under the Florida Agreement*." A1589-90 (emphasis added). But it agreed with Reynolds and ITG that ITG's duty to *try* joining the Florida Settlement "did not result in [ITG's] assumption … of the payment liability created by the Florida Agreement." A1591. Significantly, the court emphasized it was *not* addressing the allocation of liabilities *between* Reynolds and ITG *under the APA*: "[I]t is for the Delaware Court, not this Court, to determine Reynolds' and [ITG's] rights and obligations under their [APA]." A1594; *see also* A1591.

The court memorialized its ruling in the Florida Judgment, which held Reynolds "liable to make Annual Payments to" Florida for ITG's "sales of cigarettes under the [Acquired Brands], in perpetuity[,] … unless and until ITG becomes a Settling Defendant." A1601-02 (¶ 4). Annual payments, the Judgment says, are handled "as if the transaction with ITG Brands had not occurred." A1602 (¶ 5). The Judgment thus specified how this approach bears on the Profit Adjustment: "No separate calculation is to be performed for ITG because ITG has no obligations under the Florida Settlement." A1602 (¶ 4). Instead, "net operating profits from domestic sales of the Acquired Brands" would, as before the divesture, be included in "Reynolds's Net Operating Profits" for the base years and current year. *Id.* The Judgment was affirmed. *R.J. Reynolds Tobacco Co. v. State*, 301 So.3d 269 (Fla. Dist. Ct. App. 2020).

D. The Court of Chancery's decisions holding that, under the APA, the Florida Judgment is an Assumed Liability and so ITG must indemnify Reynolds for the full amounts it has paid under that Judgment

Shortly after Florida moved to enforce its Settlement, ITG commenced this litigation to resolve the issue that the Florida court did not: ITG's and Reynolds's respective obligations to each other, under the APA. ITG sued Reynolds in the Court of Chancery, contending that, under the APA, it had no further obligation to try joining the Florida Settlement (and other PSS Agreements) and was not liable for any payments Reynolds was required to make based on ITG's sales. A229-33. Reynolds counterclaimed that ITG had breached its continuing duty to use its reasonable best efforts to join the Florida Settlement (and others) and, regardless, must indemnify any payments Reynolds was required to make to Florida for ITG's sales. A704-13.

Over seven years, the trial court issued five memorandum opinions.

1. The 2017 ruling on the pleadings

The Court of Chancery first rejected, on cross-motions for partial judgment on the pleadings, ITG's attempt at escaping its duty to try joining the Florida Settlement. The court held in 2017 that ITG's argument—that its duty expired when the APA closed—was contrary to "the plain and unambiguous language of" AAT § 2.2, and "would lead to an absurd result" to which "no reasonable tobacco manufacturer would have agreed." Ex. J at 27-29, 31.

2. The 2019 ruling on the pleadings

In 2019, the Court of Chancery resolved another set of cross-motions for partial judgment on the pleadings, this time on whether ITG assumed the liability that the Florida Judgment imposed on Reynolds. The court agreed with Reynolds that ITG "would be liable for the Florida Judgment" under § 2.01(c)**(v)**, addressing actions relating to post-closing sales of Acquired Brands cigarettes. Ex. H at 19.[2] But it found a "potential for conflict" between that provision and § 2.01(c)**(vii)**, addressing liabilities under the State Settlements. *Id.* at 19. The court understood (c)**(vii)** as "specifically address[ing] the Florida Settlement" and (c)**(v)** as more general. *Id.* at 22. And it thought (c)**(vii)** could depend, via the Agreed Assumption Terms to which it is "subject," on whether ITG used its reasonable best efforts to join the Florida Settlement. *Id.* at 19-20. Given this "potential" conflict, the court viewed § 2.01(c) as ambiguous, making judgment on the pleadings "not appropriate." *Id.* at 23.

3. The 2022 summary-judgment ruling on liability

After discovery, the parties re-raised—on cross-motions for summary judgment—ITG's assumption, under the APA, of the Florida Judgment liability. Each side again argued that the plain text supported it. Reynolds provided "further textual analysis informed by the Court's prior opinion," to "show that the 'potential' conflict is not actual." A794-95. Similarly, ITG argued from "[t]he plain text of Section 2.01(c)(vii) and related sections" and stated that "ITG continues to believe that the

[2] The court thus found it "not necessary to address Reynolds's argument" that ITG also assumed the liability under § 2.01(c)**(iv)**. *Id.* at 13 n.42.

APA's language resolves this issue." A756 & n.12. Both parties also offered extrinsic evidence in case it was needed. A761-75; A830-48.

In 2022, the Court of Chancery held that ITG had assumed Reynolds's Florida Judgment liability under the APA's plain text. *First*, it held that ITG assumed that liability under § 2.01(c)**(iv)**, concerning its post-closing use of the Transferred Assets. Ex. E at 31-35.

Second, the court held that ITG *also* assumed the liability under its preferred provision, § 2.01(c)**(vii)**. That liability "falls within the plain language of [(c)**(vii)**'s] main clause," covering "all Liabilities under the State Settlements." *Id.* at 36. And the court rejected ITG's argument that this was overridden by (c)**(vii)**'s "subject to the Agreed Assumption Terms" clause, because (c)**(vii)** and the Agreed Assumption Terms "address entirely different issues": Section 2.01(c)**(vii)** "allocates to ITG, *as between ITG and Reynolds*, Liability under the State Settlements," whereas AAT § 2.2 "imposes an obligation on ITG to join the State Settlements" and thereby "tak[e] on an obligation *to a third party* (e.g., Florida)." *Id.* at 39-40 (emphases added).

Third, the court "assume[d] for the sake of thoroughness" that, as ITG argued, ITG could have assumed the Florida Judgment liability via § 2.01(c)**(vii)** only by failing to use its reasonable best efforts to join the Florida Settlement. Even then, (c)**(vii)** does not "trump" ITG's assumption under (c)**(iv)**, because those provisions "would not conflict." *Id.* at 41. The court noted it was not bound by the earlier decision finding a "potential" conflict between (c)**(v)** and (c)**(vii)** "at the pleadings stage,"

because that opinion "did not address § 2.01(c)**(iv)**." *Id.* at 43 n.189 (emphasis added). And "[t]he fact that one subsection of § 2.01(c) *does not* make something an Assumed Liability does not mean that it *cannot* be an Assumed Liability under another subsection." *Id.* at 43-44.

Finally, the court added that Reynolds's interpretation "provides for a logical outcome," under which "ITG assumed Liabilities arising from its post-closing use of the Acquired Brands." *Id.* at 45. By contrast, ITG's position "would lead to an unreasonable outcome" under which Reynolds "subsidize[s] the business of ITG, a competitor." *Id.* at 46.

So the court held that ITG must indemnify Reynolds under § 11.02(a)(vi), as "the amounts Reynolds Tobacco has paid (and will pay) due to the Florida Judgment are [indemnifiable] Losses" from that Assumed Liability. *Id.* at 48.

4. The 2023 summary-judgment ruling on remedies

After summary-judgment cross-motions on remedies, the Court of Chancery in 2023 reiterated that "Reynolds is entitled to indemnification for the Losses associated with the Florida Judgment Liability based on ITG's sales of the Acquired Brands' cigarettes." Ex. D at 56. It rejected various arguments by ITG to avoid or reduce its indemnification duty. But it determined that ITG's central argument for drastically reducing its payments—based on how the Florida Settlement's Profit Adjustment would have been allocated "if ITG joined" that Settlement"—raised "factual disputes," which it "reserved for trial." *Id.* at 44, 56.

5. The 2025 post-trial ruling

In July 2024, the court held a two-day trial. The issue was, *assuming* ITG could offset its indemnity obligations based on its Profit Adjustment argument, the amount of that offset. That would require determining the profits to assign to the Acquired Brands when they were components of Reynolds's and Lorillard's brand offerings back in 1996. Ex. B at 2. The parties' respective experts covered several base-year possibilities. B312-13 (collecting nine).

Ultimately, the court determined it did not need to guess at an amount, because ITG's "offset" argument failed as a matter of law. Under APA § 11.02(a)(vi), calculating damages "is straightforward": They are "all Losses [Reynolds] incurred because of the Florida Judgment Liability." Ex. B at 18. And that Judgment "contemplates that Reynolds must pay Florida based on ITG's sales of the Acquired Brands as though Reynolds continued to own them," with "no separate Profit Adjustment calculation" for ITG. *Id.* at 18-19 (quoting A1602 (¶ 4) (alterations omitted)).

The court also explained how the APA's requirements fit with "settled principles of Delaware law," under which indemnification "should restore Reynolds to … the position it occupied before" the Florida Judgment. *Id.* at 19-20. ITG's argument, by contrast, depended on the idea that Reynolds had "saved from the Profit Adjustment allocation due to ITG's non-joinder to the Florida Settlement," and sought to reallocate the Profit Adjustment as if ITG *had* joined. *Id.* at 14-16. Because ITG's indemnity obligation arose not from its "failure to join the Florida Settlement"

but from the Florida Judgment liability itself, "Reynolds' remedy need not account for a hypothetical world" where ITG joined. *Id.* at 15-16, 25-26.

The court also explained that an offset would give ITG an "unfair advantage": "Reynolds would continue to pay Florida for ITG's sales of the Acquired Brands cigarettes," whereas ITG would "receive profits for [those] sales" *and* "obtain a reduction to the indemnification damages it owes Reynolds." *Id.* at 26-27. "Perverse incentives would result," "disincentiv[izing] ITG from ever" joining the Settlement. *Id.* "If ITG wishes to benefit from the Profit Adjustment allocation, it has a solution: it may join the Florida Settlement." *Id.* at 27. Indeed, all parties to that Settlement agreed in 2021 on language by which ITG would join—but ITG has refused to sign. B130.

The court set Reynolds's damages at the amount it has actually paid Florida thus far for ITG's sales of Acquired Brands cigarettes: through 2024, $275,716,082.52 (plus pre- and post-judgment interest). Ex. A ¶¶ 4-5. ITG also must indemnify Reynolds for all future payments Reynolds makes under the Florida Judgment. *Id.* ¶ 3(d).

ARGUMENT

I. The Court of Chancery was correct that, under the APA, ITG assumed the Florida Judgment liability imposed on Reynolds for annual payments based on ITG's sales.

A. Question Presented

Under the APA, ITG assumed certain "Liabilities of the Sellers," including "all Liabilities under the State Settlements" relating to the Acquired Brands (§ 2.01(c)**(vii)**), and "all Liabilities … arising out of … [its] use of the Transferred Assets" (§ 2.01(c)**(iv)**)—each as of the closing. Under the Agreed Assumption Terms, ITG agreed to use its "reasonable best efforts" to join the Florida Settlement, in which case it would assume a Settling Defendant's obligations under that Settlement. Was the Court of Chancery correct that, under the APA, ITG assumed the Florida Judgment liability imposed on Reynolds, regardless of whether ITG used its reasonable best efforts to join the Settlement and thus become a Settling Defendant?

B. Scope of Review

This Court reviews "[q]uestions concerning the interpretation of contracts" *de novo*. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

C. Merits of the Argument

The Court of Chancery correctly held that ITG assumed the Florida Judgment liability imposed on Reynolds. ITG's argument depends on conflating distinct concepts: its duty to try taking on obligations *to Florida*, under *the Florida Settlement* (which would take Reynolds out of the mix); and its assumption of liabilities *of Reynolds*, under *the APA* (which would matter if, as happened, ITG's joinder efforts

failed and Reynolds was held liable for settlement payments on ITG's sales). These distinct concepts work together to ensure a sensible result: ITG—not Reynolds—is ultimately liable for payments based on *ITG's* sales of *ITG's* products. *Infra* § I.C.1.

This distinction undermines ITG's arguments. Under multiple provisions of § 2.01(c), ITG assumed the Florida Judgment liability, regardless of its joinder efforts. ITG did this under its preferred provision, § 2.01(c)**(vii)**—covering "all Liabilities under the State Settlements"—and nothing in the Agreed Assumption Terms overrides that assumption of liability. *Infra* § I.C.2. ITG *also* assumed this liability under § 2.01(c)**(iv)**—covering "all Liabilities arising," even "indirectly," out of its "use of the Transferred Assets." *Infra* § I.C.3. Finally, *even if* ITG's assumption under (c)**(vii)** was limited to using its reasonable best efforts to join the Florida Settlement—it is not—that would not negate its assumption under (c)**(iv)**. *Infra* § I.C.4.

1. ITG flouts the APA's distinction between "Liabilities of the Sellers," which it agreed to assume and indemnify under the APA, and the "obligations of a Settling Defendant," which it agreed to try assuming under the Florida Settlement.

Reynolds and ITG, through the APA, drew a sensible line: Once ITG owned the Acquired Brands, ITG—not Reynolds—would generally bear the liabilities stemming from its ownership of those brands.

As to the Florida Settlement (and other PSS Agreements), there are two ways to do this. The APA, as the Court of Chancery recognized, utilizes both, which "work together to achieve the same result: to ensure ITG (not Reynolds) is responsible for the use of the Acquired Brands post-Closing." Ex. E at 44.

The simplest path is for ITG to join the Florida Settlement. That would result in ITG "ow[ing] obligations directly *to Florida*," under *that contract*. *Id.* (emphasis added). This direct approach would obviate any intermediary role for Reynolds and prevent Reynolds's being held liable for payments on ITG's brands. The APA's Agreed Assumption Terms mark this simpler path, requiring ITG to use its "reasonable best efforts" to join the Florida Settlement and thereby take on "the obligations of a Settling Defendant" under that Settlement. A378 (§ 2.2).

The alternative path—if ITG does not join and Reynolds is held responsible for payments on ITG's sales—is for ITG to indemnify Reynolds, under the APA, for those payments Reynolds is required to make. Otherwise, Reynolds would be in the absurd position of making payments on *its competitor's* sales. The APA implements this alternative path via § 2.01(c)'s Assumed Liabilities provisions, which "protect Reynolds and allow Reynolds to look to ITG for indemnification." Ex. E at 44.

ITG has recognized the distinction between these paths. In answering Philip Morris's related appeal, ITG noted that the Agreed Assumption Terms charge it with "'us[ing] its reasonable best efforts to reach agreement[] with' Florida[] *to assume FSA obligations*." ITG's Br. 8-9, *Philip Morris, USA Inc. v. ITG Brands, LLC*, No. 175, 2025 (July 10, 2025) (emphasis added).[3] ITG also recognized its "indemnity obligation to Reynolds *under the APA*," "based on the calculation of Reynolds' 'Losses' stemming from ITG's purported failure to assume liability for the Florida

[3] Philip Morris has since dismissed its appeal. B351-53.

judgment." *Id.* at 31-32 (emphasis added). As ITG acknowledged, the "contracts and obligations" governing what is "owed between ITG and Reynolds *under the APA*" are "separate and distinct" from those governing payments owed "to Florida *under the FSA*." *Id.* at 31 (emphases added).

In *this* appeal, ITG seeks to erase that distinction. It claims that the APA contemplates ITG's bearing the Florida Judgment liability *only* if ITG fails to use its reasonable best efforts to join the Florida Settlement—that is, that the Agreed Assumption Terms "speak directly to th[e] same liability" covered by § 2.01(c)**(vii)**, and "set forth the circumstances under which such assumptions [under § (c)**(vii)**] would occur." Br. 2, 37.

ITG is wrong. The Agreed Assumption Terms neither address "th[e] same liability" as § 2.01(c)**(vii)** nor dictate the terms for ITG's assumption of liabilities under that provision (or any other § 2.01(c) subsection). Those Terms address ITG's assuming obligations *to Florida* by joining the Florida Settlement, whereas § 2.01(c) addresses ITG's paying *Reynolds*. The plain text of § 2.01(c) and AAT § 2.2 illustrates these distinctions in four ways:

1. **The *vehicle* for assumption differs.** Section 2.01(c) lists liabilities ITG assumed *under the APA*—i.e., that ITG "*hereby agrees* … to assume," "[u]pon the terms and subject to the conditions *set forth in this Agreement*." A252 (emphases added). But ITG could not similarly assume obligations to Florida *under the APA*. Br. 13. So AAT § 2.2 says ITG's (potential) assumption of *those* obligations would be "*under the PSS Agreement* with each such State." A378 (emphasis added); *see also* Ex. E at 39 (noting ITG's duty "to join the State Settlements, which are agreements independent of the APA").

2. **The *timing* of assumption differs.** Section 2.01(c) identifies the liabilities that ITG assumed at a precise point in time: "as of *the Closing*." A252 (emphasis added). By contrast, ITG's assumption of obligations under the Florida Settlement would not occur automatically upon *the APA's closing*, but upon *ITG's joinder* to that Settlement, whenever it happened. So AAT § 2.2 addresses "agreements … by which [ITG] *will assume*" those obligations. A378 (emphasis added).

3. **The *parties* to the assumption differ.** ITG's assumption of liabilities under the APA confirms that § 2.01(c) allocates liabilities "*between ITG and Reynolds*." Ex. E at 39 (emphasis added). Indeed, ITG calls this "unquestionabl[e]." Br. 37. But ITG would not, by joining the Florida Settlement, become liable *to Reynolds*. So AAT § 2.2 instead "concerns ITG taking on an obligation *to a third party (e.g., Florida)*." Ex. E at 40 (emphasis added).

4. **ITG's *status* after assumption differs.** Through § 2.01(c), ITG assumed "Liabilities of *the Sellers*"—Reynolds and Lorillard—as the "*Acquiror*." A244, A252 (emphasis added); Ex. E at 6 n.16. But with the Florida Settlement, the parties' shared understanding was that the Sellers would have no liabilities as to the Acquired Brands once Reynolds no longer owned them. *Supra* at 8. So AAT § 2.2 instead addresses "the obligations *of a Settling Defendant*" (A378 (emphasis added)), meaning ITG would, by joining the Settlement, take on "the same obligations that the Settling Defendants had prior to the Closing" (Ex. J at 16).[4]

Thus, AAT § 2.2 and APA § 2.01(c) concern liabilities assumed through different vehicles, at different times, between different parties, resulting in different statuses for ITG. This indemnification dispute concerns only the liabilities ITG assumed under § 2.01(c), upon the closing, between itself and Reynolds. It does *not* address the obligations ITG agreed under AAT § 2.2 to *try* taking on, at some other point, under the Florida Settlement, by becoming a Settling Defendant.

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[4] ITG equates "Settling Defendant" with "i.e., Reynolds." Br. 35. But the APA defines "Settling Defendant" not as "Reynolds," but as the "Persons other than the Previously Settled States that are parties to the PSS Agreements." A344. This Court "presume[s] that the parties," when using distinct terms, "intended a variation in meaning." *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at *6-7 (Del. Ch. Oct. 11, 2019).

2. The Court of Chancery was correct that ITG assumed the Florida Judgment liability under ITG's preferred provision, § 2.01(c)*(vii)*.

ITG insists § 2.01(c)**(vii)** "[e]xclusively [g]overns" whether it assumed the Florida Judgment liability, and conditions that assumption on whether it used its reasonable best efforts to join the Florida Settlement. Br. 26. But the Court of Chancery was right: Section 2.01(c)**(vii)** makes the Florida Judgment liability an Assumed Liability, *regardless* of ITG's joinder efforts. Its main clause—covering "all Liabilities under the State Settlements"—easily includes that Judgment. And nothing in the Agreed Assumption Terms, to which (c)**(vii)** is "subject," says otherwise.

a. Under § 2.01(c)*(vii)*'s main clause, the Florida Judgment liability is plainly a "liability under [a] State Settlement."

Start with § 2.01(c)**(vii)**'s "main clause" (Ex. E at 36), under which ITG assumed "all Liabilities under the State Settlements in respect of the [Acquired Brands] that relate to the period after the Closing Date" (A253). ITG *agrees:* This "comprehensive" language covers "Reynolds' obligations under the FSA as set out in the Florida judgment." Br. 26.

Rightly so. The Florida Judgment holds Reynolds liable "under the Florida Settlement." A1601 (¶ 4); Ex. E at 37. And it *exclusively* concerns the Acquired Brands and post-closing period, requiring Reynolds to make annual payments "for the sales of cigarettes *under ... the 'Acquired Brands'*[], with respect to *the period after June l2, 2015*." A1601-02 (¶ 4) (emphases added).

b. That Section 2.01(c)*(vii)* is made "subject to the Agreed Assumption Terms" does not take away ITG's assumption of Reynolds's Florida Judgment liability.

Section 2.01(c)**(vii)**'s opening clause, making the main clause "[s]ubject to the Agreed Assumption Terms" (A253), does not change this. ITG's argument is that this language overrides the main clause, such that ITG's only obligation under § 2.01(c)**(vii)** is to use its reasonable best efforts to join the Florida Settlement. ITG is wrong: The two provisions work together to ensure that ITG is ultimately liable for settlement payments on the sale of its products.

1. A "subject to" clause "merely shows which provision prevails in the event of a clash." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). So a main clause operates by its terms, unless it is "inconsistent with" the provision to which it is subject. *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997). *Only* inconsistency would mean the referenced provision "sublimate[s]—or 'trump[s]'—the first … provision." *Id.*; *see In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 62 (Del. 2019) (main clause applies "unless [it] interferes with" provision to which it is "subject"); *Reading Law* 126 ("[T]he main clause … does not derogate from the provision to which it refers.").

A "subject to" clause, however, "does not necessarily denote a clash of provisions." *Reading Law* 126. It is a precaution, a guide in applying the basic "principle of contract interpretation that requires this court to interpret the various provisions of a contract harmoniously." *Thompson St. Cap. P'rs IV v. Sonova U.S. Hrg. Instruments*, -- A.3d. --, 2025 WL 1213667, at *9 (Del. Apr. 28, 2025) (citation omitted).

2. Here, applying § 2.01(c)**(vii)**'s main clause by its terms is not remotely "inconsistent with" anything in the Agreed Assumption Terms. *Penn Mut.*, 695 A.2d at 1150. To the contrary, they work hand-in-glove, ensuring that ITG is ultimately liable for settlement payments based on sales of *its own* products—either by paying Florida directly (by joining the Florida Settlement pursuant to AAT § 2.2), or, if that fails, by assuming liability for any payments Reynolds is required to make on those sales (pursuant to § 2.01(c)**(vii)**'s main clause). In either case, § 2.01(c)**(vii)**'s main clause does not "interfere[] with" (*Shorenstein*, 213 A.3d at 62) or "derogate from" (*Reading Law* 126) the Agreed Assumption Terms, and so there is no basis for those Terms to "trump" ITG's assumption under § 2.01(c)**(vii)**'s main clause (*Penn Mut.*, 695 A.2d at 1150). The provisions "address entirely different issues." Ex. E at 39.

This conclusion is reinforced by AAT § 5.5. Section 2.01(c)**(vii)** of the APA is "[s]ubject to" not just AAT § 2.2, but *all of* the Agreed Assumption Terms, which cover many topics beyond ITG's duty to try joining the PSS Agreements (e.g., notifying the States of the brand transfer, handling certain attorneys' fees, calculating settlement payments). A378-79 (§§ 3.1-3.3, 4.4). And AAT § 5.5 makes "[t]his Exhibit" (i.e., the *entire* Agreed Assumption Terms) "subject to … the APA"—specifically "including … the provisions regarding liabilities in APA § 2.01(c)." A382. Thus, nothing in those *Terms* can interfere with or derogate from any provision of *§ 2.01(c)*—including § 2.01(c)**(iv)**, which makes the Florida Judgment liability an Assumed Liability, and is *not* "subject to the Agreed Assumption Terms." *Infra*

§ I.C.3. And as to § 2.01(c)**(vii)**, it creates reciprocity: Section 2.01(c)**(vii)** is subject to the Agreed Assumption Terms, and those Terms are subject to *all of* § 2.01(c). These counterbalancing "subject to" clauses reinforce that "the Agreed Assumption Terms and APA should be read together to avoid conflict." Ex. E at 40.

3. ITG insists its duty to try joining the Florida Settlement under AAT § 2.2 *does* trump its assumption of State Settlement liabilities under § 2.01(c)**(vii)**'s main clause. Its arguments fail.

First, ITG's principal argument is that the "subject to" clause is merely a cross-reference, overriding § 2.01(c)**(vii)**'s plain language about "all Liabilities under the State Settlements" and replacing it with AAT § 2.2's "reasonable best efforts" duty. Br. 27-29. ITG thus equates "subject to" with "then" and "in turn," and frames it as "conditional language" that incorporates AAT § 2.2's "conditions precedent." *Id.* at 2, 7, 27, 31. But that reading would make § 2.01(c)**(vii)**'s main clause superfluous, doing nothing but pointing to the Agreed Assumption Terms. This flouts basic contract-interpretation principles: As ITG recognizes, "contracts should not be read to render provisions 'meaningless or illusory.'" Br. 33-34 (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

Contrary to ITG, a "subject to" clause is not a pass-through, *replacing* the main clause's content with the Agreed Assumption Terms. If it were, why bother including the main clause at all? Instead, a "subject to" clause requires determining *whether* that main clause is "inconsistent with" the pointed-to provision. *Penn Mut.*,

695 A.2d at 1150. If so—*only* if so—the latter "trump[s]." *Id.* But if not, the "contingency" for which the "subject to" clause accounts does not occur, and there is no basis for "impos[ing] a hierarchy." Br. 27-28 (citations omitted). Instead, the main clause—here, § 2.01(c)**(vii)**'s assumption language—operates on its terms, *without* "conditions precedent." *Id.* 27.

Second, ITG says that, even assuming § 2.01(c)**(vii)**'s main clause and "subject to" clause "do not interfere with one another," Reynolds "wholly disregard[s] the 'subject to' clause" and gives it "no meaningful impact." Br. 32-33.

That is clearly wrong. Again, the clauses address different scenarios: The "subject to" clause accounts for ITG's duty to try joining the Florida Settlement; the main clause addresses its assumption of any liability of Reynolds under that Settlement if ITG fails to join. But both have the common goal of ensuring that ITG—not Reynolds—is ultimately liable for settlement payments on ITG's brands.

ITG, in contrast, assumes the "subject to" clause means there *must* be inconsistency between those Terms and § 2.01(c)**(vii)**. That is false. Again, a "subject to" clause "merely shows which provision prevails *in the event of a clash*—but does not necessarily denote a clash of provisions." *Reading Law* 126 (emphasis added).[5] The "subject to" clause still serves a purpose absent a conflict, by ensuring related

[5] In *Reading Law*'s example, there *was* inconsistency between the main clause and the provisions to which it was subject. *Id.* at 127-28 (discussing *Weinstock v. Holden*, 995 S.W.2d 411, 418 (Mo. 1999)). But that does not mean that, as ITG implies (Br. 33), a "subject to" clause *always* identifies inconsistency.

provisions are read together. This case illustrates the point. Under § 2.01(c)**(vii)**, ITG assumed "all Liabilities under the State Settlements" for post-closing sales of the Acquired Brands. Ex. E at 36; A252. But no such liability should arise if, as AAT § 2.2 contemplates, ITG joins the relevant settlement. It therefore makes perfect sense to say that § 2.01(c)**(vii)**'s main clause is "subject to" the Agreed Assumption Terms, including the "reasonable best efforts" provision. But nothing in the "subject to" clause requires manufacturing a conflict where none exists.

Third, ITG claims APA § 2.01(c)**(vii)** and AAT § 2.2 *do* interfere with each other, because both concern "ITG's assumption of th[e] same liabilities" and "describe obligations that ITG *owes to Reynolds* under the APA." Br. 34-35. That mischaracterization suffers from the fundamental error infecting ITG's entire argument. APA § 2.01(c) addresses ITG's assumption of liabilities of *Reynolds*, under the APA; AAT § 2.2, in contrast, addresses its duty to *try* assuming liabilities *to Florida*, under the Florida Settlement. *Supra* § I.C.1; *see also* Ex. B at 15 (distinguishing ITG's "assum[ption] [of] the Florida Judgment Liability under [the] APA" from its "failure to join the Florida Settlement").[6] So while ITG is right that it assumed the Florida Judgment liability under § 2.01(c)**(vii)**'s "main clause … on day one" (Br. 34), AAT

[6] The court did not say the Agreed Assumption Terms "exist 'outside' the APA." Br. 34. It simply recognized that ITG's "*join[ing] the Florida Settlement*" would create "a contractual obligation existing outside of the APA"—between ITG and Florida. Ex. E at 43 (emphasis added). That is true, and confirms that AAT § 2.2 addresses something other than ITG's assumption of *Reynolds's* liabilities under the APA.

§ 2.2 recognizes that its *possible* assumption of liabilities under the Florida Settlement was *not* self-executing upon the APA's closing. That is why the latter did not have to happen *on* "day one" (the closing), as the Court of Chancery confirmed in 2017. Ex. J at 3.[7]

Claiming it "makes no sense" to understand § 2.01(c) and the Agreed Assumption Terms as addressing different transactions, ITG asks rhetorical questions that this conclusion supposedly raises:

> [W]hy would the parties have included those [Agreed Assumption] Terms in the APA at all? And why would [the parties] have mentioned them specifically in Section 2.01(c) …?

Br. 36. The answer is simple: The two provisions work hand-in-glove, addressing different possible scenarios, but both with the goal of ensuring that ITG—not Reynolds—would bear the burden of settlement payments for ITG's sales. As both parties recognized, the *ideal* solution was ITG's joining the Florida Settlement, taking Reynolds out of the mix. But they *also* recognized the possibility that ITG's "reasonable best efforts" might fail, in which case ITG would indemnify any payments Reynolds was required to make for ITG's sales. Nor did ITG's assumption of "all Liabilities under the State Settlements" eliminate the need to address the divesture's

[7] ITG takes issue with the court's observation that its obligations would be based on "whatever bespoke" terms it negotiated with Florida. Br. 35 (quoting Ex. E at 39 n.176). But ITG elsewhere confirms this is true, recognizing it needed to "negotiate" joinder with Florida. Br. 3, 16. Indeed, ITG's new position—that joinder was *not* "bespoke"—is belied by litigation below over unique joinder terms on which ITG insisted. *See, e.g.*, Ex. H at 2, 26.

many other implications for those settlements. *Supra* at 23 (explaining that the Agreed Assumption Terms cover many settlement-related topics).

Finally, ITG takes issue with the Court of Chancery's discussion of AAT § 5.5, which makes the Agreed Assumption Terms "subject to" the entire APA, specifically including § 2.01(c). Br. 36-37; *supra* at 23-24. But ITG just baldly asserts its own interpretation: that § 5.5 means those "Terms have no force independent of the APA." Br. 36-37. ITG cites no authority for that (unclear) understanding of "subject to." And its position is irreconcilable with § 5.5's singling out § 2.01(c) as a section to which the Agreed Assumption Terms are "subject"—which would be pointless if the parties meant only that the Terms depend on the *entire* APA's existence.

3. The Court of Chancery was correct that ITG also assumed the Florida Judgment liability under § 2.01(c)*(iv)*, because it arose out of ITG's use of the Transferred Assets.

a. The Court of Chancery was also correct that the Florida Judgment liability is an Assumed Liability under § 2.01(c)**(iv)**'s plain text. Under it, ITG assumes "all Liabilities (other than Excluded Liabilities) to the extent arising, directly or indirectly, out of … the use of the Transferred Assets, in each case from and after the Closing." A252.

Those elements, too, easily cover the Florida Judgment liability. That liability "aris[es]," at least "indirectly," out of ITG's "use of the Transferred Assets." *Id.* It is based on ITG's "sales of cigarettes under … the 'Acquired Brands.' A1601-02 (¶ 4). And ITG sells Acquired Brands cigarettes *only* by using the Transferred Assets.

Those assets, identified in § 2.01(a)'s 18-subsection list, cover everything from "finished goods inventories," to "intellectual property," to "manufacture and materials information," to "goodwill." A246-50 (§ 2.01(a)(ii), (vii), (ix), (xii)). As the Court of Chancery observed, ITG "sells Acquired Brands cigarettes by using these Transferred Assets," and "cannot do the former without doing the latter." Ex. E at 33. ITG does not dispute this.

The Florida Judgment liability also relates to the post-closing period. A252. The Judgment applies "to the period after June 12, 2015"—i.e., the APA's closing date. A1601-02 (¶ 4). ITG here does not dispute this either.

b. ITG nevertheless contests this simple reading of § 2.01(c)**(iv)**. *First*, ITG claims it requires an "extended chain of logic" that is "far too broad[]." Br. 39. But ITG never made that argument below. Its only argument regarding § 2.01(c)**(iv)** was temporal: that a liability tied to *post*-closing sales relates to the *pre*-closing period. A776-78. The Court of Chancery easily rejected that argument—twice. Ex. E at 33-34; Ex. H at 15-16 (rejecting same argument under (c)**(v)**). ITG thus waived this "too broad" argument that it raises "for the first time on appeal." *Brown v. State*, 108 A.3d 1201, 1207 (Del. 2015).

ITG's failure to raise this argument below makes perfect sense: It is plainly wrong. A § 2.01(c)**(iv)** liability need only "aris[e] … out of" ITG's use of the Transferred Assets "indirectly"—and the liability here clearly does. A252. As this Court explained in ITG's cited decision, "arising out of" requires only some "meaningful

linkage," more than a "tangential" or "incidental" one. *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 347, 349 (Del. 2023) (cited at Br. 39). And the provision there did not use the broadening term "indirectly." Here, the Florida Judgment liability depends on ITG's selling Acquired Brands cigarettes, which depends on its using the Transferred Assets. That linkage is easily "meaningful."

Second, ITG says applying § 2.01(c)**(iv)** in this manner "eviscerates" two "textual distinction[s] the APA draws": "between 'Transferred Assets' and the 'Acquired Tobacco Cigarette Brands,'" and "between general 'operation' and 'conduct' of a business and 'use' specifically." Br. 39. Wrong again. As to the distinction between the Transferred Assets and the Acquired Brands: The APA did not grandly declare that the Acquired Brands were now ITG's; it transferred to ITG "certain … assets … relating to the [Acquired Brands]." A244-45 (¶ E). The parties thus sensibly provided that ITG was assuming all liabilities arising out of what was transferred. As to the distinction between ITG's "use of the Transferred Assets" and its "operation or conduct" of business (which § 2.01(c)**(iv)** addresses with respect to business in Puerto Rico): ITG never explains why "use" is necessarily narrower than the "operation or conduct" of a business. *See Use*, Black's Law Dictionary (12th ed. 2024) ("[t]he application or employment of something"). And not all Transferred Assets (e.g., intellectual property) can be "operat[ed] or conduct[ed]"; "use" more naturally encompasses the list.

Third, ITG insists the Court of Chancery wrongly treated § 2.01(c)**(iv)** as a "catch-all" that "sweep[s] in all manner of liabilities." Br. 40. But the court actually called (c)**(iv)** "far from a catch-all." Ex. E at 41 n.182. It was correct, as ITG confirms with its examples (Br. 40)—each appearing at a list's *end* and framed with "*other*." *See Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 217 (2024) ("list discussing 'cars, trucks, motorcycles, *or any other vehicles*'" (emphasis added)); *Tex. Pac. Land Corp. v. Horizon Kinetics LLC*, 306 A.3d 530, 553 (Del. Ch. 2023) ("extraordinary transaction" defined as "any tender offer, exchange offer, share exchange, … *or other matters involving a corporate transaction that require a stockholder vote*" (emphasis added)).

The court was also correct that § 2.01(c)**(iv)** need not be a catch-all to reach "broadly." Ex. E at 42. In an *Asset* Purchase Agreement, it is unsurprising that the buyer would assume the liabilities associated with its use of those assets—however broad that may be. That is not inconsistent with "cover[ing] particular types of liabilities." Br. 40-41. As ITG recognizes, it acquired "a particularized list of assets." *Id.* at 1. Those particularized assets *are* the Transferred Assets. Section 2.01(c)**(iv)**, covering ITG's use of those assets, is "particularized" in the same way. *Id.*

4. Even if ITG were correct that it did not assume the Florida Judgment liability under § 2.01(c)*(vii)*, that would not negate that it could and did assume that liability under § 2.01(c)*(iv)*.

ITG thus assumed the Florida Judgment liability under both § 2.01(c)**(iv)** and (c)**(vii)**—regardless of whether it used its reasonable best efforts to join the Florida

Settlement. But *even if* ITG were correct that (c)**(vii)** encompasses only its "reasonable best efforts" duty, that would not change the outcome. As the trial court held, ITG's reading of (c)**(vii)** would not "trump[] subsection (c)**(iv)**'s allocation of the Florida Judgment Liability to ITG." Ex. E at 41.

ITG invokes interpretive canons to try showing that § 2.01(c)**(vii)** *can* nullify (c)**(iv)**. But even indulging ITG's reading of (c)**(vii)** (as the Court of Chancery did (*id.*)), those canons do not support ITG's theory that it preempts the rest of § 2.01(c).

Specific-over-general canon. ITG centers its argument on the point that "only" § 2.01(c)**(vii)** "expressly addresses allocation of liabilities under state settlements." Br. 7, 30. But as it recognizes, the specific-over-general canon applies only where provisions "conflict" (*id.* at 30 (citation omitted)). There is no conflict here.

Most fundamentally, even assuming § 2.01(c)**(vii)** says only that ITG has an obligation to use its "reasonable best efforts" to join the Florida Settlement, that does not conflict with § 2.01(c)**(iv)**'s requirement that ITG indemnify payments Reynolds must make if ITG's "reasonable best efforts" *fail*. The provisions together ensure that, however ITG's efforts turn out, ITG shoulders settlement payments based on its own sales.

ITG insists there *is* a conflict because § 2.01(c)**(iv)** "makes Reynolds's FSA liabilities an Assumed Liability," whereas (c)**(vii)** makes them "*not* an Assumed Liability." Br. 38. That is simply false. At most, (c)**(vii)** is *silent* on the issue. Even under ITG's erroneous interpretation, that provision imposes upon ITG an obligation

to try joining the Florida Settlement—but does not address what happens if those efforts fail. In that scenario, there are two possibilities: Either *ITG* indemnifies Reynolds for the payments Reynolds makes for ITG's sales, or *Reynolds* bears the burden of those payments. Section 2.01(c)**(iv)** fills that gap, establishing that the former—not the latter—governs.

It is entirely unremarkable that both provisions could implicate a State Settlement liability. As the Court of Chancery recognized, "a 'belt and suspenders' approach" is legitimate under Delaware law. Ex. E at 44 (citing, *inter alia*, *Restatement (Second) of Contracts* § 203 cmt. b (1981)). As one Vice Chancellor explained: "Including multiple protections does not render each one redundant. I feel safer driving a car that has airbags and seatbelts, plus other protections like crumple zones and anti-lock brakes." *Paul v. Rockpoint Grp., LLC*, 2024 WL 89643, at *13 n.12 (Del. Ch. Jan. 9, 2024). Here, § 2.01(c)**(vii)** is the seatbelt: The parties agreed ITG would try joining the Florida Settlement and taking Reynolds out of the mix. And (c)**(iv)** is the airbag: If the seatbelt failed, ITG would indemnify Reynolds for payments Reynolds was required to make for ITG's sales. The Court of Chancery's ruling thus reflects not just the APA's plain meaning, but common sense.[8]

The way a conflict *would* arise is if a liability were both an *Assumed* Liability under § 2.01**(c)** and an *Excluded* Liability, which the APA lists in its next subsection,

[8] ITG notes that § 2.01(c)**(vii)** is "'subject to' only the Agreed Assumption Terms, not to Section 2.01(c)(iv)." Br. 31. So what? Because the provisions do not conflict, there is no need for one to control.

§ 2.01**(d)**. *That* would require determining which provision controls. *See DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (quoted at Br. 30) (more specific provision required knowledge of illegality for liability; more general provision allowed liability without knowledge). But ITG rightly never argues that the Florida Judgment liability is an Excluded Liability. So there is no conflict.

Canon against superfluities. ITG next claims that treating the Florida Judgment as assumed under § 2.01(c)**(iv)** renders several provisions "meaningless or illusory." Br. 41 (citation omitted). It is wrong on every count.

First, § 2.01(c)**(iv)** does not render (c)**(vii)** or AAT § 2.2 superfluous. Br. 41-42. Again, they simply address different scenarios, but with the common goal of ensuring that ITG bears responsibility for settlement payments based on its own sales. But these different provisions, addressing different scenarios, each serve a purpose. In reality, it is *ITG* that would negate § 2.01(c)**(vii)**'s main clause, by making that provision a mere cross-reference. *Supra* at 24.

Second, § 2.01(c)**(iv)** does not negate § 11.02(a)**(v)**. Br. 41. That provision requires ITG to indemnify Reynolds for Losses resulting from "any breach by [ITG] of the Agreed Assumption Terms." A316. But there can be an Assumed Liability *without* ITG's breaching those Terms. For example, if, as ITG (wrongly) believes, it used its "reasonable best efforts" to join the Florida Settlement, then it did not breach its obligation under AAT § 2.2—so § 11.02(a)**(v)** would not apply, even though the liability is assumed under § 2.01(c)**(iv)** and so indemnifiable under § 11.02(a)**(vi)**.

Supra § I.C.3. Conversely, if ITG *did* breach the Agreed Assumption Terms, nothing would short-circuit § 11.02(a)**(v)**'s indemnification requirement.

Third, § 2.01(c)**(iv)** does not "render[] other assumption-of-liability provisions illusory." Br. 42. ITG's only example is a liability arising out of "the operation or the conduct of the blu Brand [e-cigarette] Business" (covered by § 2.01(c)**(iii)**), which it says would also be covered by (c)**(iv)**. But again, there is no problem with multiple Assumed Liabilities provisions' applying. *Supra* at 33; *see also SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *8 (Del. Ch. May 19, 2023) (a term is "not superfluous to the extent it provides [the parties] with additional comfort" (citation omitted)), *aff'd*, 314 A.3d 662 (Del. 2024) (TABLE). Indeed, any liability under § 2.01(c)**(v)**—arising out of actions concerning the sale of Acquired Brands cigarettes—would likely also be covered under (c)**(iv)**. But ITG rightly does not claim *that* is a problem with the ruling that it assumed the Florida Judgment liability under (c)**(iv)**, after the court's earlier conclusion that this liability is covered by (c)**(v)**. Ex. H at 13-16; *supra* at 11-12.

Canon against absurdities. Finally, ITG challenges the Court of Chancery's determination that its position yields absurd results—which the court found true of virtually *every* position ITG took below. Br. 42-45; *see* Ex. B at 26 ("Perverse incentives would result" from ITG's position); Ex. D at 23 ("ITG's position … would create absurdities …."); Ex. E at 46 ("ITG's interpretation … would lead to an

unreasonable outcome."); Ex. H at 29-30 (ITG's position "would lead to an absurd result"); Ex. J at 27 ("ITG Brands' interpretation would lead to an absurd result ….").

The court was right. Why would Reynolds risk making eight-figure annual payments, "in perpetuity" (Br. 2, 10, 11, 51), for brands it no longer owned—while its competitor *profits* on those sales, *without* making corresponding payments? Ex. E at 46. ITG never explains how this is anything *but* absurd.

It instead shifts the focus, saying Reynolds was "highly motivated" to finalize the divesture in connection with its merger. Br. 43. ITG cites no evidence, and presumably it had its own motivation: acquiring four valuable brands, worth approximately $7.1 billion. ITG's conjecture also ignores that Reynolds had other options if ITG took unreasonable positions; it was by no means forced into rendering itself forever responsible for payments on its competitor's sales. A845-46.

ITG also claims Reynolds is "in a better financial position" due to ITG's not joining the Florida Settlement, because it is supposedly "saving … tens of millions of dollars a year" in Profit Adjustment allocations. The Court of Chancery rightly rejected the idea that these are "saving[s]." *Infra* § III. And even if ITG were right about the Profit Adjustment, the Florida Judgment has caused Reynolds to make a nine-figure-payment (so far) that it would never have otherwise made. *See* Ex. A ¶ 4; Br. 54. That is no boon.

II. The Court of Chancery was correct in holding that ITG's assumption of the Florida Judgment liability is unambiguous under the APA.

A. Question Presented

The Court of Chancery held that the APA *unambiguously* makes the Florida Judgment liability an Assumed Liability. Was the court correct in finding this unambiguous?

B. Scope of Review

This Court reviews contract-interpretation questions *de novo*. *Paul*, 974 A.2d at 145.

C. Merits of the Argument

1. ITG's fallback argument is that the Court of Chancery wrongly held that it *unambiguously* assumed the Florida Judgment liability. Its ambiguity argument, however, is not based on the APA's text. ITG, rather, tries *importing* ambiguity, claiming the court's decision conflicts with its earlier decision inviting parol evidence on this question, and with decisions by courts in Previously Settled States regarding ITG's liability to those States under their settlements. ITG is wrong at every turn.

First, it was entirely proper for the Court of Chancery to hold that ITG had assumed the Florida Judgment liability under the APA's unambiguous text, notwithstanding its earlier determination that there was a "potential" conflict. Ex. H at 22. ITG tries couching its argument in the "law of the case" doctrine, but only in passing

and without actually trying to show it applies to the court's ruling at the pleading stage. Br. 9, 48. This hint of an argument is waived and wrong.

It is waived because ITG never argued below that the 2019 ruling about "potential" conflict, at the pleadings stage, was law of the case. To the contrary, at the summary-judgment stage, ITG—like Reynolds—argued that its position was supported by "[t]he plain text," and that "the APA's language resolves this issue." A756 & n.12. And it did not hypocritically argue that the law of the case foreclosed *Reynolds's* argument from the APA's plain text. ITG thus waived this invented-for-appeal argument. *Brown*, 108 A.3d at 1207.

The argument is also wrong. There is nothing improper about the Court of Chancery's revisiting the Assumed Liabilities question after receiving briefing focused on the "potential" conflict identified earlier. In response to that ruling, the parties submitted six briefs (on cross-motions) exhaustively addressing whether § 2.01(c)**(vii)** (under ITG's interpretation) *actually* conflicts with ITG's assumption of the Florida Judgment liability under other § 2.01(c) subsections. A756-61, A776-78, A810-30; B81-100; B144-85; B214-23, B230-33; B257-71. In considering those refined arguments, the court explained that the earlier finding, "at the pleadings stage," did not preclude it from "concluding on summary judgment that 'there is no ambiguity.'" Ex. E at 43 n.189 (quoting *Capella Hldgs., LLC v. Anderson*, 2017 WL 5900077, at *4, *7 (Del. Ch. Nov. 29, 2017)). The court also noted that the earlier

ruling "did not address § 2.01(c)**(iv)**," and so found no conflict between that provision and (c)**(vii)**—potential or otherwise. *Id.*

Nor did this reassessment *become* improper because there was a change in presiding judge. *Contra* Br. 47-48. ITG cannot explain why it would have been wrong for Chancellor Bouchard, if he still presided in 2022, to revisit his earlier decision and hold that the "potential" conflict never actually arises. It was no more inappropriate for Vice Chancellor Will to do so. As the Vice Chancellor explained, Chancellor Bouchard "did not address the specific meaning and effect of the 'subject to' phrase." Ex. E at 40 n.179 (citation omitted). Instead, the Chancellor merely noted that phrase, and seemingly assumed it could make (c)**(vii)** depend on AAT § 2.2. Ex. H at 19-20. After reviewing briefing focused on that point, Vice Chancellor Will determined that the "subject to" clause does *not* have that effect, and explained *why*. Ex. E at 41-44.

In any event, ITG's argument leads nowhere. The question here, on *de novo* review, is how the APA allocates responsibility for the Florida Judgment liability. Br. 25, 46. If the Court shares Vice Chancellor Will's reading, Chancellor Bouchard's finding of a "potential" conflict is irrelevant. *See Frank G.W. v. Carol M.W.*, 457 A.2d 715, 719-20 (Del. 1983) (it is for this Court to "exercise [its] judgment on the issue that split the two [trial court] judges").

Second, ITG fares no better in claiming the decision below contradicts rulings by courts in the Previously Settled States. Its alleged rule of imported ambiguity

requires *twice* passing off minority opinions as holdings: ITG quotes the *concurring* opinion in *Lincoln Savings Bank, S.A. v. Wisconsin Department of Revenue*, but depicts it as the *majority*. Br. 49 (quoting 573 N.W.2d 522, 531 (Wis. 1998) (but not noting Abrahamson, C.J., concurring)). And the majority *rejected* ITG's position: "Nor is a statute rendered ambiguous if courts differ as to its meaning." 573 N.W.2d at 527. ITG also quotes the four-member majority in *Petersen v. Magna Corp.*—without noting that two of the four concurred only on a separate basis, and *disagreed* that the relevant provision was ambiguous. Br. 49 (quoting 773 N.W.2d 564, 575 (Mich. 2009)); 773 N.W.2d at 585 (Hathaway, J., concurring).

Nor does this Court's decision in *Jones v. State Farm Mutual Automobile Insurance Co.* help ITG. Br. 49 (citing 610 A.2d 1352 (Del. 1992)). This Court found "considerable ambiguity" there through *its own* reading, and simply noted that a "split of authority … buttress[ed]" its conclusion. 610 A.2d at 1353 & n.2. Even then, the Court stressed that other jurisdictions' interpretations are "of little importance." *Id.*

But none of this matters, because the Previously Settled States' courts did not rule on the Assumed Liabilities question here—unsurprisingly, as APA questions are within the *Delaware* courts' exclusive jurisdiction. A325 (§ 12.12(b)). The Florida trial court was unequivocal: "[I]t is for the Delaware Court, not this Court, to determine Reynolds' and Imperial's rights and obligations under their [APA]." A1594; *see also* A1591. That court merely held that the APA did not make ITG directly liable to *Florida* under the Florida Settlement. *See* A1591 (Florida Settlement "did not

result in [ITG's] assumption … of the payment liability *created by the Florida Agreement*"). Again, that could happen only if ITG joined the Florida Settlement. The appellate court, which ITG selectively quotes (Br. 48), similarly considered—and rejected—the argument that ITG through the APA became "liable as Reynolds's successor or assign *under the FSA*." *R.J. Reynolds Tobacco Co.*, 301 So. 3d at 277 (emphasis added). That court did not even cite § 2.01(c). Reynolds thus is not "collateral[ly] attack[ing]" the Florida rulings. Br. 4.

Same story in Texas and Minnesota. As the Court of Chancery noted, neither of those courts "opined on the meaning of 'subject to.'" Ex. E at 40-41 n.179. Nor did they resolve ITG's liability *to Reynolds* under the APA. The Texas court expressly "exercise[d] judicial restraint to leave the issues between Reynolds and [ITG] within the capable hands of the Delaware Court." *Texas v. Am. Tobacco Co.*, 441 F. Supp. 3d 397, 459 (E.D. Tex. 2020). And although the Minnesota court said it would hold proceedings to determine "whether ITG was a 'successor' or 'assign' under the Minnesota Settlement Agreement by reference to the APA" (A1576-77), the case settled before those proceedings occurred.

2. ITG uses its ambiguity argument to sneak in its distorted account of the parol evidence. Br. 43-44. In reality, the relevant parol evidence points in one direction, and reinforces that ITG assumed the Florida Judgment liability. For instance:

- From the very first draft of the APA—which ITG prepared—ITG made clear that it expected to bear all liabilities under the PSS Agreements for its sales of Acquired Brands cigarettes. A831-40.

- ITG's expectation made sense. No tobacco manufacturer had ever made state-settlement payments for cigarettes manufactured and sold by another company. A841-42.

- The officer who led Reynolds's brand-divesture negotiations testified that, if ITG had suggested Reynolds could be responsible for payments on ITG's sales, that would have ended the deal: He "would have gone and sought another party who was interested" in the Acquired Brands. A845-46 (citations omitted). But ITG never made any such suggestion. *Id.*

- Instead, the parties implemented a straightforward baseline rule for allocating liabilities: "Our watch, your watch." A842-44. As Reynolds's lead drafters testified, "any future liabilities … go with the assets, unless they are expressly carved out." A842-43 (citation omitted). If the parties had bizarrely intended Reynolds to bear payments on ITG's sales of Acquired Brands cigarettes, the APA surely would have said so expressly. A843-44.

- ITG stresses that the Agreed Assumption Terms were negotiated by "specialized attorneys experienced in the [state] settlements." Br. 49. But that proves Reynolds's point: No such experience was necessary for the general Assumed Liabilities provisions, where the parties implemented "our watch, your watch."

Thus, opening up the analysis to parol evidence would only confirm what the plain text establishes: ITG assumed the Florida Judgment liability.

III. The Court of Chancery was correct in holding that ITG must indemnify the entire amount that Reynolds has undisputedly paid under the Florida Judgment.

A. Question Presented

Delaware law requires restoring an indemnitee to its pre-injury position. And the APA requires ITG to indemnify Reynolds for "all Losses" it incurs due to "any Assumed Liability." The Assumed Liability here (the Florida Judgment) requires calculating Reynolds's payments *without* allocating the Profit Adjustment as if ITG had joined the Florida Settlement. Was the Court of Chancery correct in holding that ITG must indemnify Reynolds for everything it has actually paid under the Florida Judgment?

B. Scope of Review

This Court reviews damages awards for abuse of discretion, and "embedded legal issues" *de novo*. *Holifield v. XRI Inv. Hldgs., LLC*, 304 A.3d 896, 937 (Del. 2023).

C. Merits of the Argument

ITG asked the Court of Chancery to imagine how the Florida Settlement's Profit Adjustment would have been allocated if ITG *had* joined that Settlement, and to reduce ITG's indemnity obligation accordingly. That reduction would have been significant: ITG sought a $155.5-million "offset" through 2023 alone (against the roughly $250 million Reynolds paid through 2023). A1640-41; Ex. A ¶ 4. But Delaware law, the APA, the Florida Judgment, and common sense all align: ITG must indemnify what Reynolds *actually pays* under that Judgment. There is no basis for

hypothesizing a world in which ITG joined the Florida Settlement, notwithstanding its steadfast refusal to do so. Indeed, crediting ITG's position would give it a massive windfall, ensuring it never joins that Settlement.

1. Delaware indemnity law requires restoring Reynolds to the position it occupied before the Florida Judgment.

Under Delaware law, ITG must restore Reynolds to its *status quo ante*—its position before the Florida Judgment was entered. Ex. B at 20. "[I]ndemnity is an obligation by one party to make another whole for a loss that the other party has incurred," and "operates to fully shift th[at] loss." *Christiana Care Health Servs. Inc. v. Carter*, 223 A.3d 428, 431 n.7 (Del. 2019); *see also Indemnity*, Black's Law Dictionary (12th ed. 2024) ("1. A duty to make good any loss, damage, or liability incurred by another."). An indemnitee thus must be restored "as close as possible to the same position as she was in before the injury." *LCT Cap., LLC v. NGL Energy P'rs LP*, 249 A.3d 77, 91 (Del. 2021). The "paradigmatic example" is where the indemnitee has paid "a sum certain." *Levy v. Hayes Lemmerz Int'l, Inc.*, 2006 WL 985361, at *11 (Del. Ch. Apr. 5, 2006).

Before Reynolds's injury—the Florida Judgment—it paid Florida only for *its own sales*. *After* that injury, it has *also* paid "a sum certain," annually, for *ITG's sales*. *Id.* The Court of Chancery thus was right: Restoring Reynolds to its pre-injury position means indemnifying the "actual payment [that] has been made." Ex. B at 26 (citation omitted).

ITG claims this resulted in Reynolds receiving "windfall" compensation for losses "never actually suffered." Br. 52. But there is no dispute that Reynolds has paid more than $275 million under the Florida Judgment—which it would *not* have paid absent that Judgment. Ex. A ¶ 4. For instance, ITG recognizes that, "[u]nder the Florida judgment, Reynolds paid Florida about $26.9 million" in 2020. Br. 53. That loss was "actually suffered"—as were the losses in all other covered years. *Id.* at 52. Fully compensating Reynolds does not yield a windfall, which occurs when a party receives a "double recovery" (*AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 419 n.24 (Del. 2007)) or one that is "greater than [its] losses" (*Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1452 (3d. Cir. 1996)). The decision below compensates Reynolds just *once*, for what it *actually paid*.

ITG seeks a different comparison: not to the actual pre-Judgment world, but to the "hypothetical world" that might have existed *if* ITG had joined the Florida Settlement. Ex. B at 15-16. This is baseless. As the trial court explained, imagining a scenario where ITG joined would work only if ITG's indemnity obligation were based on "its failure to join." *Id.* at 15. But it was not; the basis was simply "the Florida Judgment Liability." *Id.* "[B]lack letter law" thus required restoring Reynolds "to the status it held before" that Judgment. *Id.*[9]

[9] ITG's preferred framing is further undermined by the fact that there is no way to know how the Profit Adjustment would have been allocated if it joined. As the court noted post-trial, the "uncertainty inherent in this calculation" counseled against ITG's position. Ex. B at 16 n.45; *see also Hill v. LW Buyer, LLC*, 2019

ITG says the Court of Chancery "misunderstood" its argument. Br. 55. But ITG's position below was clear: "[J]oinder is the appropriate comparison." A1514; *see also* A1511-18; A1639 (advocating but-for "world in which ITG joins the Florida Settlement"); A1640-41, A1666. Even now, ITG urges the Court to compare "ITG's non-joinder" and "ITG joining." Br. 55 (citing A1514). The Court of Chancery rightly understood—and rejected—that inapposite framework.

2. The APA aligns with Delaware indemnity law.

The APA fully aligns with Delaware indemnity law (by which it is governed). A325 (§ 12.12(a)). Under it, ITG must indemnify Reynolds for "all Losses" it "may suffer or incur, or become subject to, as a result of … any Assumed Liability." A315-16 (§ 11.02(a)(vi)). The Assumed Liability here is the Florida Judgment.

The APA thus asks what "Losses" Reynolds "suffer[ed] or incur[red]" "as a result of" that Judgment. *Id.* Those Losses are "broadly defined," and include "all … damages, deficiencies, fines, penalties, costs, expenses, commitments, judgments, [and] orders." Ex. B at 17 (quoting A338). The other terms are similarly straightforward: to "incur" is "[t]o suffer," as in "a liability or expense" (Black's Law Dictionary (12th ed. 2024)); to "suffer" includes "experienc[ing] or sustain[ing]" an "injury," such as "damages" (*id.*); and "as a result" means "because of something" (*S'holder Rep. Servs., LLC v. Shire US Hldgs., Inc.*, 2020 WL 6018738, at *25 (Del. Ch. Oct. 12, 2020) (quoting merrriam-webster.com), *aff'd*, 267 A.3d 370 (Del. 2021) (TABLE).

WL 3492165, at *10 (Del. Ch. July 31, 2019) (indemnification is not based on "speculative Losses") (cited at Br. 52).

So the APA question can be further distilled: What has Reynolds paid *because of* the Florida Judgment? The Judgment answers that question. It requires Reynolds to "make Annual Payments to [Florida] under the Florida Settlement Agreement for the sales of cigarettes under the [Acquired Brands] … in perpetuity." A1601-02 (¶ 4). And it specifies that "settlement payments must be calculated as if the transaction with ITG Brands had not occurred." 1602 (¶ 5). Lest there be any doubt, it explains what that means for the Profit Adjustment: "*No separate calculation* is to be performed for ITG." 1602 (¶ 4) (emphasis added).

Reynolds's indemnifiable Losses are thus the annual payments it has made under the Florida Judgment. Consistent with Delaware law, nothing in the APA or the Judgment authorizes speculating as to how the Profit Adjustment *might have* been allocated in a hypothetical world where ITG *had* joined the Florida Settlement.

ITG responds by ignoring the APA and contradicting the Florida Judgment. It does not even try squaring its position with § 11.02(a)(vi). It offers a single sentence, relying on a definition of "loss"—from *outside* the APA—as "when a party's costs exceed its benefits." Br. 51-52 (quoting Black's Law Dictionary (12th ed. 2024)). But what matters is *the APA's* definition of "Losses." *See Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Delaware courts look to dictionaries for … terms which are *not* defined in a contract." (emphasis added)). And even under ITG's definition, the Florida Judgment establishes Reynolds's "costs"—what it has actually paid—without any "benefit" to offset.

Lacking any answer, ITG collaterally attacks the Florida Judgment. It asks the Court to undo the "savings" that supposedly "stem directly from the FSA's settlement payment calculation enshrined in the Florida judgment." Br. 55 (emphasis omitted). Absent is any explanation of how this Court could hold that the Florida court was wrong in calculating payments under the Florida Settlement—a question within the *Florida* courts' exclusive jurisdiction. A481 (¶ I.A). Nor does ITG try justifying this appeal to *anti*-comity.[10] ITG cannot use this Court to override the Florida Judgment.

3. ITG's position leads to absurdities.

ITG closes by trying to smooth over the absurdity of its position—which the Court of Chancery recognized is "contrary to the very letter and spirit of the APA." Ex. B at 27. Awarding ITG an offset would give it the best of both worlds: not joining the Florida Settlement, but benefiting from the Profit Adjustment as if it had. This would, undisputedly, provide ITG a massive windfall for *not* joining. If ITG *had* joined, it would have been responsible for the entire volume-based $275 million through 2024, and the Profit Adjustment would have been allocated solely between Reynolds and Philip Morris based on the (unknowable) structure of a joinder. The massive offset ITG seeks would thus make it far better off by *not* joining. And that

[10] There is nothing nefarious about the calculation "enshrined in the Florida Judgment." Br. 55 (emphasis omitted). The Florida court told the parties it "intended that Reynolds continue to make all payments under the settlement agreement as if there had been no transfer." A1624-25 (citation omitted). The Judgment memorializes that intention.

all-upside, no-downside world would eliminate any reason for ITG to try joining. This turns the parties' agreement on its head.

If ITG thinks the APA gives Reynolds an unfair advantage, its remedy lies in its own hands: "[I]t may join the Florida Settlement." Ex. B at 27. But it has steadfastly refused to do so. Accordingly, the APA, Delaware indemnity law, and common sense all require the same thing: that ITG reimburse what Reynolds has, in fact, paid Florida for ITG's sales. No more, but no less.

CONCLUSION

The Court should affirm the Court of Chancery's judgment.

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